

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

THURSDAY, SEPTEMBER 25, 1919.

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

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m., in the room of the Committee on Appropriations in the Capitol, Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Chamberlain.

STATEMENT OF LIEUT. COL. W. C. RIGBY—Resumed.

Senator WARREN. We shall proceed, Colonel, and take up the matter where you left off yesterday.

Lieut. Col. RIGBY. I will formally offer at this time, if it meets the approval of the committee, a copy of the statement of which I spoke yesterday of Maj. Gen. Childs, of the British Army.

Senator WARREN. That will be printed in the record.

(The document is as follows:)

APPENDIX.

68 GOLDEN HOUSE, LONDON, ENGLAND,

Memorandum for Maj. Gen. CHILDS:

Before leaving for America it is desired to obtain the following papers and documents to take with me to be submitted to the War Department, to wit:

1. Verification, over your signature, of transcript of interview heretofore had with you, with such revision and corrections, if any, as you desire to make.

2. Copies of statements of commanding generals with reference to field punishment No. 1, mentioned in your above-referred-to interview to be furnished to us. Maj. Chichester informed Col. Rigby that he had mailed this document to our office at 68 Golden House Monday last, a week ago, but it has never been received, hence a duplicate of same is requested.

W. CALVIN WELLS,
Major, Judge Advocate, United States Army.

WAR OFFICE, WHITEHALL, S. W. 1.,
August 9, 1919.

DEAR MAJ. WELLS: I return to you as promised the typescript, as also the copy reports which you desired.

In regard to the interview, it is difficult to exactly reconstruct the conversation which took place, and the report is, of course, somewhat disjointed, as some of my remarks are obviously in reply to questions put to me by Col. Rigby, such questions being left out. It can not, therefore, be considered an accurate report of what I said, but I expect it will be near enough for Col. Rigby's purposes.

Please convey my kind regards to Col. Rigby.

Yours, sincerely,

B. E. W. CHILDS.

Maj. W. C. WELLS,
Judge Advocate, United States Army,
68 Golden House.

July 10, 1919, at 10.45 a. m., Lieut. Col. William C. Rigby, judge advocate, accompanied by Maj. W. C. Wells and stenographer, visited the War Office, London, England, and had the following interview with Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B., deputy adjutant general, British Army:

Lieut. Col. RIGBY. I desire a recorded interview with you, getting your advice as to certain matters of court-martial procedure based upon your experience, especially in this war. If agreeable, I would like to know your views on the practicability of having noncommissioned officers and privates on courts-martial for the trial of soldiers, as has been proposed in a bill introduced in Congress by Senator Chamberlain.

Gen. CHILDS. My view of that subject is this: I admit that I do not know the army as I knew it before the war. I do not know the new one, but we are now rapidly going back to the conditions of the old one, the one we had before we went to France. I therefore do not know the rank and file of the new army, as I have never served with it and it has not been under the same conditions absolutely. I say, therefore, when I give my views, they must be accepted with the knowledge that I am speaking without experience in the new army. I do feel, though, that my previous experience teaches me this: A soldier's life is very intimate with his fellow soldiers; and sometimes in a company there is a man that gives trouble, and that is most unfortunate. My experience with soldiers is that in a well-run company there is an understanding between officers and men and you do not have trouble. As I was saying, in a well-run company the feeling of comradeship is so great, and regimental feeling so great, the affection between all ranks so great, that the man who gives trouble or commits crime is very unpopular, whatever the rank of the man may be, whether a noncommissioned officer or a private soldier. So if noncommissioned officers sat on courts-martial and there was a conviction of a popular soldier, it might be considered unjust and would be unpopular, and this man on the court would never want to be on the court again. The men—the old soldiers—had ways in which they made their displeasure felt, and in the interests of the army I would be opposed to a court-martial being composed of anything else but officers. The officers do not live in the barracks with the men but live by themselves, and there you have the dividing line between the officers and private soldiers.

There is no association between the two, except the associations in our army in sports, games. It is a sort of an unwritten law. Of course, to go out shooting you take your servant. I do not mean that. So it is anywhere. But even in the games and sports played, I mean, there is that line between them. But answering your question, I do not think it wise to have any other than officers on the courts, because, as I said, the noncommissioned officers are constantly in association with the men, and, except the sergeant in our army, they sleep in the same barracks. Corporals and lance corporals sleep bed by bed with the rank and file, and, as I say, they would strongly object to mixing up with the punishment of their fellow men.

Lieut. Col. RIGBY. Has the practice of having soldiers on the courts ever been in vogue in Great Britain?

Gen. CHILDS. No; not to my knowledge. I think it would be most unpopular in this army. I mean the men would hate to mix up with the administering of punishment. They would not like it. It would not appeal to them. If a fellow was convicted, the soldier member of the court would be unpopular in the regiment. He would be asked why he did not stick it out. He might have voted for an acquittal, but to keep his oath he could not tell it, and so on.

Lieut. Col. RIGBY. Do you think it might have an effect on the severity of the sentences to have soldiers as members of the court? What do you think on the subject?

Gen. CHILDS. It entirely depends on the nature of the affair. If a man who commits an offense is a damned nuisance all around, he goes into the guard-house, and men of his own regiment have to guard him, and feed him, take him under escort to the latrine, and so on, and have to parade him. He is a damned nuisance. A man in the guardhouse takes another man for a guard, a soldier, perhaps, who has his week-end pass. A fellow gets into trouble and he is taken as a guard. The man is damned unpopular amongst the men. Not with the officers, but with the rank and file. I think myself you would get very severe sentences if you put noncommissioned officers and soldiers on a court.

Lieut. Col. RIGBY. And you think it would make sentences very severe?

Gen. CHILDS. Yes; I think that to have soldiers as members of the courts would cause the sentences to be (1) very severe, (2) would make the life of men who sat on courts unbearable, and (3) that the men would strongly object to mixing up with punishments. They would like to play football rather than sit as a member of a court.

Lieut. Col. RIGBY. Another thing, your practice as to preliminary investigations prior to trials is set out in detail—

Gen CHILDS. In the rules of procedure?

Lieut. Col. RIGBY. Yes; a careful investigation is required, but what I want to ask is whether in practice this investigation is cumbersome and delays the administration of justice so as to impair rather than promote the same.

Gen. CHILDS. No; I have conducted very many of them. The commanding officer has the adjutant to take down the summary, to take the evidence in the case, and I informed the accused of his right to introduce testimony. It was very simple. A summary of the evidence for a field general court-martial is not necessary. It depends of the surrounding circumstances. There was one man shot during the retreat from Mons. He was tried and shot in a half hour. The Germans were walking over his grave in an hour. Later in trench warfare the investigations were made in a more leisurely manner. Do you follow me? Field general courts-martial are most expeditious in the administration of justice. We merely take down what happens. Sergeant ——— saw this, and Sergeant ——— said so and so.

Lieut. Col. RIGBY. In general courts do you get a complete stenographic report?

Gen. CHILDS. Not always. It is recorded by the president, but to have a stenographer is most convenient. But you want two working—it is better to have two or three. Your evidence is taken and typed, and then have another chap for the next, and so on. If you have only the one, you do not see the thing for a couple of days.

Lieut. Col. RIGBY. You do not try in district and field courts to take a stenographic report?

Gen. CHILDS. It is most convenient in any form of court to have shorthand typists. Our district courts-martial are so simple, so short, the evidence so clear, it does not take long.

Lieut. Col. RIGBY. You use district courts in peace times for most of the military offenses?

Gen. CHILDS. Yes; this court can only award up to two years' imprisonment. In peace time it was scarcely ever necessary to award more than that. It can not try an officer. But in peace times we had few trials of officers.

Lieut. Col. RIGBY. Only a few as shown in the statistics furnished me.

Gen. CHILDS. Oh, yes; during the war we had a most satisfactory plan of suspending sentences which worked very well indeed. Under the Army suspension of sentences act a man might never be committed to prison. For example, a sergeant in my regiment was tried by court-martial, but he never went to prison and, afterwards got a D. C. medal.

Lieut. Col. RIGBY. Is that the case you told about the other day? Please repeat it.

Gen. CHILDS. Yes; this man was tried by court-martial, under what offense, for the moment, I forget, but I think it was cowardice. He lost his nerve, but was not a bad man. The sentence of death was commuted to a long sentence—possibly the original sentence may have been penal servitude. But he never went to prison. The sentence was suspended and was subsequently remitted for gallantry in action and the man got a D. C. M. and subsequently was killed in action as a sergeant.

Lieut. Col. RIGBY. That act, providing for suspension of sentences, you drew yourself?

Gen. CHILDS. I did.

Lieut. Col. RIGBY. Tell me something again as to how it works. I understand it resulted in the suspension of a great many sentences, so you told me the other day.

Gen. CHILDS. The way it has worked during the war has been this: But for this act we should have committed to prison and lost the services of between 30,000 and 40,000 men. The whole object of the act was to prevent wastage from the front and to give the men an opportunity to make good. In France—it must have been in December, 1914—I saw about 120 men going to prison under escort, shouting, singing, and happy. It made me think. I also had in mind the case of a man named Richardson, who was condemned to death for desertion. I knew this man could not do such a thing. The facts were he went

down to see a draft. A draft had come up to the regiment. He went down to see the draft, about a half mile back, and got drunk and lost the battalion. I sent back an inquiry to the commanding officer of the man's battalion. Whether it was a deliberate act, whether he was the sort of a man to desert and as to his demeanor in action and previous behavior. I got an answer that he was the best man in the company, best of fighters. Without it, that fellow would have gone to prison, and a fighting man would have been lost for the whole period of the war. The two facts made me draft that act. The dual purposes are to give a man the opportunity for making good and save fighting men for service. It is worthy of consideration. Perhaps a man lost his nerve for a moment. Also, there were soldiers of a bad type who would prefer penal servitude to the possibility of losing their life. But the act was drafted so that a man never knew his fate. A man got 10 years and went to a military prison in the field, and without the slightest warning, say after three months, he was again drafted and sent to the front with an organization, so that those guilty of crime to evade duty lived a time in prison in the field and never away from the prospects of going to the front. That act thus prevents crime. No man will risk days of imprisonment to find himself drafted again say after six months in prison. On the other hand, there were hundreds of cases where you had good soldiers gone. That was something stupid. The act alone prevented lots of crime, and saved hundreds of men who might have been shot. When I left France—I had been in France 20 months—only two men ever came back to the prison. After suspension of their imprisonment, out of about 1,500 men only 2 ever came back. They had enough of that prison. It was meant to be a nasty place in which to stay. Only two came back. I returned from France in January, 1916.

Lieut. Col. RIGBY. Maj. Wells suggests that you tell us the services they had to perform in prison.

Gen. CHILDS. I never went through one of these prisons myself. They are put at hard labor—damned hard work.

Col. RIGBY. Are they kept in good physical training?

Gen. CHILDS. Yes; as hard as nails. They are punished by restrictions of food, solitary confinement, and, if necessary, a court-martial again.

Lieut. Col. RIGBY. Will you tell us something of your opinion on the advantages and disadvantages of your field punishment?

Gen. CHILDS. Only yesterday I got in reports from C. O. Cs. I asked them two questions—whether they recommended the continuance of such punishments, and, if not, what they recommended as a substitute.

(Col. Rigby asked for a copy of these reports containing the views of Field Marshal Haig and other commanders, and Gen. Childs promised to furnish copies within a week or 10 days, and when received it is to be filed as Exhibit 1 to this interview.)

Lieut. Col. RIGBY. Another radical change proposed to be made in our practice by the bill in Congress is that instead of having cases reviewed by the Judge Advocate General, according to our present practice, there is to be a Court of Appeals, its members to be appointed for life, appeals to be taken just as in civil trials.

Gen. CHILDS. When that point was proposed by certain members of Parliament this court-martial committee, of which I am a member, considered it, and has considered other changes of that nature. In our courts of appeal in this country we do not have the attendance of witnesses. They merely refer to and have before them the written testimony sent up from the inferior court. Your court of appeal would be reviewing paper, not men. Here is the point. There are certain essentials as to courts-martial in time of war which do not apply in time of peace. In time of peace I should not see the slightest objection to any form of appeals.

In peace times all civilian offenses are tried before civil courts, and it is a fact that under our law after I am tried by a civil court and convicted or acquitted I can not be tried by a military court. In war time most offenses are military offenses, and therefore a court of appeal should and must be a court of soldiers. No civilian can appreciate the charge of striking a superior officer. A man in civilian life is struck by another and is fined 10 shillings. In military life a soldier strikes his superior officer and gets 5 years. Any military court in peace times must be a court of military officers. In war time and on active service, as in France, these offenses which are civil offenses have to be tried by a military court. The civil powers try men for forgery, embezzlement, and acts of indecency, which military courts are not at all qualified to try. Before I was a soldier I was a lawyer. Not one soldier

out of a hundred knows or can tell you the difference between embezzlement or larceny. In the service outside of this country you have to try soldiers by military courts, courts sitting for expediting military justice. In regard to civil offenses, have you had a court of appeals ever to accompany an army in the field? I would not object to any court of appeal on civil offenses. No court of appeal for military offenses for which the death penalty has been awarded is necessary, because you do not take a man's life because you want it, but for the disciplinary effect it has. In Australia, under their army act, you can not inflict the death penalty for desertion. The result has been deplorable. The fact remains that the situation in the Australian forces as to absences and desertion was wretched many times. The Australians do not want the death penalty. They can fight without it it is true, but those deserters were not the men who won the war. The Australian officers themselves sought the right of imposing the death sentence, but it was not permitted. A death penalty inflicted for desertion in the field is for the effect that it will have, and if the discretion of the Commander in Chief was to be upset by a court of appeal in this country or in France the result would be intolerable. Take the field marshal in France—suppose he confirms a death penalty. If you are going to set up a court of appeals, there you would have to find three field marshals who thus would be of equal rank with a field marshal to determine for the G. O. C. as to whether he should shoot a man for desertion.

Lieut. Col. RIGBY. Was extensive use made of the power to shoot a man down for misconduct in line of battle without any court-martial?

Gen. CHILDS. That is the unwritten law of the soldier. I have never heard of a case, but it has doubtless happened. I know a case of a fellow deserting to the enemy. They got him as he was going over the top.

Lieut. Col. RIGBY. Were there rather more in the French Army?

Gen. CHILDS. I think so. I have heard that there were cases of officers being put against the wall and shot.

Lieut. Col. RIGBY. Under their customs which give commander in chief more control?

Gen. CHILDS. I do not know anything of their code. In our job in military courts we must never forget that behind all that there is the necessity of maintaining discipline in the fighting service. Above all things one has to advise whether to shoot a man or not. It is a beastly job. You do not want the fellow's life, but for certain offenses the death penalty must be awarded or the Army would become an armed rabble.

Lieut. Col. RIGBY. Another thing—I am jumping from point to point. Will you tell me a little more about the powers of your Judge Advocate General?

Gen. CHILDS. Our Judge Advocate General has no executive powers whatever. He is the legal adviser of the Secretary of State for War. He merely advises as to the legality of proceedings, before trial in certain cases, and advises and assists prior to trial, and after trial. He has no executive power whatever. In the old days, 15 or 20 years ago, the Judge Advocate General had such power, and exercised that power to quash proceedings.

Lieut. Col. RIGBY. The change was made about 1905?

Gen. CHILDS. About 15 years ago, yes.

Lieut. Col. RIGBY. What was the reason for the change?

Gen. CHILDS. I do not know. Probably there was a strong objection to the Judge Advocate General having executive power to quash proceedings.

Lieut. Col. RIGBY. You stated the other day the high opinion you hold of Judge Cassel.

Gen. CHILDS. Yes; he is a lawyer, a most brilliant man.

Lieut. Col. RIGBY. Why are the records of cases referred by the Secretary of State for War, then, to the Attorney General for opinion, after he has been advised by the Judge Advocate General, Judge Cassel?

Gen. CHILDS. That is purely a departmental arrangement. If I do not agree with the Judge Advocate General, it goes to the Secretary of State for War—in a direct sense of the word it goes to the Attorney General who either supports the Judge Advocate General or myself on behalf of the Secretary of State for War, and directs that they be approved or quashed.

Lieut. Col. RIGBY. You do not then consider yourself bound to follow his recommendation; that is, the Judge Advocate General's?

Gen. CHILDS. That is all a working arrangement between Cassel and I. I will give you an example of the way we work together. [Getting two folders.] Here are two court-martial records which came to me in connection with certain offenses. I did not like it at all. I wrote to the Judge Advocate General

a private note, that I did not feel the proceedings could be sustained. I wrote him a personal note. These proceedings had been reviewed by him. They were held last May.

Lieut. Col. RIGBY. Did he recommend confirmation?

Gen. CHILDS. They had been confirmed and also reviewed by him and he did not advise quashing. I wrote a personal note. He then wrote a minute or review, as you call it, in which he raised the point whether the proceedings can be sustained. I am going to send that minute to the Secretary of State for War and they will be quashed. That is the way we work together. If we see things wrong we give him the tip. If my advice was not worth having he would not take it, and I would not worry. I have very rarely disagreed with Cassel; but when I do, I put it back to him. If he says "no," the Attorney General settles it. I have not worked with anyone more charming. He is a brilliant lawyer. The law is that the Judge Advocate General on paper is the legal adviser of the Secretary of State for War. The Secretary can take other advice. The Judge Advocate General never quashes a sentence; that is for the consideration of the military authorities. The legality of the sentence is what he is to advise about.

Lieut. Col. RIGBY. He has nothing to do with clemency?

Gen. CHILDS. No. If he thinks a sentence is too severe, I expect him to draw my attention to any such sentence. That is the way we work.

Lieut. Col. RIGBY. Then, personally, you feel it to be your own duty, sir, to examine carefully all proceedings?

Gen. CHILDS. Yes; there are two reasons. I must know the pulse of the Army, and there is no better stethoscope than court-martial proceedings. I want to see everything going on. I read them on Sunday. If I do not think the sentence is too severe—one has to insure that a man does not suffer in justice—I merely return them to the Judge Advocate General. Centralization is bad. Carry it too far and it is bad.

Lieut. Col. RIGBY. May I ask further: In case of your disagreeing with the Judge Advocate General and the matter is referred to the Attorney General, would the Secretary of State for War feel bound to follow the Attorney General's decision?

Gen. CHILDS. It is purely, as I say, a personal arrangement. But if he did not agree, nothing would make him. The Secretary might be merely a signing machine. In fact, since I have held my present appointment he could not possibly personally review all the proceedings. The Attorney General relieves him and the Secretary signs blind.

Lieut. Col. RIGBY. Has the Attorney General any official responsibility?

Gen. CHILDS. No responsibility, except by working arrangement. The responsibility under the law is in the Secretary of State for War. During the war the Attorney General acts on behalf of the Secretary. Our courts-martial get extraordinary review. Take a simple case. It goes down below. Cassel sees it, and then it comes to me. It gets a most exhaustive review.

Lieut. Col. RIGBY. It is practically an automatic appeal?

Gen. CHILDS. Yes. Here is the record of a trial before a court-martial held in Cologne, for drunkenness. It was confirmed in France on advice of Judge Advocate General.

Maj. WELLS. What is the charge—drunkenness?

Gen. CHILDS. No. Conduct unbecoming an officer. It was reviewed in France and again reviewed by Cassel on this side. Now, the case comes to me. I will read the proceedings. If I think dismissal is too severe, although confirmed in France, I never let it go. It is wrong to let it go. I know how much drunkenness is going on in Cologne. By scrutinizing all courts-martial records I found it necessary to draw a letter, which I am going to send out.

(Copy of the letter furnished and is attached, marked, "Exhibit 2.")

Gen. CHILDS. As a matter of fact, I spoke to the commander in chief's adjutant general himself when he was here the other day. He realizes that there is too much of drunkenness going on. I am calling attention to the courts that sentences are too lenient. I can only publish it in orders. I can not direct any court to punish more severely.

Lieut. Col. RIGBY. Do you ever in approving a sentence or an acquittal, or too light a sentence as in the cases referred to, put any memorandum or note in the action that it was regretted that it was not more severe, or calling attention?

Gen. CHILDS. No; our regulations as laid down forbid that. If an officer desires to comment on any court-martial, he is only permitted to write to the Army council.

Lieut. Col. RIGBY. Are you not permitted to put in the action any comment?

Gen. CHILDS. No; if the convening authority desires to comment on any court-martial he addresses a note to the Army council. The court does not even know that he did it. If a court-martial has previously failed in its duty in the manner of trial in displaying ignorance, it would be proper for me to direct the court's attention to it, and perhaps to say that the president should be detailed for preliminary instruction in a number of courts-martial, but never in any other way.

Lieut. Col. RIGBY. Is it permissible to take any action that may be considered as a personal rebuke to the court?

Gen. CHILDS. No; if they acquit, they acquit. We never ask why. If the taking of evidence was bad, and the rules of procedure were disregarded so as to necessitate the proceedings being quashed, or confirmation being refused, we have furnished directions, directing attention of the court to the rules of procedure, purely, though as a matter of education. Never a word is said to the court on their decision.

Lieut. Col. RIGBY. Do you ever discharge a court and appoint a new one if you are not getting severe enough sentences?

Gen. CHILDS. No. You use the expression "discharging a court." Our system is that in peace times a court, until discharged, is available to try cases. But we never keep a court-martial beyond a few days. We want them to get training. We never keep a standing court.

Lieut. Col. RIGBY. Then you never allow a court to run along for any considerable length of time?

Gen. CHILDS. No. Suppose in peace times I had a court-martial sitting to-day, and I had two more men to try. I would order the same court to assemble to-morrow.

Lieut. Col. RIGBY. I believe the requirements are that an officer must be commissioned three years before he is appointed on a general court?

Gen. CHILDS. Yes; that is the law.

Lieut. Col. RIGBY. The Army act?

Gen. CHILDS. Yes.

Lieut. Col. RIGBY. That, I suppose, you find a great help in peace times?

Gen. CHILDS. Yes. On active service it is different. In peace times we did not have many general courts-martial. Two or three a year since I have been here, in peace times. I had been here four years before the war.

Lieut. Col. RIGBY. Your statistics show 12 in nine years. I remember, an average of 1½ per annum.

Gen. CHILDS. Yes; that is probably right—about one a year.

Lieut. Col. RIGBY. You have been using lawyers as court-martial officers, on field and general courts-martial. About how many men are required?

Gen. CHILDS. I do not know how many. It worked down to one court-martial officer per brigade, I think.

Lieut. Col. RIGBY. Would he be appointed to membership in several courts?

Gen. CHILDS. Yes; but we use those fellows for anything—for any legal work, sometimes as members of court, sometimes as prosecutor. They are used to assist in every way.

Lieut. Col. RIGBY. Please state whether it required a personnel which caused embarrassment to get the number of men.

Gen. CHILDS. We managed it easily during the war. We had a list of officers who were lawyers in civil life, and they were used. There was no embarrassment in getting plenty. Under the territorial system, lawyers and barristers always seem to join the territorial forces, and we had scores of qualified men before the war, qualified as line officers in the territorial forces.

Lieut. Col. RIGBY. Did you have to take enough away from the line to feel the lack of officers in the line?

Gen. CHILDS. We did not start this system until later on in the war. There were also lots of fellows unfit for the front who had been wounded. We never found any difficulty. I set up the same system when I came to this country. The commander in chief is delighted to have these people at headquarters to advise him on legal questions.

Lieut. Col. RIGBY. Did you have judge advocates for district courts sometimes?

Gen. CHILDS. No; we do not have judge advocates on district courts.

Lieut. Col. RIGBY. Is it permissible?

Gen. CHILDS. Yes; but they are only used in difficult cases.

Lieut. Col. RIGBY. The "specially qualified member" of your field general court-martial becomes an additional member of the court. Does he sum up in open court as to the law or the facts of the case?

Gen. CHILDS. No; he is a member of the court. I have no doubt that when the court is closed to consider, the president says: "Mr. Lawyer, what is your view?" But that is not on record. If a member of the court happens to be a lawyer, no doubt on the inside when considering he is consulted. I know if I were on a court, I would say, "Mr. Lawyer, what do you think?"

Lieut. Col. RIGBY. How are they appointed?

Gen. CHILDS. Why, I call for a list of lawyers who are officers and select them and appoint them after an investigation. I followed the same procedure in France. I simply called for a return of officers available and qualified. I never have any difficulty.

Lieut. Col. RIGBY. What about the counsel for the accused?

Gen. CHILDS. That always is easy.

Lieut. Col. RIGBY. Some criticized us because some used in our courts were second lieutenants.

Gen. CHILDS. Even though qualified men?

Lieut. Col. RIGBY. Yes; because it was charged that their low rank embarrassed them in defending the accused. Has that been your experience as to the low rank of any officer defending proving embarrassing in any way?

Gen. CHILDS. None whatever. I do not know from personal experience. I know enough to warrant me thinking that a barrister and lawyer is a person of formed ideas who would not feel embarrassed. Courts are always very careful how they deal with men who know the law, and who could not be for that reason embarrassed.

Lieut. Col. RIGBY. Did it ever appear to you in your work that counsel for the accused of low rank were in any way embarrassed?

Gen. CHILDS. Not on the document.

Lieut. Col. RIGBY. Outside of the document?

Gen. CHILDS. I never heard of it. It was suggested at the court-martial committee hearing that he should be of high rank, same rank as the president. This witness who suggested this though was a person of very low intelligence and failed to convince us that there was anything in the suggestion.

Lieut. Col. RIGBY. In France they seem to have frequently used private soldiers.

Gen. CHILDS. In France.

Maj. WELLS. In Belgium, too.

Lieut. Col. RIGBY. One of the propositions made in this new bill in Congress is that the penalty for assaulting a superior officer in the execution of his office be confinement for not over one year in addition to the usual punishment for a simple assault. Heretofore our Articles of War have provided that for that kind of offense the punishment shall be in discretion of the court-martial.

Gen. CHILDS. Can the court award the death penalty?

Lieut. Col. RIGBY. Yes; in time of war. In time of peace anything up to the death penalty. Here is a limitation to one year's imprisonment.

Maj. WELLS. In addition to the other penalty authorized for assault or striking.

Gen. CHILDS. Surely no soldier advocates such a law. Still during the war we inflicted only one death penalty for striking an officer. In my experience, it is essential to retain it (the death penalty). Otherwise an Army will degenerate into a mob. A soldier hits an officer over the head with a rifle. A person not familiar with military law does not understand why a man who assaults another on the street is only fined 10 shillings, while an assault on a superior officer should be punished so severely. You can not maintain an Army under those conditions. It is an explicit offense. Otherwise you can not win a war.

Lieut. Col. RIGBY. How do you punish by imprisonment?

Gen. CHILDS. In this country we have detention camps. Got men in civil prisons in this country for civil offenses, not for military offenses. Men were transported from France for civil offenses committed in France. For other offenses committed in France they were put in military prisons in the field. Our policy is this—never permit a soldier to go to prison and then go back to the ranks. We believed that he became contaminated and not fit to wear the uniform. There is no contamination in a detention camp, which is only for military offenses. Fifty-four thousand trained men have left these shores from detention barracks in this country. They were intensively militarily trained

men. I never have seen a man rejected from a draft who came from a detention camp. A man was sent to a detention camp and kept there until trained. I kept them in not to undergo sentence but to make them fit for the front. Our offenses were frequently absences without leave or desertion. We sent them to a detention barracks. Before the war a man went to prison and was discharged from the Army. All discharges, except for ill health, were held up during the war. No soldier that I permit to remain in prison is allowed to stay in the Army. Any sentence which should be commuted to detention is commuted. If I do not commute, I discharge. I am weeding out the undesirables from the Army.

Lieut. Col. RIGBY. Have you determined what sentences or punishment would be sufficient to send him to detention barracks? When you transfer him from prison to detention camps you do not discharge him?

Gen. CHILDS. I never discharge. He serves as a soldier.

Lieut. Col. RIGBY. Are you transferring quite a number?

Gen. CHILDS. About as fast as I can get them out.

Lieut. Col. RIGBY. What proportion? Are you transferring one-fourth or one-half?

Gen. CHILDS. I never kept tab. The point is this. I am not commuting many for this reason. The class of men coming through from France to prison is the scum of the army who have committed looting, assaults. The class of men that should go to the detention camps is not coming through. The class of men getting detention is the class whose sentences are suspended in France, unless he is a hardened fellow, not in the commuted class at all.

I think that you must be suffering from the same thing we are. The people feel that the army is unfair, unjust, do not give consideration to cases. The truth is that no case in court receives so much consideration as the review a court-martial coming up before me gets. Take these three case [indicating]. The men have not appealed. Still there is always somebody looking after them. Privates tried in Ireland, tried, and the paper come up here. The cases are investigated. There is no appeal, but they are investigated. They do not need a court of appeals, the power here is so great. The people do not understand, do not realize. If you take a court-martial in France, whether it is a soldier or an officer, who has been tried, there is a court-martial officer that handles the case, then another one, the legal advisor for the confirming officer, then the confirming officer. It goes through division, corps, and army, through their legal officers, then to G. H. Q., to the commander in chief, and so on through channels here to Cassel, then to me. It is scrutinized 20 times. The people do not know that. What court in civil life gives care like that?

Then I give the commandants of the detention barracks power to send me the names of men to be released. I ask for no facts, just direct them to send the names. They can tell a man when he goes in, "You got nine months; if you play the fool, you do nine; if you play the man, you get out in three."

EXHIBITS ATTACHED TO GEN. CHILDS'S STATEMENT.

DRAFT LETTER.

I am commanded by the Army Council to say that their attention has been drawn to the large number of courts-martial which have been held on officers for offenses of drunkenness, improper conduct, and against the inhabitants of occupied territory, and they note with regret that in the very large majority of cases the offenses have been dealt with by the court by an award of forfeiture of seniority and even lesser punishments.

The council consider that offenses of these descriptions should, in the absence of very extenuating circumstances, be dealt with by an award of cashiering or dismissal, as the honor of the British Army is sullied by such behavior and it can not fail to give the enemy just cause to bring forward such incidents as a set-off against the irregularities and atrocities committed by German troops in France and other theaters of war.

WAR OFFICE,
London, S. W., April 15, 1919.

SIR: I am commanded by the Army Council to inform you that during the debate on the army (annual) bill an amendment was moved to insert in section 44 of the army act a proviso to the effect that field punishment should not be

of the character of personal restraint in the sense that a soldier could be kept in irons or other fetters, but rather should be of the character of hard labor; and arising out of the amendment the secretary of state for war gave an undertaking in the following words:

"I will give an undertaking that we will institute forthwith a series of inquiries to obtain the opinion of the military authorities in France, here, and in other theaters, with a view to seeing if a substitute can be devised for this form of punishment without impairing the means by which discipline is maintained, and without leaving us with possibly the danger of being drawn, under certain circumstances in another war, into a more free infliction of the death penalty than has been the case in this war. I would suggest that there is no reason why there should be any delay. I will make these inquiries, and see what amendments can be made to the rules of procedure."

I am to say also that in reply to questions in the course of the debate the secretary of state undertook to secure the opinions of officers, noncommissioned officers, and men on the subject, and to this end I am now to request that you will render a report to this department, with your recommendations on the following points:

(a) Whether that portion of field punishment which involves confinement in irons (i. e., fetters or handcuffs, or straps or ropes) should be maintained; and
 (b) In the event of it being recommended that this portion of field punishment should be abolished, what form of punishment is suggested in substitution therefor.

I am to request that a very early reply be furnished.

I am, sir,

Your obedient servant,

The GENERAL OFFICER COMMANDING IN CHIEF.

C. R. 5081-P. S. 2.

From Lieut. Gen. Sir J. J. Aaser, K. C. M. G., K. C. V. C., C. B., general officer commanding British troops in France and Flanders.

To: The Secretary, War Office, London, S. W. 1.

HEADQUARTERS, BRITISH TROOPS IN FRANCE AND FLANDERS,

June 26, 1919.

SIR: With reference to War Office letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, I have the honor to report that I have caused very extensive inquiries to be made with a view to obtaining the opinion of commanders of every grade as well as of regimental officers, noncommissioned officers, and men, on the desirability or otherwise of retaining that portion of field punishment which involves confinement in irons, straps, or rope.

The balance of opinion amongst commanders is heavily in favor of the retention of this form of punishment for the following reasons:

(a) It has a great effect as a deterrent.

(b) The only substitute appears to be imprisonment with hard labor, which enables the offender to escape the danger and hardships of the fighting area.

(c) It can be put into operation immediately and is therefore specially effective as a quick, sharp punishment.

(d) Its removal from the scale of punishment which can be awarded by a commanding officer would increase the number of courts-martial, thus causing delay in disposing of offenses.

The opinion of noncommissioned officers and men is about equally divided as regards retention or abolition.

The older soldiers are usually in favor of field punishment No. 1, and the younger ones against it.

I attach for the information of the Army Council reports of interviews with various noncommissioned officers and men.

After a careful revision of all the reports submitted to me, I am of opinion that, in the interests of discipline on active service, it is essential that commanding officers should have the power to inflict upon persistent offenders a degree of punishment in excess of field punishment No. 2, which in actual practice is little more than confinement to barracks with the added penalty of forfeiture of pay.

The punishment of "tying-up" is not a satisfactory one, but there does not appear to be any other less objectionable which, in the field, can be substituted for it, and in these circumstances I consider it should be maintained.

I recommend, however, that the punishment of field punishment No. 1 be restricted as follows:

(a) A commanding officer should be allowed to award it only to a soldier who has committed an offense whilst undergoing imprisonment in a military prison in the field, or whilst undergoing field punishment No. 2.

(b) The "tying-up" of a British soldier should never be carried out in view of civilians, natives, or allied troops.

I consider it essential that the provisions of paragraph 2 (a), (c), and (d) of the rules for field punishment (par. 721 M. M. L.) should still hold good. On active service, especially when on the line of march, it is of the greatest importance that an effective method of securing prisoners against escape shall be at the command of those responsible for their safe custody. I have the honor to be, sir,

Your obedient servant,

Lieutenant General, Commanding British Troops in France and Flanders.

[Rhine Army No. A. H. 8095. 105 Gen. No. 2767.]

From: General Sir William R. Robertson, G. C. B., K. C. V. O., D. S. O., A. D. C., Commanding in Chief, British Army of the Rhine.

To: The Secretary, War Office, London, S. W. 1.

COLOGNE, June 10, 1919.

SIR: In reply to your letter No. 105, Gen. No. 2767 (A. G. 3) of 18/4/1919, I have the honor to report that the whole question of punishments in the field is one of considerable difficulty. It is undoubtedly desirable to keep offenders in or near the front line, and not to allow their offenses to procure them safety and perhaps relative comfort. It is equally desirable in many cases that the soldier should not receive the taint of imprisonment for a military offense.

On the whole I am of the opinion that "Personal restraint" should not be abolished as part of field punishment No 1 under active service conditions. Some form of punishment which can be readily and quickly administered is necessary. It must be possible to carry it out without the employment of much personnel or elaborate accommodation, and it must be at the same time sufficiently distasteful to those undergoing it to act as a deterrent. I have the honor to be, sir,

Your obedient servant,

General, Commanding in Chief, British Army of the Rhine.

FORCES IN GREAT BRITAIN,
HORSE GUARDS,
Whitehall, London, S. W. 1.

SIR: With reference to War Office letter 103, General Number 2767 (AG3) dated April 18, 1919, I have the honor to report that I have asked various officers for their opinions on this subject, including officers of the Regular and New Armies and Territorial Force, who have commanded a battalion or brigade with distinction in the field.

2. The consensus of opinion is that field punishment No. 1 involving confinement in irons (i. e., fetters or handcuffs or straps or ropes) forms a valuable aid to discipline, and as such should be maintained. A few officers, from a sentimental point of view, wish that it could be dispensed with, but are unable to find a substitute other than a flogging, and are generally in agreement that its abolition would result in an increase of death sentences.

3. No complaints have been brought to my notice of any soldier experiencing hardships in any way approximating to torture due to the nature of the appli-

cation of field punishment No. 1, and personal inspection of men undergoing this form of punishment on numerous occasions has convinced me that no serious exception can be taken thereto.

4. I am quite certain that it would not have been possible to maintain the high standards of discipline in the British Army in France if field punishment No. 1 had been nonexistent, and it is not beside the point to recall the effect on discipline in the Australian Corps of the absence of capital punishment for desertion.

5. I would call the attention of the Army Council to my letter from General Headquarters British Expeditionary Force, dated December 4, 1916, on this subject, in which the case is put very fully and clearly. After a lapse of three years I am unable to modify the views expressed in that letter or to suggest any substitute for that portion of field punishment referred to above, and as it fulfills its object, whilst being in no sense torture, I am of opinion that it should be maintained. I have the honor to be, sir,

Your obedient servant,

D. HAIG,

Field Marshal, Commanding in Chief, Great Britain.

The SECRETARY, WAR OFFICE,
Whitehall, London, S. W. 1.

HEADQUARTERS, June 20, 1918.

From: The Commander in Chief Egyptian Expeditionary Force.

To: The Secretary War Office, London, S. W. 1.

SIR: In accordance with war office letter No. 165, G. N. 2767 (A. G. 3) of April 18, 1919, relative to the question of the retention or abolition of that portion of field punishment which involves confinement in irons, I have the honor to report that I have obtained the opinions of the officers, noncommissioned officers, and men under my command and find that the majority of officers advocate the retention of the present rules with the exception of that portion involving attachment to a fixed object, while the majority of the noncommissioned officers and men favor the abolition of field punishment altogether.

The general opinion amongst corps and divisional commanders is that field punishment should be retained as it is, but should be employed only for offences of a grave or disgraceful character.

The alternative to field punishment recommended by those who favor its abolition is hard labor, pack drill, or other forms of rigorous physical fatigue.

My opinion is that the retention of field punishment is desirable as being a deterrent to many constant offenders to whom a prison presents no terrors and because its abolition would result in an increase in the number of men committed to prison and thus temporarily lost to their unit. I recommend therefore that field punishment No. 2 be retained, but that field punishment No. 1 be abolished. I have the honor to be, sir,

Your obedient servant,

E. M. ALLENBY,

General, Commander in Chief Egyptian Expeditionary Force.

From: Gen. Sir George F. Milne, K. C. B., K. C. M. G., D. S. O., Commander
in Chief British Army of the Black Sea.

To: The Secretary War Office, London, S. W.

GENERAL HEADQUARTERS,

Constantinople, May 13, 1919.

SIR: I have the honor to acknowledge receipt of your letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, and in reply beg to state that I have caused inquiries to be made to secure the opinions of my officers, noncommissioned officers, and men upon the subject therein referred to.

As a result of the inquiry, I find that that portion of field punishment No. 1, which involves confinement in irons or being tied to a fixed object, is, in general, objected to, and I entirely agree that this procedure should be abolished as degrading. On the other hand, I can not find that any really effective substitute has been suggested.

It would appear to be the general opinion that the greatest deterrent punishment is "pack drill," which is disliked more than hard labor of any kind, and should it be decided to discontinue that portion of field punishment above referred to, I would recommend that a period of, say, two hours per day of pack drill be substituted.

Two other suggestions have been made, which I forward for your consideration:

1. That commanding officers who have awarded sentences of field punishment No. 1 should have the power, subject to review by superior military authority, for suspending a sentence awarded on the march or whilst fighting is going on until after the arrival of the unit at a place where the punishment can be performed; and

2. That the commanding officers' powers of forfeiture of pay should be extended, and that the forfeiture of pay under an award of field punishment shall not be dependent upon the fact that the man is in custody, but shall be automatic to the award.

I have the honor to be, sir,

Your obedient servant,

G. F. MILNE,
General, Commanding in Chief
British Army of the Black Sea.

Subject: Field punishments. Confidential.

GENERAL HEADQUARTERS, IRELAND,
Parkgate, Dublin, May 20, 1919.

SIR: With reference to war office letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, I have the honor to state that all formation commanders and O. C. units and representatives of W. Os. N. C. Os. and men of all units have been consulted, and that the majority (W. Os. N. C. Os. and men almost unanimously) are of opinion that that portion of field punishment which involves tying in a fixed position in public should be abolished.

They can not, however, suggest a suitable substitute, and many commanding officers, therefore, advocate the retention of the tying up in a fixed position.

Personally, I am of opinion, after consultation with other officers who have had experience of command of units in the field:

(a) That "tying up" in a public spot as a portion of field punishment should be abolished.

This punishment is undoubtedly degrading and is, in the majority of cases, awarded for offenses such as insubordination, which do not call for a punishment of a degrading character.

I think that the infliction of this punishment is calculated to make a man lose his self-respect, the retention of which is vital to him as a soldier, and the fact that the safety of the nation may depend on the morale of each individual man makes it, in my opinion, more desirable to eliminate any such form of punishment.

(b) It is not clear that any substitute is really necessary, and it is very difficult to suggest one for what is, after all, only a portion of field punishment No. 1.

The main consideration is that any form of field punishment should be equal in its incidence, and that the delinquent should not escape the risks suffered by his comrades by reason of his bad behavior. In a large army, such as the British Army in France, it was found in practice very difficult to secure these conditions.

The only method of doing so was to send men behind the line, and, therefore, out of immediate danger. Consequently many men preferred to do severe field punishment well behind the line than to run the risks attendant upon the so-called period of "rest" in close support of the trench line, where long and arduous night-working parties under fire caused the soldier to prefer his tour of duties in the trenches to that of his short tour of "rest."

I think a solution might be found in the formation of penal companies or battalions, to which all men with sentences of 14 days' field punishment or upward would be sent.

These penal units could be used for working parties in the dangerous zone, and, moreover, could be given a special diet without luxuries of any description. As long as a man remains with his unit a special diet is impracticable.

I consider that if a penal company formed part of each division it would be possible to adopt the system for any form of warfare.

I have the honor to be, sir,

Your obedient servant,

F. SHAW,

Lieutenant General, Commanding in Chief, Ireland.

The SECRETARY,

War Office, London, S. W. 1.

GENERAL HEADQUARTERS, April 27, 1919.

From: Maj. Gen. H. B. Walker, K. C. B., D. S. O., commanding the British force in Italy.

To: The Secretary, War Office, London S. W. 1.

SIR: In reply to your No. 105 Gen. No. 2767 (A. G. 3), dated April 18, I have the honor to make the following recommendation:

That there be only one field punishment;

That commanding officers may award as heretofore 28 days and a court martial three months of such field punishment;

That the wording of paragraph 2 should be:

(a) "He may be kept in irons, i. e., fetters or handcuffs, or both fetters and handcuffs, so as to prevent his escape or in the event of his being violent, but not as a means of punishment.

(b) Strike out.

(c) As before.

(d) As before.

For offences requiring a more serious award the sentences should be as heretofore, imprisonment with H. L., penal servitude, death, according to the gravity of the offence.

I have the honor to be, sir,

Your obedient servant,

H. B. WALKER.

Major General, Commanding the British force in Italy.

Senator CHAMBERLAIN. Have you also a copy of the interview with Judge Cassel, judge advocate general of the British Army?

Lieut. Col. RIGBY. I was about to offer that also. There should be attached to that, to make it complete, a copy of my questionnaire and a copy of Judge Advocate General Cassel's formal answer to my questionnaire, upon which this interview was based. I will furnish those, to make some parts of the interview intelligible. And also a statement by Capt. Eastwood, court-martial officer to the London command, in a portion of which Maj. Du Plat Taylor, the other court-martial officer of that command—and so-called "permanent" president of its district court martial—joined.

(The documents referred to are as follows:)

INTERVIEW HAD BY LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, OFFICE OF JUDGE ADVOCATE GENERAL, WITH FELIX CASSEL, ESQ., K. C., JUDGE ADVOCATE GENERAL, BRITISH ARMY, AT 68 VICTORIA STREET, LONDON, ENGLAND, JULY 17, 1919.

Under date of June 14, 1919, Lieut. Col. Rigby submitted a questionnaire to Judge Cassel (copy attached) requesting, on behalf of the United States Government, information concerning the administration of military law in the British armies, so far as practicable to furnish it.

On July 17, 1919, at 4 o'clock, p. m., Lieut. Col. Rigby called at Judge Cassel's office, by appointment, and received the answers to his questionnaire (copy of memorandum of Judge Cassel attached); also had the following interview:

Lieut. Col. RIGBY (reading from questionnaire):

"On behalf of the United States Government, the following information concerning the administration of military law in the British armies is respectfully requested, so far as it may be practicable to furnish it: 1. (a) Results of preliminary investigation and trial."

Judge CASSEL (reading, from his memorandum) :

"1. (a) No statistics are available as to the number of charges investigated by commanding officers, nor as to the proportion of such charges which are dismissed, remanded for trial by court-martial, or dealt with summarily."

No record of proceedings of commanding officers reach the judge advocate general's office.

Lieut. Col. RIGBY. Have you any way of approximating or estimating the relative proportion of charges that are dismissed as a result of the preliminary investigation or disposed of otherwise than by being sent to a court-martial?

Judge CASSEL. No, I really have not. The records do not reach me at all. I could make a guess, but it would not be reliable.

Lieut. Col. RIGBY. If you could give an estimate from your general information.

Judge CASSEL. I do not think I could give an estimate that would be of any value. I do not think that the war office or the adjutant general's department could give it.

Lieut. Col. RIGBY. Could some of the court-martial officers give it, say out of several individual commands so as to get a rough view?

Judge CASSEL. I think the people that would be most likely to know would be the record office. I will make further inquiries. But, as I said, I do not think it is possible. Make a note of that, please [speaking to assistant].

Lieut. Col. RIGBY. Will you give me some kind of a line on the effectiveness of your preliminary examination in weeding out trivial and unfounded charges?

Judge CASSEL. I think you may take it that it is effective. But it is difficult to get any exact figures.

Lieut. Col. RIGBY. Could not approximate figures be obtained from one or two commands through the court-martial and record officers?

Judge CASSEL. What you really want is the number of cases dismissed, summarily dealt with, or sent for trial to court-martial?

Lieut. Col. RIGBY. Yes; If I could get that for two or three commands.

Judge CASSEL. I do not think it would be possible, but I will make inquiries.

Lieut. Col. RIGBY (reading next question) :

"1. (b) How the investigation is actually carried on in practice."

Judge CASSEL :

"1. (b) In the case of a N. C. O. or man, a charge is first investigated by his company (battery or squadron) commander, whose powers of punishment are very restricted. (See King's Regulations, 501.) If the company commander can not, or thinks that he ought not to deal with the case, he sends it on to be dealt with by the commanding officer. The latter after the charge has been read to the accused hears the witnesses. The accused may cross-examine the witnesses called against him, and may make a statement (or give evidence) in his defense, and may call witnesses. If the accused so requires, the evidence must be taken on oath; but it is only very rarely that such a request is preferred. The accused has no right to be represented by counsel or by an officer before the commanding officer."

The commanding officer then takes one of the following courses:

"(I) He dismisses the charge.

"(II) He disposes of it summarily, if he can do so without reference to superior authority. The charges that may be so disposed of are set out in King's Regulations, 487. The punishments which a commanding officer can award to a N. C. O. or man are set out in section 46 (2) of the army act and King's Regulations, 493.

"(III) If he thinks that the case is one which may be dealt with summarily, but he is not empowered to so deal with it without sanction from superior authority, he refers it to such authority. He will then either be authorized to deal with it summarily, or be directed to send it to a court-martial.

"(IV) He adjourns it in order that the evidence may be reduced to writing, with a view to a court-martial.

"In every case where the award or finding involves a forfeiture of pay, and in every other case unless one of the minor punishments referred to in army act, section 46 (9) and King's Regulations, 493, is awarded, the commanding officer must give the accused the option of being tried by court-martial. (Army acts 46 (8).)

"Where a case is adjourned for the evidence to be reduced to writing, this is (as a rule) done by the adjutant, though any officer may be detailed by the commanding officer for the purpose. The witnesses attend again, give

their evidence, and are cross-examined as before; the accused makes any statement or gives any evidence that he wishes, after being cautioned that he need not say anything, and calls witnesses if he wishes. The whole evidence is taken down in writing by the adjutant or other officer detailed for the purpose. Each witness signs the evidence given by him, and the evidence so taken is called the 'summary of evidence.' The evidence is generally not taken on oath, and the accused has no right to be represented. This has, however, sometimes been allowed in cases of exceptional difficulty or importance."

Lieut. Col. RIGBY (interrupting). No representation at the taking of the evidence?

Judge CASSEL. It is not considered that the accused has the right to it [continuing reading]:

"The commanding officer then reconsiders the written record, and finally decides whether to apply for a court-martial, or whether to dispose of the case summarily (assuming that he has the power to do so and that the accused has not elected trial by court-martial).

"If he decides upon a court-martial, he prepares and signs a charge sheet and formal application for trial, which he forwards with the summary of evidence and conduct sheets of the accused to an officer having power to convene a court-martial for the trial of the accused. That officer considers whether the summary of evidence justifies trial, and, if he comes to the conclusion that it does, makes an order accordingly."

So far, I am dealing with noncommissioned officers and men. [Continuing reading:]

"In the case of an officer, the case goes at once to the commanding officer without the intervention of the company (battery or squadron) commander. The commanding officer has no power to punish an officer. He can either dismiss the case, or apply for a court-martial, or, if the accused officer is below field rank, can refer the case to a superior officer, not under the rank of general. The latter, in the case of an officer below field rank, can award certain minor punishment, or can direct trial by court-martial. (See Army act, sec. 46A.) Where a court-martial is decided upon, a written 'summary of evidence' must be taken as in the case of a soldier if the accused so requires, otherwise a summary may be dispensed with, and an "abstract" of the evidence given to the accused."

In the case of an officer, it is not obligatory to take a summary, but the accused may require it, and if he does not require it, it is obligatory to give him an "abstract."

Lieut. Col. RIGBY. But in the case of an enlisted man, it is obligatory?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. In taking the summary, it is taken in writing. Does that mean that the testimony is taken down verbatim, or just a summary, a condensation of it made?

Judge CASSEL. It is taken in narrative form.

Lieut. Col. RIGBY. Not in the form of questions and answers?

Judge CASSEL. No, only subject matters.

Lieut. Col. RIGBY. Does the accused have the right to be present at the examination of each of the witnesses?

Judge CASSEL. He must be present.

Lieut. Col. RIGBY. He has the right to cross-examine witnesses?

Judge CASSEL. Certainly.

Lieut. Col. RIGBY. What right does the accused, if any, have to see the summary before it is forwarded to the commanding officer?

