

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

SATURDAY, SEPTEMBER 27, 1919.

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

The subcommittee met, pursuant to adjournment, at 2.30 o'clock p. m., in the room of the Committee on Appropriations, Capitol, Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

Senator WARREN. General, will you please state your rank and service to the stenographer?

### STATEMENT OF BRIG. GEN. EDWARD A. KREGER, JUDGE ADVOCATE GENERAL'S DEPARTMENT.

Gen. KREGER. Lieutenant colonel, Judge Advocate, in the permanent establishment; brigadier general, Judge Advocate General's Department, in the emergency establishment.

Senator WARREN. Will you please state your service, General?

General KREGER. Captain, Company M, Fifty-second Iowa Volunteer Infantry, during the Spanish War; captain, Thirty-ninth Infantry, United States Volunteers, during the Philippine insurrection; appointed first lieutenant of Infantry, permanent establishment, in 1901, since which date my service has been continuous.

Senator WARREN. You were in the Volunteer service up to that time, and then went into the permanent establishment?

Gen. KREGER. Yes. In 1907 I was detailed as acting judge advocate. In 1911, coincident with my promotion to the grade of captain in the Infantry, I was appointed a major in the Judge Advocate's Corps, and since then have served in that corps.

Senator WARREN. I think you said you were not graduated from West Point.

Gen. KREGER. No. However, from August, 1914, until April, 1917, I served as professor of law at the United States Military Academy.

Senator WARREN. You did line service, as you have indicated?

Gen. KREGER. My service was in the line from 1898 until my appointment in the Judge Advocate's Corps in 1911, except that for a time I served as an acting judge advocate by detail.

Senator WARREN. This subcommittee, General, is seeking information regarding the present Articles of War as compared with the bill which is before us, S. 64, called the Chamberlain bill, and our research has widened somewhat into a comparison of our system of courts-martial with the systems of other countries, and we have endeavored to ascertain as to the application abroad as well as here at home, whether sentences have been oversevere or less severe, or how the workings have been under our law.

As we understand, you have served during the war one year on the other side, as your stripes would seem to indicate, and the balance of the time here, but all of the time in the Judge Advocate General's Department, and we should like to have you give us your ideas of the present law as compared with the proposed law, or some other one that might be proposed, or some system that you might think better than either one. Do I state the case fairly, Senator Chamberlain?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. From the time the United States entered the war until shortly before my departure for Europe in March, 1918, I served in the Provost Marshal General's office, and therefore was not connected during that period with the administration of the Judge Advocate General's Department.

I think I ought to say at this point that the work coming to my desk has kept me so busy that I have had substantially no opportunity to examine the pending bill. The notice of this call to appear before this committee reached me late yesterday afternoon, and there has been no opportunity since then to make special preparation.

Senator WARREN. You have seen this pamphlet, have you, this print in parallel columns of the proposed bill with the present law?

Gen. KREGER. I have seen a copy. My statement was intended as a suggestion that perhaps the committee had better question me specifically, rather than expect a statement from me.

Senator WARREN. I am inclined to think that there would be quite a good many interrogatories propounded even if you laid out the work pretty well beforehand, giving us what is in your mind as to the issue. Senator Chamberlain, would you like to draw him out by questions?

Senator CHAMBERLAIN. I think Senator Lenroot might like to ask him some questions.

Senator LENROOT. Were you a lawyer when you went into the Spanish-American War?

Gen. KREGER. Yes.

Senator WARREN. You were not at West Point as a student?

Gen. KREGER. No.

Senator WARREN. You have been there as one of the teachers since, have you?

Gen. KREGER. From August, 1914, to April, 1917, I served as professor of law at the Point.

Senator CHAMBERLAIN. What were your duties in the Judge Advocate's office up to the time you were detached from that and placed in the Provost Marshal General's office?

Gen. KREGER. During the period prior to my assignment at West Point?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. From March, 1911, until August of 1914, I was on duty in the Judge Advocate General's office.

Senator CHAMBERLAIN. Here in Washington?

Gen. KREGER. In Washington.

Senator CHAMBERLAIN. What were your particular functions?

Gen. KREGER. During a considerable portion of the time I had charge of what was termed the legislative desk.

Senator CHAMBERLAIN. Preparing measures that affected the Judge Advocate General's Department and looking over measures which had been proposed as affecting that?

Gen. KREGER. The study of legislation affecting the Army and the War Department, and making reports on such propositions when either a committee of Congress or a branch of the War Department asked for a report.

Senator CHAMBERLAIN. Then after you left West Point as an instructor of law there—that was in 1914?

Gen. KREGER. I left West Point in 1917.

Senator CHAMBERLAIN. Then you came back here and took another tour of duty in the Judge Advocate General's office proper?

Gen. KREGER. I served in the Provost Marshal General's office; was connected with the draft administration.

Senator CHAMBERLAIN. You remained there how long?

Gen. KREGER. From May 1—that is the approximate date—

Senator CHAMBERLAIN. That is, 1914?

Gen. KREGER. 1917.

Senator CHAMBERLAIN. 1917?

Gen. KREGER. Until about February 9, 1918.

Senator CHAMBERLAIN. And when were you detached from the service in the Provost Marshal General's office?

Gen. KREGER. About February 9, 1918.

Senator CHAMBERLAIN. Then you went to France?

Gen. KREGER. I was attached to the Judge Advocate General's office until my departure for France. I left Washington about the 9th of March, 1918, having been attached to the Judge Advocate General's office about a month immediately preceding my departure for France.

Senator CHAMBERLAIN. Did you go over there to act in the capacity of a judge advocate?

