IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Michael B. GILBREATH Corporal (E-4) U.S. Marine Corps, Appellant	APPELLANT'S REPLY BRIEF USCA Dkt. No. 14-0322/MC Crim.App. No. 201200427

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

COMES NOW, the Appellant, Corporal (Cpl) Michael B. Gilbreath, U.S. Marine Corps, and replies to the Government's Answer of the following Issues:

I.

WHETHER INDIVIDUAL READY RESERVISTS, SUBJECT TO PUNISHMENT UNDER THE UCMJ, ARE ENTITLED TO THE PROTECTIONS OF ARTICLE 31(B) WHEN QUESTIONED BY SENIOR SERVICE MEMBERS ABOUT SUSPECTED MISCONDUCT COMMITTED ON ACTIVE DUTY.

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT APPELLANT'S STATEMENTS WERE ADMISSIBLE UNDER ARTICLE 31(B), UCMJ, AND MILITARY RULE OF EVIDENCE 305.

Reply to Government's Statement of Facts

The Government's Answer makes several factual errors and misstatements of the Record. First, the Government claims the lower court was incorrect in stating that Sgt Muratori supervised Cpl Gilbreath because, in its view, "the Record does not clearly support this."[1] The Government is wrong. Sgt Muratori evaluated Cpl Gilbreath in submitting his Proficiency and Conduct (Pro/Cons) markings and was responsible for counseling him.[2] Along with two other Corporals that worked in the armory, Corporals Olson and Hunter, all of these Marines, according to Sgt Muratori, "worked for" him.[3] The Record clearly shows a Marine Corporal working for a Marine Sergeant, where the Sergeant writes the Corporal's Pro/Cons and regularly counsels him. This means Sgt Muratori supervised Cpl Gilbreath.[4]

Second, the Government states that Sergeant (Sgt) Muratori and Cpl Gilbreath had "no concept of rank distinction between [them] and they referred to each other by their first names"[5] and that "even at work, they would only refer to rank between

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[1] Appellee's Br. at 3.
[2] JA. at 155.
[3] JA. at 170.
[4] The lower court concurs. "Prior to his discharge in January 2011, the appellant had been assigned to Force Reconnaissance Company, First Reconnaissance Battalion, where he served as the armory custodian from June 2009 through his departure on terminal leave in December 2010. In that position, the appellant worked with *and for* Sergeant NM (Sgt NM)." JA at 2 (emphasis added).
[5] Appellee's Br. at 3.

themselves if they were in the presence of their superiors."[6] This is misleading and makes it appear that the two Marines always called each other by their first names, except in the presence of superiors. The two Marines referred to each other at work by their *last* names, and would use name and rank whenever an Officer, First Sergeant, or Sergeant Major was in their presence.[7] This indicates a misguided and somewhat unprofessional concept of rank distinction, but a distinction nonetheless.

Third, the Government claimed the Appellant made a misrepresentation to this Court: "Contrary to Appellant's contention in his Brief that Sgt Muratori suspected that Appellant before talking to Appellant, Sgt Muratori merely thought that Appellant might have some knowledge of what happened to the missing pistol. (J.A. 171.)" [*sic*] The Government misstates the Record and the Appellant's Brief.

In a footnote, the lower court stated, "Regardless of whether Sgt NM suspected the appellant at the beginning of their conversation, he clearly suspected the appellant by the time that he asked where the weapon was and noted that people at the command, including himself and the XO, would be held

[6] Appellee's Br. at 3.
[7] JA. at 155.

accountable."[8] This was exactly the Appellant's point in his Brief.[9] It is unclear why the Government asks this Court to believe that Sgt Muratori never suspected Cpl Gilbreath at all.[10] Whether before Sgt Muratori called Cpl Gilbreath, or in the midst of their conversation, the record clearly shows Sgt Muratori suspected Cpl Gilbreath of stealing the weapon before he questioned him.[11]

I.

WHETHER INDIVIDUAL READY RESERVISTS, SUBJECT TO PUNISHMENT UNDER THE UCMJ, ARE ENTITLED TO THE PROTECTIONS OF ARTICLE 31(B) WHEN QUESTIONED BY SENIOR SERVICE MEMBERS ABOUT SUSPECTED MISCONDUCT COMMITTED ON ACTIVE DUTY.