Judge CASSEL. No specific provision in the rules of procedure entitles the accused to a copy of the summary until the order for trial is made by the convening authority, but, in practice, if he applied for a copy of the summary, it would probably be given to him. Sometimes the convening officer may direct that additional evidence be taken. The rules of procedure do provide that the accused must be supplied with a copy of the summary when ordered for trial. It is then served upon him. To give it to him earlier, there is no provision, strictly speaking, under the rules, but it would be accorded in practice if the accused called for it.

Lieut. Col. RIGBY. If, after the summary is taken, additional witnesses are found, must they be examined in the presence of the accused?

Judge CASSEL. In precisely the same way.

Lieut. Col. RIGBY. At the trial can witnesses be called who were not called at the time that the summary was taken?

Judge CASSEL. They may be called, but the accused must be asked whether he wishes for an adjournment in order to give him an opportunity to prepare for their cross-examination.

Lieut. Col. RIGBY. He has the right to ask for an adjournment?

Judge CASSEL. Unless a reasonable notice of the intention to call additional evidence has been given him before the trial.

Lieut. Col. RIGBY. Must that notice include a statement of the character of the evidence, the name of the witness—

Judge CASSEL. Yes; if that has not been done, the accused is not only within his right to adjournment, but must be informed of that right.

Lieut. Col. RIGBY. In the case of officers—unless he requires it, testimony can be taken out of his presence and written in an "abstract"?

Judge CASSEL. Only in the case of an officer, but an officer can always require it to be taken in the same way as an enlisted man.

Lieut. Col. RIGBY. In practice, can you tell me what percentage of the cases are disposed of by the award of the commanding officer without resorting to court-martial?

Judge CASSEL. That comes back to the same question upon which I said that I had no statistics available. It is the same question.

Lieut. Col. RIGBY. You told me that you could not tell me how many were disposed of without any punishment being given—dismissed—but will your statistics show the number of cases punished, disposed of by the award of the commanding officer?

Judge CASSEL. No records of commanding officers reach my office—only proceedings of courts-martial.

Lieut. Col. RIGBY. Don't go through you?

Judge CASSEL. No.

Lieut. Col. RIGBY. If statistics are available, where can I find them?

Judge CASSEL. I think probably the only place would be the record office. That is one of the points under the first head—going back to the inquiry you made. My office is not concerned with commanding officers' punishment or their dealing with a case unless it eventually results in a court-martial. Any irregularity in conduct of a preliminary proceeding before a commanding officer which might have affected the subsequent court-martial trial, that would come to my notice, but it would not come to my notice if a court-martial had not resulted, unless I was especially consulted whether a particular award by a commanding officer was legal or not. Sometimes a general in going through the awards of a commanding officer finds an award, as to the legality of which he is doubtful. He then writes to me for an opinion. Apart from that, unless a commanding officer consults me about a case, it rarely would come under my notice.

Lieut. Col. RIGBY. What I would like to get is the number of awards by commanding officers during the war, so that we may compare these—the percentage—with the number of court-martial trials, to get at the efficiency of the system in cutting down the number of trials by the right of commanding officers to make awards.

Judge CASSEL. That would mean the number, the total of all cases disposed of by commanding officers during the war. Very doubtful if I can get that, but I will do the best I can.

Lieut. Col. RIGBY. To give us a view of its efficiency—a system which we do not have, and we are greatly interested.

Judge CASSEL. I will tell you this—I can not give you any definite figures, but it is very effective and very valuable, but when you ask me to give you statistics, percentages, and figures, I can not do it. I have no reason for seeing and do not see the records of commanding officers.

Lieut. Col. RIGBY. We do not want to burden you unduly, but if you can refer us to the place to go—

Judge CASSEL. I will let you know the best way to find out what can be found out. But you may take it that I am satisfied that it is on the whole a very valuable and efficient procedure. It depends in a large measure on the particular commanding officer; that is to say, whether the commanding officer is a man of experience and capacity, and where he is it does work very well.

Lieut. Col. RIGBY. From your experience, has the present powers given under Army orders of 1910 extending the commanding officers' powers from, I think, awards of 14 to 28 days—what has been the effect of that compared to the former?

Judge CASSEL. These increased powers of commanding officers have had the result of practically doing away with regimental courts-martial. We have, as you know, a form of court-martial called regimental court-martial, which is convened and confirmed by the commanding officer himself, and which is composed entirely of officers under his command. The extension of the powers of the commanding officers has very largely reduced the number of regimental courts-martial. Regimental courts-martial are now very rare indeed, because a commanding officer's powers so nearly approximate to those of a regimental court-martial. In fact, regimental courts-martial are now only resorted to in special cases.

Lieut. Col. RIGBY. They correspond to our summary courts.

Judge CASSEL. On the whole, I think it has been an advantage. I think the commanding officers have dealt satisfactorily with the cases, but there is always some feeling against a court convened by the commanding officer, consisting entirely of officers under his command and confirmed by the commanding officer—all in the same regiment. There is a feeling that it is not the judgment of an independent court, but regimental courts-martial practically cease to exist through this extension of power.

Lieut. Col. RIGBY. The 14 days' power was not sufficient?

Judge CASSEL. It was not sufficient; but on the other hand, if you go to increasing the power largely beyond what it is at present, I think the result will be that soldiers will be more frequently electing a trial by court-martial, and not run the risk to be tried by commanding officer. Twenty-eight days is, I think, about a proper power of punishment for a commanding officer to possess. Suggestions have been made for increasing it still further, but those are under consideration. If you increase it very much you do run the risk of increasing the number of cases in which soldiers would elect trial where they now abide by the commanding officer's award. I do not think the powers to deal with a case summarily should be increased beyond what they are now.

Lieut. Col. RIGBY. After a summary is taken, is it forwarded to the commanding general of the unit to appoint the court?

Judge CASSEL. We have no general commanding a unit. District courts-martial would generally be appointed by commander of a brigade; general courts-martial in the United Kingdom by commander in chief of the command—

Lieut. Col. RIGBY. I was not using the word in a technical sense, but only referring to any organization or body of troops whose commander is empowered to appoint a court-martial. When it goes to his office—the general's office—what practically is done with it? Does it go to him personally or to some court-martial officer?

Judge CASSEL. Always goes to the staff officer who is skilled in military law or court-martial officer who advises the general as to the legal aspects of the case. The general sometimes uses his own judgment. On the legal aspects he has a legal adviser. Since the war we have had special court-martial officers; before the war, some staff officer having special legal training. The convening officer, which is the name I give to the officer who has power to convene courts-martial, examines with much care the summary of evidence, and on the legal advice which is given him determines whether it is a case which should go to a court-martial.

Lieut. Col. RIGBY. These court-martial officers appointed under War Office instructions of September, 1916—I saw a copy of the circular—and as I remember there was nothing in that requiring that they be men necessarily of legal training.

Judge CASSEL. Originally this may have been the case, but it is now universally a general rule that they must be barristers or solicitors.

Lieut. Col. RIGBY. Any regulation requiring that the summary or evidence be submitted to them?

Judge CASSEL. Simply a matter of practice.

Lieut. Col. RIGBY. Is that practice universal?

Judge CASSEL. I think you may take it as being practically universal. As I said before, if the staff officer or court-martial officer concerned feels any difficulty on any point of law which is raised on the charge, or if the general does not agree with the advice which is tendered to him, the matter is referred to the Judge Advocate General in the United Kingdom—referred to me—abroad it would be referred to my deputy. My deputy in any part of the world always has the right to consult me if he himself has any doubt or difficulty.

Lieut. Col. RIGBY. In practice, then, the convening authorities feel themselves bound to act in accordance with the advice given by the staff officer or court-martial officer, or else have it referred to you or your deputy?

Judge CASSEL. So far as legal questions are concerned. In case of any difference from a disciplinary as distinct from a legal point of view, he would exercise his own discretion. As regards aspects of the case other than legal, he would not in practice feel himself bound to follow the advice of a skilled legal authority.

Lieut. Col. RIGBY. Although a court-martial officer had advised him that a case was legally sufficient, he might nevertheless decide, from a disciplinary standpoint, not to send a case to trial.

Judge CASSEL. He might, for example, decide that the commanding officer should himself dispose of it. In the case of an officer now, he would summarily dispose of it himself. The powers of disposing summarily of officers' cases are given by the Army act of 1919.

Lieut. Col. RIGBY. On the other hand, would he decide to order a case to trial, although the court-martial officer advised him that it was not legally sufficient?

Judge CASSEL. No provision of the Army act which prevents him from doing so, but in practice he does not do it. I think if in such circumstances he sent it to a court-martial, and it resulted in an acquittal and the army council heard of it, they might intimate their disapproval of the line he had taken, but I do not think I can remember a case of that kind. It might be that the officer would write to the army council to indicate to them the difficulties, from a point of view of discipline, that had been created by the fact that he had been prevented from bringing a case to trial on the legal grounds of the court-martial officer.

Lieut. Col. RIGBY. In practice, if the summary of evidence contains any testimony which in the opinion of the court-martial officer should not come before the court, he simply blue-pencils it or marks it out—that portion of the evidence that appears to be irrelevant or immaterial?

Judge CASSEL. The practice is that the court-martial or staff officer ought to strike out that part of the evidence in such a way that it is completely obliterated. In the case of a general court-martial, every case is referred to the judge advocate general before it goes to trial. In these cases the obliteration of the inadmissible evidence would be done in this office. General courts-martial are always referred to the judge advocate general before trial—

Lieut. Col. RIGBY. Or to deputy?

Judge CASSEL. Outside of the United Kingdom, always in practice referred to deputy. In the United Kingdom the regulations specifically require that the proceedings should be referred to the judge advocate general. We examine the charge and evidence and advise whether legally sufficient to try on the charge, whether the charge is in order, whether laid under the correct section of the Army act.

Lieut. Col. RIGBY. Do you ever have occasion to advise that further testimony ought to be taken on any case? What procedure is followed?

Judge CASSEL. If further evidence is available, additional summary of evidence would be taken by the commanding officer, who would detail the same officer to take the additional summary who had already taken the summary.

Lieut. Col. RIGBY. The accused must again be present and be given an opportunity to cross-examine those witnesses?

Judge CASSEL. Exactly.

Lieut. Col. RIGBY. In practice does that result in any embarrassment on the part of the Army authorities; too much delay; any disadvantage of that kind?

Judge CASSEL. I have not heard of any complaints on that score. There have been one or two cases where we have allowed counsel to appear at the summary where there has been a complaint of the cross-examination of the time it has taken?

Lieut. Col. RIGBY. It really amounts to two hearings or trials, in a way?

Judge CASSEL. There have been complaints that witnesses have to go twice, once to attend before the commanding officer and again to attend at the trial. The complaints on that ground have been chiefly from police and other civilian witnesses.

Lieut. Col. RIGBY. What about the feeling in general—what do officers think of it—are there any complaints about having practically two trials?

Judge CASSEL. No complaints on that score excepting those which I have just referred to from witnesses about having to attend twice.

Lieut. Col. RIGBY. The commanding officers themselves, so far as you know, do not feel unduly encumbered by the necessity of having all that care taken—the taking of the summary?

Judge CASSEL. They generally deputize their adjutant. A case comes before a commanding officer in the morning. Before he begins his day's work. He deputizes the adjutant, and the adjutant does it in the afternoon.

Lieut. Col. RIGBY. Does it result in delay in the examination or the investigation?

Judge CASSEL. That depends on the commander of the particular units concerned. With efficient units I do not think it does lead to any great delay. It is analogous in a way to civil procedure before a magistrate; the case is committed to trial and the witnesses have to come again.

Lieut. Col. RIGBY. Yes; practically given a hearing before a magistrate. The objection has been made in some quarters that it will impose undue delay; that it really means a second hearing—second trial. In ordinary military cases it would appear to be unnecessary. Our manual requires that the commanding officer make a careful investigation and leaves it to his discretion as to how the examination should be made.

Judge CASSEL. I think that documentary evidence should be very largely allowed at the summary to prove facts which are more or less formal in their nature, such as the proof of arrest by a policeman. It does seem to me unnecessary that you have to bring a policeman twice to give evidence upon which in ninety-eight cases out of a hundred there is no cross-examination at all—no dispute. It is really an unnecessary waste of that man's time, and a waste of the people's money in bringing him twice to get his evidence. In proving formal facts, documentary evidence should be offered largely at these preliminary investigations. In fact, it is very largely used because if the accused does not ask a cross-examination or raise any objection to it, documentary evidence is in fact very largely accepted.

Lieut. Col. RIGBY. This circular of August 1, 1918, as to field general courts, provides for that kind of testimony, not necessary to bring such witnesses to testify.

Judge CASSEL. In the case of field general courts-martial, rules as to preliminary investigation do not strictly apply, although they are in practice observed. There is greater latitude in cases of field general courts-martial than in general and district courts.

Lieut. Col. RIGBY. I would like to get a copy of that circular memorandum of August 1. In practice then they did find it best in the army at the front to carry out substantially the procedure as to taking a summary?

Judge CASSEL. Documentary evidence was more largely used than it would be here.

Lieut. Col. RIGBY. From your experience, was it an essential advantage to the accused to have the opportunity to confront the witnesses and cross examine at the preliminary hearing?

Judge CASSEL. Yes. First, advantage in the preparation of the defense; second, not infrequently it has led to the case being dismissed; third, very often material has been secured to cross examine at the trial on something that a witness said at the summary. It enables the commanding officer and convening officer to decide whether the case ought to go to a court-martial.

Lieut. Col. RIGBY. It is for that purpose, a real value.

Judge CASSEL. It is.

Lieut. Col. RIGBY. And in the taking of this summary the accused is not represented.

Judge CASSEL. He is not strictly represented by some one else; he is there himself. But the preliminary hearing is a value in this way, the accused knows the case that he is to meet at the trial.

Lieut. Col. RIGBY. And there are no disadvantages?

Judge CASSEL. Disadvantages—the chief one is having to bring witnesses twice to be examined. To a certain extent, in some cases that may cause delay.

Lieut. Col. RIGBY. That is what I was thinking of—the question of delay?

Judge CASSEL. In practice, in the great majority of cases as against the delay caused in some cases you have a considerable number of cases dismissed.

Lieut. Col. RIGBY. It works very well with your plan of summary disciplinary punishment. Gives the commanding officer a summary of the case on which to exercise his power of award.

Judge CASSEL. Or whether to dismiss a case, refer to superior authority or send to court martial. I think it would be very difficult for a commanding officer to deal with a case without it.

Lieut. Col. RIGBY. The alternative plan—the commanding officer in a mere informal way to have the officer whom he detailed to get the summary, examine

the witnesses, have them called before him without the formality of confronting the accused with them.

Judge CASSEL. If that procedure were adopted it would be very difficult for the commanding officer to exercise any powers of punishment. You must give the accused the opportunity of confronting and cross-examining those on whose evidence he will be convicted. If you do away with the necessity of giving opportunity to the accused to cross-examine witnesses themselves, we would have to alter our system of summary punishments. The present system places the commanding officer in a position to handle cases in any of the ways I have mentioned. That would not be practical in any system where the accused did not have an opportunity to cross-examine. It seems to me hardly consistent with justice to the accused to say that a commanding officer could punish him summarily without giving him an opportunity of being present at the evidence given against him.

Lieut. Col. RIGBY. That may be why the preliminary hearing with us does not give much power to the commanding officer.

Judge CASSEL. That must be the reason—the two things hang together so closely.

Lieut. Col. RIGBY. Largely for giving the commanding officer that authority.

Judge CASSEL. Yes.

Lieut. Col. RIGBY. Aside from that, in other words, if the commanding officer did not have that power of summary disciplinary punishment, would you think it wise to have a summary hearing as you do? Our commanding officers have some summary powers—

Judge CASSEL. Can he dismiss cases?

Lieut. Col. RIGBY. Yes.

Judge CASSEL. I still think it would be of value. I feel it to be contrary to justice to take evidence and not to give the accused an opportunity of being there.

Lieut. Col. RIGBY. It is interesting to get your point of view. Because of your experience and practice in actually carrying it on, do you think that consideration would forbear any objection that would be made against any encumbrance or delay in requiring the accused to be confronted with the witnesses?

Judge CASSEL. Yes; I still think so. But in that case it would be very advantageous to more largely allow documentary evidence where witnesses were at a great distance, accepting the commanding officer's certificate as to the great difficulty in obtaining the testimony of the witnesses.

Lieut. Col. RIGBY. Do you suggest to allow them to certify as to the difficulty of obtaining witnesses, and that a written statement be accepted, to prove formal facts not under dispute?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. Would you have any personal suggestions as to changes that should be made if we decided embodying your practice?

Judge CASSEL. With regard to the commanding officer?

Lieut. Col. RIGBY. The preliminary examination and the commanding officer's award. They usually go together.

Judge CASSEL. I have already indicated that. I should more largely allow proof of formal facts by documentary evidence. A defect in our system is that there is no power to compel civil witnesses to attend at the preliminary investigation. I think that ought to exist. That is a real difficulty at present. That could be improved.

Lieut. Col. RIGBY. Would you advise allowing the accused to have a "military friend" or a counsel to advise him at the preliminary examination, if he wanted it?

Judge CASSEL. I am not disposed to advise that. From the moment that you do it you would have to have a prosecutor, and the inquiry would take up very much more time than it does now. You would probably have to have another officer than the adjutant to take the summary. We do not want to make it an encumbrance. In special cases counsel has been allowed.

Lieut. Col. RIGBY. In the discretion of the commanding officer?

Judge CASSEL. In the discretion of the convening officer.

Lieut. Col. RIGBY. (reading questionnaire):

"(2) How far convening authorities are, in fact, governed by recommendations of law officers as to ordering cases to trial."

Judge CASSEL. (reading):

"(2) On legal points, e. g., as to whether the acts alleged constitute an offense against the Army act or whether the evidence is sufficient to justify

trial, the advice of a qualified officer is taken; but questions of difficulty would generally be referred to the Judge Advocate General or his deputy, whose advice is almost invariably taken."

Lieut. Col. RIGBY (reading).

"(3) Summary disciplinary punishment."

Judge CASSEL. This details what the punishments are [reading]:

"(3) A commanding officer can not punish an officer or warrant officer. A general officer holding a general court-martial warrant and a general officer commanding in chief in the field, and any officer (not under the rank of major general) appointed by him or by the Army council can award the following to an officer below field rank:

"Forfeiture of seniority of rank (subject to right of accused to elect trial by general court-martial.)

"Severe reprimand or reprimand (without such option to elect).

"This power was only conferred in 1919 by the annual Army act of that year."

Lieut. Col. RIGBY. That, of course, as you stated is still experimental. What was the reason for that enactment?

Judge CASSEL. I will give the reason, for Gen. Childs and I are largely responsible for it. We had a great many general courts-martial taking place for comparatively slight offenses by officers; for instance, conduct to the prejudice of good order, in borrowing money from soldiers or absence for a few hours. For all these small offences the "sledge-hammer process" of a general court-martial had to be resorted to. All the ceremony of a general court-martial had to be gone through for every offense, however trivial. The period of arrest awaiting trial by general court-martial was, in some cases, in my judgment, itself a more severe punishment than the offense merited. So that this conclusion was arrived at, that some more summary procedure ought to be devised in dealing with these comparatively slight offenses by officers. This clause is the outcome of our deliberations in that respect. I hope that it will be very valuable and beneficial to officers. You can not pass over these offenses if they are occurring frequently. The difficulty with us was that previously we had no power to punish officers except by court-martial.

Lieut. Col. RIGBY. Was a formal memorandum submitted proposing that enactment?

Judge CASSEL. Yes, I think so. There was a discussion before the Army council. I can remember writing some minutes on it myself; Gen. Childs wrote some. We felt no doubt about its advantages.

Lieut. Col. RIGBY. Wondering if we might have a copy of the correspondence, any form of correspondence going into the reasons for it. That is a thing that interests us. We have the same difficulty in having to deal with an officer by general court.

Judge CASSEL. I do not think there would be any memorandum other than what I have stated. I have stated exactly the reasons. I should have gone further myself if I could.

Lieut. Col. RIGBY. What is your opinion and present advice on that point?

Judge CASSEL. I am not prepared, without further consideration, to say how much further this could be carried.

Lieut. Col. RIGBY. Did your memorandum recommend further power?

Judge CASSEL. No.

Lieut. Col. RIGBY. You drafted the act?

Judge CASSEL. Parliamentary counsel drafted the act but it was submitted to me for approval.

Lieut. Col. RIGBY. It went through in the form in which you advised.

Judge CASSEL. Yes, substantially.

Lieut. Col. RIGBY. Your advice would have been for arbitrary power. What I am trying to get at it, what you would advise us to do—our problem is the same?

Judge CASSEL. I would carry it further, but I am not prepared to furnish precise limits without further consideration.

Lieut. Col. RIGBY. Is the Army Act of 1919 available in printed form?

Judge CASSEL. I will try to get you one if it is [continuing reading]:

"A noncommissioned officer may be severely reprimanded, reprimanded or admonished; also, if holding 'acting' or 'lance' rank, may be ordered to revert to his permanent rank.

"In the case of privates, the 'summary' punishments awardable by a commanding officer are: Detention up to 28 days; for drunkenness a fine not ex-

ceeding 10/—, in addition to or with detention; authorized deductions from pay (e. g., to make good damages done, or loss of arms and kit); on active service only, field punishment up to 28 days; on active service only (in addition to or without any other punishment), forfeiture of ordinary pay up to 28 days.

“The following minor punishments may also be awarded: Confinement to barracks up to 14 days; extra guards or picquets; admonition (see King's Regulations 493).

“If the commanding officer is not of field rank, his powers in respect of detention are limited to 7 days (except in cases of absence).

“A company (squadron or battery) commander can award normally: Confinement to barracks up to 7 days; extra guards and picquets; fines for drunkenness; he can deal with cases of absence, which entail automatic forfeiture of pay; his awards can be reduced by the commanding officer; and, if he has not 3 years' service, his powers may be limited by the commanding officer (see King's Regulations 501).

“A commanding officer must give a soldier the option of claiming a trial by court-martial in every case where the award or finding involves a forfeiture of pay, and in every other case unless he awards one of the ‘minor’ punishments (Army act S. 46 (8)).

“Subject to this option, a commanding officer can in law deal summarily with any offense, if he considers that his powers of punishment are sufficient; but King's Regulations (Par. 487) require him to first refer certain of the more serious offenses to superior authority for directions as to whether they shall be dealt with summarily or whether a court-martial shall be held.”

Lieut. Col. RIGBY. In practice does a man usually demand a court-martial; in what proportion of cases does he demand a court-martial?

Judge CASSEL. As a rule he accepts his commanding officer's award in cases where the commanding officer himself thinks it is a proper case to deal with.

Lieut. Col. RIGBY. There is a value, do you believe, in giving him the option to demand a court-martial? For instance, under the French system no such option is given to him.

Judge CASSEL. I think there is a value, because the commanding officer has necessarily to deal with cases somewhat hurriedly, and it is a great safeguard. There are, of course, some commanding officers who are not so well qualified as others to deal with cases.

Lieut. Col. RIGBY. What is the value of field punishment which you have and which is unknown to our practice?

Judge CASSEL. The value of field punishment is this: On active service you really want some punishment which will not take a man out of the line for a long period or necessitate sending others with him out of the line. Long periods of imprisonment are for many cases not suitable punishments when on active service. Field punishment has created a great deal of discontent on two grounds (1) because it is considered to be degrading to the soldier, (2) on the ground that it may be administered with such varying degrees of severity. But it is difficult to find any other punishment to take its place. Long imprisonment on active service may not be an effective deterrent. A man who does not want to be in the line gets a long term of imprisonment. That may be exactly what he wants, and it necessitates sending other soldiers back with him. Imprisonment is very difficult to apply when troops are on the move in a war of movement. In a war of movement you want some punishment which can be quickly applied without sending a man back from the front, but if some punishment could be devised other than field punishment which would be effective, then let field punishment go. It is necessary first to devise some other punishment to take its place. Unless this was done it might be that the death penalty would be more frequently inflicted. I think that field punishment is open to objection. But at present no effective substitute has been devised. I would be glad to see some substitute take its place, something that does not involve any prolonged absence from the fighting line is, I think, necessary. [Referring to book.] I have here the report of a select committee on punishments on active service. Very glad to loan it to you to read and make such extracts from it as you like. This committee was appointed after the South African war, and contains a good many records about punishments awarded during the South African war. It may interest you.

Lieut. Col. RIGBY. It will.

Judge CASSEL. It deals particularly with the question of field punishments.

Lieut. Col. RIGBY (interrupting). The next question.

"4. Information and statistics relating to the impartial judge advocate attached to a general court-martial (and to what extent in practice assigned to district court-martial)."

Judge CASSEL (reading):

"4. A judge advocate is always appointed for a general court-martial; he is generally an officer with legal knowledge, but may be a civilian."

Lieut. Col. RIGBY. If a civilian, is he a barrister in practice?

Judge CASSEL. Always. [Continuing reading:]

"The appointment in the United Kingdom is made by the judge advocate general; abroad, by the general officer commanding in chief. A judge advocate is at present only rarely appointed in the case district courts-martial. No statistics are available."

Lieut. Col. RIGBY. What rule is followed in the appointment of court-martial officers?

Judge CASSEL. The adjutant general's office of the war office in the United Kingdom have frequently consulted the judge advocate general as to whether an officer concerned is a fit and proper person to be appointed as a court-martial officer, but the actual appointment is made in the United Kingdom by the adjutant general's department at the war office; abroad, by the adjutant general's branch of the commander in chief's headquarters, upon the recommendation of the deputy judge advocate general. I think abroad they always consult my deputy before appointing.

Lieut. Col. RIGBY. Does a court-martial officer have direct access to you or to your deputy abroad, or must he go through military channels?

Judge CASSEL. Technically, he ought to go through military channels, but I have on occasions had direct communication with court-martial officers, but technically they should go through military channels.

Lieut. Col. RIGBY. In practice does a judge advocate of a general court-martial in ruling on evidence or in summing up do it as a judge, as though his ruling should govern with the court? What form would the judge advocate use in advising the court that such and such evidence was not admissible? How far does he govern in ruling the court; how far advisory?

Judge CASSEL. In actual practice his advice is almost invariably followed. If the court did not take his advice it would be a serious responsibility, and it would be reported by the judge advocate himself to the convening authority. The judge advocate would be justified in that case to inform me that his ruling had not been followed by the court. I would take that into account in reviewing the case and in considering whether or not to recommend confirmation and in advising whether the conviction should be quashed. The form in which the judge advocate sums up in open court is much the same as that in which a judge would sum up to a jury, but a judge advocate's summing up is much shorter generally, and it is not necessary for the judge advocate to sum up at all if the court and the judge advocate agree that a summing up is not required.

Lieut. Col. RIGBY. And does the court close to consider his advice?

Judge CASSEL. It closes on points of importance.

Lieut. Col. RIGBY. And the court almost invariably accept the ruling of the judge advocate?

Judge CASSEL. If not they would incur a very grave responsibility, and the judge advocate would have the right, as he is my representative on the court, to inform me directly that his advice has not been accepted. It might lead to the proceedings being not confirmed or quashed.

Lieut. Col. RIGBY. Does his advice and summing up become a part of the record?

Judge CASSEL. Yes; it becomes a part of the record unless both the court and the judge advocate think it unnecessary to record it.

Lieut. Col. RIGBY. It is necessary to record his ruling on the admissibility of testimony?

Judge CASSEL. It is necessary to record the decision of the court, but not necessarily the ruling of the judge advocate.

Lieut. Col. RIGBY. In practice is his summing up usually recorded or not?

Judge CASSEL. It is usually recorded where he does sum up. In many cases the court and the judge advocate both agree that a summing up is not necessary.

Lieut. Col. RIGBY. The summing up and ruling by the judge advocate—whether it points out defects in the record—whether it does cause an undue number of disapprovals on account of legal questions in any way?

Judge CASSEL. There have been a certain number of appeals against the summing up of the judge advocate on the ground that there was misdirection and error of law in them, but on the whole the number of cases on which the proceedings have been quashed on that ground have not been numerous. What I consider in dealing with questions of that kind is really the substance of the matter, whether the court has in fact been misled on the matter of law submitted in the summing up by the judge advocate. If I come to that conclusion and consider that a miscarriage of justice has resulted, I would advise quashing the proceedings. The fact that every point in the evidence has not been brought out, or that something has been omitted by the judge advocate would certainly not be a ground for quashing or not confirming proceedings, provided there is no reason for supposing that there has been any substantial injustice.

Lieut. Col. RIGBY. You do not find it necessary to quash a large number of cases because of what you have stated?

Judge CASSEL. Very few have been quashed on that ground.

Lieut. Col. RIGBY. The alternative plan as to summing up is followed in your field general courts, where a specially qualified member of the court gives advice to the court in closed session. Between the two plans, what are the disadvantages?

Judge CASSEL. There is a good deal to be said on both sides of the question. There are advantages and disadvantages in both alternatives. My opinion on the whole inclines toward the judge advocate rather than the special member of the court. A judge advocate is the recognized representative of the judge advocate general with a definite position laid down in the rules of procedure to which all of the other members of the court are required to conform. On the whole, I think it is an advantage that the actual finding and sentence should be those of regimental officers in close touch with regimental life, and acquainted with the actual conditions of fighting. The actual findings and sentence should be theirs, and on points of law they should be guided by a legal expert.

Lieut. Col. RIGBY. One proposal that has been given us is to make the specially qualified member to be president of the court. What would your thought about that be, being that you prefer a judge advocate?

Judge CASSEL. I lean to the judge advocate, though I think it would be better if you have a special officer, that he should be the president rather than an ordinary member.

Lieut. Col. RIGBY. In practice, has the need of a judge advocate on district courts-martial been shown?

Judge CASSEL. I think myself they should be appointed more frequently on district courts, especially on cases of fraud and for civil offenses. I find that the class of courts-martial which most frequently have to be quashed on legal grounds are district courts-martial for the trial of cases of stealing, fraud, and civil offenses where there is no judge advocate. On that ground I am personally in favor of more frequently appointing judge advocates on district courts. I do not think you want them on every district court, not for instance for ordinary cases of absence or drunkenness.

Lieut. Col. RIGBY. What would be your views as to how it should be determined in that case; what cases they should be appointed on?

Judge CASSEL. By the convening authority acting on the advice of his staff officer or court-martial officer. It might be possible to lay down some general rules, such as that judge advocates should usually be appointed where the charge is one of fraud, stealing, or some other civil offense.

Lieut. Col. RIGBY. I noticed in attending some of your district courts, in the taking of the summary of evidence or record of evidence, the president does not require the recording of questions and answers that may have been proposed on cross-examination by the accused, which the president has ruled out as irrelevant or immaterial, so that no note is made of the fact that the question was asked and was ruled out. Is there any reason for the protection of the accused that a legal adviser should be present? Is any harm done the accused should there be carelessness in making up the record?

Judge CASSEL. That is not my ground for thinking it desirable to more frequently have a judge advocate on districts courts. The accused is entitled to have any question recorded to which objection is put.

Lieut. Col. RIGBY. But if not represented by counsel, no note is made of it. That question is ruled out, perhaps properly ruled out, but no record is made of it.

Judge CASSEL. A record ought to be made.

Lieut. Col. RIGBY (reading next question):

"(5) The 'specially qualified member' of the British general field court-martial—

"(a) How many officers are required for this service?

"(b) From what department are they drawn?

"(c) By whom and how are they chosen?

"(d) Are they in practice required to have legal training?

"(e) What qualifications are required for this 'specially qualified member'?

"(f) How many courts can one such officer conveniently serve?

"(g) Do they in practice sum up the case as to the facts, as well as the law, like the judge advocate of the British general court-martial?

"(h) And, if so, how does such summing up (by an officer who is himself a member of the court and required to vote as one of the members) work in practice?

"(i) How much deference is in practice paid to the opinions of the 'specially qualified member' of the court?

"(k) How does the whole system actually work out?"

Judge CASSEL (reading):

"(5) It must be remembered that the 'specially qualified member' of a field general court-martial, generally called a court-martial officer, was unknown before, and in the early stages of the war. The first court-martial officers were appointed in August, 1915."

Lieut. Col. RIGBY (interrupting). Was there a general order or an army council letter?

Judge CASSEL. No; not abroad. At home there were army council instructions some time about September, 1916, but abroad it was done experimentally at first. I am not aware that there was any actual order issued on the subject abroad, but I will have inquiry made. The little green book which I am going to give you has in it a reference to court-martial officers abroad. [Continuing reading:]

"(a) The general rule was to have one attached to each corps of not more than two divisions. If there were more than two divisions in the corps, there were two court-martial officers. In addition, there were one or more court-martial officers attached to each army. There were special appointments for lines of communication."

There would be a court-martial officer at corps headquarters, with a corps consisting of not more than two divisions, but if there were more than two divisions in the corps, say three or four divisions, there would be two court-martial officers at corps headquarters. The court-martial officers attached to the army would be at the army headquarters. [Continuing reading:]

"(b) From the army as a whole, in which a great many barristers and solicitors were serving.

"(c) By the adjutant general's department, after inquiry as to applicant's ability and professional standing, on the recommendation of the judge advocate general or his deputy.

"(d) (e) They were all fully qualified barristers or solicitors.

"(f) The answer to this question depends on the local conditions and the length and difficulty of the cases; the number of officers referred to under (a) were found sufficient to do the work required."

That answers your question?

Lieut. Col. RIGBY. These court-martial officers would be appointed to membership in several courts?

Judge CASSEL. He would go from one court to the other. One would suffice for a corps with not more than two divisions. [Continuing reading:]

"(g) They do not formally sum up (either on fact or law) in open court. When the court retires, they give their views both on law and on fact."

Lieut. Col. RIGBY (interrupting). That is not made part of the record.

Judge CASSEL. No; nothing which is not in open court is recorded. [Continuing reading:]

"(h) This does not arise.

"(i) On questions of law their opinion was generally followed; on a question of fact it had considerable weight, though not so much as on questions of law. But the obligation of secrecy imposed by the oath renders it difficult to speak with certainty.

"(k) It is considered that the system has in the emergency worked extremely well. There is, however, a difference of opinion as to whether it would not be better that the court-martial officer should sit either as judge advocate or president, and not merely as a member of the court."

In that I have not expressed a view as to which is best. The balance of my opinion is, as I have already stated, on the whole in favor of judge advocate.

Lieut. Col. RIGBY (reading from questionnaire):

"(6) What have been the results in practice of British Army Orders 110 and 111 of March 17, 1917 (analogous to General Orders Nos. 7 and 94, U. S. War Department, 1918)?

"(a) Upon what considerations were these British orders based?

"(b) Just how far has their application been extended?

"(c) How uniformly have the recommendations of the judge advocate general been followed by confirming authorities?"

Judge CASSEL (reading):

"(6) Before Army Orders 110 and 111 of 1917, in the United Kingdom the judge advocate at the trial forwarded the proceedings of general courts-martial direct to the judge advocate general.

"Under the new system introduced by Army Orders 110 and 111 the proceedings in such cases, instead of going direct to the judge advocate general, pass to him through the convening officer who adds his remarks and recommendations.

"(1) If confirmation by His Majesty was required the judge advocate general transmitted them to the secretary of state for submission to His Majesty.

"(2) If confirmation by His Majesty was not required the judge advocate general returned them with his advice to the convening officer (who was also the confirming officer)."

That was explaining what the position was before. Now [continuing reading]:

"(a) The object of the Army Orders 110 and 111 was to insure that the judge advocate general in reviewing the proceedings, and the secretary of state for war or air tendering the advice to His Majesty should have before them the views of the convening officer.

"(b) The orders extend to all general courts-martial held in the United Kingdom.

"(c) The recommendations of the judge advocate general as to confirmation have almost invariably been followed."

I can not remember a case as to confirmation that has not been followed since I have been judge advocate general.

Lieut. Col. RIGBY. Referring to (b), is there any analogous order for field general courts-martial—field courts at home?

Judge CASSEL. No; it only deals with general courts-martial at home.

Lieut. Col. RIGBY. We will come to quashing later on. So, in speaking of uniformity in following your recommendations in confirmation, you mean now recommendations where you have advised confirmation and they have followed you?

Judge CASSEL. Yes; confirmation or nonconfirmation. I have been trying to recall a case where they have not acted on my advice as to confirmation or nonconfirmation. With regard to quashing, I will come to that later.

Lieut. Col. RIGBY (reading questionnaire):

"(7) To what relative extent during the war has the British Army made use of its several disciplinary agencies?

"(a) General courts-martial.

"(b) District courts-martial.

"(c) Field general courts-martial.

"(d) Summary disciplinary punishment.

"(8) What about the length and severity of sentences during the war in the British Army for—

"(a) Military offenses?

"(b) Civil offenses?

"(9) Statistics for the purposes of throwing light on all of the above questions, and others that may arise, as to—

"(a) Total number of court-martial trials, segregated among the different courts—

"1. General courts-martial.

"2. District courts-martial.

"3. Field general courts-martial.

"(b) Annual percentage of court-martial trial to total strength.

"(c) Number (and percentage) of acquittals.

"(d) Number and percentage of cases reviewed, disapproved, modified, etc., and by what agencies (that is, confirming authority or recommendation of judge advocate general, or otherwise).

"(10) Number and length of sentences for principal military offenses and principal civil offenses; collated and tabulated separately.

"(11) Number of sentences reduced in severity by the confirming authority or on the recommendation of the judge advocate general—

"1. Classified according to the character of the offense; and

"2. With figures as to the aggregate of such reductions and the percentage of such reductions to the number and length of original sentences.

"3. Classified to show separately those so reduced on recommendation of judge advocate general.

"(12) Death sentences, classified as to—

"1. Offenses for which imposed.

"2. How many carried into execution.

"3. Statistics as to commutation.

"(13) Detention barracks statistics: Number of such sentences, classified as to—

"1. Character of offense and length of sentence.

"2. Figures as to the restoration of men to duty.

"3. Number of men who, having served detention barracks sentences, were again sentenced to the barracks, or to severer punishment.

"(14) Summary disciplinary punishment statistics.

"1. Number and character of sentences and for what kind of offenses.

"2. Number of men so sentenced a second, third, or more times.

"3. Number of men so sentenced who were thereafter sentenced to the detention barracks or to severer punishment."

Judge CASSEL. These paragraphs have been grouped together in my answer: "(7), (8), (9), (10), (11), (12), (13), and (14). All the statistics available in this office have been supplied. Possibly the adjutant general's department may be able to supply further information as to strength of army, detention barracks, and punishments. There are no statistics of summary punishments by commanding officers, no record of such punishments reaches the office of the judge advocate general."

Our statistics, as I told you before, during the war were improvised. When I was appointed I found no statistics at all, so our statistics previous to my appointment have been made up subsequently and they are not perhaps as full as we should like them to be.

Lieut. Col. RIGBY. These statistics have been given to me in confidence and not to be submitted to Congress.

Judge CASSEL. When submitted to the British House of Commons, I may be able to authorize you to submit them to Congress. I have communicated with the secretary of state. But I would not be justified in authorizing you to disclose to Congress what has not yet been made public in our own house.

Lieut. Col. RIGBY. Any conclusions we may draw from them—percentages—that you may tell me. For instance, I have in mind the percentage of your acquittals before the war, which I gather from examination of the statistics. Can you tell me anything in this form—percentage of disapprovals and acquittals for the purpose of comparison with our own in times of peace. I could make up a little table of conclusions which I have drawn and submit it to you.

Judge CASSEL. I will tell you what I will do. Submit it to me and I will submit it to the secretary of state, but I do not think I would feel justified in authorizing the furnishing of statistics for Congress without having his special permission. If you will submit it to me, I will submit it to him, and if he assents I will let you know.

Lieut. Col. RIGBY. The next question is (15).

"(15) Average length of time elapsed between the offense and final disposition of cases:

"1. By summary disciplinary punishment.

"2. By courts-martial (classified so far as possible by the different kinds of courts-martial).

"3. Final confirmation or other disposition."

Judge CASSEL (reading):

"(15) 1. An offense would ordinarily be disposed of by summary punishment on the day following arrest, but there may be delay owing to a number of causes, such as difficulty in obtaining evidence, reference to superior authority, etc."

I will take an ordinary case—a soldier commits an offense this afternoon, say he strikes a superior officer; he is put in the guardhouse this afternoon; as a rule, he goes before the commanding officer the next morning. First, before the company commander, as I explained. The company commander if he disposes of it summarily would probably do so that morning. If it goes to the commanding officer, he would also ordinarily deal with it this morning; that is to say, the morning after the arrest. There may, however, be a number of reasons which cause delay. [Continuing reading:]

"(2) The times which would elapse between commission of the offense and confirmation of the sentence in the case of each of the four kinds of courts-martial if every step were taken as promptly as possible and no difficulty arose in connection with the obtaining of evidence or otherwise are shown in the table annexed to the evidence of the judge advocate general before the committee on courts-martial. (Appendix III, p. 27, copy attached.)

"(3) No statistics as to the actual times which elapse have been kept."

That table (referring to book) you need not regard as confidential, not treated as confidential. The table appears marked in blue pencil, pages 30 and 31. That table really does give you the information, each step, every hand through which a case passes.

Lieut. Col. RIGBY. What particularly interests us is how long it takes you to run a case through, taking into consideration the delay that you do need?

Judge CASSEL. During the war, delays have frequently arisen particularly due to the exigencies of the war, the fact that officers had to be constantly on the move or had other more important work to be attended to. District courts-martial do not cause much undue delay in peace time. District courts-martial ought to be tried within a fortnight or thereabouts and from inquiries which I have made I think that before the war that period was not, as a rule, much exceeded. In the case of general courts-martial there is more delay. Three weeks, I think, is the minimum time that is requisite, but especially during the war there have been very long delays.

Lieut. Col. RIGBY. Have you had experience during the war with delays in a case going to 30 or 40 days?

Judge CASSEL. More than that, I am sorry to say—even three, four, or five months in exceptional cases. I have made it a rule to send in to the war office all the cases where I think there has been undue delay. The war office investigate the reasons for the delay, and if it is not satisfactorily accounted for, the officers concerned hear of it. We have constantly had this question of delay under our notice during the war. If an accused is convicted, the general rule is that the court should take the delay into account in awarding sentence, but that only holds redresses to hardships where there is a conviction or if the sentence admits of it. If the accused is acquitted or if the proceedings are not confirmed, or if a light sentence is awarded, it is not possible to remedy the hardship in that way. We are meeting that by a larger use of "open arrest," and more frequently releasing the accused without prejudice to his trial; in fact by more closely approximating to the practice in civil courts in granting bail to the accused.

Lieut. Col. RIGBY. That is a thing we have been interested in and have kept statistics for several years.

Judge CASSEL. I think it is very desirable, and when we get back to normal conditions we shall certainly keep statistics ourselves as to the periods of arrest awaiting trial.

Lieut. Col. RIGBY. How long have you found it necessary to get a case through this office?

Judge CASSEL. In cases before trial we make it a point to try and send the papers back on the same day; if not possible, within 48 hours after their receipt. That is the standard we work up to; to have them passed the same day. Any case involving liberty is given precedence and is dealt with first; I mean if the liberty of the soldier would be affected by the papers being kept here. In advising before trial, we return papers generally on the same day; always within 48 hours. Of course, in reviewing proceedings it takes longer. The accused is already under sentence of a competent court. Where we particularly make a point of expedition is where the liberty of the accused is affected, and he is not yet proven guilty. Of course, asking for additional evidence and additional information may take time.

Lieut. Col. RIGBY. In reviewing cases, how long does it take?

Judge CASSEL. We do it as quickly as we can—with proceedings coming from all parts of the world; all cases are reviewed here except cases tried in India. There is a separate judge advocate general for India. Sometimes we get a

very large number per week; during the war as many as 2,000 in a week, and we have only a very small staff of officers to deal with them. Considerable delay sometimes takes place before proceedings reach us. This was especially the case with proceedings from France while heavy fighting was going on.

Lieut. Col. RIGBY. Cases of death sentences, how are they handled? In what way?

Judge CASSEL. In the United Kingdom not a single death sentence on an officer or soldier in the British Army has been carried out during the war, either for any strictly military or for any civil offense.

Lieut. Col. RIGBY. For strictly military offenses?

Judge CASSEL. By court-martial, none at all in the United Kingdom as regards officers or soldiers of the British Army. Abroad the death sentence has to be confirmed by the commander in chief. Before he confirms the proceedings he has the advice of the deputy judge advocate general, who can always refer to the judge advocate general at home if there is any question of doubt or difficulty. In addition to that the commander in chief has before him the recommendations of the commanding officer of the accused, the brigade commander, the divisional commander, the corps commander, and the army commander as to whether the requirements of discipline are such that the sentence should be carried out or whether clemency should be extended.

Lieut. Col. RIGBY. Are these recommendations required?

Judge CASSEL. There is no law which requires it, but it is a universal practice. Orders have been issued that these recommendations should be forwarded to the commander in chief. He has these before him, and on legal questions he has the advice of the judge advocate general or his deputy. If there is any question as to a man's mind having been affected, through shell shock or in any other way, a special examination by medical board is ordered.

Lieut. Col. RIGBY. Is the advice of the deputy judge advocate general in written form or review?

Judge CASSEL. It takes the form of submitting the proceedings to the adjutant general to place them before the commander in chief, and if the deputy judge advocate general considers that they are in order, his minute would merely be submitted to the adjutant general to place before the commander in chief. If he has grounds for thinking that the proceedings should not be confirmed, he would give his reasons. The position of the deputy judge advocate general is laid down in our field service regulations. What I have been telling you is the practice.

Lieut. Col. RIGBY. One other question: Do you review proceedings afterwards in cases where the death sentences are carried into effect abroad?

Judge CASSEL. I do; but I have had no occasion to send in any minute where the sentence has actually been carried out.

Lieut. Col. RIGBY. Where the accused is at home you review a death case before it is carried into execution?

Judge CASSEL. Not a single death sentence has been awarded at home.

Lieut. Col. RIGBY. Have not had a death sentence at home?

Judge CASSEL. No. If one had been awarded I would have advised on it before confirmation.

Lieut. Col. RIGBY. Your recommendation is required?

Judge CASSEL. No death sentence at home would be carried into effect unless personally reviewed by me.

Lieut. Col. RIGBY. Have you any thought as to the advisability of having all death sentences awarded abroad being reviewed at home before being carried into effect?

Judge CASSEL. There are very strong reasons against it. Suppose in Mesopotamia a man is sentenced to death, it would take too long a time to send the case back to England. The essence of a death penalty is to carry it out quickly. The quick carrying out of a death penalty has great value, especially with native troops, to prevent mutiny from spreading. If every death sentence had to be sent back to London it would defeat some of the principal objects which necessitate the awarding of a death sentence. I should certainly say it would be a great disadvantage if the case were sent to London. If you are to have death sentences at all, the commander in chief in the field should be able to say whether it should be carried out. He has always the legal advice of the deputy judge advocate general, who in turn can refer to the judge advocate general at home in any case of doubt or difficulty.

Lieut. Col. RIGBY. In practice how quickly was a death sentence carried into effect abroad?

Judge CASSEL. One case in the early part of the war a death sentence was carried out within three days after arrest; that was while the troops were actually on the move. A certificate of urgency was given by the convening officer, and it was carried out under three days.

Lieut. Col. RIGBY. Case of misconduct in the face of the enemy?

Judge CASSEL. It was. It occurred during the retreat from Mons. The death penalty had to be speedily carried out. The evidence was absolutely clear beyond the shadow of a doubt. Other cases where it is necessary to carry out the death sentence very quickly is with native troops to prevent a mutiny from spreading. For troops in the trenches there is not the same necessity for expedition, and longer time is taken. I can not give you an exact figure.

Lieut. Col. RIGBY. In a general way, your death sentences were very few?

Judge CASSEL. Very few, considering the number in the army and the very stringent circumstances of the fighting.

Lieut. Col. RIGBY. In a general way are you able to tell me in this form the character of the offenses for which most of the sentences were imposed?

Judge CASSEL. The only offenses for which the death sentence was carried out were mutiny, cowardice, desertion, murder, striking and using violence to a superior officer, willful disobedience of lawful command of superior officer, and casting away arms.

Lieut. Col. RIGBY. In a general form can you tell me the relative proportion as between these offenses?

Judge CASSEL. The great bulk of them were for desertion in the face of the enemy; desertion on active service.

Lieut. Col. RIGBY. Does that include cowardice?

Judge CASSEL. Desertion on active service, as a rule, involves cowardice also. If absence for a definite period of time is involved it is usual to frame the charge as one of desertion; where there is not absence for any definite period the charge of cowardice is preferred.

Lieut. Col. RIGBY. In addition to the great bulk which you say was for desertion, what number, what proportion for cowardice?

Judge CASSEL. The great bulk were for desertion; not many for cowardice.

Lieut. Col. RIGBY. Any further information about these death cases you feel free to give me at this time?

Judge CASSEL. I do not think I can at the moment.

Lieut. Col. RIGBY. From your experience in the war, would you advise any change in the method of handling them or as to confirmation; any suggestions to make to us?

Judge CASSEL. No; I think not. The only suggestion I have to make is rather of a minor character. It is this: When the accused is informed in a sealed envelope that he has been sentenced to death by the court, subject to confirmation, he should also be informed that he may make any representation which he or his counsel may wish to the confirming authority. It is now a rule with us that an accused who is tried on a capital charge must be assigned a suitable officer to represent him, if he wishes to be represented.

Lieut. Col. RIGBY. Capital charge, or any charge on which the court has power to award the death sentence?

Judge CASSEL. On which the death sentence is likely to be awarded.

Lieut. Col. RIGBY. Any reason, in your opinion, for allowing an accused who has been sentenced to death to apply for clemency—

Judge CASSEL. To whom?

Lieut. Col. RIGBY. To the confirming authority—higher authority?

Judge CASSEL. I do not think anything more is necessary than what I have just suggested. The percentage of cases in which clemency is in fact exercised is so extraordinarily high, that I think nothing more is required.

Lieut. Col. RIGBY. Put it in another way. Your opinion would be the needs of discipline overbear any possible reason for giving additional time to the accused to appeal for clemency. The disciplinary value of the death sentence is so largely dependent on its being speedily carried out, that it would not be advisable for the purposes of clemency to allow time for appeal?

Judge CASSEL. No time for appeal at home should be allowed. If the death sentence is to be of value at all, it must be carried out speedily. It is very important to keep this power in the hands of the commander in chief. He is responsible for the safety and welfare of the army, and should enforce the discipline. It would be dangerous to transfer that power from him or to weaken his power.

