

The Article 120 Implementation Challenge: Avoiding Unintended Consequences
and Unjust Outcomes

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19 September 2014

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Article 120, UCMJ should not be amended by Congress, or, if it is amended, it should be amended in very limited ways. The problems with the statute can be fixed without Congressional action. The problems with the current sexual offense law can be fixed by executive actions that begin within the Department of Defense. The key to improving the law is recognizing the effect of consent in sexual offense cases and defining important terms.

Until October 1, 2007, Article 120, UCMJ required the prosecutor to prove, beyond a reasonable doubt, that the act of sexual intercourse was done by force and without the consent of the victim to get a conviction for rape. Some believed reform was necessary because the old formula requiring force did not fit the evolving understanding of sexual offenses.¹ Another dynamic driving reform was the misguided and unobtainable goal of “shift[ing] the focus from the victim to the offender by removing the element of lack of consent.”² The first dynamic indicates that the requirement to prove force should be eliminated from the elements of rape, while the second dynamic indicates the requirement to prove a lack of consent should be eliminated from the elements. Congress had to choose one or the other; it could not eliminate both without making purely consensual sexual activity a crime. Law-makers chose to eliminate “lack of consent” from the elements of rape. Not only has this choice failed to meet its goal³ –

¹ Most rapes do not involve physical force or use of a weapon. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST. SPECIAL REPORT, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 21-22 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

² Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012*, 2012 Emerging Issues 6423 (Lexis Nexis).

³ The alleged victim's conduct is frequently the focus of sexual offense cases despite the elimination of “lack of consent” as an element. Military Rule of Evidence (M.R.E.) 412 does not prevent the conduct of an alleged victim in the period leading up to the alleged crime from being offered and considered at trial. M.R.E. 412(d)(“Sexual behavior’ includes any sexual behavior not encompassed by the alleged offense.”). Moreover, information about the

shifting the focus to the rapist's conduct – it has created tremendous confusion. Focusing on the conduct of the alleged victim is inevitable in most sexual offense trials. An accused soldier has a Due Process right to present a set of facts to the fact-finder that is different from the prosecution's,⁴ and, if the defense's theory is actual consent or mistake of fact as to consent, the alleged victim's conduct will be part of the focus of the case. While it is possible to draft elements on paper that focus only on the conduct of the perpetrator,⁵ once the case gets to trial, the alleged victim's conduct often is the critical focus of the case.

Beginning in the 1980s, military appellate courts adjusted well to the trend of sexual offenses being done without force using the common law tradition. Case-by-case, military courts created the doctrine of constructive force, which essentially eliminated the requirement that rape be accomplished by actual force in certain circumstances.⁶ This doctrine had a solid foundation because it was expanded slowly as each new type of case was decided. The doctrine of constructive force covered the problematic situations that vex us today: the use of threats or intimidation;⁷ the abuse of military power;⁸ parental compulsion;⁹ children of tender years;¹⁰ victims with mental infirmities;¹¹ and victims who are asleep, unconscious or intoxicated.¹²

alleged victim's sexual history is admissible if it is relevant, material and favorable to the defense. *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)(citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)).

⁴ *Washington v. Texas*, 388 U.S. 14 (1967)(recognizing the right to present a defense). “[A]ny rule that impedes the discovery of the truth in a court of law impedes as well the doing of justice.” *Hawkins v. United States*, 358 U.S. 74, 81 (1958)(Stewart, J. concurring).

⁵ Although this statute does not do so. See *infra* notes 33-34 and accompanying text.

⁶ See U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-45-1, note 11 (1 Jan. 2010)[hereinafter Benchbook] (“When a victim is incapable of consenting, because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.”).

⁷ Benchbook, *supra* note 5, para. 3-45-1, note 5.

⁸ Benchbook, *supra* note 5, para. 3-45-1, note 6. *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987), *cert. denied* 484 U.S. 827 (1987).

⁹ Benchbook, *supra* note 5, para. 3-45-1, note 7; *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991).

¹⁰ Benchbook, *supra* note 5, para. 3-45-1, note 8; *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991).

¹¹ Benchbook, *supra* note 5, para. 3-45-1, note 10; *United States v. Henderson*, 15 C.M.R. 268 (C.M.A. 1954).

¹² Benchbook, *supra* note 5, para. 3-45-1, note 11; *United States v. Mathi*, 34 M.J. 33 (C.M.A. 1992).

