TO PRISON OR THE BRIG: SLAMMING THE DOOR SHUT ON MILITARY MENTAL COMPETENCY DEFENSES IN *UNITED STATES V. FRY*, 70 M.J. 468 (C.A.A.F. 2012)

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I. INTRODUCTION

Now, more than ever, Americans expect immense sacrifices of their men and women wearing the military uniform. However, what happens when there are problems under the helmet? The more interesting legal question involves the validity of the enlistment contract when a mental disease or developmental disability is present before the service member enlists or signs the contract to re-enlist. The Court of Appeals for the Armed Forces (CAAF) answered this question in the recent case of *United States v. Fry* by determining whether the military courts had jurisdiction over a soldier who had documented developmental disabilities prior to enlistment in the military.[1]

Discussions of mental illness and developmental disabilities, as well as enhanced methods to diagnose and treat these disorders, have pervaded public policy debates in the last forty years, reflecting their prevalence in the United States.[2] The Centers for Disease Control has reported that one in eighty-eight children are diagnosed with autism each year, up seventy-eight percent in the last decade.[3] In *United States v. Fry*, CAAF was faced with two issues related to the mental capacity to enlist in the armed forces. First, CAAF confronted whether the federal Uniform Code of Military Justice (UCMJ) or state contract law applied to military enlistments.[4] Second, CAAF considered whether a soldier who was diagnosed with mental illness or developmental disability before entering the military had the mental capacity to enlist, thereby conferring military court jurisdiction.[5]

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1. United States v. Fry, 70 M.J. 465 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 609 (2012).
2. Kimberly Leupo, *The History of Mental Illness*, TODDLERTIME NETWORK, http://www.toddlertime.com/advocacy/hospitals/Asylum/history-asylum.htm (last visited Feb. 12, 2014).
3. Miriam Falco, *CDC: U.S. Kids with Autism up 78% in Past Decade*, CNN (Mar. 29, 2012, 1:16 PM), http://www.cnn.com/2012/03/29/health/autism/index.html.
4. *Fry*, 70 M.J. at 468-69.
5. *Id.* at 469-72.

The distinction between civilian and military criminal jurisdiction is all the more important considering the differences between their procedures and punishments. Although they operate under substantially similar procedures to civilian courts, military courts have been criticized as being in favor of the chain of command, and few people outside the military are familiar with the process.[6] Court-martial panels (juries) are mostly made up of commissioned officers and only require a two-thirds majority to convict.[7] While most civilian criminal prosecutions are under state law, a successful court-martial brings the stigma of a federal conviction.[8] Punishments can entail the forfeiture of all pay and allowances, confinement in an institutional prison at Fort Leavenworth or the Naval Consolidated Brig, more than a month of hard labor, a dishonorable discharge, or even death in extreme cases.[9] In fact, a military member can be held in confinement or punished past the end of his enlistment contract.[10] Therefore, the differences between civilian and military adjudication can be stark.

Section II of this Note will provide a brief history of the military justice system and an in-depth explanation of the military's historical and current approaches to the legal requirements for mental capacity to enlist. Section III will discuss the factual and procedural background of *United States v. Fry*. Finally, Section IV will discuss why CAAF wrongly decided that the presence of developmental disabilities before enlistment does not strip the military courts of jurisdiction and argue that the dissent was correct. This decision is wrong because it was based on an erroneous reading of the legislative history of the statute, invites error in the way military judges handle mental competency cases, and inconsistently applies Department of Defense (DoD) policies on developmental disabilities.

II. LEGAL BACKGROUND

In order to understand the court's reasoning in *United States v. Fry*, it is important to explore the statutory scheme that Congress created to grant jurisdiction to the military courts and consider how this scheme has evolved over the sixty years that the UCMJ has been in effect. This section will also address the conceptualizations by the courts of enlistments as contracts and the applicability of the common law of contracts. First, however, this

6. Fred Karasov, *Military Justice: An Oxymoron?*, 66 BENCH & BAR MINN. (2009), *available at* http://mnbenchbar.com/2009/12/military-justice-an-oxymoron/.

7. *Id.*

8. *Id.*

9. *See* RULES FOR COURTS-MARTIAL 1003(b), *reprinted in* MANUAL FOR COURTS-MARTIAL 178-82 (2012 ed.).

10. *See* Barrett v. Hopkins, 7 F. 312, 315 (D. Kan. 1881) ("[W]hen the jurisdiction of a court attaches . . . by the commencement of proceedings and arrest of the accused, it will continue for all the purposes of the trial, judgment, and execution.").

section will provide a brief introduction to the history and structure of the military court system.