Lieut. Col. RIGBY. Would that, in your opinion, apply to all death sentences or do you make a distinction between the character of the offenses?

Judge CASSEL. I make no distinction. If the evidence is sufficient to warrant the death penalty, it must ultimately rest with the commander in chief whether the sentence should be carried out or clemency exercised, and if it is carried out it should be done without undue delay.

Lieut. Col. RIGBY (reading next question):

"(16) Results of suspension of sentence, under suspended-sentence act—statistics and general working of the system."

Judge CASSEL (reading from his answers):

"The working of the suspension of sentences acts has been most beneficial during war time and the acts have fulfilled the purposes for which they were originally passed. They have given many a soldier the opportunity of redeeming his character by bravery in the field. They have prevented men whose services were required in the field from being detailed for long periods in prison. A feature in connection with these acts which has given rise to some dissatisfaction is the fact that, while soldiers who had committed comparatively slight offenses and who had not had their sentences suspended had to serve those sentences, others who had been guilty of graver crimes and who had their punishments suspended escaped all punishment. The adjutant general's department would be able to supply further information on this question."

This question of suspension really does not come under my department, but under the jurisdiction of the adjutant general. It has been a most beneficial act; it has saved many soldiers from imprisonment. There is one weak point.

Lieut. Col. RIGBY. Have you any suggestions as to any changes?

Judge CASSEL. Any suggestion I would make is this: The court might award forfeiture of pay, and imprisonment in addition. The imprisonment could then be alone suspended. The forfeiture of pay would still stand, so that the soldier would not be altogether without punishment.

Lieut. Col. RIGBY (reading from questionnaire):

"(17) An opportunity (such as was afforded Col. Dunn, of the United States Army in 1911) of visiting detention barracks and other military prisons, and statistics as to the length of sentences and character of offenses for which the prisoners are undergoing confinement.

"(18) An opportunity to visit and make stenographic reports of the proceedings of courts-martial of the different classes—G. C. M., D. C. M., F. G. C. M.—and to procure complete copies of records of actual proceedings (with the names of the defendants omitted, of fictitious names substituted if desirable), such as has been furnished by the French authorities."

Judge CASSEL (reading):

"(17) (18) This is being arranged. Further statistics as to sentences can possibly be supplied by the adjutant general's department of the war office and the authorities at the detention barracks."

Lieut. Col. RIGBY. We had an opportunity to visit Aldershot and got information there. Very interesting. We plan to visit those at Perth and Stirling to-morrow; Gen. Childs has made arrangements for that. [Reading from questionnaire:]

"(19) Information as to the working in practice of the judge advocate general's office; e. g., the number of cases passing through the office per annum, or per month, during the war; the length of time required for the disposition of a case in the office; the routine method of handling cases; the number of cases recommended to be disapproved; number of recommendations to clemency; figures showing how uniformly recommendations of the judge advocate general have been followed by military authorities:

"(a) of disapproval, wholly or partially, on legal grounds.

"(b) of clemency."

Judge CASSEL (reading):

"(19) The work of the judge advocate general's office consists in giving advice as to courts-martial both under the army act and the air force act and legal advice on other questions. The work so far as it relates to courts-martial falls under four main heads: (i) Advice before trial; (ii) advice before confirmation; (iii) review after confirmation; (iv) review upon appeal.

"As to (i): In the United Kingdom the convening officer before ordering trial submits the charge sheet and summary of evidence in all general courts-martial cases and in all district courts-martial cases where fraud is alleged or where he desires advice. Similar duties are discharged in relation to courts-martial abroad by the deputy of the judge advocate general.

"In such cases advice is given as to whether the evidence is admissible and sufficient to support the charge and what kind of further evidence, if any, is

required, and also whether the charge is correctly drawn and what amendments and additional charges, if any, are necessary.

"The judge advocate general himself does not deal with cases 'before trial' except to lay down general principles, and it is a cardinal rule of the office that the officers who deal with cases at that stage should not deal with them 'after trial.'"

I am very particular on that point.

"As to (ii): In the United Kingdom after trial and before confirmation the proceedings are forwarded to the judge advocate general in all general court-martial cases and in any other cases where the confirming authority desires advice.

"These are dealt with by the judge advocate general with the help of legal assistants. Abroad similar duties are discharged by the deputy of the judge advocate general who refers to the judge advocate general in London in cases of doubt or difficulty.

"If the proceedings require confirmation by His Majesty, the judge advocate general forwards them to the secretary of state with his opinion embodied in a minute, and the secretary of state submits them to His Majesty. In other cases he returns them to the confirming authority with his advice.

"As to (iii): All proceedings held in any part of the world except India are after confirmation forwarded to the office of the judge advocate general in London for review and custody. For India there is a separate judge advocate general who reviews proceedings of trials held there.

"In all cases sent to the judge advocate general's office the proceedings are carefully reviewed to see whether the charges are properly framed, whether the evidence justifies a conviction and whether the proceedings are otherwise legally in order. If the proceedings are in order they are filed. If not, they are forwarded to the secretary of state for war or the secretary of state for air or the adjutant general, or other proper authority, advising that the proceedings should be quashed or that such other action should be taken as the circumstances of the case may require.

"As to (iv): It is open to any person convicted by court-martial to petition His Majesty or the army council, or air council at any time against his conviction or sentence, and persons frequently petition more than once. Such petitions if they involve any legal questions are referred to the judge advocate general and are again considered by him in the light of any further facts or arguments brought forward by the petitioner. Advice is then given to the secretary of state for war or air as to whether there is any ground for interference.

"It must be clearly understood that the judge advocate general is concerned only with the legality of convictions and sentences. He is not concerned with recommendations as to clemency though he occasionally calls attention to sentences if they appear unusually severe. His recommendations upon the legal aspect of cases are almost invariably accepted and acted upon. The only cases in which this has not been done is when the attorney general has been consulted and has taken a different view.

"Cases for advice before trial and before confirmation are, so far as circumstances permit, dealt with and dispatched from the judge advocate general's office within 48 hours of receipt unless they raise some point of exceptional difficulty.

"Cases for final review after confirmation are dealt with as rapidly as possible; the delay is seldom more than three days.

"As the statistics show, nearly a quarter of a million convictions were reviewed in the office during the war."

Lieut. Col. RIGBY. How many are in your staff?

Judge CASSEL. My staff now consists of three civilians, including the registrar and nine attached officers. I had more before the armistice.

Lieut. Col. RIGBY. How many then?

Judge CASSEL. During the heavy work of the war, I had 14 or 15 attached officers.

Lieut. Col. RIGBY. With that small staff were you able to write reviews, opinions on a case, or did you simply make a minute?

Judge CASSEL. I am guided by circumstances. I should send in a full minute if I thought it necessary. We have to distribute the work. But we have been rather shorthanded.

Lieut. Col. RIGBY. Do you have fixed rules to distribute the work among sections of the staff?

Judge CASSEL. I have certain officers who deal with cases before trial and nothing else, unless it so happens that they have not work to occupy their whole time, and one of the other groups is pressed. I then let them review cases after trial, but never the same case on which they advised before trial. No hard and fast rules—certain general rules. During the press of work, everybody has to help everybody else.

Lieut. Col. RIGBY. Do you divide the cases as to character?

Judge CASSEL. I have one officer who reviews district courts after confirmation. General courts I always review personally. All appeals I deal with personally. Field general courts-martial when they come here are dealt with by two officers, specially detailed. There have been a very large number of field general courts-martial during the war. All these have been reviewed once abroad by either the deputy judge advocate general or some other under him, so that they do not get so full a review here as a district or general court-martial.

Lieut. Col. RIGBY. Through how many hands would a case go?

Judge CASSEL. Very many hands. Take the case of a district court-martial—first of all the officer who advises the confirming officer, and the confirming officer himself, who must deal with it. After confirmation it is reviewed in my office. Afterwards it is sent by me to the adjutant general's branch, and two or three officers there read it. Some cases go before the attorney general as well as myself. In the case of a general court-martial every possible care is taken before it is finally submitted to His Majesty. Field courts are reviewed first abroad, then come here. If some point of military custom or practice is involved, I sometimes send over to the adjutant general to obtain the views of the military authorities on the military aspect of the case. Any doubt as to whether the accused was mentally responsible, I refer to the war office for a medical report—to have a medical board examine the accused concerned.

Lieut. Col. RIGBY. A case coming into your office then would be reviewed by some officer in the office and he, if he saw any reason for submitting it to you—any irregularity—is his action final? Do you generally follow it?

Judge CASSEL. If he submits it to me I deal with it personally.

Lieut. Col. RIGBY. Does he sign it in your name?

Judge CASSEL. No; I sign personally. If an officer does not submit the proceedings of a court-martial he has reviewed to me personally, he initials them. So I know who is responsible if any question arises. In such cases he simply initials, and the proceedings go to the files. [Continuing reading:]

"In addition to court-martial work of the army and royal air force, the judge advocate general deals with other legal work, e. g., the answering of questions which arise in practice upon the construction of the army act, King's regulations, the pay warrant and other regulations and orders, the drafting of orders and new regulations, military courts upon prisoners of war, etc."

Lieut. Col. RIGBY (reading questionnaire):

"(20) Forms of actions, recommendations or memoranda used by the judge advocate general in the disposition of cases."

Judge CASSEL. Twenty and twenty-one I deal with together.

Lieut. Col. RIGBY (reading next question):

"(21) Information as to the finality of action of the judge advocate general:

"(a) From the forms used in practice.

"(b) In theory (that is to say, showing how far in practice the power of the judge advocate general is final and judicial, and how far it is, either in theory or practice, recommendatory and subject to the action of higher authority).

"(c) Information of the exact nature of the change some years ago in the status, tenure, and power of the judge advocate general."

Judge CASSEL (reading):

"(20) and (21) (a) The attached specimen minutes show the forms used by the judge advocate general in advising the secretary of state both before and after trial.

"(b) In theory his duties are advisory only. In practice his advice is almost invariably acted upon; the only cases where this is not done is when the attorney general is consulted and he differs from the judge advocate general.

"(c) Before the reconstitution of the office in 1905, on the appointment of Sir Thomas Milvain, the judge advocate general had been the direct responsible adviser of the Crown. He submitted direct to the sovereign those court-martial

cases which required the confirmation of the sovereign as head of the army. To insure the responsibility of the judge advocate general to Parliament for the advice which he gave to the Crown, he was generally a member of Parliament and privy councillor, and the office was political, changing with successive governments."

Really a member of the Government.

"Since 1905 the office has not been political, the appointment has been permanent, and the judge advocate general has not been a member of Parliament or of the Government. He does not submit his advice direct to the sovereign, but through the secretary of state, of war, or air. The judge advocate general now devotes his whole time to the work of his office. Formerly the ordinary work of the office was left to the deputy judge advocate general, and it was only in cases of exceptional difficulty or if questions were raised in Parliament or advice had to be given to the sovereign that the judge advocate general acted personally."

Lieut. Col. RIGBY. In what form was that change made in 1905?

Judge CASSEL. There has been no change of law affected by act of Parliament. It was a change of practice. There was a slight change in the wording of the patent.

Lieut. Col. RIGBY. Change in the reconstitution of the cabinet; was not a part of the cabinet?

Judge CASSEL. The change was not affected by any statutory enactment or order in council, but merely by a change of practice and in the wording of the letters patent. Sir Thomas Milvain, my predecessor, ceased to be a member of Parliament after he became judge advocate general. He, in practice, carried out the decision of the cabinet as to how the work of the office was to be carried on in future.

Lieut. Col. RIGBY. The cabinet determined that the work thereof should be carried on in a different way. Before that had not his predecessors been members of the cabinet?

Judge CASSEL. They had generally been members of the privy council, but not of the cabinet.

Lieut. Col. RIGBY. Do I get it correctly then—the change was made largely in the reconstitution of the cabinet at that time?

Judge CASSEL. No. Previously the judge advocate general had generally, though not always, been a member of Parliament and a privy councillor and he had advised the sovereign directly. After the change he ceased to be a member of Parliament or privy councillor and his position became more analogous to that of a civil servant. He ceased to advise the sovereign directly, but did so through the secretary of state for war. After this change more of the work was done by the judge advocate general personally and less through his deputy. His whole time was given to the work after the change.

Lieut. Col. RIGBY. In an informal way—practice since adhered to?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. May I ask your opinion on that—would you advise changing back to the old form? Before that your office really had executive powers that it does not have now?

Judge CASSEL. No.

Lieut. Col. RIGBY. He became responsible under the old system so that in effect his advice was really an order, finally determined in effect all what should be done with a case?

Judge CASSEL. Even before the change the functions of the judge advocate general were not executive. They were advisory, though his advice was almost invariably followed. I have an opinion of Lord Coleridge and Sir George Jessel given in 1873, in which they advised that the judge advocate general had no judicial or executive functions, but that his functions were advisory only.

Lieut. Col. RIGBY. Prior to 1905 was there the same practice that now exists to refer to another officer the opinions and advice of the judge advocate general?

Judge CASSEL. That practice has mainly arisen during the present war.

Lieut. Col. RIGBY. What are your thoughts as to reverting to the old system?

Judge CASSEL. On the whole I do not think it would be an advantage to revert to the old system. I think it is useful that the judge advocate general should give his whole time to the work of the office rather than that it should be left largely to his deputy as formerly. The secretary of state should be responsible to Parliament for the whole work of his department, including courts-martial. The position of the judge advocate general now is really that of legal adviser to the secretary of state for war.

Lieut. Col. RIGBY (reading questionnaire) :

"(23) Information as to the routine followed by confirming authorities in acting upon records of trials by courts-martial—

"(a) General courts-martial.

"(b) District courts-martial.

"(c) Field courts-martial.

"(24) Through whose hands do such records pass; and upon the recommendation of what, if any, legal officer does the confirming authority act?"

Judge CASSEL (reading) :

"(23) and (24) This is shown by the table (Appendix III) annexed to the judge advocate general's evidence before the court-martial committee and to his memorandum.

"The confirming or reviewing authority acts upon the advice of a staff officer specially skilled in military law or a legal adviser specially attached to the formation which he commands."

Lieut. Col. RIGBY. He is the legal adviser, but the final decision rests with the secretary of state for war?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. In the case analogous, the attorney general and solicitor general are final advisers. Whose advice would be followed if there was a conflict?

Judge CASSEL. That of the attorney and solicitor general; they are advisers to the Government as a whole.

Lieut. Col. RIGBY. Any reason for making it a question in Parliament if the secretary of state for war overrules the opinion of the judge advocate general?

Judge CASSEL. None at all. I should not consider myself aggrieved by the fact that they had overruled me. I accept the position that they are advisers to the Government as a whole. I am happy to say the number of cases where they have differed are few.

Lieut. Col. RIGBY (reading questionnaire) :

"(25) Also to have interviews (in the presence of a stenographer, such as have been furnished us in France) with commanding generals in the field, or those who have commanded in the field during the war, for the purpose of procuring their opinions upon the disciplinary or other value of some points wherein the British court-martial and disciplinary practice varies from ours (and from the French), notably—

"(a) Summary disciplinary punishment.

"(b) Field punishment.

"(c) Lack of power to return acquittals for reconsideration.

"(d) Lack of power on revision to increase the severity of a sentence.

"(e) Power of the commanding general in Great Britain and the United States (as contradistinguished from the French practice) to review the proceedings of courts-martial).

"(f) Detailed instructions, as prescribed in the British regulations, as to the method of conducting the preliminary examination.

"(g) The value of a legal officer as an impartial judicial officer on the court-martial (judge advocate, as in the British G. C. M., or 'specially qualified member' of the court, as in F. G. C. M.)

"(h) Other questions that may be presented.

"(26) The advice and opinion of the British judge advocate general and his assistants and of military lawyers familiar with court-martial practice, as to these questions, and also particularly as to—

"(a) The value of counsel for the accused in court-martial trials and the method of choosing counsel for the accused."

Judge CASSEL (reading) :

"(25) Interviews with generals who have commanded in the field will be arranged through the adjutant general's department at the war office.

"(26) The views of the judge advocate general upon the questions asked here and in No. 25 are as follows:

"(a) The presence of counsel (including an officer acting as such) to represent the accused is a great safeguard and of great assistance to the accused and the court, provided such counsel is competent. An accused person has the right to be represented by a barrister or solicitor or an officer selected by him. Nevertheless the cases where the accused have not been represented have been frequent. The judge advocate general considers that whenever practicable the assistance of a suitable officer should be offered to the accused for his defense without in any

way derogating from the right of the accused to be represented by the counsel or officer of his own choice."

Qualified officers as counsel are of great value if competent. An incompetent counsel may do a great deal of harm.

Lieut. Col. RIGBY. The matter of counsel is one of the problems with us. What do you think of the suggestion of having public defenders or military defenders appointed?

Judge CASSEL. Not civilian advocates. But it would be desirable to insure so far as practicable that suitable officers should be available for the purpose.

Lieut. Col. RIGBY. I see the French have a plan by which the president of the court has the right, the same as a civil judge, to appoint counsel for the defense, and it is the duty of the "advocate" to appear without charge to defend if directed to do so, just as if he were assigned by a civil judge.

Judge CASSEL. A civil advocate?

Lieut. Col. RIGBY. Yes; that seems to be under their laws, part of the duties—to obey the orders of a military judge.

Judge CASSEL. That would only apply while troops were in the United Kingdom.

Lieut. Col. RIGBY. Under the French system, in armies in the interior.

Judge CASSEL. If you did that while troops were at home, you would be less likely to have suitable officers for the defense abroad and on active service. Even in peace time a large proportion of the British Army is always outside of the United Kingdom—nearly one-half. I am inclined to think that it will be possible to secure a sufficient number of properly qualified officers. I think this is better than assigning civil advocates.

Lieut. Col. RIGBY. Do you think that a counsel is of real assistance to the accused?

Judge CASSEL. On the whole they are, particularly in cases of any complication. Very often a soldier is rather nervous when he goes before a court-martial. He has not the facility of bringing out circumstances in his own favor in the same way as a counsel or qualified officer would.

Lieut. Col. RIGBY. When represented by an officer, in practice what is the rank of the officer representing him?

Judge CASSEL. There is no rule or requirement as to rank. Anything from a second lieutenant upward. On the whole I think that the court gives due weight to arguments irrespective of rank if the counsel is competent.

Lieut. Col. RIGBY. Do you find from your records and general experience in the office, in a general way, which way lieutenants stand out; is there any disadvantage in defending before a court because of the fact that he is a junior officer? Does he fail to bring out the case for the accused because of any timidity on account of his low rank?

Judge CASSEL. No; I do not think so. It has been suggested in Parliament here that the counsel for the accused should always be of high rank; of the same rank as the president of the court.

Lieut. Col. RIGBY. The same suggestion has been made with us. There has been criticism in some quarters of appointing lieutenants to defend the accused.

Judge CASSEL. It all depends on the competency and legal knowledge of the lieutenant. But that has been suggested in Parliament. If a junior officer is well qualified to conduct the defense, I do not think that his rank is sufficient reason for excluding him. [Reading balance of paragraph 25a:]

"To increase the number of officers competent to defend the accused, legal instruction among officers should be improved and a list of qualified officers kept.

"(b) (25a) The British system of summary disciplinary punishment works well in the hands of good commanding officers."

Lieut. Col. RIGBY. Limiting to good commanding officers. Taking the army as a whole, as they are, does it work well?

Judge CASSEL. Yes.

"(c) (25b) There is very strong opposition to field punishment on the ground that it is degrading and carried out with varying degrees of severity. No effective punishment in substitution has been suggested. Some form of punishment other than a long term of imprisonment is essential on active service."

Lieut. Col. RIGBY. Have you found one?

Judge CASSEL. We have not.

"(d) (25cd) Lack of the powers referred to does lead to miscarriages of justice and makes it more difficult to secure uniformity of sentences through the action of the confirming authority. On the other hand the exercise of such

powers would lead to undermine confidence in the independence of the court and might lead to the belief that convictions or unduly severe sentences had been secured through pressure exercised by the confirming authority."

In the old days the confirming officer could send back an acquittal to the court or could send back a sentence in order to have it increased in severity. We should never go back to that. It would be considered as giving an opportunity to confirming officers to press for convictions or severe sentences unduly.

Lieut. Col. RIGBY. We still have it as you used to have it.

Judge CASSEL. I do not think we shall ever go back to it.

Lieut. Col. RIGBY. You don't know of any disadvantage that arose from practice that made that change?

Judge CASSEL. As I pointed out, our present system makes it more difficult to secure uniformity of sentences, as the confirming officer can only mitigate sentences downward. If a sentence is ridiculously light, he can do nothing. If the next soldier gets a heavier sentence, under less grave circumstances, he is very discontented, but the confirming officer can do nothing. At the same time I don't think that we shall ever go back to the old system, as it is desirable to avoid any pressure whatever being brought to bear on the court to make sentences more severe.

Lieut. Col. RIGBY. Is there any reason why all sentences should not be announced in open court?

Judge CASSEL. I think that they should not all be announced in open court, because it would be in many cases a disadvantage to the accused himself. Take the case of officers. Sentences of cashiering or dismissal announced in open court, to which the press are entitled to attend, and not yet confirmed by His Majesty. Suppose His Majesty does not subsequently confirm, the position of that officer is so affected by the public announcement that it is very difficult for him to regain his old prestige and position. Therefore, I think in all cases where sentence is dismissal from the service or more severe, it would be a great disadvantage to the accused to announce the sentence in open court. It would place him in a very embarrassing position during the interval while the approval of His Majesty was being obtained. I see no objection to communicating the substance in a sealed envelope.

Lieut. Col. RIGBY. Would you advise to change the regulations so as to direct telling him by way of the sealed envelope?

Judge CASSEL. Yes; I should tell the accused himself—the accused should be informed in a sealed envelope, being told at the same time that the sentence is still subject to confirmation. I further think that in those cases where the sentence is less severe than dismissal from the service in the case of officers, and in the case of soldiers where it does not involve loss of liberty, it should be announced in open court. In the case of light sentences I should have the announcement made in open court and the accused at once released from arrest. With us, the sentence can not be increased in severity on confirmation.

"(e) (25e) The retention of the power to 'review' appears desirable. It is a great safeguard against illegal or improper convictions and excessive sentences and helps to secure uniformity of sentences. It operates automatically without any special application which is necessary in the case of an appeal. The reviewing authority is responsible for the maintenance of discipline in the force he commands which is essential for the safety of his troops and the success of their operations. He can judge better than anyone else what the requirements of discipline are and how far exemplary punishments are necessary. On legal questions he is guided by skilled advisers.

"(f) (25f) Detailed instructions, though perhaps unnecessary in a small, fully trained army, appear to be very desirable when military law has to be administered by officers who only hold temporary commissions or who have not had a lengthy training.

"(g) (25g) Their value has been fully proved; but they should sit either as judge advocates or presidents, rather than as members only.

"(h) (25h) The judge advocate general considers that it is of great importance that legal education among officers in the army should be improved. Officers should be encouraged to qualify in law by additional pay or other advantages. So far as practicable only officers who had, after examination, been certified as fit to do so should sit as presidents or members of courts-martial or act as prosecutors or defenders of the accused. A part of the legal instruction of officers should consist in attending the hearing of cases in the civil courts."

Lieut. Col. RIGBY (reading questionnaire) :

"(27) Clemency: (a) Before the armistice and (b) since the armistice—methods adopted: Routine of procedure; theory upon which it proceeds; statistics showing results."

Judge CASSEL (reading):

"(27) The adjutant general's department of the war office should be applied to for the information."

Lieut. Col. RIGBY (reading questionnaire):

"(28) Any literature on the general subject—motions in Parliament, reports of any parliamentary commissions; and any debates, magazine or newspaper articles, etc., of value."

Judge CASSEL (reading):

"(28) There was a debate in the House of Commons on March 3, 1919, copy of Hansard attached, as a result of which the present court-martial committee was appointed. This committee is at present considering its report. The debate is reported in Hansard, columns 100-183, copy herewith.

"A committee on punishments on active service was appointed after the South African War and reported in 1904. Copy report herewith.

"A royal commission on courts-martial was appointed in 1868 and made two reports, dated July 24, 1868, and May 14, 1869, respectively.

"A select committee appointed to examine into the mutiny act in 1878 and reported in the same year.

"A number of articles have appeared in a weekly publication called *John Bull*, edited by Mr. Bottomley, M. P., and there are also articles in the *Contemporary Review* of March, 1919, and *Blackwood's Magazine* of June, 1919."

(Interview concluded at 8 o'clock p. m.)

(Signed) F. CASSEL,
Judge Advocate General.

AUGUST 8, 1919.

(Reporter: Army Field Clerk F. T. McEneny.)

LONDON, June 14, 1919.

Memorandum for the judge advocate general, Great Britain:

On behalf of the United States Government, the following information concerning the administration of military law in the British Armies is respectfully requested, so far as it may be practicable to furnish it:

1. Results of preliminary investigation and trial and how the investigation is actually carried on in practice.

2. How far convening authorities are, in fact, governed by recommendations of law officers as to ordering cases to trial.

3. Summary disciplinary punishment.

4. Information and statistics relating to the impartial judge advocate attached to a general court-martial (and to what extent in practice assigned to district courts-martial).

5. The "specially qualified member" of the British field general court-martial—

(a) How many officers are required for this service?

(b) From what department are they drawn?

(c) By whom and how are they chosen?

(d) Are they in practice required to have legal training?

(e) What qualifications are required for this "specially qualified member"?

(f) How many courts can one such officer conveniently serve?

(g) Do they in practice sum up the case as to the facts, as well as the law, like the judge advocate of the British G. C. M.?

(h) And, if so, how does such summing up (by an officer who is himself a member of the court and required to vote as one of the members) work in practice?

(i) How much deference is in practice paid to the opinions of the "specially qualified member" of the court?

(k) How does the whole system actually work out?

6. What have been the results in practice of British Army orders 110 and 111, of March 17, 1917 (analogous to General Orders, Nos. 7 and 84, United States War Department, 1918)—

(a) Upon what considerations were these British orders based?

(b) Just how far has their application been extended?

(c) How uniformly have the recommendations of the judge advocate general been followed by confirming authorities?

7. To what relative extent during the war has the British Army made use of its several disciplinary agencies?

- (a) General courts-martial.
- (b) District courts-martial.
- (c) Field general courts-martial.
- (d) Summary disciplinary punishment.

8. What about the length and severity of sentences during the war in the British Army for—

- (a) Military offenses?
- (b) Civil offenses?

9. Statistics for the purposes of throwing light on all of the above questions, and others that may arise, as to:

(a) Total number of court-martial trials; segregated among the different courts—

- (1) General courts-martial.
- (2) District courts-martial.
- (3) Field general courts-martial.
- (b) Annual percentage of court-martial trials to total strength.
- (c) Number (and percentage) of acquittals.

(d) Number and percentage of cases reviewed, disapproved, modified, etc., and by what agencies (that is, confirming authority or recommendation of judge advocate general or otherwise).

10. Number and length of sentences for principal military offenses and principal civil offenses, collated and tabulated separately.

11. Number of sentences reduced in severity by the confirming authority or on the recommendation of the judge advocate general—

(1) Classified according to the character of the offense; and,
 (2) With figures as to the aggregate of such reductions and the percentage of such reductions to the number and length of original sentences.

(3) Classified to show separately those so reduced on recommendation of judge advocate general.

12. Death sentences, classified as to—

- (1) Offenses for which imposed.
- (2) How many carried into execution.
- (3) Statistics as to commutation.

13. Detention barracks statistics: Number of such sentences, classified as to—

- (1) Character of offense and length of sentence.
- (2) Figures as to the restoration of men to duty.
- (3) Number of men who, having served detention barracks sentences, were again sentenced to the barracks, or to severer punishment.

14. Summary disciplinary punishment statistics:

- (1) Number and character of sentences and for what kind of offenses.
- (2) Number of men so sentenced a second, third, or more times.
- (3) Number of men so sentenced, who were thereafter sentenced to the detention barracks, or to severer punishment.

15. Average length of time elapsed between the offense and final disposition of cases:

- (1) By summary disciplinary punishment.
- (2) By courts-martial (classified, so far as possible, by the different kinds of courts-martial).
- (3) Final confirmation or other disposition.

16. Results of suspension of sentence, under suspended sentence act; statistics and general working of the system.

17. An opportunity (such as was afforded Col. Dunn of the United States Army in 1911) of visiting detention barracks and other military prisons; and statistics as to the length of sentences and character of offenses for which the prisoners are undergoing confinement.

18. An opportunity to visit and take stenographic reports of the proceedings of courts-martial of the different classes—G. C. M., D. C. M., F. G. C. M.—and to procure complete copies of records of actual proceedings (with the names of the defendants omitted, or fictitious names substituted if desirable), such as has been furnished us by the French authorities.

19. Information as to the working in practice of the judge advocate general's office; e. g., the number of cases passing through the office per annum, or per month, during the war; the length of time required for the disposition of a

case in the office; the routine method of handling cases; the number of cases recommended to be disapproved; number of recommendations to clemency; figures showing how uniformly recommendations of the judge advocate general have been followed by military authorities;

(a) of disapproval, wholly or partially, on legal grounds,

(b) of clemency.

20. Forms of actions, recommendations or memoranda used by the judge advocate general in the disposition of cases.

21. Information as to the finality of action of the judge advocate general.

(a) From the forms used in practice.

(b) In theory (that is to say, showing how far in practice the power of the judge advocate general is final and judicial; and how far it is, either in theory or practice, recommendatory and subject to the action of higher authority).

(c) Information of the exact nature of the change, some years ago, in the status, tenure, and power of the judge advocate general.

22. Information showing the routine disposition or action upon recommendations of the judge advocate general, by the secretary of state for war, army council, chief of staff, or other authorities.

23. Information as to the routine followed by confirming authorities in acting upon records of trials by courts-martial—

(a) General courts-martial.

(b) District courts-martial.

(c) Field general courts-martial.

24. Through whose hands do such records pass; and upon the recommendation of what, if any, legal officer does the confirming authority act?

25. Also to have interviews (in the presence of a stenographer, such as have been furnished us in France), with commanding generals in the field, or those who have commanded in the field during the war, for the purpose of procuring their opinions upon the disciplinary, or other, value of some points wherein the British court-martial and disciplinary practice varies from ours (and from the French), notably—

(a) Summary disciplinary punishment.

(b) Field punishment.

(c) Lack of power to return acquittals for reconsideration.

(d) Lack of power on revision to increase the severity of a sentence.

(e) Power of the commanding general in Great Britain and the United States (as contradistinguished from the French practice) to review the proceedings of courts-martial.

(f) Detailed instructions, as prescribed in the British regulations, as to the method of conducting the preliminary examination.

(g) The value of a legal officer as an impartial judicial officer on the court-martial (Judge Advocate, as in British G. C. M., or "Specially qualified member" of the court, as in F. G. C. M.).

(h) Other questions that may be presented.

26. The advice and opinion of the British judge advocate general and his assistants, and of military lawyers familiar with court-martial practice, as to these questions, and also particularly as to—

(a) The value of counsel for the accused in court-martial trials; and the method of choosing counsel for the accused.

27. Clemency: (a) Before the armistice, and (b) since the armistice; methods adopted; routine of procedure; theory upon which it proceeds; statistics showing results.

28. Any literature on the general subject; motions in Parliament; reports of any parliamentary commissions; and any debates, magazine, or newspaper articles, etc., of value.

WILLIAM C. RIGBY,
Lieutenant Colonel, Judge Advocate.

ANSWERS TO QUESTIONS RAISED IN THE MEMORANDUM DATED JUNE 14, 1919, OF
LIEUT. COL. W. C. RIGBY, JUDGE ADVOCATE, CHIEF OF SPECIAL MISSION, U. S.
ARMY.

(1) (a) No statistics are available as to the number of charges investigated by commanding officers, nor as to the proportion of such charges which are dismissed, remanded for trial by court-martial, or dealt with summarily.

(b) In the case of a N. C. O. or man, a charge is first investigated by his company (battery or squadron) commander, whose powers of punishment are very restricted. (See King's Regulations 501.) If the company commander can not, or thinks that he ought not to, deal with the case, he sends it on to be dealt with by the commanding officer. The latter after the charge has been read to the accused hears the witnesses. The accused may cross-examine the witnesses called against him, and may make a statement (or give evidence) in his defense, and may call witnesses. If the accused so required, the evidence must be taken on oath; but it is only very rarely that such a request is preferred. The accused has no right to be represented by counsel or by an officer before the commanding officer.

The commanding officer then takes one of the following courses:

(I) He dismisses the charge;

(II) He disposes of it summarily, if he can do so without reference to superior authority. The charges that may be so disposed of are set out in King's Regulations 487. The punishments which a commanding officer can award to a N. C. O. or man are set out in section 46 (2) of the army act and King's Regulations 493.

(III) If he thinks that the case is one which may be dealt with summarily, but he is not empowered to so deal with it without sanction from superior authority, he refers it to such authority. He will then either be authorized to deal with it summarily, or be directed to send it to a court-martial.

(IV) He adjourns it in order that the evidence may be reduced to writing, with a view to a court-martial.

In every case where the award or finding involves a forfeiture of pay, and in every other case unless one of the minor punishments referred to in army act, section 46 (9) and King's Regulations 493 is awarded, the commanding officer must give the accused the option of being tried by court-martial (army act section 46 (6)).

Where a case is adjourned for the evidence to be reduced to writing, this is (as a rule) done by the adjutant, though any officer may be detailed by the commanding officer for the purpose. The witnesses attend again, give their evidence and are cross-examined as before; the accused makes any statement (or gives any evidence) that he wishes (after being cautioned that he need not say anything), and calls witnesses if he wishes. The whole evidence is taken down in writing by the adjutant or other officer detailed for the purpose. Each witness signs the evidence given by him, and the evidence so taken is called the "Summary of evidence." The evidence is generally not taken on oath, and the accused has no right to be represented. This, however, has sometimes been allowed in cases of exceptional difficulty or importance.

The commanding officer then reconsiders the written record, and finally decides whether to apply for a court-martial or whether to dispose of the case summarily (assuming that he has power to do so and that the accused has not elected trial by court-martial).

If he decides upon a court-martial, he prepares and signs a charge sheet and formal application for trial, which he forwards with the summary of evidence and conduct sheets of the accused to an officer having power to convene a court-martial for the trial of the accused. That officer considers whether the summary of evidence justifies trial, and, if he comes to the conclusion that it does, makes an order accordingly.

In the case of an officer, the case goes at once to the commanding officer without the intervention of the company (battery or squadron) commander. The commanding officer has no power to punish an officer. He can either dismiss the case or apply for a court-martial, or (if the accused officer is below field rank) can refer the case to a superior officer, not under the rank of general. The latter, in the case of an officer below field rank, can award certain minor punishments or can direct trial by court-martial. (See army act, sec. 46A.) Where a court-martial is decided upon, a written summary of evidence must be taken as in the case of a soldier; if the accused so requires otherwise, a summary may be dispensed with, and an "abstract" of the evidence given to the accused.

(2) On legal points, e. g., as to whether the acts alleged constitute an offense against the army act or whether the evidence is sufficient to justify trial, the advice of a qualified officer is taken; but questions of difficulty would generally be referred to the judge advocate general or his deputy, whose advice is almost invariably taken.

(3) A commanding officer can not punish an officer or warrant officer. A general officer holding a general court-martial warrant and a general officer

commanding in chief in the field and any officer (not under the rank of major general) appointed by him or by the Army council can award the following to an officer below field rank:

Forfeiture of seniority of rank (subject to right of accused to elect trial by general court-martial).

Severe reprimand or reprimand (without such option to elect).

This power was only conferred in 1919 by the annual army act of that year.

A N. C. O. may be severely reprimanded, reprimanded, or admonished; also, if holding "acting" or "lance" rank, may be ordered to revert to his permanent rank.

In the case of privates, the "summary" punishments awardable by a commanding officer are:

Detention up to 28 days.

For drunkenness, a fine not exceeding 10/-, in addition to or without detention.

Authorized deductions from pay (e. g. to make good damage done, or loss of arms and kit).

On active service only, field punishment up to 28 days.

On active service only (in addition to or without any other punishment), forfeiture of ordinary pay up to 28 days.

The following minor punishments may also be awarded:

Confinement to barracks up to 14 days.

Extra guards or picquets.

Admonition (see King's Regulations, 493).

If the commanding officer is not of field rank his powers in respect of detention are limited to 7 days (except in cases of absence).

A company (squadron or battery) commander can award normally—

Confinement to barracks up to 7 days.

Extra guards and picquets.

Fines for drunkenness.

He can deal with cases of absence which entail automatic forfeiture of pay.

His awards can be reduced by the commanding officer, and if he has not three years' service his powers may be limited by the commanding officer. (See King's Regulations, 501.)

A commanding officer must give a soldier the option of claiming a trial by court-martial in every case where the award or finding involves a forfeiture of pay, and in every other case unless he awards one of the "minor" punishments. (Army act, sec. 56 (8).)

Subject to this option, a commanding officer can in law deal summarily with any offense if he considers that his powers of punishment are sufficient; but King's Regulations (487) require him to first refer certain of the more serious offenses to superior authority for directions as to whether they shall be dealt with summarily or whether a court-martial shall be held.

(4) A judge advocate is always appointed for a general court-martial; he is generally an officer with legal knowledge, but may be a civilian.

The appointment in the United Kingdom is made by the judge advocate general; abroad, by the general officer commanding in chief. A judge advocate is at present only rarely appointed in the case of district courts-martial. No statistics are available.

(5) It must be remembered that the "specially qualified member" of a field general court-martial, generally called a court-martial officer, was unknown before and in the early stages of the war. The first court-martial officers were appointed in August, 1915.

(a) The general rule was to have one attached to each corps of not more than two divisions. If there were more than two divisions there were two court-martial officers. In addition, there were one or more court-martial officers attached to each army. There were special appointments for line of communication.

(b) From the army as a whole, in which a great many barristers and solicitors were serving.

(c) By the adjutant general's department, after inquiry as to applicant's ability and professional standing, on the recommendation of the judge advocate general or his deputy.

(d) (c) They were all fully qualified barristers or solicitors.

(f) The answer to this question depends on the local conditions and the length and difficulty of the cases; the number of officers referred to under (a) were found sufficient to do the work required.

(g) They do not formally sum up (either on fact or law) in open court. When the court retires they give their views both on law and on fact.

(h) This does not arise.

(i) On questions of law their opinion was generally followed; on a question of fact it had considerable weight, though not so much as on questions of law. But the obligation of secrecy imposed by the oath renders it difficult to speak with certainty.

(k) It is considered that the system has in the emergency worked extremely well. There is, however, a difference of opinion as to whether it would not be better that the court-martial officer should sit either as judge advocate or president, and not merely as a member of the court.

(6) Before Army Orders 110 and 111 of 1917, in the United Kingdom, the judge advocate at the trial forwarded the proceedings of general courts-martial direct to the judge advocate general.

Under the new system introduced by Army Orders 110 and 111 the proceedings in such cases, instead of going direct to the judge advocate general, pass to him through the convening officer, who adds his remarks and recommendations.

(I) If confirmation by His Majesty was required, the judge advocate general transmitted them to the secretary of state for submission to His Majesty.

(II) If confirmation by His Majesty was not required, the judge advocate general returned them with his advice to the convening officer (who was also the confirming officer).

(a) The object of the Army Orders 110 and 111 was to insure that the judge advocate general in reviewing the proceedings and the secretary of state for war or air tendering advice to His Majesty should have before them the views of the convening officer.

(b) The orders extend to all general courts-martial held in the United Kingdom.

(c) The recommendations of the judge advocate general as to confirmation have almost invariably been followed.

(7), (8), (9), (10), (11), (12), (13), and (14). All the statistics available in this office have been supplied. Possibly the adjutant general's department may be able to supply further information as to strength of army, detention barracks, and punishments. There are no statistics of summary punishments by commanding officers; no record of such punishments reaches the office of the judge advocate general.

(15) (1) An offense would ordinarily be disposed of by summary punishment on the day following arrest, but there may be delay, owing to a number of causes, such as difficulty in obtaining evidence, reference to superior authority, etc.

(2) The times which would elapse between commission of the offense and confirmation of the sentence in the case of each of the four kinds of courts-martial if every step were taken as promptly as possible and no difficulty arose in connection with the obtaining of evidence or otherwise are shown in the table annexed to the evidence of the judge advocate general before the committee on courts-martial. Appendix III, page 27, copy attached. No statistics as to the actual times which elapse have been kept.

(16) The working of the suspension of sentences acts has been most beneficial during war time and the acts have fulfilled the purposes for which they were originally passed. They have given many a soldier the opportunity of redeeming his character by bravery in the field. They have prevented men whose services were required in the field from being detained for a long period in prison. A feature in connection with these acts which has given rise to some dissatisfaction is the fact that, while soldiers who had committed comparatively slight offences and who had not had their sentences suspended had to serve those sentences, others who had been guilty of graver crimes and who had their punishments suspended escaped all punishment. The adjutant general's department would be able to supply further information on this question.

(17) (18) This is being arranged. Further statistics as to sentences can possibly be supplied by the adjutant general's department of the war office and the authorities at the detention barracks.

(19) The work of the judge advocate general's office consists in giving advice as to courts-martial both under the army act and the air force act and legal advice on other questions. The work so far as it relates to courts-martial falls under four main heads:

- (I) Advice before trial.
- (II) Advice before confirmation.
- (III) Review after confirmation.
- (IV) Review upon appeal.

As to (I) in the United Kingdom the convening officer before ordering trial submits the charge sheet and summary of evidence in all general courts-martial cases and in all district court-martial cases where fraud is alleged or where he desires advice. Similar duties are discharged in relation to courts-martial abroad by the deputy of the judge advocate general.

In such cases advice is given as to whether the evidence is admissible and sufficient to support the charge and what kind of further evidence (if any) is required, and also whether the charge is correctly drawn and what amendments and additional charges (if any) are necessary.

The judge advocate general himself does not deal with cases "before trial" except to lay down general principles and it is a cardinal rule of the office that the officers who deal with cases at that stage should not also deal with them "after trial."

As to (II) in the United Kingdom after trial and before confirmation the proceedings are forwarded to the judge advocate general in all general court-martial cases and in any other cases where the confirming authority desires advice.

These are dealt with by the judge advocate general with the help of legal assistants. Abroad similar duties are discharged by the deputy of the judge advocate general who refers to the judge advocate general in London in cases of doubt or difficulty.

If the proceedings require confirmation by His Majesty, the judge advocate general forwards them to the secretary of state with his opinion embodied in a minute, and the secretary of state submits them to His Majesty.

In other cases he returns them to the confirming authority with his advice.

As to (III). All proceedings held in any part of the world except India are, after confirmation, forwarded to the Office of the Judge Advocate General in London for review and custody. For India there is a separate Judge Advocate General who reviews proceedings of trial held there.

In all cases sent to the Judge Advocate General's Office the proceedings are carefully reviewed to see whether the charges are properly framed, whether the evidence justifies a conviction, and whether the proceedings are otherwise legally in order. If the proceedings are in order they are filed. If not, they are forwarded to the Secretary of State for War or the Secretary of State for Air or the Adjutant General, or other proper authority, advising that the proceedings should be quashed or that such other action should be taken as the circumstances of the case may require.

As to (IV). It is open to any person convicted by court-martial to petition His Majesty, or the Army Council, or Air Council at any time against his conviction or sentence, and persons frequently petition more than once. Such petitions, if they involve any legal questions, are referred to the Judge Advocate General and are again considered by him in the light of any further facts or arguments brought forward by the petitioner. Advice is then given to the Secretary of State for War or Air as to whether there is any ground for interference.

It must be clearly understood that the Judge Advocate General is concerned only with the legality of convictions and sentences. He is not concerned with recommendations to clemency, though he occasionally calls attention to sentences if they appear unusually severe. His recommendations upon legal aspect of cases are almost invariably accepted and acted upon. The only cases in which this has not been done is when the attorney general has been consulted and has taken a different view.

Cases for advice before trial and before confirmation are, so far as circumstances permit, dealt with and dispatched from the Judge Advocate General's Office within 48 hours of receipt unless they raise some point of exceptional difficulty.

Cases for final review after confirmation are dealt with as rapidly as possible; the delay is seldom more than three days.

As the statistics show, nearly a quarter of a million convictions were reviewed in the office during the war.

(b) In addition to court-martial work of the Army and Royal Air Force the Judge Advocate General deals with other legal work, e. g., the answering of questions which arise in practice upon the construction of the Army Act,

King's Regulations, the Pay Warrant, and other regulations and orders, the drafting of orders and new regulations; military courts upon prisoners of war, etc.

(20) See 21.

(21) (a) The attached specimen minutes show the forms used by the Judge Advocate General in advising the Secretary of State, both before and after trial.

(b) In theory his duties are advisory only. In practice his advice is almost invariably acted upon. The only cases where this is not done is when the attorney general is consulted and he differs from the Judge Advocate General.

(c) Before the reconstitution of the office in 1905, on the appointment of Sir Thomas Milvain, the judge advocate general had been the direct responsible adviser of the Crown. He submitted direct to the sovereign these court-martial cases which required the confirmation of the sovereign as head of the army. To insure the responsibility of the judge advocate general to Parliament for the advice which he gave to the Crown he was generally a member of Parliament and privy councillor, and the office was political, changing with successive Governments. Since 1905 the office has not been political, the appointment has been permanent, and the judge advocate general has not been a member of Parliament or of the Government. He does not submit his advice direct to the sovereign, but through the secretary of state for war or air. The judge advocate general now devotes his whole time to the work of his office. Formerly the ordinary work of the office was left to the deputy judge advocate general, and it was only in cases of exceptional difficulty or if questions were raised in Parliament or advice had to be given to the sovereign that the judge advocate general acted personally.

(23) (24) This is shown by the table (Appendix III) annexed to the judge advocate general's evidence before the court-martial committee and to this memorandum.

The confirming or reviewing authority acts upon the advice of a staff officer specially skilled in military law or a legal adviser specially attached to the formation which he commands.

(25) Interviews with generals who have commanded in the field will be arranged through the Adjutant General's Department at the War Office.

(26) The views of the judge advocate general upon the questions asked here and in No. 25 are as follows:

(a) The presence of counsel (including an officer acting as such) to represent the accused is a great safeguard and of great assistance to the accused and the court, provided such counsel is competent. An accused person has the right to be represented by a barrister or solicitor or an officer selected by him. Nevertheless, the cases where the accused have not been represented have been frequent. The judge advocate general considers that whenever practicable the assistance of a suitable officer should be offered to the accused for his defense without in any way derogating from the right of the accused to be represented by the counsel or officer of his own choice. To increase the number of officers competent to defend the accused, legal instruction among officers should be improved and a list of qualified officers kept.

(b) (25a) The British system of summary disciplinary punishment works well in the hands of good commanding officers.

(c) (25b) There is very strong opposition to field punishment on the ground that it is degrading and carried out with varying degrees of severity. No effective punishment in substitution has been suggested. Some form of punishment other than a long term of imprisonment is essential on active service.

(d) (25c d) Lack of the powers referred to does lead to miscarriages of justice and makes it more difficult to secure uniformity of sentences through the action of the confirming authority. On the other hand, the exercise of such powers would lead to undermine confidence in the independence of the court and might lead to the belief that convictions or unduly severe sentences had been secured through pressure exercised by the confirming authority.

(e) (25e). The retention of the power to "review" appears desirable. It is a great safeguard against illegal or improper convictions and excessive sentences and helps to secure uniformity of sentences. It operates automatically without any special application, which is necessary in the case of an appeal. The reviewing authority is responsible for the maintenance of discipline in the force he commands, which is essential for the safety of his troops and the success of their operations. He can judge better than anyone else what the requirements of discipline are, and how far exemplary punishments are necessary. On legal questions he is guided by skilled advisers.

(f) (25f). Detailed instructions, though perhaps unnecessary in a small, fully trained army, appear to be very desirable when military law has to be administered by officers who only hold temporary commissions or who have not had a lengthy training.

(g) (25g). Their value has been fully proved; but they should sit either as judge advocates or presidents, rather than as members only.

(h) (25h). The judge advocate general considers that it is of great importance that legal education among officers in the army should be improved. Officers should be encouraged to qualify in law by additional pay or other advantages. So far as practicable, only officers who had after examination been certified as fit to do so should sit as president or members of courts-martial or act as prosecutors or defenders of the accused. A part of the legal instruction of officers should consist in attending the hearing of cases in the civil courts.

(27) The adjutant general's department of the War Office should be applied to for the information.

(28) There was a debate in the House of Commons on March 3, 1919, copy of Hansard attached as a result of which the present court-martial committee was appointed. This committee is at present considering its report. The debate is reported in Hansard, columns 100-183. Copy herewith.

A committee on punishments on active service was appointed after the South African War and reported in 1904. Copy report herewith.

A royal commission on courts-martial was appointed in 1868 and made two reports, dated July 24, 1868, and May 14, 1869, respectively.

A select committee appointed to examine into the mutiny act in 1878 and reported in the same year.

A number of articles have appeared in a weekly publication called John Bull, edited by Mr. Bottomley, M. P., and there are also articles in the Contemporary Review of March, 1919, and Blackwood's Magazine of June, 1919.

(Signed, at the top:) "F. C.,-J. A. G." "24/7/19."

INTERVIEW BETWEEN LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, AND CAPT. EASTWOOD, COURT-MARTIAL OFFICER, DISTRICT OF LONDON, JULY 17, 1919, AT LONDON.

Capt. EASTWOOD. With us, a man is probably put under arrest by some sergeant or noncommissioned officer. Brought before the platoon commander and investigated, and he may give a light punishment, such as extra drills. In any event he listens to the evidence and decides it is not his case. "You will have to go before the company commander." He goes before the company commander. Investigation is made there; this officer usually has a little more experience; he may decide to send the case to the commanding officer. There the investigation is thorough, and a summary of the evidence is made [indicating papers]. Here are two papers which just came in. That case comes up to us here with the application for trial. If a case goes further than the commanding officer it must be accompanied by a summary of the evidence and application for trial.

Lieut. Col. RIGBY. Does the accused and counsel see the summary?

