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Common Sense and Article 9: A Uniform Approach to Automobile Repossession

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cohabitation in the civilian community[62] and cross-dressing[63] can be punished under the UCMJ.

When the command intrudes upon the sexual activities of a soldier, however, the intrusion should be as limited as possible while serving the military purpose. This is simply another way of stating the requirement that orders serve a military purpose,[64] as the unnecessarily broad and intrusive aspects of an order would lack a sufficient military nexus.

Tested against this standard, the required "safe-sex" order is as limited as possible while fully achieving its military purpose. Soldiers are not quarantined, nor are they prohibited from engaging in sexual intercourse.[65] They are instead simply required to ensure that potential sexual partners are protected and informed. Merely because the number of willing partners may be diminished does not mean that the order is unnecessarily intrusive. The prohibition against adultery, carnal knowledge, and fraternization, for example, reduce the pool of potential sexual partners without being overbroad or otherwise unenforceable.

Finally, the "safe-sex" order comports with the recommendations of the President's Commission on the HIV Epidemic. The commission recommended, in part:

> Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partner's knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.[66]

In summary, the "safe-sex" order has an obvious military nexus when the soldier's potential sexual partner is a service member, family member, or civilian employee. An arguable nexus is present even for "unaffiliated" civilians, given the severely service discrediting impact of unwarned and unprotected sex in the civilian community under such circumstances. Even if the order lacks a sufficient military nexus in some cases, it is sufficiently definite and related to a military purpose to support its lawfulness in most circumstances. Because the order is narrowly drawn to achieve its military purpose without unnecessarily intruding into private areas of conduct, it is not rendered unlawful because it modifies sexual behavior. The "safe-sex" order, in short, is a lawful military order.

Conclusion

As recent events demonstrate, the legality of the "safe-sex" order is not settled. Persuasive arguments against the lawfulness of the order can surely be made in certain cases. More sweeping arguments against the legality of all such "safe-sex" orders will no doubt also be advanced. Despite all of these contentions, the "safe-sex" order would constitute a lawful military order in most circumstances. Until the appellate courts authoritatively decide this issue, however, the legality of the "safe-sex" order will surely remain a subject of academic controversy and adversarial contention.

Editor's note—*As this article went to print, the Air Force Court of Military Review decided the case of* United States v. Womack, *ACM 26660 (A.F.C.M.R. 27 Oct. 1988) (en banc). In* Womack, *the court affirmed the accused's conviction for violating a "safe-sex" order from his commander by engaging in unwarned and unprotected homosexual sodomy.*

[62] United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

[63] United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[64] MCM, 1984, Part IV, para. 14c(2)(a)(iii).

[65] Compare the limited "safe-sex" order in *Manning* to the absolute prohibition against drinking alcohol in *Roach.*

[66] Report of the President's Commission on the Human Immunodeficiency Virus Epidemic, 24 June 1988, at 9–46. Consistent with these recommendations:

> In 1987 alone, 29 bills containing criminal sanctions specifically dealing with AIDS were introduced in state legislatures. Five states have enacted statutes which criminalize certain behavior by individuals who have tested positive for Human Immunodeficiency Virus (HIV), the Virus which causes AIDS—as well as those who have AIDS or AIDS-Related Complex (ARC).

M. Schechter, *AIDS: How the Disease Is Being Criminalized,* American Bar Association Criminal Justice, Section of Criminal Justice 6, 7 (Fall 1988, vol. 3, no. 3) (citing Draft Report of the American Bar Association Section of Criminal Justice Ad Hoc Committee on AIDS and the Criminal Justice System, March 1988, p. 59).

Common Sense and Article 9: A Uniform Approach to Automobile Repossessions

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Introduction

At best, automobile repossession cases are vexing irritants for legal assistance attorneys. They are particularly frustrating given the circumstances in which they typically arise. Often, the clients are facing extreme financial difficulties. Although the clients may have suspected that repossession was likely for quite some time, they may nevertheless have delayed seeking an attorney's assistance in hopes that the inevitable would never occur. They may

even have delayed seeking legal help until after the repossession. The longer the clients wait before seeking assistance, the more they limit their options and the attorney's ability to obtain relief.

Clients who seek legal assistance earlier in the repossession process preserve their options, which may include preventing the repossession altogether, allowing the client an opportunity to reclaim the vehicle after repossession, or limiting the client's liability to the loss of the vehicle itself. Many of the actions considered by the attorney will be based on the provisions in Article 9 of the Uniform Commercial Code (U.C.C. or the Code).[1] This article begins with a discussion of steps that may be taken to eliminate the need to resort to the U.C.C. Because these steps will not always be successful, the article also examines the protective provisions of the U.C.C. and how they have been interpreted and applied by various courts.[2]

Preventing Repossession

The most typical causes of automobile repossession are debtor ignorance and procrastination. When debtors fail to seek legal assistance because they are unaware of their rights with respect to secured transactions or because they believe that nothing can be done to prevent the repossession, the attorney will indeed be able to do little following the repossession. Hence, the attorney's first step in preventing repossession is to educate potential clients so they will seek help.[3]

If the legal education campaign has been effective, the attorneys should see their clients well before repossession occurs. At the initial meeting, the attorneys should gather the information necessary to formulate their strategy, determine how many months the clients are behind in their payments, and consider what actions the creditors have already taken. It is also important to obtain copies of purchase and finance contracts, payment booklets, checking and savings account statements, leave and earnings statements, and summaries of the clients' monthly expenses. The attorney should inquire into the clients' payment histories and determine whether the creditors have previously threatened repossession. If time permits, attorneys should obtain their clients' credit reports.[4]

Attorneys must also direct some attention to the vehicles. They should determine the mechanical condition of the cars, as well as the retail and wholesale values of the cars. The clients should be encouraged to keep the cars clean and mechanically sound, if possible, to protect the resale values in case the clients are forced to sell the cars.

All of this information is essential in determining strategy and predicting the likelihood of success. For example, the prospect of obtaining alternative financing may be discounted if the clients have grossly abused their previous credit privileges. Conversely, if the attorney determines that the delinquency is due merely to a temporary cashflow problem, it may be prudent to dedicate substantial time to negotiating with the creditors. Because time is always of the essence, it is important that the attorneys become completely familiar with the circumstances before devoting their attention to one approach or the other.

