REVISION OF THE ARTICLES OF WAR

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON MILITARY AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-FOURTH CONGRESS

FIRST SESSION

ON

AN ACT TO AMEND SECTION 1342 AND CHAPTER 6, TITLE XIV, OF THE REVISED STATUTES OF THE UNITED STATES, AND FOR OTHER PURPOSES

JUNE 29 AND 30, 1916

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916.

A3 26

REVISION OF THE ARTICLES OF WAR.

SUBCOMMITTEE OF COMMITTEE ON MILITARY AFFAIRS,
HOUSE OF REPRESENTATIVES,
Thursday, June 29, 1916.

The subcommittee met at 10 o'clock a. m., Hon. William Gordon (chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL.

Gen. CROWDER. Mr. Chairman, I am instructed by the Secretary of War to say that he had a call to the White House at 10 o'clock this morning, and that his arrival here will be delayed in consequence.

Mr. GORDON. Gen. Crowder, if you desire to make a statement now, you may proceed.

Gen. CROWDER. I observe, Mr. Chairman, in the confidential committee print you sent me evidences that the subcommittee has already made a study of the Senate bill and indicated certain amendments.

Mr. GORDON. That is not quite the fact, Gen. Crowder. We have invited suggestions from all competent authorities, including yourself, upon the question of the revision of these Articles of War, gecause of the extreme importance of. the matter. The confidential print, of which I sent you and the Secretary of War a copy, contains merely suggestions that have been made to the Subcommittee, upon which we have taken no action and formed no opinion.

Gen. CROWDER. I so assumed, but I thought that perhaps it suggested a procedure this morning.

Mr. GORDON. It does.

Gen. CROWDER. And that we would take them up in their order and go over these suggestions.

Mr. GORDON. We would be very glad to hear you on the changes suggested in that confidential print.

Gen. CROWDER. I will commence, then, by inviting attention to the modified form of section 1342, first page of the confidential committee print, and note in passing the insertion of some new language "except as otherwise prescribed by law," and the omission of certain language. The significance of the matter specially inserted and that which has been stricken out will more clearly appear when we come to examine article 2, subsection (a). Turning to that article and that subsection, we find again some stricken language and some new language inserted. The change suggests that the article has received rather careful study, and I want myself to make inquiry first to see if I thoroughly understand the meaning to be attached to the new

language which has been inserted. Before stating my question I will read the specially included matter:

The following persons and no others are subject to these articles, etc.

All officers and soldiers in the active military service of the United States, or in the Regular Army Reserve, including volunteers from the dates of their muster or acceptance into said service, and all other persons lawfully called, drafted, or ordered into, or to duty in, said service, from the date of notice of such call, draft, or order.

Am I right in assuming that it was the intention of the committe—

Mr. CALDWELL (interposing). Do not say "committee" there, General.

Gen. CROWDER. Is it intended by this insertion to relieve retired officers of the Army and retired enlisted men from subjection to the Articles of War when not employed on active duty? That certainly is the effect here of the language. It applies only to officers and soldiers in the active military service. To-day retired officers and enlisted men are subject to the Articles of War at all times.

Mr. GORDON. Under what provision of law are they made so subject?

Gen. CROWDER. They are included in the composition of the Army of the United States in the national defense bill passed on June 3, 1916, just as they were so included in the law of 1901 by the provision that the Regular Army of the United States shall consist of—and then passing down—"the officers and enlisted men on the retired list." Now, the Regular Army being subject to the Articles of War, and officers and enlisted men on the retired list being a part of that Army, they are clearly subject to the Articles of War.

Mr. GORDON. Does that include men other than those in the reserve? You are not confusing the retired list with the reserve list?

Gen. CROWDER. No; not at all.

Mr. GORDON. Is it your contention that all persons who have been in the Army and retired are subject to the Articles of War?

Gen. CROWDER. Yes; and always have been.

Mr. GORDON. But the Constitution of the United States provides that all persons are entitled to trial by jury except those in the land and naval forces of the United States.

Gen. CROWDER. And Congress has declared that officers on the retired list and enlisted men on the retired list are a part of the Army of the United States and therefore a part of the land forces.

Mr. CRAGO. Of course, there is a distinction between being on the retired list and having served in the Army. There are hundreds of thousands of people wo have served in the Army who are not on the retired list, and every man on the retired list gets some form of pay.

Gen. CROWDER. Yes.

Mr. CALDWELL. And if they do things they should not do, they ought to be court-martialed and put out.

Gen. CROWDER. We are trying retired officers by court-martial all the time,

Mr. GORDON. You are?

Gen. CROWDER. Yes; and have been for years.

Mr. GORDON. Of course, that is a matter which the committee will carefully consider, and we want to hear all the suggestions you have to make on the subject.

Mr. CALDWELL. In your opinion, would it cure the situation to add at the end of the italicized words on page 3 the words "and all retired officers and retired enlisted men"?

Gen. CROWDER. That would cure it that far, yes; but I have other observations to submit, and I doubt the, desirability of settling upon any phraseology until we finish our consideration of all the language.

Mr. GORDON. I wish you would be kind enough to explain the apparent conflict between this state of facts and your description of the status of retired Army officers. Now, it is a fact that retired Army officers are not subject to military duty unless they reenlist, is it not?

Gen. CROWDER. It is the effect of retirement only to withdraw an officer from command and from the line of promotion. In all other respects his relations to the military service contine.

Mr. GORDON. How long has that been the law?

Gen. CROWDER. Since we have had a retired list; that is, since 1861. Then we found in our Regular Army many officers of advanced years. We had to have some eliminations in order to make the Regular Army efficient in the field, and Congress hastily passed the first retirement law that the United States Army ever had. Since that date this relation of retired officers to the service has existed and this relation was created by the retirement act. Its only effect, as I say, is to withdraw the retired officer from command and from the line of promotion and, of course, to reduce his pay.

Mr. GORDON. The reason for my recent inquiry was this, before the full Committee on Military Affairs the question of the status of retired Army officers was brought up in connection with the employment by a number of manufacturers of arms and munitions of war who had employed retired Army officers, and the question was raised in our committee as to whether or not retired Army officers were at liberty to engage in such employment, and whether or not there was any power upon the part of the President or of Congress to prevent such employment, and it was stated after very full discussion, and it seemed to have been the consensus of opinion among those on the committee who were best qualified to pass upon the question, that retired Army officers were at full liberty to engage in any employment they saw fit, and that their further employment in the Army in any capacity was upon the same basis as that of any other citizen, and that they were under no obligations to the Government of the United States after their retirement according to law, but could reenlist if they saw fit to do so.

Mr. CRAGO. You mean volunteer for active service. We were told that, General, by officers of the department.

Gen. CROWDER. It is one of those complex questions of status which arises to vex you when you are considering the employment of anybody on the retired list, either officer or soldier. You will readily see that when the original statute creating the retired list provided that an officer retired should be withdrawn from command and from the line of promotion, it took him out of the orders of the President of the United States as Commander in Chief. To get him back, Congress has passed a series of enabling statutes. The first statute of that kind, as I now remember, was the statute which permitted a retired officer to be detailed to duty as governor of the Soldiers' Home. Then followed a series of statutes relating to the employment of retired

officers upon various duties, particularly upon college duty, with which statutes you are all more or less familiar. From time to time Congress enacted further statutes which permitted the President to employ retired officers on court-martial and board duty, as military attachés, on recruiting duty, and general staff duty not involving service with troops. In all such cases the consent of the officer was required. In time of war the President is authorized to order them without their consent to any kind of duty not involving command. Such was the law until in the act passed on June 3,1916, you removed the restriction as to command and said that the President might order retired officers to any kind of duty in time of war without their consent. All the statutes, except the one relating to employment of retired officers in time of war, provide that they may be ordered to duty only with their consent.

Mr. CRAGO. That is what we were told right along.

Gen. CROWDER. That provision respecting consent was not, however, in statutes which regulated their employment in time of war. In time of peace they can be employed only with their consent. Then there are other statutes which give them eligibility for appointment in the Volunteer forces and in the National Guard, so that taking all the statutes together there is quite a large use that can be made of these men by the President with their consent in time of peace, and quite a large use that can be made of them without their consent in time of war.

Mr. GORDON. Then would you say that statutes rendering them available for service with their consent would render them amenable to the Articles of War?

Gen. CROWDER. This language you have employed here, "and all other persons lawfully called, drafted, or ordered into or to duty in said service from the date of notice of such call, draft, or order," would subject the retired officer ordered with or without his consent to active duty to the Articles of War, but until that order was issued, under the law as you have drawn it, he would not be so subject.

Mr. GORDON. Then the question really before the subcommittee for its determination is whether or not they will by these Articles of War make retired officers of the Army subject to daft by the President?

Gen. CROWDER. No; whether they shall be subject to the Articles of War in time of peace when they are not under any kind of a call.

Mr. GORDON. That perhaps states it better than I stated it.

Mr. CALDWELL. Let me ask you a question: You say that for some years they have been subject to trial by courts-martial. Will you give us some idea of the offenses for which they have been tried?

Gen. CROWDER. I think in most instances the charges have been under the sixty-first article of war, which punishes for conduct unbecoming an officer and a gentleman. The most frequent example of trials of that kind is for failure to pay debts; that is, utilizing the credit which their place in the public service gives them to contract debts and then neglect to pay them. We have had more cases of that kind, although there have been some for improper conduct.

Mr. CALDWELL, Your experience, then, has been that these cases of men who are court-martialed while they are on the retired list and not engaged in active duty have been practically confined to cases of debt involving more or less a certain amount of immorality?

Gen. CROWDER. Yes; practically.

Mr. CALDWELL. Have there been any cases in which men have been convicted of crime, or does the conviction of crime cut him off from his pay without a court-martial?

Gen. CROWDER. I am not able at this moment to cite any convictions for crimes. The effect of a trial upon on a man's pay depends upon the sentence adjudged, which is very likely to be a forfeiture of so much of his pay for a period of so many months.

Mr. CALDWELL. That is in a court-martial, but in a civil court they can not do that.

Gen. CROWDER. No; but we can.

Mr. GORDON. If he was convicted of a felony which forfeited his citizenship, would not that terminate his right to draw retired pay?

Gen. CROWDER. We have not any such sentence as forfeiture of citizenship in time of peace. You abolished that feature in 1912, and it was then provided for only for the offense of desertion.

Mr. GORDON. I mean in the civil courts.

Gen. CROWDER. What effect it would have upon his citizenship rights would depend upon the recognition that the State statutes give to conviction by military court of a felony,

Mr. CALDWELL. If it destroyed his citizenship would that take him off the pay roll?

Gen. CROWDER. It is unfortunately the case that citizenship is not a requirement for holding a commission in the United States Army, except as you have made it so in a few minor cases in this bill.

Mr. GORDON. Mr. Hay stated on the floor of the House the other day, in answer to an interrogatory by myself or by some other Member, that men in the United States Army to-day had to be citizens or must have applied for citizenship.

Mr. CALDWELL. That is under the new bill. You will find it in that hill.

Gen. CROWDER. I wish I could have my attention called to that provision.

Lieut. DOWELL. Section 57.

Gen. CROWDER. Section 57 provides that the militia of the United States shall consist of the able-bodied male citizens, etc. I had an examination made of the national defense act and found the requirement of citizenship in the case of appointments to the Medical Corp, to the corps of veterinarians, and in the case of enlisted men who are appointed as second lieutenants in the Army, but I found no such requirement in the case of civilian candidates for appointment as second lieutenants nor in case of appointments of cadets at West Point.

Mr. GORDON. We pass special acts permitting persons outside of the territory of the United States—or rather persons residents of our insular possessions—to be admitted to West Point, and it has been held that we must always have a special act of Congress to permit that.

Gen. CROWDER. That is for people outside; but you will recall that the law you passed quite recently with regard to appointments to the Military Academy requires that the appointee shall be an actual resident of the State, Territory, or district from which appointed, but does not say anything about being a citizen.

Mr. GORDON. That is true.

Gen. CROWDER. I feel quite certain I am correct in stating that citizenship is not a requirement except in a few cases, like the Med-

ical Corps, civilian appointments to the Engineer Corps, enlisted men appointed second lieutenants in the Army, veterinarians, and pay clerks. My attention was called to this in 1894, when I was serving at Omaha. Congress passed a resolution in that year calling upon the War Department to report the percentage of officers and enlisted men of the Army who were not citizens. The report showed about four-tenths of 1 percent of the officers of the United States Army were not citizens. However, the statute law on the subject underwent no material change.

Mr. CALDWELL. Do you not think it would be well to keep the law that way, because if we got into a war we would need all the foreign help we could get?

Gen. CROWDER. That is one argument in favor of the law as it now stands; but just at present there is so much talk about hyphenated Americans that I do not feel like taking that position.

Mr. CALDWELL. Those of us who live in a hyphenated-American section do not hear that at all.

Mr. GORDON. As you say, there is a great deal to be said on both sides of that question. I believe it is true as a matter of history that in every war in which we have engaged there have been a greater or less proportion of the armed forces of the United States who have not been citizens. Some of the most distinguished men in the Revolutionary Army, like Lafayette, were not citizens of the United States, and the same thing is true of the Civil War. To-day our pension rolls contain the names of a great many men who were and still are aliens.

Gen. CROWDER. Yes; that is true.

Now, gentlemen, proceeding further with the consideration of this language, it refers in express terms to the officers and soldiers in the active military service of the United States: to the Regular Army Reserve, and to volunteers. The only reference to the National Guard or the Militia is in the phrase "all other persons lawfully called drafted, or ordered." Heretofore, because of the prominence the National Guard and Militia have assumed as part of our first line, they have been the subject of express mention. Here they are left to be included in very general phraseology "all other persons." I do not doubt the sufficiency of that language, but it is a departure in our legal terminology. I have no particular criticism to make of it, but I had expressly mentioned these forces in the language which you have stricken. If you decide as a subcommittee to recommend the inclusion of retired officers and retired enlisted men and further desire that the National Guard to be given the prominence which comes from express mention, as in case of volunteers, I will undertake to submit to you a revision of this language which would carry out your desire. I do not think we can very well agree upon language right now that we will be certain of. I am not prepared to suggest anything because I do not know what the subcommittee's desire is.

Mr. GORDON. I will say to you, General, that the subcommittee itself has come to no conclusion. We are approaching this question with an open mind, and in the course of your testimony if you come to a revision which you deem of essential importance, we would be very glad to have you submit as a part of your testimony and place in the record your own suggestions as to the language which ought to be used to carry out the ideas which you entertain upon the subject, and the committee will give it very full consideration.

Gen. CROWDER. Then I will insert in my remarks in this connection the revision I have to suggest.

Mr. GORDON. That will be entirely satisfactory.

Gen. CROWDER. With further reference to the language of subparagraph (a), article 2, I would like to invite the attention of the committee to the concluding clause, "from the date of notice of such call, draft, or order." I have said in my revision "from date of notice of call." In section 101 of the national defense act passed on June 3 it is provided that when the National Guard is called into the service as such they shall be subject to the Articles of War "from the time they are required by the terms of the call to respond thereto," and section 111 of said act makes the subjection of the National Guard drafted into the service take effect from the date of their draft

The language you have inserted in subparagraph (a) of article 2, therefore, is not in harmony with the language you used in the recent act of June 3 of this year. You here say, "from the date of notice of such call, draft, or order,'' and this language will have a repealing effect on these two sections if the article is enacted in that form.

Mr. GORDON. Do you not distinguish between drafted into the service and called into the service?

Gen. CROWDER. Of course there is a very radical difference in the consequences which follow, a call bringing them into the service of the United States for the three constitutional purposes, and the draft bringing them into the service of the United States for all purposes.

Mr. GORDON. Exactly.

Gen. CROWDER. Now we are discussing here the single question of when subjection to the Articles of War begins.

Mr. GORDON. Is it your judgment they ought to be subjected to the Articles of War upon exactly the same terms and conditions when drafted into the Service as when called into the service under the Constitution?

Gen. CROWDER. Unquestionably, for the reason that the use that can be made of them under a call may be quite as serious as the use that will be made of them under a draft.

Mr. GORDON. Under a draft they can be used for all purposes and under a call they can be used only for purposes specified in the constitution.

Gen. CROWDER. Yes; but those purposes might be the purposes of a civil war like the war of 1861–1865, quite as serious as any the Army might be called upon to serve in a foreign war. I think the subjection should be equally complete in both cases. But we are here concerned with only the date when that subjection begins. The law at present provides for the same kind of subjection when they are in the service under call as when they are in the service under draft, but how shall we fix the date? You have provided in your bill it shall be from the date of notice of such call, draft, or order.

Mr. GORDON. Permit me to correct you right there. I want you to understand that this tentative draft with these suggestions for amendment has not been considered by the committee. They are suggestions for the consideration of the committee, and I want you to understand that the mind of the committee is open and that is why we are hearing your testimony. This confidential print from which you are testifying was not prepared by this committee and has not been approved by the committee.

Gen. CROWDER. I so understand, and I, perhaps, used inapt language. I only meant to contrast the language I have suggested in this revision and which appears, also, in the confidential committee print with language which Congress has so recently used in the act of June 3, 1916. Now, I was about to say that I prefer the language that is used in this confidential print, which is substantially the language which is used in the Senate bill to the language used in the recent enactment of June 3, I did not feel like passing this without calling your attention to the fact that you are modifying an act soo recently passed.

Mr. CRAGO. By striking out the words at the end of that paragraph "draft or order" and inserting a semicolon where there is a comma, would not that fix the whole thing?

Gen. CROWDER. So that the clause would read how?

Mr. CRAGO. "From the date of notice of such call."

Gen. CROWDER. That would leave the other law to govern in the case of draft, and it would have the further defect of not giving any significance whatever to the word "order." Now, I supposed you had written in the word "order" in order to provide for the cases of retired officers and enlisted men who might be summoned to duty. I connect that up with your exclusion of retired officers and enlisted men from the jurisdiction of courts-martial in time of peace when they are not performing any duty. That is the reason I said a while ago that it would not be advisable to redraft this section until we have the judgment of the committee upon whether retired officers are to continue, as at present, subject to the jurisdiction of courts-martial at all times, or whether they are to be so subject only in time of war or when called into active duty.

Now there is another application to be made of this language of the confidential print. There are provided in the recently enacted national defense bill an officers' reserve corps (sec. 37) and also an enlisted reserve corps (sec. 55), and it is provided in respect of the former that it shall be subject to the laws and regulations governing the Regular Army when ordered to active service, and that the latter shall be so subject when ordered to active service or for purpose of instruction or training. The bill provides that both may be called out also for periods of training. I think that both should be subject to the Artices of War when they are undergoing training as well as when they are summoned for actual service in the field in time of war, actual or threatened, but that is not the provision of law as you have drawn it, unless you mean to say here that when they are "ordered into, or to duty in, said service," you mean that that language shall include the officers' reserve corps and the enlisted reserve corps when they are ordered out for purposes of training. If that is your intention I should like to redraft this language so as to make that meaning absolutely certain. I conceive it to be a very important point. It will probably not be six weeks until an officers' reserve corps will in existence. It will not be much longer than that until we shall have quite a large enlisted reserve corps. They should certainly be under Army control during both training and service. It is not so provided in express language. In the act of June 3 if we are to claim that jurisdiction over them we have got to do it under the language you have here employed, "ordered into, or to duty in, said service," said service referring back to active military service, a term which is

not defined in these articles. Jurisdictional matters are so important that I think you should use express language. I will insert here, with permission of the subcommittee, a comparative statement showing the provision of the Senate revision of the Articles of War and the provisions of the subcommittee's print and the provisions of the national defense act respecting the date when subjective to the Articles of War begins:

Comparison of the comparative print, committee print, and the national defense bill with respect to their provisions as to the time at which the members of the National Guard, when called or drafted into the service of the United States, become subject to the Articles of War.

Senate bill.	Committee print.	National defense bill.
ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: (a) All officers and soldiers belonging to the armies of the United States, including Regulars, Army reserve, militia called into the service of the United States FROM THE DATE OF NOTICE OF SUCH CALL, and Volunteers. (b) * * * .	ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons *and no others* are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: (a) *All officers and soldiers in the active military service of the United States, or in the Regular Army Reserve including Volunteers* FROM THE DATES OF THEIR MUSTER OR ACCEPTANCE INTO SAID SERVICE, *and all other persons lawfully called, drafted or ordered into, or to duty in, said service,* FROM THE DATE OF NOTICE OF SUCH CALL, DRAFT, OR ORDER.	SEC. 101. NATIONAL GUARD, WHEN SUBJECT TO LAWS GOVERNING THE REGULAR ARMY.—The National Guard when called as such into the service of the United States shall, FROM THE TIME THEY ARE REQUIRED BY THE TERMS OF THE CALL TO RESPOND THERETO, be subject to the laws and regulations governing the Regular Army so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service either on the active or on the retired list is not contemplated by existing law. SEC. 111. NATIONAL GUARD WHEN DRAFTED INTO FEDERAL SERVICE.—When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall FROM THE DATE OF THEIR DRAFT, stand discharged from the militia and shall FROM SAID DATE, be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, etc., etc. SEC. 38. * * * Any officer who while holding a commission m the officers' reserve corps shall be ordered to active service by the Secretary of War shall, FROM THE TIME HE SHALL BE REQUIRED BY THE TERMS OF HIS ORDER TO OBEY THE SAME, be subject to the laws and regulations for the government of the Army of the United States in so far as they are applicable to officers whose permanent retention in the military service is not contemplated. SEC. 55. * * * Any enlisted man of the enlisted reserve corps ordered to active service or for purposes of instruction or training shall, FROM THE TIME HE IS REQUIRED BY THE TERMS OF THE ORDER TO OBEY THE SAME, be subject to the laws and regulations for the government of the Army of the United States.

