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Thank Me for My Service: An Ethics Oversight in Department of  
Defense Social Media Policy

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Matthew Fitzgerald\*

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\* J.D., Vanderbilt University; B.S., United States Military Academy. The views expressed here are the author's own and do not necessarily reflect those of the Department of Defense, the Army, the Army Recruiting Command or any other department or agency of the U.S. Government. The analysis presented stems from the author's academic research of publicly available sources, not from protected operational information. Any errors and omissions are the responsibility of the author. A draft of this Article won the Rear Admiral John S. Jenkins Writing Award, an annual competition sponsored by the National Institute of Military Justice.

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## INTRODUCTION

*I think it might be edifying to you if you all had Facebook pages, because you might understand how it's being used and misused.<sup>1</sup>*

In 2019, prominent “YouTuber” Austen Alexander posted a video titled “Why I Was Investigated by the Navy (not clickbait).”<sup>2</sup> The author’s YouTube channel features his creative commentary and insider’s take on employment as an active duty sailor.<sup>3</sup> The author earns thousands of dollars per month from the advertising revenue generated by his service-related content.<sup>4</sup> He identifies the regulatory space in which he operates as one of “thin lines,” but asserts that military content creators act lawfully if they “don’t sell anything.”<sup>5</sup> In the same video, Alexander holds up a dietary supplement to the camera and proclaims, “I use these every morning . . . they are delicious . . . I have a code for 10% off for you guys.”<sup>6</sup> He concludes the segment with a wink.<sup>7</sup>

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<sup>1</sup> In a statement directed at the Deputy Commandant, Manpower & Reserve Affairs, Marine Corps; the Chief of Naval Personnel, Navy; the Director, Military Personnel Management, Army; the Deputy Chief of Staff for Manpower, Personnel and Services, Air Force; and Mr. Anthony M. Kurta (performing the duties of the Under Secretary of Defense for Personnel and Readiness, Office of the Secretary of Defense), only one of the five individuals admitted to maintaining a personal or professional Facebook page. Social Media Policies of the Military Services: Hearing Before the Subcomm. on Mil. Personnel of the H. Comm. on Armed Servs., 115th Cong. 21 (2017) (statement of Hon. Jackie Speier, Ranking Member, Subcomm. on Mil. Personnel).

<sup>2</sup> Austen Alexander, *Why I Was Investigated by the Navy (not clickbait)*, YOUTUBE (Nov. 10, 2019), <https://www.youtube.com/watch?v=usppG-CtbW8> [https://perma.cc/4TD4-636D]. See also Appendix A, at A1; Amanda Perelli, *An active-duty US Navy sailor shared his experience on YouTube and has now become a popular influencer*, BUSINESS INSIDER (Nov. 3, 2019), <https://www.businessinsider.com/active-duty-navy-sailor-becomes-popular-military-influencer-on-youtube-2019-11> [https://perma.cc/28QF-9BPA]. Note that Appendix A is not intended to criticize or target specific authors, but rather provides examples of the conduct discussed. Appendix A does not investigate the owner-managers of accounts, and assumes (for reasons discussed in Part III), rather than demonstrates, that such persons are subject to the full range of proscribed activities applicable to active duty servicemembers.

<sup>3</sup> Many other videos are featured. See, e.g., Austen Alexander, *MY MORNING ROUTINE (on night shift)*, YOUTUBE (Sep. 22, 2019), <https://www.youtube.com/watch?v=2hCZ2RX0CF4> [https://perma.cc/ZW6L-C69U]; Austen Alexander, *US Naval Law Enforcement (What You Should Know)*, YOUTUBE (June 8, 2019), <https://www.youtube.com/watch?v=Xki7JSG3NRs> [http://perma.cc/6NYE-ECKY]; Austen Alexander, *Becoming a BPN Sponsored Athlete + New Gym!*, YOUTUBE (June 22, 2019), <https://www.youtube.com/watch?v=b-chYQOkP3U> [https://perma.cc/2CQR-AWKX].

<sup>4</sup> Near the conclusion of the video, the author also describes having been “investigated” for possible misconduct in conjunction with his social media use, a process which he alleges resulted in him receiving not reprimand or censure, but rather a coin in recognition of the positive impact of his videos. See Alexander, *supra* note 2. In a separate video, the same author describes how he makes over \$100 per day from advertising revenue generated by his channel, which prominently features the author in a Navy uniform discussing topics relevant to his Navy job. For a “screenshot” from that video, see Appendix A, at A2. See also Austen Alexander, *How Much Money I Make Per Month from YouTube*, YOUTUBE (Oct. 20, 2019), <https://www.youtube.com/watch?v=4i7NIFRF6yU&t=314s> [https://perma.cc/9S38-96WT]. The author generates additional revenue through other social media platforms. See Appendix A, at A1.

<sup>5</sup> Alexander, *supra* note 2.

<sup>6</sup> Alexander, *supra* note 2.

<sup>7</sup> See Alexander, *supra* note 2. Alexander also claims that his chain of command explicitly approved his YouTube business ventures, except for “a . . . list of things that [he] cannot show” from his work environment; whether or not

Alexander is not alone. Many members of the U.S. armed forces receive financial compensation for military service-related content they produce on social media. A brief scan of Instagram provides myriad examples. A Navy public affairs officer “partners with” a skin care company.<sup>8</sup> An Air Force noncommissioned officer promotes an energy drink brand from inside his government vehicle.<sup>9</sup> An Old Guard soldier posts pictures of his casket detail conducting a dignified transfer to promote himself as a “sponsored athlete.”<sup>10</sup> An Army officer promotes his book, published in his capacity “as the Commander of the Guard at the Tomb of the Unknown Soldier.”<sup>11</sup> An Army company commander promotes her modeling services using portraits in uniform and descriptions of her professional trajectory.<sup>12</sup> Air Force officers serve as “representatives” of an apparel brand.<sup>13</sup> A Navy K9 handler uses images of her assigned working dog to draw followers to a page where she advertises discount codes for merchandise.<sup>14</sup> An Army career counselor asks, in uniform, “Have you reenlisted yet?” while advertising her services as a “model” and “brand ambassador.”<sup>15</sup>

This content attracts vast audiences in part because of its authenticity and the public esteem afforded the military and its members. In some cases, this content benefits military recruiting or training missions. However, federal ethics rules preclude most servicemembers from using public office for private gain.

Compensation schemes include direct revenue from advertising,<sup>16</sup> affiliate marketing deals,<sup>17</sup> sponsorships, and servicemembers’ promotions of their own products or professional services.<sup>18</sup> These commercial relationships vary from direct quid pro quo engagements to more

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any approval actually occurred or received judge advocate review is unclear. Austen Alexander, *A day in the Life of an Enlisted US Sailor*, YOUTUBE (Dec. 22, 2018), <https://www.youtube.com/watch?v=Hj0TieNi1-0> [https://perma.cc/4Y2Y-8JYC].

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

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

<sup>10</sup> Appendix A, at A3a. These examples assume authenticity of the “accounts” and “pages” discussed, and therefore are not intended to infer illegality or impropriety on a case-by-case basis. However, they do highlight a common pattern of affiliate marketing and both direct and indirect endorsements through social media accounts that appear to be owned and operated by servicemembers, or from which servicemembers otherwise stand to benefit financially.

<sup>11</sup> Appendix A, at A3b.

<sup>12</sup> See Appendix A, at A16.

<sup>13</sup> Appendix A, at A5, A6.

<sup>14</sup> See Appendix A, at A17.

<sup>15</sup> Appendix A, at A19.

<sup>16</sup> See *How Much do Youtubers Make & How to Become a Youtuber*, INTUIT (Jan. 9, 2020), <https://turbo.intuit.com/blog/relationships/how-much-do-youtubers-make-5035/#3> [https://perma.cc/R756-Y8UB]. (describing “affiliate links,” “merchandise,” and “sponsorship” as methods of supplementing a content creator’s income from Google AdSense).

<sup>17</sup> See, e.g., Appendix A, at A1 (author provides “codes” to “support the channel”), A17 (Navy dog handler uses her assigned working dog to promote a personal account with discount codes), A18 (Marine Corps officer chronicles her service and provides discount code for apparel).

<sup>18</sup> See, e.g., Appendix A, at A15 (combat cameraman runs Instagram account as a “government official” while also advertising “commissions open” and providing a link to his personal work).

opaque models, but in any event are ubiquitous. Some servicemembers make little or no money from these endeavors, but others earn hundreds of dollars per post,<sup>19</sup> or even thousands of dollars from ad revenue generated by YouTube videos.<sup>20</sup> Military organizational unit pages and accounts often “tag” or “follow” servicemembers participating in such ventures, implicitly endorsing their conduct.<sup>21</sup> Similarly, military recruiters’ social media pages promote these accounts, sending a message to the general public that the military authorizes or even encourages such profiteering.<sup>22</sup> These endorsements convey an appearance of official sanction even though many of the aforementioned commercial relationships violate federal ethics rules.

The Standards of Ethical Conduct for Employees of the Executive Branch preclude servicemembers from using “public office for . . . private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.”<sup>23</sup> The Standards direct employees to “act impartially and not give preferential treatment to any private organization or individual.”<sup>24</sup> The Standards also proscribe receiving compensation from any source other than the Government “for teaching, speaking or writing that relates to the employee’s official duties,” except for under limited circumstances.<sup>25</sup> If in doubt, employees receive a broad telos: “endeavor to avoid any actions creating the appearance that they are violating . . . ethical standards.”<sup>26</sup>

For the purposes of the Standards of Ethical Conduct, “employee” means any officer or employee of a federal agency, which is defined within the Standards to include officers but not enlisted members of the uniformed services.<sup>27</sup> However, the DOD in 2007 extended these ethics

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<sup>19</sup> This is using estimates obtained with Influencer Marketing Hub’s Instagram Influencer Earnings Calculator. See *Instagram Influencer Sponsored Post Money Calculator*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/instagram-money-calculator/> [https://perma.cc/93S7-QVF6].

<sup>20</sup> See, e.g., Brice Larimer, *How Much YouTube Paid Me For A Video With 4 MILLION VIEWS \*analytics reviewed & exposed\**, YOUTUBE (May 24, 2020), <https://www.youtube.com/watch?v=-vslzmJBh1c&t=277s> [https://perma.cc/TP5M-TYY3].

<sup>21</sup> Appendix A, at A7, A20.

<sup>22</sup> In some cases, servicemembers reach out to recruiters with large reaches and request that their private accounts be promoted. See, e.g., Appendix A, at A7 (showing an Army Mid-Atlantic Recruiting Battalion posting a picture of servicemembers conducting official duties while tagging a servicemember’s private account that she uses for almost entirely commercial purposes), A20 (showing an Army recruiter with 22,000 followers promoting servicemembers for their concurrent work as soldiers and “brand ambassadors,” including the hashtag “#YouCanDoBoth.”).

<sup>23</sup> 5 C.F.R. § 2635.101 *et seq.* (2020) [hereinafter Standards of Ethical Conduct]. The statute continues:

[This] includ[es] nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs [not herein quoted] of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

5 C.F.R. § 2635.702. This Article proceeds with the premise that this merely clarifies the rule through specific examples, rather than limits it to only these instances involving nonprofits or prospects of business relations.

<sup>24</sup> 5 C.F.R. § 2635.101 (2020).

<sup>25</sup> 5 C.F.R. § 2635.807 (2020).

<sup>26</sup> *Id.* Note further that whether particular circumstances create an *appearance* of violation shall be determined from the perspective of a reasonable person with knowledge of the relevant facts. Nonetheless, the imperative verb “endeavor” conveys a liberal thrust with which to apply the Part to which it applies.

<sup>27</sup> 5 C.F.R. § 2635.102(h) (2020).

standards to also apply to active duty enlisted members of the Armed Forces and Title 32 National Guard members.<sup>28</sup> Therefore, all active duty soldiers, sailors, airmen, and Marines are currently subject to the preclusion of use of public office for private gain.<sup>29</sup> The violations may be subject to penal exposure under the Uniform Code of Military Justice.<sup>30</sup>

This extended applicability to enlisted servicemembers became effective against the backdrop of the wars in Iraq and Afghanistan and following the publication of several popular “war memoirs” authored by servicemembers about their participation in those armed conflicts.<sup>31</sup> The broadened standard sought to ensure that all active duty servicemembers, each of whom bore an explicit duty of loyalty by oath,<sup>32</sup> would avoid the appearance of undermining that duty through private conflicts of interest.<sup>33</sup> However, as the DOD focused its attention on other priorities such as the Global War on Terror, sexual harassment and assault prevention,<sup>34</sup> and capabilities modernization in light of the growing threat posed by China,<sup>35</sup> the market for active duty social

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<sup>28</sup> The DOD has extended some parts of these regulations to enlisted personnel and members of the National Guard. The relevant instruction details include:

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

DEP’T OF DEF., DIRECTIVE 5500.07 para. 2.2.5 (2007), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/550007p.pdf> [https://perma.cc/PYU8-LAL8] [hereinafter DOD 5500.07].

<sup>29</sup> See *id.* This Article addresses provisions applicable to all branches of the military but applies case studies and makes specific recommendations applicable in particular to the Army. Note that the Department’s broadening of those “subject to” these regulations conveys exposure by means of Article 92, UCMJ, and therefore may involve different penalties than those contemplated by the regulations.

<sup>30</sup> See 10 U.S.C. § 892 (1956); DOD 5500.07, *supra* note 28, para. 2.2.5 (authorizing punishment under Article 92(3) for non-punitive provisions of the Joint Ethics Regulation); see also 10 U.S.C. § 934 (1956) (authorizing punishment for “conduct of a nature to bring discredit upon the armed forces”); DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL, Pt. IV, para. 16.d.3 (2019) (identifying maximum punishment for a violation of Article 92(3) through neglect or culpable inefficiency as “[f]orfeiture of two-thirds pay per month for 3 months and confinement for 3 months”).

<sup>31</sup> Although in some instances, servicemembers published following their discharge from active duty, this distinction was not always made clear in their work. Compare DAVID BELLAVIA, HOUSE TO HOUSE: AN EPIC MEMOIR OF WAR (2006) (published under the active duty rank and name “SSG David Bellavia”), with NATHANIEL FICK, ONE BULLET AWAY: THE MAKING OF A MARINE OFFICER (2005) (published under “Nathaniel Fick, Former Captain, First Reconnaissance Battalion, USMC”).

<sup>32</sup> See 10 U.S.C. § 502.

<sup>33</sup> Although the First Amendment would ordinarily limit the government’s ability to restrict private speech, the constitutional standard is relaxed for public employees. The Supreme Court has called the federal government’s interest in maintaining the integrity of public service “undeniably powerful,” particularly when it seeks to diminish or avoid cumulative effects of widespread practices. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 471-72 (1995).

<sup>34</sup> See DEP’T OF DEF., SECRETARY OF THE ARMY TOP PRIORITIES (Oct. 15, 2013), <https://api.army.mil/e2/c/downloads/316783.pdf> [https://perma.cc/X8CA-TXZK].

<sup>35</sup> See DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF AMERICA, <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [https://perma.cc/8DG2-FRG3].



media influencers boomed as ethics rulemaking and enforcement relaxed. Despite several policies purporting to govern social media use following the 2007 extension of the Standards,<sup>36</sup> none reflects a complete understanding of the modern landscape of social media influencers.

At least since the 2007 extension, the private gain prohibition has lacked uniformity in enforcement and interpretation across DOD component branches and subordinate commands. Alexander's video illustrates the disparity in outcome for servicemembers creating service-connected digital content. He remarks that at the conclusion of his investigation, he was awarded with an admiral's coin, a token of recognition for outstanding performance, rather than disciplinary action.<sup>37</sup> By far the most "liked" comment on that video is a former sailor's anger that ethics regulations or investigations were among the reasons he "didn't make vid[EOS] while on active duty."<sup>38</sup> This lack of uniformity in enforcement fosters resentment and perceived unfairness.

At the same time, non-enforcement and varied interpretation of the Standards within the DOD have increasingly normalized profiteering off of one's image and likeness as a servicemember. As servicemembers operating lucrative social media enterprises continue to gain prominence, the ability to identify "right" from "wrong" grows increasingly elusive. A landscape in which active duty servicemembers appear free to leverage their privileged status and access for private benefit leads other servicemembers to believe that such conduct is permissible, or even encouraged. This creates a positive feedback loop. The result may be a "professional" military in which it is not uncommon for servicemembers to simultaneously serve two entities: the Constitution they swore an oath to protect and defend, and the private organizations paying them for service-related digital content. This conflict is of particular concern where influencers may maximize profit by broadcasting messages that degrade their employer's public image.

An additional danger lies in the normalization of abuse of power over subordinates. Consider one Army drill sergeant's videos that feature basic trainees conducting training.<sup>39</sup> If these (or similar) videos serve a purely recruiting or training purpose, no concerns for the featured trainees' interests arise.<sup>40</sup> However, in this case, the drill sergeant uses the videos to acquire subscribers and followers, to whom she promotes her alter ego as a private fitness instructor and offers affiliate marketing deals.<sup>41</sup> In scenarios like this, the basic trainees amount to unpaid background actors, or free labor for the videographer to leverage for private benefit, while trainees

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<sup>36</sup> See, e.g., DEP'T OF DEF., INSTRUCTION 5410.20, PUBLIC AFFAIRS RELATIONS WITH FOR-PROFIT BUSINESSES AND BUSINESS INDUSTRY ORGANIZATIONS (2016), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/541020p.pdf> [https://perma.cc/TY44-MXL3] [hereinafter DoDI 5410.20]; DEP'T OF DEF., INSTRUCTION 8170.01, ONLINE INFORMATION MANAGEMENT AND ELECTRONIC MESSAGING (2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/817001p.pdf> [https://perma.cc/7YST-XTEM] [hereinafter DoDI 8170.01].

<sup>37</sup> See Alexander, *supra* note 2.

<sup>38</sup> Alexander, *supra* note 2.

<sup>39</sup> See, e.g., Ericka Bernie, *BCT Pick Up | Day ZERO*, YOUTUBE (Nov. 30, 2017), <https://www.youtube.com/watch?v=QXBD3PKJN2s> [https://perma.cc/V6WH-5MG9].

<sup>40</sup> This is to say that if trainees' or subordinates' individual interests are subjugated in the name of a legitimate *official* purpose, their voluntary entry into an employment contract raises an inference of consent.

<sup>41</sup> See Ericka Bernie, *Drill Sergeant Takes NEW ACFT!*, YOUTUBE (Aug. 19, 2019), <https://www.youtube.com/watch?v=4OjTvceNAEc&feature=youtu.be&fbclid=IwAR1yOxjZO2hH6E4GyiSg-J-BpM2kR0kmx4QiXcJA5vMJB2S1T9caJ4ru00c> [https://perma.cc/5ML7-J9KS] (providing affiliate marketing links).

lack any meaningful power to object. This rapidly proliferating abuse of power threatens to undercut the chain of command and the image and mission of the Armed Forces.<sup>42</sup>

This Article first analyzes the applicability of the federal “public office for private gain” prohibition to digital social media. It demonstrates that servicemembers who receive compensation from non-federal entities in exchange for service-related digital social media content creation violate that prohibition. It then argues that the DOD and Department of the Army do not provide adequate guidance for servicemembers’ use of social media, resulting in unlawful yet unpoliced uses of servicemembers’ rank, position, and status for private financial gain, often in plain sight. Last, it offers policy recommendations that seek to promote, reward, and facilitate servicemembers’ content creation while also achieving compliance with federal ethics rules and enabling uniform enforcement.

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

To reiterate, the Standards dictate that DOD employees “shall not use . . . public office for . . . private gain, for the endorsement of any product, service or enterprise,<sup>43</sup> or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.”<sup>44</sup> The applicability of this rule to the modern landscape of social media influencers turns here on two issues: the scope of “use [of] public office” and the causal nexus between use of public office and private gain.

This section first demonstrates that “public office” includes, at a minimum, any deliberate reference to one’s role as a member of the military, regardless of whether position, rank, uniform, or operational information are involved. It does so by exploring the structure and context of the provision, as well as the absurdity of alternative readings. Next, this section shows that the Code’s concept of “private gain” includes, at a minimum, receipt of monetary incentives, and finds that compensation paid to servicemember influencers is almost always an impermissible result of service-related content. However, it also demonstrates why the impermissible nature of these transactions is not immediately apparent to those tasked with enforcing ethics rules and suggests that influencers have become adept at obscuring affiliate marketing structures and business promotions to resist enforcement.<sup>45</sup>

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<sup>42</sup> Subordinates may be led to question why their superiors direct them to take certain actions. Viewed from subordinates’ perspective, it may be unclear whether the orders they receive safeguard their individual interests, the interests of the Armed Forces, or merely the interests of a content creator who holds coercive power by virtue of superior rank.

