

A View from the Bench: Charging in Courts-Martial

“Little Errors in the Beginning Lead to Serious Consequences in the End.”¹

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“Drafting or reviewing court-martial charges is one of the most important, and maddening, jobs in military justice.”² Counsel should appreciate why Chief Trial Judge Felicetti used the word “maddening.” Charging in courts-martial in the second decade of the 21st century is anything but a casual, routine, or ministerial process. Lesser-included offense (LIO) jurisprudence³ and jurisprudence regarding pleading of offenses charged under Article 134 (the “general article”),⁴ have recently changed in revolutionary ways. Even the substantive criminal law of important types of offenses continues to change. The substantive law regarding sexual assault changed dramatically in 2007, and changed yet again on 28 June 2012.

In this day and age, following model specifications in the Manual for Courts-Martial (MCM)⁵ and relying on the MCM’s enumeration of LIOs may fail to ensure that charged specifications are immune from attack, or that an accused is adequately placed on notice of uncharged offenses that may or may not be “genuine” LIOs. If a substantive offense has been amended or superseded by a new statute, reliance on seemingly well-settled case law interpreting the old, superseded offense is also likely to lead to errors in charging. For this very reason, the electronic, downloadable

version of the Military Judges’ Benchbook (MJBB),⁶ known as the Electronic Benchbook (EBB) is now a true living document, constantly updated and reposted on the Army’s JAGCNet.⁷

There are two basic steps in charging: first, what should go into each specification; and second, which, and how many, specifications should appear on a charge sheet. Conversely, for a defense counsel, there are two basic steps in evaluating a charge sheet served on your client: first, is any particular specification defective; and second, are there specifications on the charge sheet which can be challenged because of their relationship to other specifications.

This article discusses, through the use of several examples, the essential initial step in pleading particular specifications, or in scrutinizing any given specification on a charge sheet served on your client; go beyond model specifications, from whatever source, and put yourself in the shoes of the military judge who would instruct panel members on the elements of the offenses, and the definitions of relevant terms, in a contested case.

Second, this article discusses procedural law with regard to specifications which are vulnerable to attack as “failing to state an offense” or as otherwise defective, and notes that in many circumstances, this reputedly “non-waivable” error can be effectively waived unless it is raised and litigated at or before trial.

Finally, this article discusses (in brief, since it is more comprehensively discussed elsewhere⁸) the issue of which and how many specifications appear on a charge sheet: the charging of “quasi” LIOs in light of the Court of Appeals for the Armed Forces (CAAF) adoption of the “statutory elements” test; the continuing validity of the double jeopardy prohibition against charging “genuine” LIOs; and the pitfalls of overcharging.

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¹ “‘The least initial deviation from the truth is multiplied later a thousandfold.’ So wrote Aristotle in the fourth century B.C. Sixteen centuries later Thomas Aquinas echoed this observation. Paraphrasing it, he said in effect that little errors in the beginning lead to serious consequences in the end.” MORTIMER J. ADLER, *TEN PHILOSOPHICAL MISTAKES*, at xiii (1985).

² Captain Gary E. Felicetti, *Surviving the Multiplicity/LIO Family Vortex*, *ARMY LAW.*, Feb. 2011, at 46.

³ In *United States v. Jones*, the Court of Appeals for the Armed Forces (CAAF) adopted the statutory elements test for lesser included offenses (LIOs), and has since offered some further clarification regarding how that test will be applied. 68 M.J. 465 (C.A.A.F. 2010), *infra* notes 43–52 and accompanying text.

⁴ In *United States v. Foster*, the CAAF held that where a specification of adultery under Article 134 of the UCMJ was both challenged as defective and contested at trial, and where the “terminal element” (that is, “such conduct being prejudicial to good order and discipline” under Clause 1 of Article 134, and/or “such conduct being of a nature to bring discredit upon the armed forces” under Clause 2 of Article 134) was omitted from the specification, the specification failed to state an offense under Article 134, since the terminal element, in the court’s view, was not “necessarily implied” by inclusion of the word “wrongfully” in the specification. 70 M.J. 225 (C.A.A.F. 2011).

⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008) [hereinafter MCM].

⁶ U.S. DEP’T OF ARMY, PAM. 27-9, *MILITARY JUDGES’ BENCHBOOK* (1 Jan. 2010) [hereinafter MJBB].

⁷ The Electronic Benchbook (EBB), used by judges in all services, is no longer a static document updated every few years, with interim changes posted as separate documents. From early 2010, the EBB editor (a designated Army circuit or chief circuit judge) has republished and reposted for downloading the entire EBB every three to six months, incorporating with each revision interim changes approved by the Chief Judge, U.S. Army Trial Judiciary, since the last posting. The current and updated version of the EBB is always available for download at the U.S. Army Trial Judiciary home page, <https://www.jagcnet.army.mil/usatj>. Select “Electronic Benchbook” from the items that appear on the left side of the web page.

⁸ Felicetti, *supra* note 2.

