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Fertile Ground for Violent Extremists: A New Framework to Protect Military Servicemembers and Their Civil Liberties

Sarah Armstrong
Harvard Law School

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FERTILE GROUND FOR VIOLENT EXTREMISTS: A NEW FRAMEWORK TO PROTECT MILITARY SERVICEMEMBERS AND THEIR CIVIL LIBERTIES¹

*Sarah Armstrong**

Veterans and active-duty members of the armed forces are popular and vulnerable targets for recruitment by alt-right and violent white extremist (“VWE”) groups. As the United States government attempts to deal with an influx of violent hate groups throughout the country, both in the civilian and military context, it must respect the civil liberties of those investigated. This is critical because prosecutors often sweep with a broad brush when investigating resistance movements, and protestors of color and from marginalized backgrounds are disproportionately targeted. Further, on a constitutional level, every American has fundamental rights that cannot be abridged. Therefore, when dealing with active duty servicemembers and recruitment by violent white extremist groups, military courts must remain mindful and respectful of servicemembers’ First Amendment rights. Prosecutors must find ways to separate extremist conduct—which can and should be punished—from extremist ideologies, words, and thoughts, which, on their own, cannot and should not.

This Article first provides a brief overview of the characteristics of alt-right and VWE groups, including a history of the white supremacist movement in the United States and the current landscape in which these groups operate. It then explores the tactics that alt-right and VWE groups utilize to recruit U.S. servicemembers and reviews current First Amendment doctrine that traditionally limits law enforcement’s ability to police VWE speech both online and in person, making it difficult to prevent this type of recruitment. Finally, after examining the relevant cases in military courts that demonstrate the different standards for servicemembers’ speech, this Article proposes a new specific, speech-integral crime of recruitment for extremist organizations. This proposed crime, in

* J.D., Harvard Law School, 2023; B.S., United States Naval Academy, 2016. I would like to thank Martha Minow for her thoughtful feedback and kind encouragement in the development of this piece. I am also profoundly grateful to the editors of the *Voting Rights and Democracy Forum*, not only for their excellent guidance and edits but also for their recognition that the prevalence of violent extremism in this country is unconditionally intertwined with the project of protecting our democracy. Finally, I would like to thank my father, “the simple country lawyer,” for teaching me to always stand up for what is right.

¹ The military has often been characterized as “fertile ground” for alt-right and violent white extremist recruiters. See, e.g., *Racists Work Fertile Ground of Military*, L.A. TIMES, Aug. 21, 2000, at A8, <https://www.latimes.com/archives/la-xpm-2000-aug-21-mn-7813-story.html> [<https://perma.cc/2NV5-45AJ>].

the vein of other speech-integral crimes like solicitation, extortion, and perjury, is designed to preserve servicemembers' First Amendment rights when adjudicating cases in this space.

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INTRODUCTION

On January 12, 2021, the Naval Criminal Investigative Services (“NCIS”) received a tip from federal law enforcement that a sailor in San Diego, Damage Control Fireman James C. Hart, had made social media posts advocating the use of violence against local and federal law enforcement.² Hart’s posts were in response to the killing of a protestor during the January 6, 2021 attack on the United States Capitol.³ Upon investigation, however, the NCIS discovered that Hart’s postings and activities had begun well before January 6. In fact, Hart was actively planning violent attacks against U.S. personnel and was later found to be an engaged member of a violent white supremacist militia.⁴ He and other servicemembers had also

² Gov’t Response to Def. Mot. to Dismiss Charge 1, Specification 1, at 2, *United States v. James C. Hart*, General Court Martial United States Pacific Fleet (July 23, 2021), https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_hart_james_usn.pdf [<https://perma.cc/V6GM-KCVY>].

³ *Id.*

⁴ The official organization that Hart was a member of is redacted in the docket of his case. However, in multiple text messages in evidence, he refers to “the boog.” *Id.* at 4-5. The Boogaloo Movement is an anti-government extremist movement formed in 2019. The group follows an anti-police ideology and has some white supremacist members. The “Boogaloo” or “boog” is a slang term for the coming

exchanged communications that included racist memes⁵ and messages with fellow militia members detailing plans to kill fellow servicemembers and law enforcement personnel.⁶ Perhaps more strikingly, Hart had stolen military property and was keeping firearms in his barracks room at Naval Base San Diego with the alleged intent to transfer the weapons and gear to his fellow militia members.⁷

Hart's story is not unique.⁸ Veterans and active-duty members of the armed forces are popular targets of alt-right and

civil war that members anticipate. This will be either a race war or government attack on personal civil liberties. Preparation for “the boog” requires the hoarding of guns and other weapons, as well as training to prepare and fight. *See The Boogaloo Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/boogaloo> [<https://perma.cc/UE6G-7FQN>] (last visited Oct. 8, 2023).

⁵ Examples included an image of a Ku Klux Klan member with the words “Get your noose” inscribed; another image with the inscription “F*ck N****rs”; another image including the words “Total N****r Death.” *See Gov't Response to Def. Mot. to Dismiss Charge 1, Specification 1, at 3, United States v. James C. Hart, General Court Martial United States Pacific Fleet (July 23, 2021)*, https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_hart_james_usn.pdf [<https://perma.cc/V6GM-KCVY>]. At the Author's discretion, offensive or hurtful language throughout this Article is redacted.

⁶ *Gov't Response to Def. Mot. to Dismiss Charge 1, Specification 1, at 3-5, United States v. James C. Hart, General Court Martial United States Pacific Fleet (July 23, 2021)*, https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_hart_james_usn.pdf [<https://perma.cc/V6GM-KCVY>].

⁷ *Charge Sheet, United States v. James C. Hart, General Court Martial United States Pacific Fleet (Apr. 13, 2021)*, https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_hart_james_usn.pdf [<https://perma.cc/7MJM-W5HZ>] [hereinafter *Charge Sheet*]; *Gov't Response to Defense Motion to Dismiss for Unreasonable Multiplication of Charges, Specification 6, at 1, United States v. James C. Hart, General Court Martial United States Pacific Fleet (July 23, 2021)* https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_hart_james_usn.pdf [<https://perma.cc/V6GM-KCVY>].

⁸ *See, e.g.,* Meghann Myers, *The Military Fielded over 200 Domestic Extremism Reports Last Year*, MIL. TIMES (Dec. 5, 2022), <https://www.militarytimes.com/news/your-military/2022/12/05/the-military-fielded-over-200-domestic-extremism-reports-last-year> [<https://perma.cc/9PVF-49H2>]; A.C. Thompson et al., *Ranks of Notorious Hate Group Include Active-Duty Military*, PROPUBLICA (May 3, 2018), <https://www.propublica.org/article/atomwaffen-division-hate-group-active-duty-military> [<https://perma.cc/6Q7H-J2UE>]; Stephen Losey, *Report: Airman Suspected of Killing Deputy Wrote Violent Extremist Messages in Blood*, A.F. TIMES (June 12, 2020), <https://www.airforcetimes.com/news/your-air-force/2020/06/12/report-airman-suspected-of-killing-deputy-wrote-violent-extremist-messages-in-blood> [<https://perma.cc/W9UC-PWVG>]; Christopher Mathias, *Exposed: Military Investigating 4 More Servicemen for Ties to White Nationalist Group*, HUFFPOST (Apr. 27, 2019), https://www.huffpost.com/entry/white-nationalists-military-identity-evropa_n_5cc1a87ee4b0764d31dd839c [<https://perma.cc/2HKP-8PUH>]; Simon Ostrovsky, *Extremism in the Ranks: Some at the January 6 Capitol Riot Were*

violent white extremist (“VWE”) groups. In fact, according to recent research by the National Consortium for the Study of Terrorism and Responses to Terrorism (START), a military background is the “single strongest predictor of whether a perpetrator committed or planned a mass casualty attack—and their military training made them twice as deadly.”⁹ Servicemembers’ discipline, military training, tactical skills, and experience in a regimented, hierarchical culture can translate easily to the conventions of militias and supremacist organizations. Perhaps more importantly, both active servicemembers and veterans are often vulnerable to recruitment by these organizations. This susceptibility can arise from untreated Post Traumatic Stress Disorder (“PTSD”) and other mental health issues stemming from service, or simply due to the loss of community, structure, and hierarchy post-deployment.¹⁰ In turn, VWE, alt-right, and supremacist groups gain legitimacy in the public eye when veterans and military members join their organizations.¹¹ As one of the most trusted public institutions in the country,¹² the United States military provides a veneer of authority to these groups.

Alt-right and VWE groups usually carry out recruitment through three primary means: (1) infiltration, wherein members join the military and then attempt to recruit from within, as in Hart’s case, (2) online recruitment (through social media, online gaming, and internet messaging systems), and (3) propaganda.¹³

Police, Active Military, PBS NEWS (Mar. 13, 2021), <https://www.pbs.org/newshour/show/extremism-in-the-ranks-some-at-the-january-6-capitol-riot-were-police-active-military> [<https://perma.cc/ZUS7-ZXAV>].

⁹ Nikki Wentling, *Military Service Key Factor in 3 Decades of Extremist Attacks*, MIL. TIMES (June 7, 2023), <https://www.militarytimes.com/flashpoints/extremism-disinformation/2023/06/07/what-ties-violent-extremists-together-military-service-study-says> [<https://perma.cc/NK6W-9EEZ>].

¹⁰ See Daniel Koehler, *A Threat from Within? Exploring the Link Between the Extreme Right and the Military*, INT’L CTR. FOR COUNTER-TERRORISM, 3 (2019), <https://www.icct.nl/sites/default/files/import/publication/ICCT-Koehler-A-Threat-from-Within-Exploring-the-Link-between-the-Extreme-Right-and-the-Military.pdf> [<https://perma.cc/TXM9-VQL2>].

¹¹ Meghann Myers & Leo Shane III, *The Military Knows It Has a Problem with Domestic Extremists, White Supremacists*, MIL. TIMES (Jan. 14, 2021), <https://www.militarytimes.com/news/your-military/2021/01/14/the-military-knows-it-has-a-problem-with-domestic-extremists-white-supremacists> [<https://perma.cc/3M42-8RFA>].

¹² See Leo Shane III, *Trust in the Military Is Dropping Significantly, New Survey Suggests*, MIL. TIMES (Mar. 10, 2021), <https://www.militarytimes.com/news/pentagon-congress/2021/03/10/trust-in-the-military-is-dropping-significantly-new-survey-suggests> [<https://perma.cc/7HTC-JTVF>].

