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### Recommended Citation

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NEITHER A MODEL OF CLARITY NOR A MODEL STATUTE:  
AN ANALYSIS OF THE HISTORY, CHALLENGES, AND SUGGESTED  
CHANGES TO THE “NEW” ARTICLE 120

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This article is based upon a paper submitted by LT Lorenz in satisfaction of the requirements of the Seattle University School of Law seminar, Military Law; taught by Judge Nevin. LT Lorenz deserves credit for the thesis and content of this article.

## I. INTRODUCTION

Consider the following scenario: John is 21 years old and enlisted in the military after three years of post-high school unemployment. Sarah is 18 and enlisted immediately after graduating from high school to earn money for college. Both are assigned to the same unit. Both live in the same dormitory-style barracks on a base in the U.S. The base and the nearby small town lack many outlets for entertainment. Most young servicemembers assigned to the base spend their free time drinking while watching movies or playing video games in their barracks rooms.

John, Sarah, and a group of their friends often hang out in the barracks on weekends. One Saturday night, a group has been drinking for several hours in John's room. Their friends depart, leaving John and Sarah alone together for the first time. Both are drunk, but Sarah is almost incoherent after consuming nearly half of a bottle of vodka herself. She lies down on John's bed. John follows shortly after.

The next day, something is wrong. Sarah texts her friend that she cannot remember what happened, but that she thinks she might have been raped. She cannot remember the details, but does recall brief images from last night: images of John on top of her of him having sex with her. She woke up in the morning unsure of what to do or whom to contact. Her friend suggests talking to the sexual assault response coordinator on base. Sarah does, and feels she remembers enough to conclude that she did not consent to sex with John. She reports the incident.

A criminal investigation is initiated. Sarah provides a statement to investigators, and John is questioned under rights advisement. There are no other witnesses to the incident in question, although several servicemembers tell investigators that both John and Sarah had been drinking heavily. The investigators present their findings to John and Sarah's chain of command. After several previous instances involving allegations of sexual misconduct in the unit that went unpunished for various reasons, the commander feels pressure from his superiors to correct a perceived climate of tolerance of such behavior within his command.

The commander brings criminal charges against John and the case is referred to a court-martial. The charges allege that John either had sex with Sarah by force or threat of harm, or while she was unable to consent because she was severely intoxicated. Prior to trial, John provides notice that he intends to claim that either Sarah agreed to the sex, or that even if she did not, he incorrectly but reasonably believed that she had. No other witnesses or evidence corroborates either party's story: the trial will turn on the court's assessment of the credibility of either Sarah's or John's version of events.

A story such as this, while truncated, is not unfamiliar to many in the United States military.<sup>1</sup> Sexual assault is a particularly malicious and tragic crime, intentionally inflicted on a victim who often suffers lasting physical and psychological wounds.<sup>2</sup> As Justice White observed in *Coker v. Georgia*, “[s]hort of homicide, [rape] is the “ultimate violation of self.””<sup>3</sup>

Given the severity of this crime, the role of the military institution in American society, and the complexity of gender relationships in the U.S. military, efforts to combat military sexual assault must include comprehensive education of military members and robust services and support to victims. However, the most important tool available to a commander to respond to military sexual assault is Article 120 of the Uniform Code of Military Justice (UCMJ),<sup>4</sup> which defines and prescribes punishment of unlawful sexual conduct.

This article proposes that revisions to Article 120 enacted by Congress in 2007,<sup>5</sup> while well-intentioned and largely effective, require further refinement to clarify the application of the concept of consent in military sexual assault investigations and prosecutions. To support that conclusion, we will first provide context regarding the history of U.S. military sexual assault in Part II. Part III will then examine the legislative history and development of the 2007 amendments to Article 120. Next, Part IV will analyze legal challenges to the new legislative scheme, and identify areas that require further interpretation and refinement. Finally, Part V focuses on two of the most important areas in need of additional interpretations. Part VI concludes.

## II. SEXUAL ASSAULT IN THE U.S. MILITARY

Following is an overview of the circumstances and legal landscape that led to the 2007 amendments. First, a review of the role of women in the military will provide a background in which the crime of sexual assault occurs, as the vast majority of victims are female.<sup>6</sup> Next, we will examine available statistics on the frequency of sexual assault, which may explain why Congress perceived the need to enact the 2007 amendments. Finally, we will analyze information regarding the effect of sexual assault on

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<sup>1</sup> See, e.g., MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY 165-166 (2007) (noting that an Army criminal investigator referred to such scenarios as “very typical.”).

<sup>2</sup> Throughout this article, the term “sexual assault” will be used when discussing unlawful sexual contact, as defined in Department of Defense (DoD) Directive 6495.01. See *infra*, Part II.B.

<sup>3</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

<sup>4</sup> 10 U.S.C. § 920 (2011).

<sup>5</sup> See Pub. L. No. 109-163, § 552(a)(1).

<sup>6</sup> See OFFICE OF THE SECRETARY OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, FISCAL YEAR 2009 DEPARTMENT OF DEFENSE REPORT ON SEXUAL ASSAULT IN THE MILITARY, 68 (March 2010) [hereinafter SAPRO FY09 REPORT]], available at [http://www.sapr.mil/media/pdf/reports/fy09\\_annual\\_report.pdf](http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf).

military society and effectiveness as an additional reason for changing the criminal legislative scheme in an effort to more effectively address the problem.

#### A. Women in the Military

An analysis of military sexual assault and associated military justice responses should start with understanding the gender demographics of the U.S. military. The active-duty military population in the Department of Defense totals approximately 1.4 million members,<sup>7</sup> of which 14 percent are women.<sup>8</sup> Despite this relatively small proportion as compared to the general U.S. population, the numbers of women in the military have consistently increased over the last 40 years. After World War II, legal limitations on the roles of women in the military returned after years of women filling crucial roles supporting the war effort.<sup>9</sup> In the 1950s and 1960s, women comprised just over one percent of the active duty population, eventually reaching two percent by the end of Vietnam.<sup>10</sup> The end of mandatory conscription in 1973 required a diversification and increase in the roles of female servicemembers in the all-volunteer force, as the military faced a shortage of qualified men to fill previously male-only positions.<sup>11</sup> However, despite the slow but steady increase in their numbers, by 2003 women were still prohibited from working in 30 percent of available positions in the U.S. Army.<sup>12</sup>

As a result of the historical overrepresentation of men in its ranks, the U.S. military may be, according to one sociologist, “the most prototypically masculine of all social institutions.”<sup>13</sup> However, this male dominance does not necessarily directly correlate with a prevalence for sexual assault. One author has postulated that the “inherent implication of inequality” due to grossly unequal representation of the sexes in the military population, could provide some explanation for the “disproportionate rates of unwanted sexual behavior experienced by women in the military” as compared to civilian society.<sup>14</sup> While this imbalance and women’s inability to participate fully in all military occupational fields likely contributes to a culture that may increase their experience of unwanted sexual conduct, a

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<sup>7</sup> See Armed Forces Strength Figures for April 30, 2011, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/ms0.pdf>.