<sup>43</sup> This Article abstains from articulating a more comprehensive definition of “endorsement” for the purposes of regulations under 5 C.F.R. § 2635. Although a survey of social media pages that would constitute “external official presences” or “official social media accounts” suggests sweeping misconceptions of the term, such an exploration exceeds the scope of this Article’s narrow conclusions. 5 C.F.R. § 2635.

<sup>44</sup> 5 C.F.R. § 2635.702.

<sup>45</sup> See Appendix A, at A2, A4, A5, A6, A12, A17, A18. Affiliate marketing programs usually involve an entity advertising a discount code for a product, the use of which results in the product purchaser receiving a discount and the advertising entity receiving a kickback from the sale. Whether or not the advertiser may be seen to have “endorsed” the advertised product would require a fact-specific inquiry, and it does not necessarily follow that that advertiser endorsed the advertised product or products in all cases.

A. *Providing Any Indication of a Servicemember's Military Affiliation Constitutes Use of Public Office*

Servicemembers typically use their public office to carry out official duties. Examples include commanders issuing instructions and policy directives, infantry leaders maneuvering fighting elements, drill instructors training trainees, and recruiters appearing on high school campuses and speaking with potential recruits. However, individuals don't only "use" public office when they directly exercise the authority of their official position. Rather, an individual may also use public office when they more generally leverage the esteem of their office, position, or organization.

The "public office" provision is first expressed generally, and then offers an illustrative list of permissible and impermissible acts.<sup>46</sup> The provision allows for a single carveout, such that it does not prohibit "an employee who is ordinarily addressed using a general term of address, such as 'The Honorable', or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity."<sup>47</sup>

Perhaps some of the confusion that military commanders experience when attempting to determine the scope of the provision lies in the specific examples provided. One in particular notes that employees "shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise."<sup>48</sup> Without a full reading of the rule, a broad swath of conduct would appear to narrowly evade inclusion under this "endorsement" subsection. This is because the actor must claim the federal government or agency's endorsement, not merely his or her own, in order to satisfy the example. A simple work-around, and indeed one that is prevalent on social media, would be to endorse a product in a servicemember's (purportedly) personal or private capacity.<sup>49</sup> By this reading, an "own views only" banner would cleanse any misuse,<sup>50</sup> as would a lack of apparent authority to bind the government to a position. However, as further analysis will show, the general provision is triggered not when some personal or private capacity is present, but only when no official or governmental affiliation is attached at all.

The exception to the rule also provides considerable insight as to the broad scope of the rule. It permits the use of "rank" in connection with a "personal activity."<sup>51</sup> Unlike the banner provision under which it falls, the principle of *expressio unius est exclusio alterius*—the expression of one is exclusive of all others—limits the span of exceptions to this rule.<sup>52</sup> Furthermore, the lone exception is necessarily cabined by the liberal thrust of the rule; it can only be a personal *noncommercial* capacity in order to avoid rendering the rest of the provision absurd. Were this not

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<sup>46</sup> 5 C.F.R. § 2635.702 (2020) ("The specific [example] prohibitions apply this general standard, but are not intended to be exclusive or to limit the application of this section.")

<sup>47</sup> 5 C.F.R. § 2635.702(e) (2020).

<sup>48</sup> See 5 C.F.R. § 2635.702(c) (2020).

<sup>49</sup> See, e.g., Appendix A, at A10.

<sup>50</sup> See, e.g., Appendix A, at A9, A14.

<sup>51</sup> 5 C.F.R. § 2635.702(c) (2020).

<sup>52</sup> For example, the use of "rank" is excluded for a narrow purpose. The wearing of a military uniform or reference to one's assigned position in the military is not specifically excluded for any purpose.

the appropriate reading, General Mark Milley could perform management consulting work for the Boston Consulting Group, under the title of “General,” without violating the provision. Moreover, the Boston Consulting Group could then hold out “General Mark Milley” as one of their on-staff consultants. The carveout would defeat the broad purpose of the provision in nearly all instances, unless it were understood to exclude appropriation of a military rank for personal commercial purposes.<sup>53</sup>

Yet another interpretive aid for the scope of “public office” lies in the narrow purpose for which employees may ethically use government property. Federal employees owe a regulatory duty “to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.”<sup>54</sup> Government property includes “any form of real or personal property in which the Government has an ownership . . . or other property interest as well as any right or other intangible interest that is purchased with Government funds.” According to the DOD Trademark Licensing Guide, this includes “images of military persons in uniform.”<sup>55</sup> Authorized purposes include only “those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.”<sup>56</sup> By the text of 5 C.F.R. § 704, a concurrent proper purpose does not cure an other-than-authorized purpose. Hence, employees may use everything from office staplers to a government contractor’s time to images of military persons in uniform in furtherance of only the limited purposes for which that government property was procured.

Federal employees act within the purview of their public office when interacting with government-owned property in any form or manner.<sup>57</sup> They must subjugate their private enjoyment of government property to the official purpose for which such property was procured, even if the servicemember could privately benefit from putting the property to a different use. The federal rule’s liberal construction of “government property” conveys an intent that federal employees separate their professional and private interests, and not conduct the former in a manner designed to enrich the latter.

Finally, it is useful to note the context around “public office.” The fundamental concern underlying the Ethics in Government Act was unchecked executive power following the Watergate

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<sup>53</sup> This narrow reading of the exception also comports with the disjunctive nature of the banner provision, which addresses “public office for . . . private gain” or “endorsement.” 5 C.F.R. § 2635.702 (2020).

<sup>54</sup> 5 C.F.R. § 2635.704 (2020).

<sup>55</sup> DEP’T OF DEF., DOD TRADEMARK LICENSING GUIDE, <https://www.defense.gov/Resources/Trademarks/DOD-Trademark-Licensing-Guide/> [https://perma.cc/29MP-66W9]. See also DEP’T OF DEF., IMPORTANT INFORMATION AND GUIDELINES ABOUT THE USE OF DEPARTMENT OF DEFENSE SEALS, LOGOS, INSIGNIA, AND SERVICE MEDALS (2015),

<https://dod.defense.gov/Portals/1/Documents/Trademarks/DOD%20Guide%20about%20use%20of%20seals%20logos%20insignia%20medals-16%20Oct%2015F.PDF> [https://perma.cc/S4LG-5Y6V].

<sup>56</sup> 5 C.F.R. § 2635.704. Note that DOD has delegated authority to approve exceptions to this federal prohibition, but also explicitly states that use of federal resources in furtherance of “commercial activities” is “incompatible with public service.” U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REGULATION para. 2-301b.(1)(d) (Aug. 30, 1993) (C7, Nov. 17, 2011).

<sup>57</sup> Consider, for example, Appendix A, at A10. A pilot’s photographs of air-to-air refueling might replicate other, similar visual depictions of similar processes that are readily available to the public. However, the pilot still enjoys unique access and authority to create the specific photograph of his mission. As such, it falls within the sphere of “use of public office.”

scandal. In furtherance of this aim, the Standards of Ethical Conduct seek to ensure that “public service remains a public trust.”<sup>58</sup> Public service is not only about the office itself, but also inherently about the trust attached to it. It follows that public office includes the legal authority conveyed to an official position, any apparent authority ascribed to that position, and more nuanced forms of power such as credibility and influence.<sup>59</sup>

In this way, servicemembers may impermissibly use public office for private gain even where they also serve a concurrent professional purpose.<sup>60</sup> If a viewer can infer a servicemember’s governmental capacity through social media, that servicemember does not absolve her governmental capacity merely by attenuation or by creating an alter ego.<sup>61</sup> Where a servicemember represents him or herself as “Navy recruiter,”<sup>62</sup> “Air Force Staff Sergeant,”<sup>63</sup> or wears a military uniform,<sup>64</sup> such an affiliation carries through any connected content that is not service-related; the touchstone inquiry is whether it remains attributable to the same actor. Under a modern construction of “use,”<sup>65</sup> and assuming that an actor’s publication of information on social media serves at least some gratifying (or pecuniary) purpose,<sup>66</sup> a servicemember’s “office” remains in “use” throughout any account, page, article, website, or other connected medium where viewers may infer an affiliation. As explained in the following section, applicable ethics rules render certain uses of public office impermissible private gain.

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<sup>58</sup> 5 C.F.R. § 2635.101.

<sup>59</sup> For persons not subject to the Uniform Code of Military Justice, the wearing of a uniform may constitute constitutionally protected expressive conduct. *See* *United States v. Alvarez*, 567 U.S. 709 (2012) (concluding that the Stolen Valor Act, which prohibited false claims of receipt of military decorations or medals, constituted unlawful content-based restriction of speech). For persons subject to the Uniform Code of Military Justice, unauthorized wear of a uniform in violation of a lawful regulation governing such wear may constitute a violation of 10 U.S.C. § 892 (1956). Furthermore, broadcasting a visual depiction of one’s uniform might constitute an unauthorized use of “military emblems or insignia . . . for unofficial purposes, whether for commercial advertising, promotion, commercial purposes or otherwise,” unless permission for such use was obtained in accordance with DoDI 5410.20. DoDI 5410.20, *supra* note 36.

<sup>60</sup> *See generally* Appendix A (showing examples of servicemembers promoting private business entities through various media with mixed “personal” and professional content.)

<sup>61</sup> *See, e.g.*, Appendix A, at A2, A4, A5. (Servicemembers endorsing products without uniforms on, but bolstering their appearance and credibility with images in uniform that are traceable to the same actor.)

<sup>62</sup> Appendix A, at A4.

<sup>63</sup> Appendix A, at A8.

<sup>64</sup> This Article suggests that, where an actor features a military uniform in any way, that actor’s professional military capacity is invoked. Consider that “[a]dmission into an institution such as the military requires soldiers to leave behind their personal possessions, adopt a uniform, and assume the military identity . . . . The uniform plays an important role in enabling identification [and] establishing legitimacy.” Ramya Kasturi, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 YALE J. REG. 419, 427 (2012) (citations omitted). More importantly, the uniform is understood by others as a symbol of an individual’s military service. *But see Alvarez*, 567 U.S. at 709 (2012).

<sup>65</sup> The definition is “to put into action or service; avail oneself of;” or “to carry out a purpose or action by means of.” *Use*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/use> [https://perma.cc/YEY7-LYHU].

<sup>66</sup> *See* Anita Whiting and David Williams, *Why people use social media: a uses and gratifications approach*, 16 QUALITATIVE MKT. RSCH. 362, 362-369 (2013), <https://doi.org/10.1108/QMR-06-2013-0041> [https://perma.cc/T64A-GFWU].

B. *Private Gain Includes Any Pecuniary Benefit That a Servicemember Accepts That Is the Result of Digital “Content Creation” or Product or Service Endorsement*

Servicemembers have taken advantage of a perceived gray area in ethics rules, where they only tangentially link lucrative endorsement deals and self-promotion to their public office.<sup>67</sup> The following analysis identifies broad boundaries that must constrain the term “private gain,” and proposes a narrower framework for determining the threshold of permissible compensation on a case-by-case basis. Both common affiliate marketing structures and more indirect compensation schemes often place servicemember content creators’ earnings within the ambit of impermissible private gain.

To narrow the gray area where much of the social media influencer ecosystem exists, it is helpful to consider the broader spectrum of “private gain.”<sup>68</sup> On the most permissible end of that spectrum, servicemembers may receive written or verbal commendation, non-monetary tokens of appreciation of little or no monetary value, or naked goodwill.<sup>69</sup> The less permissible end, in contrast, includes receiving direct financial compensation, along with any exchange of goods or services functionally amounting to a *quid pro quo* with a non-federal entity. Hard cases arise when a servicemember receives *quid pro quo* compensation for services that appear to relate to her personal, non-military capacity.<sup>70</sup> These cases call for a second inquiry: is the compensation a function of the servicemember’s following or influence, which benefits from her image or likeness as a servicemember?<sup>71</sup> The answer is often yes.<sup>72</sup>

The market for digital social media content creation derives from the belief that “characteristics of [a] message source” and “persuasiveness of [a] message itself” influence attitude change.<sup>73</sup> When an actor participates in this market, that actor’s capacity to influence determines his or her subsequent compensation. Therefore, if a market participant’s military

<sup>67</sup> See generally Appendix A. This Article assumes that a common driver of servicemembers’ willingness to violate ethics regulations and commanders’ lack of desire to enforce them is a lack of clarity in those regulations’ applicability. Additionally, it proposes that a lack of clarity and policing may pervade the legal space in part because several of the accounts that appear to violate ethical standards belong to high-ranking officers and commanders.

<sup>68</sup> See Alexander, *supra* note 2 (characterizing the space in which he produces service-related social media content one of “thin lines”).

<sup>69</sup> Consider, for example, Alexander’s receipt of a commander’s coin in recognition of his exceptional work. See Alexander, *supra* note 2.

<sup>70</sup> See Appendix A, at A4 (Navy officer maintains separate professional and private accounts, but the two are easily linked and the latter piggy-backs on the influence accrued by the former).

<sup>71</sup> This inquiry could also be considered as one of actual cause—but for a servicemember’s military affiliation, would they enjoy the exact same degree of influence? See Emily D. Hund, *The Influencer Industry: Constructing And Commodifying Authenticity On Social Media* (2019), <https://repository.upenn.edu/edissertations/3636> [<https://perma.cc/2FBP-DEXL>] (illustrating “how the ‘influence economy’ emerged as a locus of power tied to tangible economic and social rewards on the social media-driven, visual web”).

<sup>72</sup> Authenticity lies at the core of persuasion. See *id.* However, on occasion, a servicemember joins the military already with a robust following. See, e.g., Carly Schroeder (@carlyfries18), INSTAGRAM, <https://www.instagram.com/carlyfries18/?hl=en> (representing an actress serving as an active duty Army officer); *The Rock’n’Roll Casualty Who Became a War Hero*, N.Y. TIMES (July 2, 2013), <https://www.nytimes.com/2013/07/02/magazine/evermans-war.html> [<https://perma.cc/VRA6-WC46>] (detailing a member of the band Nirvana who served with Army Special Operations Forces). In these limited instances, a significant portion of a servicemember’s influence may not be service-connected or a “use” of public office.

<sup>73</sup> GREGORY R. MAIO & GEOFF HADDOCK, *THE PSYCHOLOGY OF ATTITUDES AND ATTITUDE CHANGE* (1st ed. 2010).

affiliation elevates the characteristics or “persuasiveness” of her influence or messaging, her compensation is a function of her military affiliation.

Military affiliation adds credibility to an influencer where viewers know or can infer it. Credibility here derives from the “great deal” of public trust and confidence that Americans have in the military as an institution, including that the military is “effective, well-run, and skilled.”<sup>74</sup> The public widely perceives military leaders as “courageous and professional,”<sup>75</sup> and military officers rank second of twenty-one professions in public perception of “honesty and ethical standards.”<sup>76</sup> Overall public trust in the military far exceeds that afforded to the healthcare system, the Presidency, news media, and even institutions of organized religion.<sup>77</sup> When online personalities make their status as a servicemember known, they enjoy the public prestige associated with their official capacity.<sup>78</sup> The public may also automatically ascribe to them the desirable traits they perceive in the military as an institution, including courage, professionalism, and effectiveness.

Servicemembers also enjoy increased credibility when they discuss military matters, even if they purport to do so in their private capacity, because servicemembers appear to, and in many cases actually do, possess unique knowledge about them. Their personal perspective is more authentic and often more persuasive than officially sanctioned messaging.<sup>79</sup> Much of the content’s appeal also flows from its rarity, or the extent to which its perspective is not otherwise made available to the general public. Content creators recognize and exploit these value propositions. This is evidenced by such titles as “NAVY PROS & CONS! WATCH BEFORE JOINING,”<sup>80</sup> “A Day In The Life of a [sic] Active Duty Army Captain,”<sup>81</sup> “THE LIES MILITARY RECRUITERS

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<sup>74</sup> *U.S. Confidence in Military Reflects Perceived Competency*, GALLUP (July 27, 2017), <https://news.gallup.com/poll/214511/high-confidence-military-reflects-perceived-competency.aspx> [https://perma.cc/59WP-DBV5].

<sup>75</sup> *Id.*

<sup>76</sup> *Nurses Keep Healthy Lead as Most Honest, Ethical Profession*, GALLUP, <https://news.gallup.com/poll/224639/nurses-keep-healthy-lead-honest-ethical-profession.aspx> [https://perma.cc/Z4YP-N6Z3].

<sup>77</sup> *See Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/Confidence-Institutions.aspx> [https://perma.cc/VL8J-EA7Y].

<sup>78</sup> *See* Major Gene Souza, *Extending Influence Beyond the Chain Of Command: Understanding the Relationship between Power and Influence Tactics* (Sep. 7, 2010), [https://usacac.army.mil/sites/default/files/documents/cace/DCL/dcl\\_SecondPlaceEssay\\_1002.pdf](https://usacac.army.mil/sites/default/files/documents/cace/DCL/dcl_SecondPlaceEssay_1002.pdf) [https://perma.cc/Q9CV-QJSU] (discussing social psychology power bases leveraged by military leaders).

<sup>79</sup> NYU Stern School of Business Professor Scott Galloway suggests that the value proposition of authenticity lies in voyeurism, meaning an insight into something that people are not ordinarily allowed to see. Additional contributing factors include humor and controversy. Professor Galloway also jokes that “anything that legal approves . . . can never go viral,” and adds that viral content regarding curated brands tends to flow from third parties. FORA.tv, *How to Make Content Go Viral*, YOUTUBE (Apr. 16, 2010), [https://www.youtube.com/watch?v=VKJM\\_DIBMew&t=234s](https://www.youtube.com/watch?v=VKJM_DIBMew&t=234s) [https://perma.cc/K36P-85R3].

<sup>80</sup> OfficialShim, *NAVY PROS & CONS! \*WATCH BEFORE JOINING\* 2019 | OFFICIALSHIM*, YOUTUBE (Feb. 2, 2019), <https://www.youtube.com/watch?v=9EdwlfXRAt0> [https://perma.cc/QSH2-XFYD].

<sup>81</sup> Ericka Bernie, *A Day In The Life of a Active Duty Army Captain*, YOUTUBE (June 12, 2019) <https://www.youtube.com/watch?v=fZbm3GI3Lds> [https://perma.cc/8BBU-Y4BM].

TELL YOU,”<sup>82</sup> and “The Untold Truth About Life in the Airforce.”<sup>83</sup> These titles all tout privileged access and inside knowledge. When servicemembers provide unscripted accounts of the military based on firsthand experience, their audiences perceive them as authentic, knowledgeable, and trustworthy.

Servicemember content creators have also capitalized on their connection to the military to promote content unrelated to military matters. Consider the example of one Navy officer who maintains a noncommercial Instagram account for her recruiting work, “@lieutenanthall.”<sup>84</sup> That account regularly tags and references the same Navy officer’s personal for-profit account, “@kellierenehall.”<sup>85</sup> Even though she already maintains a professional account, user @kellierenehall’s content is littered with service-connected messages, images of servicemembers in uniform, references to the account owner’s military service, and cross-references to the professional account. In this example, even though the author has taken the time and energy to create a professional alter ego, she does not divest her for-profit endeavors from that alter ego. Doing so would undoubtedly reduce her private entity’s influence and revenue, as her professional account boasts three times as many followers as the private account.<sup>86</sup>

In another business model, servicemembers maintain distinct private personas as for-profit entities but tacitly know that outside sources will nevertheless insinuate their military service.<sup>87</sup> Servicemembers who use this business model either recognize the ethics concerns associated with using their military persona in pursuit of private profits or have already had federal ethics rules enforced against them. In most cases, the external entities promoting servicemembers in this subtler way do so at their request, as these servicemembers understand both how promotion will benefit their private ventures and how this subtler method is less likely to trigger ethics rules enforcement. Although obscure and remote, this model still runs afoul of the prohibition on use of public office for private gain. Servicemember content creators bolster their influence by ensuring that their military affiliation is known, even if not prominently featured,<sup>88</sup> and exceptions should be permitted only where such a servicemember’s professional image is used without her invitation or permission.