¹³ See, e.g., Matthew Kriner & Bjørn Ihler, *Analysing Terrorgram Publications: A New Digital Zine*, GLOB. NETWORK ON EXTREMISM & TECH. (Sept. 12, 2022), <https://gnet-research.org/2022/09/12/analysing-terrorgram-publications-a-new->

Challengingly, when trying to prevent recruitment for and participation in VWE and alt-right groups, law enforcement inevitably comes up against the bounds of the First Amendment, as many of these groups' recruitment tactics are protected by the rights of free speech and association. Yet, because of military members' unique status within the legal system, when active servicemembers participate in recruitment, the government has more enforcement tools at its disposal to identify and stop recruitment as it occurs and hold participants accountable. Further, existing case law can provide military prosecutors with novel legal arguments to remove these servicemembers from the ranks and flag them for civilian law enforcement partners.

As the United States government addresses an influx of violent hate groups in civilian and military contexts throughout the country, it must respect the civil liberties of those investigated. This is critical because prosecutors often sweep with a broad brush when investigating resistance movements, resulting in the disproportionate targeting of protestors of color and those from marginalized backgrounds.¹⁴ Further, on a constitutional level, every American has fundamental rights that cannot be abridged, requiring military courts to protect servicemembers' First Amendment rights. Prosecutors must find ways to distinguish extremist conduct—which can and should be punished—from extremist ideologies, words, and thoughts, which, on their own, cannot and should not be enough to prosecute without setting a dangerous precedent and violating key tenets of our constitutional democracy.¹⁵

digital-zine [<https://perma.cc/PW6Y-HHX4>]; Val Burris, Emery Smith, & Ann Strahm, *White Supremacist Networks on the Internet*, 33 SOCIO. FOCUS 2, 4 (2000); John M. Donnelly, *Pentagon Report Reveals Inroads White Supremacists Have Made in Military*, ROLL CALL (Feb. 16, 2021), <https://rollcall.com/2021/02/16/pentagon-report-reveals-inroads-white-supremacists-have-made-in-military> [<https://perma.cc/EUL7-3LED>].

¹⁴ See, e.g., Taimi Castle, “*Cops and the Klan*”: *Police Disavowal of Risk and Minimization of Threat from the Far-Right*, 29 CRITICAL CRIMINOLOGY 2, 215, 222 (2021); *Why Countering Violent Extremism Programs Are Bad Policy*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/why-countering-violent-extremism-programs-are-bad-policy> [<https://perma.cc/JCA2-5KGP>]; Nicolas Duque Franco, *Suspicious to Whom? Reforming the Suspicious Activity Reporting Program to Better Protect Privacy and Prevent Discrimination*, 43 N.Y.U. REV. L. & SOC. CHANGE 611 (2019).

¹⁵ Under both the Uniform Code of Military Justice and the Department of Defense's Equal Opportunity Program, the military has the discretion to investigate complaints of discrimination or harassment based on race, color, gender, sex, religion, age, or national origin (similar to a civilian employer's ability under Title VII). Servicemembers who are found guilty can be directed to counseling (one-on-one discussions with a supervisor), punishment, and even separated from the military; however, complaints of discrimination and

This Article proceeds in five parts. Part I provides a brief overview of the characteristics of alt-right and VWE groups, including a history of the white supremacist movement in the United States and the current landscape in which these groups operate. Part II explores the tactics that alt-right and VWE groups use to recruit American servicemembers. Next, Part III reviews the current First Amendment doctrine that has traditionally limited law enforcement's ability to police VWE speech, both online and in person, making it difficult to prevent this type of recruitment. In Part IV, this Article examines the relevant cases in military courts that demonstrate the different standards for servicemembers' speech. Finally, Part V proposes a new specific speech-integral crime of recruitment for extremist organizations (in the vein of other speech-integral crimes like solicitation, extortion, perjury, etc.), to preserve servicemembers' First Amendment rights when adjudicating cases in this space, while still giving the government legal tools to address the effects of extremist recruitment in the military.

By providing prosecutors and military courts with an explicitly defined crime for recruitment, punishment for servicemembers' other speech related to extremist activity will be held to the higher standard under which the U.S. Court of Appeals of the Armed Forces now operates.¹⁶ Should the armed forces succeed in their announced "crack down" on extremists within the ranks¹⁷ (and gain successful buy-in from fellow servicemembers), it will be important to ensure that members retain their core First Amendment protections.

harassment are usually dealt with at the command level in a non-judicial fashion. See Craig Westergard, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215, 230–31 (2019).

¹⁶ United States v. Wilcox, 66 M.J. 442, 448 (C.A.A.F. 2008).

¹⁷ See Stephen Losey, *SecDef Austin to Troops: If You've Seen Extremism in the Ranks, Tell Your Commander*, MILITARY.COM (Feb. 23, 2021), <https://www.military.com/daily-news/2021/02/23/secdef-austin-troops-if-youve-seen-extremism-ranks-tell-your-commander.html> [https://perma.cc/WN7W-7GSB].

I. THE CHARACTERISTICS, HISTORY, AND GROWTH OF VWE IN THE UNITED STATES¹⁸

Alt-right and VWE groups have been intertwined with the military at least since the founding of the Ku Klux Klan, originally formed as a social fraternity for former Confederate Army officers.¹⁹ And white supremacist terrorism—terrorism founded in white supremacist and white nationalist ideology—is the oldest form of terror in the United States. Beginning with the violence that European colonists, slave traders, and slave owners inflicted upon Native Americans and enslaved Africans, white supremacist terrorism has only continued, adapting to today’s environment and society.²⁰ VWE and alt-right groups today not only embrace these traditions but often idolize these historical groups.

A. *The History of American White Supremacy and Alt-Right Groups*

The KKK was founded in 1865, following the Civil War, when six Confederate veterans gathered in Pulaski, Tennessee, to mobilize a vigilante group against Reconstruction.²¹ Their tactics were the passed-down violence of slave masters and slave patrollers, forming “private militias to violently oppress, terrorize, and control newly freed, formerly enslaved individuals.”²² After a brief period of recession, the organization resurged in the early twentieth century in Atlanta, Georgia, with several thousand members in Georgia and Alabama by 1919.²³ Spread by the dog-whistles of anti-Catholicism, racism, and antisemitism, the Klan’s membership skyrocketed to somewhere between three and five million by 1925,

¹⁸ Part I is designed to give a brief overview of the organizations described throughout the rest of this Article. For a more thorough study of today’s extremist and white-supremacist movements in the United States, I recommend reading the work of Drs. Amy Cooter, Heidi Beirich, Kathleen Blee, Cynthia Miller-Idriss, Jesse Daniels, Abby Ferber, and Cassie Miller, as well as the scholarship of Daniel Byman, Khaled A. Beydoun, and Nura A. Sedique, among many others (including those cited throughout this Article). I am grateful to them all for their tireless, often thankless, work in this field.

¹⁹ Stacia Gilliard-Matthews, *The Impact of the Economic Downturn, Immigrants, and Political Representation on White Supremacist Group Organization in the United States*, 44 SOCIO. FOCUS 3, 255, 257 (2011).

²⁰ Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1067 (2021).

²¹ *Ku Klux Klan*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> [<https://perma.cc/5DMG-T6C2>] (last visited Oct. 8, 2023).

²² Johnson, *supra* note 20.

²³ DAVID J. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 31 (1987).

in communities in both the North and South, urban and rural (including 50,000 members in Chicago, 35,000 in Detroit, and 17,000 in Denver).²⁴ Though the KKK quickly lost influence again after a series of sex scandals, internal power struggles, and newspaper exposés, they rose once more during the 1960s in opposition to the civil rights movement and desegregation.²⁵ Again, violent tactics were favored, including bombings and murders reminiscent of the lynchings years before.

After the Vietnam War, the Klan splintered into smaller groups and lost most of its national organizational structure.²⁶ Notably, many members went on to found or join other supremacist organizations.²⁷ These organizations included the National Alliance, founded in 1970 by William Pierce, the neo-Nazi organization that inspired the Oklahoma City bombing that left 168 people dead;²⁸ and the Aryan Nations, the neo-Nazi organization founded in 1977 that hosted annual Aryan World Congresses for many years.²⁹ At this stage, as the civil rights movement secured significant legal and popular victories, racism became less socially acceptable and white supremacist organizations less palatable to the mainstream. In response, their operations moved underground and began catering less to middle- and upper-class families. The evolution of the Klan (whose membership trended older, married, and middle-class) to neo-Nazi/skinhead movements (whose membership was and is younger, single, and lower-class) was also in direct response to the post-war era.³⁰ New technology and forms of media allowed these groups to connect, whether it be through music, the internet, or later through mobile phones and media.³¹

²⁴ DAVID CUNNINGHAM, *KLANSVILLE, U.S.A.: THE RISE AND FALL OF THE CIVIL RIGHTS-ERA KU KLUX KLAN* 25 (2012).

²⁵ *Ku Klux Klan*, *supra* note 21.

²⁶ *Id.*

²⁷ MARTY GITLIN, *THE KU KLUX KLAN: A GUIDE TO AN AMERICAN SUBCULTURE* xxi (2009).

²⁸ *The Turner Diaries*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/turner-diaries> [<https://perma.cc/NAM8-ATJJ>] (last visited Oct. 8, 2022).

²⁹ *Aryan Nations*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/aryan-nations> [<https://perma.cc/AZ7F-PJNE>] (last visited Oct. 8, 2022).

³⁰ S. POVERTY L. CTR., *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* 23 (6th ed. 2011), <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf> [<https://perma.cc/DRJ3-P6DQ>].

³¹ James Dao & Serge F. Kovaleski, *Music Style is Called Supremacist Recruiting Tool*, N.Y. TIMES (Aug. 7, 2012), <https://www.nytimes.com/2012/08/08/us/hatecore-music-is-called-white-supremacist-recruiting-tool.html> [<https://perma.cc/2GEU-8F5H>]; *White Supremacists are Riling Up Thousands on Social Media*, PBS NEWS (June 10, 2022),

These technologies both attracted younger members and assisted these groups in becoming more covert.³²

Although both the KKK and the Nationalist Socialist Movement still exist in various forms, these organizations are small portions of a much larger community that they have since inspired.³³ The modern far-right movement stems from both this history and a distinct fear of government overreach into civilian life, epitomized by the incidents at Ruby Ridge in 1992 and Waco in 1993.³⁴

B. Current Landscape of VWE and Alt-Right Groups

There are currently hundreds, if not thousands, of VWE, white supremacist, and alt-right groups in the United States. By the Southern Poverty Law Center's ("SPLC") estimate, in 2021, there were 733 hate groups across the country, including ninety-eight specifically white nationalist groups, eighteen KKK groups, sixteen neo-Confederate, fifty-four neo-Nazi, and seventeen racist skinhead groups.³⁵ Unfortunately, that is likely an underestimate of total hate groups in the country, as the organizations that SPLC tracks do not include many of the militia groups borne out of nationalist or anti-government identities first and racial identities second (e.g., the Oath Keepers, the Boogaloo Bois, the Three Percenters).

