

Thank Me for My Service:  
An Ethics Oversight in DoD Social Media Policy

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*I think it might be edifying to you if you all had Facebook pages, because you might understand how it's being used and misused.*<sup>2</sup>

Many servicemembers receive financial compensation for service-related content they produce on social media. This content attracts vast audiences because of its authenticity, as well as the esteem afforded the military and its members. In some cases, this content benefits military recruiting or training missions. However, federal ethics rules preclude most servicemembers from using public office for private gain. This article discusses an evolving practice in which servicemembers leverage their public office for private gain through social media platforms in violation of federal regulation. It finds the current DoD policy regime inconsistent with federal ethics rules, incoherent, and ill-equipped to address these for-profit ventures. It suggests that these policies result in nonuniform enforcement, perceived unfairness among servicemembers, and loss of trust in the integrity and competence of the service. Last, it offers policy recommendations that seek to promote, reward, and facilitate military content creation while also achieving compliance with federal ethics rules and enabling uniform enforcement.

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<sup>2</sup> *Social Media Policies of the Military Services Before the House Committee on the Armed Services*, 115th Cong. 21 (2017) (statement of Hon. Jackie Speier, Ranking Member, Subcommittee on Military Personnel). This statement was directed at the Deputy Commandant, Manpower & Reserve Affairs, United States Marine Corps; the Chief of Naval Personnel, United States Navy; the Director, Military Personnel Management, United States Army; the Deputy Chief of Staff for Manpower, Personnel and Services, United States Air Force; and Mr. Anthony M. Kurta (performing the duties of the Under Secretary of Defense for Personnel and Readiness, Office of the Secretary of Defense). Only one of the five individuals admitted to maintaining a personal or professional Facebook page.

## I. INTRODUCTION

In 2019, prominent “YouTuber” Austen Alexander posted a video titled “Why I Was Investigated by the Navy (not clickbait).”<sup>3</sup> The author’s YouTube channel features his creative commentary and insider’s take on employment as an active duty sailor.<sup>4</sup> The author admits earning thousands of dollars per month from the advertising revenue generated by his service-related content.<sup>5</sup> He identifies the regulatory space in which he operates as one of “thin lines,” but asserts that military content creators act lawfully if they “don’t sell anything.”<sup>6</sup> In that same video, Mr. Alexander holds up a dietary supplement to the camera and proclaims “I use these

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<sup>3</sup> Austen Alexander. Why I Was Investigated by the Navy (not clickbait). <https://www.youtube.com/watch?v=usppG-CtbW8>. Accessed February 26, 2020. See [Appendix A](#), at A1; See also An active-duty US Navy sailor shared his experience on YouTube and has now become a popular influencer. *Business Insider*. November 3, 2019. <https://www.businessinsider.com/active-duty-navy-sailor-becomes-popular-military-influencer-on-youtube-2019-11>.

Appendix A is not intended to criticize or target specific authors, but rather provides examples of the conduct discussed. Appendix A does not investigate the owner-managers of accounts, and assumes (for reasons discussed in Part III, *infra*) rather than demonstrates that such persons are subject to the full range of proscribed activities applicable to active duty servicemembers.

<sup>4</sup> Other video titles include “MY MORNING ROUTINE (on night shift)”; “US Naval Law Enforcement (What You Should Know)”; “Becoming a ... Sponsored Athlete...”; “Maintaining Personal Fitness in the Military”; “The TRUTH About the Military”; and “A Day In The Life of Navy Sailor / My Deployment Story.” Austen Alexander. Youtube.com. [https://www.youtube.com/channel/UCm\\_KYd9ls02FktHoE\\_R\\_1Qg/videos](https://www.youtube.com/channel/UCm_KYd9ls02FktHoE_R_1Qg/videos). Accessed February 24, 2020.

<sup>5</sup> Austen Alexander. Why I Was Investigated by the Navy (not clickbait). <https://www.youtube.com/watch?v=usppG-CtbW8>. Accessed February 26, 2020. Near the conclusion of the video, the author also describes having been “investigated” for possible misconduct in conjunction with his social media use, a process which he alleges resulted in him receiving not reprimand or censure, but rather a coin in recognition of the positive impact of his videos.

In a separate video, the same author describes how he makes over \$100 per day from advertising revenue generated by his channel, which prominently features the author in a Navy uniform discussing topics relevant to his Navy job. A “screenshot” from that video is included at Appendix A, at A2. *How Much Money I Make Per Month from YouTube*. Austen Alexander. <https://www.youtube.com/watch?v=4i7NIFRF6yU&t=314s>. Accessed February 26, 2020. The author generates additional revenue through other social media platforms. See Appendix A, at A1.

<sup>6</sup> Austen Alexander. Why I Was Investigated by the Navy (not clickbait). At <https://www.youtube.com/watch?v=usppG-CtbW8>. Accessed February 26, 2020.

every morning... they are delicious... I have a code for 10% off for you guys.” He concludes the segment with a wink.<sup>7</sup>

Many servicemembers produce service-related content on social media and benefit financially from that content. A brief scan of Instagram provides myriad examples. A Navy public affairs officer “partners with” a skin care company.<sup>8</sup> An Air Force noncommissioned officer promotes an energy drink brand from his government vehicle.<sup>9</sup> An Old Guard soldier posts pictures of his casket detail conducting a dignified transfer to promote himself as a “sponsored athlete.”<sup>10</sup> An Army company commander promotes her YouTube channel and modeling services using portraits in uniform and descriptions of her professional trajectory.<sup>11</sup> Air Force officers serve as “representatives” of an apparel brand.<sup>12</sup> A Navy K9 handler uses images of her assigned working dog to draw followers to a page where she advertises discount codes for merchandise.<sup>13</sup> An Army career counselor asks, in uniform, “Have you reenlisted yet?” while also advertising her services as a “model” and “brand ambassador.”<sup>14</sup> Often, military recruiters’ social media pages promote these accounts, sending a clear message to potential recruits that the military authorizes or even encourages such profiteering.

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<sup>7</sup> Mr. Alexander also claims that his chain of command explicitly approved his YouTube business ventures, except for “a ... list of things that [he] cannot show” from his work environment. Whether or not any approval actually occurred or received judge advocate review is unclear. *A day in the Life of an Enlisted US Sailor*. Austen Alexander. <https://www.youtube.com/watch?v=Hj0TieNi1-0>. Accessed February 26, 2020.

<sup>8</sup> [Appendix A](#), at A4. Note that this content, as well as several of the examples that follow, has been removed by its author. This marks a common tactic of military social media influencers, in which sponsored activity is obscured or deleted after its usefulness in generating revenue becomes outweighed by the risk of getting caught violating ethics rules.

<sup>9</sup> Appendix A, at A8.

<sup>10</sup> Appendix A, at A3. These examples assumes authenticity of the “accounts” and “pages” discussed, and therefore are not intended to infer illegality or impropriety on a case-by-case basis. However, they do highlight a common pattern of affiliate marketing and both direct and indirect endorsements through social media accounts that appear to be owned and operated by servicemembers, or from which servicemembers otherwise stand to benefit financially.

<sup>11</sup> Appendix A, at A16.

<sup>12</sup> Appendix A, at A5, A6.

<sup>13</sup> Appendix A, at A17.

<sup>14</sup> Appendix A, at A19.

Compensation schemes include direct revenue from advertising,<sup>15</sup> affiliate marketing deals,<sup>16</sup> sponsorships, and servicemembers' promotions of their own products or professional services.<sup>17</sup> These commercial relationships vary from direct quid pro quo engagements to more opaque models, but in any event are ubiquitous. Some servicemembers make little or no money from these endeavors, but others earn hundreds of dollars per post,<sup>18</sup> or even thousands of dollars from ad revenue generated by YouTube videos.<sup>19</sup> Military organizational unit pages and accounts often "tag" or "follow" servicemembers participating in such ventures, implicitly endorsing their conduct.<sup>20</sup>

The Standards of Ethical Conduct for Employees of the Executive Branch preclude servicemembers from using "public office for ... private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity."<sup>21</sup> The Standards direct employees to "act impartially and not give preferential treatment to any private organization or individual."<sup>22</sup>

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<sup>15</sup> See How Much do Youtubers Make & How to Become a Youtuber. Intuit.com. January 9, 2020. <https://turbo.intuit.com/blog/relationships/how-much-do-youtubers-make-5035/#3>. (Describing "affiliate links," "merchandise," and "sponsorship" as methods of supplementing a content creator's income from Google AdSense.)

<sup>16</sup> See [Appendix A](#), at A1 (author provides "codes" to "support the channel"); A17 (Navy dog handler uses her assigned working dog to promote a personal account with discount codes); A18 (Marine Corps officer chronicles her service and provides discount code for apparel).

<sup>17</sup> See [Appendix A](#), at A15 (combat cameraman runs Instagram account as a "government official" while also advertising "commissions open" and providing a link to his personal work.)

<sup>18</sup> Using estimates obtained with Influencer Marketing Hub's Instagram Influencer Earnings Calculator. <https://influencermarketinghub.com/instagram-money-calculator/>. Accessed July 23, 2020.

<sup>19</sup> See e.g. How Much YouTube Paid Me For A Video With 4 MILLION VIEWS \*analytics reviewed & exposed\*. Brice Larimer. YouTube.com. Accessed July 24, 2020. <https://www.youtube.com/watch?v=-vslzmJBh1c&t=277s>

<sup>20</sup> See [Appendix A](#), at A7.

<sup>21</sup> 5 C.F.R. § 2635.101 *et seq* (2020). [Hereinafter "Standards of Ethical Conduct" or "the Standards."] The full text of the provision continues, "including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs [not herein quoted] of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section." 5 C.F.R. § 2635.702 (2020). This article proceeds assuming that the specific and narrow inclusion that follows the broad preclusion is intended to clarify and add to a specific application of the rule, rather than to limit the rule to only such narrow instances as those which entail nonprofits or a prospect of business relations.

<sup>22</sup> 5 C.F.R. § 2635.101 (2020).

The Standards also proscribe the receipt of compensation from any source other than the Government “for teaching, speaking or writing that relates to the employee’s official duties,” except for under limited circumstances.<sup>23</sup> If in doubt, employees are provided a broad *telos*: “endeavor to avoid any actions creating the *appearance* that they are violating ... ethical standards.”<sup>24</sup>

For the purposes of the Standards of Ethical Conduct, “employee” means any officer or employee of a federal agency, which includes officers but not enlisted members of the uniformed services.<sup>25</sup> However, the DoD has extended the applicability of ethics standards pertaining to unethical uses of public office to active duty enlisted members of the Armed Forces, and Title 32 National Guard members.<sup>26</sup> Therefore, by the current regulatory regime, all active duty soldiers, sailors, airmen, and marines are subject to the preclusion of use of public office for private gain,<sup>27</sup> for which Article 92, Uniform Code of Military Justice attaches the potential for penal exposure.<sup>28</sup>

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<sup>23</sup> 5 C.F.R. § 2635.807 (2020).

<sup>24</sup> Id. Note further that whether particular circumstances create an *appearance* of violation shall be determined from the perspective of a reasonable person with knowledge of the relevant facts. Nonetheless, the imperative verb “endeavor” conveys a liberal thrust with which to apply the Part to which it applies.

<sup>25</sup> 5 C.F.R. § 2635.102(h) (2020).