When servicemembers subject to federal ethics rules leverage the credibility afforded their status as servicemembers to promote products or services, they violate federal ethics rules by accepting compensation in exchange for such promotion. Only when a servicemember’s social media persona cannot be traced to his or her military affiliation is their content fit for private

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<sup>82</sup> BullyJuice, *THE LIES MILITARY RECRUITERS TELL YOU*, YOUTUBE (Aug. 23, 2017), <https://www.youtube.com/watch?v=33m3sbwGHJI> [https://perma.cc/XLT6-563B].

<sup>83</sup> Raymond Isaiah, *The Untold Truth About Life in the Airforce | Military*, YOUTUBE (Dec. 28, 2017), <https://www.youtube.com/watch?v=inN6DCkKiD8> [https://perma.cc/BRW6-237C].

<sup>84</sup> Appendix A, at A4.

<sup>85</sup> See, e.g., Kellie Hall (@lieutenanthall), *Quick Reminder: you CAN have a personality in uniform . . .*, INSTAGRAM (July 24, 2020), <https://www.instagram.com/p/CDCMHqqp Wn/>.

<sup>86</sup> The “official” account also promotes other private entities, such as “@bodybycraig.” See Kellie Hall (@lieutenanthall), *Gyms are open again in many areas of the country*, INSTAGRAM (July 23, 2020), [https://www.instagram.com/p/CC\\_QaN5p9PU/](https://www.instagram.com/p/CC_QaN5p9PU/).

<sup>87</sup> See Appendix A, at A5.

<sup>88</sup> See, e.g., Appendix A, at A4, A5, A7, A8, A12, A16, A17, A18, A19, A20.



compensation. This understanding of “public office for private gain” is hardly new,<sup>89</sup> but digital social media presents a novel frontier for its applicability. On social media, as elsewhere in the world, servicemembers enjoy a quantum of confidence and respect purely by virtue of their affiliation with the military.<sup>90</sup> To the extent that an active duty servicemember creates a persona, however private, in the digital social media space, such a persona may be tainted, or rendered unfit for compensation, by reference to or insinuation of a servicemember’s official capacity in the military. Far from being a gray area, as Alexander alleges, any monetization through non-federal entities of an active duty servicemember’s “influence” constitutes impermissible use of public office for private gain if it is a function of her image, likeness, status, apparent authority, or influence as a servicemember.<sup>91</sup>

## II. DOD SOCIAL MEDIA POLICIES CREATE CONFUSION BY MISCHARACTERIZING SERVICEMEMBERS’ ETHICAL OBLIGATIONS

The DOD, as well as component branches, has implemented various policies addressing servicemembers’ activities on “internet-based capabilities providers” or “social media.”<sup>92</sup>

Most reference the Joint Ethics Regulation, which is intended to serve as the “single source of standards of ethical conduct” applicable to the Secretary of Defense and Military Departments.<sup>93</sup> The Joint Ethics Regulation does not discuss social media but notes the general applicability of both federal regulations governing misuse of position and federal laws limiting servicemembers’ outside employment opportunities. Although the Joint Ethics Regulation incorporates federal ethics prohibitions without reducing their scope, separate and subordinate DOD regulations fail to nest in the same manner. They instead prescribe procedures applicable to certain categories of digital social media activity without defining the categories in a consistent manner, or one that might realistically beget enforcement. They also fail to identify, in simple and clear terms, that holding oneself out as a servicemember to the public bars receipt of compensation for connected activities from non-federal sources in almost all circumstances.

This section first outlines DOD instructions that contribute to confusion and then evaluates the Army as a component branch case study. Last, it evaluates an advisory opinion provided by the U.S. Office of Government Ethics (OGE). It shows that the inconsistencies and incoherencies across these sources create a space in which well-meaning servicemembers and commanders could

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<sup>89</sup> Andrew Stark, *Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?*, 91 THE AM. POL. SCI. REV. 108-20 (1997), [https://www.jstor.org/stable/2952262?read-now=1&seq=2#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/2952262?read-now=1&seq=2#page_scan_tab_contents) [https://perma.cc/5TWG-GLH4]. (articulating that drawing on “knowledge, skills, experience, stature, or prestige” derived from an official position can give rise to a finding of “public office”).

<sup>90</sup> See Lydia Saad, *Military, Small Business, Police Still Stir Most Confidence*, GALLUP (June 28, 2018), <https://news.gallup.com/poll/236243/military-small-business-police-stir-confidence.aspx> [https://perma.cc/2SCU-MVDD] (reporting that seventy-four percent of respondents have a “[g]reat deal” of confidence in the military, the most positive result for any of the fifteen categories considered).

<sup>91</sup> See generally Appendix B (illustrating a common fact pattern).

<sup>92</sup> The category of “External Official Presences” constitute a slightly broader banner than official social media accounts, at least when applying a definition of social media that would include only electronic communications. See *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> [https://perma.cc/GY7G-5XC5].

<sup>93</sup> DOD 5500.07, *supra* note 28.

form reasonable but incorrect beliefs regarding ethical boundaries for digital social media use. As such, the modern trend of servicemembers reaping unethical profits from their military images in the market for digital social media influence will continue if current policies are not amended or rescinded.

A. *DOD Policies Attempt to Regulate Servicemembers' Social Media Use Based on Unworkable and Inconsistently Identified Categories*

Recent policy directed by DOD's Chief Information Officer (CIO) mandates registration and vetting of "official" use accounts, called "External Official Presences."<sup>94</sup> The policy also ensures ample space for servicemembers to maintain "personal, nonofficial" accounts that operate in accordance with all "laws [and] regulations."<sup>95</sup> The CIO's directive is based on the flawed assumption that these bifurcated categories encompass all servicemembers' social media activities. A second instruction, promulgated by the DOD Public Affairs Officer (PAO), attempts to regulate servicemembers' use of "Visual Information." This instruction similarly directs servicemembers to comply with ethical obligations, but then elaborates on those obligations in an internally incoherent manner that also misconstrues the Standards of Ethical Conduct.

Both the DOD CIO and PAO instructions too narrowly construct the Standards of Ethical Conduct. For this reason, they also fail to address the problem of servicemembers leveraging their military status for financial gain on social media. Because these instructions purport to regulate servicemembers' digital social media activity, but fail to address this problem, they actually enable these otherwise impermissible uses of public office by making it appear that they comport with DOD guidance.

1. *The DOD CIO's Instruction Fails to Address Mixed Personal- And Professional-use Accounts with Sufficient Specificity as to Clearly Govern Their Use*

In 2019, the DOD CIO established policy, assigned responsibilities, and prescribed procedures for managing official DOD information.<sup>96</sup> This policy tasked component heads with approving, "as appropriate, establishment and registration of [External Official Presences] and official use of non DoD-controlled and non-federal-controlled electronic messaging services."<sup>97</sup> EOPs are "appropriate" where they enable "public communications related to assigned duties (e.g. recruiting) [sic]" or "for any other purpose determined ^and in the interest of the [U.S.

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<sup>94</sup> DoDI 8170.01, *supra* note 36.

<sup>95</sup> DoDI 8170.01, *supra* note 36.

<sup>96</sup> See DoDI 8170.01, *supra* note 36. The CIO exercised this authority pursuant to DoDD 5144.02. For reference, see DEP'T OF DEF., DIRECTIVE 5144.02, DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER (2017) [hereinafter DoDD 5144.02].

<sup>97</sup> DoDI 8170.01, *supra* note 36, at para. 2.7.d.

Government.]” It directs that, where “workable,”<sup>98</sup> EOPs must display the “standard” transparency banner:<sup>99</sup>

Welcome to the [name of DOD Component]’s [name of non-DoD-controlled electronic messaging service] page/presence. If you are looking for the official source of information about the [name of DOD Component], please visit [address of official website or other official information]. The [name of DOD Component] is pleased to participate in this open forum in order to increase government transparency, promote public participation, and encourage collaboration. Please note that the [name of DOD Component] does not endorse the comments or opinions provided by visitors to this site. The protection, control, and legal aspects of any information that you provided to establish your account or information that you may choose to share here is governed by the terms of service or use between you and the [name of non-DoD-controlled electronic messaging service]. Visit the [name of DOD Component] contact page at [address of official website or other official information] for information on how to send official correspondence.<sup>100</sup>

An additional best-practice for EOPs includes “[n]ot conduct[ing] communication unrelated to assigned duties, functions, or activities via official-use accounts.” DOD personnel must also “Register public EOPs at: <https://usdigitalregistry.digitalgov.gov/>.”<sup>101</sup>

The same instruction also notes that “DOD personnel who are acting in a private capacity have the First Amendment right to further release or share publicly-released unclassified information through non-DOD forums or social media provided that no laws or regulations are violated.”<sup>102</sup> They may “use personal, nonofficial accounts to participate in activities such as professional networking, development, and collaboration related to, but not directly associated with, official mission activities as DOD personnel.”<sup>103</sup> In order to assist in delineating private from public capacity, “DOD personnel should use non-mission related contact information, such as personal telephone numbers or postal and e-mail addresses, to establish personal, nonofficial accounts, when such information is required.”<sup>104</sup>

Hence, the DOD CIO’s instruction creates two distinct categories. On one end of the spectrum, EOPs are only those official-purpose accounts which have been approved and recorded by component heads, and which are “necessary” to government functions. On the other end of the

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<sup>98</sup> Elsewhere, the Instruction discusses the same banner as mandatory where “feasible.” Even if “workable” and “feasible” are afforded synonymous meanings, the mixed adjectives demonstrate the extent to which a single instruction may fail to internally nest terminology, making cross-reference exceedingly difficult. DoDI 8170.01, *supra* note 36.

<sup>99</sup> In over twenty hours reviewing official social media accounts between December 2019 and February 2020, this author did not identify a single appearance or use of the so-called “standard” transparency banner. *See* DoDI 8170.01, *supra* note 36.

<sup>100</sup> DoDI 8170.01, *supra* note 36, fig.3.

<sup>101</sup> DoDI 8170.01, *supra* note 36. This instruction does not provide a specific actor or position responsible for completing this task, or who may be held accountable were such a task neglected.

<sup>102</sup> DoDI 8170.01, *supra* note 36 (emphasis supplied).

<sup>103</sup> DoDI 8170.01, *supra* note 36.

<sup>104</sup> DoDI 8170.01, *supra* note 36.

spectrum, DOD personnel broadcasting only non-mission-related, or unclassified publicly-shared information may operate accounts in their private capacity. The space between the two ends of the spectrum is filled by a pervasive trend: mixed use accounts, or those which exceed the restrictive guidelines for private accounts, but also fail to meet the requirements for EOP designation.<sup>105</sup> This includes accounts that are not necessary to component agencies, but which may contain substantial service-related content, such as servicemembers constructively shaping the official functions of their military units,<sup>106</sup> servicemembers engaged in recruiting operations,<sup>107</sup> servicemembers engaged in public relations functions,<sup>108</sup> and other professional uses of digital social media. Despite this trend, the 2019 DOD Digital Modernization Strategy made no reference to social media whatsoever.<sup>109</sup>

Although registration might be a precursor to comprehensive and consistent policing of official accounts, it adds no value if it is ignored as a prerequisite to publishing service-related content.<sup>110</sup> Instead, it adds a bureaucratic step and increased policing for digital social media account managers. Regardless, accounts that run afoul of ethics rules often fit the mold of “personal” accounts, as described by the DOD CIO, and thus would not be required to register in the first place. The DOD CIO instruction ultimately adds no meaningful constraints or guidance for personal social media accounts that contain military content, while at the same time appearing to legitimize their existence and use.

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

## 2. The DOD PAO’s Instruction Fails to Address Mixed Personal- and Professional-Use Accounts with Actionable Specificity

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

- (1) Service members must comply with DOD 5500.07-R, DoDI 8550.01, and DoDI 1334.01 prior to permitting [non-federal entities] to use their image in uniform. Both active duty Military Service members and former members are

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<sup>105</sup> See Appendix A, at A1, A3a-b, A4, A5, A6, A7, A8, A18.

<sup>106</sup> See Appendix A, at A9.

<sup>107</sup> See Appendix A, at A10.

<sup>108</sup> See Appendix A, at A4.

<sup>109</sup> See DEP’T OF DEF., DOD DIGITAL MODERNIZATION STRATEGY: DOD INFORMATION RESOURCES MANAGEMENT STRATEGIC PLAN FY 19-23 (2019), <https://media.defense.gov/2019/Jul/12/2002156622/-1/-1/1/DOD-DIGITAL-MODERNIZATION-STRATEGY-2019.PDF> [https://perma.cc/8P6C-YTVZ].

<sup>110</sup> See Appendix A, at A14 (depicting an account that purports to be both “official” and “unofficial”), A7, A9, A10, A11, A15, A19 (depicting accounts that serve official functions but are not listed on the DOD registry). See also DEP’T OF DEF., DOD WEBSITES, <https://www.defense.gov/Resources/Military-Departments/DOD-Websites/?tab=Social%20Media> [https://perma.cc/9N7P-24KA].

prohibited from wearing their uniform in connection with commercial interests when an inference of official sponsorship for the activity or interest could be drawn.

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

(3) DOD employees may use or allow the use of their titles, positions, or organization names in conjunction with their own names only to identify themselves in the performance of their official duties.<sup>111</sup>

Each of the above-quoted paragraphs contains an inaccuracy or imprecision that results in a lack of clear, actionable instruction, and instead promotes misconceptions.

With regard to paragraph (1), although servicemembers were already obligated to comply with DOD 5500.07-R, this cross-reference additionally clarifies which corollary policies affect the ensuing provisions. Complying with applicable regulations “prior to” allowing non-federal entities to use a servicemember’s “image in uniform” likely includes enforcing compliance throughout the use of this “image in uniform” as well, but poor word choice does not doom the effect of the clause.

The paragraph then restates the Standards of Ethical Conduct, but less restrictively. Active duty servicemembers are precluded from taking any act, including but not limited to wearing their uniform where it conveys official endorsement. However, situations where “official sponsorship for the activity or interest could be drawn” are only a subset of cases where public office is still impermissibly used for private gain.<sup>112</sup> Additionally, former servicemembers are not necessarily subject to the PAO’s restriction, despite its attempt to restrict their conduct.<sup>113</sup> This suggests that the instruction was not drafted with a critical eye toward the applicability of the Standards of Ethical Conduct, or with a complete understanding of the DOD PAO’s scope of authority. For these reasons, the first paragraph is merely aspirational, rather than actually prescriptive or preclusive, in effect.

On balance, although the first paragraph provides a specific and narrow example of impermissible conduct, that example could be misunderstood as all-inclusive. It also fails to clarify any applicable regulations therein listed, causing many to overlook or ignore them.<sup>114</sup>

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<sup>111</sup> DoDI 5410.20, *supra* note 36.

<sup>112</sup> DoDI 5410.20, *supra* note 36.

<sup>113</sup> Some, but not all, former active duty servicemembers remain subject to courts martial and the Uniform Code of Military Justice. *See U.S. v. Begani*, 201800082 (N.M.C.C.A. 2020) (discussing applicability of UCMJ to officials no longer serving on active federal status), [https://www.jag.navy.mil/courts/documents/archive/2020/BEGANI\\_201800082\\_EN-BANC\\_PUB\\_Corrected%2025%20Feb%202020.pdf](https://www.jag.navy.mil/courts/documents/archive/2020/BEGANI_201800082_EN-BANC_PUB_Corrected%2025%20Feb%202020.pdf) [https://perma.cc/SYD9-QU4D]; *see also* Larrabee v. Braithwaite, No. 19-654-RJL (D.D.C. 2020), <https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2019cv00654/204940/28/> [https://perma.cc/RNE4-KEV5]. Additionally, even where former servicemembers remain subject to UCMJ, they are not necessarily subject to ethical conduct regulations governing federal employees.

<sup>114</sup> *See generally* Appendix A.

Paragraph (2) prohibits servicemembers from “approving” the use of “Visual Information” (VI) for commercial purposes without “appropriate authority.” VI describes “DOD . . . media files,”<sup>115</sup> but elsewhere is defined more broadly as “[i]nformation in the form of visual or pictorial representation of person(s), place(s), or thing(s).”<sup>116</sup> A second definition applies to “DOD VI,” which is that VI “created, controlled, owned, operated, or controlled by DOD or the Military Department or placed on DoD-based internet-based capabilities.”<sup>117</sup> Commercial use specifically excludes “personal use with no intent for further public distribution for commercial purposes.”<sup>118</sup>

After incorporating these definitions, two possible constructions result. One construction applies “VI” rather than “DOD VI” in its place, and would preclude servicemembers from approving the use of any picture of any person, regardless of military affiliation, for any commercial purpose. This would render the first sentence so overbroad as to be unenforceable. This absurdity would suggest that a second construction is appropriate, in which “DOD VI” applies throughout the paragraph, even though the term “VI” is used. However, because DOD VI applies only to that VI which is functionally owned by the DOD, this construction would only preclude servicemembers who would otherwise authorize the use of DOD-owned images. This construction best reflects the tone of the instruction, but also does no work to resolve the issue of servicemembers posting more general pictures or information about their position or service affiliation, except in the limited case where a servicemember creates media specifically for an assigned military task.<sup>119</sup>

Paragraph (3) opens with an express contradiction of the Standards of Ethical Conduct’s carveout for the use of military rank for personal matters, at least if military rank overlaps with “title [or] position.”<sup>120</sup> Whether the paragraph’s intent is ensuring ethical conduct or operational security is also not clear; using the same or similar language as in the Standards of Ethical Conduct likely would have resolved this ambiguity. Even if the paragraph has the effect of banning the use of title, position, or organizational name for personal commercial purposes, these categories are underinclusive. The use of rank, uniform, special knowledge, unique access, status, and DOD resources remain in play, or at least are not obviously proscribed, by the text of the policy.

Collectively, the DOD PAO’s guidance lacks clarity in scope and application. It fails to unambiguously prohibit the use of servicemembers’ images and likenesses on social media for commercial purposes, but still purports to govern ethical behavior in that sphere. These poorly nested regulations and their resulting ambiguity are exactly the “thin lines” Alexander references

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<sup>115</sup> DoDI 5410.20, *supra* note 36.

<sup>116</sup> DEP’T OF DEF., INSTRUCTION 5040.02, VISUAL INFORMATION (VI) (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/504002p.pdf> [hereinafter “DoDI 5040.02”]. [https://perma.cc/M9B7-ST57]

<sup>117</sup> DoDI 5410.20, *supra* note 36.

<sup>118</sup> DoDI 5410.20, *supra* note 36.

<sup>119</sup> See Appendix A, at A14, A15. These servicemembers are often referred to as “COMCAM,” or Joint Combat Cameramen.

<sup>120</sup> 5 C.F.R. § 2635.101 *et seq.*, *supra* note 24.

in his social media posts, and the reason many servicemembers have entered the commercial digital social media space.<sup>121</sup>

The DOD PAO's and CIO's instructions fail to comport with the Standards of Ethical Conduct. Both instructions cross-reference the Joint Ethics Regulation and, by extension, applicable provisions of the Standards of Ethical Conduct. However, the instructions offer boundaries for digital social media use that fail to apply both the language or the scope of the federal regulation and a DOD-level extension of the federal regulation. These subordinate instructions cannot be applied as *lex specialis* where they take away from an agency's obligations, rather than add to them. Moreover, the internal and external inconsistencies and ambiguities of both instructions magnify, rather than clarify, residual confusion about the boundaries of the Standards of Ethical Conduct.

Where DOD blurs ethics boundaries in the social media sphere, component branches have done no better. The next section discusses the Army's attempt to clarify the meaning of ethical social media use.

*B. Case Study: How the Army's Social Media Policies Mislead Soldiers by Failing to Explicitly Address the Possibility of Official and Non-official Social Media Accounts Running Afoul of the Standards of Ethical Conduct*

The Department of the Army publishes a broad swath of social media policy on a website titled "Army Social Media."<sup>122</sup> Hyperlinks direct users to several different references, including guidance for both official social media activity and other social media activity.<sup>123</sup> Although some hyperlinks are outdated,<sup>124</sup> this Article addresses both the referenced authorities which might bind soldiers, as well as those which merely stand to inform (or misinform). It shows that

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<sup>121</sup> Alexander, *supra* note 2.

