REVISION OF THE ARTICLES OF WAR

HEARING

BEFORE THE

COMMITTEE ON MILITARY AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-SECOND CONGRESS

SECOND SESSION

ON

H. R. 23628

BEING A PROJECT FOR THE REVISION OF THE ARTICLES OF WAR

WASHINGTON
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COMMITTEE ON MILITARY AFFAIRS.

HOUSE OF REPRESENTATIVES, SIXTY-SECOND CONGRESS.

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LETTERS OF SECRETARY OF WAR.

WAR DEPARTMENT,
Washington, April 19, 1912.

SIR: The Articles of War which now govern the conduct of the Army in time of peace and of war have not undergone comprehensive revision for more than a hundred years. The service conditions which these Articles of War are intended to regulate have greatly changed, and new and unforeseen conditions have arisen. As a result, experience has increasingly disclosed the inadaptability of the existing military code to present-day service conditions.

The necessity for a comprehensive revision of the code has long been apparent. Two such attempts at revision were commenced by this department, the first in 1888 and the other in 1903. The need for it has been so insistent that my predecessor, Secretary Dickinson, directed the present Judge Advocate General to undertake the labor of revision. This labor has been painstakingly prosecuted, and the results are herewith transmitted for your consideration as the basis of remedial legislation.

The accompanying letter from the Judge Advocate General to me, submitting his proposed revision, sets forth very clearly and concisely the theory of his undertaking and the details of the suggested changes. I deem it necessary, therefore, to invite your attention only to the following broad features of the project:

1. The revision was undertaken in the conservative spirit that legislative reforms should be evolutionary. In other words, that which successfully has withstood the test of experience should be retained, and changes and innovations should be limited to the wisdom of experience. As a matter of draftsmanship, it has been sought to build on established lines and to conform in general to settled administrative and judicial construction.

2. The existing articles are notoriously unsystematic and unscientific. Inevitably this condition hampers their easy and effective enforcement. A careful classification has been made; disassociated legislation in the new Articles of War has been incorporated therein, resulting in an analytical, precise, comprehensive, and easily enforceable code.

3. Experience has disclosed a very serious evil in the administration of military justice, owing to limitations of general courts-martial. But the service needs go beyond these liberalizing changes as to the constituency of general courts. As the Judge Advocate General convincingly shows, there is need of an intermediate disciplinary court to deal with that large proportion of cases midway between the grave offenses calling for dismissal, dishonorable discharge, or detention, to be disposed of by general court-martial, and

the minor offenses calling for very light punishment, which are now dealt with by the summary courts. Under existing conditions there is necessarily delay and laxity in the administration of military justice, with the resulting impairment of efficiency. I regard the use of this intermediate disciplinary court of great importance and one that is bound to be productive of much good.

I have carefully studied in detail the proposed revision, and the reasons underlying the various proposals. The whole project has my hearty approval. I trust that it will meet with your approval, so that you will urge its prompt enactment into law at the present session of Congress.

A similar request has this day been made of the chairman of the Military Committee of the Senate.

Very sincerely,

HENRY L. STIMSON,
Secretary of War.

HON. JAMES HAY,
Chairman Military Committee, House of Representatives.

LETTER OF JUDGE ADVOCATE GENERAL.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 12, 1912.

The SECRETARY OF WAR.

SIR: I have the honor to submit herewith a project of revision of section 1342 of the Revised Statutes—the Articles of War—and to request that, in the form in which approved by you, it be transmitted to the Congress with a request for its enactment. The necessity for revision will be best understood by a preliminary reference to the history of the present articles.

Code of 1775.—Passing over the earlier enactments of the American Colonies of articles of war for the government of their respective contingents, of which we have examples in the articles adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775 (American Archives, 4th series, vol. 1, p. 1350), followed by similar articles adopted in May and June of the same year, successively, by the Provincial Assemblies of Connecticut and Rhode Island and the Congress of New Hampshire (idem, vol. 2, pp. 565, 1153, 1180), we come to the first American articles—Code of 1775—enacted by the Second Continental Congress, June 30, 1775. Of this code, comprising 69 articles, the original was the existing British Code of 1774, from which said articles were largely copied. The code was amended by the Continental Congress on November 7, 1775, by adding thereto 16 provisions, intended to complete the original draft in certain particulars in which it was imperfect.

Code of 1776.—The Articles of 1775 were superseded the following year by what has since been known as the Code of 1776, enacted September 20 of that year. It was an enlargement, with modifications, of the amended Code of 1775. There followed the amendments of 1786, regulating the composition of courts-martial, and generally

the administration of military justice. As thus amended the code survived the adoption of the Constitution of the United States, being continued in force by successive statutes, "so far as the same are applicable to the Constitution of the United States." The necessity, however, for revision, in order to adapt the articles to the changed form of government, became obvious. This revision was accomplished by the act of April 10, 1806 (2 Stat., 259), which superseded all other enactments on the same subject, and is generally designated as the

Code of 1806.—The Code of 1806 comprised 101 articles, with an additional provision relating to the punishment of spies. There has been no formal revision of the Articles of War since that date, although there was such a restatement of them in the revision of the statutes of 1874 as was possible under the authority which the revisers who prepared that revision had to bring together "all statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Under this limited authority no recasting of the articles or substantial amendment was possible, and the code as it appeared in the Revised Statutes of 1874, and as it was repeated in the second edition thereof in 1878, was substantially the Code of 1806, expanded to embrace amendments and new legislation since that date. It embraced 128 articles, with the additional provision as to spies, and these, with the amendments enacted since 1878, constitute

The existing code.—It is thus accurate to say that during the long interval between 1806 and 1912—106 years—our military code has undergone no change except that which has been accomplished by piecemeal amendment. Of the 101 articles which made up the Code of 1806, 87 survive in our present code unchanged and most of the remainder without substantial change. Meantime the British code from which, as we have seen, these articles were largely taken has been, mainly through the medium of the army annual act, revised almost out of recognition, indicating that the Government with which it originated has recognized its inadaptability to modern service conditions. These facts, together with the fact that very few penal codes of the States of the Union have remained substantially unamended for such a long period, suggest very strongly the propriety of revision, but they constitute, however, no conclusive argument in favor of revision, for it may well be urged that a code that has stood the test of experience for so many years and has governed our Army during three foreign wars and one civil war needs no material amendment or recasting. If, however, it is shown, as I think it can be, that the administration of military justice was seriously obstructed, even under the mild test afforded by the Spanish-American War, and continues to be so obstructed under peace conditions, due to the retention in the code of provisions which, however well they may have served the purposes of the Army in the past, do not meet present conditions, or to the failure to enact new legislation, and that delays which impair the discipline and efficiency of the Army and which are easily avoidable result therefrom, the argument should not be considered controlling.

We entered upon our War with Spain, as upon our previous wars, relying upon the general court-martial for the trial of all offenses which could not be adequately punished within the limit of one month's confinement and forfeiture which inferior courts were authorized to adjudge.

Under the articles as they then existed and now exist this court is required to be composed of 13 officers, when that number can be assembled without manifest injury to the service, irrespective of the rank of the offender to be tried or the gravity of the offense charged against him. The authority to convene the general court-martial is vested in any general officer commanding an army, a territorial division or department, or a colonel commanding a separate department, in both peace and war. In war the authority to convene is vested also in commanders of tactical divisions and separate brigades. But when any of these convening authorities is the accuser or prosecutor of any person within his command, the court must be convened by the next higher authority in the case of a tactical division or separate brigade and by the President in other cases. The authority to convene the general court-martial is thus quite a restricted one, and the utility of this court stands further impaired by the provision of these articles which prohibits officers of the Regular Army from sitting on courts-martial to try officers and soldiers of other forces, a provision which, because of the fact that regulars, volunteers, and militia in the service of the United States have been, as a rule, brigaded together, often prevents the prompt convening of courts and is attended with resulting delays in the administration of military justice.

Next below the general court stand the regimental and garrison courts, with jurisdiction, prior to March 2, 1901, to adjudge punishment within the limit of one month's confinement and forfeiture, and since that date within the limit of three months' confinement and forfeiture. Lowest in the judicial scale is the summary court created by the act of October 1, 1890, with punishing power extending to one month's confinement and forfeiture, increased by the act of March 2, 1901, to three months' confinement and forfeiture upon the written consent of an accused to trial by such court. It is unnecessary in this connection to note the field officers' court (abolished by the act of June 18, 1898). It will be noted that the jurisdiction of the summary court, with the consent of an accused to trial thereby, is the full equivalent of the garrison and regimental courts, due to which fact the former has, since the enactment of the act of March 2, 1901, practically substituted the latter except in a limited class of cases.

It is thus made to appear that between the general court-martial, with its unwieldy membership, formal procedure, and unlimited power of punishment, on the one hand, and the summary court of one officer, with its summary procedure and limited punishing power, on the other, there is a wide gap, which the garrison and regimental courts of three members, but with power to impose punishment not exceeding that which the summary court has with the consent of an accused, do not fill. The inadequacy of the garrison and regimental courts as intermediate courts between these two is revealed by the following table, which gives the statistics as to trial by the several classes of courts above named for the fiscal years 1910 and 1911:

Courts.	Number of trials.	
	1910	1911
General courts-martial	5,206	3,851
Garrison courts-martial	305	163
Regimental courts-martial	39	43
Summary courts-martial	42,275	33,082

Attempts have been made in the project of revision herewith submitted to remedy these evils as follows:

First, the requirement that the general court-martial must consist of 13 members when that number can be assembled without manifest injury to the service has been omitted. While it is now settled construction that this requirement is addressed to the discretion of the convening authority, whose judgment as to the number of officers who may be assembled for duty upon a court-martial is not reviewable by any superior authority, still a reference to convening orders shows that the attempt is habitually made by convening authorities to secure the maximum number authorized by law, even in relatively unimportant cases—cases of a purely disciplinary character in which dishonorable discharge from the service is not contemplated or desired, and which a much smaller court could properly try. The result is a heavy draft on the time of the commissioned personnel of the Army. I am clearly of the opinion that we surrender no necessary safeguard in the administration of military justice when we leave the discretion of the convening authoity unrestricted as to the number of officers between the authorized minimum of 5 and the authorized maximum of 13 which ought to be assembled for the trial of cases.

Second, the authority to convene general courts-martial has been extended so as to meet the following conditions: In the Spanish-American War, and in the Philippine insurrection which followed, it was found necessary to organize numerous expeditionary forces and forces of occupation, and send them to remote parts of the islands. Many of these forces approached but did not reach the full equivalent of a statutory brigade, due to which their commanding officers were without authority to convene general courts-martial. These are conditions which are liable to recur in any war in which the United States is likely to engage, and are therefore conditions for which provision should be made. Recently when, because of disturbed conditions on our southern frontier, there were organized separate brigades at Galveston, Tex., and San Diego, Cal., and a maneuver division at San Antonio, Tex., the deficiencies of the existing articles were again revealed in the fact that they gave to the general officers commanding these units no authority to convene general courts-martial. Further, the authority of the Superintendent of the Military Academy to convene such courts is, by the articles, limited to the courts for the trial of cadets, and, although there are always stationed at the academy specially selected officers in all the grades available for detail on court-martial duty, the superintendent may not order a court for the trial of an officer or an enlisted man of his command. Article 8 of the project herewith

preserves the authority to convene courts-martial to those who now have it, extends this authority to the commanders of divisions and separate brigades in time of peace, removes the restriction upon the authority of the Superintendent of the Military Academy to convene courts, and provides further that in case of brigade posts, expeditionary forces, and other forces not foreseen, the President may, when in his judgment necessary, specially empower the commanders of said brigade posts and of said forces to convene general courts-martial.

Third, the provision of existing articles making regular officers incompetent to sit on courts-martial for the trial of officers and soldiers of other forces has been modified so as to give accused officers and soldiers of other forces the right of peremptory challenge against regular officers detailed to sit on courts for their trial. The existing law (art. 77) assumes a disqualifying bias upon the part of all regular officers for such duty. So complete is the assumption that it is not necessary that the accused volunteer or militiaman should even exercise the right of challenge in order to remove regular officers from duty upon a court convened to try him. The law itself disqualifies the regular officer, and the disqualification is not one which the accused can waive. This is the authoritative ruling of the Supreme Court, which has further held that this disqualifying bias which the statute assumes extends to regular officers holding volunteer commissions. Firm in the belief that the end sought to be attained by this law will be fully realized if the accused volunteer or militiaman is given the right of peremptory challenge against regular officers detailed upon a general courts-martial for his trial, I have drafted new article 4 so as to accord him this right.

But to stop here would not afford the relief which service conditions demand. The wide gap between the general court and the summary court needs, I think, to be filled by an intermediate disciplinary court which will follow the Army under all conditions of its service, field or garrison, peace or war, with adequate power to impose disciplinary punishments, but without the power to adjudge dishonorable discharge. I am confirmed in this view by the report rendered by Capt. William E. Birkhimer, acting judge advocate, First Division, Eighth Army Corps, under date of March 20, 1899. Capt. (since Gen.) Birkhimer is the author of our standard work on military government and martial law, and has had prolonged service in the legal department of the Army. Writing in that report with reference to conditions during the period of the Philippine insurrection, Capt. Birkhimer said:

> I respectfully submit that active military operations develop an evil in the administration of military justice through the instrumentality of general courts-martial as now authorized that loudly calls for remedy. Reference is here made to the unwieldiness of general courts-martial, both as to constituton and methods of procedure. The practical result of this evil is that at such times it happens that grave offenses have, in many instances, immunity from prompt and adequate punishment. Charges too serious to properly be sent before a summary court are lodged against men, but because of the difficulties of bringing them to trial this is delayed until the cases are nearly or quite forgotten by those cognizant of the facts, and all that salutary disciplinary influence resulting from prompt trial is lost.
>
> It will always be necessary to try the really graver charges by general courts-martial. This institution must therefore be preserved.

But between the cases that can appropriately be tried by summary court and those that must be referred for determination to general courts lie those that are much more numerous than the latter and for which a maximum punishment, say of six months' confinement and forfeiture of six months' pay, would be adequate and proper. It is for the prompt trial of the last class of cases mentioned that a new court should, it is respectfully submitted, be authorized by law.

In articles 3, 6, 9, and 13 of the project herewith submitted an attempt has been made to create such a court as was recommended by Capt. Birkhimer. Its membership is to consist of from three to five officers, and it is given the authority to award punishment extending to six months' confinement and forfeiture and to proceed in the trial of cases without the formality of recording the evidence except when specially ordered so to do by the convening authority. As the court is intended to be primarily a disciplinary one it is placed by the proposed articles in the hands of those officers of our Army who are primarily responsible for discipline, viz, commanders of brigades, regiments, detached battalions, posts, camps, or other places where troops are on duty and the requisite number of officers may be obtained. The statistics of this office indicate that the court as thus organized ought to try approximately 40 per cent of the cases now tried by general courts-martial with the result that the time now consumed in these cases in forwarding charges to remote division headquarters and receiving them back approved for trial by general courts-martial and in sending to the same headquarters the completed proceedings of the trial for the action of the convening authority and in returning to the place of trial the orders publishing the sentence—often aggregating two months, and not infrequently exceeding three months—will be reduced to a period of two or three days.

The only argument against establishing such a court which is entitled to consideration is that it involves a delegation of disciplinary power to the court and reviewing authorities which it has not heretofore been deemed wise to make. I do not think that the argument has weight. The court and reviewing authorities will have the guidance of and be limited by the provisions of the maximum punishment order in adjudging and approving sentences. Further, the punishing power which is given it by statute, viz, six months' confinement and forfeiture, does not extend beyond limits of punishment which police court judges throughout our country frequently exceed in disposing of criminal cases where the accused waives trial by jury.

In the project of revision the special court substitutes the garrison and regimental courts, and the authorized courts, if the revision is enacted into law, will be: (1) The general court-martial, with its extended jurisdiction, to be resorted to in grave cases calling for dismissal, dishonorable discharge, or prolonged detention in confinement with or without dishonorable discharge; (2) the special court for the trial of cases where the end sought is the retention of the offender with his command to be disciplined: and (3) the summary court for the trial of minor offenses calling for light punishments of confinement and forfeiture.

The provision of the existing law that the summary court shall not adjudge confinement at hard labor or forfeiture of pay, or both, for a period exceeding one month, except upon the consent of the accused to trial by such court, has been omitted. It is not believed that jurisdiction should ever depend upon the consent of an accused, but

the omission of the provision is called for by other considerations. Experience in administering the law as it now stands shows that only the worst characters avail themselves of this provision, in whose hands it becomes a weapon with which to obstruct the administration of military justice. Its omission for this reason alone would be justified. In lieu of the omitted provision a proviso has been inserted (see art. 14) that when the summary court officer is also the approving officer no sentence adjudging punishment in excess of one month's confinement and forfeiture shall be executed until approved by superior authority. This, it is believed, is a sufficient safeguard.

The limits assignable to a letter of transmittal of this character would be exceeded by an extended review of all the changes provided for in the project of revision herewith submitted. For this reason I limit myself to the brief summary which follows of the more important changes sought to be made.

1. The existing articles are notably deficient in arrangement and classification. In the project herewith related provisions have been brought together under five principal headings, and where subheads would serve a purpose they have been employed. A complete classification is thus presented in a manner that will facilitate study and understanding of the code.

2. Provisions of the Revised Statutes and of acts of Congress in the nature of Articles of War, but not heretofore incorporated therein, have in the project been transferred thereto. Articles 2, 4, 7, 8, 10, 14, 22, 24, 31, 35, 37, 46, 48, 49, 50, 52, 54, 79, 80, 82, 106, 108, and 114 embody such provisions. This codification will make it easier to find the law touching any particular question and thus facilitate prompt and correct administration.

3. At present, in order to determine what persons in addition to officers and soldiers are subject to military law, it is necessary to examine scattered provisions of the Articles of War, the Revised Statutes, and acts of Congress, and supplement the information thus obtained by reference to the decisions of civil courts and the opinions of law officers of the Government. An effort has been made to eliminate the major portion of this difficulty by setting forth in article 2 of the project a list of "persons subject to military law."

4. Articles 1, 10, 11, 12, 29, 30, 36, 37, 53, 76, 87, and 101 of the existing code have been omitted. Some of these articles have never met any real need in our service and may for all practical purposes be regarded as obsolete; others embrace only matters properly within the field of Army Regulations.

5. Provisions relating to the same subject matter have been brought together in single articles so far as practicable. Notable instances of the application of this rule may be found in article 48 of the project, which contains the substance of four articles of the existing code and of one section of the Revised Statutes, all of which have reference to the confirmation of sentences; and in article 60 of the project, which states the substance of six existing articles relating to unauthorized absences.

6. Under the existing code larceny, robbery, burglary, arson, mayhem, manslaughter, and certain aggravated assaults are triable in time of war as violations of the fifty-eighth article of war, and at other times as violations of the sixty-second article of war—a fact

that is productive of confusion, uncertainty, and delay, especially at the outbreak of hostilities. This objectionable feature has been eliminated by making the offenses noted above triable under one and the same article, both in time of peace and in time of war. (See art. 93 of the project.)

7. Under the existing code (see arts. 58 and 62) a person subject to military law may, in time of war, be tried by court-martial for murder or rape, but may not be so tried in time of peace. This state of the law makes it necessary to resort to a "provisional court" under conditions similar to those which existed in Cuba during the recent intervention. The fifty-eighth article of war was enacted at a time when the territorial jurisdiction of the United States did not extend beyond the geographical limits of what now constitutes the States of the Union and the District of Columbia. At that time conditions now existing as the result of the extension of the territorial jurisdiction of the United States were not in contemplation, or the fifty-eighth article would probably have taken a somewhat different form. In the project the article relating to murder and rape—article 92—has been drawn so as to preclude trial by court-martial for those offenses when committed within the geographical limits of the States of the Union and the District of Columbia in time of peace, while conferring jurisdiction for the trial of these offenses when committed in time of war or beyond the geographical limits just indicated. The penalty for the offenses in question is fixed in conformity with the provisions of sections 275, 278, and 330 of the act of March 4, 1909 (35 Stat., 1143, 1152).

8. Our first statute of limitations upon prosecutions before courts-martial was article 88 of the Code of 1806, which is now the initial paragraph of article 103. The second paragraph of that article was added by the act of April 11, 1890 (26 Stat., 54). In its original form the article was vague in its provisions. The effect of absence or of "manifest impediment" upon the running of the statute was not very clear; and the time when the statute began to run, or whether the article was applicable at all to prosecutions for desertion, did not clearly appear. The amendment of 1890 (second paragraph) determined that the period during which a deserter was absent from the United States was to be excluded in computing the two-year limitation in case of desertion in time of peace. But the existing article, as a whole, leaves it as a matter of doubt whether desertion in time of war is or is not covered by the article. The correctness of the present official construction, that desertion in time of war is not covered, is open to serious doubt, and the necessity for amendment in this regard is therefore obvious. In the corresponding article in the project—article 40—desertion in time of war is excepted from the limitations, this being in accord with the official construction of the existing article. The changes introduced are mainly for the purpose of conforming more closely to the limitation prescribed by law in respect of criminal prosecutions in the courts of the United States. The extensive jurisdiction now exercised by courts-martial in respect of civil crimes and offenses committed by persons subject to military law, and which is retained in the project for revision, makes it desirable that the limitation upon prosecutions before courts-martial be substantially the same as the limitation upon prosecutions before civil courts

of criminal jurisdiction. The period now prescribed is, perhaps, sufficient for all practical purposes, so far as enlisted men are concerned: but under present service conditions, it is quite possible for the entire two-year period of limitation to elapse after a financial transaction by an officer before the fact that the transaction was criminal in character is disclosed or becomes sufficiently apparent to warrant the filing and reference of charges for trial. It is therefore believed to be essential to extend the period of limitation to three years. The force of the latter consideration and the consequent advisability of the proposed extension became apparent in a recent case of financial irregularity on the part of an officer, in which case it was necessary to resort to the civil courts of criminal jurisdiction, because trial by court-martial was barred by the military statute of limitations.

9. It is difficult to extract from articles 122 and 124, as now in force, a workable rule concerning the rank and precedence of officers, when officers of the Regular Establishment, of the Militia, and of Volunteers are concerned. In the corresponding articles of the project—articles 118 and 119—an attempt has been made to state clearly a definite practicable rule.

10. Under the present ninety-first article of war depositions of witnesses residing beyond the limits of the State, Territory, or District in which a court-martial is in session may be read in evidence before such court in cases not capital, the constitutional rule respecting the personal attendance of witnesses before the court being inoperative in cases triable by courts-martial. The existing rule respecting depositions is, however, unsatisfactory in that it authorizes the use of a deposition when the witness resides just outside the State in which the court is in session, though perhaps only a few miles from the place of session, but does not permit the use of a deposition when the witness resides within the State, even though his place of residence may be three or four hundred miles from the place of session. Furthermore, the existing article makes no provision for the taking of a deposition when the witness, by reason of age, sickness, bodily infirmity, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing. In the corresponding article in the project (art. 25) these deficiencies in the existing article have been supplied, the new article being drawn so as to conform in the main to the provisions of section 863 of the Revised Statutes.

11. Article 96, as now in force, provides that "no person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial." The article, however, leaves it open to a bare majority of the court to find the accused guilty of an offense for which the death sentence is mandatory, so that the article does not, as a matter of fact, furnish any special protection to the accused in a case of this kind, in view of the obvious duty the court has to impose the sentence required by law upon a legal conviction. The corresponding article in the project (art. 44) has been drawn so as to require the concurrence of two-thirds of the members of the court in order to convict an accused person of an offense for which the death penalty is made mandatory by law and also to require the concurrence of two-thirds of the members of the court in passing sentence of death in any case.

The foregoing list of changes is by no means complete, as there has been a general recasting of the articles, but it embraces the more important changes to which it is desirable to invite your especial attention and that of Congress in considering the feasibility of enacting the proposed revision; but the complete recasting of the articles has not extended to changing language which might be considered defective in form, but to which settled construction has assigned a definite meaning. The effort has been made to invalidate as little as possible of the construction which the existing articles have received administratively and by the courts.

Very respectfully,

E. H. CROWDER,
Judge Advocate General.

REVISION OF THE ARTICLES OF WAR.

H. R. 23628, INTRODUCED BY MR. HAY.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MILITARY AFFAIRS,
Washington, D. C., May 14, 1912.

The committee convened at 10.30 o'clock a. m.

Present: Hon. James Hay (chairman), Representatives Slayden, Watkins, Conry, Hughes, Sweet, Pepper, Evans, Prince, Kahn, Anthony, and Tilson.

The CHAIRMAN. General, I would be glad if you would take this bill up and explain it in your own way.

STATEMENT OF JUDGE ADVOCATE GEN. E. H. CROWDER.

Gen. CROWDER. I think I can get an exposition of the revision before the committee in the best form by making a short preliminary statement and then inviting attention to the new articles which have been added and the old articles which have been materially changed. In the course of my remarks I may have to repeat to some extent statements that I have made in the exposition of the articles in the letter of transmittal which is printed with this volume, but I shall do that only to a limited extent. [The general refers to a "Comparison of proposed new Articles of War with the present Articles of War and other related statutes" prepared by him.]

The preliminary task in the preparation of this revision was one of classification. The old articles were notoriously deficient in that regard. Not only were punitive articles found associated with articles that were purely administrative in character, but there were many provisions of the Revised Statutes and of the Statutes at Large, of the nature of articles of war proper to be incorporated in a military code, in order that the service might have convenient reference to all of the provisions of law which relate to courts-martial, their composition, jurisdiction, and to provisions which denounce and punish crime.

In the course of assembling the related provisions I have had to consult not only the existing code, which comprises 129 articles and the isolated provision in regard to the treatment of spies, but also 9 separate sections of the Revised Statutes and 21 separate acts of Congress enacted since the revision of the statutes in 1874, and which contained provisions of the character that ought to be embodied in a military code. After bringing all these related provisions together I found it possible to state the new code in 119 articles, a reduction

of 10 over the present code. I have pursued the plan of assembling these new articles under five heads, entitled: "Preliminary provisions," "Courts-martial," "Punitive articles," "Courts of inquiry," and "Miscellaneous provisions." On the pages which follow that principal classification will be found the detailed classification, where the articles are further grouped under subordinate heads.

In the first pages of the report you will find underscored in red all the new articles that have been proposed, and underscored in blue all the old articles that have been substantially changed. There are 21 new articles and about 47 of the old articles that have been materially changed.

In the exposition of the project of revision which is printed in the first part of this project I have undertaken to trace the history of the present code. It is substantially the code of 1806, as 87 of the 101 articles which made up that code survive in the present articles unchanged, and a considerable number of the remaining articles survive without substantial change.

The 1806 code was a reenactment of the articles in force during the Revolutionary War period, with only such modifications as were necessary to adapt them to the Constitution of the United States; so that, in the light of what I have just said, the statement is not an inaccurate one that we are to-day living under the Revolutionary War articles as amended in piecemeal legislation enacted since 1806; that is, under a code which was enacted under the stress of war conditions, and, as I shall hereafter show, nearly all of the amendments which have since been made have been likewise enacted piecemeal during a period of war and under the stress of war needs.

During the War of 1812 four articles were amended; during the period of the Seminole War three were amended, and one new article added. There were no amendments of the code during the War with Mexico, but during the Civil War period seventeen articles were amended and eight new articles added. All of these new articles and amendments were gathered into the restatement of the Articles of War which appears in the Revised Statutes of 1874, and which is sometimes incorrectly called the Code of 1874; this would indicate that there was a substantial revision of the code in that year, which is not the fact. The revisers who prepared that revision had only a very limited authority; they could reconcile contradictions in the existing law, supply its omissions, and cure imperfections of phraseology; but beyond this their authority did not extend.

Subsequent to the revision of 1874 we had some important legislation in the nature of Articles of War, in the establishment of the summary court by the act of October 1, 1890, and the grant of authority in the same year to the President to establish maximum limits of punishment in time of peace. This was followed by certain amendatory legislation during the period of the Spanish-American War, the purpose of which was to further define the jurisdiction of the summary court, and repealing articles 108 and 110 of the code. Further legislation amendatory of the existing law respecting summary courts and repealing article 94 of the Articles of War was had in 1901. Article 122 of the existing code was amended in 1910, and article 128 repealed, but this constitutes all the amendments which have been had since 1806.

I think I have said enough to show that we are governing the Army to-day under a rather ancient code and one which has most of the defects of a code that has been compiled rather than written. That many of its provisions are archaic can be made apparent, I think, by a few examples.

Take the fifty-fourth and fifty-fifth articles of war: By them we are admonished that our soldiers are not to be allowed to commit any waste or spoil within any walks, trees, parks, warrens, fish ponds, houses, gardens, cornfields, inclosures, or meadows. This is an enumeration which would hardly be found in any statute prepared especially for our Army, and indicates its British origin, where the enumeration would be appropriate. There is the further provision of these articles forbidding any kind of riot to the disquieting of "citizens" of the United States, which should of course have read "inhabitants," as all persons residing within the United States are entitled to equal protection of the laws. Equally archaic is article 59, providing that we shall turn over to the civil magistrate all officers and soldiers committing offenses against the person or property of any "citizen of the United States," which should, for the reasons stated above, have read "inhabitant of the United States"; and the further provision that such surrender to the civil magistrate should be made only "upon application duly made by or in behalf of the party injured," ignoring the more modern doctrine that offenses are punished now at the instance of the public and not at the instance of any individual. We should, of course, turn over to the civil authorities on the application of the proper officers of the law.

It may be further stated that there are a great many important omissions in the existing articles. It is rather a startling statement which I have to make, that there is included no grant of jurisdiction to the general court-marshal, except as to persons; as to offenses its jurisdiction is left to be inferred from the use of the word "general."

Because of these defects and many others to which I will invite attention as I proceed with my remarks there has been necessity for a great deal of construction, and it is a fact that the efficacy of the existing code depends very largely upon the meaning that has been read into it by construction. It thus happens that young officers coming into the service are referred not to a concise, explicit code to ascertain what laws govern the Army, but to hundreds of pages of discussion of a very obscurely written series of articles.

It is to be doubted if the Congress has ever been called upon to amend legislation which is as archaic in its character as our present Articles of War.

The controlling principle in all military codes of the United States, as in the English codes from which they have been derived, is the subordination of the military to the civil authorities. Three or four of the existing articles are expressive of that principle, and I have attempted in the revision not to restrict its application in any instance except one, to which I shall invite attention. In some respects the application of the principle has been extended.

In the course of my remarks I shall have frequent occasion to refer to general courts-martial, by which we tried in the fiscal year of 1910 more than 5,000 cases, and this is not far from the average

number of cases tried each year; also to a certain class of inferior courts, known as garrison, regimental, and summary courts-martial, by which in the year 1910 we tried about 42,000 cases—all in the nature of minor neglects and offenses incident to garrison life.

The task of disposing of the large number of cases tried by inferior courts is not a burdensome one to the Army, for the reason that they are handled by tribunals with a summary procedure similar to that of police courts; but the burden of administering justice through the general court is a very heavy one, and the main reason for asking the enactment of new articles is to obtain relief along these lines. The new articles provide for the transfer of a part of the jurisdiction of the general court to a new court, which I have referred to in the exposition as a disciplinary court, but to which I have given the name of the "special" court for the want of a better. Perhaps the term "garrison and field court" would better describe its functions, but I was finally persuaded to adopt the name "special," because that designation brought it into certain contrast with the "general" court. However, the name is not a very important matter. I will proceed to state the evils which the special court is designed to remedy, and which can be explained better by inviting the attention of the committee to the present practice in trying cases.

Take for example a case arising in the garrison at Fort Bliss, located near El Paso, Tex. A soldier commits an offense against discipline at that garrison, too serious to be tried by an inferior court. The charges are preferred, ordinarily by the company commander, and forwarded through post and department headquarters to the remote division headquarters at Chicago; they are there considered, and, if approved, orders issue for the trial and the papers go back to Fort Bliss, where the trial is had and the proceedings made up, and the record is then forwarded to Chicago. If, upon its examination there, errors appear to have been committed in the course of the trial, the record is returned to Fort Bliss and the court reassembled for the consideration of these errors. Supplementary proceedings are prepared and the record is again forwarded to Chicago, where, if it is approved in the form submitted, an order issues publishing the proceedings of the trial, which is sent to Fort Bliss for execution. After all these delays, not infrequently approximating two months and sometimes more than four months, the soldier enters upon the execution of his disciplinary sentence—usually six months' confinement.

Now, it is in reference to this class of cases, namely, cases of a disciplinary character, where it can be reasonably foreseen that the offender will be retained in the service and disciplined, that I am asking for the creation of this new special court. If I had taken for illustration a case arising in the Philippines Division the time limits I have stated would have been much greater, because the garrisons in that division are more inaccessible and the mail communication less frequent. Had a case been taken arising in the Eastern Division the time limits would have been somewhat less, but in the Western Division, at San Francisco, they would have been about the same. These delays are inherently unjust to the accused, to the Government, and, more than that, they are unnecessary in the class of cases to which I refer.

Now, the special court which I have recommended will consist of from three to five members. The periods of time—from two to four months—will be reduced to from one to two days. Certainly a court constituted of from three to five officers can be trusted, under the guidance of a maximum-punishment order, to give sentence of that character——

The CHAIRMAN. What time would a defendant have to prepare his defense?

Gen. CROWDER. He is on his warning that he is to be tried immediately upon his arrest, and all this time elapses before he can be brought to trial. He is required to be furnished a copy of the charges within 24 hours from his arrest. He has thus ample time to prepare for his defense, and besides he is always afforded the opportunity to have counsel. Upon his request an officer is always provided to represent him at his trial.

The CHAIRMAN. Under the plan that you suggest, what length of time would he have to get ready for the trial of the case?

Gen. CROWDER. Of course, when this new court meets he would to brought to trial very promptly; but in another article of war, to which I will call your attention later, a court is authorized to grant all reasonable delays and continuances upon the motion of the accused or his counsel, and his rights in this regard are as amply protected as in the civil courts.

Mr. PRINCE. We are frequently called upon, as a military committee, to pass upon court-martial proceedings; and from the number of prima facie cases made out in a number of cases it appears that the offense (from the civilian standpoint) is simply inconsequential; yet the punishment seems to be extremely severe. Now, it may be necessary, from the military standpoint, to have the punishment severe. Would it be wise or unwise, from your viewpoint, to permit the defendant—officer, commissioned officer, or uncommissioned man—to have the right to have a civilian lawyer to properly defend him at the trial?

Gen. CROWDER. He has that privilege now.

Mr. PRINCE. Well, it is a privilege I understand, but why not have it as a legislative right?

Gen. CROWDER. There has been some attempt to legislate in that direction in the existing code, and one of the articles of this revision considerably extends the operation of the existing statute in respect of the representation of the accused at the trial.

Mr. PRINCE. A few days ago a Member of Congress appeared before this committee and urged us to grant relief to a young man who had comparatively recently entered the Army. It was charged that he stole a pair of shoes, secondhand, worth not to exceed $2, and upon conviction this man was sentenced to six months' imprisonment. Now, that is such a little petty larceny, from a civilian standpoint, that the sentence is almost outrageous.

