

## “Overshift”<sup>1</sup>

### *The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*

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The Fiscal Year (FY) 2006 National Defense Authorization Act employed an unprecedented strategy to combat the threatening problem of sexual assault in the military.<sup>3</sup> Congress completely overhauled Article 120 of the Uniform Code of Military Justice (UCMJ),<sup>4</sup> removing “without consent” as an element of rape and other sexual assaults and opting instead to make consent and mistake of fact as to consent affirmative defenses.<sup>5</sup> As an added measure, Congress took the rare step of shifting the burden of proof to the accused to prove the existence of all affirmative defenses by a preponderance of the evidence.<sup>6</sup> In a final, unprecedented step, Congress shifted the burden *back* to the government to disprove, beyond a reasonable doubt, the existence of a defense after the accused meets his burden on the initial burden shift.<sup>7</sup>

This article contends, however, that depending on how the trial court implements the new Article 120’s burden-shift, it will violate either the Fifth Amendment’s guarantee of due process or the Sixth Amendment’s promise of an absolute right to trial by jury. As a necessary starting point in its analysis, this article uses Part I to articulate the precise statutory language of the new Article 120’s burden-shifting scheme. Part I also highlights the silence of legislative history and the absence of similar schemes in other jurisdictions that could guide the application of the new Article 120. Part II considers the constitutionality of burden-shifting schemes generally, concluding that some of these schemes are constitutional.

The analysis in Part III shows how the new Article 120’s burden-shifting scheme is unconstitutional. Because the new rape statute provides no legislative history or other clues as to how the burden-shift will operate, Part III examines several possible ways in which the burden-shift could unfold at trial. Each of these possibilities raises substantial constitutional concerns. In conclusion, Part IV briefly discusses how military judges, trial counsel, and defense counsel might resolve these significant constitutional problems at trial.

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<sup>1</sup> The “overshift” is an unconventional and controversial defense employed in the game of baseball. See Chris Vining, *Athletes Kill My Braincells*, <http://www.thesportscritics.com/listingsEntry.asp?ID=363634&PT=Chris+Vining&fc=18&ic=All> (last visited Aug. 16, 2007).

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<sup>3</sup> See TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT: EXECUTIVE SUMMARY vii-xi (Apr. 2004), available at <http://www.defenselink.mil/News/May2004/d20040513SATFReport.pdf> (citing numerous problems within the DOD systemic response to sexual assaults from incomplete and nonintegrated data to a general inability to properly investigate and prosecute cases in a deployed setting). See also SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005), [http://www.defenselink.mil/dodgc/php/docs/subcommittee\\_reportMarkHarvey1-13-05.doc](http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc), at 2-3 [hereinafter SEX CRIMES AND THE UCMJ]. In the Ronald W. Reagan National Defense Authorization Act for FY 2005, Congress directed the Secretary of Defense to review and make recommendations for change to, among other things, the Uniform Code of Military Justice (UCMJ) to better address sexual assault problems in the military. *Id.* at 1. The Sex Crimes and the UCMJ Report meets the congressional requirement. The report concludes that sexual assault offenses “negatively affect morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units.” *Id.* at 2-3. See also Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, ARMY LAW. (forthcoming Sept. 2007) (surveying the field of studies conducted on the prevalence of sexual assault in the military and concluding that sexual assaults have an adverse impact on military readiness and morale in the military).

<sup>4</sup> Some of the most dramatic changes include: (1) changing the title of Article 120 from “Rape” to “Rape, Sexual Assault, and Other Sexual Misconduct,” (2) increasing the number of Article 120 offenses from two—rape and carnal knowledge—to fourteen, and (3) expanding the nature of the physical act punished by Article 120 from narrowly-defined sexual intercourse to broadly-defined “sexual act” and “sexual contact.” See generally National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256 (2006). The new Article 120 goes into effect on 1 October 2007. *Id.* § 552, 119 Stat. at 3263.

<sup>5</sup> *Id.* § 552, 119 Stat. at 3262.

<sup>6</sup> *Id.* Only two other affirmative defenses available in the military justice system—as established by the UCMJ, recognized by the *Manual for Courts-Martial (MCM)*, or developed by caselaw—shift the burden of proof to the accused. First, the *MCM* requires the accused to prove mistake of fact as to the victim’s age in a carnal knowledge case by a preponderance of the evidence. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(j)(2) (2005) [hereinafter *MCM*]. Second, the *MCM* requires the accused to prove a lack of mental responsibility in any case by clear and convincing evidence. See *MCM, supra*, R.C.M. 916(k)(3)(A).

<sup>7</sup> § 552, 119 Stat. at 3262. See the discussion in Part II *infra* for an argument as to why this second burden shift is unprecedented in criminal law in any jurisdiction.

## Part I: The New Article 120—Affirmative Defenses and Burden-Shifting

As stated above, the new Article 120 no longer requires the government to prove, as an element of rape and other forms of sexual assault, that the accused committed the offense “without the consent”<sup>8</sup> of the victim. Instead, the new Article 120 makes consent, and mistake of fact as to consent, affirmative defenses to some of the statute’s sexual assault offenses.<sup>9</sup> The statute’s language describes how these affirmative defenses should operate:

The term ‘affirmative defense’ means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the accused meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.<sup>10</sup>

With these three short sentences, the new Article 120 turns decades of military jurisprudence on affirmative defenses on its head.<sup>11</sup> An examination of the brief passage above prompts at least two immediate questions. First, who decides when the accused has met his initial burden: the military judge or the panel? Second, when does the military judge or the panel decide the accused has met his initial burden: as an interlocutory matter or upon conclusion of the trial on the merits? The analysis of these questions guides the remainder of this article.

### *Does Legislative History Guide the Application of Article 120’s Burden-Shifting Scheme?*

Unfortunately, Congress has not explained how this burden-shifting scheme should work. Congressional reports on the FY2006 National Defense Authorization Act do little more than acknowledge the new sexual assault statute as part of the larger Act.<sup>12</sup> A review of the Congressional Record reveals no debate on affirmative defenses under the new Article 120.

Digging deeper into the new Article 120’s legislative history reveals that the statute’s burden-shifting scheme originated within the Department of Defense (DOD). In 2004, Congress directed DOD to review the military justice system’s handling of sexual assault offenses.<sup>13</sup> Congress required a report from DOD with recommendations to: (1) modernize the military’s sexual assault scheme, and (2) align the military’s sexual assault scheme more closely with federal law prohibiting sexual assaults.<sup>14</sup> In 2005, DOD issued its report to Congress offering six options to address concerns with sexual assault in the military.<sup>15</sup> Congress ultimately drafted the new Article 120, basing substantial portions of the new statute—including the new statute’s burden-shifting scheme—on Option 5 of the DOD report.<sup>16</sup>

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<sup>8</sup> “By force and without consent” is an element of rape in the current Article 120. See MCM, *supra* note 6, pt. IV, ¶ 45b(1)(b).

<sup>9</sup> Specifically, the new Article 120 establishes consent or mistake of fact as to consent as affirmative defenses to rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. See § 552, 119 Stat. at 3259.

<sup>10</sup> See *id.* § 552, 119 Stat. at 3262.

<sup>11</sup> Congress enacted the UCMJ in 1950. See INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE preface (William S. Hein & Co. Books) (2000). As will be discussed in Part III *infra*, the new Article 120’s burden-shifting scheme is not only novel to military practice, but departs substantially from decades of rules and principles guiding military case law and even U.S. Supreme Court jurisprudence.

<sup>12</sup> See H.R. REP. NO. 109-089, at 332 (2005) (devoting only one paragraph to summarize the change to Article 120 without mentioning the new Article 120’s burden-shifting scheme); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.) (noting that the Senate did not include a revision of Article 120 in its bill and is otherwise silent on the new Article 120’s burden-shifting scheme).

<sup>13</sup> See National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1920-1 (2004).

<sup>14</sup> See SEX CRIMES AND THE UCMJ, *supra* note 3, at 1; § 571, 118 Stat. at 1920-1.

<sup>15</sup> See SEX CRIMES AND THE UCMJ, *supra* note 3, at 3-5.