This deliberate approach created an effective framework, whereas wholesale statutory changes in 2006 and 2011 created unintended consequences.

Before October 1, 2007, the burden was on the prosecution to prove force and disprove the existence of consent beyond a reasonable doubt. The interplay between these two related concepts was easy to understand and apply. The 2006 version of Article 120 eliminated “lack of consent” as an element, but created a statutory affirmative defense of consent. If consent was raised by the defense, the government had the burden to prove the alleged victim did not consent beyond a reasonable doubt. This framework treated consent as if it was a legal excuse.¹³ The relationship between the concepts of force and consent was discussed in *United States v. Neal*.¹⁴ In that case, the trial judge dismissed an Article 120 charge because the statutory scheme “unconstitutionally required the defense to carry the burden of proof with respect to an element of the offense.”¹⁵ The trial judge reasoned that by requiring the defense to prove the existence of consent, the defense was required to disprove the element of force. The three-judge majority did not explicitly apply the *McKelvey* rule, but its decision is consistent with it. Although to agree with CAAF one must believe that a person can be forced to do an act to which she consents,¹⁶ the

¹³ If a legal excuse is raised by the evidence, the government must disprove the legal excuse beyond a reasonable doubt unless another standard is specified. If a legal excuse is not raised by the evidence, the government bears no burden to disprove hypothetical legal excuses. A legal excuse is not an element of the offense, but an excuse that allows an exception from criminal liability. See *McKelvey v. United States*, 260 U.S. 353, 357 (1922). See also *United States v. Taylor*, 686 F.3d 182, 191 (3d Cir. 2012) (“Of course, that is not the end of the analysis: applying the *McKelvey* rule in this case naturally begs the question whether the ‘just cause or excuse’ language in §113(a)(3) qualifies as an ‘exception made by a proviso or other distinct clause.’ Whether a particular statutory phrase constitutes a defense or an element of the offense under *McKelvey* turns on whether ‘the statutory definition is such that the crime may not be properly described without reference to the exception’... If so, the exception is an element of the crime. If not, the exception is a defense. We conclude that, under the plain language of *McKelvey* as supplemented by this test, the ‘just cause or excuse’ is a defense to, rather than an element of, §113(a)(3).”)

¹⁴ 68 M.J. 289 (C.A.A.F. 2010).

¹⁵ *Id.* at 293.

¹⁶ “‘Force’ and ‘consent,’ as defined by Article 120, UCMJ, are two sides of the same coin. ... As a matter of logic I would not have thought that anyone would agree that a person can be ‘forced’ to do something the person has consented to or that ‘consent’ can be compelled. The concepts are diametric opposites and, in my view, cannot coexist with respect to the same action – which is the problem with holding that the burden to prove consent in this case is on Appellant.” *Id.* at 305 (Ryan, J., concurring in part and dissenting in part).

majority opinion treats consent as if it is a legal excuse: consent is not an element; if it is raised by the defense,¹⁷ consent must be disproven beyond a reasonable doubt. In 2011, Congress passed the current Article 120, which addressed the deficiencies discussed in *Neal* and *Prather*. The entire affirmative defense of consent is gone, including the double-burden shift. The definition of “force” was changed by eliminating language that might raise an issue of consent. Today we wonder, “what is the legal import of consent in the context of Article 120?”

The answer to this question is uncertain. Identifying the uncertainties requires a theory-by-theory analysis of Articles 120(a) and (b).¹⁸ Article 120(a)(1) defines rape as a sexual act upon another using unlawful force. Article 120(g)(6) defines unlawful force as an act of force done without legal justification or excuse. In my opinion, consent to a sexual act is a legal excuse, and we should recognize it as such. Confusion has been created by those who believe the statute should focus on the conduct of the perpetrator and claim that Congress intended to eliminate consent as a defense. To do so, they must elevate the intent of Congress over the words Congress included in the law. This is incorrect for two reasons. First, there is no expression of Congressional intent, and, second, the words of the statute are unambiguous. This means there is no need to resort to Congressional intent.¹⁹

The phrase legal justification or excuse has a meaning at common law. If terms in a statute have an accepted meaning at common law, the terms should be understood according to that meaning.²⁰ Legal justifications and excuses are defenses that exculpate the actor. A legal

¹⁷ The 2006 statute required the defense to prove consent by a preponderance of the evidence to shift the burden to the government to disprove consent beyond a reasonable doubt. This double-burden shift was found to be a “legal impossibility.” *United States v. Prather*, 69 M.J. 338, 340 (C.A.A.F. 2011).