<sup>122</sup> In response to the Frequently Asked Question, "Where can I find the 'Social Media Handbook'?" the website states, "You are looking at it." DEP'T OF DEF., ARMY SOCIAL MEDIA POLICIES AND RESOURCES, <https://www.army.mil/socialmedia/> [https://perma.cc/6S5F-TN3Y] [hereinafter ARMY SOCIAL MEDIA POLICIES AND RESOURCES].

<sup>123</sup> *See id.*

<sup>124</sup> *See, e.g.*, DEP'T OF THE ARMY, ALL ARMY ACTIVITIES MESSAGE 058/2018, PROFESSIONALIZATION OF ONLINE CONDUCT (2018), [https://www.army.mil/e2/downloads/rv7/socialmedia/ALARACT\\_058\\_2018\\_PROFESSIONALIZATION\\_OF\\_ONLINE\\_CONDUCT.pdf](https://www.army.mil/e2/downloads/rv7/socialmedia/ALARACT_058_2018_PROFESSIONALIZATION_OF_ONLINE_CONDUCT.pdf) [https://perma.cc/SWJ2-6ZJX] [hereinafter "2018 ALARACT" or "058/2018 ALARACT"]. This version is the one available on the website, but it is actually the outdated version of the memorandum, which was subsequently updated in 2019. *See* DEP'T OF THE ARMY, ALL ARMY ACTIVITIES MESSAGE 061/2019, PROFESSIONALIZATION OF ONLINE, <https://irp-cdn.multiscreensite.com/c40090aa/files/uploaded/ALARACT%202019%20061-%20Professionalization%20of%20Online%20Conduct.pdf> [https://perma.cc/Q4LD-3P76] [hereinafter "2019 ALARACT" or "061/2019 ALARACT"]. The "updated" version does not substantially modify the 2018 version. A link is also provided to DoDI 1300.18, which provides instruction for "Personnel Casualty Matters." This document discusses media engagement restrictions, but not specifically digital social media. *See* DEP'T OF DEF., INSTRUCTION 1300.18, DEPARTMENT OF DEFENSE (DoD) PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES (2009), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130018p.pdf> [https://perma.cc/BC2J-DVFB]. The Joint Ethics Regulation is not linked.

servicemembers who seek a clear articulation of Army social media policy instead find inactive references and circular instructions.

1. Army Guidance for Non-Official Social Media Misleads Soldiers by Failing to Address Prominent Violations of Ethics Rules

The first source of “Policies and Guidance” on the Army Social Media page is an All Army Activities Message (ALARACT) communication, which purports to govern “Professionalization of Online Conduct.”<sup>125</sup> The policy applies to transfers of information “by computer, phone, or other electronic device[,]” including, but not limited to “text messages, e-mails, chats, instant messaging, screensavers, blogs, social media *sites*, electronic devices applications, and web/video conferencing.”<sup>126</sup> The message further defines “misconduct” as including, but not limited to “[h]arassment, bullying, hazing, stalking, discrimination, retaliation, or any other type of misconduct that undermines dignity and respect.”<sup>127</sup> The ALARACT concludes by conveying the Army’s intent that “its members . . . tell the Army Story” and that the “responsible use of social media” is neither prohibited nor limited by the message.<sup>128</sup>

This ALARACT posted on the website is actually the outdated 2018 version of a memorandum that was slightly modified and updated in 2019.<sup>129</sup> Although the 2018 message broadly prohibited “misconduct that undermines dignity and respect,” it has been criticized as lacking in part the “unambiguous and comprehensive regulatory tools” required to permit commanders to enforce its contents “consistently and confidently.”<sup>130</sup> One legal scholar’s suggestions for improvement included denoting specific behaviors that constitute online misconduct, undermine Army values, and violate Army Command Policy, such as stalking, threatening, tricking, soliciting, and nonconsensual broadcasting of other servicemembers.<sup>131</sup> An additional suggestion includes precluding servicemembers from “[l]inking, linking, or sharing social media posts which undermine Army values.”<sup>132</sup>

Although the 2019 message primarily addresses activities that stand to undermine “dignity and respect,” its broad heading suggests that it conclusively governs all online conduct by

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<sup>125</sup> ALARACT 058/2018, *supra* note 124.

<sup>126</sup> ALARACT 058/2018, *supra* note 124.

<sup>127</sup> ALARACT 058/2018, *supra* note 124.

<sup>128</sup> ALARACT 058/2018, *supra* note 124.

<sup>129</sup> ALARACT 061/2019 marks the fourth reissuance of a 2015 memorandum regarding the same matter. ALARACT 061/2019 operates against the backdrop of, although not pursuant to, DOD Instruction 8170.01, which permits “Component heads [to] approve the establishment of non-DOD controlled electronic messaging services accounts by authorized users for public communication related to assigned duties (e.g., recruiting) or any other purpose determined necessary and in the interest of the [U.S. Government].” ALARACT 061/2019, *supra* note 124.

<sup>130</sup> Collette Langos, *Reforming The Army’s Online Policies: An Opportunity for Leadership*, THE ARMY LAWYER (2019), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/01-2019.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/01-2019.pdf) [<https://perma.cc/9QTD-UD66>].

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* As the Army Values include “loyalty, duty, respect, selfless service, honor, integrity, [and] personal courage,” this proposed preclusion raises constitutional concerns as to overbreadth and the extent to which it invites viewpoint discrimination where a servicemember’s purely private conduct is policed. U.S. ARMY, THE ARMY VALUES, <https://www.army.mil/values/> [<https://perma.cc/8A38-U56W>]; *see also* U.S. ARMY, ARMY REGULATION 600-20, ARMY COMMAND POLICY (2014) (identifying these values as foundational to “military discipline”) [hereinafter Army Command Policy].



soldiers.<sup>133</sup> Despite this heading, the message addresses one sphere of misconduct but ignores another of significance and increasing prominence: widespread improper use of official and non-official social media accounts in violation of the Joint Ethics Regulation and Standards of Ethical Conduct for Employees of the Executive Branch.<sup>134</sup> The Army's "Professionalization of Online Conduct" policy misleads soldiers by failing to explicitly address the possibility of official and non-official social media accounts running afoul of the Standards of Ethical Conduct.<sup>135</sup>

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

Certain types of personal relationships between officers and enlisted Soldiers, or NCOs and junior enlisted Soldiers, are prohibited. Prohibited relationships include . . . ongoing business relationships between officers and enlisted personnel, or NCOs and junior enlisted Soldiers such as commercial solicitation, and any other type of ongoing financial or business relationship.<sup>136</sup>

In the case of Army National Guard or Army Reserve personnel, this prohibition does not apply to relationships that exist due to civilian occupation or employment.<sup>137</sup> Although the Command Policy prohibition on solicitation appears to include the marketing structures servicemembers use on social media platforms, a scan of common social media practices suggests that the prohibition is not enforced as such.

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<sup>133</sup> The heading also suggests that it governs content "characterized by or conforming to the technical or ethical standards of a profession." *Professional*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/professional> [https://perma.cc/HB4S-4HJ9].

<sup>134</sup> See 5 C.F.R. 2635.101 *et seq.*; DOD 5500.07, *supra* note 28. This is not to suggest that a subordinate-level policy must restate *all* applicable directives from binding higher authorities in order to avoid supplanting (or the appearance of supplanting or pre-empting) higher authority on a matter. For example, ALARACT 061/2019 need not restate the entirety of 10 U.S.C. § 917(a) (1956) to avoid supplanting it merely because conduct capable of violating the latter might also fall within the ambit of the former. 10 U.S.C. § 917(a) (1956) [hereinafter Art. 117a]. Perfect nesting and cross-referencing of all applicable instructions and directives at all times would require Herculean efforts, not only on behalf of subordinate commanders drafting and issuing policies, but also on behalf of soldiers attempting to comprehend and internalize high volumes of the same. Moreover, such an effort would inherently reduce a commander's ability to add emphasis where deemed appropriate. See, e.g., NotBenedictArnold, *Battalion commander's list of number one priorities hits 50*, DUFFEL BLOG (2017), <https://www.duffelblog.com/2017/06/battalion-commander-priorities/> [https://perma.cc/NH64-JABF].

<sup>135</sup> ALARACT 061/2019 purports to conclusively govern "*professionalization* of online conduct." It encourages "tell[ing] the Army story." Although the Instruction narrowly addresses specific acts that might "undermine dignity and respect," it also purports to govern any "online-related incident[s]," defined as those "reported cases of online misconduct" for which "an electronic communication is used as the primary means for committing [sic] misconduct [sic]." ALARACT 061/2019, *supra* note 124. Despite its seemingly conclusive breadth, ALARACT 061/2019 governs only a narrow swath of impermissible online misconduct. To the contrary, it would be hard to imagine any online conduct afoul of the Joint Ethics Regulation's prohibition on official endorsement of non-federal entities or use of public office for private gain that would not also constitute "unprofessional" online conduct in the lay sense of the word. However, ALARACT 061/2019's proscribed online "misconduct" is far narrower, unless such conduct might also be considered to have undermined "dignity and respect." *Id.*

<sup>136</sup> Army Command Policy, *supra* note 132.

<sup>137</sup> See Army Command Policy, *supra* note 132.

## 2. Army Guidance for Official Social Media Includes Unclear Mandates That Are Broadly Disregarded

The Army Social Media website references White House guidance from 2016 regarding disposition of official social media accounts by Executive Branch agencies.<sup>138</sup> This guidance governs social media accounts which are “created and maintained using federal government resources,” including the official time of federal employees, “to communicate about the work of the [unit or position]. Because employees create and maintain official accounts for official purposes and use official resources, they are the property of the federal government and not of any individual employee.”<sup>139</sup> Whether intended or not, this guidance conjoins the entity creating and maintaining an account with the narrow purpose of communicating about the work of that entity. No other aspects of Army Policy make reference to this description of an official social media account, which suggests that it applies only to a narrow category of media and only for the limited purpose of account archiving and disposal.

The Army Social Media website also provides a link to the Secretary of the Army’s directive that “Commanders of Army Commands” approve External Official Presences, with redelegation explicitly authorized to “subordinate general officer[s].”<sup>140</sup> Several conditions attach to redelegation, including that it be in writing and that it be determined not legally objectionable by the servicing judge advocate or legal counsel. Under this structure, command approval is essential to the determination that an account is “official,” and the full spectrum of rights afforded such a user flow from that. These include the right to use Department manpower, money, time, cameras, or other necessary instruments in order to support the creation and ongoing operation of the account. These rights bring the duty to prevent any appearance of endorsement of non-federal entities. Despite this guidance, social media accounts representing Army units and official positions more often than not fail to obtain proper approval and judge advocate review.<sup>141</sup>

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<sup>138</sup> See WHITE HOUSE, WHITE HOUSE MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, DISPOSITION OF OFFICIAL SOCIAL MEDIA ACCOUNTS (2016), [https://www.army.mil/e2/downloads/rv7/socialmedia/memo\\_to\\_agencies\\_re\\_social\\_media\\_accounts\\_103116.pdf](https://www.army.mil/e2/downloads/rv7/socialmedia/memo_to_agencies_re_social_media_accounts_103116.pdf) [https://perma.cc/XB3A-25EW].

<sup>139</sup> *Id.*

<sup>140</sup> U.S. ARMY, DELEGATION OF AUTHORITY - APPROVAL OF EXTERNAL OFFICIAL PRESENCES (Dec. 2, 2013), <https://www.slideshare.net/USArmySocialMedia/delegation-of-authority-social-media-use> [https://perma.cc/HYK9-6C8Y]. As of January 1, 2019, DoDI 8550.01 remains posted on the Army Social Media: Policies and Resources page. ARMY SOCIAL MEDIA: POLICIES AND RESOURCES, *supra* note 122. This is even though it has been superseded. DoDI 8170.01, *supra* note 36. This delegation was set to expire on December 2, 2016. However, because it remains an active reference on the Army Social Media Handbook, soldiers may be justified in relying on it and this author assumes its continued validity unless otherwise revoked, modified, or superseded. This assumption is justified by the fact that were the delegation to sunset or otherwise render ineffective, no authority to approve establishment of External Official Presences would convey below the level prescribed by DoDI 8170.01. This instruction also appears to preclude delegation of authority below the general officer level.

<sup>141</sup> This assessment stems from a review of several echelons at which official social media accounts are ubiquitous, including individual Army recruiters, recruiting stations, and cadet companies at the U.S. Military Academy. Although the Army does not provide an updated public-facing list of approved official accounts, the frequency with which impropriety and abuse appear suggest that ongoing command approval and judge advocate review are far from the owner-operator’s mind in most cases. For comparison, the Air Force provides a public-facing list of approved official social media entities, but the list is far from comprehensive. See U.S. AIR FORCE, SOCIAL MEDIA DIRECTORY (Feb. 29, 2020), <https://www.af.mil/AF-Sites/Social-Media-Sites/> [https://perma.cc/7Z5C-8U6P].

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

[D]elegated release authority is from the commander. Social media managers are not authorized to speak on behalf of the unit, the commander or the Army without delegated release authority. The commander’s release authority is usually equal to his or her authority in other matters. Just because a commander has command and control of his installation in such matters as personnel, housing and operations, it [sic] doesn’t always mean he is authorized to release information about events that happen on or near his installation.<sup>142</sup>

The Army Social Media Handbook misstates, without signature of authority, the appropriate echelon at which EOPs may be approved in accordance with DOD Instruction 8170.01. The Handbook further instructs that servicemembers without “release authority can . . . still have [sic] . . . official social media platform[s].”<sup>143</sup> “However, it [sic] must be approved by the commander [sic] and . . . must follow . . . Army requirements.”<sup>144</sup> The most generous reading of the Army Social Media Handbook would entail reviewing DOD Instruction 8170.01, and ignoring all other guidance contained in the handbook.

Because servicemembers seeking a clear articulation of Army social media policy instead find inactive references and circular instructions, some will invariably conclude (and others already have) that social media constitutes an opportunistic medium for private gain. Where military officers, including some commanders, run public-facing commercial ventures on the shoulders of their status as servicemembers, the likelihood of misunderstanding compounds.<sup>145</sup> The net effect is an incoherent public-facing policy that actively undercuts federal ethics rules by purporting to implement them.

C. *OGE “Clarifies” the Standards as Applied to “Personal” Social Media but Without Addressing the Social Media Influencer Market*

In response to an “increase in inquiries” pertaining to the applicability of Standards of Ethical Conduct, the OGE issued an advisory opinion on the matter.<sup>146</sup> On the issue of “whether a reference to an employee’s official title or position on social media violates the Standards of

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<sup>142</sup> ARMY SOCIAL MEDIA: POLICIES AND RESOURCES, *supra* note 122 (responding to the Frequently Asked Question “What is a release authority?”).

<sup>143</sup> ARMY SOCIAL MEDIA: POLICIES AND RESOURCES, *supra* note 122.

<sup>144</sup> ARMY SOCIAL MEDIA: POLICIES AND RESOURCES, *supra* note 122.

<sup>145</sup> See Appendix A, at A4, A5, A6, A16, A18.

<sup>146</sup> Although the Ethics in Government Act directs OGE to both develop and interpret rules governing conflicts of interest and ethical problems, such authority is vested in the Office’s director. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code). Thus, the 2015 legal advisory opinion does not bind DoD. See also OFFICE OF GOVERNMENT ETHICS, LEGAL ADVISORY LA-15-03, THE STANDARDS OF CONDUCT AS APPLIED TO PERSONAL SOCIAL MEDIA USE (Apr. 9, 2015), [https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBF13/\\$FILE/LA-15-03-2.pdf](https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBF13/$FILE/LA-15-03-2.pdf) [https://perma.cc/YDS6-3WHZ].

Conduct,” the OGE general counsel opined that agency officials should consider, from the perspective of a reasonable observer:

Whether the employee states that he or she is acting on behalf of the government;

Whether the employee refers to his or her connection to the government as support for the employee’s statements;

Whether the employee prominently features his or her agency’s name, seal, uniform or similar items on the employee’s social media account or in connection with specific social media activities;

Whether the employee refers to his or her government employment, title, or position in areas other than those designated for biographical information; [and]

Whether the employee holds a highly visible position in the Government, such as a senior or political position, or is authorized to speak for the Government as part of the employee’s official duties[.]<sup>147</sup>

Although the opinion fails to address the interpretative challenges posed by the public office for private gain provision, its elaboration on non-endorsement is helpful. In particular, its carving-out of areas “designated for biographical information” reflects an understanding that an employee’s self-identification with rank and service history on a platform like LinkedIn is far less likely to promote misuse than similar conduct on platforms like Instagram, YouTube, OnlyFans, or GoFundMe. Furthermore, the opinion advises agency officials to consider whether an agency’s “name” or “uniform” is “prominently featured” when determining whether the Standards have been violated, premised on a belief that the wearing of an official uniform carries with it a presumption of official activity.

However, the OGE opinion proceeds to create confusion about how employees can disavow the appearance of government endorsement on their personal social media accounts. The opinion declares:

Ordinarily, an employee is not required to post a disclaimer disavowing government sanction or endorsement on the employee’s personal social media account. Where confusion or doubt is likely to arise regarding the personal nature of social media activities, employees are encouraged to include a disclaimer clarifying that their social media communications reflect only their personal views and do not necessarily represent the views of their agency or the United States. A clear and conspicuous disclaimer will usually be sufficient to dispel any confusion that arises.<sup>148</sup>

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<sup>147</sup> *Id.* Additional considerations pertaining to appearance of official sanction or endorsement are omitted.

<sup>148</sup> OFFICE OF GOVERNMENT ETHICS, LEGAL ADVISORY LA-15-03, THE STANDARDS OF CONDUCT AS APPLIED TO PERSONAL SOCIAL MEDIA USE (Apr. 9, 2015), [https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/\\$FILE/LA-15-03-2.pdf](https://www.oge.gov/web/oge.nsf/0/16D5B5EB7E5DE11A85257E96005FBBF13/$FILE/LA-15-03-2.pdf) [https://perma.cc/YDS6-3WHZ].

This assertion overlooks two complementary axioms: that actions speak louder than words, and that a picture is worth a thousand words. Although the OGE opinion acknowledges that a disclaimer may not always cure the inference of official sanction, such disclaimers appear regularly in two areas where they are unlikely to have a curative effect. First, disclaimers may appear where an official account's federal affiliation is clear, and such a disclaimer actually misstates the nature of the account.<sup>149</sup> Second, and more problematically, disclaimers appear on many mixed personal- and professional-use accounts, indicating the account manager's flawed belief that such a disclaimer renders their content private.<sup>150</sup> Furthermore, disclaimers do not alleviate the nexus between a servicemember's public office and their private gain through social media platforms; if anything, they may amplify the connection.

The OGE opinion adds a final disclaimer of its own, noting that “[a]gency supplemental regulations may place further limitations on employees’ use of title or position, or may impose additional requirements such as mandating the use of a disclaimer.”<sup>151</sup>

With DOD guidance from multiple department-level staff proponents urging conduct in accordance with overlapping and ambiguous ethics regulations, commanders and judge advocates face a convoluted regulatory regime. Additionally, subordinate instructions undercut superior regulations with *lex specialis* provisions, even while directing adherence to the superior regulations. Army commanders face further confusion with outdated policies purporting to govern the issue. Finally, OGE's non-binding advisory opinion on the matter suggests that use of public office for private gain only occurs when federal agency endorsement may be inferred.

The regulatory space governing military social media influencers is not simply confusing—it fosters anarchy and rewards opportunism. It has enabled the rapid proliferation of “public servants” who contradictorily serve both public and personal, commercial interests. It fails to ensure that public service retains public trust. Participants in this industry will continue to leverage public office for pecuniary gain, and the problem will only become more challenging to correct unless and until the DOD tailors its policy to address the narrow issue of modern social media “content creator” business models.

### III. RECOMMENDATIONS FOR THE DEPARTMENT OF DEFENSE

An inherent tension exists between the curated brand image that departments might wish to promote and the authenticity of a servicemember's independent perspective on the military. As a result, when a servicemember provides an independent message, that content carries authenticity that likely draws increased attention. The question is, how should the prohibition on use of public office for private gain be applied to servicemembers' social media activity?