<sup>26</sup> The Department of Defense has extended some parts of the 5 C.F.R. §2635.101 *et seq* (2020) to enlisted personnel and members of the National Guard. The relevant instruction details:

Although Chapter XVI, Subchapter B, and part 733 of Reference (c) and Reference (m) do not apply to Title 32 National Guard Members or enlisted members of the Military Departments, the following regulations are determined to be appropriate for them and are hereby made applicable to them as if the terms “employee” and “SGE,” as used therein, include them. [5 C.F.R.] Parts 2634-2635, 2638, and 2640.

Department of Defense Directive 5500.07 para 2.2.5 (2007).

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/550007p.pdf>.

<sup>27</sup> This article addresses provisions applicable to all branches of the military, but applies case studies and makes specific recommendations applicable in particular to the United States Army. Note that the Department’s broadening of those “subject to” these regulations conveys exposure by means of Article 92, UCMJ, and therefore may involve different penalties than those contemplated by the 5 C.F.R. § 2635.101 *et seq* (2020).

<sup>28</sup> 10 U.S.C. § 892 (1956).

The Standards' extended applicability became effective in 2007, against the backdrop of two large-scale kinetic and deadly conflicts. It also followed the publication of several popular "war memoirs" authored by servicemembers about their participation in those armed conflicts.<sup>29</sup> The broadened standard sought to ensure that all active duty servicemembers, each of whom bore an explicit duty of loyalty by oath,<sup>30</sup> would avoid the appearance of undermining that duty by virtue of private conflicts of interest.<sup>31</sup>

At least since its broadening in applicability, the private gain prohibition has lacked uniformity in enforcement and interpretation across DoD component branches and subordinate commands. Mr. Alexander's video illustrates the disparity in outcome for servicemembers creating service-connected digital content. He remarks that at the conclusion of his investigation, he was awarded with an admiral's coin, a token of recognition for outstanding performance. By far the most "liked" comment on that video is a former sailor's lament that ethics regulations or investigations were among the reasons he "didn't make vid[eos] while on active duty." This lack of uniformity in enforcement fosters resentment and perceived unfairness. Perceived unfairness and correlates with declines in self-rated outcomes and also detracts from workplace productivity.<sup>32</sup>

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<sup>29</sup> Although in some instances, servicemembers published following their discharge from active duty, this distinction was not always made clear in their work. Consider, for example, now-Medal of Honor recipient David Bellavia's 2006 publication *House to House: An Epic Memoir of War*. The book was published under the active duty rank and name "SSG David Bellavia." Compare the 2005 publication *One Bullet Away: The Making of a Marine Officer* by "Nathaniel Fick, Former Captain, First Reconnaissance Battalion, USMC."

<sup>30</sup> See 10 U.S.C. § 502.

<sup>31</sup> Although the First Amendment would ordinarily limit the government's ability to restrict private speech, the constitutional standard is relaxed for public employees. The Supreme Court has called the federal government's interest in maintaining the integrity of public service "undeniably powerful," particularly when it seeks to diminish or avoid cumulative effects of widespread practices. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 471-72 (1995).

<sup>32</sup> Leineweber C, Eib C, Peristera P, Bernhard-Oettel C. The influence of and change in procedural justice on self-rated health trajectories: Swedish Longitudinal Occupational Survey of Health results. *Scand J Work Environ Health*. 2016;42(4):320-328. doi:10.5271/sjweh.3565. <https://pubmed.ncbi.nlm.nih.gov/27128433/>.

Non-enforcement and varied interpretation of the Standards within the DoD have led to increasingly normalized profiteering off of one's image and likeness as a servicemember. As servicemembers operating lucrative social media enterprises continue to gain prominence, the ability to identify "right" from "wrong" grows increasingly elusive in that space. A landscape in which active duty servicemembers appear free to leverage their privileged status, access, and knowledge for private benefit creates a positive feedback loop in which other servicemembers are led to believe that such conduct is permissible, or even encouraged. The result may be a "professional" military in which it is not uncommon for servicemembers to serve two masters: that of the Constitution they swore an oath to protect and defend, and that of the private entities paying servicemembers for authentic service-related digital content.

One additional danger lies in the normalization of abuses of power over subordinates. Consider one Army drill sergeant's videos that feature basic trainees conducting training.<sup>33</sup> If these (or similar) videos serve a purely recruiting or training purpose, no concerns for the featured trainees' interests arise.<sup>34</sup> However, in this case, the drill sergeant uses the videos to acquire subscribers and followers, to whom she promotes her family members' YouTube channels and offers affiliate marketing deals.<sup>35</sup> In scenarios such as this one, the basic trainees amount to unpaid background actors, or free labor for the videographer to leverage for private

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<sup>33</sup> Ericka Bernie. Youtube.com. Accessed July 25, 2020. [https://www.youtube.com/channel/UC\\_U7-F2nSi3Eda2bFpu3uVg](https://www.youtube.com/channel/UC_U7-F2nSi3Eda2bFpu3uVg).

<sup>34</sup> This is to say that if trainees' or subordinates' individual interests are subjugated in the name of a legitimate *official* purpose, their voluntary entry into an employment contract raises at least an inference of consent.

<sup>35</sup> See Drill Sergeant Takes NEW ACFT! YouTube.com. Accessed July 25, 2020. <https://www.youtube.com/watch?v=4OjTvceNAEc&feature=youtu.be&fbclid=IwAR1yOxjZO2hH6E4GyiSg-J-BpM2kR0kmx4QiXcJA5vMJb2S1T9caJ4ru00c>. (Providing affiliate marketing links).

benefit. This rapidly-proliferating flavor of abuse of power threatens to undercut the chain of command and the image and mission of the Armed Forces.<sup>36</sup>

This article first analyzes the applicability of the federal “public office for private gain” prohibition to digital social media. It demonstrates that servicemembers who receive compensation from non-federal entities in exchange for service-related digital social media content creation violate that prohibition. It then argues that the Department of Defense and Department of the Army do not provide adequate guidance for servicemembers’ use of social media, resulting in several unlawful yet unpoliced uses of servicemembers’ rank, position, and status for private pecuniary gain, almost always in plain sight. It recommends that the Department of Defense rescind inconsistent policies, explicitly direct compliance with federal ethics regulations, and expand opportunities for servicemember content creators to receive federal incentive pay in a manner consistent with ethics rules.

## **II. ANY INDICATION OF MILITARY SERVICE ON SOCIAL MEDIA CONSTITUTES “PUBLIC OFFICE” FOR WHICH SERVICEMEMBERS CANNOT ACCEPT ANY PECUNIARY BENEFIT**

DoD employees “shall not use ... public office for ... private gain, for the endorsement of any product, service or enterprise,<sup>37</sup> or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.”<sup>38</sup> The applicability of this rule

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<sup>36</sup> Subordinates may be led to question *why* they are being directed to take certain actions. Viewed from their perspective, it may be unclear whether the orders they receive safeguard their individual interests, the interests of the Armed Forces, or merely the interests of a videographer who holds coercive power by virtue of superior rank.

<sup>37</sup> This article abstains from articulating a more comprehensive definition of “endorsement” for the purpose of 5 C.F.R. § 2635. Although a survey of social media pages that would constitute “external official presences” or “official social media accounts” suggests sweeping misconceptions of the term, such an exploration exceeds the scope of this article’s narrow conclusions.

<sup>38</sup> The full text of the provision continues, “including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs [not herein quoted] of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.” 5 C.F.R. § 2635.702. This article proceeds assuming that the specific and narrow inclusion that follows the broad preclusion is intended to clarify and add to a



to the modern landscape of social media influencers turns first on the scope of “public office.” Second, the causal nexus between use of public office and private gain must be considered.

This section first demonstrates that “public office” includes, at a minimum, any deliberate reference to one’s role as a member of the military, regardless of whether position, rank, uniform, or operational information are involved. It does so by exploring the structure and context of the provision, as well as the absurdity of alternative readings. It next shows that the Code’s concept of “private gain” includes, at a minimum, receipt of monetary incentives, and finds that compensation paid to servicemember influencers is almost always an impermissible result of service-connected content. However, it also demonstrates why the impermissible nature of these transactions is not immediately apparent to those tasked with enforcing the rules, and suggests that influencers have become adept at obscuring affiliate marketing structures and business promotions so as to resist enforcement.<sup>39</sup>

**A. Providing any indication of a servicemember’s military affiliation constitutes use of public office.**

Servicemembers most commonly use their public office to carry out official duties. Examples include commanders issuing instructions and policy directives, leaders in infantry roles maneuvering fighting elements, and recruiters appearing on high school campuses and speaking with potential recruits. However, public office is not “used” only when an official position confers actual authority upon an individual, and that individual acts in furtherance of that authority. In order to determine the appropriate scope of the term, this section explores the

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specific application of the rule, rather than to limit the rule to only such narrow instances as those which entail nonprofits or a prospect of business relations.

<sup>39</sup> See [Appendix A](#), at A2, A4, A5, A6, A12, A17, A18. Affiliate marketing programs usually involve an entity advertising a discount code for a product, the use of which results in the product purchaser receiving a discount and the advertising entity receiving a kickback from the sale. Whether or not the advertiser may be seen to have “endorsed” the advertised product would require a fact-specific inquiry, and it does not necessarily follow that that advertiser endorsed the advertised product or products in all cases.

provision’s structure, as well as the context in which it is found. It ultimately shows that public office may also be used where the esteem owed to an office, position, or organization is leveraged by a person so affiliated.

The structure of the “public office” provision is insightful as to its scope. It is first expressed generally, and makes clear that *expressio unius est exclusio alterius* does not apply to any specifically provided-for examples of conduct.<sup>40</sup> It then offers a non-exhaustive list of permissible and impermissible acts.<sup>41</sup> The provision allows for a single carveout, such that it should not prohibit “an employee who is ordinarily addressed using a general term of address, such as ‘The Honorable’, or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.”

Perhaps some of the confusion that military commanders experience when attempting to determine the scope of the provision lies in the specific examples provided. One in particular notes that employees “shall not use or permit the use of his Government position or title or any authority associated with his public office to *endorse* any product, service or enterprise.”<sup>42</sup> Without a full reading of the general applicability of the banner provision, a broad swath of conduct would appear to narrowly evade inclusion under this “endorsement” subsection. This is because the actor must convey the federal government or agency’s endorsement, not merely his or her own, in order to satisfy the example. A simple work-around, and indeed one that is prevalent in modern digital social media, would be to endorse a product in a servicemember’s (purportedly) personal or private capacity.<sup>43</sup> By this reading, an “own views only” banner would

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<sup>40</sup> 5 C.F.R. § 2635.702 (2020) (“The specific [example] prohibitions apply this general standard, but are not intended to be exclusive or to limit the application of this section.”)

<sup>41</sup> 5 C.F.R. § 2635.702 (2020).

<sup>42</sup> 5 C.F.R. § 2635.702.c. (2020) (emphasis supplied).

<sup>43</sup> See e.g. [Appendix A](#), at A10.

cleanse any misuse,<sup>44</sup> as would a lack of apparent authority to bind the government to a position. However, as further analysis will show, the general provision is triggered not when *some personal or private* capacity is present, or even prominent, but only when *no official or governmental affiliation* is attached.