Gen. CROWDER. I can add to that case, with which I am familiar, two or three other cases of the same kind. I must say that the responsibility for that rests largely with the War Department, and it is one of the evils for which I have not yet been able to suggest a remedy. We have an authority given us by Congress to fix maximum punishments, and we have promulgated a maximum-punishment

order that reads in substance: "Larceny of property of value under $20, dishonorable discharge and one year's confinement." In other words, the order does not distinguish between the larceny of $20 and larceny of 50 cents.

Now, I had a case about six months ago that came up from the Department of Texas, where a soldier had taken from the bunk of his tentmate canteen credit checks of the value of 50 cents and appropriated them. He was sentenced to one year's imprisonment and dishonorable discharge. I looked into it and soon had his sentence remitted. The conditions of barrack-room life and its associations require extraordinary attention to the offense of larceny. The soldiers live in such a state of intimacy that they have unusual opportunities of that kind, and the barrack-room thief is about the worst element that can creep into a company. But it is my intention to submit at an early date a revision of the maximum-punishment order which will distinguish between the larceny of $20 and the larceny of lesser amounts.

The CHAIRMAN. Wouldn't a man stealing $5 be just as bad as a man stealing $20?

Gen. CROWDER. I think there is a good deal to be said in favor of that view; but I don't think that is the general view or that our civil courts execute the law in that way.

Mr. PRINCE. Well, there is a difference. They have a punishment for stealing certain amounts.

The CHAIRMAN. On page 8 of the bill, at the end of article 16, you could say: "*Provided*, That an officer shall have the right to select his own counsl."

Gen. CROWDER. Administratively that would work this way: We have recently completed the trial of an officer charged with embezzlement in the Territory of Alaska. He selected as counsel an officer at Fort Leavenworth, and he asked the Government to send him to Alaska, paying his expenses. Now, if we give him the right to select his own counsel, irrespective of what the exigencies of the service may require, it will embarrass the administration of military justice. Every reasonable effort is now made to give the accused counsel of his own selection.

Mr. PRINCE. Well, but in that connection see the amount of expense that a man has to pay in civil procedure. He can go to great expense and put the Government to great expense in demanding a jury. Sometimes it takes months to get a jury; but I don't think the expense ought to be taken into consideration when it is a serious offense; that is a minor matter.

Mr. EVANS. If a man is arrested in a civil proceeding he ought not to be given an opportunity to have a man come 4,500 miles to try his case. That would not be a ground for a continuance.

Mr. PRINCE. No; but I mean, suppose you were sitting as a judge trying a man for murder, and the man made a special request to have counsel from New York, and that he could not get a fair trial without him?

Mr. EVANS. I should say, if it was prima facie, he should choose between all the lawyers between Alaska and New York. I would go down to the experts.

Mr. PRINCE. There are good doctors all over the country; a man can send for expert doctors anywhere.

Mr. ANTHONY. Does the officer have the right to select his own counsel under the present law?

Gen. CROWDER. It is not a matter of right.

Mr. ANTHONY. It is not always granted an officer?

Gen. CROWDER. I don't think there has been a single occasion of denial, but there have been occasions of denial of the services of a particular officer when he was needed for other duty, or where the distance was so considerable that it would involve great delay in the case.

Mr. ANTHONY. What change do you make in the new articles?

Gen. CROWDER. The old article is one of the archaic articles. On page 8, at the top (or p. 17, at the bottom), the old article contains the provision [reading]:

ART. 90. The judge advocate, or some person deputed by him or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States; but when the prisoner has made his plea he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself.

Now, that devolves upon the judge advocate when the accused is not represented by counsel, but one of the duties of counsel for the defense, namely, to object to leading questions. I substitute for that language the following [reading]:

But should the accused be unrepresented by counsel, the judge advocate will, from time to time throughout the proceedings, advise the accused of his legal rights.

It is absolutely impossible for the judge advocate, as a prosecutor, to take over all the duties of a counsel. The object here is to make him a kind of minister of justice when the accused is not provided with counsel.

Mr. EVANS. Mr. Kahn suggests: "It shall be the duty of the judge advocate, from time to time," etc.

Gen. CROWDER. I would consent to that change.

Mr. KAHN. "The judge advocate *shall*," etc.

Gen. CROWDER. That is the present application of the law.

Mr. PRINCE. Now, General, I did not want to break in on you.

Gen. CROWDER. I have finished what I had to say about the new disciplinary court. That will give a large measure of relief from the burden we now have of administering justice through the agency of general courts-martial. But the project carries two other reforms, in this connection: One is in respect to the constitution of general courts-martial. The present authority to convene them is quite a restricted one. Take, for example, the experience of the summer of 1911. We assembled a separate brigade at San Diego, Cal., and another at Galveston, Tex., and a maneuver division at San Antonio, Tex. Under the present condition of the Articles of War the commanders were not able to order courts-martial. They can now only convene courts-martial in time of war—that is, division and separate brigade commanders.

Take another case: A state of war exists and we mobilize an Army corps with its constituent divisions. The corps commander can not convene a court-martial, except in a particular case, when his division commanders happen to be the accusers of the person to be tried.

The CHAIRMAN. The subordinate officer has more of power than the corps commander?

Gen. CROWDER. Yes; the division commander has more authority than the corps commander. If a case arises where the corps commander is convinced that a court-martial is necessary he may bring the necessity of trial in that case to the attention of the division commander, who may have already considered the case and decided that a trial was not necessary in the interest of discipline. In the normal case it is to be supposed that the corps commander would possibly order the division commander to convene the court, and it would be a rather serious question, which I hope we shall not be called upon to decide, whether, the law having vested the discretion in the division commander, the exercise of that discretion can be controlled by superior authority. The legislation that I have proposed would make it quite impossible for this question to arise.

Mr. EVANS. What article do you find the new provision in?

Gen. CROWDER. Article 8, "General courts-martial—by whom appointed."

The CHAIRMAN (reading):

The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an Army, a field Army, an Army corps, a division, or a separate brigade, and when empowered by the President, the commanding officer of any district or of any force or body of troops, may appoint general courts-martial whenever necessary; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority.

Gen. CROWDER. I have included the President of the United States for the reason that, notwithstanding he is the Commander in Chief of the Army, his authority to convene a court-martial was denied in one case, or rather questioned, because of the fact that the existing law provided that he could appoint only when certain other officers were the accusers. They said that that statute, by necessary inference, denied his right to act in other cases.

But in the Judge Advocate General Swain litigation the Supreme Court of the United States held that the authority was inherent in the President as commander in chief, and that he could always convene a court-martial when necessary. Therefore, I have inserted the term "President of the United States."

Now, when you come to the next: The commander of a territorial division or department, you are repeating the existing law. The Superintendent of the Military Academy now has a limited authority to convene courts-martial; that is, he can try cadets. I have given him plenary authority in this provision.

The CHAIRMAN. Don't you think you had better confine his authority to the trial of cadets and enlisted men, for the reason that the superintendent might be only a captain or a major, and he is up there over colonels and lieutenant colonels?

Gen. CROWDER. Well, if you can look forward in the administration of the Army far enough to see when the Superintendent of the Military Academy will be an officer of such inferior rank, I think——

Mr. TILSON. But that is the reason.

The CHAIRMAN. You know Gen. Mills was only captain when he was appointed superintendent.

Gen. CROWDER. I would get all that I want if I could have authority to try enlisted men and cadets. I don't like this idea of dependence upon a commanding general of the Eastern Division for the discipline of the Military Academy detachment.

The CHAIRMAN. Well, but you can not tell just who is going to be appointed there. Gen. Schofield was a lieutenant general.

Gen. CROWDER. Officers of the Engineer Corps with field rank have been appointed. During my period at the academy the superintendent was Gen. Howard, and then came Gen. Schofield, and he was followed by Gen. Merritt. It was not until some time after that they went back to the system of designating officers below the grade of general.

The CHAIRMAN. Gen. Mills was a colonel?

Gen. CROWDER. Yes, sir.

The CHAIRMAN. Gen. Scott was a major?

Gen. CROWDER. Yes, sir. Scott was succeeded by a major general. The change could be made, Mr. Chairman, by striking out the words: "The Superintendent of the Military Academy" and substituting at the end the phraseology: "The Superintendent of the Military Academy shall likewise have power to convene courts-martial for the trial of cadets and of enlisted men of his command."

Mr. TILSON. That will be sufficient.

Gen. CROWDER. Yes, sir.

Mr. PRINCE. I suggest that we start at the first article.

Gen. CROWDER. And go through the entire code?

The CHAIRMAN. Yes.

Gen. CROWDER. That would make the presentation easier. Many of the articles require no comment.

The CHAIRMAN. Now, General.

Gen. CROWDER. You will find in the right-hand column, of course, the old law, and the new in the left-hand column. On the very first page I would invite your attention to the fact that we had to look at the enacting clause of the old law, and then at article 64 of that law to ascertain who were subject to the articles and governed by them. An attempt has been made to remedy this in section 1342, on the first page, and article 2 on the next page.

Mr. PRINCE. You have added the words: "And all persons now or hereafter made subject to military law."

Gen. CROWDER. Yes; to include certain persons made subject to military law without being in the Army—paymaster's clerks, retainers in the camp who, during the war, do not belong to the Army, and others whom Congress may at some future time bring under the articles.

Mr. PRINCE. This would apply to all clerks in the supply corps?

Gen. CROWDER. It would apply to that corps.

The CHAIRMAN. There are no clerks in the supply corps; they are all enlisted men.

Mr. PRINCE. In the new supply corps—I think it would apply to everybody in the corps.

Mr. TILSON. Does it also cover civilian teamsters?

Gen. CROWDER. In time of war they become retainers to the camp. We will get at that in article 2.

You will notice that the first article is given over wholly to definition, and that subdivisions (*a*) and (*b*) are a substantial repetition

of the existing law. There has been added subdivision (*c*), defining "company" as the equivalent of a troop or battery, and subdivision (*d*), defining "battalion" as the equivalent of squadron. This has been done for convenience in drafting subsequent articles, to get certain descriptive terms that will avoid the necessity for repetition.

We now come to article 2 of the revision. There has been such an enumeration here as will make it unnecessary if this code is enacted to look elsewhere to ascertain who are within the military jurisdiction. I have drawn into the domain of this article all the special legislation we have had on this subject of jurisdiction as to persons, with one exception. Existing legislation, held by the Attorney General and by the Judge Advocate General to be clearly unconstitutional, provides that inmates of the volunteer soldiers' homes are to be subject to the Articles of War. The statute has, so far as I can inform myself, never received any execution. While I have not included this, I have not undertaken to repeal the law by making any reference to the sections of the Revised Statutes conferring this extraordinary jurisdiction in the repealing clause which will be found at the end of the project.

Mr. EVANS. But if you want this adopted, and it passes, then it contains a complete statement on its face of the persons who are subject to the Articles of War?

The CHAIRMAN. It would leave that law still in force.

Mr. EVANS. Do you think so?

The CHAIRMAN. Certainly.

Mr. EVANS. If we pass this, and it contains all the persons who are subject to military law——

Gen. CROWDER. No; I didn't say all the persons.

Mr. TILSON. You will find that the Articles of War do not contain anything about the old soldiers.

The CHAIRMAN. They have nothing to do with the Army, therefore you don't have to say anything about them. If anybody desires to introduce a bill to repeal that particular provision, that can be done.

Mr. EVANS. That is, the statutory provision.

Gen. CROWDER. Article 3 is simply declaratory of the three classes of courts.

Mr. PRINCE. Now, let's see [reading]:

> In time of war all retainers to the camp and all persons accompanying or serving with the armies—

are subject to military law.

Gen. CROWDER. That provision is from the existing sixty-third article of war. The words "accompanying or" are new and are intended to cover attachés who accompany the Army but who do not necessarily serve with the field Army. The phrase includes also newspaper correspondents; we have been trying them in every war we have had for divulging military secrets and nonconformity with regulations and like offenses.

Mr. PRINCE. Have you ever tried any of them?

Gen. CROWDER. Yes; you will recall that in the Civil War Gen. Sherman brought some men to trial.

Mr. PRINCE. Yes. Then, as a matter of fact, you have been exercising that authority, claiming that you had the right for the good of the public?

Gen. CROWDER. Yes.

Mr. TILSON. You construed the law to cover them?

Gen. CROWDER. Yes.

Mr. HUGHES. There might not be any question about it.

Mr. TILSON. However, that covers the ground. He might give away the screts of the general and spoil the whole campaign.

Gen. CROWDER. The country at large will not recognize this as conferring any new jurisdiction. We are now dealing with what we have hitherto read into the articles by construction.

Mr. PRINCE. I think you have it right here: "In time of war."

Mr. TILSON. That is right.

Gen. CROWDER. Now, article 4 will claim your special attention, because it involves a radical change in the existing law. Under article 77 officers of the Regular Army are declared incompetent to sit on a court-martial to try the officers or soldiers of other forces. That was construed during the Civil War as rendering these officers absolutely incompetent to sit on courts for trial of Volunteers or militia and mixed courts of regular and volunteer or militia officers were held to be unauthorized and illegal. Consent by an accused would not under the ruling make the court legal.

In the Spanish-American War the number of Volunteers called out was about equal to the number of Regulars employed, and the two classes of troops were brigaded together or otherwise associated in small commands. It became next to impossible to convene courts for the trial of Volunteers composed exclusively of volunteer officers, and in this situation the Judge Advocate General was called upon for an opinion as to whether mixed courts would be legal. He rendered a decision to the effect that the manner of bringing Volunteers into the service of the United States during the Spanish-American War period differed in a substantial way from the manner employed in previous wars and held that the volunteer forces of that period need not be considered "other forces" within the meaning of the seventy-seventh article of war. He sustained the legality of mixed courts. During the Spanish-American War one Deming, a volunteer captain of the Subsistence Department, was tried for the embezzlement of funds in his official custody by a court of regular officers; he was found guilty and sentenced to dismissal and imprisonment. The Leavenworth Prison was designated as the place for the execution of the sentence, and Deming was confined there. He sued out a writ of habeas corpus alleging that the sentence of the court was illegal in that the court was illegally constituted of regular officers. The case was heard by the United States circuit court, which denied the writ. An appeal was taken to the United States Court of Appeals at St. Louis and that court, by unanimous decision, discharged Deming from custody. A writ of error was sued out to the Supreme Court of the United States and the case came on to be heard by that court, which confirmed the decision of the court of appeals, with two dissenting votes, holding that officers of the Regular Army were incompetent to sit on courts-martial for the trial of Volunteers, and that the fact that the accused failed to challenge the regular officers was immaterial; that the law itself rendered them incompetent and their detail upon such a court illegal. In a subsequent case the court extended this doctrine, holding that a regular officer was disqualified to sit on a court-martial for the trial of a volunteer, even though he was holding a temporary commission in the Volunteers and on an

indefinite leave of absence from his regiment. A very large percentage of the trials by court-martial during the War with Spain were invalidated as the result of this decision.

In 1903 the Dick bill was passed bringing the National Guard and the Regular Army into closer relations, the attempt being made to unify the force and to make the National Guard and the Regular Army a part of our first line. It was therein provided that a majority membership of courts-martial for the trial of officers and men of the militia when in the service of the United States should be composed of militia officers (sec. 9, act of Jan. 21, 1903). This is an awkward provision, for the reason that in the course of a trial the majority may be disturbed by challenge, sickness, or other cause. In the new article I have inserted a provision giving to accused officers and soldiers the right of peremptory challenge against officers of the Regular Army detailed to sit on courts for their trial. Personally I am of the view that there should be no restriction at all upon the detail of regular officers on court-martial duty, particularly for the reason that not only does existing legislation, but certain legislation which is proposed, contemplate making the militia the exclusive reliance for the increments of citizen soldiers which we need to raise a war army, and contemplates still closer relations between the Regular Army and these increments of citizen soldiery. But if any restriction is to be maintained, I think it should be limited to giving the right of peremptory challenge. It is interesting to note in this connection that my predecessor in the Judge Advocate General's office made an investigation which disclosed the fact that the sentences imposed by courts composed exclusively of Volunteer officers were generally more severe than those imposed by courts composed of Regular officers.

Mr. TILSON. Has not the reason for this law largely passed away?

Gen. CROWDER. I think so.

Mr. EVANS. Why should we, then, preserve the right of peremptory challenge? I can't see any reason for it. If the two are serving together, the Regular Army and the Volunteers in the same war, for the same purposes, the idea that there should be a distinction would create the impression that there is a party within a party. I don't believe it is wise to preserve such a restriction.

Gen. CROWDER. It impairs the unity of the force. But I want to be entirely frank. I think that there is a respectable minority of the National Guard that favor restricting the eligibility of regular officers for court-martial duty.

Mr. TILSON. I really think that you are taking a backward step so far as the rights are concerned, because the Dick bill prescribed that half of them might be Regulars.

Gen. CROWDER. No; a minority.

Mr. TILSON. There might be one less than half of them Regulars under the Dick bill, and under this none but a majority could be selected.

Gen. CROWDER. The Dick bill involved the difficulty of maintaining a majority, and I want to get some substitute for that.

Mr. EVANS. Then they might all be challenged.

Mr. HUGHES. I think you have brought it clearly to our attention.

Gen. CROWDER. In article 5 there has been an omission of the requirement of the law that we must have courts of 13 members when

they can be had without injury to the service. I earnestly believe we ought now to be relieved of that requirement. I think if the convening authority can convene 13 officers he ought to do so in an important case, but I think it involves unnecessary expense to require him to do so in all cases. The old requirement is based upon the analogy of a judge and a jury of 12.

Mr. TILSON. It would be more like a jury of judges?

Gen. CROWDER. Yes, sir. In article 7 the summary court is left as it was in the old law.

The CHAIRMAN. Shouldn't there be a statement there that when the parties shall desire it they should have 13?

Gen. CROWDER. I think you can trust to the discretion of any officer authorized to assemble a court-martial to convene 13 when it is proper to do so.

Mr. HUGHES. The very fact that 13 were provided for would seem to indicate that they should be assembled in grave cases?

Gen. CROWDER. Yes, sir.

I might interject here the remark that the administration of military justice differs from that of civil justice in that every case is appealed. There is always somebody above the trial court authorized to act by way of disapproval.

Mr. HUGHES. As a matter of fact, every case is appealed?

Gen. CROWDER. Yes, sir. Article 8 was discussed awhile ago.

Mr. HUGHES. I think we agree as to that.

Gen. CROWDER. Now, article 9 refers to the new special court. While there is a good deal of underscoring in that line, it is simply a restatement of the old law. It contains one provision which is new to the law [reading]:

> But such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable.

That is the concluding provision. We are making a provision for a new court and placing it in new hands. I thought it would be wise to provide that if the superior officer found a misuse of this power by a subordinate he could at once assume it for himself.

Mr. PRINCE. Could there be any conflict of power there?

Gen. CROWDER. No, sir; I think not.

Mr. PRINCE. Are you governed a great deal in your findings in courts-martial generally by precedents of other courts-martial, or is each case a law and rule unto itself?

Gen. CROWDER. Well, a few years ago the courts-martial were a great deal better acquainted with the service precedents than now, but I think to a reasonable degree they are governed to-day by precedent.

Mr. HUGHES. And the cases will be argued just as civil cases?

Gen. CROWDER. As a rule the important cases are, and the procedure is so similar to that of the civil courts that civil lawyers are not embarrassed in trying military cases.

Mr. HUGHES. Yes; but do the military lawyers assemble the authorities and present them on a side?

Gen. CROWDER. Oh, yes; that is pretty general.

Mr. PRINCE. Do you have some pretty clever fellows to defend these men?

Gen. CROWDER. We have about 75 who came into the Army in 1901 who were practicing lawyers when they came in, and they give

us a very respectable nucleus of officers competent to assume the duties of counsel.

Mr. PRINCE. And they are scattered around?

Gen. CROWDER. Yes, sir; and they are called into requisition as they are demanded.

Mr. PRINCE. Now, do some of these men finally work their way up into your department?

Gen. CROWDER. I have four of them now in my department, and when a vacancy occurs I recommend to the Secretary of War one of that class of officers.

The CHAIRMAN. Article 11 carries one change, and that is for the appointment of an assistant judge advocate for general courts-martial.

Gen. CROWDER. My primary purpose in that was to get a chance to educate young officers in the practice of trying cases. Sometimes the services of an assistant will be needed in the trial of an important case. That is all there is new in that article.

Article 12 is a new article. It simply declares the jurisdiction of the general courts-martial. I take it there is no impropriety in making that a matter of express provision.

Article 13 deals with the jurisdiction of the new special court, and it is substantially identical with the old articles 81 and 82, except the proviso. I have inserted there the language [reading]:

> That the President may, by regulations which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law."

You will observe that they have jurisdiction to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles. Now, there will be a large number of civilians accompanying the Army in war, some of them in pretty high stations of life. The President should have the right to say that these persons should be tried as officers. We ordinarily do have very distinguished men accompanying the Army in the field, who should be brought to trial, if necessary, with the same formality as commissioned officers. It may be also that future legislation of Congress may create some special grade of noncommissioned officers, whom the President would wish tried as officers. You will notice that the maximum punishment that can be imposed by the new court is six months' forfeiture of pay and six months' confinement.

Article 14 fixes the jurisdiction of the summary court-martial, both as to persons and offenses, and follows the language of the old law, except in one regard. In the old article the limit of punishing power of the summary court is three months with the consent of the accused to trial thereby, and one month without such consent. Under the new article it is three months in all cases, but it is provided that when the summary court officer is the only officer present with the command a sentence in excess of one month must be approved by higher authority. It is believed that this is a sufficient safeguard.

Mr. HUGHES. That would guard against any prejudice?

Gen. CROWDER. Any prejudice against the man.

The next article, No. 15, is entirely new, and the reason for its insertion in the code are these: In our war with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the

military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

Article 16 repeats, with only slight verbal change, the provisions of article 79, and we come to the subhead "Procedure" and article 17, which deals with the duties of the judge advocate. The underscored language in this article introduces a modification respecting the representation of the accused by counsel.

Mr. HUGHES. It seems to me there ought to be some more definite provision made in article 17 for the right of the defendant to employ civilian counsel at his own expense, provided it does not interfere with the trial. This provision is for where he has no counsel at all?

Gen. CROWDER. Yes, sir; that is it. The authority we have for the employment of counsel is given by an Army regulation which works satisfactorily, and in the experimental stage I would be glad to have it left there. There is no complaint from the service in that regard.

Mr. TILSON. Don't you think it would be interpreted as relieving the judge advocate, to some extent, of advising the accused? "He shall from time to time advise the accused of his legal rights." In the old article 90 it says:

> He shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses and to any question to the prisoner the answer to which might tend to criminate himself.

In other words, it is specifically to protect the prisoner.

Now, in article 17 it leaves it very much to the discretion of the judge advocate as to what legal rights he shall advise him of.

Mr. HUGHES. He is naturally the attorney for the Government, and he would be inclined to look out for the rights of the Government.

Mr. TILSON. Yes; but it provides that the accused shall be advised by the judge advocate. Now, the particular things are omitted from this article, and we have only the general statement that he shall be advised of his legal rights.

Gen. CROWDER. I would be willing to have the article amended by inserting, after the words "judge advocate," in line 9, the words of the old article:

> Will so far consider himself the counsel for the prisoner as to object to any leading question to the witnesses.

The CHAIRMAN. Would you be in favor of that part:

And to any question to the prisoner the answer to which might tend to criminate himself.

Gen. CROWDER. That is one of the archaic provisions of the code. It seems to relate to the time when it was possible to put the prisoner on the stand and make him testify against himself.

The CHAIRMAN. Suppose a question was asked, the answer to which would tend to criminate himself, wouldn't it be the duty of the judge advocate to advise the prisoner?

Gen. CROWDER. Yes, sir; it is done to-day. I don't object, as I say, to the specific provisions of old article 90 being included in the new article.

The CHAIRMAN. I think very frequently in criminal trials a question is asked—sometimes with malice aforethought and sometimes otherwise—the answer to which would tend to criminate the accused. That is a very general occurrence.

Gen. CROWDER. I have no objection to the change.

Mr. PRINCE. Would you object to saying, "If the accused has no counsel, civil or military"?

Gen. CROWDER. It would bring into the statute the recognition of the practice of employing civil counsel.

Mr. TILSON. Shouldn't that come in somewhere else, affirmatively, that he shall have that right?

Mr. PRINCE. That is all right.

Gen. CROWDER. We come now to article 18, which deals with challenge. The new article is a departure from the old in but one regard—the Government is given the right of challenge, whereas the old article gave it to the accused only; but the article has been construed from time immemorial as making the right mutual, and Mr. Winthrop, our standard authority, says of this construction that "Resting on long-established usage, it is now too late to dispute its authority." It is not desirable, however, that this important right should continue to rest upon construction, especially where the letter of the law does not support that construction. I have therefore made it a matter of express provision.

New article 19 states the oath of members and judge advocates of courts-martial. There is no change from the old law except in one regard. The old article required the judge advocate to be sworn not to disclose or discover the vote or opinion of any particular member of the court-martial. This has been a requirement since 1806, but by an act of Congress approved July 27, 1892, judge advocates were excluded from the closed sessions of the court (new art. 31). Since the enactment of that law the judge advocate has had no opportunity to discover the vote or opinion of a member of the court-martial which was not shared by the public. There is, therefore, no reason for continuing this requirement, and the new article omits it.

Mr. PRINCE. Going back to article 18, there is no right of peremptory challenge?

Gen. CROWDER. None at all.

Mr. PRINCE. The man has to state his ground of challenge to the court?

Gen. CROWDER. Yes.

Mr. PRINCE. And if the court does not see fit to grant it, that ends the matter?

Gen. CROWDER. That has always been characteristic of our military law.

Mr. PRINCE. Wouldn't it be an innovation to give him a few peremptory challenges?

Gen. CROWDER. It would be an innovation, and I think an unwise one.

Mr. HUGHES. In other words, your panel of the jury would be too extended?

Gen. CROWDER. Our panel is limited only by the available commissioned personnel.

Mr. PRINCE. The only question is whether that very wise safeguard, running down from centuries——

Mr. EVANS. The very history of centuries is against you. That is only as to civil cases.

Mr. PRINCE. I am one of the fellows that believe in the jury.

The CHAIRMAN. Isn't it true that the various criminal codes of the United States provide for a larger number of challenges in criminal cases than in civil cases?

Mr. PRINCE. Certainly.

The CHAIRMAN. Then, there might be a need for peremptory challenges in these cases because they are criminal.

Mr. EVAN. Then, you would have to revise the whole system, because there are different reasons in civil cases.

The CHAIRMAN. Well, but if it is founded on good common sense, good reason, and good law, wouldn't that same reason apply to this kind of cases? And if it does, are the objections on account of the summary nature of the proceedings sufficient to overcome the reasons?

Gen. CROWDER. I think you have stated the situation very fairly, and my own comment would be that the conditions of this special jurisdiction are sufficient to overcome the reasons.

The CHAIRMAN. Isn't it a fact that in the old trials in the Army no injustice has been done by reason of the failure to exercise this peremptory challenge?

Gen. CROWDER. I think so. I do not recall any instance in which that has occurred or complaint has been made.

Mr. HUGHES. How many challenges shall be exercised for cause?

Gen. CROWDER. The right is not limited.

The CHAIRMAN. Now, in that connection, wouldn't there be a hesitancy, just as there is in civil courts, toward challenging a man for cause if there was a possibility that it would not be sustained? For instance, if the challenge is overruled it would be likely to leave a bad taste in the mouth of a juror. Suppose there is something between the two men that nobody knows about but those two, and neither one of them wants it to be known, and yet the accused knows there is a prejudice and if he states it publicly he incurs more of a feeling, and if he does not do it his rights are prejudiced?

Gen CROWDER. That is as true of courts-martial as of civil courts. Human nature is likely to be the same in both cases. The right of peremptory challenge, which is common to our civil courts, has never had a place in our military jurisprudence. This is a concession to the summary character of the military jurisdiction and is not the only instance where the fact is made manifest that a soldier when

he takes on the obligations of an enlistment contract surrenders rights which he had as a civilian. Our military jurisprudence is based upon this fact, which has constitutional recognition, in that the Constitution excepts from the requirement that no person shall be held to answer for a capital or otherwise infamous crime except upon an indictment by a grand jury, cases which arise in the land and naval forces. It is likewise held that the constitutional right to be confronted by witnesses and to have a speedy public trial have relation to prosecutions before civil courts of criminal jurisdiction of the United States, and do not apply to military courts. While we have extended by legislation many of these constitutional rights to an accused before a military court, this right to peremptory challenge has not been recognized, and I am inclined to think that its introduction would be fraught with grave consequences. I do not believe that there has ever been any complaint that our military jurisprudence did not accord this right.

The CHAIRMAN. General, I think we will have to postpone our hearing until next Tuesday.

Gen. CROWDER. I thank you very much.

Thereupon, at 12 o'clock m., the committee adjourned until Tuesday, May 21, 1912, at 10 o'clock a. m.

COMMITTEE ON MILITARY AFFAIRS,
Tuesday, May 21, 1912.

The committee this day met, Hon. James L. Slayden (acting chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY—Continued.

Mr. SLAYDEN. General, you may proceed.

Gen. CROWDER. At the prior meeting of the committee we had completed the consideration of the articles relating to the composition, constitution, and jurisdiction of courts-martial and two of the articles relating to procedure, finishing with article 18, relating to challenges. The articles from 18 to 37 deal with procedure. None of the changes is fundamental. They are largely changes of verbiage, but some of them are quite important. Following the plan adopted at the last session, I will take them up article by article.

In article 19 the old law is repeated with one omission and one addition. The omission is in the oath to be administered to the judge advocate, which carried this provision—

> will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness of a court of justice in due course of law.

That is article 85 of the old law. That provision has been omitted, because under legislation enacted since that article was enacted the judge advocate is excluded from the closed sessions of the court and has no opportunity to know the vote or the opinion of any member of the court-martial which the public does not have.

Mr. SLAYDEN. And there is no occasion for retaining that provision?

Gen. CROWDER. No. The other change is at the close of the article on page 9. The sentence, "In case of affirmation the closing sentence of adjuration will be omitted," has been added. That explains itself.

Mr. SWEET. What provision is there now for a speedy trial?

Gen. CROWDER. We shall come to that in articles 68 and 69 of the revision.

Mr. KAHN. There is also another change, the word "findings."

Gen. CROWDER. Yes, sir; and I was about to explain that. The word "findings" does not appear in the existing article prescribing the oath for the judge advocate. His oath is "not to disclose or discover the vote or opinion," and makes no reference to the findings. It will be at once apparent to the committee that in the case where the law imposes a mandatory sentence, to disclose the findings is to disclose the sentence, and in other cases to disclose the findings is to give very definite suggestion as to the sentence imposed. It is a defect of the existing law not to include the word "findings" along with the words "vote or opinion" in the prescribed oath.

Article 20 deals with the subject of continuances and repeats the provision of the existing law (art. 93), but with the words "that if the prisoner be in close confinement the trial shall not be delayed for a period longer than 60 days," omitted. The omitted language is transferred to new article 69.

Mr. KAHN. It is not omitted?

Gen. CROWDER. No, sir; except that that particular language is omitted and new language inserted.

In article 21 the word "accused" is substituted for the word "prisoner"—a mere verbal change.

Article 22 deals with process to obtain witnesses. It is based upon section 1202, Revised Statutes, which was enacted in 1863. That section was in the nature of an article of war, and is properly transferred from the general body of the statutes to the new code. It will be noticed that I have extended the process which the present law says may be issued by a judge advocate only, to a summary court; so that all of our courts will have the power to compel the attendance of witnesses. The principal defect of said section 1202 is that it does not provide for compelling a witness to *testify*, although it has provided for compelling him to *attend*. Such has been the ruling of the Judge Advocate General's office, and it has been several times approved by Secretaries of War. The construction was based upon the principle that punishment of a witness as for contempt for refusing to testify is a summary proceeding, not a process, and therefore not within the provision of the article. I have left the article as it is in this regard, in view of legislation enacted subsequently to section 1202 (act of Mar. 2, 1901, incorporated in sec. 24 of the revision), and which places process to compel testimony of civilian witnesses before courts-martial in the hands of United States district courts. Before leaving this article I desire to invite attention to the fact that the compulsory process it gives to courts-martial is not available against witnesses who reside beyond the State, Territory, or District where the military court shall be ordered to sit. This limitation results from the fact that the reference of the article is to courts of criminal jurisdiction within the State, Territory, or District whose process does not run beyond the geographical limits named. It will be noted that in the new article we have given them the same process as courts

of the United States may lawfully issue, and have thus extended the field in which process to compel the attendance of witnesses will run.

Article 23 sets forth the oath of witnesses. It is the same as the old law, except in one regard, the words "in case of affirmation the closing sentence of adjuration will be omitted," have been added.

We now come to article 24, which is taken from the act of March 2, 1911, already referred to, which act constitutes the response which Congress made to the request of the War Department for compulsory process to compel civilian witnesses to testify before courts-martial. The legislation is useful in its present form, but it is submitted that its application should be extended. First, the compulsory process to compel testimony should be as available in the hands of an officer, military or civil, designated to take a deposition to be read in evidence, as it is in the hands of a court-martial before whom the deposition is to be read. I take it there will be no difference of opinion as to that. There has been omitted from the old law the language of the first proviso, as follows:

That this shall not apply to persons residing beyond the State, Territory, or District in which such general court-martial is held—

in other words, the act did not give compulsory process as against witnesses residing beyond the State, Territory, or District. It is submitted that this is a limitation which ought not to exist. The presence of this limitation in our existing law is probably due to the fact that where a witness resides beyond the State, Territory, or District there is authority in article 91 of the existing code to take depositions. Where the issues to be investigated by a court-martial are grave it may be very important, from the standpoint of the accused, that he shall be confronted by the witnesses against him, and the court-martial should have available, either in its own hands or in the hands of the civil court, the necessary process to compel personal testimony in such cases.

Mr. HUGHES. It says:

Provided, That this shall not apply to persons residing beyond the State, Territory, or District in which such general courts-martial is held;

in other words, if he lives beyond that you would take his deposition?

Gen. CROWDER. Must take his deposition unless he voluntarily appears.

Mr. HUGHES. But you could not get him as a witness?

Gen. CROWDER. That is it.

Mr. EVANS. It simply makes it effective, so that the man who does not obey the subpœna can not get out of it. Otherwise without that, where a man does not obey the subpœna, you would have to go back for additional authority?

Gen CROWDER. Yes, sir.

You will notice that the existing article gives the right of compulsory process only against witnesses before a *general* court-martial, and that I have substituted for the words "general court-martial" the word "court-martial," so as to include all three classes of these courts. Perhaps a better designation would have been a "military court," which would make the article applicable to all courts of whatever description, including military commissions and provost

courts. If that change is made, which I recommend, then the word "court-martial" appearing in line 24 (p. 10) should be substituted by the words "such court," and further, in line 7 (p. 11), there should be substituted for the word "court-martial" the words "military court."

We come now to article 25, which relates to the admissibility of depositions. The existing article (art. 91), which article 25 substitutes, provides that the depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, may be taken upon reasonable notice. I have preserved this provision, but have given the authority also to take depositions of witnesses residing beyond the 100-mile limit, following in this regard the Federal statute respecting the taking of depositions—that is, 100 miles from the place of hearing. It will be noted also that the authority to take depositions is granted where the witness is about to go beyond the State, Territory, or District, or beyond said 100-mile limit, or when by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause he is unable to appear and testify in person at the place of trial or hearing. It will be noted further that the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards.

