

**THE REDEMPTIVE ROLE OF “JUSTIFICATION OR
EXCUSE” IN ARTICLE 120(a) (2011)**

We don't need a new statute; we need new implementation

The 2011 version of 10 U.S.C. § 920(a) (and definitions) has flaws, but it can be constitutionally applied. Any recommendation to amend the statute would present grave risks, a few of which are: (1) unpredictable legislative action; (2) unpredictable judicial interpretation; (3) unpredictable implementation in the Manual for Courts-Martial and the Military Judges' Benchbook (Department of the Army Pamphlet 27-9); (4) delay in developing settled law; and (5) further erosion of public trust that Congress and the military can act to produce fair and effective trials.

Unfortunately, there has been no implementation of the 2011 statute by the President and the implementation of Article 120 by the Benchbook is more deeply flawed than the statute itself. The authors of the Benchbook openly rejected the plain text of the law in favor of their assumption (despite the lack of legislative history) that they knew what Congress intended. In particular, the Benchbook decision not to define or explain the statutory term "justification or excuse" (despite an instruction to define or explain that very term under Article 118), will leave military juries with the mistaken belief that all force is unlawful force, that consent and force may coexist, and that consent does not vitiate force, even when the force is at a minimal level.¹

Not all military judges are following Benchbook Instruction 3-45-13 (Article 120(a)), on the issues of unlawful force, consent, mistake of fact as to consent, and justification or excuse. Those who are, may be producing convictions that are subject to attack on several grounds, including lack of notice, overbreadth, and unreviewable verdicts (under Article 66, UCMJ). Using the statutory excerpts below, this paper explains why Article 120 is constitutionally sustainable, but also why convictions pursuant to Instruction 3-45-13 may not be.

Any person subject to this chapter who commits a sexual act upon another person by . . . using unlawful force against that other person . . . is guilty of rape and shall be punished as a court-martial may direct.

. . .

¹ These and other arguments made by the Army Trial Defense Service to the Benchbook Committee during the comment period on 3-45-13, *et. seq.*, are summarized in this paper and have been incorporated into an omnibus brief circulated to defense counsel throughout the services. As such, cases are now in the appellate pipeline that will give service courts and CAAF the opportunity to accept, reject, or modify the instructions in question. Although that process may be slow and piecemeal, it is likely preferable to once again starting over.

The term “force” means . . . the use of such physical strength . . . as is sufficient to . . . restrain . . . a person.

. . .

The term “unlawful force” means an act of force done without legal justification or excuse.

Article 120(a)(1), (g)(5)(B), and (g)(6) (2011).²

Consent and Mistake of Fact as to Consent are Historically Recognized as Examples of “Legal Justification or Excuse” and Article 120 Preserves that Status

Justification, Excuse, and Legal Defenses

As demonstrated by Colonel Winthrop’s treatise in 1886, and reinforced in 1912 by BG Davis’ treatise, the concepts of justification and excuse are deeply rooted in military criminal law. Both Winthrop and Davis use the crime of homicide to discuss application of justification and excuse, with Davis addressing their relationship to *mens rea*:

Justifiable homicide consists in the taking of human life either in obedience to the law, as in the execution of a criminal or the killing of an enemy in war, under such circumstances as to warrant the inference that the act was done without malice or criminal intention. . . .

Excusable homicide is that which results, from *accident* or *misadventure* in the doing of a lawful act; or in a proper and reasonable exercise of the right of *self-defense*.

A Treatise on the Military Law of the United States, at 447-448 (*see also* Military Law and Precedents, 2d. ed., at 674) .

² These excerpts are provided as one example of the curious provisions of Article 120. Only by parsing the statute as would a prosecutor in the act of drafting a specification to fit the facts of her case, and applying Instruction 3-45-13 to that specification and those facts, can we see how vulnerable the statute is to an “as applied” attack for: (1) lack of notice; (2) overbreadth; and (3) an unreviewable verdict (under Article 66, UCMJ). Additionally, as implemented by MJBB Instruction 3-45-13, the result could be a fundamentally unfair trial.