A. History of Military Law in the United States and the Enactment of the UCMJ

At the urging of General George Washington, in 1775 the Second Continental Congress established the Articles of War based on British military procedures to ensure that the Continental Army was governed by the rule of law.[11] Significantly, each branch of the military was governed under separate Articles, and the legal systems between each branch varied, in some aspects significantly.[12] Despite some expansion and amendments by Congress, this system remained substantially in place for 150 years.[13]

In 1950, Congress recognized the need to streamline and create uniformity between the legal systems of each branch, especially after the reorganization of the Department of War into the DoD and problems of improper command influence in military trials during World War II.[14] The result was the UCMJ, which went into effect on May 31, 1951.[15] Under this system, each military branch has its own trial judiciary of commissioned field grade officers, which has the authority to try criminal offenses codified in UCMJ Articles 77 through 134.[16] These crimes include standard crimes of homicide and sexual assault, but also include mutiny, dereliction of duty, and absence without leave.[17] The trial court process is generally known as a "court-martial."[18] Each branch also has its own appellate court, with field grade officers as judges.[19]

Congress foresaw that issues of fairness and justice could arise from military officers having sole jurisdiction over their own subordinates, so it created a civilian court to oversee military court-martial cases, which

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11. WILLIAM B. AYCOCK & SEYMOUR WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 9-10 (1955).
12. *See* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 11-12 (1973).
13. *See* AYCOCK & WURFEL, *supra* note 11, at 11-13.
14. *See* GENEROUS, *supra* note 12, at 16-18.
15. AYCOCK & WURFEL, *supra* note 11, at 15.
16. GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE CASES AND MATERIALS 4-5 (2012).
17. *Id.* at 424.
18. *See id.* at 3; *see also* BLACK'S LAW DICTIONARY 181 (4th pocket ed. 2011) (defining a court-martial as "an ad hoc military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the Uniform Code of Military Justice").
19. MAGGS & SCHENCK, *supra* note 16, at 7. Field grade officers are officers of pay grades of O-4 through O-6, or the equivalent of Major, Lieutenant Colonel, and Colonel. *See Officer Rank Insignia*, U.S. DEPARTMENT DEF., http://www.defense.gov/about/insignias/officers.aspx (last visited Feb. 12, 2014).

exercises worldwide jurisdiction over members of the U.S. Armed Forces.[20] This court was previously known as the Court of Military Appeals and is now the Court of Appeals for the Armed Forces, which consists of five civilian judges who serve fifteen-year terms after appointment by the President, as Commander-in-Chief, with the advice and consent of the Senate.[21] The U.S. Supreme Court retains appellate review authority over the decisions of CAAF, although it exercises this authority sparingly.[22]

B. Validity of Enlistments

In 1890, a habeas corpus petition came to the Supreme Court from a court-martial, which gave the Court the opportunity to exercise its appellate review power.[23] In *In re Grimley*, the Court declared that enlistment created a contractual relationship between the soldier and the U.S. Government, and the common law of contracts is applicable to these agreements.[24] The Court recognized that the key issue is that soldiers change their status from being civilians, and breach of the enlistment contract does not change this status and thereby strip the military courts of jurisdiction.[25] However, the Court also recognized that insanity, idiocy, infancy, and any other contractual disability would disable a person from changing his status from civilian to soldier, which would render his enlistment void and strip court-martial jurisdiction.[26]

With the adoption of the UCMJ, in broad strokes Congress attempted to define the jurisdiction of the military courts, extending it to members of a regular component of the armed forces, cadets, reserve, and certain retired members still receiving military benefits.[27] However, Congress left the separate regulations regarding specific personnel decisions for each service in operation until the newly formed DoD could review the statutes and recommend standardization, including provisions regarding enlistments.[28] The statutes for the Air Force, Army, and Navy all provided that no person who was insane, intoxicated, or a deserter could be enlisted in the armed forces; however, the Marines did not have the same provisions excluding

20. U.S. COURT OF APPEALS FOR THE ARMED FORCES, THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 3 (Nov. 2013), *available at* http://www.armfor.uscourts.gov/newcaaf/library/brochure.pdf.
21. *Id.*
22. *Id.*
23. *In re* Grimley, 137 U.S. 147 (1890).
24. *Id.* at 150.
25. *Id.* at 152.
26. *Id.* at 152-53 ("Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from . . . entering into new relations.").
27. *See* 10 U.S.C. § 802(a) (2012).
28. S. REP. NO. 90-931 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2635, 2638.

deserters from military service.[29] These separate statutes were combined into one codified provision in 1967 as Section 504.[30]

In 1975, the Court of Military Appeals ruled in *United States v. Russo* that an Army private's enlistment was void and he was, therefore, not amenable to military jurisdiction for fraudulent enlistment when his recruiter provided him a list of answers to the enlistment questions despite the fact that he could not read.[31] Around the same time, several other military members were able to successfully evade military jurisdiction on the basis of recruiter misconduct.[32] Congress held several hearings and amended Article 2 of the UCMJ in the Department of Defense Authorization Act of 1980 to address this jurisdictional gap. First, Congress added subsection (b) to restate the principles of *In re Grimley* and expressly overrule *Russo* and its progeny.[33] Second, Congress added subsection (c) to grant jurisdiction over a military member who voluntarily submitted to military authority and met the minimum age and mental competency qualifications set out in Section 504.[34]

Generally, Congress was concerned about the impact of cases like *Russo* in undermining discipline within the command and control structure of the military, in addition to "making a mockery of the military justice system."[35] However, Congress intended subsection (c) to operate only in the situation where there is not an otherwise valid enlistment, but the enlistee intends to perform as a member of the armed forces and meets the four statutory requirements; if so, then he is "constructively enlisted."[36] Congress made clear that a person may not initially meet all four of the elements, but jurisdiction may attach at the moment when any incapacity or voluntariness is removed.[37]