Mr. SWEET. Please explain what you mean by military commission.

Gen. CROWDER. That is our common law of war court, and was referred to by me in a prior hearing. This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the "council of war," with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts have never been regulated by statute. The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts. and its jurisdiction has been affirmed and supported by all our courts. It was extensively employed during the Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore by the laws of war rather than by statute.

Mr. SWEET. There is more elasticity, I suppose?

Gen. CROWDER. Yes, sir; and the lack of statutory recognition has not prevented the Supreme Court from supporting the jurisdiction of the military commission in the trial of the gravest cases, and supporting it in the most explicit language. It is a most important institution in time of war.

Article 26 specifies the persons before whom depositions may be taken. The existing law contains no provision of this character, and we have followed, by analogy, the provisions of the civil law.

Mr. SLAYDEN. You provide "any officer, military or civil"?

Gen. CROWDER. Yes, sir; any such officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

Article 27 deals with courts of inquiry. There is no substantial change from the old law (art. 121). The word "proceedings" has

been substituted by the word "record," for of course it is the record of the proceedings which would be offered in evidence.

Mr. SLAYDEN. What is a court of inquiry?

Gen. CROWDER. It is a court of inquest to examine into the nature of allegations made against any officer or soldier, and to report findings of fact, and express an opinion when expressly invited to do so.

Mr. SLAYDEN. Before a court-martial is convened?

Gen. CROWDER. Before the court is convened, and generally to determine the necessity for a court.

Mr. SLAYDEN. A grand-jury proceeding?

Gen. CROWDER. Yes, sir; of that general nature.

Mr. HUGHES. That is the present law?

Gen. CROWDER. Yes, sir; there is no change.

Mr. SLAYDEN. Do they frame an indictment?

Gen. CROWDER. They do not frame an indictment; they submit the facts to the reviewing authority.

Mr. HUGHES. They occupy the position of a grand jury in a civil court?

Gen. CROWDER. Yes, sir.

Article 28 simply repeats a provision of the old law, article 49, except that I have omitted the penal part of the old article, because desertion is punished elsewhere. This is simply a rule of evidence.

Mr. SLAYDEN. There is a law which prescribes the penalty for desertion?

Gen. CROWDER. Yes, sir.

Article 29, like article 28, is substantially a rule of evidence and substitutes that part of existing article 50 which is in its character administrative. The punitive part of said article 50 is transferred to the penal provisions of this revision, viz, to article 59 of the revision. The underscored language of new article 29 shows that the existing law has been considerably broadened. The existing law took cognizance of abandonments of one organization of the Army and enlistment in another, while the new article covers not only the abandonment of an organization of the Army, but engaging for service in any other branch of the Army, or militia when in the service of the United States, or the Navy or Marine Corps of the United States, and lays down the rule that the offender shall be deemed to have fraudulently enlisted in the new organization in which he fraudulently enlists. There can be no difference of opinion, I think, about the necessity of expanding the article in this regard.

Mr. SWEET. Is there any means provided for the private soldier to know these provisions of law?

Gen. CROWDER. You will find that provision is made in this regard in the existing aricles and also in the new code, the existing requirement being that officers are required to read over the articles to enlisted men upon enlistment or within a reasonable period thereafter, and at periods of six months during their service. Under the terms of the new article (art. 110) this requirement has been somewhat abridged. There is obviously little necessity for the reading over to soldiers of technical articles relating to the composition, constitution, and jurisdiction of courts, while there is an urgent necessity for not only reading over, but explaining, the punitive articles, and the requirement has been stated in that form.

Mr. HUGHES. They are very forcibly set forth by the officers?

Gen. CROWDER. Yes, sir; and I think the requirement that they shall be both read over and explained is a very useful provision of the new law.

Article 30 is a new article and prescribes the form of oath for reporters and interpreters. There has never been one prescribed before. I think there is a grammatical error. The word "you" should be "I", in the form in which the oath is stated.

Mr. SLAYDEN. It should read "I swear"?

Gen. CROWDER. Yes, sir; that should go in.

We now come to article 31, which deals with closed sessions of the court. Until 1892 the prosecuting officer sat with the court in its closed sessions and it was always recognized as placing the Government in an unduly favorable relation to the case; that the man who was prosecuting sat there and deliberated with the court. In the year 1892 Congress passed legislation excluding the judge advocate from the closed sessions of the court when the vote was being taken or the court was deliberating on its findings. I have excluded also the assistant judge advocate, who must also retire along with the judge advocate. That is the only new provision.

Article 32, order of voting, has already been called to your attention.

Article 33 deals with contempts. There is no substantial change, for while it embraces archaic language (its origin was in the code of James I), it is effective in its present form. It will be noted that the power of a court-martial to punish for contempt is limited to acts of disorder committed in its presence or elsewhere which disturb its proceedings. It does not extend to punishing a witness for contempt for refusing to testify, alone.

Article 34 relates to the records of general courts-martial. This is a new article. It is nowhere expressly provided in the existing code that a general court-martial shall keep a record, but the articles do refer to approving, forwarding, and preserving records of a general court-martial, and therefore evidently contemplate that a record shall be kept. As a general court-martial is a court of general jurisdiction and tries crimes of the gravest character, it would seem to be important that there should be express provision of statute on the subject of the record to be kept. This matter has heretofore been governed by Army Regulations.

Article 35 makes a similar provision respecting special and summary courts-martial, preserving the language of the old law relating to summary courts, which you will find opposite article 35.

Mr. SLAYDEN. This is a provision that there shall be a record kept of the proceedings of every court-martial, big and little?

Gen. CROWDER. Yes, sir.

Mr. HUGHES. How has it been done in the past?

Gen. CROWDER. It has been done by regulation. It seemed to me a matter of sufficient importance to make a statutory provision for it.

Article 36 simply provides for the disposition of the records. You will notice in the old article 113 that the judge advocate was required to forward, with such expedition as the opportunity of time and distance of place may admit, the original proceedings and sentence of the court to the Judge Advocate General of the Army.

That regulation has never been complied with because the judge advocate of the court has to send the record to the reviewing authority for his action.

Mr. SLAYDEN. He is commanded by statute to do something that he can not do?

Gen. CROWDER. Yes, sir; the new article requires him to forward the record to the appointing authority, and "all records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army."

As to the disposition of records of special and summary courts-martial, under the existing law, which you will find in the column opposite, such records are required to be retained for two years. I changed that to three years, which is the length of the enlistment period. If the enlistment period is to be changed this article should be changed again.

Mr. SLAYDEN. Two or three or four years?

Gen. CROWDER. Yes, sir.

Mr. EVANS. It seems to me much wiser to have a rule for keeping your records than to let it depend upon the circumstances.

Gen. CROWDER. Most of the questions which can arise respecting a trial occur within the enlistment period.

Mr. SLAYDEN. Would there be any embarrassment if it were extended to five years?

Gen. CROWDER. No, sir; no serious embarrassment. What I am concerned about is to have it survive the enlistment period, because questions may arise which would make it necessary to refer to the record.

Mr. SWEET. Could you not obviate the necessity for a change by putting it just exactly as you state it now, but instead of fixing the number of years, say "for the enlistment period of the person tried?" Then it would apply to any case and would not be subject to change.

Gen. CROWDER. I am perfectly willing to have that change made.

Mr. SLAYDEN. There is pending before this committee a bill introduced by Mr. Tilson, providing for a six-year enlistment period—three years in active service and three years in the reserve. Even five years would not cover that.

Gen. CROWDER. No, sir. You will notice that this article relates only to the records of special and summary courts-martial. The records of the general courts are never destroyed. The records of inferior courts are of minor importance; they concern only offenses against the discipline of the Army, and, really, the necessity is not urgent to retain them after the enlistment period.

Mr. SLAYDEN. What courts try desertions?

Gen. CROWDER. The general courts.

Mr. SLAYDEN. Exclusively?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. All serious military offenses are tried by the general courts?

Gen. CROWDER. Yes, sir.

I come now to two articles which I think will claim the special attention of the committee. They are new. Article 38 deals with rules to be prescribed by the President regulating the mode of proof and procedure of courts-martial. I have followed section 862 of the Revised Statutes in drafting that article which provides that, "the

mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." The President is our supreme court in trials by courts-martial, and I have undertaken to paraphrase that and give him the corresponding power in respect of courts-martial.

Mr. EVANS. With regard to that section I have come to the conclusion that there is an opportunity for construction which ought not be left in a law if we can avoid it. "Mode of proof," what is that? It is the introduction of proof. It is the mode of offering the proof. That comes under "procedure." I believe it would be simpler, clearer, and more direct to "prescribe the procedure in cases before courts-martial," etc., and quit there. "Mode of proof" seems to me to be covered by the word "procedure."

Gen. CROWDER. I think in that event we should get rid of one construction only to be faced by the necessity of another, viz, whether or not "procedure" would include mode of proof. The use that I intended to make of this article was to prescribe how documents should be proved and of what a court-martial should take judicial cognizance. Officers rarely have with them books which they can consult, and I do not want them left in the dark with respect to matters of that kind. Most of us have to look up the books on evidence to determine how to prove a document or of what a court may take judicial cognizance.

Mr. SLAYDEN. Would you not have a small book or publication of some kind for the guidance of the courts?

Gen. CROWDER. We have what we call the manual. We are going just as far as we can in this regard without trespassing upon the functions of Congress. In establishing these rules I have always been afraid that we might go too far. I thought we could go as far in that direction as Congress had already gone in developing similar authority upon the Supreme Court in equity cases and in admiralty and maritime jurisdiction.

Mr. EVANS. The rules for the procedure do not go to the merits; it is more the matter of practice. The words, "mode of proof," do not appear to have been used before. It is not a common expression in the law of evidence?

Gen. CROWDER. No, sir.

Mr. EVANS. It is not one of the definite, technical, and adjudicated meanings. Has it any military law meaning?

Gen. CROWDER. No, sir. I am introducing it in the code for the first time, and have taken it from the statutes, as I have said. It never has had any expression in the Articles of War before. Greenleaf says that courts-martial are bound in general by the rules of evidence administered in criminal cases in the courts of common law, and that this rule is subject to such exceptions as are of necessity created by the nature of the service. It thus appears that this most distinguished authority on evidence recognizes that there are exceptions to these rules of evidence in the military jurisdiction because of the nature of the service. If the President could have the sanction of this statute in promulgating rules which would indicate to the court what departure from the technical rules which govern in civil courts it would, I think, serve a very useful purpose.

Mr. EVANS. We are following in the military courts the law as laid down in the civil jurisdiction touching similar matters. That is, the weight of the evidence?

Gen. CROWDER. That is, the quantum of the evidence.

Mr. EVANS. Yes, sir. Have we power in Congress to delegate that to the President?

Gen. CROWDER. No; I think not. I propose only that the manner of proof shall be regulated.

Mr. EVANS. Off hand, I think not; but we have ample authority as adjudicated by the Supreme Court of the United States to delegate to anybody the right to make rules of practice to arrive at justice.

Thereupon the committee adjourned to meet to-morrow, Wednesday, May 22, 1912, at 10 o'clock a.m.

COMMITTEE ON MILITARY AFFAIRS,
Wednesday, May 22, 1912.

The committee this day met, Hon. James L. Slayden (acting chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL UNITED STATES ARMY—Continued.

Mr. SLAYDEN. General, you may proceed.

Gen. CROWDER. I would like to call attention to the comments made by the former Secretary of War, Mr. Dickinson, who has examined this project of revision. In article 24, page 11, in regard to the compulsory process against civilian witnesses before courts-martial, in line 5, after the words "United States," he suggests an amendment. He calls attention to a very pertinent fact, that there are some places where the Army is stationed where there are no United States district courts and the article fails to provide a remedy. For instance, in the Philippines. We have a United States district court in Porto Rico. I have sought to convert his idea into language, and I suggest that after the words "United States," in the fifth line, that there be inserted the language, "or in the court of competent criminal jurisdiction in any of the Territorial possessions of the United States."

Mr. SLAYDEN. Would it not be better to say "a"?

Gen. CROWDER. There will always be a court that will be referred to. I think "the court" indicates what was in the minds——

Mr. SLAYDEN (interposing). It will then read:

Every person not belonging to the Army of the United States who, being duly subpœnaed to appear as a witness before a court-martial, or before an officer, military or civil, designated to take a deposition to be read in evidence before a court-martial, willfully neglects or refuses to appear or refuses to qualify as a witness or to testify or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the District Court of the United States or in the court of competent criminal jurisdiction in any of the Territorial possessions of the United States.

Gen. CROWDER. That would necessitate a further change in line 7—

And it shall be the duty of the United States district attorney, or the officer prosecuting for the Government in any court of competent criminal jurisdic-

tion in any of the Territorial possessions of the United States, on the certification of the facts to him by the court-martial, etc.

He also suggests that in line 3, at the top of the page, the word "misdemeanor" should be changed to "contempt." I am inclined to think that is a very good suggestion. What we are punishing for is contempt, and why the Congress originally made it a misdemeanor rather than a contempt I do not know. The history of the legislation is a little bit obscure.

Mr. SLAYDEN. The courts have such exclusive, unrestrained jurisdiction that there must be some reason to change it from "misdemeanor" to "contempt." Is it effective.

Gen. CROWDER. It is effective in its present form. It is simply a criticism of the verbiage rather than the idea. What you want is compulsory process, and you are getting that from a civil court as the law now stands.

Mr. Dickinson seems to have given this article a great deal of attention. After the word "*Provided*," in line 11, he wants language introduced like this: "That imprisonment may be continued until the witness shall answer such questions as he is bound to answer or shall produce the documentary evidence which the court shall determine he should produce." In other words, he wants not only the six months' limit, but he wants it to continue as long thereafter as the witness is in this noncompliant attitude toward the court. I have hesitated to recommend to the committee that they strengthen this statute in this way because of the history of this legislation. Congress refused for a great many years to give the court-martial authority to punish a civilian witness for contempt. Finally and by the legislation here in reference it gave this power to the United States district court. I suppose Congress went as far as they thought they should go in the old statute, and I thought that I would not draw criticism upon the articles by trying to strengthen this provision, although I realize that this power that Mr. Dickinson would put in the statute might in rare instances be a useful power.

Mr. SLAYDEN. Practically, would you need it?

Gen. CROWDER. No, sir.

Mr. SLAYDEN. Is not the six months' punishment sufficient?

Gen. CROWDER. I think so. If the witness refuses to testify, he may be brought again before the court-martial, and if he again refuses may be again committed; and we may continue in this policy until the civil court says stop.

In article 26, the next page, in line 7, page 12—this authorizes, you remember, depositions to be considered in noncapital cases—Mr. Dickinson says add after the word "hearing" the words:

Provided, That such testimony may be adduced for the defense in capital cases;

and he adds—

it is in some States permitted to the defense to take depositions in criminal cases, although the accused must be confronted by witnesses for the prosecution.

Mr. SLAYDEN. If he demands it?

Gen. CROWDER. If he demands it. It would extend this authority to the defense, when he is on trial for his life, to take evidence by deposition. There is no doubt about your authority to do so, but we rarely try capital cases, except in time of war.

Mr. SLAYDEN. I think it would appeal to some people.

Gen. CROWDER. I think so. Of course, the prosecution is denied the right.

Mr. HUGHES. Why is not that a wise provision?

Gen. CROWDER. I think it secures additional guarantees for an accused person, and on that line it would be popular legislation. It is desirable legislation. It can not result in any detriment to the Government.

Mr. PEPPER. Would there be any danger from the Government having to combat the depositions, that they would have no chance to dispute them?

Gen. CROWDER. No. I think the burden is not an unreasonable one to impose upon the Government to meet.

Mr. PEPPER. The Government would have notice?

Gen. CROWDER. Yes, sir. "*Provided*, That such testimony may be adduced for the defense in capital cases." "Such testimony" means testimony by deposition taken on reasonable notice. Mr. Dickinson went over the articles very carefully, and he has commended the revision, with a few amendments which occurred to him.

That is all I have to call attention to until we get to article 38, on page 15, "President may prescribe rules"; where, on yesterday, in our hearing the discussion turned upon the use of the language "mode of proof," and I think it was Mr. Evans who suggested that we might be going too far in such a grant of power to the President and spoke particularly of what the language conveyed to his mind. "Mode of proof," he said, if it referred to the quantum of evidence, he would object to it, but if it referred simply to the mode of presenting proof, then he had no objection to make.

Mr. SWEET. I think you rather erroneously referred to quantum.

Gen. CROWDER. I meant to say that the new article did not. I have some alternative language to suggest this morning. Let the article read "The President may, by regulations which he may modify from time to time, prescribe the procedure, including mode of proof." This to show that it is something within procedure, and then we ought not to have any question that we are dealing with the form of proof and not with weight of evidence. Then strike out "and their procedure" in the twenty-fifth line.

Mr. SWEET. That applies more particularly to documentary evidence?

Gen CROWDER. Yes, sir; in the matter of introducing documentary evidence officers of the Army are rarely sufficiently familiar with the rules, and we want an opportunity to promulgate definite rules so that the judge advocate trying a case or the counsel for the defense will know just what formalities to comply with in order to get a document before the court. The rules to be promulgated will cover mainly military record evidence.

Mr. SLAYDEN. I suppose if you get this revision that you or some one will immediately reduce to a manual of some sort the procedure, etc., under these articles for the guidance of the officers?

Gen. CROWDER. That will be accomplished by a revision of the present manual of procedure. It will not require very much revision to adapt it to the requirements of these statutes; it will require some amplification.

Mr. SLAYDEN. The less revision you have, the better.

Gen. CROWDER. If Congress enacts this revision the service will not be cognizant of any material changes in the procedure, and courts will function much the same as heretofore.

Mr. SWEET. It will be legalized?

Gen. CROWDER. The revision will make certain a great deal that has been read into the existing code by construction. The utility of the present code depends to a very material degree upon what has been read into it by construction in the last 106 years.

Mr. PEPPER. There has been not recent revision?

Gen. CROWDER. No, sir. There was been some piecemeal revision, but no comprehensive revision since 1806.

The next article is 39, on page 16. Since that article was prepared my attention has been called to pending legislation in the Senate of the United States on the same subject which is so much better than what I have attempted to give the military courts that I am inclined to ask the committee's attention to it as a substitute for article 39. It will be noticed that article 39 is based upon existing section 1025 of the Revised Statutes, and goes no further in granting immunity from error to courts-martial than the Congress of the United States has extended to United States courts trying criminal cases; but that statute (sec. 1025, Rev. Stat.) is now about to be amended, and apparently the consideration given the new legislation shows substantial unanimity of opinion in its favor. The phraseology of the new law reads like this:

> That no judgment shall be set aside or reversed or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the party.

Mr. SLAYDEN. That would remove one of the most serious charges against the legal procedure in this country.

Gen. CROWDER. I ask that it be substituted for section 39. The next, article 40, is our statute of limitations, and it takes the place of article 103 of the existing code, the first paragraph of which was article 88 of the code of 1806, which was the only law on the subject until 1890, when the second paragraph was added. I am calling attention here to what is perhaps the most defective article in the existing code, and one which has given us the greatest trouble in the administration of military justice. I invite particular attention to the following manifest defects of the existing article:

First. The word "mustered" is used in the last line of the second paragraph of the article with reference to a peace offense. Soldiers are not mustered into the service in time of peace, but are enlisted; but that is simply inappropriate language.

Second. "Manifest impediment" which interrupts the running of the statute is included in the first paragraph of the article and not included in the second, thus establishing a different rule for desertion in time of peace than for other offenses. There is, of course, no reason for this difference.

Third. Article 103 in its first paragraph covers "any offense," and therefore includes desertion in time of war and murder. By rather bold construction we have held that desertion in time of war was excepted, and that it could be tried, irrespective of the time lim-

itation—a construction which rests upon a very doubtful basis and is likely to be upset the first time a man convicted under it has the enterprise to go before a civil court and ask for a writ. Murder should of course be expressly excepted.

Fourth. It is not made certain whether absence referred to in the first paragraph means absence from the United States; nor is it certain whether the period of this absence, or the period of manifest impediment is to be excluded in computing the period of limitation. That absence is to be so excluded in respect of a desertion in time of peace clearly appears in the second paragraph.

Fifth. Under the first paragraph the period of limitation terminates with the issue of the order for trial as to all offenses except desertion in time of peace. Under the second paragraph, which deals with the latter offense, it terminates with arraignment. Of course no distinction of this character can be justified.

Sixth. The period of limitation—two years—is too short, especially for civil crimes. Adequate proof of this is found in a comparatively recent trial in the Eastern Division, where an officer was charged with embezzlement, which under the Government system of accounting was not disclosed for more than two years.

The new article reads "No person shall be liable to be tried by a court-martial for any crime or offense, except desertion committed in time of war, or murder."

Mr. PEPPER. Except desertion in time of war or murder in time of war?

Gen. CROWDER. No; I have placed murder last so that it should not be qualified by the phrase "in time of war."

Mr. SWEET. What does the word "committed" add?

Gen. CROWDER. I will have something to say as to that term when we come to discuss existing article 47. I think I can then make plain to you why I have used that term. You will notice that I have changed not only the period of limitation from two to three years to correspond to the civil statute of the United States, but have also provided that the period shall terminate with "the beginning of the prosecution of the person for such crime or offense," and have also provided that—

> the period of any absence of the accused from the jurisdiction of the United States and also any period during which, by reason of some manifest impediment, the accused may not have been amenable to military justice, shall be excluded in computing the aforesaid period of three years.

Mr. SLADEN. In what sort of circumstances might that be applied?

Gen. CROWDER. According to our construction "manifest impediment" exists where an accused person sought to be brought to trial is sick, or is detained by the civil authorities or as a prisoner of war, etc.

The concluding provision of the article reads:

> *And provided further*, That the prosecution shall be held to have begun when the charges shall have been duly received at the headquarters of an authority competent to appoint a court-martial for the trial of charges alleging the commission of the crime or offense in question.

In other words, we have adopted the rule of the civil statute, which makes the period of limitation terminate with the finding of an indictment. When charges are duly preferred and received at the headquarters of the authority competent to order trial, every

administrative step has been taken to bring an accused to justice which can be taken in his absence. The formal convening of the court or the formal arraignment of the accused can not take place in the absence of the accused.

Mr. PEPPER. If he is away and can not be caught, it does not affect the case?

Gen. CROWDER. Not if the charges have been preferred.

We come now to consider the second proviso of this article (at the bottom of p. 16), it reads:

Provided further, That in case of desertion committed in time of peace, no part of the period for which the soldier was enlisted or mustered into the service shall be counted as a part of the aforesaid period of three years.

That is the present law, and it works this way. A soldier deserts 10 days after he enlists. He is liable to arrest for the period which remains of his enlistment, plus the statutory limitation of two years. An old soldier deserts in the last part of his enlistment and is liable to arrest and trial for a much shorter period; yet his offense is much more heinous than is the offense of the man who deserts in the recruit stage.

Mr. SLAYDEN. The other man is less well informed?

Gen. CROWDER. Yes, sir. Col. Winthrop says of this provision (Winthrop's Military Law and Precedents, Vol. I, p. 381), that this provision was engrafted upon our military code from the German military system, and was designed to extend the period for the prosecution of deserters; he then points out how unequal it is in its operation, and adds:

It is, in general, of doubtful expediency to introduce into the American military practice a rule derived from a foreign code, and especially where such rule is based upon a theory not tenable in our law. The theory upon which this rule is founded is that desertion is a "continuing offense"; i. e., is an offense which once committed on a certain day continues to be committed anew on every successive remaining day of the term of the enlistment of the soldier; so that, being committed on the last day of the term equally as upon the original day, the limitation should not begin to run till after such last day. But this refinement is not deemed to be applicable to desertion in our law. * * * But desertion consists in an offense of which the gist is a particular intent and one which must be entertained at a particular time, viz, at the moment of the unauthorized departure.

Winthrop recommends that this proviso be stricken from our law, and I concur in that recommendation. It was inserted in the new articles with the intention of asking the committee to strike it out.

Mr. PEPPER. The effect would be that both would be on the same basis, and the time of service would have nothing to do with it?

Gen. CROWDER. That is it.

Mr. SWEET. It extends it one year, anyway?

Gen. CROWDER. Yes, sir. The new article makes the period of limitation three instead of two years.

Mr. SLAYDEN. In other words, he would not be exempt from prosecution until three years after desertion, plus the unexpired portion of his enlistment?

Gen. CROWDER. Three years from the date of desertion.

Mr. KAHN. They will both be on a parity if you strike this out?

Gen. CROWDER. Yes, sir. One man commits an offense in the first year of his enlistment, another in the last year; the latter has had two or three years of instruction and discipline and knows what deser-

tion means. It seems to me that he should not be put in a more favorable position than the man who commits an offense without having had that length of period of instruction and discipline. We have a splendid detection system for deserters, and a majority of our deserters are picked up within a short time after deserting—generally less than a year. This system was elaborated by Gen. Ainsworth. If a man deserts to-day, approximately 4,000 circulars go to the police throughout the country and to the deserter's home. These circulars carry a photograph and a personal description and an offer of a reward. The circulars are usually posted in the post offices of the country, and the amount of the reward is $50. We spent last year approximately $52,000 for rewards for apprehension of deserters.

The purpose of article 41 is to extend to the military establishment by statute the constitutional guaranty against double jeopardy. There is no change.

Article 42, which is existing article 98, is retained without substantial change. It forbids punishment by flogging, or by branding, marking, or tattoing on the body.

Mr. SWEET. Should not that be, or other brutal bodily punishment?

Mr. KAHN. These were the only punishments inflicted prior to the passage of the law?

Gen. CROWDER. They were inflicted to some extent prior to the passage of the law, and hence the prohibition.

Mr. PEPPER. Does the mentioning of these offenses by implication make lawful other offenses, such as would be called barbarous; would there be any?

Gen. CROWDER. I do not think the enumeration is subject to that objection. We are guided by the doctrine of the Constitution that cruel and inhuman punishments shall not be inflicted. This is an enumeration of particular punishments which were to some extent resorted to and which it is desirable to prohibit in the future.

Article 43 is a substitute for existing article 97, which is defective in that it fails to make provision for a case where an accused is tried for military crime and civil crime in the same charge, both punishable with confinement, and the civil crime by penitentiary confinement. Let me illustrate. A man is tried and convicted of the military offense of desertion and the civil offense of assault with intent to kill. The civil offense is punishable by penitentiary confinement under existing article 97, but the military offense of desertion is not so punishable. Upon conviction the reviewing authority properly designates a penittentiary as the place of confinement. When the prisoner has served out a portion of his confinement he asks to be transferred to a military prison or guardhouse for the remainder of his sentence, in the view that not all the confinement adjudged by the court was for the civil offense. The War Department has adopted the construction that the ninety-seventh article of war authorizes penitentiary confinement, which, being authorized, may be properly continued until the entire sentence has been served. The correctness of this construction has not been before the civil courts. What is here desired is to have that construction confirmed by statute, so that the entire sentence of confinement in such cases may be excuted in the penitentiary.

Mr. SLAYDEN. That is, to keep him from going to a guardhouse for lighter punishment if the penalty was inflicted for both offenses?

Gen. CROWDER. Yes, sir. We have been doing this by construction right along—denying them the right to transfer—but I have been apprehensive that somebody would sue out a writ of habeas corpus and the civil court would say that it was not authorized under the strict letter of the statute which permits confinement in a penitentiary only for offenses so punishable by a civil law. I want a definite rule in the law. I do not want to be taking the risk any longer.

Mr. KAHN. As a matter of fact, under Gen. Crowder's statement he would not get any more than he is getting now; only under the existing law the general fears that some enterprising criminal will sue out a writ of habeas corpus and will have an interpretation of the present law to allow him to spend the latter part of the sentence in the guardhouse.

Mr. SLAYDEN. The effect of this would be to remove all doubt as to the meaning of the law and the prisoner will get all that he is entitled to.

Mr. KAHN. And it will take the law out of the sphere of controversy.

Gen. CROWDER. As I have already pointed out, I hope the committee will give us a law sanctioning the meaning we have had to read into the old articles by construction alone. That is the real argument for this project of revision. I want to get off the uncertain ground where we have been for 106 years.

Article 44 contains a change which illustrates again this point to which I have just referred. The old article says:

> No person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

For certain offenses the death sentence is made mandatory by these articles, and in the trial of such offenses it is obvious that the articles should require the finding of guilty to be by two-thirds vote. In the articles as they now stand a majority of the court may find a man guilty of an offense for which the death sentence is mandatory, and in such a case it is the manifest duty of the court to vote the sentence which the law requires it to adjudge. Unless a two-thirds vote to convict is required, the prisoner is, in such a case, without any real protection.

Mr. KAHN. Is it not your experience, in examination of the laws of the States for the infliction of the death penalty, that the jury must bring in a unanimous verdict.

Gen. CROWDER. Yes, sir; but that has never been a characteristic of our military law.

Mr. KAHN. Where a crime which will bring the death penalty with it is tried by court-martial, and there is one man on the court who has doubt as to the guilt of the accused who refuses to bring in a sentence of death, do you not think that the prisoner should be given the benefit of that doubt, and that only upon the unanimous finding of the court-martial death should be the sentence?

Mr. SLAYDEN. What would you do?

Mr. KAHN. They could send him to prison for life. I would not inflict the death penalty unless the court was unanimous.

Gen. CROWDER. The committee is here dealing primarily with the war jurisdiction of courts-martial. To require a unanimous vote for

the infliction of the death penalty in time of war would be going a long way, I think, toward impairing the success of the field operations of an army. If this were a proposition to regulate the trial of capital crimes in time of peace, the argument presented by Mr. Kahn would have greater force. As to a few military crimes, the death sentence is authorized in time of peace, but I have not been able to find any instance where a death sentence has been adjudged by a court-martial in time of peace. Over and above the court to act upon such a sentence is the convening authority, and over and above both the court and the convening authority stands the President of the United States, whose sanction is necessary in peace before a death sentence can be executed. I request that the committee consider very carefully the question of introducing into our military jurisprudence the principle of the civil law, which requires, in addition to these safeguards, a unanimous verdict.

Mr. SLAYDEN. What is the practice in other countries with respect to that?

Gen. CROWDER. The English articles, like our own, require a two-thirds vote for death sentence. Their articles, like ours, are defective in not requiring a two-thirds vote to support a finding in capital cases. Their system is identical with ours on that point. I am not informed as to what the continental countries of Europe require.

Mr. PEPPER. It will apply not only to a time of war but to a time of peace?

Gen. CROWDER. The extent to which it will apply in peace will come up in connection with article 92 of this revision. I can take up the discussion now if necessary.

Mr. EVANS. In time of peace can you try a soldier by court-martial and shoot him?

Gen. CROWDER. There are, as will appear later on as we proceed with an examination of the revision, a few military offenses punishable by death in time of peace, but the number of such offenses has been reduced in the revision.

Mr. SLAYDEN. Is not murder committed by a soldier on a military reservation tried by a civil court?

Gen. CROWDER. Yes, sir.

Mr. PEPPER. Do you mean that you can not try a case of murder occurring on a military reservation in time of peace?

Gen. CROWDER. Not by court-martial. That is reserved for trial by a civil court.

Mr. PEPPER. In the district in which the reservation is?

Gen. CROWDER. Yes, sir.

I am asking you further on in this revision to sanction trial by court-martial for murder in time of peace committed by a person subject to military law outside the geographical limits of the United States and the District of Columbia; that is, in our foreign possessions. It is one of the more important provisions of this revision.

Mr. PEPPER. Suppose we pass this temporarily?

Gen. CROWDER. Yes, sir.

Article 45 is a revision of article 100 of the old code, and certain language has been omitted. The old law required that when a soldier was convicted of cowardice or fraud the sentence of the court should include publication in the home papers of the accused and in papers in and about the camp. I have omitted this requirement. If it is

desired that the law should require publication, let it be executed administratively. There is no particular reason why the court should sentence a man to what the law commands shall be done. That results by the operation of the statute rather than by a sentence of a court-martial.

Mr. SLAYDEN. Do you not think that that is not rather extraordinary punishment, to humiliate a man's family?

Gen. CROWDER. This came down to us unamended from 1806. It has the feature you say, which works harshly upon the family, but I favor its retention in the code. It is an asset of some value in deterring from acts of fraud and particularly of cowardice.

Mr. KAHN. In those days they did not have the telegraph and daily papers and there was no means of disseminating information.

Mr. SLAYDEN. I do not care anything about punishing the individual, but this humiliates his family and punishes them also.

Mr. KAHN. To-day, if any officer were even charged with cowardice or fraud, the press of the country would immediately publish it broadcast and it would go to every paper in the land, even before he was convicted.

Mr. HUGHES. This makes it mandatory?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. Do you think it desirable to continue it?

Gen. CROWDER. I think it is an asset of considerable value. I like to feel that every man who is connected with the Army is warned by this law that if his conduct on the line of battle is not up to the standard it is going to be published to his own home people.

Mr. SWEET. The last clause "and after such publication it shall be scandalous for an officer to associate with him," is that necessary?

Mr. SLAYDEN. Is that new language?

Gen. CROWDER. That is the old language.

Mr. EVANS. Is that for the effect on the morale of the Army, the deterrent effect?

Gen. CROWDER. You make a very strong impression on the mind of any one entering the service by directing his attention to this provision, that if he misbehaves before the enemy, his home people, the people he has grown up with, will be made aware of it.

Mr. PEPPER. Is the code read over to the recruits?

Gen. CROWDER. Under the present statute. You will find that I have provided for the reading over only the punitive article of this code every six months, omitting the articles relating to the constitution, composition, and jurisdiction of courts-martial and articles administrative in character.

Mr. KAHN. Is a recruit given any opportunity to read over the articles in their entirety?

Gen. CROWDER. Yes, sir; he gets the soldiers' handbook.

Mr. KAHN. But special attention, in your judgment, should be called to the punitive features?

Gen. CROWDER. Yes, sir.

Article 46 is a repetition of the old law. Only such changes of verbiage have been made as were necessary in transferring legislation from an appropriation bill to the code.

Mr. SLAYDEN. What discretions does this give the President?

Gen. CROWDER. Under the authority of the statutes he fixes the maximum punishment and the court can not exceed that limit. That

has been very useful to us. The legislation was only given to us in 1890.

Mr. KAHN. In other words, as I understand, the President from time to time fixes the limit of punishment for various military offenses and then the courts-martial do not go beyond that and in their findings they fix the punishment within that limit?

Gen. CROWDER. Yes, sir.

Gentlemen, there is nothing in articles 47 and 48 which involves a substantial change of the old law. You will see that article 47 is substantially two articles of the old code and article 48 is six articles of the old code. It has been found possible, by changing the language, to confer powers in a much more explicit way than was done in the old law. Please note the language, "or by the commanding general of the territorial department or division." If the committee will follow me to article 105 of the old law it will find the language, "or the commander of the department, as the case may be," and in article 107 of the old law, in the concluding part of that article, they will find the words, "to which the division or brigade belongs," both articles referring to exceptional cases and where the President may act finally upon important cases. I have included both in the new law. However, there is no change. It is simply a rearrangement, such as I ought to call to the attention of the committee. I have included rape among the offenses where the confirmation of the President is not required in time of war.