Gen. KREGER. I did.

Senator CHAMBERLAIN. And while you were there you were designated as the representative in France of the Judge Advocate General?

Gen. KREGER. I was.

Senator CHAMBERLAIN. Assuming the functions there that he would have assumed if he had been there?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. As distinct and separate from the staff judge advocate of Gen. Pershing?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That avoided the necessity of sending papers that would ordinarily have come from the staff judge advocate to the Judge Advocate General here? You disposed of them there for the Judge Advocate General?

Gen. KREGER. In respect of cases involving death, dismissal, or dishonorable discharge, in which either the original appointing authority or the commanding general of the American forces in Europe had the power to enter a final order.

Senator CHAMBERLAIN. Now, how much experience did you have while you were in the office of the Judge Advocate General here and before you were detailed for duty in France, with respect to the administration of the criminal law—military law?

Gen. KREGER. During the entire period of my service in the Judge Advocate General's office, prior to my assignment at West Point, I had work connected with the administration of military justice. From time to time I was called upon to write reviews and prepare opinions in respect to what may be termed the more important cases; those that had to go to the President.

Senator CHAMBERLAIN. Could you state approximately how many records you examined from court-martial sentences, generally?

Gen. KREGER. Any statement I might make on that point would be a guess rather than an estimate, Senator, because the number of cases that came to me from time to time depended partly upon the inflow of that kind of work and partly upon whether or not my desk was otherwise in a condition to permit me to study the cases promptly.

Senator CHAMBERLAIN. In other words, as a matter of fact you did not have as much to do with the review of these appeals as others in the Judge Advocate General's office?

Gen. KREGER. During my connection with the office I had as much to do with them as any other officer had. The duty was not assigned especially and particularly to any one officer. There was a small force in the office at that time. I came here to the office from duty as judge advocate, or acting judge advocate, of the Department of the Colorado. I was detailed as acting judge advocate of the Department of the Colorado in December of 1907, and was relieved there in March of 1911 to come to Washington. In the meantime, however, I had served detached from the Denver office for duty as instructor in law at the Army Service Schools at Fort Leavenworth, and also in connection with the provisional government in Cuba; so that during the three years and a half that I was connected with the Department of the Colorado I was not present for duty there all the time.

Senator CHAMBERLAIN. What I was trying to get at was your experience in handling these sentences of courts-martial that came for review to the Judge Advocate General's office.

Gen. KREGER. I had had the experience of a department judge advocate, and the experience of an assistant in the Judge Advocate General's office.

Senator CHAMBERLAIN. You can not say approximately how many cases you reviewed after you came here to the Judge Advocate General's office?

Gen. KREGER. No.

Senator CHAMBERLAIN. What were your functions when you reviewed a sentence of a court-martial after you came here to the Judge Advocate General's Office? What did you do?

Gen. KREGER. That is, you mean in 1911, when I came here as an assistant?

Senator CHAMBERLAIN. Yes; all the time you were in the Judge Advocate General's Office? What were your functions in reviewing cases? What did you do?

Gen. KREGER. I studied the entire record to determine, first and foremost, whether the record was legally sufficient to support the sentence, and in the second place, if it were a Presidential case—that is, one that was not closed—to determine whether there was ground for the exercise of clemency.

Senator CHAMBERLAIN. And, third, whether or not the court had jurisdiction?

Gen. KREGER. That is naturally a part of the question of whether or not the record is legally sufficient to support the sentence.

Senator LENROOT. What was the test of legal sufficiency?

Gen. KREGER. There had to be a showing that the court was appointed by some one having authority to appoint the court; that the warrant of appointment appeared of record; that the man brought before the court was a man subject to military law; and then, of course, there are various and sundry additional points to be considered; for example, the court must be sworn, and the right of challenge accorded.

Senator LENROOT. Perhaps I can put it in this way: Did it go beyond the determination of whether or not the court had jurisdiction?

Gen. KREGER. You mean the examination of the record?

Senator LENROOT. Yes.

Gen. KREGER. Oh, decidedly, Senator. It was a complete and thorough examination—

Senator LENROOT. Oh, I did not mean that; but I mean, in coming to your determination of legal sufficiency—

Gen. KREGER. Oh, yes.

Senator LENROOT. For instance, if there were prejudicial error such as would cause a reversal in a civil case, how was that treated?

Gen. KREGER. Prejudicial, say, in the introduction of testimony?

Senator LENROOT. Yes.

Gen. KREGER. The theory on which we proceeded with the examination of cases covered by General Order 7 of 1918, was this, that if there were error in the introduction of testimony, the case could not stand unless the competent evidence was sufficiently strong practically to compel a reasonable man to find as the court had found, after disregarding all incompetent testimony.

Senator LENROOT. Did the court exclude evidence?

Gen. KREGER. The court, on motion of either the prosecutor or counsel for the defense, often excludes evidence.

Senator LENROOT. Then you say you tried the case upon the strength of the evidence produced, and in case you found error, where evidence had been improperly excluded?

Gen. KREGER. That might be prejudicial to the same extent as the actual improper introduction of evidence.

Senator LENROOT. Yes, and you could act on it in the same way, could you, General? I can readily see, if all the evidence was there and some of it had been improperly admitted, nevertheless, on the whole case, justice had been done; but that you could not determine if there had been improperly excluded evidence?

Gen. KREGER. That would ordinarily appear in the record, because, assuming that the evidence had been offered by counsel for the accused, and objection had been made to it, he would ordinarily indicate the nature of the evidence to such an extent that one could determine whether or not the exclusion, if erroneous, was prejudicial. Do I make myself clear?

