

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

FRIDAY, AUGUST 29, 1919.

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

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Mr. ANSELL. If the committee please, in the first place this morning I wish to read into the record this self-explanatory correspondence, consisting of a letter from me to Gen. March, dated yesterday, and a letter from Gen. March to me, in reply thereto, also dated yesterday [reading]:

AUGUST 28, 1919.

MY DEAR GENERAL MARCH: The press reports me this morning as having stated to the Senate Military Committee yesterday that you were one of the officers who obstructed the administration of clemency, through the special clemency board, of which I was the president.

I did not say this for the simple reason that you were not one of the obstructing officers. Those officers were the Secretary of War, Gen. Crowder, Gen. Kreger, and some others who were subject to Gen. Crowder's and Gen. Kreger's direction.

At my appearance before the committee to-morrow, I shall take occasion to say that in no way, directly or indirectly, so far as I ever knew, did you interfere with the administration of the special clemency board.

Very truly, yours,

Gen. P. C. MARCH,
Chief of Staff, United States Army, Washington, D. C.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, August 28, 1919.

MY DEAR ANSELL: I have your letter of August 28, in which you inform me that you did not state to the Senate Military Committee what appeared in the newspapers this morning concerning my being one of the officers who were obstructing clemency.

I have noticed the statement in the paper and was amazed at your being quoted as saying what was accredited to you, as, of course, the statement was entirely false, and I am glad to find, as I expected, that you were misquoted.

The same statement appears in the New York papers which have Associated Press service, indicating that the false statement was sent out by the Associated Press. I would be very glad if you would inform the president of the Associated Press that the matter accredited to you was false, as it not only places me in an entirely false and objectionable light before the country at large, but it is not fair to you, as many of your old associates in the War Department know the facts of the case.

Very truly, yours,

P. C. MARCH,
General, Chief of Staff.

Gen. S. T. ANSELL,
Suite 710-712 Riggs Building,
Washington, D. C.

I received that reply from Gen. March only a few minutes ago. Senator CHAMBERLAIN. I did not understand you to charge Gen. March with that.

Mr. ANSELL. No; but if it were possible for anybody to make that inference, I desire to disclaim it here.

I was discussing, when we took the adjournment day before yesterday, the administration of clemency, and I had reached the point where I had requested to read into the record the efforts that I had made to see that the special clemency board was given the instructions that I thought they ought to be given, and I had, I think, the permission of the committee to read the memorandum of instructions that I had addressed to the Acting Judge Advocate General. I wish to say that the instructions, though obviously correct—and I think the committee could not do otherwise than find them so—were held by the Acting Judge Advocate General for three or four weeks. In the meantime other instructions were given, which I did not hear, and with which, from what I have heard of them since, I did not disagree; and the results of those instructions were reflected in the work of the special clemency board.

On March 24 I asked the relief of certain members of the special clemency board, but this was ignored. (See Exhibit T.)

On May 17 I was advised by the Acting Judge Advocate General that the work of the special clemency board was nearing its completion, and that the board would be disbanded and that the officers would be distributed to other divisions of work. I protested to him that the board ought not to be disbanded. He said that we were about to finish the exigent cases of prisoners in the United States. I reminded him that we still had the prisoners in Europe. Their cases had never been touched. The War Department at that time did not know how many prisoners there were in Europe, but believed that there were but very few. I asked that the question of how many prisoners there were in Europe be taken up with the authorities there, as obviously, for every reason, the War Department ought to be cognizant of the number of prisoners we had in Europe, and I also filed a memorandum with the Acting Judge Advocate General which I wish to read. It is brief [reading:]

ANSELL EXHIBIT U.

MAY 17, 1919.

Memorandum for the Secretary of War.
(Through the Acting Judge Advocate General.)

I recommend:

1. That the special clemency work which is now limited in its considerations to prisoners confined in the United States be extended to prisoners in our Army serving sentence in Europe.

2. That a more thorough review now be made of all doubtful cases here of prisoners still having more than three months to serve; this in recognition of the fact that the work of special clemency examination has been done so hastily as to preclude assurance of satisfactory results.

3. That a thorough review now be made of all cases here and abroad in which the record of the proceedings would indicate the advisability of extending a full pardon.

4. That if I should be intrusted with this work as president of the special clemency board, I be permitted to select, as far as possible, the personnel of the board, in order that it may be in general sympathy with my views at to clemency.

S. T. ANSELL,

Lieutenant Colonel, Judge Advocate.

The purpose of this memorandum, of course, was to give us general consideration of all the prisoners in Europe, of whom I apprehended there were many, and also to go over again many of these cases; because the committee can understand that when you undertake to handle some 5,000 or 6,000 cases and examine that many records within a period of less than three months, you are necessarily acting very hastily and not thoroughly, and I thought that the matter was of such supreme importance that we ought again to go over all serious cases thoroughly. I also thought, and I still think, that the pardoning power ought not to be strained in its exercise, especially in cases of this sort, and that we ourselves ought to take the initiative in the extension of full pardon where we were convinced that justice required that course, not leaving it to some humble man to present his case here to the pardon power, through attorneys, and all that kind of thing. I was particularly anxious about this, for the reason that, as the committee may know, there are certain offenses—desertion, for instance—which carry with them incidental punishments in the way of civil disabilities. A man convicted of desertion is outlawed. He loses his right to citizenship and his right to hold office, etc.; and, obviously, no conviction of desertion or any conviction that carries such civil disabilities as that, ought to be had except upon most thorough trial and thorough consideration after trial. Whether pardon will restore the status ante culpam and remove the disabilities is questionable, nevertheless, if it would remove some disabilities, and a man not justly convicted ought to have his disabilities removed. At all events, we know as the result of the history of the Civil War that we have been correcting the records of that war, or endeavoring to correct them, by legislation, by the removal of charges of desertion and trials for desertion, in order that those men might have their rights restored.

On June 24, 1919, nothing having been done so far as I knew in this direction, I addressed another memorandum to the Acting Judge Advocate General, which I hope I may be permitted to read into the record.

SENATOR LENROOT. Proceed.

MR. ANSELL. I will read it [reading]:

ANSELL EXHIBIT V.

JUNE 24, 1919.

Memorandum for the Acting Judge Advocate General:

1. On May 17 I addressed to the Secretary of War, through you, a memorandum in which I recommended in effect that (1) clemency consideration be given our prisoners in France, as well as those in this country, which has not heretofore been done; (2) that in view of the haste with which the first

review was necessarily made, a more thorough review be made of doubtful cases, looking to still further clemency; (3) that another and thorough review be made with a view to granting in proper cases full pardon; and (4) that if I should be intrusted with the work I be permitted to select as far as possible a personnel in sympathy with my views as to clemency.

Yesterday you indicated to me that you would approve my recommendation that the prisoners in France be given the same clemency consideration as the prisoners here, but that you were of a mind to disapprove the other recommendations.

2. With the greatest earnestness I urge you to reconsider, in the hope that you may be brought to that state of mind enabling you to view the situation as I do. The work has been hastily done. More than 5,000 records, each with its accompanying papers, have been examined. It is not humanly possible to give to that number of cases, their records and the facts and information de hors the record the consideration which justice to the enlisted man requires. The clemency examiner, upon whom so much depends, has been at times inexperienced in the work and at all times almost intolerably pressed. I have observed evidence and have been conscious of hasty action in all departments of the work, including my own. It has not been done with that accuracy, deliberation, and assurance which should characterize judicial action.

A second examination would not require the most thorough examination of every record, but only those in which there were some outstanding indicia of the necessity of reexamination. To indicate one class of cases, I myself believe that many of those in which clemency has been flatly denied ought now to be more thoroughly reexamined.

3. According to your view, the application for pardon should be initiated by the individuals who deem themselves so aggrieved as to justify that course. In view of all the circumstances surrounding the administration of military justice this, in my judgment, would be an unjust as well as an unwise course. As long as clemency was permitted to be given consideration only upon the application of the individual, little clemency was had. It is the right of the individual to seek clemency; it is the duty of authority to give it. That duty carries with it, when there has been so much injustice as there has recently been, the duty of taking the initiative, and not waiting upon individual application. We took the initiative in the granting of clemency, and why should we not for the same reason take the same initiative in granting pardons? Taking such initiative would, in my judgment, be to the great credit of the pardoning power. Pardon ordinarily is a matter of mercy and as such should not be strained out just to those who may be advised to seek it, and it never should be deferred for mere convenience's sake. In many of these cases in which we can say with fair assurance that the man ought not to have been tried, or was not lawfully tried, or that the record as it stands can not fairly sustain the conviction, pardon becomes a matter not of mercy but of partial justice! In such a case we should act, not as a matter of grace, but in recognition of a high sense of justice. In such cases our sense of justice and our sense of duty should compel us to act. Furthermore, the military relation is such and the condition of the prisoner is frequently such that he has not the ability, nor the liberty, to make out the case that ought to be made for him.

We ought frankly to acknowledge and act upon the fact that courts-martial ran riot during this war and now do all we can to correct their unjust results.

4. If you still adhere to your views of yesterday and report upon my previous memorandum accordingly, after you have considered this memorandum, permit me to request that you forward it with the other papers for the consideration of the Secretary of War.

S. T. ANSELL,
Lieutenant Colonel. Judge Advocate.

I have received no written reply to those memoranda. I have been told by the Acting Judge Advocate General, orally, that the Secretary of War disapproved of all of them except the one that extended the clemency consideration to the prisoners in Europe; and I observed that the Secretary made a statement to the press to the effect that consideration was not extended in the first instance to the prisoners in Europe for the reason that they were going to be brought home soon any way, and that we would wait until they got here.

I wish to call the attention of the committee to the fact that the reason assigned at the outset for not granting clemency consideration to the prisoners in Europe was that there was a different relation between those prisoners and their offenses because of the fact that the offenses were committed in the actual theater of war, or at least abroad, and that there was less popular interest in their cases than in those here at home. I was also advised orally, but with some uncertainty upon the part of my adviser, that the Acting Judge Advocate General at the time I made this memorandum thought that Gen. Pershing had instituted some sort of clemency over there that they relied upon, and that it would not require a second examination over here. I did not believe that Gen. Pershing had instituted the kind of machinery that would give proper clemency, or even the degree of clemency that we were giving here. I observe that the press reports state that now, six months afterwards, these European prisoners are having their cases considered.

Senator CHAMBERLAIN. Here?

Mr. ANSELL. Here.

Senator CHAMBERLAIN. I know there are a great many of them.

Mr. ANSELL. I advert again to the fact, however, that the president of the special clemency board who succeeded me and who shared my views as to clemency, after or about the time that he had entered upon the examination of these European cases, was relieved.

Senator CHAMBERLAIN. That is Col. Weeks?

Mr. ANSELL. Col. Weeks.

Senator CHAMBERLAIN. Who is acting now as president of that board?

Mr. ANSELL. I have not heard, sir. So much for the administration of justice through clemency. I had taken, along collaterally with the administration of clemency, the investigation that the War Department was carrying on with relation to the administration of military justice, and I think that the results of the War Department activities, as known to the public, must indicate to every fair-minded man that the War Department has at last, through a statement made to the press through the Secretary of War, declared its real state of mind and its adherence to the reactionary policies of the regular establishment, a thing that evidently it was apprehensive of doing in the early stages of the controversy. Though the Secretary at first stated there had been no injustice, he later stated that he agreed in large part with those principles which I enunciated, which were predicated upon the assumption that the system in and of itself inevitably led to injustice; and, second, its administration had not helped it out much. He said he agreed largely with my views and principles.

I was invited to draft a bill. The public generally thought that the War Department was going to take a more liberal attitude.

The Inspector General of the Army was then directed to investigate the subject of military justice in some of its aspects—doubtless, the relation that I had to it.

This Inspector General of the Army was the very same bureau chief whom I had called reactionary in the early days of the war, and who had joined strongly with the other bureaus of the War Department to protest and resist the establishment of any revisory power in the War Department. I was called on by him to state my

side of the case, and I declined to do it. I was not going to be put in the position of the gentleman who admits the jurisdiction and fairness of the court, and then has to console himself by adjourning to the nearest corner grocery store and cussing out the court. This officer, I said, was not competent to make an investigation, first, because he was the Secretary's minion; secondly, because he was not legally qualified; and thirdly, because he was a prejudiced party. He was deeply prejudiced. I stated that to the Secretary of War and I stated it to him in a memorandum of March 10, and I wish that that memorandum may be included in the record here. It is probably brief. I do not have it now, but I will get it later.

Senator LENROOT. It may be inserted.

The paper referred to is here printed in full, as follows:

ANSELL EXHIBIT W.

The Inspector General:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigation has to do with my statement before the Senate Committee on Military Affairs, that statement for which, of course, I am responsible speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it, are not, when fairly considered, particular incidents to which your special capacity of inquiry can be properly applied; they are extradepartmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides, whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War, whose subordinate you are. Even more; it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation and excepting, as I do and for the reason given, to your jurisdictional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it, voluntarily.

S. T. ANSELL.

Mr. ANSELL. There was a so-called investigation by Gen. Chamberlain. I have no hesitancy in saying to this committee that the methods pursued in that investigation were such as to show clearly that it could not have been fair, and it was not fair. This investigation is an instance illustrative of something besides the mere personality involved. It illustrates the basic theory with which the Inspector General's Department makes preliminary investigations of suspected dereliction of duty.

The Inspector General, whom I had long known, after I had in the beginning declined in writing to participate in any investigation—that is, voluntarily to participate in any investigation—conducted by him, and when he was about to close his investigation, called me officially to his office and put me under oath and began to question me. I declined to proceed, upon the grounds previously indicated. He then advised me in a fraternal, paternal sort of way, to take part in this investigation, but I still declined to do so, repeating to him the reasons that I had formerly expressed on paper. And then the Inspector General, in my judgment forgetting whatever quasi-judicial character belongs to his position—and there ought to be a great deal to it—said, “You know, I am making a report on this subject by order of the Secretary of War. This thing is in Congress, and my report will go to Congress; and, Ansell, when it goes to Congress it will be very detrimental to you;” and I said, “Well, General, I would rather meet you in Congress than deal with you here.”

That statement was made with all the influence that office can put back of it. Now, that was of sinister significance; it is symptomatic of a general condition. When the Inspector General or the Inspector General's Department goes out to investigate a case, the evidence is that all too frequently a man less able than I, perhaps, to stand that test and protect himself, is imposed upon and induced to act in response to such a statement as that, which was a mild third degree; in my case it was a menace, a threat that unless I played the departmental rôle the report was going in against me, would be published broadcast to the world, and would be very detrimental to me, notwithstanding the fact that, as I said, the Secretary of War and the Chief of Staff, the very people whom I had opposed in this controversy from the very beginning and whom I was still opposing, were not in any position to make any investigation of me that could be fair or helpful.

A very interesting little thing came out during the investigation of the American Bar Association. Maj. Copp, a member of this special clemency board of review, put there by Gen. Crowder because he shared Gen. Crowder's views with respect to the administration of military justice and clemency, testified before the American Bar Association to the effect that the Inspector General's Department did habitually in the camp and division in which he served compel testimony out of the suspect or the accused, and then used it against him.

Maj. Copp, speaking out of what he described as his experience as a judge advocate in a division during this war, said that it was customary for the Inspector General's Department to compel, by virtue of the power of office, a man to incriminate himself. When the committee asked him time and time again, “Do you know this to be true?” he said, “Yes; because I not only observed it, but the representatives of the Inspector General's Department at the camp where I was stationed admitted that to be a fact.”

That promptly brought a denial from the Inspector General, who appeared on the stand the next day and explained and denied; but any man who knows the Army, and any man who knows the great gulf between the officer and the enlisted man, and any man who knows the great power that an inspector has in conducting these investiga-

tions and what little legal appreciation he has, knows that there ought to be some law against permitting the Inspector General's Department of the Army to use these third-degree methods of menaces and threats, and taking advantage of the innocence or ignorance or the unhappy lot of the enlisted man.

Senator CHAMBERLAIN. These are the inspections which precede of the charge?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And the charge is based on these investigations?

Mr. ANSELL. Yes; in certain cases. Of course, there is not an Inspector General's investigation made in every case. But, again, I get back to the theory that such an investigation should be quasi-judicial, and ought to be conducted by officials who know some law and who have some respect for what our civilization has prescribed for the protection of a man suspected of crime. And such is not so. The methods pursued by the War Department with respect to this bar examination, and the investigation made by the committee of the American Bar Association here, foreshadowed what is now seen to be the department's true and revealed attitude. They were going to support the existing system. They believed in it. That committee of the American Bar Association came here, got into touch with the War Department and the Judge Advocate General of the Army, got a list of witnesses from them, and called those witnesses and no other witnesses until just about four days before their hearings, which had extended over four or five weeks, were about to close. They then, condescendingly, gave me an opportunity to appear, and called one other officer voicing my views; and then they asked me if I had a list of names of gentlemen who might appear, presumably in advocacy of my side of the matter, and when I had handed in that list, they left the next day or the second day following—within 48 hours—before any but one of those gentlemen could get here, even at their own expense. They did hear one man who happened to be in New York. But that investigation had been proclaimed abroad as an investigation conducted by the American Bar Association committee. I think this committee ought to know the kind of investigation it conducted, because the report of that Bar Association committee is going to be used, of course, by the War Department to influence legislation. That investigation was never a fair investigation, and I appeared before the committee and charged them with that fact then and there.

Take first of all the witnesses. The witnesses who were called to appear before that investigating body were called by the War Department, denominated by the War Department; their expenses were paid, and it was called official duty necessary in the military service. These major generals, with the great title and power of office, who came here and told the committee that if you disturbed this system the discipline of the Army would be ruined, were on official business; and the War Department said at the time to one of these major generals here, "We are calling as witnesses before that committee those men who can present the ultra-military view"; and so that Bar Association committee sat there and heard and drank in the ultra-military view, and they heard nothing else except as I, single handed, aided by one other officer, could present.

Senator CHAMBERLAIN. Did you not, as a matter of fact, charge the committee itself with being a packed committee?

Mr. ANSELL. I did; and if this committee will permit me, I would like to put that in the record here, because I know you are going to have the report of that bar association committee here. I have not got my statement here, but I have got it. I presented it to the president of the American Bar Association, who is, by the way, president of the executive committee; and I believe I have proved the case, too. With your permission, I will insert that letter.

The letter referred to is here printed in full, as follows:

ANSELL EXHIBIT X.

JULY 17, 1919.

HON. GEORGE T. PAGE,

President American Bar Association.

SIR: In March last, pursuant to the resolution of the executive committee of the association, you appointed a special committee, consisting of Hon. S. S. Gregory, chairman, Chicago, Ill.; Judge W. P. Bynum, Greensboro, N. C.; Mr. Martin Conboy, New York City; Prof. Andrew A. Bruce, Minneapolis, Minn.; and Mr. John Hinckley, Baltimore, Md., to inquire into the status of our military law relating to courts-martial, directing that they report the results of their investigations, together with their recommendations, to the executive committee.

This special inquiry was brought about by the many complaints made during the war against the existing system of military justice, and its purpose was, of course, to acquaint the association with the actual situation with respect to the administration of military justice and to put it in a position to make an effort and exert its influence toward a reform of the existing system of military justice if the investigation should reveal deficiencies calling for remedial legislation and if the association should see fit to take action. Such a purpose required that the personnel of the investigating committee should be generally well qualified to conduct an investigation and should be capable of appreciating the place that military justice should have in our institutions, the great interest our people have in it, and, above all, the necessity that not only must justice be done in our Army, but that our people and our soldiery should have the assurance that justice is done therein. Every member of that committee should have entered upon and pursued his duties with the loftiest conception of them and their importance, and while every member should have been free from, and kept himself free from, any influence of the partisanship and personal controversy that unfortunately have been injected into this discussion, even to the point where the real issue has been obscured, still the committee, if its investigation was worth the making at all, should have heard all sides of the question fully, fairly, and impartially. This, in my judgment, the committee has not done.

The minutes show that the committee immediately got in touch and conferred with the authorities who have proclaimed the perfection of the present system and decreed the punishment of those who opposed it, but they did not confer with any who disagreed with those authorities, so far as known. The minutes show that they conferred with the Secretary of War, the Chief of Staff, the Judge Advocate General of the Army, and the Acting Judge Advocate General of the Army, who had just been brought here from France to supersede me, so that the departmental view might be impregably maintained. All these officials are uncompromising advocates of the existing system, and two of them—the Secretary of War and the Judge Advocate General of the Army—are bitterly and personally resentful of the criticism which I made of the existing system in testifying before the Senate Military Committee and for which I was promptly punished by the Secretary of War by demotion and removal from my office. Notwithstanding this, notwithstanding the fact that I had made the criticism as a result of my experience as Acting Judge Advocate General during the war, and notwithstanding my professional reputation and well-known record in the Army, I was avoided and ignored by the committee until they were, according to the announcement of the chairman, on the eve of closing their hearings.

When I appeared before the committee I deemed it my duty to say to them, and though it was disagreeable to me I did say to them, that the committee had clearly manifested a disposition to hear but one side of the case; that they had conferred only with those who were intent upon retaining the existing system; and that, with a single exception, they had heard only those officials who voiced the view of military authority that the existing system is satisfactory and had resulted in no unnecessary injustice during the war. I also said to them that I believed, and I gave them my reasons for so believing, that one member of the committee was such a close associate of that official who had been foremost in his exertions to maintain the existing system (the Judge Advocate General of the Army) and such a pronounced partisan of him and his views that such member was disqualified to sit upon the committee. Notwithstanding that the chairman of the committee announced to me just before I began my statement that the hearings were about to close, he subsequently advised me that there might be further hearings in Chicago, and such hearings were had.

I have just read all the minutes of the investigation. Now, more than ever, I am convinced of my duty. As a lawyer, as a member of the association, and, above all, as an officer of the Army intensely interested in the establishment of a system of law that will enable and, if possible, require justice to be done in the Army to the enlisted man no less than to the officer, I protest anew against the fairness of some of the members of the committee and the partiality of its proceedings. And I request that the entire record of the proceedings of this special committee be placed before the executive committee in order that they may learn the kind of hearing that was actually had and see upon what the special committee has based its report and recommendation. In my judgment the one-sided character of the investigation must destroy all reliance upon the report and recommendations, whether they are favorable or unfavorable to a liberalization of the existing code. If favorable, they must have been affected by influences de hors the record; if unfavorable, they will but be in accord with the unfair and biased character of the investigation.

The record will show that the conduct of the member whom I asked to disqualify himself was, throughout the hearing, one of oppugnance to any criticism of the existing system. The record will show that he failed to appreciate that his was a position requiring judicial conduct and fairness, and that, instead he adopted the attitude of a resourceful attorney advocating the retention of the system and laboring to secure the vindication of those who insist that the system has resulted in no injustice and not only ought to be retained but must be retained if the iron discipline assumed by them to be necessary to American military efficiency is to be retained. Witnesses who supported the system, who hailed it as superior to any civil system of justice, or who admitting its harshness condoned it on the ground that military discipline and military justice can not exist together, were led on by him and supplied with better statements than they themselves were able to make in so bad a cause.

The few witnesses—pitiably few and generally of inferior rank and humbler station in life—who expressed opposition to the system he treated with an apparent inconsideration. His questions touching the views of those opposing the present system were of a character not to elicit the truth but rather to suppress it, and his participation in the hearings succeeded, more than anything else, in establishing upon the record these propositions so orthodox and current in highest military circles: That any system of military discipline must be arbitrary, must be governed not by law but by the will of military commanders, and that our system during the war while necessarily a tyranny was a most benevolent tyranny. Notwithstanding the record facts that there have been some 30,000 general courts-martial and 340,000 inferior courts-martial within the period of a year, in which our Army could have averaged little more than 2,000,000 men, one must have believed, if one could have believed the witnesses appearing before the committee, that courts-martial were all but unknown in our Army.

I insist also that the record will show that another member of the committee was not fairly fitted for his duty. He bears the military title of colonel, and I infer from statements made by him designed to exhibit a familiarity with military administration that he was once in the National Guard and as such saw active service in the Spanish War and in more recent mobilizations on the Mexican border. Both gentlemen came to the investigation with minds fore-

closed. The former supported the system because of his regard for its chief sponsor; the latter supported it out of his professional regard for the system itself. This latter member is an example of that rigid adherence to professionalism sometimes found in those who have a commendable interest in, but do not practice, the profession itself. An examination of the record will reveal that the mind of this member, like that of the other mentioned, was foreclosed and that his appreciations were impervious to any suggestion of needed reform.

These gentlemen and the course pursued by them have not been without their influence upon the other members of the committee. All the members who sat in Chicago (Judge Bynum, of North Carolina, did not sit, most unfortunately for the cause of military justice, I think) expressed themselves toward the close of the hearing in such a way as to clearly indicate that the course pursued and the great weight of statement elicited had inclined if not persuaded them to an acceptance of the militaristic arguments relied upon to sustain the present system. These arguments were used with telling effect against the bill drafted by me and embodying the principle that military justice should be regulated by law and not be dependent upon the will of the military commander. Notwithstanding that that bill is the only affirmative proposal that has ever been made toward an amelioration of the soldiers' present disciplinary condition, the committee had it subjected to hostile and uninformed analysis in the office of the Judge Advocate General and then had the officer who had made the analysis ordered by the War Department to appear before them and present his criticisms of the bill. These views, prejudiced and uncomprehending, served to convey the most unfair impression to the committee and, in the absence of any better understanding by the committee, served as the basis of much adverse expression from them. Members of the committee, when nearing the close of the hearings, reiterated the military orthodoxies that it was one of the purposes and would be the legal effect of that bill to transfer the discipline of the Army out of the hands of the military commander into those of the Judge Advocate General, whereas the slightest understanding of the bill would have shown that the bill did nothing more in this respect than require the military commander to administer discipline in accordance with law, and lodged in the law officer the power to determine questions of pure law only.

Of course, if the hearings were to be fair and impartial, the committee should have been equally desirous of hearing witnesses on both sides and should have, if possible, secured equal facilities for their appearance. Many high ranking officers of the Regular Army appeared before the committee, either at their request or suggestion made to the War Department, or upon the initiative of the department itself. These men supported the existing system, some ardently and some less so. I have made inquiry of several of them and find in every case that their appearance was regarded by the department as a military duty found by it to be necessary in the military service, and that appearing on duty in accordance with the directions of the department, they received their pay and traveling allowances therefor. The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense. In other words, the Government procured for the committee the military witnesses to defend the system but none to oppose it. It is known here in the department, whether the committee knew it or not, that while the committee was sitting here in Washington the highest military authority in the department said that they were "ordering before the committee those who could give the military view"; that is, the departmental view, and the committee got little else.

Take one example: The committee might well have heard my exposition of the bill drafted by me, might have heard my statement in favorable explanation of it, as well as the views of the office of the Judge Advocate General in condemnation of it. The committee requested that the department have Col. West, the officer of the Judge Advocate General's Department, who had made a careless and unfavorable study of the bill, to appear before them in Chicago, and he did appear by order of the department. In Government time and at Government expense, and did condemn the bill, condemned it really with only the slightest comprehension of it. The committee also notified me that they would hear me at Chicago, if I chose to appear, but did not request the department to send me to Chicago. My appearance, of course, would have had to be in my own time and at my own expense.

These matters, while they may appear to be relatively unimportant, at least to the affluent and those who are indifferent to the subject, are nevertheless not only significant of the attitude of the committee and the department but were very real obstacles to a fair presentation of the question as well. In my own case, having nothing of this world's goods, and having expended already too much of my meager salary in behalf of the advancement of the cause of military justice, it would have been a hardship for me to go to Chicago at my own expense. Besides, a sense of propriety forbade me to ask others to appear there in my own behalf. Was it not the plain duty of the committee to request the War Department to furnish at its own expense the witnesses against the system, as well as those in favor of it?

The hearing has not been thorough, and it has not been fair. It has not been helpful. Indeed, it has been very harmful. I ask that the executive committee of the American Bar Association themselves consider carefully this important question, that they study the record of the proceedings conducted by said committee, and that they give consideration to the statement of protest made by me to that committee here in Washington, and also to this letter which I ask you kindly to forward them.

Hoping you will do me the favor to comply with my request, I have the honor to be, sir,

Yours, very respectfully,

S. T. ANSELL.

Mr. ANSELL. I said that two of the members were committed from the beginning to the other side, and had so declared themselves, and they were chosen as the result, whether they knew it or not, of strenuous efforts being made by the War Department to bolster up their cause. It is true. And not only that, but I say that the action of that committee is proof positive to the mind of any man in calling and hearing those witnesses and having the War Department pay their expenses and their mileage, and giving no man on the other side the right to be heard, except by coming here at his own expense, except as to any who happened already to be here.

Senator CHAMBERLAIN. Did the War Department pay, or offer to pay, the expenses of witnesses against the system?

Mr. ANSELL. No, sir; nor did the War Department go so far as to ask to be furnished witnesses on the other side. I did suggest witnesses to the committee of the American Bar Association, but in their telegrams or letters sent out, about which some of the witnesses have told me, they put the cautionary statement, "We have no funds to pay for your attendance here, and if you do so, you will do so at your own expense;" and the witnesses had no time to come here, because my side of the case, so-called, was not even given the opportunity to be heard until just a day or two before the committee was to go.

Senator CHAMBERLAIN. How long had they been in session then?

Mr. ANSELL. Four or five weeks. I had no knowledge of it, except the knowledge of the street, although they were in frequent contact with the Secretary of War and the Acting Judge Advocate General and the Inspector General. Whatever respect anybody else may have for such a committee, I for one, as long as I live, will not express any respect for any such committee, no matter how high it may be, or whatever association it may be a part of.

Senator CHAMBERLAIN. Have you finished with that branch? Because I want to ask you this question: Before that committee had an opportunity to make any report, there seems to have been an uneasiness somewhere along the line that induced the Secretary of War to appoint a strictly military tribunal.

Mr. ANSELL. Oh, yes; I am coming to that. It was thought—it was in the air—that this bar committee report might be unfavorable

to the department. That was not so obvious to me, because two of the members were stacked, and the personnel had been picked; the committee had been hand picked and personally conducted by the department satellites.

But the chairman of the committee, during the hearings, came right out and declared himself as a reformer of this system while I was appearing before the committee. He said that he could hardly speak for the committee, but that he was going to say that he was going to recommend that the evils of this system should be torn up by the roots and another substituted. The old gentleman spoke more rabidly on the subject, probably, while he was talking, than he spoke in his report. Is of that type.

Another committee was appointed by the Secretary immediately upon his return from France. That committee consisted of Maj. Gen. Kernan, who has been advertised not only as a most distinguished soldier but a most distinguished lawyer, a quality that was unknown in him theretofore; Maj. Gen. O'Ryan, a major general of the New York National Guard, in high favor with the present administration; Lieut. Col. Ogden, of The Adjutant General's Department; and one Lieut. Col. Barrows, of the Regular Army. Of course, I know these gentlemen. I know these gentlemen rather well—their personalities, their habits of thought, and something of their views with respect to the Military Establishment. If the Secretary of War had gone out designedly to appoint the most reactionary set of men in the United States he could not have improved upon his selection—Maj. Gen. Kernan, Maj. Gen. O'Ryan, Lieut. Col. Barrows, and Lieut. Col. Ogden.

Senator LENROOT. How many of these are Regular Army officers?