The first, often overlooked, approach is simply contacting the creditor and requesting an extension. To be successful, attorneys must satisfy the creditors that their clients are credit-worthy and can cure the delinquency within a reasonable period. Otherwise responsible payment histories and good credit ratings will assist in both respects. Extensions, which are inexpensive and painless, should never be overlooked.

Often, obtaining an extension is simply a matter of showing the creditor that an extension is in the creditor's best interest. Perhaps the delinquency is due to an unexpected, nonrecurring expense. In this case, it would be foolish for the creditor to repossess the car and further jeopardize their ability to collect on the loan. If, however, the client's delinquency is the result of a long term overextension of finances, it is unlikely that the client's financial situation will improve within a short period of time. Under these circumstances, the attorney might assist the client in developing a written plan that shows how the client proposes to cure the delinquency. A written proposal is often more effective than verbal assurances, because it shows that the client has given serious consideration to the problem. Even a plan that stretches over six months or more may provide the creditor with a greater return than if the creditor repossessed and resold the car. Upon resale, the creditor may not receive the full amount of the outstanding debt, and it will be difficult to collect the deficiency because of the client's poor financial situation. Thus, an extension may be in the creditor's best interest even though the client's financial position seems hopeless.

A second, less desirable option involves assisting the client in refinancing through the original or another creditor with the goal of achieving lower payments. The attorney's role in this process is essentially an advisory one. The attorney should discourage the client from using an easily obtainable, high interest loan; such loans invariably worsen the client's financial situation. Even the more competitive loans should be avoided, if possible, as they often increase the client's long term debt by combining lower periodic payments with higher interest rates or longer loan terms. Even under these circumstances, however, refinancing may be preferable to repossession, and should be considered.

A final approach involves selling the car to a third party and obtaining a release from the creditor. Here, too, the attorney's participation will be limited. Although the attorney may give the client a few practical tips to increase the probability of selling the car, the attorney's main concern will be ensuring that the creditor gives the client a written release and not just an acquiescence in a third party's assumption of the debt. The attorney may even draft a release for the creditor's signature. Of course, without evidence of the release, selling the car may be no solution at all. Although

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[1] Uniform Commercial Code (9th ed. 1978) [hereinafter U.C.C.]. The U.C.C. has been adopted in all states except Louisiana. J. White and R. Summers, Uniform Commercial Code 1 (2d ed. 1980).

[2] Rather than concentrate on a single jurisdiction, this article will delineate general rules. Specific cases are discussed in order to identify and exemplify trends.

[3] On most military installations there are media available for this purpose. The newspaper, daily bulletins, and information papers are excellent resources.

[4] *See* 15 U.S.C. § 1681g (1982).

selling the car and obtaining the release may seem simple enough, this approach can create additional problems, because a client who sells his only vehicle must find transportation. Obviously, collateral consequences such as this must be considered when adopting a given course of action.

Post-Repossession

Sometimes, despite the attorney's best efforts or because of client procrastination or ignorance, the creditor will repossess the client's car. It may then appear that the damage is complete and there is no remaining need for an attorney. On the contrary, it is at this point that the client most needs legal counsel. The U.C.C. contemplates as much:

> In the area of rights after default, our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties. . . . The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.[5]

Because the client is very vulnerable after repossession, the attorney's efforts on the client's behalf are critical at this stage. The attorney must alert the client that the bank may sell the automobile for whatever price is easily obtained, and that this price may not be sufficient to extinguish the client's debt.[6] If this occurs, the bank may attempt to obtain a judgment against the client for the deficiency.[7] Once the judgment is granted, the client will have little recourse, having already lost the car and whatever equity may have accrued. The client's credit rating will have been damaged, and there will be an outstanding judgment against him.

The attorney's active participation in a post-repossession case can prevent the above scenario from occurring. Article 9 of the U.C.C. may provide the attorney not only with the tools, but with the remedies as well. It establishes procedural protections designed to ensure that the debtor is treated fairly and is not saddled with an unjust deficiency judgment. The courts have also fashioned a forfeiture penalty to be used in case the creditor fails in its obligation to treat the client fairly. Skillful use of both the procedural protections and the available remedy may protect the client from further damage.

Two important protections established by the Code are the right to receive notice prior to sale of the collateral and the requirement that any sale of the collateral be conducted in a commercially reasonable manner.[8] It is important that these protections be enforced. Insisting on strict compliance will either ensure that the collateral is not sold for a grossly inadequate price or, as discussed later, prevent the creditor from asserting a large deficiency judgment against the debtor. The rights to receive notice prior to sale and to a commercially reasonable sale of the collateral are established in § 9–504(a):

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.[9]

Note that § 9–504(3) establishes two exceptions to the debtor's right to receive notice prior to sale or other disposition. The first is of no concern in automobile possession cases because an automobile is not perishable and does not speedily decline in value. The second exception, which applies only when there is a recognized market for the collateral, is equally inapplicable given the case law. It is settled that there exists no "recognized market" for used automobiles.[10] Generally, a recognized market is one in which the price of goods does not depend on individual differences and is essentially nonnegotiable.[11] In contrast, the price of a used car will depend on several factors, including "make, style, horsepower, age, and condition."[12] Thus, neither of the exceptions to the notice requirement apply in automobile repossession cases.

The requirement that notice be reasonable has provided the impetus for much litigation. The dispute most often arises when the debtor has not actually received notice, although the creditors may have made some attempt at actual notification. The Code does not define "reasonable" notification, although the comments to § 9–504 provide some insight:

> "Reasonable notification" is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take

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[5] U.C.C. § 9–501 (Comment 4) (9th ed. 1978).

[6] One study indicates that the average resale price of repossessed cars is only 52% of the retail value. *See* J. White and R. Summers, *supra* note 1, at 26–9.

[7] The creditor has the right to apply the proceeds of sale to the following:
(a) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;
(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefore is received before distribution of the proceeds is completed.
U.C.C. § 9–504(1) (1978). The debtor is liable for any deficiency. U.C.C. § 9–504 (1978).

[8] U.C.C. § 9–504(3) (1978).