When Pleading or Scrutinizing Specifications, Look at the Statute (or Punitive Regulation), the Elements, and the Definitions of Terms

In what is now a bygone era, reliance on model specifications in the MCM and the model specifications in the MJBB generally ensured that charged specifications were safe from challenge. The MJBB model specifications are intended to be more current than the MCM's model specifications, but given the pace of change may themselves be outdated at times. In any event, when drafting offenses today as a trial counsel, or when scrutinizing offenses already charged as a defense counsel, counsel must use the model specifications from either source only as a starting point. From the government's perspective, model specifications serve as a template for a rough draft, nothing more. From the defense's perspective, model specifications serve only as one among several indicators to apply to a specification in determining whether it is sufficient or, in some important way, defective.

The key to charging and finding flaws in charging is, quite simply, to put yourself in the shoes of the military judge should the case be contested before a panel. Put yourself in the position of the military judge as he or she would: (1) enumerate the elements of the offenses and (2) define related terms for the finder of fact.

Open the EBB,⁹ and bring up the elements of the offense and the related definitions of terms, as the judge would instruct on them. Tailor the elements to the specification you have drafted, or the specification which appears on your client's charge sheet. Then, ask yourself these questions: Are there terms in the draft specification, or in the specification on the charge sheet served on your client, that are not proper terms for that offense? Has the trial counsel verified the definitions of terms he or she has used? Has the trial counsel used terms which, as a judge would define them, do not comport with the facts the government has sought, or likely will seek, to prove in court? Has the trial counsel failed to specify facts which should have been specified? Has the trial counsel relied on the most current substantive law, and the case law interpreting that current law?

Example 1:

Failure to repair to a place of duty is, to all appearances, a straightforward, garden-variety military offense. Nevertheless, this example highlights that using available model specifications can sometimes result in a preferred specification challengeable as defective.

The MCM's model specification is as follows:

⁹ *Supra* note 7.

In that _____ (personal jurisdiction data), did (at/on board – location), on or about _____ 20____, without authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).¹⁰

Accordingly, you, as trial counsel, draft—or you, as defense counsel, find on your client's charge sheet—a specification as follows:

In that Specialist G, U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 3 May 2010, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic.

You then review the offense of failure to go to appointed place of duty in the EBB.

First, you note that the model specification in the EBB is identical to that in the MCM.¹¹

You then review the elements:

(1) That (state the certain authority) appointed a certain time and place of duty for the accused, that is, (state the certain time and place of duty);

(2) That the accused knew that (he) (she) was required to be present at this appointed time and place of duty; and

(3) That (state the time and place alleged), the accused, without proper authority, (failed to go to the appointed place of duty at the time prescribed) (went from the appointed place of duty after having reported at such place).¹²

Here, you should note that there are two specified facts, called for by the elements to be used in instructing a panel according to the MJBB/EBB, which are *missing* from the model specifications in both the MCM and the MJBB/EBB, on which the drafted or preferred specification was based.

First, the model specification does not call for a factual specification of who prescribed the time and place of duty, whereas the first element in the MJBB/EBB instructions

¹⁰ MCM, *supra* note 5, pt. IV, ¶ 10f(1).

¹¹ EBB, *supra* note 7, ¶ 3-10-1b.

¹² *Id.* ¶ 3-10-1c.

calls for a factual specification of the “certain authority” who prescribed the time and place of duty.

Second, and probably more importantly, the model specification does not call for a factual specification of the “time prescribed;” instead, it only calls for a factual specification of “the appointed place of duty.” The first element in the MJBB/EBB instructions, in contrast, calls for a factual specification of both the time and the place of duty.

If you tailor the elements to the specification as drafted by a trial counsel, or as found on a preferred charge sheet by a defense counsel, they would read as follows:

(1) That [*somebody*] appointed a certain time and place of duty for the accused, that is, his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic [*at XXXX hours*];

(2) That the accused knew that he was required to be present at this appointed time and place of duty; and

(3) That at or near Camp Casey, Republic of Korea, on or about 3 May 2010, the accused, without proper authority, failed to go to the appointed place of duty at the time prescribed.

Italicized and in brackets, above, are the facts missing from the specification you, as trial counsel, drafted; or you, as defense counsel, find on the charge sheet. As trial counsel, this should prompt you to redraft your specification, along the following lines:

In that Specialist G, U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 3 May 2010, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic *at 1030 hours*.

Note that one of the missing facts otherwise called for by the elements instructions in the EBB is still omitted, that is, the factual specification of who appointed the time and place of duty. This fact likely can be omitted without risk of the specification being found defective, since the ultimate authority regarding what elements are required is not the EBB; rather, it is the statutory language of the substantive offense: “Any member of the armed forces who, without authority . . . fails to go to his appointed place of duty at the time prescribed . . . shall be punished as a court-martial may direct.”¹³ The statute only requires that the time and place of

duty be “appointed” and “prescribed.” For this reason, it would likely be sufficient for a military judge to instruct on the first element as follows:

(1) That there was appointed a certain time and place of duty for the accused, that is, his Alcohol and Substance Abuse Program appointment at the Camp Casey Clinic at 1030 hours.

If, on the other hand, the statute read, “Any member of the armed forces who, without authority . . . fails to go to his appointed place of duty at the time prescribed by a certain authority . . . shall be punished as a court-martial may direct,” then a factual specification of that “certain authority” would likely be required in order for the specification to be immune from challenge as defective.

If you are the defense counsel and find the specification, as originally drafted, on your client’s charge sheet, you have at least a colorable argument that the specification fails to state an offense and should be dismissed. The factual specification of a statutory element, “the time prescribed,” is missing.