<sup>8</sup> See Department of Defense Female Active Duty Military Personnel by Rank/Grade, Sept. 30, 2010, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009f.pdf>.

<sup>9</sup> See David R. Segal & Mady Wechsler Segal, Population Reference Bureau, *America's Military Population*, POPULATION BULL., Dec. 2004, at 27.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> Jessica L. Cornett, Note, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 100 (2008).

<sup>14</sup> *Id.* at 102-103.

more complete explanation of the reasons for military sexual assault should consider a broader range of factors.<sup>15</sup>

## B. Statistics on Instances of Military Sexual Assault

Whatever the institutional reasons that may contribute to the problem, military sexual assaults are clearly numerous. Prior to 2004, neither the Department of Defense (DoD) nor any of the service branches routinely compiled statistics on sexual assault. A 1995 survey of military members provides one source of pre-2004 information. Conducted after several high-profile military sexual assault and sexual harassment controversies,<sup>16</sup> this survey found that 78 percent of female servicemembers experienced unwanted sexual behavior in the military.<sup>17</sup> However, the accuracy of such surveys, while documenting an unacceptably high rate of unwanted conduct in the DoD, may be skewed by the lack of a uniform definition of “unwanted sexual behavior.”

Recognizing both the problem of military sexual assault and the lack of consistent data regarding it, in 2004 Congress passed legislation that required the Secretary of Defense to submit annual public reports of sexual assaults involving members of the armed forces.<sup>18</sup> The law ordered DoD to create a uniform definition of sexual assault.<sup>19</sup> It required a report on the number of sexual assaults committed by and against members of the armed forces that were reported to military officials.<sup>20</sup> DoD also must provide a “synopsis of and the disciplinary action taken in” each substantiated case of sexual assault.<sup>21</sup>

In compliance with the 2004 law, DoD provided a definition of sexual assault in a 2005 directive:

[I]ntentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to

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<sup>15</sup> See, e.g., HUNTER, *supra* note 1, at 33-149 (discussing, among other topics, “the code of hyper masculinity,” hazing, prostitution, and homophobia as possible attributing factors to military sexual assault).

<sup>16</sup> See *id.* at 185-187 (listing scandals of military sexual abuse and assault, including incidents at the Army’s Aberdeen Proving Ground, the Navy’s 1991 Tailhook Convention, and the U.S. Air Force Academy).

<sup>17</sup> See Cornett, 29 WOMEN’S RTS. L. REP, *supra* note 13, at 105.

<sup>18</sup> See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1920, § 577(f) (2004) [hereinafter 2005 NDAA].

<sup>19</sup> See *id.*, 375, § 577(a)(3).

<sup>20</sup> See *id.*, 375, § 577(f)(2).

<sup>21</sup> *Id.*, 375, § 577(f)(2)(B).

include unwanted and inappropriate sexual contact), or attempts to commit these acts.<sup>22</sup>

This roughly matched several criminal offenses defined by Article 120 and Article 125<sup>23</sup> of the UCMJ at that time, as well as Article 80<sup>24</sup> (attempts) and Article 128<sup>25</sup> (assault).

Annually since 2005, DoD has complied with the law by publishing the required reports, including analysis of the data and observations regarding trends. For example, in fiscal year 2009, DoD reported 3230 incidents of sexual assault involving military members, representing an 11 percent increase from 2008 and a 20 percent increase from 2007.<sup>26</sup> Furthermore, as a proportion of the total active-duty population, the frequency of reported sexual assaults by servicemembers shows a similar increase over the same time period, from 1.6 reports per thousand servicemembers in 2007 to 2.0 reports per thousand in 2009.

According to the 2009 report, this increase may be attributed, in part, to DoD policies promulgated in 2005 that encourage victims of alleged sexual assaults to report those incidents. These policies include enhanced victims' services and available confidential reporting procedures.<sup>27</sup> Despite these new policies, the report also notes that separate DoD studies indicate that only "20 percent of servicemembers who experience unwanted sexual contact report the matter to a military authority."<sup>28</sup> Therefore, this trend of underreporting likely indicates that the real number of sexual assaults is much higher.

Finally, the 2009 report also includes demographic and geographic data of instances of sexual assault that provide a more detailed picture of the military sexual assault problem. In 2009, 91 percent of victims of sexual assault reported to authorities were female.<sup>29</sup> Furthermore, 279 reports alleged sexual assaults in "combat areas of interest," primarily those countries in and around the Iraq and Afghanistan theaters.<sup>30</sup> This represented a 16 percent increase from the number reported in 2008.<sup>31</sup>

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<sup>22</sup> U.S. DEPARTMENT OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM, Encl 2, para. 1.13 (2008), available at <http://www.dtic.mil/whs/directives/compes/pdf/649501p.pdf>.

<sup>23</sup> See 10 U.S.C. § 925 (2011).

<sup>24</sup> See 10 U.S.C. § 880 (2011).

<sup>25</sup> See 10 U.S.C. § 928 (2011).

<sup>26</sup> See SAPRO FY09 REPORT, *supra* note 6, at 58-59.

<sup>27</sup> See *id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 69.

<sup>30</sup> *Id.* at 76.

<sup>31</sup> See *id.*

Although the number of servicemembers deployed to these combat areas varies constantly, at the end of 2008 the total was approximately 294,000.<sup>32</sup> Therefore, the rate of sexual assaults per thousand servicemembers in these locations is approximately 0.94, less than half of the 2.0 rate per thousand reported for the overall DoD. This lower rate is likely due to the “arduous conditions” that make “data collection very difficult” in theater,<sup>33</sup> and is at odds with well-documented reports of sexual assaults in Iraq and Afghanistan.<sup>34</sup>

### C. Effects of Sexual Assault in the Military

*“The Department has a no-tolerance policy toward sexual assault. This type of act not only does unconscionable harm to the victim; it destabilizes the workplace and threatens national security.”*

- Secretary of Defense Robert Gates, March 2010<sup>35</sup>

*“The Department does not tolerate sexual assault of any kind. Such acts are an affront to the institutional values of the Armed Forces of the United States of America. Sexual assault harms individuals, undermines military readiness, and weakens communities.”*

- Secretary of Defense Donald Rumsfeld, May 2005<sup>36</sup>

Sexual assault causes numerous effects, which can be classified in two ways. Obviously the victim suffers direct psychological and physiological harm, as well as indirect harm based on her perception of the military’s response to the incident if she reported it. Sexual assault also threatens the military’s fundamental principles of trust, honor, and respect, if the response fails to reflect prompt and thorough investigation, and fair disposition (including adjudication) of such allegations.