Capt. EASTWOOD. Before the trial. [Indicating a paper.] Here is an application: An officer comes in one night to his mess, and this sergeant goes up to this officer and says, "You are drunk." He is reported. A most insubordinate thing. The officer put him under arrest for saying it. He was remanded for summary, and summary of evidence was taken. The application came in here on this Army form [B-116, Army form]. They have submitted this case here. I look into the case. I come to the conclusion that there was enough evidence to justify trial; three or four men are prepared to swear that he was drunk. They said so in the summary. The accused in the summary also gets other witnesses to come forward to say, "You fellows are drunk." I took the case down to the general. I told him I believed that discipline ran a certain amount of risk by a court-martial, and I thought it better that the commanding officer deal with the case, which he can do. The general did not like that, and he said, "No." The general then had the commanding officer up and wanted to know all about this sergeant. A most insubordinate fellow and troublesome among the soldiers. That being the case, the general said, "I want to try him."

Lieut. Col. RIGBY. What general do you mean?

Capt. EASTWOOD. General officer commanding the London district.

Lieut. Col. RIGBY. In striking out evidence you do it on the face of the summary itself?

Capt. EASTWOOD. I always do. When I submit it back I say, "The evidence as amended in blue pencil is irrelevant."

Lieut. Col. RIGBY. In doing that, in just what official capacity are you acting?

Capt. EASTWOOD. I am court-martial officer to the London command. I am last word in advising on court-martial matters in the command.

Lieut. Col. RIGBY. You are legal adviser to the commanding general?

Capt. EASTWOOD. I am.

Lieut. Col. RIGBY. You are what we call a staff judge advocate?

Capt. EASTWOOD. As far as legal matters are concerned. I can appeal to the judge advocate general, as in this case I did [indicating paper]. As far as discipline is concerned, I can take advantage of the field regulations, or when in doubt go to a superior officer. I can go to the war office.

Lieut. Col. RIGBY. You have access to the judge advocate general and to the war office?

Capt. EASTWOOD. I sign for the commanding general. Everything that we do we do in the name of the general officer commanding. Here are some proceedings [explained and showed Lieut. Col. Rigby how he signed papers as "Captain for Commanding General"]. The papers in all cases are eventually forwarded to the judge advocate general.

Lieut. Col. RIGBY. Court-martial officer to the command—by whom is that appointment made?

Capt. EASTWOOD. By the war office on the application of the general commanding.

Lieut. Col. RIGBY. Not on recommendation of the judge advocate general?

Capt. EASTWOOD. No. As a matter of fact it is a new office. In the old army, done by the staff captain to the brigade. Of course with the growth of the army, and the lowering of discipline most pronounced, court-martials increased until we were getting several a day during the war. The war office then appointed these court-martial officers with extra duty pay—12 shillings per day. It is not a very princely amount. They are mostly all barristers. The court-martial commission, which has just published its report, has recommended the permanent retention of that office, making it worth while. They want to have court-martial officers; they will have to do something for them, as you can not get good men with low pay. It is not worth while to work here all of my life at the regular army pay. So I believe that they are going to make this office a permanent one, and give the officers substantial pay. That is why I am staying on. It is very interesting work.

Lieut. Col. RIGBY. Are court-martial officers required to be barristers?

Capt. EASTWOOD. No. Young Lockwood here—he is a solicitor.

Lieut. Col. RIGBY. In what method was the office established?

Capt. EASTWOOD. Done on a war office letter. Originally this command was given one court-martial officer, some two and one-half years ago. War office ordered some time ago that all offenses committed in London by officers passing through on leave would be tried in London, because the witnesses are here. That is not strictly followed out here. We are very good friends with all the commands and we arranged it very much between ourselves. If we have a case here where the witnesses are in Ireland, we write to the Ireland command and transfer the case.

Lieut. Col. RIGBY. That authority appointing court-martial officers is a war office letter?

Capt. EASTWOOD. Yes. All the correspondence we have with the war office is addressed to the secretary of the war office. Before they appointed court-martial officers he was confidential aid to the staff captain. He attended to all court-martial work and the staff captain signed.

Lieut. Col. RIGBY. Are there any regulations that the summary be referred to the court-martial officer, or is that just practice?

Capt. EASTWOOD. Just practice—no regulation. But the commands shove that work on the court-martial officer.

Lieut. Col. RIGBY. Does the commanding general in practice usually follow the advice of the court-martial officer?

Capt. EASTWOOD. In 99 per cent of the cases.

(Capt. Eastwood referred to one case where there was a difficulty with a brigade commander.)

Lieut. Col. RIGBY. What did you have to do?

Capt. EASTWOOD. Wrote back, "The general officer commanding insists that this evidence will not be used."

Lieut. Col. RIGBY. In order to do that, did you have to consult the general?

Capt. EASTWOOD. In those cases, I usually do. [Referred here to Army Council Instructions, called A. C. I.—A. C. I., 1852.] These instructions are issued monthly and govern all cases. They correspond to general orders.

Lieut. Col. RIGBY. They correspond to our general orders and bulletins. The general orders deal with more important matters and the bulletins with small matters.

Capt. EASTWOOD. We are precisely the same. Any letter that comes from the war office is a war-office letter and some of them lay down advice how to deal with this or that.

Lieut. Col. RIGBY. Has A. C. I. 1852 been supplemented in any way?

Capt. EASTWOOD. No; except to this extent: That is appendix 1 that has been amended to 2. [Furnished a copy of these instructions.] I think that you will find that you will get a lot of information out of the report of the court-martial committee. [Capt. Eastwood here showed Lieut. Col. Rigby another paper which the reporter could not see or understand what it was about.] I did not want to try this fellow [indicating paper]. They wanted to try him for two things, using insubordinate language and with an alternative charge—conduct to the prejudice of good order, I did not like it. The general wanted it for disciplinary reasons, so I said I will safeguard myself and I sent a letter to the judge advocate general, requesting that I be advised as to whether the evidence will substantiate the charges.

(Other papers were referred to and the conversation was lost.)

The army act states that any witness who knows anything about the case should be called at the summary of evidence to tell what he has to say. It goes on to say that any witness called by the prosecution at the summary must be tendered to the accused for cross-examination. If I were conducting the summary I would say, "So-and-so knows something about the case." Strictly speaking, they would have to call him as a witness for the prosecution. If any of the evidence is in favor of the defense, they would have to offer him for cross-examination to the defense. If they did not do that the defense would call him as their own witnesses. [Referring to another paper.] That is what happened in this case. It came back from the judge advocate general, and on that he says we are bound to act.

As a matter of fact, if I think that I know better than they do, I go around privately and see one of them. Sometimes that gets it through, but not always. It is a little bit difficult at times. This Fratel case that you heard the other day. It has caused a lot of feeling here. The evidence does not state plainly that the individuals died as a result of the accused's treatment. Probably might have died. That is entirely a matter for the court. The most that this fellow can get is two years at hard labor. There is a case that I think the judge advocate general has misinterpreted. He disagreed with me and recommended the trial of the case on the charges I read the other day, and all the fellow can get is two years.

The judge advocate general is simply advisory and his advice is given in an advisory capacity.

Lieut. Col. RIGBY (referring to letter in Capt. Eastwood's hand). This letter is signed by Col. MacGeagh, not signed in his name of the judge advocate general. Any reason for that practice?

Capt. EASTWOOD. These fellows are all lawyers. Custom is always sign your own opinion.

Lieut. Col. RIGBY. The man whose opinion it is is responsible?

Capt. EASTWOOD. Yes and no. But the department will stand by him, but on the other hand it is a custom they have there. A good system.

Lieut. Col. RIGBY. Not signed by Judge Cassel himself?

Capt. EASTWOOD. No. As a matter of fact, I have kept a close watch on what they do. That is the situation here. This case [referring to papers] we sent back. Granted the application for trial. Either sent back for charge sheets to be redrawn, resubmitted, signed by commanding officer, or to be tried by general court-martial. Generally signed by a staff officer to the general for the general.

Lieut. Col. RIGBY. General officer does not personally sign?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. You advise the general here whether it should be tried by general court-martial?

Capt. EASTWOOD. Right.

Lieut. Col. RIGBY. Whether it should not be proceeded with at all?

Capt. EASTWOOD. Right. In cases that affect discipline. I always talk to him. May be some situation that he should know about. This case [referring to papers] which does not affect discipline, I do not bother him at all. Not until confirmed. Send it back for trial and when it is to be confirmed, I do like this [showing a memorandum]; I make a note "confirm." I go through the case to see if it is in legal order. I usually see if it is all right and then mark "confirm."

Lieut. Col. RIGBY. Does the general sign or initial?

Capt. EASTWOOD. Signs.

Lieut. Col. RIGBY. He is required to sign personally?

Capt. EASTWOOD. Oh, yes. [Referring to another case on his desk.] This man had 120 days' service. Guilty, found guilty of absence for 14 days; all right; confirm.

The case I check up. This is a simple one. These are the notes I make [indicating] to advise the general. [Reading:] Two and three-fourths years' service, clean sheet, no convictions by court-martial.

Next thing I look for is the convening order. Check the names of the court to see if it agrees with the order.

Lieut. Col. RIGBY. You do not have a list, a check slip that we use. It is very simple to check by—to compare the authority for the convening order, the detail of the court, whether the court was sworn, etc. We require that the check sheet be attached to the record.

Capt. EASTWOOD. I just look at that. Just look at the charge sheet to see whether it is in order. This one [indicating] is leaving his post. Make a note of it to tell the general. Leaving his post while on duty as a sentry. "Guilty." Pleading "guilty"; sentenced to 21 days' detention. Has a clean sheet. Accused: "I have nothing to say." Declined to cross-examine. One other thing: Is there enough in the summary of evidence to justify the charge? Done that when the application for trial came in. He pleaded guilty, and there is enough in the summary of evidence to justify the charge. Sentence, 21 days' detention; "confirm." Very simple when a man pleads guilty. When we get one here where the man pleads not guilty I have to go through the evidence.

Lieut. Col. RIGBY. Twenty-one days was within the power of the commanding officer?

Capt. EASTWOOD. Quite right. We got into the way of sending them to court-martial, because the sentences were very heavy during the war. They are away down now.

Lieut. Col. RIGBY. As a matter of habit?

Capt. EASTWOOD. A sentry leaving his post is a serious offense and ought to go to a court-martial.

Lieut. Col. RIGBY. And the court only gives him 21 days?

Capt. EASTWOOD. He has had 2½ years' service and a clean sheet. [Referring to another case.] Here is a case I will have to show to the general. Absent seven times since enlistment; one drunkenness, using insulting language, making improper remarks, wearing unauthorized wound stripe.

Here is another one [indicating]: Had five courts-martial and got field punishment and hard labor.

Here is a case where the court gave one year. We have got an army council or war-office letter—gotten out last month—in every case where a private soldier is sentenced to hard labor he shall be discharged from the army. I think it is a mistake myself. If he steals from his comrades he usually does hard labor. He may have been an excellent soldier, and the army loses him. Not every one that gets hard labor should be discharged.

Lieut. Col. RIGBY. In practice some of these sentences are being changed, are they not? Changing the order to detention?

Capt. EASTWOOD. That is what I am doing here. Have two cases here now—fellows with a bad sheet. But I will have to let them go; they are worthless.

Lieut. Col. RIGBY. Impossible to make him a good soldier?

Capt. EASTWOOD. Mass of offenses against him. He is no good; let him go. In this case had had four courts-martial. [Capt. Eastwood read off the offenses, including absence, escape from custody, etc.] The court gave him two years—two years at hard labor. Domestic trouble was given as an excuse. To see if there is anything in it, got the commanding officer of the unit to investigate. Two years is too much, and I am going to advise the general to remit one year. In view of the fact that he is always going absent will have to discharge him.

Lieut. Col. RIGBY. In that case he will be discharged under this army letter?

Capt. EASTWOOD. Yes.

Lieut. Col. RIGBY. Tell me something about field punishment.

Capt. EASTWOOD. Field punishment amounts to this. A man is put generally on parade; this corresponds to being confined to the barracks. Also, he has an hour a day tied up. Tied to a wheel; tied to a fixed post; but tying the wheel is very rarely done. A man is not tied so it hurts him—merely tied there in any permanent place where he can be seen. It is a fine punishment. Makes a man think. There has always been a political outcry against it—a demand for the rights of man—that it was an inhuman business. An army on active service in camp behind the lines, what punishment can you give without taking the man away from the front? I saw a man doing 28 days for committing a nuisance in a tent. A lot of others sleeping in there; very insanitary, and you got to put a stop to it before it starts. This man got 28 days field punishment. Was confined to camp, took part in parades, and for one hour a day tied up to a post. A most excellent punishment. I think the men quite approve of it.

Lieut. Col. RIGBY. There is no general feeling among the men against it?

Capt. EASTWOOD. Not a bit. The country would never stand for the lash. As a matter of fact, there are many offenses for which 12 strokes of the lash, properly given, would be the best punishment. But the country would never stand it. Nothing inhuman about this field punishment, merely degrading.

Lieut. Col. RIGBY. Does it leave any stigma on the man?

Capt. EASTWOOD. Not a bit.

Lieut. Col. RIGBY. Among his associates?

Capt. EASTWOOD. Not a bit. You will find a fellow with three sentences to field punishment quite a popular fellow around the barracks.

Lieut. Col. RIGBY. If it is given by the commanding officer, that goes on his service record also?

Capt. EASTWOOD. Yes, sir. They have regimental sheets from which these small offenses are taken.

Lieut. Col. RIGBY. I notice that the French are different from you and from us—do not put a commanding officer's award on service record at all. Does a commanding officer's award go on the regimental sheets?

Capt. EASTWOOD. No; not unless it exceeds seven days. Since I left the battalion, it has been altered. I am not familiar.

Lieut. Col. RIGBY. Anything over seven days?

Capt. EASTWOOD. Yes.

Lieut. Col. RIGBY. Under seven days, it does not?

Capt. EASTWOOD. No; that goes on the conduct sheet.

Lieut. Col. RIGBY. Does the conduct sheet become part of the man's permanent record?

Capt. EASTWOOD. No; it is destroyed after three years.

(Capt. Eastwood showed his record book of executions of civilians in the Tower of London, etc., during the war, for treason, espionage, etc., remarking that many death sentences were commuted.)

(Lieut. Col. Rigby mentioned officers' cases.)

Capt. EASTWOOD. Most of our officers' cases are for drunkenness—severely reprimanded.

Lieut. Col. RIGBY. You do not dismiss?

Capt. EASTWOOD. Yes; we do.

Lieut. Col. RIGBY. Did you take the summary for the Fratel general court?

Capt. EASTWOOD. Yes; we do as much as we can. In any offense which we think requires a punishment of more than two years we usually send to a general court.

Lieut. Col. RIGBY. Practically before the war you used the district court for almost everything?

Capt. EASTWOOD. District courts-martial can not give more than two years. Here is a case of stealing—tried by general, and got three.

Lieut. Col. RIGBY. Can a district court award a discharge with ignominy?

Capt. EASTWOOD. Yes; under the army act.

Lieut. Col. RIGBY. That is a matter within the jurisdiction of the court—discharge with ignominy?

Capt. EASTWOOD. Not unless it awards hard labor. You see it from these files here [indicating papers]. Two men tried for desertion under the fourth section of the army act—the court only gave two years. A district court might have given that. In the Fratel case—the most he can get is two years. The reason we are trying him by a general is that there is so much feeling we want to show the public that something was done.

Capt. EASTWOOD (making a casual remark). The more dignity you have in a court the more justice you get. [Referring to district courts attended by Lieut. Col. Rigby.] A private soldier has a man with fixed bayonet to guard him. An officer also has an officer to guard him.

Lieut. Col. RIGBY. The first man before the district court was between two guards with fixed bayonets. The guards over the second man had no fixed bayonets.

Capt. EASTWOOD. They were from different regiments—perhaps not the custom for one regiment.

Lieut. Col. RIGBY. Was the judge advocate at the Fratel trial an officer?

Capt. EASTWOOD. From the Judge Advocate General's Office. He is a civilian—not an officer. He is the Deputy Judge Advocate General. An important case, so we asked for him.

Lieut. Col. RIGBY. What about counsel for the defense?

Capt. EASTWOOD. As a matter of fact, the prosecutor always helps. When I am taking a summary, I always help the accused and ask him if he knows anyone in England whom he wants as counsel. I ask, "Can I help you?" and sometimes they ask me if I can recommend anyone, and I do according to what they are able to pay. This man Fratel stated that he could pay 50 or 60 pounds, and I recommended his counsel. He is a very good counsel; lawyer here in London.

Lieut. Col. RIGBY. Let me ask you about the efficiency of the counsel for the accused?

Capt. EASTWOOD. As far as private soldiers are concerned, it is most difficult. It is a national problem. Situation now being brought before Parliament to provide public defenders.

Lieut. Col. RIGBY. Public military defenders?

Capt. EASTWOOD. Yes. Now, we generally get him an officer from his regiment.

Lieut. Col. RIGBY. Do you try to get an officer with any legal training?

Capt. EASTWOOD. It is very difficult, particularly in peace times. In war time you have people in the army from all walks of life, including many lawyers and solicitors. Generally speaking, the president of the court is very fair and the prosecutor will help. In fact, he must help.

Lieut. Col. RIGBY. In district courts, you do not use a judge advocate at all?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. Really is it then in the hands of the president and the prosecutor that he finds his protection, or does the counsel really assist?

Capt. EASTWOOD. Very often, if he is a good solicitor, and if he has handled many cases of soldiers. Near large barracks there is generally a little solicitor, nearly always the same one that appears for the men. I find them generally most tiresome; do not know the defense, and are apt to go into the case with very elaborate statements.

I think that the administering of justice by district courts is very good. My experience is that the president assists the men. "What have you to say?" he asks. "My wife is sick." "Have you a certificate?" "No." "You better get one." The president helps considerably. When a case comes up to us, we confirm the sentence, and let the man start serving his sentence. We then investigate if he has any grievance. One out of ten are true. We write to his unit for a report. Nearly all the grievances are, "I am suffering from shell shock."

Lieut. Col. RIGBY. Where a man does not have civilian counsel to assist him, do you always offer him a counsel?

Capt. EASTWOOD. No; he has to ask.

Lieut. Col. RIGBY. You do not offer?

Capt. EASTWOOD. No. The Canadians always ask. They are a perfect nuisance. Always asking for an officer to assist them. There was an officer in France who knew the procedure very well. Some men were being tried and they asked for this officer to defend them. He got them off. After that everybody wanted him and he got the job, and he got about one-half of them off. The brigadier said, "If you don't stop this I will have to transfer you." He was a most able defender and he got them off.

Lieut. Col. RIGBY. Do you make any effort when you do offer counsel, or a military officer—do you make any effort to get a man of higher rank than a lieutenant?

Capt. EASTWOOD. No. A lieutenant or a captain. It just depends on who is available.

Lieut. Col. RIGBY. Do you sometimes get a soldier?

Capt. EASTWOOD. Now we do. There are lots of barristers in the ranks.

Lieut. Col. RIGBY. Has there been any complaint at all that an officer of low rank, acting as defender, is embarrassed?

(Maj. DuPlat Taylor, court-martial officer of the London command, and "permanent" president of the district court-martial of that command, entered, and this last question was not answered. The major joined in the interview.)

Capt. EASTWOOD (to Maj. Taylor). You help them to bring everything out?

Maj. DUPLAT TAYLOR. I have sat as president of the court at about 1,500 trials and have not acquitted more than 5 or 6. They do not send a case to trial unless the evidence is clear against the man. The man has already been confronted with the witnesses and all the evidence taken down.

Lieut. Col. RIGBY. The man at the trial yesterday asked a question in cross-examining a witness, which you ruled to be immaterial, but you did not take that down for the record?

Maj. DUPLAT TAYLOR. We do not put anything in the record that is irrelevant.

Lieut. Col. RIGBY. It struck me this way—the man asked a question of the witness and you ruled it out. It is not in the record and there is no opportunity for a review on it?

Maj. DUPLAT TAYLOR. No.

Lieut. Col. RIGBY. The fairness of the record depends almost wholly on the president?

Maj. DUPLAT TAYLOR. It says in the Rules of Procedure that the president is responsible for the taking down of a fair summary of what is given. If the man insisted on it, it would go in the record.

Col. RIGBY. But a man not represented by counsel will never insist. Your ruling was right, but a president with less experience—suppose it was a president with less experience; there might be injustice done. Is it not pretty dangerous?

Maj. DUPLAT TAYLOR. If a man has any line of defense at all, anything in his favor, I ask for it. On 1,500 cases since the war I have sat as president—permanent president of the district court.

Col. RIGBY. About how many acquittals?

Maj. DUPLAT TAYLOR. About five or six. I can not be absolutely certain. We have about 7 per cent of the cases quashed.

Col. RIGBY. Any estimate of the number of charges sent back for further investigation or directed not to be tried?

Maj. DUPLAT TAYLOR. Cases which we send back to settle summarily or order the men released go to about 12 per cent. Very low. The commanding officer does not submit the application for trial unless it is a clear case.

Col. RIGBY. One-third of 1 per cent acquittals with you, Major?

Maj. DUPLAT TAYLOR. I can not tell you the exact number.

Col. RIGBY. You must have had a great many alternative charges.

Maj. DUPLAT TAYLOR. Oh, yes; mostly fraud cases. Possibly one-half were found guilty of part of the charge. Most of the desertion cases were found guilty of absence.

Col. RIGBY. Have you a court of inquiry?

Capt. EASTWOOD. Yes.

Col. RIGBY. Is it used for this?

Capt. EASTWOOD. No. Court of inquiry held on absence of the accused.

Col. RIGBY. Really a trial in his absence.

Capt. EASTWOOD. Yes. No further evidence is required.

Col. RIGBY. Evidence only of the fact of his absence being unauthorized?

Capt. EASTWOOD. Yes, sir.

Lieut. Col. RIGBY. You do not permit its finding to be admitted to prove desertion?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. As evidence of the circumstances under which arrested?

Capt. EASTWOOD. Yes. Evidence is given on oath that the man was picked up by the police for fighting. In an ordinary case of desertion—man absent six months, the charge may be of desertion. A witness comes in and identifies the man in the jug. That is all you want to prove your case.

Lieut. Col. RIGBY. As long as the absence is of six months, you infer desertion?

Capt. EASTWOOD. Yes. If the case is disputed, then you call witnesses, if the man has deserted for six months. But they never dispute absence.

Lieut. Col. RIGBY. If the officer that arrested the man makes a report that the man was fighting, out of uniform, gave a fictitious name and fictitious organization, if he disputes these points?

Capt. EASTWOOD. Then we call witnesses. If he disputed it, it would not be accepted as prima facie evidence of the deed.

Lieut. Col. RIGBY. Another matter—proving intent to desert, desert permanently. A case where a police officer has certified that the man gave a fictitious name, claimed to belong to an outfit to which he did not belong, and the man says, "No; I give him my name, all right. I was on my way back to my outfit." In that case you will have to call witnesses?

Capt. EASTWOOD. Yes; almost sure. As a matter of fact, the rough rule in this command is to nearly always submit a charge for desertion. If a man is absent under a month and surrenders, then we alter the charge to absence without leave. If absent over a month and arrested, let the charge go and let the court hear it. It is a rough rule we have in the office.

Lieut. Col. RIGBY. If he is gone over six months?

Capt. EASTWOOD. Yes; then he is charged with desertion. Must have had no intention to return. During the war they were sentenced to six months' detention for desertion. For absence without leave, two days for every day absent. Now, they get a day. Of course, they also lose pay while away.

Lieut. Col. RIGBY. You ordinarily do not give a man a discharge for desertion?

Capt. EASTWOOD. Not during the war. But now, peace time, we do. During the war the Army council issued an order that no discharges with ignominy be confirmed without reference to them, for the reason that you would have men deliberately committing offenses to escape active service. An excellent reason. They got detention. If fit, they were sent to France in the next draft.

Lieut. Col. RIGBY. I would like to get a copy of the suspension-sentence act. That act worked well?

Capt. EASTWOOD. Oh, very well, indeed; very good.

Maj. DUPLAT TAYLOR (after a reference to not having the record made verbatim). Strictly speaking, every question and answer should go down, so that the confirming officer can tell whether the question is irrelevant or not, but I do not do it.

(Casual remarks by Capt. Eastwood.)

No orders are published announcing sentences. Read to the men on parade. The men stand at ease until you come to the findings; then they come to attention.

In the case of officers, we have them come up here. In the case of dismissal of an officer, he is called up here and I take off his badges of rank.

No reviews are made. Only make a few notes.

(Reporter: Army Field Clerk F. T. McEneny.)

Lieut. Col. RIGBY. I also want to offer, unless it is already in this record, a copy of paragraph 1 of General Order 88 of the War Department, which was issued July 14 last, forbidding return of acquittals for reconsideration.

Senator WARREN. Senator Chamberlain, do you know whether that has been included in this record?

Senator CHAMBERLAIN. It has been mentioned, but not inserted in the record. That was an order of the President, directing that after a man had been acquitted there should be no direction for a retrial and no modification of the verdict of acquittal.

Lieut. Col. RIGBY. Yes; it is a rule of procedure issued under the thirty-eighth article of war, providing for rules of procedure, which are to be submitted annually to Congress.

Senator CHAMBERLAIN. In effect, it is an order not to retry a man who has once been acquitted.

Lieut. Col. RIGBY. No; not that, because that never could be done; but an order not to direct the court to reconsider the case, in case of an acquittal. It covers two or three other things also.

Senator WARREN. I think it had better go into the record.

Senator CHAMBERLAIN. Yes; let it go into the record.

Lieut. Col. RIGBY. It covers acquittal in whole or in part, and it also forbids increasing the sentence on reconsideration.

(Paragraph I of General Order No. 88 is here printed in full, as follows:

GENERAL ORDERS, }
No. 88.

WAR DEPARTMENT,
WASHINGTON, July 14, 1919.

I. *Procedure respecting the return of proceedings to courts-martial for revision.*—The following rule of procedure prescribed by the President, modifying the existing procedure respecting the return of proceedings to courts-martial for revision, is published for the information and guidance of all concerned.

1. No authority will return a record of trial to any military tribunal for reconsideration of—

(a) An acquittal;

(b) A finding of not guilty of any specification;

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty on a specification laid under that charge which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited.

3. This order will be effective from and after August 10, 1919.

(250.4, A. G. O.)

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

Senator CHAMBERLAIN. What led to the issuance of that regulation?

Lieut. Col. RIGBY. I had a little something to do with the thing; and so far as I know it was a direction of Gen. Crowder, given before he went to Cuba last winter, that a form of changes in the Manual and the Rules of Procedure should be prepared, forbidding the return of acquittals for reconsideration, and making some other changes.

Senator CHAMBERLAIN. That was after the war?

Lieut. Col. RIGBY. That was after the war.

Senator CHAMBERLAIN. What led to it? Was it agitation on the subject of courts-martial?

Lieut. Col. RIGBY. Of course, I do not know, sir; further than that the direction came from Gen. Kreger to me to prepare the draft of that and of these changes, and I prepared and submitted them to him before I went away last April; and during my absence on the other side, they came out.

Senator CHAMBERLAIN. Why was not that done during the war time?

Lieut. Col. RIGBY. Of course, I do not know anything about that.

Senator WARREN. The date of the issuance of the order appears?

Lieut. Col. RIGBY. Yes. This was prepared last March or April, and then, of course, it had to be submitted to the General Staff and the War Department—the Secretary of War—and there were various changes, so that these are not quite in the form in which the Judge Advocate General submitted them. They are not quite as broad,

in fact, as the Judge Advocate General submitted them, in some ways; and they were promulgated on the 14th of July.

Senator WARREN. On the 14th of last July?

Lieut. Col. RIGBY. July 14, 1919. There is also, in addition to this general order, a copy of "Changes No. 5," in the Manual for Courts-Martial, also promulgated July 14, 1919, amending paragraphs 6, 75, 76, 78, 94, 108, 109, 332-A, 367, 370, and 371 of the Manual, and amending Appendix 3 to the Manual, and also adding a new paragraph, 76-A.

I may say that these changes cover the submission of charges and preliminary investigations, making more definite rules in some ways as to how the preliminary investigations shall be carried on and providing also in a cautionary form—

(c) Convening authorities are advised that a majority of the officers appointed on a general court-martial should have not less than a total of two years' service, commissioned or enlisted, either in the Regular Army, the National Guard, National Army—

Or other armed forces, except in case of emergency.

That is to make sure of some experience in the officers composing the court.

Senator CHAMBERLAIN. Those are simply regulations that can be changed at any time?

Lieut. Col. RIGBY. Certainly, sir.

Senator CHAMBERLAIN. I judge from your mentioning them that some of these regulations are really along the lines of S. 64. The one you have just read practically follows S. 64.

Lieut. Col. RIGBY. I would not say that it follows it, but it is along the same line as one clause of that.

Senator CHAMBERLAIN. If it is right to do that by regulation, why is it not proper to do these things by law?

Lieut. Col. RIGBY. My answer to that, Senator, is that as to some of these things it is wiser to do them in a less hard and fast form, so that without the difficulty of having to get the statute changed you can change them if they do not work well, and if you see that changes are needed. I think many of these things should be in a somewhat flexible form. For instance, it was suggested by Gen. Crowder, you will remember, in his letter of March 10 last to the Secretary of War, that for the purpose of trying out the plan of having a legally qualified member of the court an order should be issued, a general order, looking to that. Now, I think there is a good reason for trying that in the first place in that way rather than by statute, because until we have tried it in our Army we do not know whether it would be better ultimately to have the legal adviser in the form of the judge advocate or to have him an additional member of the court, and under just what regulation it will best work out. A general order can be changed easily, whereas if you once embody it in a statute you have it in a very fixed and definite form.

Senator CHAMBERLAIN. I do not know that I have any objection to this system of doing this by regulation, but it seems to me it is simply an excuse for not enacting a law that is pending before the Senate.

Lieut. Col. RIGBY. Of course that is a matter of opinion, Senator. I have not myself, however, thought of it in that way.

Senator WARREN. You are touching upon something that has been running through my mind, not only all through this hearing but before, and that is that there has got to be either a different law or a different application and a different practice at the front in combat positions from the practice at home in times of absolute peace. It seems to me that I can see how more vigorous action should be had at the front and while within reach of the enemy than there should be in times of peace when it is a mere matter of a little delinquency, where a complaint comes in that would be tremendously important if it were at the front.

Senator CHAMBERLAIN. I am disposed to agree with that view, Senator, but here, under the system that has been followed in the United States, the punishments were even severer at home in the camps and cantonments than they were at the battle front.

Senator WARREN. Senator, that is what I think, but as this came up I thought perhaps the colonel would like to express himself upon that point, because I think the situation is as you state it, and on the other hand I think it ought to be just the reverse.

Lieut. Col. RIGBY. That is a matter, Senator, that I do have some opinions on, that I should like to submit to you, with your permission. But I would like first to add just a word about the character of these rules.

Senator CHAMBERLAIN. These papers will be printed in the record?

Senator WARREN. Certainly.

Lieut. Col. RIGBY. The further headings here are to provide for the more careful selection of counsel for the accused, as well as of the judge advocate.

Senator CHAMBERLAIN. That is all proposed to be done by regulation.

Lieut. Col. RIGBY. It is done, sir, by these regulations; which are now in effect.

Senator WARREN. They have been in force since what time?

Lieut. Col. RIGBY. Since August 10. They were promulgated July 14, to go into effect as of August 10, if I remember rightly as to the date of going into effect.

(The documents referred to are here printed in the record, as follows:)

MANUAL FOR COURTS-MARTIAL.

CHANGES }
No. 5. }

WAR DEPARTMENT,
WASHINGTON, July 14, 1919.

Paragraphs 6, 75, 76, 78, 94, 108, 109, 332a, 367, 370, and 371, and Appendix 3, Manual for Courts-Martial, 1917, are changed, and paragraph 76a is added, as follows:

6. *Who competent to serve.*—Generally all officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, are legally competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. (A. W. 4.)

Exceptions.—(a) No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution (A. W. 8, 9); but when there is only one officer present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10). (See chapter 8, sec. 1, par. 129.)

(b) Chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps are not in practice detailed as members of courts-martial.

(c) Convening authorities are advised that a majority of the officers appointed

on a general court-martial should have not less than a total of two years service, commissioned or enlisted, in either the Regular Army, National Guard, National Army, or other national armed forces, when such officers can be detailed without manifest injury to the service. In the selection of officers for appointment as members of courts-martial care will be taken to select those officers of the command who are best qualified for such duty by training and experience. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

75. *Submission of charges.*—Charges for trial by courts-martial will be preferred only when, in the opinion of the officer preferring them, there is reasonable ground for believing that an offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. All charges for trial by courts-martial will be prepared in triplicate, using the prescribed charge sheet as first sheet and using such additional sheets of ordinary paper as are required. In the preparation of charges care will be taken to observe the provisions of paragraphs 65, 66, and 67, *ante*. In cases referred for trial to special or general courts-martial, no indorsement will be placed on the charge sheet except the indorsement referring the charges to a court-martial for trial. The charges, when the preferring officer recommends trial by a special or general court-martial, will be accompanied—

(a) By a letter of transmittal addressed to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains and signed by the officer preferring the charges, which shall contain a brief summary of the material testimony expected from each material witness for the prosecution, as well as a reference to any known document or other matter of evidence which may become important or necessary in the case. It will also contain a recommendation as to the kind of court-martial, general or special, before which the preferring officer believes the trial should be held.

(b) In the case of a soldier, the letter of transmittal will be accompanied by properly authenticated evidence of convictions, if any, of an offense or offenses committed by the accused during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

76. *Investigation of charges—Action.*—The officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains, when a charge is received by him, examine it carefully for the purpose of determining whether it states an offense cognizable by a military tribunal and whether it is laid under the proper Article of War and will, when necessary, cause or permit a charge to be amended or a new or additional charge to be preferred. If, in his opinion, any charge is trivial or inconsequential, he will dispose of it without trial by court-martial. Where the case presented is one which, in his opinion, should be disposed of under the one-hundred and fourth article of war he himself will so dispose of it. He may, without further investigation, refer the charges to a summary court-martial for trial. If he believes that the charges should be tried by a special or a general court-martial, he will, before taking further action thereon, either carefully investigate them himself or cause them to be investigated by an officer other than the one preferring the charges whose rank, experience, and qualifications are such as to fit him for the performance of this important duty. The officer investigating the charges will afford the accused an opportunity to make any statement, call any witness, offer any evidence, or present any matter in explanation or extenuation of his alleged offense that he may desire to have considered. He will, at the outset of his investigation, carefully warn the accused that it is not necessary for him to make any statement with reference to the charges against him, but that if he does make one it may be used against him. (See par. 225 (b).) The accused will not be interrogated without the consent of his counsel. All material testimony given by any witness in person will be reduced to a clear, succinct statement, which should be read to the witness and signed by him. When it is not practicable to obtain personal testimony from any material witness, either for the prosecution or the defense, a written statement will be obtained, if possible, by the officer investigating the charges of the testimony to be expected from such witness and submitted with the report of investigation. He will also submit available papers or documents which may serve to throw light on the case. Any written statement made by the accused will be read over to him and he will be offered

an opportunity to sign it if he so desires, but he will not be required to do so and will be advised that it is not necessary for him to do so. Care will be taken to insure that the accused is fully advised of the nature of the offense charged against him and of his legal rights in the premises.

The investigating officer will submit his report to the authority appointing him, inclosing papers, documents, and the signed statements of witnesses referred to above, in the form of an indorsement on the letter of transmittal submitted with the charges by the preferring officer. The report will include a reference to any known document or other matter of evidence not included but which may become important or necessary in the case. It will also include a statement of all explanatory or extenuating circumstances which shall have come to the attention of the investigating officer, a statement as to whether he believes the charges can be sustained, and a specific recommendation as to the disposition thereof. An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout such investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial. When the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains is the officer preferring the charges, he will cause them to be investigated by some officer other than himself before reaching a decision as to their disposition, except where he decides to refer them for trial to a summary court. When the officer preferring the charges is the only officer with the command, and is of the opinion that the case is one for a special or general court-martial, he will himself investigate the charges and make the report thereof as just described.

From this investigation the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains will decide what disposition is to be made of the charges against him. Unless such officer is the accuser or prosecutor of the person to be tried, he should not ordinarily forward charges to superior authority, except in cases where he desires to recommend trial by a court-martial not within his competency to appoint; all other cases he should dispose of without reference to higher authority. Action forwarding charges to superior authority will be in the form of an indorsement on the letter of transmittal submitted by the officer preferring the charges, following the report of investigation. The letter of transmittal, together with all indorsements thereon, will be referred with the charges to the trial judge advocate for his information in preparing the case for trial, but neither this document, nor any part thereof, will be shown to the court or any member thereof. In case of trial by general court-martial the letter of transmittal with all indorsements thereon will be forwarded to the Judge Advocate General with the record of trial.

Each commanding officer superior to the one immediately exercising summary court-martial jurisdiction over the accused into whose hands charges may officially come will either refer them to a court-martial within his jurisdiction for trial, forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise dispose of them as circumstances may appear to require. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

76a. *Further investigation of general court-martial charges.*—Before directing the trial of any charge by general court-martial or military commission, the convening authority will refer it to his staff judge advocate for consideration. Should the investigation of the charges appear not to be complete and satisfactory, the charges may be returned for further investigation, to be conducted, reported, considered, and acted upon in like manner as the original investigation; or, in a proper case, the necessary further investigation may, when practicable, be conducted by the staff judge advocate, an inspector, or other suitable officer through direct correspondence or personal interview. Should any charge or specification appear to be improperly drawn, the staff judge advocate may secure its correction or the substitution of another through direct correspondence or personal interview. The staff judge advocate may, over the signature of the officer preferring the charges, make corrections in the phraseology of any charge or specification by addition, substitution, or elimination whenever such correction does not change the substantive character of the charge or specification as preferred by the officer signing it. He may also

properly cause new or substituted specifications and charges, based upon the indicated competent evidence, to be preferred. When these charges are returned by the staff judge advocate to the convening authority, he should advise the latter that they are correct in form and appropriate to the indicated competent evidence in the case, and whether or not in the opinion of the judge advocate a prima facie case justifying trial exists. The duties herein prescribed for a staff judge advocate will be performed by the officer acting as such if no judge advocate is on duty on the staff of the convening authority. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

78. *Determination of proper trial court.*—When an officer who exercises court-martial jurisdiction receives charges against an enlisted man and has decided that the case requires trial by court-martial, it is his duty to consider whether such trial should be by summary, special, or general court-martial. Subject to jurisdictional limitations, he should not withhold charges from trial by special or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. On the other hand, he should not refer to special or summary court-martial offenses which, by reason of their inherent gravity or the circumstances surrounding their commission, merit greater formality of trial or more condign punishment than is found in the procedure or jurisdiction of such courts. As a general rule no case should be tried by a special or general court-martial in which, under the apparent circumstances of the case, adequate punishment can be imposed by a summary court-martial; and no case should be tried by a general court-martial in which, under the apparent circumstances of the case, including the previous military record of the accused, adequate punishment can be imposed by a summary or special court-martial. Beyond this no fixed rule can be laid down, and the matter must be decided after careful consideration by commanding officers. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

94. *Selection.*—The prompt, speedy, and thorough trial of a court-martial case is largely dependent upon the judge advocate. He will, accordingly, be carefully selected. Where it can be avoided no officer who has not had experience as a judge advocate will be detailed as judge advocate of a general court-martial unless he has had experience as a member and as an assistant judge advocate of a court-martial and is otherwise qualified by character and attainments for this duty. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

108. *Counsel.*—The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel of his own selection, or by military counsel of his own selection if such counsel be reasonably available. Military counsel will be detailed as soon as practicable after arrest or confinement. Civilian counsel will not be provided at the expense of the Government.

Should the accused request the appointment as his counsel of an officer stationed at the station where the court sits, and such officer be not a member of the court, the commanding officer will appoint such officer as counsel if he is reasonably available. Should the commanding officer decide that the officer desired by the accused is not reasonably available, the accused may appeal to the officer appointing the court, whose decision shall be final. If the counsel desired by the accused is not under the control of the commanding officer where the trial is held, application for counsel will be submitted by the accused in writing to the appointing authority, whose decision as to whether the officer desired is "reasonably available" is final.

Every officer convening a general or special court-martial will, in the convening order, detail a defense counsel for the court whose duty it shall be to act as counsel for all accused persons tried by that court except those who have counsel of their own selection. In this latter case, the defense counsel may, by mutual agreement between himself and counsel selected by the accused, act as associate counsel. Officers so detailed should have the qualifications described in paragraph 94 for judge advocates, and should be selected with the same care. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

109. An officer acting as counsel before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law, but should

not obstruct the proceedings with frivolous and manifestly useless objections or discussions. Ample opportunity will be given to judge advocates and counsel for accused properly to prepare the prosecution and defense of each case respectively, and for that purpose they will be excused from any other duty that may interfere with such work. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

332a (Added by C. M. C. M. No. 1, and changed by C. M. C. M. No. 4.) When an officer or enlisted man has been tried by a general or special court-martial and acquitted, or has been convicted and the sentence does not include dismissal, dishonorable discharge, or confinement, the judge advocate will at once notify the commanding officer in writing, directly, of the fact that neither dismissal, dishonorable discharge, nor confinement has been imposed on the accused, whereupon the commanding officer will at once release the accused from confinement or arrest, provided he is not awaiting trial or result of trial under other charges. No officer or enlisted man so released shall be ordered to duty outside of the jurisdiction of the reviewing authority until the case shall have been finally disposed of. (Dig. Ops. J. A. G., May, 1918, p. 67.) (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

367. (Changed by C. M. C. M. No. 4.) *By appointing authority.*—(a) *Records of trial by general courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by general court-martial, with the decisions and orders of the appointing authority made thereon, will be transmitted directly to the Judge Advocate General of the Army accompanied by the statement of service, if there be any; five copies of the order, if there be any, promulgating the result of the trial, and the letter of transmittal provided for in paragraph 75, with all indorsements thereon.

(b) *Records of trial by special courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial, accompanied by a copy of the order publishing the result of the trial, will be forwarded, ordinarily without indorsement or letter of transmittal, to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the Judge Advocate until the statistical information in it required for the annual report of the Judge Advocate has been secured, when it may be destroyed.

(c) *Records of trial by summary courts-martial.*—The several records, of trial by summary courts-martial within a command shall be filed together in the office of the commanding officer and shall constitute the summary court record of the command.

(d) *Reports of trial by summary courts-martial.*—The report of trial by summary court (copy of record of trial) will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the Judge Advocate until the statistical information in it required for the annual report of the Judge Advocate has been secured, when it may be destroyed. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

370. (Changed by C. M. C. M. No. 4.) *Action by reviewing authority and record thereof.*—Every record of trial by general court-martial or military commission received by a reviewing or confirming authority will be referred by him to his staff Judge Advocate for examination. The latter will carefully examine the record and recommend orally or in writing the action which, in his opinion, should be taken thereon. The duties herein defined for a staff Judge Advocate will be performed by the officer acting as such if no Judge Advocate is on duty on the staff of the convening authority.

The reviewing authority will state at the end of the record of trial in each case his decisions and orders. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

371. (Changed by C. M. C. M. No. 4.) *Sentence not effective until approved.*—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the reviewing authority as defined in paragraphs 369 and 374. Upon acquittal, or upon conviction where the sentence does not include dismissal, dishonorable discharge or confinement, the accused should be released from confinement or arrest as provided in paragraph 332a. The announcement of the result of trial in orders is not necessary to the validity

of the sentence or acquittal. It is not necessary for the reviewing authority to approve the findings and proceedings. (C. M. C. M. No. 5, July 14, 1919.)
(250. 4, A. G. O.)

Appendix 3.—Change paragraphs 1 and 2 under “Instructions” to read as follows:

1. *Submission of charges.*—Charges for trial by courts-martial will be preferred only when, in the opinion of the officer preferring them, there is reasonable ground for believing that an offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. All charges for trial by courts-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. In the preparation of charges care will be taken to observe the provisions of paragraphs 65, 66, and 67, *ante*. In cases referred for trial to special or general courts-martial, no indorsement will be placed on the charge sheet except the indorsement referring the charges to a court-martial for trial. The charges, when the preferring officer recommends trial by a special or general court-martial, will be accompanied—

(a) By a letter of transmittal addressed to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains and signed by the officer preferring the charges, which shall contain a brief summary of the material testimony expected from each material witness for the prosecution, as well as a reference to any known document or other matter of evidence which may become important or necessary in the case. It will also contain a recommendation as to the kind of court-martial, general or special, before which the preferring officer believes the trial should be held.

(b) In the case of a soldier, the letter of transmittal will be accompanied by properly authenticated evidence of convictions, if any, of an offense or offenses committed by the accused during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges. (M. C. M., par. 75.)

2. *Investigation of charges—Action.*—The officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains, will, when a charge is received by him, examine it carefully for the purpose of determining whether it states an offense cognizable by a military tribunal and whether it is laid under the proper article of war and will, when necessary, cause or permit a charge to be amended or a new or additional charge to be preferred. If, in his opinion, any charge is trivial or inconsequential, he will dispose of it without trial by court-martial. Where the case presented is one which, in his opinion, should be disposed of under the one hundred and fourth article of war, he himself will so dispose of it. He may, without further investigation, refer the charges to a summary court-martial for trial. If he believes that the charges should be tried by a special or a general court-martial, he will, before taking further action thereon, either carefully investigate them himself, or cause them to be investigated by an officer, other than the one preferring the charges, whose rank, experience, and qualifications are such as to fit him for the performance of this important duty. The officer investigating the charges will afford the accused an opportunity to make any statement, call any witness, offer any evidence, or present any matter in explanation or extenuation of his alleged offense that he may desire to have considered. He will, at the outset of his investigation, carefully warn the accused that it is not necessary for him to make any statement with reference to the charges against him, but that if he does make one, it may be used against him. (See par. 225 (b).) The accused will not be interrogated without the consent of his counsel. All material testimony given by any witness in person will be reduced to a clear, succinct statement, which should be read to the witness and signed by him. When it is not practicable to obtain personal testimony from any material witness, either for the prosecution or the defense, a written statement will be obtained, if possible, by the officer investigating the charges, of the testimony to be expected from such witness and submitted with the report of investigation. He will also submit available papers or documents which may serve to throw light on the case. Any written statement made by the accused will be read over to him and he will be offered an opportunity to sign it, if he so desires, but he will not be required to do so and will be advised that it is not necessary for him to do so. Care will be taken to insure that the accused is fully advised of the nature of the offense charged against him and of his legal rights in the premises.

The investigating officer will submit his report to the authority appointing him, inclosing papers, documents, and the signed statements of witnesses referred to above, in the form of an indorsement on the letter of transmittal submitted with the charges by the preferring officer. The report will include a reference to any known document or other matter of evidence not inclosed but which may become important or necessary in the case. It will also include a statement of all explanatory or extenuating circumstances which shall have come to the attention of the investigating officer, a statement as to whether he believes the charges can be sustained, and a specific recommendation as to the disposition thereof. An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout such investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial. When the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains is the officer preferring the charges, he will cause them to be investigated by some officer other than himself before reaching a decision as to their disposition, except where he decides to refer them for trial to a summary court. When the officer preferring the charges is the only officer with the command, and is of the opinion that the case is one for a special or general court-martial, he will himself investigate the charges and make the report thereof as just described.

From this investigation the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains will decide what disposition is to be made of the charges against him. Unless such officer is the accuser or prosecutor of the person to be tried, he should not ordinarily forward charges to superior authority, except in cases where he desires to recommend trial by a court-martial not within his competency to appoint; all other cases he should dispose of without reference to higher authority. Action forwarding charges to superior authority will be in the form of an indorsement on the letter of transmittal submitted by the officer preferring the charges, following the report of investigation. The letter of transmittal, together with all indorsements thereon, will be referred with the charges to the trial judge advocate for his information in preparing the case for trial, but neither this document nor any part thereof will be shown to the court or any member thereof. In case of trial by general court-martial the letter of transmittal with all indorsements thereon will be forwarded to the Judge Advocate General with the record of trial.

Each commanding officer superior to the one immediately exercising summary court-martial jurisdiction over the accused into whose hands charges may officially come will either refer them to a court-martial within his jurisdiction for trial, forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise dispose of them as circumstances may appear to require. (M. C. M., par. 76.) (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

By order of the Secretary of War :

PEYTON C. MARCH,
General, Chief of Staff.

Official :

P. C. HARRIS,
The Adjutant General.

Senator CHAMBERLAIN. Have these orders been published?

Lieut. Col. RIGBY. Yes; Senator.

Senator CHAMBERLAIN. In what official document may they be found?

Lieut. Col. RIGBY. The general order can be found in the general orders that are promulgated and published.

The CHAIRMAN. Will you have a dozen copies sent up here? I suppose they are regularly numbered?

Lieut. Col. RIGBY. Yes.

Senator WARREN. Please send them up here at your convenience.

Lieut. Col. RIGBY. With pleasure. The changes will, of course, appear in the next publication of the Manual. Meantime they are sent out in circular form.

As to the matter we were speaking of a moment ago, Senator—

Senator WARREN. In view of the fact that some of our newspaper friends have come in, let me say this: I understood you in the commencement of your testimony to state that your position had been and is now, in the Judge Advocate General's Office, that of the legislative committee, so that such matters as this which you have just presented would either originate with you or would be submitted to you.

Lieut. Col. RIGBY. Matters of expected congressional legislation, matters to be submitted to Congress, go through our section. These matters of the drafting of proposed amendments to the Manual and things of that sort would not necessarily go to our section. I was simply detailed to do that work last March, I suppose because of the fact that I had prepared a study of the foreign statutes and was somewhat familiar with them.

Senator CHAMBERLAIN. In that connection, Gen. Ansell was sent over to Europe for this purpose at one time, was he not?

Lieut. Col. RIGBY. Yes; Gen. Ansell went over in 1918. My understanding was that Gen. Ansell's investigation was in a way broader and in another way narrower than mine. He was not limited to an investigation of the court-martial system entirely. He was examining other things. On the other hand, he was rather examining those court-martial systems, as I understood it, more from the standpoint of getting the laws and regulations in force, and not attempting to find out, as I was specifically directed to do, so much how the systems worked in practice.

Senator CHAMBERLAIN. Was not that a part of his duty, to do just what you have done?

Lieut. Col. RIGBY. Of course I only know by hearsay and inference. I do not quite gather that from the form of his report.

Senator CHAMBERLAIN. You say he was not limited, but was he not limited by the assistance given him? He had no assistants, had he?

Lieut. Col. RIGBY. Of course I do not know anything about that, Senator. I only know about Gen. Ansell's mission from his report, and not in a definite way.

Senator CHAMBERLAIN. What assistants did they furnish you in the way of interpreters, clerks, and stenographers?

