

56 FR 30284

Title 3--

The President

AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

EXECUTIVE ORDER 12767

56 FR 30284

July 1, 1991

TEXT: By the authority vested in me as President by the Constitution of the United States of America 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, Executive Order No. 12586, and Executive Order No. 12708, 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. 405(g)(1)(A) is amended to read as follows:

"(A) *Witnesses.* Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is 'reasonably available' when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6) is not 'reasonably available.'"

b. R.C.M. 405(g)(4)(B) is amended --

(1) in clause (iii) to read as follows:

"(iii) Prior testimony under oath;"

(2) in clause (iv) to read as follows:

"(iv) Depositions of that witness; and"; and

(3) by adding the following clause at the end thereof:

"(v) In time of war, unsworn statements."

c. R.C.M. 701(a)(3)(B) is amended to read as follows:

"(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule."

d. R.C.M. 701(b) is amended --

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

"(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(1) provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(2) permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.";

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

"(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses."; and

(3) in subparagraph (5) to read as follows:

"(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention."

e. R.C.M. 705(c)(2) is amended by deleting the first sentence and substituting therefor the following sentence:

"(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:".

f. R.C.M. 705(d) is amended --

(1) by deleting subparagraph (1);

(2) by redesignating subparagraph (2) as subparagraph (1) and amending it to read as follows:

"(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.";

(3) by redesignating subparagraph (3) as subparagraph (2) and amending it to read as follows:

"(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All

terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.";

(4) by redesignating subparagraph (4) as subparagraph (3) and amending it to read as follows:

"(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement, or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign."; and

(5) by redesignating subparagraph (5) as subparagraph (4).

g. R.C.M. 707 is amended to read as follows:

"Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

- (1) Preferral of charges;
- (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or,
- (3) Entry on active duty under R.C.M. 204.

(b) *Accountability*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304(a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for the purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferal and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under this rule shall begin on the earlier of

- (i) the date of repreferal;
- (ii) the date of imposition of restraint under R.C.M. 304(a)(2)-(4).

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of (i) the date of preferral of charges; (ii) the date on which restraint under R.C.M. 304-(a)(2)-(4) is reimposed; or (iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time

period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Review under R.C.M. 908, if there is a further appeal to the Court of Military Appeals, or subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Military Appeals or, if appropriate, the Supreme Court.

(D) *Rehearings*. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

(c) *Excludable delays*. All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run.

(1) *Procedure*. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions*. Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made part of the appellate record.

(d) *Remedy*. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(e) *Waiver*. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense."

h. R.C.M. 802(c) is amended to read as follows:

"(c) *Rights of Parties*. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial."

i. R.C.M. 908(b)(4) is amended to read as follows:

"(4) *Effect on the court-martial*. Upon written notice to the military judge under subsection (b) (3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Military Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:"

j. R.C.M. 908(b) is amended by inserting the following new subparagraph at the end thereof:

"(9) *Pretrial confinement of accused pending appeal*. If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the

imposition of pretrial confinement under R.C.M. 305(h)(2)(B)."

k. R.C.M. 1004(c)(8) is amended to read as follows:

"(8) That, only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life;"

1. R.C.M. 1010 is amended to read as follows:

"In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

- a. The right to submit matters to the convening authority to consider before taking action;
- b. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such right;
- c. The right to apply for relief from the Judge Advocate General if the case is neither reviewed by a Court of Military Review nor reviewed by the Judge Advocate General under R.C.M. 1201(b)(1); and
- d. The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit."

m. R.C.M. 1103(b)(2)(D) is amended by --

- (1) redesignating clause (iv) as clause (v); and
- (2) inserting the following new clause (iv) after clause (iii):

"(iv) The original dated, signed action by the convening authority."

n. R.C.M. 1107(f)(1) is amended to read as follows:

"(1) *In general*. The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority's authority to sign shall appear below the signature."

o. R.C.M. 1110(f)(1) is amended to read as follows:

"(1) *Waiver*. The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days."

p. R.C.M. 1113(c)(1) is amended in the final paragraph thereof to read as follows:

"A dishonorable or a bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If on the date of final judgment a servicemember is not on appellate leave and more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-

conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the servicemember shall consider the advice of that officer's staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the convening authority, and a recommendation whether the discharge should be executed."

Sec. 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended by adding the following new rule at the end of Section VII thereof:

"Rule 707. Polygraph Examinations.

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

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

a. Paragraph 4e is amended to read as follows:

"e. *Maximum punishment.* Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged."

b. Paragraph 19 is amended --

(1) in subparagraph b(4) by adding the following thereto:

"[Note: If the escape was from post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.";

(2) in subparagraph c(4)(a) by adding the following thereto:

"For purposes of the aggravating element of post-trial confinement (subparagraph b(4)(d), above) and increased punishment therefor (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment.";

(3) in subparagraph e by --

(a) amending clause (3) to read as follows:

"(3) *Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.";

(b) adding the following new clause at the end thereof:

"(4) *Escape from post-trial confinement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.";

(4) in subparagraph f(4) to read as follows:

"(4) *Escape from confinement.*

In that (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order accused into confinement did, (at/on board location) (subject-matter jurisdiction data, if required), on or about 19 , escape from confinement."

c. Paragraph 35c(2) is amended to read as follows:

"(2) *Operating.* Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the manipulation of its controls so as to cause the particular vehicle to move, or the setting of its motive power in action."

c. Paragraph 57d is amended to read as follows.

"d. *Lesser included offense.* Article 80 -- attempts.

d. Paragraph 96f is amended to read as follows.

"f. *Sample specification.*

In that (personal jurisdiction data), did, (at/on board -- location)(subject-matter jurisdiction data, if required), on or about , 19 , wrongfully (endeavor to) [impede (a trial by court-martial) (an investigation)]()[(influence the actions of , (a trial counsel of the court-martial)(a defense counsel of the court-martial)(an officer responsible for making a recommendation concerning disposition of charges)]()[(influence)(alter) the testimony of as a witness before a (court-martial)(an investigation officer)]() in the case of by [(promising)(offering)(giving) to the said , (the sum of \$) (, of a value of about \$)][communicating to the said a threat to][(, (if)(unless) he/she, the said , would [recommend dismissal of the charges against said] [wrongfully refuse to testify](testify falsely concerning) ()][[at such trial)(before such investigating officer)]["]."

Sec. 4. These amendments shall take effect on July 6, 1991, subject to the following:

a. The amendments made to Rule for Courts-Martial 1004(c)(8) and paragraphs 4e, 19, and 35c(2) of Part IV shall apply to any offense committed on or after July 6, 1991.

b. Military Rule of Evidence 707 shall apply only in cases in which arraignment has been completed on or after July 6, 1991.

c. The amendments made to Rules for Courts-Martial 701 and 705 shall apply only in cases in which charges are preferred on or after July 6, 1991.

d. The amendments made to Rules for Courts-Martial 707 and 1010 shall apply only to cases in which arraignment occurs on or after July 6, 1991.

e. The amendment made to Rule for Courts-Martial 908(b)(9) shall apply only to cases in which pretrial confinement is imposed on or after July 6, 1991.

f. The amendment made to Rule for Courts-Martial 113(c)(1) shall apply only in cases in which the sentence is adjudged on or after July 6, 1991.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to July 6, 1991, which was not punishable when done or omitted.

h. The maximum punishment for an offense committed prior to July 6, 1991, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. 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 July 6, 1991, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Sec 5. 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.

THE WHITE HOUSE, June 27, 1991.

/s/ George Bush

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