

# A Proposal to Amend Military Rule of Evidence 304 to Conform with Federal Practice

Major Brittany Warren\*

## I. Introduction

Confessions are one of the most powerful pieces of evidence against an accused in a criminal trial. For this reason, and because of a discreditable history of police overreach regarding coerced and unreliable confessions,<sup>1</sup> modern courts tend to view confessions with a jaundiced eye. Confessions are now required to be not only voluntary, but also corroborated by independent evidence.<sup>2</sup> The reasoning behind this fundamental mistrust of confessions was articulated fifty years ago by Justice Goldberg: “[A] system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.”<sup>3</sup>

The corroboration requirement is designed to protect against coercion and prevent a mentally-ill accused from being convicted of an imaginary crime. In essence, the government has the burden of proving beyond a reasonable doubt that: (1) an injury occurred; (2) the cause of the injury was criminal in nature; and (3) the accused caused the injury.<sup>4</sup> The first two elements are what is known as the *corpus delicti*, or body of the crime.<sup>5</sup> Under the military rules of evidence, the accused’s confession is not sufficient standing alone to prove that a crime has in fact been committed.

Basically stated, the corroboration requirement is the idea that a confession or admission of an accused cannot be used against him as evidence of guilt in a criminal trial “unless there is independent evidence which sufficiently corroborates the confession.”<sup>6</sup> This rule has a lengthy history both at common law and in military practice. The military’s version

of the corroboration requirement is currently codified at Military Rule of Evidence (MRE) 304(c)<sup>7</sup> but has existed in some form for over a century. Despite clear intent by Congress that military courts apply the same standard as federal courts, military judges have used ambiguous language found in Rule 304(c) to apply a more stringent standard when evaluating the admissibility of an accused’s confession.<sup>8</sup> Recently, Congress directed the President to amend MRE 304 to match the federal version of the rule.<sup>9</sup> This article proposes language for the new rule and a drafter’s analysis to guide its application during courts-martial.

## II. Historical Context

Early English practice allowed for an accused’s conviction based solely upon his confession.<sup>10</sup> This frequently led to miscarriages of justice. In a widely-reported 1661 case, two brothers and their mother were executed for murder when a third man, William Harrison, disappeared under suspicious circumstances.<sup>11</sup> The evidence against them consisted of bloody clothing found on the road to Harrison’s home and one of the co-defendants’ confession.<sup>12</sup> Two years after their executions and far too late to do any of the unfortunates any good, Harrison re-appeared, claiming that he had been kidnapped by pirates and sold into slavery.<sup>13</sup> In a similar case in the United States, *The Trial of Stephen and Jesse Boorn*, two brothers were convicted of murdering their missing brother-in-law based on a brother’s confession that the brother-in-law’s ghost appeared to his father and said he was dead.<sup>14</sup> Thankfully for these two, the supposedly dead brother-in-law turned up alive and well in New Jersey prior to the scheduled date of execution.<sup>15</sup> Clearly, a new rule was needed, and the *corpus delicti* rule was born.

\* Judge Advocate, U.S. Army. Student, 64th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Virginia.

<sup>1</sup> See, e.g., *Beecher v. Alabama*, 389 U.S. 35 (1967); *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>2</sup> Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 32 HARV. C.R.-C.L. L. REV. 105, 107-08 (1997).

<sup>3</sup> *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (Goldberg, J., concurring), quoted in Major Russell L. Miller, *Wrestling with M.R.E. 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 2 (2003).

<sup>4</sup> See *Proof of the Corpus Delicti Aliunde the Defendant’s Confession*, 103 U. PA. L. REV. 638 (1955) [hereinafter *Proof of the Corpus Delicti Aliunde*]. The idea here is to ensure that before someone is imprisoned based on their confession to a murder, it must first be established that the alleged victim was real, that they are dead, and that the victim’s death was caused by another rather than the result of an accident or natural causes. *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Miller, *supra* note 3, at 2.

<sup>7</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c) (2015) [hereinafter MCM].

<sup>8</sup> See discussion *infra* Section II.