Mr. ANSELL. I have that report here. Two are Regulars, one a National Guardsman, and the other is a National Army man. Lieut. Col. Ogden is a Boston lawyer of the Judge Advocate General's Department, who shares strenuously the view that is expressed in this report, that courts-martial have got to be the right arm of the Executive, controlled and guided by him at every point.

Senator CHAMBERLAIN. That is the so-called Kernan report, which is on file?

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. May I interrupt you there for just a moment? Were you called before that board?

Mr. ANSELL. We all got a circular letter to express our views in writing. I do not mind saying that I knew what the report of this board would be, and I was not going to waste any time in arguing before a prejudiced forum. There is no need of it. And I will say to you that many another man of rank greater than mine shared my views on that and did not put in a report. It was a foregone conclusion what that report would say.

Senator CHAMBERLAIN. Even that report recommends some 20,000 alterations.

Mr. ANSELL. Oh, yes. Not systemic; not substantial. I think, while we had all anticipated that this report would be a reactionary one, largely sustaining the existing system, nobody, even on the other side, anticipated that it would be so reactionary as it is. I have just one bit of respect for it. It is a frank, fearless statement of the opposite view, and the War Department had been afraid

to make any such statement as that before; but this report—and it is well written, concisely written, and it is a good exposition of the reactionary view—the Secretary of War has approved in toto.

Senator LENROOT. At some point in your testimony I would like to have you go through that report in detail.

Mr. ANSELL. I want to do it, sir. I mention this here to show you the extent to which the gentlemen on the other side are driven to support this view against the creation of some tribunal—appellate tribunal, if you want to call it that—to keep courts-martial in check. The committee had only one lawyer, really, on it, because Maj. Gen. O’Ryan should not any more be called a lawyer, and though he once practiced, he has been a soldier now these many years. But here is this ultra-military committee taking up 7 pages of its not long report—only 18 pages altogether—with a discussion of the legal proposition that it is not within the power of the Congress of the United States to create any such tribunal, an argument that, from a legal viewpoint, is nothing less than absurd.

I promised this committee the other day to put in the record at the proper place the record I had of at least one of the death cases from France, one that was really typical of the four, as the committee may remember, which I will do, and the incidental papers connected with that—that is, the views of the Judge Advocate General and the Chief of Staff and Gen. Pershing—and I have done so.

Senator LENROOT. That is the complete record?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Let it be inserted.

Mr. ANSELL. I also was requested—or asked permission of the committee, I have forgotten which, it does not make any difference—to put into the record a letter mentioned by the press, from the Secretary of War, and the President’s reply, which is entirely congratulatory of the results of the pardons that the President has issued in two of the cases. Of course, the article fails to mention what happened to the other two, and when I last heard of them in the War Department they were serving terms in the penitentiary.

They proceeded, of course, on the theory that these young men were properly convicted—one of them now dead and the other discharged, badly wounded—that they were convicted, and that the pardon was an act of wonderful grace; whereas I will say to you gentlemen as lawyers that if you ever get the time to look at this record you will find, and can not help finding, that pardon came in this case not as an act of grace but as an effort to correct, as far as he could, the illegality of the judgment itself.

Now, going back and taking up the vices of the existing system—

Senator LENROOT. Let me understand you. As I recollect those two cases, they plead guilty to the charge of being asleep on post?

Mr. ANSELL. They pleaded not guilty. The drill people pleaded guilty.

I have a little memorandum here which I hope will explain such differences as there are between the four cases; but, taking them by and large, the four cases are really illustrative of the same points of illegality. Of course, the plea of guilty might be held to be conclusive, and it would be if the plea of guilty were taken providently, with a court that saw it was taken providently, and with counsel there

to guard the making of the plea. Of course, we know what that means in the usual civil forum. But it is not so here.

Now, coming to discuss as briefly as my interest in these propositions will permit me, the proposition illustrative of the views of this system.

I had intended to add, day before yesterday, the statement I made replying to the statement of the Secretary of War and the Judge Advocate General, heretofore referred to in the record, as presenting my side of that question. It was this document that the Secretary of War declined to give publicity to.

Senator LENROOT. It may be inserted.

The communication referred to is here printed in the record, as follows:

ANSELL EXHIBIT Y.

WASHINGTON, D. C., March 11, 1919.

The honorable the SECRETARY OF WAR,

Washington, D. C.

SIR: The press yesterday morning carried statements made by you and by Gen. Crowder, Judge Advocate General of the Army, in defense of the criticisms now being made against the existing system of military justice and the departmental methods of administering it. A representative of the press has just supplied me with an authorized statement. It is dated March 8, marked for release for the morning newspapers of Monday, March 10, and consists of a letter under date of March 1, signed by the Secretary of War, but evidently prepared in the office of the Judge Advocate General, in which the Judge Advocate General is requested to respond with a statement "which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject." The letter of the Secretary is one voicing general support of the system, a declaration of his faith in the justice of the system and of confidence in the Judge Advocate General and in condemnation of my own attitude and view with respect to that momentous subject. The statement of the Judge Advocate General is one that speaks in warm support of the system and in justification of his own responsibility for it, and in considerable part consists of severe personal criticism and accusation of me because of my efforts, in the face of his opposition, to modify the existing system so that a fair need of justice to our enlisted men might be assured. The letter of the Secretary was designed as a vehicle for placing before the public Gen. Crowder's statement in reply, which contains imputations upon my personal and official conduct which in justice and honor I can not permit to go unchallenged. Since the Secretary himself chose this means to give to the public a bitter attack upon me, it is but common fairness and justice, and I, therefore, accordingly request that the same office should give to the public this statement of mine which is designed to show the same intelligent men and women, the only forum now left to me, the character of the issues made by those who are opposed to me and my views, the extent to which they go and the methods which they employ to support and maintain a system which well-advised opinion pronounces bad, and which those most familiar with it know has necessarily and inevitably led to injustice in the Army.

The Secretary of War says:

"My own acquaintance with the course of military justice (gathered, as it is, from the large number of cases which in the regular routine come to me for final action), convinces me that the conditions implied by these recent complaints do not exist and had not existed."

This is the Secretary of War's opinion. It is based upon inadequate evidence, very limited observation, and the statements of biased witnesses. It is enough to say that under the existing system the Secretary of War sees and takes action only upon that relatively insignificant number of cases which are required under existing law to go to the President for confirmation. These few cases consist for the most part of sentences of dismissal of commissioned officers. These are not the class of cases in which appear the injustice of which I complain. The court-martial system is such and the regard for rank in the Army is such that a commissioned officer appears before a court-martial to

far better advantage than does a private soldier. The Secretary of War believes that conditions of injustice do not exist. When he denied this department the revisory power over all courts-martial cases, he denied himself the opportunity to keep in touch with the administration of justice throughout the Army, and he speaks from the knowledge obtained from only a part of the cases of commissioned officers tried, and from those alone who are interested in supporting the existing system. I say the system does not do justice. It does injustice—gross, terrible, spirit-crushing injustice. Evidence of it is on every hand to those who will but see. The records of this office reek with it. The organization of the clemency board now sitting daily and daily recommending clemency in a hundred cases is a confession of it. Clemency, however, can never efface the injustice done. In my judgment the Army will never hold the place it ought to hold in the faith and affections of our people, until the machinery for doing military justice be humanized.

The statement of the Judge Advocate General is a dexterous effort to divert public attention from the system of injustice, which he defends, and the pater-nity, of which he proudly proclaims, to mere personal differences which are not, or must soon cease to be, of public moment. When, in so far as it is necessary for his purpose for him to do so, he discuss es the system, he become involved in inextricable confusion and patent inconsistencies. In one and the same breath he declares the system unusually excellent and then complains that Congress has failed to impose upon and above it a needed organ empowered to subject it to legal control; he declares that the military law can best be administered in the field and with virtual finality, and yet he now admits that the system would be much improved by the establishment of a departmental appellate power; he contends that courts-martial should be subject, not to legal control, but only to the power of military command, but at the same time objects to assuming the responsibility for the outrageously excessive sentences awarded when courts and commanding officers go wrong without legal restraint; he admits that our soldiery must be hurriedly drawn from civilian life and from the liberal operations of the civil code, but assumes that for such reason the military code must be the more concentratedly applied; he argues that since the soldier must on occasion yield up his life on the battle field, he should not be heard to complain if it be taken away by these "courts of chivalry and honor," applying not the modern rules of right, but the mediæval principles that governed over lord and armed retainer; he says that the officers who sit in judgment upon the private soldiery can not be considered military zealots, since the civilian clothes they doffed are not yet out of style, but in the next paragraph asserts that they are steeped in military appreciations and are more competent in their place to do justice than am I, denominated a humane critic, inexperienced in military requirements; disagreeing with the Secretary of War who asserted the contrary, he says that my briefs were not addressed primarily to the desirability of the power of departmental review, but to the question whether such power had actually been granted, and then elsewhere he accuses me of endeavoring to meet the exigent necessity of review by an earnest plea based on expediency, rather than on reason or the language of the statute.

He misstates the issue by asserting that, according to my views, Gen. Pershing in the battle of the Argonne could not have subjected one of his men to court-martial without the concurrence of his judge advocate, whereas such a question is clearly not involved; all that is involved—and that much is fundamentally involved—is that the charges should not be ordered to trial until the judge advocate could say that as a matter of law the charges sufficiently allege an offense known to the law, and that there is reasonable ground to believe they can be sustained. The issue is whether the convening authority, the court, and the officer ordering the execution shall be a law unto themselves, or whether they shall be restrained by and required to keep within the limits prescribed by established principles of law; whether military justice shall be governed by the power of military command or whether it shall be the result of the application of legal principles. Asserting at one moment there is but a small margin of controversy between us, he concedes at the next that we are separated by a world-wide gulf of principles. He insists that courts-martial shall be subjected from beginning to end to the power of military command, and I declare that military justice can never be done with assurance, unless they be made responsible to applied principles of law alone, and answerable to no commander.

In his statement the Judge Advocate General recognizes some deficiencies to which he has been peculiarly blind ever before, and concurs, verbally at least, in remedies which he has ever hitherto opposed. He says that I contend that the great fault with the system is to be found in the lack of departmental power to review courts-martial proceedings and to modify or reverse unlawful judgments. I have ever contended that this was one great fault, but not the only one. As to that one fault, he now says that he agrees with me and that there is no controversy about it. But when did he become of that mind? In November, 1917, he went out of his way to reverse the opinion rendered by this office, and insisted upon misconstruing out of existing law that very power which this office had fairly found there; in doing so he not only denied that the power was to be found in existing law but contended there was nothing wrong with the absence of such a power, and also not only that there was not but, in effect, that there ought not to be in this department any such power of review. He has constantly voiced that view and acted accordingly. In his instant statement he argues that a commanding officer, in subjecting his men to courts-martial, should suffer no legal restraint, and argues as a practicality that such legal restraint would work the destruction of all discipline. In his instant statement he contends that the purpose of the Army is not to maintain justice, but to procure victory, as though the one can be achieved only at the sacrifice of the other; I say that there can be no discipline in any army without justice, and that the efficiency of our arms will ever be dependent upon the sense of our soldiery that they can expect justice.

The Judge Advocate General says that he was so much in favor of establishing an appellate power over these unjust judgments that in January, 1918, he submitted a draft of legislation for that purpose, which the committees of Congress permitted to die. It would be well for those who are interested to look up that bill. It is well that that bill was not taken seriously. That bill would have virtually put this appellate power, not in the hands of the President, but in the hands of the Chief of Staff, the highest military official, whose every instinct and element of training is ultramilitary, an official who can not be actuated by the more lenient views which characterize those familiar with legal principles or skilled in the administration of justice. It would have authorized the setting aside of an acquittal, the changing of a finding of innocence to one of guilt, and the substitution of a heavier penalty for a lighter one awarded by a court. All this is consonant with the prevailing tendency of military practice.

But did the Judge Advocate General make a bona fide effort toward the establishment of such an appellate power? Not only did he go out of his way to misconstrue that power out of the existing statutes, not only did he voice the view that the military code was one that could be most fittingly administered in the field, but there is another evidentiary circumstance that brings to my mind the absolute conviction that his efforts were not in good faith and were simply designed to allay public apprehension and inquiry. Shortly after he submitted this legislation to the committees of Congress, he took occasion to address a letter to the senior officer of the Judge Advocate General's Department in France, in which he said, with reference to an administrative palliative which he had adopted as a remedy, that it was necessary to do something to head off a threatened congressional investigation, to silence criticism, and to prevent talk about the establishment of courts of appeal, and to make it appear to the soldier that he did get some kind of revision of his proceedings other than the revision at field headquarters. It is significant also that his interest was not such as to produce subsequent effort to secure the enactment of this legislation.

It may well be that, now the constraint is removed which seemed to him to oblige him to take an opposite course, the Judge Advocate General reverts to his first view which he on one occasion expressed as one of honest intellectual approval of the effort that our office was making to establish such an appellate power in the department. That effort was made near the beginning of the war in the latter days of October, 1917, and, with the concurrence of every officer serving at that time in this department, we deduced out of 1199, Revised Statutes, that power. These views of this office were embodied in an office opinion to the Secretary of War dated November 10, 1917. It is of this opinion that Gen. Crowder in his statement says:

"Indeed, the first time I was advised of such a view was in November, 1917, on the occasion of his presenting to you—not through me and entirely without

consulting me—the first of the elaborate briefs of which so much has been made.”

And it is of this same brief that he later refers to in the statement as one “urging a revolution in the military system and his circulation of a document of such grave consequences among every officer in my office without giving me the slightest information of his efforts.” The statements are at variance with the facts. When I came to be the head of this office in the latter days of August, 1917, Gen. Crowder at that time, doubtless placing in me the utmost confidence, came to me and said that he never intended to return to this office again; that he had always aspired to a line command and that he intended to use his office of Provost Marshal General in the raising of this new Army to secure for himself a field command. He told me to manage the office in my own way and without further reference to him.

I particularly asked whether I should consult him upon matters of general policy, and especially upon appointments, of which many would have to be made. He said, “No,” but added, “If I should wish the appointment of any particular judge advocate for my special purposes, I will let you know.” The study and preparation for the opinion establishing the revisory power were participated in by all the officers, covered a period of two or three weeks, and required many office conferences. One day while I was at one of the conferences Gen. Crowder appeared in the adjacent room and took up with me some matter of common interest. I took that occasion to tell him what the office was then engaged upon and the subject of the conference in the next room. I explained to him the necessity of discovering some means for correcting the grave injustice done to a large number of noncommissioned officers who had been very unjustly tried and convicted in Texas, the record of which trial had just reached the office. I told him my view that with the new Army it was absolutely essential to establish some such revisory power and that I was delighted to find that the office was about to agree unanimously that section 1199, Revised Statutes, was designed for that very purpose. His reply to me, in words that are impressed upon my memory, was:

“I approve heartily of your effort. Go ahead and put it over. I suspect, however, that you may find some difficulty with the military men arising out of article 37.”

He then adverted to the fact that he himself had drafted and had had enacted that particular article, and added that, of course, it was never designed to prevent any such power. I then returned to the conference and announced to my associates that Gen. Crowder had spoken with approval of our course. Under my instructions, I did not have to consult him, and did so only because it was convenient and appropriate for me to do so on this occasion.

I knew of no change of attitude in him until shortly thereafter I was advised in the department that he was preparing a brief in opposition to the office view, and two or three days thereafter he resumed charge of the office and filed the brief. When I found this to be so, I went to Gen. Crowder and accosted him about his change of attitude. In explanation thereof he said:

“Ansell, I had to go back on you. I am sorry, but it was necessary to do it in order to save my official reputation.”

He then added that he was nearing the end of his service; that he could not afford to be held responsible for the injustice that had gone on, if the existing law could have been construed to prevent it. He further adverted to the fact that fixing such a responsibility upon him would injure his career in this war. Upon my having told him that I was unable to see how he was responsible for a practice that had continued for nearly 40 years, he went on to say that the Secretary of War held him personally responsible; that the Secretary of War had seen him at the Army and Navy Club shortly after I had filed my opinion and had “upbraided” him for sitting by during the time that he had been Judge Advocate General and permitting this injustice to go uncorrected; that the Secretary had particularly asked him how long he had been Judge Advocate General and charged him with his failure to seek a remedy for the situation which I had presented. Gen. Crowder then said that, humiliated by such imputation, he had gone back to the Provost Marshal General's office, had consulted some of his friends there, and had decided that it was necessary for his self-protection to oppose the opinion this office had written and the effort it had made to establish this power, and that two of the officers there had helped him to prepare the counter memorandum.

It is obvious that Gen. Crowder committed himself to the opposing view, a view which he has ever thereafter maintained, out of a mistaken notion of the necessity of self-protection and a desire to soothe his wounded pride.

Gen. Crowder further says that the order appointing me Acting Judge Advocate General, and subsequently revoked, had never been published, but was obtained by me from the Chief of Staff without consulting the Secretary of War and without his knowledge. With respect to this order, he says:

"Gen. Ansell asked me in a formal written memorandum to help him secure an order appointing him Acting Judge Advocate General in charge of my functions. I did not wish to be relieved but did not wish to embarrass you. I therefore replied in writing that he could take the matter up directly with the Secretary of War in his own way. He did not take the matter up with the Secretary of War in his own way. He did with the Acting Chief of Staff, with the remark that I concurred. Upon this showing the Chief of Staff marked the draft of an order that Gen. Ansell had prepared for suspended publication. By accident I learned of this order."

This statement reproduces a story far different from what actually occurred. The facts are these: Col. White, the executive officer of the department, called my attention to the fact that I was directing the policy of the office and exercising sole power, but had never been designated so to do under section 1132, Revised Statutes, and that for my protection I should place the matter before the department and suggest that I be designated in accordance with the statute. I told him that I ought to confer with Gen. Crowder, called up his office on the telephone and found that he was out, and then wrote a memorandum, the purpose of which was not to help me secure an order for my own benefit but to present an official situation to him as it had been presented to me. I recommended for purely official reasons that such an order should issue, and asked whether or not he concurred. He replied by memorandum, saying:

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday."

It never occurred to me that this language was not other than frank and candid, and that his agreement was conditioned upon personal presentation to the Secretary of War. I took it up, as I took up all other official business, except when the Secretary of War had manifested a desire for personal conference; that is, I filed a memorandum with the Chief of Staff, in which I used the language of Gen. Crowder, and in due course I was furnished with a typewritten copy of the order, signed by the Chief of Staff, by order of the Secretary of War. I know nothing about any mark on the order for suspended publication, nor do I know what that term means. I only know that I got the usual typewritten copy of the order. I saw nobody in person on the subject. Everything was done officially and by written memorandum. Surely Gen. Crowder will not now deny that he concurred in the step taken—namely, that I should be designated by order to control the policy of the office, since I was responsible for all the work—and he can not deny that in such matters the Chief of Staff acts for the Secretary of War, and that regulations require that normal transaction of business through him.

A reference to the order itself will show that it is not in the form in which I recommended it, but that it proceeds to confirm the verbal directions which it was assumed the Secretary of War had previously given. The language of the order is this:

"By direction of the President and in accordance with section 32 of the Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duty."

Gen. Crowder says nothing from the truth than that I was relieved from duty in connection with the administration of military justice when I filed the original brief. He surely can not mean this. He returned at that time, took over the duties of the office, and sent all matters to my desk for my views and supervision before presentation to him, except matters affecting military justice. He established for the officer in charge of that division of work a direct relation and channel of intercourse whereby the work of the Division of Military Justice was not subjected to my supervision or to that of

Col. Mayes, my immediate assistant. Both Col. Mayes and I believed that this method of office administration of military justice was bad, and on April 15, just before sailing for France, having been invited by Gen. Crowder to express my views upon the management of the office, I frankly told him so. The fact is, from the middle of November, 1917, until the 19th day of April, 1918, when I left for Europe, I had nothing to do with the administration of military justice and, of course, nothing to do with it until after my return.

I have not shared the view that the department has done all it could under existing law. I so organized this office as to achieve much in spite of the law as the department has construed it and in spite of the departmental practice and orders. I have at all times insisted upon the location of revisory power in this department, and I have said, and said in the beginning, that while I prefer that that power be located in the highest law officer of the Army, I was content to have it located in the department somewhere. This was not done. From the time of Gen. Crowder's return to the office in November, 1917, to the time I left for Europe in April, 1918, I urged in several memoranda the necessity of closer supervision of courts-martial procedure.

I filed a report upon returning from Europe that indicated to my mind what I once said to the Secretary of War, that the enlisted man in our Army receives less protection before a court-martial than an enlisted man in any other army with which we were associated. I organized two boards of review in this office, but they were limited by orders of the War Department to giving advice. I instructed the reviewing officers of this department themselves to submit cases for clemency upon their initiative, notwithstanding the fact that by general orders of the War Department this department was limited to advising simply upon the question of legality and clemency, consideration could be had only upon application, and application could be had only once in six months.

If responsibility for such maladministration as has existed in this office is to be located, it must be located first upon the Secretary of War. He specially instructed me in November that no matters of particular importance, no matter concerning the policies of the office, and no matters concerning appointments should be dealt with by me, except with the approval of the Judge Advocate General himself. The difficulties of administration have been due to the fact that I have been in fact responsible for the output, but have had no authority of direction or choice of help and means. That authority was reserved for Gen. Crowder, who had but little time and attention for this office. He knew little or nothing about the administration of this office during this war and was entirely absorbed and consumed in his other duties. Though charged by the Secretary of War with the policies of this office, he was at the same time the provost marshal general, member of the war council, and, as it was termed in the department for a while, legislative liaison officer. It was impossible for one man to be both provost marshal general, judge advocate general of the Army, and war counsellor and do his duty by either place, and this I clearly showed him when in November, 1917, I asked for the issuance of an order under section 1132 designating me, the senior officer in the office, as in charge of the policies of this office. It was a case in which Gen. Crowder desired and the Secretary of War permitted him to assume more duties, duties that were in no sense related, than a man of greater capacity than Gen. Crowder could carry. This was bad administration, operated to the great injury of this department. It proved an insuperable obstacle.

Gen. Crowder takes credit that the existing clemency board, upon which I am still held as the president, was established by him upon his return to this office, as though he discovered the situation necessitating it. As a matter of fact that board came about from a report that I filed with the Secretary of War during Gen. Crowder's absence—a report showing that the situation was fast growing intolerable, due to the more strenuous efforts that were being made to maintain a certain rigid standard of discipline after the signing of the armistice.

I am charged with being a new convert to these views, and that during the revision of the Articles of War and before I contributed no constructive ideas. The views I now hold I have held since my cadet days. I held them and expressed them throughout my seven years of instructorship at West Point. I held them and practiced them, so far as able, in my company, as those who served with me would testify. In 1906, in the celebrated case of Grafton against the United States, then pending in the Supreme Court. Grafton, the soldier appellant, having no money for the employment of counsel, I asked the permission of the War Department to represent him as counsel, inasmuch as I

desired to establish in that case what I think the court did establish, that courts-martial are subject to the great principles of the bill of rights. Gen. Crowder himself must remember my correspondence with him in 1911, in which I expressed the opinion that the revision proposed by him was not sufficiently liberal, and he must remember also—and if he does not others will—that upon the few occasions when I had an opportunity on evenings to assist in the revision of the manual I always insisted upon a liberalization. I recall one instance well. The old rule of the manual was that the court, upon sustaining a plea in bar of trial, would submit their ruling to the convening authority and take his orders thereon, and I contended that the court should not be thus interfered with, and that a court, upon a final sustaining of a plea in bar of trial should not be ordered to proceed, but that their judgment should dispose of the proceeding and operate like an acquittal as against double jeopardy, and this view after much resistance was but partially adopted in the present manual. It ought to be said, however, that at no time, until I came to the command of the office, were courts-martial matters a part of my duty. I was assigned to an entirely different and unrelated class of work.

I think a comparison of the military code in its present form with the form in which it existed prior to 1916 will show that the so-called amendment of the code, for which Gen. Crowder claims great credit, introduced not one single systemic change and not one single liberal feature, but, on the other hand, imported more of the old idea that a court-martial is a court of chivalry and honor, not governed by ordinary rules of law.

Gen. Crowder says that all the facts concerning this subject are now to be ascertained upon the investigation by the Inspector General. I have already notified the Inspector General that I would take no part in that investigation unless compelled to for the reason that such matter is entirely beyond his jurisdiction, and for the further reason that he himself is absolutely disqualified. It was of him and his office that I spoke when I said in my brief to the Secretary of War in November, 1917, that the views of the Inspector General of the Army, together with those of others of your military advisers, are reactionary and savor of professional absolutism. I stand upon one side of this question and he stands upon the other, and thus we have stood since the beginning. I will submit to no such unfair, partial, and unjust investigation, and I have so expressed myself to him in a communication of the 10th instant, which is as follows:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigator has to do with my statement before the Senate Committee on Military Affairs, that statement for which of course I am responsible, speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it, are not, when fairly considered, particular incidents to which your special capacity of inquiry can be properly applied, they are extra-departmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides, whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War whose subordinate you are. Even more: it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation and excepting, as I do and for the reasons given, to your jurisdic-

tional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it, voluntarily.

Of course, this subject ought to be investigated. The part that the Secretary of War has played in it ought to be investigated. The part that the Judge Advocate General has played should be investigated, and I myself do not ask to be excused from such an investigation; on the other hand, I welcome any fair and impartial and helpful investigation, but such an investigation, to be helpful, and impartial, must come from without the War Department.

There is a great principle in the issue here, and I have preferred that the discussion be confined to a discussion of principle, but it is obvious to me now that I am under attack because I stood for a principle, because I opposed the existing system, and because I have expressed my opinion of it, that it is unjust, un-American, and ought to be destroyed.

S. T. ANSELL.

MR. ANSELL. I also request that Senator Chamberlain's statement made upon the denial of his request that my statement be published be put in the record. Also that my statement made in reply to a second and more broadly published statement of the Judge Advocate General and Col. Wigmore, made to Senator Chamberlain publicly and formally, be also put in the record.

SENATOR LENROOT. Those statements may be inserted in the record. The statements above referred to are here printed in full, as follows:

MARCH 19, 1919.

HON. NEWTON D. BAKER,
Secretary of War.

SIR: On the 16th instant I addressed you a telegram in which I asked that you give to the public a statement made by Lieut. Col. (formerly Gen.) Samuel T. Ansell, in reply to statements made by you yourself and by Gen. Crowder, the Judge Advocate General of the Army, in which you both gave warm support and approval to the present court-martial system, and in which Gen. Crowder besides indulged in severe personal criticism and accusation against Gen. Ansell, who in testimony recently given before the Senate Committee on Military Affairs had condemned the existing system of military justice and the administration under it. I asked you to make the statement public, primarily because it was a clarifying contribution to the subject now agitating the people, to which the people are entitled, and, secondarily, because it was only fair and just to this officer that you should do so. I believed that you would make this statement public, and do so immediately, in order that the people might have the opportunity of considering it as nearly contemporaneously as possible with the opposing views publicly expressed by you and the Judge Advocate General. In that I am disappointed.

I have just received from you the following telegram:

"Your telegram received. More than a year ago I asked of the Military Committees of both the Senate and House legislation to correct the evils in the present court-martial system. I shall renew the request when Congress re-assembles. There would seem to be, therefore, no controversy on the merits of the subject. Have not yet seen the letter in question, and can not imagine any reason why my consideration of it on my return will not be time enough.

"(Signed) NEWTON D. BAKER,
"Secretary of War."

It is painful to me, Mr. Secretary, to find you fencing upon a question which means so much to the tens of thousands of enlisted men who have suffered injustice under the present system, a question which means so much to you, the Army, the Nation. In the instant telegram you say that more than a year ago you recognized the evils of the present court-martial system and requested legislation to correct them, and that inasmuch as you intend to renew that request, there can be no controversy on the merits of the subject.

Your present recognition of existing evils of the court-martial system is strangely irreconcilable with your published statement no more remote than March 10. In that statement of warm approval of the existing system, you seemed blind to any deficiency. You say therein:

"I have not been made to believe by a perusal of these complaints that justice is not done to-day under the present law, or has not been done during the War period, and my acquaintance with the course of military justice (gathered as it is from the large number of cases which in the regular routine come to me for final action) convinces me that the conditions implied by these recent complaints do not exist and had not existed."

You further say that you are "absolutely confident that the public apprehensions which have been created are groundless." And then you put the capstone upon your monumental confidence in the system by further saying:

"I wish to convey to you here the assurance of my entire faith that the system of military justice, both in its structure as organized by the statutes of Congress and the President's regulations, and in its operation as administered during the war, is essentially sound."

And finally you call upon the Judge Advocate General to make a statement for the purpose of reassuring the people who "must not be left to believe that their men were subjected to a system that did not fully deserve the terms of law and justice"; and then you conclude, rather lightly, that after all, it is but "a simple question of furnishing the facts, for when they are furnished, I am positive that they will contain the most ample reassurances." On March 10 you were blind to any deficiencies in the existing system; as, indeed, the evidence abundantly shows you have been deaf throughout the war to complaints about the unjustice of this system, complaints which should at least have challenged your earnest attention, rather than provoked your undisguised irritation.

But, as you say, you did propose certain legislation to the committees which they did not see fit to recommend for enactment and which, very fortunately, did not become law. I can hardly believe that that bill, prepared by the Judge Advocate General of the Army and submitted by you, was a bona fide effort to reform the existing system, and the slightest consideration of the bill will show that had it been enacted into law, it would have made the system even more reactionary, if possible, than it is now. I can hardly believe that this was a bona fide effort at reform, because you already had had an opportunity to establish in your department a legitimate and necessary revisory power over, and supervision of, courts-martial procedure. Gen. Ansell was at that time Acting Judge Advocate General of the Army, and his opinions were entitled to be respected as such, and in all other matters they were so respected.

In order to keep courts-martial procedure within just and legal limitations, he wrote an office opinion, in which he clearly demonstrated that this power of supervision was to be found in existing law, and in that opinion all the officers of the department, among whom were many most distinguished lawyers from civil life, concurred. And yet, in order that that opinion might be overruled and that you might rely upon the theory that you were entirely without power, you either ordered or permitted Gen. Crowder himself, who was not at that time connected with the office, to return thereto and write for you an overruling opinion, which you approved, and in doing so voluntarily denied that it was your right and duty under existing law to supervise the system. You approved the opinion of the Judge Advocate General, which was to the effect that this supervisory power did not exist, and, furthermore, ought not to exist, inasmuch as the law military is the kind of law that should be left to be executed at the will of the camp commander. If you had really desired to establish a legitimate legal supervision of courts-martial, you could have done so simply by approving the opinion of the Acting Judge Advocate General, which was not a personal opinion, but was an office opinion, which in ordinary course of administration would have been adopted. Advised to do the proper thing by your chief law officer, and having been shown by him the way to do it, you declined to do so upon some slight legal technicality. This is evidence to me that you did not desire to do so.

