APPENDIX.

REVISION OF THE ARTICLES OF WAR.

HEARING BEFORE THE SUBCOMMITTEE ON MILITARY AFFAIRS, UNITED STATES SENATE, SIXTY-FOURTH CONGRESS, FIRST SESSION, ON S. 3191, BEING A PROJECT FOR THE REVISION OF THE ARTICLES OF WAR.

REVISION OF THE ARTICLES OF WAR.

MONDAY, FEBRUARY 7, 1916.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met at 10.30 o'clock a. m., pursuant to the call of the chairman.

Present: Senators Lea (chairman) and Colt.

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

Gen. CROWDER. Mr. Chairman, when I was before the House committee in 1912 the committee indulged me in an initial statement, in which I indicated the scope and purposes of the revision. I found that that initial statement was of great value in anticipating a great deal of inquiry. There are certain essential differences between a military criminal code and a civil criminal code. I have prepared a short initial statement for the purpose of directing the attention of the committee to these essential differences and to the salient parts of this revision. Would you care to have me put that in the record?

The CHAIRMAN. I think that would be a very good idea.

Senator COLT. I do, too.

Gen. CROWDER. It is not long.

The CHAIRMAN. We should like to hear it.

Senator COLT. Can you state, in a word, what is the purpose of this revision, General?

Gen. CROWDER. The revision reaches nearly every article. I have stated the purposes as briefly as possible in this initial statement (reading):

STATEMENT.

The pending bill before the subcommittee for consideration is a revision of the Army's criminal code. It is substantially identical with S. 1032 of the Sixty-third Congress, reported by the Senate Military Committee February 6, 1914, and passed by the Senate February 9, 1914; and passed again by the Senate February 22, 1915, as a rider to the then pending Army appropriation bill, H. R. 20347.

When the revision was first presented to Congress, April 12, 1912, I stated to the committee that the then existing code sought to be revised was substantially the code of 1806; that the code of 1806 was little more than an adaptation to the Constitution of the Revolutionary War articles of 1776, amended to some extent by the Continental Congress in 1786; and that the Revolutionary War articles were copied from the British articles of 1765, many of which were traceable back through earlier British codes to the code of Gustavus Adolphus. With the exception of 10 articles relating to the composition, constitution, and jurisdiction of courts-martial, selected from the revision then offered and enacted by the sixty-second Congress, that statement remains

true to-day. Eighty-seven of the 121 articles of the code of 1806 survive in the existing code without change, and several others without substantial change. Such amendments as the code of 1806 has undergone have been enacted piecemeal, mainly during periods of war and under the stress of war needs.

The existing articles are sometimes called the code of 1874, for the reason that they were restated in the revision of the Revised Statutes of that year, with all amendatory legislation prior to that date incorporated in the restatement—section 1342, Revised Statutes. There was, however, no real revision of the code in that year. The compilers of that revision had no general authority to revise, but only the limited authority to omit redundant matter, to bring related provisions together, and to make the minor alterations necessary to reconcile contradictions, supply obvious omissions, and amend imperfections. It will be conceded by anyone who takes the trouble to investigate that the revisers of 1874 did their work on the Articles of War in a very imperfect manner. Many obsolete articles were retained, arrangement and classification were not improved, punitive articles being often associated with administrative and procedural articles. Many provisions of law in the nature of articles of war were left by the revisers in the general body of the statutes. What the revisers of 1874 did was to carry forward the code of 1806, with the amendatory legislation enacted since 1806, which, as I have noted, was piecemeal legislation enacted during periods of war and under the stress of war needs.