<https://www.pbs.org/newshour/politics/white-supremacists-are-riling-up-thousands-on-social-media> [<https://perma.cc/3JQ3-VUNR>].

³² Michael Wines & Stephanie Saul, *White Supremacists Extend Their Reach Through Websites*, N.Y. TIMES (July 5, 2015), <https://www.nytimes.com/2015/07/06/us/white-supremacists-extend-their-reach-through-websites.html> [<https://perma.cc/XN2F-JDS4>] (noting the white supremacist movement has been "rendered more anonymous by the Internet"); Petula Dvorak, *White Supremacists are Recruiting White Teens Online. Parents Must Stop Them.*, WASH. POST (Aug. 15, 2019), https://www.washingtonpost.com/local/white-supremacists-are-recruiting-white-teens-online-parents-must-stop-them/2019/08/15/5169c192-bf69-11e9-b873-63ace636af08_story.html [<https://perma.cc/5XFR-AZCP>].

³³ Some of the larger iterations of the KKK currently include the Knights of the Ku Klux Klan, which David Duke founded in 1975, the Brotherhood of Klans, the Imperial Klans of America, and the Church of the National Knights of the Ku Klux Klan. See *Ku Klux Klan*, *supra* note 21. Over fifty neo-Nazi organizations are currently spread throughout the United States, with more than twenty having an interstate reach. See *Neo-Nazi*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/neo-nazi> [<https://perma.cc/2P2C-NGWW>] (last visited Oct. 8, 2023).

³⁴ Jacob Ware, *Siege: The Atomwaffen Division and Rising Far-Right Terrorism in the United States*, INT'L CTR. FOR COUNTER-TERRORISM, 3 (July 2019), <https://www.icct.nl/sites/default/files/import/publication/ICCT-Ware-Siege-July2019.pdf> [<https://perma.cc/P2A9-3LZ>].

³⁵ See *Hate Map*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> [<https://perma.cc/4CB3-MRZX>] (last visited Oct. 8, 2023).

The alt-right/VWE movement is ever-evolving. Due to constant off-shooting, fractionalization, resurrection of old organizations, and graduation of younger members into leadership, new organizations are constantly forming, and old groups are often rebranding themselves.³⁶ With the rise of social media, it has become easier than ever for leaders with strong followings to, with the click of a button, form new organizations or create mass turmoil for former allies.³⁷ Despite this turbulence, a few groups have entrenched their presence in the past decade and are likely to continue to grow without government intervention.

The largest white supremacist organization in the United States today is likely Patriot Front, a group that began in 2017 after its leader, Thomas Rousseau, split from another now-defunct white nationalist group, Vanguard America.³⁸ Patriot Front was responsible for an estimated 80 percent of all white supremacist propaganda incidents in 2020.³⁹ Smaller, but more violent, is the Nationalist Socialist Coalition, a neo-fascist entity that, together with the United Acceleration Front, runs the Terrorgram Collective, a community on the digital platform Telegram where extremists organize, distribute propaganda, and train recruits.⁴⁰

Offshoot groups from the Nationalist Socialist Coalition include The Base and the Atomwaffen Division. The Base is a neo-Nazi organization founded by Rinaldo Nazzero, an American (and former federal government official) living in Russia who conducts

³⁶ See, e.g., *Patriot Front*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/patriot-front> [<https://perma.cc/3QUT-TPGN>] (last visited Oct. 8, 2023) (explaining how the organization was formed after splitting from Vanguard America, another white supremacist organization); Alex Newhouse, *The Threat Is the Network: The Multi-Node Structure of Neo-Fascist Accelerationism*, 14 COMBATING TERRORISM CTR. SENTINEL 5, 17 (explaining how Atomwaffen Division's "collapse" led to the Nationalist Socialist Order); see *With Hate in Their Hearts: The State of White Supremacy in the United States*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/report/hate-their-hearts-state-white-supremacy-united-states> [<https://perma.cc/GG4J-SU58>] (last visited Sep. 4, 2023).

³⁷ Johnson, *supra* note 20, at 1071.

³⁸ See *Patriot Front*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/patriot-front> [<https://perma.cc/3QUT-TPGN>] (last visited Oct. 8, 2023).

³⁹ *Id.*

⁴⁰ Kriner & Ihler, *supra* note 13; see also Deeba Shadnia et al., *Militant Accelerationism Coalitions: A Case Study in Neo-Fascist Accelerationist Coalition Building Online*, CTR. ON TERRORISM, EXTREMISM, & COUNTERTERRORISM, MIDDLEBURY INST. OF INT'L STUD. AT MONTEREY (2022), https://www.middlebury.edu/institute/sites/www.middlebury.edu.institute/files/2022-06/REDACTED%20CTEC_TAT%20Accelerationism%20Report%20.pdf?fv=tQaw4Tx- [<https://perma.cc/L6UZ-MEEC>].

organizational activities online.⁴¹ Members of The Base are known to be conducting paramilitary training for an impending race war, with multiple members arrested for murder, firearms, and other felony charges.⁴² Similarly, the Atomwaffen Division (German for “nuclear weapons division”) is a small neo-Nazi terrorist organization founded in 2015 whose members have been implicated in at least five murders and charged with explosives and weapons crimes.⁴³ The organization has now spread to Canada, Germany, and Ukraine.⁴⁴

Other growing paramilitary groups of recent years have sprung out of the militia movement. The largest of these organizations have surged in popularity during former President Donald Trump’s campaign and administration, with groups like the Oath Keepers, the Proud Boys, Patriot Prayer, Three Percenters, and the Boogaloo Movement all growing exponentially.⁴⁵ Each group has a slightly different ideology, but they often unite toward a common goal.

For instance, though the Oath Keepers accept anyone as a member, their explicit focus is recruiting current and former military, law enforcement, and first responder personnel, emphasizing these individuals’ duty to purportedly keep the oaths each took upon joining their service-oriented profession.⁴⁶ To “keep the oath,” Oath Keeper members are expected to protect their communities from the federal government, which they believe has been coopted by a shadowy conspiracy to strip American citizens of their rights.⁴⁷ The Three Percenters similarly believe that they must

⁴¹ See *The Base*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/base> [<https://perma.cc/M9WS-HWGR>] (last visited Oct. 8, 2023).

⁴² See *id.*

⁴³ Ware, *supra* note 34, at 7. The leader of the Atomwaffen Division, Brandon Russell, was recently arrested for conspiring to blow up multiple power grid substations in Maryland in the hopes of instigating a race war. See Press Release, U.S. DEP’T OF JUST., *Maryland Woman and Florida Man Charged Federally for Conspiring to Destroy Energy Facilities* (Feb. 6, 2023), <https://www.justice.gov/opa/pr/maryland-woman-and-florida-man-charged-federally-conspiring-destroy-energy-facilities> [<https://perma.cc/NYV3-MTT8>].

⁴⁴ Ware, *supra* note 34, at 6.

⁴⁵ See *New Hate and Old: The Changing Face of American White Supremacy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/report/new-hate-and-old-changing-face-american-white-supremacy> [<https://perma.cc/VRF8-TF5B>] (last visited Oct. 8, 2023).

⁴⁶ *Oath Keepers*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/oath-keepers> [<https://perma.cc/N5R3-CMSH>] (last visited Oct. 8, 2023). The Anti-Defamation League (“ADL”) estimates there are between 1,000 and 3,000 Oath Keeper members in the United States. *Id.*

⁴⁷ *Id.* According to the Oath Keepers’ own propaganda videos, they “are in a battle for the hearts and minds of our own troops. To win that battle, Oath Keepers will use written and video testimony of active duty military, veterans (especially

protect Americans from government tyranny. In recent years, however, their focus has shifted to opposing Muslims, leftists, and, notably, immigrants.⁴⁸ Finally, the Boogaloo Movement is also anti-government and anticipates a second civil war (“the boog”) spurred by political differences around gun rights and race relations.⁴⁹ Separately, militia groups like the Proud Boys and Patriot Prayer claim to be “pro-Western” male bonding organizations. However, both are far-right—if not openly fascist—with members often espousing anti-government and anti-authority ideology. Although they pride themselves on having multiracial membership, most members and leaders of both groups also have anti-immigrant, racist, misogynistic, and antisemitic views, and many members actively pursue violence and intimidation tactics.⁵⁰

Finally, there are hundreds of small and local militias, organizations, and groups dedicated to alt-right and VWE ideology and action throughout the United States.⁵¹ New groups are founded regularly, and participation in a smaller group often involves indoctrination through these larger national organizations’

combat vets), and peace officers to reach, teach, and inspire our brothers in arms in the military and police to fulfill their oaths and stand as guardians of the Republic.” DARYL JOHNSON, *RIGHT-WING RESURGENCE: HOW A DOMESTIC TERRORIST THREAT IS BEING IGNORED* 6 (2012).

⁴⁸ *Three Percenters*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/three-percenters> [<https://perma.cc/7L4E-4RQR>] (last visited Oct. 8, 2022).

⁴⁹ *Boogaloo Movement*, *supra* note 4.

⁵⁰ *Proud Boys*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/proudboys> [<https://perma.cc/H2GG-AAAR>] (last visited Apr. 16, 2022); *see also* Jane Coaston, *The Pro-Trump, Anti-Left Patriot Prayer Group, Explained*, VOX (Sept. 8, 2020) <https://www.vox.com/2020/9/8/21417403/patriot-prayer-explained-portland> [<https://perma.cc/V2PH-9ERL>].

⁵¹ *See, e.g.*, Odette Yousef, *Rightwing Extremist ‘Active Clubs’ Are Growing Across the U.S.*, NPR (July 18, 2023), <https://www.npr.org/2023/07/18/1188408223/rightwing-extremist-active-clubs-are-growing-across-the-u-s> [<https://perma.cc/FJ8X-9E7A>]; *East Coast Knights*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/east-coast-knights> [<https://perma.cc/S5Y5-HVWW>] (last visited Oct. 8, 2023); *Feuerkrieg Division (FKD)*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/feuerkrieg-division-fkd> [<https://perma.cc/B6L5-TC9A>] (last visited Oct. 8, 2023); *Golden State Solidarity*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/golden-state-solidarity-symbol> [<https://perma.cc/X8SU-8FZB>] (last visited Oct. 8, 2023); *New Jersey European Heritage Association (NJEHA)*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/new-jersey-european-heritage-association-njeha> [<https://perma.cc/R7MC-7HFD>] (last visited Oct. 8, 2023); *Joplin Honkys*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/joplin-honkys> [<https://perma.cc/5N2T-WUZ2>] (last visited Aug. 18, 2023); *Knights Party*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/knights-party> [<https://perma.cc/7MUB-EBT4>] (last visited Aug. 18, 2023).

teachings, online presence, social media, podcasts, music, and videos.⁵²

C. Characteristics of VWE and Alt-Right Groups

As explained above, VWE and alt-right groups can have different motives and tactics. Some groups focus on political violence, while others focus on spreading propaganda and information in the hopes of winning hearts and minds to their cause. Similarly, some base their ideology on a neo-Nazi or white nationalist/white supremacist background, while others are founded on anti-government, pro-civil liberties ideas. Others are established in ideals of Western masculinity and misogynistic culture. Many involve some combination of all of these.