From its beginnings, the Court of Military Appeals, consistent with the common law, recognized the defense of “mistake of fact” and observed the overlapping relationship between the concepts of justification, excuse, and defenses, in general. Since 1951, military appellate courts have embraced most defenses, including consent and mistake of fact as to consent within the catchall phrase “justification or excuse.” Differing with Davis, CMA has characterized self-defense as a “justification,” rather than an “excuse.”

Justification may also be based upon a mistake of fact by the defendant, where his mistake is a reasonable one and where the fact – if it were as he believed it to be – would have constituted justification. A familiar example is that of the defendant who kills in self-defense because he reasonably believes that he is in danger of death and that the only way to save his life is by killing his assailant.

U.S. v. Perruccio, 15 C.M.R. 28 (1954).

The only indication of mistake of fact contained in this record lies in the statements of the accused. The substance of his story was that he thought the unknown person or persons fired at to be enemy soldiers. . . . We think that, under the evidence in this case, the law officer would have been justified in disbelieving the accused's story. Even if he had believed it, it is still difficult to say that a reasonable issue of justification, excuse or imperfect self-defense was raised thereby.

U.S. v. Furney, 8 C.M.R. 70 (1953).

In *Townsend v U. S.*, 95 F.2d 352, 358 (D.C. Cir. 1938), it was said, in connection with a charge of willful default after having been summoned as a witness by the authority of Congress, that, “Justification may also be based upon a mistake of fact by the defendant, where his mistake is a reasonable one and where the fact – if it were as he believed it to be – would have constituted justification.”

U.S. v. Holder, 22 C.M.R. 3 (1956).

That absence without leave under Article 86, *supra*, involves only a general intent; and that in such a general intent case a mistake of fact must be both honest and reasonable in order to constitute a defense, is not an open question in this Court.

U.S. v. Scheunemann, 34 C.M.R. 259 (C.M.A. 1964).

The Air Force Court of Military Review decided early on that neither passion nor a feeling of compulsion could serve as an excuse for rape:

Whether or not the accused wrestled with conscience or fear, or both, is not to us important in itself. If the presence of passion or a feeling of compulsion excuses one of rape on the grounds of simple "compulsion", we would never have a conviction.

U.S. v. Johnson, 27 C.M.R. 932, 936-937 (1958).

CMA decided *U.S. v. Carr* in 1984, reaffirming the existence of mistake of fact as a defense in general intent crimes under the UMCI and clarifying that honest and reasonable mistake of fact as to consent may *excuse* an accused charged with rape (at the time, lack of consent was an element of rape, but given the definition of "unlawful force" in Article 120(a)(1), that distinction does not compel a different conclusion):

Usually an honest and reasonable mistake of fact is a defense, even in a crime involving general criminal intent. . . . Paragraph 199*b*, the Manual for Courts-Martial expresses one exception to this principle when it states – in accord with considerable precedent – that ignorance or misinformation as to the true age of the victim is no defense in a prosecution for carnal knowledge. However, paragraph 199*a*, which deals with rape, expresses no such exception as to consent. Likewise, we perceive no occasion to deviate in rape cases from the principle that an accused can be excused by an honest and reasonable mistake of fact.

18 M.J. 297, 301.

Although interpreting the MCM and not defining the common law, *Carr* is consistent with the mainstream of American jurisprudence, which recognizes that elimination of *mens rea* should be limited to the realm of public welfare statutes/regulations and crimes against children.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. U.S., 342 U.S. 246, 250 (1952).

The Court of Appeals for the Armed Forces has rejected any broad notion of strict liability offenses, which many offenses under the 2011 Article 120 would become without the defenses of consent and mistake of fact.

In modern criminal law, it is generally accepted that a crime consists of two components: the *actus reus* (an act or omission) and the *mens rea* (a particular state of mind). . . "Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime."

"[T]he mental ingredients of a particular crime may differ with regard to the different elements of the crime." . . . "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."

U.S. v. Thomas, 65 M.J. 132, 133 (C.A.A.F. 2007)[internal citations omitted].