Senator LENROOT. Yes. Well, suppose you determined that it was prejudicial; what then?

Gen. KREGER. If it were determined that it was actually prejudicial, I held that the conviction was invalid.

Senator LENROOT. In other words, you applied the same rule that an appellate court of civil jurisdiction would apply?

Gen. KREGER. That has been my theory.

Senator LENROOT. That is what I was getting at.

Senator CHAMBERLAIN. Then what is the practice?

Gen. KREGER. If the conviction is held invalid, wholly or partly, either the sentence is set aside, or there is action by way of clemency.

Senator CHAMBERLAIN. I do not understand that you agree with the general contention there in the Judge Advocate General's Department. I understand that your department acted under section 1199 of the Revised Statutes, did you not?

Gen. KREGER. Section 1199 of the Revised Statutes never became a subject of discussion, so far as I recall, until some time near the end of 1917.

Senator CHAMBERLAIN. Well, take a supposed case before that controversy came up. Would the Judge Advocate General, where you found that a sentence was irregular, set it aside and order the prisoner discharged; or would you simply, from the record you made, advise the court or the commanding officer as to what ought to have been done; or did you order a retrial or a reversal?

Gen. KREGER. The action of the office always was advisory.

Senator CHAMBERLAIN. That is what I am getting at. I understand that the action of the office was simply advisory to the commanding officer?

Gen. KREGER. It was.

Senator CHAMBERLAIN. So that you really did not set aside a sentence?

Gen. KREGER. If I used that terminology I should ask to correct it.

Senator CHAMBERLAIN. I rather understood that you did.

Senator LENROOT. I think you did.

Senator CHAMBERLAIN. Did you not so understand him, Senator?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. My understanding is that no matter what you found in the record, provided the court had jurisdiction and there was some evidence to sustain the judgment, you did not interfere except in an advisory way?

Gen. KREGER. That is correct. However—

Senator CHAMBERLAIN. Yes; that is right.

Gen. KREGER. I might suggest that there must have been more than "some evidence." The "scintilla rule" never was followed in the office. The rule requiring substantial evidential support for every essential allegation in a specification governed.

Senator CHAMBERLAIN. Now then, suppose you found that state of facts, that there was evidence—a scintilla of evidence, if you please; did you then undertake to reverse the sentence?

Gen. KREGER. We undertook to advise the Secretary of War respecting it.

Senator CHAMBERLAIN. That is my understanding of it, General. I do not want any misapprehension between us as to that.

Gen. KREGER. Yes.

Senator CHAMBERLAIN. If the court had had jurisdiction and the trial had been regular, then no matter how small the evidence might have been, you acted only in an advisory capacity?

Gen. KREGER. In any event we acted in an advisory capacity, because even a declaration of nullity was made by the Secretary of War.

Senator CHAMBERLAIN. So that if you found the court did not have jurisdiction, then what happened?

Gen. KREGER. We advised the Secretary of War and drew a declaration of nullity.

Senator CHAMBERLAIN. So that you did not exercise the power of reversal or modification or amendment prior to the time when this controversy arose?

Gen. KREGER. We exercised it in an advisory way.

Senator CHAMBERLAIN. After the controversy arose you did not change the rule which you had adopted?

Gen. KREGER. There has been no change, except as required by General Order 7 of 1918.

Senator LENROOT. Did you follow cases after your action had been taken?

Gen. KREGER. I naturally did, over in France.

Senator LENROOT. With reference to this—this is what I had in mind, this advisory action. Were there any cases where your action was not confirmed or your advice was not followed?

Gen. KREGER. Yes; in a very few cases, the proportion being so small as to be practically negligible.

Senator LENROOT. Generally speaking, who was it that did not follow the advice? Would it be the court or the commanding officer or the Secretary of War?

Gen. KREGER. I shall have to speak, now, more particularly with reference to the period of the recent war, because the cases preceding that period have faded out of my recollection.

Senator LENROOT. Yes.

Gen. KREGER. During the time that I was acting judge advocate general for the American Expeditionary Forces in Europe I can now recall only two cases in which my advisory recommendation was not in the end followed with reference to the question of whether or not the sentence should be held good. In one of those cases the judge advocate of the appointing power and the appointing power disagreed with me on the law, and they followed their own judgment rather than mine. Speaking from recollection, the case was one in which a man was found guilty of desertion. I held that there was sufficient evidence erroneously introduced on the issue of desertion, as distinguished from absence without leave, to invalidate the finding of guilty of desertion, and recommended that the finding of guilty of desertion be disapproved, or rather that only so much of the find-

ing of guilty of desertion be approved as involved a finding of guilty of absence without leave, the lesser included offense. My advice was not followed.

Senator CHAMBERLAIN. Was that a death sentence?

Gen. KREGER. No. My recollection now is that it was not a question of releasing the man from confinement, even had my advice been followed, but it was a question of reducing or mitigating the adjudged punishment, and, of course, a question of clearing the man's record of the charge of desertion.

The other case was a case in which the judge advocate of the appointing authority, the appointing authority, the judge advocate of the confirming authority, the confirming authority, and also the Secretary of War disagreed with me. There was an appeal from my opinion.

Senator CHAMBERLAIN. To whom?

Gen. KREGER. Primarily to the Judge Advocate General. Unfortunately that case arrived in Washington after I had become Acting Judge Advocate General. Naturally, having judged the case below, I did not participate in judging it up here. I sent the case to the Military Justice Division, presided over by Col. Read. That division passed on it; passed it up to the Secretary of War.

Senator CHAMBERLAIN. Agreeing with you?

