

Uniform Code of Military Justice

Subject: Absence Without Leave.
A. W. 61

I. Army Provisions

1. Articles of War

"ART. 61. Absence Without Leave.-- Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 132. SIXTY-FIRST ARTICLE OF WAR.

"Discussion.--The article is designed to cover every case not elsewhere provided for where any persons subject to military law is through his own fault not at the place where he is required to be at a time when he should be there....."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 61 was not changed by P. L. 759.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4.....The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--....."

"Ninth.....-- Or leaves his station without being regularly relieved;....."

"ART. 8.....Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Ninth.....-- Or is negligent or careless in obeying orders,.....;

"Nineteenth.....-- Or is absent from his station or duty without leave, or after his leave has expired;....."

"ART. 9.....Any officer who absents himself from his command without leave, may, by the sentence of a court martial, be reduced to the rating of seaman, second class....."

"ART. 22. (a) Offenses not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct"

2. Naval Courts and Boards

Willfully missing ship is charged under AGN Art. 22 (a). If there is no deliberate intent, it is charged as absence without or over leave with the fact of missing ship as a matter of aggravation.

3. Proposed Navy Bill

"Sec. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Nineteenth. Or is negligent or careless in obeying orders,"

"Twenty-ninth. Or is absent without authority from his place of duty;

"Fifty-seventh. Or, without authority, deliberately and willfully misses his ship or mobile unit;

"Sixty-first. Or is guilty of any disorder or neglect to the prejudice of good order and discipline.....other than any disorder or neglect.....mentioned in these Articles;....."

"Sec. 7. Article 9 is renumbered as Article 10 and amended....."

(Art. 10 will read as amended: "Any officer who absents himself from his command without authority, may, by the sentence of a court martial, be reduced to the rating of seaman, second class.")

"Sec. 3. Article 4 is renumbered as Article 8 and amended....."

(Present Article 4, paragraph Ninth, is not included in the amended article.)

"Sec. 15. Articles 22 and 23 are repealed."

III. Differences

1. The present A.G.N. does not make it an offense of absence without leave to fail to repair at the fixed time to the properly appointed place of duty. Such an offense is now punishable under Art. 22(a), or, in many cases, could be brought within present Art. 8, paragraph ninth. New Art. 9, paragraph twenty-ninth, is worded more broadly than the present article and may be intended to cover all of the types of unauthorized absence specified in A. W. 61. If paragraph twenty-ninth is construed more narrowly than this, a failure to repair might be punished under new Art. 9, paragraph nineteenth, or paragraph sixty-first.
2. Navy provisions make a separate and more serious offense of unauthorized absence occurring in conjunction with a deliberate and willful missing of a ship or mobile unit. (Proposed Navy Bill, Sec. 11, New Art. 9, Fifty-Seventh.)
3. Navy provisions make a separate offense of the case where an officer absents himself from his command without authority. Punishment permissible for this includes a sentence of reduction to the rating of seaman, second class. A. W. 61 provides for this offense, but a sentence of reduction to the rank of private would be permissible only in time of war. Cf. C.S., A.W. 44.

IV. Recommendations

None.

Uniform Code of Military Justice

Subject: Disrespect Toward President, Vice President, Congress, etc.
A.W. 62.

I. Army Provisions

1. Articles of War

"ART. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.-- Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct."

2. Manual for Courts-Martial.

No comment.

3. Public Law 759--80th Congress, Chapter 625--2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

This offense was included under Art. 22 (a), offenses not specified, as conduct to the prejudice of good order and discipline.

2. Naval Courts and Boards

Only comment is specification for the offense of sending a contemptuous or disrespectful letter to the Secretary of the Navy.

3. Proposed Navy Bill

"SEC. 11.....

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy --

P. 2

"Forty-seventh. Or (who) is contemptuous or disrespectful in language or deportment to or concerning the President, Vice President, the Congress of the United States, the Secretary of the Navy, or the governor or legislature of any State, Territory, or other possession of the United States in which he is on duty or present."

III. Differences

The provisions of the Articles of War and the proposed Navy bill are substantially the same, except that A. W. 62 specifically provides that an officer may be dismissed for this offense and thus precludes the President from setting any maximum less than dismissal in such a case.

The Army and Navy provisions provide for disrespect toward the Secretary of the Army and Navy respectively. In the articles for the government of the armed services, the Secretary of Defense should be provided for or all the Secretaries of the various departments under the generic term of all cabinet officers.

IV. Recommendations

The Ballantine, Keefe, McGuire, White, and Vanderbilt Reports make no comment.

FEL - 1

Uniform Code of Military Justice

Subject: Insubordinate Conduct Toward Officers and Noncommissioned Officers.
A. W. 63-65.

I. Army Provisions

1. Articles of War

"ART. 63. Disrespect Toward Superior Officer.-- Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct."

"ART. 64. Assaulting or Willfully Disobeying Superior Officer.-- Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

"ART. 65. Insubordinate Conduct Toward Noncommissioned Officer.-- Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 133. DISRESPECT TOWARD A SUPERIOR OFFICER.

"Discussion.-- The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

"It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

"The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; but by superior is not necessarily meant a superior in rank, as a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a medical officer.

"Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. Disrespect by acts may be exhibited in a variety of modes-- as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop.)

"Where the accused did not know that the person against whom the acts, etc., were directed was his superior officer, such lack of knowledge is a defense.

"Proof.--(a) That the accused did or omitted to do certain acts or used certain language to or concerning a certain officer, as alleged; (b) that the behavior involved in such acts, omissions, or words was, under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; and (c) that the officer toward whom the acts, omissions, or words were directed was the accused's superior officer."