The exception to the rule also provides considerable insight as to the broad scope of the rule. It permits the use of “rank” in connection with a “personal activity.”<sup>45</sup> Unlike the banner provision under which it falls, *expressio unius est exclusio alterius* is appropriate to limit the span of exceptions to the rule.<sup>46</sup> Furthermore, the lone exception is necessarily cabined by the liberal thrust of the rule. That is, it can only be a personal *noncommercial* capacity in order to avoid rendering the rest of the provision absurd. Were this not the appropriate reading, General Mark Milley could perform management consulting work for the Boston Consulting Group, under the title of “General,” without violating the provision. Moreover, the Boston Consulting Group could then hold out “General Mark Milley” as one of their on-staff consultants. The carveout would defeat the broad purpose of the provision in nearly all instances, unless it were understood to *exclude* appropriation of a military rank for personal *commercial* purposes.

Yet another interpretive aid for the scope of “public office” lies in the narrow purpose for which government property may ethically be used. Federal employees owe a regulatory duty “to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.”<sup>47</sup> Government property includes “any form of real or personal property in which the Government has an ownership ... or other property interest as well as any

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<sup>44</sup> See e.g. [Appendix A](#), at A9, A14.

<sup>45</sup> 5 C.F.R. § 2635.702.c. (2020).

<sup>46</sup> For example, the use of “rank” is excluded for a narrow purpose. The wearing of a military uniform or reference to one’s assigned position in the military is not specifically excluded for any purpose.

<sup>47</sup> 5 C.F.R. § 2635.704 (2020).

right or other intangible interest that is purchased with Government funds.” This includes “images of military persons in uniform.”<sup>48</sup> Authorized purposes include only “those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.”<sup>49</sup> By the text of 5 C.F.R. § 704, an other-than-authorized purpose is not cured by a concurrent proper purpose. Hence, employees are permitted to use everything from office staplers to a government contractor’s time *only* in furtherance of the limited purposes for which that government property was procured.

Federal employees act within the purview of their public office when interacting with government-owned property in any form or manner, as such property may not be used for other-than-official purposes.<sup>50</sup> They must subjugate their private enjoyment of government property to the official purpose for which such property was procured, even if the servicemember could privately benefit from putting the property to a different use. The federal rule’s liberal construction of “government property” conveys an intent that federal employees separate their professional and private interests, and not conduct the former in a manner designed to enrich the latter.

Finally, it is useful to note the context in which “public office” is found. The fundamental concern underlying the Ethics in Government Act was unchecked executive power following the Watergate scandal. In furtherance of this aim, the Standards of Ethical Conduct

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<sup>48</sup> DoD Trademark Licensing Guide. <https://www.defense.gov/Resources/Trademarks/DOD-Trademark-Licensing-Guide/>. See also Important Information and Guidelines About the Use of Department of Defense Seals, Logos, Insignia, and Service Medals. <https://dod.defense.gov/Portals/1/Documents/Trademarks/DOD%20Guide%20about%20use%20of%20seals%20logos%20insignia%20medals-16%20Oct%2015F.PDF>

<sup>49</sup> 5 C.F.R. §2635.704.

<sup>50</sup> Consider, for example, [Appendix A](#), at A10. A pilot’s photographs of air-to-air refueling might replicate other, similar visual depictions of similar processes which are readily-available to the public. However, the pilot still enjoys unique access and authority to create the specific photograph of his mission. As such, it falls within the sphere of “use of public office.”

seek to ensure that “public service remains a public trust.”<sup>51</sup> It follows that “public office” includes the legal authority conveyed to an official position, any apparent authority ascribed to that position, and more nuanced forms of power such as credibility and influence.<sup>52</sup>

Public office may be used for private gain even where a concurrent professional purpose is served.<sup>53</sup> If a viewer can infer an entity’s governmental capacity through social media, that entity’s governmental capacity is not absolved merely by attenuation, or by the creation of an alter ego.<sup>54</sup> Where a servicemember represents him or herself as “Navy recruiter,”<sup>55</sup> “Air Force Staff Sergeant,”<sup>56</sup> or wears a military uniform,<sup>57</sup> such an affiliation carries through any connected content that is not service-related; **the touchstone inquiry is whether it remains attributable to the same actor.** Under a modern construction of “use,”<sup>58</sup> and pursuant to an assumption that

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<sup>51</sup> See 5 C.F.R. § 2635.101.

<sup>52</sup> For persons not subject to the Uniform Code of Military Justice, the wearing of a uniform may constitute constitutionally protected expressive conduct. See *United States v. Alvarez*, 567 U.S. 709 (2012) (Stolen Valor Act, which prohibited false claims of receipt of military decorations or medals, constituted unlawful content-based restriction of speech.) For persons subject to the Uniform Code of Military Justice, unauthorized wear of a uniform in violation of a lawful regulation governing such wear may constitute a violation of 10 U.S.C. § 892 (1956). Furthermore, broadcasting a visual depiction of one’s uniform might constitute an unauthorized use of “military emblems or insignia ... for unofficial purposes, whether for commercial advertising, promotion, commercial purposes or otherwise,” unless permission for such use was obtained in accordance with DoDI 5410.20. *PUBLIC AFFAIRS RELATIONS WITH FOR-PROFIT BUSINESSES AND BUSINESS INDUSTRY ORGANIZATIONS*. September 29, 2016. <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/541020p.pdf>.

<sup>53</sup> See [Appendix A](#) (showing examples of servicemembers promoting private business entities through various media with mixed “personal” and professional content.)

<sup>54</sup> See e.g. [Appendix A](#), at A2, 4, 5. (Servicemembers endorsing products without uniforms on, but bolstering their appearance and credibility with images in uniform that are traceable to the same actor.)

<sup>55</sup> See e.g. [Appendix A](#), at A4.

<sup>56</sup> See e.g. [Appendix A](#), at A8.

<sup>57</sup> This article suggests that, where an actor features a military uniform is featured in any way, that actor’s professional military capacity is invoked. Consider that “[a]dmission into an institution such as the military requires soldiers to leave behind their personal possessions, adopt a uniform, and assume the military identity.” Ramya Kasturi, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 *Yale J. on Reg.* 419, 427 (2012) (citations omitted). “The uniform plays an important role in enabling identification [and] establishing legitimacy.” *Id.* More importantly, the uniform is *understood by others* as a symbol of an individual’s military service. *But see* *United States v. Alvarez*, 567 U.S. 709 (2012) (Stolen Valor Act, which prohibited false claims of receipt of military decorations or medals, constituted unlawful content-based restriction of speech.)

<sup>58</sup> Either “to put into action or service; avail oneself of;” or “to carry out a purpose or action by means of.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/use>. Accessed 25 June. 2020.

an actor’s publication of information on social media serves at least some gratifying (or pecuniary) purpose,<sup>59</sup> a servicemember’s “office” remains in “use” throughout any account, page, article, website, or other connected medium on which it is inferred.

Although providing indicia of a servicemember’s professional capacity constitutes “use of public office,” the vast majority of such conduct conforms to federal ethics regulations. This is because both rule and custom have permitted personal enrichment through increased social status up to and until the point of pecuniary gain. Despite the relatively recent trend in which a swath of servicemembers have openly leveraged their unique esteem and knowledge as servicemembers to acquire “followers” or “subscribers” on social media,<sup>60</sup> most servicemembers are not the beneficiaries of lucrative affiliate marketing structures, and therefore do not run afoul of the rule. This article turns now to the conjunctive component that renders certain uses of public office impermissible, “private gain.”

**B. Private gain includes any pecuniary benefit that a servicemember accepts that is the result of digital “content creation” *or* product endorsement.**

Servicemembers have taken advantage of a perceived gray area in ethics rules, in which lucrative endorsement deals and self-promotion are linked only by tangent to a servicemember’s public office.<sup>61</sup> The following analysis identifies broad boundaries that must constrain the term “private gain,” and proposes a more narrow framework for determining the threshold of permissible compensation on a case-by-case basis. It also demonstrates that common affiliate

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<sup>59</sup> Whiting, A. and Williams, D. (2013), "Why people use social media: a uses and gratifications approach", *Qualitative Market Research*, Vol. 16 No. 4, pp. 362-369. <https://doi.org/10.1108/QMR-06-2013-0041>.

<sup>60</sup> Take, for example, Mr. Alexander. When he published his above-referenced video, his YouTube account had about 200,000 subscribers. Six months later, the same channel had over 400,000 subscribers.

<sup>61</sup> See [Appendix A](#). This article assumes that a common driver of servicemembers’ willingness to violate ethics regulations and commanders’ lack of desire to enforce them is a lack of clarity in those regulations’ applicability. Additionally, it proposes that a lack of clarity and policing may pervade the legal space in part because several of the accounts that appear to violate ethical standards belong to high-ranking officers and commanders.

marketing structures, as well as more indirect compensation schemes, often place servicemember content creators' earnings within the ambit of impermissible private gain.

In order to narrow the (supposedly) gray area in which much of the digital social media influencer ecosystem exists, it is helpful to first consider the broader spectrum of “private gain.”<sup>62</sup> On the most permissible end of that spectrum lies the receipt of written or verbal commendation, non-monetary tokens of appreciation of little or no monetary value, and naked goodwill.<sup>63</sup> The least permissible end consists of receipt of direct financial compensation, as well as any exchange of goods or services functionally amounting to a *quid pro quo*. Hard cases arise when an actor receives *quid pro quo* compensation for service that appear to correspond with a servicemember's personal, non-military capacity.<sup>64</sup> These hard cases call for a second inquiry, “is the compensation, *a function of* the actor's ‘following’ or ‘influence,’ which are benefited by the actor's image or likeness as a servicemember?”<sup>65,66</sup> The answer is (almost always) yes.<sup>67</sup>

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<sup>62</sup> Austen Alexander. Why I Was Investigated by the Navy (not clickbait). <https://www.youtube.com/watch?v=usppG-CtbW8>. Accessed February 26, 2020. (Calling the space in which he produces service-related social media content a “gray area.”)

<sup>63</sup> Consider, for example, Mr. Alexander's receipt of a commander's coin in recognition of his exceptional work.

<sup>64</sup> See [Appendix A](#), at A4 (Navy officer maintains separate professional and private accounts, but the two are easily linked and the latter piggy-backs on the influence accrued by the former in violation).

<sup>65</sup> This inquiry could also be considered as one of actual cause, i.e. “but for a servicemember's military affiliation, would they enjoy the exact same degree of influence?”

<sup>66</sup> See Dean Hund, Emily, "The Influencer Industry: Constructing And Commodifying Authenticity On Social Media" (2019). Publicly Accessible Penn Dissertations. 3636. <https://repository.upenn.edu/edissertations/3636>. (“[D]emonstrating how the ‘influence economy’ emerged as a locus of power tied to tangible economic and social rewards on the social media-driven, visual web[.]”)

<sup>67</sup> Authenticity lies at the core of persuasion. See Dean Hund, Emily, "The Influencer Industry: Constructing And Commodifying Authenticity On Social Media" (2019). Publicly Accessible Penn Dissertations. 3636. <https://repository.upenn.edu/edissertations/3636>. However, on occasion, a servicemember joins the military with a robust and devout span of influence. See e.g. “Carly Schroeder.” Instagram.com. June 30, 2020. <https://www.instagram.com/carlyfries18/?hl=en> (former and current actress serving as an active duty Army officer); The Rock'n'Roll Casualty Who Became a War Hero. *The New York Times*. July 2, 2013. <https://www.nytimes.com/2013/07/02/magazine/evermans-war.html> (member of the band Nirvana served with Army Special Operations Forces). In these limited instances, a significant portion of a servicemember's “influence” may *not* be service-connected or a “use” of position.