Mr. SLAYDEN. He does not have to approve the finding of the court?

Gen. CROWDER. No, sir. In the Philippines there were offenses of this character committed, but still we did not execute the death penalty in many of those cases.

Mr. SLAYDEN. You mean rape?

Gen. CROWDER. Yes, sir; committed by our own soldiers. This is an offense in respect of which a commanding general in the field in time of war can act finally.

In article 49 I have incorporated new language. It is of considerable importance to the military service. I would like to explain the necessity for it by calling attention to a case which occurs frequently in the administration of justice. A soldier is tried for an offense, the court convicts him and the proceedings come to headquarters for approval. They are subjected to review by the commanding general. Let us take a case which not infrequently arises. The commanding general and his legal adviser think the proof not sufficient. Under the present practice the proceedings must be returned to the court, with request for reconsideration of its finding and sentence. The court not infrequently adheres. The commanding general can not approve a finding which he believes unjust, and therefore disapproves, and the soldier escapes punishment. That amounts to a miscarriage of justice in a case where all minds are convinced there is guilt, and the difference of opinion is only as to the degree of guilt. The commanding general will not approve the sentence for the graver offense, but would approve a proper sentence for the lesser included offense. I can not conceive of any objection to that power being granted the commanding general in the most explicit way,

and I hope very much that the committee may take that view of it, because it would save us a lot of time.

Subdivision *b* is new and grants to the reviewing authority the power to change the sequence in which a sentence as adjudged by the court may require the execution of the punishments of dishonorable discharge and confinement. Under the present practice a soldier sentenced to be dishonorably discharged and to confinement is sentenced to be dishonorably discharged first and serves his confinement in the status of a civilian. It is sometimes the case that the reviewing authority is convinced that the prisoner might mend his conduct under discipline. By giving him the power to defer dishonorable discharge he could in a meritorious case remit the discharge and restore the man to duty with the colors. There is nothing further in that article which is new.

Nor is there anything new in article 50, except in line 9, commencing with the last word "for" to the word "held" in the tenth line. I am introducing a new idea into the law, which I can explain briefly. You will observe that every officer under the old law authorized to order a general court-martial had the power to pardon or mitigate any punishment adjudged by it. We have had a very interesting case arise in the administration of the Army. Some years ago a department commander took the view that the grant of authority to him in article 112 was unqualified and that he could execute that authority at any time prior to the termination of the sentence; that therefore he could follow the man into another command or into the military prison or penitentiary and mitigate his sentence. The War Department would not, of course, permit that, and ordered him not to exercise that authority, but the incident was an embarrassing one, as the letter of law supported the department commander's contention. That is all the change there is in article 50.

Article 51 is simply a repetition of the old law; there is no substantial change and none is needed.

We come now to the punitive articles of the revision; in other words, the articles which enumerate and punish offenses.

Article 52 has some new language, taken from the existing Army regulations which have governed the Army from the date of enactment of the law, making fraudulent enlistment a military offense in 1892. You will observe that the language, which is in the right-hand column, did not define fraudulent enlistment, and we had considerable difficulty in defining the offense. It was finally defined by regulations as follows:

> Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment shall be punished as a court-martial may direct.

It has stood the test of 20 years. The offense is now defined by statute rather than regulation, which can be changed from day to day.

Mr. KAHN. How severe would this be on a young man who is anxious to go into the military service and is but 17½ years of age and who swears that he is 21 years of age and who makes a good soldier and gets along? He has willfully misrepresented his age.

Gen CROWDER. The President has fixed the maximum punishment and has said to courts that they shall not punish the offense which you have mentioned with a punishment greater than a dishonorable discharge and one year's imprisonment.

Mr. KAHN. A young man sometimes becomes dissatisfied with the conditions at home, frequently a stepmother or stepfather is responsible, and enlists. He is not of an age which entitles him to enlist. It seems to me that the officer who enlists him can generally tell whether or not he is of the desired age.

Gen. CROWDER. In most cases of this character he is not even tried, and when he is tried they give a short period in the guardhouse and start him off anew.

Mr. KAHN. I would not like to see him given a dishonorable discharge.

Gen. CROWDER. It is the present policy to save to the colors as many cases of this kind as possible.

Article 53, which is the next article, I have considerably changed and it ought to be underscored in red. The existing article 3 undertakes to specify the particular facts which make an enlistment invalid; that is, it covers the case of a minor over 16 years of age without the written consent of his parents or guardian, or any minor under the age of 16 years, or any insane or intoxicated person, or any deserter, and so on. The enumeration there is not complete. There are many other persons whose enlistment is forbidden by law. An article containing a partial enumeration is defective, but that is the only way to keep it from reaching unusal limits.

Mr. KAHN. Can you furnish the provisions of law which define this?

Gen. CROWDER. These are the ones noted on the margin in red. I have also several provisions listed here. The new article does not undertake any enumeration, but punishes all enlistments made in violation of either law or regulations.

You will notice that in article 54 there is nothing new. It incorporates the punitive part of the act of January 21, 1903, without change.

I have omitted from article 55 the phraseology:

And shall thereby be disqualified to hold any office or employment in the service of the United States.

Mr. SLAYDEN. Why?

Gen. CROWDER. I do not know that it devolves upon me to object to that phrase, but it seems to me that if you are going to sentence a man to political disability you should do it by a civil court.

Mr. SLAYDEN. How do you propose to prevent it?

Gen. CROWDER. There is a sentence "shall be dismissed from the service and suffer such other punishment as a court-martial may direct," which ought to be sufficient. The phrase, "and shall thereby be disabled to hold any office or employment in the service of the United States," I have stricken out, because I do not think it is proper for the military courts to sentence people to loss of political rights.

Mr. EVANS. It is not. It is simply creating a status, simply giving notice.

Gen. CROWDER. The law imposes that loss.

Mr. EVANS. I do not know that it is a good place to put it.

Gen. CROWDER. Then it ought to be found with other articles punishing frauds as well as in this article.

Mr. EVANS. I have no doubt.

Gen. CROWDER. Here you have the provision:

> Any officer who takes money or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster rolls shall be dismissed from the service.

Why should you single out that particular fraud against the Government and impose disqualification. If the provision is to be retained, why not have it general? I am willing to insert this language in connection with the article on page 18 on publication—I should not object to it:

> When an officer is dismissed from the service for cowardice or fraud he shall be thereafter disqualified from holding any office or employment in the service of the United States.

Mr. EVANS. I think that is a very wise provision of law. I think anybody in the Army ought to know what the consequences are for committing frauds on the Government, for the very reason that in the Army they have to be trusted, and it is not like civil life. They have got to be trusted, and as an Army they make a fine record. I believe that is a very valuable thing to put in there.

Mr. KAHN. I rather agree with Mr. Evans's statement.

General, what is the idea of the language here, "by way of gratification"?

Gen. CROWDER. That is rather archaic language. I have substituted "consideration" instead of "gratification."

Mr. KAHN. I see you have changed it.

Mr. SLAYDEN. Would it not be better to say, "for mustering in a regiment"?

Gen. CROWDER. I do not think the meaning is at all obscure, Mr. Slayden.

Mr. KAHN. "Who wrongfully takes money"?

Mr. SLAYDEN. That makes it much clearer.

Gen. CROWDER. All right; I have written "wrongfully" in. Perhaps you have already noticed that I have made an omission. The old article says "upon proof thereof, by two witnesses." That requirement is not written into our statutes any more. This is the only place it occurs in the military code. There is no more reason of having it here than in other articles punishing frauds. I have erased that.

There is no change in article 56.

We now come to article 57 for punishing desertion, to which I have already referred. The defects sought to be remedied are in old article 47 on the subject of desertion. The intention of the old article was undoubtedly to punish desertion committed in time of war differently from desertion in time of peace. You will notice that the word "shall" is misplaced in the second line so as to carry the construction that the article deals only with punishment in time of war. There is another defect which is corrected by the insertion of the words "or when under orders for active service when war is imminent." A war might be imminent and we might send orders to the Fifteenth Cavalry at Fort Myer to be ready to march, and a desertion

committed after receipt of such an order would be just as harmful as one occurring after the war had been declared. I have worked those two ideas into the new article.

Article 58 is the same as the old law, except that I have included the offense "knowingly assists another to desert," which was not covered in the old law, and have made the phraseology a little clearer as to the peace offense.

Article 59 is simply a repetition of so much of existing article 50 as was punitive in character. The administrative part of the latter article has been placed elsewhere.

Mr. SLAYDEN. There is no limit on the punishment of an officer?

Gen. CROWDER. We have the limitation that death sentences can not be imposed except when expressly authorized, and that penitentiary confinement can not be imposed except for crimes so punishable by the civil law of the place. Then it is competent for the President to establish limits of punishment, which may not be exceeded in time of peace, in respect of offenses which are punishable at the discretion of the court.

In article 60 I have combined six articles of the existing code into one short article. We had these six different articles punishing various forms of absence, all at the discretion of the court-martial. It led to confusion and frequent errors in pleading. There is little or no necessity for more than one article. All these six articles came down from the Code of 1806 without amendment.

Mr. SLAYDEN. When does desertion begin?

Gen. CROWDER. The moment the intent is formed not to return. We presume for administrative purposes that that intent is manifested by 10 consecutive days of absence, but the presumption is not conclusive.

Thereupon, the committee adjourned to meet to-morrow, Thursday, May 23, at 10 o'clock a. m.

THE COMMITTEE ON MILITARY AFFAIRS,
Thursday, May 23, 1912.

The committee this day met, Hon. James L. Slayden (acting chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY—Continued.

Mr. SLAYDEN. General, you may proceed.

Gen. CROWDER. At the conclusion of the hearing yesterday the committee had completed its consideration of article 60. Before resuming the discussion of the revision I want to invite attention to the fact that the committee has now before it the punitive chapter of the new code. It will be observed that nearly all the articles end with the words "shall suffer such punishment as a court-martial may direct." This is a quality of the military code which I have not noted in any civil code which I have examined. The quoted phrase standing alone would give unlimited authority to a court-martial to assess and grade punishments, but other articles limit its

meaning. For example, in article 43 of the revision, which is article 97 of the existing code, a penitentiary confinement can not be adjudged for any offense or act not so punishable by the civil law of the place, and under article 44 of the revision, article 96 of the existing code, the death sentence may be imposed only when especially authorized by the articles. There is also a further limitation upon the discretion of a court-martial under this power to adjudge punishment, to be found in article 46 of the revision, which is taken from the act of September 27, 1890, which provides in substance that where a punishment for an offense is left to the discretion of a court-martial it shall not in time of peace be in excess of the limit which the President may prescribe. Under the authority of this article the President has issued maximum punishment orders, which in effect say to courts-martial that they shall exercise their discretion as to punishment within the limits fixed in such orders. I will here hand to the members of the committee copies of the most recent maximum order, along with certain amendatory orders which have been issued, and which will show in what manner the President has exercised the authority given by the Congress to establish limits of punishment.

Article 61 punishes acts of disrespect toward civil authorities, and is intended to be expressive of the principle of the subordination of the military authority to the civil. The article reads:

> 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 chief magistrate 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 soldier who so offends shall be punished as a court-martial may direct.

There have been few trials under this article, most of them during the Civil War period, for denunciatory language toward the President or his administration. Recently we had the trial under this article of a soldier for using disrespectful language toward the President of the United States. So it has not entirely fallen into disuse.

Mr. SLAYDEN. Assuming that we were considering this language on the floor of the House, and a Member reads this Article 61, "shall suffer such other punishment as a court-martial may direct," and he asks us what punishment may be inflicted by a court-martial?

Gen. CROWDER. The discretion lodged in the court-martial by this article is limited only by the provisions I have above cited, namely, that the death sentence can not be imposed except where expressly authorized, and that a penitentiary sentence may not be adjudged in any case unless authorized by the civil law of the place.

Mr. SLAYDEN. By statute?

Gen. CROWDER. By statute. Those are the general limitations. The further limitation is in the law which I have already referred to, under the authority of which the President establishes maximum punishments for peace offenses punishable under the article at the discretion of a court-martial. The President has not thus far exercised this discretion in fixing the maximum punishments in cases of officers. The present maximum punishment order relates wholly to enlisted men.

Mr. EDMONDS. You can not clearly and positively answer that question?

Gen. CROWDER. You may say any punishment except death, or punishment by confinement other than in a penitentiary, and that it is within the power of the President at any time, under the authority which he now has, to prescribe a limit of confinement under this article which the court shall not exceed.

Mr. SLAYDEN. Suppose an officer does speak without respect of the Vice President or Congress, or the Secretary of War, or any of the other people which the paragraph undertakes to protect—he is tried by court-martial and convicted. What punishment can they inflict?

Gen. CROWDER. Dismissal, dishonorable discharge, confinement.

Mr. SLAYDEN. How long?

Gen. CROWDER. At present there is nothing to limit the confinement, because the President has not acted in fixing a maximum punishment under this article. For fear a wrong impression may be conveyed by that answer, I want to say that between April 10, 1806, and September 27, 1890, there was no limitation upon the discretion of a court-martial except in respect of death sentences and sentences of penitentiary confinement. Then came the act of September 27, 1890.

Mr. SLAYDEN. There was a law of September 27, 1890.

Gen. CROWDER. It reads as follows:

> That whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.

In pursuance of this authority herein conferred the President has issued a maximum punishment order, which I have already placed before you. The order is not as broad as the authority, but he can immediately issue an amendment to the order to include any offense which may now be omitted.

Mr. HUGHES. In time of peace the death penalty is fixed by the civil authorities.

Gen. CROWDER. Yes; by statute law, as I have explained. Another article of this code—article 44—provides that the death penalty shall not be assessed except where it is expressly authorized. Still another article—article 43—prohibits sentences of penitentiary confinement except for offenses so punishable by the civil law of the place. The matter is further regulated by this maximum punishment order issued by the President under the authority of the statute of 1890.

Mr. SLAYDEN. We seem to be conferring on one man the privilege of assessing a penalty of an extraordinary nature, and it seems to me that there should be, so to speak, an east and west boundary of punishment.

Gen. CROWDER. Is it the principle that you speak of, or is it this particular article?

Mr. EVANS. It is this particular article; that it does not distinguish between time of war and time of peace. In time of war I can see that it is absolutely essential that our troops should not go into a town meeting or a primary and express their opinion disrespectfully of their superiors. To allow any such conduct would be to destroy the morale of the Army, but in time of peace, it seems to me, that is rather drastic, more drastic than the American people would approve of.

Mr. SLAYDEN. For certain offenses a court-martial may fix the penalty, but not including capital punishment. Is that right?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. All offenses that may be punished by death, for example, have the penalty fixed by statute?

Gen. CROWDER. That is right?

Mr. SLAYDEN. Both in times of peace and war?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. In time of war it would be the ascertainment of the guilt and the ability to fix capital punishment?

Gen. CROWDER. The law fixes the extreme limit.

Mr. SLAYDEN. There is another class of offenses in which capital punishment is not considered, speaking contemptuously of officers, and things of that kind, for which they may be dismissed from the Army?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. And they may be imprisoned?

Gen. CROWDER. Yes, sir.

Mr. SLAYDEN. Indefinitely?

Gen. CROWDER. Yes, sir, indefinitely; but it is competent for the President at any time to exercise the authority he has under the law and prescribe limits under this article.

Mr. SLAYDEN. That might be life imprisonment; and that approaches capital punishment, it seems to me.

Gen. CROWDER. While I have answered your questions accurately, I think that the answers made leave the committee under an erroneous impression. It is true that under the code of 1806 there was nothing to restrain the discretion of courts-martial in assessing punishments, except the provision of one of the articles that the death penalty could not be adjudged except where it was expressly authorized. That was the law down to 1862, when the existing article (art. 97) was enacted prescribing that penitentiary confinement should not be adjudged by a court-martial except when it was imposed for any offense made punishable by such confinement under the laws of the place. There was a good deal of discussion in the service and out of it as to the inequality of punishment which resulted. A court sitting at one post would give a severe punishment for a given offense, and a court sitting at a near-by post, in trying a similar offense, would give a comparatively mild punishment. This was the complaint brought against the articles by the service itself. The agitation culminated in the legislation of 1890, to which I have already referred, and which authorized the President to establish a limit of punishment for offenses the punishment of which was left by the Articles of War to the discretion of the court-martial.

Mr. SLAYDEN. And hence these orders?

Gen. CROWDER. Yes, sir.

Under the authority of the legislation of 1890 the President issued these maximum-punishment orders. You happen to be considering an article which is not included in these maximum-punishment orders, but it should be remembered that it is competent for the President to fix at any time the limit of imprisonment that may be adjudged by a court-martial under the authority of this article. The fact that he has not done so is probably due to the circumstance that a case rarely arises under the article.

I may say further that since the enactment of 1890 and the issue of maximum-punishment orders there has been little or no com-

plaint of abuse of discretion upon the parts of courts-martial in assessing and grading punishments.

Mr. DENT. Can the President change the order so as to apply to offenses after committed?

Gen. CROWDER. No, sir. He would be restrained by constitutional principles from doing that. This principle of punishing at discretion is old in military codes, and it is preserved in the British code to-day. It is what is distinctive of the military code of to-day. I think that the service would feel very much handicapped if that discretion were limited in the way it is in the civil codes.

Mr. EVANS. We might add the words "but not to exceed dismissal from the service."

Gen. CROWDER. In case of an officer?

Mr. EVANS. Yes, sir. After the word "direct" change the period to a comma and add "but not to exceed dismissal from the service."

Gen. CROWDER. I do not believe any other punishment than dismissal would be given under the authority we have now. A sentence of dismissal is an appropriate one for the offense.

Mr. EVANS. It seems to me that is reasonable. You say it never would, in fact, let us have it in law.

Mr. SLAYDEN. What punishment would exceed dismissal from the service?

Mr. EVANS. Putting a man in jail for life.

Gen. CROWDER. It is possible for the court to give a sentence less than dismissal.

Mr. EVANS. Or you might make it read, "such other punishment short of dismissal as the court-martial may direct."

Gen. CROWDER. It is to be presumed, I think, that when Congress legislated in 1890 respecting maximum punishment it took cognizance of the fact that the discretion of courts-martial in assessing and grading punishment was limited only in respect of death sentences and sentences to confinement in a penitentiary, and considered that the authority they gave to the President to establish limits of punishment for peace offenses would be effective to guard against excessive punishments. We may also assume, I think, that the Congress was at that time convinced that this power to assess punishment should not be restricted in time of war, for the legislation they then enacted was to be operative only in time of peace to limit punishment.

Mr. EVANS. That is giving the President power of legislation, and it does apply in time of peace; there is no question about that?

Gen. CROWDER. Yes, sir. No authority is given to fix limits in time of war.

Mr. EVANS. I do not think we should. That is just why I think this section is needed. I think it is not properly drawn. It seems to me it should refer entirely to time of peace.

Gen. CROWDER. Would you not punish the offense in time of war?

Mr. EVANS. You have the right in time of war.

Gen. CROWDER. I do not think there is anything more vital in this legislation than the preservation of the principle of punishment at the discretion of a court-martial, restricted only, as I have stated, as to the imposition of death sentences, penitentiary confinement, and in time of peace, as the President may prescribe in orders issued under the authority of the legislation of 1890. It would be a radical departure if that principle should be impaired in this revision. As

I have pointed out, it is a principle that characterizes the military code as distinguished from the civil code, and characterizes the code of England as well as of this country. It is a fact that the British code does not undertake to limit the discretion of courts-martial in the assessing of punishment except in a very limited way. I do not think the discretion of the court-martial should be further restricted.

Mr. SLAYDEN. You do not think it would be wise to define the offense and fix the maximum and minimum in the statutes?

Gen. CROWDER. No, sir.

This is rather interesting in this connection. I am reading from Winthrop.

Mr. SLAYDEN. He is the military writer?

Gen. CROWDER. Yes, sir.

This article first appears in the code of 1776, where it was provided that an officer or soldier who should "presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled—

The then Government—

or the legislature of any of the United States in which he may be quartered" should be punished in the same manner as prescribed in the present form, except that cashiering was made the mandatory in the case of an officer. * * *

The acts in violation of this article which have formed the subject of military trials in the United States have been almost exclusively of a political character. The great majority of the cases were those of denunciatory language used in regard to the President of his administration during the late War of the Rebellion.

He cites 10 cases that were tried during the War of the Rebellion and then adds:

No instance has been found of a trial upon a charge of disrespectful words used against Congress alone or the Vice President alone, although in some examples the language complained of has included Congress with the President. Only one case in known of an arraignment upon a charge of speaking disrespectfully of a governor of a State—and in that the accused was acquitted—and none of an alleged violation of the article in assailing a State legislature.

That is the history of the article, and the application it has had in the service. I do not suppose there have been 15 trials under it in the life of the Republic.

The next article, 62, is a related article. It treats of disrespect toward superior officers, and the only change is from the word "commanding" in the old article in the left-hand column to the word "superior" in the new article. I have substituted for the words in the existing article "any officer or soldier" the words "any person subject to military law," thus broadening the application of the article. We have not in practice construed the words "commanding officer" appearing in the existing article very strictly. It has been held that any superior who, in the exercise of his command, is authorized to require obedience to his orders is covered by the term.

Mr. AMES. It does not mean an officer superior to a man who is not in his command?

Gen. CROWDER. No, sir. But it is believed that it should, and the new article so provides. Both the new article and the existing article deal with disrespect, and a superior, whether or not in the line of command, is entitled to receive the respect of inferiors. The insertion of the word "superior" considerably broadens the application of the provision, for, although the term "commanding officer" is a com-

prehensive one and has been liberally construed in some respects so as to place an inferior in relation to more than one officer who would occupy toward him the relation of commanding officer, there have still remained many cases where it has been necessary to charge disrespect to an officer of higher grade under the sixty-second article of war (the general article as to conduct to the prejudice of good order and military discipline), thus introducing complications as to pleading and leading to numerous errors in pleading. There can be no question, I think, but that the change from "commanding officer" to "superior officer" is called for.

This article, like the others, contains the language "shall be punished as a court-martial may direct," which is a recurring phrase that runs through most of our punitive articles. In a few of our articles specific penalties are provided.

Article 63 is one closely related to the sixty-second article of war, just discussed. I have inserted the word "willfully" to conform to the accepted construction of the present article 21, which the new article 63 substitutes. That the disobedience covered by the article must be of a positive and deliberate character has been uniformly held, but the letter of the present article will permit any kind of disobedience to be charged under it. There have been frequent errors in actual practice in charging mere neglect in not complying with an order, through heedlessness, remissness, or forgetfulness, and the effect of charging this character of disobedience under the present article 21 has been to invite courts to impose the severe penalty carried by the article.

Article 64 is new, and is introduced into the code in order to emphasize in a separate provision the necessity of obedience to, and proper deportment toward, a noncommissioned officer in the execution of his office. It is believed that the existence of an express statutory provision of this character will do much toward elevating the character of the noncommissioned officer in our service and increasing the authority and dignity of his office. This is carrying out the policy which has been favored by the military authorities for some time, namely, to instill into the soldier in the ranks a high respect for his noncommissioned officer.

Mr. AMES. The difference in this article between noncommissioned officer and commissioned officer is that it only becomes disrespect when he is in the execution of his office?

Gen. CROWDER. This article respecting noncommissioned officer is more directly related to article 63 which deals with disobedience of the lawful orders of a superior officer, and in both articles it is required that an officer should be "in the execution of his office." But article 62, which treats solely of disrespect toward a superior officer, punishes that disrespect whether or not the officer is in the execution of his office.

We come now to the offenses of mutiny and sedition, punished by article 65, which is practically the existing article. The provision on this subject has been extended in the new article by adopting the phraseology "any person subject to military law" in substitution of the phraseology of the existing article "any officer or soldier."

Mr. SLAYDEN. That means civilian employees?

Gen. CROWDER. Yes, sir; and all camp followers and persons serving with or accompanying the Army in the field; also veteri-

narians, pay clerks, and others made subject to the Articles of War by express provision of the statute. Mutiny is quite as likely to occur among these classes of camp followers, retainers, and persons connected with an army, but not belonging to it, as among officers and soldiers, perhaps more likely. There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.

Mr. SLAYDEN. I think I remember that the Supreme Court held, under certain circumstances, that volunteer officers who were subject to court-martial and had punishments assessed against them had to be tried by other volunteer officers.

Gen. CROWDER. That is an express provision of the statute. It is article 77 of the existing code, which makes incompetent officers of the Regular Army to sit on courts-martial for the trial of officers and soldiers of other forces.

I have not doubt but that the article respecting mutiny and sedition should, for the safety of the camp and of our field operations, where mutiny is most likely to occur, include all persons subject to military law and, among them, civilian employees serving with the Army in the field.

Mr. SLAYDEN. The question in my mind was whether we had the power. Mutiny and sedition are very serious.

Gen. CROWDER. They are among the gravest offenses denounced and punished by the military code; that is, are capital offenses, although the death sentence is not mandatory; but it is to be remembered in that connection that no sentence of death can be carried into execution in time of peace except upon the approval of the President, nor in time of war until it has been confirmed by an authority superior to the convening authority.

Mr. MCKELLAR. I don't suppose the President one time in ten thousand overrules the court-martial. It is always done in a time of great public excitement or something of that kind.

Mr. SLAYDEN. President Lincoln usually reversed the court-martial in the case of the death penalty?

Gen. CROWDER. Yes; that is true. The only new language in article 66 is the phrase "or having reason to believe," the insertion of which would seem to require no explanation.

Mr. MCKELLAR. That is really more important than the other.

Gen. CROWDER. Yes, sir; and is an omission in the existing articles which should be remedied. The failure to include in the existing articles such language as is here supplied has made it necessary in pleading to resort to the general article (sixty-second) under which we punish all crimes not capital and all disorders and neglects which are not specifically mentioned in other articles.

Articles 67 relates to quarrels, frays, and disorders. There is no substantial change from the existing article 24, which is the common-law doctrine in regard to affrays. I have substituted for the words "all officers of what condition soever" the words "all officers and noncommissioned officers," which is the accepted interpretation of the language first quoted; and is, indeed, an interpretation made

necessary by the old article in view of the reference to noncommissioned officers found in that article in the next to the last line. Of course the article has been expanded to include persons subject to military law in order to cover quarrels, affrays, and disorders of persons who do not answer to the description of the existing article; that is, who do not belong to a "corps, regiment, troop, battery, or company."

Mr. SLAYDEN. Suppose a noncommisssioned officer finds a commissioned officer in a quarrel or affray. Can he order him under arrest?

Gen. CROWDER. Yes, sir; that is the express provision of the existing article, and that has been its construction at all times.

The committee thereupon adjourned to meet on Saturday, May 25, 1912, at 10 o'clock a. m.

COMMITTEE ON MILITARY AFFAIRS,
Saturday, May 25, 1912.

The committee met at 10 o'clock a. m., Hon. Dudley M. Hughes presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL UNITED STATES ARMY—Continued.

Mr. HUGHES. You may proceed, Gen. Crowder.

Gen. CROWDER. At the close of Thursday's session the committee had completed conclusion of article 67. I will now take up article 68, which relates to arrest and confinement of accused persons, and first consider in some detail articles 65 and 66 of the existing code, which the new article substitutes.

Mr. TILSON. Have you combined 65 and 66 in article 68?

Gen CROWDER. Yes, sir; that is the significance of their being printed opposite new article 68.

Article 68 is a restatement of the existing law, with additions necessitated by the fact that the existing law was lacking in comprehensiveness and defective in the regards which I will now indicate.

First. It made confinements to barracks, quarters, or tent a necessary incident of the arrest of an officer for crime. Instances are not infrequent where, because of the gravity of the offiense charged, it is necessary, in order to guard against escape, to confine an officer elsewhere than in his barracks, quarters, or tent—sometimes in a guardhouse—and this has been done notwithstanding the restriction of the article.

Second. Under the wording of the article there is doubt whether purely military offenses are included within its provisions.

Third. There is further to be observed that it has come to be the practice of the service to exercise discretion as to the necessity for arrest when an officer is to be brought to trial, and in many cases he is not ordered into arrest. Whether the arrest shall be close or open, with extended limits, depends upon circumstances, and the practice of the Army follows the analogy of the civil practice of enlargement on bail.

Illustrating the necessity for discretion in this latter regard and for a departure from the terms of the existing law, we have the recent case of an officer tried in Alaska for the embezzlement of over $17,000 of funds appropriated by Congress for the improvement of roads. Subsequent to the trial of this officer, but before the results were promulgated, he was confined, under guard, in a place other than his barracks.

Mr. HUGHES. I am surprised that they made the article that way.

Gen. CROWDER. But that is the existing law; and I may further say that the mandatory requirement of the existing article that the party arrested shall be deprived of his sword is one more honored in the breach than in the observance. Discretion has always been exercised in this regard.

The practice is not to subject an officer to arrest or confinement where it is not obviously the proper thing to do. You will note in the new article there is added after the words "charged with crime" the words "or with a serious offense," and that further on in the article the necessity is recognized in certain cases for confinement other than by arrest. There is to be noted, further, that the existing article makes the sentence of dismissal mandatory in the case of an officer who leaves his confinement before he is set at liberty by his commanding officer. Not all breaches of arrest merit mandatory dismissal, and the court, in whom it is the policy of our articles to vest discretion as to assessment of punishment, should be empowered to discriminate in this regard. The sentence of dismissal is preserved in the new article, but is there relieved of its mandatory character by adding the words "or suffer such other punishment as a court-martial may direct."

New article 69 relates to investigation of and action upon charges, and substitutes articles 70, 71, and 93 of the existing code. It is the purpose of the latter articles to extend by statute to accused military persons the guaranty of a speedy trial, which the Constitution extends in criminal prosecutions by the civil courts of the United States. The defects of these three articles are: First, that they are all lacking in penal sanction; second, that the prescribed time limits are often impossible to observe, and if observed, would in certain grave cases lead to escapes; and third, they were enacted when foreign service was not particularly in view, and did not take into consideration delays which under present conditions are inseparable from the administration of military justice. In the new article I have dispensed with the provision of the existing articles relating to time limits. When I had the privilege of going over these articles with the chairman of the committee, Mr. Hay, he expressed the opinion that the time limit in respect of the service of charges ought to be preserved, and said if the accused were served with charges he was willing to trust an expeditious trial thereon to the military authorities, but was of the opinion that the mandatory requirement that service of charges should be made within a particular time ought to be preserved. Since that conversation I have given some thought to an amendment of this article to cover the points raised by the chairman, and have decided to offer for the consideration of the committee a second paragraph of new article 69 to read as follows:

In every case where a person remains in military custody for more than 10 days without being served with a copy of the charges upon which he is to be tried, or for more than 30 days without being brought before a court-martial

for trial, a special report of the necessity for further delay shall be made by the officer responsible for preferring charges, or by the officer responsible for bringing the accused to trial; and a similar report shall be forwarded every 10 days thereafter until charges are served, or until such person is brought to trial or relieved from custody.

Mr. HUGHES. That makes really a speedy trial.

Gen. CROWDER. Yes, sir.

The next article—article 70—carries no change in the existing law, which is article 67 of the present code, except to give that article what it lacks in the existing code, viz, a penal sanction, which is provided for in the concluding words of the new article, "Any officer or soldier so refusing shall be punished as a court-martial may direct."

Article 71 is the existing article 68, without substantial change.

Mr. TILSON. Why do you substitute "every commander of a guard" for "every officer"?

Gen. CROWDER. Because under some circumstances the commander of the guard will be a noncommissioned officer. It is very often the case that the sergeant of the guard will be in command.

Mr. HUGHES. That covers any emergency that may arise?

Gen. CROWDER. Yes, sir.

Mr. TILSON. Is there any time when an officer may be in charge of a prisoner without being a guard? Would you call an officer a guard if he is in charge of the prisoner—you say "commander of a guard."

Gen. CROWDER. I have in mind the normal condition, viz, that the prisoner is held in custody of the guard and an officer is in command of it.

Mr. TILSON. Suppose that the prisoner was being sent from one place to another?

Gen. CROWDER. Under such conditions of the service this article would have no application. An officer who is conveying a prisoner across the country would have an order of superior authority for such a journey, and would have no duty to perform such as is outlined here—to report in writing within 24 hours the name of the prisoner, with the charges against him. He would ordinarily have no immediate superior to whom he could report.

New article 72 is existing article 69, and no substantial change has been made. The latter article provides that an officer who suffers a prisoner to escape shall be punished as a court-martial may direct. I think it would better express the meaning if the words "who, through neglect or design," are inserted. The prisoner might escape without any dereliction on the part of the officer.

We now come to new article 73, which is rather an important one. It is a substitute for existing article 59 and deals with a situation where we come into closest relation with the civil authorities. A soldier commits an offense punishable under military law and also under the civil law; that is, the jurisdiction in respect of the offense is concurrent. Existing article 59 provides that upon a proper demand he shall be turned over to the civil authorities for trial.

Mr. HUGHES. The civil authorities in control?

Gen. CROWDER. Yes, sir.

This recognizes the superior right of the civil authorities. I have tried to preserve that feature and at the same time remedy certain

defects in the existing article, which I will now proceed to enumerate.

First. It specifies offenses against persons and property only, leaving unprovided for offenses against society or the Government.

Second. It specifies offenses against citizens only, ignoring the fact that all persons within the United States, whether citizens or not, are entitled to the equal protection of the laws.

Third. It refers to citizens of any of the United States, leaving it quite uncertain as to whether citizens of Territories are included.

Fourth. It requires that the application for the surrender shall be made "by or on behalf of the party injured." Crimes are no longer punished in this way, but on behalf of the public, and the demand should, of course, come from the civil authorities.

Fifth. The article covers only "officers and soldiers," and fails to include veterinarians, pay clerks, and others made subject to military law.

All these defects have been remedied in the new article.

We now come to the consideration of the new language introduced into the article, to wit:

> Except one who is held by the military authorities to answer for a crime or offense punishable under these articles.

Under the accepted construction of the existing article, it has been held that where the jurisdiction of the military authorities has attached in respect of a crime committed by a soldier as to which the civil courts have concurrent jurisdiction the surrender need not take place under the requirements of the article until the military jurisdiction has been exhausted. This is a matter of construction under the existing article, and I have deemed it best to make it a matter of express provision, and let the military trial proceed uninterrupted by the demand.

Mr. TILSON. If in the progress of that trial the prisoner would commit some additional crime, you mean that the trial would go on for the same crime and he would not be turned over to the civil authorities for the new crime?

Gen. CROWDER. That is an exceptional case that you have stated. It would depend largely upon the gravity of the new crime. The comity that prevails between the two jurisdictions has resolved all such matters heretofore without complaint upon the part of either, so far as my reading informs me. It would be hard to write into the law provisions which would govern in every exceptional case. I think we can rely upon the fact that in the history of this article 59 no complaint on the part of the civil authorities that there was any lack of cooperation on the part of the military authorities in recognizing their jurisdiction in important cases has occurred.

Mr. TILSON. But why do you say, "except one who is held by the military authorities to answer for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia"? Why may he not be held by the military authorities to answer for a crime which he has committed within the geographical limits of the United States or the Territories?