Mr. GORDON. I agree with you on that, General. I myself do not believe there is any difference between service and training, and I do not think this act should distinguish between the two. I think the jurisdiction of courts-martial should be coextensive in time of service and in time of training. That is my individual judgment, and any suggestion you may desire to submit to make the wording of that clear and plain I would like to have you submit.

Gen. CROWDER. Then I think I have sufficiently indicated my views to insert in this connection in my testimony a draft which will be expressive of that general idea.

(Draft of substitute provision prepared by the Judge Advocate General for subparagraph (a) of art. 2:)

(a) All officers and soldiers belonging to the Army of the United States, including Regulars, Regular Army Reserve, officers' reserve corps, and the enlisted reserve corps when lawfully ordered to duty for training or service from the date of notice of the order, volunteers from the date of their muster or acceptance into the service, and the National Guard and all other persons lawfully called, drafted, or ordered into, or to duty in, the service of the United States from the date of notice of such call, draft, or order.

Passing now to subparagraph (f), section 2, I invite attention to certain stricken matter. The language stricken was inserted in the bill originally because it was a mere recognition of existing law. All the language you have stricken here is already on the statute books. My whole purpose in repeating this legislation here is that the new articles may inform the military service of the jurisdiction of courts-martial as to persons, so that it will not be necessary to look through the Statutes at Large and the Revised Statutes to ascertain what persons are subject to military law.

There has always been some question as to the constitutionality of that stricken language; that is, of the existing law. Attorney General Miller, under Harrison's administration, held that the statute was constitutional. The inmates of the National Home for Disabled Volunteer Soldiers are men who from the date of the Civil War have ceased to have any connection with the Military Establishment. They are as much civilians as any class of our population, and yet Congress has said that the moment they are admitted into one of these homes they shall become subject to the Articles of War. As I say, the constitutionality of these statutes has been questioned. Mr. Miller, in an opinion which did not discuss the question, treats of the legislation as constitutional.

Mr. GORDON. General, will it be convenient for you to insert in your testimony a transcript of that opinion of Attorney General Miller?

Gen. CROWER. Attorney General Miller said, in an opinion rendered January 18, 1893:

Congress has manifested a clear intention that the institution (Soldiers' Home) should be governed by the Rules and Articles of War. (20 Op. Atty. Gen., 515.)

The same constitutional objection may be urged against other language stricken here, "all persons admitted to treatment in the Army and the Navy General Hospital at Hot Springs, Arkansas, and in the hospital at Fort Bayard, New Mexico, while patients in said hospitals." Of course, certain military men enter there who are subject to the Articles of War, but when the inmates have not that military character, it seems to me a pretty bold stretch of authority to undertake to subject them to courts-martial. You have stricken all this out,

and I have no objection to its being stricken out, because it is authority we never use.

I come now to subparagraph (g) of the same article. You have amended it so as to read "all persons hereby or hereafter declared by law to be subject to the Articles of War or to trial by courts-martial." Hereby or hereafter does not include heretofore. I am not certain but that that has a repealing effect upon certain language you have used in the recently enacted national defense act. Unless the officers' reserve corps are considered to be officers in active military service and the enlisted reserve are considered to be soldiers in active military service, they will not be included as subject to the articles. They are included in the national defense act, but "hereby or hereafter" does not include certain classes you have subjected to the Articles of War in the national defense act. Why would it not be well to leave the language as it was, "now or hereafter declared to be"?

Mr. CALDWELL. Do you not think that the scrivener who proposed this amendment intended that should apply only to the people who have been defined in this bill? For instance, there is a whole list of people who are to be governed by the Articles of War, and he did not intend to leave out anybody who was sought to be included. Now if he has left out anybody, why not put in a clause that will cover that?

Gen. CROWDER. I am always afraid of language which undertakes to be a complete enumeration.

Mr. GORDON. Would not the "all persons hereby or hereafter declared by law to be subject to the Articles of War" include everybody who was made subject to the Articles of War by the national defense act of June 3, last?

Gen. CROWDER. No: because those made so subject by the national defense act would fall into the class of those heretofore made subject.

Mr. CALDWELL. Why not strike out the words "hereby or hereafter," so that it will read "all persons declared by law"?

Gen. CROWDER. That would be absolutely satisfactory.

STATEMENT OF HON. NEWTON D. BAKER, SECRETARY OF WAR.

Secretary BAKER. I ask especial attention from the committee to the suggestions of the Judge Advocate General on the subject of the confinement of persons in the disciplinary barracks and the penitentiaries for military offenses. I do not know anything finer in the history of the administration of the War Department than the innovation made some years ago which separated felons from men who had simply breached minor disciplinary regulations and required retention under disciplinary restraint to restore them to their efficiency as military men. The bill, as it has been suggested to be amended, would have the effect of again mixing these first offenders and minor infractors of mere military discipline with serious and perhaps degenerated felons and would bring an end to the segregation, which, I think, would be most unfortunate for both the restoration of the boys and the discipline of the institution. I feel sure the committee did not intend to bring that about; and if they will hear the Judge Advocate General on that subject I am confident they will not want that result to follow.

Mr. GORDON. We will give that matter very careful consideration, and I want to correct an apparent misapprehension. This confidential point includes merely suggestions.

Secretary BAKER. I so understand.

Mr. GORDON. And the committee is not committed to any provision in it.

Secretary BAKER. I so understood. I thank you very much.

Mr. CALDWELL. I suggested would it not be better to have it read, "all persons declared by law to be subject to the Articles of War," etc.

Gen. CROWDER. That would seem to me to eliminate every doubt and uncertainty in regard to the jurisdiction over persons and would also effectuate the purpose to have congressional authority for subjection to these articles.

Mr. GORDON. Why would not this suggestion be preferable to the one just made: "All persons legally subject to the Articles of War"?

Mr. CALDWELL. That is the same thing as "declared by law to be."

Gen. CROWDER. That would be satisfactory to me.

Mr. GORDON. It seems to me better because you might declare a man subject who was not in fact or in law subject.

Gen. CROWDER. Passing now to article 4, that article undertakes to say who shall be competent to sit on courts-martial. As amended it reads, "officers of the Regular Army forces drafted or called into the service of the United States from the National Guard, etc." I suppose there is a mistake there. It should be "officers of the Regular Army, of forces drafted or called into the service of the United States from the National Guard of the volunteer army, and of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on any courts-martial for the trial of any persons who may lawfully be brought before such courts for trial."

Before we proceed to discuss the sufficiency of the phraseology I want to invite attention to the joint resolution of Congress which was accepted by the two Houses yesterday. You will recall that it provides for the combining into larger units of several State contingents. A State that has only a battalion will find that battalion associated with two other battalions from other States to constitute a regiment. A State that has only a regiment or two regiments will find them combined with a regiment or more of other States to constitute a brigade, and in similar manner units will be combined to constitute divisions. The joint resolution empowered the President to appoint the officers of these higher units. Will officers appointed in this way be covered by the prhase, "officers of forces drafted or called into the service of the United States"? There might be some question whether he was an officer of the drafted forces having come in voluntarily, at his own will, to take one of these higher places, staff or line, that comes into existence because of the combination of drafted State contingents into superior units. I am afraid of the limiting effect of the language you have employed there.

More than that, you are aware that the call which was issued on June 18 of this year embraced both the Organized Militia and the National Guard. That call was couched in that language with the very deliberate purpose of meeting a situation which it was thought might possibly exist when the call reached the troops which were to be subjected to it. They were in the process of transforming them-

selves from Organized Militia under the Dick bill to National Guard provided for in the national defense act. The purpose was to cover them in either capacity. If they had not transformed themselves, to cover them under the Dick bill, and if they had transformed themselves, to take them under the national defense law. Now, certain of them will be in there in one capacity and certain of them in another, but you provide here only for the drafted forces "from the National Guard." If you had said "forces drafted or called into the service of the United States" and had omitted the limiting language "from the National Guard," the article would be free from that objection.

Mr. CALDWELL. Did you think of this: The act of June 3 went into effect on the date it was signed by the President, and that was June 3, 1916. In that act we provide that no State shall have any other militia except the one prescribed in that act; and is it not a fact, as a matter of law, that on the enactment of this statute on June 3 the National Guard ceased to exist, as a matter of law?

Gen. CROWDER. I will answer that question by inviting your attention first to the fact that the section of the national defense act to which you refer (sec. 61) uses the word "troops" not "militia." It uses the language of the constitutional provision that no State shall maintain troops without the consent of Congress. I never knew the history of section 61. What are "troops," as the term is used in the Federal Constitution? The courts have answered. The Supreme Court of Illinois answered that the Organized Militia were not "troops" in the sense of the Federal Constitution. That was in 1879 before the militia was reorganized under the Dick bill. The Court of Claims in 1914 held that the Organized Militia under the Dick bill were not "troops" within the meaning of the land-grant act which gave the United States Government preferential rates and treatment by the land-grant railroads in the transportation of troops. I have not yet reached a conclusion as to the application to give to section 61 of the national defense act. If we accept the doctrine of the two decisions above referred to the section (61) would it seem to have no application to the Organized Militia under the Dick bill, and the States might in this view continue after June 3, as theretofore, to maintain Organized Militia, and also the National Guard. I wish you would enlighten me as to what was the intent of Congress when they employed that language.

Mr. CALDWELL. We discussed the question, and we were under the impression when we used the word "troops," we were using a word that would include everything. Of course, these particular cases were not called to our attention.

Gen. CROWDER. We are acting upon the contrary view, namely, that the Organized Militia who have not transformed themselves continues to exist, and will be reached by this call, and when reached by the call will be mustered into the service under the provisions of section 7 of the Dick bill. The recent call is being executed in this sense. The National Guard of the District of Columbia was, I understand from Col. Harvey, mustered into the service under section 7 of the Dick bill. They had not taken the new oath nos subscribed to the new contract provided in sections 70 and 73 of the national defense act of June 3, 1916. I do not know to what extent a similar procedure is being followed at other mobilization camps where these men have been assembled, but we are proceeding to take them either

as Organized Militia under the Dick bill or, where they have transformed themselves as National Guard, under the national defense act, under the theory that that section of the statute which went into effect, as you say, on June 3 does not muster out of the service the Organized Militia.

Mr. GORDON. Is it your contention that the effect of this decision of the Court of Claims to which you refer would exclude from the term "troops" either the Organized Militia of the United States or the National Guard when ordered or drafted into the service of the United States?

Gen. CROWDER. Oh, no; not after the draft has been executed.

Mr. CRAGO. That decision would not apply to this new act?

Gen. CROWDER. I have not considered that question as yet, and upon that at present I prefer not to express an opinion. The moment the draft becomes executed, or the moment the muster in is an accomplished fact, that moment they become troo s of the United States, with as clearly a defined status as "troops" as the Regular Army, and no question of that kind can arise. The land-grant railroads are compelled all over the country to give these preferential rates to all persons who have been in fact mustered into the service of the United States. The Court of Claims case came up with reference to the Organized Militia. Traveling, under invitation of the Secretary of War, to mobilization camps for the purpose of training, and there are two or three cases now pending in the Court of Claims where the railroads are claiming the higher rates because such Organized Militia were not "troops" of the United States–claiming this under this decision which the Court of Claims rendered last year.

Mr. GORDON. Will you be kind enough to put a citation of that decision of the Court of Claims in the hearing?

Gen. CROWDER. Yes, sir.

Alabama Great Southern Railroad Co. *v.* The United States. In this case, construing section 3 of the act of June 3, 1856 (11 Stat. L., 17), the effect of which was to give to the Government free transportation of "any property or troops of the United States," the court said, quoting from the syllabus:

"VII. Under the constitution and military laws of Alabama and Mississippi the active Militia or National Guard is enrolled for certain specific purposes, and while so enrolled as soldiers of the State they are not 'troops' within the meaning of section 10, article 1, of the Federal Constitution.

"VIII. The National Guard of a State may become 'troops of the United States' within the meaning of the land-grant act, but it is not the potentiality, but the actuality of being in the service contemplated by the Constitution which fixes their status as such 'troops.'

"IX. The meaning of the land-grant act is not to be restricted to the Regular Army, nor can it he extended to include the National Guard when not actually in the service of the United States." (49 C. Cls., 522.)

Dunne *v.* The People (94 Ill. Rep., 120). In this case the court, held, quoting from the syllabus:

"7. The organization of the active Militia of the State is not in violation of that clause of the Federal Constitution which withholds from the States the right to keep troops in time of peace. Such a militia is not embraced in the term 'troops,' as used in the Constitution. The State militia is simply a domestic force, as distinguished from Regular troops, and is only liable to be called into service when the exigencies of the State make it necessary."

Mr. CALDWELL. From what you say I gather this was a case where the question was whether they were troops of the United States, and the point I make is with reference to troops of a State. What is a troop? Is it not a body of men armed?

Gen. CROWDER. The courts have thus far refused to apply the term "troops" to bodies of men who are armed, and who leave their ordinary vocations only temporarily for the purpose of training or for service for short periods as the militia have done in times past, and restrict the application of that term to men who have adopted the military profession more or less as a calling. That statement is not in all respects accurate, but it is substantially correct,

Mr. CALDWELL. I know it was the intention of the committee when we put in the words "troops" to cover any person who had theretofore been spoken of as a militiaman, that is, a citizen soldier or a professional soldier.

Gen. CROWDER. I think those of you who may have read the Congressional Record at the time the Dick bill was under consideration may have noticed there a most interesting discussion of this very question, participated in by Senator Bacon of Georgia and Senator Spooner of Wisconsin. Senator Bacon took the view that it was not competent for Congress to provide for organizing a reserve of the United States Army which would only be temporarily employed as soldiers and place this reserve under the orders of the President; that they would be essentially militia of the Constitution whose officers must be appointed by the Governors of the States and that their training would likewise be under State control.

Mr. CRAGO. "Militiamen" is a broader term than "troops."

Gen. CROWDER. But I do not think that has been the legislative view. Senator Bacon was asked whether the men who left their civil pursuits to enlist in the Volunteer Army of the Spanish-American War, but always with the intent to return, were troops of the United States. He conceded then that character, inasmuch as they left for indefinite periods, saying they took on for the indefinite period of their contract the status of troops, notwithstanding their intention was to revert back to civil pursuits. Senator Bacon applied the term "troops of the United States" to that class of Volunteers.

Mr. CALDWELL. Our bill ought to be amended so as to say "troops or militia;" then it would be covered.

Gen. CROWDER. I have not had to construe that section yet, and I shall approach the task with a good deal of doubt as to the construction it should receive.

Mr. CRAGO. The general's suggestion, "forces called or drafted into the service of the United States," would obviate all necessity for that.

Gen. CROWDER. I would suggest you leave out "from the National Guard," because you can not tell in what direction a draft may reach.

Mr. CRAGO. Before I forget it, there is another feature of that section we might just as well get the view of the subcommittee on and see if you can make any suggestion about it, and that is the section which heretofore has provided that volunteers called into the service of the United States can not be tried by courts composed of officers of the Regular Army. The question is, do we want to leave it so that a volunteer soldier in the service of the United States can be tried before a court composed entirely of Regular Army officers?

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Gen. CROWDER. Are you aware that you repealed that law on April 25, 1914?

Mr. CRAGO. Yes; I know that law was repealed, and now the question is whether we want that in. We might as well thrash it out now, and then draft this section accordingly. The present law provides what?

Gen. CROWDER. The present law makes officers of all forces in the service of the United States equally eligible to sit on courts-martial. There is no discrimination. That has been the law since April 25, 1914.

Mr. CALDWELL. That is, a Regular Army officer can be tried by officers of the National Guard?

Gen. CROWDER. He always could be by a national guardsman in service, but such national guardsman could not, prior to April 25, 1914, be tried by Regular Army officers. Before you pass on this article I want to say that considering the tendency of recent legislation toward federalizing the National Guard and establishing closer relations with the regular forces, the reasons which justified the other legislation seem no longer to be before us, and I hope the existing law, which makes all officers equally eligible, will be retained, and in much the language that we have in article 4.

I would like to have the judgment of the committee upon eliminating from lines 20 and 21 the words "from the National Guard," so as to make it apply to all forces drafted or called into the service of the United States, and take out that limiting language "from the National Guard,'' for if I am right in my theory that the Organized Militia may continue to exist—

Mr. CALDWELL (interposing). In line 24 the language should be "any court-martial'' and not "courts-martial."

Gen. CROWDER. Yes. May we now leave that article, Mr. Chairman?

Mr. GORDON. If that is all you desire to submit on the subject.

Gen. CROWDER. Yes. We come next to article 11. The committee print shows stricken from article 11 language which I had inserted with this special purpose in view. I doubt if there is any class of military duty which is so inefficiently performed as the duty of a trial judge advocate. I think you will readily understand that that must be the case where the trial judge advocate is detailed from officers who have not had opportunities to study court procedure; the laws of evidence. Of neccessity our trials can not be as efficient in the manner in which they are conducted as are trials in civil courts.

Mr. GORDON. The function of a trial judge advocate is similar to that of a prosecuting attorney in a civil court, as I understand it?

Gen. CROWDER. We will start out with that general analogy. There are some exceptions which I may call attention to later or. My whole purpose in inserting that language was to be able to detail an officer who could in a sense go to school while the trial was going on and not have to learn his lesson as trial judge advocate with all the responsibility of a case on his shoulders. I wanted authority to detail an officer as judge advocate and another to assist him—some junior officer—to come in and prepare summons and papers and that sort of thing, and listen to the trial and see how his chief conducts it and become himself, by virtue of that association with the trial judge advocate, competent to discharge the duties of a trial judge advocate.

Mr. CALDWELL. No extra pay goes with this service?

Gen. CROWDER. No.

Mr. CALDWELL. And it provides no new office?

Gen. CROWDER. No.

Mr. CALDWELL. It simply gives you the right to detail another officer of the line for this kind of work?

Gen. CROWDER. I would not need authority to do that. I could do that under existing law, but he would not have any standing before the court unless the statute law gives him a standing. That is the whole purpose of it, gentlemen. If you decide to retain it the language which has been stricken from other related articles should be left in the text of the bill. There is such stricken language in article 19 which should be left in the bill, and in article 30 and article 33, and in certain others.

Mr. CRAGO. The next change is on page 9.

Gen. CROWDER. Yes; there are some important matters to consider on page 9. Article 17 on that page relates in part to counsel for the accuse. The bill as it passed the Senate provides that, "the accused shall enjoy the right to have the assistance of counsel for his defense." That language is identical with the provision of the Constitution of the United States. I thought I was on safe ground when I extended by statute law to the military accused the rights which a civilian has under the Constitution of the United States.

Mr. GORDON. It is your opinion that the Constitution in that regard is self-executing and does not require additional legislation?

Gen. CROWDER. I have never doubted that it was.

Mr. GORDON. But suppose the Congress fails to provide for it by law.

Gen. CROWDER. I do not see that any provision of law is necessary. When a man comes into court the constitutional provision immediately requires, without the aid of statute law, his counsel to be recognized by the court, and a legal trial could not proceed without such recognition.

MR. GORDON. In our civil courts that constitutional provision has been construed, at least in the States, to warrant the legislature, and I presume the legislature in every State has done so, to provide for the appointment and payment of counsel for the defense.

Gen. CROWDER. I know that there is statute law in almost all of the States which regulates the exercise of this right, and places upon the courts certain duties respecting it.

Mr. CALDWELL. Is there anything in the language as suggested here that would be objectionable? For instance, instead of saying "enjoy" does not the word ("have'' convey a better idea of what we are trying to express than the word "enjoy"?

Gen. CROWDER. I hesitate to say so, because it is an effort to improve upon the language of the Constitution of the United States. The United States Constitution says "enjoy."

Mr. CALDWELL. The English language grows like human beings, and that was written one hundred and forty and odd years ago.

Gen. CROWDER. I would be satisfied with either. I do not care about that.

Mr. CALDWELL. Then it continues: "have the assistance of."

Gen. CROWDER. Again, that is the language of the Constitution.

Mr. CALDWELL. The language suggested here conveys the same impression to your mind that the other language did, so there can not be any inherent objection except, perhaps, the question of sticking to the old established language of the Constitution.

Gen. CROWDER. Yes.

Mr. CALDWELL. The only additional suggestion made here, then, would be "of his own selection," whereas in the Constitution it is provided that the court itself may assign the counsel.

Gen. CROWDER. Yes.

Mr. CALDWELL. And you can readily see how dangerous it would be to have counsel assigned to a man who, instead of representing him, would misrepresent him.

Gen. CROWDER. I understand that, and I am in sympathy with the introduction of language which will give the accused counsel of his own selection, provided you will safeguard it in a way that will not bring about great embarassment to the service.

Mr. CALDWELL. Have you any suggestion to make?

Gen. CROWDER. Suppose a soldier being tried in the Philippine Islands applies for the assistance of an officer as counsel stationed in the United States or in Alaska. What are you going to do about it?

Mr. CRAGO. What is there to compel him to ask for an officer? Can he not bring in any demagogue he might want?

Gen. CROWDER. They have always enjoyed that right. If he wants to be represented by civilian counsel, he can be so represented.

Mr. GORDON. Would the insertion of the word "available" between the words "by" and "counsel" on line 9 meet your objection?

Gen. CROWDER. Who will be the judge of the availability?

Mr. GORDON. I apprehend the court. I take it unless counsel were willing to represent him he could not insist upon any particular counsel, and if the man he wants to represent him is beyond the seas it would be unreasonable for him to insist upon delaying the trial until the presence of that man could be obtained.