By virtue of their military affiliation, servicemembers enjoy a “great deal” of public trust and confidence.<sup>68</sup> They enjoy the referent power and expert power ascribed to their official capacity and the organization of which they are a part.<sup>69</sup> Servicemember content creators bolster their soft power, and subsequently their influence, by ensuring that their military affiliation is known, even if not prominently featured.<sup>70</sup>

The market for digital social media content creation is founded on the belief that “characteristics of [a] message source” and “persuasiveness of [a] message itself” influence attitude change.<sup>71</sup> Commercial market exists for tailored digital social media content.<sup>72</sup> An actor’s capacity to influence determines that actor’s compensation, at least insofar as they elect to leverage that capacity in a commercial market. The default presumption is therefore that an actor in any advertising space is compensated *directly because of* their service-connected capacity to influence. This presumption for servicemembers operating in the digital social media

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<sup>68</sup> U.S. Confidence in Military Reflects Perceived Competency. Gallup.com. July 27, 2017. <https://news.gallup.com/poll/214511/high-confidence-military-reflects-perceived-competency.aspx>.

It might also be said that content created by servicemembers retains a unique authenticity that makes it likely to draw attention. NYU Stern School of Business Professor Scott Galloway suggests that the value proposition of authenticity lies in voyeurism, meaning an insight into something that people are not ordinarily allowed to see. Additional contributing factors include humor and controversy. Professor Galloway also jokes that “anything that legal approves ... can never go viral,” and adds that viral content regarding curated brands tends to flow from third parties. How to Make Content Go Viral. FORA.tv. YouTube.com. Accessed July 9, 2020. [https://www.youtube.com/watch?v=VKJM\\_DIBMew&t=234s](https://www.youtube.com/watch?v=VKJM_DIBMew&t=234s).

<sup>69</sup> See Extending influence beyond the chain of command: understanding the relationship between power and influence tactics. Major Gene Souza. September 7, 2010. [usacac.army.mil](https://usacac.army.mil/sites/default/files/documents/cace/DCL/dcl_SecondPlaceEssay_1002.pdf). [https://usacac.army.mil/sites/default/files/documents/cace/DCL/dcl\\_SecondPlaceEssay\\_1002.pdf](https://usacac.army.mil/sites/default/files/documents/cace/DCL/dcl_SecondPlaceEssay_1002.pdf). (Discussing social psychology power bases leveraged by military leaders).

<sup>70</sup> See e.g. [Appendix A](#), at A4, A5, A7, A8, A12, A16, A17, A18, A19.

<sup>71</sup> Id. (*Quoting* Maio, G. R., & Haddock, G. (2010). *The Psychology of Attitudes and Attitude Change* (1 edition). London: SAGE Publications Ltd.).

<sup>72</sup> Consider *Bloomberg Bankrolls a Social-Media Army to Push Message*. The Wall Street Journal. February 19, 2020. Available online at [https://www.wsj.com/articles/bloomberg-bankrolls-a-social-media-army-to-push-message-11582127768?mod=hp\\_lead\\_pos2](https://www.wsj.com/articles/bloomberg-bankrolls-a-social-media-army-to-push-message-11582127768?mod=hp_lead_pos2). Accessed February 19, 2020.



space may be overcome when their private conduct cannot be linked to their status or role as servicemembers.<sup>73</sup>

This Article is hardly the first to import such a meaning to “public office for private gain,”<sup>74</sup> but digital social media represents a novel frontier for its applicability. On digital social media, as elsewhere in the world, servicemembers enjoy a quantum of confidence and respect purely by virtue of their affiliation with the military.<sup>75</sup> To the extent that an active duty servicemember creates a persona, however private, in the digital social media space, such a persona may be tainted, or rendered unfit for compensation, by reference to or insinuation of a servicemember’s official capacity as a servicemember. Far from the “gray area” Mr. Alexander alleges, any monetization through non-federal entities of an active duty servicemember’s “influence” constitutes impermissible use of public office for private gain if it is a function of her image, likeness, status, apparent authority, or influence as a servicemember.<sup>76</sup>

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<sup>73</sup> Consider the example offered by [Appendix A](#), at A4, in which a Navy officer maintains a noncommercial account for her recruiting work, “@lieutenanthall.” That account regularly tags and references her personal account, “@kellierenehall.” See e.g. [https://www.instagram.com/p/CDCMHqpp\\_Wn/](https://www.instagram.com/p/CDCMHqpp_Wn/). On her personal account, the Navy officer endorses and engages in marketing deals with various products and services. A presumption that service-connected content bolsters support for ancillary commercial ventures is necessary to preclude this scenario, in which mild obscuration would otherwise render such relationships permissible.

<sup>74</sup> See Stark, Andrew. "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?" *The American Political Science Review* 91, no. 1 (1997): 108-20. Accessed July 9, 2020. doi:10.2307/2952262. [https://www.jstor.org/stable/2952262?read-now=1&seq=2#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/2952262?read-now=1&seq=2#page_scan_tab_contents). (Drawing on “knowledge, skills, experience, stature, or prestige” derived from an official position can give rise to a finding of “public office.”)

<sup>75</sup> See Lydia Saad, Military, Small Business, Police Still Stir Most Confidence, GALLUP (June 28, 2018), <https://news.gallup.com/poll/236243/military-small-business-police-stir-confidence.aspx> (reporting that seventy-four percent of respondents have a “[g]reat deal” of confidence in the military, the most positive result for any of the fifteen categories considered).

<sup>76</sup> For an illustration of a common fact pattern, see Appendix A, at A20.

### III. DEPARTMENT OF DEFENSE SOCIAL MEDIA POLICIES CREATE CONFUSION BY MISCHARACTERIZING SERVICEMEMBERS' ETHICAL OBLIGATIONS

The DoD, as well as component branches, has implemented various policies addressing servicemembers' activities on “internet-based capabilities providers,” or “social media.”<sup>77</sup> Although most reference the Joint Ethics Regulation,<sup>78</sup> they prescribe procedures applicable to certain categories of digital social media activity without defining the categories in a consistent manner, or in a manner that might realistically beget enforcement. They fail to identify, in simple and clear terms, that holding oneself out as a servicemember to the public bars receipt of compensation from non-federal sources in almost all circumstances.

This section first walks through DoD instructions, then evaluates the United States Army as a component branch case study. Last, it evaluates an advisory opinion from the United States Office of Government Ethics (OGE). It shows that the inconsistencies and incoherencies across these sources create a space in which well-meaning servicemembers and commanders could form reasonable but incorrect beliefs regarding ethical boundaries for digital social media use. It asserts that the modern trend of servicemembers reaping unethical profits from their military images in the market for digital social media influence will continue if current policies are not amended.

#### **A. DoD policies attempt to regulate servicemembers' social media use based on unworkable and inconsistently-identified categories.**

Recent policy directed by the Department of Defense Chief Information Officer (DoD CIO) mandates registration and vetting of “official” use accounts, called “External Official

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<sup>77</sup> The category of “External Official Presences” constitute a slightly broader banner than official *social media* accounts, at least when applying a definition of social media that would include only *electronic* communications. See *Social Media*. MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/social%20media>. (Last visited 6 February 2020).

<sup>78</sup> DoDD 5500.07-R (1993).

Presences.”<sup>79</sup> The policy also ensures ample space for servicemembers to maintain “personal, nonofficial” accounts that operate in accordance with all “laws [and] regulations.”<sup>80</sup> The CIO’s directive is based on the flawed assumption that these bifurcated categories encompass all servicemembers’ social media activities. A second instruction, promulgated by the DoD Public Affairs Officer (PAO), attempts to regulate servicemembers’ use of “Visual Information.” This instruction similarly directs servicemembers to comply with ethical obligations, but then elaborates on those obligations in an internally incoherent manner that also misconstrues the Standards of Ethical Conduct.

Both the DoD CIO and PAO instructions reflect impermissibly narrow constructions of the Standards of Ethical Conduct. For this reason, they also fail to address the problem, whereby many servicemembers leverage the influence they enjoy in the digital social media space by virtue of their military service for pecuniary benefit. Because these instructions purport to regulate servicemembers’ digital social media activity, but fail to address this problem, they create a space in which otherwise impermissible use of public office for private gain appears to comport with DoD guidance.

**1. The DoD CIO’s Instruction fails to address mixed personal- and professional-use accounts with sufficient specificity as to clearly govern their use.**

In 2019, the Department of Defense Chief Information Officer established policy, assigned responsibilities, and prescribed procedures for managing official DoD information.<sup>81</sup>

This policy tasked component heads with approving, “as appropriate, establishment *and*

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<sup>79</sup> DoDI 8170.01.

<sup>80</sup> DoDI 8170.01.

<sup>81</sup> DoDI 8170.01, ONLINE INFORMATION MANAGEMENT AND ELECTRONIC MESSAGING, Dated January 2, 2019. [Hereinafter “DoDI 8170.01”]. The CIO exercised this authority pursuant to DoDD 5144.02, Department of Defense Chief Information Officer, Dated November 21, 2014, Incorporating Change 1, September 19, 2017.

*registration* of [External Official Presences] and official use of non DoD-controlled and non-federal-controlled electronic messaging services.”<sup>82</sup> EOPs are “appropriate” where they enable “public communications related to assigned duties (e.g. recruiting)” or “for any other purpose determined *necessary* and in the interest of the [United States Government.]” It directs that, where “workable,”<sup>83</sup> EOPs must display the “standard”<sup>84</sup> transparency banner:

Welcome to the [name of DoD Component]’s [name of non-DoD-controlled electronic messaging service] page/presence. If you are looking for the official source of information about the [name of DoD Component], please visit [address of official website or other official information]. The [name of DoD Component] is pleased to participate in this open forum in order to increase government transparency, promote public participation, and encourage collaboration. Please note that the [name of DoD Component] does not endorse the comments or opinions provided by visitors to this site. The protection, control, and legal aspects of any information that you provided to establish your account or information that you may choose to share here is governed by the terms of service or use between you and the [name of non-DoD-controlled electronic messaging service]. Visit the [name of DoD Component] contact page at [address of official website or other official information] for information on how to send official correspondence.<sup>85</sup>

An additional best-practice for EOPs includes “[n]ot conduct[ing] communication unrelated to assigned duties, functions, or activities via official-use accounts.” DoD personnel must also “Register public EOPs at: <https://usdigitalregistry.digitalgov.gov/>.”<sup>86</sup>

The same instruction also notes that “DoD personnel who are acting in a private capacity have the First Amendment right to further release or share publicly-released unclassified information through non-DoD forums or social media *provided that no laws or regulations are violated*.”<sup>87</sup> They may “use personal, nonofficial accounts to participate in activities such as professional networking, development, and collaboration related to, but not directly associated

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<sup>82</sup> DoDI 8170.01 at 2.7.d. (emphasis supplied).

<sup>83</sup> Elsewhere, the Instruction discusses the same banner as mandatory where “feasible.” Even if “workable” and “feasible” are afforded synonymous meanings, the mixed adjectives demonstrate the extent to which a single instruction may fail to internally nest terminology, making cross-reference exceedingly difficult.

<sup>84</sup> In over twenty hours reviewing official social media accounts between December 2019 and February 2020, this author did not identify a single appearance or use of the “standard” transparency banner.

<sup>85</sup> DoDI 8170.01 at Figure 3.

<sup>86</sup> DoDI 8170.01. This instruction does not provide a specific actor or position responsible for completing this task, or who may be held accountable were such a task neglected.