Lieut. Col. RIGBY. I was assigned one major, Maj. Wells, to assist me, who as I testified yesterday, did the work chiefly in Belgium, and also was with me in other interviews; and I was also furnished the assistance of one second lieutenant who was a lawyer—

Senator CHAMBERLAIN. Who was he?

Lieut. Col. RIGBY. Second Lieut. Frank Feuille; and Regimental Sergeant Major Leroy Vander Burgh, who was a New York lawyer, of the Judge Advocate General's Department. He was a very capable young man. Then I had the assistance of Lieut. Ely M. Behar, who was a French interpreter, and of Second Lieut. Henry Bosson, who was translating the Scandinavian languages, and then a major of The Adjutant General's Department was assigned as executive officer, or office manager.

Senator CHAMBERLAIN. Who was that?

Lieut. Col. RIGBY. Maj. John W. Llufrío; and I succeeded in borrowing from the peace commission for a time the services of a French court stenographer whom they were using, and he went with me to some of these interviews with the French officials, and attended French courts martial. He proved himself a very capable man also. Capt. Pierce of the interpreters' bureau of the peace commission was also good enough to go with me several times to help out in interpreting; as was also Capt. McFadden, assistant military attaché in Paris. And I had a stenographer who was a sergeant major in the Judge Advocate General's Department, Sergeant Major Henry J. Celse. Then I was given the services of other stenographers and field clerks and some civilian translators who were just assigned to me by the officers over there in Paris from time to time as I needed them; or I think I got two field clerks from Chaumont; and three or four from Tours just before I came home, to help in arranging my material. I was really handicapped. I had hoped I might get some money with which to work, but I did not succeed in getting a penny, so I was really put to it to borrow assistants as I could. I was allowed my actual expenses for subsistence, not to exceed \$5 a day, and my actual traveling expenses, which I understand is the same that Gen. Ansell was allowed.

Senator CHAMBERLAIN. All of these men whom you have named, practically, received their salaries as officers and men of the Army?

Lieut. Col. RIGBY. Certainly; but there was no special allowance made for any of them at all. They were loaned to me. That was rather easier right then than it might have been otherwise, because different organizations were just waiting for their turns to go home.

Senator CHAMBERLAIN. May I ask you when you come to revise your testimony to give the personnel, the names and official positions, of all those who assisted you?

Lieut. Col. RIGBY. I will be very glad to do so if I have not done it completely. I have the names.

Senator CHAMBERLAIN. You may want to correct them when you look over your testimony.

Lieut. Col. RIGBY. I will be glad to check the names.

Senator CHAMBERLAIN. You had an ample force to accomplish the purposes of your mission?

Lieut. Col. RIGBY. Oh, yes; in a way, Senator; but not to do all that I wanted to do.

Senator CHAMBERLAIN. When did you go over?

Lieut. Col. RIGBY. I sailed on April 7, and arrived in Paris on April 16.

Senator CHAMBERLAIN. And when did you finish your work over there?

Lieut. Col. RIGBY. I really did not finish the work. I should have had two or three weeks more, but I was directed to return so as to be home by the 31st of July, and I dropped the work in time to do that, or to get here within two or three days later. Unfortunately I was held, not being able to get a boat for a few days.

Senator CHAMBERLAIN. That was all in this year?

Lieut. Col. RIGBY. That was all in this year, yes. I was in France from April 16, the date I arrived—I arrived in Brest on April 15—until July 30, the date when I sailed from Brest.

Senator WARREN. I do not want to go too far afield, but I wish to ask you, have you had occasion, either before you went over there or since you returned, to look into court-martial matters in other armies and other countries than France and England; that is, in Italy and perhaps in Germany? We are not supposed to know anything about that.

Lieut. Col. RIGBY. I confess I do not know much of the German system. I did succeed, pretty nearly the last thing I did before I left, in getting quite a lot of the German material, copies of their codes and quite a lot of material which I did not have time to examine before I left, because I was immediately coming home; and I have not had time to examine it yet. I have it, but have not had time to examine it.

Senator WARREN. I do not care to lead you into any detailed statement, but I did not know but you might have some general statement to make as a comparison between the system of our country and that of some other country, or by way of comparison between England and France and the other countries.

Lieut. Col. RIGBY. As to some of those countries I have, and with your permission I will simply refer to that as I go along in connection with what I say on the different points about the countries I have more specially investigated.

Now I find that I am at liberty to offer here and will be glad to offer these statistics of the French courts-martial during the war, which were given to me, and which, as I say, do not show the severity of the sentences or the number of death sentences, but do cover the number of cases tried of different kinds.

Senator WARREN. Is that simply a statement of the cases tried by the French?

Lieut. Col. RIGBY. That presents a statement of all the cases tried, the number of charges brought, the number of charges not sent to trial, the number of acquittals, all that sort of thing, quite in detail; but without a statement of the quantum of the sentences.

Senator CHAMBERLAIN. By whom was that furnished to you?

Lieut. Col. RIGBY. By the under secretary of state for military justice in France, M. Edouard Ignace.

Senator CHAMBERLAIN. Does it give the number of appeals and the disposition of the cases on appeal?

Lieut. Col. RIGBY. No, Senator, it does not; and it was impossible to get definite statistics on that. I will say that this is an English translation of the original French which was handed to me. I tried to get statistics on appeals, and I got estimates. I could not get definite statistics. The estimates that were given to me were that around 25 per cent, between 25 and 30 per cent, of the cases are appealed.

Senator WARREN. Are those figures given in this document?

Lieut. Col. RIGBY. No; I was simply verbally told that.

(The document referred to is as follows:)

	Complaint not entertained.		Quashed ("nonlieu").		Ordered for trial.		Acquittals.	
	Military code.	Ordinary law.	Military code.	Ordinary law.	Military code.	Ordinary law.	Military code.	Ordinary law.
1914.								
Armies.....	461	138	606	221	4,255	1,861	1,104	444
Interior.....	962	116	2,128	692	3,109	1,347	588	250
Morocco.....	25	8	16	3	276	101	50	16
Total.....	1,448	262	2,750	916	7,640	3,309	1,742	710
1915.								
Armies.....	1,021	347	1,635	584	15,419	6,733	2,871	1,260
Interior.....	2,442	378	4,529	2,013	15,711	5,907	2,503	922
Morocco.....	159	22	139	70	1,161	447	92	55
Total.....	3,622	747	6,303	2,667	32,291	13,087	5,466	2,237
1916.								
Armies.....	1,893	584	2,009	560	24,154	4,723	2,122	659
Interior.....	2,534	367	3,117	1,494	15,656	5,722	1,506	878
Morocco.....	88	32	98	67	1,053	306	43	23
Total.....	4,515	983	5,224	2,121	40,863	10,751	3,671	1,560
1917.								
Armies.....	2,408	459	2,594	754	35,767	3,223	1,830	603
Interior.....	2,389	539	2,320	1,665	16,409	7,020	1,073	1,037
Morocco.....	77	27	148	119	1,898	407	105	45
Total.....	4,874	1,025	5,062	2,538	54,074	10,650	3,008	1,685
1918.								
Armies.....	1,898	414	2,158	851	23,763	4,444	1,473	685
Interior.....	1,554	472	1,585	1,441	14,326	7,111	1,048	1,208
Morocco.....	64	38	63	64	1,030	286	23	26
Total.....	3,516	924	3,806	2,356	39,119	11,841	2,544	1,929
Grand total....	17,975	3,941	23,145	10,598	173,987	49,638	16,431	8,121

	Insubordination.	Desertion (soldiers).	Desertion (officers).	Abandonment of post.	Assault on superiors.	Outrages.	Revolt, mutiny.	Military theft.	Offenses against military administration.	Condemned by civil law.	Seditious utterances, discouraging propaganda.	Treason, espionage.	Recapitulation.
1914.													
Armies.....	4	509	1	1,365	63	499	29	262	.....	1,406	7	68	4,213
Interior.....	561	633	18	225	57	43	49	318	2	1,187	66	10	3,599
Morocco.....	3	17	.....	27	12	84	10	42	1	101	2	6	305
	568	1,159	19	1,617	132	1,056	88	622	3	2,694	75	84	8,117
1915.													
Armies.....	18	2,433	2	4,269	437	3,740	201	783	8	5,620	40	59	17,610
Interior.....	1,343	6,330	2	1,131	261	2,050	163	1,247	14	4,926	144	31	17,642
Morocco.....	5	84	.....	147	47	457	20	140	3	395	1	4	1,303
	1,366	8,847	4	5,547	745	6,247	384	2,170	25	10,941	185	94	36,555
1916.													
Armies.....	12	8,924	11	5,337	731	5,054	196	790	10	4,190	30	89	25,374
Interior.....	1,523	7,403	49	536	333	1,752	153	1,238	33	4,731	45	40	17,843
Morocco.....	2	94	.....	136	36	411	5	132	5	273	10	2	1,106
	1,537	16,421	60	6,009	1,100	7,224	354	2,160	48	9,194	85	131	44,323
1917.													
Armies.....	5	21,174	13	4,650	935	4,844	535	1,010	24	3,572	94	201	37,057
Interior.....	692	9,052	1	534	505	1,778	286	1,297	25	6,226	77	37	20,510
Morocco.....	2	419	.....	189	56	508	7	156	.....	380	1	.....	1,718
	699	30,645	14	5,373	1,496	7,130	828	2,463	49	10,178	172	238	59,285
1918.¹													
Armies.....	15	13,032	13	2,617	660	2,848	203	1,231	21	3,606	27	47	24,323
Interior.....	339	7,684	.....	588	320	1,588	242	1,499	42	5,932	36	69	18,399
Morocco.....	11	392	.....	82	41	271	17	127	2	240	.....	.....	1,186
	368	21,108	13	3,287	1,021	4,707	462	2,857	65	9,781	63	116	43,848
General total.	4,538	78,180	110	21,833	4,494	26,364	2,116	10,272	190	42,788	580	663	192,128
										53,250			

¹ Complete statistics of courts-martial for 1918 have not yet come to hand.

Senator CHAMBERLAIN. That covers the French courts-martial during the whole period of the war?

Lieut. Col. RIGBY. Yes. As I say, I was informed that from 25 to 30 per cent of the cases were appealed, but that less than 10 per cent of those appealed were reversed, or sent back for new trial. In the armies on active service, the appeals were practically limited to death cases.

Senator WARREN. Was it only 10 per cent of the number appealed, or was it 10 per cent of the whole number of cases that were reversed or sent back?

Lieut. Col. RIGBY. Only 10 per cent of the cases appealed, which would be about 2½ per cent of the whole number of cases tried.

Senator WARREN. That is what I wanted. I wanted to establish the fact, whatever it might be.

Lieut. Col. RIGBY. That was the situation. That, of course, relates only to the regular courts. In the cases in the "special courts," there was no appeal at all, and until 1917 there was no provision for

stay of execution. In 1917 there was a direction from the President to stay executions in cases where death was adjudged by the "special courts" until they could be submitted to the President for examination.

I just want to add to what I said the last thing yesterday, in answer to a question of Senator Warren, I believe, about those cases of the men who were restored to duty from the disciplinary barracks.

Senator CHAMBERLAIN. At Leavenworth?

Lieut. Col. RIGBY. Referring to the cases cited in Senator Chamberlain's speech, I want to add that our records show really two cases, either one of which might, as it left the court-martial, have been the case mentioned of the 17-year-old boy sentenced to 10 years for sleeping on post. One is the Urben case, 114717, and the other is either the Sabbri case or the Walworth case. I seem to have those two names—Sabbri and Walworth—confused in my mind, somehow. It is one or the other of them. I had assumed, however, and do assume, that the Senator was not referring to the Urben case, because in that case the reviewing authority cut down the sentence to a guardhouse sentence of six months. The other case to which I was referring yesterday, where the man was restored after nine months in the disciplinary barracks, is, as I say, either the Walworth or the Sabbri case.

Senator WARREN. I had no idea of singling out any persons, but I wanted to know the general plan. I had supposed all these years—not since the question has come up before us, but all the years before—that the disciplinary barracks were on a different plan than county jails or State penitentiaries. I assumed that the men were sent to the disciplinary barracks with the intention of getting them out and getting them into the service as fast as possible, provided they were worthy; and if not, to get them out of the Army.

Lieut. Col. RIGBY. That is my understanding also, Senator; and my memory is that in pursuance of that policy 1,182 men were restored in that way to the colors from the Fort Leavenworth barracks alone during the year 1918.

Senator WARREN. I only wanted to know whether that is the plan or not. It ought to be, and I wanted to know whether it really is. How many men do you say were restored to the colors?

Lieut. Col. RIGBY. One thousand one hundred and eighty-two; is my memory; but that is only memory and may be wrong.

Senator WARREN. Within the one year?

Lieut. Col. RIGBY. Within the one year, from the one barracks.

Senator WARREN. How many were committed there?

Lieut. Col. RIGBY. I would have to look up those figures.

Senator WARREN. Can you approximate the proportion?

Lieut. Col. RIGBY. It would not be safe for me to try. I do not know how many were restored from Fort Jay, or how many were restored from Alcatraz. I could easily get and put into the record those figures for you, however, covering the committals to the three institutions and the restorations from the three.

Senator WARREN. We ought to have these figures, because that is the point we ought to get above all others, so as to see what is done; and if there is to be a change made, this Congress ought to be in a position to propose the change.

Lieut. Col. RIGBY. If that may be added to my statement I will have it inserted.

Senator WARREN. Certainly.

Lieut. Col. RIGBY. The figures, as given to me by Lieut. Col. Dinsmore, the Chief of the Statistical Division of the Judge Advocate General's Office, are as follows: For the period April 1, 1917, to July 31, 1919, the committals to all the disciplinary barracks amounted to 11,492; and the total restorations to the colors from the same barracks were 2,528. On April 1, 1917, there were 2,100 persons in confinement in the various disciplinary barracks. On August 30, 1919, the number so in confinement in those barracks was 3,728; which is only 1,628 more than before we entered the war.

Senator CHAMBERLAIN. Taking the Sabbri case to which you have referred—and I really do not remember to what case I referred in my speech—it would seem from the fact that he was committed for a long term, and practically restored to the colors or given an opportunity to be restored to the colors within nine months, that there is much force in the suggestion of Gen. O'Ryan and others that the original sentences were in the nature of sentences *in terrorem*.

Lieut. Col. RIGBY. I might say to you, Senator, that that is quite in line with what was told me soon after I entered the service. I suppose I had the same experience that every other lawyer coming from civil life into the Judge Advocate General's office had, when I was set to examining records and found some of these startlingly long sentences. Of course, while I was first in the "retained in service" section this did not come before me, but immediately when I was transferred to the disciplinary barracks section I noticed them, and I went to the chief of my section and asked about it, and he said to me, "You must remember that these do not really necessarily mean what they say, because these are disciplinary barracks cases and these men have a chance to be restored to the colors; and then beside that, this is during the war, and they have to maintain discipline in the Army, and undoubtedly after the war is over there will be some kind of a review of the cases, something of that kind." Of course I am not quoting the exact language, or trying to do so, but that was the impression on my mind.

Senator CHAMBERLAIN. As a matter of fact, Colonel, when you first went into the service you approved of some system of review or appeal, with power to modify or reverse, did you not?

Lieut. Col. RIGBY. Yes; and I still do.

Senator CHAMBERLAIN. Do you still have that view?

Lieut. Col. RIGBY. Yes; very strongly.

Senator CHAMBERLAIN. I am glad to know that. You find it very generally amongst the lawyers who have come into the service from civil life, do you not?

Lieut. Col. RIGBY. I think so; and not only among them, but among the Regular officers also. I do not think I know of anyone who has seriously considered the question who does not think there should be some such power.

Senator CHAMBERLAIN. As you construed section 1199 of the Revised Statutes, when you first went into the service you thought they had a greater power than was being exercised by the Judge Advocate General, did you not?

Lieut. Col. RIGBY. No, sir; I never did. Of course, it is fair to say, Senator, that I was not in the office in 1917. I came into the service in August, 1918, and my attention was never really called to this until some time along last Christmas.

Senator CHAMBERLAIN. You came in as a captain?

Lieut. Col. RIGBY. I came in as a major.

Senator CHAMBERLAIN. And you were promoted when?

Lieut. Col. RIGBY. Promoted to a lieutenant colonelcy last April. I forget the exact date. The promotion came to me by cablegram while I was over on the other side.

Senator CHAMBERLAIN. I believe there are two bar association committee reports, a majority report and a minority report.

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Both those reports, as well as the Kernan report, recommend some kind of appellate tribunal, do they not?

Lieut. Col. RIGBY. I so understand.

Senator CHAMBERLAIN. The difference between the so-called militaristic view, if I may so designate it, and the civilian view of it is that on the one hand it is insisted that this whole business ought to be done within the military tribunal itself and the others contend for some sort of a civil appellate tribunal.

Lieut. Col. RIGBY. Of course, Senator, I would not like to subscribe to your use of the word "militaristic," because I do not think those who favor the plan recommended, for instance, by Gen. Crowder, are necessarily any more "militaristic" than the others.

Senator CHAMBERLAIN. Of course, that is only a question of opinion.

Lieut. Col. RIGBY. I am frank to say to you, sir, that my own opinion has been, and is, in favor of the ultimate appellate power being vested in the President as Commander in Chief of the Army. It seems to me that is the logical place to put it; and also that that is in accord with the practice in the British system, which is the nearest akin to ours.

Senator CHAMBERLAIN. In theory there is no objection to that, but in practice it is a physical impossibility for the President to review these cases.

Lieut. Col. RIGBY. In practice, Senator, as I understand it, that would mean always the same kind of review that we now have; that is, it would be done on the advice of the Judge Advocate General.

Senator CHAMBERLAIN. Surely.

Lieut. Col. RIGBY. As it is in Great Britain; and that, it seems to me, is the right way to do it. In other words, I think the review should be a careful legal review, and the President advised in that way, leaving the President in the last analysis free to act on his own judgment.

Senator CHAMBERLAIN. Still, the great difference between the British system as you have narrated it and our system is that in Great Britain the judge advocate general is completely dissociated from the military establishment. He is a civilian, while here your tribunal would still be within the military régime.

Lieut. Col. RIGBY. Well—

Senator CHAMBERLAIN. Within the military establishment?

Lieut. Col. RIGBY. That is in a sense true, Senator; but not quite in the way you put it. It is also true, of course, that while the

British judge advocate general is a civilian, he reports through a military officer, namely, the deputy adjutant general, who reviews his work; so that it is much on the same plan as ours.

Senator CHAMBERLAIN. But you have stated that in nearly if not all the cases the opinion of the judge advocate general is followed both by the deputy adjutant general and by the attorney general.

Lieut. Col. RIGBY. In nearly all cases; I think about the same as with us. There is no great difference that I can see, one way or the other, between the British plan and our plan in that regard.

Senator CHAMBERLAIN. Colonel, let us be perfectly frank about it. The cases that stand out in this hearing so far are those of the four young men who were sentenced to be shot in France. The record that Gen. Crowder has made is one of presenting a solid military front in the disposition of those cases. He has so stated in his letter to the Chief of Staff. A man ought not to be influenced by that consideration. It ought to be a consideration first, of doing justice to the young men, rather than the presenting of a solid military front with reference to the disposition of the cases.

Lieut. Col. RIGBY. Senator, I can only say that I can not read that letter of April 5, 1918, in that way. My reading of that letter is that the letter strongly pointed to clemency; and my reading of the Judge Advocate General's memorandum of April 16, in which he gathered up together the cases cited in Lieut. Col. Clark's memorandum of April 10, and the cases cited, together with the arguments in Gen. Ansell's memorandum of April 15, which were all put together and sent to the Chief of Staff, is that it, to my mind, constitutes a very strong presentation of the reasons for clemency, and points very strongly to clemency. It is very true that he very carefully said that he did not want to formally reopen the case. He was very careful not to invite conflict with the Chief of Staff if he could avoid it; but to my mind that memorandum of April 16 was a very effective argument for clemency; and I can not help thinking it had a great deal to do with the clemency ultimately given in those cases.

Senator CHAMBERLAIN. That is a difference in the construction of what took place.

Lieut. Col. RIGBY. Wholly and entirely so.

Senator CHAMBERLAIN. I take a different view of it; and it seems to me now, in the light of the history of those cases, that a firm recommendation for clemency on the part of Gen. Crowder would have brought about the results you seem to think he wanted.

Lieut. Col. RIGBY. Of course, that is only an opinion on the construction of the papers.

Senator CHAMBERLAIN. Yes; that is all. The language speaks for itself. But however that may be, that is the great difference between the British system and the American system. The appellate tribunal there is civilian, and it does not interfere with the military discipline of the Army, because it goes through military channels in the last analysis.

Lieut. Col. RIGBY. I think it is true that the only substantial difference between their plan and ours is that their judge advocate general is a civilian, whereas ours is a military officer. The functioning of the two systems seems to be almost the same.

Senator CHAMBERLAIN. On the other hand, the judge advocates in Great Britain are appointed, are they not, by the judge advocate general?

Lieut. Col. RIGBY. No, sir; they are appointed by the commanding officer, the convening authority, except within the United Kingdom, where they are appointed always, I think, by or on the recommendation of the judge advocate general.

Senator CHAMBERLAIN. Certainly; and his recommendations usually "go"?

Lieut. Col. RIGBY. I think so; but, in practice, he asks the commanding general, the convening authority, to nominate a fit person for the appointment.

Senator CHAMBERLAIN. Then there is this further difference: The judge advocates over there, while not members of the court, sit by and advise the court with reference to the admissibility of testimony and the proceedings to be had. They do not appear in the rôle of prosecutors, do they?

Lieut. Col. RIGBY. That is, sir, the great difference in the organization of the court, and I am frank to say to you that is a thing wherein I think we might well copy their plan.

Senator CHAMBERLAIN. I am glad to know that.

Lieut. Col. RIGBY. And as I understand it, that was what Gen. Crowder had in mind in his recommendation in his letter of March 10 to the Secretary of War, where he thought a general order should be issued to try out that plan and see how well it will fit here in our Army.

Senator CHAMBERLAIN. I am glad you entertain that view, because it does not stand to reason that under our system a man acting as judge advocate and acting as prosecutor can see to it that justice is done to the prisoner.

Lieut. Col. RIGBY. I very thoroughly agree with you, Senator. It seems to me the only question there is a practical question, the working out of the plan in a way most adaptable to our Army, and without overloading the personnel of our Army with lawyers.

Senator CHAMBERLAIN. It does seem to me, Colonel, that there can be no more effective system for the maintenance of discipline in the Army than to see that justice is done, both to the enlisted personnel and to the commissioned personnel. Any system that leaves in the mind of the military forces a feeling of injustice, or the possibility of injustice, will do more to destroy morale than anything else.

Lieut. Col. RIGBY. I thoroughly agree with you, Senator, in that, of course. What I had in mind was simply this, the practical way of doing it. Now, the British during the war worked out this plan for their "court-martial officers," and found that they could get along with just about two to each division, provided that one acted as staff judge advocate and the other as this additional member of the field courts, without being required to be present at all the trials. Now, they say that worked pretty well. On the other hand, Judge Cassel is inclined to think that for the permanent purposes of their army there ought to be a judge advocate who is the legal adviser of the court, and not a member of the court, but only to be present at the trials of serious, difficult, and complicated cases, outside of their rarely used general court. They are going to experiment with that,

Senator. Now, of course, if in the reorganization of our Army, it is to be gathered into rather large aggregations—to use a word purposely not technical—it may be easier for one legal officer to cover a good deal of work. On the other hand, if the Army were to be scattered as it was before the war, it would be another proposition and another problem, and for that reason it seems to me, personally, that it would be wiser to try it out in the first place with a general order, as Gen. Crowder suggested, which is flexible and can be changed from time to time so as, with experience, to finally whip it into such form as may ultimately seem best; and then, as he suggests, when it has been tried out and we find what is the most practical way to apply it in our Army, then embody it in legislation.

Senator CHAMBERLAIN. The danger about that is that the Judge Advocate General's position is not a permanent one, and neither is that of the Chief of Staff, so that the regulations are likely to be changed according to the whim of the man who happened to fill those two places at the time. That can not be done under a statute, but recommendations for a change or modification of a statute might be made, but it would still be up to Congress to make it.

Lieut. Col. RIGBY. That is true, Senator. Only I can not quite see the danger of the thing being changed simply as a matter of whim.

Senator CHAMBERLAIN. I have been connected with this machine for 10 years, and I find that these whims are quite common on the part of the different heads of the different bureaus.

Proceed. I did not mean to interrupt you so much.

Lieut. Col. RIGBY. I would like to offer in evidence and put in a translation of this French presidential decree of September 6, 1914, to which I referred yesterday, establishing their "special courts," and of the preamble to the letter of Marshal Joffre of September 9, 1914, promulgating that decree.

Senator CHAMBERLAIN. We want to have it in, do we not?

Senator WARREN. Certainly.

(The documents referred to are here printed, as follows:)

TRANSLATION OF PRESIDENTIAL DECREE OF SEPT. 6, 1914, ESTABLISHING "SPECIAL COURTS MARTIAL" FOR THE PERIOD OF THE WAR (PP. 71-72, "GUIDE PRACTIQUE ET SOMMAIRE DES CONSEILS DE GUERRE AUX ARMÉES").

Decree concerning the functioning of courts-martial in the armies in active service ("Conseils de Guerre aux Armées").

The President of the French Republic upon the report of the Minister of War in view of the Code of Military Justice for the Territorial Armies and in view of Article 3 of the law of February 25, 1875, concerning the organization of public powers.

DECREES.

ARTICLE 1. Provisionally and during the continuance of the war, courts-martial in the armies on active service are empowered to function in accordance with the conditions hereinafter indicated under the form of "Special Courts Martial" to try military persons and those assimilated to that status taken in the act of committing an offense and also any person following or employed in whatever capacity with the army, or permitted to accompany it, and also prisoners of war. Their accomplices are also equally subject to trial before the special courts-martial.

ARTICLE 2. Special courts-martial will be organized upon the order of the general-in-chief commanding the armies, at headquarters of an army, a corps, a division, a brigade, a regiment, or other unit of not less than a battalion.

ARTICLE 3. They will be composed of three judges appointed by the commandant of the army, corps, division, brigade, regiment, or other unit where

they are established. The president should be, if possible, a general officer or field officer. The two other judges will be, when the accused is an officer, of rank at least that of the accused: in case of a lack of sufficient number of officers of that grade, one of the two judges may be of the next lower rank. If the accused is a noncommissioned officer, corporal, or soldier, one of the judges will be a noncommissioned officer. The commanding officer will appoint an officer to act as commissaire du gouvernement, and a noncommissioned officer as clerk.

ARTICLE 4. The special courts-martial will take cognizance of "crimes" (i. e. not including misdemeanors) punishable under the Code of Military Justice, and also "crimes" punishable under articles 295 to 304, 309 and 310, 331 to 333, 434 and 435 of the Penal Code.

ARTICLE 5. The procedure before the special courts-martial will be that indicated in articles 152 to 158 of the Code of Military Justice; except that no delay will be imposed between the citation of the accused and the meeting of the court. The judgment will be pronounced by a majority of two votes against one.

ARTICLE 6. The judgments of the special courts-martial will not be subject to recourse to revision nor to cassation (i. e. no appeal is to be allowed to the "Conseil de Revision" nor to the Court of Cassation).

ARTICLE 7. The Minister of War is charged with the execution of this decree. Done in Bordeaux, September 6, 1914.

R. POINCARÉ.

For the President of the Republic.
The Minister of War,

A. MILLERAND.

TRANSLATION OF PREAMBLE OF CIRCULAR LETTER OF MARSHAL JOFFRE, No. 4487, SEPTEMBER 9, 1914, PROMULGATING THE PRESIDENTIAL DECREE OF SEPTEMBER 6, 1914, ESTABLISHING "SPECIAL COURTS-MARTIAL."

Subject: Instructions for the application of the decree of September 6, 1914, relative to special courts-martial.

The generals commanding the armies have several times called to my attention, in most pressing terms, the extreme difficulty of reconciling the forms and delays prescribed by the Code of Military Justice with the imperious necessities of discipline and of the maintenance of public order.

Acting upon their advice, I asked the Government to introduce into the procedure of courts-martial ("conseils de guerre") in the armies on active service the necessary simplification by giving those tribunals a simpler composition and a more rapid procedure and providing for the possibility of their establishment in every organization or unit where it may appear to be necessary.

A decree of September 6, 1914, adopting this point of view, now authorizes the organization, provisionally and during the war, of special courts-martial in the armies on active service; the jurisdiction, organization, composition, and procedure of which will accord with the views above set forth.

I have the honor to send you with the text of the decree the following instructions for its application.

(Here follow instructions, divided into four paragraphs, under the following headings, viz: Organization of special courts-martial; Composition of special courts-martial; Jurisdiction of special courts-martial; Procedure.)

J. JOFFRE.

Senator CHAMBERLAIN. That decree was subsequently repealed by the French Parliament?

Lieut. Col. RIGBY. Those courts were abolished in 1918.

Senator WARREN. Those were war measures?

Lieut. Col. RIGBY. Emergency measures, so denominated. It simply shows that an emergency court was created during the war, or the early part of the war. The reasons for its creation are stated in the letter of Marshal Joffre.

Just a word more on the question of appeal in our Army. I think Senator Chamberlain asked me yesterday whether we have any ap-

peal. In that sense we have none. But I think it is fair to say that I think the review that we do have in the office of the Judge Advocate General is really at least as careful an examination as is made by most appellate courts; and that is true, not only of the death cases and dismissal of officers' cases, but of all other cases. The same review precisely, I think, is had, at least was had while I was in the penitentiary section, of all penitentiary cases. A penitentiary case has to go through the hands of, and the review has to be approved by, at least six men besides the Judge Advocate General.

Senator CHAMBERLAIN. When was that reviewing board established?

Lieut. Col. RIGBY. The second board referred to was established in November, 1918, I think; but before that those cases went to the first board of review, so there was no difference in practice. It simply was dividing the board of review, because they were getting behind with their work. The practice was not changed at that time at all.

Senator CHAMBERLAIN. In theory that was a review without power to afford remedy, without power to reverse, without power to modify; without any other power, where the court had jurisdiction and the proceedings were regular, than the power to advise the commanding officer.

Lieut. Col. RIGBY. Of course, that is like the British system. Under General Order No. 7, which became effective February 1, 1918, before the approval becomes final—and, therefore, while it is possible to set aside the whole proceedings and disapprove them, if there is error in the record—in around 98 per cent of the cases at least, where the judge advocate general advises disapproval or modification, his advice is followed; so that, while not formally executive in its form, the judge advocate general's recommendation practically is so.

Senator CHAMBERLAIN. Can you give the number of cases which were actually reviewed by the board, and the number of cases where the judge advocate general advised a modification of the sentence to the commanding general, and the number of cases where that advice was acted upon favorably?

Lieut. Col. RIGBY. I could get and insert the number of those, I think. I can not tell you from memory the number reviewed. I can state substantially the number where reversals were recommended, as I remember it, up to the 1st of October of last year. During the year prior to that, there were about 276 sent back to the commanding officers, and roughly 250 sent up to the Secretary of War, or possibly I have them just turned around, vice versa.

Senator WARREN. You will get those figures?

Lieut. Col. RIGBY. Yes, and put them in. Out of all of them there were only 13 where we were not followed, 6, I think, by the Secretary of War, and 7 by the commanding officers, or maybe that is vice versa.

Senator CHAMBERLAIN. I would like to have in the record the total number of sentences and the total number of reviews, the total number of cases where you had made recommendations to the commanding officer—

Lieut. Col. RIGBY. That is other than he approved, you mean, Senator?

Senator CHAMBERLAIN. Yes. That would include the total number of approvals, the total number of those sent back to the commanding officer and the total number of cases where the commanding officer followed your advice. Can not that be put in the record?

Lieut. Col. RIGBY. I think we can put that in the record, yes, sir. I can put in a table giving the figures from October 1, 1917, to August 31, 1919, prepared by Col. Dinsmore.

I may say that during the first six months of the war no accurate records were kept covering these matters, so that it is impossible to give statistics for that early period of the war without having an examination made of all the original records for that six months in our office and the corresponding records in The Adjutant General's office. The table is as follows:

	Number of cases examined in Judge Advocate General's Office during period covered (Oct. 1, 1917, to Aug. 31, 1919).	Number of cases in which recommendations for modification or disapproval of sentence on legal grounds were made.	Recommendations given effect.	Per cent of total number of cases in which recommendations were made.	Recommendations not given effect.	Per cent of total number of cases in which recommendations were made.	Per cent of total number of cases examined.
To reviewing authority... } To War Department..... }	28,463	{ 275 182	271 176	98.54 96.70	4 6	1.46 3.30	0.00014 .00021

Then, continuing a little further with my comparison of the composition of the court, which was what I started out to make, I think I have told how the judges of the French court are constituted. There is attached to the court an officer corresponding somewhat roughly to our trial judge advocate. They call him the "commissaire du gouvernement."

Senator WARREN. You are going back to about where you were yesterday?

Lieut. Col. RIGBY. Yes. In the territorial courts, that is, the courts in use in the armies not in active service, the commissaire receives from the reporter or rapporteur the report of the preliminary investigation. He advises the commanding general whether the case should be referred for trial. If it is referred for trial he acts as the prosecutor before the court and also as the legal adviser to the court. He is supposed to be the minister of justice—or to represent the minister of justice—before the court. The commissaire du gouvernement is an officer in the army, and the only requirement is that he be an officer of field rank and be at least 25 years of age.

Senator WARREN. Their field rank is relatively about the same as ours?

Lieut. Col. RIGBY. The same as ours—colonel, lieutenant colonel, commandant, who is the same as major. There is no requirement that he be a lawyer. In practice he sometimes is, and he sometimes is not, a lawyer. As it happened last May when I had occasion to look it up in Paris—six courts were running in Paris, with six commissaires du gouvernement, and exactly half those men were law-

yers and the other half were not men of legal training—three lawyers and three who were not lawyers. I was told an effort had been made during the war to get lawyers so far as possible for those positions. But it had not always been possible to do it. Before the war it was almost always a regular army officer who did the work. The position carries with it the same double responsibility as that of our judge advocate does; that is, he is both prosecutor and adviser to the court.

It might be well to say there, in connection with the method of trial, of course the French procedure is a great deal more rapid than ours. It can be so, because they have the preliminary investigation conducted, where there is one—and there always must be one in the territorial armies, although not always when in active service—by this officer, the rapporteur, who investigates the charges, questions the accused, and makes a report of the testimony of each witness; and the court at the trial sits rather in the position of an American equity judge or chancellor hearing a case on objections to a master's report, than like our court. In other words, their court does not sit primarily to listen to witnesses and get at the facts—that is supposed to have been done by the rapporteur—but sits primarily for the purpose of applying the law to the facts which the rapporteur has gathered up. Some witnesses may be called, but usually not nearly all of them; and they may go ahead without even a single witness in court. If the commissaire has called a witness or two witnesses and they are not there for any reason, the court may direct adjournment until they can come; or the president of the court may direct that their evidence as contained in the rapporteur's report be read; and they may even go so far, as I was told by two of the commissaires du gouvernement, whom I really cross-examined on that question, that they can try a man and even condemn him to death without even a single witness appearing in open court against him, by simply reading to the court the testimony that was taken by the rapporteur.

Senator CHAMBERLAIN. You would not advocate such a system?

Lieut. Col. RIGBY. I certainly would not, sir. I am simply giving you a comparative view, as I got it, of the French method of trial. Of course, their belief is that the men are wholly protected by their method of investigation by the rapporteur. They have the plan of what they call "confrontation of witnesses" in the course of that preliminary investigation. The accused is permitted to have counsel at the preliminary investigation.

Senator CHAMBERLAIN. Before the charge is preferred?

Lieut. Col. RIGBY. Before the charge is referred to the court for trial. When it is first preferred, the commanding general, if he thinks it is worth investigating, refers it to this rapporteur to investigate, and the rapporteur must give the accused an opportunity to have counsel present at the last hearing, and the first hearing. He may see him in between times, without the counsel. If he finds a witness who contradicts the statements of the accused, he must confront the accused with the witness, and they thresh it all out in that way; so that, as I said, the nearest analogy that we have, that I know of, is the hearing before a master in chancery, and then the trial in court on objections to the master's report—assuming that the chan-

cellor had power to call witnesses if he chose to in his discretion—and you have pretty nearly a picture of the French trial.

In the Belgian Army they have a court composed of five judges. They call it the “conseil de guerre,” the same term the French use. They have but the one court. That court is composed of one civilian, and four military officers.

Senator CHAMBERLAIN. What is the function of the civilian?

Lieut. Col. RIGBY. He is president of the court. He is appointed by the king for three years. He must be a doctor of laws. He must have had at least 10 years' experience as a judge of a civilian court, in order to be eligible.

Senator CHAMBERLAIN. He sits in the trial and participates in the sentence?

Lieut. Col. RIGBY. Yes, sir; he is president of the court, and he occupies a very important position. He is the permanent member of the court. The military members, four officers, are appointed by roster for periods of one month. At the end of every month there is a change, the theory being apparently that the military officers should be kept in close touch with the army itself. The permanent civilian judge sits there to get the legal element into the court. They do not have any noncommissioned officers nor any enlisted men on the court. They have four officers temporarily appointed, and the one president, a permanent civilian judge, who sits in his robe of office, in the way they do over there, formally; and there is a great deal of formality about the Belgian court. The one in Brussels sits in the Palace of Justice, in as fine a courtroom as perhaps there is anywhere, and there is a great deal of formality about it all.

Then, corresponding to our trial judge advocate, they have what they call the “auditeur militaire.” He again has the double function of adviser to the court and of prosecutor.

Senator CHAMBERLAIN. Is he a civilian?

Lieut. Col. RIGBY. He is a civilian, and is appointed by the king for three years, and must be a lawyer. He occupies a really more powerful position than that of the French commissaire du gouvernement, because he is also the chairman of what they call the “judiciary commission” which makes the preliminary investigation. This preliminary investigation is always made by this judiciary commission composed of three men.

Senator CHAMBERLAIN. Does that court have to do only with commissioned officers?

Lieut. Col. RIGBY. The trial court, the conseil de guerre?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. It tries everything.

Senator CHAMBERLAIN. Of course their army is smaller and their territory is much smaller than ours.

Lieut. Col. RIGBY. Yes.

Now, I was just going to add that their preliminary examination is by the judiciary commission of three members, composed of this same civilian “auditeur militaire,” with two officers of the army to assist him; and of course he is in an advantageous position if the case is referred to trial and he appears as prosecutor at the trial.

Summing those up and comparing them with what to my mind are the outstanding features of Senate bill 64:

In the first place as to the position of the judge advocate: Senate bill 64 provides that the judge advocate shall organize the court. He really is to appoint the court from the panel. I do not find any such power given to any corresponding officer, or to any legal officer, in either of the other systems that I mentioned; nor, I may say, in any other system of which I have knowledge. I have some knowledge of the Italian, the Swiss, the Netherlands, the Norwegian, and the Swedish systems, and there is no such power in any of those systems given to any legal officer or to any subordinate officer, by which I mean staff officer subordinate to the appointing authority.

Then, second, as to the provision of Senate bill 64, that the rulings of the judge advocate as to matters of law shall govern the court. There is no such power as that in the corresponding legal officer either in Great Britain, France, or Belgium, or in any that I know of.

Senator CHAMBERLAIN. In effect it is the same, though, according to your testimony of yesterday. The judge advocate of the court of Great Britain advises the court as to the law and eventually sums up the evidence, and if the court departs from his view of the law it does it at its peril, and only departs from it in cases of emergency.

Lieut. Col. RIGBY. At their peril is putting it a little more strongly than the wording of section 103 (F) of their rules of procedure warrants; but that is, in effect, not far from true. To my mind this is the vital difference; that, after all, the power of decision in all of those systems is left with the court.

Senator CHAMBERLAIN. Yes; that is true, Colonel, but here in the Federal court, where the judge has the power to comment both on the law and the evidence, if the jury does not follow his view the court can set aside the verdict.

Lieut. Col. RIGBY. To my mind the difference is largely that, to come to the civilian courts, between the Federal courts of which you speak, and the courts of some States, for instance, of Illinois, where by statute the jury in criminal cases are made the judges of the law as well as of the facts, and where the court in instructing them has to say to them, "Gentlemen, I have told you my view of the law, but you have the right, if you see fit, to disregard my view," and once in a while the jury will do that.

Senator CHAMBERLAIN. That is practically the way it is in the British court, and if the court disregards the instructions or the views of the judge advocate over there they are held in frequent cases in damages.

Lieut. Col. RIGBY. No; but, to put it accurately, as I remember, if a damage suit is brought, and they are able to show in defense that they acted in reliance on the advice of the judge advocate, that is a substantial defense. If they are not able to show that, then it is neither one thing nor the other; it is open for the plaintiff to prove his case if he can.

But that is, as I view it, the vital difference on that between Senate bill 64 and all of those other systems, for those systems all provide that the legal officer attached to the court is merely an adviser, however much the court may in practice be expected to follow his advice. The court have the power to judge for themselves—to accept or reject his advice—whereas Senate bill 64 makes them bound by his directions.

Then, third, Senate bill 64 provides that the judge advocate of the court, the trial judge advocate, shall have the power to approve in whole or in part the findings of the court; and that carries with it, I think necessarily, the correlative power to disapprove the findings of the court. In other words, the judge advocate is to become really the reviewing authority for the court; and is not to be limited to reviewing matters of law, but may review questions of fact, and may really substitute his opinion for that of the court, so that in effect the court become simply advisers to the judge advocate. Now, I do not find any such power given to any legal officer in any of the other systems which I have examined or of which I have any knowledge whatever.

Then, fourth, Senate bill 64 further provides that the court shall not impose sentence in any case where there is a judge advocate—that is, the special court or the general court—but that the sentence shall be imposed by the judge advocate. That, again, is not provided in any of the systems of those other armies, nor in any system of which I have any knowledge; and I may say that, so far as I gather views and opinions, that would seem to be opposed to the general current of opinion, even among those who believe that the question of the guilt or innocence of the accused is to be judged as a question of law, or even pure law, or by lawyers. Most men with whom I have talked—even those who hold those views—seem to think that even then the quantum of the sentence is the thing to be determined, if any part of it is to be determined at all, by the military men, because the quantum of the punishment is a matter directly affecting discipline and of which the military men—if they are to be allowed to judge of anything at all—are in the best position to judge. At any rate, there is nothing corresponding to that provision in any of the other systems. It seems to be an entirely new plan proposed in this bill.

Then, fifth, the power given by Senate bill 64 to the judge advocate, the trial judge advocate of the court, to suspend the sentence which he has imposed and to suspend it either in whole or in part, except, I think, in death sentences or in sentences of dismissal of an officer, is different from anything in any of the other systems or in any system of which I have knowledge. No such power is given to a legal officer or adviser of the court or to any staff officer or legal officer in any system with which I am familiar to thus suspend the sentence of the court.

As I look at it, Senate bill 64 would make the proposed judge advocate really an autocrat. The court become simply the advisers to him; and there is no authority above him that can in any way affect his decisions. There is no power of review in the commanding officer, or the commanding general, or in any other military authority, even in the President; and the power of review given, in the case of special courts, to the judge advocate—the staff judge advocate—and in the case of general courts to the military court of appeals is stated in articles 39 and 52 to be a review on questions of law only. If that be the case, and if article 52 is to be construed in that way, then the trial judge advocate becomes really the sole arbiter of questions of fact. He really tries the case, and becomes the officer responsible, so far as discipline is enforced through the courts, for the discipline of the command, and subject to no higher authority whatever. There

is some language used in article 52, in the latter part of it, providing for the court of military appeals' power [reading]:

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 guilty of a lesser included offense.

To disapprove the whole or any part of a sentence.

Some provisions here that, in practically carrying them out, would almost require the consideration of questions of errors of fact. But I am assuming that the intent of the proposed bill is to provide for a review of errors of law only; and that, if there is any question about that, the bill could be amended to make that clear.

To sum it all up, I do not find any officer in any foreign system given any such broad powers as are proposed for this trial judge advocate.

Senator WARREN. You give your opinion that this proposed system is better than or not as good as those of the countries with which you have compared it, do you?

Lieut. Col. RIGBY. Why, for whatever my opinion may be worth, as a result of my examination of this bill and of my investigations of the other systems, it seems to me that the proposed system is not nearly as good as those of the other armies or as our own.

It seems to me, to begin with, that it is wholly experimental, and is going very far in the way of experiment, and with a very important subject, in taking away the control of the courts-martial from the commanding officer and placing them absolutely in the power—and the autocratic power, really—of a civilian; because, in effect, that is what is done. The trial judge advocate is to be a member of the Judge Advocate General's Department, if available, or otherwise to be a man recommended by the Judge Advocate General because of legal qualifications, not required necessarily to have had any military training or any special military qualifications, and is to be, really, a civilian, although wearing a uniform; and he is a subordinate officer.

Take, for instance, if the American Army should find itself some time in the position of the British during the retreat from Mons, and if it became necessary to try a man for desertion in the face of the enemy, like that man was tried by the British in the case in which the transcript of the trial was introduced here yesterday. The responsibility for determining whether it was necessary to shoot that man instantly for the purposes of discipline, or whether he should be allowed to go, would be in the hands of this civilian, instead of in the hands of the commander of the division or of the Commander in Chief of the Army; and no matter how important it appeared to the general commanding that a guilty man should be punished, and punished promptly, if the judge advocate did not coincide with that view, the judge advocate's view would be the determining factor; he would have to take the responsibility of determining what punishment should be used in enforcing discipline in the Army, even under the most strenuous circumstances. It seems to me that it is certainly dangerous, without the experience of any other army anywhere in the world to guide us, to go so far as that in taking that power away from the responsible commanding officers and putting it into the hands of a junior, who is purely a legal officer, practically a civilian.

Now, sixth, as to the provision in the same section of Senate bill 64 that noncommissioned officers and privates shall sit on the court. I may say that I do not suppose from reading this bill that it was really contemplated that more than three enlisted men, privates or noncommissioned officers, should sit on the general court, or more than one on the special court; and yet, really, as I read the language of the bill, there is nothing to prevent the trial judge advocate, if he saw fit to do so, in organizing the court, from putting eight privates on the general court, and three privates on the special court, or any number of privates or noncommissioned officers, at all. In other words, it is wholly in his discretion; except that he can not put more than five officers on the general court, or more than two officers on the special court except where the accused is an officer. Article 4 makes soldiers equally competent with officers to sit on the court. And while article 5 provides that three members of the court shall be privates in the case of the trial of a private, and three of them noncommissioned officers in the case of the trial of a noncommissioned officer, there is nothing there to say that there shall not be more than three privates or noncommissioned officers on the court in any case.

Senator WARREN. You take the ground that while it restricts the number of commissioned officers, it does not restrict the number of privates and noncommissioned officers?

Lieut. Col. RIGBY. That is the way I read it. I do not suppose that was the intention in drafting the bill, Senator. The context does not seem to imply that.

Senator WARREN. It had not occurred to me in reading it.

Lieut. Col. RIGBY. I think it would bear that construction. I do not think there is anything to prevent the trial judge advocate, if he wanted to so constitute the court, from doing it. For instance, he might choose eight privates to try their captain.

Senator CHAMBERLAIN. That is article 52?

Lieut. Col. RIGBY. No, sir; articles 4, 5, and 6, Senator. But in any event it provides for three privates for the trial of a private in a general court; and I do not find any such provision, either in the French or the Belgian or the British systems.

Senator CHAMBERLAIN. You mean such an exact provision? They do have enlisted men on some of these courts?

Lieut. Col. RIGBY. I was speaking of a private soldier. There is no provision for a private soldier on the British, Belgian, or French courts; and there is no provision for a noncommissioned officer on the Belgian or the British courts. There is a provision for one noncommissioned officer in the French court, but only one, and as I said yesterday, the trend of opinion seems to be against increasing the number, while they do think favorably of their present plan of having one noncommissioned officer on the court in France. But he is usually, in practice, of the highest noncommissioned grade.

And just in passing for a moment, I might say that you will find in Gen. Childs's statement, which I have put in, of England, his opinion as to having private soldiers or noncommissioned officers on the courts; he is against it for the English Army. I may add that I meant to say yesterday in my testimony—I have never read the statutes myself, but I have a compilation made by one of our officers

in France—that during the French Revolution they did experiment with having private soldiers on the courts. They instituted a court which was practically a jury; but Napoleon I, as soon as he came into power, abolished it. Now, further than that, I do not know about that experiment, nor just why Napoleon abolished it; but he apparently did, as soon as he gained control of the army.

Senator WARREN. Is there a record showing that it was ever attempted in this country, or in any of the others that you know of, except as you have related?

Lieut. Col. RIGBY. Yes, Senator, I have a list of some of the other countries. In Holland they do not do it. They have one civilian and four officers on their court, very much like Belgium. In Switzerland they do have a court of seven members, all of them appointed for three years by the Federal Council. One of those men is a lawyer, a member of the Judicial Section of the General Staff, which corresponds pretty closely to our Judge Advocate General's department. He is the president and must be an officer of field rank. Three other members of the court are officers; and the other three are either non-commissioned officers or privates. That was introduced by the law of 1889 into the Swiss system. I think it would be very interesting to know how that worked out, through their long mobilization during the war. I was unable to get to Switzerland; and I do not know anything about it; and only know from reading their laws that Switzerland has experimented, during the last century, a great deal with her courts. They tried at one time in 1851 a jury of eight jurors with three judges; and they have made, during the last century, quite a number of changes. They never seem to get anything to satisfy them; and how it worked, I do not know.

Senator WARREN. In the meantime, they have not been in actual war.

Lieut. Col. RIGBY. They have never been in actual war during the century, that I know of, Senator; and the great difference between their plan, you see, and the plan proposed in Senate bill 64, is that their judges of that court are all appointed for three years, and are appointed by the Federal Council of the Republic.

Now, I can understand, as it seems to me, that you can pick out three men from the enlisted ranks, experienced noncommissioned officers, or perhaps an experienced private, and make him a permanent judge, appoint him for three years, and give him a feeling of responsibility, practically such as an officer has. You separate him in that way from the ordinary body of the enlisted personnel. It is not, as it seems to me, quite the same as temporarily taking a soldier who may to-morrow go back among his tent mates, and be ostracized perhaps if he has voted in an unpopular way on the court to which he was temporarily assigned. I think the Swiss court really has, in that, a very different factor introduced; but, as I say, I do not know how it works.