While it may seem excessive to parse the drafting of a specification of such a simple offense in this way, the point here is that drafting or preparing a challenge to any specification, even those apparently most simple, always requires careful thought and attention to detail. Counsel should always bear in mind that the most authoritative sources of substantive criminal law are: first, the statute passed by Congress; second, appellate case law interpreting that statute; and, third, the elements as enumerated in MJBB/EBB instructions, which are based on decades of accumulated collective experience within the trial judiciaries of the armed services. Model specifications are only a starting point. Keeping these principles in mind becomes all the more important when more complex offenses are at issue, particularly when statutory law regarding those offenses has undergone, and continues to undergo, significant transformation.

Example 2:

Congress drastically transformed Article 120 of the UCMJ in 2007,¹⁴ and recently has recast yet again.¹⁵ The

¹⁴ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256 (2006).

¹⁵ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011). “The amendments made by this section shall take effect 180 days after the date of the enactment of this Act and shall apply with respect to offenses committed on or after such effective date.” The effective date of the new Articles 120, 120b, and 120c is 28 June 2012. The 2012 version of Article 120 is hereinafter referred to as UCMJ art. 120 (2012).

¹³ UCMJ art. 86 (2008).

primary purpose of using Article 120 examples in this article is to *highlight a process* counsel should go through in drafting or scrutinizing specifications, rather than to provide authoritative substantive guidance regarding any version of Article 120.

Here a specification of rape under the post-1 October 2007 version of Article 120, specifically, Article 120(a)(1), which you, as a trial counsel, have drafted, or you, as a defense counsel, see on a preferred or referred charge sheet served on your client:

Specification: In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, cause Private First Class X to engage in a sexual act, to wit: vaginal intercourse, by holding her hips and not allowing her to move.

The MCM's model specification is as follows:

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required) , on or about _____ 20__, cause _____to engage in a sexual act, to wit: _____, by using (physical violence) (strength) (power) (restraint applied to), sufficient that (he)(she) could not avoid or escape the sexual conduct.¹⁶

The EBB's model specification (in pertinent part) is as follows:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, cause _____ to engage in (a) sexual act(s), to wit: _____, by [if force alleged, state the force used].¹⁷

The specification, as drafted or as preferred, complies with the model specifications in the MCM and EBB, but depending on the evidence at trial, the government, having preferred such a specification, may have committed itself to proving more than it bargained for.

¹⁶ MCM, *supra* note 5, pt. IV, ¶ 45g(1)(a)(iii).

¹⁷ EBB, *supra* note 7, ¶ 3-45-3b. The omitted portions of the model specification in the MJBB/EBB refer to types of rape other than rape by force (i.e., rape by causing grievous bodily harm, rape by using threats or placing in fear, rape by rendering another unconscious, and rape by the administration of a drug, intoxicant, or similar substance). Counsel should bear in mind that when rape by force is at issue, the portions of the EBB model specification, omitted from the text above, have no application.

To see why, review the EBB elements and definitions of related terms as a military judge would instruct a panel, and tailor them to the facts as alleged in the specification. You should come up with something very close to the following:

ELEMENTS:

(1) That at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, the accused caused Private First Class X to engage in a sexual act, to wit: vaginal intercourse; and

(2) That the accused did so by using force against Private First Class X, to wit: holding her hips and not allowing her to move.

DEFINITIONS:

“Sexual act” means the penetration, however slight, of the vulva by the penis.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

“Force” means action to compel submission of another or to overcome or prevent another's resistance by physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.¹⁸

You should immediately note a problem in the specification as drafted or as charged; the “sexual act” with which the accused is charged (or would be charged if the draft were included in preferred charges) is “vaginal intercourse.” In the post-1 October 2007 version (and in the new 2012 version) of Article 120, the word “vagina” nowhere appears; rather, the statute uses the term “vulva.”¹⁹

¹⁸ *See id.* ¶ 3-45-3c & d.

¹⁹ From the post-1 October 2007 statute: “The term ‘sexual act’ means . . . contact between the penis and the vulva, and for the purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight.” UCMJ art. 120(t)(1)(A) (2008). From the statute effective on 28 June 2012:

The term “sexual act” means . . . contact between the penis and the vulva or anus or mouth, and for the purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; or . . . the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by an object, with an intent to abused, humiliate, harass, or

A near synonym of “vagina” does appear in the post-1 October 2007 statute (but not in the 2012 statute), that is, “genital opening;” but “genital opening” is only relevant when the “sexual act” at issue is “the penetration, however slight, of the genital opening of another by a hand or finger or any object,”²⁰ rather than “contact between the penis and the vulva” where there is “penetration, however slight.”²¹ The EBB accordingly provides a definition for the terms “genital opening” and “vagina,” as follows: “[T]he entrance to the vagina, which is the canal that connects the genital opening to the uterus.”²²

Therefore, in order to prove the offense as the specification as drafted, the government will have to prove not just penetration, “however slight,” of the *vulva*, but penetration of the genital or *vaginal opening*. While this may not pose a problem if the alleged victim is clear about the extent of penetration and/or the accused has expressly admitted to penetration of the vaginal opening in a statement to law enforcement, usually the parties to the sexual act are not so precise in their statements, and all too often law enforcement is equally imprecise.

