

Application of Article 2(c) of the UCMJ to Title 32 Soldiers

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Introduction

National Guard Soldiers often perform training away from their home states and units in a full-time National Guard status under Title 32.¹ While performing such duty, the question arises regarding whether these military personnel are subject to state or federal codes of military justice for purely military offenses.² To illustrate this issue, consider a Texas Army National Guard Active Guard Reserve (AGR) officer serving in a Title 32 status while attending the Graduate Course at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. While at the Graduate Course, this officer commits the offense of disrespect toward a superior commissioned officer, who is a Title 10 active duty officer assigned to TJAGLCS as an instructor.

This note presents the traditional analysis regarding Uniform Code of Military Justice (UCMJ) jurisdiction over National Guard Soldiers with particular emphasis on Title 32 duty. It then considers the different state codes of military justice that may be applicable to the hypothetical case described above. Finally, it analyzes Article 2(c) of the UCMJ and concludes that this provision of the UCMJ may be applicable to Title 32 National Guard Soldiers when such Soldiers commit purely military offenses away from their home states.

Review of State and Federal Law Applicable to Title 32

The UCMJ and State Codes of Military Justice

Members of the National Guard may perform duty under three distinct provisions of law.³ They may perform duty as members of the National Guard of the United States under Title 10 of United States Code (U.S.C.).⁴ They may further perform duty as members of the National Guard of

their individual states under Title 32 of U.S.C. (federal funding, but state control), or perform state active duty (state funding and state control).⁵ The UCMJ does not typically apply to Soldiers serving in a military status pursuant to Title 32 or state active duty.⁶ To fill this gap, the majority of states and territories have developed their own codes of military justice.⁷

Chapter 432 of the Texas Government Code is the Texas Code of Military Justice (TCMJ).⁸ Broadly speaking, TCMJ is applicable to all members of the state's military forces who are not in federal service.⁹ Further, the TCMJ applies in all places and to all persons otherwise subject to its provisions while they are serving outside the state and while they are going to and returning from service outside the state, in the same manner and to the same extent as if they were serving inside the state.¹⁰ Like the UCMJ, the TCMJ includes offenses that are purely military.¹¹ For example, § 432.134 of the TCMJ makes it an offense for a Soldier to show disrespect toward his superior commissioned officer.¹² The TCMJ defines an "officer" as a commissioned or warrant officer of the state military forces.¹³ The "state military forces" of Texas are defined as the National Guard of Texas and other militia or military forces organized under the laws of Texas.¹⁴

In contrast, the Commonwealth of Virginia incorporates the entire UCMJ as its state code of military justice.¹⁵ Therefore, Article 89 of the UCMJ (disrespect toward a superior commissioned officer) is specifically incorporated as an offense under Virginia state law.¹⁶ However, the

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¹ See 10 U.S.C. § 101(d)(6)(A) (2013). See also U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU, REG. 350-1, ARMY NAT'L GUARD TRAINING tbl.3-2 (4 Aug. 2009) [hereinafter NGB 350-1]. Title 32 is the title of the U.S. Code under which National Guard Soldiers serve when they are training under State control, but funded with federal money. *Id.* See also 32 U.S.C. § 502 (2013).

² See, e.g., U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2(b) (3 Oct. 2011) [hereinafter AR 27-10].

³ See 32 U.S.C. §§ 326-27 (2013).

⁴ *Id.* § 101(5). National Guard Soldiers serving under Title 10 are subject to the United States Code of Military Justice. See 10 U.S.C. § 802(a)(1) (2013).

⁵ See *id.* § 502; TEX. GOV'T CODE ANN. § 432.001(2) (West 2008) [hereinafter TCMJ].

⁶ See 10 U.S.C. § 802(a)(3) (2013); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 discussion (5) (2012) [hereinafter MCM]; see also 32 U.S.C. §§ 326-27 (2006). Under Title 32, National Guard Soldiers may perform full-time National Guard duty or inactive duty training. See NGB 350-1, *supra* note 1, tbl. 3-2.

⁷ See Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW., Dec. 2007, at 30.

⁸ See TCMJ, *supra* note 5, § 432.001.

⁹ See *id.* § 432.002.

¹⁰ See *id.* § 432.004.

¹¹ See *id.* § 432.131.

¹² *Id.* § 432.134.

¹³ See *id.* § 432.001(14).

¹⁴ See *id.* § 432.001(18).

¹⁵ See VA. CODE ANN. § 44-40 (West 2010).