<sup>9</sup> See National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (2015) (vetoed by President).

<sup>10</sup> See *Proof of the Corpus Delicti Aliunde*, *supra* note 4, at 638.

<sup>11</sup> *The Story*, THE CAMPDEN WONDER, [http://www.thecampdenwonder.com/the\\_story.html](http://www.thecampdenwonder.com/the_story.html) (last visited Mar. 30, 2016).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Miller, *supra* note 3, at 5, n.21 (citing Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 175 (1962)).

<sup>15</sup> *Id.*

As articulated by Colonel William Winthrop, a leading 19th century scholar of military law, the *corpus delicti* rule states: “As to the requisites to the admission in evidence of *extra-judicial* confessions—it has been seen, in the first place that a confession cannot be admitted in evidence till the *corpus delicti*—the fact that the alleged criminal act was in fact committed, by somebody—is proved.”<sup>16</sup>

The purpose of this rule is to prevent false and coerced confessions; to provide incentives to law enforcement to seek additional evidence, which would confirm the reliability of a particular confession; and to protect against jurors’ tendency to view confession evidence uncritically regardless of the circumstances under which a confession was given or the extent of corroboration.<sup>17</sup> At the federal level, controversy arose about what precisely the *corpus delicti* rule required. On one side of the circuit split was *Daeche v. United States*,<sup>18</sup> which held that corroboration of a confession required merely “substantial evidence” supporting the veracity of the confession and that corroborative evidence needed only to touch on the *corpus delicti* of the charged offense.<sup>19</sup> On the other side lay *Forte v. United States*,<sup>20</sup> which held that corroboration of a confession required independent evidence tending to establish “the whole of the *corpus delicti*,” which means proving “each of the main elements or constituent parts of the *corpus delicti*.”<sup>21</sup> In 1954, the Supreme Court resolved this circuit split in favor of *Daeche*, in what came to be known as the “trustworthiness doctrine”:<sup>22</sup> “It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.”<sup>23</sup>

Under this doctrine, the purpose of the corroboration rule is merely to ensure the reliability of the confession or the admission of the accused.<sup>24</sup> To this end, the corroborative evidence need not be sufficient—*independent* of the confession—to establish all elements of the crime charged, as long as it tends to establish the trustworthiness of the statements as well as those elements of the offense that are not proven by the statement.<sup>25</sup> While this holding should have

settled matters, the state of the law in military courts was much more complicated.

### III. The Uniform Code of Military Justice and *Adams*

Prior to establishment of the Uniform Code of Military Justice (UCMJ) on May 5, 1950,<sup>26</sup> the military had a version of the corroboration rule largely similar to the language from *Daeche*. In the 1921 Manual for Courts-Martial (MCM), the drafters explicitly stated that the evidence introduced to corroborate the confession did not need to cover each element of the offense.<sup>27</sup> Despite this, and similar language in the 1928 and 1949 MCMs, military courts and boards of review tended to apply the more strict *Forte* elements test.<sup>28</sup> The first post-code MCM in 1951 did not substantially change the language of the pre-code rule,<sup>29</sup> but it did remove the clause that the corroborating evidence need not “cover every element of the offense charged.”<sup>30</sup> Because of this, and because pre-code practice was to functionally disregard that clause in favor of the *Forte* rule, the Court of Military Appeals (CMA) overturned a conviction for desertion in the 1953 case *United States v. Isenberg*, holding that the Government failed to provide independent evidence corroborating every element of the offense of desertion.<sup>31</sup> When post-*Opper* cases gave the CMA the opportunity to revisit the rule, it refused to adopt the more lenient federal standard, stating that the stricter rule was within the President’s power to promulgate.<sup>32</sup> In response, the 1969 MCM contained a provision explicitly making the *Opper* holding applicable to military courts,<sup>33</sup> but also adding a new wrinkle:

It is a general rule that a confession or admission of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which

<sup>16</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 327 (2d ed. 1920).

<sup>17</sup> Miller, *supra* note 3, at 6-7.