DOD should make two critical changes to its current policies. First, DOD should either promulgate a uniform and superseding regulation that addresses the conduct in question or rescind the instructions currently in force that undermine the Standards of Ethical Conduct. Second, DOD should harmonize its new regulation (or the Standards of Ethical Conduct) with its recruiting and

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<sup>149</sup> See Appendix A, at A14.

<sup>150</sup> See Appendix A, at A9a-b, A10.

<sup>151</sup> OFFICE OF GOVERNMENT ETHICS, *supra* note 146.

retention functions and policies. This could primarily be accomplished by expanding eligibility for recruiter bonus pay to servicemember social media influencers, where appropriate, to account for their ineligibility to receive private profits, as well as through recognition in performance evaluations and reassignment to public affairs roles.

A. *DOD Policy Must Reflect Federal Ethics Regulations*

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

The Secretary of Defense should also issue a directive that clearly proscribes the receipt of compensation from any non-federal entity in exchange for a service that relates in any way to a servicemember's service-connected identity or persona. The definition of "compensation" must address in particular affiliate marketing structures, remuneration flowing through a digital social media provider, and any promotion of any products or services for which the servicemember stands to receive a financial benefit, or any non-monetary benefit such as free products or services.<sup>152</sup> A servicemember's service-connected persona should be defined to include any image or writing conveying that servicemember's military affiliation, or that might lead to an inference of such an affiliation.

More restrictive options are also available. If the Secretary assesses that it is necessary to maintain the integrity of the service,<sup>153</sup> he could go so far as to create a presumption that a servicemember's participation in any business consisting of or augmented by a digital social media presence is impermissible.<sup>154</sup> Only when a servicemember could demonstrate that no reasonable observer could draw a link between that servicemember's status on active duty and the commercial undertaking could they accept compensation from a non-federal entity. Such a policy would also benefit from expanding the applicability of the Standards of Ethical Conduct to servicemembers, who are assigned to reserve components, to promote fairness and uniform enforcement.<sup>155</sup>

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

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<sup>152</sup> For a convenient diagram of remuneration "flowing through a digital social media provider," consider Alexander's diagram. *See* Appendix A, at A1.

<sup>153</sup> Insofar as the First Amendment limits the government's ability to restrain or chill speech or expressive conduct, the policy must bear a clear nexus between what is prevented and the integrity and efficiency of the Armed Forces. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 471-72 (1995); *Wolfe v. Barnhart*, 446 F.3d 1096, 1106 (10th Cir. 2006).

<sup>154</sup> This would tend to defeat the pattern charted in Appendix B, in which servicemembers acquire influence and convert it to personal financial gain, iteratively obscuring the link between service-connected content and profit to prevent enforcement. *See* Appendix B.

<sup>155</sup> *See, e.g.*, Appendix A, at A7.

B. *In Lieu of Non-Federal Compensation, DOD May Seek to Enhance and Expand “Recruiter Pay” and Other Federal Incentives for Servicemember Content Creators*

DOD has substantial recruiting needs that benefit from its servicemembers telling their authentic stories.<sup>156</sup> Having recognized this, DOD has shifted recruiting budgets to favor digital marketing, where such stories can be widely shared.<sup>157</sup> The Army Recruiting Command (USAREC) has encouraged leveraging social media platforms to effectively engage recruits and potential recruits,<sup>158</sup> including a call for “all Army personnel” to support the Army’s recruiting mission through social media engagement and amplification.<sup>159</sup> Recruiters in brick-and-mortar recruiting stations may no longer be the most important promoters of the military occupation, as digital content shapes potential recruits’ perceptions before they contact their local recruiter.<sup>160</sup> In light of this trend, it would likely be cost-effective for DOD to encourage and amplify the premier content that many servicemembers independently create, rather than curtail it.

Although many servicemembers’ independent social media ventures are ripe for leveraging in this way, they regularly fail to adhere to federal ethics regulations.<sup>161</sup> The Secretary of Defense should adopt a strategy to leverage servicemember content creators with proven influence without running afoul of ethics regulations. This strategy should avoid excessively inhibiting the authenticity of servicemembers’ stories while also authorizing permissible incentives to

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<sup>156</sup> See, e.g., Corey Dickstein, *Military recruiting takes a digital turn during the pandemic*, STARS AND STRIPES (2020), <https://www.stripes.com/news/military-recruiting-takes-a-digital-turn-during-the-pandemic-1.629727> [https://perma.cc/X855-4SUK] (discussing recruiting efforts through social media); Corey Dickstein, *Army misses 2018 recruiting goal, which hasn't happened since 2005*, STARS AND STRIPES (2018), <https://www.stripes.com/news/army/army-misses-2018-recruiting-goal-which-hasn-t-happened-since-2005-1.548580> [https://perma.cc/ZK6W-LYB5] (describing the Army’s first failure to meet its recruiting target since 2005).

<sup>157</sup> See Thomas Brading, *Digital technology helping Army exceed 2020 recruitment goals*, ARMY NEWS SERVICE (2020), <https://www.army.mil/article/232940/digital-technology-helping-army-exceed-2020-recruitment-goals> [https://perma.cc/EH2F-NLSS].

<sup>158</sup> Consider also the statement of former Secretary of Defense James Mattis, describing his days as a recruiter in the U.S. Marine Corps:

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

*James Mattis Talks with Michael Morell*, CBS NEWS (Oct. 23, 2019), <https://www.cbsnews.com/news/transcript-james-mattis-talks-with-michael-morell-on-intelligence-matters> [https://perma.cc/5NRR-3DXG].

<sup>159</sup> Sean Kimmons, *All Army personnel, veterans asked to be recruiters next week*, ARMY NEWS SERVICE (June 24, 2020), <https://www.army.mil/article/236719/all-army-personnel-veterans-asked-to-be-recruiters-next-week> [https://perma.cc/6R26-W3QL].

<sup>160</sup> See *The New Digital Divide*, DELOITTE, <https://www2.deloitte.com/us/en/pages/consumer-business/articles/the-new-digital-divide-retail-sales-influence.html> [https://perma.cc/Z4KP-23NY] (charting the extent to which digital influence touches retail sales, including a prediction that the fraction in 2012 would be less than one-fifth of the same figure in 2020).

<sup>161</sup> Recall that the extension of federal ethics regulations to enlisted members of the armed forces was promulgated at the level of DoD. This expansion could be reduced, but the preclusions affecting officers would remain. In any event, many of the entities violating federal ethics rules are military officers. See Appendix A, at A4, A5, A6, A16, A18.

compensate for foregone commercial revenues. Moreover, such a strategy should disrupt the current uneven and unfair enforcement pattern so that all servicemembers are subject to the same restrictions and stand to gain the same authorized compensation.

To accomplish this, DOD should expand eligibility for recruiting incentive pay. Army Recruiters are authorized special duty assignment pay, with additional pay incentives upon completion of an initial training period.<sup>162</sup> Other branches offer similar bonuses for servicemembers assigned to recruiting roles. In light of the benefit that servicemember content creators can provide to recruiting messages, the Secretary of Defense should direct that servicemembers with demonstrated ability or potential in the field of social media influence be prioritized for assignment to recruiting units and authorized special duty assignment pay.<sup>163</sup> The Secretary might also direct that recruiting bonuses be authorized even when servicemembers are not specifically assigned to recruiting units, but provide vital recruiting functions. Because the pay incentive comes from the federal government, private conflicts of interest are a non-issue. Furthermore, this strategy benefits from a preexisting framework for implementation, including prior approval of its funding mechanism.

Public affairs channels might naturally be directed to oversee this effort and develop measurable qualifying criteria for servicemembers seeking pay incentives. These criteria should include, at a minimum, a requirement that servicemembers who apply or recertify for a special recruiting bonus sign an affidavit stating that they have neither accepted nor benefitted from any compensation provided by a non-federal entity related to their social media influence. Servicemembers accepting incentive pay must be required to submit their social media accounts to official audit and agree not to carry out any social media activity not subjected to such audit. An initial grace period would allow for servicemembers who previously accepted compensation to remain eligible, while also incentivizing divestiture of their accounts from non-federal sponsorship. These standards should be capable of evolving with trends in social media use, and should reflect a rough approximation of private market compensation.

Although incentives should correspond with non-federal incentives across different media platforms, a discount against private market compensation rates would be appropriate, as servicemembers currently profiting from their image and likeness are operating in a black market. They are also not similarly situated to social media influencers in the broader civilian market; their content benefits not only from their private personas, but also from the respect and credibility they are afforded as a result of their military affiliation. Last, servicemember content creators arguably already act within the purview of their employment. The Army charges officers with extending influence beyond the chain of command as part of their ordinary duties, for which no special or added compensation is due.<sup>164</sup> In the Marine Corps, all “sergeants and above” are to be evaluated based on their ability to “inspire” and “influence” persons they are not tasked with leading

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<sup>162</sup> See All Army Activities Message, 043/2019, U.S. Dep’t of Army, subject: Special Duty Assignment Pay (SDAP) Review and Recertification Guidance.

<sup>163</sup> 37 U.S.C. 307a (special pay authority). See also DEP’T OF DEF., SPECIAL AND INCENTIVE PAY (June 30, 2020), <https://militarypay.defense.gov/Pay/Special-and-Incentive-Pays/> [https://perma.cc/4CWZ-W5D4].

<sup>164</sup> See DEP’T OF THE ARMY, ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION (July 31, 2019).



directly.<sup>165</sup> If servicemembers who would stand to receive lesser payouts leave the military to realize the full value of their private business, their commitment likely fell shy of that required for continued service in the first instance.

One shortcoming of reassigning social media influencers to recruiting units lies in the potential for such reassignments to undermine the authenticity of those servicemembers' messages. However, this detriment would be offset in part by the expanded access that content creators would enjoy. Much of the most sought-after content drawing from privileged access and unique knowledge would be available for official DOD publication without violating ethics rules. Additionally, where servicemember content creators previously had to obscure the link between service-related content and their private for-profit accounts, the two could now merge. Last, it may not be the case that servicemembers' authentic messages further a military department's best interests in all instances.<sup>166</sup>

In addition to pay incentives, servicemembers should be rewarded and positively evaluated in recognition of their contributions to recruiting, retention, and training efforts through independent social media activity. Evaluation of this nature may be inherent where servicemembers are assigned to recruiting or retention roles, but a lack of acceptance of social media as a recruiting tool results in a lack of recognition for those in non-recruiting positions.<sup>167</sup> In no event should positive evaluations flow from impermissible for-profit social media accounts. Although the Army already recognizes "extend[ing] influence beyond the chain of command" as fundamental to effective leadership,<sup>168</sup> it may take time for non-recruiting occupations to embrace social media as a sanctioned means of achieving this aim. Nonetheless, the status quo enables increasingly flagrant and widespread violations of federal ethics regulations, which will continue unless and until effective corrections are made.

The Army's advertising budget is approximately \$400M annually.<sup>169</sup> The Army's YouTube channel typically generates several thousand views per video, and has reached one million views of a single video only twice.<sup>170</sup> In contrast, Alexander's YouTube channel garners hundreds of thousands of views per video, often more. One video alone garnered eight million

<sup>165</sup> DEP'T OF THE NAVY, DEMCO 1610.7, PERFORMANCE EVALUATION SYSTEM (Feb. 13, 2015), <https://www.marines.mil/Portals/1/Publications/MCO%201610.7.pdf> [https://perma.cc/K63A-BDSH].

<sup>166</sup> Consider the example of one Army officer who told an unmistakably anti-Semitic joke to his three million followers on TikTok. See Haley Britzky, *Army lieutenant gets lost trying to navigate human decency after joking about the Holocaust on TikTok*, TASK AND PURPOSE (Aug 31, 2020), <https://taskandpurpose.com/news/army-lieutenant-tiktok-holocaust-joke> [https://perma.cc/T63S-WNEK].

<sup>167</sup> See Kellie Rene Hall, *Missunderstood*, LISTEN NOTES, <https://www.listennotes.com/podcasts/missunderstood-with-kellie-rene-hall-kellie-Zn3CO4YgmSH/> [https://perma.cc/L4EF-929Z]. (discussing how, in 2015, senior Navy leaders rebuked the idea of diverting resources to recruit through social media).

<sup>168</sup> DEP'T OF THE ARMY, ADP 6-22, *supra* note 164.

<sup>169</sup> See Patrick Coffee, *E-Sports, Comic-Con and 'Momfluencers: How the U.S. Army is revamping its multi-billion dollar marketing plan*, BUSINESS INSIDER (Oct. 12, 2019), <https://www.businessinsider.com/us-army-marketing-esports-comiccon-momfluencers-2019-10#:~:text=Esports%2C%20Comic%2DCon%2C%20and,multi%2Dbillion%2Ddollar%20marketing%20plan&text=The%20US%20Army%20has%20struggled.advertising%20budget%20in%20recent%20years> [https://perma.cc/QU5W-27ZW].

<sup>170</sup> See U.S. Army, YOUTUBE (June 30, 2020), <https://www.youtube.com/user/usarmy> [https://perma.cc/VK76-T67E].

views, or eight times as many as the Army official YouTube account's most-watched video. Alexander has far exceeded the number of the Army's followers and viewers on a comparatively shoestring budget. DOD has an asymmetric recruiting opportunity to leverage servicemember content creators.

As military departments increasingly leverage digital social media and the social media activity of servicemembers, ethics obligations must be reiterated at every stage of program development. Anything less will perpetuate the public-facing trend of abuse. For example, the Army's esports team premiered in the online gaming community in 2019.<sup>171</sup> Within one year, a team member had already leveraged his official platform to direct his thousands of followers to a for-profit Twitch stream, as well as to his own merchandise store.<sup>172</sup> The merchandise store features apparel with a cartoon depiction of the servicemember, who holds himself out as a noncommissioned officer and Green Beret, drinking alcohol with a junior enlisted soldier while wearing his Army uniform.<sup>173</sup> Other products include shirts adorned with "JUST DON'T BE A FUCKIN [sic] BITCH" and "I (heart symbol) Hot Moms."<sup>174</sup> The same noncommissioned officer also solicits and has received several cash donations from viewers of his gameplay through Facebook gaming.<sup>175</sup> Again, service departments may contend with whether certain authentic messages further a federal mission, but commanders should at least establish a baseline that official positions cannot be leveraged for private gain.

Alexander's recounting of the official investigation into his social media conduct illustrates that even high-profile ethics violations are consciously and deliberately accepted or even celebrated. The conclusion here does not require an assessment of the merits of Alexander's individual case; if misconduct was ignored in light of competing priorities, that decision should be a bellwether for DOD to properly enforce use of public office for private gain prohibitions.<sup>176</sup> The course of action proposed herein seeks to incentivize servicemember content creation while eradicating conflicts of interest that undermine servicemembers' duties of loyalty. Maintaining the status quo will render that outcome increasingly elusive.

## CONCLUSION

Servicemembers who accept compensation from non-federal entities for military-related social media influence violate federal regulations. However, a morass of DOD policies that purport to govern social media ethics obscures that federal rule and has resulted in a landscape in which dozens, if not hundreds, of servicemembers violate the rule in plain sight. These incoherent and inconsistent DOD policies have resulted in a lack of uniformity in interpretation and enforcement,

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<sup>171</sup> See Sean Simmons. *Thousands apply to join new Army esports Team*, ARMY.MIL (January 25, 2019), <https://recruiting.army.mil/News/Article/1740292/thousands-apply-to-join-new-army-esports-team/> [<https://perma.cc/JZV2-HYHL>].

<sup>172</sup> See Joshua David (@strotnium), INSTAGRAM, <https://www.instagram.com/strotnium/?hl=en>.

<sup>173</sup> Recall the allegedly unenforced prohibitions of Army Command Policy, *supra* note 132, governing commercial relationships between servicemembers of different ranks.

<sup>174</sup> Strontnium Store, <https://strotnium2.com/merch> [<https://perma.cc/3BEA-GVMC>].

<sup>175</sup> See Joshua David (@strotnium), FACEBOOK, <https://www.facebook.com/gaming/strotnium>.

<sup>176</sup> Or, at a minimum, another possibility would be to roll back its own extension of that provision to enlisted members of the Armed Forces. Rescission would solve the cynicism problem that flows from disparate enforcement of ethics rules to otherwise similarly-situated content creators because all commercial content creation would be permissible.

which in turn fosters perceived unfairness among servicemember content creators. Additionally, the integrity and competence of the military suffers when servicemembers openly leverage their public office to further private business ventures.

DOD currently lacks the authority to permit federal employees to use public office for private gain. Therefore, the Secretary of Defense should rescind or modify subordinate policies inconsistent with DoD's ethics requirements. This should be done without inhibiting recruiting and retention programs. Furthermore, opportunities exist to leverage prominent servicemember social media influencers in furtherance of strategic communications efforts, while providing such servicemembers with appropriate and ethical financial incentives for their influence.

## APPENDIX A: SERVICEMEMBER SOCIAL MEDIA EXHIBITS<sup>177</sup>

A1. Austen Alexander, Why I Was Investigated by the Navy (not clickbait), YOUTUBE<sup>178</sup>

The screenshot shows a YouTube video player. The video title is "Why I Was Investigated by the Navy (not clickbait)" and it has 82,186 views as of Nov 10, 2019. The video content shows a man in a grey hoodie pointing to a whiteboard. The whiteboard has two diagrams. The top diagram shows a stick figure labeled "YouTuber" with an arrow pointing to a box containing a play button icon, a bottle, and a dollar sign. The bottom diagram shows a stick figure with an arrow pointing to a box containing a play button icon, which then has an arrow pointing to a dollar sign. A calendar is visible on the table in front of the whiteboard.

<sup>177</sup> This supplement is not intended to identify or otherwise indict culpable servicemembers, but rather to illustrate specific activities which could *potentially* give rise to violations of 10 U.S.C. § 892. Some servicemembers referenced herein may not be subject to the Uniform Code of Military Justice or the ethics provisions discussed in text. All screen captures occurred between November 23, 2019 and August 4, 2020. All notes and annotations reflect the author's perception of conduct described, and do not necessarily reflect the intent of the featured servicemember or servicemembers. Graphics have been added for emphasis. In some cases, identities have been obscured.

<sup>178</sup> Servicemember and "YouTuber" diagrams the attenuation between service-related content creation, internet-based capabilities providers (social media), and cash flow from third parties. Alexander, *supra* note 2.

A2. *Austen Alexander, How Much Money I Make Per Month from YouTube, YOUTUBE*<sup>179</sup>

The screenshot shows a YouTube video player. The video content is a payment receipt from Google LLC. The receipt includes the following information:

**Google LLC**  
1600 Amphitheatre Pkwy  
Mountain View, CA 94043  
United States

**Payment date**  
**Billing ID**  
**Payment method**  
**Payment number**

Description	
Payment amount	\$5,010.80

The video player shows a progress bar at 6:14 / 11:36. The video title is "How Much Money I Make Per Month from YouTube" with 43,197 views and a date of Oct 20, 2019. The video has 2.2K likes and 21 dislikes. The video player also shows a thumbnail of a man sitting at a desk with a laptop and a monitor.

<sup>179</sup> Servicemember publishes a report of his revenue from YouTube while promoting a dietary supplement brand. Alexander, *supra* note 4.

A3a. DJ/Producer, INSTAGRAM<sup>180</sup>

The image shows a screenshot of an Instagram profile and a post. The profile is for 'DJ/Producer' with 503 posts, 11.2K followers, and 5,006 following. The bio includes 'Musician/Band', '-DJ and Producer.', '-DC / NYC Resident DJ.', and '<1> RLTW - @titan\_performance\_llc Sponsored Athlete www.soundcloud.com/blastriot'. The post is from 'Arlington National Cemetery' showing soldiers in uniform. The caption reads: 'Proud of these Soldiers who always put forth great effort to honor our Country. This was a Dignified Transfer at Reagan Airport #ArlingtonNationalCemetery #dignifiedtransfer #USArmy #USA #AmericanFlag #Soldier'. The post has 3,016 likes and 64 comments.