The urgent necessity of a comprehensive revision has been repeatedly recognized. The first formal recognition which I have found is contained in a letter from Gen. Winfield Scott to Secretary of War Calhoun, dated December 2, 1818. O'Brien, one of our standard military law writers, in his work on military law, published in 1845, set forth the necessity for revision and published therein a statement of what he conceived to be the essentials of an adequate revision. Winthrop, our standard authority on military law, writing in 1886, recommended extensive amendments (Winthrop's Military Law and Precedents, p. 1107), a recommendation which he repeated 10 years later in the second edition of his work (idem, vol. 2, p. 1201). In 1888 a board of officers was convened by Secretary of War Endicott to consider the general subject of a revision of the Articles of War, and this board reported a complete revision. There is no record of its approval by Secretary Endicott, or of its having been brought by him to the attention of Congress. The next comprehensive revision was submitted by me while a member of the General Staff in 1903; but the exigencies of foreign service from 1903 to 1909 prevented me from following up the attempt then made.

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 criticisms 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.

SCOPE AND CHARACTER OF THE REVISION.

Fourteen articles of the existing code, all derived from the British code of 1765, except one enacted by the Continental Congress in 1786, have been omitted. The subcommittee will find a ready reference to these omitted articles on page 77 of the committee's comparative print. Some of the omitted articles have never at any time met any real need in our service, and for all practical purposes may be considered superfluous or obsolete. Others embrace only matters within the field of regulations. The necessity for the omission of many of these articles was recognized by Winthrop as early as 1885. (Winthrop's Military Law and Precedents, p. 1201.)

Clearly the military code should be broadly inclusive of all legislative provisions in the nature of articles of war. A search of the Revised Statutes and of the Statutes at Large reveals 12 sections of the former and 19 provisions of the latter of this character, and they have been embodied in this revision. The comparative print shows the particular articles of the revision which are thus based, and the attached memorandum gives a reference to all legislation of this character that has been incorporated or made the basis of new articles.

When these exclusions of obsolete and superfluous articles, and the inclusion of related matter from the Statutes at Large had been made, there remained the work of grouping related articles. As has already been noted the existing code is notably deficient in arrangement and classification. In the project here submitted related articles have been grouped under five principal headings: "Preliminary provisions," "Courts-martial," "Punitive articles," "Courts of inquiry," and "Miscellaneous provisions," and where subheads would serve a useful purpose they have been employed. The result is shown on pages 1 and 2 of the comparative print. The last table on page 2 indicates very clearly the large amount of transposition found necessary to a proper rearrangement.

SPECIFIC CHANGES INTRODUCED.

A comparison of the revision here submitted with the existing code which it is designed to replace, discloses the following more important changes which have been made:

Article 2. Subhead (a), which corresponds to article 64 of the existing code, sections 7 and 9 of the act of January 21, 1903 (32 Stat., 776), as amended (35 Stat., 401), has been so framed as to make the militia subject to the code from the date of notice of the call, and its service under such a call compulsory service, enforceable in terms of specific performance. Under the law, as it now stands, the militia is so subject only upon muster in, and it has been held that:

"No department or officer of the Government of the United States could, under these laws, compel a drafted militiaman to be mustered into the service or to attend a place of muster, or to undergo punishment beyond prescribed penalties, or submit to ulterior military detention." (McCall's Case, No. 8669, 15 Fed. Cases, p. 1225.)

The opinion followed that of the Supreme Court of the United States in Houston *v.* Moore, which distinctly recognizes that the call into the service of the United States by the President places the militiaman in that service, and further that these laws recognize—

"That a fine to be paid by the delinquent militiaman was deemed an equivalent for his services and an atonement for his disobedience." (5 Wheaton, 21.)

This was the judicial construction that the act of February 28, 1795, received. That act, in section 5, provided that every militiaman failing to respond to a call into the service of the United States by the President should be subject to certain forfeitures to be adjudged by a court-martial. Its language is not dissimilar from the corresponding provision of the Dick bill. Under the ruling of the court to which I have called your attention, it is clear that the obligation of the militiaman to serve under a call of the President was not enforceable in terms of specific performance. The theory is that militia service is purely a compulsory service; in fact it is not. In the case of Houston *v.* Moore, the court recognized, in the clearest possible language, that Congress might, by law, have fixed the period for the submission to the authority of the United States at any time, instancing the order given to the militia officer as a date which might have been fixed. The new article, to which I here invite your attention, is drafted in accordance with this opinion of the court, and the date of notice of the President's order calling the militia into the service of the United States has been fixed as the date from which the draft is effective and the subjection of the man to the Articles of War begins. Clearly, with this provision written into our statute law, the obligation of the militiaman under a call of the President will be enforceable in terms of specific performance; that is, it can not be evaded, as it may be now, by undergoing a punishment adjudged by a court-martial for delinquency in failing to report.