A. The Government misunderstands the pressure required to trigger a rights advisement under Article 31(b), UMCJ.

The Government acknowledges the text of Article 31(b), UCMJ, and states the current legal test that the "Article applies only to situations in which because of military rank, duty, or other similar relationship, there might be subtle

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[8] JA at 5. FN 1.
[9] Appellant's Br. at 3 ("Based on this investigation, and his personal knowledge of Cpl Gilbreath (one of his Marines when Cpl Gilbreath was on active duty), Sgt Muratori suspected he stole the pistol and used a WIR receipt to do so.") (referencing JA at 171); Appellant's Br. at 32, ("Once Cpl Gilbreath indicated a suspicious level of familiarity with the missing weapon, Sgt Muratori suspected Cpl Gilbreath of stealing the pistol.") (referencing JA at 66).
[10] Appellee's Br. at 4-7.
[11] JA at 66, 171.

pressure on a suspect to respond to an inquiry."[12] The Government then provides several examples that are all irrelevant to this particular case.

First, the Government asks this Court not find "special inherent pressure or coercion"[13] and offers *United States v. Jones*,[14] *United States v. Rios*,[15] and *United States v. Richards*[16] in support. None of these cases assist the Government's claim.

In *United States v. Jones*, this Court held that the questioner's motives amounted to simple "personal curiosity", "no one had tasked him", and he was "not acting in any official capacity."[17] Here, the Government admits Sergeant Muratori was ordered to engage in a quest for evidence for the missing weapon by his acting Commanding Officer,[18] and was engaged in this quest in his official capacity "because he had been assigned to the command the longest and as the training chief had the most interaction with the armory."[19] *United States v. Jones*, is therefore, inapposite to this case.

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[12] Appellee's Br. at 11, (citing *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981); *United States v. Jones*, 73 M.J. 357 (C.A.A.F. 2014)).
[13] Appellee's Br. at 11-12.
[14] 24 M.J. 367, 369 (C.M.A. 1987).
[15] 48 M.J. 261, 264 (C.A.A.F. 1998).
[16] 17 M.J. 1016, 1019 (N.M.C.M.R. 1984).
[17] *Jones*, 24 M.J. at 368.
[18] Appellee's Br. at 4 (citing JA 149 Finding of Fact(k)), 156, 174.
[19] Appellee's Br. at 4 (citing JA 154, 157).

In *United States v. Rios*, this Court found that admissions made during a pretext phone call between the appellant and his 14-year-old stepdaughter were admissible. This Court held that no Article 31(b), UCMJ, warnings were required because "the second prong of *Duga* was not met, because there was not an element of coercion based on 'military rank, duty, or other similar relationship.' Appellant thought he was talking to his daughter, not an interrogator or military superior."[20] Cpl Gilbreath was not participating in a pretext phone call, but a phone call with a military superior who was acting in his official capacity in a quest for evidence. Moreover, in *United States v. Jones*, this Court "expressly reject[ed] the second, subjective, prong of that test . . . [.]"[21] As such, *Rios* is also unsupportive of the Government's claim.

United States v. Richards also provides no assistance for the Government's position. There, the appellant admitted to the ship's chaplain that he stole funds while working in the ship's disbursing office. The chaplain discussed the issue with the ship's staff judge advocate, who advised that it would be better for the unknown-sailor to report himself before the command discovered the crime. The chaplain returned to the sailor and received permission to report the crime to the command. The

[20] *Rios*, 48 M.J. at 264.
[21] 73 M.J. 357, 362 (C.A.A.F. 2014).

U.S. Navy-Marine Corps Court of Military Review held that the "*only* motivation was the conduct of a privileged conversation pursuant to MIL.R.EVID. 503."[22] Clearly, Sgt Muratori was not Cpl Gilbreath's priest.

From there, the Government transitions to "pressure...from military rank, duty, or similar relationship"[23] and then on to "coercive pressure" as the only kind of pressure meriting rights warnings under Article 31(b), UCMJ. Again, this misstates the law and erroneously invites this Court to disregard the actual test that looks for "subtle pressures which exist in military society."[24]

The Government offers *United States v. Martin*[25] and *United States v. Kelley*[26] as examples of cases where no "coercive pressure" was placed on the person being questioned.[27] But these cases are irrelevant in light of both the actual test and the granted issue now before this Court.

In *United States v. Martin*, a Navy doctor engaged in a pretext conversation with a patient whom he had assaulted.[28] During the conversation, the doctor engaged in "private, emotion-ridden colloquies" and could not have felt any "subtle

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[22] *Richards*, 17 M.J. at 1019 (emphasis in the original).
[23] Appellee's Br. at 12.
[24] *Duga*, 10 M.J. at 209.
[25] 21 M.J. 730, 732 (N-M.C.M.R. 1985).
[26] 3 M.J. 535, 537 (A.C.M.R. 1977).
[27] Appellee's Br. at 12-13.
[28] *Martin*, 21 M.J. at 731.

pressure or coercion to make a self-incriminating statement."[29] The doctor thought he was having a private conversation with someone wholly unconnected with the military. Cpl Gilbreath cannot be said to have engaged in "private, emotion-driven colloquies" with Sgt Muratori.