Aside from racism and antisemitism, most VWE and alt-right groups oppose immigration (both legal and undocumented), gay and transgender rights, feminism, globalism, and all religious identities other than Christianity (and often only strains of Protestantism).⁵³ Almost all groups also involve “ritualized enactment of white masculine solidarity and identity-building,” in which members attempt to prove their masculinity through membership and organizational activities.⁵⁴ Most groups believe that their views are shared by the vast majority of white people in the United States, reasoning that others are just unwilling or unable to say so out loud.⁵⁵ Instead, they purport that only their members have the confidence to reject the government and societal norms and openly speak for the American people.⁵⁶

Finally, most groups share a belief that there is a coming war for which they, as an organization, must prepare. This war takes many forms: for the Boogaloo Bois, it is known as “the boog,” a slang term derived from the film “Breakin’ 2: Electric Boogaloo,”

⁵² Johnson, *supra* note 20, at 1073-74.

⁵³ Gilliard-Matthews, *supra* note 19, at 257-58.

⁵⁴ Kathleen M. Blee, *Racial Violence in the United States*, 28 *STUD. CONFLICT & TERRORISM* 599, 607 (2005).

⁵⁵ See Simon Clark, *How White Supremacy Returned to Mainstream Politics*, *CTR. FOR AM. PROGRESS* (July 1, 2020), <https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics> [<https://perma.cc/QE37-XWFP>] (last visited Oct. 8, 2023).

⁵⁶ In rejecting the “government,” these members are often rejecting the “Zionist Occupied Government,” which is thought to be the shadowy conspiracy controlling the federal government. “The American people” members speak for are white, Christian Americans. See Michael S. Waltman, *Stratagems and Heuristics in the Recruitment of Children into Communities of Hate: The Fabric of Our Future Nightmares*, 69 *S.J. COMM’N* 22, 34 (2003).

which led to internet stirrings of a Civil War 2: Electric Boogaloo.⁵⁷ “The boog” may be a racially motivated war or a war to protect Second Amendment rights if the federal government attempts to take members’ guns.⁵⁸ The equivalent for many Klan affiliates and neo-Nazi organizations is “Rahowa,” which stands for the coming racial holy war.⁵⁹ Some groups, like the Atomwaffen Division, are accelerationist in that they assume an urgent responsibility to push society into this war with the goal of triggering apocalyptic collapse so a white ethnostate may rise.⁶⁰

II. THE RECRUITMENT OF SERVICEMEMBERS INTO ALT-RIGHT AND VWE GROUPS

VWE and alt-right organizations, as previously stated, recruit heavily from the armed forces and the veteran community.⁶¹ Some groups, like the Oath Keepers, specifically target *only* servicemembers, law enforcement personnel, and first responders for recruitment, due to their mission of “keeping the oath.”⁶² Other groups simply attempt to recruit military personnel for their specific skills—servicemembers have tactics and weapons training, access to equipment, and a proven ability to follow orders as part of a unit, all skills that militias and white supremacist organizations seek.⁶³ Military personnel are also often a strong pool of recruits because, as an all-volunteer force since 1973, the armed forces tend to skew male, young, and increasingly politically conservative.⁶⁴

⁵⁷ Jared Thompson, *Examining Extremism: The Boogaloo Movement*, CTR. FOR STRATEGIC INT’L STUD. (June 30, 2021), <https://www.csis.org/blogs/examining-extremism/examining-extremism-boogaloo-movement> [<https://perma.cc/H3B2-6AJA>] (last visited Oct. 8, 2023).

⁵⁸ *Id.*

⁵⁹ *Racial Holy War/RAHOWA*, ANTI-DEFAMATION LEAGUE, <https://extremismterms.adl.org/glossary/racial-holy-warrahowa> [<https://perma.cc/DQF6-N7L7>] (last visited Oct. 8, 2023).

⁶⁰ *See Atomwaffen Division*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/atomwaffen-division> [<https://perma.cc/2Y5T-A6J8>] (last visited Oct. 8, 2023).

⁶¹ *See, e.g.*, Rina Torchinsky, *1 in 5 Patriot Front Applicants Say They Have Ties to the Military*, NPR (Feb. 9, 2022), <https://www.npr.org/2022/02/09/1079700404/1-in-5-patriot-front-applicants-say-they-have-ties-to-the-military> [<https://perma.cc/2LAX-Y344>].

⁶² *See Oathkeepers*, *supra* note 46.

⁶³ William Y. Chin, *War and White Supremacists: How Use of the Military in War Overseas Empowers White Supremacists at Home*, 11 S.J. POL’Y & JUST. 8, 14–15 (2017).

⁶⁴ *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/demographics-us-military> [<https://perma.cc/Q8DF-M83C>] (last visited Oct. 8, 2023); Denise-Marie Ordway, *Younger Veterans Are More Likely to Be Republicans Than Democrats*,

Psychologically, many servicemembers are vulnerable to recruitment because their service has instilled in them a sense of importance and duty to make a larger impact, as well as a need for camaraderie.⁶⁵

VWE and alt-right groups mostly recruit servicemembers in three ways, though oftentimes these overlap or are combined: (1) infiltration of the military, (2) online recruitment, and (3) distribution of propaganda. These groups have an extra advantage when servicemembers themselves actively recruit other servicemembers—members of the military are more likely to trust each other and having servicemembers in an organization legitimizes its actions to others.⁶⁶

The armed forces concede that members of VWE and alt-right groups sometimes succeed in joining the military.⁶⁷ Very often, members of these groups succeed because they hide their supremacist or extremist ties: extremist leaders are known to counsel followers who lack white supremacist tattoos or a record of extremist activities, and who can thus pass as normal, socially acceptable community members, to join the military.⁶⁸

JOURNALIST'S RES. (Aug. 23, 2018), <https://journalistsresource.org/politics-and-government/veterans-republican-party-affiliation> [<https://perma.cc/Q2VX-HNY6>].

⁶⁵ See generally Rachel Goldwasser, *Extremism Among Active-Duty Military and Veterans Remains a Clear and Present Danger*, S. POVERTY L. CTR., <https://www.splcenter.org/hatewatch/2021/10/12/extremism-among-active-duty-military-and-veterans-remains-clear-and-present-danger> [<https://perma.cc/AB2V-873M>] (Oct. 12, 2021); see also Randy Blazak, *White Boys to Terrorist Men*, in *HATE AND BIAS CRIME: A READER*, 319 (Barbara Perry, ed., 2012) (analyzing how boys and men are recruited into VWE and alt-right organizations to relieve their psychic stress and comparing this phenomenon to the ways people are recruited into both criminal gangs and religious cults).

⁶⁶ See, e.g., MAJORITY STAFF OF THE H. COMM. ON VETERANS' AFFAIRS, 117th CONG., *DOMESTIC VIOLENT EXTREMIST GROUPS AND THE RECRUITMENT OF VETERANS* (2021); *Why Are White Supremacists Trying to Recruit Veterans?*, PBS NEWS (Oct. 6, 2020), <https://www.pbs.org/wnet/amanpour-and-company/video/why-are-white-supremacists-trying-to-recruit-veterans> [<https://perma.cc/M7V9-UDVC>].

⁶⁷ See DEP'T OF DEF., *REPORT ON COUNTERING EXTREMIST ACTIVITY WITHIN THE DEPARTMENT OF DEFENSE* (Dec. 2021), <https://media.defense.gov/2021/Dec/20/2002912573/-1/-1/0/report-on-countering-extremist-activity-within-the-department-of-defense.pdf> [<https://perma.cc/GP66-2H86>].

⁶⁸ See Amanda Rogers, *Dismantling White Supremacist Infiltration of the Military and Law Enforcement*, CENTURY FOUND. (Jan. 25, 2021), <https://tcf.org/content/commentary/dismantling-white-supremacist-infiltration-of-the-military-and-law-enforcement> [<https://perma.cc/ZR33-BTDU>]; FED. BUREAU OF INVESTIGATION, *WHITE SUPREMACIST RECRUITMENT OF MILITARY PERSONNEL SINCE 9/11*, at 7 (July 7, 2008), https://documents.law.yale.edu/sites/default/files/FBI_WHITE_SUPREMACY-2008-ocr.pdf [<https://perma.cc/J2UU-N9LX>].

Aside from hiding their affiliations, members of VWE and alt-right groups have been able to join the military due to military recruiters' desperation to sustain an all-volunteer fighting force. Researchers have noted that, particularly during the Iraq War when the need for troops increased, military recruiters purposefully lowered their standards to meet personnel quotas and fulfill service needs.⁶⁹ One former Army paratrooper explained why recruiters overlooked those with VWE ties: “[w]e need man power, so [as] long as the man isn’t acting out, let’s blow it off.”⁷⁰ The armed forces also lowered retention standards, resulting in the termination of multiple investigations into servicemembers’ extremist ties, despite sufficient evidence demonstrating their actions were against regulations.⁷¹ This recruitment issue continues today, with even U.S. Senators calling on the armed forces to allow white extremist servicemembers to ensure military “readiness.”⁷²

Once extremists have infiltrated military units, they can recruit fellow servicemembers to their organizations through friendship, trust, and discussion of their ideology.⁷³ Beyond facilitating recruitment, infiltration also remains a high priority for VWE and alt-right organizations because members receive military training under the auspices of the U.S. government, which can later serve the organization’s extremist purposes.⁷⁴ Jeff Schoep, the leader of the Nationalist Socialist Movement from its 1994 resurgence to the mid-2000s, said in 2019 that the Nationalist Socialist Movement was “sending people into the military all the time . . . By the time I left, it was about 50 percent.”⁷⁵ By joining the military, members of alt-right and VWE groups can not only receive training but also stockpile weapons and tactical gear,

⁶⁹ See Chin, *supra* note 63, at 12.

⁷⁰ MATT KENNARD, IRREGULAR ARMY: HOW THE U.S. MILITARY RECRUITED NEO-NAZIS, GANG MEMBERS, AND CRIMINALS TO FIGHT THE WAR ON TERROR 22 (2012).

