"A Camel is a Horse Designed by Committee"[1]: Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses

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Sex crimes are different than other crimes. In this one area of criminal activity, both society and statutes historically have focused first on the behavior of the victim when considering whether a sexual assault has occurred. In almost every other area of criminal law, the inquiry looks first and primarily at the acts committed by the accused.

Congress recognized the illogic of this unusual treatment, and in 2007 dramatically altered the landscape of military sexual assault offenses. In a complete rewrite of Article 120, Uniform Code of Military Justice (UCMJ), Congress created a complex and supposedly comprehensive scheme of crimes and procedures. The 2007 legislation redesigned Article 120 to reflect an offender-centered concept. The new statute eliminated lack of consent as an element of sexual offenses because the traditional consent inquiry was focused squarely on the behavior of the victim.[2]

Unfortunately, like many congressional compromises, the new Article 120 contains contradictory provisions that cannot be reconciled.[3] The most glaring flaw in the statute stems from the apparent inability of the drafters fully to abandon the concept of "consent." This inability led to an unnecessarily complex statute which included "affirmative defenses" of consent and mistake of fact as to consent. By including these defenses, failing to differentiate between them, and using strange language to define them, Article 120 contains both practical and constitutional problems. In 2011, the Court of Appeals for the Armed Forces (CAAF) declared crucial portions of the statute relating to defenses to be unconstitutional and illogical.

This article analyzes CAAF cases interpreting consent defenses in Article 120. It concludes that what remains of the statute is fatally flawed, but suggests ways in which the present statute can be constitutionally applied. Part I briefly describes how the consent and mistake of fact defenses operate, and discusses the legal and philosophical differences between the two. Part II explores recent CAAF cases which have criticized or abolished parts of the affirmative defense provisions of Article 120. Parts III and IV describe the current state of consent and mistake of fact as to consent defenses. Part V discusses model instructions that comply with the current state of the law.

I. Article 120's Consent Defenses: "She said 'Yes'" and "I thought she said 'Yes'"

Congress rewrote UCMJ Article 120 in large part to shift the focus in sexual crimes from the victim to the offender. A centerpiece of the revisions was the elimination of "lack of consent" as an element of sexual assault crimes which the prosecution must prove beyond a reasonable doubt.[4] It appears, however, that some drafters of the statute had difficulty taking the simplest approach: that evidence of consent should be treated like any other relevant evidence, without any statutory label. The drafters chose instead to create an "affirmative defense" of consent and linked it to a mistake of fact defense without recognizing that these two defenses have little in common except the word "consent."

Consent is a mental state of the alleged victim. In advancing a consent defense, the accused is asserting that the victim freely agreed to engage in a sexual act with him. His factual claim is that "She said 'Yes'" in words or actions. In a truly offender-focused statute, evidence indicating consent is simply evidence that could raise a doubt concerning whether the Government has proven the crime charged. Consent often is relevant to the element of force, but need not be considered a "defense" to the crime.[5]

Mistake of fact as to consent, by contrast, is entirely offender-focused: it looks at what was in the brain of the accused at the time of the sexual act. In asserting the mistake of fact defense, the accused declares, "I [reasonably] believed she said 'Yes.'" Neither objective fact (what actually happened) nor the mental state of the victim (actual consent) are crucial concepts in a mistake of fact defense. Because mistake of fact inquires into the thoughts of the accused, it is a paradigm of an affirmative defense which the accused should have to prove. Offender-centered affirmative defenses of this kind involve "an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce

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[1] Attributed to Sir Alec Issignonis, architect and designer of the Mini automobile. Design Museum, British Council, http://designmuseum.org/design/alec-issigonis (last visited June 14, 2011).

[2] *See* United States v. Neal, 68 M.J. 289, 301 (C.A.A.F. 2010) (noting that the District of Columbia Court of Appeals attributed this rationale to a similar civilian statute).

[3] Major Howard H. Hoege III, "*Overshift*"*: The Unconstitutional Double Burden Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2, 4.

[4] United States v. Neal, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff'd* 68 M.J. 289 (C.A.A.F. 2010). The exception to this rule is Article 120(m), Uniform Code of Military Justice (UCMJ), wrongful sexual contact, which includes as an element "without that person's permission." *See* UCMJ art. 120(r) (2008).

[5] *Neal*, 68 M.J. at 302.

supporting evidence."[6] Military law recognizes mistake of fact as a general defense to criminal charges, but usually requires the Government to disprove it, when it applies, beyond a reasonable doubt.[7]

Unfortunately, the drafters failed to recognize the theoretical and evidentiary differences between consent and mistake of fact as to consent and treated them identically in the revised Article 120. One result of this homogenized approach was to re-inject the issue of "consent" into the trial of sexual crimes in the following ill-considered language: "Consent and mistake of fact as to consent are not an issue, or an affirmative defense in a prosecution under any . . . subsection, *except they are an affirmative defense for the sexual conduct in issue in a prosecution*" for rape, aggravated sexual assault, aggravated sexual contact and abusive sexual contact.[8]

The first portion of this sentence is a straightforward statement of the philosophy behind the reworking of Article 120. That clear declaration, however, is immediately contradicted in the "except" clause, which applies to the four most serious sex offenses. Although legislative history for Article 120 is sparse,[9] the awkward language concerning the consent defenses reads far more like a last-minute compromise in the Joint Services Committee than like a reasoned part of a comprehensive legislative scheme.[10] Apparently unwilling to leave consent out of Article 120, the drafters resurrected it as an "affirmative defense," for which the accused bears an initial burden of proof.[11] The CAAF confirmed in *United States v. Neal* that Congress was free to require the accused to prove this defense in cases charging aggravated sexual assault by force.[12]

The drafters' fatal mistake, however, was the creation of a "double burden-shifting"[13] arrangement for these sex-crime-specific affirmative defenses. Under this arrangement, the accused must first prove the defense by a preponderance of the evidence; then the prosecution must disprove the defense beyond a reasonable doubt. The apparent purpose of this arrangement was to increase the quantum of evidence an accused must present to inject the defenses into a case, and to obtain an instruction on the defense. The assigned burdens, however, created an impossible situation: if the accused proves consent by a preponderance of the evidence, the prosecution can never thereafter eliminate all reasonable doubt about consent. In *United States v. Prather*, the CAAF declared this unique[14] formulation "a legal impossibility."[15] The *Prather* majority avoided labeling the double burden-shift facially "unconstitutional" deciding the case on a related issue[16] without formally reaching that one—a choice criticized by the dissent in that case.[17]

II. The Affirmative Defense Controversy—*Neal*, *Prather*, *Medina*, *RCM* 916, and the *Military Judges' Benchbook*

An affirmative defense is "any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts."[18]

[6] OHIO CODE REVISED, 2901.05 (D)(1)(b) (2010). *See also* Russell v. United States, 698 A.2d 1007, 1017 (D.C. 1997), *cited in* United States v. Neal, 68 M.J. 289, 300 (C.A.A.F. 2010),

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(b) (2008) [hereinafter MCM].

[8] UCMJ art. 120(r) (emphasis added); *see id.* art. 120(t)(14), (15), (16). *See also Neal*, 68 M.J. at 300.

[9] Hoege, *supra* note 3, at 3.