"Par. 134. a. ASSAULTING SUPERIOR OFFICER

"Discussion.-- The phrase 'on any whatsoever' is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined in A. W. 67.

"By 'superior officer' is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

"The word 'strikes' means an intentional blow with anything by which a blow can be given.

"The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The weapon chiefly had in view by the word 'draw' is no doubt the sword; the term might, however, apply to a bayonet in a sheath or to a pistol, and the drawing of either in an aggressive manner or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether or not loaded) or of a club, or of any implement or thing by which a serious blow could be given, would be within the description, 'lifts up.' (Winthrop.)

"The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.' But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article. (Winthrop.)

"An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office.

"Proof.--(a) That the accused struck a certain officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (b) that such officer was the accused's superior officer at the time; and (c) that such superior officer was in the execution of his office at the time.

"b. DISOBEYING SUPERIOR OFFICER

"Discussion.--The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under A. W. 96. Where the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under A. W. 64, although carrying out such an intention may be.

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

"A person can not be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate. Disobedience of an illegal order might under some circumstances involve an act of insubordination properly chargeable under A. W. 96.

"That obedience to a command involved a violation of the accused's religious scruples is not a defense.

"Failure to comply with the general or standing orders of a command, or with the Army Regulations, is not an offense under this article, but under A. W. 96; and so of a nonperformance by a subordinate of any more routine duty.

"The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

"Proof.--(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command. A command of a superior officer is presumed to be a lawful command."

"Par. 135. a. ASSAULTING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER.

"Discussion.--.....The part of the article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application.

"Proof.--(a) That the accused soldier struck a certain warrant officer or noncommissioned officer as alleged, or assaulted or attempted or threatened to strike or assault him in a certain manner, as alleged; and (b) that such violence was done, attempted, or threatened while such warrant officer or noncommissioned officer was in the execution of his office.

"b. DISOBEYING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER

"Proof.--(a) That the accused soldier received a certain order from a certain warrant officer or noncommissioned officer, as alleged; and (b) that such order was given while such warrant officer or noncommissioned officer was in the execution of his office; and (c) that the accused soldier willfully disobeyed such command. An order from a warrant officer or a noncommissioned officer in the execution of his office is presumed to be a lawful order.

"c. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER.

"Discussion.-- The word 'toward' limits the application

of this part of the article to language and behavior within sight or hearing of the warrant officer or noncommissioned officer concerned; the word not being used in the same sense as in A. W. 63.

"Proof.--(a) That the accused used language or did or omitted to do acts under certain circumstances, or in a manner, or with an intended meaning, as alleged; (b) that such language or behavior was used toward a certain warrant officer or noncommissioned officer; and (c) that such warrant officer or noncommissioned officer was in the execution of his office at the time."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 3. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--....."

"Sixth (Contempt of superior officer).-- Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office;

"Seventh (Combinations against commanding officer).-- Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

"Twentieth (Violating general orders or regulations).-- Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;"

"ART. 4. The punishment of death or such other punishment as a court-martial may adjudge may be inflicted on any person in the naval service--....."

"Second. (Disobedience of orders).-- Or disobeys the lawful orders of his superior officer;

"Third (Striking superior officer).-- Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;"

2. Naval Courts and Boards

"SEC. 63. Contempt of superior officer--.....

"Elements: It is essential that the superior officer be present and in the execution of his office at the time, but it is immaterial whether the words or acts be directed toward him in his official or private capacity.

"The accused must know that the person to whom the language or deportment was directed was, in fact, his superior officer.

"Disrespect by deportment may be exhibited in a variety of modes--as by neglecting the customary salute, by a marked disdain, indifference, impertinence, undue familiarity, or other rudeness in the presence of the superior officer."

"SEC. 47. Disobedience of orders.--.....

"Elements: No specific intent is necessary, but the order must be understood, the accused know that it is from his superior officer, and the disobedience wilful.

"'Superior officer' as here used includes petty and noncommissioned officers.

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. The accused cannot be convicted of this charge if the order was in fact illegal.

"The form of the order is immaterial so long as it is definite and positive, as is the method by which it is transmitted to the accused; but the communication must amount to an order.

"When the order is to be executed in the future, neglect to comply therewith is not, as a rule, chargeable under this article but under the charge of conduct to the prejudice of good order and discipline, and the same is true of a refusal to obey such an order before the time set for its execution.

"Failure to comply with the Navy Regulations or with general orders is not an offense under this charge, but under the 8th A.G.N., paragraph 20.

"Disobedience of a local order is an offense under the general charge. Nonperformance by a subordinate of routine duty is properly charged as neglect of duty."

"SEC. 48. Striking and assaulting his superior officer.--.....
.....

"Elements: To strike means to inflict an intentional blow.

"An assault is an unlawful offer or attempt with force or violence to do a corporal hurt to another. Rushing, aiming a blow, or pointing a weapon at another is an assault. It is the apprehension of hurt, not the real design of the offender, that constitutes the offense.

"There must be intent, actual or apparent, to inflict corporal hurt on another.

"There must be some overt act toward carrying out such intent as opposed to mere preparation.

"The force or violence must be physical; mere words, however threatening, or insulting gestures are not in themselves sufficient to constitute an assault.

"It is immaterial that the offender is not in a position to consummate the threatened injury, provided that the superior officer believes there is a present ability to injure him. Example: Although a weapon pointed at a person is unloaded, this may still constitute an offense.