Gen. CROWDER. The new language written into the article provides for this case, and, as I have said, it simply expresses the accepted construction of the article. Take the case of a soldier on trial for

mutiny before a court-martial. During the progress of the trial he commits another offense, defined and punished by the civil law, of which the court-martial could not take jurisdiction. The trial for mutiny, which is one of our gravest military offenses, ought not to stop and the prisoner be surrendered to the civil jurisdiction. Both offenses to be tried in the case taken for example are serious offenses. If there was a marked difference between the two offenses and the one of greatest gravity was against the civil law, it is probable that under the rule of comity, heretofore referred to, the soldier would be turned over to the civil authorities.

Mr. TILSON. Let us get at this a little in detail. "When any person subject to military law," etc., "is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who, upon such application, refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities," etc. If that exception was left out that would turn him over to the civil authorities for any offense committed within that jurisdiction?

Gen. CROWDER. Yes, sir; except where the military jurisdiction had attached. There are two exceptions written in the new article. To strike out the latter would leave the law in an imperfect condition. It has never been a provision of the code to require soldiers to be turned over to the civil authorities in time of war.

Mr. TILSON. How much do you change the law? Don't you nullify it almost completely by the exception? It looks to me that you are excepting the very person that the article was made to cover.

Gen. CROWDER. I think I can clear up that point by reading from Winthrop on Military Law, volume 2, page 1081, a passage which will explain the significance of the new language which I have introduced and make it apparent that it is expressive of the accepted construction of the existing law:

> Where a civil and a military court have concurrent jurisdiction of an offense committed by a military person, the court which is the first to take cognizance of the same is entitled to proceed.

This portion of the text is based upon Sixth Opinions of the Attorneys General, page 414.

Mr. Winthrop continues:

> And although the precedence of the civil jurisdiction is favored in the law, yet if this jurisdiction does not assert itself until the other has been duly assumed in the case, its exercise may properly be postponed until the other has been exhausted. Upon the commission of such an offense, of a serious character, the military authorities will in general properly wait a reasonable time for the civil authorities to take action; but if, before the latter have initiated proceedings under the article, the party is duly brought to trial by court-martial for the military offense involved in his act, the commander may, and ordinarily will, properly decline to accede to an application for his surrender to the civil jurisdiction until at least the military trial has been completed and the judgment of the court has been finally acted upon—

citing in this connection Steiner's case (6 Opins., 423) and Howe's case (idem., 513–514).

Mr. TILSON. Now, suppose a soldier in a drunken fury strikes another soldier or an officer. That is, under the civil law, a serious breach of the peace. It may become a crime. He may have assaulted him sufficiently to have maimed him, so as to make it a serious crime. It is also a crime under those articles—striking his superior officer, we will say. Now, as I understand it, under this article, after he has been placed under arrest, which he naturally would be—then under this exception there would be no necessity for turning him over to the civil authorities at all.

Gen. CROWDER. He would not be turned over to the civil authorities until after his trial by the military authorities is completed. Then he would be. That is the effect of the language which I have introduced into the law. That is the construction which has been read into the act and which is to be made a matter of express provision. If you leave it out we would still be governed by this construction, and the execution of the law would remain unchanged.

Mr. TILSON. Suppose the article were left out entirely, what serious detriment would it be?

Gen. CROWDER. I think there would be very much opposition on the part of Congress to leaving the article out altogether. It would, of course, strengthen the hands of the Army—put it under no obligation to recognize civil jurisdiction in such cases.

Mr. TILSON. You have made no obligation now. In case the military authorities have arrested a man and are holding him for trial, you have imposed no obligation upon the military authorities to turn him over to the civil authorities.

Gen. CROWDER. The obligation is simply after the completion of the military jurisdiction—after the military jurisdiction has been exhausted. That is the provision of that article.

Mr. TILSON. Where does it say that it shall be done after the military trial has been finished?

Gen. CROWDER. When the accused person ceases to be held by the military authorities he comes under the provision of the article. When he is no longer held, then the requirement of the new article becomes explicit that he shall be turned over. If I thought it did not mean that, I should ask to have the requirement put in such language that it could not be mistaken. We could get along in the future, as in the past, without the new language, and if there is objection to it it can be left out.

Mr. TILSON. I would not want to take it out of the law. I think the military ought to be given sufficient power to maintain itself in proper circumstances, and I should not wish to see it taken out of the law. But my question was whether it will do it clear enough, as you have expressed it here, to make it reliable. If, as you say, it is in accordance with the construction of the law, it would probably cause no confusion at all.

Gen. CROWDER. No confusion at all, I think.

Now, we come back to the subheading "War offenses," page 30. There is very little change in any of these articles defining war crimes and punishments. The only difference between the projected and the existing code is that related articles have been brought together under a subheading entitled "War offenses."

Article 74 is a consolidation of articles 41 and 42. I believe there is nothing in particular to call attention to in that article.

Mr. HUGHES. "Any officer or soldier who misbehaves himself before the enemy," etc., shall suffer death. Does it mean that? [Reading from new article.]

Gen. CROWDER. Suffer death or such other punishment as a court-martial may direct. The death penalty is not mandatory.

Article 75 has some new language. The existing article says, "any garrison, fortress, or post," and I have added "camp, guard, or other command," giving the article broader application. In other respects the article remains unchanged.

Article 76, "Improper use of countersign"——

Mr. TILSON. You simply made that apply to any person subject to military law, instead of any person belonging to the Army?

Gen. CROWDER. Yes. This includes anybody connected with the Army who might be given the countersign. We use the countersign in time of war and in time of peace, but the old article does not distinguish between war and peace. It seems absurd to impose the death penalty for making known a countersign in time of peace. You will notice a change has been made there to distinguish between war and peace.

Mr. TILSON. Suppose it was in time of war and this occurred while you were going through a course of training of troops?

Gen. CROWDER. We would expect the court to exercise a wise discretion, and if it made an error, that the reviewing authority would correct it. It is pretty hard to distinguish in the law between the line of communications or the base of supplies and the fighting front of the Army.

Mr. TILSON. You think that is sufficiently taken care of by leaving it open to "such other punishment as a courts-martial may direct"?

Gen. CROWDER. Yes; I think so.

Mr. TILSON. Is that a misspelled word? Do you means "courts-martial"?

Gen. CROWDER. It should be "court-martial." There is a mistake in spelling there.

Article 77, "Forcing a safeguard." The only change in that is to substitute for "Whosoever belonging to the armies of the United States" the words "Any person subject to military law."

Mr. HUGHES. That is better language.

Gen. CROWDER. Yes. The words "in foreign parts" are omitted.

Article 78 deals with captured property. Under the existing article 9 there is no penal section except the general provision "for neglect thereof the commanding officer shall be answerable." The penal sanction has been supplied in the new article by the insertion of the words "any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct," which substitutes the last clause of existing article 9.

Article 79, "Dealing in captured property." This is an attempt to make the Articles of War out of section 5313 of the Revised Statutes. There is no change except "All persons in the military or naval service of the United States" is changed to "Any person subject to military law." The statute is not repealed and is left in force to cover the Navy.

Mr. TILSON. The statute as it applies to the Army is made an article of war?

Gen. CROWDER. Yes. The same may be said of article 80, "Introducing goods into enemy territory." That is section 5306, Revised Statutes, which was in the nature of an article of war and is here transferred to the new articles. It was enacted during the Civil War and worked satisfactorily during that period, and it also worked satisfactorily during the period of the Spanish-American War.

Mr. TILSON. You think it would be better to make the statute an article of war?

Gen. CROWDER. Yes; because the service does not have access to the Revised Statutes, as a rule.

Mr. TILSON. You realize that you are making the Articles of War much longer?

Gen. CROWDER. On the contrary, I have incorporated 9 provisions of the Revised Statutes, 21 provisions of the Statutes at Large, and have reduced the articles from 129 to 119 and made them shorter.

Mr. TILSON. You mean that the total length of the Articles of War as you have them here will be shorter than they are at present?

Gen. CROWDER. I think so.

Article 81, "Relieving, corresponding with, or aiding the enemy." That is a combination of existing articles 45 and 46 without substantial change, except that it recognizes the authority of the military commission along with the court-martial to try these offenses. If you retain the phraseology "whosoever relieves the enemy," it suggests the civilian as well as the person in military service, and for that reason we bring into this article a recognition of this war court. You will find that also in the next article, 82, relating to spies. That article 82 is section 1343 of the Revised Statutes incorporated without any change whatever. That statute was passed during the Civil War and expressly recognizes military commissions in the last line, which is my justification for recognizing them here and in the preceding article. It is an offense which can be committed by a civilian as well as a person subject to military law, and that makes it necessary to recognize the military commission.

Mr. TILSON. You think that it is absolutely necessary to maintain that punishment, the death penalty?

Gen. CROWDER. Yes. When you come to interfere with the death sentence in time of war you impair efficiency of your field armies. I will have more to say on that when we get through with the punitive articles.

Mr. HUGHES. We will adjourn now until 10 o'clock Monday morning.

THE COMMITTEE ON MILITARY AFFAIRS,
Monday, May 27, 1912.

The committee this day met, Hon. James L. Slayden (acting chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY—Continued.

Mr. SLAYDEN. General, you may proceed.

Gen. CROWDER. Under the subhead "Miscellaneous crimes and offenses," we have a series of articles which could not be conveniently classified under other headings. The first one, article 83, substitutes

article 15 of the existing code. Article 15 provides that "Any officer who, willfully or through neglect, suffers to be lost, spoiled, or damaged any military stores belonging to the United States shall make good the loss or damage and be dismissed from the service." The sentence is mandatory, irrespective of the value of the property. The willful loss of property of the value of 25 cents would come within the terms of the article. I have taken away the mandatory character of the sentence, preserving the obligation to make good the loss or damage.

Mr. SLAYDEN. That is a reasonable modification?

Gen. CROWDER. Yes, sir.

Waste or unlawful disposition of military property issued to solders is covered by new article 84, which is a combination of articles 16 and 17 of the existing code. I have made no change in it, but I desire to ask the committee to make a change. The words "to him," in the sixth line, ought to be omitted to cover this situation.

Mr. SLAYDEN. "Issued to him for use in the military service"?

Gen. CROWDER. Only the words "to him." A soldier leaving the service sells his clothing to a comrade who continues in the service. The purchaser avoids in this way the necessity of drawing upon his clothing allowance and accumulates a credit. The Government is just as much interested in protecting that property as any other property used in the service. My attention was called to these words by some of the criticisms which I have received since these articles were first sent out.

In the next article, article 85, there is an important change. The old article provides:

> Any officer who is found drunk on his guard, party, or other duty shall be dismissed from the service.

In the early codes, the Revolutionary War code, that article read: "Guard, party, or other duty under arms." In the revision of 1806 the words "under arms" were omitted, which left the phraseology, "guard, party, or other duty." The construction which the article has since received is that the new phraseology covers all descriptions of duty, so that the sentence of dismissal for an officer is mandatory, no matter how unimportant a duty he was executing at the time he was found drunk.

Mr. SLAYDEN. That is a question where the punishment does not fit the crime?

Gen. CROWDER. I think so. Yet the court is required to give the sentence of dismissal in every case. This violates the theory of our code, which assigns to courts rather than to reviewing authorities the power to assess and grade punishment. Under this mandatory provision the court has no discretion in the matter at all. I have also suggested a change to distinguish between drunkenness in time of war and in time of peace. I do not think there can be any question about the advisability of these changes.

In article 86, which relates to the misbehavior of sentinels, there is another important change. I would first invite your attention to article 39, which the new article substitutes. It says:

> Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

Mr. HUGHES. That is absolutely mandatory?

Gen. CROWDER. Take the case of a sentinel at Fort Myer who goes to sleep on post. He is within the terms of this article, because it does not distinguish between war and peace. It is one of the capital offenses. Of course, that is an absurdity in the law. No one would think of punishing with death a sentinel found asleep on post at one of our peace garrisons, and of course the court never gives the death sentence in such a case, but it is permissible to do so, and I do not think it should be. There is one other change. It is believed that a sentinel found drunk on post has offended to the same degree as the sentinel found asleep on post, and I have changed the new article so as to cover both offenses, and provided that when committed in time of war the death penalty may be adjudged, and that when committed in time of peace the offender shall suffer any punishment except death that a court-martial may direct.

Mr. SLAYDEN. I see one little difficulty. It seems to me there is absolutely no trouble about telling when a person is asleep, but it may be a matter of judgment when a man is drunk.

Gen. CROWDER. That is a difficulty we encounter under other articles of war punishing drunkenness. I think courts make very few errors in their findings in such cases.

Articles 87 and 88, on the next page, may well be considered together. They came down to us from the ancient codes, and were useuseful in the days when armies were without the trained and efficient commissariat of the modern army. It was then the policy to encourage the inhabitants to bring in supplies. The articles are not without their use to-day. Vendors of victuals, supplies, and edibles still visit our camps, garrisons, and forts. I have broadened the provision of article 18 and have dropped the punishment of mandatory dismissal in this article, and also the death penalty of article 56—both manifestly inappropriate. Under article 18 any officer who, for his private advantage, lays any duty or imposition upon or is interested in the sale of products of vendors was punished by mandatory dismissal.

Mr. EVANS. Should it not be penal if he does it for anybody's advantage?

Gen. CROWDER. He might do it for the purpose of securing funds for the sick, or other laudable purpose. The prohibition is against private gain.

Article 88, you will observe, is a related provision. It comes to us from the code of Gustavus Adolphus (1621), and had a place in all the early British codes. I have stricken out the words "foreign parts," and I have omitted the death penalty, which is never an appropriate penalty for the offense of doing violence to a man who brings provisions in, unless the violence results in homicide or bodily injury, when it can be reached under another article.

Article 89 is a partial substitute for existing articles 54 and 55. It preserves the punitive part of these articles. The administrative part is transferred to new article 105, to which I will later call your attention. When our soldiers take the field there are not infrequently minor depredations against the property of civilians. Articles 54 and 55 were intended to remedy that. They direct officers to keep order and redress abuses such as maltreating persons or the willful destruction of property, and to see that justice was done to anyone

whose property had been despoiled to the extent that the offenders pay shall go toward reparation.

Mr. SLAYDEN. Partly?

Gen. CROWDER. Yes, sir. I have made some reference to these articles in my opening statement, referring to the presence in them of a good deal of archaic language. I have preserved, in new article 89, the punitive part of articles 54 and 55 in language which I think covers very substantially the provisions of the existing law.

An occasion arose for applying articles 54 and 55 when the Separate Brigade was stationed near Galveston, Tex., in the summer of 1911. Some soldiers undertook to utilize a boat on a near-by lake for diving purposes, and they destroyed the boat. The owner of the property petitioned under these articles for redress, and proceedings to which I will call your attention in discussing new article 105 were inaugurated for the purpose of fixing the responsibility upon the offenders and to reimburse the citizen who had lost his property.

Articles 90 and 91 are related articles, and are substantially articles 25, 26, 27, and 28 of the existing code. I can give you a better idea of the articles and their purposes by reading a very short extract from a standard work on military law:

> The twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth articles, having a common history and purpose, will be considered together. All codes of military discipline subsequent to the introduction of the standing army in England have contained provisions calculated to repress, and eventually to suppress, the practice of dueling.
>
> In article 36 of the Prince Rupert code "reproachful or provoking speeches or acts" are prohibited, as are "challenges to fight duels," and it is declared to be a military offense for an officer or soldier "to upbraid another for refusing a challenge." Dueling is expressly prohibited, and officers commanding guards are forbidden to "suffer either soldiers or officers to go forth to a duel or private fight." Finally, "in all cases of duels the seconds shall be taken as principals and punished accordingly." The several requirements of the articles of 1874 relating to this subject can be traced without difficulty through the King James articles of 1686 to the comprehensive provisions of the Prince Rupert code above cited. It is proper to remark, however, that in the American articles, as in the English codes of the eighteenth century, dueling, as such, is not expressly prohibited, the provisions respecting challenges, promoters, and the like being in the nature of measures of prevention. The British articles in respect to this subject underwent considerable modification in 1844, when dueling, as such, was expressly prohibited; as so modified the articles were embodied in the permanent Army discipline act of 1881.

In new article 90 we have the existing article 25 substantially without change, except that its provisions are extended to persons subject to military law.

I have attempted to draw within the provisions of the new article 91 all the substantial provisions of articles 26, 27, and 28. I want to say that since preparing this article my attention has been called to the corresponding article of the British code. As these articles—the articles here under discussion—all have a British origin, it is interesting in this connection to refer to the British code and note its present requirements.

Mr. SLAYDEN. What are you reading from?

Gen. CROWDER. From the British Articles of War. Article 38 of the British code is very brief and seems to cover every point that I have covered in this revision and one other, and I want to ask the

committee if it would not be advisable to substitute the present British article for our own. The British code says (art. 38):

> Every person subject to military law who commits any of the following offences; that is to say, (1) fights, or promotes, or is concerned in, or connives at fighting a duel; or (2) attempts to commit suicide, shall, on conviction by court-martial, be liable, if an officer, to be cashiered or to suffer such less punishment as in this act mentioned, and if a soldier, to suffer imprisonment or such less punishment as is in this act mentioned.

They have gotten rid of the archaic language employed in their earlier codes and have put in this brief article in substitution. I want to ask the committee if it would not be better in this instance to copy the British code?

Mr. EVANS. Instead of article 91?

Gen. CROWDER. Instead of new article 91.

Mr. EVANS. I think so, and especially on account of lines 20 to 24 of article 91, which preserve a very beautiful piece of archaic language. That is not the intention of this code?

Gen. CROWDER. No, sir.

Mr. EVANS. There is one thing that this article does not mention, and that is the person who believes the challenge has passed and fails to report.

Gen. CROWDER. Would that not be covered by "conniving"?

Mr. EVANS. No, sir. It might be made to read "or having knowledge thereof fails to report."

Gen CROWDER. Would you retain the provision in regard to attempts to commit suicide?

Mr. EVANS. I think so.

Gen. CROWDER. I served as judge advocate of a department in 1909 for three months and in that time we had three cases of attempted suicide, which we tried under the general article. It is an offense of not infrequent occurrence in our service and I would like to see it expressly punished in the code. I would suggest an article reading something like this:

> Every person subject to military law, who fights or promotes or is concerned in or connives at fighting a duel or having knowledge thereof fails to report the same, or who attempts to commit suicide, shall, on conviction by court-martial, be punished, if an officer, by dismissal from the service (they use the term cashiered) or to suffer such less punishment as the court-martial may direct, and if a soldier, to suffer such punishment as the court-martial may direct.

We come now to a very important article in the new revision—important because it embodies a substantial change. I refer to new article 92, which, with its related article, 93, substitutes existing articles 58 and 62.

I wish, first, to invite your attention to articles 58 and 62, which you will find printed in the right-hand column. From these two articles military courts derive all the jurisdiction they have to punish civil crimes. Article 58 is operative only in time of war. It covers capital crimes and the graver noncapital crimes, thus overlapping article 62, which is operative both in peace and war and covers "all crimes not capital." In view of the overlapping of these two provisions we are compelled upon the breaking out of war to stop pleading under article 62 the noncapital crimes enumerated in article 58, a difficulty which leads at the outbreak of war to numerous errors in pleading.

It will be noted that under the existing law—articles 58 and 62—courts-martial have no jurisdiction of capital crimes in time of peace. My proposition, explicitly stated, is to give courts-martial jurisdiction of the only two crimes made capital by the new penal code of the United States, viz, murder and rape, when committed by persons subject to military law in our foreign possessions, leaving these crimes to be tried by civil courts when committed within the geographical limits of the States of the Union and the District of Columbia.

Under the present condition of the law, if one of our soldiers stationed in the Philippines commits a capital offense there, he goes before a court consisting of a single judge, to be tried for his life, and in a majority of cases it will be a native judge. The soldier will be tried under a code which has not been Americanized in all respects and by a court administering what is essentially an alien jurisprudence.

Mr. EVANS. I do not believe that is the trouble you usually have, but the trouble is that an American soldier kills a native.

Gen. CROWDER. That is the usual case.

Mr. EVANS. To leave that entirely to a court-martial, while the soldier does not always get off, it is a question whether it would not render our administration abroad unpopular. There is the serious question.

Gen. CROWDER. That is a legitimate criticism of the article and one which I had considered before proposing article 92. I was influenced to propose the article largely, perhaps, by experience during our second intervention in Cuba. It was not very long after that intervention had been inaugurated until two soldiers were charged with homicide of some natives. There was no civil court of the United States having jurisdiction. Plainly the court-martial could not try them, as the condition was not war. There were two courses open: First, to surrender them for trial before a Cuban court, which administered a jurisprudence in all respects alien, with whose procedure they were unfamiliar, and which was conducted in a language not understood by the accused soldiers; the second course was to utlize the extraordinary authority which inhered in the office of the provisional governor and which extended to the making of laws, to promulgate a special decree creating a provisional court for the trial of these men. This second course was followed, and the accused soldiers were tried by a court composed of officers of the Army, which administered the provisions of the Spanish criminal code. Should we be confronted again with the necessity of intervention, that situation is likely to repeat itself. I have been determined to avail myself of the first opportunity to pass up my share of responsibility for the continuance of these conditions to higher authority.

Mr. HUGHES. In lines 4, 5, and 6 control is given to the local authority in time of peace?

Gen. CROWDER. Within the United States and the District of Columbia capital crimes will continue to be punished by the civil courts under lines 4, 5, and 6. The new article giving authority to courts-martial to try these crimes is operative only in our foreign possessions; the language of the article would make it operative in Alaska. I do not insist upon Alaska being included, but I think as long as conditions there are unsettled there would be some propriety in

providing that soldiers stationed there should be tried for these offenses by their own officers. It is not, however, a provision that I would insist upon.

Mr. EVANS. I think that we had better trust our own people.

Gen. CROWDER. The argument that appeals to me is that a soldier goes to one of our foreign possessions in obedience to orders to serve the interests of his Government, and it does not seem to be keeping faith with him to turn him over to an alien court to be put upon trial for his life.

Mr. EVANS. That does not impress me so much. A man who commits murder is not entitled to extraordinary consideration.

Gen. CROWDER. But he is entitled to a fair trial.

Mr. EVANS. Yes, sir.

Mr. SLAYDEN. That brings us up against the question, Can he not get a fair trial in those courts?

Gen. CROWDER. We look forward to the time when he can. The time when I was there—1898 to 1901—was a period of insurrection. At that time, and for a considerable period thereafter, your question would probably have had to be answered in the negative.

In the event new article 92 is rejected, I would suggest that article 58 be retained as article 92, eliminating therefrom all noncapital offenses, because we shall have ample authority to try offenses not capital under the succeeding article. It is a source of confusion and embarrassment to charge these noncapital crimes under one article in time of war and under another in time of peace.

Thereupon, the committee took a recess until 8.15 p. m.

EVENING SESSION.

At the expiration of the recess the committee reassembled.

The ACTING CHAIRMAN. Gen. Crowder, you may proceed.

Gen. CROWDER. I pointed out that in articles 58 and 62 of the existing code, published on the right-hand column of page 37, at the top, that those articles give to courts-martial their grant of jurisdiction to try civil crimes. All the jurisdiction of a military court to try civil crimes is conferred by these two articles. The first article, 58, relates to the time of war, insurrection, or rebellion; the second article is in operation both in peace and war.

As the second of those two articles covers all crimes not capital, it covers every crime mentioned in article 58 except murder and rape, which are the only offenses punishable by death in the penal code of the United States. But that is sufficient statement to show you that the two articles overlap each other. We must try all crimes not capital under article 62 in peace, but in time of war we have to jump to the fifty-eighth article of war—to try the most serious noncapital crimes we must go to article 58. The proposition in article 92 is to give jurisdiction to the court-martial to try murder and rape outside the geographical limits of the States of the Union and the District of Columbia. The effect of article 92 will be to give us jurisdiction to try our soldiers for murder or rape outside of the States of the Union and of the District of Columbia; that is, in Alaska, the Philippines, and Porto Rico, or in Cuba, should be again intervene there.

Our soldiers go to these foreign possessions under orders; it is true they volunteer for military service, and that is understood to carry with it an obligation to serve anywhere the Government needs their services, but, in a sense, they go there under compulsion, and it seems to me unjust that when in compliance with the orders of their country they go into a land where the jurisprudence is an alien one, and where it is exercised in a language which they do not understand, it is unfair to turn them over to the courts of such a country for trial.

Article 93 is a substitute for article 62 of the existing code, but not a complete substitute. It seemed to me that it was objectionable to try such grave crimes as are enumerated in article 93, manslaughter, arson, embezzlement, perjury, and assault with intent to commit any felony, under a general authorization of existing article 62 to try the crimes not capital. It seemed to me that they ought to be enumerated in a separate article, these graver noncapital crimes, and retain article 62 in the new code for the purpose of trying minor crimes that escape enumeration in a penal code. I have therefore grouped the principal noncapital crimes in article 93; that is, made them the subject of a separate article.

It reads:

Various crimes.—Any person subject to military law who commits manslaughter, mahem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to bodily harm, shall be punished as a court-martial may deem——

Mr. EVANS. Let me ask you, there, General: Where do you want to retain 62 in there?

Gen. CROWDER. I have retained it, and I will explain this retention. It is the last article in the penal code.

Mr. EVANS. Let me ask you one question on that. I have but one question on article 93, and that is whether that definition is exclusive without doubt. There are some crimes that, under the definitions of some States, that you would not include here. Now, many States have murder in the first and second degree. Then, in that case, we will say—what would be the construction here? If they are tried in times of peace it would not make any difference; in times of war I do not know that that makes any difference. You are satisfied that you have gotten everything that you need to have? You need have no general words?

Gen. CROWDER. I am satisfied with that, because we have been exercising our war jurisdiction for all time under an article which punishes the crime by the single designation "murder," manslaughter, larceny," etc.; and in peace we punish civil crimes under the authority of the existing sixty-second article of war to punish all crimes not capital.

Mr. EVANS. Suppose we had there, "or commit any felony"?

Gen. CROWDER. Where?

Mr. EVANS. I am simply speaking of the result.

Gen. CROWDER. Article 93?

The CHAIRMAN. It is in there.

Mr. EVANS. Assault with intent to commit any felony?

Gen. CROWDER. I thought I had a complete list of felonies.

Mr. EVANS. I do not at this moment recall any you have not got.

Gen. CROWDER. If I have omitted any it will be caught by article 62 in the form I have retained it in the new code, viz, "all crimes not capital." That language is retained in new article 96.

Mr. EVANS. What crime of the military law, General?

Gen. CROWDER. We adopt the definition of the common law or of the statute law of the United States. Chief Justice Fuller in Carter *v.* McClaughry (183 U. S., 397) says of the reference of the existing 62d article to "all crimes not capital" that it embraces crimes created and made punishable by the common law or by the statutes of the United States.

Mr. EVANS. We are, in the statutes of the United States, constantly making certain trade relations crimes that did not use to be. That raises quite a question. Where is this last section?

Gen. CROWDER. It is the last punitive article, No. 96, on page 40.

Mr. EVANS. We ought to construe these two articles together.

Gen. CROWDER. There is no overlapping of jurisdiction between them. You will notice that article 96 says, "not mentioned in these articles."

Mr. EVANS (reading):

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, are to be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

I think we want sufficiently definite expression to cover that. You have that covered here. You say, "all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital."

Gen. CROWDER. Yes, sir.

Mr. EVANS. Here are certain crimes and offenses.

Gen. CROWDER. You asked me a question a minute ago as to how we would handle degrees of murder and other crimes established by civil statutes. Degrees of crime are not known to military law. Winthrop says in his comment on the Fifty-eighth Article of War:

> It is to be observed that as these crimes are not specifically defined in the article or elsewhere in the written military law, they are to be interpreted by the doctrines of the common law, each being viewed as the common-law offense of the same name.
>
> In this connection it may also be noted that no such distinctions as degrees of offenses, such as are established by the statutes of some of the States, are recognized by the military law, and that such distinctions have no bearing whatever upon the subject of the definition of the crimes specified in the article, but are material only with reference to the question of their punishment, hereafter to be considered. (Winthrop's Mil. Law and Prec., vol. 2, p. 1040.)

Mr. EVANS. Whether we want to continue that as the law is the question.

Gen. CROWDER. It is a simple procedure to enumerate the various crimes by name, leaving us to the common law for a definition of the crimes and without going into the refinements of statutory definition.

Mr. EVANS. Let us get right down to the cases that may happen. This refers only to the trial outside of the United States. Section 93 contains no such limitations?

Gen. CROWDER. Oh, no. We try all crimes not capital now within the States.

Mr. EVANS. Within the States, by military——

Gen. CROWDER. By military courts?

Mr. EVANS. Yes.

Gen. CROWDER. We only stop at capital crimes.

Mr. EVANS. Embezzlement, robbery, larceny, etc., are to be tried according to the military law; in other words, you are to try certain crimes committed within the jurisdiction by a law different sometimes from the civil law of that jurisdiction?

Gen. CROWDER. Yes. However, we can not, in the punishment of any of those offenses, give penitentiary confinement unless it is authorized by the law of the place.

Mr. EVANS. That is interesting, and may cause some question where the law of a place does not mention the crime by the same definition you have it here; whereas you have murder in the first and second degree, that would not apply to murder—yes, it would, because murder is not a capital offense in certain jurisdictions.

Gen. CROWDER. No.

Mr. EVANS. All I want to do is to see that it is inclusive, so that when we are through with this legislation some question does not arise for which we have not covered the ground.

Gen. CROWDER. I felt I was following safe lines when I adhered to the terminology of the old law in respect of the enumeration of civil crimes.

Mr. EVANS. Where, then, is there a conveyance of jurisdiction in this code to try offenses less than capital in times of peace?

Gen. CROWDER. Where is the authority?

Mr. EVANS. Yes.

Gen. CROWDER. In article 96, page 40. I intend to leave that there, but to take out of it the more important noncapital crimes and enumerate them in 93.

Mr. EVANS. You are answering my question now. My question is that I have not seen any absolute grant of jurisdiction. There is not any in the proposed code, except that you added it to No. 62.

The CHAIRMAN. What is it you can take out of 62 but that? I do not see any enumeration of crimes there.

Gen. CROWDER. All crimes not capital are included in the new article 96 and were included in old article 62. We have precisely the same grant of jurisdiction in both articles as to noncapital crimes.

The CHAIRMAN. Manslaughter, mayhem, arson, burglary, etc.?

Gen. CROWDER. We have never had any express grant of jurisdiction to try the crimes you enumerate, except in article 58 in war. As I have explained, we have been trying them under the general article—article 62—which gives authority to try all crimes not capital; and I thought it proper that this general designation should be departed from to the extent of enumerating the more important noncapital crimes and making them the subject of a new article, which I have done in new article 93.

Mr. EVANS. You could fix this article this way [reading]:

All crimes not capital and all disorders, etc., are to be taken [scratch out "though not mentioned in the foregoing Articles of War"]—are to be taken cognizance of by general, regimental, garrison, or field officers' courts-martial.

We want to change the present system. You have three courts-martial, have you not?

Gen. CROWDER. Yes, sir; general, special, and summary.

Mr. EVANS. Then, scratch out " by regimental, garrison, or field officers' courts."

Gen. CROWDER. I see your point, Mr. Evans. You do not see any grant of jurisdiction to any of the courts provided for in the new code, and you are looking for such a grant of jurisdiction as you find in existing articles 81, 82, and 83, relating to regimental and garrison courts?

Mr. EVANS. Yes, sir.

Gen. CROWDER. The grant of jurisdiction to try these offenses is made express in an article which we passed the other day and which is inserted in the new code under the subhead "Jurisdiction." You will find it on page 6 of the report.

Mr. EVANS. This covers it right here [indicating].

Gen. CROWDER. It appears here because I have tried to keep out of the punitive articles any grant of jurisdiction and put that grant in the articles relating to jurisdiction.

Mr. EVANS. I have got it here on page 6.

Gen. CROWDER. In article 12 on page 6 [reading]:

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by statute or by the law of war is subject to trial by military tribunals.

In the following article 13 on the same page it is provided that—

Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles * * *.

Then follows in article 13 a limitation upon the power of special courts-martial to punish, viz, six months' confinement and forfeiture. By reason of this limitation upon the power to punish the graver noncapital offenses are not tried by this court.

In the old article the grant of jurisdiction was in the punitive articles. We have separated them in this new code.

Mr. EVANS. That answers the question, I think.

Gen. CROWDER. Now, we come to article 94, which is taken from the Revised Statutes and made an article of war in the revision of 1874.

Mr. KAHN. May I ask you one question before you go on to that? I have just came in, General.

Gen. CROWDER. Yes, sir.

Mr. KAHN. Article 93 says that attempt to commit any felony, or assault with intent to do bodily harm, shall be punishable as a court-martial may direct. I have not looked up the statutes for some little time, but my recollection is that the statutes make very few offenses felonies. Have you looked into that, Gen. Crowder?

Gen. CROWDER. Well——

Mr. KAHN (continuing). That a good many things in the statutes are called felonies which in the States are only misdemeanors.

Gen. CROWDER. I have had in mind the old common-law felonies. Offenses that carry penitentiary confinement.

Mr. KAHN. I know a very large number of offenses defined and punished by State codes fall into that category. That is true of the State codes—how about the Federal?

Gen. CROWDER. The new Penal Code of the United States went into effect January 1, 1910, but I do not think it made any change in this regard. I have not critically examined it.

Mr. KAHN. I have not looked it up for some little time.

Gen. CROWDER. New article 94 is existing article 60 with absolutely no change except the phrase "Any person in the military service of the United States" is made to read in the new article "Any person subject to military law."

The CHAIRMAN. Otherwise it is precisely the same?

Gen. CROWDER. Yes, sir; its origin is the enactment of Congress during the Civil-War period to provide adequate means for punishing frauds in connection with the military service, which were frequent during that period. It is a very serviceable article to-day. We have tested every clause of it by numerous prosecutions and no defect has yet been found.

Mr. KAHN. Why do you prefer the new language to the old?

Gen. CROWDER. Because the phrase "any person in the military service" does not include all persons subject to military law. We have these numerous retainers to the camp and contractors serving with the Army in the field who can commit fraud.

That takes us to article 95. There is a very slight change in article 95. I have included the words "or cadet," so as to make the article read (reading):

> Any officer or cadet who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service.

It is now the accepted construction that a cadet is neither an officer nor an enlisted man; he does not fall, therefore, within the provision of old article 61, which punishes conduct unbecoming an officer and a gentleman.

The CHAIRMAN. General, do you need that about the cadets?

Gen. CROWDER. There is a little bit of sentiment attached to that. We have the idea of building up among the cadets the standard of an officer; and I wanted authority to try them as officers for conduct unbecoming a gentleman.

The CHAIRMAN. May you not by doing that affect other matters that you do not have in mind?

Gen. CROWDER. Well, I would be glad to be informed.

The CHAIRMAN. May you not be giving them a pensionable status?

Mr. KAHN. If he is dismissed from service for conduct unbecoming an officer and a gentleman, I do not think he could get any pension.

The CHAIRMAN. Certainly not. I was just wondering if that generally did not affect the legal status of a cadet in a way?

Mr. EVANS. I doubt if the infliction of punishment would create that status.

Gen. CROWDER. I do not think this changes the status; on the contrary, it emphasizes the difference, by the fact that the term cadet is recognized as not embraced in the term "officer." It says in effect the standards of the officer we will exact of the cadet.

Mr. EVANS. That does not create the same status—it differentiates rather than confuses.