[10] The inference of compromise is circumstantially supported by the placement of these defenses within the final statute. The consent provisions are the last two sections of the substantive crimes portion Article 120; Article 120(r) & (s); and the final three entries in the definitions section. UCMJ art. 120(t)(14), (15) & (16). The awkward language was not created by Congress, as it was contained within proposal #5 submitted to Congress by the Department of Defense. Hoege, *supra* note 3, at 4.

[11] *Id.* art. 120(r).

[12] *Neal*, 68 M.J. at 304. *Neal* did not address mistake of fact, but the reasoning would apply even more strongly to that defense. *See supra* note 6 and accompanying text. United States v. Prather, 69 M.J. 338, 344–45 (C.A.A.F. 2011) (deciding that the accused could not be assigned any burden of proving consent in "substantial incapacity" cases charged pursuant to Article 120(c)(2)). *See infra* Part II.C.

[13] Article 120(t)(16) states in part: "The accused has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist." UCMJ art. 120(t)(16). For a thorough legal deconstruction of the affirmative defenses in Article 120, see Hoege, *supra* note 3, *passim*.

[14] Hoege, *supra* note 3, at 5.

[15] *Prather*, 69 M.J. at 344-45. *See infra* Part II (providing a detailed discussion of *Prather* and other constitutional decisions).

[16] *Prather* held that in a case charging "substantial incapacity" under Article 120(c)(2), it was unconstitutional to require the defense to prove consent. The "legal impossibility" language was contained in dicta.

[17] *Prather*, 69 M.J. at 348 (Baker, J., dissenting in part and concurring in the result). Mistake of fact was not discussed in any of the recent burden-shifting decisions even though the military judge instructed on mistake of fact in *Prather*. *See infra* note 23. Because the court did not address the issue, Part II of this article does not do so. Mistake of fact is discussed in Part IV.

[18] UCMJ art. 120 (t)(16). The "old" Article 120 placed the burden on the accused to prove a reasonable belief that the victim of carnal knowledge was at least sixteen years of age. UCMJ art. 120(d)(2) (2005). The *MCM* uses "affirmative defense" and "special defense" interchangeably. MCM, *supra* note 7, R.C.M. 916(a) and Discussion, R.C.M. 916(k)(2); *id.* MIL. R. EVID. 412(e); UCMJ art. 113(b)(6); *id.* art. 120(o), (q)(1), (t)(16); *id.* pt. IV ¶¶ 13(c)(5), 76(c)(3). The label has no consistent relationship to the burden of proof. Most defenses require the prosecution to disprove the defense beyond a reasonable doubt. MCM, *supra* note 7, R.C.M. 916(b)(1). The accused is assigned the burden to prove lack of mental responsibility by clear and convincing evidence. *Id.* R.C.M. 916(b)(2). Of the remaining defenses listed in Rule for Court-Martial (RCM) 916, mistake of fact as to age in child sexual cases and mistake of fact as to consent each place the

The *Manual for Courts-Martial* (*MCM*), unlike some state statutes, does not use "affirmative defense" as shorthand for requiring the accused to bear the burden of proof.[19] Article 120(r) states that both consent and mistake of fact as to consent are affirmative defenses, and Article 120(t)(16) places the initial burden of proving each on the accused.[20] Rule for Courts-Martial (RCM) 916, entitled "Defenses," however, contains no defense of consent. Only mistake of fact as to consent is an enumerated defense.[21]

In three recent cases,[22] the CAAF addressed Article 120's affirmative defense structure, finding serious constitutional flaws in the statutory scheme.[23] These cases demonstrate that Article 120's consent provisions are badly, perhaps irretrievably, flawed. The trio of cases answers some questions clearly, and leaves others remarkably vague. These cases clearly establish that the double burden-shift of Article 120(t)(16) is unconstitutional, and that the accused cannot be required to prove consent in "substantial incapacitation" cases. The unanswered questions include: Is there a way constitutionally to charge Article 120(c)(2) in cases involving substantial incapacitation? Does treatment of consent or mistake of fact differ in "force" cases and "substantial incapacity" cases? Are there instructions that can "save" Article 120 where the case contains "some evidence" of consent or mistake of fact as to consent?

The answer to each of these questions is "yes." Getting to "yes," however, requires inquiry into the interplay of the CAAF decisions, the Army Trial Judiciary's solutions to the defects in the statute, and consideration of the defenses set out in RCM 916.

A. Prescient But Overbroad: The Army Trial Judiciary Solution—Saving Convictions, Eliminating Burdens, Creating Elements

A brief historical note is necessary before the recent CAAF decisions can be put in proper context. As the new Article 120 approached its effective date of 1 October 2007,[24] senior members of the Army Trial Judiciary were concerned. These judges noted that the affirmative defense provisions of the law contained a strange double burden-shifting arrangement that raised questions both about congressional intent and also about the legal viability of the statute.[25]

In an unprecedented abrogation of clear pronouncements of both Congress and the President, the Army Trial Judiciary unilaterally eliminated the affirmative defenses defined in Article 120(r) before they ever took effect.[26] Their solution, placing the burden on the Government to disprove consent and mistake of fact as to consent, was prescient and simple. It also drastically shifted the balance of Article 120 cases against the Government. The magnitude of that shift was unnecessary.

Without briefing, argument, or even a case before it, "[t]he Army Trial Judiciary [took] the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist."[27]

The explanation for this instructional "note" correctly recognized the "illogic" of the double burden-shift. The Trial Judiciary interpreted the affirmative defense provisions to imply that Congress must have intended something for

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burden of proof on the accused and contain the double burden-shift language. *Id.* R.C.M. 916(b)(3) and (b)(4).

[19] Several states define an "affirmative defense" as one on which the defendant bear the burden of proof, usually by a preponderance of the evidence. ALASKA STAT. § 11.81.900 (2) (2011); CONN. GEN. STAT. ANN. § 53a-12 (2011) (annotations list eleven statutes with affirmative defenses); HAWAII REV. STAT. § 701-115 (2)(b) (2011); N.Y PENAL LAW § 25.00 (Consol. 2011); TEX. PENAL CODE ANN. § 2.04(d) (West 2010); 2011 Mo. Legis. Serv. H.B. 111 (West) (amending MISSOURI REV. STAT. § 568.040 2(4) to include language assigning the accused the burden of proof of an affirmative defense by preponderance of the evidence in child nonsupport cases).

[20] The only other "affirmative defenses" in the *MCM* which require the accused to prove the defense are lack of mental responsibility, RCM 916(k)(1), and age in child sexual offenses, RCM 916(j)(2).

[21] MCM, *supra* note 7, R.C.M. 916 (b)(4) (burden of proof); *id.* R.C.M. 916(j)(3) (ignorance or mistake of fact, sexual offenses). Although the "Discussion" falling in the middle of RCM 916(j) specifically refers to Article 120(r), there is no reference to consent being a defense, affirmative or ordinary. Rule for Court-Martial 916(j)(3) quotes Article 120(t)(15) (definition of mistake of fact as to consent) essentially verbatim, but makes no reference to Article 120(t)(14) (consent). *See also id.* R.C.M. 920(e)(5)(D) (requiring instructions in accordance with RCM 916, but not referring to UCMJ article120(t)(14), (15) or (16)).

[22] United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010); United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011); United States v. Medina, 69 M.J. 462 (C.A.A.F. 2011). Note that mistake of fact was not raised as a defense in any of these trials. *See infra* Parts II and IV.