In *United States v. Kelley*, this Court held an Army captain's statements to a staff sergeant without Article 31(b), UCMJ, warnings were admissible.[30] The captain obtained his official military record from an office administered by the staff sergeant. He complained that negative material was located in his record. When he returned the record, the materials were missing. The staff sergeant tracked down the captain to ask where they were and the captain admitted he removed the materials. Relying on the "position of authority test" and the now-discarded second prong of *United States v. Duga*, the U.S. Army Court of Military Review held the captain was under no duty from rank or position to respond to the staff sergeant; it also held that he could not possibly have believed he had any such duty.[31] In comparison to this case, the relative ranks are inverted, and Sgt Muratori, despite the Government's claims, was Cpl Gilbreath's former supervisor. This case also provides no assistance to the Government.

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[29] *Martin*, 21 M.J. at 732.
[30] All facts from *United States v. Kelley*: 3 M.J. at 535-37.
[31] *Id*. at 537.

The Government then simply declares Cpl Gilbreath "faced no pressure from military rank or duty" because he was a member of the Individual Ready Reserve (IRR).[32] In doing so, the Government assumes an IRR Marine would not feel subtle pressure if questioned about his active-duty misconduct. Indeed, the pressure is not even subtle.

In discussing IRR Marines, the Government recognizes they are subject to administrative separation for failure to adhere to Marine Corps guidelines, which are authorized by Federal law.[33] The Government also recognizes that IRR Marines are subject to involuntary recall under Article 3, UCMJ.[34] These two consequences form the basis of the subtle pressure an IRR Marine faces when questioned about active-duty misconduct.

Subtle means "so delicate or precise as to be difficult to analyze or describe."[35] Here, Cpl Gilbreath, or any IRR Marine who is questioned about alleged active-duty misconduct, is on the receiving end of pressure to respond to the questioning. If an IRR Marine refuses to answer the questions, there is a very real likelihood he can be involuntarily recalled back to active duty for a nonjudicial punishment, an Article 32, UCMJ, investigation, or a court-martial. This could rip that Marine

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[32] Appellee's Br. at 12.
[33] *Id*. at 13.
[34] *Id*. at 12.
[35] New Oxford American Dictionary 1688 (2nd ed. 2005).

from his home, his family, his career, or his education. It could be a complete upheaval of his life with far-reaching consequences. This significant pressure lurks just below the surface and is, arguably, not even subtle. The emotions an IRR Marine feels when receiving official mail from Marine Corps Mobility Command (MOBCOM) are very real. The force of Federal law is behind whatever message is enclosed. Just the same, the force of the UCMJ was behind the questions Cpl Gilbreath felt compelled to answer.

In addition to the pressure a Marine may feel when faced with the possibility of involuntary recall to active duty, the Marine may also face the subtle pressure of being administratively separated from the IRR. Many, many Marines after completing their active-duty contracts spend some time in the IRR before transitioning to being “drilling Reservists” in a Select Marine Corps Reserve unit. An IRR Marine may feel pressured to answer a former supervisor’s questions to avoid not being allowed to join his local Reserve unit.

Finally, the Government’s Answer ignores the basics of agency law. The Government is correct that Cpl Gilbreath was subject to involuntary recall to active-duty. But it is wrong to claim that because Sgt Muratori could not issue that order,

that no pressure existed or could exist.[36] While only the Secretary of the Navy or an active-duty general court-martial convening authority could involuntarily recall Cpl Gilbreath, Sgt Muratori is still their agent. He addressed Cpl Gilbreath in that capacity, and he can transmit information to either of them. He questioned Cpl Gilbreath on their behalf.

The irony of the Government's position is that agency theory is contemplated in administering rights warnings under Article 31(b), UCMJ. In Military Rule of Evidence (M.R.E.) 305, a "person subject to the Code includes a person acting as a knowing agent of a military unit or a person subject to the Code."[37] The Military Rules of Evidence (absent a pretext conversation where no pressure could objectively be perceived)[38] do not allow the Government to escape from agency principles. This Court should not allow the Government to evade agency principles by claiming Cpl Gilbreath felt no pressure because his questioner was not the Secretary of the Navy or the Commanding General of the 1st Marine Division.[39]

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[36] Appellee's Br. at 14.
[37] M.R.E. 305(b)(1); *see generally United States v. Penn*, 39 C.M.R. 194 (C.M.A. 1969); *United States v. Quillen*, 27 M.J. 313, 314 (C.M.A. 1988).
[38] *United States v. Ruiz*, 54 M.J. 138, 140 n.2 (C.A.A.F. 2000).
[39] One wonders what the pressure to respond to questioning would be like if either of those persons telephoned Cpl Gilbreath and moreover, if the Government would still claim there was no pressure to respond.