Gen. CROWDER. I have taken some liberties with article 96, which is our old article, or existing article 62. It is sometimes known as

the "general article," because it catches everything that is omitted from the specific articles, and it has sometimes been called the "Devil's article." The origin of the article is the British code of 1642, and it has never lost a place in any of the succeeding British codes, and it is in the British code to-day. Although we have about 44 punitive articles in the existing code specifically defining offenses, we try about 25 per cent of all offenses under this general article. You will notice that I have transposed the language somewhat. The transposition is for the purpose of taking advantage of a decision of the Supreme Court of the United States in the case of a soldier tried in the Philippines for manslaughter. The case was decided in 1907 by Justice Harlan. Prior to Justice Harlan's opinion the construction of this article most frequently advanced was that it gave jurisdiction to courts-martial over crimes not capital only when the circumstances under which the crimes were committed directly affected military discipline. The view was advanced by many persons that the crimes could be tried by court-martial when committed under circumstances which affected in any material though inferior degree the discipline of the service; and in the latter view all crimes not capital could be tried, for none could be committed by a member of the military service which would not to an inferior degree affect the discipline of the service. Under the former construction it was difficult to trace the line between what was triable as prejudicial to military discipline and what was not so triable. Justice Harlan's language seems to adopt the latter construction, and goes further. He uses the following language:

> The crimes referred to in that article embrace those not capital committed by officers and soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers are excepted by the above article from the jurisdiction conferred upon courts-martial excepting those that are capital in their nature.

It is most undesirable that the language of the article should continue uncertain. I have changed the order of statement so as to make it absolutely certain that the phrase appearing in the existing sixty-second article of war, viz, "to the prejudice of good order and military discipline" does not qualify the phrase "all crimes not capital," but only disorders and neglects.

Mr. EVANS. Yes; but that language which you have read in Justice Harlan's opinion says you can not try any crime except that which was punishable by law. Do you not understand it that way?

Gen. CROWDER. Justice Harlan says, "The crimes referred to in that article embrace those not capital," but it does not say that other crimes are excluded.

Mr. WATKINS. I understand that the civil law means the law of the land and that it covers civil or criminal cases.

Mr. EVANS. That is my form. That is what I maintain, and the article therefore does not seem to me to cover military law.

Gen. CROWDER. I think I can make it plain that the contrary view is the one we must adopt. In the Grafton case there was a plea in bar of trial before the civil court based on a previous acquittal by a military court; that is, Grafton was arraigned before a civil court of the Philippines for homicide, and the plea was made that he had been found not guilty by a court-martial of that particular homicide.

Mr. EVANS. That was manslaughter, and then a capital case, and that takes it out of this act.

Mr. KAHN. Manslaughter is not a capital case. Murder would be. Homicide would cover both.

Gen. CROWDER. As I have said, Grafton had been tried by a court-martial and acquitted. He was demanded by the civil authorities of the Philippines, and he went before the Philippine court to be tried for the same homicide which the court-martial had tried.

Mr. ANTHONY. The real purpose is to prevent a soldier being tried in hostile territory?

Gen. CROWDER. No, sir; that is in another article.

Mr. EVANS. I am afraid, General, you are not getting this point. The language of Justice Harlan makes article 62 cover only those offenses which are punishable by the laws of the land, whereas you want to go beyond that.

Gen. CROWDER. Justice Harlan says it embraces offenses which are punishable by the laws of the land; he does not say that it embraces no others.

Mr. KAHN. May I look at his decision, if you have it convenient?

Gen. CROWDER (handing him decision). You will easily see how you must read limitation into the language we are discussing when you consider the issue that was raised in the trial of Grafton.

Mr. EVANS. I want to avoid this. I want to be sure that no one raises it with effect before a court.

Gen. CROWDER. What Justice Harlan decided was that the military court had tried a crime in its civil aspects, and that therefore the man could not be tried by the Philippine court without being tried twice for the same offense.

Mr. EVANS. In other words, res adjudicata?

Gen. CROWDER. Yes; but Justice Harlan held that the courts of the Philippines were courts of the United States, and that as long as the courts trying this case, military and civil, were courts of the same jurisdiction, an acquittal by one was a bar to trial by the other.

The CHAIRMAN. The Supreme Court released him?

Gen. CROWDER. The Supreme Court released him.

Mr. KAHN. They held that the acquittal of the court-martial was a bar? This language would certainly carry that out.

Gen. CROWDER. You can see the only thing Justice Harlan was emphasizing—was the fact that the court-martial had tried the case in its civil aspects; he did not say it had not also tried it in the military aspects.

Mr. KAHN. This is at cross-purposes; this is not the point raised at all. The point raised is whether we are not minimizing our jurisdiction in that opinion and whether your words here are sufficiently definite, to give you jurisdiction for military courts, which is necessary to preserve order over and above that jurisdiction. The civil courts have all offenses——

The CHAIRMAN. You want all the powers of the civil court plus?

Mr. EVANS. Exactly; we need them. You have got to have them in military affairs.

The CHAIRMAN. The General thinks he has that now—a bit further along.

Mr. EVANS. Here is the question, General: "All conduct of a nature to bring discredit upon the military service." That is pretty vague language.

Gen. CROWDER. I want to explain that. That was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position, we can try him under the sixty-first article of war for conduct "unbecoming an officer and a gentleman." We can not try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to good order and military discipline; because the act of a man on the retired list, away from any military post, can not reasonably be said to affect military discipline. I threw in that language to cover the cases of those men.

Mr. EVANS. The language is "all conduct of a nature to bring discredit upon the military service."

Mr. KAHN. That language is in the existing law, only that it has been simply transposed in this new article. All that language is in article 62, "all disorders and neglects which officers and soldiers may be guilty of," now becomes a part of this—officers and soldiers may be guilty of to the prejudice of good order and military discipline. That is all in the existing law and the general has just transposed it a little.

Mr. EVANS. But here is a serious question; courts military therefore are given authority to create and to punish offenses which they may say bring discredit upon the military service and which we may consider as picayune in their nature, is one of the problems, if we grant power in any such very broad language. We are conveying here practically punitive power for officers to punish men or punish each other under courts-martial. The things which one man may consider—a martinet, for example—prejudicial to the service and another man may not. You see it is a very broad language for legislation, an expression of opinion of what ought to be; but it seems to me that is a little too loose for the law.

Gen. CROWDER. Is it any looser than the phrase preceding "Conduct unbecoming an officer and a gentleman"?

Mr. EVANS. That has been construed so often.

Gen. CROWDER. So has "Conduct to the prejudice of good order and military discipline."

Mr. KAHN. Even by the Supreme Court of the United States.

Mr. EVANS. Do you think there is adjudication sufficient to give those words a definite adjudicated meaning?

Gen. CROWDER. The Supreme Court has said with reference to this very article, that while its language is general its meaning to the military mind is not at all obscure, and that it serves a very useful purpose. I do not recall right now the case in which the court expressed this view that this language had a definite meaning to the military mind.

Mr. KAHN. Has article 62 been construed by the Supreme Court of the United States often enough to give it at the present time a definite meaning?

Gen. CROWDER. Oh, yes.

Mr. KAHN. Then, what would be the object in changing it? You have no judicial decisions which affect it absolutely. You are using new language which evidently must be passed upon by the courts

again, or probably will be passed upon by the courts again, and you may get an entirely different decision.

Gen. CROWDER. I understand your inquiry to relate to the new language, viz, "All conduct of a nature to bring discredit." Only the small class of men that I have spoken of could be tried under it, for the soldier on the active list is covered by other articles. The officer on the active list or on the retired list is covered by the preceding article, and here are a lot of retired noncommissioned officers and enlisted men who misbehave occasionally, I am sorry to say, and my office is called upon to consider their cases. Sometimes it is because of refusal to support their families while on this retired pay; complaints of creditors come into the office; and in the corresponding case of the officer we can try them under the preceding article for conduct unbecoming an officer and a gentleman. I wanted that language in this article in order to try those retired soldiers whose cases became flagrant. We have cases of absolute abandonment of family by men enjoying retired pay of $45 to $50 a month.

Mr. HUGHES. This language "all conduct of a nature to bring discredit upon the military service" seems to include everything?

Gen. CROWDER. It was inserted for that purpose.

Mr. KAHN. It is like the catch-net language of the tariff bills.

Gen. CROWDER. Yes. It is not of the greatest importance, but it would relieve the service of considerable embarrassment to have that language retained.

The CHAIRMAN. You better strike that out. I have an idea it is abundant now to catch them.

Gen. CROWDER. The next chapter relates to courts of inquiry. So very few changes are made in the articles under the subjects of "Courts of inquiry" that I think we can pass over them rather quickly. You will notice in the first article under that heading that I have omitted certain language, much for the same reason that we have asked to have omitted the preachment in the article about dueling, Mr. Evans. The omitted language follows "Courts of inquiry" in the third line of existing article 115 and says that as such courts "may be perverted to dishonorable purposes and may be employed in the hands of weak and envious commandants as engines for the destruction of military merit," they shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into. I have omitted the quoted language, but preserved the prohibition. Under the new article, as under the existing one, the President is the only authority that can order a court of inquiry on his own motion. A subordinate must order them if at all upon the request of the party to be investigated.

The CHAIRMAN. That is an old statute?

Gen. CROWDER. That is an old statute. The new article preserves that prohibition upon the commanding officer ordering a court of inquiry, but omits the preachment. I have no objection to it remaining in the article, if anybody wants it.

Mr. EVANS. I think we might change "of" to "into."

Gen. CROWDER. That should be done.

Mr. KAHN. Inquire into the conduct of a man.

Mr. HUGHES. Changing "of" to "into" makes better English.

Mr. EVANS. Yes; that is better English.

Gen. CROWDER. The next relates to the composition of courts of inquiry. The old article said that the court should consist of one or more officers, not exceeding three. There has been but one instance in the history of our Army when we convened a court of one officer. There has always been the maximum, and our most important courts of inquiry have been convened under special legislation authorizing five or seven, or whatever number of members was deemed appropriate.

The next article is a new one, article 99—members of courts of inquiry may be challenged by the party whose conduct is being inquired into and by the recorder, but only for cause stated to the court. We have been according the right of challenge during the entire time we have been convening courts of inquiry without any authority of statute so to do, but because it was just and proper to give a man a right to challenge off of the court of inquiry any member for cause. I have made this a matter of express grant.

The oath of members is preserved in the form in which it appears in the existing articles. Of course, I have added that formal conclusion in case of affirmation.

The CHAIRMAN. It should be "I, A B"?

Gen. CROWDER. This says, "The recorder of a court of inquiry shall administer to the members the following oath," and he says "You." We have made that correction where we did not have that phrase.

Article 101, "Powers and procedure of courts of inquiry," is the existing law, with the obligation written into it that the reporter and interpreter shall take the oath of a reporter and interpreter for a court-martial. You will recall we prescribed an oath for the reporter and interpreter for courts-martial. As the procedure of courts of inquiry is assimilated to that of courts-martial, we simply require them to take the same oath.

It is characteristic of our courts of inquiry that they render no opinion on the merits of a case unless they are expressly required to do so, and I have retained that article in the new code—article 119 of the existing code.

The CHAIRMAN. I should think that would be obviously a matter of course that the duty of a court of inquiry was to express an opinion.

Gen. CROWDER. It depends upon what particular use of the court of inquiry you have in contemplation. At a previous hearing I spoke of the character of courts of inquiry and the analogy of their procedure to that of a grand jury, but that is not the primary use of a court of inquiry. They are frequently to pass upon the merits of a campaign and to inquire into the conduct of a particular general in a given battle, not with the idea that he is to be tried, but for the purpose of straightening out the history of the engagement; and perhaps we have more courts of that character than we have had of any other.

Mr. ANTHONY. Is not the whole function of a great many courts of inquiry to fix the responsibility for loss of Government property?

Gen. CROWDER. That has always been done by survey.

Mr. ANTHONY. You do not call them a court of inquiry?

Gen. CROWDER. No; that is not a court of inquiry.

The CHAIRMAN. A court of inquiry is appointed for the purpose of ascertaining the state of facts. Having ascertained the state of facts it must necessarily report it to somebody.

Gen. CROWDER. They may report the facts, but they express no conclusions unless required to do so.

Mr. EVANS. They give judgment, but write no opinion. They enter the judgment.

Mr. KAHN. No; they do not give judgment. They simply say, "These are the facts."

Mr. EVANS. Then they have the finding of fact.

The CHAIRMAN. Let us see about that for a moment. Take the illustration the general made—suppose it were an inquiry to investigate the conduct of a particular general in an engagement.

Gen. CROWDER. Let me give you an example right there, and then you can continue your remarks.

The CHAIRMAN. Very well.

Gen. CROWDER. A court of inquiry was convened by President Jackson at Frederick, Md., to inquire into the causes of the failure of the campaigns in Florida against the Seminole Indians, and also in other campaigns against the Creeks.

The CHAIRMAN. They had to report an opinion?

Gen. CROWDER. They did not have to, and perhaps the convening authority preferred to form his own opinion to have them report the facts.

Mr. EVANS. Where do we find that the jurisdiction of this court of inquiry is in this code? Let us get down to the basic principles. Where does the court of inquiry get any jurisdiction at all in this code. Let us get at the jurisdiction question first.

Gen. CROWDER. It is discussed here under the head of its function rather than its jurisdiction.

Mr. KAHN. Article 97, page 40, at the top, formation of the court, when and by whom ordered.

Mr. EVANS. Let us get the exact language:

> Examine into the nature of any transaction of or accusation or imputation against any officer or soldier who may be ordered by the president. * * *

Mr. KAHN. Or by any commanding officer.

Mr. EVANS. Now, then, to inquire into the nature of any transaction. They must report, then, the nature of the transaction, the accusation, or imputation. They must report as to the accusation or imputation.

Gen. CROWDER. I can answer your question directly in the words of Winthrop:

> The court of inquiry, so called, is really not a court at all. No criminal issue is formed before it. It arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial; nor is its opinion when it expresses one a judgment. It does not administer justice and is not sworn to do so, but simply to "examine and inquire." It is thus not a court, but rather a board—a board of investigation, with the incidental authority, when expressly conferred upon it, of pronouncing a conclusion upon the facts; but as it is a sworn body, and as the witnesses before it are sworn and examined and cross-examined as before courts-martial, it is a board of a higher sort in the nature of a court, and has thus come to be termed a court in the law military.

Mr. KAHN. Would it not be better to change that language and say boards of inquiry?

Gen. CROWDER. I hate to lose any of the terminology of our code.

The CHAIRMAN. If the meaning is clear?

Mr. EVANS. It is not. The moment you talk about a court to the average man he gets confused about it. It is inaccurate English, and why carry on the inaccuracy to confuse everybody's mind?

Mr. KAHN. A court is supposed to try the case and find upon the evidence; a board does not necessarily have to do that.

Mr. WATKINS. No, Mr. Kahn, that is a mistake; a court is not always expected to do that. Take the jury trial in the United States court. They very frequently review all the evidence in the case and then submit it to the jury for decision without passing upon the question of the guilt or innocence at all.

Mr. KAHN. And yet the function of the court is to get a final decision, even though it be not by the court; it is by the jury, then.

Mr. EVANS. But Mr. Kahn's distinction is nevertheless well taken, if his definition of a court was a little broad in this particular instance. It is not a court. The general has just read us that. Why continue to call it so, when by inaccurate English you cause an inexplicable confusion to any but the trained military lawyer? That is one of the objections I have to technical language of any kind except where absolutely necessary, and I do not think it is absolutely necessary here.

Gen. CROWDER. Let me read from Winthrop a little further on that point:

> But the court of inquiry, though only a quasi-judicial body, is an instrumentality of no little scope and importance; its investigations are frequently much more extended and its conclusions more comprehensive than would be those of a court-martial in a similar case; and in individual instances its results may be scarcely less final than if it had the power to convict and sentence. It is mainly, however, as contributions to history or to the annals of the Army that the researches of the courts under consideration are significant and valuable. (Citing the courts of inquiry convened in the cases of Maj. André, Gen, Hamar, 1791; Wilkinson, 1808; Winder, 1815; Gaines and Scott, 1836; Pillow, 1848; Buell, 1862; Howard, 1874; Warren, 1879, etc.)

Mr. PATTEN. Don't you think, Mr. Evans, that this terminology applies to a trained lawyer like yourself——

Mr. EVANS. I want it so that the ordinary layman will understand it. To the average man's understanding the court of inquiry is a court with power to pronounce judgment; it implies judicial power to the average man.

Mr. WATKINS. That is true.

Mr. EVANS. I am not discussing this as a technical definition, but I am rather inclined to agree with Mr. Kahn that we ought not to continue to use language that to the layman is confusing. If it were not for your next section here it would not be so objectionable. It says, "unless especially ordered so to do." I do not think it is very material, but if I were going to interpret the law I do not think I should be bound down by the misuse of language.

Gen. CROWDER. We convene boards of survey to pass upon property that is lost or damaged in the public service. The function of a board is so clearly subordinate to the function of a court of inquiry that it would seem like lowering the court of inquiry a little in the judicial scale to classify it as a board.

Mr. EVANS. That is the main trouble I find with the Army. The essence of the thing seems to be so very unimportant. The real thing is that this is a board and it is not a court.

Gen. CROWDER. I suppose we do capitalize those things to some extent, and we become very fond of the names.

Mr. EVANS. Exactly. Lawyers do the same thing, and I think they make a great mistake when they do it.

Mr. KAHN. I notice that last sentence there, General:

In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

The thought occurred to me when you were speaking of these cases of certain generals who were heard before courts of inquiry that possibly such a court, if it were held while the Army was in the field, might eventually get into a condition where the president also would be unable to sign the record.

Gen. CROWDER. No man is designated as president. The senior always acts as president; so he is always present.

Mr. KAHN. That explains it.

Gen. CROWDER. That carries us to "Miscellaneous provisions." Article 104 is a new article in this code. It has a special purpose. Our existing code embodies no express recognition of punishments other than such as can be inflicted by a court-martial. Summary punishments have not been recognized except in 25, 52, and 53 of the existing articles. They require certain administrative punishments, such as to ask pardon for using provoking speeches (art. 25), small forfeitures for misbehavior at any place of divine worship, or profanity. There is no record that these articles have ever had any execution, and I have asked to have all of them except article 25 omitted from the code. If they go out, there will be no recognition in the code anywhere of summary punishment.

Now, there has been a demand among our company commanders for a long time for more disciplinary power over their men. We have been going step by step, by regulations, to give them that power. The company commander likes to feel that his disciplinary arm is strong in dealing with the family of 65 men which the law gives him to govern. It seemed to me that we were on rather dangerous ground in trying to grant that power by regulation alone, especially as it seemed to be a principle of our code that punishment should be judicially imposed. I have undertaken to write into a new article the provisions of the existing regulations on this subject which have stood the test of experience.

Mr. EVANS. What you have heretofore done without warrant of law you want now to incorporate in the law?

Gen. CROWDER. Yes, sir.

The article—new article 104—was then read to the committee.

Mr. KAHN. Well, General, why should a soldier who has objected to the punishment and taken up an appeal be compelled to undergo the punishment while the appeal is pending? Should not the appeal act as a bar until final decision?

Mr. EVANS. I should say not, in an army.

Gen. CROWDER. I should think so in dealing with an offense of any gravity, but these are minor offenses.

Mr. EVANS. I should think that for the discipline of the Army the superior officer must have some such power.

The CHAIRMAN. General, what is the character of offenses, by way of illustration?

Gen. CROWDER. A soldier is absent from fatigue; he is boisterous in quarters; he fails to salute an officer. Most company commanders dislike to have their men before courts-martial, and it helps the discipline of the command wonderfully to be able to step right in and handle the case on their own authority.

The CHAIRMAN. Can he order men to the guardhouse for a little while?

Gen. CROWDER. No; I am withholding even that much authority from the company commander. I have mentioned the punishments here that he can impose: First, admonition; second, reprimand; third, withholding of privileges; fourth, extra fatigue—he goes on the fatigue detail or is detailed on kitchen police; fifth, restriction within certain specified limits. Then I add that it shall not include forfeiture of pay or confinement under guard.

Mr. HUGHES. It seems to me it is all very mild.

Mr. WATKINS. What might be the extent of that extra fatigue? What would it be possible to make the punishment under that regulation?

Gen. CROWDER. That would rest very largely with the post commander. If it were a question of punishment by court-martial it would be regulated by our maximum punishment order.

Mr. WATKINS. What is that?

Gen. CROWDER. An order issued by the President, under authority of law, which provides that the punishment imposed by court-martial shall not exceed certain limits for peace offenses.

Mr. WATKINS. Would it not be well to put in there the extent of that punishment?

Gen. CROWDER. The punishments are of such a light character that I doubt if there is any necessity for regulation. It seems to me we would encumber the statute a good deal by attempting regulation.

The CHAIRMAN. That seems to be a very reasonable thing, indeed.

Gen. CROWDER. I have been trying to get some field in which the company commander can move without too much restriction in holding his men up to a standard and having them recognize him as the authority in that company.

The ACTING CHAIRMAN. I think that is a reasonable provision of law.

Mr. KAHN. Under what circumstances would a crime or offense grow out of the same act or omission for which he has received disciplinary punishment?

Gen. CROWDER. He may, for example, be punished for roughly treating a comrade, which was thought at that time to be a trivial matter; it might have been a much more serious affair than the preliminary investigation indicated. If tried for the assault, he would doubtless want to show that he had been already punished. He may, under the new article, do this; but the showing goes only to the amount of punishment to be inflicted for the assault.

We dealt with article 54 of the existing code at Saturday's hearing. A part of it, namely, that part that was administrative, was left unprovided for, and I then notified the committee that it had been made the subject of a special article. We are here dealing with the

case of a command which is on a practice march, say, encamped near a farm. Some of the rougher elements of the company disturb the farmer in his property rights. They take fuel or foodstuffs or something of that kind. The farmer complains and furnishes a list of the property taken. Article 54 commands every officer commanding under such conditions to keep good order and to the utmost of his power redress all abuses or disorders which may be committed by any officer or soldier under his command. And then it adds this requirement:

> If, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot to the disquieting of the citizens of the United States he refuses or omits to see justice done to the offender and reparation made to the party injured so far as part of the offender's pay shall go toward such reparation, he shall be dismissed or otherwise punished as a court-martial may direct.

This new article is to deal with reparation. The old article provided that the person should be reimbursed, but it provided no procedure. Now, I have introduced an article here which provides a procedure, and I have said in that article: "Whenever complaint is made to any commanding officer." [Reading from p. 44 of draft.]

Now comes a part of the procedure which, on first reading, is generally objected to.

The ACTING CHAIRMAN. That is where you make the organization responsible?

Gen CROWDER. That is where we make the organization responsible if they do not disclose the names of the offenders. That reads:

> Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed equally upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted.

Mr. WATKINS. That is contrary to the general trend of the law not to require a man to become a witness against himself. If he should testify he might incriminate himself, and it would to that extent be forcing him to testify against himself.

Gen. CROWDER. The same principle is involved here as before the Brownsville court of inquiry, where we could not locate the men responsible for the shooting up of Brownsville, Tex.

Mr. EVANS. I do not believe we can consider for a moment the rights of soldiers on a civil basis. We have got to have order, and the discipline has got to be rigid and the administration of punishment quick in order to be effective.

Gen. CROWDER. This is a very useful article.

Mr. EVANS. I think the judge's point is very well taken as a matter of law, but that is really only assessing the damages against some crowd that has done an act and refuses to throw responsibility upon any one person. There is quite a distinction between that and the case of the man who pleads the immunity or privilege that he does not have to testify against himself.

Mr. KAHN. There is another little distinction in that matter, I think: A soldier is intended to protect property, not to destroy it. He is a guardian of property, and when he destroys it——

Mr. EVANS. It is a worse offense, you mean?

Mr. KAHN. Exactly so.

The ACTING CHAIRMAN. General, has any other Government such a provision in its articles of war?

Gen. CROWDER. I think this particular provision, assessing loss against the command, is peculiar to our own articles. It seems to have originated in a general order published back in 1868.

The ACTING CHAIRMAN. Have you had the principle since then?

Gen. CROWDER. Yes.

The ACTING CHAIRMAN. And it works well?

Gen. CROWDER. It works very well.

Mr. EVANS. I do not object to that.

Gen. CROWDER. Article 106 is an attempt to make an article of war out of the act of June 18, 1898, section 6, giving authority to civil officers to arrest deserters.

Mr. WATKINS. Before we pass that proposition entirely wouldn't it have a more salutary effect to dismiss them from the service than to punish them by confining or deducting the amount from their compensation?

Gen. CROWDER. Well, the crime is not one that seems to call for expulsion from the service. It is more frequently a frolic among the men than a deliberate purpose to destroy property. It occurred down here in Galveston, Tex., in 1910, when the command there was marching out on a practice march and encamped near a lake, where a nearby resident had a boat. They used the boat for diving purposes, finally got to shooting into the boat, and they destroyed it. There were several companies there and we could not locate the responsible men. The only possible way of reimbursing such a man is to assess the value of the boat against the organizations. They all knew who it was, but they would not tell. They were not required to tell; but this penalty was enforced.

Mr. KAHN. But they did not demur?

Gen. CROWDER. They could have gotten out of it if they wanted to produce testimony.

Mr. KAHN. Was there any disposition to avoid payment?

Gen. CROWDER. No; our men are generally willing to get out of it on those terms. We had that question of assessment against Troop G during the Sioux campaign, when certain men went out and shot a steer when the supply of beef was running a little short. They happened to shoot a very valuable animal, and the company had to pay about $150, I think. It helps to maintain friendly relations with the civil community when we use the authority of this article to reimburse anybody who has lost.

There is no change in article 106, except that I have introduced the words " a possession of the United States," to cover civil officers in the Philippines or Porto Rico who may arrest deserters. All officers of a State, Territory, or District have that authority.

Mr. EVANS. There is no Territory now.

Gen. CROWDER. There is the Territory of Alaska.

Mr. KAHN. That is not an organized Territory, is it?

Gen. CROWDER. I think it is a Territory within the meaning of this statute. It has been held to be a Territory within the meaning of the statute giving representation at West Point.

The ACTING CHAIRMAN. We granted that cadet to Alaska by a special act, didn't we?

Gen. CROWDER. No, sir; we rendered an opinion in our office, and I think it was made under that decision.

Mr. KAHN. If it is not a Territory, then it is a District, and the word "District" is used here.

Gen. CROWDER. We come now to article 107. There is considerable new matter in that article. The existing article which it substitutes requires a soldier to make good time lost through desertion. In the act of May 11, 1908, Congress provided:

That an enlistment shall not be regarded as complete until the soldier shall make good any time lost during an enlistment period by unauthorized absences exceeding one day.

So that as the law now stands time lost through desertion and by unauthorized absences exceeding one day must be made good. In the pending Army appropriation bill it is further provided:

That any officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs, or alcoholic liquors, or other misconduct, shall not receive pay for the period of such absence from any part of the appropriation in this act for the pay of officers or enlisted men; the time of absence and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War.

I have attempted to combine these various legislative provisions into a new article. I can see no reason why time lost through illness of the character named in the legislation should be counted as a part of the enlistment period if it is not to be counted for pay.

Mr. KAHN. Illness brought on by the soldier's own indiscretion?

Gen. CROWDER. Yes, sir.

The article is broader than the legislation enacted by Congress, in that the latter requires only a loss of pay, while the article requires the time lost through such illness to be made good. Of course, I am anticipating that the legislation in the pending Army appropriation bill will be enacted.

Mr. EVANS. We are committed; we can not object to it.

Gen. CROWDER. Article 108 relates to separation from the service of soldiers. That is a very troublesome subject in Army administration. We start out with the general principle that nobody has authority to rescind a contract of service made between the Government and an individual, and when that authority exists it exists by express enactment. The first enactment on the subject was the fourth article of war, which remained the law from 1806 down to 1890. It provided that—

No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

In other words, the statute authorizes three different authorities to discharge a soldier prior to the termination of his enlistment period: The President, the Secretary of War, and the commanding general of the department. Nobody else could exercise this authority until the enlistment contract had expired. Now, by Army regulations, which were certainly of doubtful validity, the Secretary of War forbade the commanding general of the department to exercise

the authority that Congress had conferred upon him. That was for the purpose of keeping the discharges regulated by the central authority and to see that discharges by favor were not granted, except in a uniform way.

There has always been a great demand—and a good deal of it proceeds from Members of Congress—to get men relieved of the obligation of the enlistment contract before their terms of service had expired. Finally Congress enacted in 1890 that in time of peace the President may, in his discretion and under such rules as he may prescribe, permit any enlisted man to purchase his discharge. We issued orders under that authority fixing the price of a discharge after completion of one year's service at a certain amount, and at lesser amounts for the second and third years, diminishing with the period left to serve.

The demand became very insistent—it has always been insistent—for discharge in quite another class of cases—cases of dependency of relatives occurring after a man has entered into the enlistment contract.

Mr. HUGHES. I expect all of us have had a good many of those appeals.

Gen. CROWDER. In February, 1901, Congress passed the second piece of legislation, stating that a soldier, after the expiration of one year of service, should either of his parents die, leaving the other solely dependent upon the soldier for support, could claim his discharge as of right. The effect of this legislation is to limit discharge by favor to these two classes of cases. I have taken those three statutes—they are widely scattered provisions—and combined them into an article of war which states the manner in which a soldier may leave the service. I think I have them accurately stated in the new article.

Mr. EVANS. One question about the last line:

Provided, No soldier shall, before the completion of his term of service, be discharged by order of the President, the Secretary of War, or any officer, unless such discharge be ordered in the interests of the United States.

What does that mean?

Gen. CROWDER. A discharge by favor to the individual is one thing, and a termination of the contract by the President of the United States in the interests of the Government is quite another thing.

Mr. EVANS. Why don't you say, "for the benefit of the service?"

Gen. CROWDER. If a soldier is worthless——

Mr. KAHN. You would not discharge him without honor if he had not committed any offense? If he was shiftless and you did not care to have him reenlist, you would give him an honorable discharge, so long as he had not committed any serious offense?

Gen. CROWDER. Not before his term of enlistment has expired, and then he would take his chances for a discharge with good character, fair, bad, or whatever his classification might be. We do discharge men dishonorably for incapacity, the result of their own misconduct—a line of intemperate misconduct which does not involve them in any violation of the regulations.

Mr. KAHN. Would you give him an honorable discharge, or give him an honorable discharge with a notation of the discharge—"not liable for reenlistment"?

Gen. CROWDER. We give a discharge "without honor" in those cases.

Mr. ANTHONY. What is that? A bobtail discharge?

Gen. CROWDER. No; a bobtail discharge was a dishonorable discharge; everything was cut off in the way of character, and it was called "bobtailed" on that account.

Mr. ANTHONY. The bobtail discharge is not used any more, is it?

Gen. CROWDER. I have not seen one of those discharges in two or three years, and do not know whether they tear off the lower part of it or not. I think they have a new blank where that is not necessary. We have honorable discharge, dishonorable discharge, and then the intermediate, or what is called the "discharge without honor," which is imposed administratively for the good of the service.

Mr. KAHN. Does it read on its face, "discharged without honor"?

Gen. CROWDER. Yes, sir.

The ACTING CHAIRMAN. That does not mean a dishonorable discharge?

Gen. CROWDER. Oh, no.

Mr. ANTHONY. It does not deprive the man of any of his vested rights?

Gen. CROWDER. It deprives him of the right to reenlist.

Mr. ANTHONY. It leaves him in a pensionable status?

Gen. CROWDER. I have never had a case of that kind before me. I do not know whether it affects the pensionable status or not. I rather think it does not.

Mr. EVANS. It certainly ought not.

Gen. CROWDER. Now; this article 108——

Mr. KAHN. Do you think it necessary in article 108 to repeat the preposition "of" in each one of these; say, in line 9, "or by order of the President, of the Secretary of War, or of an officer"? Wouldn't it suit your purpose if it read, "by order of the President, the Secretary of War, or an officer having authority under the regulations"?

Gen. CROWDER. Quite as well; yes.

Mr. KAHN. I do not think that "of" should be repeated there. It is not important at all.

Mr. WATKINS. I think it makes it clearer.

Gen. CROWDER. It reads the word "order" into it every time.

Mr. KAHN. I think the language will be more euphonious.

The ACTING CHAIRMAN. Is the soldier furnished a copy of the Articles of War?

Gen. CROWDER. No.

The ACTING CHAIRMAN. Is he given an opportunity to read them?

Gen. CROWDER. They are read to him. They are in the first sergeant's room in two or three forms. He can always have them.

Article 111 is a repetition of article 114.

We come now to an article of war which gave me some trouble to draft. I shall go over it a little bit in detail, because it is an important article to the service. It is the question of the probate jurisdiction we have to exercise in a small way when an officer or soldier dies in active service.

Mr. KAHN. You want us to take up the typewritten section?

Gen. CROWDER. The typewritten section, instead of the one that was printed. The one that was printed was an effort to draw an

article following the District of Columbia statute. It was too complicated, especially for field service, where the article is more often applied than elsewhere. I have, therefore, drawn a much simpler statute, which I think I can explain.

There is necessity in the military service for the exercise of a kind of summary jurisdiction upon the effects of officers, soldiers, and other persons subject to military law; that is, over personal property used in the military service. This was attempted in articles 125, 126, and 127 of the existing code. They originated back in the British code of 1774, and were carried forward in the code of 1775, 1776, and finally in the code of 1806, and they survive in the present code in the form they had in the code of 1806.

Their defects are: First, that they apply only to officers and soldiers of regiments—rather archaic language—and make no provision for officers and soldiers who do not belong to regiments. By somewhat bold construction we apply the article whether or not the officer or soldier dying came within the description of the article.

In the second place, the articles do not cover persons other than officers and soldiers, and subject to military law.

In the third place, the articles devolve the duty of administration, in the case of an officer, upon the major of the regiment and, in case of the soldier, upon his company commander, quite irrespective of their qualifications to do that class of work. I am devolving this duty in the new article upon the summary court, the officer of the command presumably best fitted, in the judgment of the commanding officer, to perform such duties.

The fourth defect of the existing articles, and their principal one, is that they confer no authority to collect the debts due the estates or to pay small perferential claims which always come up at such a time. It may be a debt due a laundry or a mess table. Neither does the existing law give any authority to collect debts due the estate.

The first effort to draw the article was made with reference to the existing statute of the District of Columbia. I am convinced that it is too complicated, and have submitted a simpler one—the typewritten one which you will find pasted over printed article 112.

It will be noted that should there be no legal representative, widow, or next of kin, the accounting is to be made to the War Department under the operation of regulations and of the act of June 30, 1906, for the settlement of the accounts of deceased officers and enlisted men of the Army; the account is certified to the Auditor of the War Department for settlement. It follows the provisions of said act of 1906 as to distribution.

The concluding provision of article 112 has been inserted to cover cases of inmates of the United States Soldiers' Home of the District of Columbia. Deaths at that institution are of frequent occurrence and nearly all the decedents leave a little property. There ought to be somebody connected with the Soldier's Home to take possession of that small amount of property and relieve the administration of the home of the necessity it is now under of invoking the jurisdiction of the probate authorities of the District of Columbia. It is strictly an old-soldier proposition, and I have no hesitation in asking that this provision be included.