<sup>18</sup> *Daeche v. United States*, 250 F.566 (2d Cir. 1918).

<sup>19</sup> *Id.* at 571.

<sup>20</sup> *Forte v. United States*, 94 F.2d 236 (D.C. Cir. 1937).

<sup>21</sup> *Id.*

<sup>22</sup> *Opper v. United States*, 348 U.S. 84, 86 (1954).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Uniform Code of Military Justice, Pub. L. No. 81506, 64 Stat. 107 (1950).

<sup>27</sup> See *United States v. Isenberg*, 8 C.M.R. 149, 152 (C.M.A. 1953). *Isenberg* contains an excellent discussion of the historical development of the rule in military courts. See *id.*

<sup>28</sup> *Id.* at 153-55.

<sup>29</sup> *MANUAL FOR COURTS MARTIAL, UNITED STATES*, pt. iv, ¶ 140(a) (1951).

<sup>30</sup> *Isenberg*, 8 C.M.R. at 155.

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

<sup>32</sup> See, e.g., *United States v. Smith*, 32 C.M.R. 105 (C.M.A. 1962). In this case, regarding a lewd and lascivious act upon a child, the court held that the Government’s evidence, aside from a confession by the defendant, consisted solely of medical testimony establishing that the child had sustained injuries consistent with penetration by an erect penis. *Id.* Because that testimony could not rule out other causes, however, the confession was held to be insufficiently corroborated. *Id.*

<sup>33</sup> See U.S. DEP’T OF THE ARMY, PAM. 27-2, ANALYSIS OF CONTENTS *MANUAL FOR COURTS-MARTIAL* ch. 27, para. 140a(5) (July 1970).

corroborates *the essential facts admitted* sufficiently to justify an inference of their truth.<sup>34</sup>

Despite the drafters' intent that this language invoke *Opper*, military courts debated what exactly "essential facts" were,<sup>35</sup> and their holdings reflected the confusion. Courts debated the quantum of evidence required to corroborate, whether the corroborative evidence itself had to be admissible, and whether the entire confession was admissible or only those facts that had been corroborated.<sup>36</sup> In 2015, the Court of Appeals for the Armed Forces (CAAF) appeared to take a substantial step back towards the elements test in its holding in *United States v. Adams*<sup>37</sup> when the CAAF overturned a conviction based on a confession that it held was insufficiently corroborated. It was error to have admitted the accused's entire confession into evidence because every "essential fact" within it had not been corroborated; only those corroborated portions of the confession should have been introduced.<sup>38</sup> The *Adams* holding requires the Government to corroborate essential facts on a one-for-one basis, "effectively returning the law to a *corpus delicti* test."<sup>39</sup>

As the case law demonstrates, an elements-based test for corroboration encourages over-technical application and unjust results.<sup>40</sup> There is no reason for military practice to differ so substantially from the rule used for more than a half-century in federal courts.<sup>41</sup> In direct response to *Adams*, the Fiscal Year 2016 National Defense Authorization Act (FY16 NDAA) mandates the President to amend MRE 304(c) to conform to federal practice. The remainder of this article outlines what that amendment should look like.

### III. Proposal

The MRE 304(c) amendments should clarify the following points: (1) The quantum of corroborating evidence necessary (substantial); (2) whether the corroborating evidence must be itself admissible (yes); (3) whether the corroborating evidence must be admitted before the confession can be offered (yes); (4) whether the confession

can be admitted in its entirety once its trustworthiness has been corroborated (yes); and (5) whether the confession can itself be proof of an element of the offense (yes).

The rule should be worded as follows:

#### (c) Corroboration of a Confession or Admission.

(1) *An admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if substantial independent evidence, either direct or circumstantial, has been admitted into evidence that tends to establish the essential trustworthiness of the statement.*

This above paragraph's language is taken verbatim from *Opper*.<sup>42</sup>

(2) *Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. So long as the essential trustworthiness of the statement is established by admissible independent evidence, the confession or admission may be admitted in its entirety.*

The proposed paragraph above requires that the corroborating evidence be itself admissible and allows for a corroborated confession to be admitted into evidence in its entirety. This latter language overrules *Adams*.