[23] Significantly, only the defense of consent was raised in these three cases. While the CAAF opinions address the affirmative defense provisions which include both consent and mistake of fact, the holdings directly apply only to the defense of consent. This article contends that the defense of mistake of fact can and should be considered both differently than and separately from consent. *See* discussion *infra* Parts III and IV.

[24] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(c), 119 Stat. 3136, 3263 (2006).

[25] Major Harold Hoege, then a professor in the Criminal Law Department at The Judge Advocate General's Legal Center & School, alerted readers to the same problem, analyzing the new Article 120 in great detail. Hoege, *supra* note 3.

[26] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-45-3 n.10.1 (1 Jan. 2010) [hereinafter BENCHBOOK] (approved interim update).. Hoege, *supra* note 3, at 17 (citing a draft version with identical language in an article published in May 2007).

[27] *Id.* Para. 3-45-3 n.10.1

both of the burdens.[28] The Trial Judiciary's solution inferred that the accused's burden was intended to be a burden of production, and the Government's burden was intended to be the burden of proof once the defense was raised. This solution, however, is not as logical as it might appear.

The *Military Judges' Benchbook* (*Benchbook)* provides no guidance on how to treat the textual burden placed on the accused as a burden of production. Does a judge make a preliminary determination of whether the accused has met his burden, as the phrase "burden of production" would suggest? What is the burden of proof? The *Benchbook* suggests no answer. If the accused produces evidence of consent or mistake of fact by that standard, how could the government ever disprove consent beyond a reasonable doubt?[29] In practice, Army military judges have ignored the stated burden of production, and the *Benchbook* contains neither procedures nor notes about using it. The recommended instructions rely solely on the general rule that if a defense is raised by some evidence the Government must disprove the defense beyond a reasonable doubt.[30]

The practical effect of the *Benchbook* instruction is to re-impose on the Government the burden to prove the congressionally-abandoned element of lack of consent.[31] The *post hoc* reason given for this choice was the "rule of lenity," the principle that criminal statutes are to be construed in favor of the accused.[32] Relying on that rule of statutory construction, while logical and legally sound, was not the only possible choice, as will be shown in Part III.

The *Benchbook* solution was in place when criminal trials charging the new Article 120 first reached military courtrooms. While most Army judges delivered the *Benchbook* instruction concerning consent and mistake of fact, sister service courts frequently instructed in the language of the statute. Constitutional challenges to Article 120's affirmative defenses reached CAAF in late 2010. The opinions which followed confirmed that the statutory affirmative defense provisions were legally unsustainable.

B. *United States v. Neal*—Consent and the "Force" Provisions of Article 120

Airman Raymond Neal was charged with a violation of Article 120(e), aggravated sexual contact by use of force.[33] The defense moved to dismiss that specification, claiming that the statute unconstitutionally required the accused to disprove an "implied" element of the crime. "At trial, the military judge interpreted Article 120(e) as requiring the defense to disprove an implied element—lack of consent—and dismissed the charge on the ground that the statute unconstitutionally shifted the burden of proof on an element from the Government to the defense."[34] The Navy-Marine Court of Criminal Appeals (N-MCCA) disagreed, and the case was certified to CAAF.

The CAAF rejected the concept of an implied element of consent,[35] confirming that the legislature has broad powers to determine the elements of crimes. Article 120 states that "consent and mistake of fact as to consent are not an issue" in the revised Article 120. In *Neal*, CAAF interpreted "an issue" narrowly to avoid constitutional error. If Article 120 were interpreted to preclude presentation of any evidence of consent, the court held, the statute would be depriving the accused of evidence relevant to rebut the Government's proof. The *Neal* court determined that "the provision could be interpreted as providing that consent is not 'an issue'—a discrete matter—that must be proved beyond a reasonable doubt as an element of the offense,"

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[28] *Id.* Paragraph 3-45-5 note 10.1 states

> Because this burden shifting provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that consent is treated like many existing affirmative defenses.

Id. para. 3-45 n.10.1.

[29] The CAAF's answer to this question is: "that could never happen." *See* Part II.C, *infra* (discussing United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011)) and text accompanying note 44.

[30] *See* United States v. DiPaola, 67 M.J. 98, 99 (C.A.A.F. 2008) (illustrating the general rule before the 2007 changes; the original case was tried under the prior statute. *Id.* at 101 n.5).

[31] Ironically, this usurpation of congressional and Executive intent may have saved the convictions in Army "substantial incapacity" cases. As will be seen below *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) held that requiring the accused to prove consent was unconstitutional in cases charged under Article 120(c)(2). Because most Army judges have followed the *Benchbook* instruction placing the burden on the Government to disprove consent, Army panels have not received the unconstitutional instruction. *See* Part III.D, *infra* (discussing *Medina*).

[32] BENCHBOOK, *supra* note 26, para. 3-45-3 (approved Change 11-02A) (citing rule of lenity as suggested on-the-record justification for judges following the *Benchbook* instruction). *See* United States v. Williams, 458 U.S. 279, 290 (1982) (briefly discussing the rule of lenity). The 2007 *Benchbook* explanation for giving an instruction that ignored the statutory preponderance language did not cite the rule of lenity (and, indeed, did not provide trial judges with any legal justification to cite for the change). That principle was invoked first in approved Change 11-02 to the *Benchbook*, which adds the explanation issued to enable judges to comply with the holding of *Medina* that "without legal explanation" it was error to use the 2007 *Benchbook* instruction. *Medina*, 69 M.J. at 465.. *See infra* note 94 (quoting the new *Benchbook* instruction).

[33] United States v. Neal, 68 M.J. 289, 292 (C.A.A.F. 2010). The elements of Article 120(e) are defined by reference to Article 120(a). Airman Neal was charged with the equivalent of subsection (c)(1)(B).

[34] *Id.* at 291.

[35] *Id.* at 302–03.

and upheld the power of Congress to remove the element of consent from the statute. [36]

After confirming the constitutionality of the changes to Article 120, the court then explained why eliminating "lack of consent" as an element was a reasonable exercise of congressional authority.

> Article 120 focuses on the force applied by an accused, not on the mental state of the alleged victim. . . . The statute describes the prohibited act in terms of the degree of force applied to the alleged victim by the accused. Although the statute describes the degree of force in terms of the relative actions of the accused and the alleged victim, the prosecution is not required to prove whether the alleged victim was, in fact, willing or "not willing." If the evidence demonstrates that the degree of force applied by an accused constitutes "action to compel" another person, the statute does not require further proof that the alleged victim, in fact, did not consent.[37]

Turning to the affirmative defense of consent, the CAAF approved the statutory affirmative defense framework[38] as applied to "force" cases in which consent was raised by the evidence.[39] The court also affirmed that Congress can require an accused to prove affirmative defenses, but also pointedly warned that a statute cannot oblige the accused to disprove an element of a crime.[40] The court then explained that proper instructions could avoid improperly shifting the burden of proof to the accused.

> [T]he statute does not preclude consideration of consent evidence by a court-martial panel when determining whether the prosecution has proven the elements of the offense beyond a reasonable doubt, and it permits consideration of such evidence with respect to the affirmative defense of consent. If such evidence is introduced, the military judge must instruct the members to consider all of the evidence, including the evidence of consent, when determining whether the government has proven guilt beyond a reasonable doubt. *See* [*Martin v. Ohio*,], 480 U.S. [228] at 232-36 [(1987)]. In doing so, the military judge must be mindful of both the content and sequential structure of the instructions.[41]

Thus, while the court said almost nothing that would guide a military judge in ruling on the admissibility of consent evidence, it did include some direction concerning instructions.