Mr. CALDWELL. He would have to make a reasonable selection. The court would read in the rule of reason.

Mr. GORDON. Would not the word "available'' meet that situation?

Mr. CALDWELL. I do not know whether it would make any difference. I think the court would naturally read in the rule of reason.

Gen. CROWDER. Suppose he should object to everybody who was available and would not select any one. In that situation your civil court simply a points. I am afraid of the language and I jave not been able to select any substitute for it. The only thing I can suggest is that you trust the military to the same extent that you trust the civil authorities in the matter. I do not believe any accused officer or soldier will say that he has ever been embarassed in getting counsel.

Mr. GORDON. Suppose after the words "of his own selection" we insert the words "if available''?

Gen. CROWDER. That would help more than any language that has been suggested yet.

Mr. GORDON. I recognize the force of your criticism.

Gen. CROWDER. A case actually occurred, Mr. Chairman, where an officer was being tried in Alaska for embezzlement of some $17,000 and he applied to have an officer on duty at Fort Leavenworth sent up there as his counsel. That officer was a member of the law faculty of the school at Leavenworth. If this had been the law, I am afraid

we could not have conducted a legal trial in Alaska without taking that man away from very important duty at Leavenworth and sending him up there.

Mr. CRAGO. He would have been available?

Mr. GORDON. Available would mean reasonably available. I do not think it would permit him to ask for somebody who was dead or somebody who was beyond the seas.

Mr. CALDWELL. Have they ever refused to assign some one requested by the accused as his counsel?

Gen. CROWDER. Suppose he were to ask for the president of the court or some member of the court? They would refuse that.

Mr. GORDON. Or the President of the United States. He might ask for some one who would not consent to act for him.

Mr. CRAGO. I think if you strike out the words "of his own selection," you will fix it about right.

Mr. GORDON. Are not the words "of his own selection" quite important there?

Mr. CRAGO. If an accused was refused an available man of his own selection under this language, it would be pretty nearly cause for setting aside a finding.

Gen. CROWDER. I am very clear that in the event this article is enacted in a form giving the accused counsel of his own selection as a matter of right and there is any such refusal as your remark suggests, I should hold it fatal error.

Mr. CRAGO. Yes. No court-martial would take a chance on refusing a reasonable request.

Mr. CALDWELL. I think he would be protected by the courts as well.

Mr. CRAGO. If he asked for somebody who was available and they refused him, I think it would be fatal error just as the general suggests.

Mr. GORDON. Then you would write into the statute the very language that is there now?

Mr. CRAGO. Except I would not make it in such a way that he could tske advantage of the fact by making request for a man who would delay the trial unnecessarily or something of that kind. If it is made to read "of his own selection" or "available," it can be considered that everybody is available who is in the world and can be gotten. That man at Leavenworth could have been obtained.

Mr. CALDWELL. Not only that, but they could have transferred the man to Leavenworth to be tried.

Gen. CROWDER. And that might have required sending all the witnesses down there.

Mr. CALDWELL. Yes; unless the took the testimony by deposition.

The CHAIRMAN. What do you think about "reasonably available"?

Mr. CALDWELL. Who is going to determine the reasonableness?

Mr. GORDON. The court would have to determine that. We do not necessarily have to decide this question now, and if you desire to submit anything further on this subject, we will be glad to have it.

Gen. CROWDER. I submit a substitute:

ART. 17. JUDGE ADVOCATE TO PROSECUTE.--The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel for his defense, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights.

We come now to article 18, which deals with challenges: You have stricken from the article as passed by the Senate the language which gave to the judge advocate of the court, as well as to the accused, the right to challenge. The existing article, article 88, says:

> Members of a court-martial may be challenged by a prisoner, but only for cause sta ed to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

The English code is in substantially the same language.

Mr. GORDON. In the same language as our present law or as the proposed law?

Gen. CROWDER. As the existing law. But from time immemorial the judge advocate both in England and in this country has exercised that right. You would think from the language of the existing article that as the right of challenge had been conferred only upon the prisoner, it was by necessary implication denied to the judge advocate, but I am callin your attention to an immemorial practice that has existed under ttis condition of our statute law, a practice which seems to run counter to the provisions of the statute law. What is the judge advocate to do when in the trial of a case some member of the court shows or expresses an opinion upon the merits of the case? He has no right of challenge. A civil prosecutor would be able to challenge a juror under those circumstances. If we deny the judge advocate the right to challenge altogether, must he sit there and see his case go to a verdict in the face of a statement by a member of the court which convicts him of a disqualifying animus or bias which would prohibit him from qualifying as a juror in a civil case? I realize the fact that judge advocates have rarely exercised this right of challenge. There is occasional necessity for it, and it has been written into the new code for the purpose of meeting that occasional necessity. It is stricken out here in the suggested amendment, and when I call attention to this occasional use that there is for the power of challenge I have made all the statement to the subcommittee I desire to make. The practice would hardly have grown up if there had not been necessity for it.

Mr. CALDWELL. A man who would go into the trial of a case and take the oath as prescribed in the United States regulations would lay himself open to court-martial, would he not?

Gen. CROWDER. Yes; that is true; but that enables you to proceed against him. It does not save the pending case.

Mr. GORDON. Suppose by inadvertence the officer appointing the court-martial should appoint a man who was a relative of the defendant? Would it be your judgment that in the absence of a provision conferring power upon the judge advocate to challenge for cause, he would be compelled to proceed to trial with a relative of the defendant on the court?

Gen. CROWDER. He could be gotten off in only two ways, one by challenge acted upon by the court, and the other by order from the convening authority relieving that man, which order the convening authority is competent to issue. You would have that way of reaching such a case, but it would involve a great deal of delay in the trial of a case to communicate with the convening authority, which is sometimes at a remote point. I understand that the objection to this article is that the Government has really a double right of chal-

lenge; that discrimination may be exercised in the selection of the court, and then again by the judge advocate in the trial of the case. Of course, a convening authority is supposed to act very impartially in making up the detail for a court. He does not knowingly include an body who would be disqualified as a juror if the case were tried before a civil court. Occasionally, however, he may detail a man with disqualification. That disqualification may be one that the accused would want to take advantage of, or it may be one that the Government would want to take advantage of. As the law is drafted, and as it passed the Senate, it gives the right of challenge to both sides, but only for cause. I think, gentlemen, that puts the whole case before you. We can get along without the right of challenge but I should dislike to see the provision stricken from the code.

Mr. CRAGO. The challenge for cause has to be sustained by the court martial, so it is pretty well safeguarded there.

Gen. CROWDER. Yes, sir; we swear the member on his voir dire, examine him as to his own qualifications, following substantially the procedure with which you gentlemen are familiar, and the issue is determined under the same sanction as is the issue when raised before a civil court.

The next item is on page 15, article 30.

Mr. CALDWELL. You have skipped the italicized words on page 13 in Article 25.

Gen. CROWDER. Yes. I am disposed to accept that, although I see little occasion for it. The effect of the article is to include with capital offenses cases extending to the dismissal of an officer.

Mr. CALDWELL. Should not the word "nor" in line 20 be changed to "not?"

Gen. CROWDER. No; it should remain just as it is. There are two classes of cases, capital cases and cases extending to the dismissal of an officer.

Mr. GORDON. The question for the committee to determine is whether or not the dismissal of an officer constitutes such a grave punishment that evidence to sustain a charge leading to such dismissal should be given in open court and subject to cross-examination.

Gen. CROWDER. Such a provision would discriminate against the private soldier. If he were being tried for any grave offense, not capital, depositions could be taken as of right. The officer, on trial for the same offense, could exclude all deposition evidence.

Mr. CALDWELL. Have you had any particular case in which this has worked hardship?

Gen. CROWDER. None at all. I do not think there is any service demand for it.

Mr. GORDON. I suspect that was suggested for the reason that there might be occasions where it was desired to get an officer out of the service and to avoid the possibility of using a deposition which might be obtained. Men do not testify with the same solemnity by deposition that they do in the presence of a court. That is a fact which is notorious, and that is why in our civil courts in no case are they permitted to use depositions against a defendant, but he may use them in his own behalf.

Mr. CRAGO. You might just as well say you shall not use them at all, because practically everything an officer is tried for can result in his dismissal from the service.

Gen. CROWDER. That is true; but that does not work out in practice, while it is permissible under the law.

Mr. CRAGO. But I say that practically every charge against an officer could have that result.

Gen. CROWDER. Nearly all of our punitive articles conclude with the phrase "shall be punished as the court-martial may direct," which would include dismissal.

Mr. CALDWELL. It would be a good way to avoid dismissal to get some of his friends to send in such testimony.

Gen. CROWDER. When a soldier or an officer demands to be confronted by his witnesses the right is accorded him unless the officer's witness or the soldier's witness is thousands of miles away or on some foreign duty, and it is impossible to bring him back without delaying the trial for months. The depositions are taken under the same sanction as in civil law. I do not believe there is any general service demand for this additional protection for an officer.

Mr. CRAGO. It might be only a matter of an account, and it is sometimes very hard to have the officers present. It would result in his dismissal if he were found guilty, yet sometimes it is almost impossible to confront the accused with such witnesses.

Gen. CROWDER. Consider for a moment the conditions under which the Army is operating to-day in Mexico. Suppose an officer who was being tried for an offense for which he might be dismissed demanded he be confronted with his witnesses and that no depositions be taken. He could tie up military operations or the administration of justice and embarrass them to a great extent.

Mr. CRAGO. Every man familiar with a transaction at Governors Island might be down on the border, and the accused man might be here waiting for trial and could hold the whole thing up until the Army is brought back.

Gen. CROWDER. You have got to make some concessions to the nature of our service and conditions under which the Army is called upon to operate.

In reference to article 30, I am perfectly willing to accept the language that has been inserted. I want, of course, the provision with regard to assistant judge advocates to remain, and if you allow that language to remain you need to employ the word "their" instead of the word "his," as indicated in line 19 on page 15; and, of course, when you say that the advice of the judge advocate shall be obtained in open court, that means in the presence of the accused and his counsel, because they are always present in open court, and for that reason I have no objection to the express language being employed.

On page 16, article 33, we have again to notice the striking out of the provisions of article 33 which relate to assistant judge advocates.

We now come to our statute of limitations, article 39. The stricken language "or for any crime or offense punishable under articles 93 and 94 of this code," refers to certain statutory and common-law felonies. Articles 93 and 94 deal with civil crimes for which officers and soldiers may be tried by court-martial. The statute of limitations of the Federal Penal Code is three years. Our statute is two years. I wanted to adopt for those offenses where we exercise concurrent jurisdiction with the civil courts the period provided by the Federal Penal Code which Congress has enacted, so we would have three years in which to try men for these felonies, leaving our two years

statute of limitations in force as to other offenses. It has been stricken here, for what purpose I do not know. We undertook to try an officer a few years ago for embezzlement. We found that the military statute of two years had run in his favor, and we were compelled to call upon the United States district court to try that officer under the Federal Penal Code, as our statute of limitations had run, while the Federal statute had not run. I can see no objection to extending the militar statute as long as we are keeping within the limits provided by Congress. If that language can be restored, that article remains perfectly satisfactory from our point of view.

We now come to article 42, places of confinement, and this is the article with respect to which the Secretary made his remarks. This committee print leaves the article just as it passed the Senate, with the exception of a proviso which concludes the article, and that proviso reads:

Provided further, That persons sentenced by court-martial to dishonorable discharge and to confinement in a penitentiary shall be confined in the United States disciplinary barracks or elsewhere, as the Secretary of War may direct, but not in a penitentiary.

In other words, after authorizing penitentiary sentence to be imposed by a court-martial, this language says it shall not be executed in a penitentiary but in a disciplinary arracks. I would like to make a statement in that connection, reinforcing what the Secretary of War has said.

I became Judge Advocate General in 1911. At that time we had military prisons at Fort Leavenworth and Alcatraz, Cal. They were administered as required by the law of their creation, the act of 1874. That act created them penal institutions. Penal servitude was exacted there just as it was exacted in penitentiaries. We had as inmates of those two prisons soldiers who had been convicted of common law and statutory felonies, as well as soldiers whose offenses were primarily against the discipline of the Army and involved no moral turpitude. They were held together in close prison association. Among those prisoners were boys from 18 to 21 years of age, and the average age of all the persons confined in those prisons at the date of the inspection I made in 1911 was about 23. I think that probably out of 900 and some odd prisoners I found at the Leavenworth prison, maybe 125 or 130 ha been convicted of common law and statutory felonies. That included men who had been convicted ofunnatural crimes, sexual perverts. I made a classification of the pisoners along those lines. I came back and made a recommendation which eventually led to the enactment of new legislation repealing the old prison act of 1874 and establishing in lieu of those prisons disciplinary barracks. We inaugurated at that time this policy of segregation, and availing ourselves of the authority of existing statutory law we sent all our common-law and statutory felons to the penitentiary. If you permit this proviso to remain, we have got to go back to the old conditions.

Mr. GORDON. What amendment would you suggest?

Gen. CROWDER. Just strike out the proviso.

Mr. GORDON. The whole proviso?

Gen. CROWDER. Yes; and leave the article as it passed the Senate.

Mr. GORDON. My impression from reading that proviso was that it would provide for a more humane treatment of them.

Mr. CRAGO. No; it takes these men convicted of these statutory crimes and puts them in these disciplinary barracks.

Gen. CROWDER. Yes; and will not permit them to be confined anywhere else.

Mr. CRAGO. You can not send these professional lawbreakers to the penitentiary, but you have got to send them where you are sending these boys. We do not want anything like that.

Gen. CROWDER. I was wholly unable to understand the reason for it.

Now, coming to article 47, the entire article is stricken. I do not know what considerations called for striking this article from the code, but I desire to lay before the subcommittee some reasons why it should be retained.

Mr. CALDWELL. That is a new section.

Gen. CROWDER. Yes; it is a new section, and the remarks I make in regard to article 47 will apply also to article 49, which has likewise been stricken.

Prior to 1892 the law was that no sentence of a court-martial should be carried into execution until "the whole of the proceedings" had been approved by the convening authority. In that form it was embarrassing. It was often difficult to approve the whole of the proceedings, and yet the sentence ought to stand. In 1892 Congress revised the statute and made it read that "no sentence" of a court-martial shall be carried into execution until the same has been approved by the convening authority, making his approval relate only to the sentence. It has been a question whether he did not have to accept the sentence in its entirety or whether he could approve a part and disapprove the other part. We are exercising authority to approve in part and disapprove in part now, but I wanted to get that construction written into the statute. Reading article 47 you will find it said:

> The power to approve the sentence of a court-martial shall be held to include, inter alia, the power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involved a finding of guilty of a lesser included offense when, in the opinion of the authority to approve, the evidence of record requires a finding of only the lesser degree of guilt and the power to approve or disapprove the whole or any part of the sentence.

I do not think there can be any doubt but what we need that authority. Suppose, for example, the sentence is dishonorable discharge and forfeiture of his pay for three months. Why should we not disapprove the dishonorable discharge and keep the man in the service if the department commander, the convening authority, thinks the man deserves another trial, or why should we be compelled to send the case back to the court, and if they refuse to give us the authority, stand there powerless to do anything?

Mr. GORDON. In other words, it is necessary to confer upon the convening authority or the President the power to mitigate a sentence?

Gen. CROWDER. No; he has power to mitigate, and we could accomplish it by the exercise of the power of mitigation but for this fact: Approval must precede mitigation, and you put the reviewing authority in the attitude of approving something that ought not to be approved for the sole purpose of mitigation.

Now, this provision straightens that all out. And subsection (a) of article 47 is even more important. It gives to the reviewing

authority or the convening authority upon review of the case the power to approve or disapprove the finding, and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt. Now I want to explain to the committee the necessity for that. Take a case in the eastern department: Gen. Wood is in command. He convenes the court, say, at Jackson Barracks, La., to try a man for desertion. The trial proceeds and the court finds the man guilty of desertion. The case comes before Gen. Wood as the convening authority for his review. If he differs from the court, believing that the special intent which it is necessary to prove, namely, to abandon the service permanently, is not proven in the case, the present practice is for Gen. Wood to return those proceedings to the court and ask them to reconsider. Let us take an instance of where the court reconsiders and adheres to their former finding. The reviewing authority knows he can not approve that finding.

This new article gives him the right to write in an approval of the lesser and included offense of absence without leave. It is a provision which works in favor of a military accused. In time of war it would save us many delays. Gen. Wood in the given case would know, all the evidence being of record before him, that he never could approve a finding of guilty of desertion; but he is absolutely dependent, under existing law, upon the procedure I have outlined, namely, convincing the court and getting the court to sustain him in his view. When the court comes back with an adherence to their first view, he is powerless unless you give him this authority to write in a modified finding of guilty of absence without leave for the period alleged, and unless you do give him this authority there results a failure of justice. It would have saved a great deal of time if he could have done that at first, because the case would have been disposed of without all the delay and the inconvenience of reassembling the court. In time of war it would be a very useful provision, because delays are very embarrassing at such times.

Mr. CALDWELL. The same things you have said in reference to this article will also apply to article 49?

Gen. CROWDER. Yes; because there we are dealing with the confirming power of the President. In certain cases the act of the reviewing authority is not final, and that article gives the President the same authority that article 47 gives the reviewing authority. I sincerely hope it will be the judgment of the committee to retain these articles in the code.

There is a slight change in article 50 which is unimportant. The words "inter alia" are stricken. I have no point to make in regard to that. I think the meanin of the article is not affected by the omission of the words "inter alia." However, if you leave the words "inter alia" in articles 47 and 49, you should leave them in article 50.

We come now to article 53.

Mr. CALDWELL. You have skipped the language in italics at the top of page 24.

Gen. CROWDER. Yes.

Mr. GORDON. What have you to say about the language at the top of page 24?

Gen. CROWDER. That does not add to nor subtract from the article as drawn. This says "competent to appoint, for the command, in which the person under sentence is held." Now, as a matter of fact, the United States Disciplinary Barracks is under the command of the Secretary of War, and all miltary prisoners in the military penitentiaries are under him, and no department commander has those men under his command, and therefore that is surplusage, and does not affect the meaning one way or the other, except it would make it impossible for the Secretary of War to place the disciplinary barracks under the command of a subordinate, and the same thing is true in section 52, page 25. The same thing is also true of article 53.

Article 56, gentlemen, is the insertion in this revision of an article of the existing law which I omitted as not being important to retain. This relates to a matter of administration, namely, the muster rolls of the Army. I have thought that everything pertaining to the muster rolls was in the field of administration and need not be prescribed by Congress. I brought with me here a muster roll in order to show you that the requirements of the article that a muster roll shall state how long absent officers have been absent and the reasons for their absence, and how long absent noncommissioned officers and private soldiers have been absent and the reasons for their absence are only 2 of about 15 or 16 requirements of the muster roll. If you are going to legislate on the subject of the muster roll, the legislation ought to be complete. This was adequate language, perhaps, back in 1806, when the article was adopted, but the muster roll has grown with the administrative situation until to-day, as I say, these are only 2 of about 15 or 16 requirements of the muster roll, and therefore I dropped it from the code because the muster roll was an administrative matter, better left by Congress to the department. I do not object to its being kept here if there is any real demand for it.

Mr. GORDON. Your contention is that if any part of it is included it all ought to be included?

Gen. CROWDER. Yes, and that would require you to go into the field of administration with details that would probably embarrass the Army next year when the situation might be changed.

Now I have the same thing to say about article 57. You will see a part of that is new matter. The part italicized is simply putting back into the new code an article of the existing code which I proposed to eliminate. It goes into the matter of the returns that commanding officers of organizations shall make.

Mr. GORDON. Your idea is that. these sections can all be properly controlled by regulations?

Gen. CROWDER. Yes.

We now come to article 62, which deals with disrespect toward certain officials. It was originally written into the article that the Secretary of War should be included along with the President, Vice President, and the legislatures of the States as well as governors and legislatures of Territories or other possessions of the United States. The inclusion was not favored by the House committee of the Sixty-second Congress which considered this revision. They eliminated it, but a committee of the Senate restored it. You know the purpose of this article is to require officers of the Army to live in proper subordination to the civil authorities and have a proper attitude of respect toward constituted civil authority. It is made here a matter of ex-

press requirement, and it serves as an admonition to officers when commands of the Regular Army are stationed within any civil community that they owe a certain respect to those officials. I do not care whether you include the words "the Secretary of War and the governor or legislature of any Territory or of the Philippine Islands or Hawaii or Porto Rico" or not. It is not a matter of very great concern.

Mr. GORDON. What is meant by disrespect toward the Congress?

Gen. CROWDER. Suppose some Army officer should come out in the public press and characterize Congress as an incompetent body, or as a body which is not patriotic. He could be tried under this article for a military offense.

Mr. GORDON. What would be your judgement about distinguishing between the body itself and Members of the body?

Gen. CROWDER. That is a phrase of it I have not specially considered, Mr. Chairman. I should think that a criticism addressed to an individual Member of Congress on account of official acts he had performed as Congressman ought to be as much within the prohibition of the law as against Congress as a body. That woul be my first view.

Mr. GORDON. It is a rather delicate thing for Congress to enact laws which would preclude criticism.

Mr. CALDWELL. It has been the law since 1806.

Gen. CROWDER. It was built upon the British code. They protected their civil authorities in the same way.

Mr. CALDWELL. It has been the law in this country since 1806, and this language simply adds the Territories and the Secretary of War.