<sup>87</sup> DoDI 8170.01 (emphasis supplied).

with, official mission activities as DoD personnel.”<sup>88</sup> In order to assist in delineating private from public capacity, “DoD personnel should use non-mission related contact information, such as personal telephone numbers or postal and e-mail addresses, to establish personal, nonofficial accounts, when such information is required.”<sup>89</sup>

Hence, the DoD CIO’s instruction creates two distinct categories. On one end of the spectrum, EOPs are only those official-purpose accounts which have been approved and recorded by component heads, and which are “necessary” to government functions. On the other end of the spectrum, DoD personnel broadcasting only non-mission-related, or unclassified publicly-shared information may operate accounts in their private capacity. The space between the two ends of the spectrum is filled by a pervasive trend: mixed use accounts, or those which exceed the restrictive guidelines for private accounts, but also fail to meet the requirements for designation as an EOP.<sup>90</sup> Included are those accounts not “necessary” to component agencies, but which may contain substantial service-related content. It includes servicemembers constructively shaping the official functions of their military units,<sup>91</sup> servicemembers engaged in recruiting operations,<sup>92</sup> servicemembers engaged in public relations functions,<sup>93</sup> and other unmistakable “professional” uses of digital social media. Despite this trend, the 2019 DoD Digital Modernization Strategy made no reference to social media whatsoever.<sup>94</sup>

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> See [Appendix A](#), at A1, A3, A4, A5, A6, A7, A8, A18.

<sup>91</sup> See [Appendix A](#), at A9.

<sup>92</sup> [Appendix A](#), at A10.

<sup>93</sup> [Appendix A](#), at A4.

<sup>94</sup> DoD Digital Modernization Strategy. 2019. [dodcio.defense.gov. https://media.defense.gov/2019/Jul/12/2002156622/-1/-1/1/DOD-DIGITAL-MODERNIZATION-STRATEGY-2019.PDF](https://media.defense.gov/2019/Jul/12/2002156622/-1/-1/1/DOD-DIGITAL-MODERNIZATION-STRATEGY-2019.PDF)

Although registration might be a precursor to comprehensive policing of official accounts, it adds no value if it is ignored as a prerequisite to publishing service-related content.<sup>95</sup> Instead, it adds a bureaucratic step for digital social media account managers, with a lone benefit of accepting increased policing. In any event, the accounts that run afoul of ethics rules tend to be those of individuals, which fit the mold of “personal” accounts as conceived of by the DoD CIO, and would not be deemed “necessary” so as to mandate registration in the first instance. The DoD CIO instruction ultimately adds no constraints or guidance of value for personal social media accounts that contain military content, while at the same time appearing to establish “top cover” for their existence.

Where the DoD CIO’s Instruction focuses on the official or unofficial nature of the *entity* represented by a social media presence, the DoD PAO’s instruction targets both the entity represented and the *means* of representation. However, as the following analysis shows, the PAO’s instruction is similarly narrow and insufficiently comprehensive as to clearly preclude use of public office for private gain through mixed-use social media accounts.

## **2. The DoD PAO’s instruction fails to address mixed personal- and professional-use accounts with actionable specificity.**

In 2016, the DoD PAO promulgated DoDI 5140.20. Regarding DoD Visual Imagery on non-federal entity internet-based capabilities, that instruction reads,

(1) Service members must comply with DoD 5500.07-R, DoDI 8550.01, and DoDI 1334.01 prior to permitting [non-federal entities] to use their image in uniform. Both active duty Military Service members and former members are prohibited from wearing their uniform in connection with commercial interests when an inference of official sponsorship for the activity or interest could be drawn.

(2) Service members are not authorized to approve the use of [Visual Information] that portrays or includes other individuals for commercial purposes. Only those with the appropriate authority may approve use of [Visual Information] that contains military equipment with official markings.

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<sup>95</sup> See [Appendix A](#), at A14 (depicting an account that purports to be both “official” and “unofficial”); A7, A9, A10, A11, A15, A19 (depicting accounts that serve official functions but are not listed on the DoD registry). DoD registry available at <https://www.defense.gov/Resources/Military-Departments/DOD-Websites/?tab=Social%20Media>.

(3) DoD employees may use or allow the use of their titles, positions, or organization names in conjunction with their own names only to identify themselves in the performance of their official duties.<sup>96</sup>

Each of the above-quoted paragraphs contains an inaccuracy or imprecision that results in a lack of clear, actionable Instruction, and instead promotes misconceptions. These issues are addressed, in order, below.

**Paragraph (1):**

Although servicemembers were *already* obligated to comply with DoD 5500.07-R, this cross-reference adds value by virtue of seeking to ensure an understanding of which corollary policies affect the ensuing provisions. Complying with applicable regulations “prior to” permitting non-federal entities to use a servicemember’s “image in uniform” probably includes ensuring compliance throughout, but poor word choice does not doom the effect of the clause.

The paragraph then devolves; it is hypothetically true that active duty servicemembers are precluded from taking any act, including but not limited to wearing their uniform where it conveys official endorsement. This does no more than restate the Standards of Ethical Conduct. However, the example is also incomplete, as the Standards preclude more conduct than those limited to occasions “when official sponsorship for the activity or interest could be drawn.”<sup>97</sup> Additionally, it is not necessarily true that *former* servicemembers are subject to the same restriction.<sup>98</sup> This merely indicates that the Instruction was not drafted with a critical eye toward the applicability of the Standards of Ethical Conduct, or with an understanding of the

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<sup>96</sup> DoD Instruction 5140.20. September 29, 2016.  
<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/541020p.pdf>.

<sup>97</sup> See Part II, *supra*.

<sup>98</sup> Some, but not all former servicemembers remain subject to the Uniform Code of Military Justice. See *United States v. Begani*, NMCCA No. 201800082 (2020) (discussing applicability of UCMJ to officials no longer serving on active federal status). [https://www.jag.navy.mil/courts/documents/archive/2020/BEGANI\\_201800082\\_EN-BANC\\_PUB\\_Corrected%2025%20Feb%202020.pdf](https://www.jag.navy.mil/courts/documents/archive/2020/BEGANI_201800082_EN-BANC_PUB_Corrected%2025%20Feb%202020.pdf). Even where former servicemembers remain subject to UCMJ, they are not necessarily subject to ethical conduct regulations governing federal employees.

DoD PAO's scope of authority. For these reasons, the first paragraph is best read as aspirational rather than prescriptive or preclusive in effect.

On balance, although the first paragraph provides a specific and narrow example of impermissible conduct, that example could be misunderstood as if all-inclusive. It also fails to clarify any applicable regulations therein listed, and has been overlooked or ignored by many.<sup>99</sup>

**Paragraph (2):**

The second paragraph prohibits servicemembers from “approving” use of “Visual Information” [hereinafter “VI”] for commercial purposes without “appropriate authority.” VI describes “DoD ... media files,”<sup>100</sup> but elsewhere is defined more broadly as “[i]nformation in the form of visual or pictorial representation of person(s), place(s), or thing(s).”<sup>101</sup> A second definition applies to “DoD VI,” which is that VI “created, controlled, owned, operated, or controlled by DoD or the Military Department or placed on DoD-based internet-based capabilities.”<sup>102</sup> Commercial use specifically excludes “personal use with no intent for further public distribution for commercial purposes.”<sup>103</sup>

After incorporating these definitions, two possible constructions result. The first follows an application of “VI” rather than “DoD VI” in its place, and renders the first sentence so overbroad as to be both unenforceable. It would preclude servicemembers from approving the use of *any* picture of *any* person, regardless of military affiliation, for *any* commercial purpose. This absurdity would suggest that the second construction is appropriate, in which “DoD VI” is

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<sup>99</sup> See e.g. [Appendix A](#).

<sup>100</sup> DoDI 5410.20. September 29, 2016.

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/541020p.pdf>.

<sup>101</sup> DoDI 5040.02. October 27, 2011 Incorporating Change 2, Effective April 20, 2018

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/504002p.pdf>.

<sup>102</sup> DoDI 5410.20.

<sup>103</sup> DoDI 5410.20.



distributively applied throughout the paragraph, even though the term “VI” is actually used. However, under this construction, because DoD VI applies only to that VI which is functionally *owned by DoD*, the provision serves only as a preclusion affecting servicemembers who would otherwise authorize the use of DoD-owned images. This construction best reflects the tone of the Instruction, but also does no work to resolve the issue of *servicemembers* broadcasting pictures or information about their position or service affiliation, except in the limited circumstance in which that servicemember creates such media in furtherance of an assigned military task.<sup>104</sup>

**Paragraph (3):**

This paragraph opens with an express contradiction of the Standards of Ethical Conduct’s carveout for use of military rank for personal matters, at least if military rank overlaps with “title [or] position.” Whether the overall flavor of the paragraph is one of ensuring ethical conduct rather than operational security is also not clear; word choice reflective of the Standards of Ethical Conduct would have resolved any debate, but none are present here. Notwithstanding any lack of clarity, even if the paragraph is afforded the effect of banning use of title, position, or organizational name for personal commercial purposes, these categories are underinclusive. The use of rank, uniform, special knowledge, unique access, status, and DoD resources remain in-play, or at least not obviously proscribed by the text of the policy.

Collectively, DoD PAO’s guidance lacks clarity in scope and application. It fails to unambiguously proscribe the use of servicemembers images and likenesses for commercial purposes, but purports to govern ethics matters. The ambiguity created by poorly-nested regulations is the reason Mr. Alexander called the ethical realm in which his accounts operate

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<sup>104</sup> See [Appendix A](#), at A14, A15. These servicemembers are often referred to as “COMCAM,” or Joint Combat Cameramen.

“gray,” and the reason many additional servicemembers have entered the commercial digital social media space.

Between DoD PAO’s and DoD CIO’s instructions, the resounding shortcoming is a failure to comport with the Standards of Ethical Conduct. Both instructions provide cross-reference to the Joint Ethics Regulation and, by extension, applicable provisions of the Standards of Ethical Conduct. However, the instructions offer boundaries for digital social media use that apply neither the language nor the scope of the federal regulation, nor DoD-level extension of the federal regulation. These subordinate instructions cannot be applied as *lex specialis* where they *take away from an agency’s obligations*, rather than add to them. Moreover, the internal and external inconsistencies and ambiguities of both instructions magnify, rather than reduce or clarify any residual confusion about the boundaries prescribed by the Standards of Ethical Conduct.

Where DoD staff heads blur ethics boundaries in the social media sphere, component branches have done no better. The next section discusses the United States Army’s attempt to clarify the meaning of ethical social media use.

**B. Case study: How the Army’s social media policies mislead soldiers by failing to explicitly address the possibility of official and non-official social media accounts running afoul of the Standards of Ethical Conduct.**

Department of the Army publishes a broad swath of social media policy on a website titled “Army Social Media.”<sup>105</sup> Hyperlinks direct users to several different references, including guidance for both official social media activity and other social media activity.<sup>106</sup> Although

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<sup>105</sup> In response to the Frequently Asked Question, “Where can I find the ‘Social Media Handbook?’ the website states, “You are looking at it.” <https://www.army.mil/socialmedia/> (December 23, 2019).

<sup>106</sup> *Id.*

some hyperlinks are outdated,<sup>107</sup> this article addresses both the referenced authorities which might bind soldiers, as well as those which merely stand to inform (or misinform). It shows that Soldiers who seek a clear articulation of Army social media policy instead find inactive references and circular instructions.