[9] *Id.*

[10] *See* J. White and R. Summers, *supra* note 1, at 26–10.

[11] *Id.*

[12] Nelson v. Monarch, 452 S.W.2d 375, 377 (Ky. Ct. App. 1970).

appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.[13]

Significantly, there is no provision guaranteeing that the debtor actually receive notice. The Code simply requires that notice be "sent." "Sending" notification requires only that the creditor dispatch the notice in a manner that reasonably ensures receipt, such as depositing a properly stamped and addressed letter in the mail.[14]

There are, nevertheless, circumstances under which a court sympathetic to the debtor may view the failure of actual receipt as important. In *Mallicoat v. Volunteer Finance & Loan Corp.*,[15] the creditor repossessed an automobile and sent notice by registered mail of its intent to sell the vehicle. When the letter was returned unclaimed, the creditor proceeded to sell the vehicle and obtain a deficiency judgment against the debtor.[16] On appeal, the court held that the creditor had not given reasonable notice, finding that the creditor should have made a further attempt to ensure actual receipt of notice, as the debtor and creditor were in the same city, the creditor knew where the debtor and his parents lived, and the creditor knew that the debtor had not actually received the letter of notification.[17]

Other courts have acknowledged that actual receipt is irrelevant under the Code, and then gone to great lengths to find insufficient notice. In *Central Bank & Trust Co. v. Metcalfe*,[18] a Kentucky case, the creditor sent notice to codebtors who were husband and wife. Although the financing contract was signed individually by both husband and wife, the creditor sent the single repossession notice to "Mr. and Mrs. Herbert H. Metcalfe." The Court held that this notice was insufficient as to the wife, finding that notice to one spouse is not automatically imputed to the other.[19] Thus, while the Code requires that the creditor do very little to meet the notice requirement, some courts have held the creditor to a stricter burden.

An attorney who is successful in ensuring notice prior to sale of the collateral will be in a much better position to influence the price at which the collateral sells. One method of ensuring notice is for the attorney to contact the creditor immediately after the first client interview, inform the creditor of the attorney's representation, and request that all notices and documents be sent directly to the attorney.

Once notice is given, the attorney will be able to monitor the method of sale to ensure that the collateral brings a fair price. If, for example, the creditor plans to sell the collateral at a public auction, the attorney may wish to inquire into the methods of advertising and be present at the auction. If the attorney finds the planned method of sale insufficient, the attorney should be certain to register an objection. These objections should be made even if the sale could be considered commercially reasonable under U.C.C. standards. Often, the creditor will heed those objections in order to avoid future litigation.

The second important protection provided by § 9–504(3) is the requirement that the creditor sell or dispose of the collateral in a "commercially reasonable" manner. Here again, the Code provides little guidance:

> If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.[20]

Better guidance with respect to what type of sale will be considered commercially reasonable is usually provided by the courts. One court, however, has defined a commercially reasonable sale as one that is in accordance with "prevailing trade practices among reputable business and commercial enterprises engaged in the same or similar business."[21] Given the vagueness of the terms used, this definition is only moderately helpful, at best. Other courts have provided more definitive guidance.

In *Trimbol v. Sanitol of Memphis, Inc.*,[22] the court gave a short but helpful discussion of commercial reasonableness. The opinion highlighted six factors that should be considered in determining whether a sale is commercially reasonable: the type of collateral involved, the condition of the collateral, the number of bids solicited, the time and place of sale, the purchase price or terms of sale, and any special circumstances.[23]

The attorney should use the *Trimbol* factors in analyzing a particular fact situation. The first two factors, type and condition of the vehicle, focus on the price at which a reasonable sales representative would expect to sell the collateral. If the attorney's analysis shows that the car is a rusty, old, foreign import that needs repair, the price expectation should be low. The third and fourth factors, time and

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[13] U.C.C. § 9–504 (Comment 5) (1978).

[14] U.C.C. § 1–201 (38) (1978).

[15] 415 S.W.2d 347 (Tenn. Ct. App. 1966).

[16] *Id.* at 349.

[17] *Id.* at 350. Later Tennessee opinions have relied on *Mallicoat* to take a functional approach to the notice requirement, focusing their inquiry on whether the creditor's actions have actually informed the debtor of the impending disposition. For example, in International Harvester Credit v. Ingram, the court stated:

> We think the provision for notice in connection with a sale is intended to afford the debtor a reasonable opportunity (1) to avoid a sale altogether by discharging the debt and redeeming the collateral or (2) in case of sale, to see that the collateral brings a fair price. A notice that does not afford him this reasonable opportunity is not reasonable notification and a sale under it is not commercially reasonable.

619 S.W.2d 134 (Tenn. Ct. App. 1981) (citing Mallicoat v. Volunteer Finance and Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966)).

[18] 663 S.W.2d 957 (Ky. Ct. App. 1984).

[19] *Id.*

[20] U.C.C. § 9–507(2) (1978).

[21] *See, e.g.*, Mallicoat v. Volunteer Finance & Loan Corp., 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966).

[22] 723 S.W.2d 633 (Tenn. Ct. App. 1986).

[23] *Id.* at 642 (citing *In re* Four Star Music Co., 2 B.R. 454 (M.D. Tenn. 1979)).

place of sale and number of bids solicited, focus on the efforts put into the sale based on the price expectations determined by the first two factors. If the automobile was an extremely popular model with low mileage, it would be unreasonable for the creditor to sell the automobile to the first bidder, without negotiation. The sixth factor, referred to as "special circumstances" by the *Trimbol* court, is simply a catch-all phrase for any other relevant equitable circumstances. For example, in *Trimbol*, the defaulting debtor contacted potential purchasers and suggested that the collateral would be entangled in lawsuits, thereby discouraging those purchasers.[24] Thus, the *Trimbol* factors provide for a pragmatic approach to the issue of commercial reasonableness.

The price factor listed in *Trimbol* is really not a factor at all. Instead, it is the goal toward which all other factors are geared.[25] Despite the Code drafter's intentions to the contrary,[26] the price for which the collateral sells is the overriding consideration. Indeed, the issue of commercial reasonableness will never arise unless the collateral sells for an unsatisfactory price. Therefore, an insufficient price should not be a factor in determining commercial reasonableness. Instead, the debtor's attorney should treat a low price as the basis for a presumption of commercial unreasonableness.