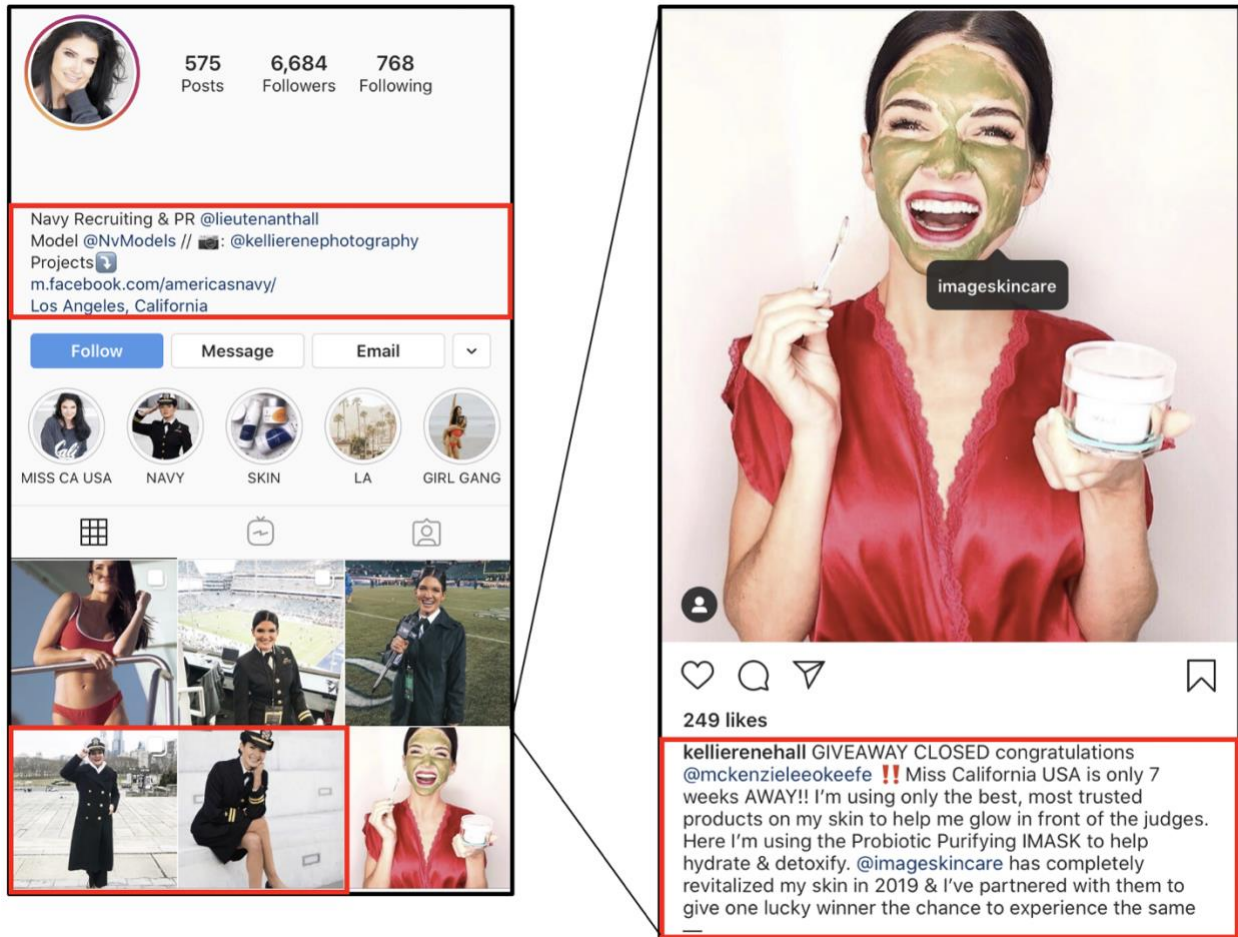
<sup>180</sup> Old Guard soldier promotes his private business with content pertaining to his federal job. The user's handle has been removed for the purposes of this article. DJ and Producer, INSTAGRAM.

A3b. *Submitted Everest* – USAT National Bestselling Author, INSTAGRAM<sup>181</sup>

The image shows a screenshot of an Instagram profile and a post. The profile, 'Submitted Everest', is a verified account with 115 posts, 62.3k followers, and 634 following. The bio identifies the author as a 'USAT National Bestselling Author' and promotes a new book, 'A Higher Calling'. A red box highlights the bio text. Below the bio, an 'About the Author' section states that the author is a 'Captain' and 'is an active-duty Army officer currently serving as the Commander of the Guard at the Tomb of the Unknown Soldier.' To the right, a post from the 'Tomb Of The Unknown Soldier' account features a photo of a soldier in uniform and a caption describing the significance of the tomb. Below this, another post shows a group of soldiers in uniform saluting, with a caption describing the 'Dignified Transfer of Spc. Antonio Moore' and including hashtags like #neverforget, #arlingtonnationalcemetery, #Old Guard, and #memorialday.

<sup>181</sup> Old Guard officer publishes a book in his capacity as an active duty Army officer and promotes that book with DoD Visual Imagery. Personal handles have been removed. Submitted Everest – USAT National Bestselling Author, INSTAGRAM.

A4. Kellie Hall, INSTAGRAM<sup>182</sup>



<sup>182</sup> Navy recruiter “partner[s] with” makeup brand “@imageskincare.” This post was removed by the user shortly after it was created, adhering to a *modus operandi* in which influencers obscure profit-seeking content in order to benefit while evading enforcement of ethics rules. Kellie Hall (@kellierenehall), INSTAGRAM, <https://www.instagram.com/kellierenehall/>. This recruiter maintains a professional recruiting account as well. See Kellie Hall (@lieutenanthall), *supra* note 85.



A5. @curves.n.combatboots, Happy Saturday!, INSTAGRAM<sup>183</sup>

outdoors\_

outdoors\_

259 Posts 30.3K Followers 2,075 Following

→23-NJ-TN-CO-AL→ 🌻

Just a normal girl who happens to love the great outdoors. Proud to represent @elk\_river\_outfitters, @vsa\_usa & @gruntstyle !  
sfm.gruntstyle.com/ninaoutdoors

12,756 likes

curves.n.combatboots Happy Saturday! Here's the gorgeous @ outdoors\_ of the #USAF

Hey y'all, name's  
I'm 23 years old & I'm a 2LT in the Air Force. Daddy is my best friend and he was in the Army for 21 years. I decided it was my turn to serve my country. He wouldn't let me go Army. He said "Army sucks, Air Force treats ya better and there's only 2 ways to die in the Navy...you burn to death or drown to death." I then went to the Air Force Academy to start my dream of protecting this great nation! God bless America!

elk\_river\_outfitters

gruntstyle\_outdoors

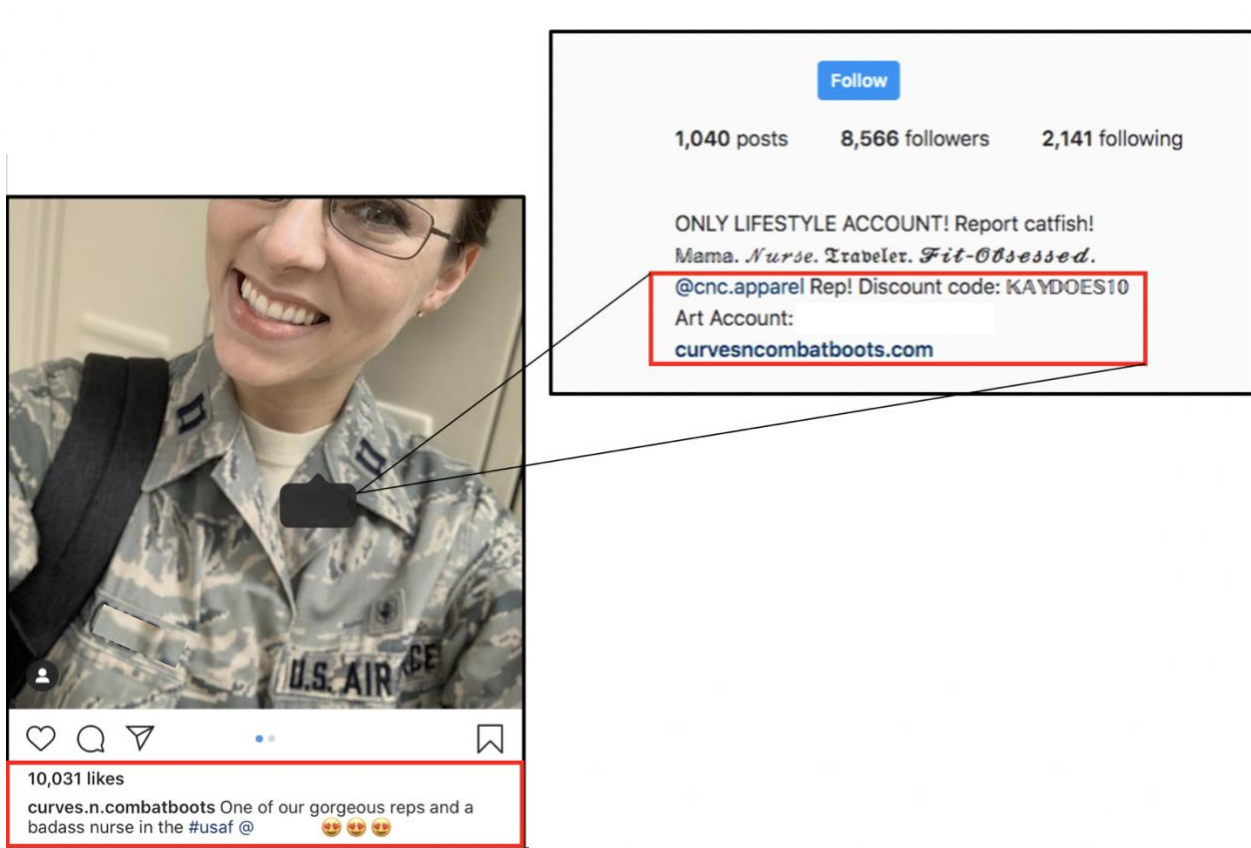
outdoors\_ • Follow  
Elk River Outfitters

outdoors\_ Nothing beats watching the sunset in the Arkansas skies after a beautiful day of duck hunting. 🦆

Book your hunts for next duck season in Arkansas with my buddies at @elk\_river\_outfitters ! Y'all won't regret it.

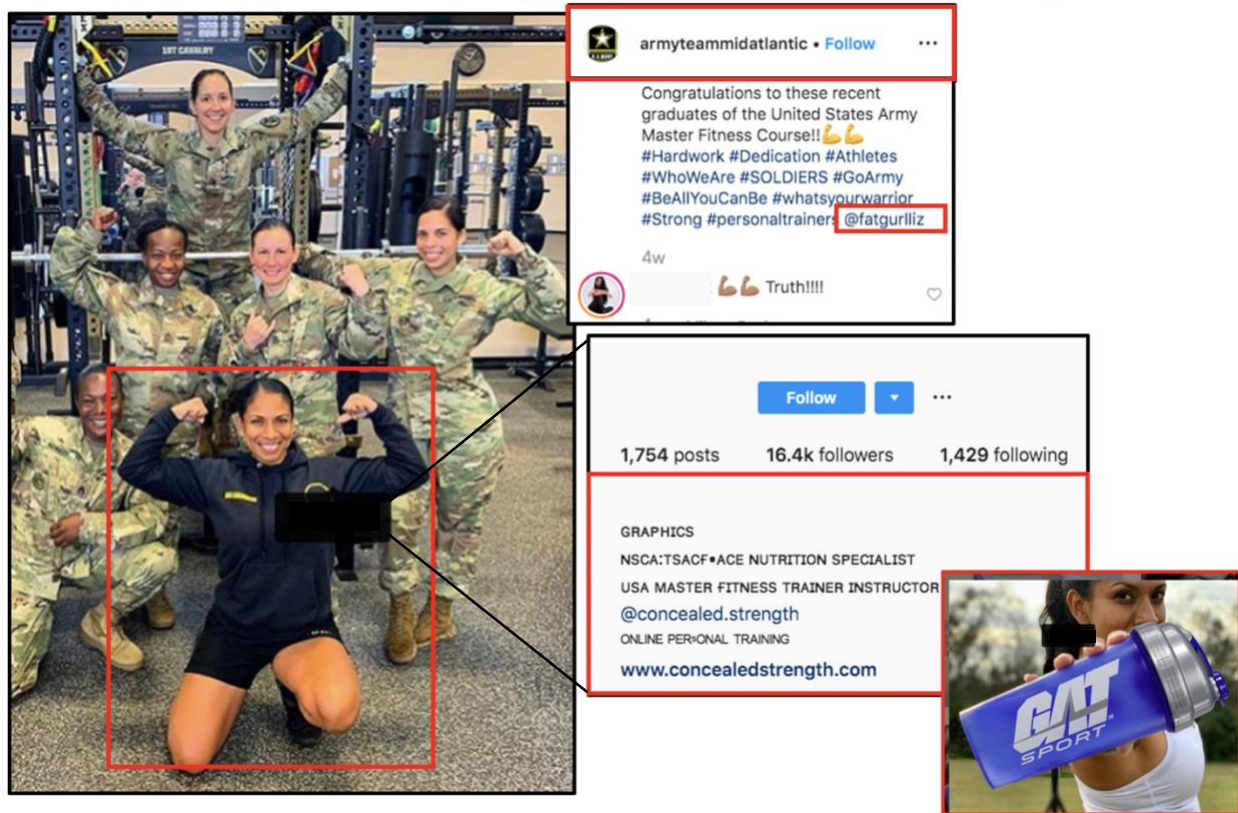
<sup>183</sup> A brand features and tags an Air Force Lieutenant, who is “[p]roud to represent” private companies on her personal page. Nametapes and tags have been blurred. @curves.n.combatboots, *Happy Saturday! Here's the gorgeous @outdoors\_ of the #USAF*, INSTAGRAM, <https://www.instagram.com/curves.n.combatboots>; @outdoors\_, INSTAGRAM (noting that this is not the user's real handle).



A6. @curves.n.combatboots, One of our gorgeous reps and a badass nurse in the #usaf, INSTAGRAM<sup>184</sup>



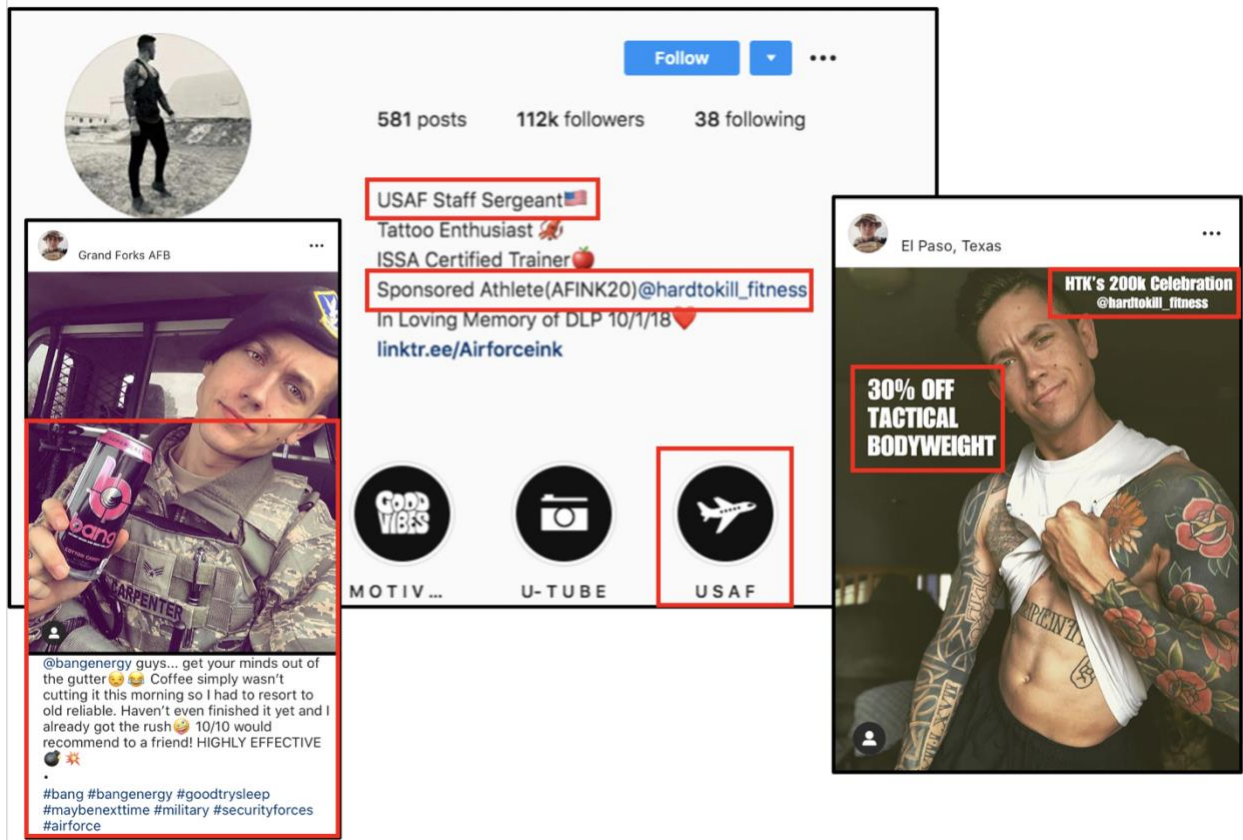
<sup>184</sup> A brand tags a servicemember, who also promotes that brand on her personal page. Personal handles, nametapes, and tags have been removed. @curves.n.combatboots, One of our gorgeous reps and a badass nurse in the #usaf, INSTAGRAM, <https://www.instagram.com/curves.n.combatboots/>; ONLY LIFESTYLE ACCOUNT!, INSTAGRAM (noting that the personal handle has been removed).

A7. Congratulations to these recent graduates, INSTAGRAM<sup>185</sup>



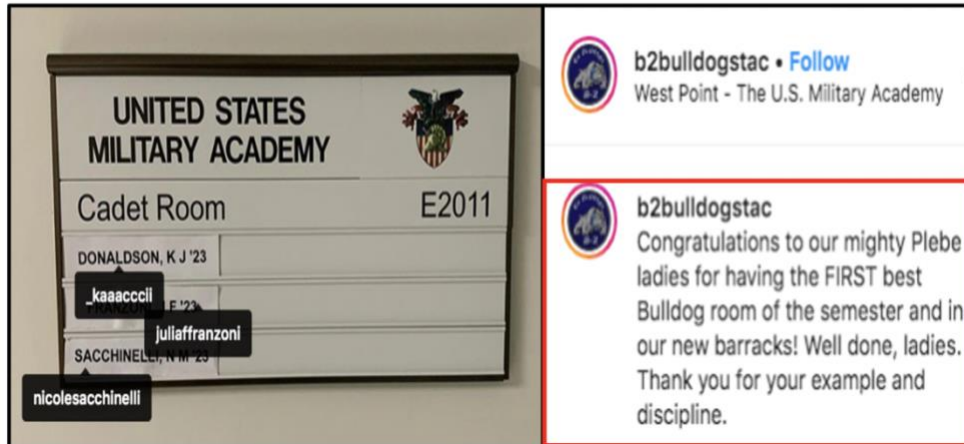
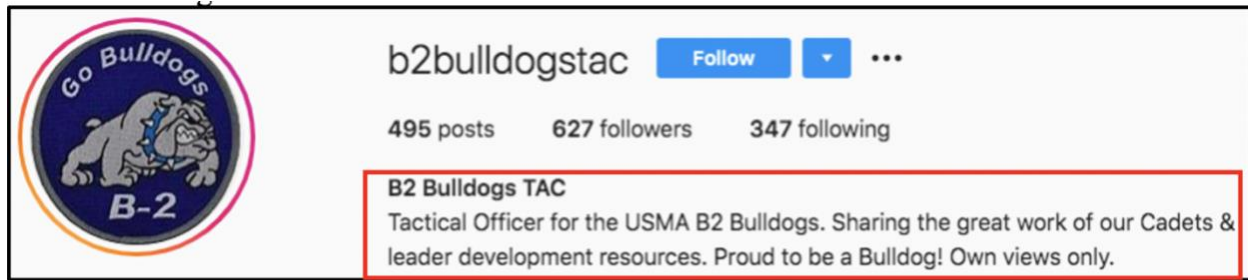
<sup>185</sup> Army recruiting unit account “armyteammidatlantic” posts a photo of Soldiers performing duties and tags an Instagram user, who promotes several businesses through her account. Personal handles have been removed. @armyteammidatlantic, *Congratulations to these recent graduates of the United States Army Master Fitness Course!!*  , INSTAGRAM; GRAPHICS, INSTAGRAM.