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29. *Id.*
30. 10 U.S.C. § 504(a) (2012) ("No person who is insane, intoxicated, or a deserter from an armed force . . . may be enlisted in any armed force.").
31. United States v. Russo, 1 M.J. 134 (C.M.A. 1975), *superseded by statute*, Department of Defense Authorization Act of 1980, Pub. L. No. 96-107.
32. *See, e.g.*, United States v. Barrett, 1 M.J. 74 (C.M.A. 1975); United States v. Catlow, 48 C.M.R. 758 (C.M.A. 1974); United States v. Brown, 48 C.M.R. 778 (C.M.A. 1974).
33. S. REP. NO. 96-197, at 121-22 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1818, 1827.
34. The full text of Article 2(c) states:

> Notwithstanding any other provision of law, a person serving with an armed force who-(1) submitted voluntarily to military authority; (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority; (3) received military pay or allowances; and (4) performed military duties; is subject to this chapter until such person's active service has been terminated in accordance with law or regulations . . . .

10 U.S.C. § 802(c) (2012).
35. S. REP. NO. 96-197, at 121.
36. *Id.* at 122-23; *see also* CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW IN A NUTSHELL 50-51 (2d ed. 1996).
37. S. REP. NO. 96-197, at 123.

CAAF interpreted this statute in *United States v. Phillips* as setting up an analytical framework, where Article 2(c) confers jurisdiction if a person is serving with an armed force and meets the four-part test of the statute, thereby retaining that person into "active service" until released by law or regulation.[38] This was the framework used by CAAF to analyze *United States v. Fry*.[39]

III. EXPOSITION OF THE CASE

In *United States v. Fry*, CAAF analyzed two main issues dealing with the military court-martial jurisdiction. First, it was called on to decide whether state law or the Federal UCMJ applied to military enlistments.[40] Answering that federal law applied, the court then turned to whether a defendant who was diagnosed with mental illness before entering the military had the mental capacity to enlist under the UCMJ.[41] A divided court answered in the affirmative, thereby conferring jurisdiction in the military courts and affirming Fry's court-martial conviction.[42]

A. Facts

In 1996, the appellant, Joshua D. Fry, was diagnosed with autism.[43] He was later diagnosed with obsessive compulsive symptoms, attention deficit hyperactivity disorder (ADHD), and oppositional defiant disorder.[44] When Fry was sixteen, he contacted a Marine recruiter in California, but was unable to enlist because he was expelled from high school and was leaving to attend a school in Colorado for teenagers with psychiatric, emotional, and behavioral problems.[45] Before he left, his grandmother successfully petitioned a California court to appoint her as his limited conservator because he had autism, was arrested for stealing, and was unable to provide for his own needs.[46]

Upon returning from Colorado, Fry contacted the California Marine recruiter while still under the limited conservatorship.[47] Fry passed the

38. United States v. Phillips, 58 M.J. 217, 219 (C.A.A.F. 2003).
39. United States v. Fry, 70 M.J. 465, 469 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 609 (2012).
40. *Id*. at 468.
41. *Id*. at 468-69.
42. *Id*. at 467.
43. *Id*. In order to diagnose children with autism, there must be "a qualitative impairment in their social interaction" and communication, which can range from children who are "low functioning" and have no interaction or language, to children who are very gifted, but still have impairments in their social interactions and communication. *Id*. at 481 app. A.
44. *Id*. at 473 (Baker, C.J., dissenting).
45. *Id*. at 467 (majority opinion).
46. *Id*.; *see also* CAL. PROB. CODE § 1801 (West 2010).
47. *Fry*, 70 M.J. at 467.

Armed Services Vocational Aptitude Battery (ASVAB) test, signed the enlistment contract, and received pay and allowances despite the fact that the Marine Corps knew or should have known that he was not suited for enlistment.[48] In fact, evidence at a pretrial hearing indicated that serious recruiter misconduct likely occurred and the recruiter may have committed perjury.[49] During basic training, Fry had several problems, including stealing peanut butter, urinating in his canteen, and failing to shave and subsequently lying about it.[50] The medical staff contacted his grandmother, who told them of his autism diagnosis.[51] He was allowed to stay in basic training after convincing the medical staff that he was motivated and otherwise medically fit, and he passed through all of the drills and phases of basic training without further incident and successfully graduated.[52]

Fry was then sent to the School of Infantry at Camp Pendleton for further training, where he continued to receive basic military pay and allowances.[53] After two months, he was absent twice from his unit without authorization and was later found with downloaded images of child pornography on two cell phones and two laptop computers.[54] After an investigation, the Marines charged Fry with one specification (count) of fraudulent enlistment in violation of Article 83 of the UCMJ, two specifications of unauthorized absence in violation of Article 86, and four specifications of possession of child pornography in violation of Article 134.[55]

B. Procedural History

All of the charges were referred to a general court-martial, and Fry filed a pretrial motion to dismiss for lack of jurisdiction.[56] He argued that because he did not have the capacity to enter into a contract under California law due to the limited conservatorship, his enlistment was invalid; therefore, he was not subject to military jurisdiction.[57]

In support of this claim, Fry brought in a declaration from his treating psychologist of ten years, Dr. Julie Schuck, who stated that his autism