Gen. KREGER. That is my understanding. I did not look into it, but recently I was advised that the office here, the Military Justice Division, had agreed with me, but that the Secretary of War had agreed with the other judge advocates.

I do not mean to state definitely that those are the only two cases, out of some 2,500 that I passed on over on the other side, in which there was disagreement. My recollection is now that those were the only ones in which, in the end, the advice of my office respecting the validity of a conviction was not followed.

Senator CHAMBERLAIN. In the 2,500 cases that you speak of over there, in what proportion of them did you advise a modification and reversal of the sentence?

Gen. KREGER. I should have to make a guess as to that. Modification or reversal probably ran somewhere between 5 and 10 per cent.

Senator CHAMBERLAIN. Of your recommendations?

Gen. KREGER. I should judge so. Now, I shall want to check that up, however.

Senator CHAMBERLAIN. Yes; you can correct that.

(NOTE BY GEN. KREGER.—The chief of the statistical section, Judge Advocate General's Office, states that in approximately 6 per cent of the cases examined by the branch office in France while I was in charge of that office reversal or modification of findings or sentences was recommended.)

Senator LENROOT. Did it not frequently happen that a court-martial would receive evidence of other offenses or conduct of the defendant, other than that charged?

Gen. KREGER. Occasionally. That was, I think, part of my quarrel on the first case I discussed here.

Senator LENROOT. That is what I was going to ask you about. But you took the position that it might have so prejudiced the minds of the court that a correct conclusion was not arrived at?

Gen. KREGER. Yes, sir.

Senator LENROOT. I see.

Gen. KREGER. When a man is brought before a military court, the theory is that all charges against him that are properly cognizable by a court shall be cleared up at that time.

Senator CHAMBERLAIN. So that he may be tried on three or four charges; but not unless they are specified?

Gen. KREGER. Not unless they are specified. The rule is that a man may not have his other offendings exploited before a court, except that after the court has arrived at a finding of guilty, and before adjudging a sentence, the court may hear evidence of previous convictions within one year. It may not go further back than that, and may consider only previous convictions of which there is record evidence; and only previous convictions before military courts, not before civil courts.

Senator CHAMBERLAIN. You went over all of the cases that were tried before courts-martial where sentences were rendered to go up to the Judge Advocate General for revision?

Gen. KREGER. Over those within my jurisdiction, as heretofore indicated.

Senator CHAMBERLAIN. Were they all carefully revised—all carefully examined into and reviewed?

Gen. KREGER. Every case had a careful review. I speak only of the review or revision respecting cases that my office reviewed or revised.

Senator CHAMBERLAIN. Is it not true that there were sentences of courts-martial rendered and executed before the record reached your office and you went over them?

Gen. KREGER. Of what period are you speaking?

Senator CHAMBERLAIN. I am speaking of the time before the issuance of that general order which required all cases where a death sentence had been adjudged, to be sent to the Judge Advocate General's Office.

Gen. KREGER. No sentence of death or dismissal adjudged in time of peace may be executed before the President has passed upon it.

Senator CHAMBERLAIN. But when was that regulation adopted?

Gen. KREGER. That has stood in the statutes of the United States since the Government was founded.

Senator LENROOT. It is the original law.

Senator CHAMBERLAIN. But here are those Texas cases where those negroes were hung—were executed—before the records got to the Judge Advocate General's Office.

Gen. KREGER. That was in time of war, Senator.

Senator CHAMBERLAIN. That possibility was removed by a regulation later, was it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. When?

Gen. KREGER. General Order No. 7, War Department, January 17, 1918.

Senator CHAMBERLAIN. That was after the war started?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That general order was really the basis of your having been sent to France, was it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. So that the Judge Advocate General could review the cases in pursuance of this regulation?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Without having the records sent here?

Gen. KREGER. Without having the records sent here.

Senator CHAMBERLAIN. There was a case, notwithstanding the law you speak of—take the Texas case—even in time of war, where the sentence was executed without your office having opportunity to review or suggest or revise; is not that true?

Gen. KREGER. Yes; but those cases were tried before General Order 7, 1918, was promulgated. Under the law, in time of war, in the absence of a regulation, the department commander's action on the sentence was final.

Senator CHAMBERLAIN. Take the Texas cases where those negroes were executed. Did you review the record after the men were executed?

Gen. KREGER. I did not. I have had nothing to do with those cases except in passing on applications for clemency.

Senator CHAMBERLAIN. It would not have helped the men very much for you to have examined the record and found that it was irregular, or even that the court had not jurisdiction, would it?

Gen. KREGER. No. Of course, in time of peace, no sentence of death or dismissal can be executed without the confirmation of the President; and that, of course, brings the record up here for formal revision.

Senator CHAMBERLAIN. In time of war, however, that was done until the adoption of General Order No. 7?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Those sentences were carried into execution without the reviewing authority or the President having a chance to pass on them?

Gen. KREGER. Yes; as even now certain sentences are carried into effect before the record gets up to the office here for review.

Senator CHAMBERLAIN. What kind of cases are they?

Gen. KREGER. Those are sentences that do not involve any permanent change in the status of a man.

Senator CHAMBERLAIN. That is, dishonorable discharge or the death sentence?

Gen. KREGER. Yes. No sentence involving death, dismissal, or dishonorable discharge can be executed until this review is had. If it is a question of confinement or forfeiture only, then the general order publishing the final action of the reviewing authority is published and the execution of the term begins. Of course, if, when the record reaches us here, we find it bad, we advise the Secretary to that effect, and he either publishes, himself, or directs the reviewing authority to publish, a modifying order.