⁷¹ Chin, *supra* note 63, at 12.

⁷² Azi Paybarah, *GOP Senator Says of White Nationalists in the Military, ‘I Call Them Americans’*, WASH. POST (May 11, 2023) <https://www.washingtonpost.com/politics/2023/05/10/tuberville-military-extremists> [<https://perma.cc/XGK4-NGY6>].

⁷³ See, e.g., United States v. Mallar, 2014 WL 7226127, at *1, 5 (Army Crim. App. Apr. 30, 2014) (discussing defendant who recruited multiple members of his unit to join his extremist organization).

⁷⁴ Chin, *supra* note 63, at 12.

⁷⁵ *National Socialist Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/national-socialist-movement> [<https://perma.cc/DA8Q-22K3>] (last visited Oct. 8, 2023).

property of the armed forces that they believe they will need for missions, terror attacks, and the supposed coming civil war.⁷⁶

Other than infiltration (and often concurrent with infiltration), members of VWE and alt-right groups recruit servicemembers through online recruitment and propaganda. The internet—perhaps the largest tool with which these groups recruit—allows VWE and alt-right groups to connect with potential recruits anywhere, at any time. VWE and alt-right groups use social media, online gaming platforms, file-upload sites, and end-to-end encrypted chat platforms to engage with potential new members and provide them with extremist information and educational materials.⁷⁷ For instance, nearly a quarter of online gamers will encounter white extremist propaganda while playing.⁷⁸ Others find it on social media: users most likely to be engaged by this content most often find it on platforms like Facebook, YouTube, and X (formerly known as Twitter), eventually moving to more alternative social networking platforms.⁷⁹ Due to algorithm-driven engagement, which filters much end-user content, VWE and alt-right groups can easily target a specific captive audience.⁸⁰ Once users are interested, VWE and alt-right groups then leverage the internet to fundraise and expand their networks to like-minded individuals internationally. The effect snowballs—with larger platforms, these groups recruit more members online even more easily and quickly.⁸¹

⁷⁶ For instance, Christopher Hasson, a lieutenant in the U.S. Coast Guard, is alleged to have stockpiled multiple weapons for a mass casualty attack he was planning. Hasson was arrested for “plotting to kill journalists, Democratic politicians, professors, [and] Supreme Court Justices.” Christine Hauser, *Coast Guard Officer Called a 'Domestic Terrorist' Pleads Guilty to Gun and Drug Charges*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/christopher-hasson-coast-guard-white-supremacist.html> [<https://perma.cc/6DGH-K3S8>].

⁷⁷ See *Year in Hate: New SPLC Analysis Shows Extremists Leveraging Little-Known and Encrypted Technology to Spread Dangerous Messages, Plot Violence*, S. POVERTY L. CTR., <https://www.splcenter.org/news/2021/02/16/year-hate-new-splc-analysis-shows-extremists-leveraging-little-known-and-encrypted> [<https://perma.cc/V9BH-LN7U>] (last visited Oct. 8, 2023).

⁷⁸ *Id.*

⁷⁹ *With Hate in Their Hearts*, *supra* note 36; Johnson, *supra* note 20, at 1073.

⁸⁰ Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, PBS NEWS (Mar. 28, 2019), <https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms> [<https://perma.cc/PZJ7-PEX6>].

⁸¹ See generally Bharath Ganeth & Jonathan Bright, *Countering Extremists on Social Media: Challenges for Strategic Communication and Content Moderation*, POL’Y & INTERNET 6 (2020); *Funding Hate: How White Supremacists Raise Their Money*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/report/funding-hate-how-white-supremacists-raise-their-money> [<https://perma.cc/4YCN-WKTB>] (last visited Oct. 8, 2023).

VWE groups distribute propaganda through posting and distributing flyers (or “flyering”) in public places or on college campuses, in places where multiple group members work; dropping banners from a bridge or roadway; and spray painting hateful or organizational symbols in public places or other targeted areas.⁸² The SPLC tracks flyering and banner incidents in the United States. In 2021, they reported over 14,000 flyers and banners by white supremacist groups, with Texas, California, and Pennsylvania as the states most targeted.⁸³ Other propaganda efforts can include leafletting, in which members of organizations hand out leaflets with the group’s principles and mission, and events, like marches and protests, that provide in-person demonstrations of the organization’s size, influence, and opinions to would-be recruits.⁸⁴

Oftentimes, propaganda actions are filmed and then posted online to expand the reach of the original action and demonstrate the real-world efforts of an online presence. Videos of protests, marches, banner drops, and other propaganda efforts demonstrate to recruits throughout the country the reach and size of VWE and alt-right organizations (sometimes, even allowing organizations to appear larger than they actually are).⁸⁵ The internet has also become not only a recruitment hub but also a proving ground for hopeful recruits—individuals do on-the-ground propaganda efforts then report back to leadership and demonstrate their commitment to the cause through online posting and advocacy.⁸⁶ In this way, again, recruitment strategies are combined to have the greatest effect.

III. FIRST AMENDMENT LIMITS ON PROSECUTION OF VWE GROUPS

⁸² Kelsey Rushner, *Antisemitic Graffiti and White Supremacist Flyers Surface in Baltimore County Ahead of Yom Kippur*, CBSNEWS (Sept. 20, 2023), <https://www.cbsnews.com/baltimore/news/antisemitic-graffiti-and-white-supremacist-flyers-surface-in-baltimore-county-ahead-of-yom-kippur> [<https://perma.cc/HB6J-RMYW>].

⁸³ *Map of White Supremacist Flyering in the U.S.*, S. POVERTY L. CTR., <https://www.splcenter.org/flyering-map> [<https://perma.cc/MD45-3M7K>] (last visited Oct. 19, 2022).

⁸⁴ *Masked White Supremacist March in Boston Draws Condemnation: “Your Hate Is as Cowardly as It Is Disgusting,”* CBSNEWS (July 2, 2022) <https://www.cbsnews.com/news/masked-white-supremacist-patriot-front-march-in-boston-draws-condemnation-your-hate-is-as-cowardly-as-it-is-disgusting> [<https://perma.cc/JKR2-7ZKB>].

⁸⁵ *Id.*; *Map of White Supremacist Flyering in the U.S.*, *supra* note 83.

⁸⁶ See, e.g., *Discord Leaks*, UNICORN RIOT, <https://discordleaks.unicornriot.ninja/rocket-chat/server/1fdbdef-b0d7-4513-90c9-0830ebfa39e2> [<https://perma.cc/R4LY-FKYU>] (last visited Oct. 8, 2023) (providing thousands of leaked messages from white supremacist and neo-Nazi Discord chat servers, demonstrating how members of VWE groups would prove their on-the-ground actions to leadership online after the fact).

The United States Constitution broadly protects freedom of speech via the First Amendment. When drafting the Bill of Rights, the Founders sought to protect certain rights from government overreach. Although some Founders argued a Bill of Rights was unnecessary, deep fear that the federal government could use its enumerated powers to infringe on fundamental rights led to its enactment.⁸⁷ In explicitly protecting these fundamental rights, like speech, the Founders recognized their vital importance. Speech is presumed to be protected by the First Amendment and therefore not regulable by the government.

Law enforcement traditionally lacks the ability to police VWE and alt-right recruitment in the civilian context because these actions amount to First Amendment-protected speech. Recruiting is, after all, speaking to others—either in person, online, or by sharing written materials. While distributing propaganda can sometimes involve property crimes, like spray painting or disrupting public roads, there is often no conduct to prosecute—only the words themselves. And, as stated above, the U.S. Constitution is staunch in its protection of an individual’s right to share their message.

Regardless of how subversive the speech is, the government cannot punish it simply based on the viewpoint espoused.⁸⁸ In *R.A.V. v. City of St. Paul*,⁸⁹ teenagers who burned a cross on a Black family’s lawn were convicted under a St. Paul, Minnesota, ordinance prohibiting the display of a symbol one knew or had reason to know “arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”⁹⁰ The Court found that the ordinance was unconstitutional because it discriminated based on viewpoint: by prohibiting hate speech on the basis of certain named categories (race, color, creed, religion, and gender), the city may “handicap the expression of particular ideas.”⁹¹ Therefore, prohibiting recruitment into an extremist organization just because the viewpoint espoused is unpopular, hateful, or discriminatory would violate the First Amendment. Although the government may prohibit specific types of speech due to their content, like libel, obscenities, and incitement, it cannot prohibit speech due only to the viewpoint advocated. Because recruitment for other types of organizations, like a school Parent Teacher Association or even the military, is legal, to punish recruitment for

⁸⁷ MICHAEL KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 551–54 (2016).

⁸⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

⁸⁹ *See id.*

⁹⁰ *Id.* at 397 n.1 (White, J., concurring).

⁹¹ *Id.* at 394.

VWE or alt-right groups due to the viewpoint of those groups would be unconstitutional.⁹²

An exception that would place speech outside of First Amendment protection is when recruitment involves directing or advocating others to partake in imminent, lawless action, and that action is likely to occur.⁹³ However, this exception for incitement rarely applies to the speech used for recruiting new members to a VWE or alt-right organization. At least, it is unlikely that recruitment messages *on their own* would be likely to incite *imminent*, lawless action. Because most of the recruitment tactics employed by VWE and alt-right groups are long-term, indoctrination-level programs, wherein applicants learn about the ideology, goals, and work of an organization well before they partake in any action, it is rare that VWE and alt-right recruitment can be punished under incitement jurisprudence. Instead, *imminent* lawless actions are most likely sparked by words and conduct taken by and for those who have already been recruited and are members of these groups, rendering the incitement doctrine a dull tool for prosecuting VWE and alt-right recruitment tactics.

Another exception to First Amendment protections may apply if the speech is tied to specific conduct or actions through speech-integral crimes like extortion, perjury, and solicitation. Again, however, it must be viewpoint-neutral—government regulation must target the action taken instead of the ideas expressed.⁹⁴ Although sometimes the Court has had difficulty distinguishing between viewpoint-neutral and viewpoint-discriminatory conduct restrictions, confusion has mostly come on the issue of support to foreign terrorist organizations. In *Holder v. Humanitarian Law Project*,⁹⁵ six nongovernmental organizations brought suit alleging that a federal statute prohibiting material support to foreign terrorist organizations was unlawfully restricting their political and diplomatic training of foreign nonstate actors.⁹⁶ Because the statute in question defined material support to include

⁹² One exception that the Supreme Court has recognized regarding viewpoint discrimination is providing “material support” to foreign terrorist organizations in the form of the advocacy. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–28 (2010); *infra* text accompanying note 95.