When *Carr* was decided, R.C.M. 916(j) looked very much as R.C.M. 916(j)(1) looks today. The 1984 R.C.M. 916(c) described "justification" just as that Rule does today.³ As noted above, not all authorities agree on the precise distinction between "justification" and "excuse," but all agree that legal defenses

³ Note that R.C.M. 916 is not a limitation on defenses, but is the President's exercise of his Article 36 authority to recognize or prescribe defenses. No case or statute supports the proposition that the President could eliminate by executive order criminal defenses recognized by Congress, the Supreme Court, or military appellate courts

sometimes recognized as “affirmative defenses” or “special defenses” are examples of one or the other or both. In the context of today’s MCM, “justification” has at least one particular meaning (in R.C.M. 916(c)), even if it may be used in a broader sense elsewhere, while “excuse” has lost much of the particularity it connoted for Winthrop and Davis, now being given over to a more generic usage. In any event, the phrase “legal justification or excuse” has always embraced the defenses of “consent” and “mistake of fact as to consent.”

Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Carter v. U.S., 530 U.S. 255, 264 (2000).

In December 2011, when Congress passed this version of Article 120, “mistake of fact as to consent” was an existing “justification or excuse,” recognized by the Supreme Court, by C.M.A., by C.A.A.F., and by the MCM. When using the term of art “justification or excuse,” for the first time outside Article 118, Congress “presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.” Other arguments – particularly that the phrase is surplusage or a “place holder” – are illogical, inconsistent with history and with *Carter*, and contradicted by the canons of construction discussed below. Not only is “without legal justification or excuse” a “defense available under this chapter,” but so long as “without legal justification or excuse” remains in Article 120, the President is not free to eliminate that defense by fiat in the MCM. “A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done.” *Collins v. Youngblood*, 497 U.S. 37, 49 (1990).

Since *Carr*, C.M.A. and C.A.A.F. have repeatedly confirmed the place of

consent and mistake of fact as to consent in cases involving sexual assaults, batteries, larcenies, and other crimes. *See, e.g., U.S. v. Greaves*, 40 M.J. 432 (C.M.A. 1994); *U.S. v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006); *U.S. v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000); *U.S. v. Watt*, 50 M.J. 102 (C.A.A.F. 1999); *U.S. v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995); *U.S. v. Joseph*, 37 M.J. 392 (C.M.A. 1993) etc. In addition, C.M.A. has reaffirmed the importance of the defense of mistake of fact in assessing the lawfulness of an accused's actions, emphasizing that in some circumstances, mistake of fact may create the defense of justification:

The military judge agreed to give an instruction on mistake of fact, as it relates to the unlawful nature of the killing, with respect to "all of these murder charges and the lesser included," but he neglected to repeat the instruction with respect to Article 118(3). Appellant argues that mistake of fact goes to two elements of the offense: (1) the heedless or indifferent state of mind required for wanton disregard for human life and (2) the unlawfulness of the killing. The Court of Military Review held that appellant was not entitled to a mistake-of-fact instruction with respect to Article 118(3) because a mistake of fact would not negate the mental state of mind required to commit the offense. We hold that appellant was entitled to an instruction on mistake of fact with respect to Article 118(3).

. . . .

The court below also held that appellant's mistaken belief would not negate the element of unlawfulness. This holding also is incorrect. The military judge correctly deduced that mistake of fact in this case gave rise to a defense of justification. Under the specific facts of this case, the two special defenses of mistake and justification are interrelated. A mistake of fact can negate unlawfulness because ignorance or mistake a fact can produce "a mental state which in turn supports a defense of justification."

U.S. v. McMonagle, 38 M.J. 53, 59 (C.M.A. 1993)[internal citations omitted].

And, in an opinion affirmed and lauded by C.A.A.F., A.C.C.A. emphasized that mistake of fact may arise not only in regard to a stated element, but in regard to "facts essential to an element:"

"Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand. . .'" *United States v. Bailey*, 444 U.S. 394 . . . (1980) (quoting *Morrisette v. United States*, 342 U.S. 246 . . . (1952)). Generally, every element of an offense contains a mental component, or mens rea. See *United States v. Greaves*, 40 M.J. 432, 437 n.5 (C.M.A. 1994). If the accused possesses an incorrect belief as to facts essential to an element, he may not have the requisite mental state and the government may not be able to carry its burden of proof to obtain a conviction . . . In order to determine whether, and in what manner, the defense of mistake of fact applies to an offense, it is necessary to identify both the elements of the crime and the corresponding mens rea required.

