

51 FR 6497

Title 3 --

The President

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

Executive Order 12550 of February 19, 1986

51 FR 6497

February 25, 1986

**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, 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. 707(a) is amended to read as follows:

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

"(1) Notice to the accused of preferral of charges under R.C.M. 308; or

"(2) The imposition of restraint under R.C.M. 304(a)(2)-(4)."

b. R.C.M. 805(b) is amended by striking out "911" each time it appears and inserting "912" in lieu thereof.

c. R.C.M. 903(c)(3) is amended by inserting "a request" after "or".

d. R.C.M. 909 is amended --

(1) by amending subsection (a) to read as follows:

"(a) *In general.* No person may be brought to trail by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.";

(2) in subsection (b) by striking out "appears" and inserting in lieu thereof "is established"; and

(3) by amending subsection (c)(2) to read as follows:

"(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case."

e. R.C.M. 916(e)(3) is amended by striking out "(c)(1)" and inserting in lieu thereof "(e)(1)".

f. R.C.M. 920(e)(2) is amended by inserting, "unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar" after "issue".

g. R.C.M. 921(d) is amended by striking out "sentence" and inserting in lieu thereof "findings".

h. R.C.M. 922(b) is amended --

(1) by redesignating the second sentence as paragraph (1); and

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

"(2) In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state. This provision shall not apply during reconsideration under R.C.M. 924 (a) of a finding of guilty previously announced in open court unless the prior finding was announced as unanimous."

i. R.C.M. 1001 is amended --

(1) in subsection (b)(1) by striking out "age, pay," and inserting in lieu thereof "pay"; and

(2) in subsection (b)(3)(B) by striking out "65(c)" and inserting in lieu thereof "64".

j. R.C.M. 1003(b)(10)(B) is amended by inserting "Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty." after the first sentence.

k. R.C.M. 1004 is amended --

(1) by striking out "circumstance" and "circumstances" each time these words appear and inserting in lieu thereof "factor" and "factors", respectively;

(2) in subsection (a) by --

(A) striking out "and" at the end of paragraph (1); and

(B) redesignating paragraph (2) as paragraph (3) and inserting the following as paragraph (2):

"(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and";

(3) by amending subsection (b)(4) to read as follows:

"(4) *Necessary findings.* Death may not be adjudged unless --

"(A) The members find that at least one of the aggravating factors under subsection (c) existed;

"(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

"(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this Rule.";

"(4) by amending subsection (c)(2) to read as follows:

"(2) That in committing the offense the accused --

"(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

"(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;"

(5) in subsection (c)(4) by striking out "Article 120" and inserting in lieu thereof "Articles 104, 106a, or 120";

(6) in subsection (c)(7)(F) by --

(A) inserting "(including a Delegate to, or Resident Commissioner in, the Congress)" after "Member of Congress"; and

(B) striking out "or any judge of the United States." and inserting in lieu thereof "justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2) or 315(c)(3);";

(7) in subsection (c)(9)(B) by striking out "or";

(8) in subsection (c)(10) by striking out the period and inserting "; or" in lieu thereof; and

(9) by inserting the following new subsection after subsection (c)(10):

"(11) That, only in the case of a violation of Article 104 or 106a:

"(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

"(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim."

l. R.C.M. 1010 is amended --

(1) by striking out "ADVICE" and inserting in lieu thereof "NOTICE" in the rule title;

(2) by striking out "(a) *Advice.*" at the beginning of the rule;

(3) by redesignating subsections (1), (2), (3), and (4) as subsections (a), (b), (c), and (d), respectively; and

(4) by striking out subsection (b), "*Inquiry*", in its entirety.

m. R.C.M. 1106(b) is amended by striking out "or any reviewing" and inserting in lieu thereof "to any reviewing".

n. R.C.M. 1114(c)(1) is amended by striking out "actions" in the last sentence and inserting in lieu thereof "orders".

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

a. Mil.R.Evid. 304 is amended as follows:

(1) Subdivision (a) is amended by striking out "An involuntary" and inserting in lieu thereof "Except as provided in subsection (b), an involuntary".

(2) Subdivision (b) is amended by --

(A) striking out "*Exception*" and inserting in lieu thereof "*Exceptions*";

(B) designating the first sentence as subsection (1); and

(C) adding the following new subsection at the end thereof:

"(2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made."

(3) Paragraph (e)(3) is amended by --

(A) striking out "either";

(B) striking out "or" and inserting in lieu thereof a comma; and

(C) inserting ", or that the evidence would have been obtained even if the statement had not been made" after "use of the statement".

b. Mil.R.Evid. 311 is amended as follows:

(1) Subdivision (b) is amended to read as follows:

"b. *Exceptions*.

"(1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

"(2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

"(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

"(A) The search or seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil.R.Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

"(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

"(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard."