⁹³ *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

⁹⁴ *See R.A.V.*, 505 U.S. at 385 (“[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses.”). *Compare* *United States v. O’Brien*, 391 U.S. 367, 377, 385 (1968) (determining statutorily that arrest for burning a Vietnam War draft card was not expressive conduct and analyzing it with intermediate scrutiny), *with* *Cohen v. California*, 403 U.S. 15, 16–18 (1971) (viewing arrest for wearing a jacket with the words “F*** the Draft” as an arrest for words chosen and applying strict scrutiny).

⁹⁵ 561 U.S. 1 (2010).

⁹⁶ *See id.* at 7–10.

“expert advice or assistance,” the prosecution was required to look at the speech involved to prove that the defendants in fact provided “expert advice or assistance;” the statute did not merely prosecute conduct—it also prosecuted speech, specifically for what the speech at issue communicated.⁹⁷

Nevertheless, the statute in *Holder* was upheld.⁹⁸ The *Holder* Court found that the government has an “urgent objective of the highest order” in stopping terrorism, and therefore created a new, intermediate level of scrutiny between strict and rigorous scrutiny to apply to cases of this kind.⁹⁹ But this statute targeted support to foreign terrorist organizations. It is unlikely that a similar statute targeting support to homegrown extremist groups would survive the same level of scrutiny. Domestic extremist organizations are comprised of Americans protected by the First Amendment. Any statute restricting their speech, which would be on issues of social and political concern, would face the strictest levels of scrutiny.¹⁰⁰

IV. THE BLURRY LINES OF MILITARY APPELLATE CASE LAW

Active-duty military personnel are not prosecuted in the same courts as regular Americans. The Uniform Code of Military Justice (“UCMJ”), the military’s penal code, is drafted by Congress and serves as the law that servicemembers are expected to follow. Military courts, under the Supreme Court, apply the UCMJ and the Constitution.

Military courts and administrative adjudications¹⁰¹ have a dual commitment when adjudicating speech cases: first, to protect the free speech rights of members of the military, and second, to

⁹⁷ *Id.* at 11, 27.

⁹⁸ *Id.* at 40.

⁹⁹ *Id.* at 28.

¹⁰⁰ See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (holding issues of social and political concern are “the core of what the First Amendment is designed to protect.”). The closest the courts have come to restricting speech regarding domestic extremism is in a solicitation case, *United States v. White*, wherein a white supremacist website editor was convicted of solicitation of a federal crime due to his postings encouraging readers to harm a federal juror. See 698 F.3d 1005, 1020 (7th Cir. 2012).

¹⁰¹ Most military speech crimes are dealt with at a lower level than judicial punishment, using administrative disciplinary proceedings. See LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 158–65 (2010) (describing the UCMJ’s Article 15 non-judicial punishment and lesser military justice administrative measures that, along with criminal provisions, constitute the overall military justice scheme); Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 *NEW ENG. L. REV.* 21 (2015) (exploring the strengths and weaknesses of the ways in which the military justice system operates and attempts to control speech).

maintain good order, discipline, and a commitment to the mission. This tension makes servicemembers' rights both less salient and narrower than those of the general public, and often subject to both generally applicable and case-by-case restrictions. Therefore, the actual guidelines restricting servicemembers' speech can be ambiguous and discretionary.¹⁰²

As the UCMJ currently stands, servicemembers are prosecuted for their membership in and activities with VWE and alt-right organizations through two main mechanisms: UCMJ Article 92 and UCMJ Article 134.¹⁰³

Under Article 92 of the UCMJ, servicemembers may be charged upon failure to obey any order or regulation; knowledge of the regulation in question need not be alleged or proved to charge the offense.¹⁰⁴ Under Department of Defense Instruction (“DoDI”) 1325.06, Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces, servicemembers are prohibited from “actively participating in extremist activities.”¹⁰⁵

¹⁰² These issues of discretion can lead to the types of civil rights targeting that resistance groups have faced in the civilian context. *See supra* note 14.

¹⁰³ 10 U.S.C. § 892 (2012); 10 U.S.C. § 934 (1958). UCMJ art. 133, 10 U.S.C. § 933 (2012) (also known as “conduct unbecoming”) has also been used in similar cases, but its use is limited to officers, midshipmen, and cadets, and its effects are the same as UCMJ Article 134. *See, e.g.*, *Standage v. Braithwaite*, 526 F. Supp. 3d 56, 62 (D. Md. 2021).

¹⁰⁴ 10 U.S.C. § 892. The text of UCMJ Article 92 states that “[a]ny person subject to this chapter who: (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.” *Id.*

¹⁰⁵ Dep’t of Def. Instruction 1325.06, HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (Dec. 20, 2021), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132506p.PDF> [<https://perma.cc/LJ3G-FURD>]. Extremist activities are defined as: “(a) Advocating or engaging in unlawful force, unlawful violence, or other illegal means to deprive individuals of their rights under the United States Constitution or the laws of the United States, including those of any State, Commonwealth, Territory, or the District of Columbia, or any political subdivision thereof; (b) Advocating or engaging in unlawful force or violence to achieve goals that are political, religious, discriminatory, or ideological in nature; (c) Advocating, engaging in, or supporting terrorism, within the United States or abroad; (d) Advocating, engaging in, or supporting the overthrow of the government of the United States, or any political subdivision thereof, including that of any State, Commonwealth, Territory, or the District of Columbia, by force or violence; or seeking to alter the form of these governments by unconstitutional or other unlawful means (e.g., sedition); (e) Advocating or encouraging military, civilian, or contractor personnel within the DoD or U.S. Coast Guard to violate the laws of the United States, or any political subdivision thereof, including that of any State, Commonwealth, Territory, or the District of Columbia, or to disobey lawful orders or regulations, for the purpose of disrupting military activities (e.g.,

The instruction defines this “active participation” to include, among other things:

[A]dvocating or engaging in the use or threat of unlawful force or violence in support of extremist activities . . . recruiting or training others to engage in extremist activities . . . distributing literature or other promotional materials, on or off a military installation, the primary purpose and content of which is to advocate for extremist activities, with the intent to promote that advocacy . . . knowingly displaying paraphernalia, words, or symbols in support of extremist activities or in support of organizations that support extremist activities, such as flags, clothing, tattoos, and bumper stickers, whether on or off a military installation . . . engaging in electronic and cyber activities regarding extremist activities, or groups that support extremist activities – including posting, liking, sharing, re-tweeting, or otherwise distributing content – when such action is taken with the intent to promote or otherwise endorse extremist activities.¹⁰⁶

DCFN Hart, found to be actively planning and stealing military property for attacks against other sailors, was charged with an Article 92 violation.¹⁰⁷ His messages and activities were found to be in direct violation of DoDI 1325.06’s prohibitions of extremist activity.¹⁰⁸ Hart’s case is one example of Article 92 serving its purpose—to effectively filter dangerous extremist speech and actions by servicemembers.

Yet, DoDI 1325.06 also provides commanders substantial discretion in disciplining servicemembers—including the option to give no punishment at all.¹⁰⁹ Commanders may also opt for simply

subversion), or personally undertaking the same; [and] (f) Advocating widespread unlawful discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation.” *Id.*

¹⁰⁶ *Id.* at 10–11.

¹⁰⁷ See *Charge Sheet, supra* note 7.

¹⁰⁸ Hart’s Article 92 violation occurred prior to the most recent revision of the Instruction, DoDI 1325.06 (Nov. 27, 2009). For another example of the military charging extremist actions under UCMJ Article 92, see *United States v. Mallar*, 2014 WL 7226127, at *1 (Army Crim. App. Apr. 30, 2014).

¹⁰⁹ Dep’t of Def. Instruction 1325.06, at 12 (“Commanders may, as appropriate, pursue adverse administrative action in addition to or in lieu of punitive action in response to a Service member’s active participation in extremist activities, pursuant to military service regulations and other existing authorities. Adverse administrative action may include involuntary separation, reassignment, loss of

advising servicemembers that extremist activities will “be taken into consideration when evaluating duty performance.”¹¹⁰ With the variety of options open to commanders, many extremist activities may go unpunished or face adverse administrative action in lieu of a punitive response. These vague and often conflicting standards between commands may make it more difficult for servicemembers to know with certainty what their rights are.¹¹¹

UCMJ Article 134 provides an even more ambiguous standard: it allows punishing with court-martial any action taken “to the prejudice of good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces.”¹¹² Article 134 offers over fifty specific crimes that can fall under its general category (such as adultery, child pornography, drinking liquor with a prisoner, and causing “obscene matters” to be deposited into the mail)—yet, in practice, commands have the discretion to charge servicemembers with anything they feel prejudices good order and discipline or discredits the armed forces.¹¹³ Because participation in and recruitment for VWE and alt-right organizations may be prejudicial to good order and discipline or discrediting of service, commands have found it in their discretion to charge servicemembers for their actions under Article 134.¹¹⁴

In the leading case on service-discrediting military speech doctrine, *United States v. Wilcox*,¹¹⁵ the defendant, a soldier in the Army, was originally charged with violations of UCMJ Arts. 90, 92, 107, 121, and 134.¹¹⁶ His alleged crimes included disobeying an officer; violating Army regulations by attending a Ku Klux Klan rally; violating Army regulations by wrongfully recruiting other members of the Army in extremist activity; violating Army regulations by distributing extremist literature; making a false official statement; larceny of property; and finally, “wrongfully

security clearance, denial of reenlistment, and other administrative or disciplinary actions deemed appropriate by the commander, based on the specific facts and circumstances of the particular case.”).

¹¹⁰ *Id.*

¹¹¹ For instance, servicemembers do not need to be formal members of VWE organizations to be found guilty of espousing their ideologies in violation of DoDI 1325.06 and Article 92, which led to surprise charges for a servicemember who published supremacist remarks and symbols on his personal webpage but did not engage with an organization as a formal member. *See United States v. Dornon*, 2008 WL 2259758, at *2 (A.F. Crim. App. 2008).

¹¹² 10 U.S.C. § 934 (1958).

¹¹³ *Id.*

¹¹⁴ *See United States v. Wilcox*, 66 M.J. 442, 443 (Armed Forces App. 2008); *United States v. Blair*, 67 M.J. 566, 567 (Coast Guard Crim. App. 2008).

¹¹⁵ 66 M.J. 442 (Armed Forces App. 2008).