This approach is justified by case law. While the courts may *state* that price is not everything, they invariably *treat* price as though it were the determining factor. In *Womack v. First State Bank*,[27] the court stated: "While a low price is not conclusive proof that a sale has not been commercially reasonable, a large discrepancy between sales price and fair market value 'signals a need for close scrutiny.' "[28] In another case, *Smith v. Daniels*,[29] the court stated: "Although the Code is careful to point out that a creditor's failure does not in and of itself make a sale commercially unreasonable, a sufficient resale price is the logical focus of the protection given debtors by these sections."[30] It seems obvious, then, that a low resale price gives the attorney a basis upon which to make a good faith argument that the sale was commercially unreasonable.

Two points of reference to be used in arguing that the sale price was commercially unreasonable are the fair market value of the vehicle and the market chosen by the creditor (wholesale or retail). The fair market value of an automobile can easily be determined by reference to the Red Book.[31] Although the Red Book value is not the sole standard by which to analyze a resale, "even when such handbooks are only considered a guide to valuation they will provide the attorney with a rough standard by which to measure the sufficiency of the price received."[32]

Most handbooks will list both the wholesale and retail value of the automobile. The retail value will always be higher than the wholesale value. It is therefore necessary to determine which market is considered commercially reasonable. The debtor's attorney, of course, should argue that a sale in a wholesale market is commercially unreasonable. Unfortunately, this argument has not been very successful in recent times. In *Hall v. Owen State Bank*,[33] for example, the court stated:

> It is certainly true that a retail sale of goods will in most cases command a much higher price. However, a retail sale will usually generate considerably more expense, such as reconditioning expenses, advertising expenses and sale commissions, insurance costs, etc., and usually will take much longer to consummate. This in turn may result in higher storage expenses and a higher interest accrual under the original obligation. Therefore, a sale to a dealer on the wholesale market will probably be the more reasonable approach in most cases.[34]

If the facts are such that a retail sale will generate more expense, *Hall* should allow creditors to use the wholesale market. In most automobile repossession cases, however, these expenses will not be present. This is especially true if the creditor is a bank, in which case the attorney should insist that some attempt be made to sell the vehicle on the retail market. This would only require that the vehicle be parked in the bank parking lot with a "For Sale" sign. It would not require reconditioning, advertising, commissions, or storage expense. Hence, *Hall* does not automatically preclude sale in the retail market.

Section 9–507 establishes the debtor's remedy where the creditor violates the protections outlined in Article 9. It provides for damages and establishes a minimal amount of recovery.[35] This remedy will normally not be very advantageous, as the debtor's obligation on the original loan will probably exceed provable damages. The more effective remedy in response to a creditor's violation of the U.C.C. is the forfeiture of the deficiency judgment. This "remedy" for the debtor also acts as a penalty against the creditor. It is also more effective in creating an incentive for creditors to provide the Code protections.

Not all jurisdictions recognize the forfeiture penalty. Some hold that the creditor's failure merely creates a rebuttable presumption that the collateral would have garnished

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[24] *Id.* at 640.

[25] *See* J. White and R. Summers, *supra* note 1, at 26–11.

[26] "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." U.C.C. § 9–507(2).

[27] 728 S.W.2d 194 (Ark. Ct. App. 1987).

[28] *Id.* at 197.

[29] 634 S.W.2d 276 (Tenn. Ct. App. 1982).

[30] *Id.* at 278.

[31] National Market Reports, Inc., Red Book (January 1988).

[32] J. White and R. Summers, *supra* note 1, at 26–11.

[33] 370 N.E.2d 918 (Ind. Ct. App. 1977).

[34] *Id.* at 930.

[35] "If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price." U.C.C. § 9–507(1).

an amount equal to the debt had the creditor followed U.C.C. procedures.[36] In those jurisdictions, the creditor has the burden of proving that the collateral's resale price was unaffected by the failure to follow U.C.C. procedure. Once this is accomplished, the creditor is entitled to a deficiency judgment.

The movement to accept the "forfeiture penalty" concept as the majority rule is best illustrated by a series of cases decided by the Arkansas Supreme Court. The first, *Norton v. National Bank of Commerce*,[37] involved the typical situation. The bank repossessed an automobile and, without notice to the debtor, sold it at a private sale.[38] The proceeds were insufficient to cover the debt and the bank therefore sued for a deficiency judgment.[39] The debtor argued that the bank's failure to give notice barred it from collecting a deficiency judgment.[40] The court agreed that the bank had acted improperly but nevertheless refused to accept the debtor's argument. Instead, the court established a compromise:

> We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law.[41]

The rule in *Norton* seems fair to both the debtor and creditor. The court's approach cautiously accepted the Code drafters' notion that creditors are often tempted to take advantage of defaulting debtors.[42] Additionally, the court rejected the idea that creditors' actions are always so repugnant that they bar a deficiency judgment. The court, therefore, acknowledged that neither the creditor nor the debtor is completely lacking in fault. After all, the debtor's obligation should not be ignored simply because the creditor has acted erroneously. To do so would unjustly enrich the debtor. This is not to suggest that the court should ignore possible overreaching by creditors. By purposefully or accidentally failing to follow Code procedures, the creditor may have deprived the debtor of the full value of the automobile. The court's shifting of the burden to the creditor provides adequate protection of both parties' interests.

In *Rhodes v. Oaklawn Bank*,[43] however, the Arkansas Supreme Court provided increased protection for debtors. In that case, the bank repossessed restaurant equipment from a defaulting debtor.[44] Later, the bank sold the equipment without notifying the debtor.[45] On appeal from the grant of a deficiency judgment, the court held that because the bank did not give notice, it was not "entitled" to a judgment.[46] Curiously, the court did not remand the case so that the bank could attempt to meet the *Norton* standard. As a result, the decision could be interpreted in two ways. First, that as a matter of law, a creditor that fails to provide notice can never meet the *Norton* standard. A second, more expansive reading of the decision would lead to the conclusion that *Norton* was simply overruled and that a failure to comply with the U.C.C. in any respect caused the creditor to forfeit the deficiency.