### **1. Army Guidance for non-official social media misleads soldiers by failing to address prominent violations of ethics rules.**

The first source of “Polic[y] and Guidance” on the Army Social Media page is “All Army Activities Message 061/2019,” which purports to govern “Professionalization of Online Conduct.”<sup>108</sup> Its primary focus are those transfers of information “by computer, phone, or other electronic device[,]” including, but not limited to “text messages, e-mails, chats, instant messaging, screensavers, blogs, *social media sites*, electronic devices applications, and web/video conferencing.”<sup>109</sup> The message further defines “misconduct” as including, but not limited to “[h]arassment, bullying, hazing, stalking, discrimination, retaliation, or any other type of misconduct that undermines dignity and respect.”<sup>110</sup> The 2019 ALARACT concludes by conveying the Army’s intent that “its members ... tell the Army Story” and that the “responsible use of social media” is neither prohibited nor limited by the message.

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<sup>107</sup> For example, All Army Activities Message, 061/2019, 061309Z Sep 19, U.S. Dep’t of Army, subject: Professionalization of Online Conduct [hereinafter “ALARACT 061/2019” or “2019 ALARACT”]. A message “TRANSMITIED [*sic*] BY JSP ON BEHALF OF HQDA” and “APPLICABLE TO ALL MEMBERS OF THE ARMY TEAM[.]” As of February 27, 2020, the website provides a link to the outdated 2018 version of this memorandum, but the updated version can be found with Common Access Card at Army Publishing Directorate. [https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB\\_ID=1007798https://loginac.milsuite.mil/reg/noAccount?goto=https://www.milsuite.mil:443/book/docs/DOC-667814](https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=1007798https://loginac.milsuite.mil/reg/noAccount?goto=https://www.milsuite.mil:443/book/docs/DOC-667814). February 24, 2020. The “updated” version does not substantially modify the 2018 version. Another link, titled “Social Media and the Hatch Act,” directs users to an expired web page. A link is also provided to DoDI 1300.18, which provides instruction for “Personnel Casualty Matters.” This document discusses media engagement restrictions, but not specifically digital social media. The Joint Ethics Regulation is not linked.

<sup>108</sup> ALARACT 061/2019.

<sup>109</sup> ALARACT 061/2019 (emphasis supplied; capitalization modified from original).

<sup>110</sup> *Id.*

The 2019 ALARACT regarding “Professionalization of Online Conduct” modifies a 2018 message addressing the same.<sup>111</sup> Although the 2018 message broadly prohibited “misconduct that undermines dignity and respect,” it has been criticized as lacking in part the “unambiguous and comprehensive regulatory tools” required to permit commanders to enforce its contents “consistently and confidently.”<sup>112</sup> One legal scholar’s suggestions for improvement included denoting specific behaviors that constitute online misconduct, undermine Army values, and violate Army Command Policy, such as stalking, threatening, tricking, soliciting, and nonconsensual broadcasting of other servicemembers.<sup>113</sup> An additional suggestion includes precluding servicemembers from “[l]iking, linking, or sharing social media posts which undermine Army values.”<sup>114</sup>

Although the 2019 message primarily addresses activities that stand to undermine “dignity and respect,” its broad heading suggests that it conclusively governs *all* online conduct by soldiers.<sup>115</sup> Despite this heading, the message addresses one sphere of misconduct but ignores another of significance and increasing prominence: widespread improper use of official and non-official social media accounts in violation of the Joint Ethics Regulation and Standards of

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<sup>111</sup> ALARACT 061/2019 marks the fourth reissuance of a 2015 memorandum regarding the same matter. ALARACT 061/2019 operates against the backdrop of, although not pursuant to, Department of Defense Instruction 8170.01, which permits “Component heads [to] approve the establishment of non-DoD controlled electronic messaging services accounts by authorized users for public communication related to assigned duties (e.g., recruiting) or any other purpose determined necessary and in the interest of the [United States Government].”

<sup>112</sup> Dr. Collette Langos, *Reforming The Army’s Online Policies An Opportunity for Leadership*. The Army Lawyer, Issue 1 2019. [https://www.loc.gov/rr/frd/Military\\_Law/pdf/01-2019.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/01-2019.pdf).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* As the Army Values include “loyalty, duty, respect, selfless service, honor, integrity, [and] personal courage,” this proposed preclusion raises constitutional concerns as to overbreadth and the extent to which it invites viewpoint discrimination when servicemember’s purely private conduct is policed. The Army Values. <https://www.army.mil/values/>. Accessed February 12, 2020; *see generally* Army Regulation 600-20 (Army Command Policy), dated November 6, 2014 (identifying these values as foundational to “military discipline[.]”).

<sup>115</sup> The heading also suggests that it governs content “characterized by or conforming to the technical or ethical standards of a profession.” “Professional.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/professional>. Accessed 26 Feb. 2020.

Ethical Conduct for Employees of the Executive Branch.<sup>116</sup> The Army’s “Professionalization of Online Conduct” policy misleads soldiers by failing to explicitly address the possibility of official and non-official social media accounts running afoul of the Standards of Ethical Conduct.<sup>117</sup>

An additional issue raised by non-official social media use includes the potential for relationships violative of Army Command Policy. For example,

Certain types of personal relationships between officers and enlisted Soldiers, or NCOs and junior enlisted Soldiers, are prohibited. Prohibited relationships include... Ongoing business relationships between officers and enlisted personnel, or NCOs and junior enlisted Soldiers such as commercial solicitation, and any other type of ongoing financial or business relationship.<sup>118</sup>

In the case of Army National Guard or U.S. Army Reserve personnel, this prohibition does not apply to relationships that exist due to civilian occupation or employment.<sup>119</sup>

Although the Command Policy prohibition on solicitation appears to address the affiliate

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<sup>116</sup> 5 C.F.R. 2635.101 *et seq*; Joint Ethics Regulation (JER). DoD 5500.07-r. (1993). This is not to suggest that a subordinate-level policy must restate *all* applicable directives from binding higher authorities in order to avoid supplanting (or the appearance of supplanting or pre-empting) higher authority on a matter. For example, ALARACT 061/2019 need not restate the entirety of 10 U.S.C. § 917(a) (1956) (hereinafter “Article 117a, Uniform Code of Military Justice” or “Art. 117a”) to avoid supplanting Art. 117a merely because conduct capable of violating the latter might also fall within the ambit of the former. Perfect nesting and cross-referencing of all applicable instructions and directives at all times would require Herculean efforts, not only on behalf of subordinate commanders drafting and issuing policies, but also on behalf of soldiers attempting to comprehend and internalize high volumes of the same. Moreover, such an effort would inherently reduce a commander’s ability to add emphasis where deemed appropriate. Consider, as a comedic illustration, NotBenedictArnold’s 2017 satire *Battalion commander’s list of number one priorities hits 50*. <https://www.duffelblog.com/2017/06/battalion-commander-priorities/> (January 17, 2020).

<sup>117</sup> ALARACT 061/2019 purports to conclusively govern “*professionalization of online conduct*.” It encourages “tell[ing of] the Army story.” Although the Instruction narrowly addresses specific acts that might “undermine dignity and respect,” it also purports to govern any “online-related incident[s],” defined as those “reported cases of online misconduct” for which “an electronic communication is used as the primary means for committing [*sic*] misconduct [*sic*].”

Despite its seemingly conclusive breadth, ALARACT 061/2019 governs only a narrow swath of impermissible online misconduct. To the contrary, it would be hard to imagine *any* online conduct afoul of the Joint Ethics Regulation’s prohibition on official endorsement of non-federal entities or use of public office for private gain that would not also constitute “unprofessional” online conduct in the lay sense of the word. However, ALARACT 061/2019’s proscribed online “misconduct” is far narrower, unless such conduct might also be considered to have undermined “dignity and respect.”

<sup>118</sup> Army Command Policy. Army Regulation 600-20 para. 4-14c (2014).

<sup>119</sup> *Id.*

marketing structures engaged in by servicemembers on social media platforms, a scan of common social media practices suggests that the prohibition is not being enforced as such.

**2. Army guidance for official social media includes unclear mandates that are broadly disregarded.**

The Army Social Media website references White House guidance from 2016 regarding disposition of official social media accounts by Executive Branch agencies.<sup>120</sup> This guidance governs social media accounts which are “created and maintained using federal government resources,” including the official time of federal employees, “to communicate about the work of the [unit or position]. Because official accounts have been *created and maintained for official purposes and using official resources*, they are the property of the federal government and not of any individual employee.”<sup>121</sup> Whether intended or not, this guidance conjoins the entity creating and maintaining an account with the narrow purpose of communicating about the work of that entity. No other aspects of Army Policy makes reference to this articulation of what constitutes an official social media account, which suggests that it is understood as applying only to a narrow category of media and only for the limited purpose of account archiving and disposal.

The Army Social Media website also provides a link to the Secretary of the Army’s directive, in 2013,<sup>122</sup> that “Commanders of Army Commands” approve External Official

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<sup>120</sup> See *Disposition of Official Social Media Accounts*. White House Memorandum for Heads of Executive Departments and Agencies. October 31, 2016. [https://www.army.mil/e2/downloads/rv7/socialmedia/memo\\_to\\_agencies\\_re\\_social\\_media\\_accounts\\_103116.pdf](https://www.army.mil/e2/downloads/rv7/socialmedia/memo_to_agencies_re_social_media_accounts_103116.pdf).

<sup>121</sup> Id. (emphasis supplied).

<sup>122</sup> *Delegation of Authority - Approval of External Official Presences*. Dated December 2, 2013. Accessed January 3, 2020. Available at <https://www.slideshare.net/USArmySocialMedia/delegation-of-authority-social-media-use>. As of January 1, 2019, DoDI 8550.01 remains posted on the Army Social Media: Policies and Resources page, <https://www.army.mil/socialmedia/>, even though it has been superseded by DoDI 8170.01, ONLINE INFORMATION MANAGEMENT AND ELECTRONIC MESSAGING, Dated January 2, 2019. This delegation was set to expire on December 2, 2016. However, because it remains an active reference on the Army Social Media Handbook, soldiers might well be justified in relying on it and this author assumes its continued validity unless otherwise revoked, modified, or superseded. This assumption is justified by the fact that were the delegation to

Presences, with redelegation explicitly authorized to “subordinate general officer[s].”<sup>123</sup> Several conditions attach to such redelegation, including that it be in writing, *and that it be determined not legally objectionable by the servicing judge advocate or legal counsel*. Under this structure, command approval is essential to the determination that an account is “official,” and that the full spectrum of rights afforded such a user flow from that. These include the right to use Department manpower, money, time, cameras, or other necessary instruments in order to support the creation and ongoing operation of the account. With these rights flows the duty to prevent any appearance of endorsement of non-federal entities. Despite this guidance, a scan of social media accounts representing Army units and official positions more often fail to obtain proper approval and judge advocate review than not.<sup>124</sup>

The Department of the Army has reinforced several qualifying requirements for official social media accounts, including that of command-approval by an “appropriate” commander. As of 2018, “appropriately” would appear to mean by the applicable Major Command commander. The Army Social Media Handbook notes that this

[d]elegated release authority is from the commander. Social media managers are not authorized to speak on behalf of the unit, the commander or the Army without delegated release authority. The commander’s release authority is usually equal to his or her authority in other matters. Just because a commander has command and control of his installation in such matters as personnel, housing and operations, it [*sic*] doesn’t always mean he is authorized to release information about events that happen on or near his installation.<sup>125</sup>

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sunset or otherwise render ineffective, no authority to approve establishment of External Official Presences would convey below the level prescribed by DoDI 8170.01.