U.S. v. Zachary, 61 M.J. 813 (2005), *aff'd* 63 M.J. 438 (C.A.A.F. 2006)[parallel and supporting citations omitted].

Justification and Excuse Post-2006 and 2011

What has changed since *Carr*, of course, is the language of Article 120. Congress deleted "and without consent," from both the 2006 and 2011 revisions of Article 120, eliminating consent as an element for many sex offenses. Unlike the present Article 120, the 2006 Article 120 expressly delineated offenses for which "consent" and "mistake of fact" were affirmative defenses, while recognizing the existence of other affirmative defenses. The 2006 Act included full explanations of "consent," "mistake of fact as to consent," and "affirmative defenses." Practice problems ensued and Congress apparently decided on a different approach in 2011. Without legislative history, we don't know why, but the approach is indisputably different.

In the 2011 Article 120(a), Congress removed "causes" and continued to define "consent," while defining "force" and "unlawful force" in novel terms. These changes render *Neal's* (see below) discussion of consent/force completely inapposite, and there is simply no textual basis for the supposition that Congress "wanted" to eliminate consent and mistake of fact as to consent as defenses. Rather, while defining "unlawful force" without direct reference to any particular defense, Congress has ensured that lawful conduct is not prosecuted by limiting

unlawful force under Article 120(a)(1) to force used “without legal justification or excuse.”

Examining the 2006 Article 120 in *Neal*, CAAF confirmed that, in a prosecution for sexual assault, a conviction may be had despite the absence of proof that there was no consent: “In short, under the structure of the amended statute, the absence of consent is not a fact necessary to prove the crime of aggravated sexual contact under Article 120(e).” *U.S. v. Neal*, 68 M.J. 289, 301 (2010). *Neal* also explained that, under the force/consent rubric of the 2006 Article 120, consent remained a relevant “failure of proof” defense to most non-child-related sex offenses: “We do not interpret Article 120(r) as a prohibition against considering evidence of consent, if introduced, as a subsidiary fact pertinent to the prosecution's burden to prove the element of force beyond a reasonable doubt.”

While *Neal* was not a mistake of fact case, the drafters of DA Pam 27-9 acknowledged both *Neal* and *U.S. v. Medina*, 69 M.J. 462 (C.A.A.F. 2011), in Note 6, under Article 120 (2006), dutifully quoting the statutory definition of “force” (omitting consent). Notes 8.1 and 11.1, under Article 120, address “consent” and “mistake of fact to consent” in much the same terms as the pre-2006 instructions, wholly consistent with the statutory description of consent, mistake of fact, and “other affirmative defenses,” as well as the phrases “compel submission” and “overcome resistance” in the 2006 definition of “force,” phrases that are clearly negated by consent. The new Instruction 3-45-13, based on the 2011 Article 120, leaves to the individual judge’s discretion not just whether mistake of fact has been raised, but apparently whether consent and mistake of fact even exist as defenses. The simple answer is that any conduct that was susceptible of a consent defense or a mistake of fact defense before the 2011 Act, is just as susceptible under the new law. “This Court has recognized the defendant's right of access to witnesses and evidence. . . . But access alone is not enough. The defendant has the right to present legally and logically relevant evidence at trial.” *U.S. v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994). Any conclusion that the words “legal justification or excuse” have no meaning or that Congress intended for there to be no “legal justification or excuse” ignores the canons of statutory construction. Worse, that conclusion would transform a statute that distinguishes

lawful from unlawful conduct into one that would make criminal even most acts of marital, procreative, sexual intercourse, whenever one partner is in a physically superior position.

Article 120(2011) and “Consent” as a Defense to Rape

Under the 2011 statute, as under predecessors, no putative victim may consent to threat or application of deadly force, nor may consent be given by a sleeping, unconscious, or incompetent person. Similarly, unmarried children cannot consent to prohibited sexual acts. Most agree that “consent,” *qua* “consent” is no longer an element of Rape, or of Sexual Assault, Aggravated Sexual Contact, or Abusive Sexual Contact; however, as to each of these offenses (§§ 920(a)-(d)), consent remains a defense to any conduct susceptible of consent prior to 2011, and, once raised, must be disproven by the government beyond a reasonable doubt.

