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Spilman on Consent and Mistake of Fact as to Consent

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Zachary D Spilman on Consent and Mistake of Fact as to Consent: Defenses to Adult Sexual Offenses under the Uniform Code of Military Justice

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SUMMARY: In the past ten years Congress passed two major revisions to Article 120 of the Uniform Code of Military Justice (UCMJ). These revisions expanded the number of statutory sexual offenses, incorporating crimes previously enumerated under Article 134 while also specifying new offenses. Zachary D Spilman reviews the changing landscape of defenses and affirmative defenses under Article 120.

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ARTICLE: In the past ten years Congress passed two major revisions to Article 120 of the Uniform Code of Military Justice (UCMJ). n1 These revisions expanded the number of statutory sexual offenses, incorporating crimes previously enumerated under Article 134 n2 while also specifying new offenses. Additionally, these revisions defined and then re-defined the defenses available to an accused charged with a sexual offense against an adult.

Today Article 120 identifies four adult sexual offenses (rape, sexual assault, aggravated sexual contact, and abusive sexual contact), while other Articles identify additional sex crimes. This analysis considers consent and mistake of fact as to consent as they apply to the four adult sexual offenses in Article 120 by first explaining the crucial difference between a defense and an affirmative defense; second, tracing the development of the current Article 120; third, considering the applicability of consent to the current Article 120; and fourth, considering the applicability of mistake of fact as to consent to the current Article 120.

I. The crucial difference between a defense and an affirmative defense.

There is a significant difference between a defense and an affirmative defense (also called a "special defense" in military practice). n3 A defense denies commission of an act that constitutes an element of the charged offense. An affirmative defense does not "deny[] that the accused committed the objective acts constituting the offense charged [but instead] denies, wholly or partially, criminal responsibility for those acts." n4 Put differently, a defense disproves an element while an affirmative defense addresses something that isn't an element but nevertheless avoids criminal responsibility. For example, it is a defense that an accused did not kill a victim, while it is an affirmative defense that

even though an accused did kill a victim, the killing was done in self-defense.

This difference between a defense and an affirmative defense is crucial because of the constitutional burden that applies for elements. Due process demands that the prosecution prove all of the elements of an offense (and thereby disprove any defense) beyond a reasonable doubt, and that burden may not shift to an accused. n5 However, due process does not prohibit requiring that an accused prove the existence of an affirmative defense. n6 Accordingly, proper delineation between defenses and affirmative defenses is essential to determining the legality of any burden shift.

The common law placed the burden on a defendant to prove any affirmative defense or any other "circumstances of justification, excuse, or alleviation." n7 Nevertheless, military law generally gives an accused additional protection by requiring that the prosecution disprove the existence of an affirmative defense beyond a reasonable doubt. n8 For crimes committed today, the UCMJ requires that an accused prove the existence of an affirmative defense only for lack of mental responsibility, n9 and for marriage n10 or mistake of fact as to age n11 in certain sexual offenses involving children. In all other instances it is the prosecution's burden to disprove the existence of an affirmative defense beyond a reasonable doubt. n12

II. Adult sexual offenses under Article 120 from 1951 to the present.

From establishment of the UCMJ in 1950, n13 until a revision signed into law on January 6, 2006, n14 Article 120 defined only one adult sexual offense: forcible rape in violation of Article 120(a).

To obtain a conviction for forcible rape, the prosecution was required to prove that an accused committed "an act of sexual intercourse with a female not his wife, by force and without her consent." n15 Because lack of consent was an element, consent was inexorably a defense that the prosecution was required to disprove beyond a reasonable doubt. However, the prosecution did not have to prove that an accused knew that the other person did not consent. Forcible rape was a general intent crime with no requirement that an accused have knowledge that the intercourse was nonconsensual, and an accused's mistaken belief that the other person was consenting was not a defense that disproved an element. n16