Gen. CROWDER. Yes, The Secretary of War being a civil officer, is not an official superior, so that a case could be handled under the article of war which punishes an officer for using this kind of language or behaving with disrespect toward his superior officer.

Mr. CALDWELL. Of course, the Secretary of War has to pass upon the finding of the court, and perhaps that is the reason for striking that out. This would make it pretty hard for him.

Gen. CROWDER. The Secretary of War simply represents the President.

Mr. GORDON. The Secretary of War, in fact, does not act himself.

Gen. CROWDER. And in that case the President could so couch his orders as to show that he had personally functioned on the case and relieve the Secretary of any embarrassment.

Mr. GORDON. That same criticism would apply to the President himself.

Anything in the nature of a general criticism of any officer of the United States, from the President down, ought not to subject him to punishment. As a citizen he has the same right to criticize an officer of the Government that, any other citizen has. Of course, I mean criticism in a legitimate way; of course, disrespect—

Gen. CROWDER (interposing). That is what this article punishes. It does not deal with criticism, but the use of disrespectfu1 words against any of these people.

We come now to article 70, page 32, which has been stricken out, and to the substitute for that article, which appears on page 33, which is the existing law.

Mr. SHALLENBERGER. I notice the language is used here, "shall suffer death or such other punishment as a court-martial may direct." The question I would like to ask is, where the penalty is not mentioned ——

Gen. CROWDER (interposing). There is an express provision in this code which forbids the death penalty unless it is specifically authorized.

The suggestion of the committee print is that the existing law on the subject of trials or time limits in preferring charges, etc., be retained. In respect of the existing law I have made these comments:

It operates unequally upon the commissioned officer and the enlisted man. As to the enlisted man, the guaranty is against arrest for "more than eight days or until a court-martial can be assembled," a guaranty which is dependent upon and may be defeated by the uncertainties attending upon the assembling of the officers necessary and proper to compose a court for his trial, the collecting of witnesses at the time of trial, the movements of the Army in peace and in war, or other incidents of the service. As to the officer, unless he be stationed at a remote post or station, the guaranty may not be defeated by such uncertainties, but is limited by the article absolutely and under all circumstances to certain periods.

In other words, I wish to say that the guaranty which is against confinement for more than eight days or until certain things can be done is no guaranty at all. That is the provision in regard to enlisted men. Now, when we come to the case of an officer the language is different. It says:

When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days.

In other words, we announce a definite time limit for the officer, but leave the enlisted man with only this general guaranty.

The existing law says:

If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease.

Again, a provision wholly for the benefit of the officer, and one which does not extend to the benefit of the enlisted man, but provides that an officer released in this way shall be liable to trial within 12 months. A most unsatisfactory condition of the law. I take it we can afford to hold the scales pretty evenly when it comes to trials by court-martial as between officers and enlisted men, and my whole purpose in writing the new article was to impose definite time limits upon action by the administrative authorities upon which prompt trial depended, and make them equally applicable to officers and enlisted men. I do not know for what purpose they have restored the existing law. I am utterly unable to criticise it because I do not know what the intent was in striking out the new article and inserting the existing law.

Another thing, you will notice the archaic language of the existing law:

When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him, etc.

That may not be the duty of the officer who has put him under arrest at all. It may be the duty of some superior authority, and yet by law it is imposed upon this man; and the officer by whose order he is put under arrest is also required to bring him to trial within certain time limits. That depends upon the action of the commanding officer. Therefore you are restoring language here of the existing law which is subject to the objections I have mentioned, and rejecting phraseology found in the new article which establishes the same time limit for both officer and enlisted man. I can not criticise it because I do not know the motive which led to striking out the article proposed, which was passed by the Senate, and retaining the existing law.

(The subcommittee thereupon recessed until Friday, June 30, 1916, at 10 o'clock, a. m.)

SUBCOMMITTEE OF COMMITTEE ON MILITARY AFFAIRS,
HOUSE OF REPRESENTATIVES,
Friday, June 30,1916.

The subcommittee met at 10 o'clock a. m., Hon. William Gordon (chairman) presiding.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER—Resumed.

Mr. GORDON. You may proceed with your statement. I believe we had reached article 70, on page 32.

Gen. CROWDER. I had read into my testimony in the consideration that was given article 70 the reasons I had asked for a change in that article. The confidential print of the committee suggests the elimination of article 70 in the form I had proposed it, and in the form the Senate had enacted it, and the insertion in lieu thereof of the existing law. I very much deprecate that being done. For a long time we have been very earnestly engaged in an endeavor to shorten the period between the time of placing an officer or soldier in arrest for the purpose of trial and his entering upon the execution of his sentence. In 1911 I assembled some statistics on the subject which showed that an average period of about 45 days elapsed between the time of putting a soldier in arrest for the purpose of trial and his entering upon his sentence. I do not know of anything that helps discipline more than prompt trial, and I put in this article 70 in order to establish time limits upon commanding officers in acting upon charges and perfecting them and getting them ready for trial.

The proposition, or the suggestion, of the confidential print of the subcommittee is that we continue to live under the old law. I ask the very earnest attention of the subcommittee to the matter in the hope they will see their way clear to retain the article in the form in which the Senate enacted it. We will have occasion later on to call your attention to some criticism of this article made by the General Staff. I will do that when we come to consider the General Staff's criticism of the articles, which I will take up next, with your permission. They want the time limits I have put in article 70 eliminated, because they feel it would be difficult in practice to live up to these limits, and I am prepared to concede their point in so far as to make these time limits operative only in time of peace, realizing that so

many war emergencies arise which might prevent living up to them that the article had better be operative as to the time limits imposed only when the Army is operating under normal conditions. This average period of 45 days' delay in trying a man for an offense, somewhat reduced since 1911, ought to be abridged as much as possible.

Mr. GORDON. Without substantial injury to the rights of the accused?

Gen. CROWDER. Yes; I think it is the object of every criminal code, especially every modern one, to make that period just as short as possible.

Mr. SHALLENBERGER. In time of war would it not perhaps be more essential that these trials should be expedited than in time of peace?

Gen. CROWDER. It is of great importance at all times.

Mr. SHALLENBERGER. Do you think it is really—

Gen. CROWDER (interposing). Suppose, for instance, a man who is in a detachment operating south of Namiquipa commits an offense. There are field activities everywhere, and it is utterly impracticable to say to a commanding officer, "You shall do certain things within a period of eight days," because the demands on his time are of such character he would have to fail in his compliance with such a statute.

Now, passing on, there is a slight change in article 85, in line 12, of page 39. The committee has substituted the words "other than" for the word "except," and I think that is an improvement.

We come now to article 91, on page 41. The committee has stricken the language "or who attempts to commit suicide shall."

Mr. CRAGO. We will have to leave the word "shall" in there, even if we strike out the other words.

Gen. CROWDER. Yes; that will have to be left. When I was before this committee in the Sixty-second Congress, with the first revision presented to Congress, we consulted, when this article was considered, the corresponding article of the British code. We copied our existing article from the British code of 1765, and it has survived down to the present time in much the form in which we copied it from that early British code. I have here to-day, the British code of 1914, and their corresponding article includes attempts to commit suicide along with dueling and failure to suppress a duel as an offense punishable under their military code. The committee's attention was attracted by this statement, and I recall that Mr. Evans, who then represented a district in Chicago,, expressed himself as favorable to the incorporation of such a provision in the then pending. articles. It led to some discussion. I made the statement then, which I have verified since, that an attempt to commit suicide constituted an offense at common law and is an offense to-day where the common law has not been abolished. This fact explains why, in States that have abolished the common law, certain of the criminal codes make provision for the punishment of this offense. I think the cases will be rare when we shall prosecute under such a provision. I have never insisted upon its inclusion in this revision, in the view that the matter is not one of great importance.

Mr. GORDON. You are right; it is an offense at common law to attempt to take your own life.

Mr. CRAGO. I do not think it would hurt to leave it in there. It would rarely ever be enforced.

Gen. CROWDER. During the brief period I was judge advocate of the Western Department, in 1909, there were three prosecutions, as I now remember, for this offense, alleged under the general article. I have never heard of any other prosecutions of this character. These three cases resulted, as I now remember, in rather mild disciplinary punishments. The argument against this provision which the General Staff Corps makes and which Gen. Funston has also made, is that no man commits the offense who is in a normal state of mind. The answer to this argument is, of course, that that is a matter of defense.

My experience is limited in the enforcement of such a law. Unquestionably we can try the offense to-day under the general article, which covers all crimes not capital. During the brief period I was judge advocate of the Western Department in 1909, I passed upon three cases of that kind tried under the general article.

Shall we pass now to the next change? Have you heard all that you care to hear about that?

Mr. GORDON. Yes.

Gen. CROWDER. The next changes we find are in article 108, on page 50.

Mr. CRAGO. Article 99.

Mr. GORDON. Yes; page 45.

Gen. CROWDER. We have dealt with this subject heretofore when we considered challenges by judge advocates and counsel before courts-martial. We are here dealing with the court of inquiry, and the subcommittee has consistently made the same changes in this article it made in the other. I stated to the committee yesterday my reasons for desiring the right of challenge in the judge advocate to be recognized, and the same remarks appfy to this article.

We come now to article 108, which relates to discharges. I rather think the language introduced by the committee is preferable to the language of the Senate draft. At the time the article was drawn and at the time it was passed by the Senate we had not had our attention specifically drawn to other means of getting a man into the service than by enlistment or by muster in, which is the equivalent of enlistment. We now have the draft, and when you have put it here "lawfully inducted into the military service of the United States" you use general language which will cover enlistment, muster in, draft, or order. I therefore think I prefer your language to my own. I think the further changes made by the subcommittee constitute an improvement, as I had it in mind myself to suggest these identical changes after conference with Gen. McCain.

On page 55, article 116, you have stricken the provision there in regard to powers of assistant judge advocates, which, of course, you will retain if you allow us to have these assistant trial judge advocates. I think I will stop here to say that further reflection confirms me in the view that this is a most important article. I can not conceive of any objection to allowing the department to train men in the duties of prosecutors by allowing them to be present with the regular trial judge advocate, listening to the case and performing subordinate duties in connection with the prosecution.

Mr. GORDON. I believe you stated yesterday there was no additional compensation.

Gen. CROWDER. No additional compensation and no additional office. It makes no demand on the Public Treasury at all.

I find I omitted one article, and we will go back to article 115. By the changes made by the committee there the power to appoint a reporter and an interpreter for a court-martial is taken away from the judge advocate, where it has always been placed, and lodged in the hands of the president of the court-martial or of the court of inquiry. I do not know what considerations influenced that change. Practically it works in this way: A court-martial is ordered, for instance, out here at Fort Myer. The judge advocate makes all the preliminary arrangements for a meeting on a particular day. He has his witnesses there, and he has a reporter there, and if he has got to have testimony in a foreign language he has his interpreter there, and the law very properly places the duty of providing those employees upon the judge advocate. Of course, they can not enter upon their duties without the consent of the court. Now, you change it here to the president of the court and devolve upon him administrative duties. I can see every reason why the judge advocate should continue to have this duty, and I can see every reason why the recorder of the court should continue to have that authority. I can, however, see no advantage to the service in lodging it in the president of the court. There is nothing further to be said about that.

I find the next change in article 118, on page 56. The changes made in the confidential print are changes that ought to have been made in view of the recent legislation respecting draft, and I accept them all.

Mr. CRAGO. How about that insertion here in lines 15 and 16? The provision, "But the President may at any time drop from the rolls of the Army any officer who has been absent from duty and from duty three months without leave," etc. Why are the words "from duty and" inserted?

Gen. CROWDER. That is a change that I have not marked. There must be a mistake there. I had it "absent from duty," and you have the words "from duty and." What does it mean?

Mr. CRAGO. It does not mean anything.

Gen. CROWDER. It does not mean anything. It escaped my attention. Without those words, it is just a repetition of the existing law.

Mr. GORDON. The insertion of those words appears to be purely surplusage.

Zen. CROWDER. Yes, sir; it is pure surplusage.

Mr. CRAGO. These officers who have been absent for three months without leave can be dropped without trial or anything under this provision, but why they should have put those words "from duty and," in there is a mystery to me.

Mr. GORDON. It is obviously a misprint.

Mr. CRAGO. I think it would be better to leave it as it was.

Gen. CROWDER. I take it that those words should come out. Regarding the later provisions of article 118, you will want of course to omit from lines 10 and 11, page 57, the words "from the National Guard,'' unless you are prepared to take the view that the Organized Militia now has no legal existence. I am not prepared to take that view, and we are going upon a different theory. If you leave that out, it would provide for forces drafted into or called into the service of

the United States from whatever source. I would suggest that you go further in that connection, and use the language that you will probably retain in article 2 and say, "forces drafted, called, or ordered into or to duty in the service of the United States.'' I would use the language in article 2—it ought to be here. Now, coming farther down, the language in line 13, "forces drafted or called into the service of the United States," would have to be changed to correspond with the language above. Farther down, I think you would have to leave in the words "Organized Militia,'' and put in the conjunctive ''and," to describe the condition of those two forces when they are called into the service for constitutional purposes as distinguished from being drafted into the service for all purposes. Again, I must defer to the view that the language of the law that deals with the Organized Militia should be retained so that we may have the benefit of any construction the courts may place upon it.

With these modifications, the changes embraced in the print of the subcommittee are acceptable, so far as I can see.

In the succeeding article, 119, page 58, changes will have to be made to conform that article to whatever phrase you adopt in article 118. As you see, they use the same language with the same limitations.

We now come to article 120, or existing article 30. The committee has substituted, or has reinserted from the existing code, an article which I had marked for elimination. Article 30 of the existing code appears here as article 120. That article provides:

> Any officer or soldier who thinks himself wronged by his commanding officer, and, upon due application to such commander, if refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

In respect to this, Winthrop, our standard military law writer, and, really, our Blackstone, says:

> This article, which (dating originally from the Code of James II) has not been materially modified since 1806, is also a provision of comparatively slight value in the code. It entitles indeed a soldier "who thinks himself wronged by any officer" to a hearing before a court of his regiment, and, if he is not satisfied with the result, to an appeal to a higher court; but the remedy is practically limited to cases arising in regiments; the courts, so far as relates to the matter of redress, are merely investigating bodies without defined powers; and the article fails to indicate what classes of wrongs they may consider, or what authority may be exercised by commanders in carrying out their conclusions. Moreover, the effect of the threat contained in the last clause of the article must rather be to discourage soldiers from seeking relief under it. It has thus been found inadequate in practice, and is comparatively rarely availed of.

Article 30 says:

> Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

That, however, is omitted from the article as you have it. Reading further from Winthrop:

> Rather than resort to the cumbrous and precarious proceedings which it provides, enlisted men prefer in general to address their claims, through the proper channels, to the department commander or Secretary of War, for authoritative and final adjustment.

This is an unused article, and I presume a strong argument could be made that it had been repealed by nonuse. There is, I think, no demand for it in the service, and I can recall but one trial under this article, or, rather, but one investigation under it, in my 39 years' of service. The inspectors visit the posts and they hear the soldiers' complaints. Then, the soldiers can make their complaints to the commanding officers and investigations and trials result. Substantial justice is done, and this article is of no use in the service. Therefore I left it out of this article. I do not care whether it is retained, further than it encumbers the code because the service has outlived it.

Mr. SHALLENBERGER. Where do they go to get relief?

Gen. CROWDER. They go to their commanding officers and make complaints, or to the inspectors when they visit the posts. The complaints may be brought to the attention of the inspector.

Mr. SHALLENBERGER. If the commanding officer does not grant relief—

Gen. CROWDER (interposing). There is an appeal to the department commander and an appeal from the department commander to the Secretary of War. I do not believe there was ever a case where a soldier made a serious appeal of that sort that it did not come to the Secretary of War and receive his personal attention. I do not know of anything that is looked after with greater solicitude than appeals from soldiers on account of any injustice that may have been done them. I do not know why this article is reinserted, unless somebody thinks it is good preachment to have on the statute books.

Mr. SHALLENBERGER. It sounds good.

Gen. CROWDER. Yes, sir. I wish to ask your attention, in passing, to section 2, which has been stricken out. In conference with representatives of the General Staff who went over the revision of the Articles of War I said that I would not insist upon this section being included in the revision of the Articles of War, but would take my chances in the national-defense act of securing for the Judge Advocate General's Department the organization I considered it should have. I am under some limitations, therefore, in bringing this section to your attention. I have been very anxious to secure the extension of the detail system now provided by law for the Ordannce Department to the Judge Advocate General's Department. That system requires competitive examinations for entrance into the corps, and officers selected by competitive examination may retain their places in the corps only through meritorious performance of duty. At present the Judge Advocate General's Department is under the permanent-tenure system, and, when selection is made and the officer appointed, he takes his place in the Judge Advocate General's Department for the remainder of his active service. Frequently selections must be based on insufficient evidence. We assume, without the benefit of a try out of the man, that he will make a good military lawyer and be a useful man in the department. We are bound by the decision for the rest of his active service. The system of detail in force for the Ordnance Department, which, like the Judge Advocate General's Department, is a technical department, admirably meets the needs of the legal corps. As I have heretofore stated, details are made in the Ordnance Department as the result of competitive examination, the details are for four years, and the officer who does not make good under such

detail goes back to duty that he can perform. I regret very much the decision to leave the system of selection of officers for the Judge Advocate General's Department unchanged. It is the only staff corps, except the Medical Corps and the Engineer Corps, which is left under the permanent-tenure system. A most efficient, legal corps could be maintained with a competitive-examination test for entrance into the corps and with the test of efficient performance of duty for remaining therein.

Mr. SHALLENBERGER. How do they get in there now?

Gen. CROWDER. Under the act of 1901 appointments were dictated very largely from political sources, and there is a good deal of pressure being brought to bear on the War Department to-day for the appointment of Army officers whom certain public men have selected.

Mr. SHALLENBERGER. Without any competitive examination?

Gen. CROWDER. None at all — with no examination at all. The statute does not require it.

Mr. SHALLENBERGER. Who appoints them?

Gen. CROWDER. The President of the United States.

Mr. SHALLENBERGER. It is not all left to the President?

Gen. CROWDER. The selection; yes. I endeavor to place before him for consideration all the officers who seem to have designated themselves through their own initiative by the meritorious performance of legal work, and if appointments are made without being influenced by special considerations generally good appointments follow, but sometimes influences are brought to bear which make difficult the selection of the most meritorious men. Under the detail system that prevails in the Ordnance Department the legal department would be perfectly protected.

Mr. SHALLENBERGER. If some one wanted to come into the Judge Advocate's Department from the volunteer forces how would that be done?

Gen. CROWDER. That is done under the provisions of the act of April 27, 1914, and the appointments are limited to men who have won recognition for themselves as judge advocates in the National Guard. They are specially mentioned in the statute as being eligible for appointment in the department.

Mr. SHALLENBERGER. Is an examination had of those men, or do you have them placed on an eligible list?

Gen. CROWDER. To some extent — and I am speaking now with reference to the field for selections if Congress desired to raise a volunteer army — there is a way open by statute, provided by section 23 of the Dick bill. That has been in force since January 21, 1903. I think there are some 50 or 60 men who in the intervening 13 years have taken advantage of that section and offered themselves for examination. I mean 50 or 60 for all arms of the service, Of that number, I think that two or three judge advocates qualified, and one of them, I think, is Congressman Chiperfield, of Illinois.

Mr. SHALLENBERGER. What are the salaries of these men?

Gen. CROWDER. The lowest rank in the legal department is major— the rank, pay, and allowances of a major.

Mr. SHALLENBERGER. That would be the same in the case of volunteers?

Gen. CROWDER. Yes, sir. I ought to explain, however, that we have authority under a general statute to detail officers of the line of

the rank of captain or first lieutenant as acting judge advocates, but they serve only under detail. The officers of the department are of the grades of major, lieutenant colonel, and colonel, with one Judge Advocate General with rank of a brigadier general.

Mr. SHALLENBERGER. Is that done so that younger officers may familiarize themselves somewhat with military law?

Gen. CROWDER. Yes, sir; that enters into it to some extent, especially when a young man, through his own initiative, shows interest in the legal work of the Army and aptitude therefor.

Mr. GORDON. As a practical proposition, under the present system you are not permitted to select your subordinates?

Gen. CROWDER. No, sir; though I am accorded the privilege of making recommendations.

Mr. GORDON. Is it your judgment that this section 2, which has been stricken out in the confidential print, would materially improve the personnel and the service in your department?

Gen. CROWDER. There is no question about it. It gives the Judge Advocate General's Department the detail system of the Ordnance Department, where the qualifications to enter the corps are determined by competitive examination and where tenure in the corps depends upon the efficient performance of duty.

Mr. GORDON. I can see your objections to this.

Mr. SHALLENBERGER. This does not state the fact that competitive examinations are required in the Ordnance Department.

Gen. CROWDER. No; but the law of the Ordnance Department which it adopts does.

Mr. SHALLENBERGER. So far as I am concerned, and I presume it is the same way with the other members of the committee, I did not appreciate this point as an essential feature of this provision until you explained it to us.

Gen. CROWDER. Probably for the reason that there were no hearings upon this provision, so far as I know, when the national defense act was being considered by the House committee. My own examination before that committee did not extend to the organization which the Judge Advocate General's Department should have. The same is true respecting my examination by the Senate committee. Nearly all the questions asked me related to federalization of the militia. The Senate Military Committee, so far as I know, has not considered this provision except when they considered section 2 of this revision. They passed this section as it appears in this bill, but later, when considering the national defense bill, the committee reported and passed the section relating to the Judge Advocate General's Department in a form which perpetuated the present system of permanent tenure, and the national defense bill as reported from Congress, accepted by both Houses, and approved by the President left the Judge Advocate General's Department under the permanent-tenure system.