Accordingly, the government would do well to revise the specification as shown below:

Specification: In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Yongsan, Republic of Korea, on or about 1 July 2010, cause Private First Class X to engage in a sexual act, to wit: penetration of the vulva by the penis, by using restraint sufficient that she could not avoid or escape the sexual conduct, to wit: by holding her hips and not allowing her to move.

The defense, for its part, may choose to wait until the military judge discusses instructions after all findings evidence has been presented, and demand that the military judge, in accordance with the wording of the specification

degrade any person or to arouse or gratify the sexual desire of any person.

UCMJ art. 120(g)(1)(A) & (B) (2012). There is no definition of the term “vulva” in either statute. The MJBB/EBB uses a standard medical definition, in accordance with the practice of federal courts applying similar statutes. “For women, the ‘external genitalia’ include the mons pubis, the labia majora, the labia minora, the clitoris, and the vaginal orifice. ‘The term . . . *vulva* includes all these parts.’” *United States v. Jagahirdar*, 466 F.3d 149, 152 (1st Cir. 2006) (internal citations omitted).

²⁰ “The term ‘sexual act’ means . . . the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” UCMJ art. 120(t)(1)(B) (2008).

²¹ UCMJ art. 120(t)(1)(A) (2008), *quoted in supra* note 19.

²² EBB, *supra* note 7, ¶ 3-45-3d n.5.

(as originally drafted), depart from the standard MJBB/EBB instructions and instruct that a finding of penetration of the “genital opening” is required.

Note that under the 2012 revision of Article 120, it becomes all the more important to avoid completely the use of the term “vagina” in charging, since the term “genital opening” (and therefore the near-synonym “vagina”) is dropped altogether from either definition of “sexual act.” In the new statute, the term “vulva” is used in both definitions of “sexual act” (i.e., both penetration, however slight, of, *inter alia*, the vulva by the penis, and penetration, however slight, of, *inter alia*, the vulva “by any part of the body or by any object”).²³

Example 3:

As substantive criminal law changes, it is critical for counsel to bear in mind that terms and concepts from a prior, superseded statute should not influence the charging of an offense under a newer statute.

Here is a specification of rape under the post-1 October 2007 version of Article 120, specifically, Article 120(a)(1), which you, as a trial counsel, have drafted, or you, as a defense counsel, see on a preferred or referred charge sheet served on your client:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, cause Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis, by force sufficient to cause penetration of the vulva.

Here, the specification complies with the model specification in the EBB, which only calls upon the trial counsel to “state the force used,”²⁴ but not with the model specification in the MCM, which, if followed, requires the words “sufficient that she could not avoid or escape the sexual conduct” at the end of the specification.²⁵

Again, review the EBB, bring up the elements and definitions of related terms as a military judge would instruct a panel, and tailor them to the facts as alleged in the specification:

²³ *Supra* note 19.

²⁴ *See supra* note 17 and accompanying text.

²⁵ *See supra* note 16 and accompanying text.

ELEMENTS:

- (1) That at or near Camp Casey, Republic of Korea, on or about 15 February 2011, the accused caused Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis; and
- (2) That the accused did so by using force against Specialist X, to wit: *force sufficient to cause penetration of the vulva.*

DEFINITIONS:

“Sexual act” means the penetration, however slight, of the vulva by the penis.

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

“Force” means action to compel submission of another or to overcome or prevent another’s resistance by physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.²⁶

The specification purports to charge that accused accomplished the sexual intercourse (“penetration, however slight, of the vulva by the penis”) by force, but the Benchbook definition of “force” reveals that the specification as drafted (or as pled and preferred) simply has failed to plead “force” as defined by Article 120(t)(5)(C) of the post-1 October 2007 statute. “Force sufficient to cause penetration”—however slight—“of the vulva,” on its face, falls far short of “physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act.”²⁷ Indeed, the specification amounts to a redundancy, in that it alleges that the accused engaged in sexual intercourse with Specialist X by engaging in sexual intercourse with Specialist X.

In other words, the drafted (or preferred) specification charges the accused with an *actus reus* (simple penetration) formerly defined, under the superseded pre-October 2007 version of Article 120, as constituting, by the fact of penetration itself, the “constructive” force required where the alleged victim, due to young age, mental infirmity, sleep, unconsciousness, or intoxication, is incapable of

understanding the nature of the sexual act, incapable of refusing to participate in the sexual act, or incapable of communicating lack of consent. In those instances, the military judge under the pre-1 October 2007 version of Article 120 would instruct that “no greater force is required than that necessary to achieve penetration.”²⁸

This is precisely the conduct criminalized, under the post-1 October 2007 version of Article 120, by Article 120(c)(2), that is, a form of aggravated sexual assault. Under the post-1 October 2007 version of Article 120, simple penetration of the vulva of an adult alleged victim by the penis, without any other act by the accused being alleged, is sufficient to constitute an offense (a crime no longer labeled as “rape” or punishable as rape) only if it is also alleged that the alleged victim was mentally infirm, or “substantially incapacitated” (a term which, under the post-1 October 2007 statute, denotes being incapable of understanding the nature of the sexual act, incapable of refusing to participate in the sexual act, or incapable of communicating lack of consent, due to mental infirmity or due to being asleep, unconscious, or intoxicated). Note that this distinction between rape by actual, physical force, and by committing a sexual act with a person incapable of consenting, is retained in the 2012 revision of Article 120.²⁹