The definitions of “bodily harm” (requiring offensive touching and excluding consensual sexual acts and contacts) and “unlawful force” (“without legal justification or excuse”) are new, but both definitions are consistent with CMA/CAAF’s historical and current view of consent as a defense. Under the 2011 law, however, mere “force” is defined in such a way that it cannot survive due process analysis unless consent is recognized as a defense. Instead of 2006’s “action to compel . . . or overcome,” under 2011’s § 920(g)(5), “force” requires only “physical strength . . . as is sufficient to . . . restrain,” *not* physical strength that *does* restrain a person who does not wish to be restrained. This focus on the objective over the subjective survives constitutional scrutiny only if the physical strength must also be applied unlawfully to complete the crime. If consent is not a defense (justification or excuse), most consensual sexual intercourse, including much procreative marital sex, would become criminal, with the perpetrator being whoever is in the physically dominant position and capable of exerting force “sufficient to restrain.”

Congress did not intend such an absurd result, which would violate the presumption in favor of *mens rea* (*Morissette v. U.S.*, 342 U.S. 246, 250 (1952)), the due process clause, and the privacy and liberty rights of individual service members. “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of

what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” . . . We have said that when a statute “interferes with the right of free speech or of association, a more stringent vagueness test should apply.” *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2718 (2010). After *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Lawrence v. Texas*, 539 U.S. 558 (2003), there can be no question that individual constitutional privacy and liberty rights prohibit Congress from criminalizing private sexual behavior between consenting adults wherein the level of force applied does not rise to the level of death or grievous bodily harm. “Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.” *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Even if service members’ constitutional rights of privacy and liberty are truncated to satisfy national security interests, Congress may not criminalize private sexual behavior between consenting adults in the military service, unless such conduct has a direct and palpable impact on military good order and discipline or service reputation. Applying the concepts in *Parker vs. Levy*, 417 U.S. 733 (1974), any purported prohibition on consensual, adult, sexual conduct, unrelated to good order and discipline or other compelling government interest, would clearly be within the “fringe” about which *Levy* speculated. **Wilcox?**

Courts are obliged to construe criminal statutes in favor of giving effect to Congress’ enactments, regarding invalidation as a last resort. *Skilling v. U.S.*, 130 S.Ct. 2896 (2010). “Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.” *Scales v. U.S.*, 367 U.S. 203, 211 (1961). “The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *INS v. Chada*, 462 U.S. 919, 944 (1983). All that said, the only thing we must do in construing 10 U.S.C. § 920 (2011) to avoid constitutional questions is to give effect to the words of the statute itself. Nothing in the text of the 2011 statute changes the role of consent in rape prosecutions, other than to eliminate “without consent” as an element to be affirmatively proved by the government in its case-in-chief.

As to rape and the definition of “unlawful force,” the phrase “legal justification or excuse” is plain on its face, has “an accepted meaning within the field addressed by statute,” and carries an historical pedigree leaving no doubt that it encompasses all defenses and all circumstances that vitiate *mens rea* or otherwise remove criminality from the accused’s acts.

General words of criminality can effectively express the lawmakers’ intent that the conduct specified by the statutory elements can result in a conviction when it is engaged in without justification or excuse.

E. R. Milhizer, Justification and Excuse: What they were, what they are, and what they ought to be, St. John’s Law Review, vol. 78, at 876.

Article 120(2011), “Mistake of Fact,” and Statutory Interpretation

Generally, the analysis as to whether a mistake of fact defense is available turns on the question whether a mistake with respect to the fact in question negates a required mental state essential to the crime charged. . . . The answer to that question, in turn, is a matter of statutory construction, and, when necessary, an “inference of the intent of Congress.” . . . Even where the statute, by its terms, does not provide a *mens rea* with respect to a particular fact, courts may read in an intent in order to effectuate “the background rule of the common law favoring *mens rea*.” [internal citations omitted].