"An officer may be in the execution of the duties of his office without being on duty in the strictly military sense. This phrase may properly be defined: In the performance of an act or duty either pertaining or incident to his office or legal or appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or usage of the service."

"SEC. 75. Violating general orders or regulations.--.....

"Elements: As a practical manner 'violation of' includes 'refusing obedience to' and the former term should be used in the charge. A regulation or general order issued by the Secretary of the Navy is lawful that is not in conflict with the Constitution or the provisions of an act of Congress. No specific intent need be shown."

3. Proposed Navy Bill

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--
.....

'Tenth. Or does not properly observe the orders of his commanding officer, and use his utmost exertion to carry

them into execution, when ordered to prepare for or join in, or when actually engaged in battle, or while in sight of an enemy; -

'Twelfth. Or does not use his utmost exertions to join in battle, when so ordered.'"

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

'Sixteenth. Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while such superior officer is in the execution of his office;

'Seventeenth. Or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer;

'Thirtieth. Or violates or refuses obedience to any lawful general order or regulation issued by the Secretary of the Navy;

'Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine.'"

III. Differences

1. Disrespectful Conduct.

Under the A.G.N. the term "superior officer" includes warrant officers and noncommissioned officers, while under the Articles of War, offenses against warrant officers and noncommissioned officers are triable under separate articles.

It is not necessary that the disrespect occur in the presence of an Army commissioned officer, but if the person offended is an Army non-commissioned officer or a Navy commissioned or non-commissioned officer, such person must be present and in the execution of his duty.

The A.G.N. makes combining to weaken the lawful authority of, or to lessen the respect due a commanding

officer a separate offense. The specification in NC&B, Sec. 64, deals with combining to lessen the respect due to his commanding officer.

2. Disobeying Orders.

Under the Articles of War, the offenses of disobeying commissioned officers and disobeying noncommissioned officers are treated separately, while under the proposed A.G.N. the offense is disobeying the order of lawful authority, which presumably continues the present Navy practice of not distinguishing between commissioned and noncommissioned officers insofar as this offense is concerned.

The offense of disobeying an Army commissioned officer is punishable by death, while under the proposed A.G.N. only certain battle disobedience offenses are punishable by death.

The A.G.N. makes disobedience to a general order or regulation issued by the Secretary of the Navy a separate offense, while under the Articles of War, such disobedience is tried under the general article, A.W. 96.

3. Assault

Assaults against commissioned and noncommissioned officers under the Articles of War are treated separately, while under the proposed A.G.N., all assaults are treated alike.

Assaults against superior commissioned Army officers are punishable by death, while assaults against Army non-commissioned and Navy superior officers are not.

Using threatening language is an offense against A.W. 65 (non-commissioned officers), or A.W. 96 (general article), or A.G.N. 9, Thirteenth.

IV. Recommendations

There are no comments on these offenses in the McGuire, Ballantine, White, Keefe, or Vanderbilt Reports or Navy JAG Recommendations.

Uniform Code of Military Justice

Subject: Assaulting or Willfully Disobeying Superior Officer.

See C.S., A.W. 63 - Insubordinate Conduct Toward Officers
and Noncommissioned Officers.

Uniform Code of Military Justice

Subject: Insubordinate Conduct Toward Noncommissioned Officer.

See C.S., A.W. 63 - Insubordinate Conduct Toward Officers
and Noncommissioned Officers.

Uniform Code of Military Justice

Subject: Mutiny or Sedition, A.W. 66.

I. Army Provisions

1. Articles of War

"ART. 66. Mutiny or Sedition.-- Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court martial may direct."

2. Manual for Courts-Martial

"Par. 136. SIXTY-SIXTH ARTICLE OF WAR

"a. ATTEMPTING TO CREATE A MUTINY OR SEDITION.

"Discussion.-- Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. Sedition implies the raising of commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

"The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent.

"An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt while material in extenuation is not a defense.

"The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny or sedition and so be guilty of an attempt to create a mutiny or sedition, alike whether he was joined by others or not, or whether a mutiny or sedition actually followed or not.

"Proof.-- (a) An act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States.

"b. BEGINNING OR JOINING IN A MUTINY OR SEDITION.

"Discussion.--See 136a. There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

"Proof.--(a) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States; and (b) that the accused began or joined in such certain collective insubordination.

"c. CAUSING OR EXCITING A MUTINY OR SEDITION.

"Discussion.--See 136a. As in 136b, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in, or being present at, the demonstrations of mutiny which result from his activities.

"Proof.--(a) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States; and (b) acts of the accused tending to cause or excite the certain collective insubordination."

3. Public Law 759--80th Congress, Chapter 625, 2D Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"Article 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be

inflicted on any person in the naval service--

"First (Mutiny).--Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;"

"Article 8. Persons to whom applicable.--Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....."

"Eighth (Mutinous words).--Or utters any seditious or mutinous words;"

2. Naval Courts and Boards

"Sec. 46. Mutiny.--Charge:

- 1. (Making) a (mutiny.
- (Attempting to make) (mutinous assembly.
- (Uniting with)

"....."

"Elements: 1. Mutiny consists in an unlawful opposition or resistance to or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same. Simple violence without proof of purpose to usurp, subvert, or override authority is not mutiny. Specific intent is an essential element. To complete the offense an overt act of mutiny must occur. This may consist, however, of a persistent refusal or omission with the essential intent. To constitute mutiny it is not necessary that there should be a concert of several persons, though it will be rare that this is lacking.

"Uniting with a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do.