The trial counsel, if he or she meant to charge the accused with a form of aggravated sexual assault, should redraft the specification as an aggravated sexual assault specification, along the following lines:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, engaged in a sexual act, to wit: penetration of the vulva by the penis,

²⁸ The Article 120 in effect prior to 1 October 2007 defined rape as “an act of sexual intercourse by force and without consent.” UCMJ art. 120 (2005). Further in various circumstances where literal force was not employed the definition of “force” was left to common law. In military practice, this common law was (and still is, due to the possibility of prosecutions for pre-1 October 2007 conduct) summarized in the MJB/EBB. EBB, *supra* note 7, ¶ 3-45-1, nn.3-11. The words “no greater force is required than that necessary to achieve penetration” appear four times in paragraph 3-45-1, note 8 (“Victims incapable of giving consent—children of tender years”); note 9 (“Constructive force (parental, or analogous compulsion) AND consent issues involving children of tender years”); note 10 (“Victims incapable of giving consent—due to mental infirmity”); and note 11 (“Victims incapable of giving consent—due to sleep, unconsciousness, or intoxication”).

²⁹ In the 2012 revision of Article 120, a closely similar offense, relabeled simply “sexual assault” rather than “aggravated sexual assault” appears, as Article 120(b)(3) (“commit[ting] a sexual act upon another person when the other person is incapable of consenting . . .”), and remains distinct from rape by using force, Article 120(a)(1) and (2) (whether “unlawful force” or “force causing or likely to cause death or grievous bodily harm”), with “force” defined, in Article 120(g)(5), as “use of a weapon,” “such physical strength or violence as is sufficient to overcome, restrain, or injure a person,” or “inflicting physical harm sufficient to coerce or compel submission by the victim.”

²⁶ See EBB, *supra* note 7, ¶ 3-45-3c & d (emphasis added).

²⁷ UCMJ art. 120(t)(5)(C) (2008).

with Specialist X, who was substantially incapacitated.

Alternatively, if the trial counsel indeed meant to charge the accused with rape by force, he or she should redraft the specification to allege “force” as defined in the current statute, along the following lines:

Specification: In that [the accused], U.S. Army, did, at or near Camp Casey, Republic of Korea, on or about 15 February 2011, cause Specialist X to engage in a sexual act, to wit: penetration of the vulva by the penis, by force sufficient that she could not avoid or escape the sexual conduct.

If the original draft specification is preferred and referred, the defense should consider whether to move to dismiss the specification as failing to state an offense prior to the presentation of evidence, or whether to contest the case without challenging the specification until after jeopardy has attached. The risks of the latter approach are discussed further below.

Example 4:

Counsel should bear in mind that not all critical definitions of terms will appear when they consult the elements and definitions in the MJBB/EBB. This is particularly the case when the accused is charged with a violation of a lawful general order or regulation under Article 92. Terms likely will appear in the relevant portion of the general order or regulation which are not defined in the MJBB/EBB. At some point, those terms will *have* to be defined with precision. Unless they are common dictionary terms, their meaning cannot be left to chance or a hunch.

Suppose, for example, you are charging an accused, or have a client who is charged with, violating the Secretary of the Army’s 1 February 2011 memorandum prohibiting, *inter alia*, the distribution of some variant of “Spice.”³⁰ Investigation has revealed that the accused distributed a substance to other Soldiers on 2 March 2011. That substance was never seized or tested by a forensic laboratory. However, on 3 March 2011, law enforcement found the accused in possession of a “stash” of a green leafy substance. That substance was tested and was found to be one of the five “synthetic cannabinoids” listed as Schedule I controlled substances on 1 March 2011.³¹

³⁰ Memorandum from Secretary of the Army, Command Policy Memorandum, Subject: Prohibited Substances (Spice in Variations) (10 Feb. 2011) [hereinafter SecArmy Memo].

³¹ Temporary Listing of Substances Subject to Emergency Scheduling, 21 C.F.R. § 1308.11(g) (2011). *See also* Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11,075–11,078 (Mar. 1, 2011).

The Secretary of the Army’s policy letter provides that “[a]ll Army personnel are prohibited from, without proper authorization, . . . distributing . . . [a]ny controlled substance analogue or homologue such as ‘Spice’ or similar substances containing synthetic cannabis, any THC substitute, or any synthetic cannabinoid.”³²

The drafted (or preferred) specification reads as follows:

In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Humphreys, Republic of Korea, on or about 2 March 2011, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by distributing to Sergeant Z a type of “spice,” a Tetrahydrocannabinol (THC) analogue.

If you bring up the Article 92 elements and definitions using the EBB, of course, you will not find any definition of “Tetrahydrocannabinol (THC) analogue.” Counsel should appreciate, of course, that “analogue” is here used, not in the common dictionary sense, but as a legal term of art applying to contraband substances under federal law. Counsel should then do what a military judge would do: go to the U.S. Code to find the controlling definition of “analogue.”³³ The federal statutory definition specifically provides that if a substance is a controlled substance, it is not a controlled substance analogue.³⁴

If whatever the accused sold to or shared with Sergeant Z on 2 March was from the same “stash” as law enforcement discovered in his possession on 3 March, and if the substance discovered in his possession on 3 March was (according to forensic testing of the substance seized) one of the substances added to Schedule I on 1 March 2011, then the accused distributed what was, as of 1 March 2011, a controlled substance, not an “analogue.”