This issue was decided in *First State Bank of Morritton v. Hallett*,[47] where the bank repossessed the debtor's car and sold it without notice.[48] As if intending to put the matter finally to rest, the court stated that "the rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment."[49]

The language chosen by the court was sufficiently expansive not only to overrule the *Norton* case, but also to conclude that, at least in Arkansas, any violation of the Article 9 protections is enough to preclude a deficiency judgment.

As representative of the majority rule, *Hallett* appears to be an outgrowth of sympathy for defaulting debtors. Most cases, after all, involve a relatively large institutional creditor against a nearly destitute debtor. It is no wonder, then, that *Hallett* represents the majority. It is also clear that sympathy may be the attorney's best weapon in automobile repossession cases. In analyzing the equities of the forfeiture penalty, there can be no other conclusion than that it is an attempt to give debtors a break.

Conclusion

There are many practical and legal approaches to automobile repossession cases. None of these approaches is very successful, however, unless the problem is brought to an attorney's attention in a timely manner. This merely states the obvious. Yet, one would think that the proposition is terribly complex, given the frequency with which clients seek help after repossessions. Recognizing and attempting to prevent client procrastination, therefore, is the first step for any attorney involved in an automobile repossession case.

Once this step is taken, the attorney can begin to apply practical solutions in an effort to prevent the repossession. Many suggestions, such as an extension or refinancing, do

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[36] *See, e.g.*, J. White and R. Summers, *supra* note 1, at 26–15.

[37] 398 S.W.2d 538 (Ark. 1966).

[38] *Id.* at 539.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 542.

[42] *See supra* note 5 and accompanying text.

[43] 648 S.W.2d 470 (Ark. 1983).

[44] *Id.*

[45] *Id.* at 471.

[46] *Id.* at 472.

[47] 722 S.W.2d 555 (Ark. 1987).

[48] *Id.*

[49] *Id.* at 557 (quoting Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972)).

not necessarily require the services of an attorney. The attorney's participation, however, will increase the probability of preventing repossession.

Even where the attorney is unsuccessful at preventing repossession, it is better for an attorney to become involved early in the process. Once the repossession becomes a reality, the attorney is in a better position to enforce the protective provisions of the U.C.C. These include the right to notice prior to sale and the right to insist that the creditor resell the collateral in a commercially reasonable manner. With respect to resale, the attorney should determine whether the applicable jurisdiction recognizes the forfeiture penalty. Although the forfeiture penalty creates a windfall for the debtor, it is still the most effective means of ensuring that the debtor is not burdened with a large deficiency judgment. In many instances, in fact, preventing or reducing the deficiency judgment will be the only positive aspect of an otherwise totally frustrating experience.

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United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

The Demise of the *Burton* Demand Prong

In *United States v. McCallister*[1] the Court of Military Appeals shot down the "demand prong" of *United States v. Burton*[2] as a *per se* violation of the accused's right to speedy trial. The court revisited the rationale of *Burton's* "demand prong" and explained that Rule for Courts-Martial 707,[3] along with the *Burton* 90-day rule and the four-part sixth amendment standard set forth in *Barker v. Wingo*,[4] adequately protect an accused's right to speedy trial. Has this ruling made a demand for speedy trial a lifeless defense request?

In *Barker*, the United States Supreme Court held that, due to the relative nature of the speedy trial right, courts should approach each claim of denial of speedy trial on an *ad hoc* basis. To provide guidance, the Court set out a broad constitutional standard. The Court explained that the lower courts should balance four factors to determine if an accused had been denied the right to speedy trial: 1) the length of the delay; 2) the reason for the delay; 3) the accused's assertion of his right; and 4) the prejudice to the defendant caused by the delay.[5]

In *McCallister*, the appellant was found guilty of absence without leave and wrongful appropriation. Pursuant to the demand prong of *Burton*, appellant made an oral demand for speedy trial two days after being placed in pretrial confinement. Two days later, he made a written demand. The government did not specifically respond to these demands and waited a while before moving forward with a view toward trial. Ten days after the written demand, the government appointed an investigating officer under article 32.[6] At trial, appellant maintained that the government had not responded to his demands. Appellant contended that the failure to respond deprived him of his right to a speedy trial and therefore required dismissal of the wrongful appropriation specification.

The Army Court of Military Review had stated that it did not believe the *Burton* demand rule was intended to result in automatic dismissal where the accused's rights had not been violated by the delay.[7] To determine whether appellant's right to speedy trial had in fact been prejudiced by the government's failure to respond to appellant's demands, the Army court analyzed the government's failure to respond to appellant's demands under the sixth amendment standards of *Barker* in conjunction with the *Burton* demand rule, and held that the government's appointment of an investigating officer was sufficient response to appellant's demands and was evidence of the government's diligence in disposing of the case.[8]

The Court of Military Appeals eliminated "sufficiency of the government's response" from the analysis and specifically overruled the "demand prong" of *Burton*. The court stated that *Burton* was decided before the President

[1] 27 M.J. 138 (C.M.A. 1988).

[2] 44 C.M.R. 166 (C.M.A. 1971).

[3] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 707 [hereinafter R.C.M.].

[4] 407 U.S. 512 (1972).

[5] *Id.* at 530.

[6] Uniform Code of Military Justice art. 32, 10 U.S.C. § 932 (1982).

[7] 24 M.J. 881 (A.C.M.R. 1988).

[8] *Id.* at 892.

promulgated R.C.M. 707 to provide guidelines for enforcing the right to speedy trial. Now R.C.M. 707 provides specific guidelines that ensure an accused will be brought to trial within 120 days of restraint or preferral of charges, or within 90 days of confinement. Any claim of denial of sixth amendment speedy trial is still examined under the *Barker* analysis. Therefore, "any purpose sought to be served originally by the 'demand prong' of *Burton* is now fully met by the three sets of protections mentioned."[9]

In light of *McCallister* there are now four standards for determining speedy trial: 1) the 120-day standard of R.C.M. 707(a); 2) the 90-day standard of R.C.M. 707(d); 3) the *Burton* 90-day rule;[10] and 4) the sixth amendment guarantee. An accused's unanswered demand for speedy trial alone *per se* is no longer grounds for dismissal, but such a demand is still an important element to consider when litigating an accused's claim of denial. Therefore an accused should still make demands for speedy trial and trial defense counsel should ensure the "demand prong" lives beyond its *Burton* demise. CPT Patricia D. White.