(2) Paragraph (e)(1) is amended by striking out the period at the end thereof and inserting in lieu thereof ", that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant."

(3) Paragraph (e)(2) is amended by striking out the period at the end thereof and inserting in lieu thereof ", that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant."

c. Mil.R.Evid. 609(e) is amended by deleting "65(c)" and inserting in lieu thereof "64".

d. Mil.R.Evid. 804(a) is amended by striking out "claim or lack of memory" and inserting in lieu thereof "claim of lack of memory".

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

a. Paragraph 16 is amended --

(1) in subparagraph b(3)(b) by striking out "had knowledge" and inserting in lieu thereof "knew or reasonably should have known";

(2) by amending subparagraph c(3)(b) to read as follows:

"(b) *Knowledge*. Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence."; and

(3) by amending subparagraph f(4) to read as follows:

"(4) *Dereliction in the performance of duties*.

"In that XXX , (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board -- location) (subject-matter jurisdiction data, if required), (on or about XXX 19 X ) (from about XXX 19 X to about XXX 19 X ), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed to XXX , as it was his/her duty to do."

b. Part IV is amended by inserting the following new paragraph after paragraph 30:

"30a. Article 106a -- Espionage

"a. *Text.*

"(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, any thing described in paragraph (3), shall be punished as a court-martial may direct, except that if the accused is found guilty of any offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

"(2) An entity referred to in paragraph (1) is --

"(A) a foreign government;

"(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

"(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

"(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

"(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless --

"(A) The members of the court-martial unanimously find at least one of the aggravating factors set out under subsection (c); and

"(B) The members unanimously determine that any extenuating or mitigating factors are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

"(2) Findings under this subsection may be based on --

"(A) evidence introduced on the issue of guilt or innocence;

"(B) evidence introduced during the sentencing proceeding; or

"(C) all such evidence.

"(3) the accused shall be given broad latitude to present matters in extenuation and mitigation.

"(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

"(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

"(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

"(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

"(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36)."

"b. *Elements.*

"(1) *Espionage.*

"(a) That the accused communicated, delivered, or transmitted any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense;

"(b) That this matter was communicated, delivered, or transmitted to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly; and

"(c) That the accused did so with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

"(2) *Attempted espionage.*

"(a) That the accused did a certain overt act;

"(b) That the act was done with the intent to commit the offense of espionage;

"(c) That the act amounted to more than mere preparation; and

"(d) That the act apparently tended to bring about the offense of espionage.

"(3) *Espionage as a capital offense*

"(a) That the accused committed espionage or attempted espionage; and

"(b) That the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptographic information, or (4) any other major weapons system or major element of defense strategy.

"c. *Explanation*

"(1) *Intent.* 'Intent or reason to believe' that the information 'is to be used to the injury of the United States or to the advantage of a foreign nation' means that the accused acted in bad faith or otherwise without authority with respect to information that is not lawfully accessible to the public.

"(2) *National defense information.* 'Instrument, appliance, or information relating to the national defense' includes the full range of modern technology and matter that may be developed in the future, including chemical or biological agents, computer technology, and other matter related to the national defense.

"(3) *Espionage as a capital offense.* Capital punishment is authorized if the government alleges and proves that the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptographic information, or (4) any other major weapons system or major element of defense strategy. See R.C.M. 1004 concerning sentencing proceedings in capital cases.

"d. *Lesser included offense.* Although no lesser included offenses are set forth in the code, federal civilian offenses on this matter may be incorporated through the third clause of Article 134.

"e. *Maximum punishment*

"(1) *Espionage as a capital offense.* Death or such other punishment as a court-martial may direct. See R.C.M. 1003 and R.C.M. 1004.

"(2) *Espionage or attempted espionage.* Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

"f. *Sample specifications*

In that XXX (personal jurisdiction data), did, (at/on board -- location), on or about XX , 19 X , with intent or reason to believe it would be used to the injury of the United States or to the advantage of XX , a foreign nation, (attempt to) (communicate) (deliver) (transmit) XX (description of item), (a document) (a writing) (a code book) (a signal book) (a sketch) (a photograph) (a photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, [which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) ( XXX , a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptographic information) ( XXX , a major weapons system) ( XXX , a major element of defense strategy)] to XXX [(a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)] [(a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)] (indirectly by XXX )."

c. Part IV is amended by adding the following new sentence at the end of paragraph 105e:

"However, any person subject to the code who is found guilty of soliciting or advising another person to commit the offense of aiding the enemy, spying, or espionage (Articles 104, 106, or 106a) shall be subject to any punishment, other than death, that a court-martial may direct."