¹¹⁶ 10 U.S.C. §§ 890, 892, 907, 921, 934 (2000).

advocat[ing] anti-government and disloyal sentiments, and encourag[ing] participating in extremist organizations while identifying himself as a ‘US Army Paratrooper’ on an American OnLine [AOL] Profile and advocat[ing] racial intolerance by counseling and advising individuals on racist views and that under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces.”¹¹⁷

By the time the case reached the U.S. Court of Appeals for the Armed Forces, however, every charge had been either mooted, modified, or dismissed—all except the Article 134 charge for “wrongfully advocat[ing] anti-government and disloyal sentiments [etc.] . . . to the prejudice of good order and discipline in the armed forces or . . . to bring discredit to the armed forces.”¹¹⁸ The court, therefore, had to decide whether the sole remaining conviction—based on messages expressed in an online profile—was constitutional in light of the First Amendment.¹¹⁹

The court ruled that the “substantive messages conveyed therein, while distasteful, constitute [Wilcox’s] ideas on issues of social and political concern, which has been recognized as ‘the core of what the First Amendment is designed to protect.’”¹²⁰ While the Court recognized that the differences between the military community and civilian community do and must allow military law to regulate more aspects of servicemembers’ lives,¹²¹ the Court for the first time overtly interpreted Article 134 to require a direct connection between the military and the speech at issue for the government to prove that it was either prejudicial or service-discrediting.¹²²

Therefore, the *Wilcox* Court designed and applied a two-part balancing test: First, courts should examine the speech at issue to ensure it is otherwise protected by the First Amendment (if it amounts to libel, obscenity, fighting words, or dangerous speech, for instance, then a different standard applies).¹²³ Second, courts should weigh whether the government has proven a “direct and palpable connection between speech and the military mission or military environment.”¹²⁴ If both requirements are met, then the military is justified in regulating the servicemember’s speech; otherwise, the

¹¹⁷ *Wilcox*, 66 M.J. at 443–44.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 446.

¹²⁰ *Id.* at 446–47 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

¹²¹ *Id.* at 447 (quoting *Parker v. Levy*, 417 U.S. 733, 749 (1974)).

¹²² *Id.* at 448–49.

¹²³ *Id.* at 448.

¹²⁴ *Id.*

speech is protected by the First Amendment and the government cannot interfere. Even though the speech has an indirect, but still dangerous effect on the military environment, as Wilcox's speech surely did, the protections of the First Amendment are paramount. As the *Wilcox* Court explained: “[W]e must be sensitive to protection of ‘the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.’”¹²⁵

In the instant case, the government had only proven that a civilian investigator had viewed Wilcox's chatroom messages and other online posts.¹²⁶ It would be speculative to assume that other servicemembers or anyone else had seen them. Therefore, the court found that the government had not proven Wilcox's speech to be prejudicial to good order and discipline, a disservice to other servicemembers, or that he had attempted to recruit other servicemembers to his ideology or organization.¹²⁷ Simply put, there was no evidence that Wilcox's statements had “a reasonably direct and palpable effect on the military mission or military environment,” so the court dismissed the charge.¹²⁸

The *Wilcox* balancing test has become the standard military courts use to examine the constitutionality of prosecuting a servicemember for their speech.¹²⁹ Although the *Wilcox* test was designed to protect servicemembers' First Amendment rights, some scholars have argued that cases following *Wilcox* demonstrate military courts' inability to properly apply the U.S. Court of Appeals for the Armed Forces' intended pro-defendant narrowing of prejudicial and service-discrediting military speech.¹³⁰

For instance, the defendant in *United States v. Blair*,¹³¹ an active-duty U.S. Coast Guard member, was charged with violating Article 134 for posting KKK recruiting flyers in an airport bathroom.¹³² Blair's command had sent him to the airport to attend a group counseling session. Although he was wearing civilian

¹²⁵ *Id.* at 447 (quoting *United States v. Priest*, 21 C.M.A. 564, 570 (1972)).

¹²⁶ *Id.* at 451.

¹²⁷ *Id.* at 450–51.

¹²⁸ *Id.* at 450–52.

¹²⁹ *See, e.g.*, *United States v. Blair*, 67 M.J. 566, 570 (Coast Guard Crim. App. 2008); *United States v. Hiser*, 82 M.J. 60, 67 (C.A.A.F. 2022); *United States v. Rundle*, Army Misc 20190158, 2019 WL 2207637, at *1 (Army Crim. App. May 17, 2019); *United States v. Shea*, No. ACM 39158, 2018 WL 1636082, at *1 (Armed Forces App. Mar. 26, 2018).

¹³⁰ *See, e.g.*, Rachel E. VanLandingham, *The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech*, 88 OHIO ST. L.J. 73, 119–20 (2019).

¹³¹ 67 M.J. 566 (C.G. Ct. Crim. App. 2008).

¹³² *See id.* at 569.

clothes, Blair had driven to the airport in a military-owned vehicle, and the counseling session group knew he was a member of the Coast Guard.¹³³ The court held the “possibility . . . that a member of the public who knew [Blair] to be in the Coast Guard could have readily seen him posting a flyer, constitute[d] a sufficient factual basis” for a direct and palpable effect on the military mission or military environment—despite nobody actually seeing Blair posting the flyers.¹³⁴ Unlike in *Wilcox*, where the court found too “tenuous and speculative” the possibility of someone finding the defendant’s online postings and identifying him as a servicemember (Wilcox’s online profile identified him as a U.S. Army Paratrooper), in *Blair*, the court held that the possibility of someone seeing Blair was a legally sufficient concern to support the second element of the *Wilcox* test for Article 134.¹³⁵

The *Blair* Court distinguished its holding from *Wilcox* by noting that Blair’s actions were more public-facing than Wilcox’s—he was on the ground, so to speak, rather than online—making the potential harms more significant.¹³⁶ They also noted that Blair explicitly admitted to the “service-discrediting effect” of his actions.¹³⁷ Nevertheless, the two-pronged *Wilcox* standard placed high evidentiary demands on the prosecution. It is unsurprising that, since *Blair*, no Article 134 cases challenging a servicemember’s extremist speech or recruitment actions have reached the military appellate courts.¹³⁸ Instead, military commands and prosecutors have since favored Article 92 for cases of this nature due to its less stringent evidentiary hurdle. Of course, as discussed, under Article 92, servicemembers’ First Amendment rights are left to the discretion of their command, making those rights ambiguous and unprotected.

Yet, because both Article 92 and Article 134 provide only for restrictions on servicemembers’ speech, it is rare that a prosecution successfully charges these violations on their own.¹³⁹

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *United States v. Wilcox*, 66 M.J. 442, 451 (Armed Forces App. 2008).

¹³⁶ *United States v. Blair*, 67 M.J. 566, 570 (Coast Guard Crim. App. 2008).

¹³⁷ *Id.*

¹³⁸ Military appellate courts have seen multiple cases under Article 134 regarding servicemembers’ speech for “communicating true threats,” a specific crime designated under Article 134. *See, e.g.*, *United States v. Rapert*, 75 M.J. 164, 173 (C.A.A.F. 2016) (finding the defendant guilty of communicating a threat against the president of the United States for making statements regarding a plan to issue a KKK order and lynch the president).

¹³⁹ *See, e.g.*, *Blair*, 67 M.J. at 567 (convicting the defendant of violating Articles 134 and 92 as well as two other articles); *United States v. Avery*, 79 M.J. 363, 365 (C.A.A.F. 2020) (finding the defendant guilty of violating Article 134 and sexual assault); *United States v. Gleason*, 78 M.J. 473, 474 (C.A.A.F. 2019)

Punishing a servicemember for their speech, without any attending conduct, is difficult to justify under First Amendment standards and the Article 92 and Article 134 requirements discussed above. For instance, DCFN Hart, who was charged under Article 92 for his actions, was also originally charged with nine other crimes, all of which had nothing to do with his speech or extremist ideologies.¹⁴⁰ Instead, Hart's charges stemmed from firearms, obstruction of justice, and property offenses.¹⁴¹ As the First Amendment limited the speech crimes with which Hart could be charged, his other crimes became the focus of his trial. And without his other crimes, the government's evidence would have simply consisted of messages between Hart and acquaintances. Although those messages may have been enough to demonstrate active participation in extremist activities, the case would have been much less probative.¹⁴² If he had been prosecuted on just those messages alone, it likely would have set a dangerous precedent regarding servicemembers' First Amendment rights.

V. PREVENTING INFRINGEMENT ON SERVICEMEMBERS' FIRST AMENDMENT RIGHTS

The current military speech doctrine provides some protection for servicemembers, but that protection would be hampered by any attempts to curtail recruitment by VWE and alt-right groups under existing laws. Danger to servicemembers' rights arises when military commands utilize UCMJ Article 92 to discipline VWE and alt-right organization membership and participation. Under Article 92, commands may charge servicemembers for disobeying DoDI 1325.06, which prohibits "active participation in extremist activities."¹⁴³ Unfortunately, commands have wide discretion to interpret the definition of

(finding the defendant guilty of violating Article 134 as well as six specifications of assault consummated by battery, two specifications of aggravated assault, and one specification of adultery).

¹⁴⁰ *Charge Sheet*, *supra* note 7.

¹⁴¹ *Id.* The obstruction of justice charge was withdrawn and dismissed without prejudice prior to trial. *Id.*

¹⁴² Gov't Response to Def. Mot., *supra* note 2, at 3–5. Messages that demonstrate Hart's active participation in extremist activities include, among others, a text message regarding a plan to kill Navy Seals ("Kill and take their gear. I don't give a f**k if I served with them. Killing them."), a text message regarding a plan to kill National Guard members ("Can't wait to terrorize the National Guard. I am going to white death the national guard. Wage my on [sic] war against them. Sniping them guerilla style. Pop then run."), and a text message regarding his readiness for imminent action ("Just say the sleeper cell activation word and I'm mobile."). *Id.*

¹⁴³ Dep't of Defense Instruction 1325.06, *supra* note 109, at 9.

“extremist activities” within the Instruction. Because commanders are the first line in deciding what “extremist activities” means, their biases and opinions—political, ideological, or otherwise—may come into play when judging a servicemember’s actions. This discretion may lead to a failure in rooting out extremism in the military, as lower-level commanders turn a blind eye to certain behaviors. A superior may even take advantage of the regulation to punish servicemembers’ with whom they personally disagree. As Professor Rachel E. VanLandingham has discussed, “[a] superior could hypothetically order a subordinate to not engage in whatever speech that superior finds offensive, with disobedience of said order automatically made criminal through these articles.”¹⁴⁴

Another likely threat to servicemembers’ rights when charged under Article 92 is that the “extremist activities” defined in DoDI 1325.06¹⁴⁵ include some broad First Amendment-protected activities, and the regulation has yet to be tested in courts. For instance, the prohibition against “[e]ngaging in electronic and cyber activities regarding extremist activities, or groups that support extremist activities—including posting, liking, sharing, re-tweeting, or otherwise distributing content—when such action is taken with the intent to promote or otherwise endorse extremist activities,” falls directly at the “core” of First Amendment-protected speech and is unlikely to be upheld under strict scrutiny.¹⁴⁶ Posting opinions or ideologies on the internet, without more, is simply “lawful political speech . . . the core of what the First Amendment is designed to protect.”¹⁴⁷ Further, since commands have the discretion to respond to extremist activity within their units, servicemembers may receive conflicting guidance and experience varying applications of the law at different commands. Servicemembers need consistency—a law is only legitimate if a person of ordinary intelligence has a reasonable opportunity to know what is prohibited.¹⁴⁸

As discussed, servicemembers can be charged under Article 92 for both generally recruiting for extremist organizations or distributing literature or promotional materials for extremist organizations.¹⁴⁹ Courts must still conduct a balancing test between the danger of the speech and servicemembers’ constitutional rights.¹⁵⁰ However, due to the possible risks to servicemembers’

¹⁴⁴ VanLandingham, *supra* note, at 124.