<sup>123</sup> Id. Note also that this instruction appears to preclude delegation of authority below the general officer level.

<sup>124</sup> This assessment stems from a review of several echelons at which official social media accounts are ubiquitous, including individual Army recruiters, recruiting stations, and cadet companies at the United States Military Academy. Although the Army does not provide an updated public-facing list of approved official accounts, the frequency with which impropriety and abuse appear suggest that ongoing command approval and judge advocate review are far from the owner-operator’s mind in most cases. For comparison, the Air Force provides a public-facing list of approved official social media entities, but the list is far from comprehensive. *Social Media Directory*. af.mil. February 29, 2020. <https://www.af.mil/AF-Sites/Social-Media-Sites/>.

<sup>125</sup> Army Social Media Policies and Resources. Army.mil. January 6, 2020. <https://www.army.mil/socialmedia/> (responding to the Frequently Asked Question “What is a release authority?”)

The Army Social Media Handbook misstates, without signature of authority, the appropriate echelon at which EOPs may be approved in accordance with Department of Defense Instruction 8170.01. The Handbook further instructs that servicemembers without “release authority can ... still have [*sic*] ... official social media platform[s].”<sup>126</sup> “However, It [*sic*] must be approved by the commander [*sic*] and ... must follow ... U.S. Army requirements.”<sup>127</sup> The most generous reading of the Army Social Media Handbook would entail reviewing Department of Defense Instruction 8170.01, and ignoring all other guidance in the Handbook.

Because soldiers seeking a clear articulation of Army social media policy instead find inactive references and circular instructions, some will invariably conclude that social media constitutes an opportunistic medium for private gain. Where military officers, including some commanders, run public-facing commercial ventures on the shoulders of their persona as servicemembers, the likelihood of misunderstanding compounds.<sup>128</sup> The net effect is an incoherent public-facing policy that actively undercuts federal ethics rules by purporting to implement them.

**C. OGE “clarifies” the Standards as applied to “personal” social media, but without addressing the social media influencer market.**

In response to an “increase in inquiries” pertaining to the applicability of Standards of Ethical Conduct, the United States Office of Government Ethics issued an advisory opinion on

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<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> See [Appendix A](#), at A4, A5, A6, A16, A18.



the matter.<sup>129, 130</sup> On the issue of “whether a reference to an employee’s official title or position on social media violates the Standards of Conduct,” OGE opined that agency officials should consider, from the perspective of a reasonable observer:

Whether the employee states that he or she is acting on behalf of the government;  
**Whether the employee refers to his or her connection to the government as support for the employee’s statements;**  
**Whether the employee prominently features his or her agency’s name, seal, uniform or similar items on the employee’s social media account** or in connection with specific social media activities;  
Whether the employee refers to his or her government employment, title, or position in areas other than those designated for biographical information; [and]  
Whether the employee holds a highly visible position in the Government, such as a senior or political position, or is authorized to speak for the Government as part of the employee’s official duties[.]<sup>131</sup>

Although the opinion fails to address the interpretative challenges posed by the public office for private gain provision, this elaboration on non-endorsement assists in both realms. In particular, its carving-out of areas “designated for biographical information” reflects an understanding that a reasonable observer could associate an employee’s self-identification with rank and service history on LinkedIn in a manner far less-likely to promote misuse than similar conduct on platforms such as Instagram, YouTube, or Etsy. Furthermore, the opinion advises agency officials to consider whether an agency’s “name” or “uniform” is “prominently featured” when determining whether the Standards have been violated. This consideration is premised on a belief that the wearing of an official uniform carries with it a presumption of official activity, either within the scope of or at least related to one’s public office.

The OGE opinion then missteps, albeit in a manner adopted by the DoD. It declares that

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<sup>129</sup> Although the Ethics in Government Act directs OGE to both develop and interpret rules governing conflicts of interest and ethical problems, such authority is vested in the Office’s *director*. Ethics in Government Act of 1978 (Pub. L. 95-521, as amended through P.L. 115–277, Enacted November 3, 2018). As such, the 2015 legal advisory opinion constitutes in no way binds the Department of Defense.

<sup>130</sup> *The Standards of Conduct as Applied to Personal Social Media Use*. OGE Legal Advisory LA-15-03. April 9, 2015. [https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/\\$FILE/LA-15-03-2.pdf](https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/$FILE/LA-15-03-2.pdf).

<sup>131</sup> *Id.* (emphasis supplied; line breaks in original). Additional considerations pertaining to appearance of official sanction or endorsement are omitted.

[o]rdinarily, an employee is not required to post a disclaimer disavowing government sanction or endorsement on the employee's personal social media account. Where confusion or doubt is likely to arise regarding the personal nature of social media activities, employees are encouraged to include a disclaimer clarifying that their social media communications reflect only their personal views and do not necessarily represent the views of their agency or the United States. **A clear and conspicuous disclaimer will usually be sufficient to dispel any confusion that arises.**

This assertion overlooks two complementary axioms: that actions speak louder than words, and that a picture is worth a thousand words. Although the OGE opinion cabins the ability of a disclaimer to cure defects to the temporal limitation "usually," such disclaimers appear regularly in two areas. First, they may occur where an official account's federal affiliation is clear, and such a disclaimer actually misstates the nature of the account.<sup>132</sup> Second, and more problematically, it appears on many mixed personal- and professional-use accounts betray the account manager's flawed belief that such a disclaimer renders everything below it "private."<sup>133</sup> Disclaimers also do no work toward alleviating the nexus between a servicemember's potential use of public office and private gain through social media platforms.

The OGE opinion adds a final disclaimer of its own, noting that "Agency supplemental regulations may place further limitations on employees' use of title or position, or may impose additional requirements such as mandating the use of a disclaimer."<sup>134</sup>

Between DoD guidance from multiple staff proponents urging conduct in accordance with cross-referenced ethics regulations, commanders and judge advocates face a convoluted regulatory regime. Subordinate instructions undercut superior regulations with more narrow *lex specialis* provisions, even while directing adherence to the superior regulation. Army commanders are met with an additional morass of stale policies purporting to govern the issue, ranging from a message primarily directed at online bullying to a website's "Frequently Asked

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<sup>132</sup> [Appendix A](#), at A14.

<sup>133</sup> [Appendix A](#), at A9a-b, A10.

<sup>134</sup> *The Standards of Conduct as Applied to Personal Social Media Use*. OGE Legal Advisory LA-15-03. April 9, 2015. [https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/\\$FILE/LA-15-03-2.pdf](https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/$FILE/LA-15-03-2.pdf).

Questions” section. The Office of Government Ethics’ non-binding advisory opinion on the matter then suggests that use of public office for private gain can only occur when endorsement of the federal agency could be inferred.

To say that the regulatory space governing military social media influencers is convoluted falls short of the mark; it fosters anarchy. It rewards opportunism. It has allowed for rapid proliferation of a cohort of “public servants” who serve two masters. It fails to ensure that public service remains a public trust. Participants in this industry will continue to leverage public office for pecuniary gain, and the problem will only become more challenging to correct unless and until DoD tailors policy to address the narrow issue of modern “content creator” business models.

#### **IV. RECOMMENDATIONS FOR THE DEPARTMENT OF DEFENSE**

When a servicemember provides an independent perspective on an aspect of the military, that content retains an authenticity that makes it far more likely to draw attention. An inherent tension exists between the curated brand image that departments might wish to preserve and the appeal of a servicemember’s independent message. Because the latter is more likely to achieve influence at scale, the DoD stands to benefit from embracing, rather than rejecting it. The question is, how?

This policy recommendation consists of two elements. The first is a legal imperative that the DoD either promulgate a uniform and superseding policy that addresses the conduct in question, or rescind the instructions currently in force that undermine the Standards of Ethical Conduct. The second element is discretionary, but includes specific policy recommendations intended to harmonize accomplishment of the legal imperative with the necessary efficiency of the Department’s recruiting and retention functions. The recommended primary mechanism for

incentivizing social media influencers entails expanding eligibility for recruiter bonus pay. Recognition in performance evaluations and reassignment to public affairs roles may also augment pay incentives, such that influential servicemembers have reason to continue their active duty service despite corresponding ineligibility for receipt of private profits.

**A. Department of Defense policy must reflect federal ethics regulations.**

DoD lacks the authority to permit federal employees to use public office for private gain. Therefore, the Secretary of Defense should direct the rescission or modification of subordinate policies and guidance documents that do not comport with federal ethics regulations. This includes regulations which purport to govern any facet of ethical digital social media use but do not reiterate verbatim the specific provision pertaining to public office and private gain.<sup>135</sup>

The Secretary of Defense should also issue a directive that clearly proscribed the receipt of compensation from any non-federal entity in exchange for a service that relates in any way to a servicemember’s service-connected identity or persona. The definition of “compensation” must address in particular affiliate marketing structures, remuneration flowing through a digital social media provider, and any promotion of any products or services for which the servicemember stands to receive a financial benefit, or any non-monetary benefit such as free products or services.<sup>136</sup> A servicemember’s service-connected persona should be defined to include any image or writing conveying that servicemember’s military affiliation, or that might lead to an inference of such an affiliation.

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<sup>135</sup> Among others, see the DoD PAO and DoD CIO instructions discussed in Part IIIA, and Department of the Army guidance discussed in Part IIIB.

<sup>136</sup> For a convenient diagram of remuneration “flowing through a digital social media provider,” consider Mr. Alexander’s convenient diagram. [Appendix A](#), at A1.

More restrictive options are also available. If the Secretary assesses that it is necessary to maintain the integrity of the service,<sup>137</sup> he could go so far as to create a presumption that a servicemember's participation in any business consisting of or augmented by a digital social media presence is impermissible.<sup>138</sup> Only when a servicemember could demonstrate that no reasonable observer could draw a link between that servicemember's status on active duty and the commercial undertaking could they accept compensation from a non-federal entity. Although it is not a legal imperative, the policy would also benefit from expanding the applicability of the Standards of Ethical Conduct to servicemembers who are assigned to National Guard or reserve components.<sup>139</sup> This is because of the positive feedback loop created when some servicemembers create high-visibility service-related content and others assume that such conduct is either ethically permissible or insufficiently offensive as to trigger enforcement of ethics rules.

Regardless of how sweeping the DoD Directive is, it must abolish the myth that use of public office for private gain consists only of instances in which a federal agency's official endorsement could be inferred.

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<sup>137</sup> Insofar as the First Amendment limits the government's ability to restrain or chill speech or expressive conduct, the policy must bear a clear nexus between what is prevented and the integrity and efficiency of the Armed Forces. U.S. CONST. AM. I; *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 471-72 (1995); *Wolfe v. Barnhart*, 446 F.3d 1096, 1106 (10th Cir. 2006).

<sup>138</sup> This would tend to defeat the pattern charted in [Appendix A](#), at A20, in which servicemembers acquire influence and convert it to personal financial gain, iteratively obscuring the link between service-connected content and profit to prevent enforcement.

<sup>139</sup> *See e.g.* [Appendix A](#), at A7, A13.