C. *United States v. Prather*—Consent and the "Substantial Incapacity" Provisions of Article 120

Airman Stephen Prather was charged with violation of Article 120(c)(2), aggravated sexual assault of "[SH], who was substantially incapacitated."[42] After the Air Force Court of Criminal Appeals affirmed his conviction,[43] the case was certified to CAAF. In *United States v. Prather*, CAAF held that the accused could not be required to prove consent in cases presented under the "substantially incapacitated" section of Article 120(c)(2).[44] Because an *element* of Article

[36] *Id.* at 301–02.

[37] *Id.* at 302 (citing Russell v. United States, 698 A.2d 1007, 1009 (D.C. 1997), describing a similar civilian statute, D.C. CODE § 22-3007). While CAAF relied heavily on the parallel sexual assault statute discussed in *Russell*, that statute had been amended to retain a defense of consent to sexual crimes, but to eliminate the defendant's burden to prove the defense, even before CAAF announced its decision in *Neal*. D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec. 10, 2009) states in part, "Sec. 213. Section 206 of the Anti-Sexual Abuse Act of 1994, effective May 25, 1995 (D.C. Law 10-257; D.C. Official Code § 22-3007), is amended by striking the phrase, 'which the defendant must establish by a preponderance of the evidence.'"

[38] *Neal* addresses only consent, not mistake of fact as to consent, because that was the only defense at issue in the appeal. *Neal*, 68 M.J. at 297. *Neal* appears to validate the defense provisions of Article 120, and raises no concerns about the double burden-shifting arrangement later declared to be "a legal impossibility" in *United States v. Prather*. 69 M.J. 338, 345 (C.A.A.F. 2011). The double burden-shift was not raised on appeal, but the military judge may have applied it, finding that the accused's testimony concerning the encounter raised an issue of consent. The judge dismissed the charge before there was an opportunity to apply the second burden of proof. The *Neal* court therefore did not address the issue of whether the double burden shift is generally "illogical and unusable" as claimed in the *Benchbook*. The court was careful to note that it was analyzing the specific trial court finding that consent was an "implied element."

[39] As will be seen, below, Part II.C, *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) declared the affirmative defense arrangement unconstitutional in relation to the "substantially incapable" sections of the statute, Articles 120(c)(2) and 120(h). By reasonable analogy, Article 120(a)(5) should be equally affected by *Prather*.

[40] *Neal*, 68 M.J. at 298 (citing Patterson v. New York, 432 U.S. 197, 205–06 (1977)).

[41] *Id.* at 303.

[42] *Prather*, 69 M.J. 341 n.4.

[43] *Id.* at 339.

[44] Article 120(c) states, in part:

> Any person subject to this chapter who . . . (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—
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> (A) appraising the nature of the sexual act;
> (B) declining participation in the sexual act; or

120(c)(2) is the inability of the alleged victim to consent, the court stated, it is unconstitutional to require the accused to prove, or even to claim, consent. "If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated."[45]

While *Prather* directly addressed the consent defense only in substantial incapacity cases and did not address mistake of fact at all, the decision also invalidated one aspect of the affirmative defense provisions for both defenses in any case. After declaring the issue of the second burden shift "moot," the court stated in dicta that the double burden-shifting scheme of Article 120(r)[46] creates a "legal impossibility" because if an accused proves consent by a preponderance of the evidence, the Government could never thereafter disprove consent beyond a reasonable doubt.[47] The *Prather* majority did not use the word "unconstitutional" to describe this "legal impossibility." The dissent in the case was not so reluctant, chastising the majority for avoiding the label "unconstitutional" when it so clearly applies.[48] The following analysis presumes that the double burden-shift is both illogical and unconstitutional.

Given that the double burden-shift is unconstitutional, judges and judge advocates are left with several possible approaches for future cases, which may be different for force cases and substantial incapacity cases. Is the entire affirmative defense scheme unconstitutional, or only one or the other burden? If so, should a court sever the entire affirmative defense provisions, or only sever one or the other burden of proof? Congress expressed two incompatible burdens in Article 120's affirmative defense provisions: (1) that the defense bears a burden to prove consent by a preponderance of the evidence; and (2) that the Government must disprove consent, when raised by evidence, beyond a reasonable doubt. *Prather* declared the first of these choices unconstitutional when the charge alleges substantial incapacity. But in substantial incapacity cases, the Government cannot have an independent duty to disprove a "defense" of consent, because if the Government proves substantial incapacity, by definition it has proven that the victim *could not* consent to sexual activity.[49] This reasoning supports an argument that the entire consent provision of Article 120 is meaningless in substantial incapacity cases. Part III further develops this conclusion.

The legal status of force cases is facially quite different. *Neal* validated placing the burden on the accused to prove consent, but failed to address the double burden-shift. Can a court legally require the accused to prove consent, but sever the Government's second burden? Must the court impose the burden on the Government to disprove consent, severing only the burden placed on the accused? Or can the court sever all of the consent defense provisions and treat the issue of consent merely as evidence relevant to the issue of force, as suggested in *Neal*?[50] Part III explores each of these possibilities.

Prather holds that the defense does not have to prove consent in substantial incapacity cases, and that instructing the panel on the second shift does not cure the constitutional defect created by the first shift. (It further states, in dicta, that the double burden-shift can never be applied in any case, and that no instructions can save it.[51]) Thus, *Prather* implies that, in substantial incapacity cases, the military judge must instruct the panel that the Government has the burden to prove "substantial incapacity" beyond a reasonable doubt, without imposing any burden on the defense. It is prudent, however, to incorporate *Neal*'s suggestion that if evidence of consent is adduced at trial, the judge must instruct the panel to consider that evidence in deciding whether the Government has met its burden of proof.[52]

A broader argument can be made, however, that if the military judge instructs on consent, the instruction should require the Government to disprove consent beyond a reasonable doubt. *Prather* states that proof of substantial incapacity is sufficiently akin to proof of lack of consent that the accused cannot be required to prove consent. Thus, lack of consent arguably is an implicit element of "substantially

(C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault. . . .

The CAAF's *Prather* holding applies equally to Article 120(h) "substantial incapacity" cases by direct reference (since 120(h) is defined by reference to 120(c)). By inescapable inference, the holding also applies to Article 120(a)(5) ("thereby substantially impairs the ability of that other person to appraise or control conduct. . . ."), and its coordinate charge under Article 120(e).

[45] *Prather*, 69 M.J. at 343.

[46] Article 120(t)(16) states in part: "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist." UCMJ art. 120(t)(6). Article 120(r) defines consent and mistake of fact as to consent as affirmative defenses. *Id.* art. 120(r).

[47] *Prather*, 69 M.J. at 344-45.

[48] *Id.* at 348 (Baker, J., dissenting as to Part A and concurring in the result) (the dissent, following *Neal*, would have upheld the initial burden shift but reversed the case based on the second shift).

[49] UCMJ art. 120(t)(14) ("A person cannot consent to sexual activity if . . . substantially incapable of…appraising the nature of the sexual conduct at issue . . .physically declining participation in the sexual conduct . . .or . . .physically communicating unwillingness to engage in the sexual conduct at issue."

[50] United States v. Neal, 68 M.J. 289, 303, 304 (C.A.A.F. 2010).

[51] *Prather*, 69 M.J. at 344–45.