<sup>16</sup> See LTC Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 27 (identifying Option 5 as the basis for the new Article 120). Additionally, the DOD report offered a primary and secondary recommendation. The report strongly recommended no change to either the UCMJ or the MCM, arguing that case law had developed the UCMJ and the MCM to a point where any form of sexual assault could be prosecuted under the UCMJ. See SEX CRIMES AND THE UCMJ, *supra* note 3, at 1. The report recommended, however, that Congress use Option 5 as the basis for any statutory changes to the UCMJ in the event Congress deemed change necessary. See SEX CRIMES AND THE UCMJ, *supra* note 3, at 1, 3.

The DOD report is equally silent on how the new Article 120's burden-shifting scheme should operate. Option 5, in a section titled "Source and Rationale for Each Subsection," simply memorializes the burden-shift:

Once these two affirmative defenses are established by a preponderance of the evidence, the Government is required to prove beyond a reasonable doubt that the victim did not consent, and/or that the accused was not reasonably mistaken as to consent.<sup>17</sup>

Option 5 suggests that it borrowed this burden-shift from the District of Columbia (D.C.) Code, citing two cases as authority.<sup>18</sup> The D.C. Code, however, stops after shifting the burden to the criminal defendant to prove consent by a preponderance of the evidence.<sup>19</sup> Option 5, as stated earlier, takes the additional step of shifting the burden back to the government to prove the affirmative defense did not exist beyond a reasonable doubt. Neither the *Russell* decision nor the *Hicks* decision cited by Option 5 expands the D.C. Code to incorporate a second shift back to the government after a criminal defendant meets his burden.<sup>20</sup>

The *Russell* and *Hicks* opinions do, however, give us some insight into where this new Article 120 burden shift originated. Consider the jury instructions from *Russell*:

Consent by the victim is a defense to the charge of first degree sexual abuse which the defendants must establish by a preponderance of the evidence . . . . If you find that Mr. Russell has proven by a preponderance of the evidence that [the complainant] consented to the sexual act, then the government must prove beyond a reasonable doubt that the complainant's consent was not voluntary.<sup>21</sup>

Consider also the jury instructions from *Hicks*:

Now, consent by the victim is a defense to the charge of first degree sexual abuse which the defendant must establish by a preponderance of the evidence . . . . If you find that Mr. Hicks has proven by a preponderance of the evidence that S.H. agreed to the sexual act, then the Government must prove beyond a reasonable doubt that the complainant's consent was not voluntary.<sup>22</sup>

These two sets of trial court instructions, of course, are virtually identical to the burden-shifting scheme proposed by Option 5 and ultimately adopted by the drafters of the new Article 120. Facially, then, it may appear that D.C. Circuit case law has, in fact, expanded the D.C. Code to include a second burden-shift back to the government. Option 5—and as a result, the new Article 120—however, fails to account for the fact that the D.C. Circuit Court of Appeals held both of these sets of trial instructions to be constitutionally inadequate, reversing the convictions in each case.<sup>23</sup>

While both the *Russell* and *Hicks* opinions based their holdings on the separate issue of the extent to which the given instructions limited the juries' consideration of evidence of consent, one should not conclude that the above instructions constitute the state of the law on burden-shifting in the D.C. Circuit. The *Russell* opinion never discusses whether the above excerpt of the trial judge's instructions on burden-shifting passes constitutional muster. Instead, the opinion concludes that the D.C. Code's statutory provision of a single burden-shift to the criminal defendant to prove consent by a preponderance of

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<sup>17</sup> See SEX CRIMES AND THE UCMI, *supra* note 3, at 249.

<sup>18</sup> See *id.* Specifically, Option 5 relies on *Hicks v. United States*, 707 A.2d 1301 (D.C. App. 1998) and *Russell v. United States*, 698 A.2d 1007 (D.C. App. 1997).

<sup>19</sup> See D.C. CODE § 22-3007 (2007). The *Russell* Court applied the D.C. Code's predecessor, D.C. Code § 22-4107. See *Russell*, 698 A.2d at 1009. The statute was merely renumbered, however, and the substance of the statute has remained the same from the *Russell* decision in 1997 through the drafting of Option 5 and the writing of this article. Other commentators have noted that the D.C. Code stops short of making the second shift back to the government. See Johnson, *supra* note 16, at 28; Captain Gregory Marchand, Information Paper: Affirmative Defenses Under the Revised Article 120, at 5 (Nov. 5, 2006) [hereinafter Marchand Information Paper] (on file with author).

<sup>20</sup> See *Russell*, 698 A.2d at 1007 (conviction reversed and new trial ordered because of faulty instructions); *Hicks*, 707 A.2d at 1301 (conviction reversed and new trial ordered because of faulty instructions).

<sup>21</sup> *Russell*, 698 A.2d at 1011.

<sup>22</sup> *Hicks*, 707 A.2d at 1303.

<sup>23</sup> *Russell*, 698 A.2d at 1016. *Hicks*, 707 A.2d at 1303.

the evidence is constitutional.<sup>24</sup> Likewise, the *Hicks* opinion does not discuss the constitutionality of the above excerpt of the trial judge's instructions. D.C. Form Instruction 4.61, which post-dates *Russell* and *Hicks*, supports the ultimate conclusion that the D.C. Circuit has no second burden-shift to the government following the criminal defendant's successful showing that the affirmative defense exists by a preponderance of the evidence:

If the defendant has met his/her burden of proving consent by a preponderance of the evidence (that is, that it is more likely than not that [name the complainant] consented), then you must find him/her not guilty of [name the charge(s)]. If s/he has not met that burden, then it is your duty to find the defendant guilty of [name the charge(s)].<sup>25</sup>

At best, Option 5 and the legislative history to the new Article 120 offer shaky footing for the new Article 120's burden-shifting scheme. At worst, each is completely silent on both the origin and the application of the novel scheme. Without guidance from the documents supporting and establishing the new Article 120, this article looks next to other jurisdictions to draw persuasive authority for direction on implementing the new Article 120's burden-shift.

#### *Do Any Similar Civilian Statutory Burden-Shifting Schemes Inform the Military's Application of Article 120's Burden-Shifting Scheme?*

Put simply, the new Article 120's statutory burden-shifting scheme is unparalleled in any U.S. criminal law jurisdiction or system, civilian or military. While other jurisdictions place the burden of demonstrating the existence of an affirmative defense on a criminal defendant,<sup>26</sup> none give the government a "second bite at the apple."<sup>27</sup> In other words, no other jurisdiction provides the government with the opportunity to disprove the existence of a defense after a criminal defendant successfully proves its existence, albeit by a lesser standard. To find any analogous procedural burden-shift, one has to turn to civil statutes such as Title VII of the Civil Rights Act of 1964.<sup>28</sup>

The Supreme Court's landmark decision, *McDonnell Douglas Corp. v. Green*,<sup>29</sup> details the shifting burdens in a Title VII discrimination case. To start, the employee carries the initial burden to establish a *prima facie* case of discrimination.<sup>30</sup> Upon the employee's successful demonstration of a *prima facie* case of discrimination, the burden shifts to the government to articulate a legitimate, nondiscriminatory purpose for the corporate or government action giving rise to the Title VII claim.<sup>31</sup> Once the government has stated its legitimate purpose for a given action, the burden shifts back to the employee to show that the government's stated purpose was actually a pretext for illegal discrimination.<sup>32</sup>

At first blush, the *McDonnell Douglas* procedure looks like a promising analogy to help guide the military justice system's navigation through the new Article 120's burden-shifting scheme. The employee's burden to establish a *prima facie* case loosely parallels the "some evidence" standard for raising a special, or affirmative, defense pursuant to Rule for Courts-Martial (RCM) 920.<sup>33</sup> Like the Title VII burden-shift from the employee to the government following the *prima facie* case,

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<sup>24</sup> *Russell*, 698 A.2d at 1016.

<sup>25</sup> See Instruction 4.61, Consent Defense to Sexual Abuse, available at <http://www.pdsdc.org/calendar/summerseries/ss06222006/JuryInstruction4.61.pdf> (last visited June 4, 2007). Captain Marchand makes the same observation in his information paper on the new Article 120's burden-shifting scheme. Marchand Information Paper *supra* note 19, at 5. Lieutenant Colonel Johnson also highlights the problematic approach of relying on faulty instructions as the basis of the new Article 120's burden-shifting scheme. Johnson, *supra* note 16, at 27.