The government, having discovered this definitional issue (by, again, standing in the shoes of a hypothetical military judge who is drafting findings instructions), should amend its draft specification to account for the possibility that the substance was, in fact, a controlled substance and not an analogue. An amended specification might read as follows:

In that [the accused], U.S. Army, did, at or near U.S. Army Garrison Humphreys, Republic of Korea, on or about 2 March

³² SecArmy Memo, *supra* note 30, ¶ 5.

³³ 21 U.S.C. § 802(32) (2006).

³⁴ *Id.* § 802(32)(C)(i).

2011, violate a lawful general order, to wit: paragraph 5, Secretary of the Army Policy on Prohibited Substances (Spice in Variations), dated 10 February 2011, by distributing to Sergeant Z a type of “spice,” a substance containing a synthetic cannabinoid.

Of course, applying the overall methodology advocated in this article, even this modified specification should not be preferred without first thinking through the definitions the military judge might give for the term “synthetic cannabinoid.” “Synthetic cannabinoid” may be susceptible of definition based upon, *inter alia*, the Drug Enforcement Administration’s Final Order placing five synthetic cannabinoids onto Schedule I of the Schedules of Controlled Substances.³⁵

The other possibilities (besides “synthetic cannabinoid”) provided for in the Secretary of the Army’s policy letter, “synthetic cannabis” and “any THC substitute,” could instead be used in the redrafted specification, but locating authoritative definitions for those terms is more problematic. Counsel should be wary of drafting and preferring a specification that reads, “a substance containing synthetic cannabis, any THC substitute, or any synthetic cannabinoid.” Even though that language tracks the language of the policy letter, the use of the word “or” could raise the issue of disjunctive pleading,³⁶ unless the terms “synthetic cannabis,” “THC substitute,” and “synthetic cannabinoid” have overlapping meanings or are near-synonyms.

³⁵ “A ‘cannabinoid’ is a class of chemical compounds in the marijuana plant that are structurally related. The cannabinoid D9-tetrahydrocannabinol (THC) is the primary psychoactive constituent of marijuana. ‘Synthetic cannabinoids’ are a large family of chemically unrelated structures functionally (biologically) similar to THC, the active principle of marijuana.” Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. at 11,075.

³⁶

We take this opportunity to strongly discourage disjunctive pleadings. Such pleadings serve no discernable purpose and unnecessarily create avoidable appellate issues. While statutory construction may offer alternate theories of criminal liability, pleadings should specify those theories, using the conjunctive and if more than one may apply. . . . If concerned with exigencies of proof, trial counsel may plead in the conjunctive and fact-finders may find by exceptions. . . . This eliminates any potential for ambiguity in pleadings or findings. Further, we urge trial judges to eliminate disjunctives by ordering the Government to amend the specification when, as here, it otherwise gives sufficient notice of the crime alleged and would not constitute a major change. . . . Certainly, judges should ensure disjunctives are eliminated when entering findings or when members make findings on a specification.

United States v. Crane, 2009 WL 6832590, at * (A. Ct. Crim. App. 2009) (internal citations omitted).

If the specification, as *originally* drafted, is preferred then referred, the defense could not argue that the specification is facially deficient. However, the defense could argue that there is ample reasonable doubt that the alleged “THC analogue” substance distributed on 2 March was in fact the controlled substance seized on 3 March. That is, the defense could argue that no reasonable finder of fact could conclude that the substance distributed on 2 March was, beyond a reasonable doubt, distinct from the substance seized on 3 March. Therefore government’s proof cannot sustain the specification as charged: if the substance distributed on 2 March was a controlled substance, it could not have been a “THC analogue.”³⁷

Defective Specifications Challengeable at Any Time: Myth or Fact?

It may well be asked: can’t a defense counsel just sit on his or her hands and withhold a challenge to a defective specification until after jeopardy has attached? Indeed, can’t a defense counsel simply let the issue first be brought up before the service court on appeal? There are several problems with this approach. Depending on the sentence ultimately adjudged, not all convictions are susceptible of an appeal of right to a service court of criminal appeals.³⁸ More importantly, depending in part on *how* defective the specification is, waiver can be applied against an accused who fails to litigate the issue at or before trial on the merits.

“A specification that is susceptible to multiple meanings is different from a specification that is facially deficient. . . . [A] facially deficient specification cannot be saved by reference to proof at trial”³⁹ However, “a specification susceptible to multiple meanings” may be saved by reference to whether the proof at trial entailed sufficient evidence of the element arguably missing from that specification; whether the military judge’s instructions on findings enumerated (and, if necessary, defined terms relating to) that arguably missing element; and whether the defense counsel argued the insufficiency of the government’s proof regarding that arguably missing element.⁴⁰

Moreover, “[a] flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence. . . .”⁴¹ Even a facially defective specification, e.g., an allegation of

³⁷ See United States v. Reichenbach, 29 MJ 128, 137 (C.M.A. 1989); see also United States v. Raymer, 941 F.2d 1031, 1045 (10th Cir. 1991).

³⁸ UCMJ art. 66(b)(1) (2008).