"A mutinous assembly differs from a mutiny in that, although the intent to commit a mutiny is entertained, no overt act has yet occurred.

"....."

"Lesser included offenses: Under charge 1, 'attempting to

P. 4

make' or 'uniting with' under the charge of 'making', and 'mutinous assembly' under 'mutiny'.

"Under any of the three charges, conduct to the prejudice of good order and discipline.

"Sample specifications:

"CHARGE I

"MAKING A MUTINY

"SPECIFICATION

"In that A _____, B. C _____, seaman second class, U. S. Navy, D _____ E. F _____, fireman third class, U. S. Navy, and G _____ H. I _____, private, U. S. Marine Corps, while serving as general court-martial prisoners in the U. S. naval prison at the navy yard, _____, _____, having conspired each with the other to mutiny against the lawful authority of and escape from the lawful custody of U _____ V. W _____, coxswain and X _____ Y. Z _____, seaman second class, U. S. Navy, stationed at said prison and on duty as sentinels over the aforesaid C _____, F _____, and I _____, did, on or about September 5, 19____, while in the said prison and while in the lawful custody of the said W _____ and the said Z _____, make a mutiny against the lawful authority of the said W _____, and the said Z _____, in that they, the said C _____, F _____, and I _____, did then and there by force and violence take from the said W _____ a Colt automatic pistol and a bunch of keys, and did tie, bind, fasten, and secure, and assist in tying, binding, fastening, and securing the feet and hands of the said W _____ and the said Z _____, and did therein and thereby escape from the lawful custody of the said W _____ and the said Z _____; the United States then being in a state of war."

"Sec. 65. Seditious or mutinous words.--....."

"Elements: Mutiny is against military authority; sedition against civil.

"Seditious words tend to degrade and vilify the Constitution, to promote insurrection and circulate discontent, to asperse justice and anyway impair the exercise of the functions of Government. The words must have been knowingly uttered and with seditious intent. Sedition implies a resistance to lawful civil power.

"Similarly mutinous words are words tending to have the same effect as regards military or naval functions."

3. Proposed Navy Bill

"ART. 8. The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person subject to the Articles for the Government of the Navy--

'First. Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;

"ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--

'Eighteenth. Or utters any seditious or mutinous words;

III. Differences

The definitions of mutiny in both the AGN and Articles of War are extremely broad. Under these definitions, it is possible to include many acts not ordinarily thought of as mutiny. For instance, the Navy sample specification for mutiny deals with a prison break using force.

Although the offenses under the AGN and A.W. cover the same acts in general, the Army provisions are broader in that the Army offense of attempting to create a mutiny or sedition includes more than the Navy offense of uttering mutinous or seditious words.

The use of the word "make" in the Navy offense of making a mutiny is ambiguous as it has the connotations of "creating", "causing", or "exciting." It is very doubtful whether these connotations are intended.

IV. Recommendations

There are no comments on these provisions in the McGuire, Ballantine, White, Keefe, or Vanderbilt Reports or the Navy JAG recommendations.

Uniform Code of Military Justice

Subject: Failure to Suppress Mutiny or Sedition.
A. W. 67.

I. Army Provisions

1. Articles of War

"ART. 67. Failure to Suppress Mutiny or Sedition.-- Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court martial may direct."

2. Manual for Courts-Martial

Par. 137

"a. FAILURE TO SUPPRESS MUTINY OR SEDITION

"Discussion. The article applies only to officers and soldiers. Similar acts or omissions by other persons subject to military law are chargeable under A. W. 96.

"One is not present at a mutiny unless an act or acts of collective insubordination occur in his presence.

"The article requires of an officer or soldier 'his utmost endeavor' to suppress a mutiny or sedition at which he is present. Where such extreme measures are reasonably necessary under the circumstances, the use of a dangerous weapon and the taking of life are required; but the use of more force than is reasonable necessary under the circumstances is an offense.

"Proof.--(a) The occurrence of an act or acts of collective insubordination in the presence of the accused; and (b) acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

"b. FAILURE TO GIVE INFORMATION OF MUTINY OR SEDITION

"Discussion. Where circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such 'reason to believe' as will render him culpable under the article.

"It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"'Delay' imports the lapse of an unreasonable time without action.

"Proof.--(a) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced, in a reasonable man, a belief that a mutiny or sedition was impending; and (b) acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief."

3. Public Law 759--80th Congress, Chapter 625, 2d Session

No change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

"First (Mutiny). Who.....being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer."

2. Naval Courts and Boards

"Sec. 46. Mutiny--.....

"Elements:.....

"2. The duty to suppress a mutiny may even extend in extreme cases to the taking of life. The word 'utmost' means the utmost that may properly be called for by the circumstances of the situation, and in view of the rank, command, and abilities of the individual. To convict one of this charge the fact that a mutiny existed must be proved.

"3. To convict of this charge (failing to report), it is essential that there be proof of the knowledge of the accused, the fact of a mutinous assembly or intended mutiny, and the neglect to give information."

3. Proposed Navy Bill

No change. This provision is included in Art. 8, First, of the proposed A.G.N.

III. Differences

As to failure to suppress a mutiny, the Army and Navy provisions are substantially the same.

As to failure to report knowledge of a mutiny, the Army provisions refer only to impending mutinies, while the Navy provisions refer to either a present or future mutiny or mutinous assembly.

As to knowledge, the Army uses a test of whether a "reasonable man" would have known, while the Navy provisions require actual knowledge.