However, military law has long recognized that an honest and reasonable mistake regarding a material fact is a defense to a general intent crime. n17 Accordingly, it was an affirmative defense to a charge of forcible rape that an accused had an honest and reasonable mistake of fact belief about consent; that an accused honestly and reasonably (but wrongly) believed that the other person consented to the sexual intercourse. n18 The prosecution was required to disprove this affirmative defense beyond a reasonable doubt whenever it was raised by the evidence. n19

On January 6, 2006, the President signed the National Defense Authorization Act for Fiscal Year 2006, enacting a revised Article 120 that contained fourteen separate offenses. n20 Among these was a revised offense of rape that removed the element of lack of consent. n21 The legislation also included definitions for the terms "consent" n22 and "mistake of fact as to consent," n23 and language that established both as "affirmative defenses" n24 to certain offenses.

Additionally, the 2006 legislation modified the prosecution's burden to disprove the existence of consent or mistake of fact as to consent beyond a reasonable doubt, adding an initial burden shift to an accused. Under the 2006 legislation, an accused had the initial burden to prove the existence of consent or mistake of fact as to consent by a preponderance of the evidence. Only if an accused met this burden was the prosecution then required to disprove consent or mistake of fact as to consent beyond a reasonable doubt. n25

It is likely that the drafters of the 2006 legislation intended to reverse the historic requirement that the prosecution disprove the affirmative defense of mistake of fact as to consent beyond a reasonable doubt, shifting the burden to an accused in a constitutionally-permissibly manner. However, the 2006 statute's definitions of consent and mistake of fact as to consent, and the accompanying burden shift, suffered from two serious flaws. First, the statute conflated a defense with an affirmative defense, eliminating the distinction between consent evidence that disproves an element of an

offense and mistake evidence that does not disprove an element but otherwise avoids criminal responsibility. Second, the statute envisioned the logical impossibility that after an accused proves consent or mistake of fact by a preponderance of the evidence, the prosecution might then disprove it beyond a reasonable doubt.

The first of these flaws ignored the difference between a defense and an affirmative defense. The 2006 statute removed lack of consent as an element that the prosecution was required to prove beyond a reasonable doubt. However, despite the removal of lack of consent as an element, consent remained a viable defense because an alleged victim's consent could still disprove a different element. For example, in a prosecution involving the use of force, "evidence that the alleged victim consented to the charged sexual contact is relevant to the jury's determination of whether the prosecution has proved the element of force beyond a reasonable doubt." n26 Similarly, in a prosecution involving a substantially incapacitated victim, "if an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault - that the victim was substantially incapacitated." n27 Put differently, even though lack of consent was not an element, other elements functionally required that the prosecution disprove consent. This burden cannot constitutionally shift to an accused. By defining consent as an affirmative defense and shifting the burden to an accused to prove consent by a preponderance of the evidence, Congress created an unconstitutional statutory scheme. n28

The second of the flaws supposed that the prosecution could disprove something beyond a reasonable doubt after an accused first proved it by a preponderance of the evidence. This was a legal impossibility. n29 "If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty." n30

As a result of these flaws, some military judges provided instructions to court-martial members that were deliberately inconsistent with the statutory language. n31

Congress revisited Article 120 in 2011 as part of the National Defense Authorization Act for Fiscal Year 2012, with changes that became effective on June 28, 2012. n32 Among many modifications, Congress removed the burden shifts for consent and mistake of fact as to consent, as well as the language defining both as affirmative defenses. n33 These changes resolved the two serious flaws in the 2006 statute discussed above.

Three other modifications to Article 120 in the changes effective in 2012 affect how consent and mistake of fact as to consent apply to adult sexual offenses. First, Congress removed the statutory definition of mistake of fact as to consent, though it retained a slightly-revised statutory definition of consent. n34 Next, Congress added a knowledge element to sexual offenses involving a victim incapable of consenting due to impairment by a substance or due to a mental or physical disability. n35 Finally, Congress added the following paragraph discussing the defenses available to an accused charged with a violation of Article 120:

Defenses- An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section. n36

The version of Article 120 that took effect in 2012 functionally restored the defense of consent and the affirmative defense of mistake of fact as to consent to the status that existed before the changes enacted in 2006, while retaining the 2006 elimination of lack of consent as an element. Consent remains a viable defense, and mistake of fact as to consent a viable affirmative defense, to adult sexual offenses under the UCMJ.