A8. USAF Staff Sergeant *us*, INSTAGRAM<sup>186</sup>



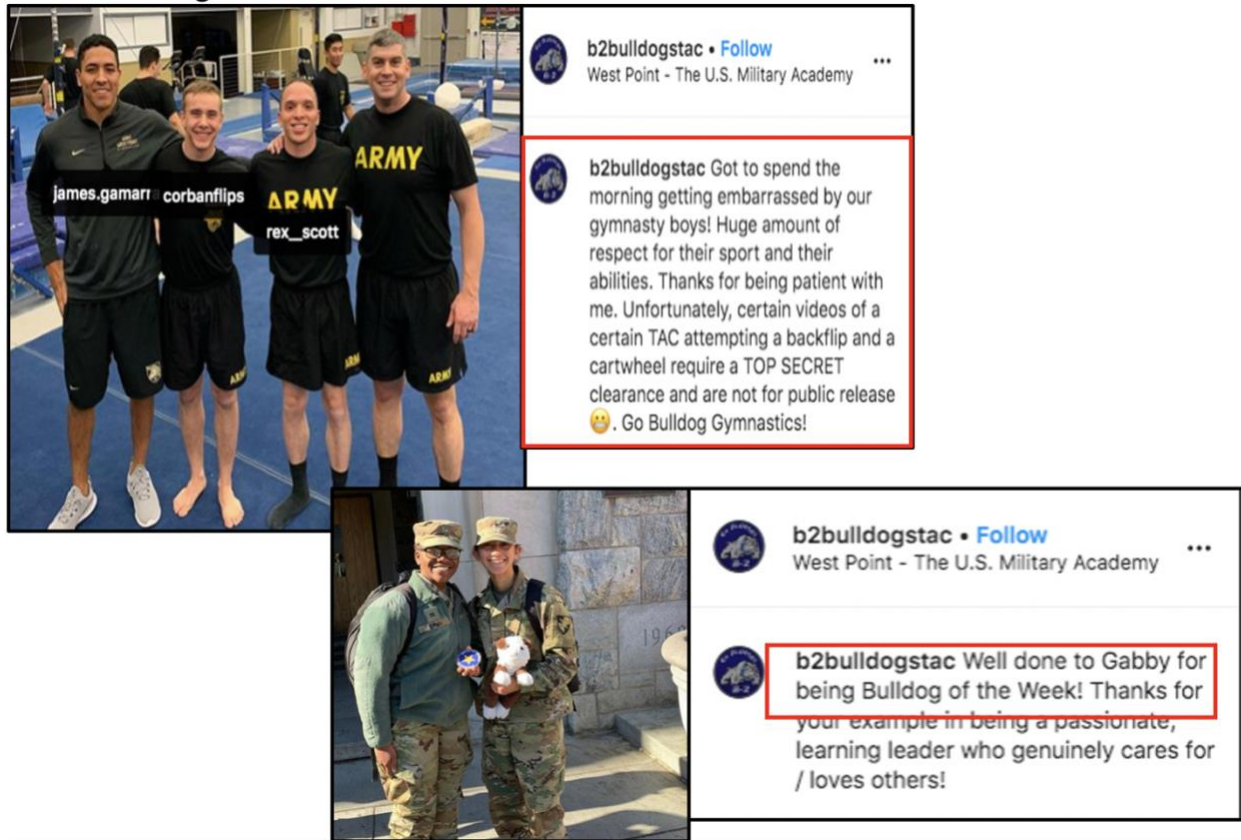
<sup>186</sup> Air Force Staff Sergeant promotes Bang energy drink and represents a fitness brand. Personal handles have been removed. USAF Staff Sergeantus, INSTAGRAM.

A9a. @b2bulldogstac, INSTAGRAM (Exhibit 1)<sup>187</sup>



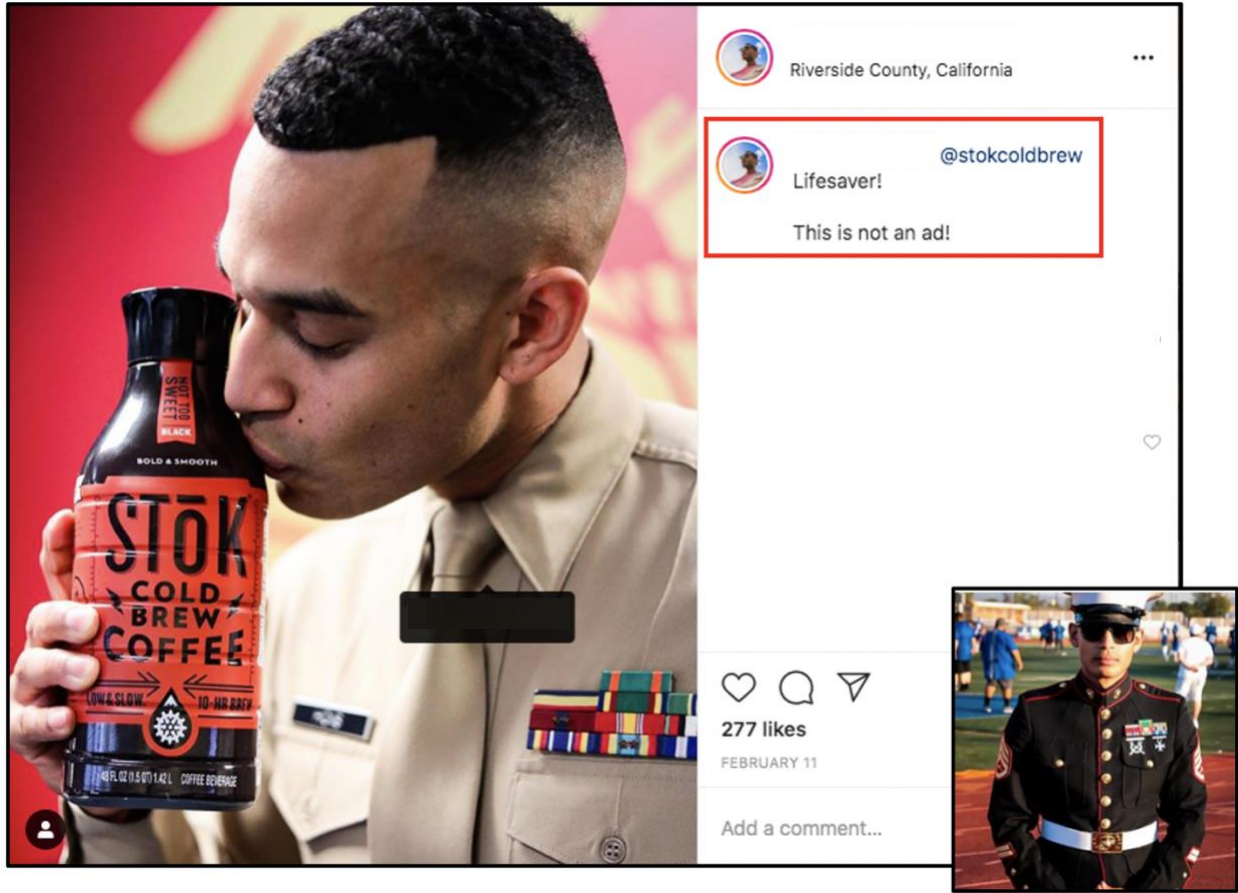
<sup>187</sup> West Point tactical officer professes “own views only,” but conducts official military business through the same account. @b2bulldogstac, INSTAGRAM, <https://www.instagram.com/b2bulldogstac/?hl=en>.

A9b. @b2bulldogstac, INSTAGRAM (Exhibit 2)<sup>188</sup>



<sup>188</sup> West Point tactical officer professes “own views only,” but conducts official military business through the same account. @b2bulldogstac, INSTAGRAM, <https://www.instagram.com/b2bulldogstac/?hl=en>.

A10. Marine Recruiter, INSTAGRAM<sup>189</sup>



<sup>189</sup> Marine recruiter contends that his post does not “ad[vertise]” anything. Personal handles, nametapes, and tags have been removed. Marine Recruiter, INSTAGRAM.

A11. Air Force Officer, INSTAGRAM<sup>190</sup>



<sup>190</sup> Air Force officer posts photo of himself performing an air-to-air refuel mission. Personal handles have been removed. Air Force Officer, *Slow and steady*, INSTAGRAM.



A12. USAFus, INSTAGRAM<sup>191</sup>

202 posts 45.9k followers 768 following

Kenzie 🇺🇸  
USAF 🇺🇸  
👉 @cnc.apparel REP: KENZIE10  
👉 @strikeforceenergy: KENZIE  
👉 @gallongear: MCKENZIEM  
curvesncombatboots.com

tony.royal Congratulations on your accomplishments. I wish you all the best. Thank you for your service.  
5w Reply

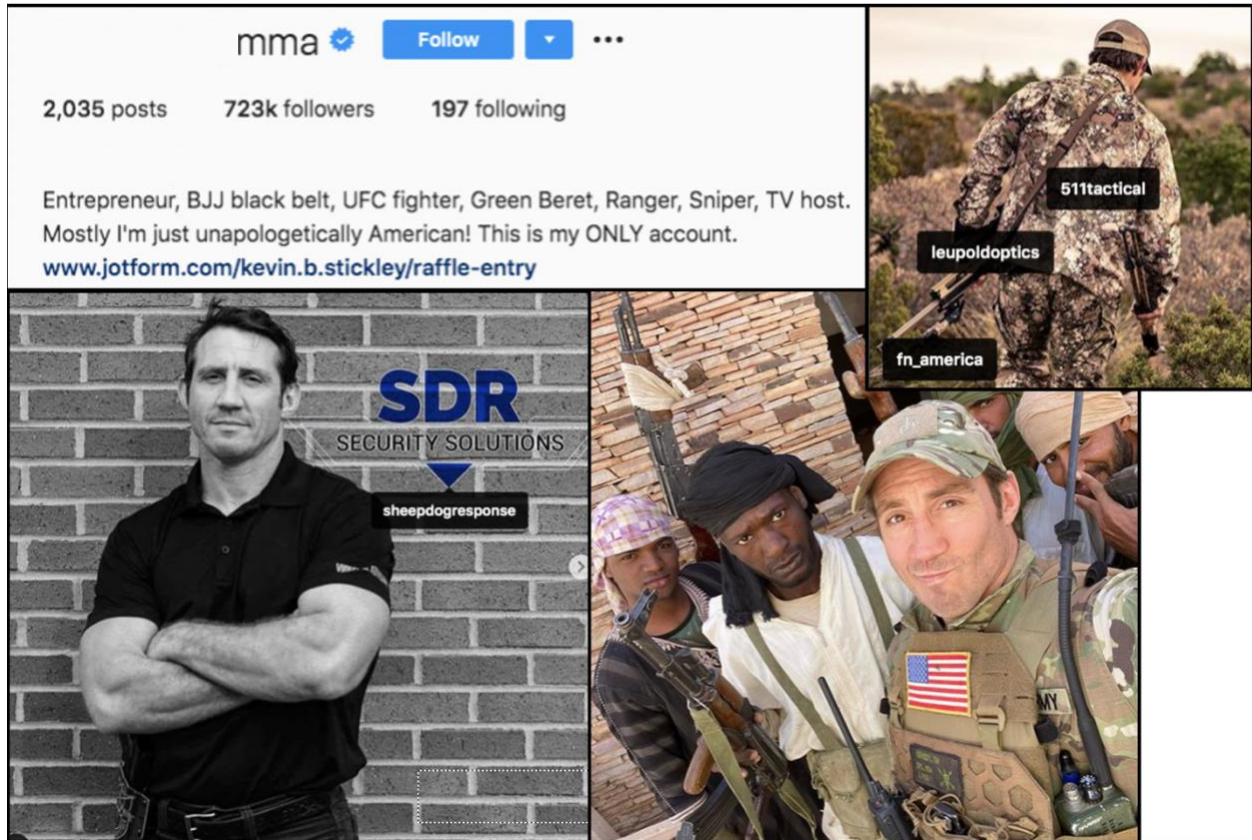
themountain0311 Confidence 🇺🇸  
4w Reply

brandon\_york1 Congratulations  
4w Reply

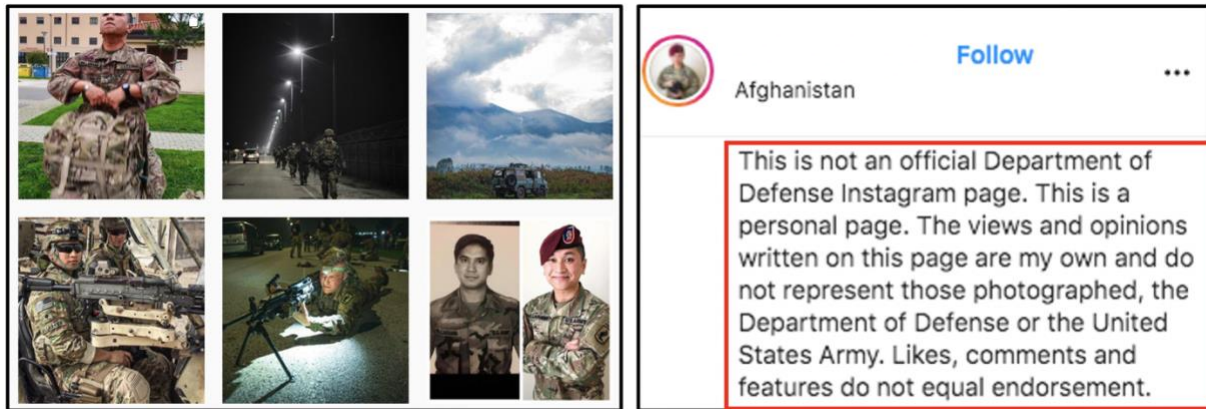
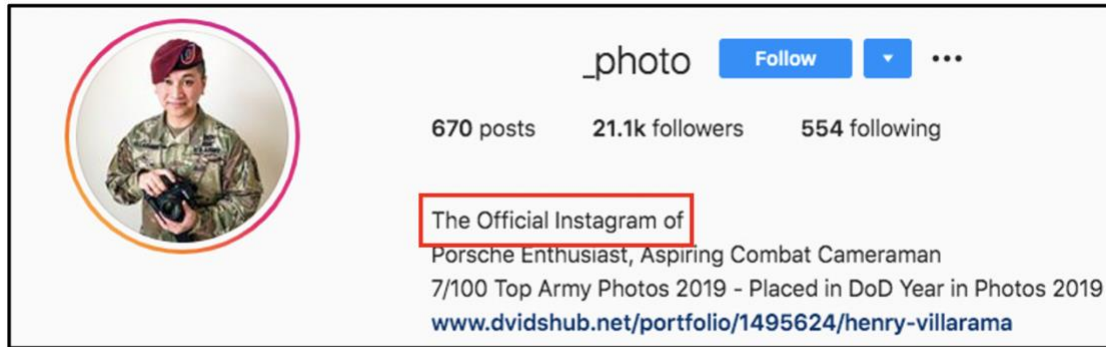
mustangkid8 Thank you for your service.

<sup>191</sup> Instagram followers thank an Air Force brand “rep” “for her service.” Personal handles, nametapes, and tags have been removed. Kenzie, INSTAGRAM.

A13. Entrepreneur, BJJ black belt, UFC fighter, Green Beret, INSTAGRAM<sup>192</sup>

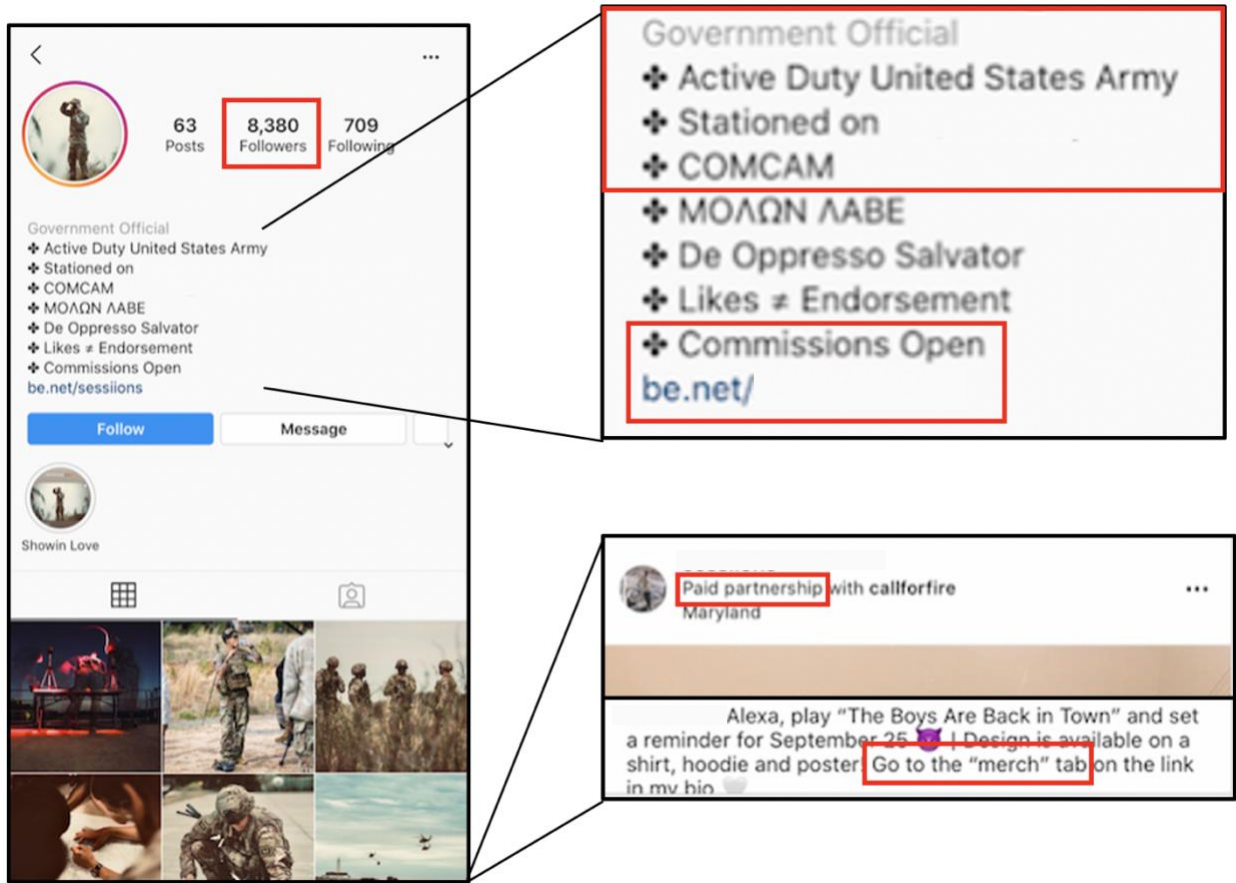


<sup>192</sup> A professional athlete promotes various businesses, while also chronicling his National Guard service. Entrepreneur, BJJ black belt, UFC fighter, Green Beret, INSTAGRAM (noting that this is not the user's real handle).