You supplanted the officer who had seen fit to call to your attention at the beginning of the war the necessity of keeping the strictest supervision over courts-martial procedure by an officer who contended that such supervision was not necessary and that such supervision would derogate from the power of the commanding officer and destroy discipline. You elbowed aside the one officer who even then had the courage to condemn the system and the provision to point out its terrible results, Gen. Ansell, and took into the bosom of your confidence a trio of men who are pronounced reactionaries—Gen. Crowder, the then

Acting Chief of Staff, and the Inspector General—the last named of whom is even this day engaged, by your order, in a so-called "investigation" designed, in my judgment, to destroy the man who exposed the injustice of the present system. You accepted those views. But, in order that any future responsibility might be shifted from your shoulders to Congress, you presented a bill which, even if you did not your advisers did know, could not be passed. Your advisers did not wish any modification of the existing system. They and you declined to accept the views of the Acting Judge Advocate General that would have gone far toward alleviating the situation on the ground that those views were not fully justified by the letter of the statute. You were thus solicitous that your power be found in the letter of the statute. And yet in the very bill proposed you asked for the power of suspension of sentences, when you were already suspending sentences by administrative order without one word of legal authority therefor.

There is another evidentiary circumstance that indicates the effort was not made in good faith, but was simply designed to allay public apprehension and inquiry by the appearance of doing something. It is shown by the records of your department that the Judge Advocate General of the Army, in correspondence with the senior officer of his department in France shortly thereafter, said, with respect to an administrative makeshift which he had proposed for adoption, and which you did adopt, that it was necessary to do something to head off a threatened congressional investigation, to silence criticism, to prevent talk about the establishment of courts of appeal, and to make it appear to the soldier that he did get some kind of revision of his proceedings other than the revision at field headquarters. How can it be said that such an attitude of mind is consistent with an honest desire to alleviate the situation? It is significant also that your interest upon this subject was not such as to produce that active participation of the department which characterizes its efforts when it desires to secure legislation.

The bill to which you refer and the nonenactment of which you plead as shifting the responsibility for the maladministration of military justice from you to Congress, if honestly submitted, is conclusive evidence that you yourself are entirely reactionary or that you have been imposed upon and deceived by advisers who are. That bill is Senate 3692, and provides, so far as immediately pertinent to this discussion, that section 1199, Revised Statutes, be amended to read as follows:

"The Judge Advocate General shall receive, revise and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and report thereon to the President, who shall have power to disapprove, vacate or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside."

Do you really know, Mr. Secretary, the purpose and legal effect of that bill? In the first place, it would have to be construed together with that statute which makes the Chief of Staff the trusted military adviser of the President and Secretary of War, whose authority he habitually exercises, on the one hand, and places him in supervision and control of all bureau officers, including the Judge Advocate General of the Army, upon the other hand. The President's power, therefore, as a matter of law, over the control of courts-martial cases would under that bill be habitually exercised by the Chief of Staff, an ultramilitary official, without the slightest competency to pass upon those errors of law which prejudice the rights of the accused and thereby render it necessary to modify the judgment, and with a disposition to disregard such rights. And, also, the Chief of Staff, and not the President, would be the one to exercise this power, in fact. There were some 350,000 courts-martial from the time we raised the new Army until July 1, last. Nobody would expect the President to review such a number or any appreciable part of them. Nobody, indeed, could expect the Chief of Staff himself to do so. The work would have to be entrusted to some military minion, inexperienced in law and the administration of justice, and whose training had disqualified him for such functions.

The Judge Advocate General, when he appeared representing you before the Military Committee, admitted that this would be the course of administration and contended that the Chief of Staff ought to have that power. He said that that was necessary in order to maintain discipline.

But worse than this, that bill would authorize the Chief of Staff to disapprove, vacate, and set aside a finding of "not guilty" and substitute upon his view of the evidence a finding of his own. Notice, the language is that

he shall have the power to disapprove, vacate, or set aside "any finding," and also to modify, vacate, or set aside "any sentence." This is a power which ought not to be granted to any man, and I feel safe in saying will never be granted by Congress. This alone was sufficient not only to condemn the bill in the mind of Congress, but to show the attitude of those who proposed it. Do you believe, Mr. Secretary, that the President of the United States, the Secretary of War, the Chief of Staff, or any other official, should have the power to set aside an acquittal and substitute for it a conviction or to set aside one sentence and substitute for it a harsher one, or to set aside a finding of guilty of a greater one? That is what the bill which you proposed authorizes.

But the bill further provides "that the President may return any record through the reviewing authority to the court for consideration and correction." This power is on a par with and supplemental to the absolute power which I have just referred to. If the Chief of Staff were not satisfied with a finding of "not guilty," he could return the record to the court-martial with instructions to make a finding of guilty. If not satisfied with a light sentence he could instruct the court to award a heavier one. If not satisfied with a finding of guilty of a minor offense, he could instruct the court to find the accused guilty of a more serious one. Do you believe that the President, the Secretary of War, or the Chief of Staff, or any other official, should have such power? If you stand for that bill you evidently do.

The Judge Advocate General who appeared before the committee in representation of your views testified:

"I want the President authorized to return the record which we get here, back through the convening authority to the trial court, and ask a reconsideration of their action so that he may proceed, if he desires, upon the revised findings of the court, and thus make the court participate with him in the final judgment."

When asked the question whether a commanding general could disapprove a finding of not guilty and send it back, he said:

"Yes, when in his opinion the finding is not sustained by the evidence"; and he argued that that power was necessary to the maintenance of discipline, was now possessed by all commanding officers and ought to be possessed by the President and Chief of Staff. In further argument sustaining that view he said with respect to cases in which very small sentences had been awarded:

"I do not know anything that could attack discipline more if the commanding general, who is also the reviewing authority, or the Secretary of War, or the President, who will become the reviewing authority of that class of cases under this legislation, could not invite the attention of the court to the effect of such a sentence upon the discipline of the Army generally. I do not think this power would have survived throughout the centuries if it were intrinsically wrong."

Obviously he was unaware that this is one of the few countries in which such a barbaric practice has survived. These views you doubtless approved inasmuch as in your letter to the committee you invited it to hear the views of the Judge Advocate General in explanation and support of the proposed legislation.

For the moment, at least, you now conceive that there should be a power of revision. That, to use your language, is "structural," "organic." The lack of a proper revisory power is a lack of legal control at the top. There are many other deficiencies of the same character. There is an absolute lack of legal control at the bottom and throughout the proceedings. You have said that the cases that come to you in regular routine convince you that the complaints against the system are groundless. Unfortunately, Mr. Secretary, you are not in touch, and apparently do not desire to get in touch, with the administration of military justice. You must know that under the existing system the Secretary of War sees and takes action only upon that relatively insignificant number of cases which are required under existing law to go to the President for confirmation. He sees none others. These few cases consist in the far greater part of a few sentences of dismissal of commissioned officers. These are not the class of cases in which appears the injustice of which I have complained. The courts-martial system is such, and the regard for rank in the Army is such, that a commissioned officer appears before a court-martial to far better advantage than does a private soldier. You do not see the system in operation. You do not see its tragic results. When you denied the department the revisory power over all courts-martial cases you denied yourself the opportunity to keep in touch with

the administration of justice throughout the Army. Your knowledge is obtained from this insignificant number of cases of commissioned officers and from those persons surrounding you who are interested in supporting the existing reactionary system.

The existing system does injustice—gross, terrible, spirit-crushing injustice. Evidence of it is on every hand. The records of the Judge Advocate General's Department reek with it, and upon proper occasion I shall show the people that this is true. The organization of the Clemency Board, now sitting daily and grinding out thousands of cases, is a confession of it. Clemency, however, can never correct the injustice done.

You have, of course, adopted the statement of the Judge Advocate General, which you invited and published. That statement is involved in an inextricable confusion and patent inconsistencies as your own pronouncements upon this subject. In one and the same breath it declares the system unusually excellent, and then blames Congress because it has failed to enact the bill which you proposed and has heretofore been referred to; it declares that military law can best be administered finally in the field, but at the same time argues that the system would be much improved by the establishment of a departmental appellate power; it contends that courts-martial should be subject, not to legal control, but only to the power of military command, and at the same time objects to assuming responsibility for the outrageously excessive sentences awarded when courts and commanding officers go wrong, without legal restraint. It admits that our soldiery must be hurriedly drawn from civilian life and from the operations of the more liberal civil code, but assumes that for that very reason the military law ought to be more harshly applied in order to obtain discipline. It argues that courts-martial are not courts of justice, but "courts of chivalry and honor," and concludes that since the soldier must on occasion yield up his life on the battle field, he should not be heard to complain if it be taken away by these courts of chivalry; it places courts-martial in high esteem, though admitting that they apply not the modern rules of right, but medieval principles that govern overlord and armed retainer. It says that the officers who sit in judgment upon the private soldier can not be military zealots, because it was only yesterday that they got out of their civilian clothes, but in the next paragraph asserts that they are most competent to award military punishments, because of their military appreciations. It argues that the primary purpose of a court-martial is to maintain discipline, as though discipline in any real sense could be maintained in our Army without doing justice.

I beg to assure you that there is controversy on the merits of the subject. There is great difference between you and me. That would be relatively unimportant. But there is great difference between you and Congress, and there is great difference between you and the American people. I do not believe that a court-martial should be controlled from beginning to end by the fiat of military command. I do not believe that a commanding officer should order the trial of an enlisted man on a charge that is legally insufficient. I do not believe that he should order a court to overrule pleas made in behalf of an accused which upon established principles of law would bar the trial. I do not believe that the court and the commanding officer can cast established rules of evidence to the winds and insist upon the conviction of a man upon evidence that no court for a moment would entertain. I do not believe that the court and the commanding officer should be permitted to deprive an accused of the substantial right of counsel and railroad him, unheard and unrepresented, to a conviction. It was only yesterday that I was shown a record in which the counsel for the accused was intimidated from examining his superior officer as a witness by a threat made in open court by the superior officer, that any question asked him, reflecting upon his credibility, would promptly bring charges against the youthful counsel. I do not believe that the conduct of a court should be controlled by a commanding officer. I do not believe that a court should be directed or instructed to reverse its finding of innocence or to impose a harsher punishment than that originally awarded. On the other hand, I believe, and I insist that the courts-martial having in their care and keeping the lives and liberties of every single one of our soldiers shall be courts of justice, acting as judges, controlled by and responsible to no man controlled by and responsible to their own oaths, and to the great principles of law which have been established by our civilization to protect an accused wherever he is placed on trial.

Surely you have been misled. Officers of your department who have supported the iniquitous system and who have imposed upon you, or most unfortunately persuaded you, have been busy preparing their defense. You have been presented lengthy reports designed to controvert the speech which I made in the Senate on this subject, which reports I have shown you to be misleading and utterly unreliable. Volumes of statistics are being prepared to show that, after all, the system is not so bad. Whether you do or not, the American people see and have the evidence; Members of Congress have the evidence. You have taken a terrible stand upon a subject which lies close to a thousand American hearthstones. The American people will not be deceived by such self-serving, misleading reports and statistics. Too many American families have made a Pentecostal sacrifice of their sons upon the altar of organized injustice.

Very sincerely,

GEO. E. CHAMBERLAIN.

MILITARY JUSTICE.

RIGGS BUILDING,
Washington, August 16, 1919,

HON. GEORGE E. CHAMBERLAIN,
United States Senate, Washington, D. C.

SENATOR: At a recent interview you referred to the defense made by the Judge Advocate General of the Army and the Secretary of War on "Military Justice During this War," as contained in the document so entitled, consisting of a letter from the Secretary of War to the Judge Advocate General, and of a letter from the Judge Advocate General in reply, published and distributed throughout the country at public expense as official business.

You expressed yourself at the time as of the opinion that the presentation made by these public officials was not helpful to the true interests of the public or of the Army. I said to you then that that presentation could be shown to be of such character that it could but misinform and mislead the public mind. I shall endeavor to show you now that such is its real character.

In the very beginning we are made to see that—

THE SECRETARY OF WAR BLINDLY SUPPORTS THE EXISTING SYSTEM.

Military justice is a subject in which the people should have deepest interest and the Secretary of War keenest concern. It involves in a very direct way our national safety. It affects the morale of our soldiery, and influences the attitude of our people toward military service. Like all matters of justice, it should be the object of sustained solicitude upon the part of the people and a highly sensitive regard upon the part of their officials who have immediately to do with its administration. Thereby alone may imperfections in justice be seasonably revealed and remedial action taken. Hardly could it be denied that the maintenance of justice in the Army requires that the Secretary of War be receptive to all complaints of injustice to our soldiery, alert to discover imperfections in the system of its administration, quick to take or recommend the amplest remedies. Throughout the war his attitude has been the very opposite.

At the beginning of the war, in the actual absence of Gen. Crowder, who had been appointed Provost Marshal General, I, by virtue of seniority, came to be the acting head of the office of the Judge Advocate General, which includes the Bureau of Military Justice, just when the mobilization of the National Army began. The instances of palpable and unquestioned injustice through court-martial soon became so numerous, so gross, and of such a tendency to aggravation as to seem to me to call imperatively for legal check. More than ever before it was becoming apparent to me, and to my office associates as well, that we could not apply the existing system of military justice to the new Army, as it had been applied to the old, without doing great injustice to the soldiery. Some of the gravest deficiencies of our system, as applied to the old Regular Army, became perfectly apparent. It was more clearly revealed than ever before that that system belonged to other institutions and to another age. It is one in which military justice is to be achieved, as it was achieved in England and on the Continent 150 or more years ago, through the arbitrary power of military command rather than through the application of principles of law; a system governed by man—and a military commander at that—instead of by law. Designed to govern a medieval army of mercenaries, it is utterly unsuited to a national army composed of our citizens called to the performance of the

highest duty of citizenship. Designed to govern military serfs obligated by personal fealty and impelled by fear, it is utterly unsuited to American freemen serving the State as soldiers, acting under the impulse and inspiration of patriotism. All this was borne in upon us and impelled us to contemplate remedial methods. It is regrettable that it should not have been seen and appreciated by our professional officers charged with the making of this new Army, whom, unfortunately, the department insisted upon chaining to the medieval system under which they had been trained.

Confronted immediately by a case of shocking injustice, conceded to be such by the department, and still conceded to be such by the Judge Advocate General in his defense (p. 50), in which eight or ten old and experienced non-commissioned officers of the Army had been arbitrarily and unlawfully charged with and tried and convicted of mutiny, we in the office of the Judge Advocate General set to work to reexamine our authority to review the judgment of a court-martial for errors of law, with a view to setting this judgment aside by reason of its illegality. In a unanimous opinion, having for the moment the concurrence of the Judge Advocate General himself, we found this power conferred by section 1199, Revised Statutes, which in terms enjoins the Judge Advocate General of the Army to "revise" the proceedings of courts-martial, a Civil War statute designed, in our judgment, for the very purpose. We conceived that this power of revision of the judgments of courts-martial would largely answer the necessity for the legal supervision of the procedure and judgments of courts-martial, for the establishment of legal principles and appreciations in the administration of military justice, and for giving legal guidance to the power of military command over such judicial functions. That necessity was thus early apparent to the office of the Judge Advocate General, the office that was in daily contact with the administration of military justice and charged with such legal supervision over it as War Department administration would permit; but it was not apparent to the military officials of the War Department insistent upon the view that a military commander must be absolute and unrestrained by law. In control of the Secretary of War they, led by the Judge Advocate General, who had been induced to change his views, won and had their way throughout the war. The old system, applied without legal restraint, was maintained in its full flower throughout the war. The commanding officer was to have full and final power beyond all review. Thereafter the best we could do was to appeal to the natural sense of justice of those who wielded the power of military command.

Throughout the war, upon every proper occasion, I strove with all the power within me, with such reason, argument, and persuasion as I could command, first, to establish legal regulation of the power of military command in its relation to the administration of military justice, and, when I had failed in that, to induce military authority of its own accord to act justly. The records of the War Department will show that this was my insistent attitude throughout, an attitude with which the department disagreed consistently, except when coerced by expediency into the adoption of some administrative palliative. The department would not stand for the legal supervision of court-martial procedure, but insisted that it should be controlled from beginning to end, and finally, by the power of military command. Surely beyond departmental circles and departmental influence, fairminded men who know aught of this subject know that the administration of military justice during this war has resulted in injustice, tyranny, and terrorization. The evidence is on every hand. Tens of thousands of our men have been unjustly tried and unjustly punished by courts-martial, and large numbers of them, not tried, have been arbitrarily placed in prison pens and subjected therein to barbarous cruelty, physical violence, and torture. If there be those not willing yet to concede so much, they will be overwhelmed by evidence later on. With our system of military justice, as it was considered and decided upon by the Secretary of War and the military authorities, the results could not have been otherwise. Those who are responsible for that decision, namely, the Secretary of War, the Judge Advocate General of the Army, the Acting Chief of Staff, and the Inspector General of the Army, must assume the responsibility for the gross injustice done.

Such injustices can not be concealed, however, even during war. Members of Congress became apprised of them from many sources. They became, and properly they ought to have become, a matter of congressional consideration. Bills were introduced for their correction. You were the leader in this remedial movement. In the middle of February last I was summoned before the Senate Military Committee, of which you then were the chairman, and, without having

had any previous conference with you upon the subject, to testify out of my experience as Acting Judge Advocate General during the war, and I did testify to the effect that our existing system and the administration of it had resulted in the most cruel injustices. I should have been false to my duty and to my oath had I done otherwise. There had been outcries against the system while war was flagrant. Complaints were everywhere to be heard by all who had not closed their ears. To the extent of my ability, I lost no opportunity to acquaint both the Secretary of War and the Judge Advocate General of the Army with them. But the Secretary, as many another stronger man has done, exhibited unusual strength in adhering to his original commitment.

WAR DEPARTMENT METHODS OF DEFENSE.

The matter was now before the public, and the department had to act. The Secretary immediately set about not to inquire, not to investigate, but to make a defense. Therein he was guided, as upon this subject he has ever been guided, by his Judge Advocate General. They appreciated and acknowledged that they were responsible for the injustice, if injustice there had been. They denied that there had been any injustice, and prepared to support and make plausible that denial. Within 10 days after I had testified before the Senate Military Committee the Judge Advocate General and the chief exponent of his view had a conference with the Secretary of War, at which they formulated a plan for the defense of the existing system and their administration under it. The system was to be maintained at all costs. The authority of the department was to be used to reassure the people as to the merits of the existing system, to deny or condone its results, and to destroy the force of all criticism or condemnation of it. Power of government was to be liberally used to this end. Bureaus of the department were set to work to prepare a defense, public funds generously used, and a campaign of propaganda initiated. Officers of high rank, under Col. John H. Wignore, in charge, and an adequate clerical force were assigned to the task. Much since then has been said and done in the execution of the plan. The methods employed were such as when employed in private affairs habitually receive the condemnation of honest men and discredit any cause; public funds have been improperly used; official favors have been lavishly bestowed upon those in the office of the Judge Advocate General who would actively support the system, and official power has been used to suppress, discredit, menace, demote, and discipline those who oppose it; clemency boards have been "packed" with friends of the system, and simplest mercy denied in order to vindicate the system and those involved in its defense.

Speaking now to the document under discussion: First, the chief of the propaganda section prepared for the signature of the Secretary of War the letter standing first in the document discussed, in which the Secretary of War was made to convey to the Judge Advocate General an assurance of his entire faith in the system and of his confidence in the Judge Advocate General, and to declare that injustice had not been done during this war. And especially did he call upon the Judge Advocate General to prepare for publication a statement to the end that the public mind should receive ample reassurance on the subject. The chief propagandist then prepared a responsive statement for the signature of the Judge Advocate General, under date of March 8, which consisted of a general defense of the system and largely of a personal attack upon me. The Secretary of War gave this statement to the press, having arranged in the meantime for the fullest publicity. With all possible patience I prepared a statement pointing out the deficiencies of the system and my own attitude toward it, and asked the Secretary of War to give my communication the same publicity he had given his and that of the Judge Advocate General. This he declined to do, though this communication of mine afterwards appeared in the New York Times, but without any knowledge or connivance upon my part. In that communication I pointed out conduct upon the part of the Secretary of War and the Judge Advocate General in their relation to this subject that was clearly inconsistent with official or personal integrity, notwithstanding which both have ever since kept silent and taken no action, although I remained in the Army for nearly four months thereafter in order that I might continue amenable to such disciplinary action as they might choose to take. However, there was not one word in the communication that I had not previously spoken to the Secretary of War in person, and without denial from him, on the last night of February last.

Not content with this first statement which was given to the press, the chief of the propaganda section prepared the far more comprehensive defense contained in the letter signed by the Judge Advocate General in the document under discussion, between seventy and one hundred thousand copies of which were published and distributed to the lawyers and others throughout the country at public expense. The circumstances attending the publication of this document, when contrasted with contemporaneous representations of the Secretary of War, will mildly illustrate the character of the official methods employed throughout this controversy. This communication, though bearing date of March 10, was not authorized by the Secretary of War until March 26, and was not given to the public until April 9. In the meantime, on April 5, the Secretary of War had assured me in writing that he deprecated the public controversy and that it ought to stop on both sides, and cordially invited my cooperation in remedying the existing system. This assurance I accepted in good faith, only to find four days later this comprehensive publication launched against me and sent broadcast throughout the country.

An artful incident of the common authorship of the three communications is to be found in the fact that the author has the Secretary, in his letter of March 1, give strong and unqualified approval to the system of military justice and its results. But after reflection he has the Judge Advocate General, in his defense, concede many deficiencies and admit much injustice. He might also have taken the Secretary from such an exposed position. This letter, or defense, of the Judge Advocate General is designed to be the last word, the final avouchment, upon the subject, the complete vindication of the system, its supporters, and the department, and to bring about the utter discomfiture of those who have criticized the existing system and have sought and are still seeking a better one.

The system can scarcely be stronger than this skillful representation of it would have it appear. If this representation is weak, the system may be presumed to be weaker still. I would have you first look into the strength of that representation for the moment, not as though it were factitious, but regarding it as of face value and indulging the presumption that it is an expression honestly arrived at and honestly entertained.

THE SECRETARY'S LETTER.

Please look at it. It is from the highest authority, from the chief guardian of the soldier's rights, who should have been watchful for any weaknesses in the system and sympathetic for all who suffered by them. It was his supreme duty to discover its deficiencies and to exert his power for progress and improvement. His letter, saved of its inconsistencies, consists entirely of prejudice and expressions of satisfaction. This was his state of mind toward the code and the criticism made of it, and he would so express himself without making the slightest investigation. In his letter he first affects surprise at the complaints and resolutely expresses the "firmest determination that justice shall be done." But at once he says he does not believe the complaints and is convinced that injustice has not been done. He arrives at this conviction, he confesses, through the confidence he has in his Judge Advocate General and the faith that he has in the system. Then, observing that, though entirely satisfied himself, "it is highly important that the public mind should receive ample reassurance on the subject," he directs the Judge Advocate General to prepare a statement for that purpose. He does not withhold judgment upon the specific complaints and have them investigated; he does not direct an inquiry; he resents the complaints, sees in them an attack upon "the department and its representatives, who have not been in a position to make any public defense or explanation and have refrained from doing so." His proclaimed purpose is not to determine the facts, but to assume them to be what he wants to believe them to be, and he calls for a statement, based upon that assumption, in order "to reassure the families of all these young men who had a place in our magnificent Army." You can understand his predicament, the necessity for loud asseveration to impress public opinion by assuring it and himself that all was well. It was necessary that he continue to repeat the unreasoned assertions that led to his commitment to the system in the early days of the war. Having committed himself to the views of those intent upon maintaining that system, it was necessary that ever afterwards he soothe his conscience by closing his ears to the cries of justice. Never thereafter would he hear me, an officer of rank,

experience, and some repute, with a responsibility that placed me in immediate contact with the unjust results of that system. Holding their hands, he had taken the plunge, and to them he must look for safety. They told him that the department as a matter of law did not have, and as a matter of policy ought not to have, general supervisory power over courts-martial in questions of law, but that the views of the commander in the field should be final. When he denied the department that supervisory power he shut his eyes to his responsibility, he denied himself the opportunity to keep in touch with the administration of justice in the Army, and, relying upon a mere convention which had no basis in law, he turned his back upon the demands of justice and screened himself from its sufferings. He stands or falls with the system.

THE JUDGE ADVOCATE GENERAL'S DEFENSE.

His defense consists of blind professions of faith in the system, unreasonable assertions of its excellence, and a sympathetic appeal that they be believed in even as you would believe in him. It does him less than justice; it would have you believe that sheer cruelty of the system made him happier than Caligula's minion, whereas he is only blind to its cruelty. The statement does reveal his immovable mental attitude upon the subject, which was not to be unexpected. Trained to the line of the Army and not to the law, finding the work of his own department uncongenial, ever ambitious for a line command, orthodox in every military appreciation, he has, throughout his long years of service, taken not the judicial but the professional soldier's "rough-and-ready justice" point of view. He regards the system as so organically perfect and vital to military efficiency that even its form is to be touched only lightly. His mind has repelled all criticism of the system and is incapable of contemplating that it might be fundamentally and structurally wrong. This fixed mental attitude obtrudes throughout the statement. So addicted to regard the system with blind veneration he can never perceive its wretched incongruity as an American institution. He refers to his "firm belief in the merits and high standards of our system of military law." He asserts his vital interest "in vindicating the honor of the Army and War Department as involved in the maintenance of that system." At every point he declares the inherent superiority of courts-martial to the civil system. He resents even those criticisms based upon specific instances of injustice since "they are calculated to undermine unjustly and needlessly the public confidence in that system." He would have the people "know confidently and take pride in the fact that we possess a genuine and adequate system of military justice." He takes "consolation in believing that if the public at large and particularly the families of those men who have been subjected to military discipline during the past two years could realize the thoroughness of this system they would feel entirely satisfied that the system is calculated in its methods to secure ultimate justice for every man." He refers to some futile proposals of his affecting military justice as tending to show that his attitude "has been an advanced one, at least in comparison to others whose authority was superior to mine at the time." He refers to his own career as Judge Advocate General "as demonstrating that it is inherently improbable that any state of things, even remotely justifying some of the extreme epithets recently used in public criticism, could have existed in our Army during the last two years." These expressions alone reflect a stagnant mental pool.

HIS STANDARDS OF JUSTICE.

The Judge Advocate General asserts that he was actuated by the spirit of justice throughout this war, and that he has not been satisfied with anything less than the highest standards of justice. Doubtless swayed by the demands of discipline as he understood them, he did not deliberately do what he knew to be unjust. It is simply a matter of standard of appreciation. He insisted, however, upon maintaining the system unmodified, and the system has led, was leading, and might have been expected to lead, to the grossest injustice. Let us examine his standards as illustrated by the very cases used by him.

(a) The case of the Texas "mutineers." In that case certain old noncommissioned officers of the Regular Army had been subjected to the tyrannous and lawless conduct of a superior officer. Their innocence is conceded. They acted well within their rights in quietly refusing to submit to a palpably unlawful command, and for that refusal they were tried and found guilty of mutiny and sentenced to dishonorable discharge and imprisonment for terms from 10 to 25

years. In this case officers, not men, should have been tried. The trial in its entirety was illegal; the substantial rights of the men were at no point protected; and yet this procedure received the approval of the entire military hierarchy, capped by a major general who approved the sentence and dismissed the men. The Judge Advocate General protected the officers over my protest and denied justice to the men. That was the first case of gross injustice to come to the office after I became its head in August, 1917. I and my associates in the office knew that there would be many like it during the war. The Judge Advocate General admits that this was a "genuine case of injustice" and that it "illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice." The military minds of the War Department conceded the injustice, conceded the illegality of the proceeding if it could be reviewed for error, but contended that the approval of the major general in command was final and placed the judgment of the court, whether legal or illegal, beyond all power of review. This case presents the crux of the entire difficulty and reveals the fundamental deficiency of the entire system. Courts-martial are controlled not by law but by the power of military command. I held that this could not be, and deduced the authority to review the judgments of courts-martial for errors of law out of existing statutes enacted during the Civil War for the very purpose, statutes which the War Department and compliant Judge Advocate Generals had permitted to become obsolete. The present Judge Advocate General, though he had relinquished all control of his office to become Provost Marshal General, returned to the department and filed an overruling opinion which the Secretary of War was induced to approve. That opinion established the law for the department that the judgments of courts-martial once approved by the convening authority, however erroneous they may be when tested by legal principles, are beyond all power of legal review and correction. This case presented no more illegality than thousands of others that have since been tried. Clemency was resorted to in that case and the unexecuted punishment remitted, though the men themselves, excellent soldiers of long service, had been branded as mutineers and expelled from the Army in disgrace. Clemency has been resorted to in all such cases as a means of curing, as best it can, the injustice resulting from illegal trials that must go uncorrected. Mercy is given for offenses never committed, and pardon is used where judgments are illegal and should be reversed. This accounts for the wholesale clemency in which the department is indulging. The Judge Advocate General, in order to protect the power of military command, opened the gates to all the injustice of this war. His view was injected into the question. He overruled the opinion of the entire department, consisting of 12 eminent lawyers from civil life, but he succeeded in maintaining supreme the power of military command over military judicial functions. It was under such ruling that the same commanding general in Texas was permitted to hang a half score of negro soldiers immediately upon the completion of the trial and before the records had been reviewed or had been dispatched from his headquarters to the Judge Advocate General of the Army for whatever revision the statute might be thought by him to require. In those cases the Judge Advocate General, as a result of his construction, engaged in the futile task of "reviewing" the proceedings four months after the accused men had been hanged.

(b) "Burglary" case, No. 110595. This is another case used to illustrate the beneficence of the system. This accused was charged with burglary, and at the end of the trial the court acquitted him. But the commanding general disagreed. He ordered the court to reconvene, and told it that the evidence, to say the least, looked "very incriminatory." The court upon reconsideration as ordered found the accused guilty and sentenced him to be dishonorably discharged and to confinement at hard labor for five years. The Judge Advocate General, in his statement, says: "His (the accused) story was disbelieved and he was found guilty." That is not true; his story was believed and he was acquitted, and it was not until the camp commander ordered a reconsideration that the court convicted him. The Judge Advocate General further says:

"This office reached the opinion that though there was sufficient evidence to sustain the finding, the evidence did not go so far as to show his guilt beyond a reasonable doubt."

A lawyer would be expected to suppose that in a criminal case the evidence in order to be sufficient must be such as to convince the court beyond a reasonable doubt of the guilt of the accused. However, the record shows that the office of the Judge Advocate General said in the review of this case:

"After careful consideration of the evidence, this office is firmly convinced of the absolute innocence of the accused."

As indicating a lack of power in the Judge Advocate General's office to give effect to a conclusion of this sort, a copy of the review was addressed to the camp commander "in order that the reviewing authority may have the benefit of the *study* referred to."

The Judge Advocate General's report also says:

"In such a situation no supreme court in the United States would interfere and set aside a jury's verdict. Nevertheless this office recommended a reconsideration of the verdict by the reviewing authority."

The great fact to be noted is that such a case as this would never have come to any appellate court, because the original acquittal could never have been set aside. And if the case could have gone to any appellate court upon evidence as weak as this after a fair jury had once found an acquittal, there could never be any doubt about what action the court would take. However, the office of the Judge Advocate General did not recommend the reconsideration of the verdict by the reviewing authority. It only expressed its own serious doubt and referred its "study" to the reviewing authority "for such consideration as he may deem advisable to give it." This case well represents the whole difficulty due to the lack of authority in the office of the Judge Advocate General to do more than present "studies."

Gen. Crowder's defense says:

"It (the verdict) was, in fact, reconsidered; but the court adhered to its findings."

This is not true. After the Judge Advocate General's office had "studied" the case it never went back to the court. The "study" was simply sent to the reviewing authority and the court never had any opportunity to see that "study."