48. *Id.* at 468.
49. *See* Reply to Government's Brief in Opposition to Certiorari, Fry v. United States, 133 S. Ct. 609 (2012) (No. 11-1395), 2012 WL 5246244, at *1-2.
50. *Fry*, 70 M.J. at 467.
51. *Id.*
52. *Id.* at 467-68.
53. Brief on Behalf of Appellee, United States v. Fry, 70 M.J. 465 (2012) (No. 11-0396), 2011 WL 3320329, at *4.
54. *Id.*
55. *Id.* at *1.
56. United States v. Fry, NMCCA 201000179, 2011 WL 240809, at *2 (N-M. Ct. Crim. App. Jan. 27, 2011), *aff'd*, 70 M.J. 465 (C.A.A.F. 2012).
57. *Id.*

caused a fixation on military fantasy and impulses, including an "inability to weigh the consequences of his actions."[58] This impulsivity "resulted in a long history of poor choices that evidence his lack of judgment and reasoning skills necessary to make life decisions," which rendered him "unable to independently handle his daily personal affairs [and] make important decisions."[59] Further, she stated that his mental state was developmentally like that of a fourteen-year-old child.[60] The Government produced an expert witness, Dr. Bruce Reed, whose only knowledge of Fry's case was participating on the board to determine whether Fry was fit to stand trial.[61] He concluded that Fry understood the effect of enlisting by a preponderance of the evidence.[62] However, he acknowledged that Fry was not completely responsive and that he did not have access to Fry's full medical history.[63]

The military judge denied the motion to dismiss, saying that "*all* of the evidence indicates that the accused's enlistment was voluntary."[64] He did not cite either expert's testimony, but the judge said that Fry had been diagnosed with obsessive-compulsive symptoms and that he could not control his impulsivity.[65] However, he stated that the surrounding circumstances did not support this claim, citing Fry's passage of the ASVAB and completion of training without further incident, showing that he understood the need to conform his conduct to Marine standards.[66]

Considering this ruling, Fry subsequently pled guilty to all charges and was sentenced to four years of confinement, a bad-conduct discharge from the military, and forfeiture of all pay and allowances.[67] While confined, Fry appealed to the Navy-Marine Court of Criminal Appeals, which affirmed the trial court judgment without hearing oral arguments in the case.[68] The court used the legislative history of the UCMJ to determine that Article 2 reaffirmed *In re Grimley*, and thus, Congress did not cede authority to the states to determine a person's capacity to enlist.[69] The court then considered California law to conclude that the imposition of a limited conservatorship did not equate to Fry not being able to understand the significance of enlisting, and this ensured that Fry had the capacity to

58. *Fry*, 70 M.J. at 488-89 app. B.
59. *Id.* at 489.
60. *Id.*
61. *Id.* at 471 (majority opinion).
62. *Id.* ("When you ask me 51 percent or more, I would have to say yes.").
63. United States v. Fry, NMCCA 201000179, 2011 WL 240809, at *2 (N-M. Ct. Crim. App. Jan. 27, 2011), *aff'd*, 70 M.J. 465 (C.A.A.F. 2012).
64. *Fry*, 70 M.J. at 477 (Baker, C.J., dissenting) (emphasis added).
65. *Id.* at 471 (majority opinion).
66. *Id.*
67. *Id.* at 465.
68. *Fry*, 2011 WL 240809, at *3.
69. *Id.*

voluntarily submit to military jurisdiction.[70] Fry then appealed for review to CAAF, which was granted on May 26, 2011.[71] The appeal asserted that the decision of the California court as to his capacity to contract should be given full faith and credit under federal statute, and therefore a military court could not rule otherwise.[72]

C. Majority Opinion

To decide the first issue of whether California or federal law applied, the court had to decide which subsection of Article 2 applied to Fry's case. The court began by citing cases supporting the notion that federal law was supreme when applied in a military context, noting that it had doubts that the full faith and credit statute was ever intended to apply to enlistment contracts.[73] However, the court declined to fully address this issue, citing Supreme Court precedent that difficult and novel constitutional issues should be avoided if possible.[74] The court therefore avoided the issues of federalism inherent in a decision based on Article 2(b) and moved into a discussion of the applicability of subsection (c) to Fry's case.[75]

Citing the word "notwithstanding" at the beginning of Article 2(c), the court summarily stated that this language indicated a clear statement by Congress that all other laws, including state laws, would be inapplicable to jurisdictional issues arising under this subsection.[76] Therefore, the military judge was not bound by the California court order to decide whether Fry had the capacity to enlist; he was only required to review California law as a part of the relevant evidence on whether the requirements under Article 2(c) were met.[77]

Next, the court undertook a discussion of Article 2(c), citing the framework in *Phillips* and recognizing that only the requirements of voluntariness and the application of Section 504 were at issue.[78] First, the