³⁹ United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006).

⁴⁰ *Id.* at 211–12.

⁴¹ United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986).

distribution of controlled substances under Article 112a that omits the essential element of wrongfulness, may be shielded from dismissal on appeal if the accused failed to challenge the specification at trial or pled guilty.⁴²

A defense counsel faced with a defective specification must weigh the risks of withholding a challenge to the specification against the danger of being later held to have waived the challenge. It is possible that if the issue is raised very late in the findings portion of a trial, and if the military judge does not regard the specification as “facially deficient,” the military judge him- or herself may (as would an appellate court at a later stage) find the defense, by litigating the case as if the specification were in proper form, to have waived its challenge.

Charge “Quasi” LIOs (If the Evidence Warrants) But Not “Genuine” LIOs

The trial counsel, having wrestled with the question of what goes into any particular specification, must then face the further challenge of determining which specifications should be included on the charge sheet. The defense counsel, having scrutinized each specification for possible defects, must then consider whether one or more specifications can be challenged in light of their relationship to other specifications.

On the one hand, considering the exigencies of proof in light of the anticipated evidence, the trial counsel will not want to go to trial lacking charged specifications which are not real and “genuine” LIOs (that is, are only “quasi” LIOs) but which that evidence could sustain. On the other hand, the trial counsel should avoid overcomplicating matters by charging actual or “genuine” LIOs which, as the MCM urges (and as the prohibition against double jeopardy requires), should not be charged at all.⁴³ Nor should the trial counsel find himself or herself attempting to argue for instructions on what may or may not be “genuine” LIOs at trial which he or she simply did not think about or consider when the charges were preferred.⁴⁴

⁴² *United States v. Brecheen*, 27 M.J. 67, 68–69 (C.M.A. 1988). Recently, service courts have applied this principle of waiver to pleas of guilty to Article 134 offenses omitting the “terminal elements” (conduct prejudicial to good order and discipline or service discrediting conduct) found to be essential to a properly pled Article 134 offense in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *supra* text accompanying note 4. See, e.g., *United States v. Leubecker*, 2011 WL 4095937 (N-M. Ct. Crim. App. 2011), *petition for review granted*, 71 M.J. 302 (C.A.A.F. 2012).

⁴³ “In no case should both an offense and a lesser included offense thereof be separately charged.” MCM, *supra* note 5, R.C.M. 307(c)(4) discussion. To charge both a greater and a lesser offense, as measured by the statutory elements test, is violative of the prohibition against double jeopardy. See Felicetti, *supra* note 2, at 52 n.71.

⁴⁴ “A lesser included offense is reasonably raised when a charged greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser included offense.” *United States v. Arviso*, 32 M.J. 616, 619 (A.C.M.R. 1991). In order for an LIO instruction

The altered landscape of LIO doctrine, in the wake of the adoption of the “statutory elements” test by the CAAF in *United States v. Jones*,⁴⁵ has been thoroughly and clearly delineated elsewhere.⁴⁶ Since *Jones*, the CAAF has applied the new “statutory elements” test in half a dozen cases. The CAAF has determined that negligent homicide under Article 134 is not a LIO of premeditated murder under Article 118⁴⁷ or of involuntary manslaughter under Article 119;⁴⁸ and that indecent acts with a child under Article 134 is not an LIO of forcible sodomy under Article 125.⁴⁹ These determinations by the CAAF were more or less a foregone conclusion, since the “terminal element” of any Article 134 offense will not be necessarily included in the elements of other punitive articles.

On the other hand, addressing the post-1 October 2007 version of Article 120, the CAAF has determined that aggravated sexual assault under Article 120(c)(1)(B), that is causing another person to engage in a sexual act by “causing bodily harm,” is an LIO of causing another person to engage in a sexual act by using force against that person, reasoning that when one “appl[ies] the common and ordinary understanding of the words in the statute,” any act of force, as the term “force” is defined by Article 120(t)(5)(C), “at a minimum, includes the offense touching that satisfies the bodily harm element” (“any offensive touching, however slight”) of aggravated sexual assault by inflicting bodily harm.⁵⁰

Two recent holdings by CAAF indicate that certain offenses can be deemed to be LIOs even though those lesser offenses, as abstractly defined by statute, may embrace not only the factual scenario envisioned in the charged offense, but also other factual scenarios the charged offense does not reach. The CAAF has determined that assault consummated by a battery is an LIO of wrongful sexual contact, reasoning that because assault consummated by a battery requires physical contact “however slight” with another person, without legal justification or excuse, and that the contact be “offensive”: all the elements of assault consummated by a battery are embraced within wrongfully causing the victim to have physical contact with the accused’s genitalia without the victim’s permission and with the intent of abusing,

to be warranted, that factual element must, in light of the facts in evidence, be “in dispute.” See MCM, *supra* note 5, R.C.M. 920(e)(5)(C) & discussion.

⁴⁵ 68 M.J. 465 (C.A.A.F. 2010).

⁴⁶ Felicetti, *supra* note 2.

⁴⁷ *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

⁴⁸ *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

⁴⁹ *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010).

⁵⁰ *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

humiliating, or degrading the victim.⁵¹ The CAAF so concluded even though assault consummated by a battery, considered in the abstract, embraces a far wider scope of factual scenarios than does the offense of wrongful sexual contact.