Mr. WATKINS. All those seem to be all right, except that with regard to having a relative take charge. There might be a controversy between the relatives. I think it would be better to strike that out.

Gen. CROWDER. I was merely looking at the subject in the manner in which it had revealed itself to me in actual practice. I have never known of any embarrassment on that score.

Mr. KAHN. There would be a question as to who was the legal representative. I take it, from the language of the section, that the money could not be turned over until the legal representative was found or determined.

The ACTING CHAIRMAN. I also see another thing there, Mr. Evans, "The said summary court shall turn over to him all effects not sold." Suppose the mother were the heir of the man; would she be barred under the language?

Mr. EVANS. No, sir. In my State we have a curative statute by which "he" is "him," the plural is singular and so on.

Gen. CROWDER. That is pretty nearly common law, isn't it?

Mr. EVANS. I was wondering, right there, about the language "a member of his family." As Judge Watkins says to me—my training in law was in probate law first—a "member of the family" is very vague. It is my experience that two or three members will set up their rights right off, especially as to property. You say you have not in your experience had any trouble with that? It must be simply because the soldiers die when the members of the family are not around. If there were there would be two members of the family applying in 1 case out of 15 or 20. In most States they have found it necessary to regulate the right to administer according to relationship, and to give a certain number of days after which a widow may renounce, or the next of kin may renounce, or a creditor. Then, again, if there are no next of kin, the creditors should have a right to apply.

Gen. CROWDER. I will tell you how it works in practice, Mr. Evans. Whenever there is a dispute of that kind the responsible officer resorts to the procedure prescribed by existing regulations and forwards everything to the Auditor of the War Department, and the auditor distributes it under the statute of 1906, which provides for precedence among claimants.

Mr. EVANS. That suggests just the words that I was thinking ought to be in here, "shall present to a member of the decedent's family, in case no legal representative has appeared." You have it that the commanding officer must turn it over to a member of the family. That involves, as Judge Watkins has said, a possible contest between members. But also there may be a legal representative appointed by a court, and it would seem to me that there ought to be some time allowed before the money is actually turned over to the member of the family. There is a great deal of difference between the members of a family. One may be a wife, who is entitled, and another may be a cousin, who is not even an heir.

Gen. CROWDER. Of course, the ordinary case is that the member of the family is present and in possession.

Mr. EVANS. I should think it should be some one who is next of kin. The member of the family may not even be an heir.

Gen. CROWDER. Yes; that is possible.

Mr. EVANS. There is hardly any family that does not extend beyond the next of kin of any one member of it.

Gen. CROWDER. What language could be inserted there, Mr. Evans, that would convey your idea?

Mr. KAHN. The language on the other side would cover it—"decedent's widow or legal heirs."

Mr. WATKINS. Strike out "member of the family."

Gen. CROWDER. "Legal heirs" would require a military officer to know who they are.

Mr. EVANS. Anybody can testify as to kinship.

Mr. WATKNS. I would not substitute anything for "members of the family;" just strike that out.

Mr. EVANS. "Shall permit the legal representative or members of the decedent's family present to take"—after what time?

Gen. CROWDER. Oh, immediately. The intent is that they should take possession immediately.

Mr. KAHN. A soldier has not any creditors to speak of, as a rule.

Gen. CROWDER. He may owe for his laundry.

Mr. WATKINS. He may have an heirloom. He may have souvenirs, relics, in which the family takes pride.

Gen. CROWDER. Is there any change of language that could be made there, or shall we strike out "members of the decedent's family"?

Mr. EVANS. The legal representative could only be a person with letters of administration. Strike out the words "member of the decedent's family" and insert "his widow or next of kin present to take possession." I believe that would be all right.

Gen. CROWDER. It would also have to be changed below.

Mr. EVANS. In line 5 strike out the words "a member of the decedent's family" and insert in lieu thereof "his widow or next of kin;" and in the third line below that strike out the words "members of the family" and insert in lieu thereof "widow or next of kin."

Gen. CROWDER. And further down, following the semicolon, "but if in the meantime the legal representative or a member of decedent's family."

Mr. EVANS. Strike out "a member of decedent's family" and insert "his widow or next of kin."

Gen. CROWDER. That will complete the article, will it not?

Mr. EVANS. Yes, sir.

Gen. CROWDER. Article 113 relates to inquests. That is a new article. Embarrassment has arisen in the past when a death occurred on a military reservation through accident, violence, or suspicious causes, which elsewhere would require a hearing before a coroner. The coroner charged by the local law with this duty has no authority on a reservation where the jurisdiction of the United States is exclusive. The main difficulty is in transporting bodies of deceased persons to cemeteries, due to objections of State health authorities that the certificate as to the cause of death required by State laws is lacking.

Article 114 extends the authority to administer oaths to the president of a general or special court-martial, the president of a court of inquiry, of a military board, or any officer designated to take a

deposition, also to the adjutant of any command. That this is a necessary extension of authority will not, I think, be questioned.

It will be recalled that a previous article makes provision for an assistant judge advocate of general courts-martial when one is necessary. New article 115 makes such assistant judge advocate competent to perform in substitution of the regular judge advocate the duties of the latter.

We come now to an important article, and one which is new to the code. There are numerous statutes which devolve civil duties upon the Army. Three sections of the Revised Statutes devolve duties of this character upon the Army in the protection of civil rights. Five sections similarly devolve duties upon the Army in the protection of Indians. There are two or three enactments which permit the Army to be utilized for the preservation of public lands, and other provisions of law give the Army duties respecting public health, the preservation of neutrality, and, of course, we have to bear in mind the extensive employment of the Army in time of riot and civil disturbance.

In the performance of these duties officers of the Army come into very close relations with the civil authorities and with the people, and not infrequently are sued in local courts on account of acts done by them under the color of office or military statutes.

Instances of civil suits in State courts of this character are found in the case of Capt. John C. Bates, Infantry—now lieutenant general, retired—sued in 1877 for seizing liquors about to be introduced into Indian country, the seizure being made under the orders of the department commander; in the case of Col. John Brooke—now major general, retired—for a similar seizure on the reservation of Fort Union, N. Mex.; and there is the recent case of Capt. Biddle, of the Cavalry, sued for executing an order of the post commander to expel stock found trespassing on the military reservation of Fort Meade, S. Dak. Many other cases might be cited.

When any civil suit is commenced in any court of a State against a revenue officer of the United States, on account of any act done under color of his office, he is, by the act of March 3, 1911, given the right to transfer the litigation to a United States district court. I have taken that legislation and built an article of war upon it, and am asking for a corresponding provision in the case of officers and enlisted men of the Army that are sued in civil courts of a State on account of acts done in the performance of official duty. This is what new article 116 is intended to accomplish. It simply paraphrases the act of Congress of March 3, 1911.

It seems to me that the request is a reasonable one. The authority of an officer or soldier or other person in the military service for acts done in his official capacity is measured by the Federal law, and it seems to me just as well as expedient that when his action in line of duty or under color of his office and military status is brought in question by means of a civil suit there should be a right to transfer to a Federal court.

Mr. WATKINS. I think that would be proper if you would let it be shown conclusively that it was for his acts performed in his military capacity, but if he should go out in his own individual capacity, he ought to be responsible.

Gen. CROWDER. I think the new article is clear in that regard. I have said "on account of any act done under color of his office or status or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces or under the law of war." Is not that sufficient?

Mr. WATKINS. I think if he shows clearly that it is in the line of his military duty, that would be proper.

Gen. CROWDER. Now, we come to article 118, rank and precedence among regulars, militia, and volunteers. We have been in consultation in the War Department in the past three or four weeks with the national militia board and other representatives of the National Guard.

Mr. KAHN. Pardon me; you have passed over section 117.

Gen. CROWDER. Yes; that is simply a reenactment of article 99 and two acts of Congress; one, section 1299, Revised Statutes, and the other, the act of January 19, 1911. They are consolidated into article 117 with no changes.

Mr. EVANS. Under this article 117, would the President of the United States be authorized to discharge an adjutant general?

Gen. CROWDER. No, sir. There is no change from existing law in that article at all.

Before proceeding to discuss article 118, I would like to invite your attention to articles 124 and 122 on the next page. The two articles will have to be considered together.

Mr. EVANS. Now, General, I do not want to take up too much time, but this article you have put in says, "and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial." That takes away from the President the right to dismiss in time of peace.

Gen. CROWDER. The old law said, "and no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of a court-martial to that effect or in commutation thereof."

Mr. EVANS. Then he has no right to dismiss in time of peace?

Gen. CROWDER. No. He does not do it; he never has done it since the passage of this law.

Mr. EVANS. Did he not do it in the Ainsworth case?

Gen. CROWDER. No; he relieved Gen. Ainsworth from duty, and subsequently the general applied for retirement.

Taking up articles 122 and 124 of the existing code, you will observe that they prescribe two opposed rules of precedence. Under article 122, on "marches, guards, or in quarters"—rather archaic language, but intended to be descriptive of all classes of duty—all officers of the Army, Marine Corps, militia, or volunteers are placed upon an equality with respect to rank and precedence, and the senior line officers in point of commission command the whole. Under article 124, on the preceding page, it is provided that on "detachments, courts-martial, and other duty," the regular officer shall rank the militia officer, and the militia officer shall rank the volunteer in the same grade, irrespective of dates of commission. So that we have one rule for marches, guards, or in quarters, and another for detachments, courts-martial, and other duties. The two articles are in conflict unless you consider detachments, courts-martial, and other

duty as not embracing anything embraced in marches, guards, or quarters.

Now, to get rid of that conflict in the statute laws there have been several conferences with National Guard officers interested in the pending militia-pay bill, and they are agreed now upon a certain phraseology which I have incorporated in this article, with one exception, which I will proceed to state. In 1862 embarrassment arose in assigning the command of our field armies, and Congress passed a resolution, April 4 of that year, which provided that "whenever military operations may require the presence of two or more officers of the same grade in the same field or department the President may assign command of the forces in such field or department without regard to seniority of rank."

That legislation worked well during the Civil War period, and I have prepared legislation to be incorporated in the new articles of war, or in some other military legislation, in substitution of the rule which is prescribed by these articles, 124 and 122, which I have read. At the session which was held to-day it was agreed to insert in the pending militia-pay bill which is before this committee, I believe, for its consideration a provision like this [reading]:

When the Organized Militia in service of the United States is employed in conjunction with the regular or volunteer forces of the United States, and military operations require the presence of two or more officers of the same grade in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of organizations thereof, without regard to seniority in the same grade of rank.

Following this language the provisions of new article 118 in this project.

Mr. WATKINS. What does that mean?

Gen. CROWDER. It means, among other things, that if you have three major generals in the same field operating together, the President may designate the junior of them, if he so chooses, to command over the other two.

The new article incorporating the foregoing language would then read as follows:

Provided, That in the absence of such assignment by the President officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, viz: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of the Organized Militia transferred to the Army of the United States or called into the service of the United States; third, officers of the volunteer forces: *Provided further*, That officers of the Regular Army holding commissions in the Organized Militia in the service of the United States, as hereinbefore provided, or in the volunteer forces, shall rank and have precedence under said commissions as if they were commissioned in the Regular Army; but the rank of officers of the Regular Army under their commissions in the Organized Militia shall not, for the purpose of this section, be held to antedate their formal entry into the service of the United States under said commissions.

I talked this article over with your chairman, Mr. Hay, and he said he thought there were some protests on the part of the National Guard officers against this legislation. I was talking this afternoon with a representative of the protestants, and he says that his objection to the legislation is not to its merits but to its place in the militia pay bill. He would have no objection to it as a part of these articles.

The ACTING CHAIRMAN. Suppose four officers should come together—we will say a major general of the Marine Corps, a major general of the Organized Militia, a major general of the volunteer forces, and a brigadier general of the Regular Army.

Gen. CROWDER. They would all command the brigadier general, and this now article would not give the President any authority to change that.

The ACTING CHAIRMAN. Say there were four divisions assembled making one grand army, and all their commanders were major generals except the Regular Army officer, and he a brigadier. Naturally and under ordinary circumstances the senior major general would command, whether he was Volunteer, Organized Militia, or Marine Corps officer.

Gen. CROWDER. Yes; that is the rule to-day; but if this legislation passes the senior militia major general would command the volunteer in the same grade irrespective of rank, and both of them would command the Regular Army officer, because he was in the next lower grade. This article affects rank within the grade, but it does not affect grades. For instance, it will not be within the power of the President under this legislation to place the brigadier general of the Regular Army in command of the major general.

The ACTING CHAIRMAN. Suppose four major generals come together and the Regular Army officer were the junior, would he command the other two?

Gen. CROWDER. Yes.

Mr. KAHN. Under this section he undoubtedly would.

Gen. CROWDER. There appears to be no objection to that provision.

Mr. EVANS. What do we train him for—what are we spending money on the Army for if we do not get superior men?

The ACTING CHAIRMAN. I have in mind one or two major generals that were never Regular Army officers, who, by results achieved in the field in the handling of armies, demonstrated rather superior qualities——

Mr. EVANS. Oh, in the last war. But those two men in that picture [indicating a painting of Gens. Grant and Lee] are both West Point men.

Mr. KAHN. But in the Spanish-American War there were several brigadier generals created.

Mr. EVANS. If we are going to make laws here, if we are not going to put the trained men in command, we had better stop training them; that is all.

The ACTING CHAIRMAN. What rank did Forrest get as a cavalry officer, major general?

Gen. CROWDER. Yes; I think, perhaps, he got to be a lieutenant general before the close of the war. They had many lieutenant generals on that side.

I would like to ask whether or not that article can be passed in the form in which I have the preliminary part, saying that when the Organized Militia is called into the service of the United States and employed in conjunction with the regular or volunteer forces of the United States in military operations which require the presence of two or more officers, the President may assign the command, etc.?

Mr. KAHN. Will you have a few typewritten copies of that preliminary language made?

Gen. CROWDER. Yes.

Mr. KAHN. If it is not difficult for you, I think it would be well for you to have a copy made for every member of the committee. In considering the bill in executive session we will want to have the language before us.

Gen. CROWDER. Now, we have a second related article, 119—command when different corps or commands happen to join. [Reading:]

When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, Organized Militia, or Volunteers there on duty shall, subject to the provisions of the preceding article, command the whole and give orders for what is needful in the service unless otherwise directed by the President.

That straightens out and harmonizes the two articles of the existing code.

I have omitted to call your attention to one article which should be 114½. I omitted to transfer one section of the Revised Statutes, which was in the nature of an article of war to this revision. The section reads like this:

The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court, and may set down the case in the first instance in shorthand. The reporter shall, before entering upon his duties, be sworn or affirmed faithfully to perform the same. (Sec. 1203, R. S.)

While this section of the law gives the authority to the judge advocate of a court to employ a reporter, Army Regulations have been issued denying him the exercise of that authority, except with the sanction of the authority convening the court. This was an attempt upon the part of the War Department to control and limit expenditures for reporters. The regulation was a useful one, but the grant of authority in the statute was not restricted. I have written the limitation into the new article in order that it may affirmatively appear that the judge advocate has not this authority except with the approval of the convening authority.

It will be noticed that the new article is broader than the section of the Revised Statutes upon which it is based, in that it provides for the employment of an interpreter as well as a reporter. I ask to have this new article inserted as new article 114½.

Mr. KAHN. Would you have any objection to inserting it as 114, paragraph a or b, or to number it 115 and change the numbers of all the subsequent articles? I do not like to begin a new code by having 114½.

Gen. CROWDER. It would look better as paragraph 2 of article 114, which is headed "Authority to administer oaths." We could just strike out that heading and make it read "Administration of oaths—Employment of reporters and interpreters." Then this would come in as paragraph 2 of that article. It fits in there very well.

Mr. EVANS. The balance is nothing but the repealing acts.

Gen. CROWDER. I am sorry to protract the meeting, but I have a very important matter to present to the committee. I have Mr. Hays's sanction, I believe, for presenting it.

The general subject of discipline of the Army includes not only these articles of war, but it includes our prison statutes. There has been considerable agitation for a number of years, in the service and

out of it, about the treatment of military prisoners. The discussion has been directed more particularly toward the treatment of deserters. There is one class of officers who adhere to the view that desertion should be regarded as a felony and the deserter rated a felon, who is appropriately punished with penal servitude. A few years back we used to brand the deserter and tattoo his body, but that punishment was finally prohibited by Congress, along with flogging. We still adhere to the idea of penal servitude. In 1873 Congress passed a law to establish a military prison. The first draft of the law provided for its establishment at Rock Island. The law was subsequently amended to make the place Fort Leavenworth. That statute was one of the earliest prison statutes of the United States. It is a severe statute.

As a result of this agitation, I was requested to consider a change in the treatment of the military prisoners, but it was a matter about which there was a grave difference of opinion, and I opposed the change for several months until I could make a thorough study of the subject. I finally asked for an order to proceed to Fort Leavenworth and make an investigation of that prison. I found 940 men in confinement there. They had the appearance of boys. Upon inquiry I ascertain that their average age at commitment was about 23 years. With the aid of the prison officials I effected a classification of the inmates. I found 71 per cent were there for purely military offenses—by far the larger number of these for desertion and fraudulent enlistment. Associated with those crimes were the offenses of absence without leave, disobedience of orders, and kindred offenses, where a man had fallen short in the discipline of the Army—667 out of the 940 were in there for purely military offenses. One hundred and ninety-seven were in there for military offenses and common-law and statutory crimes together—but by common-law and statutory crimes I want you to understand that I include misdemeanors. Many of the offenses were trivial, but still of a civil character, like larceny of small amounts. But 78, I think, were in there for serious common-law and statutory crimes.

When I had finished my investigation at the prison I went over to the United States penitentiary located on the same reservation, and I saw the large number of inmates of that institution. They were men of more advanced years, grizzled veteran criminals, many of them, and had the criminal look. Yet our young ex-soldiers at Leavenworth were wearing the same kind of prison garb, conforming to the same prison régime—hair close cropped, numbers on their backs and legs, carrying their arms folded in the presence of authorities, undergoing the same penal servitude as at the penitentiary.

I came to the conclusion that that system was fundamentally wrong, but that before we could apply any remedy it was necessary to segregate our offenders. I made recommendation that all the military offenders be sent to Leavenworth and that all of the common-law and statutory offenders be sent to Alcatraz, the branch prison at San Francisco, and that then we consider the question of what régime should be maintained at these two places. I submitted quite a lengthy report, which occupies some 10 pages of the Chief of Staff's last annaual report. I ask that it be incorporated as an apendix to the hearings before this committee. It concludes with five recommendations, to carry out which requires legislation I am now about

to bring to your attention. This legislation, which I now offer, is a substitute for chapter 6, title 14, of the Revised Statutes of the United States. I ask that it be inserted as section 2 of this act.

The result of enacting legislation of this character will be to establish the system of detention barracks of England. For a long time they treated desertion as a felony and the deserter as a felon. They have abandoned this policy, which had always been a failure, and resorted to these detention barracks with the idea of reforming these men, and they have made a great success of it. It is to be admitted that this will be a radical change of policy for us, this passing from penal servitude to detention barracks with the idea of saving these men to the colors.

Mr. WATKINS. That applies to time of peace, I suppose.

Gen. CROWDER. Yes.

Mr. WATKINS. So you only have two prisons now?

Gen. CROWDER. We have three, counting Castle William, in New York Harbor.

Mr. WATKINS. Then the prisoner has to be conveyed there all the way at the expense of the Government?

Gen. CROWDER. Yes, sir; that has been the rule for some time.

The ACTING CHAIRMAN. General, how would you arrange it in the Philippines, for example? How would you keep your goats separate from your sheep where you would have only one prison?

Gen. CROWDER. We have very ample guardhouses that are practically prisons.

The ACTING CHAIRMAN. And you make those camps of detention?

Gen. CROWDER. They can be so used.

In England, instead of a 9-hour day—which is the usual prison day—they have made it a 10-hour day at the detention barracks. They keep the men busy a good deal of the time at military instruction, and they are sending them back to their regiments from which they deserted better shots, knowing how to dig intrenchments, and in many other important regards better instructed than the men remaining with the colors. The company commanders of the English Army are reported as glad to have these men come back.

Mr. KAHN. There is one little thing that the general can probably help the committee out on, and that is these repealed sections. It might be well for him to draw up just a little statement of what these sections are.

Gen. CROWDER. I think it is due the committee to state that Mr. Hay, when we went over these, thought I had made a mistake in expunging the article which says, "It is earnestly recommended to all officers and soldiers diligently to attend divine service."

Mr. EVAN. We might leave out the part about the forfeiture.

Gen. CROWDER. Here is another one that I left out:

> Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article.

Mr. KAHN. I do not think that the use of profane or irreligious language is as prevalent now as it was when these Articles of War were first adopted. I do not think it is necessary in our day to keep those articles in.

Gen. CROWDER. I will, with your permission, submit for the consideration of the committee as a part of the argument for a revision

of our prison statute (1) an extract copy of the prison report referred to in my statement; (2) an extract copy of the Inspector General's report on the English detention barracks. I submit, also, an analytical table showing the origin of each of our existing articles of war, and request that all these documents be printed as appendices.

APPENDIX A.

[Extract of report of Judge Advocate General on military prison.]

CHANGE OF ADMINISTRATION OF THE MILITARY PRISON FROM A PENAL INSTITUTION TO A MILITARY REFORMATORY.

It does not admit of question, I think, that the laws applicable to the military prison require it to be administered as a penal institution. As pointed out in my former report, they follow closely the legislation of the States and the later legislation of the United States for the establishment and maintenance of penitentiaries. This is especially evident when the provisions embodying the requirements for employment of inmates at daily hard labor and in the trades are considered. In some respects the laws applicable to the prison are less humane than later legislation of the United States creating penitentiaries. For example, the provisions of the act of March 3, 1890 (26 Stat., 839), that in the construction of prison buildings there shall be such an arrangement of cells and yard space that prisoners under 20 years of age shall not in any way be associated with prisoners above that age, and that the management of the class under 20 years of age shall be, as far as possible, reformatory, is not found in the laws relating to the military prison.

The regulations adopted from time to time for the government of the military prison and its inmates (editions of 1877, 1883, 1888, 1890, and 1910) shows that the War Department has uniformly interpreted the law as requiring the prison to be administered as a penal institution. In the five editions of said prison regulations it has been provided that prisoners should be clad in prison dress, wear their hair close cropped, with face clean shaven, be designated by numbers, and employed at the kind of hard labor at which convicts confined in civil prisons and penitentiaries are customarily employed. While in the several editions of prison regulations in force down to 1895 the inmates of the prison were uniformly designated as "prisoners," in the present edition of the regulations the term "convict" is uniformly used.

The department has uniformly administered the prison as a penal institution. This is made to appear from the present employment of prisoners confined therein, which does not differ from past employment, except in so far as their labor is diverted to the work of new prison construction, and which the commandant states as follows:

"1. *Domestic labor.*—This includes orderlies, messengers, clerks, barbers, cooks, bakers, waiters, hospital attendants; and tailors, shoemakers, harness makers, blacksmiths, electricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters, etc., for repair purposes only; laundrymen, librarians, warehouse laborers, teamsters, butchers, printers; total, 250.

"2. *Construction work* on new prison and the shops and industries in connection therewith; total, 450.

"3. *Outside work* in connection with the construction of roads, the operation of the terminal railway, the care and preservation of the forest, the care of the reservation and prison farm; total, 240. (This number is far below the daily requirements and does not meet the demands.)"

Upon the theory that the prison will continue to be administered as a penal institution after the completion of prison construction, the commandant recommends that they be employed as follows:

"1. *Domestic labor.*—This includes orderlies, messengers, clerks, barbers, cooks, bakers, waiters, hospital attendants; and tailors, shoemakers, harness makers, blacksmiths, electricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters, etc., for repair purposes only; laundrymen, librarians, warehouse laborers, teamsters, butchers, printers; total, 250.

"2. *Operation of shops inside the prison.*—In the operation of the shops such work would be recommended as would be least liable to cause interference from outside labor, as follows: Making shoes for the use of all prisoners in the Army; making harness for the use of the Army; making brooms for the use of the Army (a large part of the broom corn can be raised on the prison farm); making tinware and stove pans, etc., for the use of the Army; also galvanized-iron buckets; making clothing for all prisoners in the Army, especially civilian suits for discharged prisoners; repair of wheel transportation; laundry work; total, 250. This number depends, of course, upon the amount of work of this class that is given the prison to do and can be expanded indefinitely.

"3. *Outside work.*—(*a*) The operation of the prison farm: Between 700 and 800 acres of land are now available for farm purposes; this will have to be diked and the diking will have to be of the very best; the river bottoms will have to be protected; it appears to be possible to do this and have an 800-acre farm in the bottoms; 200 additional acres could be secured on the reservation on the northwest side without interference with any military operations; a 1,000-acre farm, using a large part of it as a truck garden, would give employment to a large number of convicts. (*b*) The operation of a dairy for the use of the prison. (*c*) The repair and maintenance of post roads and the construction of reservation roads; approximately 12 miles of rock road are to be built. (*d*) Grading; the number of hills to be removed and the amount of yardage is very great. (*e*) Drainage and construction of culverts and bridges; this work requires a large amount of labor. (*f*) Care of the forest and the conversion of waste portions of the forest into park land for use of troops in maneuvers. (*g*) Crematory and disposal of wastes; should the crematory be removed from its present location, which appears to be inevitable, the construction and maintenance of it should be turned over to the prison. (*h*) Operation and repair of the terminal railway system; the handling of all freight, coal, and forage in connection with the operation of the railway system. (*i*) Operation of the rock quarries, crushers, limekiln, brick plant, concrete-block machines in connection with such work at the prison and post as may be authorized by the Quartermaster General. (*j*) Installation of a water supply for the prison and post. (*k*) Operation of an electric light and power plant for the prison and post. (*l*) Operation of an ice and refrigerating plant for the prison and the post."

Because of the proximity of the military prison to the large and important post of Fort Leavenworth, and the extensive and urgent demands for labor upon the post reservation indicated above, it is probably true that no similar institution of the United States or of any State or Territory is in such a favorable situation for the utilization for public purposes of free prison labor. The extensive employment of its inmates at daily hard labor on the much-needed and urgent improvements of the military reservation proper, the conservation of the forests, and the building of roads, for which contract labor would otherwise be necessarily employed, would result in very obvious economies to the Government; while the employment of the prisoners on the large prison farm (about 900 acres) in the raising of food products and in the shops of the prison at trades in the manufacture of articles for use of prison and prisoners confined there and at posts would be a long step in the direction of making the prison self-sustaining. The argument of economy is thus seen to be exceptionally strong, and, in connection with the opportunity the work outlined above affords for the training of prisoners in civil employment and graduating them back into civil pursuits under conditions which would put them in the way of establishing themselves in civil life upon their release from the military prison, constitutes the most persuasive argument that can be urged, I think, in favor of continuing the administration of the military prison as a penal institution.

I am prepared to concede to this argument controlling effect as to the inmates of the prison convicted of common-law and statutory felonies alone. These belong to the regular criminal class, and their punishment should conform to what is prescribed by law for this class of prisoners undergoing punishment in our United States, State, and Territorial prisons; but I do not think it should be regarded as decisive of the more important questions presented, viz: Should soldiers convicted of purely military offenses, committed in time of peace, be subject to ignominious penal servitude similar to that inflicted upon common-law and statutory felons? Preliminary to a discussion of this question, I invite

attention to the following classification of prisoners serving sentence at the military prison, Fort Leavenworth, at the time of my inspection:

TABLE No. 1.—*Prisoners convicted of military crimes only.*[1]

Of desertion only	440
Of desertion and fraudulent enlistment only	104
Of desertion and other military crimes other than fraudulent enlistment	56
Of desertion, fraudulent enlistment, and other military crimes	12
Of military offenses, not including desertion and fraudulent enlistment	6
Of fraudulent enlistment only	49
Total	667

TABLE No. 2.—*Prisoners convicted of military crimes in connection with common-law and statutory crimes.*

Of desertion and common-law statutory crimes not military	75
Of desertion, fraudulent enlistment, and common-law and statutory crimes not military	10
Of desertion, fraudulent enlistment, other military crimes, and common-law and statutory crimes not military	12
Of desertion and other military crimes, not including fraudulent enlistment, and common-law and statutory crimes	48
Of military crimes, not including desertion and fraudulent enlistment, and common-law and statutory crimes	46
Of fraudulent enlistment, other military crimes, not including fraudulent enlistment, and common-law and statutory crimes	4
Total	195

TABLE No. 3.

Number of prisoners convicted of common-law and statutory crimes only	78

Summary.

Prisoners convicted of military crimes only	667
Prisoners convicted of military crimes in connection with common-law and statutory crimes	195
Prisoners convicted of common-law and statutory crimes only	78
Grand total	940

TABLE No. 4.—*Desertions.*

	Number.	Average age at enlistment.
First year of enlistment	431	23 years 5 months 28 days.
Second year of enlistment	210	23 years 2 months.
Third year of enlistment	34	22 years 8 months 16 days.
Second enlistment period	59	26 years 1 month 25 days.
Third enlistment period	12	29 years 10 months 4 days.
Fourth enlistment period	5	32 years 7 months 9 days.
Fifth enlistment period	2	39 years 11 months.

The data for the Pacific branch of the United States military prison at Alcatraz Island, Cal., if assembled, would probably show similar percentage strength of the several classes of prisoners confined in said branch.

The foregoing classification is not as complete as it is desirable that it should be, in that it fails to distinguish between civil felonies and misdemeanors. It is doubtless true that a large majority of the prisoners listed as common-law and statutory offenders have been convicted of misdemeanors only, and that therefore only a very small percentage of the inmates of the military prison belong to the regular criminal class.

It will be noted that the average age at enlistment of prisoners serving sentences for desertion is about 23 years. I did not ascertain the average age at

[1] Slight variances in totals appear in these tables which do not affect the argument based upon them.

enlistment of other classes of offenders, but it is presumably about the same as for deserters. The average age of prisoners at the time of my inspection may be safely estimated at between 25 and 26 years. The contrast in respect of age between them and convicts of the United States penitentiary located on the same military reservation, which I visited, is most marked, the latter being in appearance a much older class of men. In prison dress and in the methods of treatment and daily employment of inmates there is no substantial difference between the two institutions, and the inmates of the prison are undergoing penal servitude of the same character as inmates of the penitentiary, with the additional ignominy in case of deserters of loss of citizenship rights, of rights to become citizens, and the right to hold office of trust or profit under the United States.

Recurring now to Tables 1, 2, and 3, we find that of the 940 prisoners undergoing sentence at the military prison at the time of my inspection, 667—approximately 71 per cent—were convicted of purely military offenses. If we add to these those convicted of purely military offenses in connection with common-law and statutory offenses of the grade of misdemeanor, ordinarily punished by light jail sentences, we shall have a total of approximately 90 per cent of the inmates of the prison, by far the greater number deserters, who may be said not to belong to the regular criminal class, but who are undergoing the same kind of penal servitude as felons confined in the United States penitentiary located on the same reservation. The question whether penal servitude is a proper punishment for them is thus seen to turn mainly on what is a proper punishment for desertion in time of peace.

Perhaps there is no other single subject connected with the administration of the military establishment which has received more earnest attention by the military authorities than this subject of desertion, its causes, and its proper punishment. Annual reports, service journals, and the public press have teemed with its discussion. It may be said also that there is no other single subject connected with Army administration in respect of which such diverse views have been expressed. Systematic efforts have been made to ameliorate the condition of the soldier in respect of his living, dress, enjoyments, comfort, and contentment as a means of reducing desertion rates. The Inspector General, in his report of 1905, summarizes the efforts of the Government in this regard as follows:

"It has constructed for him barracks luxurious in their appointments compared to the housing of the armies of other civilized countries throughout the world; it has provided in these barracks air space in dimension equal to the demands dictated by the best scientific thought; it has given him spring beds, mattresses, pillows, sheets, and pillow cases; it has provided him with toilets and baths of the most modern manufacture, and much superior in general appearance and effect to similar necessities enjoyed by people in middle life; it has provided spacious reading rooms, supplied with newspapers and books calculated to cater to the soldier's taste; it has bettered the amount and quality of his clothing; it is to-day supplying him with the largest variety and best quality of food that is given to any Army; and at many of the large posts it has provided magnificent exchange buildings, not a few of which have swimming tanks and gymnasiums thoroughly equipped for athletic exercises. It has made the demands of discipline and authority over the soldier, in conformity with the spirit of the age, mild compared to what it was 20 years ago; it sends the uneducated soldier to school and gives the partially educated every advantage of an extended education; it has provided outdoor amusements for him in the way of athletic games; and it has, in fact, accomplished everything to make him contented and to cause him to live out his enlistment, with one exception—it has failed to provide an adequate punishment for the crime of desertion.

"Nine-tenths of the soldiers who desert from the Army of the United States have no real cause for the act."

But the efforts of the Government have not been limited to what is outlined in the foregoing report of the Inspector General. We have tried the additional expedients of long-term and short-term enlistments, bounty for reenlistment, retained pay and detained pay, forfeited to the Government by desertion, discharge by purchase, and, finally, increased pay—all, except discharge by purchase, without appreciable deterrent effect upon the commission of the offense of desertion. If, as claimed by the Inspector General, we have failed to find adequate punishment for desertion, it is not because we have not run the gamut in this regard; for we tried the ignominious punishment of branding and tattooing the deserter, the wearing of ball and chain, and long sentences of

penal servitude. We have also tried the expedient of recognizing different grades of criminality in desertion, distinguishing between the recruit led off by companions, homesickness, ignorance, and the old soldier who commits the offense with full knowledge and deliberation, giving to the former a very short term of imprisonment and frequent restoration to duty, and preserving as to the latter the long sentence of penal servitude. In 1908 we abandoned the attempt to distinguish between the recruit and the old soldier in respect of this offense and provided one punishment for desertion, only to return to the prior system in 1911. That none of these expedients has been attended with results which were satisfactory to the department tends directly to support the view expressed by The Adjutant General of the Army in his report for the fiscal year of 1908, that:

"The principal cause of the evils in question lies deeper than any of the causes commonly assigned for them, and is beyond the reach of any of the measures proposed. Our people, although aggressive enough, are not a military people. They have little real interest in the Army in time of peace, and from the earliest days of the Republic have been accustomed to look upon it as a more or less unnecessary institution that may be pared down with safety whenever a demand for retrenchment of public expenses arises. Enlistment in the Army in time of peace is not uncommonly regarded as evidence of worthlessness on the part of the recruit, and desertion in such a time is generally looked upon as nothing more culpable than the breach of a civil contract for service. The deserter suffers little or no loss of caste by reason of his offense, and is seldom without friends and sympathizers to shield him from arrest and to intercede in his behalf in the comparatively rare event of his falling into the hands of the military authorities.

"It is safe to predict that desertion from the Army will continue to be excessive until there shall have been a radical change of public sentiment toward the Army and until the deserter shall come to be regarded as the criminal that he is, to be ostracized and hunted down as relentlessly as any other transgressor of the laws. There is no reason to look for such a change of sentiment in the near future, and there are some who believe that the change will never come until our people shall have learned through national disaster and humiliation, that the effective maintenance of an Army of professional soldiers is absolutely essential to the preservation of the national honor and life, and that the trained and disciplined troops of a modern enemy can not be withstood by hastily organized armies of untrained or half-trained civilians."