Unlike physical injuries, time alone does not heal the psychological effects of sexual assault on victims. In fact, a 2005 study of veterans of the 1991 Gulf War found that “high combat exposure and sexual harassment/assault” most commonly triggered the Post-Traumatic Stress Disorder diagnosed among the participants<sup>37</sup> Furthermore, military sexual assaults result in direct and indirect fiscal costs to DoD, in terms of

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<sup>32</sup> See CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS NO. R40682, TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001-FY2012: COST AND OTHER POTENTIAL ISSUES, (July 2, 2009), at 6, available at <http://www.fas.org/sgp/crs/natsec/R40682.pdf>.

<sup>33</sup> SAPRO FY09 REPORT, *supra* note 6, at 76.

<sup>34</sup> See, e.g., Sara Corbett, *The Women’s War*, N.Y. TIMES MAGAZINE, Mar. 18, 2007.

<sup>35</sup> SAPRO FY09 REPORT, *supra* note 6, at i.

<sup>36</sup> Memorandum from Sec’y of Def. to Secretaries of Military Departments, et al, (May 3, 2005) (on file with author) [hereinafter Rumsfeld Memo].

<sup>37</sup> *Id.* at 182.



personnel retention, recruiting, and long term medical treatment. While difficult to estimate, these costs are likely quite large.<sup>38</sup>

Sexual assaults also seriously and negatively impact military effectiveness and unit cohesion. For example, the effective operation of a military unit requires trust between fellow servicemembers and also up and down the command and leadership chain. Sexual assault necessarily damages this fragile and critical state of trust, particularly in cases involving one member alleging an offense committed against them by a fellow member, and where such matters inevitably occupy the attention of all members of the unit.

Furthermore, an allegation of sexual assault will often affect a unit even more directly. For example, the military will not normally permit an accused servicemember to change duty stations or deploy during the investigation and adjudication of allegations against them.<sup>39</sup> Likewise, receiving medical treatment and other support services, as well as the necessity of participation with investigators and attorneys, will nearly always preclude a victim's effective contribution to the mission of their unit.<sup>40</sup> Furthermore, investigation and adjudication may also involve and require the additional participation of other unit members, thereby magnifying the impact.

These negative individual and group effects caused by incidents of military sexual assault likely persuaded Congress to consider changes intended to combat the problem. Modifying the existing legal framework in order to enable more effective criminal prosecution of military sexual assault would advance both military needs and the rule of law—foundations of the military justice system. Improving punishment of sexual misconduct would further military necessity by reducing negative group effects of sexual assault.

However, any change in the legislative scheme that criminalizes sexual assault in order to further the rule of law must be balanced against equally important considerations to protect and preserve the rights of the accused. According to one author, provisions such as the recent changes in military sexual assault prosecution place “little to no value upon the substantive or procedural rights of an accused, or to the fundamental fairness implicit in the guarantees of due process.”<sup>41</sup> Thus, according to these authors, while society does have a military necessity interest in the immediate response to a sexual assault victim, there is an equal rule of law

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<sup>38</sup> See TERRI T.S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY, 189-213 (2001).

<sup>39</sup> See Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, ARMY LAW., Aug. 2007, at 14.

<sup>40</sup> See *id.*

<sup>41</sup> Lieutenant Keith B. Lofland, *The Neglected Debate Over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311, 313 (2008).

interest in ensuring that any prosecution of the accused is a fair process.<sup>42</sup> A proper examination of recent Congressional responses to the problem of military sexual assault must include an assessment of these competing interests.

### III. CONGRESSIONAL RESPONSE: THE “NEW” ARTICLE 120

Beginning with the 2004 legislation requiring annual reports detailing the instances of military sexual assault, Congress began to address the problem it perceived. The statistics denoting the pervasiveness of military sexual assault discussed *supra*, in addition to several cases of military sexual abuse highlighted in the media, certainly contributed to Congress’ agenda to consider structural reforms within the military justice system in order to better combat the problem.

Additionally, some military courts noted the limited nature of the pre-2007 Article 120, particularly that it did not “reflect the more recent trend for rape statutes to recognize gradations in the offense based on context.”<sup>43</sup> Overall, a review of the legislative history of the amended Article 120 sets the stage for a proper analysis of recent judicial interpretations and proposals for modification to the statute.

#### A. Congressional Request for Options

President Bush signed the Ronald W. Reagan National Defense Authorization Act (NDAA) for Fiscal Year 2005 on October 28, 2004.<sup>44</sup> In addition to the sections requiring the annual reporting of instances of sexual assaults and the creation of a uniform definition of sexual assault, the 2005 NDAA also required the Secretary of Defense to

[R]eview the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what *changes are required to improve* the ability of the military justice system to address *issues relating to sexual assault* and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial *more closely to other Federal laws and regulations* that address such issues.<sup>45</sup>

Thus, in an attempt to address the problem of military sexual assault, Congress sought proposals from the DoD to modify the UCMJ, implicitly

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<sup>42</sup> See *id.* at 330.

<sup>43</sup> *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (“Article 120 is antiquated in its approach to sexual offenses.”).

<sup>44</sup> See 2005 NDAA, *supra* note, at 18.

<sup>45</sup> *Id.*, §571(a) (emphasis added).

recognizing that the provisions in the UCMJ that dealt with sexual assault required modification for improvement.