The Judge Advocate General's report says:

"But the feature for emphatic notice is that reconsideration was given, not by exercising the 'arbitrary discretion of a military commander' but by referring the case to the judge advocate of the command as legal adviser."

The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of the Judge Advocate General. This illustrates the necessity for final power in the office of the Judge Advocate General. It is to be noted here (1) that the judge advocate who made the elaborate review was the same judge advocate that recommended trial in the first instance; (2) he was the officer on the staff of the camp commander who ordered the trial and who insisted on a conviction instead of an acquittal; (3) to show his bias, he undertakes to say in his review that the court could not have been influenced by the camp commander when it was instructed by him to change its findings from not guilty to guilty; (4) he himself says that he believed that the court was impressed with the "ring of sincerity" of the case when it first voted his acquittal of the charges, and added that he himself was so impressed when he first preliminarily examined the case; (5) the judge advocate's review consists of a belabored argument of 18 pages and is supplemented by a semipersonal note to the Judge Advocate General insisting upon the guilt of the accused. This is a good example of the fact that under the present law judge advocates do not consider themselves as judicial officers at all, but simply as staff officers supporting the views of the camp commander; nor do they consider the office of the Judge Advocate General as a judicial office, for such a relation would bar such semipersonal correspondence. Moreover, this review speaks many times, in what amounts to a slurring manner of the "study" made by the Judge Advocate General.

The Judge Advocate General's report further says that this reconsideration on the point of proof beyond a reasonable doubt "was a measure of protection which the law does not provide in any civil court for the control of a jury's verdict." As indicated before, the verdict of the jury would have promptly acquitted this man. There would have been no occasion to review it. If a case should get to an appellate court in which the evidence was so weak as to result first in an acquittal, and then required military direction to change it to a conviction, and then two superior reviewing judge advocates pronounced the evidence insufficient to sustain the finding, nobody can have any doubt what a court of appeals would do.

The Judge Advocate General's defense says:

"The case is a good illustration of the feature in which the system of military justice sometimes does even more for the accused than a system of civil justice."

This should be admitted. It does do more. It does it hard and plenty.

It may be well to add that since the Chamberlain speech was made the justice of the sentence in this case has been reexamined in the office of the Judge Advocate General upon an application for clemency, and as a result Gen. Crowder, on February 12, 1919, recommended that the unexecuted portion of the sentence be remitted and that the prisoner be released and restored to duty. This recommendation contains the ironical statement that the accused had served nearly one year of his sentence. Here is also a strange admission in the general's memorandum:

"This office is strongly of the opinion that injustice may have been done to this man, and that it should be righted now, so far as possible."

It is a remarkable coincidence that Gen. Crowder signed this memorandum on the same day that he signed his defense in which he vigorously contends for the rightful results of the case.

(c) The four death cases from France: The next cases cited by the Judge Advocate General as illustrating the justice with which the system meets "the stern necessities of war discipline" were four death sentences from France in the cases of four 18-year-old boys, who had volunteered at the beginning of the war—Nos. 110753, 110754, and the companion cases, 110751 and 110752. These were the first death sentences received from France. In the first two the death penalty was awarded for a charge of sleeping upon post, and in the last two for refusal to go to drill. The trials were legal farces, as any lawyer who will look at the records will see. In each of two of the cases the trial consumed about three-quarters of an hour, and the record occupies less than four loosely typewritten pages. The other two consumed slightly more time, and resulted in a slightly larger record. The courts were not properly composed and in two of the cases were clearly disqualified. The accused were virtually denied the assistance of counsel and the right of defense. A second lieutenant as counsel made no effort to assist. That they were hindered rather than helped in their defense by counsel is demonstrated by the fact that in the case where a plea of guilty was entered the sole effort of counsel consisted of his calling a witness and asking him this question:

"Q. Was the accused's record good up to this time?—A. It was not. It is one of the worst in the company."

Two pleaded guilty to a capital offense and the other two made not the slightest fight for their lives. Even if the men had been properly tried and convicted, no just judge could have awarded the death penalty. These young soldiers had been driven to the point of extreme exhaustion. At the time of commission of the offenses, the military authorities evidently regarded them lightly. The two who were charged with sleeping on post were not relieved from post nor were they arrested or accused for 10 days thereafter, and the two who were charged with refusal to go to drill were not arrested or charged for a month thereafter. But at this juncture the authorities abruptly changed their policy, and decided to make an example of these men. Gen. Pershing, who under the law had nothing whatever to do with these cases, injected his power and authority into the course of justice, clamored for the death penalty, and asked that the cable be used to transmit to him the mandate of death.

According to the Judge Advocate General, Gen. Pershing urged the adoption of the inexorable policy of awarding the death penalty in all cases of sleeping on post, and he insists that no one should be criticized for agreeing with this policy or acceding to Gen. Pershing's urgent request. And then the Judge Advocate General makes this surprising statement:

"I myself, as you know, was at first disposed to defer to the urgent recommendation of Gen. Pershing, but continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency."

The record shows an entirely different attitude. It shows that on March 29 to April 4 Gen. Crowder wrote the reviews in these cases, but did not as yet conclude them with his recommendation. On April 5 he sent them to Gen. March in this unfinished state, accompanied by a letter in which, while indicating that by right and justice these boys ought not to die, he suggested, nevertheless, that since Gen. Pershing insisted upon the death penalty the department should uphold him and present a united front to the President. He asked for a conference with the Chief of Staff in order that there might be unanimity in the department to that end. Here is his language:

"You will notice that I have not finished the review by embodying a definite recommendation.

"It would be unfortunate indeed if the War Department did not have one mind about these cases. There is no question that the records were legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think if we extend clemency that we have not sustained him in a matter in which he has made a very explicit recommendation.

"May we have a conference at an early date?"

He did confer with Gen. March, and they agreed to present the united front, to uphold the hands of Gen. Pershing, and to recommend the execution of the sentence of death. On April 6 Gen. Crowder brought back from his conference with the Chief of Staff the unfinished reviews and immediately concluded them by adding to them the following recommendation:

"I recommend that the sentences be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an Executive order designed to carry this recommendation into effect should such action meet with your approval.

" (Signed) E. H. CROWDER,
"Judge Advocate General."

Gen. Crowder says that he was "disposed to defer" to the urgent recommendation of Gen. Pershing, but the record shows that he did defer.

The record also contradicts his statement that—

"continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency."

And the record also disproves his statement that after an examination by several of the most experienced judge advocates of his staff "no reversible error was found, and there was no doubt of the facts in either case, the only issue in the cases being the severity of the sentences." The record shows that on April 15 I, accidentally hearing about these cases, filed a memorandum in which I pointed out with all the power within me not only reversible error, but annihilating error, and urged that these sentences be set aside and these young soldiers be not executed. And three other judge advocates expressed full concurrence in my views. The record further shows that on April 10 still another judge advocate of high rank, whom Gen. Crowder esteems as a splendid lawyer and who supports the general's views on military justice, filed with him a long memorandum to the effect that these trials were a tragic farce and concluded that—

"it will be difficult to defend or justify the execution of these death sentences by way of punishment or upon any ground other than that as a matter of pure military expediency someone should be executed for the moral effect such action shall have upon the other soldiers."

These memoranda the general did not forward to superior authority, but the record shows that upon reading them and "upon continued reflection" the next day, April 16, he addressed a memorandum to Gen. March, which began as follows:

"Since our interview on the four cases from France, involving the death sentences, at which interview we agreed that we would submit the cases with the recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited."

He then sets out some, but by no means all, of the facts of these memoranda, simply passing them on to the Chief of Staff "for his information." He did not deem them sufficient to modify his own conclusion or his agreement with the Chief of Staff, for near the close of the memorandum he expressly declared that he submits them without any desire "to reopen the case," and he then concludes as follows:

"It will not have escaped your notice that Gen. Pershing has no office of review in those cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his views that all four men should be placed before the firing squad. I do not make this statement for the purpose of criticizing his action—indeed, I sympathize with it—but it is fair in the consideration of the action to be taken here to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official rela-

tion to the prosecution, but as commanding general, anxious to maintain the discipline of his command.

" (Signed) E. H. CROWDER,
" *Judge Advocate General.*"

No case could furnish better evidence of what happens when the chief judicial officer of the Army is subject to the power of military command, is "supervised" by it, and must rely upon it for his appointment to and retention in office; and the fact that these men did not die, as the military hierarchy would have had them die, was not due to the Judge Advocate General of the Army, and the fact that they came perilously close to an unlawful death and were deprived of protection for themselves, and have been unlawfully subjected to penitentiary servitude, was due to the Judge Advocate General of the Army.

When Gen. Crowder first replied to the Chamberlain criticism and my own, he made reference to other cases, which he deemed to be beyond criticism and illustrative of the justice of the system, which he now significantly omits. I will supply them:

(d) John Schroeder, Machine Gun Company, One hundred and fifty-sixth Infantry, was convicted of absenting himself without leave from May 9 to 15, when his command was about to embark for overseas service. The gravamen of this offense is obviously the intention to avoid overseas service, as pointed out in the Crowder report, by the division judge advocate, and by Gen. Hodges, who, in his review of June 19, 1918, congratulated the court "in adjudging an adequate sentence and thereby demonstrating its disapproval of an act of a soldier's absenting himself" without permission immediately following his designation for overseas service. This, of course, is one of the most serious offenses, notwithstanding which the accused, represented by an inexperienced first lieutenant as counsel, pleaded guilty; and it is also shown that while without counsel he was approached by an investigating officer, who reported that "the accused declines to make a statement, but says that he will plead guilty," indicating that there was some inducement for the plea. The accused, however, at the trial and after his plea of guilty, stated under oath that he went home for the purpose of seeing a sick mother, and, besides, that he did not know that the company was going abroad and had never been informed of that fact. This statement, absolutely inconsistent with his plea, required the entry of a plea of "not guilty" and a trial of the general issue. There being no evidence whatever to show that the accused was informed that his company was going abroad, the court should have taken the statement of the accused as true and acquitted him. This is an excellent example of a meaningless trial. The accused had no counsel worthy of the name; he did not appreciate nor was he advised of the gist of the offense; he made an ill-advised and uncomprehending plea of guilty, and then made statements absolutely inconsistent with his plea, all of which went unnoticed and resulted in his being sentenced to be dishonorably discharged and to be confined at hard labor for 25 years.

(e) No. 106800 is a sort of companion case to the immediately preceding one. The gist of the offense, here as there, is to be found in the intention to escape overseas service. This accused was also defended by worse than no counsel. The whole proceeding is invalid for the reason that the court disposed of it as though the accused had entered a plea of guilty, whereas he pleaded "to the specification, not guilty; to the charge, guilty." The important part of the plea is, of course, the plea to the specification, the plea to the charge being mere form and may be ignored.

This being a plea of not guilty, the accused should have been tried accordingly. As showing the lax method of the court, even on an assumption of a valid plea of guilty, the accused made a sworn statement absolutely inconsistent with his plea, saying that he did not know and had not been informed that he was ordered to overseas service. He was sentenced to 15 years' confinement and the court was commended as in the previous case.

(f) No. 114717 was a charge of sleeping on post, in this country, and a plea of guilty. The accused, referred to as "but a little kid," was said to have been found asleep by a lieutenant. This was a capital crime in which the accused, but 17 years old, was permitted by inexperienced counsel to plead guilty, for which he was sentenced to 10 years. The whole proceeding occupies seven pages of loosely typewritten matter double spaced. The court submitted a recommendation for clemency, asking for a reduction of the sentence on the ground that inasmuch as the accused had pleaded guilty they had been reluctant but compelled to give him a sentence commensurate with the offense, and also on the ground of his youth.

(g) No. 113076. This is a case in which Gen. Crowder contended that the sentinel had been drinking whisky before going on guard and that, having been found asleep thereafter, the case was plainly one for severest exemplary punishment. It is passing strange how justice can hurdle the salient point that an example ought to have been made not so much of the man as of an officer who in violation of regulations and common sense will post as a sentinel a man who had obviously been drinking.

These cases—and there are thousands like them in point of illegality and injustice—are sufficient to show what the Judge Advocate General terms “the general state of things in the administration of military justice.”

HIS SPECIFIC CONTENTIONS.

(1) He contends that courts-martial procedure is in accordance with the “rigid limitations of the criminal code” and not according to the arbitrary discretion of the commanding officer.

There are no “rigid limitations” of the code. That is the trouble. The military code is worthy of the name of law only in the sense that any absolute and unregulated power established by law is worthy of it. Congress has authorized military power to do as it pleases in the exercise of this highly penal jurisdiction. Look at the articles from first to last. Is there a word to regulate the preferring of the charge, the arrest, the sufficiency of the charge, the rights of the accused before, at, and after trial? Is there any standard of law to which the court-martial procedure must conform? Is there a single provision for the legal ascertainment of errors and the correction of them? None. All this is committed not to law but to the power of military command. The power of military command determines whether or not there is reasonable ground to believe that the offense has been committed and that the accused committed it. Military power determines whether there is a *prima facie* case. Military power selects the judges. Military power selects such counsel as the accused may have. Military power determines the legal sufficiency of the charge. Military power determines the kind and competency and sufficiency of proof. Military power passes finally upon every question of law that can arise in the progress of the trial. And military power finally passes upon the legality of the judgment and the entire proceedings. This is one code, criminal in character, that does not recognize principles of law and does not contemplate the services of a single man skilled in the law. Thus there is no standard by which error may be determined, except the view of the commanding general. Whatever he determines is right is right, and whatever he determines is wrong is wrong, by virtue of his determination alone. Under such a system, of course, there can be no such thing as error of law; there can only be a variation from whatever the commanding general believes to be right. And from his decision there is no appeal. There is no power on earth to review his decision with authority to say that it is wrong as a matter of law.

And should not a criminal code define the offenses and prescribe the penalties if it is worthy of the name of law? Look at the code. There are 29 punitive articles. Not one of them defines any offense. The definition is to be found in the common law military or what military men conceive to be the customs of the service. Not one of them prescribes the penalty.

The court-martial is authorized to award any punishment it please. Twenty-nine of these articles conclude by each declaring that the offense punishable therein shall be punished “as the court-martial may direct,” which means any punishment less than death. Eleven of them authorize any punishment “that a court-martial may direct, including death,” and two of them mandatory prescribe death. Why should there not have been shocking punishments, shocking both because of their harshness and because of their senseless variations, when courts-martial have unlimited authority to punish as they please? I myself can not conceive that lawyers believe in such delegations of legislative power, either on principle or as a matter of policy. True it is that in times of peace Congress has authorized the President, if he sees fit, to prescribe certain maximum punishments, thus limiting the discretion of courts-martial. This is, nevertheless, an unwise if not an unlawful delegation, inasmuch as a matter of practical administration the military authorities, and not the President, prescribe such limits. Its only effect is to transfer the unlimited power of prescribing the punishment from the several courts-martial to a single military authority of the War Department. It is equally an abdication by Congress itself to prescribe the offense and the punishment.

Does the code contemplate the participation of a single lawyer? Of course, lawyers are used in the system. During this war we had a large corps of judge advocates. But they are without authority. They were upon the staff of the commanding general, and like all other staff officers are to do his bidding and be governed by him. No distinction is made between the legal staff and the purely military or administrative staff. It is presumed that the commanding general is as competent in the field of law as he is in the field of tactics, and as a general rule the word of his staff officer means little to him. The authority is the authority of the commanding general. Congress has conferred it upon him, and we may expect a military man, of all men, to exercise it. Lawyers are like other ordinary human beings. They are dependent upon the commanding general for advancement and recognition and professional success in the Army. Having no power and authority of his own a lawyer may not be expected to do other than support the view of his commanding general as best he can, whether right or wrong. Indeed, that he should do so is one of the tenets of the military profession. There is but one will—that is the will of the commanding general. I have seen lawyers placed in this position abase themselves in the face of military authority to the point where one would incline to doubt whether they had not abandoned their professional principles altogether. A member of the Board of Review appearing before the committee of the American Bar Association recently made the following statement:

“While in many cases the trials of enlisted men are not so elaborate as the trials of officers, and in many cases the rules of evidence are not observed and counsel is obviously inadequate, while in a considerable percentage of cases we find that the decision is not sustained by the fact, still I do not recall a single case in which morally we were not convinced that the accused was guilty.”

And in this statement other judge advocates concurred. Verily they have received their reward. Such a statement shows to what extent subjection to the power of military command deflects legal judgments, imposes itself upon professional appreciations, and obscures those first principles which are normally regarded as the foundation stones of the temple of justice. The last man in the world to be expected to prefer his personal impression of moral guilt to guilt duly adjudged, his own judgment to the judgment of a court of law, should be the lawyer. Think a moment what it means for a lawyer sitting in a judicial capacity to say:

“We find the soldier has not been well tried; we find that the rules of evidence were transgressed in his case; we find that he had not the substantial assistance of counsel; we even find that the decision was not sustained by the facts of record; yet we are morally convinced that the accused was guilty, so let him be punished.”

That means something worse than injustice to the accused; that is the argument of the mob; that is the road to anarchy. I myself prefer the statement made by Warren in answering the same contention in the British Army nearly 90 years ago:

“It concerns the safety of all citizens alike that legal guilt should be made the sole condition for legal punishment; for legal guilt rightly understood is nothing but moral guilt ascertained according to those rules of trial which experience and regulation have combined to suggest for the security of the State at large. * * * They (these fundamental principles of our law) have, nevertheless, been lost sight of and with a disastrous effect by the military authorities conducting and supporting the validity of the proceedings about to be brought before Your Majesty.”

And the chief of all judge advocates, the Judge Advocate General himself, is also subject to this military power at its very height. He himself has not one particle of authority; he also may advise and recommend to the Chief of Staff, the highest exponent of military authority. By statute the Judge Advocate General is placed under the “supervision” of the Chief of Staff; by the statute also the Judge Advocate General will hold office for a term of four years unless sooner relieved or unless reappointed. He is subject to the supervision, power, and control of the Chief of Staff just as is the chief of the department that issues the rations, supplies, and matériel, or makes a military plan. His retention of office depends upon the approving judgment of the Chief of Staff. Such a man can not be independent, and in the end must be influenced by what the military authorities would have him do. That this is so is observable daily.

From top to bottom the administration of military justice is not governed by the rigid limitations of the code, but by the rigid powers of military command.

It is to be noted that throughout his defense the Judge Advocate General claims that the punishments have been comparatively light, since the code imposed no limit. The code should limit punishment. The difficulty is, it does not.

(2) He contends that the code is modern and enlightened.

He admits that prior to his "revision" of 1916, it was the British code of 1774, and I say that his "revision" did not revise, and that we still have the British code of 1774, itself of even more ancient origin. The best proof that our present articles are organically the British Articles of 1774 is to be found by comparing the two. The next best evidence is to be had out of the mouths of the highest officials who proposed the so-called revision of 1916, now relied upon as a complete modernization of the old British code. The British code was adopted under the exigency of the Revolution, and John Adams, the chief instrument in securing the adoption, attributed his surprising success to that emergent situation. There were few minor changes made during the Revolution, and up to the so-called code of 1806. In his statement to the Military Committee, the Judge Advocate General on May 14, 1912, said:

"As our code existed, it was substantially the same as the code of 1806."

And he also showed that the code of 1806 was substantially the code of 1774. Of this code of 1806, he said:

"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."

The modifications that were deemed necessary were simply such modifications as were necessary to make the articles fit into the mere machinery of our Government, and introduced the requisite terminology therefor. Speaking of his so-called revision of 1916, the Judge Advocate General said:

"It is thus accurate to say that during the long interval between 1806 and 1912—106 years—our military code has undergone no change except that which has been accomplished by piecemeal amendment. Of the 101 articles which made up the code of 1806, 87 survive in the present code unchanged, and most of the remainder without substantial change. Meanwhile, the British articles from which, as we have seen, these articles were largely taken, has been, mainly through the medium of the Army annual act, revised almost out of recognition, indicating that the Government with which it originated, has recognized its inadaptability to modern service conditions."

The so-called revision of 1916 was only a verbal one and not an organic revision. This, a comparison with the code as it previously existed will demonstrate. The proponents of the revision themselves so stated; they did not contemplate the making of a single fundamental change. This was clearly shown in the letter of the Secretary of War to the Committee on Military Affairs under date of May 18, 1912, and it is equally clearly shown by the letter of the Judge Advocate General, submitting the project in which he described "the more important changes sought to be made" as those of "arrangement and classification." Nobody, either the Judge Advocate General, the Secretary of War, or either committee of Congress, has ever regarded the project of 1916 as a substantial revision. The Judge Advocate General took occasion to deny that it was anything but a restatement of existing law for the sake of convenience and clarity. He himself pledged the committee—

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

Such revision as was made made the structure rest even more firmly upon the principles that courts-martial are absolutely subject to the power of military command.

(3) He contends that the commanding officer may not put a man on trial without a preliminary hearing into the probability of the charge.

Notice, he does not say the code requires such hearing, but that regulations and orders of the War Department do. Therein lies the deficiency. Law is a rule established by a common superior, and as between the man to be tried and the officer ordering his trial such a regulation is not law. It establishes no right. Its only sanction is in the authority that issued it. It may be inadequate, ignored, disobeyed, modified, revoked, or its violation waived without involving the rights of the man to be tried. As a matter of fact, well known in the Army, such preliminary investigation as is prescribed is as a rule per-

functorily made. It must not be presumed to be very thorough when 96 per cent of all charges drawn are ordered for trial. The failure to provide for an investigation whereby it shall be legally determined that there is a prima facie case is at the origin of the great number of trials, and is therefore the source of much of the injustice.

Any officer can prefer charges against any enlisted man by virtue of his official status alone. The Judge Advocate General says that the Army follows the Anglo-American system of filing an information by a prosecuting officer. Of course not. Any officer may prefer charges. He acts under no special requirement or sense of obligation. The Judge Advocate General naively says that "this protection is invariable." Would you call it a protection if every man under the sun standing one degree above you in wealth or social position or official position had the power to indict you or inform against you and subject you to a criminal trial? Would you agree that even every civil officer in the land should have such a power over a civilian? And yet, every Army officer has that power by virtue of his office alone.

(4) He insists that there have not been too many trials; indeed, that there have been comparatively few.

He admits that in the year preceding the armistice there were 28,000 general courts-martial and 340,000 inferior courts. He uses 4,000,000 as the size of the Army during the period, whereas the average for the period was, of course, less than 2,000,000. Applying the ratio of Army trials to the population of the United States, you would have 1,500,000 felonies and 19,000,000 misdemeanors tried annually. Comparison will also show that we tried seven times as many men per thousand per year as either France or England. He takes great consolation in the fact that the percentage of trials was smaller in the war Army than in the old Regular Army. That is true, but a cause for shame, not consolation. The system as applied to the Army in peace was intolerable. General courts-martial in the Regular Army averaged six per hundred men per annum. Applying the Regular Army ratio of trials to the National Army, the result would have been for the year mentioned 120,000 general courts-martial and 1,500,000 inferior courts-martial, surely a number that would have destroyed any army.

The Judge Advocate General and the War Department now say that the injustices revealed during the war have been due largely to the new officer. Quite the contrary. The records show that the new officer, bringing into the Army his civilian sense of justice, has preferred and ordered fewer courts-martial than the regular. It must be remembered also that the old experienced Regular Army officers have been the officers with the authority to convene general courts-martial and approve the punishments awarded by them. They are therefore responsible.

In any event, inasmuch as our wars are to be fought by citizen soldiers, no system ought to be maintained that must inevitably result in injustice by reason of the inexperience of the men.

(5) He contends that our officers are sufficiently grounded in the law to be military judges.

This, again, is a matter of standards. It may be informative to point out the inconsistency between the statement that the new officers are responsible for the deficiencies of the administration of military justice developed during the war and the contention that they are competent military judges. Of course, they are not competent as judges. A case before a court-martial involves the entire criminal law. Courts-martial are judge as well as jury. His regard for the judicial requisites can be properly appreciated in view of his argument that the study of the brief course in the elements of law at West Point or of the course by the new officers, in the three months' training camp is sufficient "to insure an acquaintance with the law by the members of a court-martial."

In any event, he says, the deficiencies of the trial court will find its corrective supplement in the reviewing judge advocate—one system of legal mechanics that stands the pyramid on its pinnacle.

(6) He contends that the judge advocate does not combine the incompatible function of prosecutor, adviser of the court, and defender of the accused.

The law and universal practice are otherwise. The judge advocate shall prosecute in the name of the United States (art. 17). If accused is not represented, the judge advocate shall, throughout the proceedings, advise him of his legal rights (art. 17). This is defined to be the substantial duty of counsel (par. 96, M. C. M.). The judge advocate is the legal adviser of the court (par. 99, M. C. M.). There are cases in which a single officer set a trap for the

accused, was the prosecuting witness, was appointed judge advocate to prosecute the case, and, besides, was also specially detailed as counsel for the accused, and performed all functions. For such an instance, see case of Pvt. Claud Bates, in which, when I pointed out these inconsistencies, the commanding general complained I was "trying to break up our court-martial system."

(7) He resents the criticism that second lieutenants, knowing nothing of law and less of court-martial procedure, are assigned to the defense of enlisted men charged with capital or other serious offenses.

He admits, however, that in an examination of 20 cases a lieutenant appeared as counsel in 13 of them. I can go further and say that in an examination of 5,000 cases lieutenants of but few months' experience appeared in 3,871, or 77 per cent of them. This was perfectly natural; under the system of administration the duty of counsel is an irksome one, imposed upon those who have not enough rank and standing to avoid it. He also contends that all officers are properly equipped to perform the duties of counsel, by reason of the fact, already stated, "that graduates of every training camp have studied and passed an examination upon the Manual for Courts-Martial, and therefore the above criticism is upon its face unfounded." He also finds that after officers of rank and experience have been assigned as members of the court and as judge advocate it is not feasible to find legally qualified officers to act as counsel. "No one," he says, "who has any acquaintance at all with conditions in the theater of war would suppose for a moment that this is practicable." He then dismisses the whole subject by saying that, no matter how incompetent is counsel, he finds in the scrutiny subsequently given the cases, "the most satisfactory assurance that such deficiencies as may from time to time occur through the inexperience of officers assigned for the defense have been adequately cured." It might be remarked that it is a rather sad criticism of any judicial system that it regards military rank as the main assurance of efficiency.

(8) He is inclined to resist the view that improvident pleas of guilty are received from those charged with capital crimes.

He says the percentage of such pleas is a small one; and so it should be hoped, although such pleas are known to be surprisingly frequent. As an argument to offset the inference of resultant injustice, he relies upon "the common instincts of fairness and justice of the officers taken recently from civilian life to sit upon the courts as judges." It is interesting to note that shortly before this, in a public address before the bar of Chicago, the Judge Advocate General attributed the harshness of the system to the inexperience of the new officers, as follows:

"Undoubtedly there are things wrong with the administration of military justice. We have brought over 100,000 officers into the Military Establishment of the United States within the brief space of a year. Their commissions are their credentials to sit in the courts and administer justice, and it would be strange, indeed, if there were not a number of cases in which a disproportionate punishment is given."

(9) He admits that commanding generals return acquittals to the courts with directions to reconsider them.

He thinks, however, that "the very object of this institution is to secure the due application of the law," and he adds: "My own experience in the field can recall more than one case in which the verdict of acquittal was notoriously unsound, and in which the action of the commanding general in returning the case furnished a needed opportunity for doing full justice in the case." He finds "that this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to abuse of the commanding general's military prestige." He finds that out of 1,000 cases there are only 95 acquittals, anyway, and he says:

"Of these 95 acquittals 39 were returned only for formal correction; of the remaining 56 the court adhered to its original judgment in 38 cases, and in only 18 cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty of any offense."

Though of every 95 acquittals 18 are changed into convictions by the direction of the commanding general, this he considers negligible. This leaves only 77 acquittals out of a thousand tried. Out of deference to unreasonable public opinion, however, he would recommend a change to accord with "the British practice," which he regards as the limit of liberality.

(10) He contends that under all the circumstances the sentences imposed by courts-martial are not, as a rule, excessively severe.

He indicates clearly that we would have profited by "keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes" in the Civil War, that the inexorable attitude of shooting all deserters would prove merciful in the end, and argues that, inasmuch as we did not adopt that policy, we should not be "reproached for severity." Dealing with the offense of absence without leave, he would have us believe that "this offense is in many cases virtually the offense of an actual desertion," whereas exactly the opposite is true. The records will show that absence without leave is more frequently than otherwise charged as desertion, since in cases of "doubt" the higher offense is always charged; besides, several commanding officers ordered that all absences, even for a few days, be charged and tried as desertion. There has been no greater source of injustice than the indiscriminate treatment of absence without leave as desertion and the procurement of convictions accordingly. Along the same line, the Judge Advocate General argues that disobedience of orders is always to be punished most severely, without regard to the kind or materiality of the order, and he asserts that the disintegration of the Russian Army was due not to age-long tyranny or oppression or reaction, or any other like cause, but entirely to a failure to treat "disobedience in small things and great alike."

Finally, however, after much argument, he concedes that these sentences were long, but justifies them on the ground that "the code prescribes no minimum," and on the further ground "that probably none of these officers (who pronounce sentences) supposed for a moment that these long terms would actually be served"; and he reminds us that there has already been a 90 per cent reduction. He ignores the fact that, whether such sentences were or were not intended to be served, they greatly outraged justice. If intended to be served, they abused justice; if not so intended, they mocked it. He says, "Nobody intended they should be served," which, as one writer has recently put it, is "like hanging up a scarecrow to frighten the birds that does not scare them as soon as they learn that it is a sham, and then use it to rest on."

(12) He admits that the sentences of courts-martial are very variable for the same offense.

He delights in the fact, however, that "this very matter of variation in sentences is one of the triumphs of modern criminal law," and finds virtue in a situation that gives courts-martial "full play for the adaptation of the sentences to the individual case." A court should have sufficient latitude to make the sentence fit the offense; but I had not supposed that this "modern triumph" would authorize any court—not even a court-martial possessing the virtue of being untrained, unlettered, and unskilled in the administration of justice—to punish an offense, however trivial, "as it may direct," with life imprisonment or death if it pleases.

(13) He denies that the Judge Advocate General's office partakes in the attitude of severity.

His defense speaks rather loudly for itself. I must be permitted to say this: Every organ of that office designed to secure correctness of court-martial procedure or moderation of sentences—which now he calls so effectively to his aid—was instituted by me and by me alone. Without any authority from or help of the War Department or of the Judge Advocate General I organized the several divisions of the office—the board of review and the first and second divisions thereof—and the clemency board—and it was my effort, taken in his absence, that showed the necessity for the special clemency board, which, though restricted in every covert way by the department and the office of the Judge Advocate General, has done so much recently to reduce sentences. The Judge Advocate General's attitude has been one of absolute recation. He has not approved of such organization; he has not approved of my efforts to secure correctness of court-martial judgments or moderation of them. Twice have I been relieved by him from all participation in matters of military justice and superseded by officers who shared his views. He says:

"On the 20th of January you (the Secretary) approved a recommendation of mine, dated January 18, proposing the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency."

He does not say, however, that this was done at my insistence, not his; that when he returned to the office last January he published a written office order relieving me from all connection with administration of military justice.