¹⁸ The same analysis applies to Articles 120(c) and (d) in the context of a sexual contact.

¹⁹ This revision was passed so hastily that no traditional sources of Congressional intent – committee reports, floor debates, conference reports – exist. Even if they did exist, there is no reason to resort to legislative intent because the words Congress used are unambiguous. Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends*, 39 (Aug. 31, 2008) [hereinafter CRS].

²⁰ *Id.* at 5-6.

justification focuses on the act and not the actor and exculpates the accused because the accused's conduct, which otherwise would be criminal, benefits society or is socially useful.²¹ A legal excuse focuses on the actor and not the act and exculpates the accused because, under the circumstances, the accused's conduct is judged to be not blameworthy.²² Although there is some disagreement among scholars about whether a particular defense is a legal excuse or legal justification, there is agreement about which defenses fall into one or the other category.²³

There is no military case that recognizes consent to a sexually related act as a legal justification or excuse. This is understandable because until October 1, 2007 lack of consent was an element of rape. From October 2007 to June 2012, consent was an affirmative statutory defense that was treated like a legal excuse. Courts did not have a need to decide if consent was a legal justification or excuse. The fact that "lack of consent" was an element of rape until 2007 and consent was an affirmative defense until 2012 tells us that for most of the history of the UCMJ the existence of consent exculpated a soldier charged with a sexual offense. That is the hallmark of a legal justification or excuse. Moreover, there is military authority that recognizes mistake of fact as to consent as a legal justification or excuse.²⁴ Logically, if mistake of fact as to consent is a legal justification or excuse, consent must be a legal justification or excuse because the mistake of fact defense is premised on the concept that if the circumstances were as

²¹ Joshua Dressler, CRIMINAL LAW 204 (6th ed. 2012). Eugene Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725,726 (2004).

²² Dressler, *supra* note 20, at 205; Milhizer, *supra* note 20, at 726.

²³ See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L. J. 1 (2003). Professor Berman proposes the following taxonomy for organizing defenses: A justified action is not *criminal*, whereas an excused defendant has committed a crime but is not *punishable*. *Id.* at 4. There are some defenses that are neither justifications nor excuses: statute of limitations or diplomatic immunity are examples. *Id.* at 51.

²⁴ *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984). See also *United States v. Scheunemann*, 34 C.M.R. 259 (C.M.A. 1964)(recognizing mistake of fact as a defense); *United States v. Holder*, 22 C.M.R. 3 (1956)(recognizing mistake of fact as a legal justification); *United States v. Perruccio*, 15 C.M.R. 28 (1954)(recognizing mistake of fact as a legal justification.).

the actor believed them to be, the actor would not be guilty of the offense.²⁵ Using Professor Milhizer's system of classification of legal justifications and excuses, we should ask the following questions: is consensual sexual activity socially beneficial? Is sexual activity blameworthy if both actors fully consent to the activity? Using Professor Berman's taxonomy, we should ask: should consensual sexual activity be criminal? Should consensual sexual activity be punishable? In my opinion, the answer to the first question is, generally, yes, and the answers to final three are, generally, no. In my opinion and recognizing that some sexual activity between consenting partners is and should be criminal, consent to sexual activity is a legal excuse in cases where the consensual sexual conduct is not specifically prohibited.²⁶ The general rule should be consent to sexual activity is a legal excuse, and law-makers can address the exceptional circumstances individually, as they have for decades. The fact that lack of consent to the charged sexual conduct is not an element of the sexual offenses in the current version of Article 120 is immaterial to whether consent excuses those offenses. Such an assertion confuses legal excuses with failure-of-proof defenses. A legal excuse is "a claim that although the actor has harmed society, [the actor] should not be blamed or punished for causing that harm."²⁷ An example of a non-elemental legal excuse is the lack of mental responsibility defense.²⁸

The Military Judges' Benchbook creates confusion. Congress used the phrase "legal justification or excuse" in two places in the UCMJ: Article 118 (murder) and Article 120 (rape and sexual assault). Article 118 begins, "Any person subject to this chapter, who, without legal

²⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(j) (2012) [hereinafter MCM].