<sup>26</sup> See the discussion of the constitutionality of burden-shifting in Part II, *infra*.

<sup>27</sup> Marchand Information Paper, *supra* note 19, at 5 (referring to the second shift in the new Article 120's burden-shifting scheme as "another bite at the apple").

<sup>28</sup> 42 U.S.C.S. § 2000-3 (LEXIS 2007).

<sup>29</sup> 411 U.S. 792, 802 (1973).

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 804-05.

<sup>33</sup> See MCM, *supra* note 6, R.C.M. 920(e) discussion (stating, "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.").

the new Article 120 shifts the burden to the accused after “some evidence” raises the affirmative defense. Back in the Title VII case, once the government articulates a legitimate, nondiscriminatory purpose for a given action, the burden shifts back to the employee to show the stated purpose was merely a pretext. Similarly, in a new Article 120 case, once the accused establishes the existence of the affirmative defense, the burden shifts back to the government to disprove the existence of that affirmative defense.

Upon closer examination, however, the analogy between Title VII and the new Article 120 does not survive. First, the obvious problems of importing civil law principles into criminal law prosecutions prevent serious use of Title VII to guide the way forward in the application of the new Article 120. Civil law, of course, requires a lower ultimate standard of proof than the criminal law “beyond a reasonable doubt” standard.<sup>34</sup>

Second, Title VII cases begin with both parties agreeing that the underlying act—a refusal to hire, for example—has, in fact, occurred.<sup>35</sup> The subsequent litigation focuses solely on the question of why the underlying act occurred, which is resolved by navigating the burden-shifting scheme. In a new Article 120 prosecution, the parties must both litigate whether the underlying act occurred—and also resolve the narrower question of whether the affirmative defense exists, using the new Article 120’s burden-shifting scheme. The subtle procedural difference between a Title VII case and a new Article 120 prosecution is that the parties in a Title VII case need only juggle one task at trial, while the parties in a new Article 120 prosecution must juggle two. Figuring out which task comes before the other, or whether the two tasks in a new Article 120 prosecution are handled simultaneously compounds, rather than resolves, the problem analyzed below. Analogizing to Title VII, a single-task proceeding, helps little in applying the new Article 120 burden-shifting scheme.

Finally, the distinction between a burden of persuasion and a burden of production eliminates Title VII as a viable analogy on which to rely. The Supreme Court revisited its decision in *McDonnell Douglas* eight years later in its *Burdine* decision.<sup>36</sup> In *Burdine*, the Supreme Court applied *McDonnell Douglas* to a woman’s claim of gender discrimination.<sup>37</sup> In particular, the Supreme Court considered whether or not the Court of Appeals for the Fifth Circuit was correct when it held that the initial shift to the government to articulate a legitimate, non-discriminatory purpose for a given employment action required the government to prove that purpose by a preponderance of the evidence.<sup>38</sup>

In *Burdine*, the Supreme Court decided that the progressive burden shifts in *McDonnell Douglas* merely shifted burdens of production, not burdens of persuasion.<sup>39</sup> Two rationales support the *Burdine* opinion: (1) the burden of persuasion on a particular issue, as an established principle of evidence, never shifts,<sup>40</sup> and (2) the *McDonnell Douglas* progressive burden shifts should “bring the litigants and the court expeditiously and fairly to [the] ultimate question.”<sup>41</sup> Note that the Court references the “ultimate question” in the singular – the goal is not to answer two ultimate questions.

The new Article 120’s burden-shifting scheme operates contrary to *Burdine*’s interpretation of *McDonnell Douglas*. As stated above, the new Article 120’s burden-shifting scheme compels the finder of fact to first ask, based on the accused’s case, whether or not the affirmative defense exists. If the fact finder’s answer is “yes,” then the new Article 120 would ask a second time, based on the government’s case, the identical ultimate question. *Burdine*, as an extension of *McDonnell Douglas*, then, offers little insight as to how the new Article 120’s burden-shifting scheme will operate.<sup>42</sup>

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<sup>34</sup> See PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 145 (1984) (acknowledging the lower burden of persuasion in civil trials); MCM, *supra* note 6, R.C.M. 918(c) (memorializing the “beyond a reasonable doubt” standard in the military justice system).

<sup>35</sup> See *McDonnell Douglas*, 411 U.S. at 802.

<sup>36</sup> Texas Dep’t of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981).

<sup>37</sup> See *id.* at 252-53.

<sup>38</sup> See *id.* at 249.

<sup>39</sup> See *id.* at 254-55.

<sup>40</sup> See *id.* at 253 (citing 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) (stating, “the burden of persuasion ‘never shifts.’”)).

<sup>41</sup> See *id.*

<sup>42</sup> Some may yet argue that the accused’s initial burden under the new Article 120 operates merely as a burden of production. The plain statutory language of the new Article 120 does not permit this reading. The language itself requires that the accused prove the existence of the affirmative defense “by a preponderance of the evidence.” See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3262 (2006). By articulating a burden of persuasion standard (“by a preponderance of the evidence”), the statute leaves no room for the debate that occurred in the context of Title VII and the *Burdine* opinion. See ROBINSON, *supra* note 34, at 145 (defining a burden of persuasion as, “The degree to which the trier of fact must be

Indeed, nothing in the legislative history of the new Article 120; nothing in the criminal law, civilian or military; and nothing in civil law hints at the application of the new Article 120's novel burden-shifting scheme.<sup>43</sup> Absent any internal or external guidance, this article turns first to analyzing the constitutionality of burden-shifting schemes generally.

## Part II: The Constitutionality of Burden-Shifting Schemes Generally

### *The Supreme Court Decisions on Burden-Shifting in the Context of Affirmative Defenses*

As recently as last term, the Supreme Court considered and upheld the constitutionality of shifting the burden onto a criminal defendant to prove at trial the existence of an affirmative defense.<sup>44</sup> Indeed, since the late nineteenth century, the Supreme Court has repeatedly addressed the question of when a jurisdiction may require the criminal defendant to assume a burden of persuasion at trial.<sup>45</sup> Supreme Court jurisprudence has established some relatively clear principles to guide shifting the burden to a criminal defendant.

Generally speaking, the government may never reduce its own burden of proof in a case by requiring the defense to disprove an element of a charged offense. In *U.S. v. Davis*, for example, the Supreme Court considered the propriety of the trial court's requirement that Davis bear the burden of proving his insanity as a defense to his murder charge.<sup>46</sup> In *Davis*, the Supreme Court found that the federal definition of murder necessarily included, as an element of the offense, that a criminal defendant was of "sound memory and discretion," and that "he had sufficient mind to comprehend the criminality of right and wrong."<sup>47</sup>

To the *Davis* Court, the question of insanity, as a defense, and mental capacity, as an element, were inseparable.<sup>48</sup> Placing the burden on Davis to prove his insanity was the effective equivalent of requiring him "to establish his innocence, by proving that he is not guilty of the crime charged."<sup>49</sup> Furthermore, "The burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted."<sup>50</sup>

Following the principle established in *Davis*, the Supreme Court has subsequently upheld only those instances of shifting the burden to a criminal defendant where the affirmative defense does not require the defendant to disprove an element of the offense charged. Revisiting the insanity defense to a murder prosecution, the Court in *Leland v. Oregon* upheld a state law requiring the defendant to prove his insanity beyond a reasonable doubt.<sup>51</sup> For the *Leland* Court, the elements were

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persuaded in order to decide an issue in favor of the burdened party.") The burden of production, in contrast, is usually articulated in terms of quantities of evidence: "some evidence" or "more than a scintilla." See ROBINSON, *supra* note 34, at 136. *Burdine* proved necessary because neither Title VII nor *McDonnell Douglas* expressly assigned a burden of persuasion standard—or any evidentiary standard, for that matter—to the government's responsibility to show a legitimate, nondiscriminatory purpose for a given employment practice.

<sup>43</sup> Curiously, one of Congress's stated objectives of the new Article 120 was to align "the statutory language of sexual assault law under the UCMJ with federal law under sections 2241 through 2247 of Title 18, United States Code." H.R. REP. NO. 109-89, at 332 (2005). Congress failed to align the new Article 120's burden-shifting scheme with federal law on defenses, as no federal defense contains the new Article 120's double burden shift.

<sup>44</sup> See generally *Dixon v. United States*, 126 S. Ct. 2437, 2447-48 (2006).