III. Consent under current law.

Most of the offenses under the current Article 120 do not require the prosecution prove lack of consent as an element. n37 However, consent remains a viable defense in many instances because it is a fact that disproves a different element.

For example, one way to prove the offense of rape in violation of Article 120(a) is for the prosecution to prove that an accused committed a sexual actⁿ³⁸ upon another person by using unlawful force.ⁿ³⁹ By asserting that the other person consented to the sexual act, an accused denies commission of the objective act of using force.

Similarly, in a prosecution for sexual assault of a person who was incapable of consenting due to impairment by an intoxicant in violation of Article 120(b)(3)(A), the prosecution must prove that the other person was incapable of consenting. By asserting that the other person consented, an accused denies that the other person was incapable of consenting.

A third example is a prosecution for sexual assault where an accused is alleged to have threatened or placed the other person in fear, in violation of Article 120(b)(1)(A). Threatening or placing another person in fear is defined from the objective perspective of "a reasonable fear" of wrongful action as a consequence of non-compliance.ⁿ⁴⁰ By asserting that the other person consented, an accused denies the existence of a reasonable fear of wrongful action.

The availability of consent as a defense does not make lack of consent an "implied element."ⁿ⁴¹ None of the four offenses under Article 120 (rape, sexual assault, aggravated sexual contact, and abusive sexual contact) necessarily includes the element of lack of consent (though it may be added by certain charging decisionsⁿ⁴²), and the ability of an accused to assert the defense of consent does not somehow add the element of lack of consent to any offense. Rather, consent is a defense that disproves an element other than lack of consent, such as force, incapacity, unconsciousness, or fear in the examples discussed above.

Consent must not be conflated with the capacity to consent, and the statutory definition of consent provides numerous circumstances where the defense of consent is precluded.ⁿ⁴³ For instance, Congress provided that an unconscious person cannot consent as a matter of law,ⁿ⁴⁴ so an accused cannot claim that the other person was both unconscious and consenting. Similarly, Congress provided that a person cannot consent to force causing or likely to cause death or grievous bodily harm,ⁿ⁴⁵ so an accused cannot claim that the other person consented to such a high degree of force.

The availability of the defense of consent is no panacea for an accused because it places no additional legal burden on the prosecution beyond its preexisting duty to prove the elements of the offense. For example, proving the element of unlawful force necessarily disproves consent because the statutory definition of consent excludes submission caused by force.ⁿ⁴⁶ Similarly, proving the element that the other person was incapable of consenting necessarily disproves any claim that the other person actually consented because the two conditions are mutually exclusive.ⁿ⁴⁷ Finally, proving fear necessarily disproves consent because a person in fear cannot consent as a matter of law.ⁿ⁴⁸ In every instance the existence of the defense of consent does not add to the burden on the prosecution to prove the elements of the offense beyond a reasonable doubt.

Notably, Article 120 permits charging a sexual offense in a way that makes lack of consent an element of the offense. For example, both sexual assault in violation of Article 120(b) and abusive sexual contact in violation of Article 120(d) may involve an allegation that an accused caused "bodily harm" to the other person.ⁿ⁴⁹ The definition of bodily harm includes "any nonconsensual sexual act or nonconsensual sexual contact."ⁿ⁵⁰ A charge that is based on bodily harm in the form of nonconsensual sexual activity will require that the prosecution to prove lack of consent as an element. Similarly, rape in violation of Article 120(a) may involve the nonconsensual administration of "a drug, intoxicant, or other similar substance."ⁿ⁵¹ Such a charge will require that the prosecution prove that the administration was, in fact, without the consent of the alleged victim.

IV. Mistake of fact as to consent under current law.

An accused might assert an honest and reasonable (but incorrect) belief that the other person consented to the sexual activity at issue. Such a mistake may be either a defense or an affirmative defense to adult sexual offenses under Article 120.