B. The Government's reading of Articles 2 and 3, UCMJ, is incoherent.

The Government cautions this Court against "append[ing] additional language as it sees fit" to a statute.[40] The Government means this only in a limited sense. Its entire argument requires this Court to append additional language to Article 31(b), and reject the plain, common-sense textual reading of the statute.

The Government's reference to a *textual* canon of statutory construction is also meant in a limited sense.[41] The canon *expressio unius est exclusio alterius* or, "the expression of one thing is the exclusion of another" does not mean what the Government thinks it means –- at least not for this case. This doctrine "is not even lexicographically accurate, because it is not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege on other kinds."[42] Judge Richard Posner wrote of the maxim, "Recent Supreme Court decisions sometimes approve the canon, but more often reject it. The

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[40] Appellee's Br. at 14, (citing *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014)).

[41] Appellee's Br. at 15. Even the Supreme Court case cited by the Government, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), shows the maxim only applies when the natural association is so strong that the excluded items are excluded by a deliberate choice and not inadvertence.

[42] Black's Law Dictionary, 620-21 (8th ed. 2004). The canon is referred to as "the best example of a Latin maxim masquerading as a rule of interpretation."

doctrine should be rejected. Congress may want to create an exception to a general grant without wanting to prevent the courts from recognizing additional exceptions in keeping with the spirit of the statute."[43]

However, if this Court takes the Government's claim at face-value, it could mean that IRR Marines can be prosecuted under the UCMJ, but not receive all of its protections, simply because they are not a separate stand-alone category under Article 2, UCMJ. The Government does not find IRR Marines in one of the thirteen categories of "persons subject to the Code" under Article 2(a), UCMJ, and asks this Court to conclude the matter. This is an error.

A full reading of Article 2, and Article 3, UCMJ, shows that IRR Marines are subject to the UCMJ. The thirteen categories of service members in Article 2(a), UCMJ, include persons where jurisdiction is self-evident. This includes active duty personnel, regular component retirees, and cadets, and those whose jurisdiction is conditional, such as reservists who are conducting inactive-duty training or retired reservists who are receiving hospitalization form an armed force. An IRR Marine would come under the jurisdiction of the UCMJ if he

[43] Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 775 (1987).

returned to active duty or transferred to a drilling Reserve unit and conducted inactive-duty training.

Article 2 goes on to states in paragraph(d)(1), clearly states that a "member of a reserve component who is not on active duty" may be "ordered to active duty involuntarily" if he is the subject of an Article 32 investigation, a court-martial, or a nonjudicial punishment. As the Government points out, each branch of the Armed Forces has a Ready Reserve, a Standby Reserve, and a Retired Reserve, which comprises the "reserve component."[44] If the Government's suggested statutory canon is still operative, then the IRR is included.

Article 3(a), UCMJ, also allows for certain personnel to be involuntarily returned to active duty to be tried at court-martial if personal jurisdiction existed at the time of the alleged misconduct. This includes all IRR Marines who were alleged to have committed misconduct while they were in a status in which they were subject to the UCMJ. Article 3(d) states that a change in status cannot prevent an involuntary recall of a service member, such as an IRR Marine, to be tried at a court-martial for active duty misconduct or misconduct occurring during inactive-duty training. Read together, Articles 2 and 3, UCMJ, show that IRR Marines, such as Cpl Gilbreath, are plainly subject to the UCMJ for alleged misconduct while on active-duty,

[44] Appellee's Br. at 16-17.

and are subject to the UCMJ when questioned about the alleged active-duty misconduct.

If the Government had its way and IRR Marines were a separate fourteenth category under Article 2(a), UCMJ, what would the language of the statute look like:

> Article 2(a)(14): Inactive members of a reserve component who are on active duty or who are on inactive-duty training.

This would make no sense and border on statutory surplusage, because these circumstances are covered by Article 2(a)(1) and (3). Simply making a category where IRR Marines are *always* subject the UCMJ would place them on an equal footing with their active-duty, and other, counterparts, and create a mismatch between IRR Marines and Select Marine Corps Reserve Marines when the latter are not on inactive-duty training. This would be non-sensical.

The Government asks this Court to consider the "overall statutory scheme" in interpreting Article 31(b), UCMJ, and referenced a Supreme Court case, *Food and Drug Admin., et al. v. Brown & Williamson Tobacco Corp., et al.*[45] Cpl Gilbreath agrees with this reference because the "words of a statute must be read in their entire context and with a view to their place in the overall statutory scheme."[46] If this Court also agrees with the

[45] 529 U.S. 120 (2000).
[46] *Id*. at 133; Appellee's Br. at 11.