Senator WARREN. May I ask you about that Order No. 7; has that been changed, or rescinded, or altered?

Gen. KREGER. General Order No. 7 is in force to-day.

Senator WARREN. The status of your office according to the opinion in your office is that we are still in war times, is it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Was not General Order No. 7 modified by General Order No. 84?

Gen. KREGER. Yes; there was a modification of the jurisdiction of the office on the other side.

Senator CHAMBERLAIN. The modification or the amendment of it practically brought you back to the United States?

Gen. KREGER. No; the first modification which was made in September—September 11, 1918—extended my jurisdiction over there to include not only the cases involving death, dismissal, or dishonorable discharge, but all other cases.

Senator CHAMBERLAIN. When was that modification, about?

Gen. KREGER. Speaking from recollection, September 11, 1918; that is, General Order No. 84.

Senator CHAMBERLAIN. Yes; 84. Was there a still further modification of it?

Gen. KREGER. The order which brought me back here placed the functions of the French office in abeyance, temporarily, and when the office began to function again, there was a modification in the terminology of the order.

Senator CHAMBERLAIN. What was that number?

Gen. KREGER. Forty-five or 49, or something like that, of 1919—about March 22, 1919.

Senator CHAMBERLAIN. Will you put those three general orders, Order No. 7, and each of the modifications thereof, in this hearing?

Gen. KREGER. I shall be glad to.

Senator CHAMBERLAIN. Put them in together, so that we will have them.

Senator WARREN. Because of those you were sent over to the other side, for service over there?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. And then you were brought back?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. And then you were sent over and brought back again?

Gen. KREGER. No; I went over there once only, in the early part of March, 1918, returning about the middle of March, 1919. During that time my sole duty on the other side was to review general court-martial records. I had no other jurisdiction.

Senator WARREN. No one took that up, to follow it up afterwards?

Gen. KREGER. Yes. When the period of temporarily suspended animation was over with, Col. Herbert A. White, of the Judge Advocate General's corps, was placed in charge of the office, and the office has been functioning from that time on until the present.

Senator CHAMBERLAIN. The result being somewhat the same as if you had been brought back here and then sent over again?

Gen. KREGER. Exactly.

(The General Orders above referred to are here printed in full, as follows:)

General Orders, No. 7.

WAR DEPARTMENT,  
*Washington, January 17, 1918.*

I. Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record

of trial has been reviewed in the Office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199 Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge 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 findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. 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.

By order of the Secretary of War :

JOHN BIDDLE,  
*Major General, Acting Chief of Staff.*

Official :

H. P. MCCAIN,  
*The Adjutant General.*

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 any 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.*

General Orders, No. 41.

WAR DEPARTMENT,  
*Washington, March 25, 1919.*

I. Review of records of general courts-martial. The last subparagraph of section II, General Orders, No. 7, War Department, 1918, as amended by section IV, General Orders, No. 84, War Department, 1918, is further 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, to the end that any such sentence or any part thereof so found to be illegal or void shall not be carried into effect. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. 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.

[250.4, A. G. O.]

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By order of the Secretary of War :

FRANK MCINTYRE,  
Major General, Acting Chief of Staff.

Official :

J. T. KERR,  
Adjutant General.

Senator CHAMBERLAIN. When were you made acting Judge Advocate General?

Gen. KREGER. The order is dated March 10 of this year. I was furnished a copy of the order on landing in the United States on March 13.

Senator CHAMBERLAIN. As a matter of fact, General, taking your testimony as a basis for the question, and the testimony of other witnesses, there is really no appellate tribunal in the military establishment? There is a reviewing tribunal with an advisory power; that is about all, is it not?

Gen. KREGER. That is one way of putting it.

Senator CHAMBERLAIN. If there is any other way, let us have it, because we want to know what the fact is.

Gen. KREGER. In practice every case does undergo a careful review.

Senator CHAMBERLAIN. Yes; a review, but not an exercise of appellate jurisdiction to modify, reverse, or change, and it is not modified?

Gen. KREGER. The office does not assume to exercise the power to decree a reversal. A recommendation is made to the reviewing authority or to the Secretary of War on the subject.

Senator CHAMBERLAIN. So that if a man has been prejudicially convicted, or convicted where some substantial right has been invaded, the only thing for him is clemency, is it not?

Gen. KREGER. Oh, no.

Senator CHAMBERLAIN. I want to know where there is any appellate tribunal that can grant relief except the Commander in Chief of the Army and Navy.

Gen. KREGER. Take the case of a man tried for desertion, who is found guilty and sentenced by the court, and whose sentence as adjudged by the court is approved by the reviewing authority. The record goes up to the Judge Advocate General's Office, because execution of the judgment is stayed by the operation of General Order No. 7, 1918. It is reviewed in the Judge Advocate General's Office. That office finds the record legally insufficient to support the sentence, and advises the commanding general to that effect. The commanding general enters his disapproval on the record in lieu of his original approval. The case is ended; and the man is released from confinement and restored to duty. That is on the assumption that the commanding general will respond to the legal advice given by the Judge Advocate General.

Senator CHAMBERLAIN. Suppose he does not?

Gen. KREGER. If he does not, he runs counter to what is intended to be brought about by General Order No. 7; namely, that no sen-

tence shall be carried into effect if the Judge Advocate General finds the record legally insufficient to support it.

Senator CHAMBERLAIN. General Order No. 7 is not a law, but is simply a regulation of recent origin and adoption?

Gen. KREGER. Yes. It is an effective one, however. I can now recall only one case arising during the six months I served as Acting Judge Advocate General in which the reviewing authority disagreed with us on the question of disapproving a sentence.