Whether mistake of fact is a defense or an affirmative defense to any offense depends on the mental state required to commit the offense. n52 Article 120 identifies both general and specific intent crimes. n53 When the crime requires specific intent or knowledge and an accused's mistaken belief contradicts the existence of that intent or knowledge, that mistaken belief is a defense because it disproves an element of the offense. When the crime requires only general intent, an accused's mistaken belief is an affirmative defense because it does not deny the objective acts constituting the offense but instead denies criminal responsibility for those acts.

As a defense, mistake of fact need only exist in the mind of an accused and need not be reasonable (it need only be an honest mistake). n54 However, as an affirmative defense the mistake must be both honest and reasonable. n55

Numerous factual scenarios may raise the possibility of mistake of fact as a defense under the current version of Article 120. For example, an accused might be charged with an offense involving sexual activity done with the specific intent to degrade another person. n56 An accused's honest belief (no matter how unreasonable under the circumstances n57) that the other person would not be degraded by the sexual activity is a defense because it disproves the element of intent to degrade.

Additionally, in the changes effective in 2012, Congress established a mistake of fact defense for offenses involving a sleeping, unconscious, or otherwise unaware person, or involving a person incapable of consenting. n58 In these situations Article 120 requires that the prosecution prove that an accused knew or reasonably should have known of the other person's condition. An accused's honest and reasonable belief about the other person's condition (that is, an accused's belief that the other person was not asleep, unconscious, otherwise unaware, or incapable of consenting) is a defense because it disproves the element of knowledge. Notably, unlike other mistakes of fact that disprove an element, Congress required that this particular mistake be reasonable. n59

Outside of these scenarios, mistake of fact as to consent is an affirmative defense to adult sexual offenses under Article 120 because Article 120(f) explicitly allows an accused to raise any applicable defense and "military jurisprudence - like that of other jurisdictions - has long recognized that a reasonable and honest mistake (or as some writers would put it - 'ignorance') as to a material fact is a defense to criminal activity." n60 More particularly, three decades ago the Court of Military Appeals "perceived no occasion to deviate in rape cases from the principle that an accused can be excused by an honest and reasonable mistake of fact." n61 The current version of Article 120 does not upset this precedent, nor does it contain indications of congressional intent to dispense with *mens rea* entirely. n62

Accordingly, if there is some evidence n63 of an accused's reasonable (but mistaken) belief that the other person consented, then the prosecution has the burden to disprove that belief beyond a reasonable doubt. Unlike the defense of consent, which does not increase the burden on the prosecution, the affirmative defense of mistake of fact as to consent does add to the prosecution's overall burden at trial. Depending on the facts of the case, this additional burden could be substantial.

For example, as discussed above, one way to prove the offense of rape in violation of Article 120(a) is for the prosecution to prove that an accused committed a sexual act upon another person by using unlawful force. n64 Even if the prosecution proves that the act was accomplished by force (thereby disproving the defense of consent n65), the evidence might raise the affirmative defense of the accused's reasonable belief that the other person consented to the use of force. If it does, then the prosecution bears the added burden to disprove the existence of the affirmative defense beyond a reasonable doubt, either by proving that there was no such belief, or by proving that the belief was unreasonable under the circumstances.

However, the application of the affirmative defense of mistake of fact as to consent is significantly constrained by the comprehensive definition of consent enacted by Congress in the statutory changes effective in 2012. n66 An accused's mistaken belief about consent must be consistent with the statutory definition of consent in order to be valid, as an accused who claims a mistaken belief that the other person consented under circumstances that are inconsistent with the statutory definition of consent is claiming a mistake of law, not a mistake of fact. For example, because "a

person cannot consent to force causing or likely to cause death or grievous bodily harm," an accused cannot assert a belief that the other person consented to the use of force of this magnitude. n67

The complexity of the current version of Article 120 makes it impractical to predict every possible factual scenario where consent or mistake of fact as to consent might apply. There are many variations in the way adult sexual offenses may be charged and the defenses that are available under Article 120. The defense of a service member accused of an adult sexual offense in violation of Article 120 must begin with a thorough analysis of the facts of the case to determine what defenses apply. That analysis should include careful consideration of how consent and mistake of fact as to consent apply to the facts of the case.