[52] *Neal*, 68 M.J. at 303. Suggested model instructions are presented in Part V, *infra*.

incapable," which the Government must prove.[53] This argument is undercut by *Neal*'s refusal to apply implicit elements to Article 120, but it has greater traction in a substantial capacity context than in a force case.

Mistake of fact as to consent is largely unaffected by the central holding of *Prather*. Mistake of fact does not address the actual consent of the victim, but only the perception of the accused. Asserting the defense therefore does not require the accused to disprove the victim's ability to consent, which was the basis for *Prather*'s finding of unconstitutionality. The double burden-shift language in Article 120, on the other hand, is impossible to apply under any circumstances, whether applied to mistake of fact or consent.

D. *United States v. Medina*—Can an Illegal Instruction Be Acceptable?

Staff Sergeant (SSgt) Jose Medina was convicted of, among other charges, violation of Article 120(c)(2), aggravated sexual assault of a person who was substantially incapacitated. The accused raised defenses of consent and mistake of fact as to consent. Although the facts were different, the charge and the consent defense presented at trial were basically the same as those in *Prather*. The crucial difference between the cases, however, lies with the instructions given by the military judge concerning the burden of proof for the defenses.

In *Prather*, the instructions tracked Article 120(t)(14), (t)(15) and (t)(16), placing on the defense the burden to prove both the consent and mistake of fact defenses by a preponderance of the evidence. Those instructions also contained the double burden-shifting provisions of Article 120(t)(16).[54] In *Medina*, the trial judge delivered instructions on the defenses which had been devised by the Army Trial Judiciary and published in the *Military Judges' Benchbook*. Those instructions state, in relevant part:

> The evidence has raised the issue of whether [the victim] consented to the sexual acts concerning the offense of aggravated sexual assault . . . .
> Consent is a defense to that charged offense . . . .
> The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense of aggravated sexual assault . . . you must be convinced beyond a reasonable doubt that, at the time of the sexual acts alleged, [the victim] did not consent.[55]

Thus, *Medina*'s instructions required the Government to prove, not only all elements, but the non-element of lack of consent, beyond reasonable doubt. By so doing, these instructions increased the Government's burden beyond that required by Article 120. In so doing, they ignored both the language and intent of the amendments to Article 120, but also avoided the constitutional infirmity identified in *Prather*.

Medina claimed on appeal that failure to instruct in the language of Article 120 was a systemic error requiring reversal. The N-MCCA agreed that the military judge erred by ignoring the text of the statute, but held that the error was harmless because it favored Medina by increasing the government's burden of proof.[56]

United States v. Medina was certified to CAAF, and was argued on the same day as *Prather*. In a decision released thirty days after *Prather*, the CAAF stated the following

> In *Prather* we noted that the Article 120, UCMJ, statutory scheme in these circumstances placed military judges in an impossible position and, 'in order to provide an instruction that accurately informed the panel of the Government's burden (as recommended by the Military Judges' Benchbook), the military judge would have to ignore the plain language of Article 120, UCMJ.' [*Prather*] at 343 n. 8. That appears to be exactly what occurred in this case. The military judge did not employ the terms of the statute with respect to the affirmative defense in his instructions, but set forth no reasons in the record for his deviation from the statutory

[53] *See Prather*, 69 M.J. at 343.

[54] *Id.* at 340, 345-46.

[55] United States v. Medina, 69 M.J. 462, 464 (C.A.A.F 2011). The trial judge also instructed on mistake of fact as to consent using an instruction from the *Benchbook*. *Id.*at 464 n.2. The *Benchbook*'S "solutions" to the ills of Article 120 are discussd in Part II.A, *infra.*

[56] United States v. Medina, 68 M.J. 587, 593 (N-M. Ct. Crim. App. 2009). A simple statement of that decision understates the interesting legal debate waged in the concurring and dissenting opinions. Judge Booker's concurrence cleverly harmonizes the difficult language and procedures of article 120, but his reasoning was later rejected by *Prather*. Judge Maksym also concurred in the result, but scathingly criticized the "poorly written, confusing and arguably absurdly structured and articulated act of Congress" that is Article 120. He concluded that the *Benchbook* instruction is the only way to save the constitutionality of Article 120, and that its use saved the conviction in this case. Judge Beal, dissenting in part, argued that Article 120 as currently written is facially unconstitutional. More significantly, he explained that the "radically unauthorized" use of the *Benchbook* instruction to avoid the pitfalls of the affirmative defense scheme has had the unintended consequence of making sexual offenses harder to prosecute under the revised Article 120 than under the former version. *Id.* at 593–602.

> scheme. It is not apparent from the record whether the military judge interpreted the statute, misinterpreted the statute, affirmatively severed a portion of the statute on constitutional grounds, or simply overlooked a portion of the statute.[57]

The court held that "in the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute." Because the error benefitted the accused, however, it was harmless.[58] Yet the court also held that "[t]he instruction that was given was clear and correctly conveyed to the members the Government's burden."[59]

Medina effectively holds that cases can be prosecuted pursuant to Article 120(c)(2) by instructing in accordance with the *Benchbook*, as long as judges provide a legal reason for deviation from the statutory language of Article 120.[60] *Medina* does not hold, however, that the *Benchbook* provides the only acceptable approach. Unfortunately, the court's silence on other acceptable solutions leaves practitioners and judges in an uncertain legal position. An alternative solution is proposed in Part III.

Medina establishes that giving the *Benchbook* instruction, with a legally sufficient explanation, will likely avoid reversible error on appeal. The *Benchbook* instruction, however, makes an appeal less likely, because it increases the likelihood of acquittal. "[A]pplication of the statute in such a manner actually makes prosecution of these sorts of sexual offenses more difficult."[61] These instructions graft an additional element onto the Government case whenever consent is raised by the evidence. The instructions effectively require the Government to focus on both the actions of the perpetrator and on the mental state of the victim. Article 120 intended to eliminate lack of consent as an element, but the *Benchbook* instructions reinsert that element of proof into the statute. The result is a confusing hybrid of instructions that first imply that consent is not an element of proof, then state directly that it is. A jury that is confused by the instructions is more likely to find a reasonable doubt.

E. Maybe the President Got It Right—RCM 916 Defenses

Parts III and IV present practical solutions to overcome the defects CAAF has identified in Article 120 by keeping mistake of fact as to consent as a defense and eliminating actual consent as a defense. Rule for Court-Martial 916, is already written this way—mistake of fact as to consent is listed as a defense, but consent is not.

The treatment of consent and mistake of fact in RCM 916 is more consistent with the theoretical underpinnings of Article 120 than is the punitive article itself. Consent was not, prior to 2007, an RCM defense, while mistake of fact has long been a defense to any crime.[62] A simple resolution to the holdings of *Neal* and *Prather* lies in following the overall philosophy of defenses contained in RCM 916, by treating mistake of fact as a defense, but treating consent as mere evidence.[63]

The common element of defenses defined in RCM 916 is that each is based on a factual predicate that allegedly affects the behavior of the accused or his participation in acts which would otherwise be criminal. Nearly all of those defenses involve a mental state or mental belief held by the accused.[64]

Rule for Court-Martial 916's focus on the accused directly parallels Article 120's philosophical shift of focus from the victim to the offender. Moreover, the rule's omission of a defense of "consent" also is more consistent with the structure of military justice defenses than is the inclusion of consent as a defense in the text of Article 120. Consent relates to the mental state of the alleged victim. Mistake of fact, like other RCM 916 defenses, focuses primarily on the mental state of the accused. Mistake of fact as to consent is "something within the knowledge of the accused that he may fairly be required to prove."[65]

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[57] *Medina*, 69 M.J. at 464 .