Senator WARREN. From all that, I understand that you do not recommend the use of privates and noncommissioned officers in courts-martial?

Lieut. Col. RIGBY. No, sir; I see no reason for doing so, from what I know. And from what I have heard during my service, I have not got the impression that there is any great demand for it in our

Army; and I am very strongly of the opinion that you would not get as good service from the courts if you had enlisted personnel as you get now, particularly if you were to put private soldiers, who would be inexperienced, on the courts; who would probably either be led wholly by the officers and look up to them, or else would be always inclined to fight against any severe punishment for their fellow soldiers. In any case, might be afraid of ostracism when he returned to his tent mates and his company mates, if he had not done the popular thing. I fear that it would be impossible to prevent it being known how the different judges voted on the court, because you would probably not have the same feeling of responsibility in that on the part of the private soldiers who are less educated than the officers, as a rule, even in our temporary Army, and in the Army to which we may look forward in the future. The selection of efficient men for officers takes the best men out of the ranks; so that the men whom you would get would probably not be experienced, and not be as suitable.

And then it does seem to me that we must look ahead to the possibility of a crisis sometime, and there might be danger, in a crisis, in having a court so constituted. If, for instance—I will refer again to a situation which might meet us if we were forced to have our Army go through an experience like the Russian retreat in 1915 or the British retreat from Mons, and it was necessary to impose severe punishment to hold the men up to the mark under very hard circumstances—it would be more difficult, it seems to me, to enforce necessary discipline by the use of private soldiers on the court.

Senator CHAMBERLAIN. You are assuming all the time that with enlisted men on the courts there would not be the proper legal instruction given. But what I would suggest is an independent judge advocate general acting as adviser, when there would be no more danger than there is under the jury system:

Lieut. Col. RIGBY. I fear there would be. There is a difference, it seems to me. To begin with, it is not a national calamity for a jury to refuse to convict a saloon keeper guilty of selling liquor on Sunday, though he is clearly guilty; but under some circumstances it might really amount to a national calamity for a military court to refuse to convict men absent without leave. Then, again, you take your jurors from the general body of the country, and they represent the general intelligence and education of the country. You are likely to get good men on your juries frequently, as well as others. In the Army you do not have the same fair cross section from which to take them. When you take them from the Army, the cream of the intelligence is already drained off to make into officers, and in the old Regular Army the best men have been chosen for officers, and even in the temporary Army the best men are promptly made noncommissioned officers and get a chance for a commission.

Senator CHAMBERLAIN. I thought this Army presented a pretty fair cross section of the American people.

Lieut. Col. RIGBY. I think so, Senator; but is it not true also that as soon as the men get into the Army this straining process commences, and before very long you will find the best men getting out of the ranks, simply because they are needed in the commissioned personnel, and the whole theory is to make the best use of the men

you have; so that you would be taking your jury from what, I would fear, would rather be the inferior material?

Senator WARREN. Of course, you are only alluding to them as inferior in the line of legal capability?

Lieut. Col. RIGBY. Oh, surely; or general experience. I can not believe that one who has enlisted under the draft, say, and just come into the Army within the last two or three weeks or months, can have the same breadth of view, the same capability for making a competent judge, that an officer can. We have difficulty enough, we all of us, I think, can see, in getting, even among the officers, sufficient competent men to do that work. I fear you would simply multiply the difficulty if you went out into the field of enlisted personnel generally.

My thought would really be to rather follow the British again in that lead where they provide, for instance—and we have followed it to some extent in this amendment to the Manual of July 14 last—the British will not let an officer sit on a general court-martial until he has held a commission for at least three years, and in order to make sure that they may have experience they put members on the court “for instruction” only; that is, members who simply sit with the court and go with the court into closed session, but have no vote and take no part in the proceedings.

Senator WARREN. Would not that be pretty restrictive in times of war, as in the case of the late war, when our Army was constituted so largely of new men? Would you be able in such case to establish the courts with men that had served three years?

Lieut. Col. RIGBY. No; you can not do that in a hard and fast way—they could not do it on their field courts—and for that reason all that you can do, it seems to me, is to make a hard and fast restriction for armies not on active service, or in times of peace, and to provide that on active service those regulations shall, so far as possible or practicable, be obeyed, but pointing out and insisting, so far as possible, on putting men on the court who have had experience for a certain length of time.

Senator WARREN. Now, as I understand from your testimony and from the testimony of others, there seems to be a necessity of one law for actual war and one law for times of peace, or else a law with alternative provisions, or else we must trust largely to regulations under the law, with the law so constructed that from time to time the effect would be largely changed by regulations under it, and it seems to me that our difficulty is very largely by reason of having a part of the Army in war and a part in peace largely made up of new and inexperienced men.

Lieut. Col. RIGBY. I thoroughly agree with that, Senator. It seems to me that really our country has arrived, perhaps, at the time when it might be wise to consider following again the experience of countries that have had colonial armies, like Great Britain and France, providing the difference between the two kinds of status, the status of what we call war, and the status of what we call peace; making the distinction not between technical peace and war, but between the “Army on active service” and the “Army not on active service.” For instance, I had occasion to review last winter a record of trial of some prisoners who had murdered a fellow prisoner

out in Fort Leavenworth in the disciplinary barracks, and the counsel for the accused insisted very strongly and ingeniously that the disciplinary barracks were 4,000 miles away from where any active fighting was going on, and therefore, in effect, it was a time of peace in Kansas, and the civil courts were open and functioning in Kansas, and therefore under the ninety-second article of war a military court could not take jurisdiction to try men for murder.

Now, of course, as a legal argument, there was nothing in it. They were wrong; but it does seem to me that looking at it in a broad way, as a matter of policy, there is some justice in that; for Kansas was locally at peace, and the courts were functioning. We might have a war perhaps in the Philippines, just as Great Britain sometimes has a war in Afghanistan; but it should not be necessary for that reason to treat the whole Army everywhere as on a war footing. The British do not do so during most of their wars. In fact, this war was the first time, I think, in three centuries, so I was told, when their army within the United Kingdom had been treated as "in active service," in spite of all the wars which Great Britain has had.

So that, for instance, to limit the maximum punishments under article of war 45, which provides that the President may by Executive order "in time of peace" limit the punishment—it seems to me that if those words "in time of peace" were out of that article, or if instead of saying "in time of peace" it should read "not on active service," the President could then by Executive order prevent all of these unduly severe sentences, such as were given in some cases here at home. It does seem to me that it would be much wiser to provide that the President by Executive order, which might be changed and varied from time to time—it need not necessarily be the same order for the Army at the front as for the Army here in the United States at the same time—might limit the maximum punishments. I think, in fact I know, that that is one of the things that Gen. Crowder recommended in his letter to the Secretary of War of March 10 last. I believe that to be of great value. I notice the Kernan Board did not adopt it in their report; but nevertheless I do think it a matter of great value; and I do think that it would be wiser to put the whole distinction, which is now made between war and peace, on a basis like the British, and make the distinction between the Army "on active service" and the Army "not on active service."

Senator WARREN. Of course, they would have to define that "active service" a lot more specifically, because now active service and retired service seem to be the two opposites.

Lieut. Col. RIGBY. There would have to be a new definition. The British do have a careful definition of it in their army code—in section 189 of their army act, which I have already read to you here.

Then passing to another matter in Senate bill 64, that is the provision of what, if I understand it correctly, is the veto power given to the staff judge advocate, before bringing an accused to trial.

Senator CHAMBERLAIN. What article is that? That is article 19, is it not?

Lieut. Col. RIGBY. Yes, sir; article 19, which provides as follows [reading]:

No officer with authority to appoint a special court shall refer any charge to such court for trial, nor shall any commanding officer charged with such

duty forward any charge to an officer having authority to appoint general courts until he shall have made or caused to be made a thorough investigation—

and so on. Article 19 is the preliminary investigation. Then Article 20 provides [reading]:

ART. 20. No charge shall be referred to or be tried by a general court unless an officer of the Judge Advocate General's Department charged with such duty shall have indorsed in writing upon the charge that in his opinion an offense made punishable by these articles is charged with legal sufficiency against the accused and that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged, nor unless the officer referring the charge believes that in the interests of the service and of justice the charge can not be disposed of except by trial by general court-martial.

Now, the first part of that article 20 places, as I see it, really a veto power in the hands of the staff judge advocate against the commanding general to whose staff he is attached, because it provides that the commanding general shall not have any power under any circumstances to refer the case for trial, unless he first has the written indorsement of the staff judge advocate and the staff judge advocate's favorable opinion. Now, I might say that I do not find any such power given to any legal officer or to any staff officer or other subordinate official anywhere in any of the other systems which I have investigated, or of which I have any knowledge. Of course, in our own system the commanding general does have the benefit of the advice of his staff judge advocate. That has been, through this war, anyway, I think, the almost universal practice; and that practice is now crystallized into a definite regulation, which is a definite law for the Army, by paragraph 76 (a) of the changes in the Court-Martial Manual of July 14 last, which has been put in evidence here. So that it is the rule of the United States Army to-day that the commanding general must have before him, so that he can consider it and have the benefit of it, the advice of his legal officer; but he is, of course, not bound to take it, although I think it is fair to say that, as far as I have been able to gather, the commanding general almost invariably follows on legal matters, such as the reference of a case for trial, the advice of his staff judge advocate.

That is also the rule in Great Britain. There is no regulation in Great Britain providing that the commanding general must ask the advice of the staff judge advocate or of any other legal officer.

In that way their regulations, on their face, are just as ours were prior to July 14, 1919; except that in Great Britain, in the general courts within the United Kingdom, the charges have to be referred to the Judge Advocate General before the case is referred for trial. With that exception, there is no provision in the way of regulation about it, in the British system. The advice of the Judge Advocate General is advisory; it is not mandatory. But it is, in fact, in practice almost universally, if not universally, followed. Outside of that their system is practically the same as ours. In practice the commanding general or convening authority does refer the charges to his legal officer, who has been, since the institution of the corps of court-martial officers, in September, 1916, one of those court-martial officers. He gets his opinion, and, in practice, is almost invariably guided by that opinion.

In France a very analogous system is in vogue. The power to refer cases to trial, whether before the "special" or emergency courts in use during the war, or before the regular courts, is wholly in the hands of the commanding general, the territorial division commander, the commander of the division on active service, or of a higher command; or, in some cases of a brigade, as the case may be. The convening authority of the court has the full and untrammelled power to order a case to trial, or not, as he sees fit. He is in practice advised by an officer who is called the "Chief of the Bureau of Military Justice," attached to his staff, who is appointed on the recommendation of the Undersecretary of State for Military Justice. This "Chief of the Bureau of Military Justice" is required to be an officer. He is not required to be a lawyer, although in practice he often is an officer with legal training. In practice, also, he usually is the commissaire du gouvernement of the court. All these functions are usually united in the same official; although not invariably.

The legal adviser, be he commissaire du gouvernement or separate Chief of the Bureau of Military Justice, does not make any formal written report or recommendation as to whether the case shall be referred for trial, other than that which the commissaire du gouvernement makes in connection with the investigation (where one has been had), but prepares a formal order such as he thinks the general ought to sign, either refusing trial or directing trial; and the practice as to the general's following this advice seems to be rather variable. I have talked with quite a number of commissaires du gouvernement and divisional chiefs of staff, and others, in France. I have a number of written interviews here; and while, on the whole, the commanding general usually follows the advice, it depends pretty much on the personality of the general and the personality of the legal adviser. For instance, I have an interview with one commissaire du gouvernement who was a very capable lawyer, a man who would impress you, who said that never in all his experience had the general failed to follow his recommendations; except, I think, once. On the other hand, I have an interview with a commissaire du gouvernement who was a young man, I think just 25 years of age, who had just graduated from a law school before he went into the army, and then gone into the line of the army, and was appointed a commissaire du gouvernement later on. He said very frankly, "The general follows my advice, because I know in advance what the general wants, and advise accordingly." In other words, he was just a secretary to the general; and between those extremes it runs the whole gamut.

Perhaps the best interview I had on that was with Col. Gausot, the chief of staff of the Thirty-sixth Division, who had been, during the war, chief of staff to 10 different divisional generals. He said that every man had his own method; that sometimes, as chief of staff, the reports of the commissaire du gouvernement were referred to him for advice, but other generals did not do so; that some generals almost invariably followed the advice of their legal advisers; but that other generals frequently acted contrary to the advice of the commissaire du gouvernement; and that all that could be said was that, taking it by and large, on the whole, the recom-

mentation was usually followed; but that where it was not followed, the instances where it was not followed were usually those where the commissaire du gouvernement had recommended against trial. In other words, where the legal officer recommends trial, the French general almost invariably falls in with the recommendation, and sends the case to trial. But where the commissaire du gouvernement's recommendation is against trial, there the general is very likely to take the responsibility of personally going all through the papers in the case, and not infrequently does order a case to trial, over the adverse recommendation of his legal adviser.

Then another thing that they do, which of course we do not do, because we do not have such broad summary disciplinary powers, the French general will very often, instead of sending the case to trial, give a man 60 days' confinement by simple executive order. If, for instance, he finds that it is rather doubtful whether a case can be fully proved, and he feels that the man is surely guilty, but there is some question as to the proof, instead of ordering the case to trial and taking chances of an acquittal, he will give him 60 days in prison by executive order. Or, if it is doubtful, for instance, whether the intent of desertion can be proved, where desertion is charged, instead of ordering the case to trial and taking the chances of acquittal, the commanding general would simply give the man this summary disciplinary punishment, and dispose of it in that way. They use that very freely, and they believe in it a great deal.

They insist that it is better to give a lighter punishment, and to give it by disciplinary measures immediately and certainly, than to send the case to trial before the court. It may be that one reason for that has to do with the fact that once the case goes to court it is out of the general's hands. The French court is a final judicial body; that is, its judgments are final in this, that they are executive in form, they do not require the approval of the commanding general; so that once the case has gone to the court it is wholly out of the commanding general's hands. How far that may have to do with their tendency to use this summary disciplinary power which the general has in his hands, instead of sending the case to court, I do not know.

I tried to get information, as far as I could by interviews, as to the relative value of our power of the reviewing authority to approve or disapprove the findings and sentence, instead of having the judgment of the court final as the French do, and I got very varying opinions. For instance, I had a talk with Gen. Gouroud, who, you may remember, was the commander of the French Army at Rheims on the 15th of July, 1918, who beat back the German attack and really stopped the German rush toward Rheims during their last offensive. Gen. Gouroud was also in command of the French Army in Gallipoli earlier in the war; and was, when I saw him, in command of the Fourth Army, in Alsace. I asked him the question whether in his opinion the American and British plan of having the judgment of the court-martial subject to review by the commanding general, or the French plan of having the judgment of the court-martial final, was the better system, and what

he thought were the advantages or disadvantages of each, and Gen. Gouroud answered very emphatically—I have his exact words in an interview here—but he said in substance, “I do not hesitate for a moment to say that the American system is infinitely superior,” and then he went on to tell a number of instances where he had felt the lack during the war, in emergencies, of the power to in any way control the judgments of the courts.

On the other hand, Gen. Valdant, chief of staff at Paris, and Gen. Halluin, commander at Bordeaux, believe in the French plan and the finality of the judgments; but when I asked them, if they were faced with an emergency, with a lowering of morale, in an event of that sort, what would they do, they said they would discharge the court and appoint another court, or they would call up the commissaire du gouvernement, and they would find ways to bring pressure to bear on the court, and they would resort to the free use of the summary disciplinary power.

Senator WARREN. Now, Colonel, we have a pretty good photograph of the different systems. Are there some other points to which you wish to allude?

Lieut. Col. RIGBY. The other one that I had especially in mind was the matter of appeal, the court of military appeals contemplated in article 52 of Senate bill 64, and the corresponding provisions in the other armies; and I had some suggestions that I wanted to put before you as to punishments and the use of the suspended sentence, and the things that were accomplished by Great Britain, particularly concerning the suspended sentence, and the results of that during the war.

Senator WARREN. Proceed.

Lieut. Col. RIGBY. I do not want to take too much time. To continue the same topic for a moment, in Belgium the plan is substantially the same as in France. There also the commanding general has the complete and absolute power, with the only exception that if the complaint has originated with a civilian, and the judiciary commission has found and recommended that the complaint ought not to be proceeded with, it must be dismissed. With that exception, the commanding general has full power to follow or not follow the recommendation of the judiciary commission which makes the preliminary investigation; though, in practice, we found that it was followed in almost all cases.

In Holland, I may say I know what the regulations are, though I know nothing further. The regulations provide, apparently, the same full power in the commanding general.

Summing it all up, I do not know of any system which gives Senate bill 64's proposed veto power over the reference of cases to trial, to any officer corresponding to the staff judge advocate, or to any other legal officer, or staff officer.

Now, as to the proposed system of a court of military appeals, and review after trial, Senate bill 64 provides two plans of review or appeal.

Senator CHAMBERLAIN. Under what article?

Lieut. Col. RIGBY. First, article 39 provides, as to special courts and summary courts, that the staff judge advocate at the headquarters to which the report of the summary court or the record of the

special court is directed to be transmitted by the President—that the staff judge advocate at those headquarters shall have powers of review similar to those given by article 52, in the case of general courts, to the proposed court of military appeals, to “review and revise”——

Senator CHAMBERLAIN. What article are you reading?

Lieut. Col. RIGBY. Article 39 [reading]:

Review and revise all such records and reports for errors of law prejudicial to the accused.

Then, second: Article 52 provides, in the case of general courts, for an appeal and a review on appeal by the “court of military appeals.” The court of military appeals is not to review as of course all records of trials by general courts, but only those in which the accused does not indicate that he does not want the appeal. In other words, it is a kind of semiautomatic appeal; except that sentences which do not carry confinement for more than six months, or death, dismissal, or dishonorable discharge, are not to be reviewed at all. So that, as I view it, the result is that there is to be, first, an automatic review in all cases by the staff judge advocate, for errors of law only, of the reports of summary courts and the records of special courts; and, second, that as to the general courts, there is (a) to be no review by anybody, and no possibility of any reexamination of any kind, except for purposes of clemency or pardon, or of any judgment not carrying confinement for more than six months, or death, dismissal, or dishonorable discharge; and that (b) as to the four latter classes of cases, the sentences of the general court—that is, those carrying confinement for more than six months, death, dismissal, or dishonorable discharge—there is to be a review by the court of military appeals in all cases, unless the accused shall indicate that he does not care to have a review.

Now, first, as to the review by the staff judge advocate. That comes back very closely to the same thing as the present review for the purpose of approval or confirmation (except that it is to be “for errors of law” only). But the vital difference is that this bill provides that the staff judge advocate is to make the decision himself, instead of advising his chief, the commanding general. Now, I do not find any system of law, anywhere, vesting such a final executive power in a staff officer, or in any legal officer.

At present we do have a review in all cases by the staff judge advocate of records of general court trials, for the purpose of advising the commanding general. But the power to decide is in the commanding general. Great Britain has the same thing. I do not know of any other army that does, unless it be in Holland, in their supreme military tribunal or court, to which I am coming presently. But the British review, like ours, is for the purpose of advising the commanding general. I know of no system that makes the staff officer, the legal officer on the staff of the commanding general—or any staff officer—the final arbiter in those cases.

As to appeal, or review otherwise, by some higher tribunal of the judgment, such as is proposed for certain classes of judgments of the general courts by the proposed court of military appeals, there is, of course, in Great Britain no court of military appeals or anything of that kind; but there is—as with us—a review, as I have explained from my study of it, by the deputy judge advocate general or the

Judge Advocate General, in an advisory capacity only; and they have the right, even after the proceedings have been reviewed and confirmed, for the accused or anyone for him at any time to petition the Sovereign for a reexamination, which petition will be referred to the Judge Advocate General for his advice; and the Sovereign does have the power, if so advised, to quash. We have no such "appellate" power, after final approval or confirmation. The only thing in our present system of review which is not wholly automatic is that an accused—if he wants to have a brief or anything presented—I think it would be entertained undoubtedly by the staff judge advocate anywhere. I know it would be, and has been, in the office of the Judge Advocate General. Printed briefs are sometimes submitted, and wherever briefs are offered within a reasonable time they are always welcome.

Senator CHAMBERLAIN. Do all the records and information of the division go up to the staff judge advocate?

Lieut. Col. RIGBY. Do you mean of the general courts?

Senator CHAMBERLAIN. Any court?

Lieut. Col. RIGBY. All records of the general courts go up. All records of special courts go to the headquarters of the convening authority. That is usually the brigade commander, and if there is a reason why there is anything not quite in order about it or requiring legal advice, the staff judge advocate is the one who reviews it.

Senator CHAMBERLAIN. No record is made of the summary court?

Lieut. Col. RIGBY. Only a report of the summary court, no formal record of testimony, any more than there is in the case of a French court. I should have perhaps said, on the French system, that they make no record in any case of the evidence heard in court.

Senator CHAMBERLAIN. All the records of special courts and all the records of general courts finally reach the judge advocate general?

Lieut. Col. RIGBY. All the records of general courts do, Senator; not of special courts.

Senator CHAMBERLAIN. They do not get there at all?

Lieut. Col. RIGBY. They simply make reports on them to us, statistical reports. The general court records all come up.

Now, as to the French system of appeal, they have a "court of revision." The court of revision consists of five members. There are courts of revision for the territorial armies not on active service; and for divisions, and for every army on active service.

Senator CHAMBERLAIN. That is composed of civilians or military men?

Lieut. Col. RIGBY. In the armies on active service it is composed wholly of military men. It is composed of a brigadier general, two colonels or lieutenant colonels, and two majors. In the territorial armies it is composed of three military men and two civilians. Formerly it was all military. That was changed by law during the war—by a statute enacted in 1916—by which it is now provided that the president of the court of revision in the territorial armies not on active service shall be a civilian judge of the district in which the court of revision sits.

Senator CHAMBERLAIN. That was possibly induced by these criticisms leveled against the system just as they have been leveled against the system here.

Lieut. Col. RIGBY. I am only telling you what I find there. The other civilian member is also a civilian judge. Those two civilian members are appointed on the recommendation of the under secretary of state for military justice. The civilian members really do the routine work of the court where they are appointed, but the majority of the judges are still military.

Senator CHAMBERLAIN. What cases go up to them—what convictions?

Lieut. Col. RIGBY. Unless all appeals are prohibited by presidential decree, as may be done during war, all cases may be appealed. There is no automatic review; no cases go up except those which are appealed, either by the Government or by the accused, and the appeal must be taken within 24 hours after the judgment is rendered. If it is not taken within that time, the right of appeal is absolutely gone. The court of revision sits for the correction of errors of law only, and really in a very narrow way. The record that goes up does not contain in it any of the evidence taken on the trial in the conseil de guerre. It does contain the statements of witnesses taken in the preliminary examination, the dossier; but there is no report of evidence heard in the conseil de guerre.

Senator CHAMBERLAIN. According to your statement, all the confrontation by witnesses is in the preliminary hearing.

Lieut. Col. RIGBY. That is true, so far as the record will show. There may be a confrontation on the trial, but the record will not show anything about that. So that the case does not go up on the admissibility of evidence in the conseil de guerre; and the Court of Revision is forbidden to discuss or to consider the case on the merits; and counsel in preparing their briefs are forbidden to discuss the merits of the case in any way. The only questions for consideration, as stated in the statutes, section 74 of the military code, are, first, whether the court below was constituted in accordance with the provisions of the code; second, whether it has exceeded its jurisdiction; third, whether the sentence pronounced by it is within the penalties fixed by law, upon the facts as found by the court; fourth, whether there has been any violation or omission of any form (or formality) prescribed by law "on pain of nullity"; fifth, whether the court below has omitted to accord either to the accused or to the commissaire du gouvernement, upon proper demand, any right or "faculty" secured to him by law.

As to the "pain of nullity," I might say that there are certain provisions of the code, certain things to be done, which are expressly stated to be required "on pain of nullity." They are the ones referred to in that section. For instance, "on pain of nullity," the accused must be advised at the same time the charges are served upon him, of his right to counsel, and that unless he has his own counsel, counsel will be assigned him by the court.

Senator CHAMBERLAIN. These articles do not permit the court of appeals to change the judgment except when the law has not been properly applied to the facts, etc. That is a pretty general power. That would seem to indicate that they have power to consider the facts.

Lieut. Col. RIGBY. They do not so construe that, Senator. I talked on that subject with Col. Augier, the commissaire du gouvernement

of the Court of Revision at Paris, who is a very eminent authority and author of several books—they are standard on military law in France—and he explained that they simply consider there whether the sentence accords with the facts found and set out in the findings. You see the form of their judgment below is a finding of facts and then a sentence, and the Court of Revision simply considers, under that subdivision, whether the sentence there, as found in the judgment roll, is proper in view of the facts recited as found in the judgment roll.

Senator CHAMBERLAIN. As I read that provision, it is pretty broad. Whatever the practice may be, it would seem that they could consider the facts.

Lieut. Col. RIGBY. However that may be, even if that language will bear that construction, it is not so construed by the French themselves. They construe it as I have stated, and, in fact, the rules of the court specifically forbid counsel for the accused in his "Memoir," as they call it—his brief—to discuss the case on its merits,

I will be glad to put into the record that portion of my interview with Col. Augier, if it is desired.

There is also a power, in time of peace, given by sections 80, 81, and 82 of their code, for civilians who may be tried before the conseil de guerre to appeal to the Court of Cassation; and, under the law of April 17, 1906, in time of peace, the Court of Cassation is substituted for the Court of Revision, in appeals from the conseils de guerre.

Senator CHAMBERLAIN. The trial of civilians is so limited in our jurisdiction that it does not make much difference.

Lieut. Col. RIGBY. I only call attention to it.

Then in the Belgian system they have what they call the cour militaire, which is a supreme military appellate tribunal.

Senator CHAMBERLAIN. How is that constituted? Are there any civilians on it?

Lieut. Col. RIGBY. There is one civilian on that; there are five judges—1 civilian and four line officers of the army. The civilian judge is appointed for life, and he is entitled to the honors due to a general. In practice he wears the uniform of a general, but he is a civilian appointed by the King for life. The four military judges are: One lieutenant general or major general, one colonel or lieutenant colonel, and two majors. The civilian member is the president of the court; and he must have been a civilian judge for at least 10 years before his appointment. He must, by the way, know both French and Flemish. The military members are appointed for terms of one month only. Their names are drawn by lot from a list of those available. This Belgian court of appeals differs from the French court of revision in that it reviews the facts as well as the law. It considers the case on its merits.

Senator CHAMBERLAIN. There is a record there?

Lieut. Col. RIGBY. The record there is that made up by the judiciary commission, so far as the evidence is concerned. They (the cour militaire) consider the whole case, and they have some original jurisdiction also. In Holland, there is a supreme military court. I only know of Holland from an examination of the statutes and regulations, but it is a rather anomalous situation. They have both the

review without appeal and an appeal, and both by the same court, which they call the Hoog Militair Gerechtshof.

Senator CHAMBERLAIN. That is automatic?

Lieut. Col. RIGBY. It is an automatic review of the record, Senator; and there is also a provision that the accused may within a certain fixed time, I think within 10 or 15 days, appeal. Then, in addition to the regular review of the facts on the record, the court will entertain any briefs or arguments that the accused wants to put in, and hear him.

Senator CHAMBERLAIN. Are there any civilians on that court?

Lieut. Col. RIGBY. Yes; there are civilians on that court also. This court in Holland is composed of nine judges. Of those three are civilians, three are army officers, and three are navy officers. It has jurisdiction over both the army and the navy—over all military law. The civilian judges are appointed by the sovereign upon the recommendation of the ministers of justice, war, and navy; and they are appointed for life, with the right to retire at 70 years of age. One of them is made the president of the court. In his absence the other senior civilian presides. The military judges are three army officers, as I said, and three naval officers. They are required to be at least 30 years of age. There is no further requirement. They are not required to have any special legal knowledge. They, also, however, are appointed for life, and are appointed by the sovereign upon the recommendation of the ministers of justice, navy, and war.

This court in Holland has power, as in Belgium, to review the case on its merits, both on the law and the facts; and, by the way, the court in Holland has also original jurisdiction over all prosecutions of officers of the army above the grade of captain, and of officers of the navy above the grade of first lieutenant; and also has the power to examine into the actions of any commander who surrenders a fortress or naval commander who surrenders a ship—anything of that kind. They have pretty broad original jurisdiction.

In Switzerland there is a "military tribunal of cassation," composed of five judges and three alternates. They are all chosen for a term of three years by the federal council. They are all military men, but three of the judges must be—the majority of them—chosen from the "judicial section of the general staff"; that is, the judge advocate general's department. The others must also be officers who have had some legal training. I do not really know very much about the jurisdiction of the Swiss court.

There is also a court in Prussia. I do not know anything about its composition. The interesting thing about it that I do know—I have just gotten hold of the books recently—is that it publishes formal reports every year of cases decided, so that you can get reports of the supreme Prussian military courts, as you can get the reports of the cases decided in our Supreme Court or in the supreme court of any State.

In Italy there is also a revision without appeal of all cases involving confinement for more than seven years. They call this court the "Council of Revision."

Senator CHAMBERLAIN. Is there any appeal for lesser sentences than that?

Lieut. Col. RIGBY. There is also an appeal to the supreme court of war and navy for lesser sentences, under somewhat severe restric-

tions. I have not all the details, Senator, but all cases where more than seven years' confinement is involved go up automatically. That court is composed of three judges—a "general, commanding a section of military justice," as he is called; a colonel attached to the section of military justice, and one civilian judge.

Then there is detailed to act as prosecutor before that "council of revision" the military advocate general of Italy, and an officer is detailed as reporter to the court.

Senator CHAMBERLAIN. Practically all of those courts have one civilian member on the court?

Lieut. Col. RIGBY. The situation, summing it all up, Senator, is, I think, that in all of them, either the court is wholly military, or else the majority of the court is military. Here is this table which I prepared, for which you were asking, Senator; I can put it into the record now.

(The table, relating to military courts of appeal in several different armies, is here printed in the record as follows:)

Analysis of military courts of appeal in various armies.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
I. Title of court.....	Conseil de Revision (court of revision).	Conseil de Revision (court of revision).	Council of revision.	Hoog Militair Geregshof (supreme military court).	Cour Militaire.....	Krigsöverdomstol (superior military court).	Tribunal Militaire de Cassation.
II. Number of judges.....	5.....	5.....	3.....	9.....	5.....	5.....	5 (also 3 alternates)
III. Civilian judges, number.....	2.....		1.....	3.....	1.....	2.....	
a. Qualifications—							
1. Age.....	30 years.....			30 years.....	No requirements..	25 years.....	
2. Legal experience.....	Magistrate of civilian court of appeal (Cour d' Appel).		Councillor of the Court of Appeals.	Doctor of laws....	10 years civilian judge.	Qualified for appointment as a civilian judge,	
3. Military experience.....	None required.....		None required.....	None required.....	None required.....	None required.....	
b. By whom appointed.....	Minister of War (recommendation of under secretary state for military justice.		Minister of Grace and Justice.	Sovereign upon recommendation of ministers of justice, war, and navy.	Sovereign.....	King.....	
c. Tenure of office.....	Determined by cabinet (Conseil des Ministres).			Life, retired at 70..	Life.....	For the term of court.	
d. Special powers and duties.....	Act as rapporteurs to the court.			Civilian is President. In his absence, senior civilian presides.	Rapporteur to the court; entitled to honors of a general.	Rapporteur to the court.	
IV. Military Judges, number.....	3.....	5.....	2.....	6.....	4.....	3.....	5.....
a. Qualifications—							
1. Rank.....	1 colonel or lieutenant colonel, 2 majors;	1 brigadier general, 2 colonels or lieutenant colonels, 2 majors.	1 general officer, 1 colonel.	3 army, 3 navy officers.	1 lieutenant general or major general, 1 colonel or lieutenant colonel; 2 majors.	1 general officer, 2 field officers.	Officers.
2. Age.....	30 years.....	30 years.....		30 years.....	No requirement...	25 years.....	
3. Other military qualifications.	None required.....	None required.....	1 general commanding a section of military justice; 1 colonel attached to the section of military justice.	None required.....	None.....		

4. Legal experience.....	do.....	do.....		None required.....	None required.....	None required.....	3 from "Judicial section of the general staff"; 2 others must be "officers with legal training."
b. By whom appointed.....	Commanding general.	Commanding general.		Sovereign (recommendation of ministers of justice, navy, and war).	By president of the court, by drawing from roster furnished by minister of war.	King.....	By federal council
c. Tenure of office.....	6 months.....	Commanding general's pleasure.		Life (retired at 70).	1 month.....	For term of court.....	3 years.
d. Special powers and duties.....							
V. President of court:							
a. Civilian or military	Civilian.....	Military.....	Military.....	Civilian.....	Civilian.....	Military.....	Military.
b. Qualifications—							
1. Age.....	30 years.....	30 years.....		30 years.....	No requirements.....	25 years.....	
2. Legal experience.....	President of chamber of (civilian) court of appeal. ("President de chambre de la cour d'appel".)	No requirement.....	"The general commanding a section of military justice."	Lawyer, doctor of law.	10 years as civilian judge.	No requirement.....	Member of judicial section of general staff.
3. Military experience.....	None required.....						
4. Rank.....	None required.....	Brigadier general.....	General officer.....	None required.....	None required. Entitled to honors of a general.	General officer.....	
c. By whom appointed.....	Minister of war under regulations fixed by the cabinet.	Commanding general.		Sovereign (recommendation ministers of justice, war, and navy).	Sovereign.....	King.....	Federal council.
d. Tenure of office.....	Determined by cabinet.	Pleasure of commanding general.		Life.....	Life.....	Term of the court.....	3 years.
e. Powers and duties.....	Presides, general supervision, appoints rapporteurs.	Presides, general supervision, appoints rapporteurs.		"Directs all meetings of the court." May appoint a rapporteur "to expedite proceedings."	Acts as rapporteur to court.		
VI. Officials of court. Titles of.....	Commissaire du Gouvernement, greffier.	Commissaire du Gouvernement, greffier.	Military advocate general (or military vice advocate general), reviewer.	Advokaat-fiscaal, procureur, provost general, commissaris, rapporteur, griffier.	Auditeur general, greffier.	Överkrigsfiskal....	Auditeur in chief.

Analysis of military courts of appeal in various armies—Continued.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
VII. Advokaat-fiscaal, auditeur-general, commissaire du gouvernement, judge advocate general, etc.:							
a. Title.....	Commissaire du gouvernement.	Commissaire du gouvernement.	Military advocate general.	Advokaat-fiscaal..	Auditeur general..	Överkrigsfiskal...	Auditeur in chief.
b. Civilian or military.....	Military.....	Military.....		Civilian.....	Civilian.....		Military.
c. Qualifications—							
1. Age.....	30 years.....	30 years.....		30 years.....	35 years.....	25 years.....	
2. Legal experience.....	None required.	None required.....		Doctor of law.....	Lawyer; doctor of law.	Qualified for appointment as a civilian judge.	
3. Rank.....	Field officer or "sousintendant militaire."	Field officer or "sousintendant militaire."			Entitled to honors of general.		
4. Military experience.....	Requisite rank.....	Requisite rank.....		None required.....	None required.....	No requirement..	Chief of the judicial section of the general staff.
d. By whom appointed.....	Minister of war ..	Commanding general.		Sovereign (recommendation ministers of justice, marine, and war).	King.....	King.....	
e. Tenure of office.....	Pleasure of minister of war.	Pleasure of commanding general.		Life.....	Life.....		
f. Qualifications as to impartiality, etc.	Same as judges of Conseil de Guerre.	Same as judges of Conseil de Guerre.		Not related to members of court or griffier; if related to accused, temporary Advokaat - Fiscaal appointed.			
g. Powers and duties.....	Prosecutor and adviser of the court.	Prosecutor and adviser of the court.	Prosecutor.....	1. Prosecute original cases; adviser to court in confirmation and appeal cases. 2. Advises on surrender of forts, ships, etc. 3. General supervision of Audi-	Prosecutor and adviser to the court; "discharges the functions of a public minister."	Prosecutor; general supervisor of inferior military courts.	

VIII. Assistants to commissaire du gouvernement, advocaat-fiscaal, etc.: Titles.	Substitute.....	Substitute.....	Military vice advocate general.	teurs - Militair and of Krygsraads.	Substitute.....	Substitute.....
IX. Deputy — substitute, procureur, etc.	do.....	do.....	do.....	Procureur; provost general.	do.....	do.....
a. By whom appointed.....	Commanding general.	Commanding general.		Procureur.....	King.....	Commanding general.
b. Duties.....	Same as commissaire du gouvernement (assistant).	Same as commissaire du gouvernement (assistant).		Court, on petition of Advokaat-Fiscaal.	To assist, and act for, the auditeur general.	To act, in case of absence of Överkrigsfiskal.
X. Provost General:				To assist Advokaat-Fiscaal.		
a. By whom appointed.....				Sovereign provost general.		
b. Duties.....				Charge of prisons, etc.		
XI. "Commissaris" "Juge D'Instruction"				Commissaris, one or more.		
a. Title.....				Investigation of accused in cases of original jurisdiction.		
b. Powers and duties.....				No requirement.....		
c. Civilian or military.....				No limitation.....		
d. Qualifications—				No requirement.....		
1. Age.....				None required.....		
2. Rank.....				do.....		
3. Legal experience.....				No requirements.....		
4. Military experience.....				None.....		
5. Impartiality.....						
6. Special matters.....						
XII. "Rapporteur":						
a. Powers and duties.....	Report on record to the court.	Report on record to the court.	Reviewer. Examine the record and report to the court.	To investigate case thoroughly.		
b. Member of court or not.....	Yes.....	Yes.....	No.....	No.....	Yes.....	Yes.....
c. If a member—						
1. By whom appointed.....	President.....	President.....			President acts as rapporteur to the court, ex officio.	
2. Civilian or military.....	Civilian.....	Military.....			Civilian.....	Civilian.....
d. If not a member—						
1. By whom appointed.....			Commander in chief.	President of court.		
2. Civilian or military.....			Military.....	Not fixed.....		

Analysis of military courts of appeal in various armies—Continued.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
XII. "Rapporteur"—Continued. d. If not a member—Continued. 3. Qualifications.....			Officer who has received a degree in law; and "preferably a magistrate."	Not fixed, but must not be related to any attorney in the case.			
4. Any special matters.....			Has as many assistants as may be needed.	Appointment kept strictly secret.			
XIII. "Greffier," "Griffier," clerk of court:							
a. Title.....	Greffier.....	Greffier.....	Referee.....	Griffier.....	Greffier.....	Civilian member of court keeps the record.	
b. Civilian or military.....	Military.....	Military.....	No requirement..	Civilian.....	Either (a) an officer of the army, or else (b) doctor of law, or (c) had judicial experience.		
c. Qualifications—							
1. Impartiality.....	Same as judges of Conseil de Guerre.	Same as judges of Conseil de Guerre.		Not related to judges nor to Advocaat Fiscaal. May not act where related to any party.			
2. Age.....	30 years.....	30 years.....		25 years.....	25 years.....		
3. Rank.....	Officer.....	Officer.....					
4. Legal experience.....	No requirement..	No requirement..		Doctor of law.....	As above stated; either an Army officer, or else a doctor of law, or judicial experience.		
5. Military experience.....	Requisite rank.....	Requisite rank.....		None required.....			
d. By whom appointed.....	Commanding general by roster.	Commanding general.	President of the court.	Sovereign (recommendation ministers of justice, marine, war).	King.....		

e. Tenure of office.....	6 months.....	Commanding general's pleasure.....		Life.....	Royal pleasure.....	
XIV. Jurisdiction of the court:						
a. Original.....				Naval officers above first lieutenant, Army officers above captain, provost marshals, auditors militair, pilots, commander surrendering fortress, some special cases.	Over Army officers above captain in rank; over members of courts-martial in their official capacity as such.	
b. Appellate—						
1. Automatic.....	No.....	No.....	All sentences involving a penalty greater than 7 years' confinement.	All sentences of Krygsraads, except sentences adjudged: 1. In the field. 2. In a beleaguered fortress. 3. In a city "in a state of siege."	No.....	
(a) Questions to be considered.				1. Was the case properly tried? 2. Was a complete criminal case made out? 3. Is the guilt proven beyond any doubt? 4. Is the sentence authorized by law?		
(b) May case be returned for new trial?				Yes; same court...		
2. Upon appeal, or other action—						
(a) By accused.....	Yes.....	Yes.....		By accused; with same exceptions as on review without appeal.	Yes.....	Yes.....
(b) By Government....	Yes.....	Yes.....		No.....	Yes.....	No.....
(c) Other parties.....	No.....	No.....		No.....	Yes.....	No.....

Analysis of military courts of appeal in various armies—Continued.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
<p>XIV. Jurisdiction of the court—Continued. b. Appellate—Continued. 2. Upon appeal, or other action—Continued. (d) Questions to be considered.</p> <p>(e) May case be returned for new trial?</p> <p>c. Other jurisdiction.....</p>	<p>1. Composition of conseil de guerre. 2. Did the court below exceed its jurisdiction. 3. Is the judgment authorized by law upon the facts found by the court below? 4. Was there any violation or omission of any statutory steps prescribed upon "pain of nullity?" 5. Did court below fall upon proper motion to award either to the accused or to the Government any rights secured by law?</p> <p>Yes; to different court.</p>	<p>Yes; to different court.</p>	<p>Facts, as well as law.</p> <p>Yes.....</p>	<p>Same as on review without appeal.</p> <p>Yes; to same court.</p> <p>Supervision of guardhouses and military prisons.</p>	<p>Facts, as well as law.</p> <p>Yes; to same court.</p>	.....	.....
<p>XV. Vote required: a. For findings.....</p> <p>b. For sentence.....</p> <p>c. Special requirements.....</p>	<p>Majority.....</p> <p>do.....</p> <p>Judges vote viva voce, beginning with junior in rank.</p>	<p>Majority.....</p> <p>do.....</p> <p>Judges vote viva voce, beginning with junior in rank.</p>	.....	<p>Majority of members of the court. do.....</p> <p>Members must vote in person viva voce in open court. (See arts. 36-45.)</p>	<p>Majority.....</p> <p>do.....</p>	.....	.....
<p>XVI. Is case reviewed on the merits?</p>	<p>No.....</p>	<p>No.....</p>	<p>Yes.....</p>	<p>Yes.....</p>	<p>Yes.....</p>	.....	.....

Senator CHAMBERLAIN. The cases in some of the countries are reviewed automatically, and in some only in case of appeal?

Lieut. Col. RIGBY. Yes. Italy has the automatic review for long-term sentences. Holland has the automatic review for all sentences. The others go up on appeal—all those I am familiar with—except Great Britain and the United States. I do not know the jurisdiction of the Swiss court. In all of them, where there is a formal military court of appeals established, there are one or more civilians, except in the French court of revision, in the armies on active service, where they are all officers; and the Swiss, where a majority of them are officers of the judge advocate general's department. But in none of them is the majority civilian. There is none where they are all civilian; and there is none where a majority of them is civilian. In other words, in all of them, to turn it around, either the judges are all military men, or else the majority is composed of military officers. The theory seems to be to put the trial into the hands of the military officers, with the benefit of the advice of one or more—in the minority, however—of legally trained officers; and, of course, in the French armies on active service they are all military officers.

Now, I think that is all I have to say on that question, and, perhaps, if you are not through with me you would prefer that I come back.

(Thereupon, at 1.05 o'clock p. m., the committee took a recess until 2.30 o'clock p. m.)

AFTERNOON SESSION.

The subcommittee reconvened, pursuant to the taking of the recess, at 2.30 o'clock p. m., Senator Francis E. Warren (chairman) presiding.

STATEMENT OF BRIG. GEN. WALTER A. BETHEL, UNITED STATES ARMY.

Senator WARREN. General, the duty of this subcommittee is to report to the full Committee on Military Affairs on Senate bill 64, the Chamberlain bill, so-called, as a whole, or amended, or with substitutes, and we are taking evidence to establish, if we can, what is the better mode; just how we are going to change the Articles of War and to change the method of administration of military justice.

We have been hearing testimony of officers who have become acquainted in a certain way with the laws and practices of other nations. Will you tell us what your service has been? I notice that you have four stripes, showing that you have been overseas two years. Will you tell us what has been your experience abroad, or in the Army in this country, with respect to military justice?

Gen. BETHEL. I was graduated from West Point 30 years ago, and after serving for five years with troops as a subaltern, was instructor in law at West Point for four years.

Soon after my relief from West Point, I was detailed in the Judge Advocate General's department, and have been on duty in that department ever since, having been permanently appointed judge advocate in 1903, I served as a department judge advocate in Alaska, on the Pacific coast and in the Philippines, for nine years;

after which I went to the United States Military Academy as a professor of law, where I remained as such for five years, and in 1914 came to Washington for duty in the Judge Advocate General's office, where I was when the United States declared war.

Senator WARREN. Was that the commencement of your duties here in the general office?

Gen. BETHEL. Yes, sir.

Senator WARREN. What is your real rank now, in the Regular Army?

Gen. BETHEL. I am a colonel in the Judge Advocate General's department of the Army.

Senator WARREN. That is as high as you can get?

Gen. BETHEL. As high as I can get by seniority.

On the declaration of war by the United States against Germany I went with Gen. Pershing to France as judge advocate of the A. E. F., and remained such until his return to the United States.

Senator WARREN. Then you had the highest command over there, of that kind?

Gen. BETHEL. I was the chief law officer of the A. E. F. at all times.

Senator WARREN. You were stationed at the general headquarters, were you?

Gen. BETHEL. I was stationed at general headquarters all the time; yes, sir. I might say, further, that while at West Point I undertook to write a revision of Winthrop's Military Law, based upon the Articles of War, then in the form of a bill before Congress, and devoted two or three years to that work; but inasmuch as the articles were not enacted until after I had entered on duty in the Judge Advocate General's office in Washington, I never completed the work.

Senator WARREN. Now, will you, in your own way, tell us some thing of the dispensation of military justice on the other side, and also whatever you may know of it here at home.

Gen. BETHEL. I may say that I know practically nothing as to what has occurred in the United States during the two years of my absence. I have read a few newspaper articles, and in the last few days, since being summoned to appear before this committee, I have read as much of the testimony that has been adduced before this committee as possible; but further than that I know nothing as to what has occurred in the United States. I was as familiar as it was possible for me to be with what took place in the A. E. F.

Just before leaving Europe I rendered a brief report to Gen. Pershing of the workings of the court-martial system in Europe, a copy of which I have here.

Senator WARREN. You might insert that in the hearings. You might like to have him read it over hastily, Senator Chamberlain, so that you may ask him any questions that occur to you.

Gen. BETHEL. I really think, before I go ahead with my statement, that is if you are going to question me much on the conditions in the A. E. F., it would be well for me to read that.

Senator CHAMBERLAIN. Just read it.

Senator WARREN. I think it would be well for him to read it, and then it will bring out what you want to ask him about.

Gen. BETHEL. (reading):

GENERAL HEADQUARTERS,
AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, August 7, 1919.

Memorandum: For the commander in chief.

Subject: General court-martial trials in the American Expeditionary Forces.

1. On May 7 I received the following memorandum from the secretary of the General Staff:

"The commander in chief desires that you furnish the undersigned with a monograph of the general court-martial system as it has worked in the American Expeditionary Forces, with data as to number of convictions of different crimes, length of sentence, etc."

He advised me that it was desirable to have a list by name of all persons who had been tried by general court-martial in the American Expeditionary Forces, together with the result of trial and a statement of the offenses of which the accused were convicted, their sentences and such further disposition as may have been made in their cases in the way of mitigation, remission, etc. I have had a table (see blank form herewith) prepared as above indicated and am keeping the same up to date, and shall submit the same to you upon the breaking up of the American Expeditionary Forces. As there will be but few more court-martial trials, the report which is substantially an extract from the section report will be submitted now.

Under the law each army, corps, division, and separate brigade constituted a general court-martial jurisdiction. Authority to appoint general courts-martial was granted to the commanding general of the Services of Supply September 1, 1917, and as the number of troops increased the authority was likewise granted from time to time to the commanding officers of sections of the Service of Supplies and other commands. There were in all 75 general court-martial jurisdictions in the American Expeditionary Forces.

The following table shows the number of trials by general court-martial in the American Expeditionary Forces, to include June 30, 1919, it being impracticable to fix a later date, such as will be inclusive of all trials in the various divisions and sections of the Service of Supplies:

	Convictions.		Acquittals.		Total.
	Ap- proved.	Disap- proved.	Ap- proved.	Disap- proved.	
1917.					
Officers.....	11	3	2	1	17
Enlisted men.....	97	8	13	2	120
Other persons.....	2				2
Total.....	110	11	15	3	139
1918.					
Officers.....	416	66	104	34	620
Enlisted men.....	1,628	90	309	29	2,056
Other persons.....	32	2	5	2	41
Total.....	2,076	158	418	65	2,717
1919 (TO JUNE 30).					
Officers.....	550	80	142	33	805
Enlisted men.....	2,442	202	503	48	3,195
Other persons.....	13		4		17
Total.....	3,005	282	649	81	4,017
Total trials for 1917-18 and to June 30, 1919, inclusive.....	5,191	451	1,082	149	6,873

The following table shows cases tried in the United States before divisions arrived in France, the court-martial orders having been promulgated after arrival:

	Convictions.		Acquittals.		Total.
	Ap- proved.	Disap- proved.	Ap- proved.	Disap- proved.	
Officers.....	4		1		
Enlisted men.....	227	14	15	4	
Total.....	231	14	16	4	265

It should be borne in mind that the number of troops in the American Expeditionary Forces was continually undergoing great variation. It rose from a little more than two hundred thousand in January, 1918, to about two million in November, 1918, and then diminished steadily. The number of troops in the American Expeditionary Forces on June 30, 1919, was three hundred and seventy thousand. The average number of troops in the American Expeditionary Forces during the year 1918 was considerably more than one million; and this average was maintained for the first half of the year 1919.

