

SPECIFIED ISSUES IN THE UNITED STATES COURT OF MILITARY APPEALS: A RATIONALE

by Robinson O. Everett*

I. INTRODUCTION

Most of the cases that reach the United States Court of Military Appeals are brought to it by an accused's petition for review pursuant to article 67(b)(3) of the Uniform Code of Military Justice.¹ An appellate defense counsel, who has been appointed by The Judge Advocate General to represent the accused, files a supplement to the petition for review. This supplement seeks to persuade the court to exercise its discretionary jurisdiction to review the case. To this end, counsel will assign errors committed during the trial and review of the case. However, in a substantial number of cases the supplement filed in the Court of Military Appeals simply submits the case "on the merits" without assigning any error.

In the cases in which the Court of Military Appeals orders a grant of review, the Court of Military Appeals usually indicates in its order the assignments of error—usually referred to as "issues"—that it will consider. In subsequent pleadings and in oral argument appellate defense counsel are limited to discussing the issues that the court referred to in its order granting review. Occasionally, issues as to which the court grants review have not been mentioned by appellate defense counsel in their supplements to the petitions for review. The court often has referred to these as "specified" issues to distinguish them from issues that appellate defense counsel "assigned" in the supplement.

Recently, a leading commentator on the court has questioned the desirability of the court's practice of specifying issues for its review, even though they have not been raised by appellate defense counsel.² Likewise, a committee which has been appointed to make recommendations for improving the court's operations has indicated some concern about this practice.³

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¹10 U.S.C. § 867(b)(3) (1982) [hereinafter UCMJ].

²See Fidell, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117 (1988).

³See Reestablishment of the Court Committee, 25 M.J. 154 (C.M.A. 1987).

In October 1988, during a question-and-answer session after I had spoken to a group of Air Force lawyers, I was asked whether the court should discontinue this practice if it was granted article III status. The unspoken premise for this question apparently was that, even though the specifying of issues not raised by appellate defense counsel might be appropriate for an article I court, it would not be suitable for an article III court.

In light of such concerns, I have tried to reexamine the court's practice of specifying issues with the thought that the practice may have outlived its usefulness. However, after such reexamination, I have concluded that, even though the court could save some time and probably reduce its Central Legal Staff by discontinuing the practice, it should nonetheless be retained.

II. SPECIFYING ISSUES AND IDENTIFYING "GOOD CAUSE"

The Uniform Code provides for automatic appeal to a court of military review, which "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."⁴ This language seems to place on the judges of that court a duty to give service members relief from legal error whether or not their counsel have pointed out such error.

The Code further states that the Court of Military Appeals shall review the record in "all cases reviewed by a Court of Military Review in which, upon petition of the accused *and on good cause shown*, the Court of Military Appeals has granted a review."⁵ This statutory language places on accuseds the burden of filing petitions with the court in order to invoke this jurisdiction. Moreover, it could be construed to require that the service members or their counsel show that good cause exists. However, as I interpret article 67(b)(3) the "good cause" also may be "shown" by the court's own staff—or even by a judge who concludes that the record of trial should be reviewed in greater depth.

Congress apparently does not disagree with this interpretation, which the court has followed for many years without any perceptible adverse comment from Capitol Hill. Indeed, I believe Congress intended that, if service members petitioned for review, the court should grant them relief from any prejudicial error that occurred at

⁴UCMJ art. 66.

⁵UCMJ art 67(b)(3) (emphasis added).

the trial or review of their cases—even though appellate defense counsel may not have mentioned those errors in the supplements to the petitions.

Article 37 has made clear the legislative intent to shield military justice from any kind of command influence.⁶ When military appellate defense counsel represent service members in the Court of Military Appeals, the possibility always exists—however remote—that counsel might be directed or influenced not to raise issues that would prove embarrassing to their service or to some commander. Although I believe the risk of such an occurrence is now very small, it cannot be ignored.

A few months ago, a colonel who had served as an appellate defense counsel mentioned to me that on one occasion he had received an unsigned order purporting to emanate from a superior and directing that he not proceed in a certain manner in his representation of an accused. To his credit, this lawyer then asked to receive a signed copy of the order; when none was forthcoming, he went ahead with the case as he originally had planned. Unfortunately, some counsel might display less fortitude under such circumstances; and if, in turn, the failure of counsel to raise an issue precluded review of that issue by the Court of Military Appeals, the accused's right to counsel would be violated.