**B. The Department of Defense may seek to enhance and expand “recruiter pay” and other federal incentives for servicemember content creators.**

The DoD has substantial marketing needs that benefit from its servicemembers telling their authentic stories.<sup>140</sup> Having recognized this, budgets have shifted to favor digital marketing.<sup>141</sup> United States Army Recruiting Command (USAREC) has encouraged leveraging social media platforms to effectively engage recruits and potential recruits,<sup>142</sup> including a call for “all Army personnel” to support the Army’s recruiting mission through social media engagement and amplification.<sup>143</sup> Recruiters in brick-and-mortar recruiting stations are no longer the most important “salesmen” of the military occupation, as digital content shapes potential recruits’ perceptions before they contact their local recruiter.<sup>144</sup> In light of this trend, it would likely be cost-effective for the DoD to encourage and amplify the premier content that many servicemembers independently create, rather than curtail it.

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<sup>140</sup> See e.g. <https://www.stripes.com/news/military-recruiting-takes-a-digital-turn-during-the-pandemic-1.629727> (discussing recruiting efforts through social media); see also <https://www.stripes.com/news/army/army-misses-2018-recruiting-goal-which-hasn-t-happened-since-2005-1.548580> (describing the Army’s first failure to meet its recruiting target since 2005).

<sup>141</sup> Digital technology helping Army achieve 2020 recruitment goals. Army.mil. February 21, 2020. [https://www.army.mil/article/232940/digital\\_technology\\_helping\\_army\\_exceed\\_2020\\_recruitment\\_goals](https://www.army.mil/article/232940/digital_technology_helping_army_exceed_2020_recruitment_goals)

<sup>142</sup> Consider also the statement of former Secretary of Defense James Mattis, describing his days as a recruiter in the United States Marine Corps,

[T]he idea was to get to know the people, and try to draw in people who would be very willing to embrace the Marine ethos of an elite fighting force. I don't think that's changed over many years. Now, how we convey it, *we do more social media* .... But the fundamental message is we're looking for young men and women patriots who are willing to ... put their lives on the line to protect this experiment [we] call America.

*James Mattis Talks with Michael Morell.* Intelligence Matters. October 23, 2019.

<https://www.cbsnews.com/news/transcript-james-mattis-talks-with-michael-morell-on-intelligence-matters>.

<sup>143</sup> All Army personnel, veterans asked to be recruiters next week. Army.mil. June 24, 2020.

[https://www.army.mil/article/236719/all\\_army\\_personnel\\_veterans\\_asked\\_to\\_be\\_recruiters\\_next\\_week](https://www.army.mil/article/236719/all_army_personnel_veterans_asked_to_be_recruiters_next_week)

<sup>144</sup> See The New Digital Divide. Retailers, Shoppers, and the Digital Influence Factor. Deloitte.com. Accessed July 8, 2020. Report available at <https://www2.deloitte.com/us/en/pages/consumer-business/articles/the-new-digital-divide-retail-sales-influence.html>. (Charting the extent to which digital influence touches retail sales, including a prediction that the fraction in 2012 would be less than one-fifth of the same figure in 2020).

Although many servicemembers' independent social media ventures are ripe for leveraging, they regularly fail to adhere to federal ethics regulations.<sup>145</sup> The Secretary of Defense should adopt a strategy to leverage servicemember content creators with proven influence without running afoul of ethics regulations. This strategy should seek to avoid inhibiting the authenticity of servicemember's stories while also authorizing permissible incentives to compensate for foregone profits from non-federal entities. Moreover, it should disrupt the current enforcement pattern, in which some commanders enforce ethics regulations, creating tangible unfairness by contributing to profitable monopolies for those servicemembers against whom ethics rules are not enforced.

The DoD should expand eligibility for recruiting incentive pay. Army Recruiters are authorized special duty assignment pay, with additional pay incentives upon completion of an initial training period.<sup>146</sup> Other branches offer similar bonuses for servicemembers assigned to recruiting roles. In light of the benefit that servicemember content creators can provide to recruiting messages, the Secretary could direct that servicemembers with demonstrated ability or potential in the field of social media influence be prioritized for assignment to recruiting units and authorized special duty assignment pay.<sup>147</sup> The Secretary might also direct that recruiting bonuses be authorized *even when* servicemembers are not specifically assigned to recruiting units, but provide vital recruiting functions. Because the pay incentive flows through the federal

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<sup>145</sup> Recall that the extension of federal ethics regulations to enlisted members of the armed forces was promulgated at Department of Defense level. This expansion could be reduced, but the preclusions affecting officers would remain. In any event, many of the entities violating federal ethics rules are military officers. See [Appendix A](#), at A4-6, 16, 18.

<sup>146</sup> ALARACT 043/2019. Special Duty Assignment Pay (SDAP) Review and Recertification Guidance. <https://www.hrc.army.mil/asset/21492>.

<sup>147</sup> Special pay authority derives from 37 U.S.C. 307a. See also Special and Incentive Pay. Defense.gov. June 30, 2020. <https://militarypay.defense.gov/Pay/Special-and-Incentive-Pays/>.

government, conflicts of interest are a non-issue. Furthermore, this strategy benefits from a preexisting framework for implementation, including prior approval of its funding mechanism.

Public affairs channels might naturally be directed to oversee this effort and develop measurable qualifying criteria for servicemembers seeking pay incentives. These criteria should include, at a minimum, a requirement that servicemembers who apply or recertify for a special recruiting bonus sign an affidavit stating that they have neither accepted nor benefitted from any compensation provided by a non-federal entity related to their social media influence.

Servicemembers accepting incentive pay must be required to submit their social media accounts to official audit, and agree not to carry out any social media activity not subjected to such audit. An initial grace period would allow for servicemembers who previously accepted compensation to remain eligible, while also incentivizing divestiture of their accounts from non-federal sponsorship. These standards should be capable of evolving with trends in social media use, and should reflect a rough approximation of private market compensation.

Although incentives should correspond with non-federal incentives across different media platforms, a discount against private market compensation rates would be appropriate. This is because servicemembers who currently profit from their image and likeness are operating in a black market. They are also not similarly situated to the broader market for social media influencers; their content benefits not only from their private personas, but also from the respect and credibility they are afforded as a result of their military affiliation. Last, a colorable argument can be made that servicemember content creators already act within the purview of their employment. The United States Army charges officers with extending influence beyond the chain of command as part of their ordinary duties, for which no special or added



compensation is due.<sup>148</sup> In the Marine Corps, all “sergeants and above” are to be evaluated based on their ability to “inspire” and “influence” persons they are not tasked with leading directly.<sup>149</sup> If servicemembers who would stand to receive lesser payouts leave the military to realize the full value of their private business, their commitment likely fell shy of that required for continued service in the first instance.

One shortcoming of reassigning social media influencers to recruiting units lies in the potential for such reassignments to undermine the authenticity of those servicemembers’ messages. However, this detriment will be offset in part by the expanded access that content creators would enjoy. Much of the most sought-after content drawing from privileged access and unique knowledge would be available for publication without violating ethics rules. Additionally, where servicemember content creators previously had to obscure the link between service-related images and videos and their more private for-profit accounts, the two could merge.

In addition to pay incentives, servicemembers should be awarded and positively evaluated in recognition of their contributions to recruiting, retention, and training efforts through independent social media activity. Evaluation of this nature may be inherent where servicemembers are assigned to recruiting or retention roles, but acceptance of social media as a recruiting tool still lags its potential as a tool.<sup>150</sup> In no event should positive evaluations flow from impermissible for-profit social media accounts. Although the Army already recognizes

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<sup>148</sup> ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION. July 31, 2019.

<sup>149</sup> MCO 1610. 7: PERFORMANCE EVALUATION SYSTEM. Dated February 13, 2015. marines.mil. Accessed July 20, 2020. <https://www.marines.mil/Portals/1/Publications/MCO%201610.7.pdf>

<sup>150</sup> See Hall, K., 2020. Top 3 Ways I Feel Misunderstood. (podcast). MISUNDERSTOOD with Kellie Rene Hall. Available at: <https://www.listennotes.com/podcasts/missunderstood-with-kellie-rene-hall-kellie-Zn3CO4YgmSH/>. (Discussing how, in 2015, senior Navy leaders rebuked the idea of diverting resources to recruit through social media).

“extend[ing] influence beyond the chain of command” as fundamental to effective leadership,<sup>151</sup> it may take time for non-recruiting occupations to embrace social media as a sanctioned means of achieving this aim. Nonetheless, maintenance of the status quo enables increasingly flagrant and widespread violations of federal ethics regulations. This will continue to be the case unless and until effective countermeasures are taken.

The United States Army’s advertising budget is reported to be approximately \$400M annually.<sup>152</sup> The Army’s YouTube channel generates several thousand views per video.<sup>153</sup> Despite Mr. Alexander’s dubious ethics situation, his YouTube channel garners hundreds of thousands of views per video, often more. One video alone garnered eight million views, nearly quadruple the magnitude of the Army’s Instagram following. His filmmaking budget does not appear comparable in scale to that of the United States Army’s advertising budget. Regardless of which incentive pay structure is pursued, the DoD has an asymmetric opportunity in servicemember content creators-cum-recruiters.

This article is not intended to set DoD priorities. Mr. Alexander’s telling of official investigation into his conduct illustrates that even high-profile ethics violations are consciously and overlooked. The conclusion here does not require an assessment of the merits of Mr. Alexander’s individual case; if misconduct was deliberately ignored in light of competing priorities, that decision should be a bellwether for the DoD to lobby for rescission of use of

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<sup>151</sup> ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION. July 31, 2019.

<sup>152</sup> E-Sports, Comic-Con and ‘Momfluencers: How the U.S. Army is revamping its multi-billion dollar marketing plan. Patrick Coffee. BusinessInsider.com. October 12, 2019. <https://www.businessinsider.com/us-army-marketing-esports-comiccon-momfluencers-2019-10#:~:text=Esports%2C%20Comic%2DCon%2C%20and,multi%2Dbillion%2Ddollar%20marketing%20plan&text=The%20US%20Army%20has%20struggled,advertising%20budget%20in%20recent%20years.>

<sup>153</sup> U.S. Army. Youtube.com. June 30, 2020. <https://www.youtube.com/user/usarmy>.

public office for private gain prohibitions.<sup>154</sup> The course of action proposed herein seeks to incentivize servicemember content creation while eradicating conflicts of interest that undermine servicemembers' duties of loyalty. However, maintenance of the status quo will render that outcome increasingly elusive.

## V. CONCLUSION

Servicemembers who accept compensation from non-federal entities for military-related social media influence violate federal regulations. However, a morass of DoD policies that purport to govern social media ethics obscure the federal rule, and have resulted in a landscape in which dozens, if not hundreds of servicemembers violate the rule in plain sight. These incoherent and inconsistent DoD policies have resulted in a lack of uniformity in interpretation and enforcement, which in turn fosters perceived unfairness among servicemember content creators. Additionally, the integrity of and competence of the service suffer when servicemembers openly leverage their public office to further private business ventures.

The DoD currently lacks the authority to permit federal employees to use public office for private gain. It is therefore recommended that the Secretary of Defense order rescission or modification of subordinate policies inconsistent with the Department's ethical imperatives, although it may do so in a limited manner so as not to inhibit recruiting and retention programs. Furthermore, opportunities exist to leverage prominent social media influencers in furtherance of strategic communications efforts, although the DoD must authorize financial incentives from a federal bucket, if any are to benefit content creators.

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<sup>154</sup> Or, at a minimum, roll back its own extension of that provision to enlisted members of the Armed Forces. Rescission would solve the cynicism problem that flows from disparate enforcement of ethics rules to otherwise similarly-situated content creators because *all* commercial content creation would be permissible.