A. W. 66 includes sedition as well as mutiny, while proposed AGN, Art. 8, First, only applies to mutiny.

IV. Recommendations

There is no comment on these provisions in the McGuire, White, Ballantine, Keefe, or Vanderbilt Reports or Navy JAG Recommendations.

Uniform Code of Military Justice

Subject: Quarrels; Frays; Disorders.
A. W. 68.

I. Army Provisions

1. Articles of War

"ART. 68. Quarrels; Frays; Disorders.--All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct."

2. Manual for Courts-Martial

"Par. 138. SIXTY-EIGHTH ARTICLE OF WAR

"a. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT

"A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word 'fray' is thus seen to be somewhat restrictive, but the words 'quarrels' and 'disorders' include any disturbance of a contentious character from a mere war of words to a rout or riot.

"It is immaterial under the article whether the officer or other person who essays to part or quell a quarrel, fray, or disorder is on a duty status or not, as it is immaterial whether the persons engaged in the quarrel, etc., are superior to him in rank or not.

"It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or non-commissioned officer, or other person thereunto authorized by the article.

"b. The word 'threat' as here used includes any menacing action, either by gesture or by words."

Par. 134

"a. ASSAULTING SUPERIOR OFFICER

".....

"The phrase 'draws or lifts up any weapon against' covers any simple assault committed in the manner stated. The phrase 'offers any violence against him' comprises any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.'"

"b. DISOBEYING SUPERIOR OFFICER

"The willful disobedience contemplated is such as shows an intentional defiance of authority....."

The principles herein stated are applicable to all persons acting pursuant to authority prescribed in A. W. 68.

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 68 -- no change.

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4. Persons to whom applicable.-- The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service--

"Second (Disobedience of orders).-- Or disobeys the lawful orders of his superior officer;

"Third (Striking superior officer).-- Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;"

"ART. 8. Persons to whom applicable.-- Such punishment as a court martial may adjudge may be inflicted on any person in the Navy--....

"Seventeenth (Refusing to apprehend offenders).-- Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;"

2. Naval Courts and Boards

The word "fray", "quarrels" and "disorders" as defined in par. 138(a), MCM, are similarly defined in sec. 92.

Sec. 47. 'Disobedience of orders.--.....No specific intent is necessary, but the order must be understood, the accused know that it is from his superior officer, and the disobedience wilful. 'Superior officer' as here used includes petty and noncommissioned officers. The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. The accused cannot be convicted of this charge if the order was in fact illegal."

"Sec. 48.....An assault is an unlawful offer or attempt with force or violence to do a corporal hurt to another....."

"An officer may be in the execution of the duties of his office without being on duty in the strictly military sense. This phrase may properly be defined: In the performance of an act or duty either pertaining or incident to his office or legal or appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or usage of the service." To constitute the offense of threats, the words of the charge must be taken in their usual acceptation, and the person to whom the threat was directed must be present.

3. Proposed Navy Bill

Sec. 11. "Article 14 is renumbered as Art. 9 and amended to read as follows:

"ART. 9. Such punishment, other than death, as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--....."

"Thirteenth. Or uses provoking or reproachful words or gestures toward any person in the naval service, or strikes, threatens to strike, or assaults any person;

"Twenty-seventh. Or refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose;

"Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine;"

III. Differences

All officers, including warrant officers and noncommissioned officers, and field clerks are authorized to order into arrest any person subject to military law under circumstances set forth in A. W. 68. Under the provisions of Art. 9(27), however, it is incumbent upon every person subject to the articles to apprehend and bring to punishment all offenders also so subject.

The provisions of A. W. 68 relating to punishment are applicable solely in cases wherein persons subject to military law were engaged in an affray, quarrel, or disorders; and did threaten, assault, or disobey an order of a person acting pursuant to authority prescribed therein. Although there is no comparable provision in the proposed Navy bill, art. 9(13) and 9(50) authorize punishment for the above offenses. The difference herein lies in the fact that the power conferred in the proposed bill is not restricted in its application to the prerequisite offenses of A. W. 68. See C.S., A.W. 69.

IV. Recommendations

No specific recommendations.

V. Comment

The term "Army field clerks, field clerks Quartermaster Corps" should be deleted from A. W. 68 since the Army no longer has them and the term has been stricken from A. W. 2(a), as amended.

Uniform Code of Military Justice

Subject: Arrest or Confinement.
A. W. 69.

I. Army Provisions

1. Articles of War

"ART. 69. Arrest or Confinement.— Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court martial may direct."

2. Manual for Courts-Martial

In general, the law with respect to arrest and confinement pending trial is set out in A. W. 69. The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. "In arrest the restraint is moral restraint imposed by the orders fixing the limits of arrest or by the terms of the article. Confinement imports some physical restraint", par. 139.

A person in arrest is restricted to his barracks, quarters or such larger limits as may have been specified in the order of arrest (A. W. 69). He cannot, if he is to remain in that status, be required to perform full military duty. A person who is confined pending trial is a garrison prisoner and subject to the provisions of AR 600-375, 17 May 1943. If he is a private or private first class, he will perform such hard labor and military duties as may be required in par. 20(b), AR 600-375. If he is of higher rank, he will not be required to perform military duties or hard labor, par. 20(d), AR 600-375. No greater restraint shall be imposed than is required by the circumstances of the particular case. No person will be placed in confinement or in arrest under the authority of A. W. 69 except on personal knowledge of, or inquiry into, his offense, par. 19.