A subcommittee of DoD's Joint Service Committee (JSC) for Military Justice took up the task of developing recommendations to go to Congress. The JSC is comprised of representatives of the major stakeholders in the DoD's uniformed and civilian legal community, and is responsible, in part, for reviewing the Manual for Courts Martial (MCM) and proposing updates to the UCMJ.<sup>46</sup> The subcommittee reviewed the then-current UCMJ, MCM, several federal criminal statutes, and the American Law Institute's Model Penal Code, and, ultimately presented DoD's recommendations to Congress in March 2005.<sup>47</sup>

The subcommittee unanimously recommended against any changes to the UCMJ. Its members could identify no military sexual misconduct that could not be effectively prosecuted under the existing UCMJ and MCM.<sup>48</sup> Furthermore, the JSC subcommittee asserted that any "rationale for significant change [would be] outweighed by the confusion and disruption that such change would cause."<sup>49</sup> Finally, the subcommittee emphasized that given the "well-developed, sophisticated jurisprudence" in the military justice system, changes in the UCMJ or other regulations would not likely result in any significant increase in prosecutions of sexual offenses.<sup>50</sup>

However, the subcommittee further stated that "if higher authorities direct a UCMJ change to substantially conform to [federal criminal law]," one of potential changes it had considered represented the option "that best takes into account unique military requirements."<sup>51</sup> This option would divide sexual misconduct into degrees according to various aggravating factors.<sup>52</sup> Despite the fact that the subcommittee explicitly advocated no change in existing law as necessary or prudent to deal with the problem of military sexual assault, this option soon formed the basis of the amendments to Article 120 that Congress later enacted.<sup>53</sup>

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<sup>46</sup> U.S. DEPARTMENT OF DEFENSE, DOD DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (2003), available at <http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf>.

<sup>47</sup> Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice at 1 (Feb. 2005) available at [http://www.defenselink.mil/dodgc/php/docs/subcommittee\\_reportMarkHarvey1-13-05.doc](http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc), [hereinafter Sex Crimes and the UCMJ].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 85.

<sup>53</sup> *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., Jun. 2006, at 27 (referencing discussions with a House Armed Services Committee attorney who served as a member of a drafting committee for the new sexual assault legislation).

## B. The “New” Article 120

Contrary to the primary recommendation of the DoD subcommittee, the 2006 National Defense Authorization Act included a complete rewrite of Article 120.<sup>54</sup> Unfortunately for those seeking to understand Congress’ intent, the available legislative history provides little explanation of the specific reasons or purposes for the complete revision.

For example, the report of the House Committee on Armed Services’ version of the NDAA included only one paragraph summarizing the rewrite of the article.<sup>55</sup> Furthermore, the Conference Report on the combined House and Senate bill noted that the Senate version of the NDAA bill did not include a revision to Article 120.<sup>56</sup> Additionally, floor debate in Congress contains only a single apparent reference to the rewrite. Representative Loretta Sanchez of California noted that the rewritten Article 120 provided for a “modern complete sexual assault statute that protects victims [and] empowers commanders and prosecutors.”<sup>57</sup> Furthermore, she stated that the amended statute “affords increased protection for victims by emphasizing acts of the perpetrator rather than the reaction of the victim during the assault.”<sup>58</sup>

The President signed the 2006 NDAA and its Article 120 rewrite into law on January 6, 2006.<sup>59</sup> According to the statute, the new Article 120 would not go in to effect until October 1, 2007.<sup>60</sup> The revised article now specifies 14 categories of sexual assault offenses, including rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.<sup>61</sup>

Understanding the categories of offenses under the revised article requires first examining the definitions of “sexual act” and “sexual contact.” The statute defines a “sexual act” as contact between the penis and vulva or penetration of a genital opening of another by hand, finger, or other object with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.<sup>62</sup> It defines “sexual contact” as the intentional touching of another with the intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire.<sup>63</sup> After initially identifying the nature of the conduct between the perpetrator and the victim, determination of the

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<sup>54</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3137 (2006) [hereinafter 2006 NDAA].

<sup>55</sup> See H.R. Rep. No. 109-089, § 555 (2005) (noting that the amended Article 120 would include both “a series of graded offenses relating to rape, sexual assault and other sexual misconduct” and “a precise description of each offense.”).

<sup>56</sup> See H.R. Rep. No. 109-360, § 552 (2005).

<sup>57</sup> 151 Cong. Rec. H3912-02, 3920 (2005).

<sup>58</sup> *Id.*

<sup>59</sup> See 2006 NDAA *supra* note, at 54.

<sup>60</sup> See *id.*

<sup>61</sup> See 10 U.S.C. § 920, (a) – (h) (2011).

<sup>62</sup> 10 U.S.C. § 920(t)(1).

<sup>63</sup> 10 U.S.C. § 920(t)(2).

specific offense then requires further consideration of numerous aggravating factors, including the use of weapons, force, or threats of bodily harm.<sup>64</sup>

Along with the enumeration of several new offenses, the amended Article 120 includes two other important changes. First, the statute eliminated the previous requirement in rape and sexual assault prosecutions that the government prove the accused committed the sexual conduct without the consent of the victim. The new Article 120 replaced this requirement with provisions for the accused to raise and assert consent, and reasonable mistake of fact as to consent, as affirmative defenses to the alleged offenses of rape, aggravated sexual assault, aggravated sexual contact, or abusive sexual contact.<sup>65</sup> This differs considerably from the previous version of Article 120, which required the government to prove the accused committed the act of sexual intercourse, with force, and without consent.<sup>66</sup>

Second, the new Article 120 requires an accused that raises the affirmative defense(s) of consent and/or reasonable mistake of fact as to consent, to support the defense(s) by a preponderance of the evidence.<sup>67</sup> After the defense satisfies this initial quantum of proof, the burden of proof then shifts to the government to disprove the existence of consent or reasonable mistake of fact as to consent, beyond a reasonable doubt.<sup>68</sup>

These two provisions effect the changes worked by the new legislative scheme, as Representative Sanchez described them: that the law will now shift the focus of sexual assault prosecutions away from the victim and toward the conduct of the accused. However, these two provisions triggered very serious appellate challenges that have resulted in judicial conclusions that the new law may be unconstitutional. The new law clearly needs further legislative refinement and interpretation to survive further scrutiny and to further Congress' apparent intent.

#### IV. APPELLATE CHALLENGES AND JUDICIAL INTERPRETATIONS

Even before the newly revised Article 120 became effective in October 2007, several commentators detailed possible problems with the amendments shortly after its enactment.<sup>69</sup> Using these critiques, military defense counsel almost immediately attacked the constitutionality and application of the amended article as soon as accused members were charged with offenses under it. Since its enactment, each of the services' Criminal Courts of Appeal, as well as the U.S. Court of Appeals for the

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<sup>64</sup> See 10 U.S.C. § 920(t)(3) – (t)(8).

<sup>65</sup> See 10 U.S.C. § 920(r).

<sup>66</sup> See Johnson, *supra* note 57, at 27.

<sup>67</sup> See 10 U.S.C. § 920(t)(16).