<sup>45</sup> See *Davis v. United States*, 160 U.S. 469 (1895) (holding that the criminal defendant did not have the burden to prove lack of mental capacity in a premeditated murder prosecution); *Leland v. Oregon*, 343 U.S. 790 (1952) (holding that the criminal defendant did have the burden to prove insanity in a premeditated murder prosecution where state statute assigned the burden to the defendant); *Martin v. Ohio*, 480 U.S. 228 (1987) (holding that the criminal defendant did have the burden to prove self-defense in an aggravated murder prosecution where state statute assigned the burden to the defendant).

<sup>46</sup> See *Davis*, 160 U.S. at 478-79.

<sup>47</sup> See *id.* at 484-85.

<sup>48</sup> See *id.* at 488.

<sup>49</sup> See *id.* at 487.

<sup>50</sup> See *id.*

<sup>51</sup> See *Leland v. Oregon*, 343 U.S. 790, 802 (1952). The Supreme Court declined to apply *Davis*, which the Court viewed as a federal rule, not a constitutional one. *Id.* at 797.

sufficiently distinct from the defense, and the instructions were sufficiently clear, that the government never relinquished the burden of proving the defendant's guilt beyond a reasonable doubt.<sup>52</sup>

The permissibility of shifting the burden to a criminal defendant extends beyond the insanity defense to other defenses, provided the defendant is not required to disprove an element of the offense. In *Martin v. Ohio*, the Supreme Court upheld a burden-shift to the criminal defendant to prove self-defense in a murder prosecution.<sup>53</sup> The Court held that the *Martin* burden-shift avoided constitutional due process concerns because the affirmative defense did not "seek to shift to Martin the burden of proving any of [the offense's] elements."<sup>54</sup> Using identical reasoning, the Supreme Court upheld a federal burden-shift on the affirmative defense of duress raised to challenge a firearm prosecution.<sup>55</sup> The Court remains vigilant, however, ready to halt any government tendency to unconstitutionally transfer its burden to prove all elements of an offense to a criminal defendant.<sup>56</sup>

### *Military Jurisprudence on Burden-Shifting in the Context of Affirmative Defenses*

Shifting the burden to the accused to prove an affirmative defense is not unprecedented in the military justice system. As noted earlier, two defenses require the accused to shoulder the burden of proof: mistake of fact as to age in a carnal knowledge prosecution, and lack of mental responsibility.<sup>57</sup> The accused must prove mistake of fact as to age in a carnal knowledge case by a preponderance of the evidence.<sup>58</sup> The accused must prove lack of mental responsibility by clear and convincing evidence.<sup>59</sup> A survey of military appellate cases reveals no constitutional challenges to the two existing burden-shifting schemes in the military justice system.<sup>60</sup>

While the Supreme Court has upheld the government's ability to shift the burden to criminal defendants in certain prescribed ways against constitutional attack, and while the current military burden-shifting schemes have received no rigorous appellate scrutiny, the new Article 120's burden-shifting scheme nonetheless faces serious constitutional challenges. Part III will now consider a handful of ways in which a trial court could potentially implement the new Article 120's burden-shifting scheme. Each option, however, fails constitutional muster.

### **Part III: Why the New Article 120's Burden-Shifting Scheme is Unconstitutional**

This article has established some important benchmarks that dictate how Part III should proceed. First, the new Article 120 is silent on how, procedurally, the statute's double burden-shift should transpire. Second, no legislative history discusses or explains how the trial court should proceed through the statute's burden-shifting scheme. Third, no civilian jurisdiction, criminal or civil, employs an analogous double burden-shift to guide the application of the new Article 120's burden-shifting scheme. These three benchmarks raise concerns about whether the new Article 120's burden-shifting scheme enjoys the

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<sup>52</sup> See *id.* at 795-96.

<sup>53</sup> See *Martin v. Ohio*, 480 U.S. 228, 233 (1987).

<sup>54</sup> See *id.* at 233.

<sup>55</sup> See *Dixon v. United States*, 126 S. Ct. 2437, 2447-48 (2006).

<sup>56</sup> See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). The Child Pornography Prevention Act (CPPA) contained an affirmative defense requiring the criminal defendant to disprove an element of the offense. *Id.* While the Court did not decide the constitutionality of the burden-shift contained in the CPPA, the Court nonetheless fired a salvo at the government: "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Id.*

<sup>57</sup> See MCM, *supra* note 6, R.C.M. 916(b).

<sup>58</sup> See *id.* R.C.M. 916(j)(2).

<sup>59</sup> See *id.* R.C.M. 916(k)(3)(A).

<sup>60</sup> Instead, appellate challenges to these two affirmative defenses focus, without constitutional protest, almost exclusively on whether the accused did, in fact, carry his burden at trial. See generally *United States v. Martin*, 56 M.J. 97 (2001) (holding accused had not met his burden of clear and convincing evidence to prove lack of mental responsibility); *United States v. Magee*, ACM S 29513, 2000 CCA LEXIS 267 (A.F. Ct. Crim. App. Nov. 27, 2000) (unpublished) (holding accused had not met his burden of a preponderance of the evidence to prove mistake of fact as to age); *United States v. Jones*, No. 200001846, 2004 CCA LEXIS 190 (N-M. Ct. Crim. App. Aug. 20, 2004) (unpublished) (holding accused had not met his burden of a preponderance of the evidence to prove mistake of fact as to age).

protection of the general principle that burden-shifting schemes are constitutional when they do not require an accused to disprove an element of the offense with which he is charged.

In the absence of any procedure to analyze, Part III discusses both the potential ways to navigate the double burden-shift and the problems with each. Two questions will illuminate each alternative path through the new Article 120's burden-shifting scheme. First, who makes the initial finding that the accused has met his burden by a preponderance of the evidence: the military judge or the panel? Second, when will the fact-finder make the initial finding: as an interlocutory matter or on findings?

### *The Military Judge as Fact-Finder on the Accused's Initial Burden*

The military judge could make the finding that the accused has met his initial burden in one of two contexts: either as the military judge sitting alone, or as the military judge with a panel.<sup>61</sup> Consider first the scenario wherein the military judge sitting with a panel finds, as an interlocutory matter, that the accused has met his burden of persuasion. The burden then shifts to the government to prove beyond a reasonable doubt that the affirmative defense does not exist. The panel, as the chosen fact-finder in the case, would then have to find whether or not the government carried its burden. Setting aside questions about making the initial finding as an interlocutory matter for the moment, the notion of splitting the fact-finding responsibilities on the ultimate question of guilt between the military judge and the panel violates the Sixth Amendment right to trial by jury<sup>62</sup> or, in the alternative, the due process clause of the Fifth Amendment.

Beginning with the proposition that the accused has a Sixth Amendment right to a trial by members,<sup>63</sup> Supreme Court jurisprudence presents the logical place to launch analysis of that right. Few reported Supreme Court cases, however, deal with the Sixth Amendment in the context of an outright denial of trial by jury.<sup>64</sup> Instead, the Supreme Court considers Sixth

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<sup>61</sup> The accused may elect the composition of the court-martial. See generally MCM, *supra* note 6, R.C.M. 903. If the accused does not elect to be tried by a panel composed of enlisted members or a military judge alone, then the default composition is a court-martial composed of officers. See *id.* R.C.M. 903(c)(3).

<sup>62</sup> A Sixth Amendment analysis of the new Article 120's burden-shifting scheme starts at a counterintuitive point: military jurisprudence suggests that servicemembers do not enjoy a Sixth Amendment right to trial by jury. See *U.S. v. Witham*, 47 M.J. 297, 301 (1997) (stating, "We note that a military accused has no right to a trial by jury under the Sixth Amendment."); FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-11.00 (3rd ed. 2006). *U.S. v. Lambert*, 55 M.J. 293, 295 (2001) (stating, "A military accused has no Sixth Amendment right to a trial by jury.")

*Witham*, however, does acknowledge an alternative source for the military accused's right to jury trial: "He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." See *Witham*, 47 M.J. at 301 (citing UCMJ art. 16 (2005)). The servicemember's right to a jury trial, then, becomes a procedural due process concern. See discussion at "*Specific Problems with Treating the Initial Finding as an Interlocutory Matter*," *infra*.