Supreme Court's language in *Brown & Williamson Tobacco*, then a "symmetrical and coherent regulatory scheme" should be placed into "a harmonious whole."[47] When an IRR Marine is being questioned about alleged misconduct occurring on active duty, he can be involuntarily recalled to active duty to be tried by a court-martial. Marines who are subject to court-martial are entitled, absent some well-known exception, to Article 31(b), UCMJ, warnings. This common-sense approach makes sense out of Articles 2, 3, and 31(b), UCMJ and places them into a "harmonious whole" rather than the Government's view.

If Congress desired to remove Article 31(b) protections for IRR Marines in this particular situation, it could amend Article 31(b) and propose that the President amend M.R.E. 305. The Government apparently believes Congress desired this result because when it amended Article 2 and 3, UCMJ, it did not attempt to include the IRR.[48]

Congress might be unpleasantly surprised at where such a path might lead. It would have to completely re-write Article 31(b). As it appears in its original and un-edited form since becoming law, Article 31(b) only requires the person asking the question to be subject to the Code. The statute is not

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[47] *Brown & Williamson*, 529 U.S. at 133 (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); *Gustafon v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).
[48] Appellee's Br. at 16-18.

concerned with the military status of the person being questioned. The common-sense assumption is that the individual is being questioned in anticipation of trial by court-martial, just as Cpl Gilbreath was, and just as any IRR Marine who was questioned about his active-duty alleged misconduct would be.

C. The Government refuses to admit that Marines and other service members in the Individual Ready Reserve are part of military society.

The Government contends that, as a matter of law, IRR Marines are not part of "military society."[49] Immediately preceding this assertion, the Government tells this Court just exactly how IRR Marines are part of military society by citing the very laws that make them part of military society![50]

The Government seeks to place IRR Marines, and other similarly situated service members, into a state of limbo –- subject to involuntary recall and court-martial for past offenses, but without the basic protections intended by Congress for all service members who could face such consequences.

In the past, Marines who were involuntary recalled to active-duty to stand trial by court-martial incorrectly contested their membership in military society. For example, in *Lawrence v. Maksym*,[51] a Marine Major challenged the Government's jurisdiction over him for offenses committed during a prior

[49] Appellee's Br. at 18.
[50] *Id*. at 17.
[51] 58 M.J. 808 (N-M. Ct. Crim. App. 2003).

period of active duty. The Government considered the Major, just as it once considered Cpl Gilbreath, to be part of military society, so long as that meant prosecution at court-martial. But now that the membership in military society threatens to undermine the prosecution, the Government expels Cpl Gilbreath, along with every other IRR Marine.

In 2007[52] and 2008,[53] the President recalled nearly 2,500 IRR Marines for service. Many of these Marines were part of the "surge" that pacified Iraq, which, until recently, was considered a "stable and self-reliant" state.[54] IRR Marines were involuntarily recalled and pulled from their homes, jobs, and families, after serving their country on active duty. These service members should not be considered "not part of military society" and not befitting basic protections under the UCMJ by their own Government.

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[52] *Marine Reservists Involuntarily Recalled*, Associated Press, Mar. 27, 2007, *available at* http://www.military.com/NewsContent/0,13319,130237,00.html.

[53] Trista Talton, *IRR Marines Put Life on Hold Following Recall*, Marine Corps Times, May 25, 2008, *available at* http://www.marinecorpstimes.com/article/20080525/NEWS/805250312/IRR-Marines-put-life-hold-following-recall (attached at App. 1).

[54] *Obama Pays Tribute to Troops Who Served in Iraq*, Voice of America News, Dec. 14, 2011, *available at* http://blogs.voanews.com/breaking-news/2011/12/14/obama-pays-tribute-to-troops-who-served-in-iraq/. In a speech at Fort Bragg, North Carolina, the President said the United States in withdrawing military forces from Iraq was "leaving behind a sovereign, stable and self-reliant Iraq."

In the past, the Government has asked this Court to find that the Military Rules of Evidence applied to a service member while he was a member of the Temporary Disability Retired List (the List). For example, in *United States v. Stevenson*,[55] this Court held that M.R.E. 312(f) allowed a petty officer's blood to be drawn without his consent if the blood draw also had a valid medical purpose.

In 1997, Naval Criminal Investigative Service (NCIS) agents determined that the appellant in *Stevenson* was a suspect in a 1992 rape of a military dependent when he was on active duty.[56] In the interim, the appellant was placed on the List. When an active duty service member becomes disabled, the Service Secretary may retire the member as either permanently or temporarily disabled. If the disability "may be of a permanent nature, but the circumstances do not permit a final determination that the disability is, in fact, permanent . . . and stable, the Secretary is required to place the member on [the List], with retired pay."[57]

In 1998, the appellant was being treated at a Veteran's Administration hospital. NCIS agents asked the hospital staff to obtain a blood sample at the appellant's next scheduled treatment. The hospital staff put a needle in his arm and drew

[55] 53 M.J. 257 (C.A.A.F. 2000).
[56] All facts from *Stevenson*: 53 M.J. at 258-59.
[57] *Id*. at 258.

one vial of blood for medical use and a second vial for evidence. Though the appellant consented to the blood draw for his diabetes treatment, he was never told the reason for the second vial and never consented. The trial judge suppressed the blood sample and the Navy-Marine Corps Court of Criminal Appeals affirmed.