U. S. v. Wilson, 66 M.J. 39, 40-41 (C.A.A.F. 2008)

Not only is “mistake of fact” not affirmatively rejected or limited by the 2011 statute, “mistake” continues as a defense via decades of case law, the statute’s specific use of “justification or excuse,” and the canons of construction presumptively used by Congress in drafting the 2011 law.⁴

In matters of statutory interpretation, guidance from Congress is second in importance only to the plain language of the statute itself. As noted above, the plain language of the statute – “justification or excuse” – includes both consent and mistake of fact. There is no support for a reading of the statute that alters the plain

⁴ Any by operation of R.C.M. 916(j), as well.

meaning of “justification or excuse,” renders that language mere surplusage, and does by implication that which Congress did not do expressly. In 2008, the Congressional Research Service published an updated “Statutory Interpretation: General Principles and Recent Trends,” a CRS report for use by members of Congress, informing them of how their laws are read and interpreted by the Supreme Court. “The Court has expressed an interest ‘that Congress be able to legislate against a backdrop of clear interpretive rules, so that it may know the effect of the language it adopts.’” CRS 97-589, at 1. Knowing which canons Congress had in mind when they enacted §§ 920 – 920c, we can fill in any gaps that might be left after a plain reading of the language, and more importantly, reject interpretations inconsistent with those canons. “It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.” *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). An application of the canons recognized by CRS 97-589 follows:

Words have their ordinary meaning unless they are otherwise defined or have an accepted meaning within the field addressed by statute. *Sullivan v. Stroop*, 496 U.S. 478 (1990). The terms “legal justification or excuse” have the “accepted meaning” given them by the UCMJ and our military appellate courts. By using these terms to define “unlawful force,” Congress is presumed to know that, historically, one form of justification or excuse is “consent” and another is “mistake of fact.” Further, § 120(f)’s reference to defenses “available under this chapter or the Rules for Court-Martial” is, in part, a reflexive reference to “justification or excuse.”

Statutory language is not to be construed as “mere surplusage.” *Montclair v. Ramsdell*, 107 U.S. 147 (1883). Congress required that Rape be effected by “unlawful force” and further defined that term as meaning “force done without legal justification or excuse.” Those are not empty terms and cannot be disregarded; otherwise, all force would be unlawful force.⁵ Nonetheless, Congress’s choice not to use “and without consent . . .” is consistent not only with removal of “consent” as an element of several offenses, but with this statutory

⁵ Although the words “and without the lawful consent of the person affected,” were added to “legal justification or excuse,” by the President in his definition of “assault” under Article 128, those words are used to permit consent as a defense to offenses under Article 128(a), while denying consent as a defense to offenses under Article 128(b) (aggravated assaults). If the President had merely said “without legal justification or excuse,” consent might be deemed a defense to Article 128(b) assaults, contrary to case law.

canon, as well. That choice does nothing to remove “consent” or “mistake of fact” as defenses. Again, “applicable defenses” specifically embraces, rather than rejects, mistake of fact, consent, and all other justifications and excuses. “Resistance to treating statutory words as mere surplusage ‘should be heightened when the words describe an element of a criminal offense.’” C.R.S. 97-589, *supra*, quoting *Ratzlaf v. U.S.*, 510 U.S. 135, 140-141 (1994). Even if, under the *McKelvey* Rule, “legal justification or excuse” is not elemental, it is the sole distinction between a criminal act and conduct that CAAF and the Supreme Court have unerringly described as constitutionally protected.

A grammatical reading, if not plainly contrary to the intent of Congress, may be rejected in order to avoid a constitutional issue. *U.S. v. X-Citement Video*, 513 U.S. 64 (1994); *Debartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Even if such a reading could be contrived, any reading that infers an intent of Congress to remove defenses to crimes, in the absence of express language that does so, must be rejected in order to avoid due process challenges for vagueness, as well as creation of strict liability crimes outside the realm of public welfare and crimes against children. “A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *U.S. v. Jin Fuey Moy*, 241 U.S. 394 (1916).