Senator CHAMBERLAIN. In violation of General Order No. 7?

Gen. KREGER. The reviewing authority appealed to the Secretary of War.

Senator CHAMBERLAIN. Yes.

Gen. KREGER. In other words, I do not now recall that, during the six months of my service as Acting Judge Advocate General, a single sentence was carried into effect by a commanding general after our office had advised him that the record was legally insufficient to support the sentence.

Senator CHAMBERLAIN. What was done with the commanding officer who disobeyed General Order No. 7?

Gen. KREGER. Meaning—

Senator CHAMBERLAIN. In those two cases you spoke of?

Gen. KREGER. That I spoke of—cases that arose on the other side?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. In one of those cases my advice was simply disregarded. I do not know that anything happened to the commanding officer. I never investigated that. That was a matter for the Secretary of War.

Senator CHAMBERLAIN. Suppose the commanding officer, even after the adoption of General Order No. 7, had seen fit to disobey the advice of the Judge Advocate General's office, and to disregard General Order No. 7; what would you have done?

Gen. KREGER. The question you are raising, Senator, is as to the legality of the action of the reviewing authority in acting against the advice of the Judge Advocate General?

Senator CHAMBERLAIN. Of the Judge Advocate General, yes.

Gen. KREGER. I suspect that under the statute, as it stands, the action of the reviewing authority would have legal foundation.

Senator CHAMBERLAIN. Yes; that is what I say; General Order No. 7 has for its purpose the restraint of the commanding officer by compelling him to obey the advice of the Judge Advocate General's Office, and then if he disobeys that advice, he is perfectly sustained by the law, although he may disobey a regulation.

Gen. KREGER. However, he is subject to discipline by higher authority.

Senator CHAMBERLAIN. Yes; did they do it in either of those cases you mentioned?

Gen. KREGER. The final authority in one of these cases was the Secretary of War; and in the other case, a major general, who stood on the advice of his own judge advocate. It was a case of two lawyers disagreeing.

Senator CHAMBERLAIN. Do you think that there ought to be some appellate jurisdiction that has power not only to act but to compel obedience to its judgments?

Gen. KREGER. I do.

Senator CHAMBERLAIN. There has not been any disagreement on that proposition, so far as I have heard the testimony here. The only question about which there is a difference is as to whether that appellate tribunal should be composed in part or in whole of civilians, and whether or not it should be entirely within the Military Establishment, or partly within the Military Establishment, or a civil tribunal entirely. You think, I presume, that it ought to be entirely within the Military Establishment, composed entirely of military men or men in uniform?

Gen. KREGER. I think the course of appeal should remain within the Military Establishment, and end finally with the President.

Senator CHAMBERLAIN. That is in accordance with the amendment proposed by the Judge Advocate General's Office to the Committee on Military Affairs in January, 1918.

Gen. KREGER. I have not examined that recently. That is my recollection, however, of the theory of that amendment. I did not participate in its preparation.

Senator CHAMBERLAIN. And confirmed by the Kernan report?

Gen. KREGER. That is as it may be. I do not remember about that.

Senator CHAMBERLAIN. And recommended by the majority of the American Bar Association, I suppose. And you do not think there ought to be any civilians on that appellate tribunal?

Gen. KREGER. I do not.

Senator WARREN. I just want to ask a question outside the lawyers' domain. What proportion of the officers of the Judge Advocate General's Department came from civil life and what proportion from West Point graduates?

Gen. KREGER. You are speaking of the Permanent Establishment?

Senator WARREN. Yes; and further than that, in the selection of these various judge advocates, whether there is any difference in the selection between those that come from civil life and those that happen to come from West Point and were in the line before they were sent into the Judge Advocate General's Department?

Gen. KREGER. Have you an Army Register, Senator? I can answer definitely by reference to an Army Register. Otherwise I can only give an impression.

Senator WARREN. Give your impression, and then you can correct it afterwards.

Gen. KREGER. I think about half from West Point and the other half from other sources; though if there is any difference, it is in favor of the other sources.

(NOTE BY GEN. KREGER.—The present commissioned personnel of the Judge Advocate General's Department, Permanent Establishment, consists of 10 officers who are graduates of the United States Military Academy, and 18 who are not graduates of that institution.)

Senator WARREN. Those that come from West Point have not been prepared of course to take up the duties of law officers, have they?

Gen. KREGER. They get an elementary course in law there.

Senator WARREN. But do they not have to go to some other educational institution or be in some school of the Army?

Gen. KREGER. Practically all of the men coming from the Point who have been appointed judge advocates are men who have em-

braced an opportunity to take a course in law. Of course they never practiced as lawyers in civil life, because they went to the Point as young men.

Senator WARREN. There is a difference between the two paths, isn't there, Gen. KREGER?

Gen. KREGER. Yes.

Senator WARREN. Now, we all understand that when a man gets a uniform on he is in the Army, whether for a month or for life. I wanted to get at, if I could, what the line of—I will not say prejudice, because none of us are supposed to be prejudiced—but whether it really made any difference in the selection for that place whether a man has been in the line of the Army or whether he has been practicing law in civil life, and the qualities of the men were known.

Gen. KREGER. It is essentially a question of the earning character and capacity of the man, rather than where he comes from.

Senator WARREN. Do you think he is better fitted if he has had a good service in civil life in various lines of crimes and misdemeanors than if he has had no experience whatever?

Gen. KREGER. Successful experience as a practicing attorney is exceedingly valuable. It is from that class that the Judge Advocate's corps was recruited during the war.