This Court held that because the appellant was statutorily subject to the UCMJ under Article 2(a)(4), that M.R.E. 312(f) applied to him. In correcting the lower court, this Court stated that:

> the exercise of court-martial jurisdiction over members on [the List] . . . underscores the continuing military status of a member on [the List], even if the member is not then performing regular duties. Court-martial jurisdiction reflects the statutory concept that [the List] is a "temporary" assignment, not a permanent separation from active duty.[58]

An IRR Marine, just like a service member on the List, is not evicted from military society because he no longer "perform[s] military missions" on a regular basis.[59] While the TDRL service members have an explicit statutory basis for court-martial jurisdiction,[60] the IRR service members have jurisdiction for active duty misconduct based on Articles 2(d)(1) and 3(a).

The Government asks this Court to dismiss the idea that Cpl Gilbreath, and IRR Marines, deserve Article 31(b) warnings

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[58] *Stevenson*, 53 M.J. at 259.
[59] *Id*.
[60] *United States v. Bowie*, 34 C.M.R. 411 (C.M.A. 1964).

because they are part of military society as mere "equity."[61] It is actually the Government who appeals to equity. It is clear Cpl Gilbreath stole the weapon. In the Government's view, he must be punished because he broke the rules. The Government asks this Court to ignore that it also broke the rules by not following and applying *all* of the UCMJ. In its view, this is allowable, presumably because Cpl Gilbreath stole military property.

The Government also criticizes Appellant for not citing any cases that extend the protections of Article 31(b) to members of the IRR, though it admits it is not aware of any. This is a matter of first impression for this Court. All of the available case law, Congressional intent, and common sense indicate that IRR Marines, and other similarly situated service members are entitled to the protections of the UCMJ if they are to be subjected to its punishments.

II.

WHETHER THE MILITARY JUDGE ERRED IN CONCLUDING THAT APPELLANT'S STATEMENTS WERE ADMISSIBLE UNDER ARTICLE 31(B), UCMJ, AND MILITARY RULE OF EVIDENCE 305.

A. The Government's unsupported contention that this was merely a paperwork discrepancy is baseless.

The Government's Answer repeatedly asserts that this was merely a "paperwork discrepancy." While this may have initially

[61] Appellee's Br. at 18.

appeared to be a mismatch between the Consolidated Memorandum Receipt and the "Crane Report"[62] it soon became clear that it was more, much more, than a paperwork discrepancy. A lot of the misconduct punishable under the UCMJ may first appear to be a "paperwork discrepancy," but are in fact, crimes, such as BAH fraud or embezzlement. When a person subject to the UCMJ questions a service member about BAH fraud or embezzlement, and a crime is suspected, the nature of how the misconduct initially appeared is not relevant.

Sgt Muratori testified that he suspected Cpl Gilbreath when he questioned him about the weapon. It was clearly beyond a "paperwork discrepancy" at that point. Sgt Muratori was conducting a Preliminary Inquiry. He was required to advise witnesses who could be subject to a court-martial of their rights under Article 31(b), UCMJ.

The lower court's concurring opinion correctly grasped the seriousness of the situation, even if the Government continues to ignore it. The Government's assertion alone will not convert this quest for evidence into something other than a Marine sergeant acting in his official capacity in performing either a disciplinary or a law enforcement function. The concurring opinion stated:

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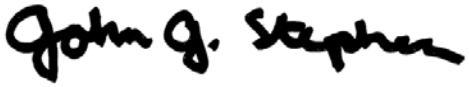
[62] The name for the report that tracks serialized weapons. These are monitored by the Government from a Naval Surface Warfare Center in Crane, Indiana. JA at 289, 294, 297, 321.

> Whenever military property is unaccounted for, it raises the possibility that those responsible for the property could be subject to disciplinary action. The greater the importance of accounting for the property given its nature and/or value, the greater the likelihood of disciplinary implications for any discrepancies. Also, the probability the property was stolen vice merely lost would in most instances lead to a greater chance of disciplinary action. Sgt NM emphasized the importance of accounting for the missing weapon when he told the appellant, "there's a lot of people's heads on the line right now and somebody is going to get in a lot of trouble if this thing doesn't get fixed." Sgt NM further explained that by "trouble" he meant his commanding officer and/or his XO were at risk of being relieved over the missing weapon. Given these circumstances, it was evident when Sgt NM first talked to the appellant about the missing weapon any evidence uncovered that the weapon had been stolen would very likely lead to disciplinary action.[63]

Cpl Gilbreath was not charged with committing a paperwork discrepancy. He was charged with stealing a pistol. If it was a serious enough offense to involuntarily recall him to active duty for a court-martial, it was serious enough to afford him his rights under the UCMJ.

