

55 FR 11353

Title 3 --

The President

Amendments to the Manual for Courts-Martial, United States, 1984

Executive Order 12708 of March 23, 1990

55 FR 11353

March 27, 1990

TEXT:

By the authority vested in me as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550 and Executive Order No. 12586, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 302(b)(2) is amended to read as follows:

"(2) *Commissioned, warrant, petty, and noncommissioned officers.* All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive-duty training."

b. R.C.M. 905(e) is amended to read as follows:

"(e) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver."

c. R.C.M. 913(a) is amended by inserting the following at the end thereof:

"If mixed pleas have been entered, the military judge shall ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered."

d. R.C.M. 1003(b)(2) is amended by inserting in the third sentence "or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training," after "basic pay".

e. R.C.M. 1103(b)(2)(B)(i) is amended to read as follows:

"(i) Any part of the sentence adjudged exceeds six months confinement or other punishments which may be adjudged by a special court-martial; or".

f. R.C.M. 1103(e) is amended to read as follows:

"(e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings.* Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements."

g. R.C.M. 1106(e) is amended to read as follows:

"(e) *No findings of guilty; findings of not guilty only by reason of lack of mental responsibility.* If the proceedings resulted in an acquittal or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required."

h. R.C.M. 1106(f) is amended --

(1) by inserting "and accused" after "defense counsel" in the title thereto; and

(2) in subparagraph (1) to read as follows:

"(1) *Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. It is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally."

i. R.C.M. 1107(b)(4) is amended to read as follows:

"(4) *When proceedings resulted in finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty.* The convening authority shall not take action approving or disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not

guilty."

j. R.C.M. 1108(b) is amended --

(1) by striking out "officer exercising general court-martial jurisdiction over the command to which the accused is assigned" and inserting in lieu thereof "commanding officer"; and

(2) by inserting the following new sentence at the end thereof:

"The 'unexecuted part of any sentence' includes that part which has been approved and ordered executed but which has not actually been carried out."

k. R.C.M. 1112(b) is amended to read as follows:

"(b) Exception. If the accused was found not guilty or not guilty only by reason of lack of mental responsibility of all offenses or if the convening authority disapproved all findings or guilty, no review under this rule is required."

l. R.C.M. 1114(c)(2) is amended to read as follows:

"(2) Dates. A promulgating order shall bear the date of the initial action, if any, of the convening authority. An order promulgating an acquittal, a court-martial terminated before findings, a court-martial resulting in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or action on the findings or sentence taken after the initial action of the convening authority shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal was announced, or the date on which the proceedings were otherwise terminated."

m. R.C.M. 1201(b)(3)(C) is amended to read as follows:

"(C) Time limits on applications. Any application for review by the Judge Advocate General under Article 69 must be made on or before the last day of the two year period beginning on the date the sentence is approved by the convening authority or the date the findings are announced for cases which do not proceed to sentencing, unless the accused establishes good cause for failure to file within that time."

Sec. 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Mil. R. Evid. 304(b)(1) is amended to read as follows: "Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), or 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement."

b. Mil. R. Evid. 506(c) is amended to read as follows:

"(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military/ department or government agency concerned. The privilege for records and information of the Inspectors General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary."

Sec. 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 10 is amended --

(1) in subparagraph b(4)(c) by adding the following new Note at the end thereof:

"[Note: If the absence was with intent to abandon the accused's guard, watch, or duty section, add the following element]"; and

(2) in paragraph f(4) by enclosing "with intent to abandon the same" in parentheses.

b. The title and content of paragraph 101 is deleted, and the word "RESERVED" substituted therefor.

c. Paragraph 105 is amended in subparagraph d to read as follows:

"Lesser included offenses. Article 80 -- attempts."

Sec. 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 5 is amended in subparagraph c(8) by --

(1) striking out the second sentence; and

(2) inserting the following new sentence in lieu thereof:

" 'Pay,' as used with respect to forfeiture of pay under Article 15, refers to the basic pay of the person or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, plus any sea or foreign duty pay."

b. Paragraph 6a is amended by --

(1) redesignating subparagraph (4) as subparagraph (5);

(2) inserting the following new subparagraph after subparagraph (3) thereof:

"(4) Unless otherwise stated, an action suspending a punishment includes a condition that the servicemember not violate any punitive article of the code. The nonjudicial punishment authority may specify in writing additional conditions of the suspension."; and

(3) amending redesignated subparagraph (5) to read as follows:

"(5) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the servicemember concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may be based only on a violation of the conditions of suspension which occurs within the period of suspension. Before a suspension may be vacated, the servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), the servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violation on which the vacation action is to be based. Vacation of a suspended nonjudicial punishment is not itself nonjudicial punishment, and additional action to impose nonjudicial punishment for a violation of a punitive article of the code upon which the vacation action is based is not precluded thereby."

Sec. 5. These amendments shall take effect on April 1, 1990, subject to the following:

a. The amendment made to paragraph 10 of Part IV, shall apply to any offense committed on or after April 1, 1990.

b. The amendments made to Rule for Courts-Martial 905 and to Military Rule of Evidence 304 shall apply only in cases in which arraignment has been completed on or after April 1, 1990.

c. The amendment made to Rule for Courts-Martial 1106 shall apply only in cases in which the sentence is adjudged on or after April 1, 1990.

d. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to April 1, 1990, which was not punishable when done or omitted.

e. The maximum punishment for an offense committed prior to April 1, 1990, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

f. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to April 1, 1990, and any such restrain, investigation, referral of charges, trail, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Sec. 6. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of title 10 of the United States Code.

GEORGE BUSH

THE WHITE HOUSE,

March 23, 1990/

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