Several factors nonetheless suggest that the current state of the military's Sixth Amendment jurisprudence does not foreclose a Sixth Amendment attack on the new Article 120's burden-shifting scheme. The first military case to consider the Sixth Amendment's applicability to courts-martial generally dealt with the Sixth Amendment right to counsel and analyzed the Sixth Amendment right to jury trial in dicta merely to draw a distinction between the two. See *U.S. v. Culp*, 33 C.M.R. 411, 417-20 (C.M.A. 1963). Virtually all cases since *Culp* that have declared that the Sixth Amendment right to trial by jury does not apply to the military have: (1) done so in dicta, and (2) dealt with the panel selection process, an issue the Supreme Court, in contrast, has held was an equal protection right, not a Sixth Amendment right. See, e.g., *U.S. v. Tulloch*, 47 M.J. 283, 285 (1997) (citing *U.S. v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988)). No decision has squarely held that the Sixth Amendment right to trial by jury does not apply to the military.

Furthermore, the two Supreme Court cases most heavily relied upon by military courts for the proposition that the Sixth Amendment right to jury trial does not apply to the military are holdings that have nothing to do with courts-martial or U.S. servicemembers. See generally *Ex parte Milligan*, 71 U.S. 2 (1866) (holding no Sixth Amendment right to trial by jury at a military commission established in a state of martial law for an individual who was not, nor had ever been, in the U.S. military); *Ex parte Quirin*, 317 U.S. 1 (1942) (holding no Sixth Amendment right to trial by jury at a military commission established to try German "unlawful belligerents").

As a general proposition, "The protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *U.S. v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960). In this spirit, the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have demonstrated willingness over time to adopt into military jurisprudence previously unrecognized constitutional rights. See generally *Culp*, 33 C.M.R. 411 (recognizing the Sixth Amendment right to counsel in courts-martial); *U.S. v. Tempia*, 37 C.M.R. 249 (1967) (recognizing the Fifth Amendment privilege against self-incrimination established in *Miranda v. Arizona*, 384 U.S. 436 (1966)); *U.S. v. Marcum*, 60 M.J. 198 (2004) (recognizing the liberty interest established by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Finally, the Supreme Court itself has intimated that the question of the full application of the Sixth Amendment to the military is unsettled. In holding that the Sixth Amendment right to counsel did not require representation at a summary court-martial, the Supreme Court briefly mentioned divergent views on the application of the Sixth Amendment generally—including the right to trial by jury—declining to "resolve the broader aspects of this question." See *Middendorf v. Henry*, 425 U.S. 25, 33-34 (1976). The door for litigation is cracked open.

<sup>63</sup> See U.S. CONST. amend. VI. The default rule favoring trial by members in the military is implicitly captured in Article 16, UCMJ and expressly captured in RCM 903 (note 61, *supra*), permitting trials by military judge alone only when the accused meets specific request criteria. See UCMJ art. 16 (2005).

<sup>64</sup> The Supreme Court has dealt with an outright refusal of the right to a trial by jury in the context of determining whether or not the Fourteenth Amendment required the states to give a trial by jury in compliance with the Sixth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (holding that the Fourteenth Amendment requires the states to give a trial by jury in criminal prosecutions). In *Duncan*, the defendant demanded a jury trial in a simple

Amendment challenges in the context of some procedural matter arising out of a jury trial.<sup>65</sup> Importantly, the Supreme Court has fielded Sixth Amendment questions also in the context of delineating the judge's role vis-à-vis the jury within the jury trial.<sup>66</sup>

The most illuminating pair of Supreme Court cases to consider the role of the judge in a jury trial is *Blakely v. Washington*<sup>67</sup> and *U.S. v. Booker*.<sup>68</sup> These two cases explore the judge's fact-finding authority to determine sentence enhancers. *Blakely* considered a Washington state sentencing law that permitted a judge to increase a sentence beyond a statutory standard range if he made factual findings to support the increase.<sup>69</sup> In *Blakely*, the trial judge substantially increased a kidnapping sentence based on his determination of facts that were "neither admitted by petitioner nor found by a jury."<sup>70</sup> Holding that the right to a jury trial is "no mere procedural formality," the *Blakely* Court struck down the Washington state law that encroached upon the province of the jury.<sup>71</sup>

In *Booker*, the Supreme Court applied *Blakely* and its Sixth Amendment analysis to the Federal Sentencing Guidelines.<sup>72</sup> Again in *Booker*, the trial judge conducted an independent, post-trial sentencing hearing without jurors in which he found both that Booker possessed substantially more crack cocaine than had been proved at trial and that Booker was guilty of obstructing justice.<sup>73</sup> As a result, the judge sentenced Booker to approximately nine additional years of confinement.<sup>74</sup> In a split opinion evidencing frustration at the Sentencing Guidelines' effect of increasing judges' power to the detriment of juries' power,<sup>75</sup> the Supreme Court held that the jury must determine any fact supportive of a sentence enhancement.<sup>76</sup>

In order to fully understand how cases like *Blakely* and *Booker* drive the conclusion that the new Article 120's double-burden shift violates the Sixth Amendment right to jury trial, consider the principle underlying the Court's analysis:

The Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.<sup>77</sup>

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battery case and was refused by the state of Louisiana. *Id.* at 146. While the *Duncan* Court extended the Sixth Amendment right to trial by jury to state prosecutions, it still permitted judge-alone trials for petty offenses or in cases where the defendant waived his right to trial by jury. *Id.* at 158. *See also* *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (applying *Duncan* and "determining the line between "petty" and "serious" for purposes of the Sixth Amendment right to jury trial."). The Supreme Court has long held that federal law permits some petty offenses to be tried without a jury. *See Callan v. Wilson*, 127 U.S. 540, 555 (1888) (conceding some petty offenses may be tried without a jury).

<sup>65</sup> *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404, 405 (1972) (holding that the Sixth Amendment right to jury trial does not require unanimous verdicts to convict a criminal defendant); *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that a "conviction by a nonunanimous six-member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury.").

<sup>66</sup> *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 490 (1972) (announcing that the Sixth Amendment right to jury trial did not disturb "the normal rule that the admissibility of evidence is a question for the court rather than the jury.").

<sup>67</sup> *Blakely v. Washington*, 542 U.S. 296 (2004).

<sup>68</sup> *U.S. v. Booker*, 543 U.S. 220 (2005). Colonel John P. Moran suggested the analogy to *Booker* to the author following a presentation by the author on the new Article 120 on 5 June 2007.

<sup>69</sup> *Blakely*, 542 U.S. at 299.

<sup>70</sup> *Id.* at 303.

<sup>71</sup> *Id.* at 305-06.

<sup>72</sup> *Booker*, 543 U.S. at 226 (Stevens, J., plurality).

<sup>73</sup> *Id.* at 227.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 236.

<sup>76</sup> *Id.* at 244.

<sup>77</sup> *Id.* at 237.

The Supreme Court's approach of treating the delineation between a trial judge's role and a jury's role in terms of the Sixth Amendment compels military courts to question the constitutionality of permitting a military judge to make a finding of fact—that the accused has proved the existence of an affirmative defense—when the accused has elected to be tried by a panel of members. How would a panel of members “stand between” the servicemember and the government if the military judge would make a finding on essentially the ultimate question in the case? Military jurisprudence also zealously guards the province of the panel at trials by court-martial.