Conclusion

WHEREFORE, Appellant asks this Honorable Court to reverse the opinion of the lower court and remand this case.



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[63] JA at 009.

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APPENDIX

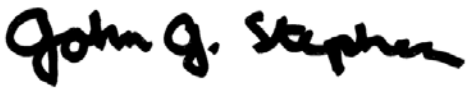
1. Trista Talton, *IRR Marines Put Life on Hold Following Recall*, Marine Corps Times, May 25, 2008 (pg. 1-7).

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 22, 2014.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(c)(1) and (2) because it contains 4,940 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2010 with 12-point-Courier-New font.



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IRR Marines put life on hold following recall

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Sgt. Randy Sullivan, center, and his fellow IRR Marines line up for chow May 7 at Camp Lejeune. (Randy Davey)

By Trista Talton
Staff writer

CAMP LEJEUNE, N.C. — Cpl. Ronald White thought he was done with war.

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After serving two tours in Afghanistan and two in Iraq, he decided to return to civilian life, bidding the Corps farewell more than a year ago.

He got engaged, tried his hand at college and eventually decided to go to bartending school. He was head bartender at a saloon in a coastal North Carolina town near Camp Lejeune's back gate when he got pulled back to active-duty for another year, one that will mark his fifth deployment to combat.

"I was pretty devastated," White said of his reaction to the recall order. "It's like winning the lottery, but the exact opposite. Afghanistan wasn't so bad. Our first push into Iraq in 2003, it was bad. I've lost a lot of very good friends."

He expressed mixed emotions about returning to the Corps and Iraq shortly after he — and nearly 200 other Marines in the Individual Ready Reserve — reported to Lejeune May 5 on recall orders.

Many said they were shocked when they got recalled. With a population of about 60,000 IRR Marines, the odds of getting picked for involuntary activation are generally pretty slim.

But as Marines who've been snatched back can attest, a contract is a contract.

Tapped for duty

The IRR consists of Marines fulfilling the remainder of their eight-year contractual obligations, usually four years, and those who have chosen to stay in when their contract is up.

Under the contract, IRR Marines are required to abide by certain rules, including providing Marine Corps Mobilization Command in Kansas City, Mo., with their up-to-date contact information and attending annual musters.

But, with multiple deployments and the wars in Iraq and Afghanistan straining active-duty resources, Marines in the IRR are being asked to do more.

In July 2006, President Bush authorized the Corps to activate up to 2,500 Marines in the IRR at any given time. The last time Marines in the IRR were involuntarily recalled for duty was during the Korean War.

MobCom, which is responsible for the administration and mobilization of the Individual Ready Reserves, only recalls IRR Marines in the second and third years of their four-year contracts, to fill critical shortages in active and Selected Reserve units.

"We've done this twice now," said Maj. Gen. Andrew Davis, MobCom commanding general, in a telephone interview. "The first involuntary activation group is in Iraq."

The second group was notified earlier this year that they were to report for duty this month.

Sgt. James Kaiser planned to wrap up his last semester at George Mason University outside Washington, D.C., when he got his letter.

"I went straight to the bar after I got my notification," he said.

But this self-described "dead-broke college student" said he could use the money he'll get paid on active duty.

MobCom has a historical attrition rate of 65 percent to 69 percent, so fewer than half of the 2,000 who received orders earlier this year will actually report to their activation units.

The order doesn't automatically mean a Marine will find himself back in active duty. IRR Marines may request exemptions. Exemption packages are reviewed by a board of officers and staff non-commissioned officers, and appeals go directly to Davis for review.

"We have been generous in our judgments on those exemptions," he said.

The numbers prove it. More than 500 of the 2,000 IRR Marines notified this year did not have to report because of medical reasons, according to MobCom officials. Another 369 were not mobilized through the Delay, Deferment and Exemption process in which the IRR Marines proved hardship. And, 379 chose to return to active duty, affiliate with a Selected Marine Corps Reserve unit or Individual Mobilization Augmentee or complete an inter-service transfer.

That leaves a little more than 600 reporting to II Marine Expeditionary Force at Lejeune and I MEF at Camp Pendleton, Calif., for duty this month. They'll serve a seven-month deployment in Iraq during their year-long activation.

Those selected were chosen principally because of their rank, experience and military occupational specialties. The men and women are non-commissioned officers, senior lieutenants and captains.