Senator WARREN. Now the laws in civil life and the laws in the Army are quite different, and the punishments and mode of procedure are exceedingly different, especially in war. Do those who come in from civil life adapt themselves to the exigencies of the Army life and Army law and Army punishments as readily as those that are from the Army in the first instance?

Gen. KREGER. There are compensating advantages and disadvantages. The lawyer from civil life who comes to the law work of the Army, with no military experience, is hampered somewhat by his lack of knowledge of conditions. He finds it difficult to orient himself. To begin with he is somewhat in the dark with respect to facts and circumstances that the man who has served in the Military Establishment knows and feels.

Senator WARREN. Now that is one side of the proposition. Now let us look at the other. The man who has had no Army life, but is well grounded in law, outside—in other words, I want to get at whether it does not make a better court to use them together than to use either one exclusively.

Gen. KREGER. Undoubtedly. The man who has served long in the Military Establishment has missed some lines of legal experience that the civilian practitioner gets. That is his disadvantage. When the two classes of officers are employed together, using one as the complement of the other, we have the ideal arrangement.

Senator CHAMBERLAIN. I do not think it is a disadvantage from the civilian's viewpoint. I do not think it is a disadvantage. He has been accustomed to seeing the criminal laws of his country administered along well-settled and well-adjusted rules of evidence, with every safeguard thrown around a man who is charged with a crime, while I sometimes doubt very much if a military man sees anything else than the strict military rule in the investigation of a crime.

Gen. KREGER. The civilian lawyer coming into the legal work of the Army, particularly the disciplinary side of it, without previous military experience, seems to be impressed with an erroneous theory

that the law of criminal procedure and the substantive criminal law on the military side differ so much from law and procedure on the civil side that he is quite likely to say, "This might be bad in a civil proceeding, but certainly we can not permit technicalities to stand in the way of substantial justice in a military court," with the result that at times the civilian lawyer when first coming into military law work will pass as valid a proceeding that the experienced military judge advocate would not pass. After a time that works itself out.

Senator CHAMBERLAIN. General, the function of a judge advocate in the smaller as well as in the larger unit is that of the prosecutor, is it not?

Gen. KREGER. Not at all. You are speaking of the member of the judge advocate's corps, the staff judge advocate?

Senator CHAMBERLAIN. Well, I am speaking now of the man who appears in the court, after a court is appointed to try a man?

Gen. KREGER. The trial judge advocate?

Senator CHAMBERLAIN. Yes; the trial judge advocate. His function is that of a prosecutor?

Gen. KREGER. That is one of his functions, and if there is counsel for the accused, that is his main function; but if there is no counsel for the accused, a rare occurrence, the trial judge advocate is charged with the protection of the rights of the accused. Of course that gives him a difficult duty to perform.

Senator CHAMBERLAIN. That gives him an impossible duty to perform if he is to do it impartially.

Gen. KREGER. It is certainly next door to impossible.

Senator CHAMBERLAIN. Why should your corps oppose something like the British system where the judge advocate is there as the legal officer of the court, protecting the court, the Government, and the defendant as well, protecting the court from the commission of error, and protecting the defendants against the admission of incompetent or improper testimony?

Gen. KREGER. You are speaking of a judge advocate who is detailed by the judge advocate general of England to sit with a general court-martial?

Senator CHAMBERLAIN. Not as a part of the court, but as an adviser?

Gen. KREGER. That is, in the comparatively few specially important cases that go to general courts-martial?

Senator CHAMBERLAIN. It might be few, or it might be all.

Gen. KREGER. I think it runs only 25 or 30 cases per annum in time of peace. The district court-martial in the British Army, in time of peace, performs to a very large extent the functions that are performed by our general court-martial.

Senator CHAMBERLAIN. Why should not the judge advocate here appear only as an adviser?

Gen. KREGER. The trial judge advocate?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. Now, the trial judge advocate is the representative of the Government in presenting the case.

Senator CHAMBERLAIN. Now?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Why should not he be there rather as adviser of the court?

Gen. KREGER. Who would present the case for the Government?

Senator CHAMBERLAIN. The court could appoint a special prosecutor if it wants, just as now it appoints a man to defend the accused. As it is now, the commanding officer appoints the court, the judge advocate appoints the man who afterwards rules on the admissibility of evidence, who disapproves or approves the evidence. As a matter of fact it is a Government of men mostly, not a government of law.

Gen. KREGER. I think, Senator, I should have to take issue with you there.

Senator CHAMBERLAIN. I would like to have you enlarge on that, because that is what I get from the hearings.

Gen. KREGER. It is true that the commanding officer appoints the court. It is true that he refers the charges. It is true that he designates the judge advocate. Under present regulations, he must also designate, with each court, a competent officer to represent the accused if the accused does not select someone else. And he passes upon the validity of the findings. He passes on all of these under the sanction of his oath as an officer, requiring him to conform to the law. As a matter of fact, the commanding general, in legal matters, rests upon the advice of his staff judge advocate. Again it is advisory. However, referring to the period when I was judge advocate of a department, I do not recall a single case in which the commanding general applied a different view of the law than the one I advised him was the correct one.

Senator CHAMBERLAIN. That might have been so in your case, but it is not so in every case, if the records here are to be relied upon. But now wherein do we disagree? Wherein is the issue between us? You have practically repeated what I said a while ago as to the power of the commanding officer.

Gen. KREGER. Someone must do these things.

Senator CHAMBERLAIN. Well, I know; but you took issue with me on what I said a while ago.

Gen. KREGER. I took issue with you upon the statement, Senator, that the judgment of a military court is merely the judgment of a man, not a judgment according to law.