He does not say that on or about January 8 I went to him and urged that something be done to modify courts-martial sentences, and that he declined to take any action, as "to do so would impeach the military judicial machinery."

He does not say that while he was absent from the office a few days thereafter I filed with the Secretary of War a memorandum, dated January 11, 1919, in which I depicted the shocking severity of courts-martial sentences, and that I was driven to take advantage of Gen. Crowder's absence to bring this to the attention of the Secretary of War. He does not point out that he had me demoted because I did not share his views upon the subject of military justice and had me superseded by an officer who did. He does not point out that notwithstanding he kept me as president of the clemency board, as an assurance to the public that clemency would be granted, he "packed" that board with the officer who wrote this defense of the Judge Advocate General, the chief propagandist for the maintenance of the system, and with other friends of his who shared his reactionary views. He does not point out that the clemency board was given no jurisdiction to recommend clemency for the prisoners in France, since "the people at home were not so interested in the men who had committed offenses in the theater of operations"; that is, the prisoners in France were not in a position to become politically articulate or embarrassing to the department. He does not point out that the dissolution of the clemency board had been determined upon, and I had been notified accordingly, without its having passed upon any of the cases in France, and that those cases were not taken up until recently, and would never have been taken up except for my written official insistence. He does not point out that a special board of review, composed of men sharing his own views, was constituted, with the sole function of reexamined and revising all findings made by the clemency board wherever clemency was to be based on inadequate trial.

(14) He contends that the action taken in the Judge Advocate General's Office has been effectual for justice.

He reaches this conclusion on the ground that seldom or never is the Judge Advocate General's Office overruled. Of course, so long as the Judge Advocate General of the Army does what the military authorities want him to do he will not be overruled. When the Judge Advocate General of the Army does, as he did in the death cases from France and as he habitually does, seeks an agreement with the Chief of Staff as to what his decision ought to be, when he regards himself not as a judge but as an advocate to uphold the hands of the military authorities, he is not likely to be overruled. I, as Acting Judge Advocate General, was overruled. I was told by the highest military authorities, in a certain case in which a half score of men were sentenced to be hanged, and in which the military authorities insisted on the execution, notwithstanding the fact that they had not been lawfully tried, that I was disqualifying myself ever to be Judge Advocate General by my insistence upon their rights. Through my insistence, however, these men were not hanged.

You can not expect the Judge Advocate General of the Army to be a judicial officer when the law does not make him one. He himself is subject to the power of military command. By section 4, act of February 14, 1903 (32 Stat., 831), the Judge Advocate General is placed under the "supervision" of the Chief of Staff in the same way that the Subsistence, Quartermaster, Engineer, Medical, Ordnance, and other departments are. He is appointed for four years, he may be relieved if he incurs the displeasure of the department, and he will not be reappointed except with the recommendation and approval of the department. He holds his office, in effect, at the will of the Chief of Staff, under whose supervision he is. If the highest law officer of the Army is subject to such military "supervision," how much more effective must the same "supervision" be over the subordinate officers of the Judge Advocate General's department assigned to the staff of a military commander?

HIS REMEDIES.

The Judge Advocate General now says he favors vesting the President with power to review courts-martial judgments for errors of law, and therefore recommends the enactment of the bill submitted by him last year—section 3692, H. R. 9164. Please look at that bill. If enacted it would (a) effectually place the power in the hands of the Chief of Staff, the head of the military hierarchy; (b) authorize the reversal of an acquittal; (c) authorize increasing the punishment; (d) authorize increasing the degree of guilt determined by the court.

The truth is, the Judge Advocate General does not believe in revisory power. He has ever insisted that military law is the kind of law that "finds its fittest geld of application in the camp," and that such revision would militate against the requisite promptness of punishment. He has not acted in good faith. In

correspondence with the senior officer of his department on duty with Gen. Pershing's staff, shortly after his submission of the above bill, he expressed his real views and purposes. In that letter, of April 5, he said something had to be done to head off a "threatened congressional investigation," "to silence criticism," "to prevent talk about the establishment of courts of appeal," and "prove that an accused does get some kind of revision of his proceedings other than the revision at field headquarters."

The other remedies proposed, consisting of a few more orders and changes of the manual and empowering the department to prescribe maximum limits of punishment in peace and war, I deemed unworthy of comment.

The Judge Advocate General assumes that he has reached the limit of liberality when he approaches in a few respects what he conceives to be the British system, not appreciating that, though that system is far more liberal than our own, it, too, has become the subject of criticism throughout Britain. The British Government has appointed a committee of inquiry of civilian barristers to examine "the whole system under which justice is administered in the Army." Differing from our own War Department, that Government gives evidence of a desire to know the facts and to find a remedy.

HIS CRITICISM OF MY PERSONAL CONDUCT.

1. He claims that my efforts to establish a revisory power within the department through the office opinion of November 10 to that end was without his knowledge.

Assuming this to be true, it was well known in the department at that time that he had authorized me to manage the office in my own way and without further reference to him, except for certain appointments having political significance. But, as I heretofore said to the Secretary of War in the paper published in the New York Times, I did take occasion to consult Gen. Crowder upon the subject, and he replied:

"I approve heartily of your effort. Go ahead and put it over. I suspect, however, that you may have some difficulty with the military men arising out of article 37."

I knew of no change of attitude in him until I was advised shortly thereafter that he had prepared a brief in opposition, and two or three days later he resumed charge of the office and filed the brief. When I found this to be so, I went to Gen. Crowder and accosted him about his change of attitude. In explanation thereof he said:

"Ansell, I had to go back on you. I am sorry, but it was necessary to do it in order to save my official reputation."

He then added that he was nearing the end of his service; that he could not afford to be held responsible for the injustice that had gone on, if the existing law could be construed to have prevented it, and adverted to the fact that fixing such responsibility upon him would injure his career in this war. He then told me that the Secretary of War held him personally responsible and had "upbraided" him at the Army and Navy Club for sitting by and permitting this injustice to go uncorrected. The general then said that, humiliated at such imputation, he had gone back to the Provost Marshal General's office and consulted some of his friends there, and they decided that it was necessary for his self-protection to oppose the opinion the office had prepared, and that two of the officers there helped him prepare the countermemorandum.

2. He says that I surreptitiously obtained an order appointing me as Acting Judge Advocate General in his absence.

Please look at his defense, pages 54 and 55. He admits that he said:

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday."

I did take it up in a formal memorandum addressed to the Chief of Staff, the channel of communication prescribed by orders. I never spoke to the Chief of Staff on the subject, and never endeavored in any way to obtain favorable action upon the memorandum. I let it take its course. Under 1132 Revised Statutes it was necessary that I be designated as Acting Judge Advocate General if I was to be charged with the policies and responsibilities of the office. Otherwise, the policies and responsibilities were Gen. Crowder's, who was not in a position to assume them. In furtherance of his ambitions he held three and sometimes four positions during this war, and he was in no position to perform the duties of Judge Advocate General or prescribe the policies of that office.

Therein lies the difficulty. I was held responsible for the output, but for means and power was kept dependent upon an officer who was absent, absorbed in other tasks, and who differed with me on the policy of military justice.

The General bases his charge of surreptitiousness solely on the ground that his approval of my designation as Acting Judge Advocate General was conditioned upon my taking it up "directly" with the Secretary of War. I had assumed that his language was frank and candid and not governed by the quibbling construction he now places upon it.

His other charge of surreptitious method is likewise based solely upon the fact that I made a recommendation on the subject of military justice in France to the Chief of Staff in a written memorandum which spoke for itself and which was never supplemented by any word or action of mine in support of it to secure favorable action. It is quibbling to say, as he does say (p. 58), that my statement to the effect that the commanding general of the American Expeditionary Forces was opposing means for a better supervision of military justice was untrue for the reason that the opposition was officially voiced to the department not by Gen. Pershing in person but by his senior judge advocate and staff officer, Gen. Bethel; the staff officer, of course, representing the views of his chief.

3. He says that I myself had at first approved the death penalty in the cases from France. If I had done so, the record would show it. The record is to the contrary. Neither is it to be expected that I should have once approved them and then have written a strong memorandum against approval without reference to my former position. The truth is, at the time the cases were being studied by Gen. Crowder, so far as he did study them, and his assistants I was away from the office in Canada. Col. Mayes, senior officer in my absence, has recently called my attention to this fact and informs me further that he has recently testified before the Inspector General that he had looked over the cases, but that I had not.

CONCLUSION.

The War Department has indeed undertaken to maintain this vicious system at all costs and by methods which reveal the weakness of both the system and the department.

Very truly, yours,

S. T. ANSELL.

MR. ANSELL. Now, if the committee please, my first proposition was that our code of military justice—the Articles of War—is absolutely archaic, taken from the British military code of 1774, which was of even more ancient origin.

I have shown that that was true, of course, unless the Crowder revision of 1916 modernized it. I wish to say that was admitted as an argument for changing the code in 1916.

The Judge Advocate General, in proposing that revision, pointed out the fact that the code was the code of 1774, and even after the speech made by Senator Chamberlain in the Senate pointing out the archaic character of this code and the injustice done, had been made, the Judge Advocate General in an address in the city of Chicago, reported in the press, which he has frequently referred to since, is shown as saying that all that the American Bar Association's president, Mr. Page, and Senator Chamberlain and other people who were going after this system, said, was true, except for the revision of 1916 of which he was the author.

So I wish the committee would look at the character of the revision of 1916, which of course constitutes our present Articles of War, and compare the revision with the articles as they existed prior to the revision. That could be rather easily done, though it would be something of a task, by comparing them in the committee print of that year, or both years, 1912 and 1916. In one column you will find the Articles of War as they existed prior to the revision, and in the other column you will find the proposed revision; and I say

to you that you can not find a single substantial change; and I say to you that Gen. Crowder and the Secretary of War, then Mr. Stimson, did not contemplate a single substantial change. Such is clearly stated by Secretary Stimson, in his letter of April 18, 1912, to the Senate Committee on Military Affairs, in submitting the proposed legislation.

Mr. Stimson described the broad features of the project as a matter of such draftsmanship as would bring together all this disassociated material and make it accessible and easy of enforcement. He did ask for a new inferior court, which was a rather real improvement, as it took the place of two inferior courts of similar jurisdiction; and certainly, as he says, we undertook this revision in a conservative spirit.

Gen. Crowder in his letter to the Secretary of War of April 12, 1912, submitting his project for revision, describes the more important changes sought to be made as: "Those of arrangement and classification." And that revision did nothing but assemble and classify and render more definite the old articles. It is that kind of revision.

Senator CHAMBERLAIN. The only real reform in the articles of 1915 was that which admitted the creation of the disciplinary barracks where young men who had been convicted by court-martial might be restored to the colors.

Mr. ANSELL. Yes; of course there had been, in the year before, legislation by your committee that did that also.

Senator CHAMBERLAIN. Yes; it is very interesting, since you have brought up that subject, and the committee can understand just what respect the War Department paid to liberalizing legislation.

Mr. ANSELL. In 1878 the Congress of the United States, upon rather more thorough than usual consideration, passed an act authorizing the Secretary of War to restore men to the colors who had been dishonorably discharged, and I say to this the committee that up until the time I came to the War Department there had never been a single man restored to the colors of the army under that statute, which was then 40 years old—not one. And I wrote an opinion, soon after I got here, reviving that statute, resurrecting it; and that was one thing, Senator, that we did talk about, as you may remember, since you were intensely interested in such reformation.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. And that opinion, while Mr. Garrison was Secretary of War, was adopted after a great deal of study and after a great deal of opposition in the War Department; and then they thought that there was not machinery, and the proper appropriations, and all that sort of thing, and the barracks were still called a prison, and they came and finally got a redeclaration, a reenactment, of that act, changing the name of the prison and modernizing it, out of your committee in 1915, and it was reenacted in the Articles of War in 1916.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. It shows you that there sat the War Department all these 35 or 40 years with a statute that permitted the reclamation of these men, and not one of them had ever been restored to the colors.

Now I wish, without taking up the time of the committee, to insert in the record the results of a study made by me of just what Gen.

Crowder said, and I have taken it from the hearing, with respect to every one of these Articles of War, and I ask that that be inserted in the record of the hearings. It is taken briefly, but quoted from the hearings, beginning in 1912 and terminating in 1916, with respect to each article.

Senator CHAMBERLAIN. Stating its purpose, with respect to each article, and defining its purpose?

Mr. ANSELL. Yes, sir; exactly. If I may have permission to do that, I will turn this over to the stenographer, Mr. Chairman.

Senator LENROOT. Certainly.

(The matter referred to is here printed in full, as follows:)

ANSELL EXHIBIT A-2.

The author of the project, discussing it before the committees, article by article, was quick to assure them upon every occasion that the project made no substantial change in the articles, which he truthfully traced to the British articles of 1774 and beyond.

The enacting clause: The enacting clause of the project, he said, defined those who are subject to military law by bringing together related provisions of the statute. He said:

"I invite your attention to the fact that we had to look at the enacting clause of the old law and then at article 64 of that law to ascertain who were subject to the articles and governed by them. An attempt has been made to remedy this in section 1342 on the first page and article 2 on the next page."

Article 1: "The first article is given over wholly to definition, and subdivisions (a) and (b) are a substantial repetition of the enacting law." The other changes "have been done for convenience in drafting subsequent articles to get certain descriptive terms that will avoid the necessity for repetition." (P. 24.)

Article 2: "We now come to article 2 of the revision. There has been such an enumeration here as will make it unnecessary if this code is enacted to look elsewhere to ascertain who are within the military jurisdiction. I have drawn into the domain of this article all the special legislation we have had on this subject of jurisdiction as to persons." (P. 24.)

Article 3: "Article 3 is simply declaratory of the three classes of courts." (P. 24.)

Article 4: "Article 4 will now claim your special attention, because it involves a radical change in the existing law." (The change authorizes Regular officers to sit on the trial of "other forces.") (P. 25.)

Article 5: "Article 5 places the number of officers on a court-martial within the discretion of the convening authority," where it was explained it had ever been by construction. The old article declared that a general court shall not consist of less than 13 when that number can be convened "without manifest injury to the service." In 1810 Attorney General Wirth held that a court was not a legal one if 13 could have been convened without manifest injury to the service. But the theory that the question of "manifest injury" is reviewable by the President or any superior authority ceased to be admissible by virtue of the decision of the Supreme Court in *Martin v. Mott* (12 Wheaton, 34). (P. 26.)

Article 6: "Article 6 provided a new court taking over the jurisdiction of regimental and garrison courts provided in the eighty-first and eighty-second articles of war." (P. 26.)

Article 7: "In article 7 the summary court is left as it was in the old law." (P. 27.)

Article 8: "I have included the President of the United States (as a convening authority) for the reason that notwithstanding he was the commander in chief of the Army, his authority to convene a general court-martial was denied in one case, or rather questioned because of the fact that the existing law provided that he could appoint only when certain other officers were the accusers. They said that that statute by necessary inference denied his right to act in other cases; but in the Judge Advocate General Swain litigation the Supreme Court of the United States held that the authority is inherent in the President as commander in chief, and that he could always convene a court-martial when necessary. Therefore I have inserted the term 'President of the

United States.' Now, when you come to the next—the commander of a territorial division or department—you are repealing existing law." (Pp. 27, 22.)

Article 9: "Article 9 refers to the new special court. While there is a good deal of underscoring in that line, it is simply a restatement of the old law." (P. 27.)

Article 10: "Article 10 is simply a restatement of the summary court act." (P. 27.)

Article 11: "Article 11 carries one change, and that is for the appointment of an Assistant Judge Advocate General and general court-martial." (P. 23.)

Article 12: "Article 12 is a new article. It simply declares the jurisdiction of the existing court-martial (now left to construction). I take it there is no impropriety in making that a matter of express provision." (P. 28.)

Article 13: "Article 13 deals with the jurisdiction of the new special court, and it is substantially identical to the old articles 81 and 82." (P. 28.)

Article 14: "Article 14 fixes the jurisdiction of a summary court-martial both as to persons and offenses and follows the language of the old law, except in one regard (a verbal one)." (P. 28.)

Article 15: "Article 15 was designed to give express recognition to the military commission in our service. The general said:

"While the military commission has not been formerly 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. * * * there will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of war courts, and the question will arise whether Congress having vested jurisdiction by statute, the common law of war jurisdiction was not ousted. I wish to make it perfectly clear by the new article that in the subject case the jurisdiction of the war court is concurrent." (Pp. 28, 29.)

Article 16: "Article 16 repeats with only slight verbal changes the provision of article 79." (P. 29.)

Article 17: "We now come to 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 (the modification was to relieve the judge advocate of his duty to advise accused when the latter is represented by counsel). With respect to the right of the accused to employ counsel, the Judge Advocate General says:

"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, and there is no complaint from the service in that regard and the general objection to bringing into the statute the recognition of the practice of employing civil counsel." (P. 29.)

Article 18: "We now come to article 18 which deals with challenge. The new article is a departure from the old in but one regard—the Government is given the right of challenge, whereas the old article gave it to the accused only; but the article has been construed from time immemorial as making the right mutual. It is not desirable, however, that this important right should continue to rest upon construction. I have, therefore, made it a matter of express provision. With respect to allowing a few peremptory challenges, the general said: 'It would be an innovation and an unwise one.' The right of peremptory challenge which is common to our civil courts has never had a place in our military jurisprudence. This is a concession of the summary character of the military jurisdiction and is not the only instance where the fact is made manifest that a soldier, when he takes on the obligations of an enlistment contract, surrenders rights which he had as a civilian. Our military jurisprudence is based upon this fact which has constitutional recognition in that the Constitution excepts from the requirement that no person shall be held to answer for a capital or otherwise infamous crime except upon an indictment from grand jury cases which arise in the land and naval forces. It is likewise held that the constitutional right to be confronted by witnesses and to have a speedy public trial have relation to prosecutions before civil courts of criminal jurisdiction of the United States and do not apply to military courts. While we have extended by legislation many of these constitutional rights to an accused before a military court, this right to peremptory challenge has not been recognized, and I am inclined to think that its introduction would be fraught with grave consequences." (Pp. 30, 31.) The articles from 18 to 37 deal with procedure. None of these changes is fundamental.

Article 19: "New article 19 states the oath of members and judge advocate of the court-martial. There is no change from the old law except in one regard" (minor). "In article 19 the old law is repeated with one omission and one addition" (minor changes). (P. 32.)

Article 20: "Article 20 deals with the subject of continuances and repeats the provision of the existing law" (art. 93). (P. 33.)

Article 21: "In article 21 the word 'accused' is substituted for the word 'prisoner'—a mere verbal change." (P. 33.)

Article 22: "Article 22 is based upon section 1202, Revised Statutes, which was enacted in 1863. That section was in the nature of an article of war, and is properly transferred from the general body of statutes to the new code." (P. 33.)

Article 23: "Article 23 sets forth oaths of witnesses. This 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."

Article 24: "We now come to article 24, which is taken from the act of March 2, 1911, already referred to."

Article 25. "We now come to article 25, which relates to the admissibility of deposition. The existing article (91), which this article substitutes, provides that 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 record the Federal statutes."

Article 26: "Article 26 specifies the persons before whom depositions may be taken. The existing law contains no provisions of this character (and has left the subject to regulation)."

Article 27: "Article 27 deals with courts of inquiry. There is no substantial change from the old law." (Art. 121.)

Article 28: "Article 28 simply repeats the provisions of the old law."

Article 29: "Article 29, like article 28, is substantially the rule of evidence and substitutes that part of existing article 50 which is in its character administrative." (Note.—This is an extension of the definition of desertion.)

Article 30: "Article 30 is a new article and prescribes a form of oath for reporters and interpreters (left heretofore to regulation)."

Article 31: "We now come to article 31, which deals with closed sessions of the court. Inasmuch as existing law requires that the judge advocate be excluded, I have also excluded the assistant judge advocate. This is the only new provision."

Article 32: "Article 32, the order of voting, has already been called to your attention. There is no substantial change."

Article 33: "Article 33 deals with contempt. There is no substantial change."

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

Article 35: "Article 35 makes a similar provision respecting special and summary court-martial preserving the language of the old law relating to the summary courts."

Article 36: "Article 36 simply provides for the disposition of the records (heretofore governed, as you will notice, in the old article 113)."

Article 37: Not discussed.

Article 38: "I come now to articles which I think will claim the special attention of the committee. They are new. Article 38 deals with rules to be prescribed by the President, regulating the mode of proof and procedure of courts-martial. I have followed section 862, Revised Statutes, in drafting that article which provides that 'the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.' The President is our supreme court in trials by courts-martial, and I have undertaken to paraphrase that and give him the corresponding power in respect to courts-martial." (Note.—This is one of the three real innovations of the Crowder re-

vision. It is entirely reactionary. Therefore, courts-martial have been regarded as bound to apply the rules of evidence as they were recognized and applied by the civil criminal courts of the United States. This article authorizes the President to prescribe rules of evidence which has not been done and in the absence of which courts-martial and revising authorities have deemed themselves authorized to do largely as they pleased. It needs no argument to show that courts-martial try men for the most serious offenses with the most serious penal consequences and should be compelled to abide by the well-established rules of evidence.)

Article 39: "The next article is 39. It will be noticed that article 39 is based upon existing section 1025, Revised Statutes, and goes no further in granting immunity from error to courts-martial than the Congress of the United States has extended to those courts trying criminal cases. But that statute is now about to be amended and apparently the consideration given the new legislation shows substantial unanimity of opinion in its favor." (This is the second of the three innovations made by the Crowder revision. It should be remembered that up to this time there was no authority in the War Department to set aside or reverse or grant new trials, no matter how erroneous the judgment. The convening authority could approve or disapprove for any reason he saw fit. This has been considered as a limitation upon that power. Furthermore, as authorizing the finding of guilty upon a charge for an offense that was not charged, it provides solely for and constitutes an offense made punishable by the Articles of War. No article has given so much trouble as this during this war.)

Article 40: "The next, article 40, is our statute of limitations, and it takes the place of article 103."

Article 41: "The purpose of article 41 is to extend to the Military Establishment by statute a substantial guarantee against double jeopardy. There is no change."

Article 42: "Article 42, which is existing article 98, is retained without substantial change."

Article 43: "Article 43 is a substitute for existing article 97, which is defective (in a minor way). We have been doing this by construction right along—but I have been apprehensive that some one would serve a writ of habeas corpus and would say that it was not authorized under the strict letter of the statute which permits confinement in a penitentiary only for offenses so punishable by a civil law. I want a definite rule in the law. I do not want to be taking the risk any longer."

Article 44: "Article 44 contains a charge which illustrates again this point to which I have just referred. (Note.—His reference was to writing in the law what construction alone had sanctioned. His statement was as follows:

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

"Note further: By this article there was crystallized into the law by statute for the first time the theory that a majority of the court-martial only was necessary to convict in the general case. When the committee called the Judge Advocate General with respect to the advisability of requiring unanimity in the case of death penalties, he said:

"To require a unanimous vote for the infliction of the death penalty in time of war would be going a long way, I think, toward impairing the success of the field operations of an army."

"And again:

"I request that the committee consider very carefully the question of introducing into our military jurisprudence the principles of the civil law, which requires, in addition to these safeguards, a unanimous verdict."

"But in the same connection, he said:

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

Article 45: "Article 45 is a revision of article 100 of the old code, and certain language has been omitted."

Article 46: "Article 46 is a repetition of the old law."

Articles 47 and 48: "Gentlemen, there is nothing in articles 47 or 48 which involves a substantial change of the old law. There is no change; it is simply rearrangement such as I ought to call to the attention of the committee. I have included rape among the offenses where the confirmation of the President is not required in time of war."

Article 49: "In article 49, I have incorporated new language (authorizing the commanding general to approve a proper sentence for a lesser included offense, when he thinks the larger offense is not proved). There is nothing further in the article which is not new."

Article 50: "Nor is there anything new in article 50, except in line 9, commencing with the last word 'for' to the word 'held' in the tenth line."

Article 51: "Article 51 is simply a repetition of the old law."

Article 52: "Article 52 has some new language taken from the existing regulations."

Article 53: "Article 53. The new article does not undertake any enumeration."

Article 54: "Article 54. You will notice in article 54 there is nothing new."

Article 55: "I have omitted from article 55 the (certain) phraseology."

Article 56: "There is no change in article 56."

Article 57: "We now come to article 57 for punishing deserters, to which I have already referred. The defect sought to be remedied is in old article 47 on the subject of desertion. The intention of the old article was undoubtedly to punish desertion in time of war differently from desertion in time of peace. You will notice the word 'shall' is misplaced in the second line so as to carry the construction that the article deals only with punishment in time of war. There is another defect which is corrected by the insertion of the words 'when under orders for active service when war is imminent.' A war might be imminent and we might send orders to the 15th Cavalry at Fort Myer to be ready to march, and a desertion committed after receipt of such an order would be just as harmful as one occurring after the war had been declared. I have worked those two ideas into the new article."

Article 58: "Article 58 is the same as the old law, but I have made the phraseology a little clearer."

Article 59: "Article 59 is simply a repetition of so much of existing article 50 as was punitive in character."

Article 60: "In article 60 I have combined six articles of existing code into one short article."

In Gen. Crowder's introduction to the punitive articles he contended strongly for a retention of the authority that courts-martial may punish all offenses denounced therein at their discretion, and said:

"This principle of punishing at discretion is old in military codes and it is observed in the British code to-day. It is what is distinctive of the military code of to-day. I think that the service would feel very handicapped if that discretion were limited in the way it is in the civil codes. I do not think there is anything more vital in this legislation than the preservation of the principle of punishment at the discretion of a court-martial restricted only, as I have stated, as to the imposition of death sentences, penitentiary confinement, and in time of peace as the President may prescribe in orders issued under the authority of the legislation of 1890. It would be a radical departure if that principle should be impaired in this revision. As I have pointed out, it is a principle that characterizes the military code as distinguished from the civil code and characterizes the code of England as well as of this country. It is a fact that the British code does not undertake to limit the discretion of courts-martial in the assessing of punishment, except in a very limited way. I do not think that the discretion of the court-martial should be further restricted."

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

"Gen. CROWDER. No, sir."

Article 61: "Article 61 extends the authorities against whom contemptuous language may be used punishable by these articles to include the Secretary of War."

Article 62: "The next article 62 is a related article. It treats of disrespect toward superior officers, and the only change is from the word 'commanding' in the old article, in the left-hand column, to the word 'superior' in the new article." (Note this is a very large extension of a punitive article, and subjects to its penalties disrespect to any superior officer whether he is a commanding officer or not.)

Article 63: "I have inserted the word 'willfully' to conform to the accepted construction of the present article."

Article 64: "Article 64 is new and is introduced into the code in order to emphasize in a separate provision the necessity of obedience to and proper deportment toward a noncommissioned officer in the execution of his office. This is carrying out the policy which has been favored by the military authorities for some time, namely, to instill into the soldier in the ranks a high respect for his noncommissioned officer." (Note.—This was formerly punishable under the general article, old 62.)

Article 65: "We now come to the offenses of mutiny and sedition, punished by article 65, which is practically the existing article. There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised."

Article 66: "The only new language in article 66 is the phrase 'and having reason to believe,' the insertion of which would seem to require no explanation."

Article 67: "There is no substantial change from existing article 24."

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

Article 69: "New article 69 relates to investigation of and action upon charges and substitutes—articles 70, 71, and 93."

Article 70: "The next article (art. 70) carries no change in the existing law, which is article 67 of the present code, except to give that article what it lacks in the existing code, namely, a penal sanction."

Article 71: "Article 71 is existing article 68 without substantial change."

Article 72: "New article 72 is existing article 69, and no substantial change has been made."

Article 73: "We now come to new article 73, which is rather an important one. It is a substitute for existing article 59. (After stating the changes, he concluded:)

"This is a matter of construction under the existing article, and I have deemed it best to make it a matter of express provision and let the military trial proceed uninterrupted by the demand."

"In examination it was reiterated that the changes were in the nature of expressions of existing construction."

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

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

Article 76: "You will notice a change has been made there to distinguish between war and peace."

Article 77: "The only change in that is to substitute for 'whatsoever belonging to the Army of the United States' the words 'any person subject to military law.'"

Article 78: "Article 78 deals with captured property, but without penal sanction, which is here supplied."

Article 79: "This is an attempt to make the Articles of War out of section 5313, Revised Statutes."

Article 80: "The same may be said of article 80. That is section 5306, Revised Statutes, which was in the nature of the Articles of War and is transferred to the new articles."

Article 81: "Article 81 is a combination of existing articles 45 and 46, without substantial change."

Article 82. "Article 82 is section 1343 of the Revised Statutes, incorporated without any change whatever."

Article 83: "Article 83 substitutes article 15 of the existing code."

Article 84: "Article 84 is a combination of articles 16 and 17 of the existing code. I have made no change in it, but I desire to ask the committee to make a change. The words 'to him' in the sixth line ought to be omitted to cover the situation."

Article 85: "In the next article 85 there is an important change. (The change was from mandatory to a discretionary sentence of dismissal.) I have also suggested a change to distinguish between drunkenness in time of war

and in time of peace. I do not think there can be any question about the advisability of these changes."

Article 86: "Making a like distinction between peace and war sentences."

Articles 87 and 88: "Articles 87 and 88 on the next page may well be considered together. They came down to us from the ancient codes, and were useful in the days when armies were without the trained and efficient commissariat of the modern army. The articles are not without their use to-day." (The penalty was broadened.)

Article 88: "Article 88, you will observe, is a related provision. It comes to us from the code of Gustavus Adolphus (1621), and had a place in all the early British codes. I have stricken out the words 'foreign parts,' and I have omitted the death penalty."

Article 89: "Article 89 is a partial substitute for existing articles 54 and 55. It preserves the punitive part of these articles. The administrative part is transferred to new article 105, to which I will later call your attention."

Articles 90 and 91: "Articles 90 and 91 are related articles and are substantially articles 25, 26, 27, and 28 of the existing code."

Article 92: "This is a rewriting of old article 58 so as to extend the jurisdiction of military courts over murder and rape outside of the geographical limits of the Union."

Article 93: "Article 93 is a substitute for article 62 of the existing code, but not a complete substitute."

Article 94: "Now we come to article 94, which was taken from the Revised Statutes and made an article of war in the revision of 1874. New article 94 is existing article 60 with absolutely no change except the phrase, 'Any person in the military service of the United States' is made to read in the new article 'Any person subject to military law.'"

Article 95: "That takes us to article 95. There is a very slight change in article 95."

Article 96: "I have taken some liberties with article 96, which is our old article or existing article 62. * * * I have changed the order of statement so as to make it absolutely certain that the phrase appearing in the existing sixty-second article of war, namely, 'to the prejudice of good order and military discipline,' does not qualify the phrase 'all crimes not capital' by only 'disorders and neglects.'"

Articles 97 to 103: "The next chapter relates to courts of inquiry. So very few changes are made in the articles under the subject of 'Courts of inquiry' that I think we can pass over them rather quickly."

Article 97: "You will notice in the first article (97) under that heading that I have omitted certain language much for the same reason that we have asked to have omitted the preaching in the article about dueling."

Article 98: "The next (98) relates to the composition of courts of inquiry. The old article said that the court should consist of one or more officers, not exceeding three. There has been but one instance in the history of our Army when we convened a court of one officer. There has always been the maximum, and our most important courts of inquiry have been convened under special legislation authorizing five or seven, or whatever number of members was deemed appropriate."