I concur in the view here forcefully expressed that the main obstacle encountered by the military authorities in their efforts to reduce desertion is found in the attitude of the people toward this offense. Public opinion, with which we have to reckon in the enforcement of any law or policy, does not associate and never has associated moral turpitude with desertion in time of peace. For this reason we do not have and never have had the cooperation and aid of public sentiment in the execution of our policy of treating desertion as a felony and punishing the deserter as a felon. I concur further in the view intimated above that this state of feeling is an outgrowth of our military policy to rely upon a volunteer army rather than upon an army of professional soldiers, and that the sentiment will continue so long as that policy continues—that is, for the indefinite future. It must, I think, be taken into account in determining our policy in dealing with the offense.

But in the past three years marked success has been achieved in reducing desertion rates in face of this adverse public sentiment by the vigorous campaign for the apprehension and punishment of deserters inaugurated by The Adjutant General's Office. The system of apprehension is fully explained in the Annual Reports of The Adjutant General for the fiscal years 1909 and 1910. It involves telegraphic notice to The Adjutant General's Office of every desertion, the preparation and distribution of desertion circulars, containing personal descriptions and reproductions of photographs of deserters, with an announcement of rewards payable for their apprehension and delivery. It appears that about 4,000 copies of such desertion circular are distributed to department, post, troop, battery, company or detachment commanders, to United States marshals, police officers of the larger cities, to established detective agencies, to agents of the Secret Service Division of the Trasury Department and of the Bureau of Investigation of the Department of Justice, and to civil peace officers in the vicinity of the homes of the deserters and in localities to which they are likely to go.

The system outlined above became fully inaugurated in October of 1908. It found the desertion rate of the Army for the fiscal year ending June 30, 1908,

at 4.59 per cent. Its deterrent effect was not immediately apparent, for in the fiscal year of 1909 there was a slight increase in the desertion rate. This is explained in the report of The Adjutant General for that year by the fact that the enlisted strength of the Army was largely increased during the year, with the result that an unusually large proportion of the enlisted men were serving in the earlier part of their enlistment, when desertions are most frequent. In the fiscal year of 1910, when normal conditions in this regard were more nearly approached, the desertion rate fell to 3.66. In the fiscal year of 1911 it fell to 2.28 per cent, the lowest desertion rate that has been reached since the establishment of the military prison in 1874, except for the fiscal year of 1898, when because of the very large increase in enlistments incident to the war the percentage rate decreased to 1.57.

I think service opinion will be found to support the view that this very marked reduction in desertion rates is to be attributed almost entirely to the system of apprehension and punishment of deserters outlined above and would view with marked disfavor any modification of the system which would tend to imperil the excellent results that follow its employment. The point to which I would invite special attention is the necessity, if any, for retaining the degrading punishment of ignominious penal servitude, or, stated in other words, whether the change in the character of the punishment, retaining its severity in so far as is consistent with the change, would impair the excellent results to be obtained under the system as now enforced.

That the stigma of prison confinement operates as a deterrent to desertion must be conceded, just as we must concede deterrent effect to the old but now disused punishments of branding and tattooing of deserters, but to what extent prison confinement has operated to deter desertion is not readily deducible from desertion statistics. It sufficiently appears, however, that during the entire period we enforced penal servitude as a punishment for desertion the department was confronted with the unsatisfactory results already referred to, and that results did not become measurably satisfactory until the vigorous campaign looking to the apprehension of deserters was fully inaugurated. A comparison of desertion statistics of the period from 1875 to 1895, during which the military prison was available for confinement of soldiers convicted of purely military offenses, with the period from 1896 to 1906, during which it was not so available, shows that the percentage of desertion to total enlisted strength during the former period was approximately 6.77 per cent, and during the latter period 4.68 per cent, excluding the year 1898, during which the percentage was, for abnormal causes, unusually low. There is thus seen to have been an actual falling off in the rate of desertion during the period that penal servitude was not in force, a reduction which must be attributed, however, largely to the fact that discharge by purchase was operative during the entire period from 1896 to 1906, whereas during the former period of 21 years it was operative only for 5 years. Still, the fact that the effect of discharge by purchase in reducing desertion was not in a greater degree neutralized by the abatement in the character of the punishment would seem to furnish some suggestion that the stigma of penal servitude, standing alone, has not a relatively important deterrent influence upon desertion.

The question has, however, another aspect which I think merits consideration. I find that since the restoration of the prison to military control in 1906, 3,924 prisoners have been confined therein. The number confined in the prison from its establishment in 1874 down to its transfer to the Department of Justice in 1895 I have been unable to ascertain, but it is undoubtedly very large; nor have I available the number of men who have been confined in the branch prison at Alcatraz during the period of its existence. Taking a total of these we have a very large number of persons who have passed from these prisons into civil life. In common with other soldiers dishonorably discharged and held in confinement at posts, they remain after discharge from confinement under statutory disability for future military service, those convicted of desertion having the additional disabilities of loss of citizenship rights, of rights to become a citizen or to hold any office of profit or trust under the Government. They constitute a large and ever increasing element of our population properly described as military outcasts.

That the organic act establishing the military prison (act of Mar. 3, 1873) contemplated that this element should to some extent be saved to the Army is made plain by the provision of section 6 of that act, that:

"The Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

I can not ascertain that the Secretary of War has ever made any use of the authority here given him to restore prisoners to duty. It has not been possible for him to do so since the enactment of the act of August 1, 1894, prohibiting the reenlistment of men whose last preceding term of enlistment has not been honest and faithful. In order that the inmates of the prison may have restored to them the chance for honorable restoration to duty with the colors which the Congress granted them in the original enactment, it will be necessary to seek such amendment of the act of August 1, 1894, as will except from its prohibition inmates of the military prison confined therein for purely military offenses and discharged therefrom as good-conduct prisoners, with the recommendation of the prison authorities that they be allowed to reenlist. Administered upon these lines the prison would acquire the character of a reformatory, or detention barracks such as are now maintained by England for the confinement of purely military offenders, and which are described by an officer of our Army who has recently inspected them, as follows:

"Only such soldiers as have been convicted of military offenses as distinguished from statutory or common law offenses are sent to detention barracks for punishment and correction. The controlling idea in the treatment of the soldier, where confined in the barracks, is to reform him and send him away from the institution a better instructed soldier than when he entered. He is worked 10½ hours a day. No prison garb is worn. The soldier is in uniform at all times, except possibly when in the workshops, and then he wears working clothes. They are designated by name—no numbers are used. Although the inmates are kept under close surveillance during the day, and in barred cells under lock and key at night, yet every effort consistent with this is made, and with considerable success, to eliminate the prison atmosphere and aspect of the surroundings. Hard work, wholesome food, plenty of sleep, regular hours, kindly treatment, and total abstinence from the use of all intoxicants and tobacco soon bring the man under control of his own will. This is the condition the authorities attempt to develop as a preliminary to proper reformation of character. Much of the work is purely military and especially designed to perfect the man in marksmanship and the use of his weapons. There is daily instruction for some hours in this class of work. The barrack inclosure is fitted up with almost every known device for training in shooting, and I was told that remarkable results are secured. Instruction is also given in military bridge building and in other types of purely military work, including a very thorough course in gymnastics.

"Each man is required to do a certain amount of work daily in the workshops. All of this work has a direct bearing on the military service and includes such tasks as repairing picks, shovels, barrack chairs, mattresses, beds, etc., which are sent to the institution from the garrisons on the outside. Very few of the inmates possessed any of the ordinary characteristics of the criminal class in appearance or bearing, and as a matter of fact they do not belong to this class. Had I seen the same men doing the same work in other surroundings I would have noted no special difference between them and other soldiers. They appeared to work with spirit and willingness, and a good atmosphere pervaded the place. Treatment by those over them, while severe and unrelenting, is very kindly. * * * The director of the institution said that he seldom or never had the same man committed a second time.

"It is worthy of note that all cases of desertion are handled here.

"The controlling idea is to send the man out sound in mind and body, reformed, and as well instructed in his duties as a soldier as he would have been had he remained in his organization."

The attitude of the English people toward desertion is the same as that of our own people. There, as here, public opinion does not associate moral turpitude with this offense. The reason is not far to seek. The contract of enlistment is voluntarily entered into and the abandonment of the service is considered by the people simply a breach of the voluntary contract. In the British service the fact has been recognized and the policy of punishing deserters as felons has been abandoned. We persist in the policy in the hope, which I think can never be realized, that by so persisting we can educate our 90,000,000 people to take the service view that the deserter should be punished as a felon.

From what has been said above it is evident that if we should adopt, in principle, the system of detention barracks as administered in the British service, there need result no abatement in severity of punishment now obtaining in our service, except in so far as relieving prisoners from the ignominy of penal servitude would be an abatement. This could be compensated for to

some degree by increasing the punishment for military offenses. Daily hard labor to the extent necessary for the domestic administration of the prison would continue as heretofore, but the system would require that there should be relief from daily hard labor not connected with said domestic administration and the time thus saved given over to the most rigid military instruction; and it would seem reasonable that, under such instructions, inmates would acquire proficiency in rifle practice and other specialized military training equal if not superior to that acquired by men who remain with the colors, and that such opposition as may now exist among officers and enlisted men to receiving inmates of the prison back into their organizations would in a very large measure disappear as to those good-conduct prisoners who acquire such proficiency and are discharged with the recommendation that they be permitted to reenlist.

The details of the new system would, I think, be appropriately fixed by a board convened especially for the purpose. I think it would be an essential part of the new system that prisoners undergoing confinement at the military prison or its branch for grave common-law and statutory crimes, and those convicted of such crimes in connection with military offenses, should be segregated.

I would suggest that Alcatraz Prison and Fort Jay Prison be reserved for their confinement, and their administration as prisons continued. And I would further suggest that those convicted of purely military offenses would be properly confined in the detention barracks, to be subjected to special discipline, the general outlines of which are given above, with a view to their restoration to duty with the colors. There would remain those convicted of common-law and statutory misdemeanors of a character ordinarily punished with light jail sentences, or of such misdemeanors in connection with purely military offenses. These, under the policy above outlined, should be sent, I think, to the detention barracks, there to be kept employed at daily hard labor connected with its domestic administration, to be admitted to the classes undergoing special military instruction only as their conduct may justify it. The effect would be such a division of military prisoners under sentence by court-martial as would segregate and give over to special training all those who have offended primarily against the discipline of the Army, leaving the regular criminal classes under the prison régime to which they are at present subjected.

In view of the fact that we are legislatively committed to the maximum use of the labor of military prisoners on new prison construction, the change from prison to detention barracks must await the completion of said construction—about two years—unless it can be assumed that Congress will be found willing to complete said construction by contract labor. But when the new prison is completed the way will be open to inaugurate the change, which can be administratively accomplished, except in the following regards, where it would be advisable to have amendments of the existing law so as to provide:

1. For changing the name "United States military prison" to "United States detention barracks," and for making the designation of the inmates of the detention barracks uniform by eliminating the term "convict" wherever necessary and substituting therefor the term "prisoner," which latter term is used in the existing law as synonymous with the term convict.

2. For exempting the detention barracks from the existing provision vesting the government and control of the prison in the Board of Commissioners of the United States Soldiers' Home; this for the reason that the detention barracks would become an integral part of the military establishment, to be administered directly as any other department thereof.

3. For modifying the provision of existing law respecting the employment of prisoners in said detention barracks so as to limit the daily hard labor of prisoners confined therein to what is required for purposes of domestic administration, as outlined above by the prison commandant, and directing that prisoners not so employed shall be subjected to a rigid course of military training and instruction.

4. For exempting from the prohibitions of section 1118 of the Revised Statutes against the enlistment in the military service of any deserter therefrom and of section 2 of the act of August 1, 1894 (28 Stat., 216), against the reenlistment in the military service of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, all good-conduct prisoners discharged from the detention barracks or post guardhouse with the recommendation of the authorities of the detention barracks or post that they be permitted to reenlist.

5. For the modification of the requirements of sections 1996 and 1998, Revised Statutes, so as to provide that the forfeiture of citizenship rights or of

the right to become citizens shall not attach to a conviction of desertion committed in times of peace.

Other minor changes will be required in the existing law, and of course extensive amendments of the existing regulations governing the United States military prison at Fort Leavenworth would be necessary to conform them to the amended law.

APPENDIX B.

[Extract from a report of the Inspector General of the Army, giving the recent inspection by him of the detention barracks of the British Arm

The result of the system seems to be to reduce the number of hardened cases to such an extent that it is found best to discharge them from the service rather than permit them to spread discontent among the soldiers. A large proportion of hard cases are manufactured in prison, and many a man comes out of prison much worse than when he went in. The detention system has the opposite effect, and it is found better to get rid of men who can not be softened or reformed.

It took five or six years for the detention system in England to establish itself, but it apparently has saved many men from trouble and from degenerating into hardened cases. They evidently endeavor in this system to apply humane common sense in the treatment of men in trouble. This gives an opportunity for the men to recover their self-respect and respond to any patriotic instinct which, under the stigma of prison life and its demoralizing environment, can not be expected to survive.

The commandant at Aldershot states that he finds a distinct feeling of self-respect within the walls of his establishment. This is apparent, in his opinion, from the fact that he observes a keenness to give satisfaction, and to put up a good show when visitors come around, and that the sulky, hangdog look of the prison is not to be found. This was apparent at the time of my visit.

The commandant states that one sojourn in the detention barracks is generally sufficient, if long enough, to make the soldier useful to his unit. Very few ever return to the detention barracks. He also reported to have known several cases of men being promoted noncommissioned officers for efficiency obtained in the detention barracks.

I was very much impressed with this system as observed at Aldershot.

Soldiers sent to the detention barracks retain their uniform and keep their entire kit, except the rifle, in their rooms. The rifles are issued to them when they turn out for parade. There is no mark or insignia to indicate any idea of imprisonment. The man remains a soldier and is treated as such except that his freedom is restricted and he is detained within specified limits. The effort is to remove the cause for the failure of the man to meet the requirements of the service, to build him up physically, so that his nervous system will be in order to respond to the character of instruction and treatment he receives while in these barracks. The majority of the men who come here are sentenced for offenses that seem to have their origin in the excessive use of alcoholic liquor, inordinate uses of cigarettes, and other indulgences which overtax and wreck the nerves. The effort is to build up the nervous system. For this reason soldiers detained in these barracks are not allowed to use tobacco at all.

The barrack at Aldershot is located within an inclosure surrounded by a high wall. The barrack is of plain, substantial construction, three stories high, with a central passage extending to the roof, upon which three tiers of rooms open. Each man has a separate room. No conversation is allowed at any time except when it is absolutely necessary in the performance of duty or work.

I saw the men at drill and at work in the shops and in the gymnasium. The work in the gymnasium was excellent and carried on under a gymnastic instructor.

The devices in the yard for target practice were excellent and constructed in a systematic way by means of diagram, etc., on a scale to appear at the short ranges employed as they would appear at the full range, miniature moving targets being used for actual firing.

The fundamental idea controlling the scheme seems to be: Keep the soldier sentenced to the detention barracks employed in useful work, the use of the rifle being very prominent in the scheme.

It will be observed that the "diet" and "separation" play an important part in the scheme of treating soldiers in these detention barracks.

American Articles of War of 1874.	American Articles of War of 1806.	American Articles of War of 1786.	American Articles of War of 1776.	American Article of War of 1775.	Charles I by 1640, Earl of North.	British mutiny act of 1765.	British Articles of War of 1765.	British Articles, 1718.	Articles of James II, 1686.	Articles of Charles I, 1639.	Articles of Gustavus Adolphus, 1621.
Art. 1	Art. 1		Art. 1 of Sec. I	Art. 1							
Art. 2; Stats. at Large. Jan. 29, 1813, c. 16, s. 13, v. 2, p. 796; Aug. 3, 1861, c. 42, s. 11, v. 12, p. 289.	Art. 10		Art. 1 of Sec. III		Of the soldier's oath.		Art. 1 of Sec. III	Art. 21	Art. 6	Oath under Art. 14 of Sec. VI.	
Art. 3; Stats. at Large. Mar. 5, 1833, c. 68, s. 6, v. 4, p. 647; Mar. 3, 1863, c. 75, s. 2, v. 12, p. 731; July 4, 1864, c. 237, s. 5, v. 13, p. 380; Mar. 3, 1865, c. 79, s. 18, v. 13, p. 490; May 15, 1872, c. 162, s. 2, v. 17, p. 117.											
Art. 4	Art. 11		Art. 2 of Sec. III				Art. 2 of Sec. III				
Art. 5	Art. 17		Art. 7 of Sec. IV	Art. 61			Art. 7 of Sec. IV				
Art. 6	Art. 16		Art. 6 of Sec. IV	Art. 60		P. 188	Art. 6, Sec. IV				
Art. 7	Art. 19		Art. 2 of Sec. V	Art. 63			Art. 2 of Sec. V				
Art. 8	Art. 18		Art. 1 of Sec. V	Art. 62			Art. 1 of Sec. V				
Art. 9	Art. 58		Art. 20 of Sec. XIII.	Art. 29 & art. 11 of add'l art. of 1775.	Art. 8 of duties in action.		Art. 20 of Sec. XIV.		Art. 25		
Art. 10	Art. 40		Art. 5 of Sec. XII.				Art. 5 of Sec. XIII.				
Art. 11; Stats. at Large, Mar. 3, 1863, c. 75, s. 32, v. 12, p. 736.	Art. 12		Art. 2 of Sec. IV	Art. 56			Art. 2 of Sec. IV.				
Art. 12	Art. 13		Art. 3 of Sec. IV	Art. 57 & art. 14 of add'l art. of 1775.		P. 188	Art. 3 of Sec. IV.				
Art. 13	Art. 14		Art. 4 of Sec. IV	Art. 58 & art. 15 of add'l art. of 1775.			Art. 4 of Sec. IV				
Art. 14	Art. 15		Art. 5 of Sec. IV	Art. 59		P. 188	Art. 5 of Sec. IV.			Art. 4 of Sec. III.	Art. 121.

Art. 15; Stats. at Large, Mar. 2, 1863, c. 67, s. 1, v. 12, p. 696.	Art. 36		Art. 1 of Sec. XII.			P. 191	Art. 1 of Sec. XIII.		Art. 40		
Art. 16	Art. 37		Art. 2 of Sec. XII.	Art. 15	Art. 7 of a soldier's duty touching his arms.		Art. 2 of Sec. XIII.		Art. 42	Art. 11 of Sec. III.	Art. 80.
Art. 17; Stats. at Large, Feb. 8, 1815, c. 38, s. 7, v. 3, p. 204.	Art. 38		Art. 3 of Sec. XII.		Art. 3 of a soldier's duty touching his arms.		Art. 3 of Sec. XIII.		Art. 40	Art. 11 of Sec. III.	Art. 80 & 81 & 124.
Art. 18	Art. 31		Art. 4 of Sec. VIII.	Art. 66			Art. 4 of Sec. VIII.		Art. 45		Art. 114.
Art. 19	Art. 5		Art. 1 of Sec. II		Of duties to the King & State; art. 1.		Art. 1 of Sec. II	Art. 6	Art. 7		
Art. 20	Art. 6		Art. 2 of Sec. II.	Art. 4	Of duties towards superiors & commanders; art. 1.		Art. 2 of Sec. II		Art. 10	Art. I. Sec. III.	Art. 26.
Art. 21	Art. 9		Art. 5 of Sec. II.	Art. 7	Of duties towards superiors & commanders; arts. 2 & 7.	P. 185	Art. 5 of Sec. II	Art. 8	Art. 15	Art. 1 of Sec. III.	Art. 29.
Art. 22	Art. 7		Art. 3 of Sec. II.	Art. 5 & art. 5 of add'l art. of 1775.	Art. 8	P. 184	Art. 3 of Sec. II	Art. 7	Art. 13	Art. 5 of Sec. II.	Art. 65.
Art. 23	Art. 8		Art. 4 of Sec. II.	Art. 6	Art. 9	P. 184	Art. 4 of Sec. II	Art. 7	Art. 13		
Art. 24	Art. 27		Art. 4 of Sec. VII.	Art. 10	Art. 8 of the duties of officers & commander in particular.		Art. 4 of Sec. VII.	Art. 19	Art. 34		
Art. 25	Art. 24		Art. 1 of Sec. VII.	Art. 11	Art. 5 of duties moral.		Art. 1 of Sec. VII.	Art. 19	Art. 34		
Art. 26; Stats. at Large, Feb. 27, 1877, c. 69, v. 19, p. 244.	Art. 25		Art. 2 of Sec. VII.	Art. 11			Art. 2 of Sec. VII.	Art. 19	Art. 34	Art. 16 of Sec. III.	Art. 84.
Art. 27	Art. 26		Art. 3 of Sec. VII.	Art. 11	Art. 4 of the duties of commanders & officers in particular.		Art. 3 of Sec. VII.	Art. 19	Art. 34	Art. 16 of Sec. III.	Art. 84.
Art. 28	Art. 28		Art. 5 of Sec. VII.	Art. 11			Art. 5 of Sec. VII.	Art. 19	Art. 34	Art. 16 of Sec. III.	
Art. 29	Art. 34		Art. 1 of Sec. XI.	Art. 13			Art. 1 of Sec. XII.		Art. 57		
Art. 30	Art. 35		Art. 2 of Sec. XI.	Art. 14			Art. 2 of Sec. XII.		Art. 51		
Art. 31	Art. 42		Art. 2 of Sec. XIII.	Art. 17 & art. 9 of add'l art. of 1775.	Art. 16 of duties in camp & garrison.		Art. 2 of Sec. XIV.		Art. 27	Art. 3 of Sec. IV.	

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American Articles of War of 1874.	American Articles of War of 1806.	American Articles of War of 1786.	American Articles of War of 1776.	American Articles of War of 1775.	Charles I by 1640, Earl of North.	British mutiny act of 1765.	British Articles of War of 1765.	British Articles, 1718.	Articles of James II, 1686.	Articles of Charles I, 1639.	Articles of Gustavus Adolphus, 1621.
Art. 32	Art. 21		Art. 2 of Sec. VI.	Art. 8	Art. 12 of duties in camp & garrison.		Art. 2 of Sec. VI.				
Art. 33	Art. 44		Art. 4 of Sec. XIII.	Art. 19	Art. 10 of duties in camp & garrison.		Art. 4 of Sec. XIV.				
Art. 34	Art. 41		Art. 1 of Sec. XIII.	Art. 16	Of duties in camp & garrison; art. 1.		Art. 1 of Sec. XIV.		Art. 20		
Art. 35	Art. 43		Art. 3 of Sec. XIII.	Art. 18	Art. 14 of duties in camp & garrison.		Art. 3 of Sec. XIV.		Art. 46	Art. 2 of Sec. IV.	Art. 49.
Art. 36	Art. 47		Art. 7 of Sec. XIII.				Art. 7 of Sec. XIV.		Art. 39		
Art. 37	Art. 48		Art. 8 of Sec. XIII.				Art. 8 of Sec. XIV.				
Art. 38; Stats. at Large, Feb. 18; 1875, c. 80, v. 18, p. 318; Feb. 27, 1877, c. 69, v. 19, p. 244.	Art. 45		Art. 5 of Sec. XIII.	Art. 20 & art. 7 of add'l art. of 1775.	Art. 5 of the duties of commanders & officers in particular.		Art. 5 of Sec. XIV.				Art. 51.
Art. 39	Art. 46		Art. 6 of Sec. XIII.	Art. 21 & art. 8 of add'l art. of 1775.	Art. 9 of duties in camp & garrison.	P. 184	Art. 6 of Sec. XIV.		Art. 32	Art. 11 of Sec. II & art. 8 of Sec. IV.	Arts. 50 & 51.
Art. 40	Art. 50		Art. 10 of Sec. XIII.	Art. 23			Art. 10 of Sec. XIV.				
Art. 41	Art. 49		Art. 9 of Sec. XIII.	Art. 22	Of duties in camp & garrison, art. 4.		Art. 9 of Sec. XIV.		Art. 28	Arts. 14 & 15 of Sec. III.	Art. 48.
Art. 42	Art. 52		Arts. 12, 13 & 14 & 21 of Sec. XIII.	Arts. 25 & 30 & arts. 10 & 12 of add'l art. of 1775.	Arts. 2 & 3 & 10 of duties in action.		Arts. 12, 13 & 14 of Sec. XIV.		Arts. 22 & 24 & 23.	Arts. 9 & 13, Sec. III & art. 1 of Sec. V.	Arts. 55 & 56 & 79 & 93.
Art. 43	Art. 59		Art. 22 of Sec. XIII.	Art. 31			Art. 22 of Sec. XIV.				Art. 73.
Art. 44	Art. 53		Art. 15 of Sec. XIII.	Art. 26	Art. 6 of duties in camp & garrison.		Art. 15 of Sec. XIV.		Art. 31	Art. 10 of Sec. II.	
Art. 45	Art. 56		Art. 18 of Sec. XIII.	Art. 27	Of duties to the King & State, art. 3.		Art. 18 of Sec. XIV.			Art. 4 of Sec. II.	

Art. 46	Art. 57		Art. 19 of Sec. XIII.	Art. 28 & art. 1 of add'l art. of 1775.	Of duties to the King & State, art. 2.	P. 184	Art. 19 of Sec. XIV.		Art. 8	Arts. 3 of Sec. II.	Arts. 70 & 71 & 76 & 77.
Art. 47; Stats. at Large, May 29, 1830, c. 183, v. 4, p. 418.	Art. 20		Art. 1 of Sec. VI.	Art. 8		P. 184	Art. 1 of Sec. VI.	Art. 10			
Art. 48; Stats. c. 14, s. 16, v. 2, p. 673; c. 16, s. 12, v. 2, p. 796.											
Art. 49; Stats., c. 54, s. 2, v. 12, p. 316.											
Art. 50	Art. 22		Art. 3 of Sec. VI.			P. 184	Art. 3 of Sec. VI.				
Art. 51; Stats., c. 183, v. 4, p. 418.	Art. 23		Art. 4 of Sec. VI.	Art. 9			Art. 4 of Sec. VI.	Art. 12			
Art. 52	Art. 2		Art. 2 of Sec. I.	Art. 2			Art. 1 of Sec. I.	Art. 1	Art. 1		
Art. 53	Art. 3		Art. 3 of Sec. I.	Art. 3	Of duties to God, art. 2.		Art. 2 of Sec. I.	Art. 3	Art. 3		
Art. 54	Art. 32		Art. 1 of Sec. IX.	Art. 12			Art. 5 of Sec. IX.	Art. 32		Art. 20 of Sec. III.	
Art. 55	Art. 54		Art. 16 of Sec. XIII.		Art. 4 of duty in marching & art. 4 of duties in action.		Art. 16 of Sec. XIV.	Art. 28	Art. 21	Art. 20 of Sec. III.	Art. 89.
Art. 56	Art. 51		Art. 11 of Sec. XIII.	Art. 24	Art. 7 of duties in camp & garrison.		Art. 11 of Sec. XIV.		Art. 33	Art. 11 of Sec. IV.	Art. 91.
Art. 57; Stats. at L., c. 3, s. 5, v. 12, p. 257; c. 32, v. 12, p. 284; c. 25, s. 5, v. 12, p. 340.	Art. 55		Art. 17 of Sec. XIII.		Of duties to the King & State, art. 6.		Art. 17 of Sec. XIV.		Art. 12		
Art. 58; Stats. at Large, c. 3, s. 5, v. 12, p. 257; c. 32, v. 12, p. 284; c. 75, s. 30, v. 12, p. 736; c. 144, v. 18, p. 479.									Arts. 33 & 17 & 18.		Arts. 85 & 87 & 92.
Art. 59; Stats. at L., c. 75, s. 30, v. 12, p. 736.	Art. 33		Art. 1 of Sec. X.		Art. 8 of administration of justice.	P. 213	Art. 1 of Sec. XI.	Art. 16			
Art. 60; Stats. at Large, c. 67, s. 1, v. 12, p. 696.											
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Art. 62	Art. 99		Art. 50 of Sec. XVIII.	Art. 50	Art. 9 of administration of justice.		Art. 3 of Sec. XX.		Art. 64		

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Art. 63	Arts. 60 & 96.		Art. 23 of Sec. XIII & art. 1 of Sec. XVI.	Arts. 32 & 48			Art. 23 of Sec. XIV.				
Art. 64; Stats. at L., c. 25, s. 3, v. 12, pp. 281, 284; c. 67, s. 1, v. 12, p. 696.	Art. 97						Art. 1 of Sec. XIX.				
Art. 65	Art. 77	Art. 14	Arts. 15 & 20 of Sec. XIV.	Arts. 41 & 46			Arts. 17 & 22 of Sec. XV.				
Art. 66	Art. 78	Art. 15	Art. 15 of Sec. XIV.	Art. 41			Art. 17 of Sec. XV.				
Art. 67	Art. 80	Art. 17	Art. 17 of Sec. XIV.	Art. 43	Art. 2 of administration of justice.		Art. 19 of Sec. XV.		Art. 60	Art. 11 of Sec. VI.	
Art. 68	Art. 82	Art. 19	Art. 19 of Sec. XIV.	Art. 45			Art. 21 of Sec. XV.		Art. 61		
Art. 69	Art. 81	Art. 18	Art. 18 of Sec. XIV.	Art. 44	Art. 2 of administration of justice.		Art. 20 of Sec. XV.		Art. 60	Art. 11 of Sec. VI.	
Art. 70	Art. 79	Art. 16	Art. 16 of Sec. XIV.	Art. 42			Art. 18 of Sec. XV.				
Art. 71; Stats., c. 200, s. 11, v. 12, p. 595.											
Art. 72; Stats., c. 179, ss. 1, 2, v. 4, p. 417.	Art. 65					P. 185					
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Art. 74	Art. 69										
Art. 75	Art. 64	Art. 1	Art. 1 of Sec. XIV.	Art. 33		P. 185	Art. 1 of Sec. XV.				Art. 140 & 141.
Art. 76	Art. 86	Art. 23									
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Art. 78; Stats., c. 132, s. 2, v. 4, p. 713.	Art. 68					P. 222					
Art. 79	Art. 75	Art. 11					Art. 9 of Sec. XV.				
Art. 80; Stats., c. 201, s. 7, v. 12, p. 598.											
Art. 81; Stats., c. 201, s. 7, v. 12, p. 598.	Art. 66	Art. 3	Arts. 10 & 11 of Sec. XIV.	Arts. 37 & 38			Art. 12 of Sec. XV.		Art. 47		
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Art. 83; Stats., c. 201, s. 7, v. 12, p. 598.	Arts. 66 & 67.	Art. 4									
Art. 84	Art. 69	Art. 6	Art. 3 of Sec. XIV.	Art. 53		P. 186	Art. 6 of Sec. XV.		Art. 48		Art. 144.
Art. 85	Art. 69		Art. 3 of Sec. XIV.			P. 186	Art. 6 of Sec. XV.				
Art. 86	Art. 76	Art. 12	Art. 14 of Sec. XIV.	Art. 40	Art. 6 of administration of justice.		Art. 16 of Sec. XV.		Arts. 62 & 54.	Art. 12 of Sec. VI.	Art. 34.
Art. 87	Art. 72	Art. 7	Art. 4 of Sec. XIV.	Art. 35			Art. 7 of Sec. XV.		Art. 48		
Art. 88	Art. 71										
Art. 89	Art. 70										
Art. 90	Art. 69	Art. 6									
Art. 91; Stats., c. 75, s. 27, v. 12, p. 736.	Art. 74	Art. 10									
Art. 92	Art. 73	Arts. 8 & 9.	Arts. 5 & 6 of Sec. XIV.	Art. 54		P. 185	Art. 8 of Sec. XV.				
Art. 93; Stats., c. 75, s. 29, v. 12, p. 736.											
Art. 94	Art. 75	Art. 11	Art. 7 of Sec. XIV.	Art. 36		P. 187	Art. 9 of Sec. XV.				
Art. 95	Art. 72	Art. 7	Art. 4 of Sec. XIV.	Art. 35			Art. 7 of Sec. XV.				
Art. 96	Art. 87	Arts. 8 & 24	Art. 5 of Sec. XIV & art. 3 of Sec. XVIII.	Art. 51		P. 187	Art. 8 of Sec. XV.				
Art. 97; Stats., c. 190, ss. 1 & 4, v. 12, p. 589.											
Art. 98; Stats., c. 54, s. 3, v. 12, p. 317; c. 316, s. 2, v. 17, p. 261.											
Art. 99; Stats., c. 176, s. 5, v. 14, p. 92.	Art. 11	Art. 13	Art. 13 of Sec. XIV.				Art. 15 of Sec. XV.		Art. 38		
Art. 100	Art. 85	Art. 22	Art. 22 of Sec. XIV.	Art. 4 of add'l arts. of 1775.							
Art. 101	Art. 84	Art. 21									
Art. 102	Art. 87					P. 187					
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Art. 104	Art. 65	Art. 2	Art. 8 of Sec. XIV.				Art. 10 of Sec. XV.				
Art. 105; Stats., c. 201, s. 5, v. 12, p. 598; c. 75, s. 21, v. 12, p. 735; c. 215, s. 1, v. 13, p. 356.	Art. 65										
Art. 106	Art. 65						Art. 15 of Sec. XV.				
Art. 107, Stats., c. 3, v. 12, p. 330.											

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American Articles of War of 1874.	American Articles of War of 1806.	American Articles of War of 1786.	American Articles of War of 1776.	American Articles of War of 1775.	Charles I by 1640, Earl of North.	British mutiny act of 1765.	British Articles of War of 1765.	British Articles, 1718.	Articles of James II, 1686.	Articles of Charles I, 1639.	Articles of Gustavus Adolphus, 1621.
Art. 108	Art. 65										
Art. 109	Art. 65										
Art. 110; Stats., c. 201, s. 7, v. 12, p. 598.											
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Art. 114	Art. 90	Art. 24	Art. 3 of Sec. XVIII.			P. 187					
Art. 115	Arts. 91 & 92.	Arts. 25 & 26.									
Art. 116	Art. 91	Art. 25									
Art. 117	Art. 93	Art. 27									
Art. 118; Stats., c. 75, s. 27, v. 12, p. 736; c. 79, s. 25, v. 12, p. 754.	Arts. 91 & 93.	Arts. 25 & 27.									
Art. 119	Art. 91	Art. 25									
Art. 120	Art. 92	Art. 26									
Art. 121	Art. 92	Art. 26									
Art. 122	Art. 62		Art. 25 of Sec. XIII.				Art. 25 of Sec. XIV.				
Art. 123; Stats., c. 159, s. 2, v. 14, p. 435.											
Art. 124; Stats., c. 159, s. 2, v. 14, p. 435.	Art. 98		Art. 2 of Sec. XVII.				Art. 2 of Sec. XIX.				
Art. 125	Art. 94		Art. 1 of Sec. XV.	Art. 68			Art. 1 of Sec. XVII.		Art. 59		
Art. 126	Art. 95		Art. 2 of Sec. XV.	Art. 69			Art. 2 of Sec. XVII.		Art. 59		
Art. 127	Art. 95						Art. 2 of Sec. XVII.		Art. 59		

Art. 128	Art. 101		Art. 1 of Sec. XVIII.		Concluding part of the soldier's oath.		Art. 1 of Sec. XX.	Art. 46			Art. 167.
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