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70. *Id*. at *4.
71. Brief on Behalf of Appellee, *supra* note 53, at *2.
72. *See* Appellant's Reply Brief, United States v. Fry, 70 M.J. 465 (2012) (No. 11-0396), 2011 WL 3565122, at *2-3 ("[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . ." (citing 28 U.S.C. § 1738 (2012))). Fry argued that the proceedings in the California conservatorship case, ruling that he did not have the capacity to contract under California law, should be given full faith and credit by the military court, thereby destroying its jurisdiction. *Id*.
73. *Fry*, 70 M.J. at 468 (stating that the relation between government and a citizen is distinctively federal (citing United States v. Standard Oil Co., 332 U.S. 301, 305 (1947))); United States v. Blanton, 7 C.M.A. 664, 665 (C.M.A. 1957) (federal law, not state law, is the benchmark for military jurisdiction).
74. *Id.* (citing Pearson v. Callahan, 555 U.S. 223, 236-37 (2009)).
75. *Id.*
76. *Id*. at 469.
77. *Id.*
78. *Id.*

court noted that it recognized that voluntariness was a distinct requirement that operated to exclude actions compelled by outside influence, and the court evaluated voluntariness under the rubric of the totality of the relevant circumstances, including the person's mental state.[79] As duress and coercion were not at issue, the court determined that the mental capacity requirement overlapped with the Section 504 requirement.[80]

The court then equated the definition of "insane" used in Section 504 as being colored by the general federal statutory definition of "idiot, lunatic, insane person, and person *non compos mentis*."[81] *Non compos mentis* was read by the court to mean someone incapable of handling his own affairs, not merely someone suffering from a mental disease.[82] Using the legislative history of the amendment creating Article 2(c), the court interpreted the intent of Congress as codifying the common law concept of capacity to consent, invoking *In re Grimley*'s statement that enlistment is a contract.[83] Given this interpretation of the statute, events occurring both before and after enlistment were deemed relevant to the issue of capacity by the court.[84]

The court noted that a military judge's findings of law are reviewed de novo and the findings of historical facts are accepted unless they are clearly erroneous.[85] Here, the trial judge concluded that jurisdiction existed and that Fry was mentally competent.[86] After considering the testimony heard by the military judge, and while admitting that the judge overstated the weight of the evidence, the court concluded that the judge considered all the evidence in making his ruling that Fry had the capacity to enlist, and therefore he did not abuse his discretion.[87] Thus, the court affirmed the judgment of the Navy-Marine Corps Court of Criminal Appeals and the court-martial.[88]

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79. *Id.*
80. *Id.* at 470 ("If Appellant had mental capacity under Article 2(c)(2), then it is surely evidence that he had the requisite mental capacity to understand the significance of submitting to military authorities, i.e., that it would tend to show that he acted voluntarily . . . .").
81. *Id.* (citing 1 U.S.C. § 1 (2012)).
82. *Id.* (citing Smith-Haynie v. D.C., 155 F.3d 575, 580 (D.C. Cir. 1998)).
83. *Id.* ("The clear purpose of § 504 was to codify something approximating the common law concept of capacity to contract, in that only those people may enlist who have the ability to understand what it means to enlist.").
84. *Id.*
85. *Id.*
86. *Id.* at 471.
87. *Id.* at 472.
88. *Id.*

D. Dissenting Opinion

Chief Judge Baker dissented, briefly touching on federalism, stating that the Supremacy Clause and military law history show that federal law controls for purposes of enlistment.[89] Applying the Article 2(c) jurisdictional test, Judge Baker believed that the only element at issue was the term "voluntarily," breaking sharply from the court's analysis of whether Fry was "insane" under Section 504.[90]

Judge Baker gave four reasons for his differing opinion. First, he noted that Congress placed the Section 504 mental capacity requirement in a different subparagraph of Article 2(c) than the voluntariness requirement, meaning that Congress intended for them to mean two different things.[91] Therefore, the majority broke a cardinal rule of statutory interpretation in giving two different statutory provisions the same meaning, making one of them superfluous.[92] Second, Judge Baker attacked the majority's treatment of the spectrum of developmental disabilities as a yes or no question by stating that, while the majority test may make for easy application of the law, it is not realistic to treat it as a bright line test because of the range of mental health conditions and disabilities.[93]

Judge Baker also pointed to other legal applications of "voluntary" to show that the acceptance of a plea bargain by an accused has not been analyzed solely on the basis of whether the person is sane or not, and therefore the analysis for jurisdiction should not be based on the sole issue of "insanity" either.[94] Judge Baker looked to CAAF case law showing that the court had set aside a plea deal when evidence was shown on appeal that the accused was "unable to appreciate the wrongfulness of his conduct."[95] He also pointed to other federal court opinions that had this same effect.[96] Finally, Judge Baker appealed to the plain meaning of "voluntary," saying that a "person cannot knowingly and voluntarily do something if that

89. *Id*. at 474 (Baker, C.J., dissenting).
90. *Id*. ("The question before the military judge was whether Appellant had the capacity to voluntarily enlist.").
91. *Id*. at 475.
92. *Id*. ("[I]t is a cardinal principle of statutory construction that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001))).
93. *Id*.
94. *Id*. at 476 (citing Brady v. United States, 397 U.S. 742, 748 (1970)).
95. *Id*. (citing United States v. Harris, 61 M.J. 391, 398-99 (C.A.A.F. 2005)).
96. *See* Gaddy v. Linahan, 780 F.2d 935, 945 (11th Cir. 1986) (requiring a trial judge to more adequately explain the nature of the crime to an illiterate and "mentally retarded" defendant); United States v. Duhon, 104 F. Supp. 2d 663, 671 (W.D. La. 2000) (stating that the difference between the short-term mentally ill and developmentally disabled defendants must be met with sensitivity for purposes of addressing competency).

person does not have the capacity to understand what he or she is doing."[97] Taking all of this into account, Judge Baker concluded that the majority's definition of "voluntarily" was inaccurate.

