

Ask the Lawyer: Are Empty Threats a Crime?

By Mathew B. Tully

Q:

Is it really a crime if you lose your cool and say some unpleasant things to someone?

A:

In the Navy, sticks and stones may break a Sailor's bones, but names can get him thrown in jail. The use of a racial slur or curse words, making a derogatory statement or just saying something mean to get a rise out of someone could result in a charge of provoking speech in violation of Article 117 of the Uniform Code of Military Justice.

According to the Manual for Courts-Martial, the type of speech prohibited by this article features words that are provoking or reproachful and that threaten to cause a "breach of peace," such as a fight. The words must be directed toward a service member, who must be present when they are spoken. Article 117's maximum punishment is six months of confinement and the monthly forfeiture of two-thirds pay for six months.

As the U.S. Army Court of Military Review said in *U.S. v. Davis* (1992), provoking words do not "have to be a challenge to violence." Insults can be just as provoking. To illustrate this point, the court noted that it would be unlawfully provoking to call a female service member "swine" in a belligerent and "smart-alecky" tone. Davis involved an Army private first class who cursed at a military policeman who intervened in a disturbance involving the private and another service member.

The use of racial slurs can be especially provoking. In *U.S. v. Ybarra* (2002), a Marine private first class used a combination of a curse word and racial slur when talking to an African American sergeant attempting to apprehend him. The Navy-Marine Corps Court of Criminal Appeals called these words "fighting words" that can "induce a breach of peace."

Empty threats or offensive language used in a friendly manner may not rise to a level of violating Article 117. That's what happened to an Army specialist in *U.S. v. Flakes* (2006). In this case, the specialist was drunk, got in a fight with another soldier and threatened to burn her in her barracks room and torch the off-post home of someone else who broke up the altercation. The U.S. Army Court of Criminal Appeals said, given that the specialist was drunk and no one took the specialist's threats seriously, it was not convinced "that a reasonable person would have expected [her] threat of future harm to induce a breach of the peace under the circumstances."

Service members charged with provoking speech or gestures should immediately consult with a military law attorney. Depending on the circumstances, an attorney could attempt to

show that under the circumstances the words or gestures he or she used were not provoking or reproachful.

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. The information in this column is not intended as legal advice.