[58] *Id.* at 465–66.

[59] *Id.* at 465. What the Court means by "correctly conveyed" is unclear, but the language together with the court's ruling strongly suggest that the Court has approved the *Benchbook* instruction.

[60] The Army Trial Judiciary has adopted exactly this interpretation, and the approved changes to the *Benchbook* now provide language to supply such a reason on the record. BENCHBOOK, *supra* note 26, para. 3-45-3.

[61] United States v. Medina, 68 M.J. 587, 602 (N-M. Ct. Crim. App. 2009). (Beal, J., dissenting in part).

[62] Mistake of fact was included as a defense in the first edition of the *MCM*. MCM, *supra* note 8, R.C.M. 916(j)(1984), 49 Fed. Reg. 17,152 (Apr. 23, 1984).

[63] There are limits, however, to the direct applicability of RCM 916. The mistake of fact as to consent defense in RCM 916(j)(3) did incorporate the unconstitutional double burden-shift contained in Article 120 (t)(16) and declared "a legal impossibility" in *United States v. Prather*. 69 M.J. 338, 345 (C.A.A.F.). Because RCM 916(j)(1) is also a mistake of fact defense, section (j)(3) need not be applied, and can be severed from the RCM on the same reasoning that the affirmative defenses can be severed from Article 120. *See infra* note 90 and accompanying text.

[64] Rule for Court-Martial 916(f) (accident) and RCM 916(i) (inability) are not directly the result of the mental process of the accused, but are still information most available to the accused.

[65] Russell v. United States, 698 A.2d 1007, 1017 (D.C. 1997), *cited with approval in* United States v. Neal, 68 M.J. 289, 300 (C.A.A.F. 2010). Russell referred to "consent" as the "something" that the accused could be required to prove. Mistake of fact is much more "within the knowledge of the accused" than is consent.

III. Where Are We?—The Consent Defense

A "she said 'yes'" consent case is commonly a pure credibility contest.[66] The victim usually testifies to facts showing force, threat, or bodily harm,[67] and the defense attacks those facts by cross-examination and testimony, often including that of the accused. As a practical matter, the factfinder's credibility determinations will decide the case. Evidence relevant to actual consent, if credited, may raise a reasonable doubt of the accused's guilt.[68]

If the accused elects to testify, labeling that testimony as a "defense" of consent is unnecessary, as the fact-finder's resolution of the classic "swearing contest" will likely determine the outcome. Consent is inevitably tied to the question of force,[69] and therefore in this scenario, need be neither a defense nor an element. *Neal* established that consent can be treated constitutionally as a simple factual question.[70] Appropriate instructions can guide the fact-finder to consider the evidence of consent as part of the overall factual determination of guilt, just one fact among many to be considered in determining whether the Government has proven the accused guilty beyond a reasonable doubt.[71]

Medina requires a "legally sufficient explanation" if a military judge is to ignore the affirmative defense provisions of Article 120. Fortunately, a simple and elegant solution grows naturally out of *Prather*. Requiring the accused to prove consent in these cases was ruled unconstitutional. Because of that unconstitutionality, a military judge can reasonably sever the affirmative defense provisions from the statute, and apply "*Neal* instructions" that the Government must prove elements beyond a reasonable doubt, and that evidence of consent may raise a reasonable doubt.[72] This approach is consistent with severability theory that seeks to "retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute."[73]

The first factor of the severance theory is easy to apply. Severing the affirmative defense sections from the remainder of the statute eliminates both provisions shown to be unconstitutional in *Prather*. Moreover, *Neal* has already held that the statute would be constitutional without any mention of consent, whether as an element or a defense.

As for the second factor, as noted in *Neal*, the statute can function perfectly well without the affirmative defense sections. With respect to *independent* functioning, "[t]he more relevant inquiry in evaluating severability is whether a statute will function in a *manner* consistent with the intent of Congress"[74] without the excised sections. As a practical matter, criminal liability and trial practice would remain the same without the affirmative defense sections. Only nonconsensual activity would be punished under the statute. If the defense had evidence of consent, it would raise that evidence, and if that evidence raised reasonable doubt as to force, the factfinder would acquit. Congress's apparent intent of removing consent as an element, while leaving it as an issue that the defense could raise, would be preserved. The only loss would be the confusion created by the impossible burden shift.

Furthermore, the remainder of the statute can function perfectly well without the defense sections. If those sections are eliminated, the general defenses of RCM 916, including the long-standing mistake of fact defense, are still available to an accused.[75] The Government loses the requirement that the accused must prove consent, but the Government is not saddled with proving lack of consent beyond a reasonable doubt, as the *Benchbook* instructions require. The accused retains the ability to elicit evidence of consent, but without any burden of proof on that factual question.

The third severance factor, whether severance of the affirmative defense sections is "consistent with Congress's basic objectives in enacting the statute,"[76] presents a more difficult analysis. The double burden-shift expresses two separate principles: (1) to make the accused meet some threshold greater than "some evidence" to raise the defense, and (2) to make the Government disprove the defense, once raised, beyond a reasonable doubt. While *Prather* declared that it is "impossible" to effectuate both intents as written in Article 120,[77] the legal import of the holding is that the

[66] A discussion of general trial techniques for supporting or attacking the credibility of witnesses is beyond the scope of this article. Aspects related specifically to consent defenses are addressed below.

[67] Rape or abusive sexual contact can be charged based on "render[ing] another person unconscious" and by forced administering of a drug. UCMJ art. 120(a)(4) and (5) (2008). These methods of committing rape, however, have sufficient similarity to the "substantially unconscious" language addressed in *United States v. Prather*, such that it is likely they suffer from the same flaws in relation to consent.

[68] *Neal*, 68 M.J. at 304.

[69] *See id.* at 301–02.

[70] *Id.* at 304.

[71] *Id.* at 303.

[72] *Id.*

[73] United States v. Booker, 543 U.S. 220, 258–59 (2005) (citations omitted).

[74] Alaska Airlines v. Brock, 480 U.S. 678, 685 (U.S. 1987) (emphasis in original). *See* Regan v. Time, Inc. 468 U.S. 641, 653 (1984) (presumption in favor of severability of unconstitutional provisions).

[76] *Booker*, 543 U.S. at 258–59.

[77] United States v. Prather, 69 M.J. 338, 345 (C.A.A.F. 2011).

double burden-shift is unconstitutional, [78] and the following discussion begins with this premise.