I would be glad if this committee would indulge me for a brief moment in outlining the duties devolving upon the Judge Advocate General's Department. You get a very inadequate idea of the scope and volume of the duties by considering those incident to the administration of military justice. These constitute a relatively small portion of the duties of the legal corps.

The Judge Advocate General's Department advises upon all legal questions coming up from our insular possessions, including the Canal

Zone. It handles most of the cases appealed from courts of last resort in our insular possessions to the Supreme Court and to the United States court of appeals. It has, in these cases, the duty of preparing briefs and making oral arguments before the courts named. Fourteen such cases were docketed for trial in the Supreme Court of the United States in the term just closed. Six cases were tried at the preceding term. Besides this business the department has all legal questions arising in connection with that part of the public domain under the control of the War Department, including national battlefield parks, soldiers' homes, national cemeteries, military reservations, and lands purchased for river and harbor improvements. Even the Yellowstone, Sequoia, Grant, and Glacier Parks are to some degree under the control of the War Department. Civil communities have grown up around military reservations, and questions are constantly arising as to easements and servitudes to be created in and over these military reservations in the interests of such civil communities. Complex legal questions arise in the legal work in connection with river and harbor work and the disbursement of river and harbor appropriations, and of course we handle all legal questions which arise in the fiscal administration of the Military Establishment proper. Many of the appropriations carried for the Military Establishment are expended under contract, and numerous questions of contract law arise, also questions as to the availability of appropriations for particular purposes. Probably two-thirds of the work is civil or quasi civil and has no relation to the administration of military justice. This enumeration is in no sense complete, but it reveals the necessity for a careful consideration of the legal qualifications of officers selected for duty in the corps.

Mr. GORDON. What is the legal limitation between the duties of your department and those of the Attorney General of the United States?

Gen. CROWDER. We preliminarily consider, in the Judge Advocate General's Department, every case that the Attorney General considers for the department upon the request of the Secretary of War. When our office opinion satisfies the Secretary of War he, of course, acts without reference to the Attorney General, but in cases of great importance, involving matters of policy, many of them broader than the War Department, reference must be had to the Attorney General. One exampe will show the class of cases in reference. The constitutionality of that part of the Dick bill which provided that the Organized Militia called into the service of the United States might be used within or without the United States was first considered in the Judge Advocate General's Office, and its opinion was rendered December 29, 1911. Because of its importance, presenting, as it did, constitutional questions of great gravity, it was sent to the Attorney General, who rendered his opinion on February 17, 1912. Both these opinions are published in the hearings before the Committee on Military Affairs, United States Senate, pages 734 to 744, inclusive. The office stands in a similar relation to the office of the comptroller. All questions arising in fiscal administration are preliminarily considered by the Judge Advocate General. If the opinion we render is convincing, the Secretary of War assumes responsibility upon that opinion alone. Where the question is a close one, and the proposed application of appropriation is doubtful, the question,

together with the Judge Advocate General's opinion, is certified to the comptroller.

But I do not intend to dwell especially upon section 2, because, as I have said, I am committed to the statement that I would abide by the action of Congress in the national defense bill.

Mr. GORDON. In other words, there is a conflict between this section and section 8, on pages 58, 59, and 60, of the Army reorganization act of June 3, 1916?

Gen. CROWDER. Yes. This will be supplemental to section 8, which deals with the Judge Advocate General's Department. I think the two would fit in together all right in the event you saw fit to take it up.

Mr. SHALLENBERGER. This would remedy what you consider a defect in the national defense act, so far as your department is concerned?

Gen. CROWDER. Yes, Now, as to all the other elisions in this bill I may say they are in the main express repealing clauses. I concur in the judgment of the subcommittee that we may rely upon the general repealing clause which they have made section 3 of the bill, which says, "all laws and parts of laws in so far as they are inconsistent with this act, are hereby repealed," for this reason: There is pending now in the Senate the Army appropriation bill, which carries a rider authorizing the Secretary of War to report to the next session of Congress a revision and codification of all our military laws. That work presumably is going to fall upon my office, and the problems of repeal can best be worked out under its provisions; I therefore concur in all that you have eliminated here in the way of repealing clauses,

I want to say to you now by way of concluding this review of the committee's print that it will be necessary to insert an additional section providing when these articles shall take effect. I will ask your permission to submit to you, before you submit your report, a section of the bill which will provide generally that this law shall take effect on January 1 of next year, but that certain articles will take effect upon approval of the act.

Now, gentlemen, I am through with all the observations I have to submit upon the confidential committee print, and I am ready to take up certain features of this revision topically. I want to first take up the support of concurrent jurisdiction of courts-martial with civil courts.

Mr. GORDON. Gen. Crowder, before you take up that matter, permit me to call your attention to page 33 of the Senate committee print on this bill, wherein under the title "Explanation of changes'' you quote from the case of In re Carver (103 Fed. Rep., 625). I have examined that case and I think you have quoted matter which is purely obiter dicta and overlooked the real question which the court decided. In that case the court did, in fact, take out of the custody of the military authorities the minor whose custody was challenged in the proceeding in habeas corpus. The court said in closing its decision of August 15, 1900:

> The court having considered the writ, the return thereof, the answer to said return, the proofs and the argument of counsel determine that the petitioner, James W. Carver, is entitled to have Charles B. Carver, who has been brought in on the writ and is now in the custody of the court, discharged from the military service of the United States, and that the said Charles B. Carver should be discharged from such military service, and judgment is entered accordingly without costs.

Gen. CROWDER. Have you the case before you?

Mr. GORDON. No; that is an extract from the court's decision.

Gen. CROWDER. I did not say in those explanations of changes that that was the point decided, but contented myself with the statement that the court remarked or said—my language here is "said"—I did not mean to leave anyone who was called upon to read that under the impression that that had been the actual point decided in the case, but that it was the only judicial expression I found on the constitutional question you had raised, and therefore I quoted it for whatever value it had in this case.

Mr. GORDON. I understand.

Gen. CROWDER. I do not doubt myself that the act which a man performs in—that is, swearing to a statement of qualifications for enlistment—is an act which does not arise in the land forces, but one performed by the man antecedent to and as a means of entering the land forces. If our statute undertook to punish that act alone, I would have very little doubt of its unconstitutionality; but when the statute associates this act with the other act—the drawing of pay and allowances (practically obtaining money under false pretenses)—I am inclined to think that the courts might take the view that the statute could be sustained because of the inclusion of that additional language; that the other was simply associated language, which described the particular fraud which had enabled him to draw the allowances, but was not a substantive part of the offense alleged.

Mr. GORDON. You stated in your testimony before the subcommittee on page 70 of the hearings, as follows:

> Gen. CROWDER. But that fraudulent act, connected with his receipt of pay and allowances under the fraudulent enlistment, is what our statute makes a military offense. I suppose we could get along with an article which would say that a person who, having fraudulently enlisted in the service of the United States, shall receive pay and allowances thereunder, shall be punished as a court-martial shall direct.

Gen. CROWDER. Yes; I would be satisfied with that kind of an article.

Mr. GORDON. My own personal judgment about it is that that is the only offense which a court-martial would have jurisdiction to try, to wit, the taking of money wrongfully after having fraudulently enlisted.

Gen. CROWDER. Yes; I should not like the duty of briefing the other side of the case, because I would be pulling a laboring oar all the time. I want to say in that connection that the importance of that article is greatly diminished by the provision of the recently enacted national defense act of June 3, 1916, which emancipates the minor over 18 years of age, so that he can make a valid enlistment contract against his parent or guardian.

Mr. GORDON. Is there any question in your mind about the power of Congress to emancipate?

Gen. CROWDER. None whatever in regard to the military contract of enlistment, because a minor at common law could make a valid military contract of enlistment against his parents.

Mr. GORDON. It was held differently in the State of Ohio during the Civil War. The power of the Government of the United States to draft into its military service minors over 18 years of age in my judgment is unquestioned, but an act short of that which depends upon the voluntary contract of the minor it seems to me might be

questioned upon the theory of his power to make a valid contract during the period of his minority, when his services are legally due to his parent or guardian.

Gen. CROWDER. I have not seen the Ohio case to which you refer, but I apprehend that this is true: That it will be found that whatever right that court found the parent had was a right founded in statute, for if you accept the view that at common law the minor could make a valid contract of military enlistment against his parent or guardian, then all rights that the parent has must be founied in statute law, and I suspect you will find there was some provision of statute from which the court deduced the right of the parent in the case to which you refer. The law prior to June 3, gave the parent this right against the Government, but if the Congress has emancipated him in that regard—that is, if this provision that they made in the national defense act is valid, we shall have very little use for this fraudulent enlistment article, because generally the fraud practiced is as to minority.

In the view that there are no further questions respecting the changes made in the confidential committee print, I will proceed, with the permission of the committee, to take up certain features of this revision topically, and, first, the concurrent jurisdiction of courts-martial with the civil courts in the trial of what are ordinarily designated civil crimes.

I think that most persons approach the consideration of the revision of the Articles of War as if, after all, it were something in the nature of regulations for the military service and hardly reached the dignity of statute law. The very contrary is true. This is the Army's criminal code, and any person subject to military law may be tried under it, not only for purely military offenses that are denounced and punished by it, but for every civil offense that is denounced and punished by the Federal Penal Code. This grant of concurrent jurisdiction to courts-martial to try these civil crimes when committed by persons subject to military law is found in the two articles—58 and 62—in the right-hand column of the sheet I have placed before you and which I ask your authority to make a part of my hearings. I will read article 62 first, because, until 1861, it was the sole authority the Army had for the trial of persons subject to military law for civil crimes. The article provides:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

As I have said, this article, until 1861, measured the authority of courts-martial to try civil crimes. The term "all crimes not capital" includes every crime known to the Federal Penal Code except capital crimes. We had no authority to try capital crimes until article 58, the second of the articles in the right-hand column, was enacted by Congress. This was a Civil War statute. It provides that in time of insurrection or rebellion we can try the three crimes which the then Federal code made capital, viz, murder, rape, and arson. There were enumerated, along with these crimes, others not capital, and which we already had authority to try under article 62; so that as to the noncapital crimes enumerated in article 58 we had a double grant of jurisdiction.

Since these two articles, 58 and 62, were enacted into law, conditions have changed as the result of the Spanish-American War. We are now a world power. We have insular possessions, and the Army is stationed in these possessions, performing active military duty. Since the close of the Spanish-American War and the Philippine insurrection conditions of peace have prevailed in all those insular possessions. Our soldiers committing capital offenses there in time of peace can not be tried by courts-martial, but must be tried by local civil courts, as the Federal Penal Code does not reach them. So it is that in the Philippines, Porto Rico, and Hawaii our soldiers are tried in the local courts for these capital crimes, and this was also true of Cuba during the second intervention. In the Philippines and Porto Rico and in Cuba during the second intervention their arraignment was before a court administering an alien jurisprudence in a language the accused did not understand.

In the first revision of these articles presented to the Congress it was provided that courts-martial might try persons subject to military law for capital crimes committed outside the geographical limits of the States of the Union and the District of Columbia, but leaving them subject to be tried exclusively in civil courts for all capital crimes committed within the geographical limits of the States of the Union and the District of Columbia. I have never sought to carry the request further. The purpose is to give our soldiers committing these offenses a forum where they will be surrounded by adequate constitutional or statutory safeguards. They would be so surrounded in a trial by civil courts within the geographical limits of the States of the Union and the District of Columbia, and, therefore, I did not think of asking that the law be changed in respect of trials within these geographical limits, retaining, in that regard, the existing law, which is based upon the principle that the Army, under all circumstances, in so far as it is practicable, should live in a state of subordination to the civil power. Perhaps there is no single article of this revision which has been more carefully considered, and there has been little disagreement in the discussions we have had respecting this article as to the necessity for giving courts-martial jurisdiction to try capital offenses committed outside the limits named.

The War College Division desires the extension of concurrent jurisdiction to go further and include capital crimes of persons subject to military law whenever and wherever committed. They would have that jurisdiction under any and all circumstances. I am afraid I did not succeed as well as I should in stating to the Senate subcommittee the reasons that the General Staff advanced for this change, and I have stated to the committee of the General Staff that considered this revision that when I appeared before the House committee I would request that General Staff officers be summoned so that they might have an opportunity to defend their recommendation before the House Military Committee. I now make that request in order that you may, if you see fit, ask the Secretary of War to send before you as witnesses members of the committee of the General Staff which worked upon this revision and any others to testify before you as to the necessity for this further extension which they stand for. Personally I would not object to having the jurisdiction of courts-martial made absolutely concurrent, with the courts of the States and

the District of Columbia under all circumstances so as to include offenses committed within the geographical limits of the States of the Union as well as without such limits. It would not lie well within the mouth of a military man to object to this extension if Congress were disposed to grant it, for I do not think that such extension of jurisdiction would be abused.

Mr. GORDON. I believe that Congress would be very reluctant to confer that additional jurisdiction within the territory of the United States.

Mr. CRAGO. Are you familiar with the Pennsylvania case of 1902?

Gen. CROWDER. At Pittsburgh?

Mr. CRAGO. No, sir. It was when the National Guard was out on strike duty at Shenandoah. There a sentinel, in carrying out the orders of his commanding officer, shot a man, killing him. The military court relieved him of any responsibility for the act and justified it upon the ground that he was simply carrying out orders. They attempted to try him in the civil court, but the civil court of that district was very much under the influence of the disaffected district. The Supreme Court held that in duty of that character the military courts had sole jurisdiction.

Gen. CROWDER. That was a question as between a State court-martial on the one hand a State civil court on the other.

Mr. CRAGO. It was a court-martial conducted in accordance with the Articles of War.

Mr. GORDON. It was the National Guard?

Mr. CRAGO. Yes.

Gen. CROWDER. It was not convened by any military authority of the United States, but by the military authorities of the State of Pennsylvania. The case probably was a noncapital case.

Mr. CRAGO. No, sir; he killed a man.

Gen. CROWDER. The charge might have been murder in the first degree or manslaughter, and the probabilities are that you will find that the court-martial tried the man, as it must have tried him, for the lesser, and included offense of manslaughter. I want to say that the Supreme Court of Pennsylvania, in deciding the case that way, would have followed the decision of the United States Supreme Court in the case of Grafton *v.* The United States, that decision being rendered by Justice Harlan. That decision held that the judgment of a court-martial in a criminal case within its jurisdiction constituted a good plea in bar of trial by civil courts of the United States, both the court-martial and civil court being courts of the United States. Therefore if a court-martial of the National Guard in Pennsylvania tried a man and acquitted him, under the doctrine in the case of Grafton *v.* The United States no State civil court could try him for the same offense. But the question remains unsettled as to whether the judgment of a court-martial of the United States would bar the civil court of a State—that is, of a different sovereignty—from taking cognizance of the same act.

You will notice that I propose to substitute for articles 55 and 62 three articles—95, 96, and 99—which you will find in the left-hand column. You will notice that I have treated murder and rape, two capital offenses under the Federal Penal Code, in an article

by themselves. Arson has ceased to be a capital offense by the revision of the Federal Penal Code in 1910. Article 95 provides:

> Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographic limits of the States of the Union and the District of Columbia in time of peace.

Mr. GORDON. Is that article 95 the same as it was in the Senate bill when it passed?

Gen. CROWDER. Yes, sir; it is the same.

Then the principal noncapital crimes are enumerated in one article, instead of alowing them to be included in the term ''all crimes not capital." They have been enumerated in article 96, as follows:

> Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony or assault with intent to do bodily harm, shall be punished as a court-martial maydirect.

Then I have in a general article all other crimes not capital, including those minor offenses which are in the nature of misdemeanors.

Those are the changes I desire to make, and I have stated in brief outline in the comment on the sheet you have before you, which I will append, the reasons which I have stated more in detail in my personal statement.

Mr. GORDON. Would it, not answer every purpose, if the General Staff desire to make a statement in opposition to sections 95, 96, and 99, to permit them to file a brief on the subject with the committee?

Gen. CROWDER. I have the brief filed by them with the War Department, but I thought they could make it plainer and save you a good deal of reading if they should appear. I will be glad to produce in this connection the reports I have from the General Staff upon this revision to be printed as a part of these hearings.

Mr. GORDON. If you have that brief, I will ask you to deliver it to the stenographer for insertion in the hearings. We can do that instead of asing them to come before the committee to testify. I make that suggestion for the reason that we are anxious to close the hearing this week. I shall be absent from the Capitol for a week at least, and I would like to have all this testimony this week, so that it may be made available for the use of the committee at the earliest convenient time.

Gen. CROWDER. I will now take up topically the other objections of the General Staff and the points of disagreement as to this revision. First, we have to consider article 27, which you can refer to in the committee print. I have retained, as you will notice, with some changes, an article of war that is as old as our military statute law respecting the use of the records of courts of inquiry as evidence before courts-martial which may follow the investigations of courts of inquiry. The General Staff recommends that the article be either omitted altogether, or that a proviso be added limiting the admissibility of such records to circumstances under which such testimony may be admitted under the rules of evidence governing other courts. The argument that the General Staff advances is that it is unjust to admit in evidence a record that would be ex parte and that the accused might not have had an opportunity to cross-examine or rebut during the investigation to which it pertains. I want to

say that the objection that they make could have been as legitimately advanced against the article of the existing code as against the article that I propose.

The General Staff seem to have taken up the letter of the proposed code and found that a certain line of evidence would be admissible according to the letter, and then asked that the article be omitted because such a thing would be possible under it, or that it be amended so as to make the use of the article which they objected to absolutely impossible. Such has never been the construction of the article as it exists to-day in the code, and I had not thought it necessary to submit a revision to guard against such a construction.They have in mind that a court of inquiry might meet down here at Washington Barracks to examine into the conduct of a particular officer, and that in the course of the evidence or proceeding evidence would be introduced which would reflect upon the conduct of another officer not being investigated and not present, and that then this article would permit that record of that court of inquiry to be used against this other officer if brought to trial. I do not think for a moment that any court that was offered evidence of that kind would do anything else than reject it, and I therefore did not make any provision for safeguarding against any such situation. I conceive that to be the only objection to the article. If the committee think that the possibility of such a thing should be guarded against, I am perfectly willing to have the article amended so as to make it impossible, although we have gotten along for 110 years without feeling the necessity for such a safeguard.

Mr. GORDON. Have you included in the testimony the communication of the General Staff, to which you just referred? We would like to have you insert in this hearing the communication from the General Staff regarding article 27.

Gen. CROWDER. Yes, sir; and their remarks will be fuller than I have presented them.

They next object to article 38, and ask that it be omitted. You will find article 38 on page 18. This is a new article in our code, and if you will examine the comparative prints you will find that it is based upon an existing statute of the United States. I think it would be worth while, perhaps, to turn to the committee print on that subject. In the committee print it is article 37.

On page 72 of the Senate committee print, examine the right-hand column before you, Mr. Chairman, and you will see that Congress has delegated to the Supreme Court authority to prescribe modes of proof in cases of equity and admiralty and maritime jurisprudence. Upon that statute I built an article of war which would vest in the President, who is really our only court of appeal, the power to prescribe procedure, including modes of proof, or trials before courts-martial. This particular article was carefully considered by the House Military Committee in the Sixty-second Congress, second session, and the article took its form from the deliberations of the House committee. I remember particularly that one Member, whom I now recall was Mr. Evans, a lawyer from Chicago, undertook to make it certain that the grant to the President was within the domain of procedure by writing the article in this form. The grant is to prescribe the procedure, including modes of proof; so it would be perfectly apparent that the delegation assumed to give no authority

to the President to change the common-law rules of evidence by which courts-martial, as civil courts, are governed; in other words, that the quantum of proof was not in issue, nor any of the fundamental rules of evidence. I do not think the General Staff concedes that that is the necessary construction of the article, made as plain as language can make it. They are apprehensive that the safeguards which exist now may be lost; that the admission of hearsay evidence might be authorized.

Mr. SHALLENBERGER. What is the necessity for that provision?

Gen. CROWDER. We have the authority of Greenleaf for saying that courts-martial, while bound by the rules of evidence observed in criminal courts of the country, are not bound to that strict compliance with them that civil courts are bound; that certain exceptions arise that are incident to the character of military service. You will understand, Mr. Shallenberger, that Army officers have not time to become lawyers, and yet they have to administer military justice. They can not carry around with them libraries, and what I wanted here was statutory authority for the President to formulate and summarize modes of proof which would help them out under conditions of field service. We have been getting along without such an article, and we have been going as far, and perhaps sometimes further, than we ought to go without the sanction of statute law in instructing courts-martial respecting their procedure and respecting the way they will prove a document, for instance. Now that is the field of operations I expect this article to have, and I think I have absolutely safeguarded it against the construction which the General Staff seems inclined to place upon it.

The next objection of the War College Division is to an article which we have already considered with respect to time limits respecting action upon charges. They want stricken from article 70, page 32 of the committee print, everything commencing with the period on line 16 down to an including the period on line 2, page 33, so that the article as the General Staff recommends would read:

> The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. Any officer whose duty it is to make such an investigation or to take such steps or to render such report who willfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion, shall be punished as a court-martial may direct.

Omitting from the article as the Senate enacted these words:

> In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried, a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay.

I have thrown in those time limits so that when the officer is not acting he is explaining why he is not acting. The General Staff thinks that is too rigid a rule for the military service to live up to. I think there is merit in the criticism to this extent. Undoubtedly these time limits would be embarrassing under conditions of field

service. I would insert, therefore, in article 70, immediately after the period and before the language I have just read, the words "in time of peace," so as to make these time limits operative only in time of peace.