Murphy's Law: The Rating Chain—Still an Issue Regarding Challenges of Court Members?

In *United States v. Murphy*,[11] the Court of Military Appeals struck down a *per se* rule of disqualification for a panel member who wrote or endorsed the efficiency reports of a junior member. Although the court in *Murphy I* eliminates the mere presence of a rating relationship among members as an automatic challenge for cause, defense counsel at trial may nonetheless try to establish that such a relationship presents actual grounds for challenge. Furthermore, counsel in the field should continue in their endeavor to demonstrate that these rating relationships are improper *per se* in all cases by developing a record that will support a general rule challenging the notion that these relationships are essentially benign.

To fully understand the significance of the decision in *Murphy I*, counsel should be aware of what the Court of Military Appeals did not decide. The court did not sanction the appointment of members who stand in rating relationships with one another. The court simply found that the Air Force Court of Military Review had not justified the imposition of an absolute rule of disqualification.

The accused, Staff Sergeant Murphy, had entered guilty pleas to sodomy of a child under 16 years of age, assault, and multiple allegations of indecent acts with a child under 16 years of age.[12] The president of the panel and another senior colonel wrote or endorsed the efficiency reports of two other court-martial members. As a result of their sincere manifestations of impartiality, the military judge denied the asserted challenges for cause against both senior officers.[13]

In their initial decision[14] and on reconsideration,[15] the Air Force court concluded that the mere presence of such a direct supervisory relationship created "an appearance of evil."[16] The sole reason compelling the establishment of a *per se* rule was that the system of justice must appear to be fair to disinterested observers.[17] The Air Force court did not appear to explore any motives that would suggest an impermissible use of these relationships.[18] The court only seems to note that those members involved would not attempt to offer undue influence. Finally, the court did not explain why the rule of disqualification only operated against the senior members of the panel.[19]

Thus, *Murphy II* did not present a factually sufficient foundation upon which to base a substantial change in policy.[20] In fact, in *Murphy III*, the Air Force court invited the Court of Military Appeals to dispute their conclusions.[21] The incorrect application of precedent, the lack of any factual predicate, and the inflexibility of a per se rule regardless of military exigencies rendered the disposition of *Murphy II and III* a foregone conclusion.

It is in this light that the decision of the Court of Military Appeals should be viewed. *Murphy I* narrowly decided the issue by holding that *United States v. Harris*[22] does not compel a *per se* rule of disqualification and that the appropriate factual predicate was not presented to support such an absolute prohibition. *Murphy I* did not, however, find that superior-subordinate relationships were not subject to

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[9] *McCallister*, 27 M.J. 138, 140–41.

[10] Although the court's opinion implies that R.C.M. 707(d) fully incorporates the *Burton* 90-day rule, not all periods of exclusions applicable to R.C.M. 707(d) are deductible under *Burton*. Therefore, it is possible to have a *Burton* violation despite compliance with R.C.M. 707(d). *See* R.C.M. 707(d) analysis.

[11] 26 M.J. 454 (C.M.A. 1988) [hereinafter *Murphy I*].

[12] United States v. Murphy, 23 M.J. 690, 691 (A.F.C.M.R. 1986) [hereinafter *Murphy II*].

[13] *Id.*

[14] *Id.*

[15] United States v. Murphy, 23 M.J. 764, 765 (A.F.C.M.R. 1986) (on reconsideration) [hereinafter *Murphy III*].

[16] *Id.*

[17] *Id.* In analyzing the appearance of impropriety, the Air Force court relied extensively on United States v. Harris, 13 M.J. 288 (C.M.A. 1982). To the extent that *Harris* relied upon other factors beyond the mere existence of a rating relationship, the Air Force court was incorrect in finding that prior precedent compelled a *per se* rule of disqualification. *Murphy I*, 26 M.J. at 456.

[18] There were no apparent allegations that the convening authority was attempting to orchestrate the outcome by exerting influence through these rating schemes. Nor did the court mention the presence of opinionated senior members who would attempt to influence attitudes of those junior in rank. Finally, there was no discussion demonstrating that these junior officers felt intimidated or had been adversely rated for past court-martial participation or any other military justice matters.

[19] United States v. Garcia, 26 M.J. 844, 846 n.1 (A.C.M.R. 1988).

[20] Furthermore, *Murphy II* failed to make reference to any allegations of impropriety that would overcome the presumption that officers or enlisted members would properly exercise their duties.

[21] "We are aware that a higher appellate court might well disagree with our conclusion and the reasoning supporting it. We welcome their guidance." *Murphy III*, 23 M.J. at 765.

[22] 13 M.J. 288.

abuse. Judge Cox, writing for the majority, cautioned that "convening authorities should avoid placing superior-subordinate combinations on courts-martial to the extent practicable."[23] Although not a statement of condemnation, such a warning recognizes that these relationships between superior-subordinates may create real conflicts.

The Army Court of Military Review has also acknowledged the sensitive nature of rating relationships between panel members. Although declining to find such a relationship *per se* improper, the Army court denominated these associations as "a matter of concern."[24] Furthermore, the Army court leaves open the possibility that a proper "overriding social or judicial concern" could support the imposition of a general prophylactic rule to guard against abuses arising from superior-subordinate rating relationships among members.[25] However, the court clearly implies that the factual basis for a general rule does not currently exist.

Nevertheless, the rating relationship may present a problem in a particular case, and should therefore be evaluated on a case-by-case basis. More importantly, counsel should continue to search for the appropriate factual basis that would support a general rule of disqualification instead of expending resources in a case-by-case fashion. Even though the Army court seems disposed to consider a factually sufficient basis for such a general rule, the most powerful source of encouragement comes from the statements by Judge Cox regarding the absence of documentation supporting any allegation of intimidation through the use of efficiency reports or the downgrading of a report as a result of that member's participation in the court-martial process. Quite simply, Judge Cox felt that defense counsel at all levels have failed to present a record wherein the Court of Military Appeals could act in such an obviously sensitive area. The court will not infer bias in matters of officer integrity because the court must deal in facts, not innuendo.