Judge Baker then took issue with the military judge's handling of the evidence Fry presented in his defense. The military judge did not present his own analysis used to make his decision and did not define what "voluntary" meant in relation to Fry's capacity to understand his enlistment; therefore, this was an abuse of discretion in applying the law.[98] He also believed that the military judge abused his discretion in analyzing the facts by not indicating he considered and analyzed the declaration from Fry's treating psychologist, even though the capacity to understand was the main issue in the case.[99] Without acknowledging, analyzing, or specifically addressing the statements by Fry's psychologist, the military judge could not have properly reached an informed conclusion on the issue of whether Fry had the capacity to understand his enlistment, and therefore, be amenable to military jurisdiction.[100] Judge Baker would have reversed the decision of the Navy-Marine Court of Criminal Appeals and the court-martial's conviction due to these problems.[101]

IV. ANALYSIS

The ruling in *United States v. Fry* presents a novel issue in the interpretation of the amended Article 2 of the UCMJ. However, the way the court attacks the issue is problematic, and therefore *Fry* was wrongly decided. Section A will analyze the proposition that, in an effort to avoid the issue of federalism inherent in the relief requested by the accused, the court stretched Article 2(c) to issues it was never intended by Congress to reach. Secondly, Section B will discuss the possibility that, by endorsing the trial judge's ruling that "all the evidence" pointed to Fry's ability to understand his enlistment, the CAAF invites future mistakes from trial judges on evidentiary issues of capacity to enlist, effectively foreclosing the possibility of raising such a defense. Section C will analyze the possible impact of *United States v. Fry* on how cases of enlisted soldiers with developmental disabilities are handled in the future.

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97. *Fry*, 70 M.J. at 477 (Baker, C.J., dissenting) (citing BLACK'S LAW DICTIONARY 1710 (9th ed. 2009)).
98. *Id.*
99. *Id.* ("He also concluded there was 'no evidence' that Appellant's enlistment was involuntary.").
100. *Id.* ("[W]e cannot know if the military judge reached the right decision regarding jurisdiction, because he did not reach it in the right way . . . .").
101. *Id.*

A. Misapplication of Article 2(c)

In its effort to avoid the issue of federalism inherent in a ruling based on Article 2(b), CAAF incorrectly applied Article 2(c)'s four-part jurisdictional test to Fry's case. The court took great pains to show, through various Supreme Court and previous CAAF and CMA opinions, that the issue of enlistment was distinctly federal in nature.[102] However, after pivoting to Supreme Court jurisprudence on constitutional avoidance, utilizing only a sentence, the majority stated that Article 2(c) could apply as well.[103] It therefore turned to that part of the statute to analyze Fry's case.

While at first glance this pivot to Article 2(c) seems to effectively sidestep the statutory issue entirely, it creates a new problem. By overruling *Russo* in recruiter malfeasance defense cases through the Department of Defense Authorization Act of 1980, Congress expressly stated that Article 2(b) was designed to reaffirm the principles in *In re Grimley*.[104] Had CAAF used Article 2(b) as its statutory basis in *Fry*, this would clearly have correctly controlled the court's analysis and this case would have been correctly decided. However, by utilizing subsection (c) instead of (b), the court confused itself on the legislative history of each subsection by importing the codification of common law contract principles in *In re Grimley* in subsection (b) to its analysis of the completely separate requirements found in Article 2(c).

Congress clearly stated that Article 2(c) was only applicable to issues of constructive enlistment "when there is not an otherwise valid enlistment."[105] CAAF has defined examples of where this doctrine would be applicable, such as in the Reserve component of the armed forces or recruiter misconduct.[106] The court appears to have latched onto Article 2(c)'s "notwithstanding" language to avoid the federalism issue implicated by Fry's attorneys. However, in doing so, it confused the fundamental Congressional intent of the provisions found in the Department of Defense Authorization Act of 1980. Nowhere in its opinion did the court state that Fry's enlistment was otherwise invalid; in fact, the majority implied that they thought the enlistment was perfectly valid.[107] By abruptly utilizing

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102. *See id*. at 468 (majority opinion).
103. *Id*.
104. S. REP. NO. 96-197, at 121 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1818, 1827.
105. *Id.*
106. *See, e.g.*, United States v. Phillips, 58 M.J. 217, 219 (C.A.A.F. 2003) (military courts had jurisdiction for a drug related case over a reservist one day prior to her report date for active duty); United States v. Ernest, 32 M.J. 135 (C.M.A. 1991) (jurisdiction over a reserve Lieutenant Colonel was proper under Article 2(c) after he was arrested while on his two days of active duty and was continued on active duty past his original orders for disciplinary purposes).
107. *See Fry*, 70 M.J. at 467 ("[C]ertifying that he understood the terms of his enlistment . . . Appellant undertook the obligations, duties, and training of a Marine, and in turn, received pay and

Article 2(c) to extend jurisdiction to Fry, the court necessarily implied that something was wrong with his enlistment in the first place, which by its own admission could only have been in relation to his capacity to contract.[108] At the same time, the court never addressed the interplay of the requirements between subsections (b) and (c) and the similarities or differences within their definitions of "voluntary."