<sup>68</sup> See *id.*

<sup>69</sup> See, e.g., Major Howard H. Hoeg III, ““Overshift” *The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2.

Armed Forces, has now considered and decided several of these challenges. The resulting decisions have caused significant uncertainty and concern in the military justice system. Agreeing with the early critics, those decisions have concluded that in some (and perhaps most or even all) cases, the new statute impermissibly and unconstitutionally shifts part of the burden of proof to the accused.

According to challengers, the revised article's definitions of force, "substantially incapacitated," and consent, combined with the removal of the previous element of lack of consent which the government had to prove, now unconstitutionally require an accused who raises the affirmative defense of consent to disprove an element of the alleged crime for which the government must satisfy the ultimate burden of proof beyond a reasonable doubt. Challenges such as this embody the aforementioned dangers of legislative overreach and have been addressed in *United States v. Crotchett*,<sup>70</sup> *United States v. Neal*,<sup>71</sup> and *United States v. Prather*.<sup>72</sup>

#### A. *United States v. Crotchett*

The Navy-Marine Corps Court of Criminal Appeals (N-M.C.C.A) tackled an iteration of the burden shifting challenge in *Crotchett*. In that case, the government charged a Sailor with aggravated sexual assault under Article 120(c), claiming that the alleged victim was substantially incapable of communicating her willingness to engage in sexual intercourse with the accused.<sup>73</sup> At trial, the accused raised the affirmative defense of consent.<sup>74</sup> After hearing arguments, the trial court dismissed the charge and specification against the accused, ruling that the prosecution would violate the accused's Fifth Amendment right to due process by unconstitutionally shifting the burden of proof to the defense to disprove an essential element of the offense.<sup>75</sup> Specifically, this essential element was the alleged victim's substantial incapacity to communicate her unwillingness.<sup>76</sup> In short, the accused argued that in order to show that the alleged victim consented to intercourse, he would have to show that she *did* have the capacity to communicate her willingness, which is the logical opposite of the government's element.

The appellate court reversed the ruling of the trial court.<sup>77</sup> In analyzing the lower court's ruling, the appellate court acknowledged an "apparent overlap of defense and government burdens" when the affirmative

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<sup>70</sup> *United States v. Crotchett*, 67 M.J. 713 (N-M. Ct. Crim. App. 2009), *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009).

<sup>71</sup> *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 121 (2010).

<sup>72</sup> *United States v. Prather*, 69 M.J. 338, *reconsideration denied*, 70 M.J. 30 (C.A.A.F. 2011).

<sup>73</sup> *See Crotchett*, 67 M.J. at 714.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

defense of consent is raised in a trial of aggravated sexual assault.<sup>78</sup> The appellate court distinguished these burdens by parsing what specifically the parties must prove in order to meet their respective burdens, either when raising an affirmative defense or when proving the elements of the offense.

First, according to the statute's definition of consent, the accused must show that the alleged victim used "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person."<sup>79</sup> The court determined the accused need only show that the alleged victim (1) uttered words or performed an overt act that (2) indicated a freely given agreement.<sup>80</sup> Unlike the government, which must prove that the alleged victim was *actually* substantially incapable of communicating unwillingness, the accused need only show that the alleged victim *objectively* manifested consent.<sup>81</sup> Thus, instead of shifting the burden of proof to the accused, the *Crotchett* court held that the accused's burden of proof to raise the affirmative defense of consent is similar, but distinct and separate from, the government's ultimate burden of proof to sustain a criminal conviction.

#### B. *United States v. Neal*

While *Crotchett* dealt with the question of consent where the alleged victim was allegedly substantially incapable of communicating her unwillingness, *Neal* involved a case of purported burden shifting where the accused attempted to use the affirmative defense of consent in a prosecution for aggravated sexual contact under Article 120(e).<sup>82</sup> As an example of the graduated levels of misconduct punishable under the new Article 120, the government in *Neal* had to prove that the accused (1) engaged in sexual contact, (2) by force, and (3) with the intent to arouse, abuse, or humiliate.<sup>83</sup> After the accused raised the consent defense, the trial court dismissed the charge against him by interpreting Article 120(e) "as requiring the defense to disprove an implied element, [the] lack of consent," which therefore "unconstitutionally shifted the burden of proof on an element from the government to the defense."<sup>84</sup> After the government appealed the trial court's ruling, the appellate court reversed and remanded the case, and the Judge Advocate General of the Navy certified several issues for review by the U.S. Court of Appeals for the Armed Forces (C.A.A.F.).

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<sup>78</sup> See *id.* at 715.

<sup>79</sup> 10 U.S.C. § 920(t)(14).

<sup>80</sup> See *Crotchett*, 67 M.J. at 715.

<sup>81</sup> See *id.*

<sup>82</sup> See *Neal*, 68 M.J. at 291.

<sup>83</sup> See *id.* at 297.

<sup>84</sup> *Id.* at 291.

On appeal to C.A.A.F., the accused argued that his assertion of the affirmative defense of consent created an “implicit element” that the law requires him to disprove the element of force for which the government must satisfy the burden of proof.<sup>85</sup> The accused argued that for the government to prove the element of force, it must necessarily also prove lack of consent, because “[o]ne does not submit if willing, one need not be overcome if willing, and one does not resist that which one wants.”<sup>86</sup> Thus, the accused advocated that asserting an affirmative defense of consent required him to disprove lack of consent (i.e., by showing that there was consent), which thereby improperly shifted the burden of proof from the government to him.

C.A.A.F. disagreed and affirmed the decision of the appellate court.<sup>87</sup> The court held that, at least in a prosecution under Article 120(e), the burden of proof does not shift to the accused when the accused raises the affirmative defense of consent.<sup>88</sup> The court noted the purpose of the revised statute to focus on the conduct of the accused and not on the mental state of the victim.<sup>89</sup> Much like the *Crotchett* court, C.A.A.F. in *Neal* focused on the government’s burden. Specifically, the court noted the government need not prove whether the victim was, *in fact*, not willing to submit if it were not for the forceful conduct of the accused.<sup>90</sup> Rather, the court noted that “if the evidence demonstrates that the degree of force applied by an accused constitutes ‘action to compel’ [the alleged victim], the statute does not require further proof that the alleged victim, in fact, did not consent.”<sup>91</sup> Thus, by parsing the limits of what the government must prove, C.A.A.F. held that assertion of the affirmative defense of consent does not unconstitutionally shift the burden to the accused.