In 1917 and 1918 the number of trials by general court-martial in the American Expeditionary Forces was approximately one-quarter of 1 per cent of the average number of troops during those years. The number of general court-martial trials during the first six months of 1919 was about three-fourths of 1 per cent per year of the number of troops. The number of trials by general court-martial in the United States Army during the five years preceding the present war was approximately 5 per cent per year of the number of troops in the Army. The small percentage of trials by general court-martial in the American Expeditionary Forces as compared with the Regular Army before the war is so remarkable as to require comment. A few cases had to be dismissed, of course, for the reason that the witnesses, on account of sickness, wounds, return to the United States, or other causes, were not available. More important, however, was the liberal employment of the special court-martial. Conditions in the American Expeditionary Forces were very favorable to the use of the special court for the reason that the other urgent duties of officers made it inadvisable to convene general courts-martial except in cases where the jurisdiction of the general court-martial is exclusive, or in those cases where severe punishment appeared to be necessary. The use of the special court, as will hereinafter appear, was encouraged in General Orders, No. 56, 1918, and it was there advised that cases of petit larceny could be properly punished under the existing conditions by the special court-martial.

By far the most important cause, however, of the small number of general court-martial trials was the character of the troops. They realized the seriousness of their cause, and their patriotism and sense of duty, together with the hard service to which they were necessarily subjected, brought about such a state of behavior and discipline as to make the commission of crime extremely rare and but few trials necessary. Since the American Expeditionary Forces was a truly National Army, the excellent behavior of the troops must be accepted as proof of the high standard of American citizenship.

The increase in trials after the signing of the armistice over what it had been prior thereto was very marked, but by no means so great as was expected. It was but natural that the relaxation that followed the severe strain of 1918 should manifest itself in a lower state of discipline and that this should be aggravated by the soldiers' desire to return to the United States when hostilities ceased. The impossibility of sending the Army home at once, or even for quite a while, produced considerable dissatisfaction. Notwithstanding these conditions, however, the number of trials by general court-martial, considering the size of the Army, was very small, and was only three-twentieths as great as in times of peace preceding the war.

It became evident in the spring of 1918 that the methods of punishment usually employed in an army were not best adapted to war-time conditions. Whether well founded or not, there was a somewhat prevalent belief that some soldiers would commit offenses with a view to obtaining dishonorable discharge from the service and confinement in a disciplinary barracks, and thereby obtain their release from military service and its incident dangers. It was, therefore, deemed inexpedient to send soldiers convicted of offenses in combat organizations to a place of confinement either

in the United States or France, except in those cases where a long penitentiary sentence only would fit the crime. It was deemed better that they should remain with their organizations, sharing the hardships and dangers of their more worthy comrades. General Orders, No. 56, of April 13, 1918, was accordingly issued in terms as follows—

I might say, before reading that order, which was published in the spring of 1918, that it was practically the only order published for the guidance of the command in disciplinary matters.

Senator WARREN. That was considered a very important order.

Gen. BETHEL. Yes, sir; I think so. I shall proceed to read it [reading]:

1. Conditions of service in the American Expeditionary Forces necessitate policies as to punishment different from those which have heretofore obtained in our armies. The law has authorized the President to prescribe maximum limits of punishment for times of peace only. (See Executive Order, par. 349, Manual for Courts-Martial).

2. Heretofore the punishment of dishonorable discharge with confinement for a term in the United States Disciplinary Barracks has been employed for serious cases where penitentiary confinement was not authorized. This punishment is not adapted to the conditions in the American Expeditionary Forces. Hereafter prisoners not sentenced to imprisonment in a penitentiary will be retained in Europe in order that their services may be here utilized and that early opportunity may be given them in proper cases to redeem themselves as soldiers. To this end reviewing authorities should freely exercise their power under the fifty-second article of war.

3. In awarding punishments, it should be borne in mind that a soldier should not escape dangerous service by the commission of crime. Petit larceny and even other offenses involving some moral turpitude, which have heretofore been punished with dishonorable discharge and confinement, may, under existing conditions, be properly punished in a disciplinary way, leaving the soldier to perform military service either with his company or at such other place as the reviewing or higher authority may direct.

In the combat units few cases will arise requiring dishonorable discharge. A sentence of confinement for six months at hard labor, or at hard labor without confinement in a combat unit, which is served by the soldier at the front is severe enough except in extraordinary cases. Where dishonorable discharge is not advisable, and the offense is not capital, the case should, as a rule, be disposed of by an inferior court-martial. Officers should not be withdrawn from their duties to constitute a general court-martial except when the offense can not be otherwise adequately punished.

4. Offenses against the persons or property of the inhabitants of France are much more serious than such offenses would be in our own country. They should be punished with the utmost vigor. When such an offense calls for a penitentiary sentence, it should be for a much longer time than would be awarded under normal conditions.

Absence without leave is an offense incomparably more serious now than in time of peace. Such absences not only give occasion for serious offenses, but whenever an offense is so committed it is brought to the attention of our allies and tends to destroy the good repute of our Army. Therefore, every measure should be taken to prevent the soldier from absents himself without leave, and when absent to apprehend him immediately, and the offense of absence without leave should be punished with severity.

Deadly weapons are carried by soldiers for the purpose of use against the enemy. Their employment to settle private disputes is equivalent to doing the work of the enemy, and such conduct should be followed by punishment much more severe than would be awarded under usual circumstances.

5. Since trial by court-martial tends to destroy the self-respect of the soldier, it should not be resorted to when other measures are adequate. For minor offenses not frequently repeated the power of the commanding officer under the one hundred and fourth article of war should be employed.

6. It is expected that the disciplinary powers of commanding officers under the one hundred and fourth article of war will be fully utilized, thereby reducing the number of trials by summary courts-martial; that the special court will be employed whenever the case is such that six months' confinement at hard labor under the special conditions now existing will meet the ends of justice; that members of combat organizations will not be sentenced to dishonorable discharge unless the sentence includes a term of confinement extending well beyond the probable duration of the war, and that commanding officers of all grades having prisoners under their control will cooperate to see that such prisoners share the hardships and dangers of their more worthy comrades. Normally a penitentiary sentence should not be given unless the term of imprisonment is 10 years or more.

7. The reviewing authority will, in a case arising in a combat unit, direct that a general prisoner whose is not to be confined in a penitentiary be confined at the station where his unit service or at such other place within the reviewing authority's command as he may deem best.

Now continuing my report to the commander in chief, I said:

While the foregoing order was in most part suggestive and advisory rather than mandatory, all officers exercising disciplinary powers were in accord with its provisions and immediately proceeded to carry it into effect. It resulted that nearly all men convicted of military offenses in combat divisions remained with their organizations and continued to perform their duty as soldiers. A great proportion of them were thus able to redeem themselves by honorable service in the course of a few weeks or months and to bring about the remission of their punishment. Many, indeed, rendered valiant service in action and were immediately released from the further operation of their sentences.

The difficulties of bringing soldiers to trial by general court-martial were very much greater than would be expected among mobilized troops. The rapid movements and frequent changes of stations of the various commands, changes in personnel effected by heavy replacements, together with evacuations of the sick and wounded to hospitals in central and western France, made it difficult in many cases to secure the witnesses. It was more necessary than ever that the trial should immediately follow the offense; but this was frequently impossible on account of the rapidity with which the operations were conducted. During the early part of 1918 our troops were employed mainly in trench warfare, and while a division was in the trenches there were cases that could not be tried by reason of the difficulty of assembling the officers necessary to constitute a general court-martial and obtaining the presence of the witnesses. Such cases were tried when the division returned to a rest area.

In the spring of 1918 the policy of sending to each division or corps a sufficient number of officers to constitute a general court-martial and to be employed on that duty alone was seriously considered. It was realized that officers employed upon this duty exclusively would so familiarize themselves with military law and the requirements of court-martial practice as to bring about regularity in the proceedings, but that such officers would not appreciate conditions of service so well as officers belonging to the division in which the offense should be committed. Had conditions continued as they were then, the employment of officers disabled by wounds as members of court-martial was intended, for the reason that such officers, after service at the front, could best understand the conditions of service there and would be most inclined to do justice in cases coming before them. The moral effect of trial by wounded officers rather than by officers of no combat experience was regarded as important. Competent officers who had convalesced from wounds were so much in need for other administrative duties, however, that but one such court was organized, which was sent where most needed in the summer and fall of 1918.

From the beginning of the Argonne offensive, on September 26, to the close of hostilities, on November 11, there were very few trials in the combat divisions. Indeed, conditions were such as to make it generally impracticable to bring offenders to trial before division courts; and most of the offenses that were committed during the Argonne offensive were tried in November and December. Had hostilities continued many months longer, it is certain that other means for the trial of offenses in the combat divisions would have had to be devised than the usual one of appointing division officers on division courts. Such conditions could have been met by the assignment to each division of sufficient number of officers convalescent from wounds constituting permanent courts. I think it desirable that our law make provision for an additional court to those now authorized to meet the condition of open warfare where troops are constantly on the march or in battle. The act of Congress of the Confederate States of America, of October 9, 1862, providing for a military court of three officers, and later acts amendatory thereto, are very worthy of consideration. In this connection it may also be observed that the field general court-martial of the British Army, usually composed of three officers, was employed in France during the war for the trial of serious offenses instead of the general court-martial analogous to ours for which the British law also provides.

Under such conditions of warfare as obtained during the Argonne offensive, only the most serious offenses should be tried by superior court-martial, and it is almost imperative that those be tried immediately. The accused, together with all witnesses for the prosecution and the defense, should be sent at once to a court sitting as near the lines as practicable. Unless this is done, cases must frequently be dismissed by reason of the witnesses not being available. It is also most important that immediate example be made of the guilty; otherwise disciplinary measures fail in their purpose.

From a comparison of the number of trials of officers and soldiers with the number of officers and soldiers in the American Expeditionary Forces, it appears that the percentage of trials by general courts-martial was more than six times greater among the officers than among the enlisted men. It should not be inferred from this, however, that the standard of conduct was lower among the officers than among the soldiers. Under the Articles of War officers can be tried by general court-martial only. The great majority of offenses committed by soldiers are not only triable, but in fact are tried, by summary or special court-martial. The figures in the above table, therefore, prove nothing as to the comparative conduct of the two classes of military persons.

In one respect the Articles of War have proved defective, I think—under war conditions—in not making sufficient provisions for the punishment of officers for minor offenses. It has been noted that officers can be tried by general court-martial only, and since it is contrary to good policy, and impracticable as well, to employ the general court for minor offenses, it follows that such offenses when committed by officers can only be dealt with under the one hundred and fourth article of war, which authorizes commanding officers to impose certain disciplinary punishments, not including, however, forfeiture of pay. The most effective of the disciplinary punishments authorized by the one hundred and fourth article of war is "restriction to limits," which, in time of peace, consists in restricting the officer to his military post. It is impracticable to impose this punishment under such conditions as we have had in France. Officers' duties have been such that they must come and go, and seldom have officers been stationed where it was practicable to prescribe limits or compel their observance. I feel that there has been a real need of a power to impose a moderate forfeiture of pay upon officers for minor offenses. In the event of a future war, I think there should be a statute authorizing officers of general rank to impose a forfeiture of one-half the monthly pay per month on officers under their command, not above the grade of captain, for minor offenses. This power would conform very closely to that now exercised by summary courts with respect to soldiers' pay, and in view of the right of appeal and other safeguards provided by the one hundred and fourth article of war, the power could not be greatly abused.

Now, I come to the commander in chief's jurisdiction, which is really a change in subject. As you know, Gen. Pershing, as the commander in chief of an army in the field, was the confirming authority for sentences of dismissal and of death adjudged and approved in the various jurisdictions. The next paragraph, however, deals with remission. [Continuing reading:]

Under the fiftieth article of war the unexecuted portion of a sentence could be remitted by the commander in chief so long as the person serving the same was in the American Expeditionary Forces whoever might have been the reviewing authority other than the President. So long as hostilities continued, the exercise of the power thus to mitigate or remit punishment was sparingly exercised. Early in 1919 the matter of general remission was taken up systematically, and Lieut. Col. William Taylor, judge advocate, spent many weeks at the camps where the prisoners were confined, conferring with the prison officers and examining the prisoners themselves, as well as the nature of their cases. Upon his recommendation the remaining portions of about 600 sentences were remitted in whole or in part. The sentences imposed by general court-martial prior to the signing of the armistice were generally more severe than those inflicted in time of peace for like offenses. Military courts appeared to regard theft or embezzlement of military property, absence without leave and acts of violence against the civilian population as more serious than such offenses would be under normal circumstances, and to require, for purposes of example, severer punishment than usual. In the mitigation of these sentences the policy was adopted of reducing them as nearly as practicable to peace-time standings, and to remit the whole where good discipline would not suffer by so doing.

Now I come to the special jurisdiction.

By far the greater number of sentences that came before the commander in chief for his action were those of dismissals of officers adjudged by courts appointed by division or other commanders and approved by them. But 64 officers and 87 soldiers were tried by court-martial appointed by the commander in chief. Four hundred and seventy-nine cases of dismissals of officers came before the commander in chief for the exercise of his approving or confirming authority, and in 318 cases the sentence was confirmed and dismissal directed. In 45 cases the sentence was confirmed, but the execution thereof was suspended, though in two

of such cases the suspension was later vacated and dismissal ordered. In 17 cases the sentence was mitigated under the provisions of an act of February 28, 1919, amending the fiftieth article of war, pursuant to which the commander in chief was, by cable of May 8, 1919, authorized to mitigate death and dismissal sentences. In 99 cases the sentence of dismissal was disapproved or confirmation was withheld. Such disapproval was given in some cases for serious mistakes in law made at the trial; in others where the evidence was not deemed conclusive of guilt; and in a few cases before the above-cited enactment, the sentence of dismissal was disapproved for the reason that it was deemed too severe in view of the offenses and their circumstances. Forty-four sentences of death came before the commander in chief for confirmation and in 11 cases the sentence was confirmed and executed. In 10 cases the sentence was disapproved and in 11 cases the sentence of death was mitigated to imprisonment for life or a term of years. Prior to the above-cited enactment 12 death sentences which the commander in chief had the power to confirm were forwarded to the President with the recommendation that the sentence be commuted. The figures in this and the preceding paragraph cover the period from the beginning of the American Expeditionary Forces to the date of this report,—August 7, 1919.

Murder and rape were the only offenses for which the offender suffered the death penalty in the American Expeditionary Forces.

Senator WARREN. Desertion was not punished in that way in any case?

Gen. BETHEL. No, sir; it was not. We had a few desertion cases that came before us.

Senator WARREN. I do not want to interrupt you if there is anything you want to ask, Senator Chamberlain.

Senator CHAMBERLAIN. Go right along, Senator.

(At this point Senator Lenroot entered the committee room.)

Senator WARREN. General, just make that last statement again, about the number of death sentences in the American Expeditionary Forces.

Gen. BETHEL. I will begin with the death sentences again. I have another copy of this report which Senator Lenroot can follow as I read. [Reading:]

Forty-four sentences of death came before the Commander in Chief for confirmation—

Senator WARREN. Those cases came up from different divisions, perhaps?

Gen. BETHEL. From different divisions and sections of the S. O. S.

Senator WARREN. With the recommendation of the death penalty—with a death sentence?

Gen. BETHEL. Yes, sir.

Senator WARREN. What was done with those?

Gen. BETHEL. In other words, these death sentences came up with the approval of the authority that ordered the court, generally the division commander. [Continuing reading:]

and in 11 cases the sentence was confirmed and executed.

Senator CHAMBERLAIN. That is, those men were shot?

Gen. BETHEL. They were hung, those 11 men. [Continuing reading:]

In 10 cases the sentence was disapproved, and in 11 cases the sentence of death was mitigated to imprisonment for life or a term of years. Prior to the above-cited enactment 12 death sentences which the Commander in Chief had the power to confirm were forwarded to the President with the recommendation that the sentence be commuted.

That was at the time when Gen. Pershing did not have the power to commute these sentences. He had the power to confirm and carry a sentence into effect, but not the power to commute.

Senator WARREN. He had the power to send a case to the President?

Gen. BETHEL. Yes; and believing that the death sentence should not be carried into effect, he sent these cases up to the President in order that they might be commuted. [Continuing reading:]

The figures in this and the preceding paragraph cover the period from the beginning of the American Expeditionary Forces to the date of this report—August 7, 1919.

Murder and rape were the only offenses for which the offender suffered the death penalty in the American Expeditionary Forces.

Senator WARREN. Then those men who were hanged were not guilty of desertion; they were not executed for desertion but for the other kinds of offenses?

Gen. BETHEL. For murder or rape, or for the combined offense of murder and rape, as in some of the cases.

Senator WARREN. I do not want to seem personal about it, but it has been asserted that the commander in chief of the American Expeditionary Forces was intent upon having carried into effect those sentences prescribing capital punishment, when he might have acted otherwise, and that is the reason that I wanted to be particular about that.

Senator CHAMBERLAIN. There has been a suggestion of that with reference to four boys, of whom two were found guilty of sleeping on post and the other two of disobedience of orders. I think those were the only four cases in which that appeared.

Senator WARREN. Yes, I understand. If this statement of Gen. Bethel is correct, no man has suffered capital punishment on account of desertion.

Senator CHAMBERLAIN. That is entirely true, no doubt; but what about those four young men?

Gen. BETHEL. The four cases to which you refer no doubt were four cases that occurred in the early history of the American Expeditionary Forces, I think about November, 1917, and they occurred in the First Division when it had, I think, just entered the line or was about to enter the line; I am not sure.

Senator CHAMBERLAIN. Did Gen. Pershing commute their sentences?

Gen. BETHEL. He had then no power as to their sentences. Gen. Pershing had power to confirm death sentences given him by the Articles of War only with respect to the following offenses: Murder, rape, desertion, and mutiny. He had no power to carry a death sentence into effect for sleeping on post, for disobedience of orders, for lifting a weapon against a superior officer, or for various other things for which the Articles of War permit the death penalty to be imposed. All cases except those of murder, desertion, mutiny, and rape required confirmation by the President for the execution of the death penalty; so that those cases might have come direct from the division commander to the President under the law.

An order was issued, however, in the early days of the American Expeditionary Forces, requiring records involving sentences which required the confirmation of higher authority to pass through intermediate authority in order that the intermediate authority might express its views and make its recommendation. In other words, cases coming up from divisions came to Gen. Pershing through corps headquarters in order that the corps commander might make recommendations, and in that way these four cases which you mention passed through Gen. Pershing's headquarters on their way to the President.

Senator WARREN. He had no power to act on them?

Gen. BETHEL. No, sir.

Senator CHAMBERLAIN. That is what the testimony shows.

Senator WARREN. He had not power to commute or do away with it?

Gen. BETHEL. No power to act on that in any way whatsoever. Just the same as these four were sent on up to the President, a number of others came up which would have had to go to the President. On my examination of them, under his supervision it was believed that a less punishment than death should be inflicted, and they were sent back to the reviewing authorities to resubmit to the court.

Senator CHAMBERLAIN. Those were cases over which the general commanding had jurisdiction?

Gen. BETHEL. He had no jurisdiction over them. They were cases where the death sentence had been adjudged, which had been approved by the reviewing authority, the division commander, and where it would require the confirmation of the President to give them effect, but inasmuch as we believed the death sentence should not be inflicted in those cases, the records were sent back to the reviewing authority with the suggestion that he send them back to the court for the imposition of a lesser penalty.

Senator CHAMBERLAIN. That was by the commander of the American Expeditionary Forces?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. He had no authority to act?

Gen. BETHEL. Not at all.

Senator WARREN. He had the authority to act in that way, to send them back?

Gen. BETHEL. In that way. In other words, there was nothing preventing his acting in that way.

Senator WARREN. He assumed as there was no law against it he could exercise it in that way?

Gen. BETHEL. Yes, sir. In other words, he sent it back to the major general who had approved it for such further action as he thought proper.

Senator CHAMBERLAIN. Did any other cases come up where the commander of the expeditionary forces recommended the change of a sentence, even where he had no authority to act himself?

Gen. BETHEL. Yes; there were a few others in which he had no power given by law but in which recommendations were made to the President.

Senator CHAMBERLAIN. He had no jurisdiction even to do that?

Gen. BETHEL. No jurisdiction conferred by law; no, sir.

Senator CHAMBERLAIN. Why was the recommendation made in these four cases that they should be executed?

Gen. BETHEL. Because it was believed to be necessary for disciplinary purposes at that time, as a deterrent to the commission of such crimes thereafter.

Senator CHAMBERLAIN. I think that is what the evidence here generally shows, Senator Warren.

Gen. BETHEL. There is not any question about that.

Senator WARREN. I wanted to get at the facts as he has given them because there has been a good deal of loose talk outside, and I wanted to get at the facts.

Senator CHAMBERLAIN. So far as that recommendation was concerned, there was absolutely no provision of law which required Gen. Pershing to certify those up and recommend execution?

Gen. BETHEL. None whatsoever.

Senator CHAMBERLAIN. And there was not any authority for him to take the case where sentence of death had been passed, no authority of law which authorized him or required him to send them back to the division commander?

Gen. BETHEL. No express authority, but such action was legally appropriate and conducive to justice.

Senator WARREN. And of course he could not remit them?

Gen. BETHEL. No, sir.

Senator LENROOT. May I ask you, General, how many death sentences were imposed, I do not mean executed. I see you speak of 44, but I see that only includes those which the commander in chief had power to confirm?

Gen. BETHEL. Yes, sir.

Senator LENROOT. How many others were there?

Gen. BETHEL. It seems to me that includes all that were adjudged in the American Expeditionary Forces.

Senator LENROOT. That did not include these four boys, for instance?

Gen. BETHEL. No; these 44 include those who came before the commander in chief for confirmation, for his action.

Senator LENROOT. How many more were there, if you know, that did not come before him for confirmation?

Gen. BETHEL. I could find out from my records, but I think not more than, I should say, not to exceed a dozen, Senator.

Senator CHAMBERLAIN. Death sentences?

Gen. BETHEL. Yes, sir; death sentences.

Senator WARREN. Could you in looking over your notes finally insert the number?

Gen. BETHEL. Yes, sir; I could. I can recall three or four now. I remember one particularly where he recommended that it be carried into effect, and I remember a number of others—I had better not state any further. My memory is not reliable.

(NOTE BY GEN. BETHEL.—In addition to the four cases heretofore referred to there were four other death sentences which required the action of the President; one of such was recommended to be executed, two were recommended to be commuted and one to be disapproved.)

Senator LENROOT. You can show those in the record where the recommendation was made for the reduction of the sentence, or where recommendations were made to carry out the sentence.

Gen. BETHEL. Yes, Senator, I shall just continue this tabulation so as to show those numbers.

I may say here also with reference to the death sentences that were carried into effect, 11 for murder and rape, that I take the absolute responsibility for what was done in those cases, and that I gave each one of those cases the most careful personal study, reading all the evidence in every case and generally rereading it, and that I feel personally responsible for the infliction of that sentence in each of those 11 cases.

Senator WARREN. Did any of them acknowledge their guilt?

Gen. BETHEL. Well, some of them did, but how many I do not remember.

Senator WARREN. That is not a controlling factor.

Senator LENROOT. In those cases, General, were they of such a nature that where the death penalty was inflicted, the same punishment would have been inflicted under the civil law?

Gen. BETHEL. I am glad you asked that question, Senator. I suppose in many of our States the death sentence is not enforced for rape. I think in practically all of them it is for murder. Most of these were rape cases. Now, we had quite a few murder cases among the 2,000,000 men of the American Expeditionary Forces, and we determined not to confirm and carry into effect the sentence of death in such cases unless we were very certain that such punishment would generally be carried into effect in the United States. In fact we leaned backward on that principle and commuted to life imprisonment or sent up for commutation by the President some pretty flagrant cases of murder. In fact, I can state the circumstances of the murder cases, where the death sentence was actually carried into effect. One was a very cold-blooded murder of a military policeman by a person who had been in desertion for quite a while and endeavored to effect his escape in that way. Another was committed by a negro upon a French professor who was endeavoring to prevent the negro from committing rape, which he was attempting at the time. The other two murder cases were in connection with rape which was being committed, and was committed at the same time.

We had a number of murder cases where the man was apparently somewhat under the influence of liquor, or where there was some degree of provocation, where he felt aggrieved and was in more or less hot blood, and in none of those cases did we carry out the sentence of death.

Senator CHAMBERLAIN. All of those are in your list here, in your detailed statement?

Gen. BETHEL. Yes, they are in this list, and I am speaking of cases where Gen. Pershing had the power to carry the sentence into effect.

Senator WARREN. What is the penalty in your State for rape?

Senator LENROOT. We have no death penalty. But, of course, I see that in this situation the death penalty for rape would be very much more proper as a deterrent than it would in civil life.

Gen. BETHEL. Yes, sir. In the first place, the article of war says that for rape the sentence shall be either death or life imprisonment, and under the special conditions existing there, where the women were defenseless, their men were all at the front, we felt it necessary to make an example on a clear case, and I am free to say that in nearly all the cases of rape that were tried, and in all in which there was a conviction, there was the clearest and most convincing evidence.

There was one case where a negro was convicted of rape and the sentence was approved and sent to our headquarters, and there was just a slight doubt as to the identity, and of course the sentence was disapproved by the commander in chief. That is one thing we had to be very careful about, that there was no question about identity, because, as you know, negroes look very much alike to us and still more alike to the French people. These rape sentences were not confined to negroes by any means. They were about equally divided between the two races.

Senator CHAMBERLAIN. You did not quite finish reading that.

Gen. BETHEL. No, sir, not quite [reading]:

On the whole, the court-martial system has worked well in the American Expeditionary Forces, and has proved its adaptability to war conditions. Difficulties were encountered, as indicated above, but they were not as great as in other fields of military administration and did not to an appreciable extent defeat the purpose of military trials—to enforce discipline. This was the first war test of the law establishing the special court and the law authorizing the President to empower other commanding officers to appoint general courts-martial than those designated in the Articles of War. Both provisions of law have proved invaluable. In fact, great embarrassment would have resulted had not the President the authority to delegate the power to appoint general courts-martial.

Cases were generally well tried. There were, of course, some poorly tried cases, but the percentage of such was not, in my opinion, greater than in peace times. In the majority of the cases it was apparent from the way the trial was conducted, as shown by the record, that not only the Judge Advocate and counsel, but some members of the court also, were professional lawyers.

With reference to that last remark, some other judge advocates have expressed a different opinion from what I have stated here with respect to the thoroughness of the trials. Of course I only read the record generally in the more important trials, the dismissal of officers and death cases, though in some other cases of soldiers. I think that these trials for thoroughness average as well as the cases I read for 10 years as a department judge advocate in time of peace, but that is an opinion that is expressed only on somewhat limited experience. I only read a certain class. A great many of them were very well tried.

Senator WARREN. That is your judgment from the experience you had?

Gen. BETHEL. That I had; yes, sir.

Senator CHAMBERLAIN. General, take your statistical record here, you say that there were in the aggregate 6,875 general court-martial cases during the years 1917, 1918, and 1919.

Gen. BETHEL. In the A. E. F.?

Senator CHAMBERLAIN. Yes.

Gen. BETHEL. Six thousand eight hundred and seventy-three it indicates; yes, sir.

Senator CHAMBERLAIN. That is right, is it not?

Gen. BETHEL. Total trials for 1917, 1918 up to June 30, 1919, yes, sir.

Senator CHAMBERLAIN. Now, have you any record to show what the aggregate of the sentences was upon those whose sentences were permitted to stand?

Gen. BETHEL. No, sir; I had submitted to Gen. Pershing, and I have a record myself, a large, tabulated record, showing the sentences in every case, together with such remissions as were thereafter made, but I never added up the aggregate, no, sir. I have not any idea as to what the aggregate was.

Senator CHAMBERLAIN. Could you furnish that?

Gen. BETHEL. I think so.

Senator CHAMBERLAIN. I would like to have it in the record.

Gen. BETHEL. The aggregate of years of confinement, you want, do you not?

Senator CHAMBERLAIN. Yes.

Senator WARREN. You want the original sentence?

Senator CHAMBERLAIN. The whole amount.

Senator WARREN. You do not want to follow them down to what has happened to them since?

Senator CHAMBERLAIN. No; just the aggregate sentence.

(NOTE BY GEN. BETHEL.—The aggregate was 12, 410½ years.)

Senator CHAMBERLAIN. Now I note in 1917 there was a total of 121 convictions, 110 of which were approved and 11 disapproved?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. You then disapproved practically about 10 per cent?

Gen. BETHEL. Apparently so; yes, sir. Of course this is of the A. E. F., which was not very large at that time. There was the S. O. S., and about 4 divisions of the A. E. F. at the end of that year.

Senator CHAMBERLAIN. In addition to these general courts-martial you say that conditions were such that generally trials were had by special courts?

Gen. BETHEL. Oh, yes; the great majority of cases. The minor cases were tried by special courts and summary courts.

Senator CHAMBERLAIN. Do you know how many trials by special courts there were?

Gen. BETHEL. No, sir; they are tabulated in the Judge Advocate General's Office. The judge advocates sent reports to the Judge Advocate General's Office of the number of special courts-martial trials.

Senator CHAMBERLAIN. They did not come to you?

Gen. BETHEL. No, sir; except as they sent copies.

Senator CHAMBERLAIN. You had no jurisdiction?

Gen. BETHEL. I had no jurisdiction over them. I did not concern myself with them a great deal.

Senator CHAMBERLAIN. Do you know how many summary court cases there were?

Gen. BETHEL. I have no idea as to the number.

Senator CHAMBERLAIN. They did not come to you?

Gen. BETHEL. No, sir.

Senator CHAMBERLAIN. These sentences of general courts-martial come to you and you review them carefully and afterwards they are approved or disapproved?

Gen. BETHEL. The ones that require the action of the commander in chief. His authority for action on a court-martial was limited. Of course Gen. Pershing could have convened courts throughout the A. E. F., but he did not do it. The law authorizes division commanders and section commanders to convene general courts-martial for their own commands, and Gen. Pershing only appointed courts-martial for those few troops which were under his command but not under the command of any other officer having authority to appoint general courts-martial. But Gen. Pershing, as commander in chief of the army in the field, was confirming authority of sentences of death and of dismissal coming up from other court-martial jurisdictions, and those cases of course were given the closest attention.

Senator CHAMBERLAIN. Those are the cases you refer to in this statistical table?

Gen. BETHEL. No; those were the cases that came under his special jurisdiction as confirming authority. But this table, however, includes the other cases that were finally acted upon by the

reviewing authorities in the various divisions and sections of the S. O. S.

Senator CHAMBERLAIN. What I was getting at was, where you found authority and what authority did you have with reference to cases which came up to you for review?

Gen. BETHEL. It is in the Articles of War.

Senator CHAMBERLAIN. What article?

Gen. BETHEL. In the forty-eighth article of war the authority that appoints a court must act upon the sentence, must approve or disapprove. Now, in those few cases where Gen. Pershing appointed the court he became the reviewing authority and the only authority.

Senator CHAMBERLAIN. There is no question about that?

Gen. BETHEL. No question about that.

Senator CHAMBERLAIN. Divisions, for instance.

Gen. BETHEL. Divisions, and sections of the S. O. S. The commanding generals there were the final authorities as to those cases unless the sentence involved the dismissal of an officer or the death penalty, and in those cases it required the action of the commander in chief, as confirming authority.

Senator CHAMBERLAIN. So that corps cases, the division cases, the brigade cases, and the lower-court cases did not reach you at all except in the classes which you mentioned?

Gen. BETHEL. Except in the classes which I mentioned. The records of general courts-martial came through our headquarters on their way to Washington and we looked at them in order to see what the disciplinary conditions in different parts of the A. E. F. were, and once in a while a remitting authority was exercised by Grn. Pershing.

Senator CHAMBERLAIN. Did he in other places than where he had appointed the court?

Gen. BETHEL. Yes; the higher authorities had power to remit.

Senator CHAMBERLAIN. Did you consider that you had power to review, reverse, or modify a decision?

Gen. BETHEL. No, sir.

Senator CHAMBERLAIN. You confined your recommendations to the commanding general to recommendations of approval or disapproval?

Gen. BETHEL. Now, we are liable to misunderstand each other. In cases that came before Gen. Pershing for his approving or confirming authority, he had the power to remit, mitigate, approve, or disapprove. In cases that did not come before him for his approving or confirming authority, and had been finally acted upon by a lower authority and had gone into effect, then Gen. Pershing's only authority was to remit, if he chose to do so. He had that authority because the man was serving a sentence under his jurisdiction.

Senator CHAMBERLAIN. What I am trying to get at is, General, you know the controversy that has been waged here, Gen. Crowder holding that under the law he has no authority to reverse, or to modify, or to set aside a sentence of a court-martial except in cases where there is a want of jurisdiction, or where there are irregularities in the trial. Now, has the commanding general any greater power than that?

Gen. BETHEL. No, indeed; Gen. Pershing had no legal authority whatsoever over a sentence finally approved by one of his lower commanders. His authority in such cases was confined to remitting the punishment of a man that might be serving in the A. E. F., he being the supreme commander.

Senator WARREN. Something in the nature of a pardon, do you mean?

Gen. BETHEL. Yes, sir; the remission of punishment.

Senator CHAMBERLAIN. You are referring to Gen. Pershing. I am not trying to make this personal, as I have a very high regard for him.

Senator WARREN. You mean the commander in chief?

Senator CHAMBERLAIN. I am trying to get at the construction of this statute. I am not trying to fix any responsibility upon Gen. Pershing. But I want to find out to what extent there is for that reviewing power under your construction of the law.

Gen. BETHEL. The law was perfectly clear so far as the powers of the commander in chief were concerned. He was the reviewing authority in the cases of courts appointed by him, and he was the confirming authority in cases of dismissal and death adjudged by lower commanders.

Senator CHAMBERLAIN. I think there is no question about that. There is no difference between us there.

Gen. BETHEL. And he also had the authority under the Articles of War to remit a punishment which had been approved and had gone into effect, and which was being served in his command.

Senator CHAMBERLAIN. Where does he get that?

Gen. BETHEL. From the Articles of War expressly, and that was the end of his authority under the Articles of War.

Senator CHAMBERLAIN. Now, what was this General Order No. 7?

Gen. BETHEL. General Order No. 7 was issued by the War Department in the spring of 1918, and provided that before the sentence of dismissal of an officer or a death sentence or a sentence inflicting dishonorable discharge of a soldier should be carried into effect, the record of trial should be submitted to the Judge Advocate General's Office for determination of the legality of the trial. Whereupon, the examination having been made, the record would be returned to the reviewing authority for his final action.

Senator CHAMBERLAIN. What was the genesis of that order? Do you know in what it had its origin? What was the occasion of its adoption?

Gen. BETHEL. No; I do not. I was in France, and it came out of a clear sky so far as we were concerned in France.

Senator CHAMBERLAIN. Let me ask you if, in August, 1918, Gen. Crowder did not write you a letter on the subject, in substance the purpose of which was that some rule must be adopted or something must be done to head off a congressional investigation as to court-martial systems?

Gen. BETHEL. He wrote me a letter. I think the letter—I have read Gen. Ansell's testimony before this committee, and came across this letter in the printed record, and I have no doubt that it is a correct copy of the letter that was sent me. I remember getting such a letter, and I have no doubt that it is a correct copy of the letter.

Senator CHAMBERLAIN. You remember the letter?

Gen. BETHEL. I remember rather vaguely the letter; yes, sir.

Senator CHAMBERLAIN. You would have it in your papers?

Gen. BETHEL. Undoubtedly; at least I presume it is in my files.

Senator CHAMBERLAIN. If the letter which is printed in the record is incorrect, and you find it incorrect with a comparison of your files, will you put in the correct one?

Gen. BETHEL. I shall have a verification made.

(NOTE BY GEN. BETHEL.—The letter is correctly set forth in the printed record.)

Senator CHAMBERLAIN. In that letter to you, did he not also state that this General Order No. 7 was to prevent our effort toward the establishment of a military court of appeals?

Gen. BETHEL. I do not recall the substance of that letter, Senator, because in fact it made practically no impression on my mind. The important part of that letter to me was this: When the office of acting judge advocate general was established in France, the branch office of the War Department, of which I was ordered to take charge temporarily, the cable, through a mistake in code numbers, as we received it, directed a certain captain of Infantry to take charge, and we assumed that that captain of Infantry was on his way to France, and therefore the office was not established at once, but about a month later the error was discovered, and then I established the office; and that was the most important thing that Gen. Crowder wrote to me about, as I remember.

Senator CHAMBERLAIN. The order was adopted without consultation with you in the first place?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And the letter was in the nature of an apology for adopting order No. 7?

Gen. BETHEL. I do not know about it, Senator. I think that letter was a good deal later, if I am not mistaken.

Senator CHAMBERLAIN. Did you favor the adopting of General Order No. 7?

Gen. BETHEL. I do not think I did, Senator, in so far as it related to cases in the A. E. F. It had its advantages and it had its disadvantages, but I do not think that on the whole I was in favor of it at the time. Now it was of great assistance to me in this respect, especially in the beginning, that I was very short-handed and the presence of an office there to make an immediate examination of the records that I had to examine for legal defects was a great deal of help to me, and in that way I did welcome it.

Senator CHAMBERLAIN. You represented—you actually stood in the place of—the Judge Advocate General over there? You were given practically the functions, the authority, of the Judge Advocate General here, so far as the American Expeditionary Forces were concerned?

Gen. BETHEL. I should hardly put it that way, Senator. The law confers certain powers on the Judge Advocate General. I was not his deputy, and really my powers under the law would be uncertain, I think, except as they are derived from the customs of the service. I was the legal adviser to Gen. Pershing, and as such, supervising the administration of military justice throughout France as far as it was practicable.

Senator WARREN. Of course in using names you mean the commander in chief.

Gen. BETHEL. Pardon; I should say that, though we had only one commander in chief.

Senator CHAMBERLAIN. I want you to understand that I am not undertaking to reflect on the commander in chief. I am trying to get at the method of administration under this law.

Gen. BETHEL. Do not think, Senator, that I even suspected that you did.

Senator CHAMBERLAIN. Was your opinion as to matters of law, as representing the department of military justice over there, regarded as final under General Order No. 7?

Gen. BETHEL. No, sir—well, you mean during the short time that I had charge of the branch office, which was about a month?

Senator CHAMBERLAIN. Yes, or any other time.

Gen. BETHEL. I want to understand the question.

Senator CHAMBERLAIN. I will put it this way: Did not Gen. Kernan refuse to take your view of the law?

Gen. BETHEL. Not my view, no sir.

Senator CHAMBERLAIN. Your department.

Gen. BETHEL. I think he refused to adopt Gen. Kreger's view of the law on two occasions. I think he did. I did not see the papers; I don't say that he did.

Senator CHAMBERLAIN. Was Kreger occupying a position in your department?

Gen. BETHEL. No, sir. Kreger's office and mine were entirely distinct.

Senator CHAMBERLAIN. What was his?

Gen. BETHEL. Kreger had charge of the branch office of the Judge Advocate General.

Senator WARREN. That is, the regular office of the Judge Advocate General?

Gen. BETHEL. Yes, sir. The distinction should be clearly borne in mind. I was judge advocate of the A. E. F., the chief law officer of the A. E. F. Gen. Kreger had an office which was a branch of the War Department, a branch of the Judge Advocate General's office of the War Department, and his office was not a part of the A. E. F.

Senator CHAMBERLAIN. He really represented the Judge Advocate General?

Gen. BETHEL. He really represented the Judge Advocate General at Washington.

Senator CHAMBERLAIN. Yes. Did not Gen. Kernan decline to follow his directions?

Gen. BETHEL. I think he did on two occasions. I am saying that only on hearsay.

Senator CHAMBERLAIN. Did not Gen. Hull, for instance—what position did he occupy?

Gen. BETHEL. Col. Hull was judge advocate of the S.O.S. until he became finance officer of the A. E. F.

Senator CHAMBERLAIN. Do you not know of cases where he advised Gen. Kernan not to observe the decisions of Kreger?

Gen. BETHEL. I do not know of that, but it is probable—well, I do not know. I will say in connection with the matter that my office always conformed to the decisions of the Acting Judge Advocate General except that we went and saw him when we thought he was

mistaken, and had him correct some of his decisions, and in two cases where I felt very certain that he was wrong I appealed to the Judge Advocate General's Office in Washington.

Senator CHAMBERLAIN. You were of the opinion that a commanding general's rulings upon questions of law were final, were you not? Gen. BETHEL. So far as his own action is concerned.

Senator CHAMBERLAIN. Well, yes, in any way, whether official or not.

Gen. BETHEL. They are only in the same way that any man's decisions are final for the time as regards his own action.

Senator CHAMBERLAIN. What was General Order No. 84?

Gen. BETHEL. I think General Order No. 84 modified General Order No. 7, somewhat, but I could not state from memory in what respect.

Senator CHAMBERLAIN. You have a copy of it, have you not?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. Will you not put that in the record, General?

Gen. BETHEL. Yes, sir. General Order No. 84, War Department, 1918? I will insert the part of it which is pertinent here.

(The part of the order referred to is here printed as follows:)

GENERAL ORDERS, No. 84.

WAR DEPARTMENT,
Washington, September 11, 1918.

* * * * *

IV. The last subparagraph of Section II, General Orders, No. 7, War Department, 1918, is amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or by part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file. (250.47, A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
Acting The Adjutant General.

Senator CHAMBERLAIN. Yes, sir. You do not question the legality of General Order No. 7, and of General Order No. 84?

Gen. BETHEL. No, sir; I do not think I have questioned the legality of General Order No. 7.

Senator CHAMBERLAIN. Or 84?

Gen. BETHEL. No; I think not. There was one of those orders possibly, that I was about to recommend that its effect be made definite and certain when it was amended. I think that was No. 7.

Senator CHAMBERLAIN. Did you protest against it?

Gen. BETHEL. No; I did not protest.

Senator CHAMBERLAIN. You accepted it without question?

Gen. BETHEL. We discussed it some. We discussed it some there at our headquarters when we first heard of it. I know that Gen. Harbord thought it was inadvisable. The only discussion I ever had of it or concerning it with Gen. Pershing, I think amounted to this, I told him I disliked very much to see a military agency established in the A. E. F. which was not a part of the A. E. F., and I remember that he expressed the same opinion.

Senator CHAMBERLAIN. That was Kreger?

Gen. BETHEL. Yes; it was an office that was not a part of the A. E. F. I think I also stated that it would be somewhat dangerous if when we got into Germany and tried Germans by military commission, to have to send the record some distance and to wait for some time before we could carry the sentence into effect. I think I expressed myself to that effect.

Senator CHAMBERLAIN. Was not that order subsequently revoked?

Gen. BETHEL. General Order 7?

Senator CHAMBERLAIN. Yes.

Gen. BETHEL. Some order, I think 84, modified it.

Senator CHAMBERLAIN. Was not that done, General, at your insistence, and after your discussion of the subject?

Gen. BETHEL. No, sir; I do not think that I had anything whatsoever to do with the modification. I do not think so; in fact, I am sure I did not.

Senator CHAMBERLAIN. Well, did not the War Department go to the extent of abolishing the office of Judge Advocate General in France?

Gen. BETHEL. Yes, sir; and we insisted most strenuously that it be reestablished.

Senator CHAMBERLAIN. That is when you complained about order No. 84?

Gen. BETHEL. No; I never made any complaint respecting General Order No. 84.

Senator CHAMBERLAIN. I would just like to know.

Gen. BETHEL. I will tell you my recollection with regard to the abolition and the reestablishment of the branch office of the Judge Advocate General in France.

Senator CHAMBERLAIN. That was Kreger?

Gen. BETHEL. Yes, sir. In the spring of 1919 a cable was received directing Gen. Kreger to return to the United States, that the office of Acting Judge Advocate General in France was abolished, and that all orders relating to it were revoked. I made a careful study of the effect of that cable, and took the advice of the other military lawyers there, and we all agreed that the effect of that cable was to abolish all review by the Acting Judge Advocate General or the Judge Advocate General's Office before we should confirm the sentence or before we should approve the sentence. I had doubts as to whether the War Department really meant to do that, and so a cable was sent asking if that was the intent. The War Department replied by a cable that it was intended that all records should be sent to the United States for examination in the United States before we should carry the sentence into effect. Now you see what delay that would involve, and we immediately asked that that office be reestablished, and it was reestablished.

Senator CHAMBERLAIN. You had changed your mind about it in the meantime? You did not think it was advisable at first that a representative of the Judge Advocate General's Office should be there in France under General Order No. 7, but you later decided to have a representative there?

Gen. BETHEL. No; I can not say it was so much a change of mind in that respect; but if we had to send the records to the Judge Advocate General's Office for examination before we could carry a sentence into effect, then I wanted the branch office reestablished in order that there might not be delay.

Senator CHAMBERLAIN. I think you were perfectly right about that, sir.

Gen. BETHEL. I had not positively made up my mind as to whether the jurisdiction originally given by G. O. No. 7 to the branch office was a good thing or not.

Senator CHAMBERLAIN. But the department was assuming that, when Kreger was recalled, the records would come here?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And that was what you were protesting against?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. In other words, that there would be this circumlocution?

Gen. BETHEL. This great delay. Men would be waiting to find out what their sentences were, and they would have to be kept in confinement, to the great inconvenience of the military authorities in France, because it is very important that military justice be as quick as possible.

Senator CHAMBERLAIN. How did you do before Kreger went over as the representative of the Judge Advocate General?

Gen. BETHEL. No examination by the Judge Advocate General's office was required before that time, and we would carry the sentence into effect at once. That had been the method in vogue in the Army since the beginning.

Senator CHAMBERLAIN. When did The Adjutant General change the rule with respect to that?

Gen. BETHEL. That was General Order No. 7.

Senator CHAMBERLAIN. I can understand your reason. The Articles of War never define penalties in time of war, but leave it to the direction of the court, do they not?

Gen. BETHEL. Yes, sir; they do not define penalties to any great extent. They authorize the President in times of peace to prescribe the maximum penalties, but that is only in times of peace.

Senator CHAMBERLAIN. Who defines the penalty in time of war?

Gen. BETHEL. In time of war it rests with the court.

Senator CHAMBERLAIN. Do you think the Articles of War ought to define the penalty?

Gen. BETHEL. Ought to prescribe the maximum penalty?

Senator CHAMBERLAIN. Ought to fix the penalty some way, or leave it entirely to the military tribunal, the court?

Gen. BETHEL. In that respect, I favor the articles as they at present exist. The Articles of War authorize the death penalty or the penalty of dismissal in certain cases, and in other cases they leave the sentence to the discretion of the court.

Senator CHAMBERLAIN. You do not think it is necessary that the Articles of War define the offense?

Gen. BETHEL. Where there is doubt as to the offense I think they should.

Senator CHAMBERLAIN. Do you know that the ninety-fifth and ninety-sixth articles of war are very broad?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And they permit the military authorities to try a man for anything prejudicial to good order and military discipline?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. Do you not think it is a very broad power?

Gen. BETHEL. It is a very broad power. I have often thought that it confided to the court the power of legislator and judge.

Senator CHAMBERLAIN. Do you not think it is too broad?

Gen. BETHEL. My experience has not taught me that it is, Senator.

Senator CHAMBERLAIN. Do you think that it is necessary?

Gen. BETHEL. I believe that you have got to have some general article. Of course the effect of it can be diminished by more specific legislation, by enumerating a greater number of offenses as military offenses.

Senator CHAMBERLAIN. Now, General, what have you to say in reference to a court of appeals, a military court of appeals of some kind, where the appellate tribunal would have greater power than the Judge Advocate General has now?

Gen. BETHEL. I have read Gen. Ansell's testimony before this committee very hurriedly and I learned of the cases known as the Texas mutiny cases, and I presume no doubt that there are other cases somewhat similar to those from time to time, and I think there should be a power to correct and reverse any illegal judgment that has been rendered.

Senator CHAMBERLAIN. I am glad to hear you say so. I think there is no question about that.

Gen. BETHEL. I feel that the pardoning power is not sufficient in such cases.

Senator CHAMBERLAIN. It does not remove the stigma of conviction.

Gen. BETHEL. It does not, because a pardon presupposes guilt.

Senator CHAMBERLAIN. Yes, sir.

Gen. BETHEL. It does not establish the fact that there was an illegal conviction.

Senator CHAMBERLAIN. No matter whether there was prejudicial error in the trial or whether the trial was irregular or not?

Gen. BETHEL. If for any reason the conviction was illegal or on insufficient evidence, or if there was a great abuse of discretion on the part of those who imposed and approved the sentence, I believe there ought to be a correcting power somewhere that can sweep away the determination of guilt.

Senator CHAMBERLAIN. Because if a man is guilty, whether clemency is exercised or not, he goes out into the world with the stamp of the convict on his brow, denied the right of citizenship and deprived of many rights.

Gen. BETHEL. For desertion in time of war, I think now he loses his right of citizenship.

Senator CHAMBERLAIN. Have you formulated in your mind any system of appeals, what it ought to consist of, how its functions should be exercised?

Gen. BETHEL. No, Senator; this subject is pretty new to me. You see we have been very busy in the A. E. F. and have heard nothing of these discussions going on here at all, and I have only been considering it in the last three days, since receiving the summons from this committee, so I am not prepared to say just yet what I would recommend in that line.

Senator CHAMBERLAIN. Well, you know this from your contact with the Judge Advocate General's office, that in his view of the law, his construction of section 1199 of the Revised Statutes, he only has an advisory power where the court had jurisdiction and there were no irregularities in the trial. You think that is not broad enough?

Gen. BETHEL. I think that some one ought to have the power to say that the trial is illegal and that the judgment is void.

Senator CHAMBERLAIN. That there was prejudicial error?

Gen. BETHEL. Yes; that there was error rendering the judgment void.

Senator CHAMBERLAIN. Or impairing some substantial right of the defendant. Would you go that far?

Gen. BETHEL. Yes; substantial right. Well—

Senator CHAMBERLAIN. If evidence was admitted that ought not to have been admitted against a man, for instance, and might possibly have been a factor in his conviction, ought there not be some tribunal to reverse the judgment on that question?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. I am glad to have your opinion along that line.

Now I am monopolizing all the time.

Senator WARREN. We are getting the benefit of all your work, are we not?

Senator LENROOT. Certainly.

Senator CHAMBERLAIN. Now, there is one other question. We have had a very able discussion of the systems in vogue in Great Britain and France, for instance, the functions and powers of the judge advocate general in Great Britain, who is a civilian, and the duties and powers of a judge advocate in the field and in the Army. Now what do you understand are the functions of the judge advocate in France with the expeditionary forces, whether he occupies the position which you do with the commanding general or whether he is with a division commander or corps commander or what not? What is his function?

Gen. BETHEL. The judge advocate of the American forces in France with respect to military justice bears the same relation to that command as the judge advocate of a division does to a division, or the judge advocate of any other court-martial jurisdiction does to that jurisdiction. You understand that the commanding general in France has not the power now to carry into effect the sentence of death or the dismissal of an officer. His power is precisely the same as any other commanding general.