Senator COLT. Can the Government, under the Constitution, call the militia into service except in time of invasion? Can they do so at any time of peace?

Article 11 deals with the appointment of judge advocates. The present code says that "Officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same."

Senator COLT. Where are you now?

Gen. CROWDER. I am on page 11, article 11.

Senator COLT. Yes; I see.

Gen. CROWDER. The article has been recast so as to give the right to appoint assistant judge advocates. It not infrequently occurs that we try very important cases, and the accused appears with an array of civil as well as military counsel. Under the present code we can only appoint one judge advocate, and it is sometimes necessary for him to have an assistant. Then, again, I wanted this provision for the further reason that I could use it to educate officers in the duties of prosecuting officers. It carries no emolument or pay. It simply enables you, while naming the judge advocate of a court, to name one or more assistants to help him carry the burden of the prosecution.

Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced:

ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents—

The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (Ex parte Vallandigham, 1 Wall., 243, and Coleman *v.* Tennessee, 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. Its composition, constitution, and procedure follows the analogy of courts-martial. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.

Yet, as I have said, these war courts never have been formally authorized by statute.

Senator COLT. They grew out of usage and necessity?

Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.

Senator COLT. Yes.

The CHAIRMAN. Article 16 is merely a restatement of article 79?

Gen. CROWDER. Yes, sir.

We come now to the general subject of procedure and to article 17. That article deals in part only with the right of the accused to counsel. We have always had, in our articles of war, a provision that the judge advocate or prosecuting officer should take on certain duties toward a military accused. In the absence of counsel for an accused soldier the judge advocate is charged with his defense, but the existing law imposes upon him only limited duties.

The CHAIRMAN. That is, to advise him not to incriminate himself?

Gen. CROWDER. It provides: "But when the prisoner has made his plea" the judge advocate "shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself." That was article 69 of the code of 1806, and it was inserted in the code in 1786 by the Continental Congress. I say, in regard to that (reading):

The article seems to assume that an accused would be unrepresented by counsel and was introduced into our code in 1806, at a time when it was unusual for an accused to be represented by counsel. It is now the rule rather than the exception that an accused person is represented before a court-martial by counsel of his own selection, either civil or military. Since 1890 orders have imperatively required the demand of the accused for military counsel to be met, except in the single instance where the individual officer desired by an accused was not available. In the case where an accused is represented by counsel of his own selection the law should not impose upon the judge advocate any part of the counsel's duties; and clearly where the accused is unrepresented by counsel the judge advocate should be required to look after and safeguard all his legal rights and not two of them. The new article so provides.

The CHAIRMAN. The only suggestion I would make there is to inquire whether just at this point you would insert the right of the accused to be represented by counsel, rather than leave it by implication, or for another article. You can tell me whether it is covered later on or not.

Gen. CROWDER. I should like to deal with that later on, if I may.

The CHAIRMAN. Certainly. My idea was, in presenting it to you here, to suggest that after the end of the third syllable of "proceedings," in line 5 you insert, "the accused is entitled to be represented by counsel," so that it would read:

The accused is entitled to be represented by counsel, but should the accused be unrepresented by counsel the judge advocate—

And so forth.

Gen. CROWDER. It occurs to me at once to accept such an amendment. At present the accused has not this statutory right, although he does not suffer from the fact that he is lacking in the statutory guaranty. As I have said, orders issued as early as 1890 imperatively require the detail of counsel on the application of the accused, and counsel of the choice of the accused, if such counsel be available. But right here we come up against a practical difficulty. It not infrequently occurs that an accused officer or soldier will apply for