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

a. The text of paragraph 2 is amended by inserting the following new paragraph at the beginning thereof:

"The following persons may serve as a nonjudicial punishment authority for the purposes of administering nonjudicial punishment proceedings under this Part:"

b. Paragraph 4a is amended by striking out "commander" each time it appears and inserting in lieu thereof "nonjudicial punishment authority".

c. Paragraph 4b(2) is amended by striking out "commander" and inserting in lieu thereof "nonjudicial punishment authority".

d. Paragraph 4c(1) is amended by --

(1) striking out "commander -- or the commander's delegee (see paragraph 2c of this Part) --

who offered nonjudicial punishment" and inserting in lieu thereof "nonjudicial punishment authority";

and

(2) striking out "commander" the second, third, and fourth time it appears in the first sentence and in subparagraphs (B), (D), and (G), and inserting in lieu thereof "nonjudicial punishment authority".

e. Paragraph 4c(2) is amended to read as follows:

"(2) *Personal appearance waived; procedure.* Subject to the approval of the nonjudicial punishment authority, the servicemember may request not to appear personally under subparagraph 4(c)(1) of this Part. If such request is granted, the servicemember may submit written matters for consideration by the nonjudicial punishment authority before such authority's decision under subparagraph 4c(4) of this Part. The servicemember shall be informed of the right to remain silent and that matters submitted may be used against the member in a trial by court-martial."

f. Paragraph 4c(4) is amended by --

(1) striking out "*Commander's decision*" and inserting in lieu thereof "*Decision*"; and

(2) striking out "commander" each time it appears and inserting in lieu thereof "nonjudicial punishment authority".

g. Paragraph 5(b) is amended by striking out "by the following commanders".

h. The introductory clause of paragraph 5b(1)(B) is amended to read as follows:

"(B) If imposed by an officer exercising general court-martial jurisdiction, an officer of general or flag rank in command, or a principal assistant as defined in paragraph 2c of this Part -- "

i. Paragraph 5b(2)(A) is amended by striking out "commander" and inserting in lieu thereof "nonjudicial punishment authority".

j. The introductory clause of paragraph 5b(2)(B) is amended by inserting "or a principal assistant to such a commanding officer as defined in paragraph 2c of this Part" after "above".

k. Paragraph 5c(2) is amended by striking out "commander imposing this form of punishment" and inserting in lieu thereof "nonjudicial punishment authority".

l. Paragraph 6a is amended by striking out "commander" and inserting in lieu thereof "nonjudicial punishment authority who imposes nonjudicial punishment, the commander".

m. Paragraph 6a(4) is amended by inserting "nonjudicial punishment authority or" after "A suspension may be vacated by any" in the first sentence.

n. Paragraph 6b is amended by --

(1) striking out "commander" in the third sentence and inserting in lieu thereof "nonjudicial punishment authority who imposed nonjudicial punishment, the commander,"; and

(2) striking out "commander" in the fourth sentence and inserting in lieu thereof "nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command".

o. Paragraph 6c is amended by striking out "commander" in the second sentence and inserting in lieu thereof "nonjudicial punishment authority who imposes nonjudicial punishment, the commander".

p. Paragraph 6d is amended by striking out "commander who imposes nonjudicial punishment" in the second sentence and inserting in lieu thereof "nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment,".

q. Paragraph 7f(3) is amended by inserting "the commander," after "the officer who imposed the nonjudicial punishment,".

Sec. 5. The amendments to Mil.R.Evid. 704, which were implemented on 10 April 1985 pursuant to Mil.R.Evid. 1102, are hereby rescinded; *Provided*, That this rescision shall not apply in the trial of any case in which arraignment occurred while such amendments were in effect.

Sec. 6. These amendments shall take effect on March 1, 1986, with respect to all court-martial processes taken on and after that date: *Provided*, That nothing contained 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 that date, 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; *Provided further*, That the amendments made in Rule for Court-Martial 1004(c) shall apply in the trial of offenses committed on or after March 1, 1986; *Provided further*, That nothing contained in these amendments shall be construed to invalidate any capital sentencing proceeding conducted prior to March 1, 1986, and any such proceeding shall be completed and reviewed in the same manner and with the same effect as if these amendments had not been prescribed; *Provided further*, That amendments to Rule for Court-Martial 707(a) shall not apply to any condition on liberty imposed before March 1, 1986, and the effect of such a condition on liberty shall be considered under Rule for Court-Martial 707(a) as it existed before March 1, 1986; *Provided further*, That the amendments made in paragraph 16 of Part IV shall apply in trials of offenses committed on or after March 1, 1986; *Provided further*, That the amendments made in paragraph 30a of Part IV shall apply in the trials of offenses committed under Article 106a on or after March 1, 1986; *And provided further*, That the amendments made in paragraph 30a of Part IV authorizing capital punishment shall apply with respect to offenses under Article 106a committed on or after March 1, 1986.

Sec. 7. 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.

/s/ Ronald Reagan

THE WHITE HOUSE,

February 19, 1986.

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