While military appellate courts have not fielded questions about the role of military judges or panels as Sixth Amendment challenges, the issues and language of the opinions mirror those of the Supreme Court's Sixth Amendment jurisprudence. So, while the Supreme Court, in *Lego v. Twomey*,<sup>78</sup> reached a discussion of the respective roles of judges and juries via a Sixth Amendment challenge in the context of an evidentiary ruling, the Navy-Marine Court of Military Review reached the same discussion on a similar issue using virtually identical language. In *U.S. v. Coleman*,<sup>79</sup> the Navy-Marine Court considered a case wherein the military judge held a hearing to evaluate evidence that the accused intended to offer in support of an insanity defense.<sup>80</sup> The military judge determined the evidence would be insufficient to raise the defense and prohibited the defense from offering it at trial.<sup>81</sup> The Navy-Marine Court set aside Coleman's conviction, holding that:

An accused is entitled to have the factual issues decided by the trier of fact. The military judge has no authority to hear the evidence before it is presented to the triers of fact, weigh it, and exclude it because he determines it is too weak to raise a defense requiring instruction. The weight of the evidence is a matter within the province of the fact finders. The judge here usurped the function of fact finders and *deprived the accused of his right to a trial of the facts before the members*.<sup>82</sup>

Again in *U.S. v. Tulin*,<sup>83</sup> the Navy-Marine Court set aside a conviction when the military judge attempted to perform fact-finding duties in a trial before a panel of members. In *Tulin*, the military judge, outside of the presence of the members, previewed and weighed evidence of duress, ultimately finding that the “defense [did] not exist in the case.”<sup>84</sup> Thereafter, the military judge precluded the defense from offering any evidence of duress in the case.<sup>85</sup> Relying on its opinion in *Coleman*, the Navy-Marine Court held that, “Such prelitigation of controverted issues deprives court-members of their legitimate functions and subverts the purpose for which they are assembled as a court-martial.”<sup>86</sup> Ultimately, the Navy-Marine Court held that the military judge violated both the accused's constitutional due process right and his right to a jury trial.<sup>87</sup>

As indicated above, the Sixth Amendment does not provide the only instrument with which to attack the new Article 120's double burden-shift. *U.S. v. Witham* and *U.S. v. Tulloch*<sup>88</sup> both provide that while the accused's right to trial by a panel of members does not grow out of the Sixth Amendment, Congress has nonetheless granted servicemembers the right to trial by members via UCMJ, Article 16.<sup>89</sup> As such, any intrusion on this statutory right creates a Fifth Amendment Due Process challenge for the accused to wield.<sup>90</sup> An accused could simply recast the previous Sixth Amendment analysis, then, as a Due

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<sup>78</sup> *Lego v. Twomey*, 404 U.S. 477 (1972).

<sup>79</sup> *U.S. v. Coleman*, 11 M.J. 856 (N.M.C.M.R. 1980).

<sup>80</sup> *Id.* at 857.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *U.S. v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982).

<sup>84</sup> *Id.* at 698.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Id.* at 699.

<sup>88</sup> *U.S. v. Witham*, 47 M.J. 297, 301 (1997); *U.S. v. Tulloch*, 47 M.J. 283, 285 (1997) (citing *U.S. v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988)).

<sup>89</sup> UCMJ art. 16 (2005).

<sup>90</sup> See *Witham*, 47 M.J. at 301 (citing UCMJ art. 16).

Process claim with an apparently similar conclusion: the new Article 120's double burden-shift cannot withstand constitutional muster if the military judge makes the initial finding in a trial before members.

The Court of Appeals for the Armed Forces (CAAF) has not published an opinion exploring the impact of splitting fact-finder responsibilities between the military judge and a panel of members.<sup>91</sup> Undoubtedly, based on the full weight of Supreme Court jurisprudence and of the persuasive authority of the service courts, the CAAF would adopt the same approach if asked to consider the constitutionality of the new Article 120's double burden shift. In fact, a survey of CAAF and service court opinions yields no holdings that endorse splitting fact-finder responsibilities between a military judge and a panel of members.<sup>92</sup> The analysis of legal authority on this question simply cannot permit the conclusion that an accused who invokes his right to trial by jury must suffer the military judge making the initial finding of fact as to whether or not the accused has proved the existence of an affirmative defense to his prosecution under the new Article 120.<sup>93</sup>

Of course, the military judge sitting alone does not encounter this split-fact-finding problem. The scenario involving the military judge sitting alone, however, raises its own procedural and constitutional problems. This article will now consider the constitutionality of a military judge—or any fact-finder—making, as an interlocutory matter, the initial finding that the accused has met his burden of proving an affirmative defense by a preponderance of the evidence.

### *Specific Problems with Treating the Initial Finding as an Interlocutory Matter*

In the case of a single fact-finder, the question remains: when to decide whether the accused has met his initial burden? The new Article 120's plain statutory language describes a second shift back to the government, implying the finding on the accused's initial burden must be determined as an interlocutory matter.<sup>94</sup> Whether a military judge or a panel, the fact-finder must make an initial finding in order to effectuate the second shift back to the government. Theoretically, the government should have an opportunity to present more evidence *after* the accused has met his burden and *before* the fact-finder decides the government's final burden. Otherwise, the second shift back to the government is nonsensical, as the fact-finder would be asked to consider whether or not reasonable doubt exists in the identical evidence the fact-finder just used to conclude that, more likely than not, the defense exists.

In the context of the single fact-finder, the new Article 120's double burden-shift not only defies explanation, it creates procedural due process problems. The Supreme Court explains procedural due process in *Mathews v. Eldridge*:

Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth

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<sup>91</sup> The CAAF has decided Sixth Amendment right to trial by jury challenges in other contexts. See, e.g., *U.S. v. Gray*, 51 M.J. 1 (1999) (Sixth Amendment challenge to racial bias in panel selection process); *U.S. v. Belflower*, 50 M.J. 306 (1999) (Sixth Amendment challenge to military judge's denial of individual voir dire during panel selection); *U.S. v. Mead*, 16 M.J. 270 (C.M.A. 1983) (analyzing the propriety of taking judicial notice of adjudicative facts in Sixth Amendment terms).

<sup>92</sup> Some might suggest that the accused's initial burden under the new Article 120, proving the existence of the defense by a preponderance of the evidence, really is a question of law for the military judge, not a question of fact. See Johnson, *supra* note 16, at 27-28 (suggesting—not advocating—that one potentially viable way of navigating the new Article 120's double burden shift would be to treat the accused's initial burden as a question of law). Proponents of this approach might seek to analogize the military judge's finding on the accused's initial burden to the finding on the lawfulness of an order, for example. As the author has presented lectures and classes on the new Article 120, occasionally an audience member will offer this analogy as a comment for discussion. The analogy fails, however, for a few reasons. First, the statutory standard for the initial burden is "by a preponderance of the evidence," a burden of persuasion standard associated with a finding of fact—not a question of law. See ROBINSON, *supra* note 34, at 145 (defining a burden of persuasion as, "The degree to which the trier of fact must be persuaded in order to decide an issue in favor of the burdened party."). Second, the existence of a defense is never considered as a question of law. See MCM, *supra* note 6, R.C.M. 916(b) (establishing the burden of proof for affirmative defenses, leaving no allowance for any defense to be settled as a matter of law). Finally, the RCM do not define "questions of law" in a way that fairly contemplates whether or not a defense, in fact, exists. See MCM, *supra* note 6, R.C.M. 801(e)(5) discussion.

It is important, too, to remember both *Coleman* and *Tulin* when evaluating whether or not the existence of a defense can ever be a matter of law. In both cases, the appellate court set aside convictions because the military judge determined the defenses did not exist. *U.S. v. Coleman*, 11 M.J. 856 (N.M.C.M.R. 1980); *U.S. v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982). Had the existence of a defense been a question of law, the results in *Coleman* and *Tulin* would have been arguably different, as settling matters of law are exclusively in the purview of the military judge. See MCM, *supra* note 6, R.C.M. 801(a)(4).

<sup>93</sup> There remain other procedural issues that make splitting fact-finder responsibilities in this case untenable. How would the military judge inform the panel that he had made his finding without prejudicing the panel in its ultimate deliberations? Would the panel vote on the elements of the offense itself before or after the military judge made his finding on the existence of the defense? If before, how might that prejudice the military judge?

<sup>94</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3262 (2006).

Amendment. . . . The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’<sup>95</sup>

The *Mathews v. Eldridge* holding sets out three factors by which courts should assess whether or not government action complies with procedural due process requirements:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>96</sup>

While *Mathews v. Eldridge* was a civil case, the Supreme Court has also used its three factors to examine procedural due process challenges in criminal cases.<sup>97</sup> To start the analysis of treating the existence of an affirmative defense as an interlocutory matter, consider the scope of interlocutory questions described in the discussion to RCM 801(e)(5): “A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory.”<sup>98</sup>

The CAAF has never decided if the existence of a defense is a “question which may determine the ultimate issue of guilt.” By definition, a defense goes directly to the ultimate issue of guilt.<sup>99</sup> Immediately, then, the notion of handling the accused’s initial burden as an interlocutory matter collides with the RCM prohibition on answering the ultimate issue of guilt as an interlocutory matter.