Perhaps I may appropriately insert here the corresponding provision of the British code of 1914:

> Every person subject to military law when so charged may be taken into military custody: *Provided,* that in every case where any officer or soldier not in active service remains in such military custody for a longer period than eight days without a court-martial for his trial being ordered to assemble, a special report of the necessity for further delay shall be made by his commanding officer in the manner prescribed; and a similar report shall be forwarded every eight days until a court-martial is assembled, or the officer or soldier is released from custody.

Mr. GORDON. That was obviously takenby the General Staff from the British code.

Gen. CROWDER. No; I am reading from the British code which supports my text. I took mine from the British code.

Mr. GORDON. I understand.

Gen. CROWDER. Now, the next objection of the War College Division is to the inclusion of that provision punishing attempts to commit suicide. Their remarks will appear fully in the report which, by direction of the committee, I will insert in these hearings. I have noted here that their objection, briefly stated, is on the ground that the men who make these attempts are mentally unbalanced; that all military persons are peculiarly liable to become so because of the tropical service and the mental and physical strain they are called upon to suffer; and that the enactment of the law would visit unmerited reflection on innocent members of families of victims of meritorious service. That is the substance of their objection to including attempts to commit suicide.

Now, gentlemen, that completes the consideration of the objections to this revision by the War College Division of the General Staff after they have examined it very thoroughly, with one exception, and that is article 119, which deals with rank and precedence among these different classes of forces when they are assembled together for joint operations. I do not feel I am the proper person to advise you about a matter that so directly concerns the line. I have incorporated here as article 119—and it is also substantially incorporated in the joint resolution passed yesterday—a section of the first committee print of the House Military Committee on the Army reorganization bill. What you there included, but failed to include in the final bill, is now included in the joint resolution which will be tested out in the field very soon if military operations ensue on our Mexican frontier. The Secretary of War has always approved of this article, and I think most of his advisers have approved of it. The dissent of the War College Division of the General Staff is, I think, based on the fact that it does not recognize length of service as a basis of command rather than rank. fjrheir position is that length of commissioned service, rather than date of commission, should determine the right of officers in the same grade to command in the United States Army. I may not state their position fairly or as broadly inclusive of other considerations as they would state it for themselves, but they have made their statement in this memorandum which I will submit to you.

Mr. SHALLENBERGER. That refers to different lines of the service; for instance, where Cavalry officers and Infantry officers are together, and the Cavalry officer, who may have been longer in the service than the Infantry officer who might outrank him as to date of commission, would still be placed in command.

Gen. CROWDER. That would be one example, but they must be in the same grade before the provision would have any application at all.

Mr. SHALLENBERGER. I understand that.

Gen. CROWDER. I do not care whether they are in the same arm or a different arm, if two colonels come together and one of them has served 33 years and the other has served 32 years, the colonel who had served 33 years would command irrespective of the date of commission. That is the principle, I think, the adherents of this view contend for.

I thought that the question of capital punishment would claim your special attention and I have prepared a memorandum which contrasts the provisions of the proposed code with the provisions of existing law. This memoranum I will insert in the bearings, with your permission.

It will be noted that under the existing code the following offenses are capital, both in peace and war: (1) Assaulting or disobeying a superior officer; (2) mutiny or sedition; (3) failure to suppress mutiny or sedition; (4) improper use of countersign; (5) sentinel sleeping on post; and (6) intimidation of persons bringing in supplies.

In the proposed code offenses 4 and 5 cease to be capital offenses in time of peace, and 6, viz, intimidation of persons bringing in provisions, ceases to be a capital offense at any time. The article which punishes it as capital (art. 56) has come down to us from the code of Gustavus Adolphus. It was a serious offense in his day, when armies subsisted upon the country in which they were operating, but it has lost its gravity since armies have their trained commissaries and live only to a limited extent upon the country.

In addition to the offenses above enumerated as capital offenses in time of peace the existing law punishes the following acts as capital offenses when committed in time of war: (1) Desertion; (2) advising or aiding to desert; (3) misbehavior before the enemy; (4) subordinates compelling a commander to surrender; (5) relieving or aiding the enemy; (6) corresponding with the enemy; and (7) lurking or acting as spy.

The new code leaves the death penalty in force for all these offenses, whichareessentially war offenses, except desertion, and advising or aiding to desert, wich may be committed both in peace and war and which have ceased to be capital offenses in time of peace since 1830. In the existing code the death penalty is mandatory for two offenses—one, lurking or acting as a spy, and the other, forcing a safeguard. In the new code the death penalty is mandatory only for the offense of acting as a spy.

Mr. GORDON. Would the offense of intimidation of persons bringing in provisions be analogous to the offense of extortion?

Gen. CROWDER. No, sir. It denounces and punishes only the offense of intimidating persons who may desire to bring supplies to an Army.

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It will be noted that the changes in the law are slight and consist mainly in the abolition of the capital character of the offenses of misuse ocountersign and sleeping on post when committed in time of peace. It seems unreasonable that the law should continue to authorize the death penalty in the case of a sentinel who was on guard duty in normal peace conditions and who goes to sleep on his post. In time of war I think the offense is not too severly punished by the death penalty, as the act of a sentinel in sleeping on his post may imperil the safety of the Army. I do think, however, that it is an anomaly in our code that the article should originally have been drawn in such a way that the provision has been always operative in time of peace as well as war.

Mr. SHALLENBERGER. What do you mean by forcing a safeguard?

Gen. CROWDER. When it becomes important in time of war to have men to protect another man's premises, you place a safeguard on those premises, and if any man violates that safeguard, the offense is punishable by death.

That completes all that I have prepared to submit to you, and I am now ready to turn over the pages of the bill, article by article, for the purpose of answering any questions you desire to ask in regard to them. I believe I have made all the criticism that is suggested by the committee's confidential print and by the General Staff. Now, what is your pleasure in regard to a further hearing on the articles? Do you want to go into the other articles, and turn the pages, one by one, and consider them, or are you content with my statement regarding those to which attention has been invited?

Mr. CRAGO. We have asked questions right along as we came to the different articles.

Mi. GORDON. I think the committee have exercised the privilege of interrogating you from time to time during the submission of your testimony, General, and I do not recall an thing else that we desire to question you about. If any member of the committee desires to submit any questions, he may, of course, do so.

Gen. CROWDER. I feel that when the committee have considered the question of capital offenses, the concurrent jurisdiction of courts-martial with the civil courts, and the relations generally which the Army community sustains to the civil community, and have noticed the criticisms of the General Staff and the criticisms that have come from other sources which we have discussed here, you will have made a pretty complete examination of the code. I do not, myself, think of any matter of such fundamental importance that I ought to bring it to your attention now. I might say this, That the revision as a whole has had very careful service consideration. I drew this revision first in 1903, when I was an officer of the General Staff. It slept in the files of the War Department for a good many years, until 1911, when I resumed legal work in the Army and revived the subject.

The revision was presented to Congress in April, 1912, and was rather exhaustively considered by the House Military Committee. You will recall that Congress had a rush program of work which held it here until August 24, and the committee never made a formal report on the bill. It is always easy to misjudge the sentiment of a committee, but so far as the expressions during the progress of the hearings went, I concluded, and I think I was justified in doing so, that I was proceeding almost by unanimous consent, and an informal suggestion was made that the Unanimous-Consent Calendar be opened

up to it. There seemed to be some necessity for immediate action to meet a situation that existed i s Texas at the time, in connection with the efforts of a Regular Army division which was operating down there to convene a court-martial. Relief legislation was introduced in the Senate. I took the opportunity to extend it so as to give me all of the articles which pertain to the military judiciary, and that bill was enacted almost immediately. There has scarcely been a session of Congress when some piecemeal legislation has not been reported that carried some of these provisions into the statute law. The Senate then took up the revision measure and passed it three times. So it has had all the consideration you could expect, and there are very few things about the code that have not been explored and passed upon by men who are in earnest in their efforts to get this relief as early as possible.

Mr. GORDON. Is it your understanding that the Secretary of War desires to be heard further upon this matter?

Gen. CROWDER. No, sir; I know that he had that special message to deliver to you respecting penitentiary confinement. He and I have talked over the revision a good deal, but I am afraid that his duties have been so excessive of late that he has not had an opportunity to refresh his recollection about the code.

Mr. GORDON. I wish you would say to the Secretary that if there is anything he desires to submit on the Senate bill or the proposed confidential print, a copy of which was sent to him, we will be glad to receive it and will include it in the hearings.

Gen. CROWDER. I will do so.

Mr. SHALLENBERGER. As I understand it, the resolution we passed the other day carried with it a proviso that the right of command, where there are conflicting ranks, goes with the date of the commission?

Gen. CROWDER. It is substantially what you have before you here, but it is emergency legislation. It is not permanent legislation.

Mr. GORDON. The committee will now take a recess subject to the call of the chairman. I will call another meeting of the subcommittee as soon as these hearings are printed and have been for a reasonable time in the hands of the committee. I hope the members of the committee will give this testimony their careful consideration.

(Thereupon at 12 o'clock noon the subcommittee adjourned.)

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL
Washington.

Memorandum for the Committee on Military Affairs, House of Representatives.
Subject: Capital offenses.

1. Below will be found the provisions of the existing Articles of War denouncing and punishing capital offenses contrasted with the corresponding provisions of the new code.

2. *Capital offenses in time of peace.*— The contrast shows that under the existing code there are six offenses punishable by death in time of peace, namely:

(1) Assaulting or disobeying a superior officer (art. 21).
(2) Mutiny or sedition (art. 22).
(3) Failure to suppress mutiny or sedition (art. 23).
(4) Improper use of countersign (art. 44).
(5) Sentinel sleeping on post (art. 39).
(6) Intimidation of persons bringing provisions (art. 56).

The new code withholds the power to impose the death penalty in time of peace for (4), (5) and (6), leaving the death penalty to be imposed in the discretion of the court only for (1), (2) and (3).

3. Capital offenses in time of war.—Under the existing code all the offenses listed above are punishable with death, and, in addition, seven other offenses, namely:

(1) Desertion (art. 47).
(2) Advising or aiding desertion (art. 51).
(3) Misbehavior before enemy (art. 42).
(4) Subordinates compelling commander to surrender (art. 43).
(5) Relieving or aiding the enemy (art. 45).
(6) Correspondence with the enemy (art. 46).
(7) Acting as spy (R. S., 1343).

The new code leaves the death penalty authorized for all these war offenses, except the offense of intimidation of persons bringing provisions to a camp or garrison (art. 88), which it takes out of the category of capital offenses both in peace and war.

4. Mandatory death penalty.—The contrast shows further that under the existing code the death penalty is mandatory in the following cases:

(1) Lurking or acting as a spy (sec. 1343, R. S.).
(2) Forcing a safeguard (art. 57).

The new code abolishes the mandatory requirement for the death penalty in the case of the offense of forcing a safeguard, leaving that offense punishable by death or by such other punishment as a court-martial may direct, so that there will remain but one offense, "lurking or acting as a spy," as to which the death penalty is mandatory.

5. The contrast of proposed articles with existing articles follows:

PROPOSED ARTICLES.	EXISTING LAW.
ART. 58. *Desertion.*—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, except death, that a court-martial may direct.	ART. 47. Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct. (Art. 20, Code of 1806, as amended by act of May 29, 1830. Art. 1, sec. VI, Brit. Code, 1765.)
ART. 59. *Advising or aiding another to desert.*—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.	ART. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States shall, in time of war, suffer death or such other punishment as a court-martial may direct, and in time of peace any punishment, excepting death, which a court-martial may direct. (Art. 23, Code of 1806, as amended by act of May 29, 1830; art. 4, sec. VI, Brit. Code, 1765.)
ART. 64. *Assaulting or willfully disobeying superior officer.*—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office,,or willfully disobeys any lawful command of his superior officer shall suffer death or such other punishment as a court-martial may direct.	ART. 21. Any officer or soldier who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer shall suffer death or such other punishment as a court-martial may direct. (Art. 9, Code of 1806; art. 5, Sec. II, Brit. Code, 1765.)
ART. 66. *Mutiny or sedition.*—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.	ART. 22. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition in any troop, battery, company, party, post, detachment, or guard shall suffer death or such other unishment as a court-martial may direct. (Art. 7, Code of 1806; art. 3, Sec. II, Brit. Code, 1765.)

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

ART. 75. *Misbehavior before the enemy.*— Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters shall suffer death or such other punishment as a court-martial may direct.

ART. 76. *Subordinates compelling commander to surrender.*— If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enem or abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

ART. 77. *Improper use of countersign.*— Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

ART. 78. *Forcing a safeguard.*— Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 81. *Relieving, corresponding with, or aiding the enemy.*— Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall

ART. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, having knowledge of any intended mutiny. or sedition, does not, without delay, give information thereof to his commangng officer shall suffer death or such other punishment as a court-martial may direct. (Art. 8, Code of 1806; art. 4, Sec. II, Brit. Code, 1765.)

ART. 41. Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters shall suffer death or such other punishment as a court-martial may direct. (Art. 49, Code of 1806; art. 9, Sec. XIV, Brit. Code, 1765.)

ART. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage shall suffer death or such other punishment as a court-martial may direct. (Art. 52, Code of 1806; arts. 12, 13, and 14, Sec. XIV, Brit. Code, 1765.)

ART. 43. If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct. (Art. 59, Code of 1806; art. 22, Sec. XIV, Brit. Code, 1765.)

ART. 44. Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death or such other punishment as a court-martial may direct. (Art. 53, Code of 1806; art. 15, Sec. XIV, Brit. Code, 1765.)

ART. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at an place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard shall suffer death. (Art. 55, Code of 1806, as amended by acts of July 13, 1861; July 31,1861; Feb. 13,1862; art. 17, Sec. XIV, Brit. Code, 1765.)

ART. 45. Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct. (Art. 56, Code of 1806; art. 18, Sec. XIV, Brit. Code, 1765.)

suffer death or such other punishment as a court-martial or military commission may direct.

ART. 82. *Spies.*—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

ART. 86. *Misbehavior of sentinel.*— Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment except death, that a court-martial may direct.

ART. 88. *Intimidation of persons bringing provisions.*—Any person subject to military law, who abuses, intimidated, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

ART. 92. *Various crimes.*—Larceny, embezzlement, forgery, robbery, burglary, arson mayhem manslaughter, murder, assault with intent to kill or to do bodily harm, wounding by shooting or stabbing with an intent to commit murder, rape, or asault with intent to commit rape, shall be punishable by a general court-martial when committed by persons subject to military law, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, District, or other place in which such offense may have been committed.

ART. 46. Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial may direct, (Art, 57, Code of 1806; art. 19, Sec. XIV, Brit. Code, 1783.)

All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death. (Sec.1343, R. S.; Res. Con. Cong., Aug. 21, 1776.)

ART. 39. 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. (Art. 46, Code of 1806; art. 6, Sec. XIV, Brit. Code, 1765.)

ART. 56. Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign ports shall suffer death or such other punishment as a court-martial may direct. (Art. 51, Code of 1806; art. 11, Sec. XIV, Brit. Code, 1765.)

ART. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, mahslahghter, murder, assault and battery with intent to kill, wounding by shooting or stabbing, with an intent to commit murder rape, or an assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed. (Acts July 13, 1861; July 31,1861; Mar. 3,1863; arts. 17, 18, 33, Code of James II, 1686).

ART. 62. All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial according to the nature and degree of the offense, and punished at the discretion of such court. (Art. 99 Code of 1806; art. 3, Sec. XX, Brit. Code, 1765.)

ART. 43. *Death sentence, when lawful.*—No person shall by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members present and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be deterhined by a majority of the members present.

ART. 48. *Confirmation, when required.*—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

* * * *

(d) Any sentence of death except in the case of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or dvision.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

ART. 96. No person hall be sentenced to suffer death, except t y the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned. (Art. 87, Code of 1806; art. 8, Sec. XV, Brit. Code, 1765.)

ART. 105. No sentence of a court-martial inflicting the punishment of death shall be carried into execution until it shall have been confirmed by the President except in the cases of persons convicted in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders convicted, in time of war, of robbery, burglary, arson, rape, assault, with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field or the commander of the department, as the case may be. (Art. 65, Code of 1806, as amended by acts of July 17, 1862; Mar. 3, 1863; and July 2, 1864.)

Memorandum for the Committee on Military Affairs, House of Representatives.
Subject: Concurrent jurisdiction of courts-martial with civil courts to try civil crimes.

Civil crimes.—The jurisdiction of courts-martial to try crimes which are also crimes under the civil law is conferred by two articles of the existing code and by three articles of the proposed code, which are contrasted in parallel columns below:

PROPOSED CODE.	EXISTING CODE.
ART. 95. *Murder–Rape.*—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.	ART. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with an intent to commit murder, rape, or an an assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed.
ART. 96. *Various crimes.*—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larcency, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.	
ART. 98. General article.—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 and offenses	ART. 62. All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance

not capital, of which persons subject to military law may be guilty, shall 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.

of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

COMMENT.

1. An examination of the provisions of the existing code (right-hand column) discloses—

(a) That from the earliest American code down to July 13, 1861, the jurisdiction of courts-martial to try civil crimes was limited to "crimes not capital."

(b) That by act of Congress of July 13, 1861, amended in two subsequent acts, this jurisdiction was extended to capital civil crimes, but only in time of war, insurrection, or rebellion.

(c) That the act of July 13, 1861, as amended, in addition to granting jurisdiction over civil capital crimes in war, granted jurisdiction to try certain specially named noncapital civil crimes, thus duplicating the grant already in existence made by the sixty-second article of war, but with the qualification that the punishment for any specific offense named should not be less than the punishment provided for a like offense by the laws of the place of commission.

2. An examination of the corresponding provisions of the proposed code (left-hand column) discloses—

(a) An extension of the jurisdiction of courts-martial to try the capital offenses of murder and rape when committed by persons subject to military law (1) in the Philippines, Porto Rico, Canal Zone, and Alaska; (2) in Canada, when our troops are in peaceful transit through Canadian territory, in Cuba under conditions existing during the second intervention, when there was no state of war, and in China, where we have maintained for several years a military force in time of peace; (3) in Mexico under conditions existing during the military occupation of that place in 1915 and now existing in those portions of northern Mexico occupied by Gen. Pershing's column; and (4) in any country outside the geographical limits of the States of the Union or the District of Columbia where our troops may be sent, as, for example, Haiti, Santo Domingo, and Nicaragua.

(b) That this extension of jurisdiction granted courts-martial for the trial of capital crimes is not exclusive of, but concurrent with, that of civil courts.

(c) That the transposition of phraseology found in the ninety-ninth article of war is for the purpose of making the statutory law correspond to the construction placed upon the existing sixty-second article of war by Justice Harlan, namely, that all crimes not capital and not simply those which prejudice good order and military discipline are included in the grant of jurisdiction to courts-martial.

3. The committee will at once note the omission of the requirement of existing article 58, that the punishment for the offenses enumerated in that article "shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed." The accepted construction of the omitted provision is that it fixes a minimum of punishment to be adjudged by a court-martial, leaving it discretionary with the court to add to such punishment if thought proper. Thus, where a State statute prescribes the penalty of imprisonment for a certain term, the court-martial, while it must impose imprisonment for at least as long a term, may, if deemed just, increase such penalty at will, its discretion in the matter being without limit, except in so far as it may properly be controlled by the maximum punishment order of the President, or by a principle analogous to that of the constitutional prohibition against cruel and unusual punishments. It will be noted also that the omitted provision is operative only in time of war, and that in time of peace the offenses enumerated in article 58 are punishable under article 62 as a court-martial may direct. The provision has been omitted in the view that it is illogical that this requirement should be in force only in war, and that in the form in which it is expressed it is an invitation to punishments of great severity.

4. I must bring to the attention of the committee the recommendation of the General Staff that courts-martial be authorized to try persons subject to military law for the civil capital offenses of murder and rape whenever and wherever committed; that is, within the geographical limits of the States of the Union and the District of Columbia, as well as without those limits. Representatives of the General Staff will appear before you for the purpose of urging the necessity of such an extension.

NOTE.—The term ''all crimes not capital" employed in existing article 62 and repeated in proposed article 99 is authoritatively held to mean crimes created or made punishable by the common law or by the statute law of the United States.

Where crimes are not specifically defined in the Military or Penal Code of the United States, it is likewise settled law that we look to the common law for their definition.

Memorandum for the Committee on Military Affairs, House of Representatives.
Subject: Points of disagreement of War College Division, General Staff.

The War College Division of the General Staff has reviewed and reported upon this revision. Their disagreement with that part of the revision respecting the trial of civil capital crimes by courts-martial has already been noted and discussed. The remaining points of disagreement, omitting any mention of minor matters where their views could obviously be adopted, concern the following articles:

PROPOSED CODE.	EXISTING CODE.
ART. 27. *Courts of inquiry–Records of, when admissible.*— The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided,* That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.	ART. 121. The proceedings of a court of inquiry may be admitted as evidence by a court-martial in cases not capital nor extending to the dismissal of an officer: *Provided,* That the circumstances are such that oral testimony can not be obtained. (Art. 92, Code of 1806; art. *26,* American Code, 1786.)

COMMENT.

The War College Division recommends that this article be either omitted altogether or that a proviso be added limiting the admissibility of such records to circumstances under which such testimony may be admitted under the rules of evidence governing other courts. It is advanced as unjust to admit in evidence a record that would be ex parte and that the accused might not have had an opportunity to cross-examine or rebut during the investigation to which it pertains. Before passing upon the validity of this objection, I think the nature of the court of inquiry and of its proceedings should be considered.