¹⁴⁵ Dep’t of Defense Instruction 1325.06, *supra* note 109, at 9.

¹⁴⁶ *Id.* at 11; *see generally* Virginia v. Black, 538 U.S. 343, 365 (2003).

¹⁴⁷ *Black*, 538 U.S. at 365.

¹⁴⁸ *See* United States v. Plummer, 581 F.3d 484, 488 (7th Cir. 2009).

¹⁴⁹ Dep’t of Defense Instruction 1325.06, *supra* note 109, at 10–11.

¹⁵⁰ Unless the speech is found to be so dangerous as to not be protected by the First Amendment, in which case the balancing test is unnecessary. *See* United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996).

First Amendment rights reviewed in this Part, Article 92 is likely not an ideal solution for thwarting VWE and alt-right recruitment within the military.

Similarly, prosecution for servicemembers' speech under Article 134 may lead to dangerous curtailment of First Amendment rights. To challenge a servicemember's speech under Article 134, *Wilcox* requires the government to develop a complete record to demonstrate whether a defendant's speech is prejudicial to good order and discipline and/or discrediting to military service.¹⁵¹ It can be difficult for prosecutors to meet this standard, but it is important to preserve this doctrine to protect servicemembers' First Amendment rights. Government prosecutors could be tempted to compose a set of form documents explaining why participation in extremist organizations can be palpably dangerous to the military mission and military environment, and then simply pull it out to substantiate any Article 134 charge. Such a system, however, could quite easily lead to courts rubber-stamping cases for any seemingly offensive speech. Courts must hold the government to a higher standard and require case-specific facts to allow restrictions on servicemembers' First Amendment rights. Therefore, Article 134 is likely not the most suitable mechanism to prevent recruitment by VWE and alt-right group members within the military.

Given that the two primary statutes by which the government prosecutes extremist group recruitment within the armed forces—Article 92 and Article 134—are each unsuitable mechanisms to fight extremism while protecting servicemembers' rights, a new solution is needed. VWE groups must be prevented from infiltrating and recruiting from within the armed forces. However, servicemembers dedicate their lives to protecting the rights of Americans, and they deserve the most vigorous protection of their own rights possible while ensuring mission success.

Considering that preventing servicemember participation in VWE groups is a priority of Congress and the Biden Administration, Congress should establish a new military crime within the UCMJ to combat recruitment for extremist organizations.¹⁵² This newly created crime should define the speech related to recruitment as integral to the crime—similar to common-law crimes like perjury and solicitation and uniquely military crimes such as disrespect

¹⁵¹ *United States v. Wilcox*, 66 M.J. 442, 448–450 (Armed Forces App. 2008).

¹⁵² See John M. Donnelly, *House Appropriators Want Pentagon to Get Tough on Extremists in the Ranks*, ROLL CALL (July 13, 2021, 12:25 PM), <https://rollcall.com/2021/07/13/house-appropriators-want-pentagon-to-get-tough-on-extremists-in-the-ranks> [<https://perma.cc/X9WZ-XVD6>]; Eric Lutz, *Biden's Secretary of Defense Is Moving to Purge the Military of White Supremacists*, VANITY FAIR (Feb. 4, 2021), <https://www.vanityfair.com/news/2021/02/biden-secretary-of-defense-moving-to-purge-the-military-of-white-supremacists> [<https://perma.cc/UU32-8PDD>].

toward a superior commissioned officer.¹⁵³ So far, the Supreme Court has created a First Amendment exception allowing content-based restrictions on speech that “tends to cause, attempts to cause, or makes a threat to cause some illegal conduct,” so long as the illegal conduct is something other than the speech itself.¹⁵⁴ Professor VanLandingham has argued that this exception should be applied to existing military speech-integral crimes to align military courts’ First Amendment doctrine with the Supreme Court’s.¹⁵⁵ I argue that this proposal should be taken a step further. Servicemember speech that the government finds it must regulate to protect the military mission and environment should be codified in specific, speech-integral crimes, instead of prosecuted through the existing vague, discretionary statutes.

Speech that “tends to cause, attempts to cause, or makes a threat to cause some illegal conduct”¹⁵⁶ would also be controlled by the “lower standard [that] pertains in the military context, where dangerous speech is that speech that ‘interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.’”¹⁵⁷ Therefore, a statute criminalizing recruitment for extremist organizations by servicemembers would criminalize speech that leads to conduct that “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.”¹⁵⁸ Such recruitment would certainly do so, and military courts would require the government to prove as much. To mitigate the vagueness and discretion concerns arising from

¹⁵³ Perjury, solicitation, and the military crime of disrespect toward a senior commissioned officer are all speech-integral crimes—they are crimes where the substantive criminal act taken is speech, but the speech is unprotected by the First Amendment because it is “intended to bring about a particular unlawful act.” *United States v. Hansen*, 143 S. Ct. 1932, 1947 (2023) (citation omitted). In perjury, the crime is not the false speech, per se, but rather the intent to use the false speech to corrupt or defraud an official government proceeding. In solicitation, the defendant solicits, urges, or otherwise incites another to commit a crime. Although the solicitation may be done through speech, it is done with the intent to bring about a crime and is therefore unprotected under the First Amendment. Finally, in the military crime of disrespect to a superior commissioned officer, such disrespect may include speech, but that speech would not be protected under the First Amendment because it is intended to undermine the respect of authority. Other common speech-integral crimes include conspiracy, blackmail, bribery, and fraud. *Id.*

¹⁵⁴ Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 986 (2016).

¹⁵⁵ VanLandingham, *supra* note 130, at 121–22.

¹⁵⁶ Volokh, *supra* note 154, at 986.

¹⁵⁷ *United States v. Wilcox*, 66 M.J. 442, 448 (Armed Forces App. 2008) (quoting *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)).

¹⁵⁸ *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)

applying Articles 92 and 134, such a statute would only punish the speech and actions involved in recruitment, remaining viewpoint neutral as to defining what is an extremist organization (as does the current DoD Instruction). By making such recruitment proscribed conduct like perjury, fraud, or conspiracy, it would no longer be First Amendment-protected speech.

CONCLUSION

The armed forces are a favorite recruitment source for VWE and alt-right groups due to servicemembers' skills, psychology, and discipline. Some groups, like the Oath Keepers, specifically target active military personnel for recruitment, while others prefer to send their members into the military to receive training, find potential recruits, and influence military measures and policies.¹⁵⁹ VWE and alt-right recruitment tactics can include infiltration of the military, distribution of propaganda, and online solicitation, among others. Although the First Amendment limits the government's ability to prevent the recruitment activities of VWE and alt-right groups in most circumstances, certain provisions of the UCMJ provide options for the government to curtail recruitment efforts when instigated by military servicemembers. Unfortunately, those provisions lack the detail and oversight to properly ensure protection for servicemembers from inappropriate overreach into their First Amendment rights.

Therefore, Congress should establish a new military crime specifically targeting extremist organization recruitment. Such a crime would criminalize the conduct of recruitment, and any speech incidental to such conduct would be criminalized only in its relationship to the conduct of recruitment itself. By centering restrictions specifically on conduct and not speech, servicemembers' First Amendment rights would be more safeguarded from overreach, while the government would still be able to successfully prosecute military recruitment by VWE and alt-right organizations. The government must provide robust protection for legitimate protestors, advocacy and resistance groups, as well as legitimate speech, even hate speech, while doing more to prevent recruitment by violent, terrorist organizations.

Such a speech-integral crime arrangement could be expanded outside of the military context to address VWE and alt-right recruitment in law enforcement, public employees, and even public school environments.¹⁶⁰ However, such a statute would need

¹⁵⁹ See *Oath Keepers*, *supra* note 46.

¹⁶⁰ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 574 (1968) (establishing balancing test for whether public employees' private speech on areas of public concern can be restrained under the First Amendment); *Mahanoy Area Sch. Dist.*

to be narrowly tailored and would likely face strict scrutiny. Congress should also be wary of passing more criminal laws to combat domestic terrorism and extremism in the civilian context when there are existing options for prosecution.

Whether or not the recommendations in this Article are implemented, the most important goals for the armed services should be to improve military recruiters' screening procedures to prevent infiltration and to provide proper mental health and support resources to servicemembers and veterans so that they are less vulnerable to recruitment by VWE and alt-right organizations. By not only imposing stricter recruiting standards but also incentivizing recruiters to screen out extremists and violent supremacists, the military can build a stronger, more cohesive force, as well as keep communities safe.¹⁶¹ And by engaging mental health professionals and social workers, the military can strategize how best to serve military personnel so that their needs are met before any contact with extremist groups.¹⁶² It is in the armed forces'—and our nation's—best interest to invest in comprehensive mental health and support services for all members and veterans. Servicemembers deserve that level of support and service from the military, and if it fortifies servicemembers against recruitment by VWE and alt-right groups, all the better.

v. B.L., 141 S. Ct. 2038, 2045 (2021) (“[S]chools have a special interest in regulating speech that ‘materially disrupts classwork or involves substantial disorder or invasion of the rights of others.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))). The Supreme Court has not dealt specifically with First Amendment protections for law enforcement personnel. However, multiple circuit courts have discussed the unique needs and exceptions that law enforcement agencies require in restricting employees' speech. *See, e.g.*, *Breuer v. Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990); *Graziosi v. City of Greenville*, 775 F.3d 731, 740 (5th Cir. 2015); *Pappas v. Giuliani*, 290 F.3d 143, 146–47 (2d Cir. 2002); *Phillips v. Town of Pamplico*, No. 98-1452, 1999 WL 22736, at *3 (4th Cir. Jan. 21, 1999); *Liverman v. City of Petersburg*, 844 F.3d 400, 407–08 (4th Cir. 2016).

¹⁶¹ *See* Chin, *supra* note 63, at 22–24.

¹⁶² Ware, *supra* note 34, at 13.