Senator CHAMBERLAIN. What I want to get at particularly is, does the judge advocate in any branch of the service, whether it is with a

larger or smaller unit act only in the capacity of an adviser to the court or does he prosecute for the Government?

Gen. BETHEL. Are you speaking now of the judge advocate of the command known as the American forces in France, or are you speaking of the judge advocate of the general court-martial in France?

Senator CHAMBERLAIN. I am speaking of them generally.

Gen. BETHEL. The conditions among our troops in France with respect to military justice are precisely the same as they are in mobilized divisions in the United States or one of the departments in the United States.

Senator CHAMBERLAIN. Well, now here is a man on trial before a general court-martial. Who prosecutes him?

Gen. BETHEL. The judge advocate of the court, the officer who has been detailed as judge advocate of the court.

Senator CHAMBERLAIN. In a special court he does the same thing?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And in a summary court he does the same thing?

Gen. BETHEL. There is no judge advocate in the summary court. That consists of only one officer.

Senator CHAMBERLAIN. Now, then, the judge advocate prosecutes or brings out the evidence for the Government?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. Does he act as an adviser for the court or does he act as an adviser for the defendant or undertake to protect the interests of the defendant?

Gen. BETHEL. The judge advocate of the court-martial is presumed to advise the court, but he does not do so very often unless the court calls upon him to look up the law on some particular point. Unfortunately, however, the judge advocate of a court is much of the time an officer who is not specially skilled in the law, and he is hardly competent to advise the court as to a serious legal question.

Senator CHAMBERLAIN. I believe that is all I desire to ask the General now.

Senator LENROOT. I think I have just one question, General. If a court of appeals were created, making it a legal tribunal and the jurisdiction of that were limited to passing upon errors of law, but with no right to pass upon the case de novo from the record, in other words, to substitute its judgment on the face of the facts for that of the court-martial, do you think that that would be impracticable?

Gen. BETHEL. No; it would not be impracticable.

Senator CHAMBERLAIN. Well, would that interfere with discipline or the command if the passing upon facts was wholly left to the military side?

Gen. BETHEL. And if the court were merely to examine the record to see whether the sentence is legal, whether the trial is legal?

Senator WARREN. You mean a court outside of the military line?

Senator CHAMBERLAIN. Well, of the judge advocate's department, composed of lawyers, but within the service.

Gen. BETHEL. No; I do not see that it would.

Senator CHAMBERLAIN. Do you think that would be beneficial?

Gen. BETHEL. Yes, I think it would; because no matter how careful the reviewing authority, with the advice of his judge advocate—and of course the staff judge advocate is really the reviewing author—

ity—but no matter how careful he may be, or even how learned—and he is not always as learned as he ought to be—of course there is bound to be an error now and then which ought to be corrected. Now, the only thing that I fear in the matter of a court of that kind is that it will draw to itself too much power, try to find error where really no substantial error exists. That will be the tendency, I fear. But still I think there ought to be a court or a board or whatever you may term it. I myself would prefer to have it composed of military officers in the Judge Advocate General's Office, but I think there ought to be a body to make an examination of the record for that purpose.

Senator CHAMBERLAIN. You say there would be a disposition, you think, for that body to draw to itself more power than it ought to and try to find error whether or no?

Gen. BETHEL. Where the error is not substantial, that is the tendency and that will have to be carefully guarded.

Senator CHAMBERLAIN. General, that is not true of appellate tribunals in the States and in the Federal courts. They usually are just the opposite.

Gen. BETHEL. They try to dodge?

Senator WARREN. In the Supreme Court of the United States even.

Senator LENROOT. Do you think a military tribunal would be more apt to look for errors than a civil court would?

Gen. BETHEL. No; I do not think that they would.

Senator LENROOT. Would not the presumption be to the contrary rather than otherwise?

Gen. BETHEL. Well, I do not know, Senator, I really do not.

Now if you gentlemen will pardon me, I am probably speaking from experience. I have had charge of the judge advocate's office of the A. E. F., and know something of the work in the acting judge advocate general's office then, which was wholly independent of my office.

Senator CHAMBERLAIN. Gen. Kreger?

Gen. BETHEL. Gen. Kreger had an excellent office, and had a number of excellent lawyers as assistants. Now, it does seem to me that at times they were attaching too much weight to inconsequential error. Now, that is the sort of thing I fear. I trust my fears may not be well grounded.

Senator LENROOT. As I gather from such testimony as I have heard with relation to this military court of appeals, I gather that there was the fear that a court consisting of the representatives of the Judge Advocate General's office would pass upon the adequacy of the sentence and the punishments and not having that knowledge of military needs and discipline, would not be in a position to give such judgments as military discipline might require. But it has occurred to me that that could not be true, in so far as their power to review for prejudicial error is concerned.

Gen. BETHEL. I agree with you, Senator. I certainly would not desire to see any court, civil or military, sitting in Washington having the power to set aside and disapprove a sentence on the ground that they thought it was too severe, because such a court will have little or no conception of the necessities of military discipline in the far-away field.

Senator WARREN. It would not have in time of war?

Gen. BETHEL. Of course we must always think of a time of war when we are thinking of military law.

Senator LENROOT. But if such a court had the power to set aside such a verdict and send the case back for prejudicial error, so that military officers, after all, had control of the sentence, there could not be any objection?

Gen. BETHEL. There would not be in theory. I doubt the advisability of sending a case back a long distance. It would be impossible to call the court together again.

Senator LENROOT. You could have a new court like a new trial court in civil life and a new jury?

Gen. BETHEL. But we are rather averse to new trials in the military service, possibly without reason. We feel that military justice ought to be swift and we feel, in striving to convict the most guilty man, the Government had better bear the loss of a conviction rather than pursue it further.

Senator LENROOT. It is your idea that where prejudicial error has occurred that should end the case?

Gen. BETHEL. I would rather not make final answer on that point, Senator. I have always been very much inclined to dismiss a case that has been tried once, even where there has been no jurisdiction, rather than to pursue the man further, although I recognize that there has been no legal trial and you have the right to bring the person to trial. I have just read hurriedly the Kernan report and I find that it does make provision for a new trial. But I have not thought about the matter sufficiently to be willing to express an opinion.

Senator LENROOT. On another branch, I would like to ask one question. In this table of acquittals it appears that in the A. E. F. there were 1,062 acquittals approved and 149 acquittals disapproved. Generally speaking, what became of those acquittals that were disapproved?

Gen. BETHEL. That is merely an expression on the part of the reviewing authority that he does not agree with the court.

Senator LENROOT. That is the end of the case?

Gen. BETHEL. Absolutely.

Senator LENROOT. There was not in any of these cases, so far as you know, where the acquittal was disapproved, a subsequent finding of guilt?

Gen. BETHEL. There could not be.

Senator LENROOT. We have some testimony where there has been in the A. E. F.

Gen. BETHEL. No; where the reviewing authority acts upon a sentence by disapproving a sentence, that is the end of it. The trial is complete. Now, before acting on it at all, he may send it back to the court, or could, until recent orders, send it back to the court for reconsideration, stating the fact that he did not agree with their conclusions.

Senator LENROOT. What is the effect of disapproval of a trial, then?

Gen. BETHEL. It has the same effect in law as the approval of an acquittal.

Senator LENROOT. What is the purpose of a disapproval?

General BETHEL. It is merely an expression on the part of the reviewing authority that he believes the court should have found the man guilty instead of not guilty.

Senator WARREN. But the court dismisses the case?

Gen. BETHEL. The case is at an end. The case has been tried, and the Articles of War say that the accused can not be tried again.

Senator LENROOT. That is part of the Articles of War?

Gen. BETHEL. The Articles of War say that no man shall be tried twice for the same offense, and when a verdict of guilty or not guilty has been reached, the man has been tried, and when the reviewing authority acts on the case, it is at an end. Now until he acts on the case, he could, until recent orders, return the record to the court for a reconsideration of its finding.

Senator CHAMBERLAIN. He might have a conviction where there had been formerly an acquittal?

Gen. BETHEL. That can be done under the Articles of War, or could be until recent orders.

Senator LENROOT. But that can not be done under a disapproval of a trial?

Gen. BETHEL. No, when once disapproved, it is at an end.

Senator CHAMBERLAIN. I want to get that fixed in my mind correctly. We will say—I have a case in mind—here is a man who is charged with embezzlement and absence without leave. He is found not guilty of embezzlement and guilty of absence without leave. He is a commissioned officer and he is dismissed from the Army. Now the commanding officer who appointed the court sends that back and the man is retried on the same charge and found guilty of embezzlement and found guilty of being absent without leave and is sent to the penitentiary and dishonorably dismissed.

Gen. BETHEL. The reviewing authority, if he thought the officer should have been found guilty of embezzlement could return the record for reconsideration of the court on the charge of embezzlement.

Senator CHAMBERLAIN. Then the judgment is not complete until the reviewing authority gets it?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. But that kind of a case would be impossible?

Gen. BETHEL. That kind of a case was possible until recent orders.

Senator CHAMBERLAIN. A few months ago?

Gen. BETHEL. Just a month ago, quite recently.

Senator WARREN. You spoke of its preparation in June and its adoption in August or July.

Gen. BETHEL. I think that order was published in July. I am not sure. I know a copy just reached us in France before I came away.

Senator WARREN. I think there is nothing more, but we should be glad if the general would offer any suggestions or anything connected with his opinions and judgments on the main subject matter, that is on the bill before us, No. 64.

Gen. BETHEL. Yes, sir. I expressed myself a moment ago in answer to a question of yours as being opposed to the law providing in general, as bill 64 does, a maximum penalty for all times. I think it probably only just to myself and you that I should explain briefly my reasons.

Senator WARREN. I wish you would enter into that quite extensively, because that is a large question of fact as to whether we should specify innumerable maximum penalties or whether we should leave very much of it to the consideration of the various courts.

Gen. BETHEL. Now the penalty proper for an offense differs very much according to the circumstances. Let me illustrate it in this way. The offense of absence without leave for two or three days is under ordinary circumstances regarded as a very minor offense, possibly punished by a fine or forfeiture of three or four dollars, not more than that. Absence without leave in time of war, however, may be most serious. For example, when the Twenty-seventh Division, the New York National Guard Division, was in the line on the English front, there were a number of absentees. There were probably a dozen men who absented themselves, for what causes I do not know, for two or three days or three or four days.

Gen. O'Ryan, the commanding general, brought them to trial by a general court-martial and they were given, I think nearly all of them, a sentence of five years, without dishonorable discharge, for they were to remain with the colors. In other words, they did not escape the dangers of service, but went right on in service. That seemed like an outrageous sentence for the offense, and one of my assistants brought it to my attention immediately with the view of having it cut down. But I felt that Gen. O'Ryan was responsible for the discipline, for the efficiency of his division, and that these sentences had better stand for the time, which they did. Of course, when the armistice came those sentences were remitted by Gen. O'Ryan.

I merely state this case as showing the difference between absence without leave at one place and at one time and absence without leave at another place and another time. Now, if the law is going to prescribe a maximum penalty for every military offense that shall be effective at all times, in war as well as in peace, it must adopt a pretty heavy maximum and it will constitute an invitation to the court, and especially to green courts, which we have in time of war, to inflict that penalty regardless of all considerations.

Senator WARREN. You fear that it will incite severe punishment instead of making punishment less severe?

Gen. BETHEL. To my mind it would, especially if you have a sufficient maximum penalty to meet the more serious cases.

Senator WARREN. Now, in the case of Gen. O'Ryan, I take it the seriousness of that kind of cases was that if a dozen men could do that and pay a few dollars, a good many more would say that it was worth the price and act accordingly. In other words, the idea of the severe punishment was to prevent others from committing the same crime?

Gen. BETHEL. The object of all military punishment is to deter others from committing a like offense.

I would prefer that the Articles of War read, most of them just as they do now, with respect to the penalty, "as the court-martial may direct." If the court imposes too severe a penalty there are ample methods by which it can be remitted promptly. Every general court-martial record gets very critical examination in the office of the Judge Advocate General, where there is a clemency board or division at all times, and I have never known the Secretary of War to refuse to exercise clemency where the Judge Advocate General recommended it.

Senator CHAMBERLAIN. But by that clemency they do not remove the stigma of conviction?

Gen. BETHEL. I am speaking now of cases where the conviction was legal, where the man was duly convicted.

Senator WARREN. Where he should be punished, but where you limit the amount?

Gen. BETHEL. Yes, but where the punishment has been gross and excessive, we have an ample remedy at all times for the removal of the excess.

Senator WARREN. As to the sentences over there, what is your judgment, that they have generally been less severe or more severe than you would approve of; now as you look back over things? Looking back over your entire experience, would you approve of the sentences, under all the circumstances? I am speaking generally, of course.

Gen. BETHEL. Yes, sir, looking backward, I do not think that sentences as a rule were unreasonable under the conditions under which they were imposed. A number of sentences were two or three times as severe as they would be in times of peace. For example, the stevedores at the base ports were robbing boxes of pistols and rifles that were being shipped over for the use of our troops, and I suppose under ordinary circumstances the punishment for such an offense would not exceed a year, but several of those men were sentenced for five years and I think the looting was stopped.

Senator WARREN. They were selling them or just arming themselves with them?

Gen. BETHEL. What became of the stolen property I do not know.

Senator WARREN. But they were stealing them in quantities?

Gen. BETHEL. Yes, sir; breaking boxes open and depriving the United States of them, anyway. They were sent, several of them, for five years, and when hostilities ended, and they had served some six, seven, or eight months, we reduced the punishment to one year, to what it would have been in normal times. Now I think it was perfectly proper for the courts to do as they did, and I think it was perfectly right for us to do as we did later.

Senator WARREN. Has there been a general cutting-down of the sentences since the armistice and before returning to this country?

Gen. BETHEL. Yes, sir; almost immediately after the closing of hostilities we had an officer who had spent several years on clemency work in the Judge Advocate General's Office visit the two camps at Gièvres and St. Sulpice and examine every case.

Senator WARREN. We can understand then, can we, that immediately the extreme danger was over, all of these cases have been reviewed with the idea of clemency, to get them under the common law as soon as possible?

Gen. BETHEL. As soon as hostilities were over we took steps to mitigate the sentences to peace-time standards, or even further when discipline would not suffer.

Senator WARREN. I think you said you did not know much about matters as they were in this country?

Gen. BETHEL. No.

Senator WARREN. I was tempted to ask one or two questions as to the comparative severity, whether the degree of severity was compatible with the difference in surroundings, on this side and the other; then I was about to ask whether the same principles of clemency had been exercised and carried out in this country. I ask because I do not know.

Gen. BETHEL. I think the same steps were taken to exercise clemency over here as over there. Now whether the sentences were more severe here than in the A. E. F. I do not know. I have heard from papers and in other ways of some sentences in this country that appear to be grossly excessive, and I think much more excessive than any in the A. E. F.

Senator WARREN. They were really ridiculous?

Gen. BETHEL. Yes, I think so, Senator.

Senator WARREN. Unless you object to that word "ridiculous" that I used.

Gen. BETHEL. Some were ridiculous.

Senator CHAMBERLAIN. I think I agree that they were not only ridiculous but outrageous.

Gen. BETHEL. Of course there were ways to correct those sentences at once.

Senator WARREN. I assume that some of them were remedied, and I hope all of them.

Gen. BETHEL. I presume they were remedied quickly; they should have been.

Senator WARREN. One point you have not covered, either, is a matter of considerable difference between this present law and the proposed one; that is, the making up of the court by using privates and noncommissioned officers.

Gen. BETHEL. If the Senators have time, I have just marked a few things that I should be glad to speak of briefly.

Senator WARREN. We should like to hear from you on all those points, because that is our business here.

Gen. BETHEL. Shall I go ahead?

Senator WARREN. If you please.

Gen. BETHEL. Article 4 of the proposed bill proposes to place soldiers on courts along with the officers as members. I am not particularly hostile to this, but I think it is desirable that courts be as intelligent as possible and I think that the presence of soldiers on courts will render the court somewhat less intelligent, necessarily. If I felt that the soldiers in our service would feel that they were getting better justice by the presence of one or more of their comrades on the court, I would be willing to lose a little of the intelligence of the court.

Senator CHAMBERLAIN. General, I believe if I were going to be tried for any crime, I would rather be tried by a jury than by lawyers and judges. They do not go into the technical side of the question. They decide on the facts.

Gen. BETHEL. I do not believe a court of soldiers would be any more lenient toward the accused. I was told by the French officers that the soldier of the court was generally more severe in his judgment than the officer.

Senator WARREN. We were told that he was a noncommissioned officer of highest rank usually.

Gen. BETHEL. I think he is, yes. I think if you were to ask the soldiers in the service, I am speaking of regular soldiers, whom I know—the members of the temporary forces can speak better as to what they would want—I do not believe that they would desire their comrades on the court at all. The soldiers of the temporary forces can speak better for themselves than I can.

Article 5 proposes to have eight members in a general court-martial. I do not believe it is desirable to have an inflexible number. The exigencies of the service are such that although we begin a trial with a certain number of men, we are liable to end with a less number. If the law required eight at all times, you would have to add a new member from time to time, even add a member after all the evidence was taken.

Senator WARREN. You mean during the trial?

Gen. BETHEL. Yes, sir. It would sometimes happen that after practically all the evidence was in you would have to have a new member to vote at the end. So I am opposed to an inflexible number. Besides, the flexible number from five to thirteen permits us to convene such number as it is practicable to have sit.

Senator CHAMBERLAIN. You usually have five, do you not?

Gen. BETHEL. No, sir; the usual number is about nine. But it very frequently happened in important cases in the A. E. F., although the court would start with eight, or nine, or ten, that before the trial was over there would be only five.

The next objection I take to the articles in the bill is to article 8, which limits much more than the present law the persons who may appoint general courts-martial, and gives as a reason that to increase the number of appointing authorities is to increase the number of courts. I am in favor of just as few trials by general courts-martial as possible, but I do not believe that you would help that purpose any by putting obstacles in the way of appointment of courts. I would therefore prefer the law to remain as it is.

One very important provision that the bill has is that relating to the judge advocate and the powers that he shall have. It makes a judge advocate the presiding officer of the court, vests him with the power to decide all legal questions, and with many other powers. In other words, he becomes a judge and no longer a prosecutor.

I think it is extremely desirable to have a man learned in the law to preside in courts-martial and to decide all questions of law. It will require a good many more judge advocates, however, possibly a great many more than the person who drew this bill thought. However much we may endeavor to reduce the number of trials by general courts-martial, they are going to be necessary here and there, and in distant places, and the court-martial can not delay the trial of a case until a judge advocate can come from a long distance, or until he can get through presiding over the trial of some other case. In order that we may have prompt trials, trials that shall promptly follow the commission of the offenses, we must have a great surplus of judge advocates if we have one to preside at every general court-martial, so that I regard this proposition more as a practical question for you gentlemen in Congress as to whether you desire to increase the corps of judge advocates so much as will be necessary. The purpose of the office of judge advocate, presiding at a trial is excellent, because it will eliminate a great deal of irrelevant testimony, and I trust reduce the number of serious errors. As it is now, we have to disapprove a considerable number of cases because a serious error has been made to the prejudice of the accused, and learned judge advocates presiding at trials ought to be able to prevent that sort of thing.

Senator LENROOT. How much flexibility is there in the use of your word "prompt?"

Gen. BETHEL. It ought to be as prompt as possible; in time of war, it must be.

Senator LENROOT. What is the rule now between the commission of the offense and the finding of the court-martial? I do not mean rule, but how does it run?

Gen. BETHEL. It runs generally, I would say, from a week to a month, generally speaking.

Senator LENROOT. Generally speaking, a month would be the maximum.

Gen. BETHEL. Yes, sir. Of course, sometimes a witness becomes sick or has been sent a long distance away, and so on.

Senator CHAMBERLAIN. There has been a good deal of complaint that men were held in guard houses a month, two months, or three months before trial.

Gen. BETHEL. That ought not to be, except in the most unusual case where the witnesses can not be obtained.

Senator CHAMBERLAIN. And in other cases he was held a long time in the guardhouse before the court announced his decision.

Gen. BETHEL. Of course the records involving dishonorable discharge or a severe sentence now have to go to the Judge Advocate General for review; and it is impossible therefore under the present arrangement to have as prompt action as we had formerly.

Senator WARREN. Now, as to the length of time, what is the very shortest time in which a court-martial could be completed? I understand the accused has a certain time allotted him.

Gen. BETHEL. Senator, I have forgotten whether our recently enacted Article of War of 1916 provided a minimum time within which the accused should not be brought to trial. I have forgotten. We discussed it at the time. I do not know whether it was made five days or not.

Senator WARREN. I think some period is fixed. I do not know what it is.

Gen. BETHEL. I think it is a five-day period.

Senator WARREN. That is one reason why it could not be brought down less than a week. It would be a week anyway before you could proceed.

Gen. BETHEL. I certainly think an accused ought not to be required to stand an arraignment for three or four days except with his consent.

Senator WARREN. But if he consented to an immediate trial, it should be granted?

Gen. BETHEL. With his intelligent consent; yes.

Senator LENROOT. That is true in civil life.

Gen. BETHEL. I can not favor the transfer of the disciplinary power now vested in the commanding general, with his advisory judge advocate, to the judge advocate presiding at the trial, as is proposed in this bill.

Senator CHAMBERLAIN. What article?

Gen. BETHEL. Article 12. When I say transfer of power, you will observe that it is provided in paragraph (g) that the judge advocate, upon conviction of the accused, shall impose a sentence upon him.

Senator CHAMBERLAIN. Does not that mean that he shall pronounce the sentence that the court has found?

Gen. BETHEL. Maybe it does, Senator. I thought, from my hurried reading of it, that he was sole judge as to what that sentence should be.

Senator CHAMBERLAIN. It was not the intent. It is like the court passing sentence, but the verdict is by the jury.

Gen. BETHEL. Then I withdraw my objection.

Senator CHAMBERLAIN. Well, the context may have the interpretation that you place upon it. So you have discussed it from your viewpoint?

Gen. BETHEL. I think you are probably right, Senator.

Senator CHAMBERLAIN. You see there (g) [reading]:

Announce the findings of the court-martial and upon the conviction of the accused—

that is, by the court—

Gen. BETHEL. Yes.

Senator CHAMBERLAIN (continuing reading):

impose sentence upon him.

I think that would be my interpretation.

Gen. BETHEL. I did not read it that way.

With respect to article 23 of the bill, I heartily approve of giving the accused the right to two peremptory challenges before a general court and one before a special court.

Senator CHAMBERLAIN. Where is that; what section?

Gen. BETHEL. Article 23. I think it is very important that the accused feel that he is getting justice, and there are frequently members of the court against whom no challenge for cause can be made, but whom the accused would like to have removed from the court, as not fair-minded.

Now as to article 41, which provides a statutory requirement that the rules of evidence shall be the same as are recognized in the trial of criminal cases in the courts of the United States, I am doubtful as to whether the enactment would be beneficial. As a matter of fact, under the common law, military courts-martial observe those rules as far as they are capable now. If they were required by statute so to do, and the court were presided over by a judge advocate to enforce such requirement, I am afraid that the accused would be prevented from offering many things in his favor that courts allow him to offer now. Courts-martial are extremely liberal to the accused as to the character of the testimony that he offers. They are willing to make every sort of mistake in his favor.

Senator WARREN. You think that would lead to greater severity rather than to liberality.

Gen. BETHEL. I fear so. I see no necessity for the enactment of such a law.

With regard to article 46, I am in general accord. I have always believed that the mere majority should not be sufficient for conviction. I would go further even than the proposed article does. I would require four-fifths of the court to convict rather than two-thirds, and would make that rule of four-fifths general as to all offenses. I would not require a unanimous vote in the case of a death sentence.

Senator WARREN. Would not that be a little difficult to calculate?

Gen. BETHEL. No, sir; five is the minimum number of members. If more than one man in a court of five or if more than one man in a court of nine believes that the accused is not guilty, that the evidence is not sufficient, I would prefer to see the man acquitted.

Senator WARREN. Now, if you have seven or eight, and you take four-fifths of that, you would have one man where perhaps you wanted two in that number. How would you figure if you had seven or eight men?

Gen. BETHEL. If seven men sat on the court, and two of them voted not guilty, the man would be acquitted.

Senator WARREN. You do not confine it to four-fifths, then?

Gen. BETHEL. My rule would be that four-fifths of the members must concur in the finding of guilty. Then if there are seven members of the court—

Senator WARREN. Just what is four-fifths of seven?

Gen. BETHEL. It is between five and six, and therefore you must have six. In a seven-member court you must have six.

Senator WARREN. I believe the testimony before us is all the way from a majority to your figure of four-fifths, three-fourths, and two-thirds.

Senator CHAMBERLAIN. What is the next one?

Gen. BETHEL. Well, article 49 of course brings up the matter that we were discussing an hour or two ago. Article 49 of the bill provides that no sentence of death shall be carried into execution until approved upon review and in addition confirmed by the President. In other words, it takes from the commanding general of the armies in the field the power that he has always had, I believe, under the law, to carry a death sentence into effect for certain specified offenses. I am not favorable to the change that is here proposed, although my views may be very much affected by the fact that I have just been through an experience where I have had the responsibility of determining in large part these things myself, and I feel that, with the very able assistance I had at the general headquarters of the American Expeditionary Forces, the power to determine whether a death sentence should be carried into effect was not abused and will not be abused under like circumstances in the future. I think it is especially important, where our army is operating in a foreign hostile territory and where there may be guerrillas and other outlaws, that an example and an early example be made of such offenses, and that there would be a great delay if the records had to be forwarded to Washington for review by a court of appeals and a determination by the President.

Senator WARREN. I was just about to ask this: It is perfectly evident, it seems to me, from consideration of this subject, that you have got to have a different line of conduct permissible at the front in time of war from that permissible at home, or in peace time.

Gen. BETHEL. Yes, sir.

Senator WARREN. Now, that being the case, would you have two laws, one for peace and one for war, or one law with alternative provisions?

Gen. BETHEL. That is what we have now, Senator.

Senator WARREN. Or would you have one with different regulations?

Gen. BETHEL. We really have two laws now with respect to the death penalty—one for war and one for peace. In peace time no person but the President can order the execution of a death sentence.

Senator WARREN. That brings up the query again whether questions might not require different treatment at the front than elsewhere, not with the same emphasis, of course, as the death sentence.

Gen. BETHEL. I think I have expressed my views on the main changes which the bill provides. Among the minor changes I know that there are some that I am not in favor of, and there are others that I heartily favor, but I doubt whether it is advisable now for me to say anything about them. I should want, if I were going to express a mature opinion on the merits of this bill, to make a much more complete study of it than I have been able to do in the last two or three days.

Senator WARREN. The committee has been much pleased with your willingness to come and give us the suggestions you have.

Gen. BETHEL. There are two other officers who served in France and who have seen as long service as I have in the Judge Advocate General's Department—Col. Hull and Col. Morrow. They have had more experience in court-martial matters than any other officers in the Judge Advocate General's Department. They are at the War College.

Senator CHAMBERLAIN. Let us have them come up.

Senator WARREN. When we get along to it.

Gen. BETHEL. I wish you could also have Col. Winship, who is now in France. You should have him as well as the other two officers of whom I spoke, were it possible.

Senator WARREN. We are greatly obliged to you, and if we should wish to call you again, you may be able to come?

Gen. BETHEL. Yes, sir; I would feel honored.

Senator WARREN. Before the committee adjourns, I should like to present, for printing in the record, a letter addressed to me by Senator Johnson, of South Dakota, and the memorandum it refers to.

(The letter and memorandum are as follows:)

UNITED STATES SENATE,
Washington D. C., September 24, 1919.

HON. FRANCIS E. WARREN,
United States Senate.

DEAR SENATOR: I inclose herewith for the consideration of the subcommittee of the Committee on Military Affairs, of which you are the chairman, memorandum containing the views of Mr. Lewis W. Bicknell, of Webster, S. Dak., formerly a major in the Infantry arm of the service, with reference to the procedure in the conduct of courts-martial and submission of evidence before military efficiency boards.

If it can consistently be done, I recommend that this memorandum be incorporated in the record of the hearings on the question of making certain amendments to the Articles of War relating to above subjects, which I understand is now pending before your subcommittee. Thanking you for your attention, I remain,

Yours, very truly,

ED. S. JOHNSON.

MEMORANDUM TO THE HON. EDWIN S. JOHNSON, UNITED STATES SENATE, IN RE COURTS-MARTIAL AND MILITARY BOARDS TO DETERMINE FITNESS OF OFFICERS.

1. *The court-martial as an instrument of justice.*—A perusal of the provisions of the "Manual for Courts-Martial," issued in 1917 by the War Department, which is the authority for the administration of the affairs of military tribunals in the Army of the United States, leads to the certain conclusion that the court-martial, therein provided for, is set up primarily as an instrument

of justice for the purpose of affording military persons who are accused of offenses cognizable by a military tribunal a fair trial. Thus, paragraph 98 directs that "the trial judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts, or distort them, to the end that the evidence may so exhibit the case that the court may render impartial justice." Challenges are provided to eliminate prejudiced members of the court. (See Sec. I, Cr. VIII.) The court swear (par. 132) "well and truly to try and determine, according to the evidence, the matter now before" them, and to "administer justice, without partiality, favor, or affection," and in paragraph 198 and succeeding paragraphs, an effort is made to set out the rules of evidence, which govern military trials, under authority of the act of Congress approved August 29, 1916 (A. W. 38). These rules follows those known to the common law, and observed by the civil courts. Section II, Chapter XII, relating to findings, furthers this idea. Paragraph 294 directs that the members must base their votes upon, and be governed by "the testimony of the case, considered with the plea." They must be satisfied of the guilt of the accused "beyond a reasonable doubt" (par. 296).

I have emphasized this proposition, of the nature of military tribunals, for the reason that every criticism of the present system of courts-martial, whether directed to the fundamental idea that the military tribunal should not be subject to the interference of the appointing authority, or merely to matters of procedure, is met by the response that a court-martial is an instrument of discipline, and that the officer having authority to convene the court, being responsible for the discipline of the soldiers of his brigade, division, department, or whatever may be his military subdivision, must needs have control of the administration of "military justice" within such subdivision. This theory has been responsible for much that has led to criticism. Acting under it, commanding generals of divisions and higher units have not hesitated to return findings of "not guilty" for reconsideration, even going so far as to demand a contrary finding, although such a course has never been sanctioned, I believe, by the Judge Advocate General; nor have they hesitated to make officers of a court who refused to comply with these directions for a change of their decision feel the weight of their displeasure. It is well enough to urge in answer to this last suggestion that the ban of secrecy in voting protects the individual, and that in any event his action can not be made the occasion of official rebuke; promotions can be withheld or recommendations therefore disapproved, and in innumerable other ways the offending officers may be made to know that their action, while pleasing to their consciences, perhaps, under their oaths, was not pleasing to the general who convened the court. Not only might these things happen—I confidently assert that they did happen.

Consider, in passing, the utter impropriety of this attitude—that is, that the court is merely an instrument of discipline—the creature of the commanding general. Appellate courts, without exception, refuse to disturb findings of disputed issues of fact, holding that the trial court, which saw and heard the witness, or witnesses, is in a far better position to determine which witness told the truth, and what evidence is credible, than the judges of the supreme or appellate court, whose impression must be gathered from the transcript of the evidence, or an abstract of the evidence printed in the appellant's brief. Yet, if this position is to be sustained, the general of a division, or department, or army, or his judge advocate, are better qualified to determine the guilt or innocence of an accused soldier than a court, sworn to try him, who heard the evidence, saw the demeanor of the witnesses, and, under their oaths, returned such decision as their consciences could justify. I am convinced that courts-martial will only be true instruments of discipline when they are so conducted and their decisions are so safeguarded as to commend them to the consciences alike of those subject to their jurisdiction and the public, and that at present they commend themselves to neither. In the following paragraphs I propose to discuss certain particulars wherein the present system fails as an instrument of justice.

2. *Too great power is vested in the appointing authority.*—Under the present system of courts-martial, the officer having power to appoint a court-martial also has the power to do the following things with reference to the trial of any person subject to military law: (a) Name the members of the court; (b) select the trial judge advocate; (c) pass upon the "reasonable availability" of an officer whose service the accused may desire as counsel; (d) order the arrest and trial of a person subject to military law; (e) review the proceedings of the trial of such person; (f) order the reconsideration of the pro-

ceedings, especially of the sentence; (g) approve or disapprove the findings, sentence, or proceedings.

Before discussing the relation of these several functions to the proceedings of the court itself, I desire to trace, briefly, the procedure from the initiatory stages of a charge to the time it ripens into a trial. An examination of the records of the Judge Advocate General's department should disclose that by no means all of the cases which have been tried by courts-martial have been occasioned by the commission of some offense of so notorious a character as to attract public comment. On the contrary, a very large proportion of the cases arise from infractions of orders or breaches of discipline which are known only to a few persons—those intimately concerned in the case. The commission of a grave offense would, of course, be followed by the arrest of the offender, and the filing of charges. The commission of some infraction of orders or discipline would likewise be followed by the placing of the offender in arrest, and the filing of charges by the officer having knowledge of the irregularity. But not infrequently arrests are made by direct orders of the division or higher headquarters. Each division has its inspector, who is responsible for the investigation of alleged irregularities, has authority to examine witnesses, and from time to time, as occasion demanded, this officer would place in arrest persons subject to military law whose irregularities were disclosed by his efforts. And supplementary to his office, in some places at least, there have been organized "intelligence services," which were even carried to the length of having at least one man in every company who was required to report, over the head of his commanding officer and not through military channels of correspondence, any matter which in his estimation would justify investigation. The effect of this arrangement on the morale of the officers of an organization may be imagined.

An official investigation made by an officer who is disinterested is in all cases required after charges have been drawn and before a trial is ordered. This officer forwards the charges, with the statements of material witnesses and his recommendation, to the officer directing the investigation, who in turn is responsible that the charges are sent to the proper officer for further action, his own action in the premises depending upon the nature of the charges, his own authority, and the nature of the recommendation. In the cases mentioned above, where, in fact, an investigation was made before the arrest or before any charges were preferred, the formal investigation would be indeed a formal matter made by the inspector himself.

In all cases where a trial by general court-martial is to ensue, the charges are examined by the organization judge advocate. Unless he approves, the case does not go forward. It follows, then, that in every case before the trial has begun the evidence has at least been partly examined, and the representative of the appointing authority, usually the very officer to whom that authority will look for legal advice in the review of the proceeding, has expressed an opinion as to the sufficiency of the preliminary proceedings to justify a trial. Here should be noted a very important distinction between the functioning of this preliminary investigation and the functioning of the grand jury or committing magistrate in the civil courts, to which it may be likened. Once the grand jury or the committee magistrate has bound an accused over for trial, their connection with the case ceases, but in the military courts the very authority which orders or advises trial is the same authority which will eventually review the proceedings. From this circumstance it results that no distinction is made between finding enough evidence unexplained to justify a trial and seeking enough evidence in the record of the trial to justify a conviction. The attitude of the reviewing authority, speaking through his legal adviser, is apt to find expression in the mere reiteration of the opinion formed before the trial at the time it was ordered, brushing aside any offered explanation as wholly immaterial. Nor should we lose sight of the fact that the same man both orders the trial and reviews the proceedings.

Returning now to the relation of the functions of the appointing authority to the trial itself: It is necessary to preface my criticism with the statement that, given a fair appointing officer, a court composed of experienced, capable officers, and a trial judge advocate, and counsel for the accused, who have sufficient legal knowledge to try the case ably, the court-martial provides a speedy, fair, and effective instrument of justice, provided it is allowed to function as such. Unfortunately, all but the first of these necessary elements are frequently lacking, and at times the fairness of the appointing authority may be at least open to question.

Any instrument provided by men in authority to deal with the lives, or personal liberties, of men accused with offenses, should inherently exhibit and possess a high degree of independence of action, just as those elements which are capable of bringing about a miscarriage of justice should be eliminated, so far as possible. In the suppositions which follow I am not pretending to deal with cases which have happened—though I have reason to believe that I shall approximately state some actual situations—but my purpose is to show what may happen in the selection of a court, and its trial of persons subject to its jurisdiction.

(a) *The appointing authority names the members of the court.*—Suppose that Maj. A., a division judge advocate, has at the suggestion of the division inspector made an investigation which satisfies him that Capt. B. is guilty of an offense; he is on bad terms with Capt. B. and names a court of officers who are his friends, to one or more of whom he states that he hopes to see a conviction and severe sentence. He adds that the general feels the same way about it. Can the accused have a fair trial? How can he reach the hidden bias against him?

(b) (c) *He selects the trial judge advocate, and passes upon the availability of the request of accused for counsel.*—It might not be open to criticism, but suppose the appointing authority has reason to believe that the only person who could adequately present the defense in a given case is Maj. ———, and, greatly desiring a conviction in that case, renders him unavailable for the defense by appointing him special trial judge advocate. Or, suppose that Pvt. D, accused of a serious crime, demands the assistant of Lieut. E. The appointing authority can inform him that this officer is not reasonably available. Further, he may suggest the name of another officer who is available. I once was approached by a division judge advocate, who asked me to suggest to an accused—I was trial judge advocate of a general court-martial at the time—that I could procure counsel for him, and he added, "If he agrees, we'll get Lieut. ———. He will stick him if you don't." I may add that I refused this assistance, and convicted my man over the efforts of counsel of his own choosing.

(d) *The appointing authority orders the trial of the accused.*—In many instances, as I have shown above, he knows in advance that there is going to be a trial, and has formed a strong personal conviction that the person to be accused is guilty, and an equally strong desire to see the imposition of a severe sentence. With this in mind, he might choose his court carefully, and having thus prepared the way he may order the accused arrested, direct that charges under whatever article of war is appropriate be filed, and bring the matter speedily to trial. He can not, of course, force the trial within the limits fixed by the manual for courts-martial—but he can get ready before the proceeding is started. The accused can not. If he is guilty, it may not matter. Suppose he is unjustly accused?

(e) *The appointing authority reviews the proceedings.*—I have previously discussed the effect of the preliminary investigation upon the mind of the officer charged with the review of the proceedings had upon the trial of a person subject to military law. Practically, there is no appeal; instead every proceeding is reviewed before the sentence or finding is promulgated. As this takes the place of an appeal, and is the final step in the whole matter at which the rights of the accused are to be considered, it is essential that the review be thorough, fair, and unprejudiced. Here again the distinction between the court as an instrument of justice, and the court as an instrument of discipline, as that word is unfortunately misused in most military organizations, presents itself. As the appointing authority of an instrument of justice, the reviewing officer might reasonably be expected to review the trial record with the rights of the accused prominently in mind. Suppose he had, at the time of ordering the trial, a strong impression that the accused was guilty. Is he more likely to look for corroboration of this impression, or for an explanation compatible with the idea of the innocence of the accused? Suppose the grand jury which returns the indictment, or the head of the detective agency which looked up what was alleged to be the evidence, or the prosecuting officer, in our civil tribunals, were the duly constituted appellate bodies? Yet where is the material difference? Your grand jury, and your prosecuting attorney are all supposed to be men of the highest order. So is your general officer. Yet if it does not work out of the army, why should it in the army?

(f) *He may order reconsideration of the proceedings and findings.*—I do not understand this to mean that a new trial may be ordered, or even that addi-

tional evidence may be taken; but the reviewing officer may order a finding or a sentence reconsidered. Suppose he, or his legal adviser, either by reason of ill will toward the accused, or from any other motive, commendable or otherwise, desires to see a conviction. It is certainly not unknown, though I think it is clearly unlawful, for the reviewing officer to return a record with a finding of "not guilty" with criticism, and a suggestion that the evidence required a judgment of conviction; and it is the practice, if a sentence is deemed inadequate, to return the proceedings with the admonition that a severer sentence should be imposed. If this is to be tolerated, why swear a court to try the case, and do justice? If the reviewing officer is to pass upon these matters with final authority, why have the court or the trial at all? If the reviewing officer, either through malice or mistake, believes a perfectly innocent man to be guilty of a serious offense, he can, under our system of courts-martial, come very near to depriving that man of his liberty and his reputation—indeed, in time of war, of his very life.

(g) *He approves the sentence, findings, or proceedings.*—Finally, the appointing authority has the power, except in cases where dishonorable discharge of enlisted men, or in the event of the conviction of an officer, to approve the sentence, and order its execution. Matters involving dishonorable discharge are customarily sent to Washington for final consideration—but this has been avoided in many cases by ordering the execution of the other part of the sentence at once, and deferring that portion involving dishonorable discharge until the execution of the balance of the sentence. This works nicely in the matter of a sentence for life imprisonment, for example.

I have indicated in a few general statements the possibilities of injustice under the present system, but I have by no means exhausted the possible contingencies which are presented by the focus of all of these several and frequently inconsistent powers in one person or office. The wholesale convictions of American citizens and the impositions by military courts of grossly excessive sentences, which were so frequent as to be a matter of common scandal; the wretchedly presented defenses; the shocking abuses in the treatment of military prisoners, all bear abundant testimony of the indifference of the high officers of the army to the rights of the individuals composing the army, as well as their wholly incorrect attitude toward a soldier accused of an offense.

On this last point another matter deserves mention. So far as my observation as an officer of the Army went, no effort is made to make a distinction between soldiers detained awaiting trial, and those convicted and undergoing sentence. All were lodged in the same guardhouse or stockade, and all were subjected to the same degrading hard labor; all were sent about under guard, in the presence of their comrades in their own organizations. Well enough, no doubt, if all were guilty. But how about those who are unjustly accused? What sort of soldiers will they be, after undergoing such treatment?

The several simple cases suggested in the preceding paragraphs, while presenting exaggerated complaints against the system, by no means exhaust the possibilities for error, injustice, undue influence, or the invasion of the rights of an accused by the excessive zeal of the officer who is charged with the enforcement of discipline, and vested with authority to order trials by court-martial. It is a matter of common knowledge, for example, that in some divisions organized during the war with Germany, sentences were uniformly excessive—and investigation would disclose the demand on its courts that this sort of sentence be imposed, by the division commander, or some one empowered to speak for him. And, at the risk of repetition, I can not refrain from suggesting the impropriety of a review of a proceeding by the very authority which caused the prosecution to be commenced. It is not enough to point out the great reliability of the officers discharging this duty. Granting that they are all that is claimed for them, they are being permitted to exercise a power over trials by military tribunals which experience has taught us can not be allowed to men of equal dignity, honor, and probity in civil offices. I am convinced that so long as they are allowed this power, abuses in courts-martial will continue.

3. *There is no adequate provision for retrial, in case of mistrial.*—Under paragraph 149, subdivision 3 (a), (b), (c), (d), and (e), it is provided that no person convicted or acquitted by a court-martial may be tried twice for the same offense. Among those situations specified as not constituting a "trial" within the meaning of this paragraph, is the reservation "where, for any cause, without fault of the prosecution, there was a mistrial." I can not see how the

inference is to be avoided that, if the "mistrial" is the result of a "fault of the prosecution," there could not be another trial, however plain the case against the accused. So, if a soldier be accused of a felony, and on his trial the trial judge advocate, not being learned in the law, seek to convict him with illegal testimony, and the record, on reaching the reviewing authority, disclose such errors that it can not be approved, it will follow that this man can not be again tried, with the result that he escapes all punishment for his misdeed. I have had personal knowledge of such disposition of cases involving capital offenses, as well as lesser crimes; and have known of numerous instances where a sentence which was wholly inadequate had to be approved because the record was in such shape that no further proceedings could be had.

Under similar circumstances in criminal prosecutions before the civil tribunals, if indeed it appear upon review that there has been a mistrial, the accused does not escape, but is held for a retrial in order that his rights may be fully protected and the conviction secured, if any be secured, may be based upon lawful evidence, taken in a proceeding lawfully conducted throughout.

It should not prove difficult to remedy the present procedure in this respect, so that this most serious defect might be removed, and justice be thereby made more certain.

4. *Injustices due to lack of authority for the procedure of "Efficiency boards."*—During the period of military preparation incident to the war with Germany, it was necessary to consider the conduct, character, efficiency, and professional fitness of many of the officers, both temporary and permanent, in the army—the question in the case of the permanent officer being usually only whether he was fitted for the duties of the temporary rank he was holding, while in the case of the temporary officer the matter to be decided was frequently whether he should be dismissed from the service.

Under the authority of standing orders from the War Department divisional and other commanders established boards for this purpose, and ordered officers before them.

As late as September, 1918, there were not in existence any prescribed rules of procedure for such boards; neither were there rules relating to evidence, review, hearsay testimony, sufficiency of the showing required, receiving and considering testimony in the absence of the officer under investigation. Necessarily, the authority conferred in these matters was very great; and it was important, above all else, that all inefficient officers be eliminated, lest their inefficiency cause unnecessary loss of life in the zone of active operations; but an instant's reflection will show the very great danger incident to the exercise of this authority, and the necessity for every possible safeguard against injustice, the gratification of personal malice, the elimination of officers, to make vacancies for the promotion of others, and the employment of this means of securing the dismissal of officers where the charges would not have been sufficient for proceedings before a court-martial.

In the Thirty-fourth Division, in which I served before going overseas, I observed the following instances of the misuse of this power (i. e., to order officers before a board). At the hearing in the case of one Behr, a colonel of Artillery, a junior officer, a lieutenant, who discharged the rather discreditable duties of espionage officer (he was called "intelligence officer," but his business was to gather data on the conduct of officers of the division, by means of operatives distributed throughout the division), was called, asked if he had made an investigation as to whether Col. Behr was guilty of certain charges, and over objection insistently urged, was permitted to state his conclusion as to whether the officer in question was guilty. In the same case the board refused to compel this lieutenant to disclose the names of his witnesses for examination in the presence of Col. Behr. Later, during the hearing of the same matter, it appeared from letters introduced in evidence that the proceeding was initiated to make room for another officer as commanding officer of the One hundred and twenty-seventh Field Artillery. On such evidence Col. Behr's dismissal was recommended and secured.

An officer named Brome was promoted from captain to major, on recommendation of division headquarters. He was assigned to the military police. Two months later he was put before a board by the same headquarters, and his dismissal secured. In a published statement after leaving the service he intimated that he, as an officer of military police, had interfered with the pleasures of certain staff officers, to his subsequent misfortune.

At the hearing of the matter of Lieut. Col. Hollingsworth, One hundred and thirty-fourth Infantry, before a board of officers at Camp Dix, when an objec-

tion to some hearsay testimony was urged the president of the board, Col. Downing, One hundred and ninth Engineers, stated that no objections were to be considered; that the officer under investigation was only present by courtesy, and that other evidence could be and would be received and considered in his absence.

At hearings in the cases of numerous other officers, all that was received by way of evidence against them was the statement of their immediate commanding officers to the effect that in the opinion of such officer the officer under investigation "was incompetent to discharge the duties of his office," or that he did not properly perform interior guard duty, or that he was deficient in close-order drill. Upon such showing these officers were dismissed.

In the case of Lieut. Col. Hollingsworth, mentioned above, the division inspector made an investigation and reported that he did not find enough evidence to justify a court-martial trial, but recommended that the officer be gotten rid of before a board.

I appeared as counsel in a number of the cases I have mentioned, and write of them with intimate knowledge of what was done. I state unhesitatingly that the system of eliminating officers which was employed made every form of injustice, every desire to play favoritism, every kind of petty tyranny a thing easy of accomplishment and in many instances these things were accomplished.

Consider, now, this situation with reference to the objections I have previously urged to the system of courts-martial. Here was an added means for a commanding general to employ in getting military tribunals to register his views in a given case—for it was easy to put members of a court before a board, make formal charges of inefficiency, and get the officers out of the service—and let others profit by the example. And, as I have suggested, if the trial by court-martial failed, the efficiency board was always available. In one instance, I defended an officer—and I believe successfully—against charges which would have resulted in dismissal if sustained. Pending the trial he was put before a board, and discharged for the good of the service.

5. *The remedy suggested.*—With reference to the matter discussed under the subtitle No. 3 above, the remedy is suggested at the conclusion of the discussion of that item.

In the matter of the too great authority of the officers having power to appoint courts-martial, it seems that this ought not to be difficult to correct. If a board of review, wholly independent of the appointing authority, and possessing final authority to approve or disapprove proceedings, subject to such reservations in capital and other important cases as the Secretary of War might see fit to make, be established, in every military department in time of peace, with such additional personnel detailed as the greater activity of war organization might demand, and all proceedings be referred to such boards for final action or recommendation, the greatest objection to the present system would be removed. The board might properly be made up wholly of military persons, of suitable rank, and experience. The argument that such a board would lessen the power of the commanding general of a tactical unit to maintain discipline does not possess much weight, if we recall that the commanding general would still have the power to order the arrest and trial of all persons under him, and would only be deprived of the right to review and approve the findings.

In making up the courts-martial, it would be a very great improvement if the court be selected by lot, from the lists of eligible officers, and this course would eliminate another possible abuse of power.

The inefficiency and inexperience of trial judge advocates and counsel for the defense might well be corrected by provision for the permanent detailing of officers possessing the necessary qualifications, for duty with the courts-martial, thus providing men of experience both for the court and the accused, who, however, should have the privilege of securing other counsel if he so elect.

The accused, before his conviction, should not be detained in the same place with, and subject to the same treatment as, men already convicted and serving sentence. Not only is such a course manifestly unfair, in the case of one wrongfully accused, but it has a most detrimental effect upon the discipline of the soldier who is unjustly detained, and tends to bring the whole system of military justice into discredit with the very persons who should hold it in highest respect.

Provision should be made that the commanding officer having power to appoint the court-martial be notified at once of the result of the trial, with

the privilege of forwarding to the reviewing board his reasons, if any, for asking that the case be disapproved, reconsidered, or retried, and the board should be required to give due consideration to his expression, their final action to be governed by all of the evidence and circumstances in the case.

Owing to the inherent possibilities of oppression, injustice, and injury to the reputation of officers called before such boards, in the operation of efficiency boards, these boards should be provided for in a special article of war, which should plainly prescribe the procedure, proof required, and reasons justifying a hearing concerning any officer; and these boards, so constituted, should be invested with the same dignity as a military court, with record of their proceedings, and proper processes of review. In no other way can many gross injustices be avoided.

(Prepared and submitted by Lewis W. Bicknell, Webster, S. Dak., Major, United States Army.)

Thereupon, at 4.50 o'clock p. m., the subcommittee adjourned until to-morrow, Friday, September 26, 1919, at 2.30 o'clock p. m.)