Any commissioned officer, except a warrant officer unless he is serving as commander of a station or unit, has the power to order an enlisted man into arrest or confinement. The commanding officer of any company or detachment may delegate this authority to his noncommissioned officers. The delegated authority shall be applicable solely to enlisted personnel of the company or detachment, and enlisted men of other organizations temporarily in the company's jurisdiction. A commissioned or warrant officer may be placed in arrest or confinement only by order of a commanding officer, par. 20, MCM. The term "commanding officer" as used herein is one who, under A. W. 10, has power to appoint a summary court.

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A. W. 69. Any completed, even momentarily casting off of the restraint of confinement, before being set at liberty by proper authority is an escape from confinement, par. 139 (a) (b).

3. Public Law 759--80th Congress, Chapter 625, 2D Session

A. W. 69 -- no change.

"SEC. 212. Article 16 is amended to read as follows:

"ART. 16. Persons in the Military Service--How Triable.--
.....No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 4(2).-- Or disobeys the lawful orders of his superior officer;....."

ART. 24. No commander of a vessel is authorized to cause the arrest or confinement of any person subject to his command for more than ten days, unless further period is necessary to bring offender to trial by court martial.

"ART. 25. All officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial shall have the same authority.....as is conferred by law upon the commander of a naval vessel....."

"ART. 43. The persons accused shall be furnished with a true copy of the charges,.....at the time of his arrest....."

"ART. 44. Every officer who is arrested for trial shall..... confine himself to the limits assigned him....."

2. Naval Courts and Boards

In general, the A.G.N. provide for two arrests -- one, where necessary, in an emergency, and the other an arrest for trial, Sec. 343. A person under arrest is restrained within certain legal limitations by his moral and legal obligations to obey an order of arrest. An arrest in an emergency is employed to apprehend and restrain an offender in the first instance. A person in confinement is in a status of arrest and is physically restrained to certain limits, N.J., p. 76-77.

The commanders of vessels and all officers of the Navy and Marine Corps who are authorized to order either a general or summary courts martial possess the power to place in arrest or confinement pending trial by court martial any person under their command. N.J. p. 103-104.

Navy regulations provide that, in general, no greater restraint shall be imposed than is required by the circumstances of each particular case. However, in the case of trial by general court martial, it is provided that the accused shall be placed formally under arrest for trial at the time he is furnished with charges and specifications, N.J., p. 77. A person in arrest is restrained within certain limitations as may be specified in the order of arrest and should not be required to perform his full military duty. A person in confinement awaiting trial is subject to regulations prescribed in the Manual of Rules and Procedures for the Administration of Naval Places of Confinement. It is not intended that these rules be strictly administered to such persons. N.J., p. 77, 78.

No person should be placed in arrest unless the authority so ordering has personal knowledge of the offense or has made inquiry into it, N.J., p. 76.

The essential elements constituting a breach of arrest or an escape from confinement are substantially the same as stated in par. 139 (a) (b), MCM. Where the offense is committed by an officer or enlisted man prior to trial, the former may be prosecuted under the provisions of article 44 or 4(2); the latter under the provisions of article 4(2) or 22(a). However, where the violation occurs subsequent to trial, the proper authority may proceed against either under the provisions of article 22(a), Sec. 94, NC&B.

3. Legal Opinions

"Construing Art. 24, 43, and 44 together, it is my opinion, clear that there may be two arrests; first an arrest in an emergency or upon the discovery of the alleged wrongdoing, with a view to a preliminary examination, and if necessary the formulation and specification of charges; and second, in the language of Art. 44, 'an arrest for trial.' I think it equally clear that Art. 43, providing that 'the person accused shall be furnished with a true copy of the charges, with specifications at the time he is put under arrest' has reference to the second and formal arrest for trial, as referred to in Art. 44, Op. Atty. Gen. 472."

4. Proposed Navy Bill

"SEC. 11. Article 14 is renumbered as Article 9 and amended to read as follows:

'ART. 9. Such punishment other than death as a court martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy--.....

'Fiftieth. Or resists arrest by or disobeys the lawful order of proper authority, or breaks arrest, restriction, or quarantine;.....'"

"SEC. 16. Article 24 is renumbered as Article 14 and amended to read as follows:

'ART. 14(a) No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement and such suspension, arrest or confinement shall not continue longer than ten days unless a further period is necessary to bring the offender to trial by a court martial; nor shall he inflict, or cause to be inflicted, upon any enlisted person, for a single offense, or at any one time, any other than one of the following punishments, namely:

'Third. Confinement not exceeding ten days, to run consecutively, unless further confinement be necessary, in the case of a prisoner to be tried by court martial;.....

'(b) All officers including commanding officers of naval vessels, Art. 17 who are empowered to convene summary courts martial shall have the same authority as that of a commander of a vessel to inflict punishments for minor offenses committed by persons regularly or temporarily under their command: Provided, That such officers may delegate to their

subordinate officers on separate or detached duty the authority to inflict the punishments set forth in article 14 (a)....."

"SEC. 33. Articles 43, 44,.....are repealed."

"SEC. 17. Article 25 is repealed."