A14. *Photojournalist, INSTAGRAM*<sup>193</sup>

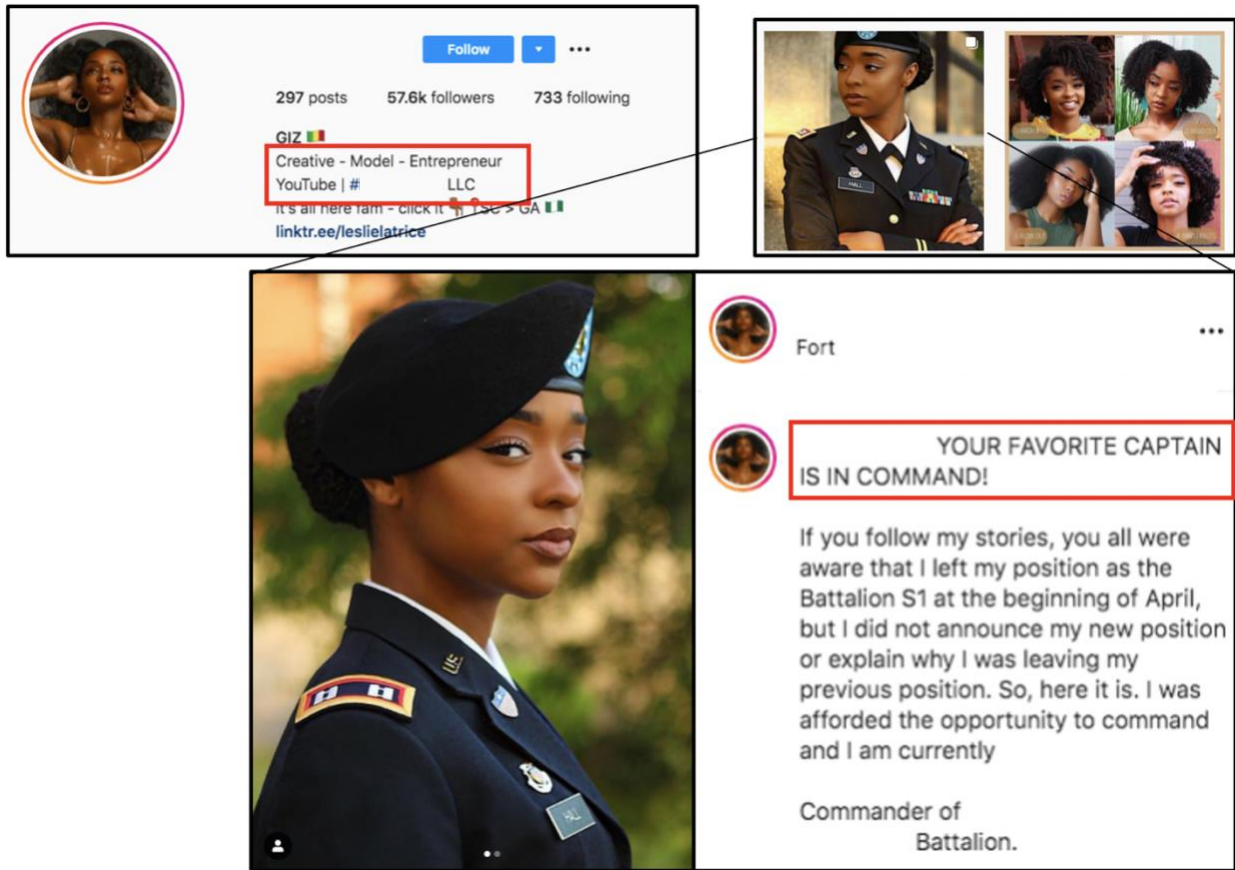
<sup>193</sup> Army photojournalist calls his page both an “official” account and “not an official account.” Porsche Enthusiast, Aspiring Combat Cameraman, INSTAGRAM (noting that this is not the user’s real handle).

A15. COMCAM Operator, INSTAGRAM<sup>194</sup>



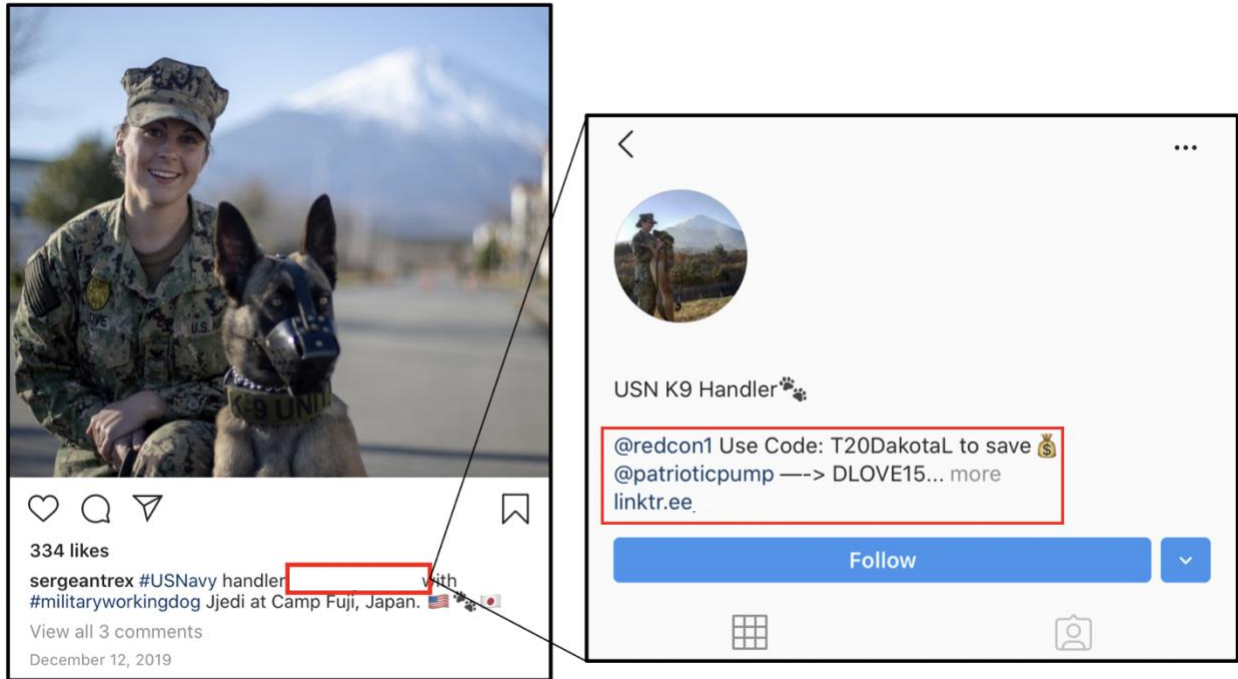
<sup>194</sup> COMCAM operator publishes DoD VI, as well as an invitation for private business (“commissions open”) and a link to his personal work. Personal handles have been removed. Active Duty United States Army, INSTAGRAM.

A16. *Creative – Model – Entrepreneur, INSTAGRAM*<sup>195</sup>



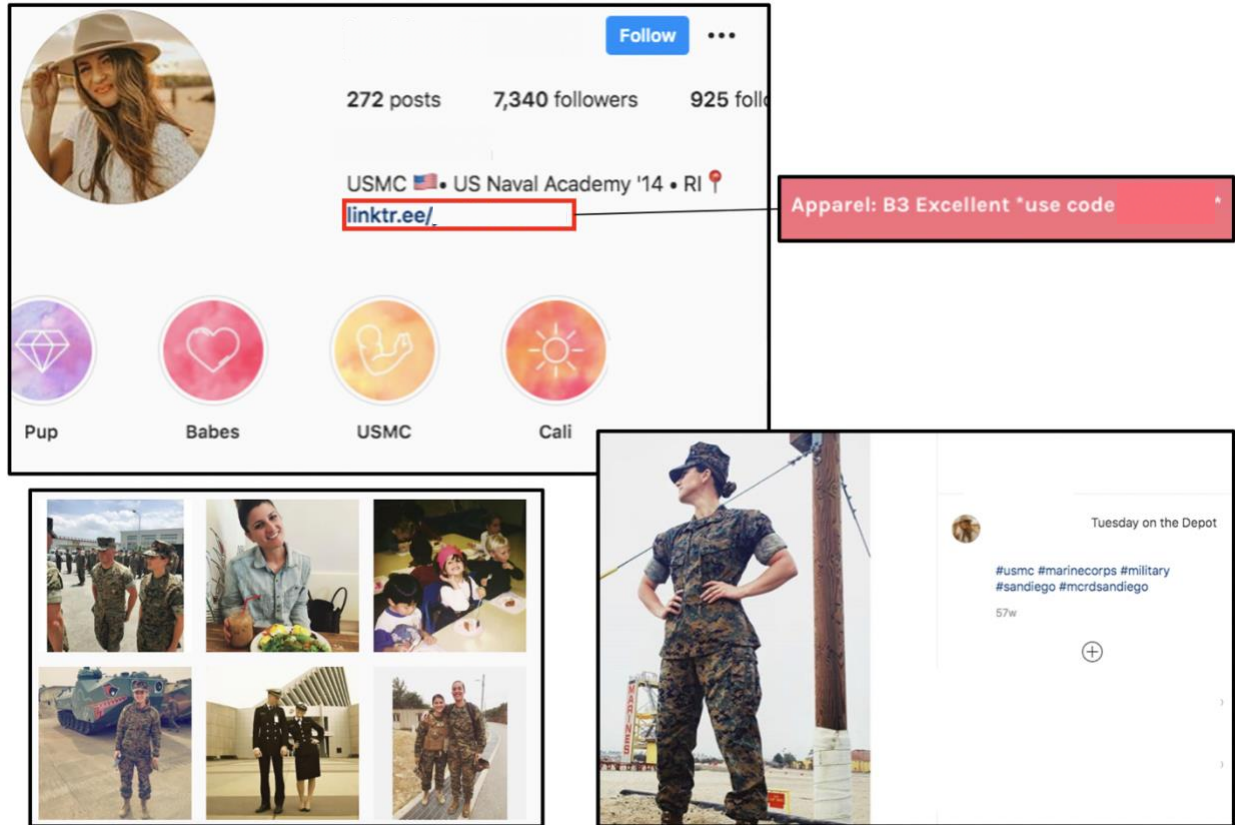
<sup>195</sup> Army company commander promotes her private business ventures. Personal handles have been removed. Creative – Model – Entrepreneur, INSTAGRAM.

A17. @sergeantrex, INSTAGRAM; USN K9 Handler, INSTAGRAM<sup>196</sup>



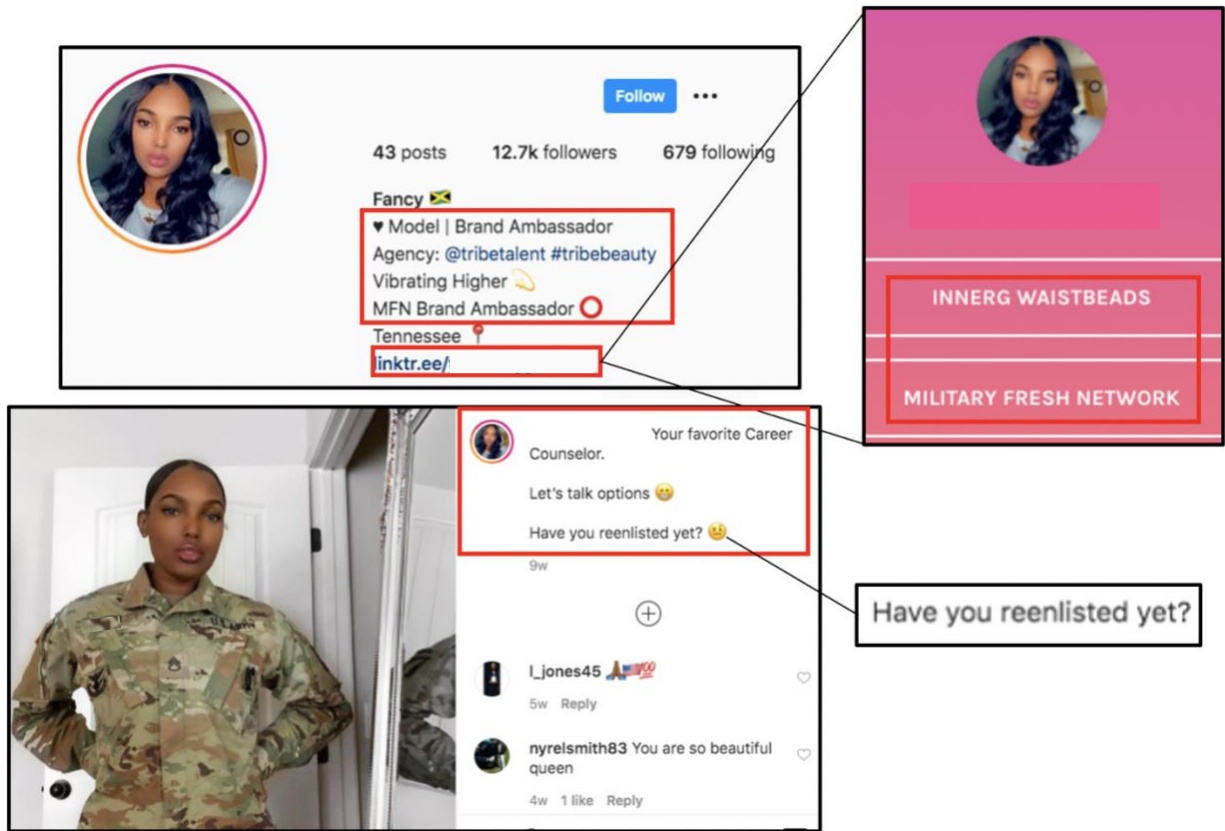
<sup>196</sup> Navy dog handler is featured on the popular @sergeantrex Instagram page featuring military working dog teams. At the same time, the handler leverages her K9 to participate in an affiliate marketing program. Personal handles have been removed. @sergeantrex, INSTAGRAM, <https://www.instagram.com/sergeantrex/>; USN K9 Handler, INSTAGRAM.

A18. USMC us• US Naval Academy '14 • RI ♀, INSTAGRAM<sup>197</sup>



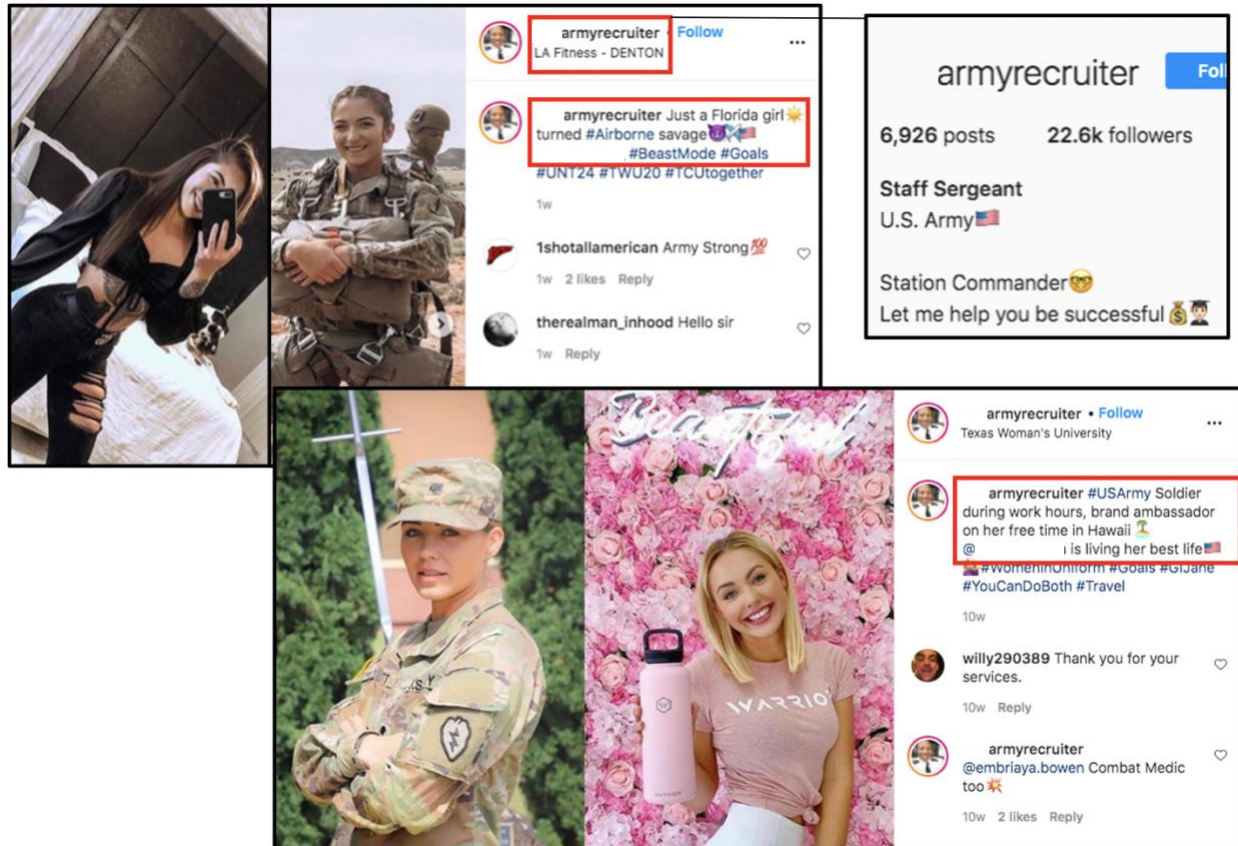
<sup>197</sup> Marine Corps officer chronicles her service and provides a discount code for apparel. Personal handles, nametapes, and tags have been removed. USMC us• US Naval Academy '14 • RI ♀, INSTAGRAM.

A19. ♥ Model | Brand Ambassador, INSTAGRAM<sup>198</sup>



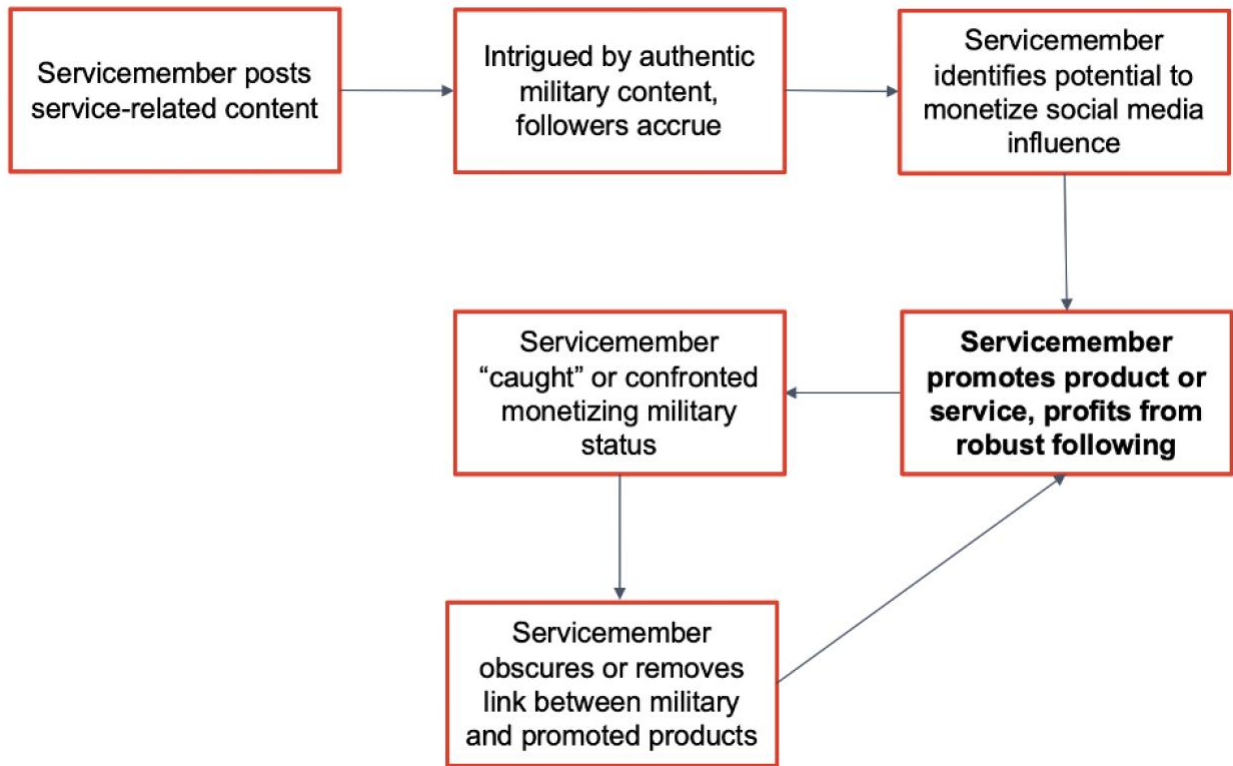
<sup>198</sup> Army career counselor conducts official business while providing a discount code for merchandise. Personal handles, nametapes, and tags have been removed. ♥ Model | Brand Ambassador, INSTAGRAM.



A20. Staff Sergeant – U.S. ArmyUS, INSTAGRAM<sup>199</sup>

<sup>199</sup> Army recruiter promotes servicemembers who promote merchandise for profit. This recruiter notes that many of the servicemembers he features reach out to him for publicity. Staff Sergeant – U.S. ArmyUS, INSTAGRAM (noting that this is not the user's real handle).

APPENDIX B: GENERAL PATH TO MONETIZATION<sup>200</sup>



<sup>200</sup> Typical lifespan of a servicemember content creator’s path to monetization. Note that followers who were acquired when the servicemember built a robust following through authentic service-related content remain in place even after the connection is obscured or removed.