Article 99: "The next article is a new article (99). I have made what was a matter of construction (challenge) a matter of expressed grant."

Article 100: "The oath of members is preserved in the form in which it appears in the existing articles. Of course, I have added that formal conclusion in case of affirmation."

Article 101: "Powers and procedure of courts of inquiry" is the existing law, with the obligation written into it that the reporter and interpreter shall take the oath of a reporter and interpreter for a court-martial, formerly left to regulation.

Article 102: "This article is old article 119 without change."

Article 104: "Article 104 is a new article. I have undertaken and written into a new article the provisions of the existing regulations on this subject which have stood the test of experience."

Article 105: "We dealt with article 54 of the existing code at Saturday's hearing. A part of it, namely, that part that was administrative, was left unprovided for, and I then notified the committee that it had been made the subject of a special article (105)."

Article 106: "Article 106 is an attempt to make an article of war out of the act of June 18, 1898, section 6, giving authority to civil officers to arrest deserters.

There is no change in article 106 except that I have introduced the words 'a possession of the United States' to cover civil officers in the Philippines or Porto Rico who may arrest deserters."

Article 107: "I have attempted to combine the various legislative provisions into a new article."

Article 108: "I have taken those three statutes—they are widely scattered provisions—and combined them into an article of war which states the manner in which a soldier may leave the service. I think I have them accurately stated in the new article."

Articles 109 and 110: "Not discussed, but made no substantial change."

Article 111: "Article 111 is a repetition of article 114."

Article 112: "Article 112 substitutes article 125, article 126, and article 127 of the old code and adds much new matter. It is a matter of probate jurisdiction."

Article 113: "Article 113 is a new article and deals with inquest."

Article 114: "Article 114 extends the authority to administer oaths to the president of a general or special court-martial, the president of a court of inquiry, of a military board, or any officer designated to take a deposition."

Article 115: "New article 115 makes such assistant judge advocate competent to perform in substitution of the regular judge advocates the duties of the latter."

Article 116: "I have taken that legislation and built an article of war upon it."

Article 117: "Article 117 is simply a reenactment of article 99 and two acts of Congress."

Articles 118 and 119: "Article 118 has to do with relative rank and 119 with authority of command when different corps or commands happen to join together, and have no relation to military justice."

Mr. ANSELL. Now, here is rather high evidence with respect to this Crowder revision, coming finally and at the end of the hearings, out of the mouth of the Judge Advocate General himself. He says:

If Congress enacts this revision, the service will not be cognizant of any material changes in procedure, and the courts will function much the same as heretofore. The revision will make certain a great deal that has been read into the existing code by construction.

I say nobody, neither the Judge Advocate General, the Secretary of War, nor the committees of Congress, ever regarded this project as a real revision, a substantial revision, and certainly not such a revision as to change the whole theory upon which the articles proceeded, and they took occasion to assure the committee every moment, as though the committee did not want any revision, that there was not any real revision here.

When we come to talk about the head of the bureau of military justice and revisions that he has proposed, and remedies that he is proposing, it is well enough to examine the attitude of this official as evidenced by his official acts toward the liberalization of this code. He and I are just like this [indicating] on this subject. He says that the code is great and I say it is rotten. Now, one or the other of us is right and one or the other of us is wrong.

Now, let us just see if we can appreciate the state of mind with which this very high and able official approaches this subject. First, he argued before your committee every time there was a liberalization suggested—as, of course, there was bound to be by members of the committee. One, I remember, suggested that there should be peremptory challenges, because the Army community was such that there must be these prejudices, ill defined, of course, such that a challenge for cause would not lie, and that challenges should be peremptory. But Gen. Crowder said with respect to that, "I think it would be very harmful, indeed, for this committee to undertake to

modify these Articles of War by injecting into them any of these civil protections."

When a member of the committee suggested that the rights of counsel ought to be declared by statute, Gen. Crowder said, "We have it in our regulations now; it is working out now pretty well the way we have got it; let the commanding officer do as he pleases"; and again he says, "I must warn you to be careful about injecting into this system these civil principles that give you counsel, and protection at every stage of the proceeding, because it will disturb discipline." He said that on pages 18, 20, 29, 30, 44, and 48 of the hearings, and repeated it time and time again. "If there is one thing we must not have in the Military Establishment it is an appellate tribunal." He said:

In a military code there can be no provision for a court of appeal. Military justice and the purpose which it is expected to subserve will not permit of the vexatious delays incident to the establishment of an appellate procedure. However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be, in addition, the confirmation of the President.

The latter statement is not accurate. It is only in cases of certain sentences of death and dismissal that the President must confirm. Gen. Crowder wanted no appellate procedure. And, mark you, you speak to any Regular Army officer to-day, colonel, major, or what not, and ask him "What do you think about this court of appeals?" "Oh, it is perfectly splendid in theory, but it will destroy discipline." "Why?" "Time consumed." Time consumed! We have consumed, Mr. Chairman, I say conservatively five times more time with this futile and unauthoritative review that we make, and arguing back and forth with commanding generals, arguing because we have no authority, than we would have consumed if we had had a set of judges up there independent of military authority, speaking with authority as to law. And then, "time consumed." I invite your attention to this formal statement made in 1916 by the Judge Advocate General of the Army to the committee over which Senator Chamberlain then presided as chairman, a long argument of three closely typewritten pages as to the distinctions growing out of the necessity of the military service being such that you could not govern these trials by legal principles; and he quotes Gen. Sherman. And if he had only quoted all of Gen. Sherman I would not have minded, because that stern old soldier, in addressing the graduating class, when he was commander of the Army in 1882, at West Point, subsequent to the time of the quotation extracted from his works and placed in here by Gen. Crowder, said this. Senator Harrison had spoken to the graduating class that day, and he was an able man with long public experience, and he had deplored the uncertainty of justice in courts-martial, and the fact that they were such that the public did not have confidence in them, and he said "We are swamped here at this late day (1882)—the Congress is swamped—by efforts to get men back into the service when the public, at least, are convinced that they ought not to have been put out of the service."

Of course everybody remembers the historic case of Fitz-John Porter in which as great a commander as Gen. Grant made up his mind inflexibly one way; and it was not until Gen. Grant came down almost to the very day of his death that he would actually listen to the other side; and when he did loosen up his mind, and had ceased to be impervious, he all at once said, "I have done this man one of the grossest injustices, and I will devote the rest of my life to the correction of it." And he did; although the court-martial, of course, was a tragic mistake. After Senator Harrison had gotten through with his address to the graduating cadets, Gen. Sherman, none too liberal, rose and said this:

Now, as to the court-martial question alluded to by Senator Harrison in referring to the appeals to him. It must be remembered that a court-martial must consist of thirteen members and its findings be approved by the President.

They are swamped just as you gentlemen will be swamped, 1, 5, 10, or 50 years hence, unless you do something now, as I believe we ought to do something to revise for errors of law in courts-martial that have been had during this war.

Senator CHAMBERLAIN. The Senate has been revising those by remedial legislation every day during the war.

Mr. ANSELL. Yes; but you know what it means to get a case through Congress; counsel, and toil, and a long struggle. I am not criticizing Congress.

Senator CHAMBERLAIN. Yes; of course you are right.

Mr. ANSELL. You see what Gen. Sherman said. And do you observe that even Gen. Sherman did not understand the court-martial system, as the Secretary of War to-day does not understand it? He does not know where the President comes in. His statement shows that he does not. Gen. Wood got up here before this Bar Association Committee and also wrote an article in the Metropolitan predicated upon his belief that there was a revision of every court-martial case by the President and that every court-martial case also came to him as Chief of Staff. He had been Chief of Staff for more than four long years, and of course he had not seen but one case in a great number. This shows you the extent of the appreciation that the ultra-military man has for the administration of justice. Now, to cease the interjection and go on. [Reading:]

I am quite willing to see a court of appeals on courts-martial established. It would settle a great many vexed questions and give a legitimate channel for subsequent operations instead of those who make the laws being told the findings are all wrong by some fellow working up his own case on ex parte statements.—Gen. Sherman's remarks to graduating class at West Point, June 12, 1882 (New York Herald).

Now, I must admit that the old general there was speaking probably as much from the viewpoint of expediency as principle. He was, however, in favor of a court of military appeals, that stern old Roman was, here at the close of his life. He had seen so many miscues and knew that the Congress was so much importuned.

Now, here is a most complete argument to the Army idea that court-martial proceedings and their conclusion and execution must be summary, or else the discipline of the Army will perish, made by that most distinguished officer whom the present Judge Advocate General so frequently refers to, Gen. Fry, the Provost Marshal Gen-

eral of the Union Army during the Civil War. Gen. Fry, student of military affairs as he ever was, writing long after the Civil War, in the eighties, saw that a great number of officers were being restored, not so much because a man could say that they were guilty or not guilty, but because of the uncertainty and distrust of what had been done during that war, though it was not one-hundredth part as bad as what has been done in this war. I would like to put in this record this article, because it is rather difficult to find. It is an article on a military court of appeals, written by Gen. Fry in the eighties.

Senator LENROOT. Very well; it may be inserted.

Mr. ANSELL. But I want to call your attention to the one fact that this article smothers, as you would suppose it would if it were well written—the argument that we must have this expedition and summariness if we would get the effect of discipline. Quickness is not the only thing we want. I think we want certainty of results first and then quickness. To be sure, nobody wants a system of appeal after appeal, and delay after delay because of technicalities. Nobody wants that, but that is not inherent in the idea that we need to have a review, because we have a review now which while no good is time-consuming and not authoritative.

(The article referred to, found at page 182 of "Military Miscellanies," by James B. Fry, retired Assistant Adjutant General, United States Army, is here printed in part in the record as follows:)

A MILITARY COURT OF APPEALS.

Col. Lieber, judge advocate, is one of the best authorities on military law. He holds that military obedience "can only be enforced by prompt punishment; that the recognition of this has led to a departure from the ordinary forms of trial, and to the building up of a new system for the very purpose of having one sufficiently summary in its nature; that in carrying out this object a common law, military, has grown up of necessity, to a large extent, at variance with the common law, civil," etc.; that "military law is founded upon the idea of a departure from the civil law and should not become a sacrifice to principles of civil jurisprudence at variance with its object"; that "the fundamental principle of a code of military punishments is the enforcement of prompt obedience by prompt punishment," and he adds: "Because we have made progress in the amelioration of punishment, we must not, however, jump to the conclusion that this includes delay in its execution * * *. The admission of new features favoring delay is inconsistent with the object," etc.

These propositions admit of some explanation or qualification. They do not justify the conclusion that the efficacy of military punishment depends on its promptness alone. The claim in favor of promptness is, of course, based on the assumption that the finding is correct. The proceedings of courts-martial should be sound as well as summary. Inasmuch as the military is a more arbitrary and despotic system than the civil, so is uniform and even-handed justice the more necessary in it.

The claim in favor of prompt punishment is a claim for prompt proceedings and true findings. The amelioration of punishment is due to progress in enlightenment. Promptness in military punishment is a feature designed to increase the exemplary effect by adding to the terror of the infliction. But in the Army, as well as out of it, government through terror is gradually yielding to the control of a higher sense of justice. Promptness must now submit to all the delay which legally constituted authority finds necessary to the ascertainment of truth according to the highest lights of the time. It is not so important that the punishment be prompt as that it be inevitable. That, nowadays can not be, until guilt is clearly established. The practical question, therefore, is, What shall be the procedure to attain this end? Col. Lieber says: "Military law, like other sciences, is progressive. It is not a

stagnant pool. But it has, by virtue of its nature, been to a large extent progressive within its own sphere independently of others."

The science of military law is progressive, and so is the science of civil law in a greater degree and in a larger field. If progress in the science of civil law has brought to light principles or modes of procedure which are essential to the ascertainment of truth, they could not be "at variance with the objects of the military code," and they ought to be applied to it. Any lack of promptness in punishment which might result would be outweighed by the increased chance of certainty of just punishment.

It is probably in deference to a deeply-seated conviction that all available means of ascertaining truth are not invariably resorted to by courts-martial—that their findings and sentences are so often interfered with by the legislative and executive branches of our Government. The President and Congress are the only sources of appeal in such cases. They often receive evidence which satisfies them that the findings of courts-martial are not just. The fact that the proceedings were summary and the punishment prompt, is usually a point in favor of the complainant, and thus, promptness—on the presumption that it has interfered with justice—tends to defeat the good effect which it is designed to secure. The certainty of punishment is overthrown by doubts which might be forestalled by less promptness. Cases are reopened which were supposed to be closed, and are retried by tribunals without legal power and without judicial modes of procedure. This is probably more injurious to the Service than less promptness and unquestionable judicial proceedings would be.

During the past eighteen months, bills or resolutions have been introduced in the United States Senate or House for the restoration of about 36 officers of the Army who have been dismissed by sentences of courts-martial. There are now on the rolls of the Army eight officers who were dismissed by sentences of courts-martial, and after remaining out of service for some time, were re-instated by special acts of Congress, and eight similarly dismissed, who were reinstated or reappointed by the President. These facts suggest the inquiry: Is not the progress of military law kept rather too closely "within its own sphere" for our Republic, by continuing to regard our ordinary courts-martial as courts of final jurisdiction in cases of sentences to death, or dismissal of officers? Could we introduce to advantage a Supreme Court-martial with final jurisdiction in such cases, by appeal from lower tribunals of military justice?

Congress can "raise and support armies," and "make rules for the government of the land and naval forces."

Courts-martial are what Congress chooses to make them under this provision of the Constitution. At present they are regarded as courts of final jurisdiction, but they are not so in fact. Appeals from them are entertained, as already stated, both by the executive and legislative branches and by both are their findings set aside. Not only this, but after courts-martial have been dissolved, new tribunals (as in the Hammond and Fitz-John Porter cases) have been constituted, for the purpose of rehearing questions long before settled by defunct courts. In the light of these facts the question is repeated, would it be wise and practical for the law-making power to create a Military Court of Appeal and final jurisdiction in the cases which the Articles of War now require shall go before the President for confirmation?

* * * * *

It is true that the power of Congress and the President's pardoning power would exist with a military court of appeal, just as they do without it, but the temptation and the opportunity to exercise these powers would be materially reduced. Moreover, the rights of the accused must be fully weighed. The sentences of dismissal awarded by courts-martial are sometimes wrong. While the President's pardoning power or an act of Congress may prevent some of the consequences of the wrong, neither the President nor Congress can proceed judicially in ascertaining the truth, nor can they rectify the wrong. That could only be done fully on ascertainment of truth through a judicial tribunal, created and empowered for such cases. Do we need one?

The sentence of dismissal (with which we are dealing, as the matter of practical importance) is blasting in its consequences. It involves loss of profession, loss of pay, and loss of reputation. The same "rude tribunal" which has had final jurisdiction of it for centuries, has it still. Yet, as we are told and admit, "Military law is not a stagnant pool. Within its own sphere it is progressive." Will that progress justify the establishment of a military court of

appeal as a remedy for the evils which have been indicated? Would the remedy be worse than the disease? Military punishment should be prompt, but it must be just. Taking things as they are in our service would delay in final action in cases of dismissal be increased or reduced, by having a court of appeal, with all the finality of jurisdiction that law could confer upon it? Neither the legislative nor the executive branch of the Government is disposed to violate its trust in the action of which we hear so much complaint concerning dismissals. They merely grope for justice, which such a tribunal as that under consideration might make so clear as to prevent their interference, or at least so probable as to give them good grounds for declining to interfere.

Mr. ANSELL. My point 3 is that this code is an anachronism that came to us out of a system of government and out of an age that we have long since turned our backs on. Why, this system came to us from the time when the armies were the result of a press gang; that is the truth; when the people had no affection for the Army; when naturally they had a hate for it; when the army was the army of the king.

Just look at the old articles of 1774, which are equally the articles of Gustavus Adolphus, which John Adams says were the original Latin articles—Roman articles—of war. I can not find the original Latin articles. Are you going to take any system out of Europe of the seventeenth century? Not much. And especially military systems, press gangs, or hired men surrounding the king to prosecute his little wars in Europe against the desires of the people?

Compare those articles with the present articles, and see: King-legislator; king-judge; king-executive. King says who shall be tried; king says whether he will have counsel or not (and usually none, of course); king or king's officer says who shall constitute the courts; king tells them when to meet, and when to stop, and rules on everything that comes up in front of them. And then when they get through the king says "I will approve or disapprove of what you have done, and if I disapprove, you will do it all over again." That is exactly what these articles of war provide, except for three or four of them. Congress prescribes that the court shall take an oath, for instance; but that very oath itself does not say that you shall try according to the law. No; "You will try largely according to the facts and to the customs of war as you understand them in like cases." Customs of war! The unwritten law military, which takes you back to our friend Gustavus Adolphus, also to the system that was made for an army of that day.

Not being a military people, we have not maintained large armies except in an emergency, and we have not gone to the people to get them, except in an emergency, and then we get rid of them as soon as we can. So that armies do not come from the people in English-speaking nations except in cases of these great modern emergencies, and if you are going to have a system of law that fits these armies coming from the people, you are certainly not going to find it in that system of law that governed this king's establishment hundreds of years ago. And yet, between our article, and the king's, the counterpart is complete. Our commanding officer, just as the king does, convenes the court, passes upon the legality of the charges—the legality such as it is—and the competence of the members to sit; and then every single case that can arise, every question that can arise in criminal procedure, he decides; and then he approves or disap-

proves what they do, and if he disapproves he makes them do it over again.

That is no court. I believe the pithiest statement of what we may describe as the irreconcilable difference between what Mr. Baker approves and the views I adhere to is to be found in an editorial in the New York Evening Tribune of the early part of this week. Discussing this Kernan report it is obvious that they misapprehend the issue, because of the fact that they do not understand the kind of Army that we are bound to have from now on, if we have any from now on—an Army of citizens. Even if we go back to the old military establishment, still the idea is becoming established that a man is a citizen even though a soldier and his soldiership is but an incident of his citizenship, and the tendency should be to give him the protection of a citizen to the utmost possible extent while he is performing this duty incident to citizenship. He is not a mercenary owing this personal obligation to a king or to a president or to some army officer.

Senator LENROOT. May I ask you, General, has any case come to your knowledge where, a commanding officer having disapproved the verdict of a court-martial, there has been a new trial of the case?

Mr. ANSELL. Disapproved? There is a kind of a new trial, according to Gen. Crowder's statistics, which I accept as true, and I believe they are true; not a new trial, but a reconsideration.

Senator LENROOT. I did not mean that. I meant where there was an actual new trial with new evidence taken.

Mr. ANSELL. Yes; we have had a few of those cases, where the War Department has held that the court was absolutely without jurisdiction. But we have had some during this war, probably at my instance, whether I was right or wrong, and I was willing to stand the test of a civil court. There was the case from Rockford, Ill., that I referred to the other day. You see there, Senator, a most flagrant case. Somebody had ravished this girl, and the court said these 17 men did it, with no trial worthy the name. Now, no man on his conscience and his oath of office, no man who appreciated his profession, could ever pass such a record as that; though, strange to say, officers of the Regular Army tried to prevail on me to select 5 men out of those 17, and recommend that they hang. They said that they thought really those 5 were guilty, anyway. Never mind the other 12, but hang those 5 in order that the law might be vindicated. They said that was rough-and-ready justice. But could you not see, Senator, that no responsible man could let that record stand and hang those 17 men when he knew that they had not had a fair trial; and yet no man appreciative of the responsibility could turn them loose, because some of them, or somebody, at the time and place alleged, had committed this most grievous offense. As I say, I worked that case as far as I fairly could under the theory that by rushing them to trial and otherwise depriving them of the assistance of counsel the court lost jurisdiction. It was not a trial at all. If, of course, it was not a trial at all, the judgment was not a judgment at all; and should it be so held you could have another trial without its being a new trial. It would have been a trial in the first instance.

But, I also said that I believed if we had the power to review at all, we had the power to reverse the judgment and allow a new trial.

Senator CHAMBERLAIN. Did they have a new trial?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. How many were convicted?

Mr. ANSELL. Some were convicted and some were acquitted. That is the point. I have no doubt that the new trial was a fair trial. I selected ex-Gov. McGovern, and two other distinguished lawyers to help him, and we saw those negro soldiers got the best of counsel, and they had the most thorough trial. Some of them have been convicted and some of them acquitted.

Senator CHAMBERLAIN. But all of them would have been convicted?

Mr. ANSELL. All of them were convicted and they would have been hanged by this time.

Senator CHAMBERLAIN. You did not answer succinctly the question of the chairman. There have been cases where the commanding general did not approve the sentence of the court-martial, and there was a retrial or a rehearing or something, and as a result of it a party who had been acquitted in the first trial was convicted on the second?

Mr. ANSELL. Yes; but of course in those cases he never put the word "approved" on the judgment.

Senator CHAMBERLAIN. What did he do?

Mr. ANSELL. He said, "I do not approve of what you did, and I send it back for your reconsideration, and these are my instructions."

Senator CHAMBERLAIN. Practically he determined the case?

Mr. ANSELL. Why, that is the whole situation. The commanding general's control over the court is such that even upon an acquittal the commanding general or the convening authority can order the court to reconsider, subject to his instructions; and that came up in the bill that Gen. Crowder and the Secretary of War submitted to your committee for this revisory power. They were going to give this revisory power to the President and also give him this same power to reverse an acquittal and direct that the case be tried over again.

Senator LENROOT. The reason I asked that question is that it has been stated there had never been a new trial for prejudicial error where that error did not go to the jurisdiction.

Mr. ANSELL. I tried to explain that we worked—or at least I worked—in a case of this sort to correct what, ordinarily would be called, perhaps, in a civil court, simply reversible error, into jurisdictional error.

Senator CHAMBERLAIN. The point is that you did, in endeavoring to get a new trial, endeavor to show a want of jurisdiction?

Mr. ANSELL. Yes; I endeavored to get under the cover of jurisdictional error as a safeguard if the writ of habeas corpus should be sued out. But I want to say that the most distinguished lawyers in my department agree that there is a statute, if the War Department would properly construe it, to reverse the judgment and order a new trial.

Senator CHAMBERLAIN. That is under the power of revision?

Mr. ANSELL. Yes. That was the view of Col. Rumbaugh, professor of constitutional law at Harvard; Prof. Morgan, professor of law at Yale; and a dozen of the best lawyers, all men of long, practical legal experience. The War Department took the other view. But I think it ought to be stated that from the time of Judge Holt's régime up until the time of this war there had been no retrials or new trials except in the case where clearly there was a lack of jurisdiction in the composition of the court or in the capacity of a court to pass upon this kind of case. So, here is what happened, I might say, Mr. Chairman: Even after we started up this review during this war, and we advised the commanding general to disapprove of the judgment which he had approved subject to this review, see what the effect was. It always turned the man loose. The general could disapprove of the judgment of a court-martial, but he could not order a new trial. Therefore, the reversal turned him loose.

I say that this code is in sharp conflict with the principles of government which, in my judgment, our Constitution evidently contemplated should apply to our Army. The Constitution of the United States provides that Congress shall make rules and regulations for the discipline of the Army. It is not conceivable to me that the framers of that historic document intended that the Congress should adopt this monarchical theory in toto, substituting the Presidents and commanding generals for kings and kings' subordinates.

The theory has been all along that this system was so absolute and detached from the Constitution that it was not subject to any legal principles, those found in the Bill of Rights or elsewhere; that every right that a man had on a trial before a court-martial came by reason of the statutory grant, and that in the absence of statutory grant, of course the power of military command could do as it pleased.

It was on this theory—this early theory—that in 1806 the Congress of the United States, accepting it, wrote into the code the inhibition against double trial; and so the Government, really accepting the War Department's views, proceeded until 1906.

Senator CHAMBERLAIN. 1906?

Mr. ANSELL. Yes; and I refer this committee, because it is composed of lawyers, to the Grafton case, which I have adverted to. It is a landmark in the military law. The Grafton case holds that the protection against double jeopardy a man gets when tried by court-martial comes not from statute but from the Bill of Rights of our Constitution. I believe that if the officers of the War Department had studied that case, had determined what it actually decided, and had acted accordingly, we would have had a different situation during this war. A fair trial. A man can not have been tried fairly if he has been tried a second time, and he can not have been tried fairly if he did not have witnesses, or if he did not have counsel for his defense. He can not have been tried fairly unless there is somebody he can address his legal objections to. Yet the War Department says that if Congress is silent on these matters or does not clearly inhibit, it simply authorizes the power of military command to do precisely as it pleases.

Let us take the punitive articles of the present Articles of War. There are 41 of them. Now, one would naturally think that inas-

much as this is a penal code, and inasmuch as Congress has been endowed by the Constitution to make the rules of discipline of the Army, where Congress says a man shall be tried, Congress should say what he shall be tried for, and Congress should prescribe within reasonable limits the penalties. I ask the committee to look at these 41 punitive articles, the very gist of the code. Twenty-seven of them terminate this way, "Whoever violates this article of war shall be punished as a court-martial may direct." Eleven of them say, "Whoever shall violate this article shall be punished by death, or as a court-martial may direct." Two of them make death mandatory. Not one of them describes or defines the offenses.

Is it any wonder that we have had an actual case of felonious homicide punished with only three days' confinement and another felonious homicide punished with death? And we have had trivial cases of absence without leave punished with sentences of 99 years' confinement.

The court has been authorized by the Congress of the United States to do just as it pleases. We talk about the great variations of punishment. How, in heaven's name, can we expect anything like a fair and reasonable uniformity of punishment when the code itself tells courts-martial "Punish these offenses as you please, any way you think is right"?

Now I, for one, am not going to deceive myself with all this talk about "Well, the court did the best it could." I assume it. I do not hold much of a brief for them, but they probably did just what any other set of men would have done if they were told to do arbitrarily as they pleased and there was no check on them.

But I say there ought to be a check. Now, Col. Wigmore in his most remarkable document here—he is a sort of a new-thought man in the legal world, notwithstanding his work on evidence—says, and a North Carolina friend of mine wrote me yesterday saying, "Ansell, this court-martial system is far superior to anything we have got in the civil administration of justice." Of course, there are men in this country who believed that the German system was superior to our form of government, that the British system of government is superior to ours and the French system. They just disagree about premises. There is in such a case no use continuing the argument.

Col. Wigmore has done a lot in that direction. He is a teacher, a new-thought man in regard to the Constitution and everything else. To such men the Constitution does not mean very much. To them it seems to have been the result of a long course of foolish thought by our people. It does not mean very much to these new-type scientific lawyers. They look at the logic of the situation and resolve everything in the forum of pure reason, not of human experience. If you told them that you were going to start a new government in the South Sea Islands somewhere, they would write a most wonderful constitution for you, but I doubt very much if anybody would ever see it work. The rules of evidence are not much to them; the Constitution is not much to them; and naturally "this military system we have got is far superior," because, I suppose, it is so different. That is what they say in this defense here; what this letter from that friend of mine said yesterday. It would be a great thing, then, to change all this civil system and supersede our safeguards by some

Army officers going around applying this very effective military system. To my mind, the absurdity of the whole proposition is shown when men have such a mental attitude that they can put up an argument like that, when they say that the Constitution of the United States and its principles do but little more than save a few criminals from just punishment. They are men who are always criticizing our courts. Our courts ought to be criticized; they are not above it. But, nevertheless, they should be criticized for the administration rather than for the principles of the system.

I want to make this point rather especially: Our Articles of War are based on the king theory. Congress has taken the reins that the king held and then turned them over to those military gentlemen who have succeeded to the king's authority here, and said, "Now, you drive as you please." Any officer of the Army can put any charge against an enlisted man. Their defense says that that is a wonderful thing; that it is nothing but an adaptation of the new American method of prosecution by information to the Army; that we were ahead of the civil system on that, and that the civil copied that from the military system. That would be like saying that all Senators could prosecute all people at will, or that all Congressmen could prosecute all people at will, or that all preachers could prosecute all people at will; that all of the upper ten could prosecute at will; that every farmer could prosecute his hired men at will. Why, of course, the information theory is that an officer of the law must have been specially designated by sovereignty and must have taken a special obligation as a quasi judicial officer to do what is right in this case, and there is only one man representing the sovereignty in the particular jurisdiction who can do that, and he is substituted for a grand jury. Now, I ask the committee, how far does an argument of that kind get with you? How far ought it to get? What ought to happen to the whole case when its defenders argue like that?

They believe that every officer ought to put in charges, not under any special sense of obligation; that he ought not even to swear or certify, "I have investigated this case and believe it ought to be tried, and therefore I submit it to trial," but should act simply by virtue of his office. Of course, an enlisted man can not prefer charges against an officer, though. Oh, no! It must be adopted by this sacred thing, official caste. And then, when I tell you that between 96 and 98 of every 100 charges preferred result in trial and conviction, I say my point is made, that officers of the Army can try anybody they please, at will, and Congress is responsible. Congress says "You try anybody you please." And then, even if the charge is murder or rape or arson or mayhem or manslaughter, is there any way whereby that man can have the legal sufficiency of that charge tested? No; Congress says that the power of military command must do that. Congress does not say that military command shall be advised by a judge advocate, even, and it is not so advised. You have not got legal personnel enough. You never had but 13 in the old Army, and they were made mostly for duty right here in Washington. You did detail a line officer who had some special proclivities, and put him at the right hand of the commanding officer as a staff officer, and he advised him. In any event, the commanding officer

takes the advice if he wants to; just as he takes, or rejects, the advice of the man who issues the rations, the man who plans the operations. The judge advocate is just like any other staff officer. So that Congress has said to every man who under these articles of war is empowered to convene a court-martial, "By virtue of your rank you are also a judge, absolute and final, with authority to do as you please."

When we try a man in a civil court for murder, for instance, you know how meticulously we guard him—probably too much so; and surely there is a way of having a judicial determination, at the very beginning of the trial, of whether the charge actually alleges an offense known to the law of the land sufficiently to justify trial. But here let the commanding officer say, "That charge is good," which he says when he refers it to a court for trial, and there is no power on earth to say otherwise.

Now, a man tried for murder or anything else over in the military forum gets the same punishment rather more and more expeditiously than he gets when he is tried by the civil court for the same offense. The effect upon the individual is just the same. It means a long term of imprisonment or deprivation of life or property; and yet we leave everything, not to the law, but to the power of military command. Now, I ask the committee, are they satisfied with letting a major general sit up and determine whether or not this offense is actually an offense against the articles of war and the law of the land, and make that final? And then, after he has determined that it is final, let us look at the challenge. You have got to challenge one at a time and for cause stated. That is a challenge for cause only. No peremptory challenges and no challenges to the array.

Mr. Chairman, if there ever was a community anywhere where there ought to be peremptory challenges and challenges to the array both, it is in the Army of the United States. The commanding general who designates that panel is frequently a prejudiced person. In that case he does not know it. Of course not. We usually do not know when we are prejudiced. But he is prejudiced all the same, and if there were a proper judicial authority to determine that fact, it would frequently be so determined.

But let us take a case like this. I can recall four cases that I have had during this war in which there were men who had committed offences under circumstances of such similiarity that you could not try one, without, indeed, passing upon the case of the others. Two men, we will say, are tried jointly, it may be properly, so far as the offense is concerned. Suppose they should be given a severance. Would you think, in a civil forum, of trying the second man by the same jury that tried the first? Of course not. And yet the same military court, when a whole crowd of soldiers are involved in the same transaction, will try them all separately, the same court will sit there and try one after another, one after another, until really, in one case that I know of, it was a perfect farce, and the men knew it was a farce also; and yet under the law of Congress you are limited in your challenges to a single challenge, and for cause stated, and the triers of the challenge are the other members of the court?