Indeed, I understand that one reason for the creation of the court's Central Legal Staff many years ago was a reported remark by a Judge Advocate General that he would decide what issues the Court of Military Appeals would review, because he would instruct appellate counsel what issues to present. The comment was reported to the then Chief Judge; and he concluded that it was necessary for the court to have a staff that could undertake independent review of the record and bring possible legal errors to the court's attention, even if the military appellate defense counsel were directed or chose not to raise them.

Equally important is the perception of justice on the part of service members, their families, and the public. As anyone who is acquainted with the appellate process knows, accuseds will sometimes want their counsel to raise issues on appeal that in the lawyers' professional judgment have no merit. According to the Supreme Court, a defendant's right to counsel does not imply that lawyers must raise on appeal all frivolous issues that their clients wish them to advance.⁷

⁶*Cf.* *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

⁷*Jones v. Barnes*, 463 U.S. 745 (1983).

The Court of Military Appeals has decided, however, that Congress intended that appellate defense counsel in the military justice system bring to the attention of reviewing authorities any issues that the accused requests counsel to raise.⁸ In this way, an accused is precluded from claiming prejudice because the appellate defense counsel was too lazy or too timid to present a meritorious issue, as the client had requested. Similarly, the court's practice of specifying issues forestalls a subsequent claim that an accused did not receive an adequate review of errors in the record because the appellate counsel neglected to call them to the attention of the Court of Military Appeals.

Admittedly, the military appellate defense counsel who appear in the Court of Military Appeals usually are highly skilled. However, it must be recognized that experience levels vary from service to service and from time to time. Also, sometimes an appellate defense counsel has an overload of cases and has little time to examine each record of trial in detail.

Furthermore, in the military justice system—unlike the civilian courts—the lawyers who handle appeals usually are not the ones who represented the accuseds at their trials. Even during the appellate process the counsel who were representing the accuseds may leave the service or be reassigned, in which event the lawyers who prepare the supplements to the petitions for review may not be the same lawyers who previously represented the accuseds at the court of military review. Due to the lack of continuity, a risk exists that the appellate defense counsel who submit the supplements in the Court of Military Appeals may, because of lack of familiarity with the earlier proceedings, overlook significant issues of law that should be raised.

Most of my comments have pertained chiefly to military counsel. However, since coming on the court in 1980, I have noticed that an increasing number of civilian lawyers are appearing before us. Many of these attorneys are experienced advocates, but some may be unfamiliar with court-martial practice and, for this reason, may not recognize important appellate issues. Even though accuseds have retained civilian counsel at their own expense, when they could have been represented without charge by military counsel, this is no reason to reduce the protection granted to them.⁹ Thus, if the court specifies issues not assigned by military appellate defense counsel, there is no reason to follow a different practice when the accuseds are represented by civilian attorneys.

⁸United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

⁹Cf. Cuyler v. Sullivan, 446 U.S. 335 (1980).

III. ADVANTAGES OF SPECIFYING ISSUES

From several other standpoints I perceive advantages in the court's practice of specifying issues. The judges and staff of the Court of Military Appeals review cases from all the armed services, and they may become aware of issues that are being routinely raised in one service but not in another. In those instances, it may be desirable for the court to specify the issues in the cases where they have not been raised by counsel, because in this way the court better assures that members of different armed services receive more uniform treatment in courts-martial.

Sometimes the court hands down an opinion in one case that would suggest an issue to be raised in other cases. If appellate defense counsel have already filed the supplements to the petitions in the other cases and if the court does not specify the issues, it will be necessary for counsel to submit motions asking for leave to submit pleadings that will raise the new issue. If these motions are granted, counsel will be allowed to amend the pleadings they have previously filed.

This procedure is more cumbersome and time consuming than for the court itself to specify the new issues at the outset on its own initiative. Moreover, when the court specifies the issues, accuseds are not prejudiced if their lawyers failed to recognize that the court's opinion in another case presents issues in their own cases.