While a *per se* rule of disqualification without any supporting factual predicate may not be warranted, an assumption that rating schemes can never be used or perceived to influence trial outcomes is unsound. Therefore, defense counsel should not relent merely because trial counsel contends that *Murphy I* ends the discussion. The express language of article 37(b)[26] acknowledges the very real existence of a problem and proscribes the use of efficiency reports to influence the result in a court-martial. Unfortunately, article 37(b) is only effective against overt attempts to exercise influence, and can only serve as a moral guidepost against surreptitious attempts to undermine the deliberative process.[27] Even assuming that superior officers have refrained and will continue to refrain from exerting any undue influence,[28] another problem remains in that the perceptions held by the rated member may affect the deliberative process.[29] Whether or not the superior member intentionally exerts influence, the junior member may feel inhibited in the free exercise of judgement.[30] As was stated by Judge Ferguson: "The lifeblood of any officer's career is his efficiency report."[31] Judge Ferguson noted that advocacy of matters in behalf of an accused could directly jeopardize an officer's career. "These are not fantasies. They are the very real and hard facts of military life."[32]

Counsel in the field need to be prepared to explore and exhaust the limits of these rating relationships. *Murphy I* and *United States v. Garcia*,[33] do stand for the proposition that *extensive* voir dire on this subject is necessary. Counsel should look for strongly held beliefs of rating members. Also, the reputation of the rater in matters of military justice is important. Consideration should also be given to statements and intentions of the convening authority with regard to particular types of offenses. Although probably not intended to influence the court-martial process, the stated desire of a general officer to deal severely with drug offenders may develop its own inertia and transmit harsh penalties through the inherently conductive features of superior-subordinate rating schemes. This problem becomes more acute whenever the convening authority selects raters that are people that he knows personally.

Counsel should also inquire into the past efficiency reports of rated members to ascertain whether they believe they have ever been adversely rated as a result of their participation in a court-martial. Initially, counsel should identify those members who have been involved in previous court-martial actions either as members or witnesses. Counsel may then want to ascertain on the record whether any member received a rating which in their individual opinion was less than deserved. Individual voir dire should then follow up on this line of questioning by asking whether there is any relationship between the court-martial service and the low rating, and if there is, what affect will that have on the member.[34] Finally, counsel may also desire to ask whether any other member of the panel believes that the

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[23] *Murphy I*, 26 M.J. at 456 n.*.

[24] *Garcia*, 26 M.J. at 845; United States v. Eberhardt, 24 M.J. 944, 946 (A.C.M.R. 1987).

[25] *Garcia*, 26 M.J. 845.

[26] Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (1982) [hereinafter UCMJ].

[27] In United States v. Hubbard, 43 C.M.R. 322, 327 (C.M.A. 1971) (Ferguson, J., dissenting), it was noted that prosecutions for a violation of UCMJ art. 37 are not common and the only method of eliminating evil is by "exorcising its foundation."

[28] The Army Court of Military Review has recognized that a rater may attempt to influence a rated individual." *Eberhardt*, 24 M.J. at 947.

[29] *Id.* (The court acknowledges that a rated officer may be influenced simply by the presence of his rater on the same panel.).

[30] In United States v. Deain, 17 C.M.R. 44, 55 (C.M.A. 1954) (Latimer, J., concurring) (wherein it was error to allow the president of the court to rate the member participants solely on the basis of their judicial duties), it was noted that junior officers in the presence of their rater may not possess the same freedom of expression and "in the background would be the desire to accomplish the task to the satisfaction of a reporting officer."

[31] *Hubbard*, 43 C.M.R. at 325.

[32] *Id.* Although *Hubbard* involved a rating relationship between trial counsel and defense counsel, the logic compelling Judge Ferguson's remarks is equally applicable to the dynamics between members in their deliberative process.

[33] 26 M.J. 844.

[34] Again, any matters of officer integrity are bound to be sensitive. Counsel should be sure of their own instincts and pretrial research when questioning about highly personal matters.

disclosed rating relationship may effect the deliberations of the panel or if the members are aware of any rating relationships that have affected court-martial practice in the past. Counsel should also determine whether each member would feel more comfortable if there were no superior-subordinate relationships between members of the same rating chain.

All of the above questions involve considerations of command influence. Therefore, counsel should use their ingenuity in fashioning other inquiries that can develop the subtleties in command and control hierarchies. In the vast majority of inquiries, the results will probably be negative. Nonetheless, only when the appellate courts are presented with a proper record, will they be in a position to recognize the value of an absolute rule of disqualification or the error in denying a particular challenge for cause.[35] Clearly, this is a situation where the appearance of impropriety must be proved because of the very important competing interests involving military integrity. However, as can be demonstrated by counsel in the field, the presence of rating relationships is an unnecessary strain on the appearance of fairness in court-martial practice. Trial defense counsel must continue their vigilance and efforts to demonstrate that if something can go wrong, it will. Or maybe, it already has. Captain Ralph L. Gonzalez.

The Providence Inquiry and Rule for Courts-Martial 1001(b)(4)

In *United States v. Holt*[36] the Court of Military Appeals upheld the decision of the Army Court of Military Review,[37] and ruled that the testimony of an accused at the providence hearing *may* constitute a proper matter in aggravation during the sentencing phase of trial. The court determined, "this [providence] testimony should be admissible as an admission by the accused to aggravating circumstances" surrounding the offense.[38]

The *Holt* decision could initially be incorrectly viewed as expanding the scope of aggravation evidence which is admissible, as directly relating to the charged offense in sentencing, to the entire providence inquiry.[39] Indeed, the court found that such testimony elicited during the providence inquiry, at a trial with members, could be introduced to members by "either a properly authenticated transcript or by the testimony of a court reporter or other person who heard what the accused said during the providence inquiry."[40] A closer examination of *Holt*, however, reveals that the court has not disturbed its precedent concerning what constitutes properly admissible evidence as being "directly related" to an offense of which the accused has been found guilty, under Rule for Courts-Martial 1001(b)(4).

