JSC Proposal Sheet

Short Description	Details	Proponent
Amend Article 31(d), UCMJ, M.R.E. 305(c)(1), and M.R.E. 304(a)	Article 31 and the military rules of evidence based on it require the suppression of involuntary "statements." The lack of clarity in use of the term "statement" was evident in the recently decided *United States v. Nelson*, No. 21-0216/NA (C.A.A.F. July 22, 2022), where three judges could not agree on the term's scope or its application to a situation in which part of an accused's confession related to an offense of which he had not been adequately warned (two other judges thought the appellant waived the issue). In *Nelson*, the military judge suppressed those parts of the accused's "statement" that concerned an unwarned offense, dismissed the unwarned offense due to lack of other evidence to support it, but then admitted the entire "statement," including those portions he had previously ordered suppressed. Citing two earlier opinions in which the CAAF's predecessor dismissed one unwarned offense but affirmed the appellant's conviction on the other despite admission of the entire "statement" at trial, Chief Judge Ohlson concluded that the military judge did not abuse his discretion. In his separate opinion, Judge Sparks concluded that admission of those parts of the statement that were unwarned became evidence of uncharged acts or uncharged misconduct. He would have permitted the admission of those parts of the statement that were either intrinsic to the warned offense or after the military judge determined that they met the requirements of M.R.E. 404(b). Judge Hardy recognized, in his separate opinion, the military judge's decision to admit the entire unredacted statement was contrary to the text of Article 31(d), yet suppression of the entire statement would have resulted in a	National Institute of Military Justice (NIMJ) admin@nimj.org

	windfall to the accused. He concluded that parts of the statement concerning warned offenses was admissible but that parts concerning the unwarned offense were precluded from admission by M.R.E. 305(c)(1) and M.R.E. 304(a). NIMJ supports Judge Hardy's interpretation: Such parts of a statement concerning unwarned offenses are not admissible. To provide clarity, Article 31(d) should be amended as follows: "No such parts of a statement obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial." Amending Article 31(d) would be the simplest solution, but NIMJ recognizes it may not be the easiest as it would require congressional action. As an alternative, the President could amend M.R.E.s 305(c)(1) and 304(a): M.R.E. 305(c)(1): "~~A~~ Such parts of a statement obtained from the accused in violation of the accused's rights under Article 31 ~~is~~ are involuntary and therefore inadmissible against the accused." ~~M.R.E. 305(c)(1).~~ M.R.E. 304(a): "*General Rule.* If the accused makes a timely motion or objection under this rule, any such parts of a ~~involuntary~~ statement from the accused that are involuntary, ~~or~~ and any evidence derived therefrom, is inadmissible at trial …."	

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Short Description	Details	Proponent
Amend Article 31, or amend M.R.E. 304(a), and delete M.R.E. 304(e)	Article 31(d), UCMJ, provides that an accused's involuntary statement may not "be received in evidence against him in a trial by court-martial." Under the authority granted by Congress in Article 36(a), the President promulgated rules of evidence implementing Article 31(d). M.R.E. 304(a) provides that, if the accused timely objects, "an involuntary statement made by the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e)." M.R.E. 304(e) provides that, if the statement is involuntary solely because of inadequate rights warnings or because interrogators failed to cease questioning the accused after he invoked his rights, the statement may still be used "(1) to impeach by contradiction the in-court testimony of the accused; or (2) in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement." Of course, the President's authority to make evidentiary rules is limited: the rules may not be contrary to or inconsistent with the UCMJ. Article 36(a), UCMJ. The exceptions noted in M.R.E. 304(e) may be reasonable and consistent with Supreme Court jurisprudence concerning an accused's Fifth Amendment right against self-incrimination, but they are contrary to and inconsistent with the text of Article 31(d). Therefore, unless Article 31 is amended to accommodate the exceptions, NIMJ recommends that M.R.E. 304 be amended by deleting the reference to exceptions in subdivision (a) and deleting subdivision (e) in its entirety.	National Institute of Military Justice (NIMJ) admin@nimj.org