Rule for Courts-Martial 801(e)(5) does not articulate the rationale behind its prohibition, but some ready observations surely inform the rule. First, if the new Article 120 does, in fact, require the accused to prove the existence of an affirmative defense as an interlocutory matter, it inexplicably places on the accused the burden of proving the existence of a defense *before* he knows whether or not the government has proven the elements of the offense. Surely such an inversion of the sequence of trial places the procedural cart before the horse and partially explains RCM 801(e)(5).<sup>100</sup> More importantly, this procedural anomaly would surely foreclose the accused’s opportunity to be heard at trial “in a meaningful time and in a meaningful manner,”<sup>101</sup> raising a procedural due process challenge.

Additionally, RCM 801(e)(5) surely accounts for Article 51(b), UCMJ, which directs that, “The military judge . . . shall rule upon all questions of law and all interlocutory questions arising during the proceedings.”<sup>102</sup> Rule for Courts-Martial 801(e)(5) is necessary in light of Article 51(b) to protect the accused’s right to a jury trial from the military judge’s exclusive, statutory authority to decide interlocutory matters. If RCM 801(e)(5) did not prohibit questions on the ultimate issue to be considered as interlocutory matters, then the military judge could inadvertently become the fact-finder in a trial before members. Doing so would violate the accused’s Sixth Amendment right to a trial by jury, as discussed above, or his Fifth Amendment Due Process rights.<sup>103</sup>

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<sup>95</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976).

<sup>96</sup> *Id.* at 335.

<sup>97</sup> *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (applying *Mathews v. Eldridge* factors in a criminal case).

<sup>98</sup> MCM, *supra* note 6, R.C.M. 801(e)(5) discussion.

<sup>99</sup> *See id.* R.C.M. 916(a) (defining “defenses” as, “Any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.”).

<sup>100</sup> While not making this exact point, RCM 916(k)(3)(c) nonetheless provide additional insight on the appropriate sequence of considering the existence of an affirmative defense. Consider, by analogy, its direction on the timing of the findings on lack of mental responsibility: “The issue of mental responsibility shall not be considered as an interlocutory question.” *Id.* R.C.M. 916(k)(3)(c).

<sup>101</sup> *Mathews*, 424 U.S. at 332-23.

<sup>102</sup> UCMJ art. 51(b) (2005).

<sup>103</sup> *See* discussion *supra* Part III. The express language of Article 51(b) would apparently foreclose the potential procedure of having the panel treat the accused’s initial burden as an interlocutory matter. The remaining analysis, however, will continue to include the panel, as there is some precedent in military jurisprudence for sending the panel into deliberations on an interlocutory matter. *See* U.S. v. Laws, 11 M.J. 475 (C.M.A. 1981) (upholding a

Whatever the rationale for RCM 801(e)(5), one might argue that to avoid a potential “cart-before-the-horse” problem, the fact-finder could simply determine, in one interlocutory finding, both the government’s proof on the elements of the offense and the accused’s proof on his initial burden. After the fact-finder’s determination on both, then the government would seemingly have the opportunity to reopen its case to offer additional evidence aimed at disproving the existence of the defense.<sup>104</sup> Following additional evidence, the case would return to the fact-finder to finally determine whether the government disproved the defense beyond a reasonable doubt. Again, the procedure of lumping these two findings together does not resolve the Article 51(b) problem of allowing the panel to resolve an interlocutory question.<sup>105</sup>

While the preceding few paragraphs describe some procedural challenges, no clear analogy informs an ultimate conclusion as to whether the challenges present constitutional concerns in either military or Supreme Court jurisprudence. It is equally difficult to articulate the constitutional propriety of re-opening a case after the accused successfully carries his burden. Comparing current military practice on shifting the burden to the accused regarding lack of mental responsibility and the new Article 120’s double burden shift reveals this particular problem.

When lack of mental responsibility is an issue in a case, the fact-finder first determines whether or not the government has proven each element of the underlying offense.<sup>106</sup> If the fact-finder determines the government has proven each element, then the fact-finder considers whether or not the accused has proven lack of mental responsibility by clear and convincing evidence.<sup>107</sup> If the accused carries his burden, then the fact-finder returns a finding of not guilty by reason of lack of mental responsibility and the court-martial is essentially done.<sup>108</sup> The new Article 120 could launch the parties into one more round of accepting evidence and one additional finding if the accused’s initial burden is treated as an interlocutory matter.

Perhaps two military holdings inch closer to the conclusion that determining the accused’s initial burden as an interlocutory question for a single fact-finder presents Due Process concerns. In *U.S. v. Cooper*, the Court of Military Appeals (COMA) reviewed the accused’s conviction for attempting to assault a superior commissioned officer.<sup>109</sup> Upon Cooper’s request, the law officer agreed to instruct the panel on the accused’s good character.<sup>110</sup> Unfortunately, the law officer forgot to give the instruction.<sup>111</sup> After the announcement of a guilty verdict and while the panel was deliberating on a sentence, the law officer recalled the panel.<sup>112</sup> He advised the panel to revoke its findings of guilty and re-vote following his correct instructions on Cooper’s good character.<sup>113</sup> The panel ultimately revoked its findings of guilty, then deliberated and re-voted to convict Cooper.<sup>114</sup> Explaining the inherent dangers of asking the members to reconsider, with open minds, “an issue which they have already settled to their own satisfaction,” the COMA set aside the conviction.<sup>115</sup>

Again in *U.S. v. Jones*, a military judge failed to instruct the members on an available defense.<sup>116</sup> After the panel reached a finding, the military judge recalled the members, instructed them, and dispatched them to deliberate again.<sup>117</sup> The

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conviction for unauthorized absence in a case where there was a substantial question as to the court-martial’s jurisdiction over the accused. The panel decided the validity of the accused’s enlistment, and therefore jurisdiction, prior to deliberating on findings.).

<sup>104</sup> See discussion *infra* concerning one final potential procedure: requiring the fact-finder to resolve the elements of the offense and both burden shifts all at once upon the conclusion of the trial on the merits.

<sup>105</sup> UCMJ art. 51(b).

<sup>106</sup> U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK 826 (15 Sept. 2002) [hereinafter BENCHBOOK].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 828.

<sup>109</sup> *U.S. v. Cooper*, 35 C.M.R. 294, 295 (C.M.A. 1965).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 298.

<sup>116</sup> *U.S. v. Jones*, 7 M.J. 441, 442 (C.M.A. 1979).

COMA, citing *Cooper*, expressed concern about “whether the members could consider the question of guilt with open minds after having resolved the issue.”<sup>118</sup> While neither *Cooper* nor *Jones* resolved constitutional challenges, they nonetheless raise a legitimate concern about a single fact-finder’s ability to return to the same question twice over, at least as far as the panel is concerned.

The sum of the analyses of treating the accused’s initial burden as an interlocutory matter leaves little doubt that applying the *Mathews v. Eldridge* factors calls for a procedural due process challenge to the new Article 120’s double burden-shift. Specifically, risk of the erroneous deprivation of the accused’s liberty right through the procedure of handling the accused’s initial burden as an interlocutory matter is easily mitigated by simply following the UCMJ’s existing procedure for affirmative defenses, whether shifting the burden to the accused or not. The analysis shifts finally to the potential scenario wherein a single fact-finder navigates the entire burden-shifting scheme at the conclusion of the trial on the merits. As expected, this final course of action presents its own procedural due process concerns.

### *Specific Problems with Navigating the Entire Burden-Shifting Scheme at End of Trial on the Merits*

Analogies do not readily surface to guide an understanding of the particular challenges inherent in handling the entirety of the new Article 120’s double burden-shift at the conclusion of the trial on the merits. Despite the absence of a ready analogy, one perceives two potential problems with instructing the panel all at once on the whole burden-shifting scheme.

A legal fiction, if not a procedural due process challenge, lies in the belief that the government could prove a defense does not exist beyond a reasonable doubt after the accused has proved that it is “more likely than not”<sup>119</sup> that the defense exists. A finding by a preponderance of the evidence would surely cement reasonable doubt in the mind of the fact-finder. For the government, realizing the futility of attempting to overcome the initial finding renders the apparent safety net of the new Article 120’s “second bite at the apple” virtually useless. For the defense, a guilty verdict after the accused has met his burden should raise an appellate question as to how, legally, a finding by a preponderance of the evidence could leave open the possibility of a subsequent finding of beyond a reasonable doubt. As a corollary to this first observation, it is difficult to imagine a set of panel instructions that would successfully describe how and when the panel could consider each question and each bit of evidence through the progressive steps of this double burden-shift.