¹⁶ *Id.*

Virginia UCMJ only applies to members of the Virginia National Guard serving in a Title 32 or a state active duty status.¹⁷

Article 2(c) of the UCMJ

Under Article 2(c) of the UCMJ, a person serving with an armed force who: (1) submits voluntarily to military authority, (2) meets minimum competency and age standards, (3) receives military pay and allowances, and (4) performs military duties is subject to UCMJ jurisdiction.¹⁸ In *United States v. Phillips*, an Air Force Reserve lieutenant colonel admittedly ingested marijuana-laced brownies while in a travel status the night before her annual training orders were to begin.¹⁹ The Court of Appeals for the Armed Forces (CAAF) found the officer subject to the jurisdiction of the court under Article 2(c).²⁰ The court reasoned the officer had submitted to military authority by voluntarily traveling on her travel day and accepting the military conditions of her travel to use government quarters.²¹ Further, the officer clearly met age and mental requirements for active service and received pay and allowances for the day of travel.²² The court also found the officer performed military duties on her travel day.²³ The court stated, “Travel is a normal part of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ.”²⁴ Therefore, the court maintained jurisdiction over the case pursuant to Article 2(c) of the UCMJ.²⁵

¹⁷ See *id.* § 44-40.01.

¹⁸ See 10 U.S.C. § 802(c) (2006). Article 2(c) indicates in full:

Notwithstanding any other provision of law, a person serving with an armed force who (1) submitted voluntarily to military authority; (2) met the mental competence 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 promulgated by the Secretary concerned.

Id.

¹⁹ See *United States v. Phillips*, 56 M.J. 843 (A.F. Ct. Crim. App. 2002).

²⁰ See *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003).

²¹ *Phillips*, 56 M.J. at 846. In affirming the lower court’s holding, the Court of Appeals for the Armed Forces also emphasized that the officer must be “serving with an armed force” as a pre-requisite to finding jurisdiction under Article 2(c). *Phillips*, 58 M.J. at 220. The court easily found that the officer was serving with an armed force on 11 July due to her pay status, receipt of retirement points, and receipt of military benefits such as lodging. See *id.*

²² See *Phillips*, 56 M.J. at 846.

²³ *Id.* at 847.

²⁴ *Id.*

²⁵ *Id.*

In *United States v. Fry*, a Marine was convicted by a general court-martial of being absent without leave, possessing child pornography, and fraudulently enlisting.²⁶ The Marine private argued that his enlistment in the Marine Corps was void because he was subject to a limited conservatorship under California state law at the time of his enlistment and that as a result, the court had no authority to court-martial him.²⁷ However, the court found jurisdiction over the case under Article 2(c) of the UCMJ.²⁸

The court analyzed the opening clause to Article 2(c), “[n]otwithstanding any other provision of law,” and found the language conclusive with respect to congressional intent to preempt or supersede all contrary state or federal law regarding this provision.²⁹ The court stated, “[T]he ‘notwithstanding’ language is a clear statement of law indicating the obvious intent of the drafters to supersede all other laws.”³⁰ Therefore, the court found it was not bound by the California competency order in deciding whether jurisdiction may be found under Article 2(c).³¹ The court then upheld the lower court’s finding that the Marine possessed the requisite mental capacity required by Article 2(c) “at the time of [his] voluntary submission to military authority” for UCMJ jurisdiction to attach.³²

Analysis of State and Federal Law Applicable to Title 32

Pursuant to the TCMJ, only Texas military forces not in a federal status, i.e., not in a Title 10 status, are subject to its provisions.³³ Although the TCMJ has explicit extraterritorial application, it limits the offenses under such code to those

²⁶ *United States v. Fry*, 70 M.J. 467 (C.A.A.F. 2012).

²⁷ *Id.* at 465. A California probate court awarded the Marine private’s grandmother a limited conservatorship over him on the basis of his previously diagnosed autism, arrest record, and impulsivity. *Id.*

²⁸ *Id.* at 468 (citing 28 U.S.C. § 1738 (2013)). (“[D]etermining whether court-martial jurisdiction existed pursuant to Article 2(b) would require a determination of important issues of federalism and comity, which are unnecessary since Article 2(c) offers an alternative means of resolving this case.”). Article 2(b) provides that

[t]he voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

10 U.S.C. § 802(b) (2013); *Fry*, 70 M.J. at 468.

²⁹ *Id.* at 468–69.

³⁰ *Id.* at 469 (emphasis added).

³¹ See *id.*

³² *Id.* The second prong of the Article 2(c) analysis was at issue in the case due to the earlier California court’s conservatorship order over Fry based on his diagnosed autism and other mental health issues. *Id.* at 465.

