Exhibit B

REVISION OF THE ARTICLES OF WAR.

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

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

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

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

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

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

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

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

In the course of assembling the related provisions I have had to consult not only the existing code, which comprises 129 articles and the isolated provision in regard to the treatment of spies, but also 9 separate sections of the Revised Statutes and 21 separate acts of Congress enacted since the revision of the statutes in 1874, and which contained provisions of the character that ought to be embodied in a military code. After bringing all these related provisions together I found it possible to state the new code in 119 articles, a reduction of 10 over the present code. I have pursued the plan of assembling

these new articles under five heads, entitled "Preliminary provisions," "Courts-martial," "Punitive articles," "Courts of inquiry," and "Miscellaneous provisions." On the pages which follow that principal classification will be found the detailed classification, where the articles are further grouped under subordinate heads.

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

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

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

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

Subsequent to the revision of 1874 we had some important legislation in the nature of Articles of War, in the establishment of the summary court by the act of October 1, 1890, and the grant of authority in the same year to the President to establish maximum limits of punishment in time of peace. This was followed by certain amendatory legislation during the period of the Spanish-American War, the purpose of which was to further define the jurisdiction of the summary court, and repealing articles 108 and 110 of the code. Further legislation amendatory of the existing law respecting summary courts and repealing article 94 of the Articles of War was had in 1901. Article 122 of the existing code was amended in 1910, and article 123 repealed, but this constitutes all the amendments which have been had since 1806.

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

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

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

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

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

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

In the course of my remarks I shall have frequent occasion to refer to general courts-martial, by which we tried in the fiscal year of

1910 more than 5,000 cases, and this is not far from the average number of cases tried each year; also to a certain class of inferior courts, known as garrison, regimental, and summary courts-martial, by which in the year 1910 we tried about 42,000 cases—all in the nature of minor neglects and offenses incident to garrison life.

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

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

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

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

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

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

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

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

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

Gen. CROWDER. He has that privilege now.

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

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

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

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

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

Gen. CROWDER. We have about 75 who came into the Army in 1901 who were practicing lawyers when they came in, and they give us a very respectable nucleus of officers competent to assume the duties of counsel.

Mr. PRINCE. And they are scattered around?

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

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

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

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

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

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

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

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

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

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

Mr. HUGHES. That would guard against any prejudice?

Gen. CROWDER. Any prejudice against the man.

The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

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

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

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

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

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

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

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

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

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

compulsory process it gives to courts-martial is not available against witnesses who reside beyond the State, Territory, or District where the military court shall be ordered to sit. This limitation results from the fact that the reference of the article is to courts of criminal jurisdiction within the State, Territory, or District whose process does not run beyond the geographical limits named. It will be noted that in the new article we have given them the same process as courts of the United States may lawfully issue, and have thus extended the field in which process to compel the attendance of witnesses will run.

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

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

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

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

Mr. HUGHES. It says:

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

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

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

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

Gen. CROWDER. That is it.

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

Gen. CROWDER. Yes, sir.

You will notice that the existing article gives the right of compulsory process only against witnesses before a *general* court-martial, and that I have substituted for the words "general court-martial" the word "court-martial," so as to include all three classes of these courts. Perhaps a better designation would have been a "military court," which would make the article applicable to all courts of whatever description, including military commissions and provost courts. If that change is made, which I recommend, then the word "court-martial" appearing in line 24 (p. 10) should be substituted by the words "such court," and further, in line 7 (p. 11), there should be substituted for the word "court-martial" the words "military court."

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

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

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

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

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