The judges or the staff may be aware of issues that the court is dealing with in cases currently under consideration or of issues that seem likely to come before the court in the near future. If those issues exist in pending cases but counsel have not raised them, the court's specifying of those issues *sua sponte* may enable the court to decide them at an earlier time than if the court waited for cases in which counsel raised the issues. In turn, disposing of these issues rapidly may provide needed guidance for persons trying cases in the field and thus reduce the likelihood of errors in future trials.

IV. RESPONSE TO CRITICISM

The criticism has been made that to specify issues that an accused has not raised is a regression to a bygone era of paternalism in military justice. Although paternalism is on the wane and waiver is being invoked more frequently than before, military justice still imposes requirements unmatched in the civilian courts.

The best example of a uniquely military requirement may be article 45, which concerns pleas of the accused and sometimes may prevent military judges from accepting guilty pleas, even though, after

consulting with counsel, accuseds are perfectly willing to do so.¹⁰ If service members testify during the providence inquiry in a manner inconsistent with their guilty pleas, military judges are not permitted to accept the pleas, no matter how much the accuseds want them to do so. In this instance, Congress has directed that the findings of the court-martial be accurate, even though the accuseds might be willing to accept inaccurate findings. This protection was probably considered to be especially important for young service members, who may be prone to give up important rights without appreciating the future adverse consequences of court-martial convictions and sentences. Likewise, I believe that Congress intended for the Court of Military Appeals to adopt procedures—such as the specifying of issues—that would protect service members against unjust convictions and unfair sentences.

There is nothing novel about the concept that an appellate court should correct legal errors, even if counsel have not raised them; nor is this concept limited to article I courts. For example, both Federal Rule of Evidence 103(d) and its twin, Military Rule of Evidence 103(d), authorize an appellate court to give relief for “plain error” with respect to evidence that the trial court has admitted without objection from counsel at trial. Specifying issues permits the court to deal with various kinds of “plain error,” even though appellate defense counsel have failed to assign the error.

The suggestion has been made that for the Court of Military Appeals to specify issues constitutes an implied criticism of the skill of appellate defense counsel. The premise for this suggestion is that, if the lawyers were doing their jobs properly, there would be no occasion for the court to specify issues. This premise is faulty. There can be many reasons for specifying issues other than may be attributed to any fault of counsel. The judges are in a better position to know what issues seem important to them than counsel can possibly be. The judges have access to information about pending cases that counsel do not possess. Certainly a practice designed to protect accused service members from unjust convictions should not be terminated because of undue sensitivity on counsel’s part.

Furthermore, I reject the contention that appellate defense counsel will become slothful in assigning errors if they believe the court will cure their omissions. I cannot imagine that lawyers could be so un-

¹⁰It is constitutionally permissible for a judge to accept a guilty plea and to base findings thereon, even though the accused has not conceded—and, indeed, has denied—his criminal liability for the offense. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

professional as to write slipshod legal pleadings on the assumption that a court would cure any omissions and protect their clients' interests.

Obviously, there will be differences of viewpoint as to which issues the court should specify when counsel have not raised them. For example, the court has often specified issues involving the multiplicity of offenses. Frequently the relief that the court ultimately grants in these cases affects only the findings but produces no reduction in sentence. Some would contend that the court has wasted its time and that, absent a change in sentence, there is no reason to be concerned about the findings. Although I recognize that this position has some merit, I conclude that even in this situation it often is appropriate to specify issues.

Certainly, the congressional concern for accuracy of results, which is reflected in the limitations on guilty pleas imposed by article 45, suggests that service members' records of convictions should be corrected if, by reason of overcharging or multiplicity, they have been made to appear guilty of more crimes than they actually committed. The Supreme Court seems to have accepted a similar view in holding that a defendant convicted of two crimes that were the same under the *Blockburger* test¹¹ was entitled to have one of the convictions vacated, even though he had received concurrent sentences.¹²

V. CONCLUSION

Although there may be reasonable differences as to the extent to which the Court of Military Appeals should specify issues when counsel have not raised them, I am still convinced that the practice of specifying issues is desirable and consistent with congressional intent. In my view it has not been demonstrated why this practice should be discontinued.

¹¹*Blockburger v. United States*, 284 U.S. 299 (1932).

¹²*Ball v. United States*, 470 U.S. 856 (1985).