III. Differences

1. In general, the law relating to arrest or confinement pending trial and subsequent to trial or sentence is set out in A. W. 69. In the proposed Navy bill references to this subject matter are contained in art. 14(a); 14(a) (3), concerning arrest or confinement of officers and enlisted personnel prior to trial; art. 14(b), conveying to all officers empowered to convene summary courts martial the same powers exercised by commanders of vessels; and art. 9(50), authorizing punishment for breach of arrest or confinement.
2. Only commissioned officers or warrant officers in certain instances or noncommissioned officers who have been authorized by their commanding officer may, under the provisions of A.W. 69, order an enlisted man into arrest or confinement except as provided in A. W. 68. The latter, however, may only exercise his authority over enlisted men who are either assigned to their organization or temporarily within its jurisdiction. A commissioned or warrant officer may be placed in arrest or confinement only by order of a commanding officer (par. 20, MCM) except as provided in A. W. 68. On the other hand, only commanding officers of vessels, all other officers empowered to convene summary courts martial, and their delegated subordinate officers on separate or detached duty, may order into arrest or confinement any officer or enlisted man under their command for trial, A.G.N. 14(a), 14(a)(3) and 14(b), as proposed. However, it is incumbent upon every person subject to the Articles to apprehend all offenders upon commission of an offense. (See C.S., A.W. 68.)
3. The status of persons placed in arrest or confinement is regulated by the provisions of A. W. 69; and A. W. 16, as amended. The former requires that persons in arrest shall be restricted to certain limits prescribed therein, unless such limits be enlarged by the proper authority. The latter prohibits the imposition of any punishment or penalties other than confinement while the accused is awaiting trial; and that no person subject to military law shall be confined with enemy prisoners or any foreign nationals outside the continental limits of the U. S. The question raised by the last restriction is: at what stage of the proceedings shall the restriction be applicable; prior

to or subsequent to trial or both? The Navy deals with this subject by administration action. Persons in arrest are subject to the same limitations of movement as provided in A. W. 69. With respect to confinement prior to trial, the requirement is that it shall not be more rigorous than circumstances may dictate, N.J., page 77,78. There is no restriction in the A.G.N. regulating confinement of naval prisoners with foreign nationals.

4. A. W. 69 provides the authority to punish any person subject to military law for breach of arrest or confinement committed prior to or subsequent to trial or sentence. A.G.N. 9(50), as proposed, authorizes punishment for resisting arrest, breach of arrest or confinement. The offense of resisting arrest in the Army is punishable under the provisions of A. W. 96.

IV. Recommendations

1. McGuire Draft Articles.

Art. 2. Every officer of the naval service, or of an organization serving as part of the Navy, who is authorized to convene either a general or summary courts martial, may order into arrest or confinement any person regularly or temporarily under his command for the purpose of trial by courts martial.

2. White Draft Articles.

Art. 7. Substantially the same as Art. 2, above, except that the authority to arrest and confine for trial by courts martial shall be vested in each officer in command or acting in the absence of the commanding officer.

"ART. 12(a) No persons subject to the jurisdiction of these articles shall:

"(3) be deprived of life, liberty or property without due process of military law;....."

3. JAG (Navy) Recommendations.

Recommends the inclusion of Art. 12 in the Naval Law Manual rather than in the A.G.N.

4. Navy Draft of Proposed Amendments to S. 1338 (Not approved)

Art. 13, as proposed, provides that all persons in the naval service, except as may otherwise be designated by the Secretary of the Navy or by officers to whom the Secretary of

the Navy has delegated his authority, shall be authorized to arrest any person subject to the A.G.N. and, in certain instances, persons not so subject. An arrest may only be made when the person making the arrest has reason to believe that the person arrested had committed an offense against these Articles.

In conjunction with the above, all references to the power to arrest or to confine pending trial by courts martial are omitted from the provisions of Art. 14, as further amended.

5. Neither the Keefe, Vanderbilt, or Ballantine Reports contain any recommendations touching upon arrest or confinement.

V. Comment

The term "arrest" as used in A. W. 69 and A.G.N. 14, as proposed, should be clarified and distinguished between formal arrest or moral restraint for the purposes of trial; and apprehension, which includes arrest, taking into custody, or seizure of any offender upon discovery of a wrongdoing.

Uniform Code of Military Justice

Subject: Charges: A. W. 70.

I. Army Provisions

1. Articles of War

"ART. 70. Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

"No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial, the commanding officer will, within eight days after the accused, is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless

the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him."

2. Legal Opinions

a. A record of trial showed affirmatively that no investigation of the charges had been made prior to the trial. Held, The provisions of A. W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred for trial. (C.M. 161728 -- 1924).

b. Under date of January 15, 1929, instructions were communicated, by order of the Secretary of War, to each officer exercising general court-martial jurisdiction, directing that steps be taken to make certain that the investigation required by the second paragraph of A. W. 70 be made by an officer other than the signer of the charge under investigation. (250. 45, Jan. 10, 1929).

c. There is no provision of law or regulation by which an accused, or an officer or soldier under investigation, may demand, as a matter of right, counsel to represent him in an investigation of charges which have been preferred against him, and it is the custom of the service to conduct such investigation without the presence of counsel. The refusal to grant a request for counsel at such investigation does not prejudice the rights of an accused. (C.M. 199315 --- 1932).

d. The requirement of A. W. 70 that charges be supported by the oath of the accuser, being procedural, and for the benefit of the accused, does not affect the jurisdiction of the court and may be waived by the accused either explicitly or by failure to object to the irregularity. (C.M. 197674 --- 1932).

3. Public Law 759--80th Congress, Chapter 625--2D Session

Sec. 222 - Article 46.

"(a) SIGNATURE: Oath. Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

"(b) INVESTIGATION. No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"(c) FORWARDING CHARGES; DELAYS; SERVICE OF CHARGES. When a person is held for trial by general court martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reason for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be grounds for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him."

Sec. 231 - Article 70. "CHARGES; Action upon, Unnecessary delay.--

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct."

II. Navy Provisions

1. Articles for the Government of the Navy

"ART. 43. Charges and specifications; arrest of accused.