In a similar vein, the CAAF has rejected the argument that, because “housebreaking can be proven by establishing the intent to commit an offense other than those listed in the third element of burglary,” housebreaking cannot be an LIO of burglary. In other words, simply because the universe of possible housebreaking offenses is larger than the universe of possible burglary offenses, housebreaking is not disqualified as an LIO of burglary. “The offense *as charged* included all of the elements of housebreaking and all of those elements are also elements of burglary. Housebreaking is therefore a lesser included offense of burglary.”⁵²

Implicit in these two recent holdings by CAAF is the common sense rule that when enumerating the elements of a LIO, the military judge must insert those elements precisely as the same specified facts that appear in the charged offense. Trial counsel should not expect to be able to argue successfully that an assault consummated by a battery, in the form of, say, a slap to the face or even a groping of the victim’s breasts, is a LIO of a charged wrongful sexual contact involving a groping of the victim’s buttocks. If the trial counsel had evidence of such a slap to the face or breast groping, he or she should have charged it. Conversely, defense counsel should be prepared to argue vigorously against any LIO instruction that does not hew precisely to the “overt acts” set forth in the charged offense.

The statutory elements test, in spite of the limited “as charged” exception thus far made by the CAAF, therefore appears to remain largely intact. The natural consequence is that the government will err on the side of charging more, rather than fewer, specifications. Charging more rather than less is a reasonable step for the trial counsel to take, *provided* his or her evidence warrants all specifications charged, *and provided* he or she is not charging what are clearly real or “genuine” LIOs. The trial counsel should not, for example, charge absence without leave (AWOL) in the alternative to desertion for the same date range. The AWOL is completely and inarguably included within desertion, save for the single *mens rea* element of having an intent to remain away permanently. Similarly, the trial counsel should not charge wrongful appropriation in the alternative to larceny. Applying “the common and ordinary understanding of the words in the statute,” an intent temporarily to deprive will, always and necessarily, be included within an intent permanently to deprive. That is, wrongful appropriation is a

⁵¹ United States v. Bonner, 70 M.J. 1, 3-4 (C.A.A.F. 2011).

⁵² United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011) (emphasis added).

“genuine,” not a “quasi,” lesser included offense of larceny, and should not be separately charged.

Overcharging

Charging more rather than less, however, necessarily risks running afoul of a defense challenge based on the doctrine of unreasonable multiplication of charges.⁵³ Charging more in order to account for anticipated exigencies of proof, and because “quasi” (i.e., not actual and “genuine”) LIOs must now be charged separately to ensure due process notice to the accused, are legitimate and laudable practices. Charging more specifications without such a rationale, indeed, charging more specifications in order to “suggest to the members that the accused has bad character,”⁵⁴ to otherwise lead the members to “draw a negative inference about the accused,”⁵⁵ or to cow the accused into submission of an offer to plead guilty on or approaching the government’s terms, is neither legitimate nor laudable, and in any event is ultimately not in the government’s best interests.

In the long run, it is far better to present an accused with a charge sheet that fairly reflects the misconduct the government believes it can prove, than it is to present the accused with a charge sheet consciously designed (at least in part) to tar the accused in the eyes of the finder of fact once it is transferred onto a flyer. A charge sheet and a flyer should contain enough specifications to account for exigencies of proof and for offenses which, while they may formerly have been regarded as LIOs, are no longer. To “pile on” for its own sake runs the risk that the accused and his counsel, in the face of what in their eyes may seem to be unreasonableness or vindictiveness, will merely dig in their heels, and subject the government to a grueling contest, not only on the merits of guilt or innocence and an appropriate sentence, but an extensive array of lesser issues as well. Lest any on the “government side” take offense, they should ponder this: were trial counsel to refrain from such tactics, there would be no need for the court-created doctrine of unreasonable multiplication of charges.⁵⁶

⁵³ See United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001).

⁵⁴ Felicetti, *supra* note 2, at 51.

⁵⁵ *Id.* at 52 n.73.

⁵⁶

[T]he prohibition against unreasonable multiplication of charges address those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion . . . the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal concept—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

Conclusion

Considerable time and effort on the record can be saved, and the accused can be properly put on notice of criminal misconduct susceptible of proof at trial, if charging errors, or charging misjudgments, are avoided at the outset. Conversely, defense counsel attuned to charging flaws can ensure that their clients go to trial based only on specifications that fairly and accurately describe the facts at issue in a given case; and in some circumstances, may be able to remove from consideration by the finder of fact criminal misconduct that was not properly charged.

In the end, properly charged offenses that reflect the important factual issues in a given case remove distractions for both sides and for the court, and contribute to the fair and

orderly administration of justice at trial. Prior to trial, proper and well-considered charging may enable the parties to assess more dispassionately the possibilities of a plea agreement or an alternate disposition. At trial, rather than spending hours on the record disputing whether one or more specifications are defective, contain superfluous language, constitute an unreasonable multiplication of charges, or amount to “genuine” LIOs which should not be on the charge sheet at all, the parties can concentrate on other, and ultimately more important and professionally rewarding, tasks: effectively presenting witness testimony, effective cross-examination, successfully admitting documents and tangible objects into evidence, raising pertinent objections to testimony or evidence, and persuasive argument.

Quiroz, 55 M.J. at 337–38.