²⁶ For example, sexual activity with minors, situations where the consent was procured by fraud, and indecent sexual conduct in public.

²⁷ Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1162-63 (1987).

²⁸ Dressler, *supra* note 20, at 205.

justification or excuse, unlawfully kills a human being ...”²⁹ Note 3 of Instruction 3-43-2 (a jury instruction for murder) tells trial judges, “when an issue of self-defense, accident, or other legal justification or excuse is raised, tailored instructions must be given.” Why are tailored instructions necessary when a legal excuse or justification is raised in a murder case, but unnecessary in a rape or sexual assault case? When the trial judiciary was considering the jury instructions judges would give to court-martial panels, the Chief of the Trial Defense Service (TDS) submitted proposed instructions for the judges’ consideration. Included in TDS’s submission was a proposed definition or explanation of the phrase “legal justification or excuse.” The proposed instruction was not included in the approved jury instructions.³⁰ There is no attempt to explain the legal concepts of justification or excuse to the court members even though a legal justification or excuse would transform unlawful force into lawful force. The Joint Service Committee, while drafting an executive order for the President’s signature, should modify Rule for Court-Martial 916 and recognize consent to sexual conduct as a legal excuse to sexual offenses, with the appropriate limitations.

In addition to treating the phrase “without legal justification or excuse” as surplus language,³¹ the trial judiciary has given the word “by” an unusual significance.³² In the explanatory section³³ of Note 8 of Instruction 3-45-13 says, “‘by’ means the sexual conduct

²⁹ Article 118, UCMJ.

³⁰ Benchbook, *supra* note 5, para. 3-45-13, note 4.

³¹ “[S]tatutes should be construed ‘so as to avoid rendering superfluous’ any statutory language.” CRS, *supra* note 19, 12 (citing *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991)).

³² The word “by” is used 75 times in Articles 77-134, UCMJ. In every instance, “by” is used to denote origin (e.g. by the person, by the victim), method, means, or manner in every instance. In the 2011 version of Articles 120, 120a, 120b, and 120c, “by” is used 29 times (including one typographical error). Ten times “by” was used to indicate origin, and the other times “by” was used to indicate means, manner and method (e.g. by any artifice, by any drug, by any means). The word “by” is never used to indicate causation.

³³ This section provides a discussion of the issue and warns judges about situations where the instruction that follows the note might be appropriate. This section is NOT part of the jury instruction. The instruction is included in footnote 34. The explanatory section of Note 8 says:

occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method.” However, there is no language that expresses this point in the instruction that follows Note 8.³⁴ The note later explicitly says that consent can be a defense for offenses under Article 120(a)(2) and (3), even though Article 120(g)(8)(B) specifically states that a person cannot consent to force causing or likely to cause death or grievous bodily harm (Art. 120(a)(2)). Article 120(g)(8)(B) also says a person cannot consent while under threat or fear (Art. 120(a)(3)). This error helps the defense, so we live with it, but one wonders why the trial judiciary is willing to create a consent defense based on a dubious premise (causation) but not recognize consent as a legal excuse.

NOTE 8: Evidence of consent. Generally, the elements of an Article 120(a) offense require the accused to have committed sexual conduct “by” a certain method. Stated another way, “by” means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate. (Note that even for offenses under Article 120(a)(2), 120(a)(3) and 120(a)(4), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.)

Benchbook, *supra* note 5, para. 3-45-13, note 8.

³⁴ The instruction that follows Note 8 provides:

The evidence has raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (____). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

Benchbook, *supra* note 5, para. 3-45-13, note 8.

Even if the judiciary's Note 8 is correct, the timid instruction that follows Note 8 does not match the conclusion that the word "by" creates a causal connection. If "by" creates a causal connection, then causation, like the word "by," is an element of the offense, which the government must prove beyond a reasonable doubt. The approved instruction that follows Note 8 does not tell the court-members that consent breaks the causal chain created by the word "by," nor does it tell the members that consent must be disproven by the prosecution beyond a reasonable doubt. The members must be told both of these things if the word "by" (which is part of an element of the offense) creates a causal chain that is broken by consent to the sexual conduct.