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n1 *10 U.S.C. § 920.*

n2 *10 U.S.C. § 934. See Manual for Courts-Martial, United States (2012 Ed.), pt. IV, 60(c)(1) (explanatory paragraph) [hereinafter MCM].*

n3 MCM, *supra* note 2, R.C.M. 916(a). *See also infra* note 12 (discussing whether terms "affirmative defense" and "special defense" are synonymous).

n4 MCM, *supra* note 2, R.C.M. 916(a).

n5 *In re Winship, 397 U.S. 358, 364 (1970).*

n6 *See Patterson v. New York, 432 U.S. 197, 206 (1977). See also Humanik v. Beyer, 871 F.2d 432, 436-438 (3d Cir. 1989) (discussing precedent addressing constitutionality of shifting burden of proof to accused for affirmative defenses and unconstitutionality of shifting burden of proof for elements).*

n7 *Dixon v. United States, 548 U.S. 1, 8 (2006).*

n8 MCM, *supra* note 2, R.C.M. 916(b)(1). *See United States v. Gutierrez*, 64 M.J. 374, 380 (C.A.A.F. 2007) (Baker, J. dissenting) (discussing burdens for affirmative defenses).

n9 UCMJ, art. 50a(b).

n10 UCMJ, art. 120a(f).

n11 UCMJ, art. 120b(d)(2).

n12 Two recent opinions of the Court of Appeals for the Armed Forces suggest that the terms "affirmative defense" and "special defense" may not be synonymous, but instead that an affirmative defense is one that an accused has the burden to prove while a special defense is one that the prosecution has the burden to disprove. *Compare United States v. Davis*, 73 M.J. 268, 271 n.3 (C.A.A.F. 2014) (prosecution has burden to disprove special defense), with *United States v. MacDonald*, 73 M.J. 426, ___ n.3 (C.A.A.F. 2014) (accused has burden to prove affirmative defense). *Contra* MCM, *supra* note 2, R.C.M. 916(b)(1) (assigning the burden to an accused for certain defenses, to the prosecution for all others). Even if military law differentiates between an affirmative defense and a special defense, the difference is immaterial for mistake of fact because the Manual for Courts-Martial requires that the prosecution disprove the existence of mistake of fact beyond a reasonable doubt. *See* MCM, *supra* note 2, R.C.M. 916.

n13 Pub. L. No. 81-506, 64 Stat. 107 (1950).

n14 Pub. L. No. 109-163, 119 Stat. 3136 (2006).

n15 UCMJ art. 120(a) (1951). Congress made Article 120(a) gender-neutral in 1992. Pub. L. 102-484, § 1066, 106 Stat. 2315, 2506 (1992).

n16 *United States v. Willis*, 41 M.J. 435, 437 (C.A.A.F. 1995).

n17 See, e.g., *United States v. Holder*, 22 C.M.R. 3, 6-7 (C.M.A. 1956). See also *United States v. Adams*, 33 M.J. 300, 301 (C.M.A. 1991) (citing W. Winthrop, *Military Law and Precedents* 291 (2d ed. 1920 Reprint)). Mistake of fact remains a well-recognized defense. MCM, *supra* note 2, R.C.M. 916(j).

n18 *United States v. Carr*, 18 M.J. 297, 301 (C.M.A. 1984).

n19 MCM, *supra* note 2, R.C.M. 916. Notably, "an accused is not required to testify in order to establish a mistake-of-fact defense." *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) (citing *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F.1998)).

n20 Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256 (2006). Many of these offenses were previously enumerated under Article 134.

n21 This was consistent with a modern trend changing the focus of a prosecution from the state of mind of the alleged victim to the conduct of an accused. See *United States v. Neal*, 68 M.J. 289, 299 (C.A.A.F. 2010) (discussing *Russell v. United States*, 698 A.2d 1007 (D.C. 1997)).