#### (3) [No Change]

(4) *Quantum of Evidence Needed. Substantial evidence is that evidence which is sufficient for a reasonable, prudent fact-finder to conclude that a crime was committed by someone. This independent evidence need not be sufficient, independent of the confession or admission, to establish all elements of the crime charged, as long as it raises an inference of the trustworthiness of the statements. Between the statement and the corroborating evidence, all elements of the offense must be proven beyond a reasonable doubt. The amount and type of evidence introduced as corroboration is a*

<sup>34</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. iv, ¶ 140(a) (1969) [hereinafter MCM].

<sup>35</sup> See, e.g., *Opper v. United States*, 348 U.S. 84, 93 (1954). The verbiage "essential facts" also comes from *Opper*, as an explanation for what evidence would be sufficient to corroborate a confession under the trustworthiness doctrine. *Id.* The Court articulated: "It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* It is unclear why the 1969 Manual for Courts-Martial drafters chose to use this phrase rather than the "substantial independent evidence" language of the Court's holding. MCM, *supra* note 34.

<sup>36</sup> See, e.g., Miller, *supra* note 3, at 37-45.

<sup>37</sup> *United States v. Adams*, 74 M.J. 137 (C.A.A.F. 2015). In this case, the accused was charged with using a firearm to rob his drug dealer, Ootz, of cocaine. *Id.* at 138. He confessed to stealing the cocaine from Ootz, but a search of his home only turned up the handgun. *Id.* At trial, the government introduced only the accused's statement and testimony from two Criminal Investigation Command (CID) agents that they were aware of

a drug dealer named Ootz and that the accused had a handgun. *Id.* As the majority opinion pointed out, there was no independent corroborating evidence as to motive, opportunity, access, intent, the subject of the larceny (the cocaine), the time of the crime, or the act of larceny itself. *Id.* at 139. The dissent pointed out that the confession was otherwise trustworthy and would have sustained the conviction without requiring independent corroboration of each fact on a one-for-one basis. *Id.* at 142 (Baker, J., dissenting).

<sup>38</sup> *Id.* at 140.

<sup>39</sup> *Id.* at 142 (Baker, J., dissenting).

<sup>40</sup> See, e.g., *United States v. Smith*, 32 C.M.R. 105 (C.M.A. 1962).

<sup>41</sup> The general principle is that the President should, to the extent he finds practicable, promulgate rules for trials by courts-martial that apply the principles of law and rules of evidence applicable in federal district courts. See 10 U.S.C. § 836 (2006).

<sup>42</sup> See *Opper v. United States*, 348 U.S. 84, 93 (1954).

*factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.*

The proposed paragraph above takes its definition of substantial evidence from federal case law.<sup>43</sup>

Because the trustworthiness doctrine is, above all, concerned with the trustworthiness and veracity of a particular confession, the drafter's analysis should be worded as follows:

In assessing the trustworthiness of the confession or admission, the military judge's analysis should hinge on whether there is independent evidence that a crime has occurred. Other factors used to substantiate the trustworthiness of a confession or admission include, but are not limited to: evidence as to the spontaneity of the statement; the absence of deceptive or coercive police or other investigative practices to obtain the statement; and the defendant's positive physical and mental condition, including age, education, and experience.

A confession may be deemed trustworthy if it is consistent with objective facts known about the crime and demonstrates the individual has specific, personal knowledge about the crime.<sup>44</sup> This analysis may include: (1) providing information that leads to the discovery of evidence unknown to investigators, (2) providing information about highly unusual elements of the crime that have not been made public, and (3) providing an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly.

This proposal will bring military practice in line with federal practice and directly reflect Congressional intent. This should be the language promulgated in the new MRE 304(c) as directed by the FY16 NDAA.

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<sup>43</sup> See, e.g., *United States v. Fuller*, 243 F.Supp. 203 (D.C. Cir. 1965).

<sup>44</sup> See discussion *supra* Section III.