³³ See TCMJ, *supra* note 5, § 432.002.

wholly involving Texas military forces.³⁴ Hence, the offense of disrespect toward a superior commissioned officer under the TCMJ is only applicable to those cases where an officer of the Texas National Guard is shown disrespect by another member of the Texas National Guard.³⁵ Therefore, the Texas National Guard AGR officer serving at TJAGLCS in a Title 32 status cannot be charged with disrespect toward a superior commissioned officer under the TCMJ for conduct toward a superior Title 10 officer.³⁶

Further, the Texas National Guard officer cannot be charged for the offense of disrespect toward a superior commissioned officer under Virginia state law, as the offense is purely military in nature with no analogous civilian crime under Virginia law.³⁷ Additionally, the Virginia military code is only applicable to members of the Virginia National Guard, not the Texas National Guard.³⁸

Uniform Code of Military Justice jurisdiction does not typically attach to Soldiers serving in Title 32 status,³⁹ though there is no express prohibition in the UCMJ to such application when the Soldier is performing full-time National Guard duty under Title 32.⁴⁰ Army Regulation (AR) 27-10 addresses this omission by explicitly limiting the application of the UCMJ to Soldiers serving in a Title 10 status.⁴¹ Therefore, the Texas National Guard AGR performing duty at TJAGLCS in a full-time National Guard status under Title 32 does not appear to be subject to the UCMJ in any manner.⁴² Consequently, this purely military offense appears to be non-cognizable under both federal and state law.

However, Article 2(c) of the UCMJ may apply in this case. The recent decision in *United States v. Fry* raises the question as to whether the CAAF's interpretation of the broad language found in Article 2(c) would cover a National Guard Soldier serving in a full-time National Guard status under Title 32.⁴³ The court in *Fry* spent a considerable amount of time discussing the first clause of Article 2(c) in

coming to its decision.⁴⁴ The court's analysis of the "[n]otwithstanding any other provision of law" provision was decisive in reaching the conclusion that it was not bound by the California court's findings regarding the Marine's mental capacity to contract.⁴⁵ The court held the "notwithstanding" clause was a clear expression of congressional intent that *all* state and federal law is preempted or superseded with respect to Article 2(c).⁴⁶ This would presumably include any prohibition in applying the UCMJ to Title 32 Soldiers serving in a full-time National Guard status.

Applying the analysis developed in *United States v. Phillips* regarding Article 2(c), the UCMJ would apply to the Texas National Guard AGR serving at TJAGLCS under Title 32.⁴⁷ The initial issue in applying Article 2(c) is whether the accused was serving with an armed force.⁴⁸ The Texas National Guard officer in the Graduate Course is clearly serving with an armed force, i.e., the U.S. Army. Once this threshold question is satisfied, the four-prong analysis set forth in Article 2(c) applies. In this case, the Texas National Guard AGR officer voluntarily submitted to military authority in following the rules and regulations of TJAGLCS by appearing for classes and participating in other activities required for Graduate Course students. Further, the Texas National Guard officer would presumably meet age and mental competence qualifications while at TJAGLCS and receive military pay and allowances. Finally, the Texas National Guard AGR officer would be performing military duties associated with his attendance at the Graduate Course. Therefore, the Texas National Guard officer's service clearly falls within the parameters of Article 2(c) despite the fact that such service is in a Title 32 status.

Conclusion

A Texas National Guard AGR officer serving in a full-time National Guard status while attending TJAGLCS under Title 32 would be subject to the UCMJ under Article 2(c) for purely military offenses.⁴⁹ The expansive language used by the CAAF regarding the application of Article 2(c) would logically apply to supersede any contrary provisions found in AR 27-10 or Article 2(a) of the UCMJ regarding Title 32.⁵⁰ Therefore, the CAAF's holdings in *Phillips* and *Fry*

³⁴ See *id.* §§ 432.001, 432.004.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See VA. CODE ANN. § 44-40 (2010).

³⁸ See *id.* § 44-40.01.

³⁹ See AR 27-10, *supra* note 2, para. 20-2(b).

⁴⁰ See 10 U.S.C. § 802(a)(1) (2013). *But see id.* § 802(a)(3) (limiting application of the Uniform Code of Military Justice for *inactive duty training* to National Guard of the U.S. Soldiers in federal service). Under 10 U.S.C. § 12602, full-time National Guard duty performed by a member of the Army National Guard of the United States shall be considered active duty in federal service as a Reserve of the Army. See *id.* § 12602(a)(2).

⁴¹ See AR 27-10, *supra* note 2, para. 20-2.

⁴² *Id.*

⁴³ See *Fry*, 70 M.J. at 465.

⁴⁴ *Id.* at 469.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003).

⁴⁸ *Id.*

⁴⁹ An offense other than a purely military offense would presumably be cognizable under Virginia state law, thereby making any analysis regarding the application of the UCMJ unnecessary. See *generally* VA. CODE ANN. 18.2-1-18.2-512 (2013).

⁵⁰ See *Fry*, 70 M.J. at 465.

have shown an inclination on the part of the court to subject servicemembers to the UCMJ when facts clearly show the presence and application of military authority.⁵¹ A Texas

National Guard AGR officer serving in uniform at a military educational course would surely present such a case.

⁵¹ *Id.*; *Phillips*, 58 M.J. at 220.