The Army Trial Judiciary has chosen the simplest accommodation of the conflicting burdens in (t)(16): ignore the burden on the accused and apply the burden on the Government based on the "rule of lenity." Although simple, this solution is far more radical a revision of Article 120 than is either legally supportable or legally required. In effect, the Army Trial Judiciary solution repealed all key aspects of the Article 120 revisions, not just an unconstitutional one, by re-concentrating the required proof on victim behavior, and re-assigning the burden to the Government to disprove lack of consent. Nothing in *Neal*, *Prather*, or the rules of statutory construction requires this major rewriting of the law.[79]

The post-*Medina* justification for the Army Trial Judiciary approach is the "rule of lenity."[80] The rule of lenity was never intended to abrogate major portions of a statute. That "rule" simply encourages courts, where the principal intent of the lawmaker is ambiguous, to adopt a statutory construction that favors the accused.[81]

The primary purpose of the Article 120 revision, however, is clear. Congress intended to eliminate lack of consent as an element of sexual crimes, and to shift the focus of the statute to the behavior of the offender rather than the victim.[82] This major change was a reasonable exercise of legislative power.[83] "'[Whenever] an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'"[84] The resulting statute should function in a manner consistent with Congressional intent.[85]

Severing the entirety of the affirmative defense provisions preserves legislative intent to focus sexual offenses on the offender. Applying the rule of lenity to reinstate lack of consent, an element Congress consciously acted to eliminate from consideration in sexual offenses contradicts the primary legislative purpose behind the reformulation of Article 120.

Although certainly some members of Congress would object to severing the affirmative defense provisions, that solution retains the most basic purposes of the new statute, without shifting the balance of the statute between the prosecution and the defense. Severance avoids the serious disadvantage that the *Benchbook* solution imposes on the Government to prove an element (lack of consent) which Congress clearly intended to eliminate. At the same time, severance also allows the accused to present evidence of consent pursuant to a lower burden of proof than the affirmative defense provisions placed on the defense. While this approach does not assure the accused of an instruction that proof of consent by a preponderance of the evidence requires acquittal, severance still guarantees an instruction that consent evidence may raise a reasonable doubt as to force. Severance effectively maintains a balance between the prosecution and the accused similar to that which motivated the creation of the double burden-shift.

Overall, the uncomplicated solution of severing all references to affirmative defenses retains the basic intent of Congress, while solving the instructional difficulties exposed in *Prather* and *Medina*. Although any severance decision carries with it some uncertainty, instructions in line with the suggestions in *United States v. Neal*[86] are the most balanced

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[78] *See id.* at 348 (Baker, J., dissenting) ("I agree with the majority that the burden shifting creates a legal impossibility. However, there is another word for what the statute does here and that is 'unconstitutional.' On this question of law, the Court should not shy away from stating so.").

[79] The *Benchbook* instruction states that it should be used once "some evidence" of consent is elicited during trial. The "some evidence" standard is extremely low, and does not require the accused to testify. United States v. DiPaola, 67 M.J. 98, 99 (C.A.A.F. 2008). United States v. Jones, 49 M.J. 85, 90–91 (C.A.A.F. 1998). Thus, the instruction is likely to be extremely common.

[80] In response to *United States v. Medina*, the following *Benchbook* update was issued in February 2011: "Insert the following new NOTE 1.1 immediately following the current NOTE 1 in Instructions 3-45-3, 3-45-4, 3-45-5, 3-45-6, 3-45-7, 3-45-8 and 3-45-11:

> "NOTE 1.1: Article 120 Affirmative Defenses. When applying an affirmative defense to an Article 120 offense—whether instructing members or judge alone—the military judge MUST include the following statement on the record:
> "This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9."

BENCHBOOK, *supra* note 26.

[81] United States v. Bass, 404 U.S. 336, 347 (1971).

[82] United States v. Neal, 68 M.J. 289, 299, 302 (C.A.A.F. 2010).

[83] *Id.* at 304.

[84] Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987).

[85] *Id.* at 685.

[86] *Neal*, 68 M.J. at 304.

approach to cases in which consent evidence is presented. Treating consent as evidence relevant to force, but with no special burden of proof is an equitable solution that most closely effects congressional intent.

IV. Where Are We?—The Mistake of Fact Defense

A. Parameters of the Mistake of Fact Defense

As discussed earlier, the mistake of fact defense differs significantly from the defense of actual consent, because it looks primarily to the beliefs of the accused. Actual consent is no part of the defense, and the defense does not require proof of the victim's capacity to consent. For this reason, mistake of fact does not require the accused to disprove an element of the Government's case, as was held unconstitutional in *Prather*.

Article 120 states that

> The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented.[87]

The statute does, unfortunately, include the double burden-shift, with attendant instructional difficulties.

B. Burden of Proof

Mistake of fact as to consent is the essence of an affirmative defense because it concerns primarily the beliefs of the accused, not the victim's physical or mental state. Proving the accused's own actual belief is the epitome of "something within the knowledge of the accused that he may fairly be required to prove."[88]

While it would make complete sense to place the burden of proof on the accused to prove mistake of fact, the current state of the law, after *Neal*, *Prather* and *Medina*, appears to forbid that approach. Congress unquestionably had the *power* to place the burden of proof on the accused, and it did so.[89] But Congress also created the impossible double burden-shift as part of the affirmative defense package, rendering the mistake of fact defense just as "legally impossible," and therefore unconstitutional, as the consent defense.

The inclusion of a mistake of fact defense in Article 120 was consistent with its long-established history in military justice.[90] Prior to the revisions to Article 120, mistake of fact, once raised in any case, had to be disproven by the Government beyond a reasonable doubt.[91] While Congress attempted to increase the burden of production of mistake of fact evidence in sexual assault cases, there is no evidence that Congress intended to change the overall philosophical approach to the defense. In Part III, the argument for allowing judges to ignore the statutory consent defense was based on Congress's intent to eliminate consent as an element of the crime, and on the unconstitutionality of the interplay between actual consent and proof of substantial incapacity to consent. While this same argument severance of the mistake of fact provisions, further support for severance is found in the history of the mistake of fact defense.

Mistake of fact has long been a defense to criminal activity.[92] Congress apparently intended to retain it as a defense by including it in the new Article 120. With two burden of proof choices in Article 120(t)(15), it is consistent with the history of the mistake of fact defense in RCM 916 to enforce the burden placed on the Government to disprove the mistake of fact defense beyond a reasonable doubt.

Military judges still need to supply a "reasonable legal explanation" for failing to use the double burden-shift language of the statute. That explanation should include the historical argument suggested here.

If Congress were to remove the affirmative defenses from Article 120 and leave the courts to rely on the mistake of fact defense in RCM 916, that would retain the bulk of Article 120 while maintaining a reasonable balance between the prosecution and the defense. Although mistake of fact is

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[87] UCMJ art. 120(t)(15) (2008). The mistake of fact also cannot be the result either of "negligent failure to discover the true facts," or of intoxication. *Id.* The wording was copied verbatim into RCM 916(j)(3), the mistake of fact in sexual offenses. The pre-existing general mistake of fact instruction, RCM 916(j)(1), differs slightly in its wording.

[88] Russell v. United States, 698 A.2d 1007, 1009 (D.C. 1997), *quoted in Neal*, 68 M.J. at 300.

[89] *Neal*, 68 M.J. at 299–300; UCMJ art. 120(t)(16) (2008).

[90] *See* United States v. Short, 16 C.M.R. 11, 18 (C.M.A. 1954), United States v. Graham, 23 C.M.R. 627, 628 (A.B.R. 1957).

[91] Manual for Courts-Martial, United States, R.C.M. 916(b)(1); R.C.M. 916(j)(1) (2005).

[92] Mistake of fact in the current RCM was taken from the 1969 edition of the *MCM*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(j) analysis, at A21-65 (2008).

a defense which the accused can reasonably be required to prove,[93] the current state of the law strongly suggests that the Government must, and should have to, disprove mistake of fact beyond a reasonable doubt.