Article 120(a)(5) defines rape as committing a sexual act upon another by administering to the other a drug or intoxicant that substantially impairs the ability of the other to appraise or control conduct by force, threat of force or without the other's knowledge and consent. Of course, this focuses attention on the conduct of the alleged victim by requiring the prosecution to prove what the alleged victim knew and that she did not consent to administration of the intoxicant. If the victim consents to neither the administration of the drug nor the sexual act, the perpetrator is guilty of rape. If the partner consents to both the administration of the drug and sexual act, there's no crime, except maybe a drug distribution. Consider the situation where the victim consents to the administration of the drug but not to the sexual act. The perpetrator has not committed rape under Article 120(a)(5). The perpetrator may have committed rape under Article 120(a)(4) if the drug makes the victim unconscious (and not just substantially impaired). The perpetrator may commit a sexual assault under Article 120(b)(3) if the impairment makes the victim incapable of consenting or under Article 120(b)(1)(B).³⁵ The harm to the victim is the

³⁵ These "only if" situations assume the crime was pled in a way to allow conviction for these alternative theories of criminal liability.

same, but the policy of not focusing on the victim's conduct has produced a situation where a victim could receive less protection from the law. An even more mind-bending thought experiment is the situation where the victim consents to engage in a sexual act but does not know of or consent to the administration of a drug that happens just before sexual activity is initiated. Here, the perpetrator could be convicted of rape even though the alleged victim consented to the sexual act under Article 120(a)(5) because the members are not explicitly instructed that the consent to the sexual act does not sever causal relationship created by the word "by."³⁶

To summarize, a person could be convicted of rape under Article 120(a)(1) and (5) in situations where the alleged victim consented to the sexual act.³⁷ A person could be found not guilty of rape under Article 120(a)(2)-(4) based on the consent of the alleged victim to the sexual act even though Congress specifically stated a person cannot consent in the situations those subsections cover.³⁸ Under Article 120(a)(5), a victim who consents to the administration of drug but not to the sexual act that follows immediately, has not been raped. Whether the perpetrator is convicted of anything depends on whether the prosecutor pled alternative theories of liability. A person who administers an intoxicant to another without the other's knowledge and consent just before beginning consensual sexual activity could be found guilty of rape even though his partner consented to the sexual act. Similar thought experiments performed using the offenses defined under Article 120(b) would reveal similar outcomes where the harm to the victim does not match the offense of which the accused is convicted. These are the unintended

³⁶ See *supra* note 34.

³⁷ Mr. White's written submission explains the circumstances where this can happen. If an alleged victim consents to a sexual act but does not consent to the act of force or administration of the a drug, the weak instruction following Note 8 does not tell the court members that the consent to the sexual act vitiates the force or administration even though that seems to be the point of the explanatory section of Note 8.

³⁸ Article 120(g)(8)(B), UCMJ.

consequences of the drafting challenges created by defining sexual offenses without regard to the alleged victim's consent.

Another flaw in the current statute is the absence of definitions for key terms. The phrase "without legal justification or excuse" is not defined in the statute or in the Military Judges' Benchbook. A person can commit rape or aggravated sexual contact by rendering the victim unconscious and engaging in a sexual act or sexual contact. A person can commit sexual assault or abusive sexual contact by engaging in a sexual act or sexual contact with a person who is unconscious. Despite the importance of the term "unconscious," neither the statute nor the current instructions contain a definition to help guide the court members' deliberations. One can be convicted of the crimes under the current Article 120 based on standards expressed as "substantially impairing," "incapable of consenting" and "impairment." Even though the rape statute that became effective on 1 October 2007 did not include a definition of "unconscious" or "substantially impaired," the pattern jury instructions for that offense contained perfectly satisfactory definitions.³⁹ It is not clear why these definitions were not included in the current instructions. Finally, the definition of consent requires consent be given by "a competent person." None of these key phrases are defined or explained in the statute or the current jury instructions. When key terms are left ambiguous or vague, sexual offense trials become unpredictable. Our soldiers deserve better.

If Congress objects to the Army trial judges' implementation of the law, Congress can act. I agree that further Congressional action is not wise for all of the reasons this panel had heard from other speakers. The military appellate courts could provide guidance and clarity. Unfortunately, the only vehicle for the appellate courts to do so is cases, and some cases may involve innocent soldiers. The President and Joint Service Committee can address these issues

³⁹ Benchbook, *supra* note 5, para. 3-45-3.

and provide the guidance and clarity that is needed. I urge this Panel, in its report to the Secretary of Defense, to recommend that the Joint Service Committee begin the process.