Now, let us see how it works out in a case of this sort where they are actually sitting as a second jury in the trial of a case of similar circumstances. You challenge one man under the law, and he steps aside, and you have got the other twelve, and they sit there and pass upon that challenge, when the challenge lies as much to them as it does to the first challenged. Now, that may seem puerile, and yet the army argues that it is all right. "We are officers of the army, and we can divest ourselves of any predilections we had in the other trial. We are intelligent and superior, and you must not make the charge of prejudice against us." Surely you are not going to let a thing like that keep up.

Now you come to the actual trial. No rules of evidence; none prescribed. The law of Congress actually, under this so-called Crowder revision, has authorized the President to make any rules of evidence he pleases. Gentlemen, if there is one thing in the world that ought to be stopped, it is the further abdication by Congress, to the power of military command, whereby a man may be tried before a court-martial not according to the rules of evidence and law, but according to some rule prescribed by the President of the United States, which, of course, means the Judge Advocate General of the Army and the Chief of Staff.

Why, I recall a case where I resisted the entire military hierarchy, the evidence being this: They actually extorted a confession out of a man and a man's wife. I say "extorted." I am not using too strong a word. Everybody agreed that the confession was thereby incompetent; had been dragged out of them by third-degree methods. Yet by means of that confession, and other means, they got other evidence. And they said that that record was good, because if you struck down the confession, struck it out entirely, there was enough left to justify the man's conviction. Now, they went that far. They said that a confession extorted by those methods resorted to by the Government, which it would not have resorted to unless it had to, an extorted confession which was used for the purpose of conviction, the most credible of all evidence when properly obtained, can be relied upon without doing any prejudicial error to the accused because there is other evidence in the case. When I said that I would have conclusively presumed error from that confession, at least, they said, "Well, it is true that the Supreme Court of the United States has held that, but we are not bound by that." And they are not. They do not follow it. They are not bound by any principles of law. Our rules of evidence may not be the most logical in the world, but they are what we have got; we have got nothing better; they are really a basic part of our jurisprudence and of our civilization, and I, for one, am not ready to give them up in the trial of an important case before a court-martial in favor of rules, or no rules, prescribed by military command.

So military command can do as it pleases when it comes to court-martialing a man. It selects the man, selects his counsel, determines the court procedure, defines the offense, applies any rule of evidence that it pleases, and then when it comes to sentence it can impose any sentence it pleases, from 1 day to 100 years, or from a penny to death. The commanding general can then do as he pleases, governed by no principle of law.

Now, I can tell you one great reason why these punishments were so harsh. Everybody knows that these courts are afraid of the commanding officer. Why, men have actually been sentenced to sit on courts-martial by commanding officers for purposes of "instruction," and it is the most arduous duty known in the Army, and Army officers hate it like sin. They do not want to do it. They know they are under the general's hand. He will likely change their station and punish them if he does not like the way they do on a court. So they say this—this is common, and they will all tell you so when they are speaking frankly and personally—they say, "The Articles of War say we can do as we please. The commanding general up there is pretty stiff. He cussed us out, that last case, you know. We said the man ought to have a small sentence, and he came back and cussed us out and said he was going to dissolve us and put a lot of his remarks on our record, and all that kind of thing. Now, I suggest, since we can do as we please, that we put it up to the old man. We will give a sentence high enough, so that the general can cut it down to suit him." They say, "Let us give this fellow a sentence of 25 years, and let the commanding general cut it down to 5 years, if he wants to." So Congress tells the court-martial to do as it pleases, and they pass it up to the commanding general and tell him to do as he pleases. They make that arrangement because they say the commanding general has authority to cut down or control it.

If that seems like a puerile sort of conduct of official business by a lot of grown men, let it seem so. It is true.

It is true, then, Mr. Chairman, that from the beginning to the end courts-martial are governed by the power of military command, not by the law of Congress. You have not required your military commander mandatorily to do certain things or not to do them. Quite the opposite. You have not told your court mandatorily to do certain things or not to do them. Quite the opposite. You have just simply adopted the old kingly system of Great Britain, foisted it upon our Army, and told them all to do as they please.

Now, quite truly, Mr. Chairman, Gen. Crowder in his proposition to revise the articles in 1912 and 1916 said, "These articles come from the British system, and the British have revised their system out of recognition." It is true, to our shame, that though the British Government is not the most liberal Government in the world to its soldiers, it is far more liberal than we. Does it not occur to you as significant that it is provided that the British judge advocate general shall be a civilian barrister; and that it is provided the French judge advocate general shall also be a civilian barrister? Does it not mean something?

The English judge advocate general, until they created the office of secretary of state—that is, when the war department was governed by the war council, up until the latter seventies or the eighties—was a member of the Government, a member of the Cabinet, with a seat in Parliament. When the Parliament came to control there, as it did, against the Crown, that was the first thing they said, "The man in charge of the bureau of military justice will be responsible to us, and he will sit in this body as a member of the Government; and he will be a civilian and he will be a lawyer, a judge; and he will

be appointed for life; and he will be taken out from the command of the war council and even of the King.

Senator CHAMBERLAIN. Has it resulted in a modification of the extreme military sentences?

Mr. ANSELL. Yes; though I must say that England is not as modern as I think England ought to be and will be; because England has an investigation on, right now.

I have here an interesting article, which I shall not read into the record but which is interesting nevertheless, from Blackwood's Magazine of June, by a distinguished Scotch barrister who was a judge advocate with the forces in the field, and he shows that they made a great outcry there against their system, as they made it here during the war; and I know they did, for I was there. They made it more vociferously than we did here because we were more suppressed. I want to show you what this distinguished barrister said. It is a very ridiculous article, but less ridiculous than an article could be written about our system. For instance, he was sitting as an officer on a court-martial. The junior member of the court votes first. A law officer sits here instructing the court as a judge would the jury. He asks the junior member of the court, "How will you vote on this?" "I think I will give him a very heavy punishment." This went up to the various members of the court, and all of them said, "Yes; a heavy punishment." Then the law officer said, "Now, gentlemen, with all due respect to you, I do not regard this as a very severe offense. You have given him 15 years." "Well, what do you think he should have?" The law officer said, "Three days, it seems to me, would be sufficient." The President said, "You have heard what the law officer says. Since considering it further, what do you think?" The junior officer said, "Well, since I have heard the remarks of the judge advocate of the court, three days, I think, is quite sufficient." So, then, it went up through the court; three days went all through, and that was the sentence. Fifteen years—three days. That is very ludicrous. But let me call your attention to the last part of it. He says:

This system of confirmation is very undesirable. No commanding general should be allowed to confirm.

He says it is actually vicious because it makes this court subject to the command of the commanding general [reading]:

For the reasons which I have already given, it tends to destroy the independence of the tribunal, as well as leaving the final decision in the matter in the hands of officers who have no special, if any, legal experience; who have not seen or heard the witnesses, and who are seriously handicapped by their military training and who are not capable to mete out impartial and disinterested justice. Is it fair or consistent that a court of criminal appeal should have been set up in respect of convictions in criminal courts and not in the case of convictions by courts-martial?

I suggest that every person convicted by court-martial (subject to the exigencies of moving warfare), should be entitled to apply for leave to appeal to a court of appeal presided over by a permanent legal judge appointed for the purpose, and conversant with military affairs, and that the present system of confirmation by military officers should be abolished.

It is worthy of note that the committee which has been set up by the War Office to inquire into military law and the procedure of courts-martial, does not possess a single member who has had any real experience during the war as a member of field general court-martial. Let us hope, however, that

the committee will make an effort to find out what the real position is, and will not shrink from such drastic reforms as may be necessary to enable the members of courts-martial in the future, without fear and with independence of judgment, to administer the sacred duty entrusted to them.

I do not know how the committee will regard it, of course; but I know the English, it must be said, do things quite thoroughly at times in matters of this kind, and they do not stack committees; but let us look at the English system as compared with our own. Here is a great outcry against their system, and England's military code, I will assure you, is far more liberal and progressive than ours; but no general court-martial can sit in the British Empire without a law officer sitting by the side of the court, endowed with the functions of a judge, who instructs that court upon every point of law, sums up for them, and does everything exactly as a judge does here, sitting in a criminal trial with a jury.

Senator CHAMBERLAIN. And then he is not a military man?

Mr. ANSELL. Not as a rule. In all general courts-martial he is usually a barrister warranted out of the great body of English barristers for the purpose, and I will give you some reasons for that later on. It is true that Great Britain, with her capacity to do things, customarily and without accurate definition, has never said that that judge's instructions were absolutely controlling of the court; but if that judge advises the court one way, and the court should do the other, when that report gets to the Judge Advocate General of England, who is a civilian, and who himself has warranted that man to sit there representing not the commanding general, but himself, as the Judge Advocate General of England expressed it to me, "Of course they know what is going to happen. The whole thing is going to be disapproved." And in fact, the law officer with the court is the judge, with all the authority that a judge has with our courts and juries.

Now, a field general court-martial is the general court-martial which accompanies the army when it is actually fighting in the field for the trial of enlisted men—not officers. The law does not provide for this law officer with that court; but the Regulations have done so, and every field general court-martial for the trial of enlisted men for any offense, however slight—they do not try them for the slight offences we do, however—has this law officer, and he is commissioned because his position is rather unstable, as you will see by reading this article, and as I saw it. They give him rank, though he is really a civilian and he is the law member of the court, and he has, of course, the power of the Judge Advocate General's office back of him; although there is no law, as I remember it, back of him. But we surely are not blind to the superiority of the British system, such as it is, over ours, when we see that at the top of the judicial hierarchy is a civilian, a barrister, answerable now to the Secretary of State for War, and never to any military commander. Never any report of the Judge Advocate of England goes to the Commander in Chief of the Army or to any military commander. I was there a considerable time, and saw that the army has accepted him as the final judge of law as applied in the Army. He does not have to write these long-winded arguments that we write. Rather briefly does he make his minutes on the case, and dispose of it. It

does not go to the Chief of Staff or to any military man, and the authority that is actually exercised over him by the Secretary of State for War is a formal one, because they have not yet gotten out of, and never will get out of, the theory, as I am advised, that Parliament has just put this chief administrator there as Secretary of State for War, and he has replaced the Judge Advocate General of England, who is sitting with Parliament, but nevertheless he has all responsibility still to Parliament. We know that Parliament does not hesitate to make a racket about any case of military injustice in England that is brought to its attention, and to call upon the Judge Advocate General for what he did in that case.

(At 12.45 o'clock p. m. the subcommittee adjourned until to-morrow, Saturday, August 30, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, AUGUST 30, 1919.

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

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Senator LENROOT. I do not remember just what point you had reached at the last session, General, do you?

Mr. ANSELL. If the committee please, yesterday I had said that Great Britain had recognized the necessity of at least a partial civil control, in the last analysis, over courts-martial. I had shown that their law requires a law officer with the powers of a judge to sit with each general court-martial, though, as I said—and ought to have said, in fairness—those powers, like so many things British, were not well defined and fixed. Probably, de jure they are advisory; de facto, they are controlling.

That with each field general court-martial, which is their agency for enforcing discipline when they are in actual campaign, so far as enlisted men are concerned, as a rule, the law does not require this judge to sit with the court-martial; but by regulations it is required, and it has worked out to the absolute satisfaction of all, the only complaint being it should go farther and be fixed by statute.

I had shown that the head of the Judge Advocate General's Department, who is the chief of the bureau of military justice there, is a civilian, had at one time been a member of the Government, still has a close relationship both to Crown and Parliament, and, most significant of all, he is not subject to any military supervision whatever.

I had also adverted to the fact, previously, that there was far greater opportunity there for the civil courts of the Kingdom to review the judgments of courts-martial than here, the sole remedy here being by way of the writ of habeas corpus; except, of course, in a suit for trespass, which, as you know, seldom or never is re-

sorted to, for the very obvious reason, I suppose, that you had to prove that a member of the court has maliciously and flagrantly violated his duty in order to do injury to the accused. Certainly that would have to be proved before damage could be recovered. Such actions are not brought here.

In France it is significant likewise that, military as that people is, the judge advocate general of the army there is a civilian, and a most distinguished one. In my travels there I met no lawyer who impressed me more than he.

Senator CHAMBERLAIN. What is his title?

Mr. ANSELL. Undersecretary of State for Military Justice, with a seat in Parliament.

In the French Army in time of peace there is a very large appellate system. Many of their cases can go to the supreme court of France, the Court of Cassation, of Paris; and in time of peace there is a court of military appeals, as well; and in time of war the law provides for a court of appeals with each army, but, as I understood their practice, perhaps a court of appeals was not maintained at the headquarters of each army, but rather, administratively, at some central point, as at Paris, where it could take care of more than one jurisdiction.

Senator LENROOT. But is maintained?

Mr. ANSELL. But is maintained. That is the point. My recollection of it is that in time of war they may have, and do have usually, on their court of military appeals men who are commissioned in the army; that is, army men. Of course there the distinction between the professional soldier and the citizen soldier is not so marked as it is here. If there is one thing more impressive about the French Army than another, it is the unity observable in their military establishment, a unity which we do not have here, but which I hope that we may some day have.

Senator LENROOT. You mean it is more democratic throughout?

Mr. ANSELL. Yes. Senator, I went to France, of course, with the utmost sympathy and admiration for the French people, but not so much with the idea that the French were really a democratic people. Whatever may be said for any other institution, that institution which is usually in all nations least democratic was in the case of the French most democratic; that is, their army. I said in my report, and I repeat, that whenever we shall change, let us not change toward the British or what might be called the northern nations' view of maintaining discipline, because I think probably this system whereby discipline is maintained by the great gulf between enlisted man and officer by erecting the officer as a sacrosanct thing far above him belongs rather to the northern races—to ourselves, to the British, and to others. Let us, if we can, incline to the French system, where, without loss of dignity and without any infringement of proper prerogatives, the relationship between officer and enlisted man is a remarkable one, a most helpful one, and causes, I think, a Frenchman to love his army as every citizen ought to love an army that gives him protection.

I am not going to compare the French Army with the British or our own. We have qualities, Mr. Chairman, that are, of course, remarkable, and they are remarkable in the Army also. But the rela-

tionship—the disciplinary relationship—between the officers and men really might be improved upon.

The French take the discipline of their men much to heart. Justice to the enlisted man is very much on their conscience, and the first thing that a colonel of a regiment does when he comes to his orderly room in the morning is to look over the delinquency book and to go into it with the greatest of care. A man may not be court-martialed there until a quasi-judicial officer does look over the charges, and does look over the evidence to see whether there is a *prima facie* case; and such officer is not under the control of military authority either. And after a man is tried, as I have indicated, he gets this review. It should be conceded that French courts-martial, like French civil courts, do not adhere to the technical rules of evidence, for instance, and other rules of procedure, as we do.

In Italy there is established the system of appeals, it seems to me, on a much more elaborate scale than in any other country. It seemed to me too elaborate, indeed.

I discovered in Paris a book which I regarded as very valuable. It was a report made by a Norwegian judge advocate, sent by his Government to investigate the systems of military justice obtaining in all the European countries; and later he extended that to our own country and some of the South American countries. It is the only comprehensive study, so far as I know, that has ever been made of such a thing. It is old, however. But after I got back home I found there was one copy of that book in this country, and I got it from Harvard University. I have let another officer have it temporarily, and have not been able to get it back, but I wanted to assure the committee that I have read the report of that officer, and that report reveals clearly that this system of military appeals is established throughout Europe, and that the system of having a specially qualified law officer sitting with each general court-martial is established throughout Europe. That officer comments on the fact that Spain, Prussia, Russia, England, and the United States are the ones who do not have it. There, I believe, is some sort of review in Prussia—was at that time—that I am not familiar with at all. But even in Spain there is a more thorough review by the judge advocate general than there is here; and most especially does he comment on the fact that the British system and the American system make no provision for an authoritative review whatever. So that this talk about a reviewing body being a new thing, detrimental to discipline, is disproved by the fact that it is an established institution in Europe, where armies, of course, are far more significant things in government and closer to the people than they are here.

Senator CHAMBERLAIN. May I ask you if, in your visit to France, you compared the maximum penalties imposed in the French army with the maximum penalties imposed in the American Army?

Mr. ANSELL. Yes, Senator; and the French punishments are comparatively very light, indeed.

Senator LENROOT. Could you secure for us for this record a copy or a translation of the French law?

Mr. ANSELL. A translation? I could do it myself, if I could get a little time.

Senator CHAMBERLAIN. I think we could ask the legislative board for that.

Mr. ANSELL. I will try and get it for you if I can.

Senator LENROOT. All right; and will you also secure for us a copy of the British law?

Mr. ANSELL. Yes. Our War Department has not yet advanced as far as the British had advanced at the beginning of this war. During the war the British have grown quite liberal. I wish to call attention to the fact that Great Britain is in process of advancing some more now. But then, above all, why should we limit ourselves, with our citizenship of the very highest grade and our liberal institutions, to the systems of Great Britain and of Europe?

The bill that is before you I do not think need be gone through in detail, and, in any event, I have spent so much time in discussion that I can not go into it in detail, but I think we can sum it up in this way: If the committee should be, for instance, in favor of having a government by legal principle rather than trusting so much to this power of military command, they could only disagree with the bill in mere matters of detail.

If, on the other hand, they agree with the War Department and the Kernan report, for instance, that courts-martial are the agencies of military command, then really you could not agree with anything—you could not agree with the fundamental principles—of that bill, and I hope that I have made that clear.

One theory is that courts-martial are governed by military command throughout.

The other theory is that they are governed by fixed principles of law and the statutes enacted by Congress, throughout.

Now, if you believe in the first principle, why, I do not know that anybody could find any great fault with our system. I could not. If military command is to be permitted to exercise all this control, I know our men are good men, and they want to do what is right, and though they do their best, we may expect the results that we have. I disagree with the results, and I attribute them to the system that we have.

Senator LENROOT. Are there not two fundamental propositions involved? Is there not one other than you have mentioned? First, there is the unlimited control of military command, within the law; secondly, the broad discretion vested in the law, in military command?

Mr. ANSELL. Yes; I think that is true. I intended to include them both. I do not say that that is so in the sense that they have not authority for what they do under the Articles of War. It seems to me that they can do almost anything.

Senator LENROOT. Is not that a proposition quite separate from their having unlimited control of military command, within the law; in other words, unlimited discretion as to punishment?

Mr. ANSELL. Yes; they have unlimited discretion as to punishment.

Senator CHAMBERLAIN. They practically make the law as to punishment.

Mr. ANSELL. Yes; of course that is true. Congress has delegated the power.

Senator LENROOT. Yes.

Mr. ANSELL. And it seems to me never before has a legislative body delegated any such power. It is true that in this bill there are of

course means—methods—advanced that are open to disagreement. We can always disagree as to means and methods, but the contending principles I think we have got a fairly good idea of now. For instance, in this bill that I have drafted, one of the things, I believe—I speak with great frankness—that shocks the Regular Army officer, and maybe officers of the new Army, more than any other one thing, is the fact that the bill provides for the detail of a number of enlisted men on general courts-martial—three out of eight, for instance. Well now, the very moment you mention that to a Regular Army officer he at once replies, “You have taken out of the hands of the officer the power of the enforcement of discipline and handed it over to the enlisted man.” Of course he is going right back, there, to his fundamental theory that officers are the governing element and must have their way. But under this bill it must be remembered, and I call the attention of the committee to that particularly, the court is really a jury finding the facts, and the officer of the law sitting with that court is the judge. I, myself, do not believe that there is a thing to the argument that you can not intrust one of the enlisted men of our Army with a proper determination of facts; and I will go further than that and say that even if they were to determine the law, were to be judges of both law and fact, from my judgment of the enlisted men of the Army as they now are, and from my knowledge of our citizenship, I will not say that the discipline of the Army is going to be destroyed by permitting enlisted men to sit on those courts and do justice under their oaths. I do not believe that, no matter what anybody else says.

Senator CHAMBERLAIN. It is just like a jury drawn from the body of the community.

Mr. ANSELL. Yes; and it is a very high-grade one. We may call the jury a cross-section of citizenship. We get some inferior men; but surely it has got to be said that there never has been an army in any country in the world that compared with the Army that we have to-day, for intelligence and probity and everything that goes to make up character in a man that will impel him to perform his duty.

Senator LENROOT. Right there, because that is a very material point in this whole matter: You have described at great length the feeling generally existing, and the condition of caste between the officers and the men. Now, is it your opinion that when charges are made by an officer against an enlisted man, generally speaking, it would require no stronger evidence to convict with enlisted men sitting as members of the court than with a jury in civil life trying a man for a like offense?

Mr. ANSELL. That it would require no stronger evidence to convict an enlisted man?

Senator LENROOT. Yes. That is, would an enlisted man be as free to convict a fellow enlisted man upon charges made by an officer, as a jury in civil life would be to convict a defendant charged with a like offense?

Mr. ANSELL. Mr. Chairman, I believe that our enlisted men, situated as they are, would, as nearly as they could, do absolute justice, and I do not believe that they would permit the fact that an officer had preferred charges against an enlisted man to create a sort of rebellious attitude, a feeling against convicting that man.

Senator LENROOT. That is the point. Of course, I was assuming that they would try to do absolute justice; but the point would be whether there would be any prejudice.

Mr. ANSELL. Of course, you would find a man here and there; but I think that we can always say this, with the knowledge of any system or hierarchy, that the lower the man is in the hierarchy the greater respect and deference he actually has for the men above him. We can not get rid of that. The abuse of the caste system, I think, is apt to be from the higher man downward rather than from the lower man upward; and if you take a lower man and put him on a higher plane, I think he will do his duty regardless of his condition in other respects. That is, for the time being an enlisted man, *pro hac vice*, becomes an administrator of the law, does he not?

Senator LENROOT. Taking it during this war, would you say that the enlisted man did have that high respect for his officers, generally?

Mr. ANSELL. For his officers as persons, why, yes; but there were so many officers that did not do well, that did not treat them well, that did not have the fullest respect of their men, I think not. The system creates distrust.

On the other hand, if a set of charges came before a court in which there was a small sprinkling of enlisted men—they are to be chosen, of course, by the man who convenes the court, who is an officer—I should think that if those enlisted men were affected at all, as they might be, it would, nevertheless, be in the direction of that great equity which is necessary to doing all justice.

Senator CHAMBERLAIN. It would not decrease the morale, because the enlisted man would then feel that he had a man on the court who could see his viewpoint.

Mr. ANSELL. I feel strongly that it has great advantages, and that it would not be abused except as all administration is once in a while abused. But here is a man who feels that he is a part of the Army, he is trusted as a part of the Army; he has got a part of its authority upon him. Under such circumstances enlisted men would feel that their station had been very much elevated, and that they were eligible to be chosen for this high duty at any time; and the accused would feel, as you said, that he had a fair man on that court in the sense that such member of the court knew his difficulties.

Senator LENROOT. Before you get away from that I would like to ask you, at the other extreme, whether in your opinion, because a court is made up wholly of officers and the charges have been preferred by an officer, there is any tendency of the court to sustain a fellow officer?

Mr. ANSELL. I answer yes, sir; there is such a tendency. I have heard this. I have sat on just as many courts-martial as any man in the Army, and if any man has ever had a full experience in the administration of military justice it must be myself. You have this all the time. Here sits the officer, member of the court, and here is a set of charges against an enlisted man. He looks on that set of charges and what does he see? He sees, "Preferred by an officer." Then he sees an indorsement on that set of charges by the post commander, the organizational commander, to the effect, "I have investigated these charges and I believe they can be sustained. I do

not believe they can be dealt with properly other than by court-martial." That is signed, usually, by a colonel. Then he sees a second indorsement referring these charges to the court-martial, which, in effect, means the same thing, that the major general believes that these charges ought to be tried; that is, he believes the man is guilty. That is signed "major general."

Now, here come the charges. Frequently, after you have gotten in the evidence it is perfectly patent to all that the evidence is very flimsy; but I have heard this statement made, I believe literally, a thousand times, "Well, you know, there is something to this case or it would never have gotten here to us. It has come up through all these authorities." You hear officers of the Army say, "Well, if a man's charges are referred to a court for trial, you may bet your bottom dollar he is guilty."

Senator LENROOT. You think that is true to a greater extent than in civil life, where in spite of the presumption of innocence the jurymen are very apt to think that if a man has been indicted by a grand jury there is something to it?

Mr. ANSELL. Sometimes I think such may be the jurymen's vague and general first impression, but when he gets into the trial, with lawyers and the judge, too—as they must, of course—required to assume innocence until guilt is proved, no matter what they may think as mere men when they get into the box, by reason of the grand jury having functioned, before they get through with the thing I think they are universally given a mental slant toward the accused.

Senator LENROOT. I think that is true. And you do not think that is true in courts-martial?

Mr. ANSELL. I think it is just the opposite there.

Senator CHAMBERLAIN. A man comes before the court with a presumption of guilt against him, for the reason that the superior officer has said it ought to be investigated?

Mr. ANSELL. I am sorry to say, Senator, that is the truth. If you were really to change the law now in courts-martial and say that a man should be presumed guilty until he has proved himself innocent, I doubt very much if the results would be changed.

I do not mean to say that these officers sitting on courts deliberately go out to convict men, although I think we have got these traditions—these professional preachments—so well grounded in us that it is difficult for us to do justice strictly in accordance with law.

Take the case of a very splendid young man tried for an offense out in the Middle West. A brigadier general was the commanding officer and prosecuting witness. He was called by the judge advocate to testify, and a very bright young lawyer from New York—a second lieutenant—defended the enlisted man, who was a sergeant—I think a candidate for a commission. Here is what happened during the trial: The brigadier general testified against the youngster, and the second lieutenant began to cross-examine to test the credibility by the usual proper questions.

Senator CHAMBERLAIN. The credibility of the brigadier general?

Mr. ANSELL. Yes; the legal credibility I am referring to, of course. There was some evidence that the brigadier general did have it in for this man, because there were two men involved in the

same transaction, and he let one of them off and insisted on court-martialing the accused. Now, obviously there was a chance to go into the commanding officer's attitude toward the accused and toward the case generally, and this young counsel undertook to do it, and the record will show that he did it most respectfully; but when he came to about the second question the brigadier general said to him, "What, sir, do you mean by asking me these questions?" Perhaps a bit unfortunately the youngster resorted to legal language and said, "I am trying to test your credibility"; whereupon the brigadier general thought that was a reflection upon his veracity and integrity, and said, "I will not permit you to ask me any such questions that reflect upon my credibility." But the youngster insisted that he had such a right; and the brigadier general jumped up, excited, and said to the counsel, "If you insist on asking any question that is designed to reflect upon my veracity and capacity and disposition to tell the truth in this case, I will put in charges immediately and have you haled before this court."

Well, as usual in such rumpuses as that, the court was closed. You see, there was an objection made by the witness to making answer. When the court was closed everybody went out, and when they were called in to hear the decision of the court the court had decided that the brigadier general was right.

Senator CHAMBERLAIN. That is a case of record?

Mr. ANSELL. That is a case of record. I could name you the brigadier general. He is a very good man, but he just did not understand. Now that is shocking to us as lawyers. I will assure you that is not shocking to Army men. It is not shocking. I have been counsel for men too many times not to know that. I have a very distinct recollection of myself having defended a signal sergeant to acquittal—I think he was a signal sergeant—and I made a pretty vigorous and sometimes technical defense—certainly, what Army men would call a technical defense, but, nevertheless, a proper defense—and friends of mine on the court would come to me at recess and say to me, "Why don't you stop this? You know your man is guilty. You are getting yourself in dutch with this court;" and all of that kind of thing. Now, they did not mean to do wrong.

Senator CHAMBERLAIN. Practically prejudging the case?

Mr. ANSELL. Oh, yes. If a judge had told you that in a civil forum you know what would have happened. But it just shows you.

I will give you another example. A lieutenant, a quartermaster, was put to making a trap for an enlisted man out in the western department, to catch him, to see if he was not stealing some goods out of a storehouse, and he set the trap and he said that he caught the man; which I very much doubt. He preferred charges against the man. He was, of course, the prosecuting witness; and then he was made judge advocate of the court; and then he was assigned by the commanding officer as counsel for the accused, and he functioned in all capacities, prosecuting witness, judge advocate, and counsel for the accused!

When that case got to me, I said very briefly that this man had not been fairly tried, and it went back to the commanding general of this particular department, and he, as though hurt, said "The Acting Judge Advocate General is actually criticizing our system";

which of course I was, if it was under our system permissible for that man to be all that he was. In other words, your present articles of war make your judge advocate the prosecutor, and also to a great extent the counsel for the accused. If there is any one thing that I hope the committee may very carefully consider, it is that we have a judge advocate. Notice the title, "judge advocate." He is the advocate for the court, and prosecutor. He is the judge for the court. He is their legal adviser. He is also counsel for the accused when the accused has no counsel, and if the accused has counsel, he is directed to see that the interests of the accused do not suffer. Now, that sounds as though it was all for the benefit of the accused. I will assure you that it is not. We ought to abolish the judge advocate as a prosecutor and make him a real judge before that court, according to the general system of Europe, and have a special prosecutor for the Government.

Now, these cases that I have used for illustration, they are not isolated cases. They are not.

Senator LENROOT. General, if this plan were adopted, to what extent, in your judgment, would it be necessary to increase the force in the Judge Advocate General's office, with the present-sized Army?

Mr. ANSELL. With the present-sized Army, I do not think we would have to increase it at all, Mr. Chairman. You see, we would have less review up here. I would have you to get that point. We wait now until all these errors have accumulated from the bottom to the top, and then we do our best to correct; and look at the reviewing force! One hundred and eight men we have had here; and we must have a very large number now. Of course I am not connected with the department now, but I doubt if it has decreased very much. One hundred and eight lawyers, with the vast number of clerks, going all the time. They are not all engaged on this work, but a large proportion of them are engaged on it.

Senator LENROOT. What was the number of the personnel prior to the war?

Mr. ANSELL. We had 13 officers under the national defense act, and then when we expanded under the national defense act when war was first declared—you remember that filled up—we got 29 or 30, and that is our law department.

Senator LENROOT. Altogether?

Mr. ANSELL. Yes; and then when the big Army came on we ran up to 450. But Col. Weeks, as executive officer, and I worked out a scheme last October which was designed to put one law officer with each court and prevent error, if we could, right at the source; and we believed that by sending many of our reviewing officers here and putting them on courts-martial and preventing error at the source, we could get along with fewer men, and I am convinced we can get along with fewer men.

But there is another element that would work toward getting along with fewer men. We have got to do something to decrease the number of trials. It must be obvious to everybody that we have too many trials by court-martial. Now, a man may do something, but every time that a man does something in violation of the law he should not be haled before a court.

Take the methods of investigation. I say if you require, as this bill does require, the most thorough investigation before a man shall be

court-martialed, and then you require the law officer, who is already on the staff of the convening authority, to go into the evidence and say that the evidence is sufficient to constitute a prima facie case, and then go into the charges and determine their legal sufficiency, I say this, Mr. Chairman, based upon my experience, and I notice that Gen. Wood agrees with me in this—and I really believe that up until the time we got into this controversy nine out of ten Army officers would have agreed with me; probably not now, because we have all gotten into a sort of controversial mood or excited—that you can reduce by more than 50 per cent the number of trials in the Army, which reduction in and of itself will tend greatly to the benefit of discipline by requiring these thorough investigations and legal tests before we arraign these men before courts-martial.