Worse, *Fry* extends this confusion to Section 504. Without explanation, the court extended the legislative history of the amendment to Article 2 and the general definition statute for the entire U.S. Code to find the "clear purpose" of Section 504 as akin to the capacity to contract.[109] It did so even though Section 504 was passed thirteen years prior to the enactment of Article 2(c), and the opinion failed to discuss the legislative history of the general definition of *non compos mentis* in 1 U.S.C. § 1. Notwithstanding this lack of explanation, the main reported holding of *Fry* has been that the concept of a person *non compos mentis* is equated with the notion of capacity to contract.[110]

It appears that the purpose of this interpretation was an attempt to counter Chief Judge Baker's assertion that the majority failed to give the term "voluntariness" and Section 504's insanity requirement different meanings.[111] However, in doing so, the majority actually fell into this trap by ingraining the same principles into both of those meanings, making one of them superfluous, just as charged by the dissent. As Chief Judge Baker stated, the majority's holding effectively closed any mental competency defenses unless the enlistee was drunk, coerced, or insane at the time of enlistment.[112] Had Congress wished, it could have closed those mental capacity defenses in the passage of the Department of Defense Authorization Act of 1980 by simply codifying the dicta contained in *In re Grimley*[113] and never creating the four-part test in the first place. The fact that Congress did not do so indicates that the majority in *Fry* has misapplied the Congressional intent evinced in enacting Article 2(c).

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allowances."); *see also id.* at 469 n.7 ("Everyone, at all relevant times, acted as though Appellant was validly enlisted . . . .").

108. *Id.* at 469 ("The only seriously contested issue here is whether Appellant was mentally competent . . . .").

109. *Id.* at 470.

110. *See* 57 C.J.S. *Military Justice* § 24 (2012 supp.).

111. *Fry*, 70 M.J. at 469.

112. *Id.* at 475 (Baker, C.J., dissenting) ("In other words, unless a person is coerced, drunk, or insane he or she has the capacity to understand the significance of enlisting and voluntarily submitting to military authority.").

113. *In re* Grimley, 137 U.S. 147, 152-53 (1890).

B. Inviting Error by Military Trial Judges in Mental Competency Cases

In its opinion in *Fry*, CAAF granted extraordinary discretionary authority to military judges considering mental competency cases by seemingly ignoring an obviously incorrect statement.[114] The majority absolved the trial judge of this admitted overstatement simply because he cited the fact that Fry had been diagnosed with developmental disabilities and that he could not control his impulsivity, even though the judge did nothing to analyze these facts within that framework.[115] The dissent correctly questioned how the trial judge could come to an informed conclusion on the central issue of capacity in this case without specifically analyzing and addressing the statements of Fry's treating psychologist.[116]

While the majority concluded that the military judge must have found that the evidence better supported a finding that Fry was mentally competent,[117] the dissent correctly noted that we can never know whether the correct decision was made, because there was no supporting documentation for the military judge's rationale underlying his ruling.[118] Had the military judge questioned the reliability of Fry's psychologist, he should have done so on the record. In all, *Fry*'s holding allows a military judge to find jurisdiction without specifically laying out his or her consideration of differing views in the analysis or even doing any analysis at all aside from listing the mental illness as an operative fact.

In his petition for certiorari to the U.S. Supreme Court, Fry's military appellate counsel charged that military jurisdiction has been heavily extended in recent years by CAAF.[119] In this context, the implications of Fry's holding are clear: Once a person with a mental disease or developmental disability has signed the contract to enlist, he or she can do little to invalidate that enlistment and destroy jurisdiction of the military courts.[120]

In affirming the trial judge's error of not fully analyzing the opposing evidence presented by Fry that he did not have the mental capacity to understand the implications of his enlistment, CAAF has implicitly

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114. *Fry*, 70 M.J. at 472 ("Admittedly, the military judge may have overstated matters when he claimed that 'all of the evidence' pointed in one direction.").
115. *Id*. at 471-72.
116. *Id*. at 477 (Baker, C.J., dissenting).
117. *Id*. at 472 (majority opinion).
118. *Id*. at 477 (Baker, C.J., dissenting).
119. Petition for a Writ of Certiorari, Fry v. United States, 133 S. Ct. 609 (2012) (No. 11-1395), 2012 WL 1852058, at *14 (citing Clinton v. Goldsmith, 526 U.S. 529 (1999)); United States v. Denedo, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting) (stating in opposition to expanding military jurisdiction that the limits on the military courts "cannot be overridden by judicial extension of statutory jurisdiction, or the addition of a further step to the ones marked out by Congress") (internal quotation marks omitted).
120. *See Fry*, 70 M.J. at 477 (Baker, C.J., dissenting).

endorsed this method of handling rulings on mental capacity. If all a military judge has to do is acknowledge the accused has a mental illness or developmental disability without actually analyzing the evidence presented, it is hard to imagine any defense involving lack of mental capacity succeeding, especially considering the move to keep military jurisdiction in an expanding set of cases. This cannot have been the intent of Congress when it set up the military court system and gave limited court-martial jurisdiction in Article 2 of the UCMJ.[121]