V. What Are Courts to Do? —Constitutional Instructions

Theory aside, military judges will need to instruct panels considering Article 120 cases. The Army Judiciary, consistent with its approach since 2007, has recommended using instructions that place the burden on the Government to prove that the defenses of consent and mistake of fact do not exist. This "*Medina* charge" is erroneous in the absence of a "legally sufficient explanation" for ignoring the statutory language. The trial judiciary has issued an approved statement which purports to be that "legally sufficient explanation."[94] Under *Medina*, this approach is probably constitutional. It definitely will avoid reversal for instructional error.[95]

The *Benchbook* approach, however, places an additional burden on the Government, which makes it less likely that the Government can prove sexual crimes. Instructional solutions consistent with the argument in Parts III and IV should pass constitutional muster, while better maintaining the balance between the Government and the accused.

A. Consent cases

If no evidence of consent has been presented—as in a case in which the only issue is identification[96]—then no instruction is necessary on consent. In many Article 120 prosecutions, however, "some evidence" of consent[97] will be presented, triggering instructions on consent. Consistent with the argument in Part III that consent be abandoned both as an element and an affirmative defense, courts can deliver simple instructions that would be the same in both force cases and substantial incapacity cases.

<u>Instruction 1:</u> "I have told you that the government bears the burden to prove every element of each offense beyond a reasonable doubt. To the extent that you find that credible evidence concerning consent by the alleged victim exists in this case, you must consider that evidence, along with all the other evidence in the case, in deciding whether the government has proven the elements of the crime(s) charged beyond a reasonable doubt."[98]

<u>Instruction #2:</u> "'Consent' means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent."[99]

By treating consent as neither an element nor a defense, the concept becomes, for a panel, just another definition of a kind of evidence.[100] By not referring to consent as a "defense," it is unlikely that the panel will expect the accused to prove consent.

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[93] The President might be well advised to consider making RCM 916's mistake of fact defense into a true affirmative defense, with a burden on the accused to prove it to a preponderance of the evidence. That change is unlikely to happen prior by corrective legislation for all of Article 120.

[94] BENCHBOOK, *supra* note 26, art. 120 (affirmative defenses) states:

> NOTE 1.1: Article 120 Affirmative Defenses. When applying an affirmative defense to an Article 120 offense—whether instructing members or judge alone—the military judge MUST include the following statement on the record:
>
> This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

Id.

[95] United States v. Medina, 69 M.J. 462, 466 (C.A.A.F 2011).

[96] Identification cases are rare in the military, where most sexual offenses involve Soldiers in the same or nearby units.

[97] A defense is raised in most cases by presentation of "some evidence," a very low standard. United States v. DiPaola, 67 M.J. 98, 99 (C.A.A.F. 2008).

[98] United States v. Neal, 68 M.J. 289, 300 (C.A.A.F. 2010). The solution suggested here and in Part III, *supra*, eliminates consent as an affirmative defense, so the second permissible instruction identified in *Neal* is omitted. The *Benchbook* instruction 3-45-3, note 8.1 could reasonably be substituted for the suggestion here.

[99] This is the language of Article 120(t)(14), and of the definitional portion of *Benchbook* 3-45-3 note 10.1. BENCHBOOK, *supra* note 26, para. 3-45-3 n.10.1.

[100] Because the word "defense" is not used, the potential problem with order of instructions delineated in *Neal*, 68 M.J. at 299, is avoided. *See supra* Part III.

B. Mistake of Fact as to Consent Cases

Mistake of fact cases as analyzed above already have pattern instructions: those in the *Benchbook*. Those instructions[101] place the burden on the Government to disprove the defense, once evidence of mistake of fact is in the case,[102] consistent with the historical approach to the defense, and acceptable after *Prather*.

C. The *Medina* Statement

In both consent and mistake of fact cases, this article advocates severing the entirety of the affirmative defenses from the remainder of Article 120. The following on-the-record statement responding to *Medina*[103] should be given, to insulate that action, and the jury instructions, from error.

Medina instruction: "This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. The C.A.A.F. has determined the Article 120(t)(16) burden shift to be a legal "impossibility." This court interprets that statement to be a finding that the affirmative defense provisions of Article 120 (t)(14), (t)(15) and (t)(16) to be unconstitutional, because they contain a double burden-shift. To preserve the constitutionality of Article 120 in this case, to effectuate the central aspects of the 2007 Congressional revision to Article 120, and to balance the interests of the government and the accused, this court will sever the affirmative defense provisions from the remainder of Article 120. The following instructions are constitutionally valid, capable of functioning independently, consistent with Congress' basic objectives in enacting the statute. See United States v. Booker, 543 U.S. 220, 258-59 (2005). I have carefully considered the effect on both the prosecution and the defense of severing those provisions, and conclude that these instructions are consistent with fairness to both parties."

VI. Conclusion

Article 120 was passed with two laudable goals: to shift the focus of military sex crimes statutes from the victim to the offender, and to eliminate lack of consent as an element of those crimes. Apparent compromises in the legislative process contradicted those aims. The final statute inartfully re-injected victim focus into the statute in the definitions of some elements of the new offenses. The further inclusion of an unconstitutional burden-shifting arrangement for defenses threatened the viability of the entire statute.

The constitutional and theoretical flaws in Article 120 were highlighted in three recent CAAF cases which upheld the facial constitutionality of Article 120, but declared the consent framework unconstitutional in "substantially incapacitated" cases.[104] The same cases found the double burden-shift contained in both consent and mistake of fact as to consent defenses to be "illogical" and unenforceable.

Although the court provided little guidance to practitioners on how to adjust for the upheaval these decisions caused in the application of the statute, it did endorse the possibility of "saving" the sexual crimes structure by judicious use of instructions that effectively rewrote problematic sections of the law. Military judges have done so, but have unnecessarily increased the government's burden in proving major sex crimes. Instead, they should treat consent merely as evidence capable of disproving the elements of the crimes charged, whether force, threat, or substantial incapacity to consent. To accomplish this, military judges must sever the provisions of Article 120 that create consent as an affirmative defense. As part of that severance, the military judge should place on the record a legally sufficient explanation of why that severance is necessary to preserve the constitutionality of the statute. No burden of proof concerning the non-element of consent should be assigned to either the accused or the Government.

This solution would leave mistake of fact as to consent as a valid defense codified in RCM 916. If the evidence raises the issue, the Government would still bear the burden to disprove the mistake of fact defense beyond a reasonable doubt. This would properly recognize the long history of mistake of fact in military justice. Because that defense does not focus primarily on the victim's state of mind, leaving it in place in RCM 916 would not defeat Congress's original purpose in amending the statute

Looking to the future, it is clear that Congress needs to amend Article 120. The statute should use elemental definitions which are exclusively offender-centric, seen from the viewpoint of a reasonable person, rather than through the eyes of the victim of the sexual act. The new statute should avoid sex-crime-specific defenses, leaving defenses to those defined in RCM 916.

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[101] BENCHBOOK, *supra* note 26, paras. 3-45-3 n.11.1; 3-45-4 n.9.1; 3-45-5 n.10.1; 3-45-6 n.7.1; 3-45-11 n.4.

[102] Whether there is "some evidence" of both subjective and objective mistake of fact is a preliminary judicial determination. United States v. Willis, 41 M.J. 435, 438 (C.A.A.F 1995).

[103] United States v. Medina, 69 M.J. 462, 465 (C.A.A.F. 2011).

[104] United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010); United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011); United States v. Medina, 69 M.J. 462 (C.A.A.F. 2011).