n22 UCMJ art. 120(t)(14) (2007), 119 Stat. 3136, 3262 (2006).

n23 UCMJ art. 120(t)(15) (2007), 119 Stat. 3136, 3262 (2006).

n24 UCMJ art. 120(r) (2007), 119 Stat. 3136, 3259 (2006).

n25 UCMJ art. 120(t)(16) (2007), 119 Stat. 3136, 3262 (2006).

n26 *United States v. Neal*, 68 M.J. 289, 300 (C.A.A.F. 2010). This is so because if the alleged victim consented to the sexual contact then the contact was necessarily not caused by force. Mere submission to force is not consent. UCMJ art. 120(g)(8)(A).

n27 *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011). This is so because a person who actually consents is necessarily capable of consenting.

n28 *Id.* at 343.

n29 *Id.* at 345.

n30 *Id.*

n31 See *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (non-prejudicial error to give constitutionally acceptable instruction inconsistent with statute); *United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012) (*per curiam*) (no error where military judge explained reasons for instructions inconsistent with statute).

n32 Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404 (2011).

n33 *Id.*

n34 *Id.*, UCMJ art. 120(g)(8) (2012).

n35 *Id.*, UCMJ art. 120(b)(3) (2012).

n36 *Id.*, UCMJ art. 120(f) (2012).

n37 One exception to this is an offense involving bodily harm where the bodily harm is a nonconsensual sexual contact. *See* UCMJ art. 120(g)(4). Another is an offense involving the nonconsensual administration of a drug, intoxicant, or similar substance. *See* UCMJ art. 120(a)(5).

n38 A legal term of art. *See* UCMJ art. 120(g)(1) (2012).

n39 UCMJ art. 120(a)(1) (2012).

n40 UCMJ art. 120(g)(7).

n41 *See Prather, 69 M.J. at 341; Neal, 68 M.J. at 290.*

n42 *See supra* note 37.

n43 *See* UCMJ art. 120(g)(8).

n44 UCMJ art. 120(g)(8)(b).

n45 *Id.*

n46 UCMJ art. 120(g)(8)(A). *See Neal, 68 M.J. at 300.*

n47 *See Prather, 69 M.J. at 343.*

n48 UCMJ art. 120(g)(8)(B).

n49 UCMJ art. 120(b)(1)(B) and 120(d).

n50 UCMJ art 120(g)(3).

n51 UCMJ art. 120(a)(5).

n52 *See United States v. Wilson*, 66 M.J. 39, 40 (C.A.A.F. 2006).

n53 *See* UCMJ art. 120(g)(1)(B) (specific intent required for sexual act not involving contact between the penis and the vulva, anus, or mouth) and 120(g)(2) (specific intent required for sexual contact).

n54 MCM, *supra* note 2, R.C.M. 916(j)(1).

n55 *Id.*

n56 *See* UCMJ art. 120(g)(1)(B) (defining sexual act) and 120(g)(2)(A) (defining sexual contact).

n57 MCM, *supra* note 2, R.C.M. 916(j)(1).

n58 UCMJ art. 120(b)(2) and (3); UCMJ art. 120(d).

n59 *Id. Contra supra* note 57 and accompanying text.

n60 *Adams*, 33 *M.J.* at 301.

n61 *Carr*, 18 *M.J.* at 301.

n62 *See Staples v. United States*, 511 *U.S.* 600, 606 (1994). *See also Wilson*, 66 *M.J.* at 40.

n63 "If the record contains 'some evidence' of the affirmative defense of mistake of fact 'to which the military jury may attach credit if it so desires,' the military judge is required to instruct the panel on that affirmative defense." *DiPaola*, 67 *M.J.* at 99 (quoting *United States v. Hibbard*, 58 *M.J.* 71, 72 (C.A.A.F.2003)).

n64 *See supra* notes 38-39 and accompanying text.

n65 *See supra* note 46 and accompanying text.

n66 UCMJ art. 120(g)(8).

n67 UCMJ art. 120(g)(8)(B).

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