The second potential problem with handling the entirety of the new Article 120’s burden-shifting scheme at the end of the trial on the merits relates to ambiguous findings. The discussion to RCM 922 directs the military judge to clarify ambiguous findings.<sup>120</sup> The RCM directive takes on particular importance in the context of the new Article 120’s double burden-shift. If the panel simply returns a guilty verdict, how can the defense determine whether grounds for appeal exist? A finding of guilt could mean either that the accused did not carry his burden after the government proved the elements of the underlying offense, or that the accused did carry his burden, but the government subsequently carried its burden on the defense. The distinction matters to the defense, as it will guide the choice of a specific ground for appeal.

Perhaps the most obvious procedural challenge to the idea of handling the entire double-burden shift at the conclusion of the trial on the merits is simply that this option presents the greatest stretch to the plain statutory language. Assigning first the burden of persuasion to the accused and second to the government makes no sense without the intervening opportunity to bring more evidence to bear on the question of the existence of the affirmative defense.

### **Conclusion: Final Thoughts on the New Article 120’s “Overshift”**

In the end, the new Article 120’s double burden-shift, for all of its procedural uncertainty, could cause an inability to convict or sustain the convictions of sexual assault perpetrators. Furthermore, the burden-shifting scheme could have farther-reaching ramifications than the scope of this article could fairly explore.

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<sup>117</sup> *Id.* at 442.

<sup>118</sup> *Id.* at 444.

<sup>119</sup> BENCHBOOK, *supra* note 106, at 444 (defining a preponderance of the evidence as “more likely than not that a fact exists”).

<sup>120</sup> MCM, *supra* note 6, R.C.M. 922(b)(2) discussion.

To facilitate the progression into the subject of the new Article 120, this article rather narrowly used consent and its changing role from an element of an old Article 120 offense to an affirmative defense to some new Article 120 offenses. Importantly, however, the new Article 120's burden-shifting scheme applies to more than just the two defenses of consent and mistake of fact as to consent. In fact, after establishing consent and mistake of fact as to consent as affirmative defenses and discussing mistake of fact as to age for some of the new Article 120's child offenses, the statute expressly states: "The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others."<sup>121</sup> The availability of the full range of affirmative defenses raises even more questions about the full impact of the new Article 120's burden-shifting scheme.

Recall that the new Article 120's double burden-shift does not exclusively invoke consent and mistake of fact as to consent. The burden shift applies to all affirmative defenses generally, which the statute defines as, "Any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts."<sup>122</sup> By tying this definition to the double burden-shift, the new Article 120 apparently creates a whole new defenses scheme operative only in the context of new Article 120 offenses. So, for example, the new Article 120 makes no exception for the defense of lack of mental responsibility, applying the double burden-shift to that defense, as well. What about the Article 50a requirement that the accused prove a lack of mental responsibility by clear and convincing evidence?<sup>123</sup> Did the new Article 120 really mean to deconstruct Article 50a in the context of Article 120 prosecutions?

Persuading Congress to amend the new Article 120 would be the cleanest way to correct the problems identified by this article. Congress could either remove the single sentence establishing the accused's initial burden or remove the single line creating the government's second burden. Eliminating either the accused's initial burden or the government's second burden would restore the statute to a constitutionally viable defense scheme. By eliminating the accused's initial burden, the statutory language would allow practitioners at trial to handle the affirmative defenses exactly as the bulk of affirmative defenses are currently handled in the military justice system. Specifically, once the defense is raised by some evidence,<sup>124</sup> the military judge instructs the panel<sup>125</sup> that the government retains the burden of disproving the existence of the defense beyond a reasonable doubt.<sup>126</sup>

The approach of eliminating the accused's initial burden departs from the statute's apparent desire to afford greater protection for the sexual assault victim. By removing "without consent" as an element of sexual assault and forcing the accused to prove consent by a preponderance of the evidence, the statute presumably makes the victim's conduct relevant only if the accused stands ready to take on the statute's heightened burden. By eliminating the accused's burden, the accused arguably has an easier time of attacking the victim during cross examination, as he merely has to raise "some evidence" of consent to set in motion the government's effort to disprove the defense. Without legislative history explaining the new Article 120's affirmative defenses scheme, the observer is left to wonder whether Congress was motivated by this particular concern.

In the alternative, eliminating the government's second burden would allow practitioners at trial to handle the affirmative defenses exactly like lack of mental responsibility, where the accused has the burden of proving the defense. Adopting this construct would address the victim concerns discussed above, but it would certainly require much of the accused. In particular, requiring the accused to prove an honest and reasonable mistake of fact as to consent would seem to compel the accused to testify at trial.<sup>127</sup>

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<sup>121</sup> See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3259 (2006).

<sup>122</sup> See *id.* § 552, 119 Stat. at 3262.

<sup>123</sup> UCMJ art. 50a(b) (2005).

<sup>124</sup> MCM, *supra* note 6, R.C.M. 916(b) discussion.

<sup>125</sup> *Id.* R.C.M. 920(e)(3).

<sup>126</sup> *Id.* R.C.M. 916(b).

<sup>127</sup> This assertion makes sense intuitively, but at least one military court has commented on the dilemma. See *U.S. v. Briggs*, 46 M.J. 699, 701-02 (A.F. Ct. Crim. App. 1996) *overruled in part* by *U.S. v. Stewart*, 62 M.J. 668 (A.F. Ct. Crim. App. 2006) ("Certainly, without the accused taking the stand, putting on a 'mistake' offense [sic] is a steep climb.").

Until Congress corrects the statute, military practitioners are left in the unenviable position of trying to apply the statutory language. Trial counsel and defense counsel should race one another to file a motion for appropriate relief with the military judge in cases under the new Article 120.<sup>128</sup> The motion for appropriate relief could articulate the arguments put forth in this article to establish not only the unworkability of the double burden-shift, but also the burden-shift's unconstitutionality. Such a motion could ask the military judge to find the double burden-shift to be unconstitutional and to disregard one or the other burden as a remedy.

The trial judiciary's draft benchbook instructions on the new Article 120's double burden-shift warrants the admittedly novel motion for appropriate relief described above. To start, the draft instructions concede that, "The use of the term of art 'preponderance of the evidence' and the burden shifting may cause confusion."<sup>129</sup> The draft instructions then direct military practitioners to treat the various affirmative defenses "like any other defense" and place a single burden on the government to prove the absence of the defense beyond a reasonable doubt once "some evidence" has raised the defense.<sup>130</sup> The draft instructions' approach to affirmative defenses tacitly acknowledges that the express statutory burden-shifting scheme is at the very least unworkable.

Furthermore, the draft instructions' departure from the new Article 120's specific statutory language creates an opportunity for trial counsel and defense counsel to provide justification for that departure to the military judge. The military judge is not bound by model instructions.<sup>131</sup> The absence of interpretive caselaw and legislative history discussed in this article gives the military judge no rationale for choosing the draft instructions' approach to defenses over the statutory approach to defenses. A motion for appropriate relief could provide that rationale to the military judge.

In short, the constitutional risks are simply too great when compared to the minimal, if any, benefit of the statute's double shift. The military judge, the defense counsel, and the trial counsel have no interest in attempting to save this burden-shifting scheme from constitutional attack. Following the burden-shift, as written, runs the risk of an improper conviction at trial for the defense counsel, of a guaranteed issue on appeal for the trial counsel, and an almost certain reversible error in instruction for the military judge.

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<sup>128</sup> See MCM, *supra* note 6, R.C.M. 906(a) (defining motions for appropriate relief).

<sup>129</sup> See Formal Proposal to Modify DA PAM 27-9, 3-45-1, note 9, 27 August 2007 (on file with author).

<sup>130</sup> *Id.*

<sup>131</sup> See BENCHBOOK, *supra* note 106 at 3. The military judge's benchbook explains:

The pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error...Special circumstances will invariably be presented, requiring instructions not dealt with in this benchbook, or adaptation of one or more of these instructions to the facts of a case. *Id.*