C. Implications of *Fry* on Handling of Developmental Disabilities in the Military

Private Fry is not the only person with autism who knowingly enlisted in the military in recent years. In 2006, Jared Guinther of Portland, Oregon, enlisted in the Army as a cavalry scout and did not disclose his condition on his medical exam.[122] He was allowed to enlist even after his parents called and reported his autism diagnosis.[123] Only after his parents reported his situation to the media did the Army separate him from service as not meeting the enrollment criteria.[124] However, he was not charged under the UCMJ with fraudulent enlistment like Fry. Subsequent to these cases, the DoD passed a regulation ostensibly prohibiting individuals with autism from joining the armed forces, among other physical and mental conditions.[125]

However, it is unclear what mechanisms the DoD has put in place to ensure compliance, especially by its continued reliance on self-reporting medical histories. Obviously, situations like those of Fry and Guinther will be handled differently from now on, especially since evidence arose very quickly alerting medical staff to their respective diagnoses aside from their medical records. However, a person who has military fantasies, no supportive family structure, and is determined to enlist, may still be able to slip through the initial cracks, just like Fry. While the government argues

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121. *See generally* 10 U.S.C. § 802 (2012).

122. James Klatell, *Army Releases Autistic Teen*, CBSNEWS (May 12, 2006, 9:26 AM), http://www.cbsnews.com/news/army-releases-autistic-teen/.

123. *Id.*

124. *Id.*

125. U.S. DEP'T OF DEF., DoDI 6130.03 Encl. 4, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES 46-47 (2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf. "[T]he conditions listed in this enclosure are those that do NOT meet the standard by virtue of current diagnosis, or for . . . a verified past medical history." *Id.* at 10. This includes "[p]ervasive developmental disorders, including autistic spectrum disorders, and pervasive developmental disorder-not otherwise specified . . . ." *Id.* at 47.

that this is unlikely to occur with frequency,[126] the fact that unreported cases of autism slipped through the cracks before does not instill confidence that these new regulations will completely solve the problem,[127] especially with self-reporting being the main tool used to screen enlistees.

If someone like Guinther enlists without meeting the enlistment criteria, he is subject to administrative discharge.[128] Once completed, this discharge destroys jurisdiction over the person by the military courts.[129] However, by bringing charges against Fry prior to discharge for offenses committed while technically in the military, the military court system was able to keep jurisdiction over him in order to try him, punish him, and eventually discharge him after his time in confinement.[130] After endorsement of this method by the CAAF in *Fry* for those who do slip through the cracks, it is clear that in similar, future cases the military will do what it can to keep jurisdiction, punish the service member, and keep him or her in the military until that punishment is served. As evidenced by the military judge's erroneous handling of Fry's case, it is unclear whether the military justice system is equipped to fully appreciate the intricacies involved when a person's mental capacity to enlist is in question.

It appears as if the DoD is trying to have things both ways: kick out any soldiers who have the potential to cause problems, but keep jurisdiction over those who do cause problems in order to punish them. Much is to be said for maintaining good order and discipline in the military setting, which is likely the main policy reason behind the majority's ruling in *Fry*. This approach makes sense if no other court would have jurisdiction over the service member, and he would otherwise not be held accountable for his crimes. After all, if Fry could enlist, wreak havoc in the military, then not be subject to its jurisdiction on a technicality, more may follow in his footsteps. This situation may make "a mockery of the military justice system," as Congress was concerned about in enacting the amendments to the Article 2 jurisdictional requirements.[131]

However, this double standard serves neither to further justice nor to maintain good order and discipline when a service member is able to be tried in civilian courts. While Fry could not have been tried in civilian court for being absent without authorization, he may still have been able to be tried for his possession of child pornography in a state civilian court

126. Brief for the United States in Opposition, Fry v. United States, 133 S. Ct. 609 (2012) (No. 11-1395), 2012 WL 4842951, at *14.

127. *See* Reply to Government's Brief in Opposition to Certiorari, *supra* note 49, at *7.

128. *See* Klatell, *supra* note 122.

129. *See* United States v. Poole, 30 M.J. 149, 150 (C.M.A. 1990) ("[M]ilitary jurisdiction continues until a servicemember's military status is terminated by discharge from his enlistment.").

130. *See generally* United States v. Fry, 70 M.J. 465 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 609 (2012).

131. S. REP. NO. 96-197, at 121 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1818, 1827.

since his actions were committed within U.S. territorial jurisdiction. If other enlistees, like Guinther, faced no discipline for attempting to enlist with autism, Fry should not be punished for the same thing just because he committed other crimes. In theory, it should make no difference that Fry was allowed to continue his Marine career, because recruiting staff ignored obvious signs of a problem, thereby positioning Fry to impact the good order and discipline of the military. It is clear that many members of the military knew that Fry had been diagnosed with autism and either willfully ignored it or implicitly found it was no issue.

V. CONCLUSION

In concluding that the military courts had jurisdiction over Marine private Joshua Fry, the Court of Appeals for the Armed Forces erred in applying the legislative history of Article 2 of the UCMJ. The court affirmed an error in consideration of the evidence that may preclude the use of mental competency defenses against otherwise valid enlistments in the future. While the DoD has changed its regulations in light of some of the issues addressed in *United States v. Fry*, they do little to stem the impact that this ruling could have on future treatment of mental health issues in the military. Ultimately, this ruling cements military jurisdiction when a person with developmental disabilities commits crimes under the UCMJ, and it forecloses defenses against a person's mental competency to enlist.