In *Holt*, the accused pled guilty to provoking speech and wrongful distribution of methamphetamine. During the providence inquiry on the drug offense, the accused testified he was asked by a Criminal Investigation Command (CID) registered source to obtain some drugs. The accused told the registered source that he would have to locate his roommate to obtain the drugs. The accused told the military judge that he found his roommate asleep in another soldier's room. Unable to arouse his roommate, the accused asked and obtained information from the other soldier on the location of the drug source. During the sentencing phase of trial, a CID special agent testified for the defense as to the accused's cooperation in the investigation. On cross-examination, the agent related that the accused, in a sworn statement, identified his *roommate* as the source of information on where the drugs could be obtained. In his argument on sentence, trial counsel highlighted this variance to the accused's sworn testimony during the providence inquiry, implying the accused was dishonest either in his sworn statement to CID or in his testimony at trial. Defense counsel did not object to this cross-examination or argument of trial counsel.

On appeal, Sergeant Holt urged that the trial counsel's use of material from the providence inquiry violated his privilege against self-incrimination.[41] In addressing this allegation of error, the Court of Military Appeals refused to rule that an accused's testimony during a providence inquiry was *per se* inadmissible during the sentencing phase of trial. Specifically, the court found that an accused is on notice that such testimony can be used against him for findings *and sentencing if* the testimony is "directly related" to the offenses to which he has pled guilty.[42] If the military judge's inquiry elicits uncharged misconduct *not* closely related to the offense to which the accused has pled guilty, the consideration of such uncharged misconduct would not be foreseeable by the accused. Thus, "the waiver of article 31, UCMJ, 10 U.S.C. § 831, rights and the privilege against self-incrimination involved in entering pleas of guilty would not extend to this uncharged misconduct."[43] The court found such uncharged misconduct, *upon defense objection*, should not be considered in sentencing.[44] In *Holt* the defense counsel did not object to trial counsel's argument on sentencing. The court determined that trial counsel's use of uncharged misconduct from the providence inquiry did not constitute plain error.[45]

Trial defense counsel should be wary of an aggressive interpretation of *Holt* by trial counsel to justify the introduction of evidence of uncharged misconduct inadmissible under R.C.M. 1001(b)(4). Defense counsel should object to the admission of such evidence as violative of the Rules for Courts-Martial and the accused's UCMJ art. 31

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[35] *Garcia*, 26 M.J. at 845.

[36] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[37] United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986).

[38] *Holt*, 27 M.J. at 60.

[39] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.].

[40] *Holt*, 27 M.J. at 61.

[41] *Id.* at 58.

[42] *Id.* at 59.

[43] *Id.* at 60.

[44] *Id.*

[45] *Id.* at 61.

rights.[46] Defense counsel should also require trial counsel to specify the theory of admissibility of such uncharged misconduct under R.C.M. 1001(b)(4).[47] Further, defense counsel should request specific findings from the military judge when ruling on the objection. Captain Jeffrey J. Fleming.

[46] In a similar case, but where defense counsel did interpose an objection to consideration of uncharged misconduct elicited from the accused in the providence inquiry, the Court of Military Appeals set aside the decision of the Army court and remanded the case for further review in light of *Holt*. *See* United States v. Whitt, U.S.C.M.A. Dkt. No. 57,576/AR (C.M.A. 29 Sept. 1988) (order).

[47] *See* Gonzalez, *A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense*, The Army Lawyer, Sept. 1988, at 37 (an excellent analysis of R.C.M. 1001(b)(4) for use by trial defense counsel).

Government Appellate Division Note

Review of Courts-Martial by the Supreme Court of the United States—Miles to Go Before We Sleep

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"General and special courts-martial resemble judicial proceedings . . ."

Justice Rehnquist, writing for the Supreme Court in *Middendorf v. Henry*.[1]

"[C]ourts-Martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."

Justice Douglas, writing for the Supreme Court in *O'Callahan v. Parker*[2]

Introduction

As those of us who are close to the military justice system know, "military justice" has undergone sweeping reform since the Supreme Court announced its decision in *O'Callahan*.[3] In 1983 Congress took a dramatic step in providing reform by authorizing direct review of Court of Military Appeals' decisions by the Supreme Court on *writ of certiorari*.[4] Congress provided this review in order to reduce the burden on soldiers attempting to reach the Supreme Court by collateral attack of their convictions, and to provide the government a vehicle to obtain review of decisions of the Court of Military Appeals.[5]

Our system in the military is now open to scrutiny before the high court on a routine basis. The press, the litigants, and the Supreme Court will review every feature of the military justice system. As practitioners, we must approach and prepare every court-martial as if it will receive Supreme Court review. In *United States v. Goodson*[6] the Court reviewed a BCD special court-martial involving a handful of drugs. With this in mind, many issues of constitutional proportion loom ahead, and this article will highlight some of those issues.

Justice Rehnquist declined to provide a ringing endorsement of the fair-mindedness of the military justice system in *Solorio v. United States*.[7] Rather, his holding was based on "the dearth of historical support for the *O'Callahan* holding," and the "confusion wrought by" that holding.[8] The dissenting justices made clear that they will closely scrutinize the system's procedural safeguards and results because, in their view, the military justice system intentionally withholds constitutional protections, is governed by unlawful command influence, and needs still more legislative reform.[9]

*The author gratefully acknowledges the many talented authors of government briefs in the Government Appellate Division who aided in the preparation of this article.

[1] 425 U.S. 25, 31 (1976).

[2] 395 U.S. 258, 265 (1969).

[3] *See infra* notes 89 through 109.

[4] The Military Justice Act of 1983, Pub. L. No. 98–209, § 10, 97 Stat. 1393, 1405 (1983).

[5] Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, The Army Lawyer, Jan. 1985, at 61.

[6] United States v. Goodson, 14 M.J. 542 (A.C.M.R. 1982), *aff'd*, 18 M.J. 243 (C.M.A. 1984), *vacated and remanded*, 105 S. Ct. 2129 (1985).

[7] 107 S. Ct. 2924 (1987).

[8] 107 S. Ct. at 2931, 2933.

[9] 107 S. Ct. at 2938, 2941 ("The trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution.") ("[M]embers of the armed forces may be subjected virtually without limit to the vagaries of military control.") (congressional action required and encouraged) Marshall, J., dissenting.