The primary function of a court of inquiry is to determine whether there should be a trial by a court-martial in a particular instance. Its nearest analogy is to the grand jury; but as the party whose conduct is under investigation may be present with counsel and is heard in his defense, and as its proceedings are generally public, the analogy indicated is by no means complete. It is true that the court of inquiry proceeds under the same sanction as a court-martial in the taking of evidence. The right of cross-examination is always afforded, and common-law rules of evidence govern the admissibility of testimony.

I conceive that the War College objection is partly founded upon the belief that the record of the court of inquiry in one case may be used as evidence before a court-martial in the trial of another case. While the letter of the statute would seem to be broad enough to permit this, such has never been the construction of the statute, and I had not deemed it necessary to guard against such a use of the record of a court of inquiry The accused has always had the privilege of attacking the record, just as he may attack any other documentary evidence.

It remains to be noted that the existing article (art. 121, left-hand column) authorizes the admission as evidence of the proceeding of a court of inquiry only when "the circumstances are such that oral testimony can not be obtained; "that is, where a witness has died or has left for an indefinite period the jurisdiction of the United States and is beyond the reach of process. I see no reason why we should not be permitted to use these records also when a witness who has testified before a court of inquiry is on a foreign station, such as the Philippines, or in other arts of our noncontiguous territory and the court-martial is sitting within the United States, jist as depositions may be used under like circumstances.

The introduction of the proviso in the new article that "such evidence (records of a court of inquiry) may be adduced by the defense in capital cases or cased extending to the dismissal of an officer" is a concession to an accused of the same rights as is accorded him respecting the use of depositions.

PROPOSED CODE.	EXISTING CODE.
ART. 38. *President may prescribe rules.*—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules made in pursuance of this article shall be laid befor the Congress annually.	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. (Sec. 862, R. S.)

COMMENT.

The War College objection to this article, as I understand it, is that according to the letter of the article the President would be authorized to prescribe modes of proof which might affect the quantity and quality that such regulations might require courts-martial to receive in evidence affidavits, hearsay, questionable records, etc.

This article received careful consideration by the Military Committee of the House when the revision was pending in 1912 and when hearings were conducted on the revision offered at that time (pp. 38, 39,40).

I think it is a sufficient answer to the War College criticism to invite attention to the fact that the power delegated to the President is to be exercised within the field of procedure and practice. The language plainly requires this construction, for the grant is to "prescribe the *procedure,* including modes of proof." It seems to me about as clear as language could make it that under this power the President could not alter the essential rules of evidence in the way suggested by the War College. In further defense of the article I would invite attention to the fact that the President is our highest court of appeal. He acts judicially upon all cases where his confirming power is required. In the exercise of this power he comments upon cases and makes rulings upon matters of practice and procedure. We are but following the analogy of the section of the Revised Statutes cited *supra* wheh we devolve upon him, as that section devolves upon the Supreme Court, the power to prescribe modes of proof. This article received the personal consideration of Secretary Garrison, who directed its retention in the code after considering the objections of the General Staff. The committee will note the concluding proviso, that all rules promulgated by the President under the authority of this article must be laid before the Congress annually.

PROPOSED CODE.	EXISTING CODE.
ART. 70. *Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. *In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report necessity for the delay shall be made by his commandin officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such*	ART. 70. No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. (Art. 78, Code of 1806.) Art. 18, Sec. XV, Brit. Code, 1765.) ART. 71. When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy

person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who wilfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided,* That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

of the charges be not served, or the arrested officer be hot brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest. (Act of July 17, 1862.)

COMMENT.

The War College Division recommends the omission of the italicized portion of article 70. Their objection to that part of the article is unferstood to be that compliance would often be difficult, and they remark further "Even if desirable, they should be the subject of orders and regulations and not of legislation."

The purpose of the italicized provision is to assure prompt trials and guard against inexcusable and avoidable delays in acting upon charges. Statistics covering the four-year period from 1912 to 1915, inclusive, show the average period of delay between the arrest of a soldier under charges and entering upon the execution of the sentence to be 37 days. Every effort has been made to reduce this average period, which was 41 days in 1912, with the result that in the year of 1915 it was 33. A study of the statistics shows that a considerable part of the leelay was incident to the time consumed in investigating the charges within the command to which the soldier belonged. The purpose of the underscored portion is to penalize unjustifiable delays upon the part of officers charged with the duty of bringing an offending soldier to trial.

The corresponding provisions of the British Code of 1914 are the following:

"ART. 45. (1) Every person subject to military law when so charged may be taken into military custody: *Provided,* That in every case where any officer or soldier not on active service remains in such military custod for a longer period than eight days without a court-martial for his trial being ordered to assemble, a special report of the necessity for further delay shall be made by his commanding officer in the manner prescribed; and a similar report shall be forwarded every eight days until a court-martial is assembled or the officer or soldier is released from custody.

* * * * * * *

"(5) The charge made against every person taken into military custody shall without unnecessary delay be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offense or such person shall be discharged from custody."

It will be noted that the English article is operative only during "active service," and I think the application of our own article should be similarly limited and not embrace periods of field service where emergencies may operate to delay the action longer, The corresponding phraesology of American statute law is "in time of peace," and I recommend that this phrase be inserted at the beginning of the italicized portion, to the end that all embarrassment be avoided. Amended in this regard, my best judgment is that the provision should be retained. I am convinced from the study I have given the subject that officers responsible for the performance of duties incident to bringing their subordinates to trial for offenses should be liable themselves to be brought before courts-martial to answer for inexcusable delays in the discharge of this duty. Nothing can be more damaging to discipline than the retention in custody of a man for a long period who is entitled to be released from custody, and nothing is so prejudicial to discipline as failure to secure to an accused person, be he guilty or innocent, a prompt trial.

PROPOSED CODE.

ART. 91. *Dueling–Attempts to commit suide.*— Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority or who attempts to commit suicide, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

EXISTING CODE.

ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. (Art. 25, Code of 1806, as amended by act of Feb. 27, 1877; art. 2, Sec. VII, Brit. Code, 1765.)

ART. 27. Any officer or noncommissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial. (Art. 26, Code of 1806; art. 3, Sec. VII, Brit. Code, 1765.)

ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law and have done their duty as good soldiers, who subject themselves to discipline. (Art. 28, Code of 1806; art. 5, Sec. VII, Brit. Code, 1765.)

The foregoing articles appear in the present British Code of 1914 in the following form:

"38. Every person subject to military law who commits any of the following offenses; 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 is in this act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this act mentioned."

COMMENT.

The War College Division objects to so much of new article 91 as punishes attempts to commit suicide, on the ground that men who make these attempts are mentally unbalanced; that military persons are peculiarly liable to become so, because of tropical service and the mental and physical strain they are called upon to suffer; and that the enactment of the law would visit unmerited reflection on innocent members of families of victims, of meritorious service.

The corresponding article of the British code of 1914, supra, punishes attempts to commit suicide. This offense is not unknown to our civil law. In the hearings before the House Military Committee in 1912 I called the attention of the committee to the incorporation of this provision, and took the judgment of the committee, which was favorable to its retention (p. 73). It is not a matter of great importance whether it remains in the code, for the offense, being one at common law, even though not specifically covered by the articles would be punishable under the general article as conduct prejudicial to good order and military discipline.

PROPOSED CODE.

ART. 119. *Rank and precedence among Regulars, Militia, and Volunteers.—That in time of war or public danger, when two or more officers of the same grade are on duty 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 any organization thereof, without regard to seniority of rank in the same grade. 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, namely: 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 in the service of the United States; and, third, officers of the Volunteer forces: *Provided,* That officers of the Regular Arm holding commissions in the Organized Militia in the service of the United States or in the volunteer forces shall rank and have precedence under said commission as if they were commissions 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 article, he held to antedate muster into the service of the United States.

EXISTING CODE.

ART. 124. Officers of the Organized Militia of the several States, when called into the service of the United States, shall, on all detachments, courts-martial, and other duty, wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of like grade in said regular forces, and shall take precedence of all officers of volunteers of equal or inferior rank, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular forces of the United States. (Art. 98, Code of 1806; as amended by act of Mar. 2, 1867; act of Mar. 8, 1910; Art. 2, Sec. XIX, Brit. Code, 1765.)

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 the command of the forces in such field or department without regard to seniority of rank. (Res. of Apr. 4, 1862; 12 Stat. 617.)

COMMENT.

The War College objects to the *underscored* portion of article 119 authorizing the President to assign command in time of war without regard to seniority of rank in the same grade, claiming that—"The law was tried, found harmful, and repealed by those who saw the harm it did. It was condemned by experience. It should never be reenacted. * * * The President approved the repealing act Jule 13, 1866." The argument of the War College Division should be read, I think, in its entirety by the committee, as their objection to this particular provision is presented with great insistence.

Article 119 is taken bodily from the first House committee print of the Army reorganization act considered this year. Obviously a law fixing rank and precedence in the exercise of command as between the various forces should be found in a reorganization act rather than in the Articles of War. However, the Army reorganization act as finally failed to make any provision in this regard, and if any law is to be enacted on the subject at all it would seem appropriate to enact it here; especially in view of the fact that this particular statute has always been found in the Articles of War, and this is likewise true of the British Code (see art. 124, supra, and notations). The General Staff states that the reason for the repeal of the act in 1866 was based upon the fact that it was found harmful and was condemned by experience. I have not been able to consult committee reports, nor the discussions in either House, and therefore do not know whether the harmful character of the legislation was commented

upon at the time the act was repealed. In the absence of any showing in this regard I should assume that the act was intended to be operative only in time of war and that it was repealed because the war had ceased; that by such repeal Congress said that this law should not survive on the statute books to regulate military operations in time of peace. Article 119 has no direct relation to the administration of military justice. It determines nothing in that field except the order in which officers sit as members of court-martial. It is doubtless true that the committee will wish to determine its action upon this article primarily with reference to the opinions of the Chief of Staff and line officers and officers of the General Staff.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 7, 1916.

Memorandum for the Chief of Staff.
Subject: Revision of the Articles of War.

1. Under date of March 11, 1916, a memorandum for the Chief of Staff was submitted on the revision of the Articles of War. The memorandum was referred from the office of the Chief of Staff to the Judge Advocate General for comment. Herewith is the memorandum, dated March 15, 1916, containing the Judge Advocate General's comments, accompanied by a memorandum from the Office of the Chief of Staff for the Chief of War College Division, which reads as follows:

"The Chief of Staff directs that accompanying papers be referred to you for the action recommended by the Judge Advocate General in paragraph 8 of his memorandum dated March 15."

Paragraph 8 of the Judge Advocate General's memorandum referred to reads as follows:

"It is suggested that this memorandum be brought to the attention of the War College Division with a view to such conference between that division and this office as may be deemed necessary in reaching an understanding upon certain points in respect to which I feel that a misunderstanding exists. I feel very certain that if this is done the form of report submitted by the War College Division, and the form of letter to be sent to the chairmen of the Military Committees of the Senate and House, will reflect what I conceive to be the favorable attitude of the War College Division toward the revision as a whole, and at the same time will insure the consideration by the committees of each recommendation which the War College Division stands for, on its merits. I have always contemplated that when this bill comes to be heard before the House Military Committee, officers of the War College Division will be summoned before that committee to present their views. I shoulf certainly desire this. There will be ample opportunity to obtain the judgment of the committee upon each and every point raised in the attached memorandum."

2. In compliance with the foregoing, a representative of the War College Division has had additional conferences with the Judge Advocate General and the War College Division has had additional meetings to consider carefully the comments, opinions, and suggestions of the Judge Advocate General regarding the revision of the Articles of War.

3. Herewith is a new memorandum on this subject (Apr. 7, 1916), to replace that of March 11, 1916.

M. M. MACOMB,
Brigadier General, Chief of War College Division.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 7, 1916.

Memorandum for the Chief of Staff.
Subject: Revision of the Articles of War.

1. Under date of January 18, 1916, the secretary of the General Staff sent the following memorandum for the Chief of the War College Division:

"The Chief of Staff directs me to send you the accompanying Senate print relative to the changes in the Articles of War, and to state that he desires the print carefully gone over with the view to determining if there is anything proposed which, in the judgment of the War College Division, is inadvisable." (W. C. D. 7060–8, Jan. 20, 1916.)

2. In compliance with these instructions the comparative print has been carefully gone over and compared with the revision of the Articles of War advocated by the War College Division in W. C. D. 7060–6, December 21, 1915.

3. The heading "A. Composition," over article 4, is omitted.

To the titles of articles 5, 6, and 7 "composition" is added.

To the titles of articles 8, 9, and 10 "by whom appointed" is added.

To the titles of articles 12, 13, and 14 "jurisdiction" is added.

Before article 12 the heading "B. By whom appointed" is omitted.

Before article 12 the heading "C. Jurisdiction" is omitted.

The order of articles 6 to 14, inclusive, is changed.

All the foregoing changes in the comparative print are left out of S. 3191.

Before the words *"Povided further,"* is article 14, *"And"* is and should be omitted.

4. The heading "C. Jurisdiction" having been omitted in the print, the title "Not exclusive," in article 15, is not complete. This, however, is corrected in S. 3191.

5. In the comparative print putting back article 28, omitted by the War College Division, is advocated. In a statement before the Senate Subcommittee on Military Affairs the Judge Advocate General said he did not think the General Staff thought of the inconsistency of ruling out the records of courts of inquiry and at the same time retaining provision for taking evidence by deposition.

The revision of the Articles of War passed by the Senate March 9, 1916, which is the revision referred to in this memorandum as S. 3191, includes arcticle 28 (No. 27 in S. 3191). The War College Division has in mind that the accused may submit cross-interrogatories for depositions. Unless the object of this article be to make the rules of evidence for courts-martial less strict than the rules of evidence observed by the civil courts, the article is at least unnecessary. It is not just to admit in evidence against an accused person before a court-martial the record of a court of inquiry of the investigation of another person, or of an act or phase of an act other than the specific act for which such person is undergoing trial. In the first case the record would be absolutely ex parte, and in the second case the accused might not have had opportunity during the investigation to cross-examine or to rebut evidence going to the specific act or phase of the act for which he is subsequently called upon to answer before a court-martial. Article 28 (No. 27 in S. 3191) should be omitted. If Congress should decide to retain this article in the revision, a proviso should be added limiting admissibility of such records to circumstances under which such testimony may be admitted under the rules of evidence governing other courts. The proviso should be so expressed as to give an accused the same protection before a court-martial which he has before any other court.

6. The word "president" in article 35 of the comparative print (No. 34 in S. 3191), referring to the President of the United States, should be "President."

he order of articles 35 and 56 is reversed. This arrangement is an improvement.

In article 37 of the print (No. 36 in S. 3191) the word "president" should be "President."

7. In article 38 (No. 37 in S. 3191) the word *"And"* is and should be omitted before the words *"provided further."*

8. Is the comparative print it is advocated that article 39 (No. 38 in S. 3191) be put back. No one could know what might be done under such an article of war. Regulations for modes of proof might affect quality and quantity of proof. Under such regulations courts-martial might be required to receive in evidence opinions, affidavits, hearsay, questionable records, etc. This is vitally wrong.

9. In article 39 the word "noncapital" is added to the first proviso, making it read: "That for desertion in time of peace or for any noncapital crime or offense punishable * * *." This added word is omitted from article 39 of S. 3191.

10. The title of article 46 is changed by substitution of the word "sentence" for "sentences." This change is correct.

11. In article 59 the words "except death" were changed to "excepting death." This change is an improvement.

12. In article 65 the word "who" is inserted before the word "attempts." This change is unimportant.

13. In the explanation of changes in article 70 of the comparative print it is stated that the responsible officers should be required to make frequent reports (every eight days), in case there be delay in serving charges or bringing the accused to trial, and that provisions for this should be made in detail in the article.

Article 70, as proposed by the War College Division, guards the interest of the accused by providing for punishment of any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion. The records regarding every case would reveal delays if they should occur. The requiring of reports every eight days, even if desirable, should be the subject of orders or regulations and not of

legislation. Without the enactment of any legislation the War Department can require reports every eight days by issuing an order or by adding such requirement to Army Regulations or the Manual for Courts-Martial. Any department commander by simply issuing an order can require reports every eight days regarding the status of cases awaiting trial. The changes in this article, above referred to, as proposed in the comparative print, are unnecessary and would result in much bother and would be very unsatisfactory to officers who serve with troops. The portion of the article requiring reports every eight days, inserted in S. 3191, should be omitted.

14. In the explanation of the changes in article 74 it is remarked in the comparative print that it is not considered wise to give military commanders discretion in time of peace in regard to turning over to civil authorities any person subject to military law who is held by the military authorities to answer or who is awaiting trial or result of trial or who is undergoing sentence for a crime or offense punishable under these articles. As it is proposed in the comparative print to change this article, a deserter might have to be delivered to a civil officer on some trifling charge, and thus be enabled to escape. For unimportant matters soldiers might be demanded by the civil authorities, and thus postpone and possibly entirely escape trial for very serious offenses. Nothing of the kind can be for the public good. In a statement before the Senate Subcommittee on Military Affairs, the Judge Advocate General advocated the article in the form recommended by the War College Division, and it is in that correct form in S. 3191.

15. The War College Division omitted from article 91 "Attempts to commit suicide." The Secretary of War agreed to the omission. That provision has been reinserted in the article in S. 3191. Of course, attempt to commit suicide is nothing like the crime of dueling, with which it is coupled in this article. Treating men as criminals because of such mental infirmities as usually cause attempts to commit suicide would not be reasonable. Moreover, such law would be unmerited reflection on innocent and afflicted families of victims of meritorious military service. Some officers and soldiers have become mentally unbalanced and attempted to commit suicide after and probably because of long and faithful military service in the Tropics. Why should they and their families be punished for this? There is certainly a vast difference between crime and insanity. Even if such were proper for a civil community, it would be most unjust to soldiers who are sometimes called upon in the line of duty to suffer unusual mental and physical strains that endanger the stability of the mind. The provision regarding attempts to commit suicide should be stricken from this article.

16. In the title of article 92 "various crimes" is added. This addition is an improvement. In the proposition to have this article replaced by two articles, Nos. 95 and 96, in Senate bill 1032, Sixty-second Congress, first session, it is stated in the comparative print, in explanation of changes, that when a person subject to military law is charged with murder or rape at a place to which he has gone in obedience to military orders, and where he can not be tried by a jury of his peers in a civil court of criminal jurisdiction, considerations of justice, as well as of expediency, would seem to demand that the charge against him be passed upon by an established military tribunal. This, it is stated in the comparative print, was eliminated from the War College revision by merging two articles into one. This does not seem to be eliminated. In a statement of the Judge Advocate General to the Senate Subcommittee on Military Affairs, pages 32 and 33, Senate Report No. 130, Sixty-fourth Congress, first session, February 9, 1916, is found the following:

"ART. 92. I come now to a provision of the code which I think will claim the very special attention of this subcommittee of the full committee, and of the Senate. I refer to article 92, which confers upon courts-martial jurisdiction over civil crimes when committed by persons subject to military law. As the law now stands, courts-martial have concurrent jurisdiction with the civil courts to try noncapital crimes of persons subject to military law at all times and wherever committed, and concurrent jurisdiction to try capital civil crimes of such persons in time of war. In the revision, which has passed the Senate twice, the jurisdiction of courts-martial was extended to include civil capital crimes in time of peace when committed outside the geographical limits of the States of the Union and the District of Columbia, where the alternative would be trial by courts administering an alien jurisprudence, without a jury, but leaving civil capital crimes committed by military offenders within these geographical limits within the exclusive jurisdiction of the civil courts.

"The General Staff has further revised the article so as to vest this jurisdiction in courts-martial, thus making the jurisdiction of the court-martial concurrent with the civil courts, as to both capital and noncapital crimes. I do not concur in this extension of the court-martial's jurisdiction, and the Secretary of War has expressed disapproval of the change in his letter transmitting this revision to the Congress.

"In other words. the General Staff has undertaken to say that capital crimes committed here at Fort Myer or anywhere else within the geographical limits of the country shall be tried as well by court-martial as by civil courts. We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. But I am very much in favor of doing it when the Army is outside of our geographical limits proper: and that is the proposition that I stand for, and not the proposition that is here submitted.

"The CHAIRMAN. What reasons do the General Staff assign?

"Gen. CROWDER. I have not seen any reason. They simply recorded a recommendation. I can easily understand the reason, viz, a desire that the Army may handle its own criminal business, and doubtless border conditions to the south of us entered into their consideration and influenced their conclusions. I concede the necessity for autonomy in these matters when the Army is serving under unusual conditions, away from the protection of constitutionally guaranteed rights.

"Senator Colt. Yes.

"Gen. CROWDER. But not when they are serving here. I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes.

"Senator Colt. That runs all through the common law, the civil law, in regard to capital crimes, I think. Of course, I can understand that the General Staff, perhaps, would like to take all the power they could in a court-martial.

Reasons for the change advocated by the division were stated in its report on the revision of the Articles of War, of December 21, 1915, as follows:

"It is to the interests of the service that military courts should have at all times jurisdiction over all offenses committed by those subject to military law. A court-martial can not to-day in time of peace try a soldier for murder. The same is true of arson and rape, these being capital crimes under the Federal law. A soldier who rapes his commanding officer's wife or daughter can not be tried by court-martial. There is no logical reason for this restriction. Since the Grafton decision, courts-martial occupy a higher plane than formerly and should be given jurisdiction over all military offenses at all times and under all conditions."