Senator LENROOT. Did I understand you to say that you thought after we got to a peace basis, 30 men in that office would be sufficient to carry out the duties?

Mr. ANSELL. I never thought that 30 were sufficient, because we relied upon getting judge advocates then by detailing men from the line.

Senator LENROOT. Yes, I understand. That is what I am getting at.

Mr. ANSELL. Oh, no. But I say this, that for the same number of men we had before the war, I mean with the same sized Army and the same number of men that we used on legal work—they were not all judge advocates—I believe we can do this same task. But it would be necessary to decrease the number of courts-martial as we would decrease them under this bill.

Senator LENROOT. The number that would be required would depend very largely upon the policy that we would hereafter pursue with reference to the consolidation of Army posts, would it not?

Mr. ANSELL. Yes. Of course the court-martial system does largely depend upon that; but it is not indissolubly connected with it. There is no reason why a court-martial should be sitting at each post. I think it is bad to take some 13 officers, with the stenographers, clerks, the attachés, and all that, and have them sitting in each Army post. Of course if an Army post had a division there, that would be an economical legal unit; but if I were a major general commanding a department, I would not have all these courts-martial sitting in all these posts. It is not necessary. I believe, just as much as I am sitting here, that an itinerant court would have been one of the most valuable things, and certainly on the battle front. Take the men to be tried; they might be partially sick, or wounded. With a good Judge Advocate, a law officer, a prosecutor, if you had let him go from place to place and let them try these men there, I believe that would have been a good thing. But, of course, under the present system, every little commander has his court-martial.

Senator CHAMBERLAIN. If he is the commander of a garrison he has his court?

Mr. ANSELL. Oh, yes.

Senator LENROOT. Your bill does contemplate that?

Mr. ANSELL. The bill permits the President himself to convene courts-martial and give them any jurisdiction with respect to territory that he pleases. But if we did ever once get this system of law-controlled courts, with the commanding general largely cut out of it,

of course there would not be, Mr. Chairman, the same necessity to resort to a court-martial at every little place.

Senator CHAMBERLAIN. That is, you mean a general court-martial?

Mr. ANSELL. A general court-martial.

Senator CHAMBERLAIN. If we had one general court-martial.

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. We have the Eastern Department and the Western Department—

Mr. ANSELL. I was up there as judge advocate at the Eastern Department, and we had scores of courts going at every one of the little stations, taking up the time of the officers from training their troops. It is ridiculous, but it is according to the old army traditions. We have not moved a peg.

Now, the Confederacy departed from this system immediately after the opening of the Civil War. They had what, we must confess, was a rather better military system than the Union Army. They broke away from this system almost from the beginning.

Senator CHAMBERLAIN. They realized the character of their citizenship down there. They would not have stood for it, I think.

Mr. ANSELL. Of course I think that is perfectly true. We all understand the differences between the two armies.

Senator CHAMBERLAIN. At the first of the war?

Mr. ANSELL. Yes. It is a very important matter.

Senator CHAMBERLAIN. I will put this question to you: There are four departments, the Eastern, the Western, the Central—

Mr. ANSELL. I think there are more now. We have the North-eastern and the Southeastern Departments.

Senator CHAMBERLAIN. There were only four departments. Now, with one general court, why could not that court function in each of these departments, and would it not become more efficient?

Mr. ANSELL. It would work out beautifully, I have no doubt in the world.

Mr. CHAMBERLAIN. Would it cause delays and long imprisonment of men?

Mr. ANSELL. No, sir.

Senator CHAMBERLAIN. They now keep a man confined sometimes four or five months before he gets a trial.

Mr. ANSELL. After all, when you make an officer of the Army realize that he is governed by a legal system, you are going to get a good result. Officers of the Army are not lawless men. When a court sits, they are going to do their duty.

Senator CHAMBERLAIN. Civil courts do that very thing; they go from one district to another and try cases.

Mr. ANSELL. Yes. I wanted to call attention to one phase of the placing of enlisted men on that court, because you will hear more of that later. It is that which has led to the suggestion in the Kernan report, as you may have observed, that this proposition is one of bolshevism. I would like to sum up with respect to this matter and say that its main provisions are that a commanding general can not court-martial a man at will. These two things must have been done; his law officer must have said, "The investigation that has been made has produced evidence that justifies a trial"; that is, prima facie proof; and, too, the law officer must have said that the charges

as drafted are legally sufficient to allege an offense against the Articles of War.

Now, then, after that the commanding general may or may not, as he pleases, court-martial the man.

Second, an officer may not prefer a charge against a man simply upon the general obligation of his office, but he has got to do so under the special obligation of an oath, on proper information. That will greatly reduce the number of charges.

Then, when we come to the trial, the man is entitled to his challenges, both for cause and peremptory challenges, and in the usual cases to challenges to the array. But, of course, in the case of challenges to the array the commanding general has the entire Army under his command to create a new panel with.

When we come to trial, the principal thing about the trial is that there is a judge and there is a jury, in fact.

Lastly, the commanding general does not confirm the proceedings, but they come to this court of appeals; and there is a court of appeals.

Now, as to the details, I presume gentlemen can dispute about them. I know they can.

I wanted to invite the attention of the committee to the Kernan report. I have studied the report with some considerable thoroughness, though not the actual amendments that they have suggested to the Articles of War; but it is obvious from the character of the report that the amendments that they suggest are but slight changes of the existing system. Observe that their great text, Mr. Chairman, is that this proposition here in the Chamberlain bill, or the bill that I drafted, or the propositions that you have heard me advocating here, will result in the transfer of discipline to the hands of lawyers. "The transfer of discipline"; that is the way it is put.

Now, let us just examine that. Let us see where a lawyer comes in. A lawyer can do no more than say that there is a *prima facie* case here; that as a matter of law the charges are legally sufficient. Where does discipline come in there? Are not those questions inherently questions of law? Are the charges good, and is the evidence sufficient to justify trial in accordance with the lawyer's well-known conception of what evidence is sufficient? He has got to know the elements of the evidence and the kind of testimony that it takes to prove it. Is that not a question of law?

Now, let us see what the opposite to that means; and it reveals the whole situation. The opposite side is this, that a man ought to be tried if the commanding general so wills it, even though the charges are not, as a matter of law, legally sufficient—that is true; that is their contention—and that a man ought to be tried if the commanding general so wills it, notwithstanding the fact that the investigation has not revealed sufficient evidence to justify the prosecution.

The statement that this bill or this proposition transfers discipline to the hands of lawyers is not true; it does no more than transfer pure questions of law to the hands of lawyers.

Now, when we come to the trial, I am going to quote the British barrister that I once referred to, away back there in 1849, Warren, and I am going to quote this Scotch barrister, writing in Blackwoods, and then I am going to appeal to our common sense. When we take from 5 to 13 of these unskilled tryers, these military men, who certainly have not acquired any capacity for judicial determination by

reason of the fact that they wear shoulder straps, and make them judges of both law and fact, may we not expect all sorts of errors of law? Would you trust 5 to 13 unskilled Army officers to determine questions of law any more quickly than you would trust 5 to 13 pure lawyers, and nothing else, to come down here and make the plans of the Army for an invasion of Germany or Mexico, or some other strategical military proposition? I would not. And it is not logical and it is not common sense; and we have never done it in any other institution of our Government. What is there about an Army officer—

Senator LENROOT. May I ask you here, so that I can follow you a little more intelligently: Do I understand that the only jurisdiction that you propose to confer upon this court of appeals is to review for errors of law?

Mr. ANSEL. To review for errors of law. I think that is the jurisdiction that is conferred upon all courts of error. They are not to retry the facts. The facts, once determined, I think should be permitted to rest, when they are legally determined under instructions by a judge, just as facts are determined in lower courts of the United States.

Senator LENROOT. In your bill, after reciting the review for the correction of errors, in article 52, the language is as follows:

Said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; and such power of review shall include the power—

(a) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of a lesser included offense.

Mr. ANSELL. Yes.

Senator LENROOT (continuing reading):

(b) To disapprove the whole or any part of a sentence.

* * * * *

And said court of military appeals shall have like jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committee and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence.

Now, it would seem to me that that empowers this court of military appeals to pass upon the facts as disclosed by the record as well as the law.

Mr. ANSELL. Not prospectively, because the last clause that you have read there was giving it a retrospective jurisdiction, to try to correct what had been done.

Senator LENROOT. That is true as to that, but in the first paragraph I read you say such powers shall include the power to disapprove a finding of guilty.

Mr. ANSELL. Yes; where it is a matter of law, and that is the only case where you could.

Senator LENROOT. I do not think you say so. It seems to me that language would permit the military court of appeals to substitute its judgment for the judgment of the court-martial upon the facts.

Mr. ANSELL. Of course, we are following there rather the existing law governing the convening authority, and it may be that in deference to that language I may have gone afield. I have not read the bill recently. I am inclined to think you will find it so upon thorough study that if the court should find—let us say that the man was charged with murder and convicted of murder—if the court should find that the evidence as a matter of fact was sufficient only to sustain a charge of manslaughter—that is, the malice was not proved—then they would be permitted to substitute the finding of manslaughter for that of murder as a matter of law.

Senator LENROOT. Yes; that would be a matter of law.

Mr. ANSELL. Yes; or if in any case the evidence failed to establish a particular element of offense, the absence of which specific element would reduce it from one grade to another, then the court would be justified in reducing it to that grade.

Senator LENROOT. I want to thoroughly understand you there. If the bill does not confine the jurisdiction of the court to the review for errors of law, it is your view that it should be so confined?

Mr. ANSELL. It is.

Senator LENROOT. And that it should not permit the court of appeals to substitute its judgment upon the facts for the judgment of a court-martial?

Mr. ANSELL. Only when the judgment upon the facts becomes a question of law.

Senator LENROOT. Oh, yes; I understand that; when the facts—

Mr. ANSELL. Are not reasonably sufficient to sustain any judgment.

Senator LENROOT. Certainly.

Mr. ANSELL. On any particular element of its finding.

Senator LENROOT. Then, one other question: If the sentence imposed by the court-martial was within the jurisdiction of the court-martial to impose, upon a proper finding of guilt, it is not your intention to permit the court of appeals to revise that sentence because it may think it excessive, although within the jurisdiction of the court?

Mr. ANSELL. Not at all, sir. I would not favor a retrial of the facts, nor would I favor permitting this court to substitute its judgment as to what the punishment upon a proper finding of guilty of an offense ought to be.

Senator LENROOT. That is what I wanted to understand.

Mr. ANSELL. In other words, I would do no more than to confer upon this appellate court the usual power that an appellate court has to correct for errors of law, except that we get a sort of modification in military procedure when we have so many offenses that are composed of included elements, as in civil life we have the various degrees of murder and manslaughter, and in the military procedure you have desertion and the lesser included offense of absence without leave, and so on. We take larceny; it may not be larceny, but it may be prejudicial conduct—trespass. The intent to steal may not be there. We have many offenses of that sort that are rather peculiar to the Military Establishment. Now, I insist, Mr. Chairman, that the statement made in the Kernan report that the effect and the purpose of the proposition that is advanced by that bill is to transfer discipline to the hands of the lawyers is

not correct. It does no more than transfer the determination of pure questions of law to the lawyers; pure questions of law, and nothing else.

Senator LENROOT. That was the point I had in mind in my questions, General.

Mr. ANSELL. Yes; I quite appreciate that. I believe that was so in the minds of myself and of every other officer who participated in the drafting of that bill. We consulted jurisdictions of courts, and the English systems, and all of that, and we have the language there; but I again say, having declared what our purpose is and the intended effect, what we want to do is to create a court of appeals here that will correct for errors of law; and we do want to give to this judge, who sits with the trial court, the power to control that jury on questions of pure law; and that is the only way, I think, that the discipline of the Army can be made a discipline regulated by law. The discipline of the Army now is not regulated by law, because the disciplinarians are judges of both the law and the facts, and they have no standard in the code. Their argument is an argument *ad hominem*. They say that the line officers should be entrusted with this great power of discipline. They take this abstract and rather resultant term, discipline—of course discipline ought surely to be a result of the application of law of some kind—they take that abstract term and say that should be left for the fighting man. Of course, the Constitution left it to Congress to prescribe the rules of discipline, and those rules are law. Let discipline be left to the fighting man, but let it be discipline governed by law.

Now, is the line officer, the fighting man, any more competent to determine these legal questions? Of course, they divide the Army into two classes, the fighting man and the legal man. But in such armies as we are going to have, are we justified in making that hard and fast distinction between the law man and the so-called fighting man? I will assure you that I saw the law man in the battle line, in quite dangerous positions, and I saw many fighting men as safe from the zone of operations as we are, sitting right here. Let us look at this argument straight. Gen. Pershing himself, commanding general of the A. E. F., was in no more danger than you are here, except when, occasionally, he did go to the battle line to inspect some organization. The headquarters of the A. E. F. never saw an air raid. It was not in the danger zone half as much as Paris was. It was absolutely free from it, as, in fact, it ought to have been; and the very general who is chairman of the committee that made this report, Gen. Kernan, was sitting away back at Tours, 150 or 200 miles from the nearest gun, and he never heard or saw a gun.

Now, are we not paying too much attention to mere labels? We had 200,000 officers in this Army. Of the old Regular officers there were somewhere between 8,000 and 10,000, and we will presume that some two or three thousand of them had heard a bullet, and that is about all. Then we took the other 190,000 from civil life and we divided them up into line and staff; and one lawyer belongs to the line and another belongs to the staff. Now, Mr. Chairman, I am not going to concede that merely because you label this new-made officer a "line officer," he becomes, *ipso facto*, qualified to pass upon all these questions of discipline so-called, unregulated, or unadvised,

or uninformed, or anything else. It does not get anybody anywhere. But what this report is really predicated on is the sharp distinctions between the professional and the nonprofessional officer, I think. They are talking about the old-time army, where the man who served with troops was supposed to be this rough-and-ready soldier who was ready to fire at any minute, who served with his troops all the time, and who knew nothing but his troops. Well, I say I think one of our great mistakes is that we adopt and maintain in time of peace a system that always falls down in time of war because it was not made for war. Our Army systems are not made for war, that is certain. Every time we have a war they have to change the whole scheme of things, and if we are going back to this system that they seem to think was fine for the Regular Army—I do not, but they seem to think so—this old-type sort of mercenary establishment, the old school, then when we come to war again I will assure you that the Senate and the House will try to remodel the thing after war has begun.

Senator CHAMBERLAIN. Has this archaic system of the Army had much to do with the prevention of young civilians enlisting in the Army?

Mr. ANSELL. I have no doubt of that. I believe I have always been a little closer in touch with civil thought, for one reason or another, than the ordinary orthodox Regular Army officer. I am orthodox enough. The time will come when your boy and mine are going to war. I think about it a great deal. I want mine to go to war, and they are going; but I shall feel very much better satisfied with any system of military instruction that you are going to have if I know that when these youngsters of mine or yours come to camp for instruction or for battle training they are going to be met rather sympathetically, and by a set of men who know that they are citizens, that they are not this professional type of soldier. If one should go absent without leave for two hours, I do not want him sent to the penitentiary or to a disciplinary barracks for 25 years.

Senator CHAMBERLAIN. I know that the civilian point of view has been obtained from observations at near-by garrisons. A young civilian goes there, or the father or mother of a civilian goes there, and finds your soldier doing menial duty, waiting upon an officer, holding a horse at the door, standing around until the officer is ready to go, and the general impression is that the soldier is acting as a servant, and they go away from there and report that to the civilian population. Have you not found that so?

Senator LENROOT. Absolutely.

Mr. ANSELL. While I was at West Point there was a very decided effort made there—I can not say that it succeeded, because I can not recall—to bar the enlisted man, when accompanied by a woman—that is, a soldier when walking with his girl or a married soldier with his wife—from the front walks, and to make them go through the alleys. I served right here at Washington Barracks as a mere boy when this order was issued. During the parade, the daily ceremony, everybody from Washington could come there, everybody, and could stand on the front walks and observe the parade, but the soldiers had to confine themselves to back alleys, etc. Now, that is not going to do. I will tell you this, West Point is one of the great-

est institutions in this world, it is second to none as a military institution, but it has its very serious faults. It inculcates these wrong views, I think, in our officers. We West Point men do establish the system, the standards, of our Army. There are only about 30 per cent of us of the old Regular Army, but for reasons that may be well appreciated, we establish the standard of the Army. The others conform.

Now, I can recall how this thing struck me as a cadet. Here was an enlisted man, well-dressed—because they have to be well-dressed there—soldierly, walking a sentry post up there, as you have seen. They guard the institution on the river front. I remember, when I was a fourth classman, asking an upper classman for some direction, and he said, "Go ask that bum." Seeing that I did not know what he meant, he said, "That bum soldier over there"—the enlisted man walking the post. It was quite common, I found out afterwards, for the young gentlemen at the Military Academy in training to become officers to refer to the enlisted men as "bums." I understand that it is claimed that the word is a derivative of "bombardier," and they were bombardiers who formerly guarded the post; but I can only say that too frequently the suggestion was of the lower order of things. Now, there ought not to be that kind of spirit. Of course, we are not talking about social equality and that sort of thing. That is not the point. Of course not. But we want a considerateness on the part of the officer for the enlisted man and a complete realization that an enlisted man is doing, at a far greater risk and disadvantage, just what the officer is doing; he is serving as a citizen and performing a military duty as a citizen, and we ought to look out for him. As I say, the whole fault with the Kernan report is that it does not visualize the fact that our armies are and must be armies of citizens.

Now look at this report, gentlemen. It bears careful perusal. It is well written, succinctly stated. But do you notice that they say it was necessary to have all these courts-martial and all these long punishments because our men were green men and it was necessary to whip them into shape as soldiers in just a few months? Of course, it was necessary to make the best soldiers out of them possible in a few months. But does not the whole report proceed upon the predicate that we got discipline through terrorism? Of course it does. And you do not get discipline, in any rightful sense of that term, through terrorism. Whatever discipline we got, I will assure you, into the Army of the United States during this war, was discipline that was based upon a high regard for citizenship. The quality of the American Army, its fighting quality, was an incident of the appreciation of its citizenship. The Army of the United States in France had a spirit that was second to the spirit of no army that this world has ever seen.

Now, you can not make anybody believe that that spirit was put into those men in the few months' time they were in training camp. It was not put there by terrorization. It was an antecedent, based upon moral considerations and appreciations; it was not pumped into them in a few months in the training camp.

Senator CHAMBERLAIN. Do you remember the story of the little sergeant major from the Argonne, who said that a man told a false-

hood if he said that he was not afraid when he went over the top; and he said, "Whenever I felt afraid of getting afraid, I thought of the folks at home"?

Mr. ANSELL. Yes, Senator. I am not going to confess that the thing that makes me stand up in front of a bullet is the fact that somebody has terrorized me, Senator. That is not so. It is a different quality from that.

I will lay it down as a fundamental proposition, and I think everybody here will agree with me, that you do not get discipline through fear. Of course you have got to punish men, but to set out to get discipline by trying every man who has violated the regulations, and giving him a maximum punishment, will never do. The higher the appreciation the soldier has for his citizenship, the closer he sticks to his duty. Our successful soldier will ever be actuated by patriotism rather than the fear of his officer. When we come to rely upon terrorism to win battles, then we shall have dropped to the point where we have got, in fact, an army of cowards, who have never won anything yet.

Just see how far these Kernan gentlemen will go, Mr. Chairman. They say that disobedience of orders is disobedience of orders regardless of the character of the order, the time, the place, or the circumstances of its commission. Now, is that reasonable? Are we going to legislate upon any such proposition as that? Is Congress going to permit the Army to be governed upon any such lawless, senseless principle as that? We have these cases. A young soldier guarding a park of artillery down in southwest Texas, exhausted, and having just come out of the hospital, still sick, sat down on post, as he ought not to have done, and fell asleep. The nearest German—so far as I know, the nearest enemy—was 4,000 miles away, with the Atlantic Ocean between. To be sure, it was necessary to guard those guns. It would probably be far better done by watchmen, but we can train soldiers that way. Now, to sentence that man to death, Mr. Chairman, simply upon this hard and fast principle that sleeping on post is sleeping on post, no matter where it is, I say is inconsistent with our natural sense of justice and what military necessities require.

They say that this boy who would not give up his cigarette must be most severely punished, because disobedience of orders like that will grow like canker or gangrene throughout the military establishment. Now, that sounds all right; but it is predicated upon the idea that we have got a set of people who are set like tinder, ready to catch fire from every bad breeze that blows in an army—and you know that we have not! Men do not want to disobey orders. Take that same man up against a German, after he has been given some instruction as a soldier, and if you went and told that man to charge the German, or to shoot at a German, or to advance on a machine-gun nest, and then he deliberately and knowingly and intentionally refused to do it, why, to say that that case is such as that case was up here in the New Jersey camp is quite absurd.

They speak contemptuously of a soldier, however new he may be in the Army, following the natural human impulse and inclination, or human sentiments. They say, and they are quoting the War Department for this, "Why, are you going to let a man go home to see

his sick mother, or a dying brother, and let him stay two or three days, and then not sentence him to death when he comes back? If so, the Army will disintegrate, and the instinct will be far greater, when you get in front of the Germans, not to charge a German trench." In other words, let a soldier follow the ordinary human impulse or sentiment in the least degree, you must not take that sentiment or impulse into account in the least degree as an extenuating circumstance. Sentiment is apt to be good; it should not be crushed out; it should simply be directed.

I do not think that our Army can ever take its proper place in the affections of the people if you are going to have a set of Army officers who are strict adherents to the theory that if I am impelled to go home to see my dying mother, and those are the facts, conceded, after I get back I should be shot, and that the great call of the human heart is not to be considered as an extenuating circumstance. That is too hard and fast. I have already told you that this report largely consists of a legal argument to the effect that you gentlemen—I mean the Congress of the United States—can not create a court of appeals. Now, consider the clause of the Constitution itself, and I do not think that the question admits of any dispute or argument. You have just as much right to create a superior military court as you have the summary court. You have just as much right to create this military court of appeals as you have the general court-martial. And certainly everybody has known from the beginning, and the Supreme Court of the United States has said time and time again, that courts-martial of the United States are purely the creatures of Congress, as you make them, whatever you make them. You may have one kind of court or ten kinds of court; you may vest final jurisdiction in the summary court or the special court or the general court, or you can vest final jurisdiction in an appellate court. Really, that is not worth arguing, although seven pages of this report is taken up with that proposition.

They say that you must not divorce discipline from the hands of the commanding general. I have never insisted that you should. I have only insisted that the disciplinary measures that are to be handled by a commanding general should be regulated by the law of the land.

Now, that whole report is right in theory with that celebrated editorial that appears in the Congressional Record of February 15 last, I think it was, taken from the Chicago Tribune, read into the Record by the present distinguished chairman of the House Committee on Military Affairs, evidently expressive of his views, at the request of the Judge Advocate General of the Army of the United States. The editorial is very brief, indeed, but it speaks a volume. It is the text of this Kernan report; it is the text of the War Department attitude. I say that this committee's report proceeds exactly along the line of this editorial, which I believe was expressive of the views of the gentlemen in the other House, and which I want to read here, because it is brief. [Reading:]

ARMY DISCIPLINE.

"For I am a man under authority, having under myself soldiers; and I say to this one, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it." (St. Matthew, vii, 9.)

When a soldier goes absent without leave, deserts his post of duty to see a dying father, he does so because his own personal desires are stronger than his sense of responsibility to his country. It may be a hard thing to give up seeing a dying father, but it is a harder thing to give up running away in the face of the enemy.

That is what military justice is about. The sole preoccupation of an Army, wherever it is, is to train its men and keep them trained to obey the will of the commander under the most trying possible circumstances, and serve the will of the nation. If disobedience had been tolerated in the United States, our Army in Europe would not have captured the St. Mihiel salient nor fought six weeks in the Argonne.

The reason that the National Guard made good in this war and failed in our previous wars was that from the time it was inducted into the Federal service it was subjected to Regular Army discipline. In previous wars it kept its own "discipline."

An Army, to be successful in the field, must from the moment it begins to train at home have absolute control of its discipline. The commanding general is everything. He must bear the three keys. He must have final control. He must be the judiciary, the legislature and the executive. If he were not, he would not have an army. He would have a collection of armed individuals.

It so happens—and I looked it up—that the text of this editorial is the statement made by the centurion when he came to Christ at Capernaum and apologetically asked Christ to save his child, saying, "I represent the power of the whole Roman Empire, and yet over these moral and spiritual things I have no control, and you have so much." That was the Roman theory, to say to the soldier, "Go, and he goeth," and to another, "Come, and he cometh;" and the centurion had absolute control. We found the Roman theory in the German Army; hard and fast iron discipline. And yet that German Army was fairly pitted—more than fairly pitted—against the liberal armies of the world, especially our own, when our Army was not the best equipped army—when it was not the best led army from the standpoint of professional soldiers; but we saw that kind of discipline pitted against this higher appreciation and conception that an American soldier has of his duty as a soldier, and we saw the result.

We overcame the German troops in front of us, not because we had had this long system of Regular Army training and this hard and fast discipline, but because of these other qualities that I have referred to; and we succeeded, to an extent, in spite of the system of discipline that we had and not because of it. We succeeded, in a word, because of the American spirit that those men took there with them. It was because of the spirit and not because of this hard and fast senseless discipline that we won against the Romano-German methods.

The gentlemen again in their report referred to the fact that the new Army officer is responsible. Responsible for what. I do not know, because the report is an approval of the result of the administration. But as I said the other morning, conceding harsh punishments, the statement is not so; and even if it were so, we ought not to have a system that permits a new officer to abuse his force. It should be controlled by law rather than by the untrained judgment and unrestrained power of this new man.

But I said that the fact was that the convening authorities were not untrained officers; they had the authority; and they ought not to pass the buck to any new officer.

The Kernan board say that they have actually heard from 255 officers, and that rather more than half of those officers approved of

the system, and that the old officers in the service in large percentage approve of it, and that the other officers go from absolute, flat disapproval to a mild approval or disapproval. Of course the gentlemen of the Regular Establishment who have been trained to this system do approve in large percentage, but this is a fact, and is one that speaks loudly: You take an officer at his retirement time, or an officer after he has retired—a Regular officer—and see what he says about it. You will find him quite a liberal-minded man. He has got back into civil life; he is no longer in the hierarchy and subject to it; he has taken a calm survey of his life's work. If they have 255 letters from officers of the Army at large, I have got seven times that many letters from officers of the Army at large and very nearly that many letters from officers of the Regular Army on the retired list and who are about to go on the retired list, saying that something ought to be done about this system. The board say that it is noticeable that the gentlemen who have been on the battlefield, out of these 255 officers, advocate the present system because they have seen how necessary it was to have this German hard and fast system applied to our troops. If that is so, if they saw on the battlefield how necessary it was, they must have seen it through observing the derelictions of our men. Now, we did not have that kind of wholesale dereliction on the battlefield. I went over to Europe and commanding generals there argued with me that they had to have more power to shoot men, and I said to one of them: "It seems to me that I must infer from your insistence that for the first time we have an army with a very considerable number of cowards in it." "No, no; nothing of that kind." "Where, then, is the necessity for this thing?" Then they began to tell me about our allies, how our allies took men and stood them up and shot them before breakfast. And I investigated our allies' administration in that respect, and it did not bear out that statement at all. When I came back from Europe, I said to the Secretary of War that an enlisted man of our Army has poorer protection than the enlisted man in any army with which we were associated. It is true. A man could not be executed in the French Army by a commander in the field in this ruthless way. It was passed upon by the supreme authorities of the land.

I have already adverted to the fact that the report concludes, following Col. Wigmore's letter, as you remember, that if you loosen up on this system of discipline, as you call it, you are bound to have bolshevism. That is the bugaboo now. There will never be a bit of reform or a bit of progressive legislation proposed but that the people who insist on being static will label it bolshevism.

Senator CHAMBERLAIN. The only indication of bolshevism in the American Army that I have seen comes from the mouths of the men who have been unjustly punished in Europe, and they are very bitter at the treatment they received.

Mr. ANSELL. Of course, if it is as reactionary as I have said it is, and there ever should be bolshevism, I think logically we could attribute the bolshevistic spirit to the oppressive treatment. Now, the idea of Mr. Wigmore coming along, and in the spirit which this report adopts, saying that that is the way they have in bolshevist

armies, and that this will lead to bolshevism. Does anybody believe that bolshevism, or whatever else it is indicating lawlessness in Russia, is due to too much liberalism and too much democracy, to too high a regard upon the part of the officers of their Army for the enlisted man? Is bolshevism, this great upheaval, or whatever it is, traceable to an overdose of liberalism or is it, indeed, traceable to the fact that it is a break up of the old reactionary system that they have had there?

It is not a fair argument to come here and argue against the bill that if you require discipline to be regulated according to law, the consequence, must be bolshevism. It is one of those arguments *ad hominem*, and a foolish one at that.

I got a letter yesterday from a New York lawyer. It was in reply to a postal card I had sent out asking the American Bar Association would they please be careful, in passing upon the report of that bar association committee, so that the American bar might not be said to espouse the retention of this system, and this New York lawyer wrote a letter. He said, "Oh, I will admit that lawyers have a great influence; but it may not be in the direction you want it in. We have got bolshevism on every hand, and the whole country is lawless, and we have got to come out and show people, and if necessary we have got to hang them. There is going to be a terrible time, it is certain. That is the line of reform we want in this country, and more and more needed."

Well, that is his view of it. When I was discussing point No. 1 the other morning, I had started on showing this committee the spirit with which that revision of 1916 was undertaken. I had put in one exhibit, but I was switched off, as I have been very frequently—switched off of my own accord—to another subject, before I put in another exhibit, which I would like to do now. I think it is very brief. It is just some statements made by the Judge Advocate General and the Secretary of War before the committee, to show conclusively that they rejected absolutely the liberalization of this system at this time, as they still do.

I desire to thank this committee for their extreme patience in hearing me, and their extreme courtesy at all times. I have had a full and fair hearing, and I want to thank you for your interest and attention.

Senator LENROOT. We are very much obliged to you.

Senator CHAMBERLAIN. May I suggest the names of some other witnesses whom we would like to hear?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. There is a gentleman here from Detroit, who served as an enlisted man through the war, and had some experience of court-martials. Can we hear him on Monday?

Senator LENROOT. Are you going away, Mr. Thomas?

Mr. THOMAS. I have been very anxious to go. I have been waiting over, Senator, in order to make my statement.

Senator LENROOT. On Tuesday, then, we will hear you.

Senator CHAMBERLAIN. There is also Col. Chantland, of the Department of Justice. Will you hear him?

Mr. ANSELL. Mr. Chantland is away, and will not be back for over a week.

Senator LENROOT. We will hear you, then, Mr. Thomas, on Tuesday at 10 o'clock.

Senator CHAMBERLAIN. Mr. Thomas, I would say, did not come here to testify. He was here in Washington on some business, and I met him and was talking to him. I thought the committee would be interested to hear him.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned until Tuesday, September 2, 1919, at 10.30 a. m.)