### C. *United States v. Prather*

In *Prather*, C.A.A.F. addressed the affirmative defense of consent in a prosecution under Article 120(c)(2).<sup>92</sup> The facts in *Prather* resemble the scenario in our introduction, *supra*: the victim testified that she passed out due to intoxication and awoke to find the accused on top of and penetrating her, but the accused claimed they had consensual intercourse.<sup>93</sup> After the presentation of evidence, the military judge then “engaged counsel in a lengthy discussion concerning the instructions he intended to give the

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<sup>85</sup> *Neal*, 68 M.J. at 302.

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 303.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Prather*, 69 M.J. at 341–43.

<sup>93</sup> *See id.* at 340–41.



members” for the sexual assault charged under Article 120(c)(2).<sup>94</sup> During this discussion, defense counsel requested that the military judge instruct the members in accordance with the Military Judges’ Benchbook,<sup>95</sup> which suggested treating consent as a traditional affirmative defense.<sup>96</sup> The military judge denied the defense request and issued instructions that “generally tracked the statutory scheme, including the shifting burdens consistent with Article 120(t)(16)...with respect to the affirmative defenses.”<sup>97</sup> After the accused was convicted of aggravated sexual assault in violation of Article 120(c)(2), on review the Air Force Court of Criminal Appeals found no violation of the accused’s due process rights.<sup>98</sup>

Unlike in *Neal*, where the court took significant interpretative steps to uphold the constitutionality of the burden shifting scheme under Article 120(e), C.A.A.F. held in *Prather* that, at least as applied to the facts of this case, the interplay between Article 120(c)(2), Article 120(t)(14), and Article 120(t)(16) “results in an unconstitutional burden shift to the accused.”<sup>99</sup> In *Neal*, the court rejected the argument that the government’s burden to prove force required a corollary proof of lack of consent. However, in *Prather*, the court found such a connection between the government’s burden of proof and a necessary element for an affirmative defense. The court stated that while there may be some “abstract distinction” between the terms “substantially incapacitated” in Article 120(c)(2) and “substantially incapable” in Article 120(t)(14), “in the context presented here we see no meaningful constitutional distinction in analyzing the burden shift.”<sup>100</sup> Thus, according to the court, the accused in *Prather* could not prove consent without first proving that the victim had the capacity to consent.<sup>101</sup> The court continued by holding that even though the military judge instructed the members consistent with the text of Article 120, “the statutory scheme was not cured by the military judge’s instructions.”<sup>102</sup>

In addition, the court continued its analysis of Article 120 by addressing the propriety of the second burden shift in Article 120(t)(16).<sup>103</sup> Although holding the initial burden shift under Article 120(t)(16) unconstitutional mooted further analysis of the second burden shift, the court agreed with the accused that “the second burden shift is a legal

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<sup>94</sup> *Id.* at 340.

<sup>95</sup> See U.S. DEP’T OF ARMY, PAM. 27-9 (Jan. 1, January 2010), available at [http://www.apd.army.mil/pdf/p27\\_9.pdf](http://www.apd.army.mil/pdf/p27_9.pdf) (The Benchbook is utilized by military judges in courts-martial through all four branches of service) [hereinafter DA PAM. 27-9].

<sup>96</sup> See *Prather*, 69 M.J. at 340.

<sup>97</sup> *Id.* at 340.

<sup>98</sup> *Id.*

<sup>99</sup> *Prather*, 69 M.J. at 340-343.

<sup>100</sup> *Id.* at 343.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at 344.

<sup>103</sup> See *id.* at 344-45.

impossibility.”<sup>104</sup> Similar to prior criticisms of the second burden shift scheme,<sup>105</sup> the court noted that the problem is structural: if a trier of fact has found that an affirmative defense is proven by a preponderance of the evidence, it is legally impossible for the government to disprove that affirmative defense beyond a reasonable doubt.<sup>106</sup> In a separate opinion, Judge Baker went further in his criticism of Article 120(t)(16), calling the second burden shift unenforceable and unconstitutional if literally followed.<sup>107</sup>

*Prather* creates significant unresolved questions as to how to apply the new Article 120 in future cases.<sup>108</sup> While the majority opinion did not explicitly limit its constitutional holding “as applied” only to the facts in that case, several limiting phrases seem to indicate that the majority intended to constrain the scope of its decision.<sup>109</sup> However, the apparent limited nature of *Prather* is complicated by the majority’s response to Judge Baker’s criticism of the majority’s failure to indicate what instruction by the military judge, if any, could cure the constitutional deficiencies identified in the first burden shift. In a footnote, the majority states that no instruction “could have cured the error where the members already had been instructed in a manner consistent with the text of Article 120.”<sup>110</sup> Thus, while the *Prather* court appears to have taken steps to limit its holding to the facts presented, its assertion that no plausible instruction could resolve the “constitutional and textual difficulties” may have seemed to permit a wider interpretation of the case.<sup>111</sup>

However, in *United States v. Boore*, the Air Force’s appellate court firmly reversed a trial decision by a military judge who adopted that wider interpretation, and threw out the proverbial baby with the bathwater.<sup>112</sup> In *Boore*, the accused was charged with abusive sexual contact with the alleged victim while she was substantially incapacitated, among other offenses.<sup>113</sup>

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<sup>104</sup> *Id.*, at 345 n.10.

<sup>105</sup> See Hoeye, *supra* note 69, at 15.

<sup>106</sup> See *Prather*, 69 M.J. at 345.

<sup>107</sup> See *id.* at 347–351–52 (Baker, J., dissenting as to Part A and concurring in the result).

<sup>108</sup> See, e.g., Marcus Fulton, *CAAF Provides Answers, Raises Questions in Prather*, CAAFLOG (Feb. 9, 2011), available at <http://www.caaflg.com/2011/02/09/caaf-provides-answers-raises-questions-in-prather/>.

<sup>109</sup> See *Prather*, 69 M.J. at 340 (“...the statutory interplay between the relevant provisions of Article 120 . . . under these circumstances, results in an unconstitutional burden shift to the accused.” (emphasis added)); *Id.* at 345 (“As we have found that the initial burden shift in Article 120(t)(16) . . . to be unconstitutional under the circumstances presented in this case, the issue involving the second burden shift becomes moot.” (emphasis added)).

<sup>110</sup> *Id.* at 344, n.9.

<sup>111</sup> *Id.* In addition, *Prather*’s holding should have no blanket effect on the applicability of the holding in *Crotchett*. Where *Prather* dealt with the burden shifting scheme as applied to a charge under Article 120(c)(2) (“substantially incapacitated”), *Crotchett* involved the burden shifting scheme as analyzed in a charge under Article 120(c)(2)(C) (“substantially incapable of . . . communicating unwillingness to engage in the sexual act.”).