Cases occur where one soldier is charged with murdering another. During the delays incident to indictment and trial before a civil court, the regiment to which these soldiers belong may be ordered elsewhere—perhaps to a foreign station or to active service in the field. Witnesses (all officers or soldiers) must be left behind for an indefinite period, to the detriment of the service; other witnesses (soldiers) may be discharged from the service from time to time and scatter to various parts of the country; the case will fail when brought to trial for lack of witnesses. If such a case could be tried by a court-martial, the trial could take place without delay at the old station or on arrival at the new station of the troops, and justice would be administered more expeditiously and more certainly.

The following extract to be found on page 144 of Report No. 343, Forty-fourth Congress, first session, "Texas frontier troubles," taken from an official letter dated San Antonio, Tex., May 14, 1875, addressed to Inspector General R. B. Marcy, War Department, Washington, D. C., and signed "N. H. Davis, Inspector general:"

"About January 26 a patrol of one noncommissioned officer and four men were sent out from Ringgold Barracks to patrol and watch the river, and prevent the Mexicans running cattle across into Mexico. At night, while this patrol were bivouacked at or near a ranch, El Grullo or Solice, some 16 miles below the post, it was fired into from the ranch. The noncommissioned officer went to the head man of the village and asked the cause of this attack; getting no satisfaction, and seeing many armed men there, he returned to his men, saddled up and moved off; but a short distance from the ranch this patrol was ambuscaded, fired upon, killing two soldiers; a brisk skirmish ensued resulting in two or three of the attacking party being shot, as reported; the sergeant barely escaped with his life, having been pursued within one and a half miles of the post; two others also escaped through the chaparral back into the interior and reached the post next morning.

"In the attack, or firing at the ranch, one Mexican was killed. The coroner's inquest before alluded to, the evidence of some of the principal and most reliable of the Mexicans there, cleared the soldiers of said patrol of the charge of having shot this man; and to confirm this, the ball was extracted, which proved to be a smaller and different-shaped ball from those used by the troops. Nine Mexicans were, by the coroner's inquest, indicted for the murder of the soldiers. A justice bailed them on a small bail. At the term of court held in Rio Grande City, last month, three of these indicted Mexicans were there held for trial under an indictment of the grand jury. The soldiers of the patrol who survived the attack were summoned as witnesses, and

were in attendance upon the court as such, when they were indicted for the murder of the Mexican killed at the ranch, and from whose body was extracted the spherical ball mentioned, and thrown into prison. They were brought before Judge Ware on a writ of habeas corpus, who offered to release them on $500 bail, the smallest bail allowable, I am told, in such a case. The statutes of Texas, I am informed, require bail from property owners in real estate, which excludes officers from bailing out these men. Citizens would willingly do it but for fear of the vengeance of the Mexicans guilty of the lawless acts stated, and the loss of their property and even their own lives.

"These soldiers paid $100 to a lawyer for his services when their case was brought before the judge on the writ of habeas corpus.

Is this not a case which demands the action of the Government to protect the lives of good soldiers, faithfully discharging their duties, against the bloody hands of these Mexican assassins and their abettors, and this, too, without any expense to the soldier? Furthermore, are these men to lie in a foul prison till the next term of court, next July, or will the strong arm of justice and protection release them?''

The following are extracts from inclosures to the above letter, which are extracts from reports of inspections made by Col. Davis, to be found on pages 142 and 143 of Report No. 343, referred to:

"The indictments for burglary against Gen. Hatch and Lieut. French are, as the former states to me, for recovering United States arms and clothing taken and stolen from soldiers shot by Mexican assassins. The said articles were found outside a Mexican jacal house on a ranch not far from the place of attack and massacre (mentioned in a previous letter), and about a week thereafter."

* * * * * * *

"I deem it not improper to call attention to the reported embarrassments under which the troops, officers, and men labor in the execution of their orders to prevent marauding, robbing, and murder by Mexicans, caused by the interference and action of the civil authorities and Mexican juries."

Had jurisdiction been conferred on courts-martial for all criminal offenses, Gen. Hatch could have been tried by court-martial and acquitted of burglary, thereby barring a trial before the civil courts. This burglary consisted in recovering Government property.

A court-martial is composed of Army officers who act as jury as well as judge; such a court can surely be depended upon to render as intelligent verdict or finding of facts as the average jury of a civil criminal court.

Among the reasons why the War College Division believes that general courts-martial should be given concurrent jurisdiction of all crimes committed by persons subject to military law when committed on military reservations or at military stations, even within the continental limits of the United States, are these:

(a) An officer or soldier may be charged with a capital crime, even in time of peace, committed at a military post or station in such a district as one in which local sentiment may be hostile to the Army to such an extent as to render difficult selection of a jury of citizens from whom a fair verdict may be anticipated. If during the present field service on the Mexican border a soldier should in the discharge of his duty as a sentinel kill a citizen, possibly a Mexican or Mexican-American, is it not just as important to authorize his trial by courts-martial at El Paso, Brownsville, or Laredo, as at some such place in the Philippine Islands?

(b) The command to which the accused belongs may be under orders for change of station, and all witnesses may, in compliance with such orders, soon have to leave the scene of the crime. The interests of the service and of justice may be served by permitting such trial to be had promptly by a general court-martial while all witnesses are available.

(c) If an officer or soldier, in discharge of his duty, kill another soldier or citizen, he should have opportunity to clear himself and obtain a bar to future trial while witnesses are available. If a general court-martial has not such jurisdiction, and the civil courts do not in such disturbed conditions as at present prevail on the border assume jurisdiction, the officer or soldier thus liable to trial, may be indicted years later for the homicide and be subject to expense and possible jeopardy of life and limb, when he can not secure witnesses whose testimony would clear his record. Such trials have been had in the Philippines years after the alleged homicide occurred, during the insurrection.

(d) Had a member of the Twenty-fifth Infantry been indicted for murder at Brownsville, Tex., at the time of the disturbance there (about 1906), could he have secured a fair trial before a jury in that vicinity?

Why should the Fourteenth amendment to the United States Constitution prohibit a State from denying "to any person within its jurisdiction the equal protection of the

laws," if the Federal Government, by the legislation proposed by the Judge Advocate General and already adopted by the United States Senate, can in equity provide that a soldier, who is, nevertheless, a citizen, may be tried by a court-martial in Porto Rico, yet another soldier must be subjected to prosecution before civil courts, and possibly long confinement awaiting trial and action thereon, if the alleged crime was committed at Brownsville or some other vicinity in which jurymen may be obsessed with prejudice against a soldier because of his race, color, or even with his status as a soldier?

Resort to the concurrent jurisdiction which should be conferred will rarely be desirable or necessary; as at ordinary stations it will be possible to procure witnesses and conduct a trial before the local civil courts, State or Federal, before such witnesses are ordered elsewhere and their testimony ceases to be available.

17. In the explanation of changes in article 93 in the comparative print (No. 94 in S. 3191) reference is made to the "insertion of the provision making the sentence of dismissal mandatory in case of an officer convicted of any of the frauds denounced and punished by the article.'' Such a provision does not appear to be inserted in the article in the comparative print or in S. 3191, and it should not be. An officer having charge, custody, or control of property of the United States might receive a cerificate or receipt and not deliver all the property at once, without any great culpability. Prompt and efficient transaction of Government business sometimes makes it to the interests of the Government for an officer to make or deliver writings without having full personal knowledge of the truth of the statements therein. Sometimes honest differences of opinion exist as to the proper application or appropriation of Government property. The article as worded in the comparative print, herewith, and in S. 3191, is properly drawn. It permits such punishment as a court-martial may direct. It would be a grave error to make the insertion mentioned in the explanation of changes in the comparative print.

18. In the first sentence of article 102 in the comparative print (No. 103 in S. 3191) the word "signature" is used instead of the word "signatures," used in the report approved by the War College Division. The word "signatures" is correct, and should be put back.

19. Article 103 in the comparative print provides:

The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall be a bar to trial by court-martial * * *."

Manifestly the sentence should read as proposed in the report approved by the War College Division, as follows:

"The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial * * *."

This error is corrected in S. 3191.

20. In the print an improvement is made in article 107 (No. 108 in S. 3191) by substituting "an enlisted man" for "any enlisted man," used in the report approved by the War College Division.

21. In article 112 of the comparative print (No. 113 in S. 3191) the word "When" is substituted for the first word "Whenever." That change is unimportant.

22. With reference to article 118 in the comparative print (No. 119 in S. 3191) the following is stated in the comparative print:

"The final proviso of the proposed article of the Senate bill carried the provision that in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of any organization thereof, the President may assign the command of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade, This proviso was stricken from the War College revision, and, it is believed, improperly so. It is based upon the resolution of April 4, 1862, which thereafter governed throughout the Civil War, was found to be very necessary during that period and was introduced into the articles in the firm conviction that it ought to survive as permanent legislation. Its reinsertion is recommended."

In a letter dated January 3, 1916, to the chairman Committee on Military Affairs, United States Senate, the Secretary of War stated with reference to the foregoing:

The War College has improperly and I think for insufficient reasons stricken this provision from the Senate bill. I recommend that it be reinserted."

It is inserted in S. 3191 as part of article 119.

In order to show the origins of this proposition, what it is really for, and how harmful it would be, the following is noted:

In report of the proceedings of the Senate for March 4, 1862, the following appears under the heading "Command of troops'' on page 1229 of the Congressional Globe:

"Mr. WILSON of Massachusetts. I am instructed by the Committee on Military Affairs and the Militia to report a joint resolution (S. 68) to authorize the President to

assign the command of troops in the same field or department to officers of the same grade without regard to seniority."

Referring to this joint resolution, Mr. Wickliffe stated in the House of Representatives on April 4, 1862:

"Now, sir, we have a law which regulates the Army of the United States, and by that law the senior officer in the field is entitled to command. If he is not fit to command he ought not to be sent into the field. The officer in command has his plans and his measures completed, and just before an advance upon the enemy some power unseen or behind the throne is put in operation and the officer in command is superseded by an officer not his superior in rank or grade. What not of indignity and outrage might not be committed upon an officer who had a just pride of character or a desire for military fame in that hour of trial. You had better dismiss such a man for incompetency and without trial than thus to supersede him in the field and degrade him in his own estimation and in the estimation of his brother officers."

Mr. Olin, who urged the passage of this joint resolution, stated there was dispute as to the rank of Gens. Fremont, McClellan, and Wool, and added "without taking any part in this controversy as to who is right, it is to obviate like difficulties that this bill is before the House * * * "

"* * * I have not examined carefully the regulations and Articles of War, but in conversation with Secretary Stanton—I suppose I may say that much—I understood from him that under existing rules and regulations of war, the President might to-morrow assign to the command of the Army of the Potomac the colonel of any volunteer regiment in the service if he saw fit to do so. I suppose he has that authority and the reason for the passage of this law is that he may exercise this authority at least in pursuance of law and thus set aside at once all heart-burnings or contentions upon this subject of rank."

The law was passed April 4, 1862.

In Senate Report No. 229, Sixty-third Congress, second session, is found the following statement of Judge Advocate General E. H. Crowder before the Committee on Miptary Affairs, United States Senate (p. 123):

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 orthe National Guard.'' * * *

On page 124:

"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:

" '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 officersof 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 or rank.' "Following this language the provisions of new article 118 in this project." * * *

On page 126:

"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 trainin them; that is all."

To mention all the ill effects of the legislation which is advocated in the quotations in this paragraph would be to narrate much of the history of our unsuccessful military operations during the Civil War. Our commanders had to conduct military operations according to civilian ideas or be superseded by those who would. When a commander got one order from the Secretary of War and a contradictory order from the President—as actually occurred—conditions in this country were, as pointed out by Gen. Upton, even worse than they were in Rome when two of her consuls commanded on alternate days until, as a result of such pernicious system of changing commanders, the Roman Army was destroyed. As our commanders could count on no continuity of conditions, it was therefore difficult to make military plans and impossible to carry them out until the President lessened his use of this law toward the end of the war.

The use of this law resulted in manifest and immense injuries to military efficiency. It was evident that the law should be repealed and Congress did repeal it. The President a proved the Repealing Act July 13, 1866. The law was tried, found harmful and repealed by those who saw the harm it did. It was condemned by experience; it should never be reenacted.

23. Section 2 of the comparative print and S. 3191 should have no connection with the revision of the Articles of War. Moreover, for reasons set forth in W. C. D. 9262–14,

November, 1915, on "Organization and administration of the War Department, adapted to a change from peace conditions to a state of war," extract copy herewith, marked "Appendix A," the War College Division does not consider it advisable to apply to the Judge Advocate General's Department the provisions of section 26 of the act of February 2, 1901, modified for the Ordnance Department.

24. In a letter of the Secretary of War to Senator George E. Chamberlain, chairman Committee on Military Affairs, United States Senate, dated January 3, 1916, the following is found with reference to the Articles of War:

"The revision here transmitted is that reported by the War College Division. * * *

"I am informed that the War College Division favors the placing of the Judge Advocate General's Department under the detail system of the Ordnance Department * * *"

A statement of Gen. Crowder to the Senate Subcommittee on Military Affairs, February 7, 1916, regarding the proposed revision of the Articles of War, contains the following:

"The revision now before you was submitted by me to the Secretary of War on April 12, 1912, accompanied by a letter explanatory of the necessity of revision, and stating its object and scope. That revision had the favorable indorsement of Secretaries of War Dickinson and Stimson, of 12 general officers who were constituted a board by Secretary Stimson for its examination and study, of the General Staff of that period, of a board of line officers convened at Fort Myer, Va., and of many line officers of rank and experience. This revision as a whole was universally commended. Some criticism was expressed of specific articles, and all these criticisms have been considered in the revision here presented. The pending bill, which is substantially identical with that bill, has the favorable indorsement of Secretary Garrison and of the entire War College Division of the General Staff, who have given it exhaustive study during the past summer."

25. Revision of the Articles of War is needed. The War College Division commends the excellent work that has been accomplished in much of the revision in the comparative print and in S. 3191. Appendix B shows the revision which the War College Division recommends be enacted into law. The revision in S. 3191, passed by the Senate March 9, 1916, should be changed as indicated in this memorandum. Some of the changes are vital to the proper administration of justice. In order that the reasons why these changes are necessary may be placed before the Committee on Military Affairs, and in order that there may be no misunderstanding as to the revision of the Articles of War which the War College Division believes would be best for the Army, it is recommended that a copy of this memorandum be sent to the chairman of the Committees on Military Affairs of the Senate and House of Representatives.

26. Draft of letters of transmittal are herewith.

M. M. MACOMB,
Brigadier General, Chief of War College Division.

APPENDIX A.

ORGANIZATION AND ADMINISTRATION OF THE WAR DEPARTMENT ADAPTED TO A CHANGE FROM PEACE CONDITIONS TO A STATE OF WAR.

1. *Importance of staff organization.*— Report No. 74, House of Representatives, third session Forty-second Congress, contains the following: * * *

"Unless we have an organization capable of expansion to an almost unlimited extent, we may well question whether it rests upon a safe basis."

3. *Expansion requires use of detail system and uncomplicated staff service.*— In order that we may make the great expansion referred to, which is especially necessary in this country, we must have available, in addition to the authorized number of staff officers, a large number who have had some experience in staff duties.

The number of officers trained for staff service, except in the Medical Corps, should be made as large as practicable by the detail system. Besides this being necessary for the requiredi expansion of our staff service in case of war, it is otherwise beneficial to the service. In a hearing before a committee of Congress, Gen. Sherman approvingly quoted Von Moltke's statement to the effect that in the German Army "every staff officer is required, for a considerable period of his life, to serve with soldiers." (P. IX, H. Rept. 74, 42d Cong., 3d sess.) This would increase the number of officers trained in staff service and diminish the number without experience with troops.

4. *More important to prepare staff organzations for war than for peace.*— It is more important that we have good staff service in war than in peace. If keeping officers continuously in staff departments promotes efficiency of staff service in time of peace, it might do so at the expense of efficiency of staff service when war comes. This especially applies in this country where staff officers sometimes leave their departments for line service in time of war. During the War with Spain the President appointed 40 per cent of the officers of one staff department general officers of Volunteers. (P. 122, S. Doc. No. 221, 56th Cong., 1st sess.)

X

REVISION OF THE ARTICLES OF WAR

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON MILITARY AFFAIRS

HOUSE OF REPRESENTATIVES

SIXTY-FOURTH CONGRESS

FIRST SESSION

ON

AN ACT TO AMEND SECTION 1342 AND CHAPTER 6, TITLE XIV, OF THE REVISED STATUTES OF THE UNITED STATES, AND FOR OTHER PURPOSES

PART 2

LETTER FROM THE SECRETARY OF WAR

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916.

REVISION OF THE ARTICLES OF WAR.

LETTER FROM THE SECRETARY OF WAR TO HON. WILLIAM GORDON, HOUSE OF REPRESENTATIVES.

WAR DEPARTMENT,
Washington, July 6, 1916.

Hon. WILLIAM GORDON,
House of Representatives.

MY DEAR MR. GORDON: I have received, through the Judge Advocate General, your request that I supplement my statement before the subcommittee appointed to consider the revision of the Articles of War with any further statement I may desire to make.

I will take advantage of this opportunity to invite your attention to section 2 of the bill, which is marked for elision in the confidential print of the subcommittee. The effect of this section, briefly stated, is to abolish the present system of permanent appointment to the Judge Advocate General's Department, and to substitute therefor the detail system which nom obtains in the Ordnance Department, under which officers of the Army at large, of the same or next lower grade, may be detailed for a period of four years—an essential and perhaps most important feature of which is the authority to make details from the grade below.

I find upon examination of the records of the War Department that the system of selection of officersof the Judge Advocate General's Department for which this section provides has been urged by the Judge Advocate General of the Army, by the Chief of Staff, and, in principle, by the General Staff; that it has found a place in the bills to revise the Articles of War which have heretofore been considered by the Sixty-third and the present Congress; that it has been twice accepted and passed by the Senate, and was recommended for enactment by my predecessor, Secretary Garrison. The reasons that have been advanced for the enactment of this legislation may be briefly summarized as follows:

(1) Officers serving in staff departments should at all times have recently served with troops and be familiar with their needs.

(2) Qualifications for service in the Judge. Advocate General's Department, as in the Ordnance Department, require an immense amount of extra effort and outside knowledge not incident to the proper performance of a line officer's duties. To prepare himself for duty in the Judge Advocate General's Department an officermust for some years devote such time to the study of law as would ordinarily be given to recreation.

(3) An efficient personnel can be best maintained in the Judge Advocate General's Department by requiring competitive examina-

tion for first detail, and by making the later details dependent upon the excellence of the officer's work.

In a letter to the chairman of the Committee on Military Affairs of the Senate, dated February 9, 1914, Secretary Garrison said:

> The success of the system as applied to the Ordnance Department has led to the opinion that an identical system for the Judge Advocate General's Department is advisable. I am convinced that under such a system the necessary personnel, thoroughly trained in the law, may be developed and maintained in the Army, and that the greatest zeal and industry and the most efficient performance of duty can be secured in the law department of the Army from men who enter that important branch of the service as the result of competitive examination and who are compelled to defend their tenure by high-grade work.

The reasons for the proposed legislation given by Secretary Garrison were accepted by the Senate Committee on Military Affairs and adopted as their own in their report to the Senate.

I have been much impressed with the number and variety of questions of War Department administration requiring solution by officers of the Judge Advocate General's Department. They relate to public property under the control of the department, such as the preparation of deeds, leases, licenses, and rights of way over the vast amount of public domain under the control of the department, e. g., military reservations, national parks, battle-field parks, soldiers' homes (volunteer and regular), national cemeteries, and lands acquired for fortification and river and harbor purposes; the preparation and construction of Government contracts requiring interpretation of the many laws governing the expenditure of funds disbursed by the War Department; to the personnel of the Army and civil employees, such as questions relating to the appointment, promotion, rank, pay, and allowances of officers and enlisted men, their civil rights, liabilities, and relations and the exercise of civil jurisdiction over them; to the business coming from our insular possessions and the Canal Zone, requiring the appearance of officers of the department in the Supreme Court of the United States and other courts on behalf of the Government; to the legislation of Congress, under the commerce clause of the Constitution, for the protection and improvement of our navigable waters; and, in the event of war and the occupation of foreign territory, the Judge Advocate General's Department must be relied upon for the proper organization of military government. The examination of the records of trial by general court-martial throughout the Army forms a minor, though a very important, part of the work of this department, and the legislation of each Congress adds to the amount and complexity of its duties. The Army appropriation bill now pending before the Senate requires, under the heading "Judge Advocate General's Department," that there be prepared and finished within two years a revision and codification of the military laws of the United States, to be submitted to Congress for reenactment if it shall so determine.

It is clearly impossible for the Judge Advocate General's Department to exist and function under the detail system of those departments where the performance of line duties is, in a large degree, preparatory. The reasons for the detail system of the Ordnance Department are even more cogent in their application to the Judge Advocate General's Department. Many of the officers detailed in the Ordnance Department belong to the Coast Artillery, where their work prepares them in large degree for ordnance work. While experience in

the line is essential to an officer of the Judge Advocate General's Department, that experience must be supplemented by years of special study.

The present system of permanent tenure does not produce the best results. Selection to fill vacancies has heretofore been, and will no doubt continue to be, seriously embarrassed by the use of outside influence. Under the national-defense act, 18 officers will be appointed to the Judge Advocate General's Department in the next four years. There are many line officers of appropriate grades more or less qualified for appointment or detail in this department, but the selection of the right ones is an almost impossible task. Should mistakes be made, as inevitably they will, the system of permanent tenure does not admit of their correction.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.