"We're finding that about 80 percent of the Marines who are being activated have been to Iraq or Afghanistan once, about 40 percent twice and 20 percent once," Davis said. "That's pretty remarkable. We're getting a combat-experienced, mature Marine who is coming back on active duty."

What the IRR does for you

The IRR is one way for Marines fulfilling the remainder of their contracts to make some extra cash and expand their professional military education.

"We do have a lot of opportunities out there that are particularly great for students, where they can come back on duty in the summertime and earn a Marine Corps salary," said Col. Lisa Hynes, MobCom assistant chief of staff of operations.

One reason it's important for IRR Marines to keep MobCom updated on their contact information is so the command can contact Marines about upcoming opportunities, Hynes said. For example, IRR Marines can work in their MOS with a nearby Reserve unit or participate in Marine Corps Martial Arts Program training.

The command's Web site, https://mobcom.mfr.usmc.mil/MOBCOM.asp">https://mobcom.mfr.u maintains a running list of job and continuing education opportunities.

"IRR Marines can request voluntary activation for short periods of time to, say, build roads in Belize," Davis said.

Attending the required annual musters is another way IRR Marines can find out more. During these typically half-day musters, which are held monthly, senior staff NCOs explain how Individual Ready Reservists get promoted and earn Reserve retirement points and talk about active-duty opportunities, said MobCom spokesman Maj. Winston Jimenez, in an e-mail responding to questions.

"Also, the screening musters are now more than just a mix of administrative activities led by MobCom Marines, but also bring a consortium of federal, state and non-profit agencies with the joint mission of providing IRR Marines with the support and education to make their time in the IRR effective and informative," Jimenez said.

Organizations such as Military OneSource, the Department of Veteran Affairs, state veterans groups, consortiums providing educational aid, Marine-4-Life, Labor Department, Helmets to Hard Hats and other veteran-friendly groups are at musters to provide information to Marines, he said.

Back to the fight

A vast majority of the Marines who reported to Lejeune earlier this month have deployed at least once to Iraq or Afghanistan, said Col. Jason Seal, commanding officer of the Deployment Processing

Command/Reserve Support Unit. Of the 194 who turned out, 147 have deployed at least once to the combat zones.

"I can't believe I'm in cammies," said Cpl. John Hale, as he sat inside the building that houses Lejeune's Reserve Support Unit.

Other Marines, many shocked that they'd been recalled, nodded as if acknowledging Hale's sentiment.

They came from all over the country — Texas, Georgia, Delaware, Ohio, New Jersey and Maryland — leaving behind their families, young children and careers. Some put their aspirations for a college degree on hold.

They were three days into their two-week check-in process at the unit, time spent updating paperwork, visiting medical to be vaccinated and waiting to hear which II MEF units they'd be assigned. For the time being, they settled into squad bays — shell shock to men and women who've become accustomed to the privacy of their own homes.

Their MOSs include radio and ammunition technicians, cooks, artillery, even a K-9 handler. That surprised some of the Marines, who assumed grunts were primarily the ones being recalled.

"I'm in artillery and I thought I wouldn't be recalled because you don't hear much about big guns over there anymore," said Cpl. Dean Delacruz.

He was asleep when his wife smacked him on the head with the FedEx envelope containing his orders.

"I'm here to do a duty," he said. "You know what you do when you sign that contract."

Sgt. Joan Ferreira was one month away from making detective in the New York Police Department when he packed up and left the busy streets of the Big Apple.

"When I got the orders, I wasn't expecting it," he said. "I look at it this way — if me being here means one less Marine getting killed over there, then this is where I'm supposed to be right now."

Sgt. Kenneth Waynick said he'd heard Marines were being recalled, so he was not exactly shocked when he got his letter. The orders actually helped him make a decision he's been pondering since he got out of the Corps more than a year ago.

"It makes the decision to enlist easier," he said. "Once I get [in Iraq], I'll probably re-enlist there."

Opting to be activated for a year was somewhat of a relief for Sgt. Matthew Hill. "I tried the reserves and didn't like it," he said. "I actually am considering re-enlisting. I'd really like to go to [officer candidate school] eventually."

Not every one of the 194 who checked into the unit earlier this month was exactly prepared. During formation of one of the groups, some Marines wore civilian clothes.

"The vast majority, as you can see, are in shape," Seal said. "They still have an active-duty mindset. There are Marines here who are a little overweight. We try to make a reasonable adjustment for them."

That adjustment is getting back into a physical training routine. Once these Marines are released to the general forces, they'll be required to pass the Corps' physical fitness test. Before that happens, the Marines are going to the School of Infantry-East for refresher training.

And as these Marines prepare to head to Iraq, more in the IRR will likely receive recall orders this year.

"We have a requirement that we are now just beginning the sourcing for another 800 Marines," Davis said. "They would probably report at the end of the year."

Sooner than later, that means 2,000 more letters will be sent out.