<sup>112</sup> *United States v. Boore*, Misc. Dkt. No. 2011-01 (A.F. Ct. Crim. App., Aug. 3, 2011).

<sup>113</sup> See *id.* at 1.

He argued that similar to *Prather*, in order for him to show consent or a mistake of fact as to consent, he would have to prove the alleged victim was not substantially incapacitated and therefore would be forced to disprove an element of the offense.<sup>114</sup> The trial judge ruled in the accused's favor, and dismissed the abusive sexual contact charge as unconstitutional. In his ruling, the judge stated that C.A.A.F. in *Prather* had held the entire Article 120 to be constitutionally unenforceable, and that he lacked authority to sever (t)(16) or to provide curative instructions – because, he said C.A.A.F. in the subsequent case of *United States v. Medina* had prohibited such a remedy, and he held it would render the remainder of the statute incoherent and invade and contravene Congressional intent.<sup>115</sup>

Upon appeal of the judge's decision by the Government,<sup>116</sup> the court held that the trial judge had erred to the extent that he found Article 120 to be facially unconstitutional, and/or that he asserted that C.A.A.F. had so held in *Prather*.<sup>117</sup> The court further held that C.A.A.F. had not prohibited application of the canon of constitutional avoidance by severance.<sup>118</sup> The court found “no difficulty” in remedying the constitutional infirmity by severing out Article 120(t)(16)'s requirement that the accused prove the affirmative defense, by a preponderance of the evidence, from the remainder of the statute.<sup>119</sup> The court further observed that this would not frustrate Congressional intent:

[I]t is clear . . . that the law's purpose is to criminalize sexual assault by military members. While Congress may have wanted to put more of a burden on the accused with respect to proving an affirmative defense, it is unrealistic to believe that Congress would have preferred to have the entire statute invalidated and thereby leave commanders without a means to prosecute sexual assault crimes rather than simply eliminating the offending burden shifting provision.<sup>120</sup>

The complex analyses in these cases demonstrate that Article 120 “is neither a model of clarity nor a model statute.”<sup>121</sup> While the courts in *Crotchett* and *Neal* strained to reject constitutional challenges to the provision, in at least one case C.A.A.F. has found the burden shifting scheme of Article 120 to be unconstitutional as to the facts presented. The

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<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 2, citing *United States v. Medina*, 69 M.J. 462, 465 n.5, *reconsideration denied*, 70 M.J. 35 (C.A.A.F. 2011).

<sup>116</sup> See U.C.M.J. Article 62, 10 U.S.C. §862(a)(1)(A).

<sup>117</sup> *Boore*, slip op. at 3.

<sup>118</sup> See *id.* at 3-4.

<sup>119</sup> See *id.* at 4.

<sup>120</sup> See *id.* at 5.

<sup>121</sup> *Neal*, 68 M.J. at 305 (Ryan, J., concurring in part and dissenting in part).

Air Force's appellate court subsequently followed in a case with similar facts. *Prather* and *Boore* do much to clarify the legal landscape and map the course to constitutionally adjudicate Article 120 cases where the accused raises the affirmative defense – while preserving the remainder of the statute and legislative scheme. However, only Congressional action to clarify and enhance Article 120 will avert continuing difficulty and potential confusion in the military courts in this area.

## V. SUGGESTED CHANGES

Article 120 requires amendments to ensure a constitutional application of the article and to reduce confusion during sexual assault prosecutions. Two such changes include (1) a redefinition of consent in Article 120(r) and (2) an amendment of the procedures used when raising the affirmative defense of consent under Article 120(t)(16).

### A. Redefine the Use of Consent in Article 120(r)

One suggested change is a legislative redefinition of the use of consent in Article 120(r). This unnecessarily confusing provision provided the textual support for the burden shifting challenges in *Crotchett*, *Neal*, and *Prather*. According to the current statute, “consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution” for several offenses under Article 120, such as rape and aggravated sexual contact.<sup>122</sup>

Refining what is meant by “consent” will clarify Congress’ intent regarding the treatment of evidence of an alleged victim’s permission, as introduced by either the accused or the government. In *Neal*, the court declined to broadly interpret the phrase, rejecting the interpretation that would never allow the use of consent evidence except when the accused meets his initial burden to establish an affirmative defense.<sup>123</sup> According to the *Neal* court, although the government need not prove lack of consent, evidence regarding consent should be allowed in order to “not preclude treating evidence of consent as a subsidiary fact potentially relevant to a broader issue in the case, such as the element of force.”<sup>124</sup>

Despite the court’s interpretation in *Neal*, Congress should undertake to clarify the evidentiary role of consent. If the revised article intends to emphasize the acts of the perpetrator rather than the reaction of the victim, restricting use of consent evidence would protect against investigating what a victim allegedly did or said during a sexual assault.

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<sup>122</sup> 10 U.S.C. § 920(r).

<sup>123</sup> *Neal*, 68 M.J. at 301-02.

<sup>124</sup> *Id.* at 304.

Such a limitation of consent would run counter to the Article 120(r) analysis in *Neal*, but would more effectively fulfill Congress' apparent intentions.

Therefore, a simple legislative fix would better articulate Congress' desire regarding the use of consent in Article 120(r). Congress may amend Article 120(r) to read “*evidence of consent and mistake of fact as to consent is not to be admitted in a prosecution under any subsection, except for the purpose of an affirmative defense....*” If enacted, this change would resolve the different interpretations presented in *Neal* and would protect victims from embarrassing revelations.

#### B. Amend the Affirmative Defense Procedures in Article 120(t)(16)

A second recommended refinement of the article involves the procedural aspects of the use of affirmative defenses under Article 120(t)(16). According to this section, raising an affirmative defense in a sexual assault prosecution triggers a two-step process. First, “[t]he accused has the burden of proving the affirmative defense by a preponderance of evidence.”<sup>125</sup> Second, “[a]fter the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.”<sup>126</sup>

Specifically, Congress should clarify (1) who determines whether the accused has met his initial burden, and (2) when during the trial the accused must meet that first burden. However, the statute provides no guidance as to whether the military judge or the panel of members decides that question, or the timing of that decision. While the statute does require that the accused must prove consent existed by a preponderance of the evidence,<sup>127</sup> this choice of a burden of proof standard is a clear indication the determination is a question of fact for the fact-finder.