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial in which case reasonable time shall be given to the accused to make his defense against such new charge."

2. Naval Courts and Boards

A.G.N. do not require a pre-trial investigation, but NC&B and Navy Regulations require careful inquiry prior to any court-martial action. (Navy Reg. 197; NC&B Sec. 342).

At mast the accused is without counsel. See also CMO No. 7, 1927 pp 5-6, as to duty of convening authority in conducting an adequate investigation prior to assigning a punishment at mast.

The investigation made by Navy JA in preparation of his case is, in effect, a pre-trial investigation. If he finds no adequate basis for trial, or for certain charges, he recommends to convening authority that charges be dropped. (NC&B Sec. 351).

A Naval Law Manual has been in course of preparation to replace Naval Courts and Boards. A tentative chapter has been drafted to prescribe the procedure to be followed for preliminary and pre-trial investigations which is designed to safeguard the rights of the accused during the period of investigation. The points concerning investigations contained therein are substantially analogous to those of the Army bill, A. W. 46.

3. Proposed Navy Bill

"ART. 37.--

"A court martial may, for reasonable cause, grant a continuance for such time and as often as may appear to be just. In time of peace no person shall, against his objection, be brought to trial before a general, summary, or deck court martial within the periods of five days, three days, and 24 hours, subsequent to the service of specifications upon him, respectively."

III. Differences

A. Army bill includes certain actions to be taken in A.W. 46 which Navy would cover by regulations and directives.

B. Preliminary investigations, pre-trial procedure, right of accused to counsel, and time allotted to defendant in preparation of the case would be essentially the same though the Navy would provide for these matters by regulation rather than by statute.

C. Navy makes no provision for "oath" on preferring charges whereas Army does.

D. System of preferring charges differs

(1) Army sets forth Article number which was violated.

(2) Navy sets forth the charge by naming the offense committed. (The proposed NIM contemplates setting out the charge by both naming the offense and giving the number of the article violated.)

E. Under Army system accuser signs charges whereas in Navy, the convening authority is responsible for personally signing the charges.

F. Chapter 10, Naval Courts and Boards (Courts of Inquiry and Investigations), provides:

Courts of inquiry and investigations, as the names signify, are primarily fact-finding bodies, and, unless

specifically directed by the convening authority, in the precept to express opinions or to make recommendations, will confine themselves to findings of fact. A court of inquiry has power to compel the attendance of civilian witnesses, and should be convened or requested where testimony of civilians will likely be desired; the proceedings of a court of inquiry may under certain conditions be evidence before a court martial; otherwise there is no vital distinction in the power or effectiveness of a court of inquiry and an investigation, and the question which to convene is entirely within the discretion of the convening authority. In important cases where the facts are various and complicated, where there appears to be reason for suspecting criminality, or where crime has been committed with uncertainty as to the perpetrator, or where serious blame has been incurred without certainty on whom it ought chiefly to fall, a court of inquiry or a board of investigation affords the best means of collecting, sifting, and methodizing information for the purpose of enabling the convening authority to decide upon the necessity and expediency of further judicial proceedings. (Sec. 720.)

A court of inquiry may be convened in accordance with the articles for the government of the Navy. (Art. 55, AGN). An investigation may be ordered by any officer empowered to convene a court of inquiry, by the commander of a division or larger force afloat, and by the senior officer present afloat or ashore. (Sec. 721.)

If there is no doubt as to the facts of any particular incident or occurrence, and no reason why sworn testimony to facts fresh in the minds of witnesses should be preserved, a complete administrative report by the commander concerned will be fully as satisfactory as the record of a court of inquiry or of an investigation could be. But ordinarily, owing to legal sequels, the following should be covered by a court of inquiry or board of investigation: (Sec. 722.)

Loss of life from accident or under peculiar or doubtful circumstances.

Serious casualties to or deficiencies in ships.

Accidental explosions in which ammunition or other explosives are destroyed.

Loss or stranding of a ship of the Navy.

Collision with a merchant ship.

A court of inquiry shall consist of not more than three commissioned officers as members and of a judge advocate.

A board of investigation shall ordinarily consist of three officers as members.

An investigation is composed of one officer. (Sec. 728).

A person whose conduct is the subject of investigation is a defendant. He shall be notified of the gist of the evidence that tends to implicate him and instructed that he will be accorded the rights of an accused before a court martial; namely, the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request, and to make a statement and argument. He has the right of any witness to refuse to answer incriminating or degrading questions. Conversely, should it become apparent at any time that a person who has been designated a defendant is involved in an insignificant degree, the court should inform him that he is no longer a defendant.

No person outside of the naval service or employ may be named a defendant.

If the rights of a defendant be not accorded when they should be, the court of inquiry or investigation, so far as concerns the person denied his rights, will be held of no evidential effect. Should a defendant waive his right to counsel, the president or senior member shall warn him that sworn testimony is admissible as evidence before courts martial, and again advise him to provide himself with counsel, informing him that counsel will be assigned him should he so desire. (Sec. 734).

IV. Recommended Provisions

Keeffe Report:

1. Allow any person in service to initiate complaint against another to his CO, but charges to be preferred by appropriate authority. (Oath to charges should not be required.)

P. 8

2. If trial ordered, accused to be given pre-trial psychiatric examination where practicable.

3. Material change in charges and specifications after first investigation to require another new investigation.

4. Only experienced personnel should be assigned the duty of investigating any reported offense.

5. Investigation should be commenced within 24 hours from the time the accused is put on report.

JEC