Particular language in one part of a statute that is omitted in another part of the statute is intentionally excluded where it does not appear. *Keene Corp. v. U.S.*, 508 U.S. 200 (1993). *Expressio unius est exclusio alterius*. *Andrus v. Glover Const. Co.*, 446 U.S. 608 (1942). This canon cuts both ways. Article 120b(d) limits the defense of “mistake of fact as to knowledge” to child-victims between 12 and 16 years of age, denying the defense entirely in cases of child-victims younger than age 12 (consistent with 18 U.S.C. § 2243), and expressly provides for “mistake of fact as to knowledge” that a sex partner is asleep, unconscious, or unaware. No discussion of “mistake of fact as to consent” appears in Article 120, permitting both the argument that Congress did not limit or exclude the defense, as well as the argument that Congress declined to provide for mistake as to consent, providing only for mistake as to certain knowledge. Similarly, Congress expressly rejected marriage as “a defense for any conduct in issue in any prosecution under this section,” but declined to reject the defenses of consent or mistake of fact. Finally, in the 2011 Act, Congress elected to import “legal justification or excuse”

only as to offenses charged under Article 120(a)(1). All other offenses are articulated so as to either make consent and mistake of fact as to consent legally or logically inconsistent with the *actus reus* and *mens rea*, or to make consent a named defense.

When Congress acts to change a judicially created concept, it does so specifically. *Midatlantic Nat'l Bank v. New Jersey Dept of Env'tl Protection*, 474 U.S. 494 (1986). As noted above, "consent" and "mistake of fact as to consent" have been recognized for decades as legal justifications or excuses to adult "forcible" sex offenses, not only by CAAF, but by the Supreme Court. There is no rejection of either defense in the 2011 Act. Rather, by specifically requiring that unlawful force be "without legal justification or excuse," Congress did nothing to change that judicially created concept. "This principle is thus closely akin to the principle noted above that, when Congress employs legal terms of art, it normally adopts the meaning associated with those terms." C.R.S. 97-589, *supra*, at 18.

The rule of lenity. Conduct "must be plainly and unmistakably within the provisions of some criminal statute." *U.S. v. Gradwell*, 243 U.S. 476 (1917). *See also, Morrissette, supra*. Any reading that purports to remove "mistake of fact as to consent," leaving otherwise innocent conduct prosecutable, would criminalize conduct that is *not* "plainly and unmistakably" forbidden by the new Article 120. "To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Whalen v. U.S.*, 445 U.S. 684, 694 (U.S. 1980). Although the Court has declined to "resort to the rule of lenity if the interpretation proffered by the defendant reflects 'an implausible reading of the congressional purpose'" (*Abbott v. U.S.*, 2010 U.S. LEXIS 9008), the defense request is to the contrary: Congress expressly excepted acts done with a "legal justification or excuse" from the ambit of "unlawful force."

Scienter. The presumption in favor of *mens rea* applies "to each of the statutory elements which criminalize otherwise innocent conduct." *U.S. v. X-Citement Video*, 513 U.S. 64 (1994). This is discussed at length above.

Finally, what is to be made of Congress' express treatment of "defenses" in the 2006 and 2011 Acts? In 2006, Congress promulgated a meatier definition of consent and expressly addressed both mistake of fact and other affirmative

defenses. As we know, much confusion ensued. In 2011, Congress simply said “[a]n accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial” added “unlawful” to the force required for rape, and defined “unlawful force” as being “without legal justification or excuse.” In other words, an accused cannot be guilty of Article 120(a)(1) rape unless he does not have the consent of the victim to use the non-deadly/non-grievous bodily harm force involved in the act, as such consent is a clearly established justification or excuse. Mistake of fact is preserved as a defense by operation of (1) “legal justification or excuse;” (2) RCM 916(j); and CMA/CAAF’s history of recognizing and applying common law defenses. *See, e.g., U.S. v. Olinger*, 50 M.J. 365 (1999)(recognizing the common law defense of “necessity,” not found in RCM 916). Some have argued that Congress’ elimination of statutory language expressly naming and explaining “consent” and “mistake of fact” eliminates or restricts those defenses and yet Congress could easily have simply said, “In this section, neither mistake of fact nor consent is a defense,” and then name whatever exceptions they deemed appropriate. Congress did not. Instead of attempting to do what we think Congress meant to do – particularly in the absence of any legislative history – we should follow the words of the statute, read according to the canons of construction that Congress tells us they applied. “In analyzing a statute, we begin by examining the text, . . . not by ‘psychoanalyzing those who enacted it.’” *Carter v. U.S.*, 530 U.S. 255, 271 (2000)[internal citation omitted].