According to one author, neither C.A.A.F. nor any of the service appellate courts has endorsed splitting this fact-finding role between the military judge and panel.<sup>128</sup> Furthermore, if the members bear the responsibility to determine whether the accused met his burden, the second step of the process is nonsensical “as the fact-finder would be asked to consider whether or not reasonable doubt exists in the identical evidence the fact-finder just used to conclude that, more likely than not, the defense exists.”<sup>129</sup> The illogical nature of Article 120(t)(16) formed the basis of the *Prather* court's condemnation of the burden shifting scheme.

C.A.A.F. has yet to definitively endorse an instruction for the procedures provided in Article 120(t)(16). C.A.A.F. declined to address the Article 120(t)(16) instruction issue in *Neal*, noting that while the trial judge

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<sup>125</sup> 10 U.S.C. § 920(t)(16).

<sup>126</sup> 10 U.S.C. § 920(t)(16).

<sup>127</sup> *See id.*

<sup>128</sup> *See Hoegge, supra* note 69 at 12.

<sup>129</sup> *Id.*

“identified interpretative considerations” in applying the procedures in Article 120(t)(16), review of the lower court’s ruling was not required as the trial court did not dismiss the charge based on that section.<sup>130</sup> However, in *Prather* the court noted that, at least in the circumstances presented, there existed no plausible instruction (presumably including those suggested in the Benchbook) that would cure the “constitutional and textual difficulties” found in applying the burden shifting scheme.<sup>131</sup> Additionally, in *United States v. Medina*, C.A.A.F. held that it was harmless error for a military judge, without a legally sufficient explanation, to give an instruction consistent with the Benchbook’s instruction.<sup>132</sup>

Finally, in a case originally tried in September 2009, C.A.A.F. very recently signaled that it will revisit (and perhaps further clarify) its previous ruling in *Prather*. In *United States v. Stewart*, C.A.A.F. granted review to answer whether “it [is] legally possible for the prosecution to disprove an affirmative defense beyond a reasonable doubt once the military judge has determined that the defense has been proved by a preponderance of the evidence and, if not, is the military judge required to enter a finding of not guilty in such a case under R.C.M. 917?”<sup>133</sup> At trial, the military judge had applied Article 120(t)(16) and found that the defense had introduced sufficient evidence of consent and mistake of fact as to consent to meet its preponderance burden.<sup>134</sup> However, when he instructed the members on findings, the judge omitted any reference to the accused’s burden of proof or persuasion on the affirmative defenses, and simply placed the burden on the prosecution to prove, beyond a reasonable doubt, that the alleged victim did not consent to the sexual act and that the accused did not reasonably and honestly believe that she had. On appeal, the Navy-Marine Corps Court of Criminal Appeals found no error in that approach.<sup>135</sup> However, the appellant also unsuccessfully argued that the judge’s finding that he proved the affirmative defenses by a preponderance precluded a subsequent finding of guilt by the members.<sup>136</sup> C.A.A.F. now intends to hear argument on that point. It seems very likely that C.A.A.F. will agree with the lower court, but the fact that it will soon issue another opinion on the subject signals the continuing challenges of constitutionally applying the statutory scheme.

In the face of these confusing procedures, the Military Judges’ Benchbook, which establishes pattern instructions and suggested procedures for courts-martial, advises military judges to sidestep the problematic burden-shifting scheme entirely. Following *Neal* and *Prather*, the Army amended the Benchbook’s instruction in Article 120 cases. According to

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<sup>130</sup> *Neal*, 68 M.J. at 304.

<sup>131</sup> *Prather*, 69 M.J. at 334, 344, n.9.

<sup>132</sup> *Medina*, 69 M.J. 462.

<sup>133</sup> *United States v. Stewart*, No. NMCCA 201000021 (N-M. Ct. Crim. App. Jan. 31, 2011), review granted, \_\_\_ M.J. \_\_\_, No. 11-0440/MC (C.A.A.F., Aug. 10, 2011).

<sup>134</sup> *See id.* at 7.

<sup>135</sup> *See id.* at 8.

<sup>136</sup> *See id.* at 8-9.

the change, when applying an affirmative defense to an Article 120 offense, military judges must now state 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 CAAF 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 the 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 Judges’ Benchbook, DA Pam 27-9.<sup>137</sup>

Thus, the Benchbook approach simply disregards the first burden shift, in an effort to comply with both C.A.A.F.’s constitutional holdings and the statute Congress enacted. This highlights one obvious and simple solution: Congress can further modify Article 120(t)(16) to delete what the Benchbook instruction has severed.

Given this murky state of affirmative defense procedures and C.A.A.F.’s concession that a fix for the scheme “clearly rests with Congress,”<sup>138</sup> the statute should be amended to provide clarity and increased protections for both alleged victims and the accused. For example, rather than require that the accused prove an affirmative defense by a preponderance of the evidence, Congress should amend the statute to treat an affirmative defense under Article 120 as any other affirmative defense, thereby allowing its consideration by the trier of fact if the accused can show some evidence that would support the defense. Once the accused has met this “some evidence” initial burden, the government would then be required to disprove the affirmative defense, and prove the required elements of the offense, beyond a reasonable doubt.

This scheme, consistent with the long history of military justice affirmative defense procedures, is similar to course of action suggested by the Military Judges’ Benchbook. Congressional codification of those procedures in Article 120(t)(16), or at least legislative recognition that an affirmative defense under Article 120 should be employed consistent with

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<sup>137</sup> DA PAM 27-9, *supra* note 9796, Approved Change 11-02 (Article 120 Affirmative Defenses), available at <http://www.caaflog.com/wp-content/uploads/BB-change.pdf>.

<sup>138</sup> *Medina*, 69 M.J. at 465, n.5.

other areas of the UCMJ, should properly balance the due process rights of the accused against a desire to facilitate sexual assault prosecutions.

## VI. CONCLUSION

The military justice system alone will not solve the problem of military sexual assault. The pervasiveness of the issue, evidenced by the increasing instances of sexual assault and the long history of gender inequity in the military, demonstrates the need for additional measures beyond a revised military sexual assault statute. Regardless, the 2007 rewrite of Article 120 represents a positive effort and first step towards improving the military legal system's protection of victims, and mitigating the effect of sexual assault on unit cohesiveness, trust, and overall military readiness. The purposes for enacting the rewrite reflect Congress' attitude towards the military sexual assault problem and should be at the forefront when considering additional revisions and interpretations as to the role of consent in sexual assault courts-martial. As this issue exemplifies the tension between an accused's right to a fair trial and the military necessity of combating a corrosive internal threat, expect the issue of Article 120 to receive continued attention from the military's appellate courts.