Senator CHAMBERLAIN. That is merely a difference in the inference that we draw from a set of facts that exists.

Senator LENROOT. General, on this appellate procedure, perhaps you do not want to say that you agree with the Kernan report. Who, in your opinion, should have the appellate power and how should it be constituted?

Gen. KREGER. It should be lodged finally in the President.

Senator LENROOT. And intermediate between the commanding officer and the President, would there be any?

Gen. KREGER. So far as the details are concerned, the Judge Advocate General's Department should be sufficiently strong in the number and the capacity of its personnel to study and report upon every case promptly and with sufficient cogency to dispose of it according to law.

Senator LENROOT. Still in an advisory capacity?

Gen. KREGER. Still in an advisory capacity.

Senator LENROOT. What difference, then, would there be between that and the present law? Is not that practically the power of the President?

Gen. KREGER. About the only change that seems to me to be necessary would be to make it perfectly clear that until a case is finally disposed of by the supreme appellate power it remains open for reversal or modification of the judgment below, so that no man would have to rest under any finding or sentence that is finally regarded as unwarranted by the record.

Senator LENROOT. Well, I speak now only of prejudicial error of law. Why should the President be the final power in that? Surely he is not presumed to have any special knowledge upon that subject.

Gen. KREGER. I think that is where the power should finally be lodged, because it is essential to the efficiency of any military organization that the final authority rest in one man.

Senator LENROOT. Why—confining ourselves now to prejudicial errors of law?

Gen. KREGER. The moment another is empowered to speak the final word with respect to anything connected with a military organization we establish a second line of command.

Senator LENROOT. Let us see about that, General. Bear in mind that I am now confining myself to prejudicial errors of law. Is it your idea that in a given case, although a competent authority should judge that prejudicial error has been committed, nevertheless there should be power vested in somebody with authority to disregard that error and confirm a sentence that was actually illegal?

Gen. KREGER. No; I do not think that will be done.

Senator LENROOT. I am not speaking of what would be done. I am asking if that would not be so. Why should not there be a competent authority to settle that question of prejudicial errors of law when it would be deemed that the President himself would not necessarily be that competent authority?

Gen. KREGER. If a way were pointed out to effectuate that without establishing a second line of command, I should be ready to consider it.

Senator LENROOT. Is not this the difficulty, General, that in these different plans that have been suggested of an appellate tribunal there is always conveyed with the power of that tribunal not alone to pass upon prejudicial errors of law but really to pass upon the record as a whole and substitute its judgment for that of the court, and is not that where you get your objection?

Gen. KREGER. There is no authority and there never has been an authority that could impose a sentence more harsh than the one adjudged by the court, or enter any finding more harsh than the one arrived at by the court.

Senator LENROOT. I understand that, but there is now an authority that, although it might be admitted by every lawyer and by any competent court that prejudicial error had been committed, nevertheless, may confirm that sentence.

Gen. KREGER. If the commanding general sees fit—

Senator LENROOT. I am speaking now of the power.

Gen. KREGER. If the commanding general sees fit to disregard the advice of his judge advocate; yes.

Senator LENROOT. Yes. Now then, my question is, why should there not be a competent authority to pass upon those questions, not to substitute its judgment, but revise the action of the court-martial with reference to its judgment upon the facts? If there is error committed prejudicial to the defendant, why should not there be some competent authority to settle that, and then go to the President or to the court-martial, or to the commanding officer, it may be, for further decision in the case?

Gen. KREGER. The law at the present time lodges that power and duty in the commanding general.

Senator LENROOT. But the commanding general is not competent upon that. He takes the advice, and it is only advice, from those who are competent to pass upon it?

Gen. KREGER. The moment we lodge that final power in some one other than the commander, however, we make that other the more powerful in the organization.

Senator LENROOT. How can that be so if the jurisdiction of this other authority is limited only to ascertaining whether prejudicial error of law is committed?

Gen. KREGER. Reducing the inquiry to one single feature?

Senator LENROOT. I have stated several times, General, that that was how I was limiting it.

Gen. KREGER. On the face of the question, it would seem not to be specially important. But if the judge advocate may pass upon that finally, it makes him to that extent the superior of the major general commanding the division.

Senator LENROOT. Does it not amount to just this: that the law is superior to the commanding officer? The commanding officer, or whoever affirms the sentence, is supposed to follow the law, and the suggestion that I have made would be purely an authoritative interpretation of the law as applied to a given case. It has nothing to do with the command.

Gen. KREGER. And yet that interpretation rendered by a major would overrule a major general?

Senator LENROOT. That might be so, of course. Let me put the question then, would you think a major general, absolutely ignorant of law, should have a higher power upon the rights of an accused, knowing nothing of those rights as a matter of law, in the matter, than a subordinate officer who is fully competent to pass upon the interpretation of law?

Gen. KREGER. I see no reason for departing from the statement that I have made that the commanding general, with the advice of a competent judge advocate, and acting under the sanction of his oath, should have this final authority.

Senator LENROOT. Even though he is incompetent to exercise it?

Gen. KREGER. I can not assume that he is incompetent to exercise it.

Senator LENROOT. Well, let me give you a case. Assume then that he has no knowledge of the law.

Gen. KREGER. That is why he has a law officer to advise him.

Senator LENROOT. That comes right back to the beginning.

Senator CHAMBERLAIN. That is reasoning in circles. Put it this way: If I may use your own illustration a little further, we will say Senator Warren here and Senator Lenroot and Chief Justice

White constitute the Department of the Judge Advocate General. Every record of conviction of these higher crimes, we will say, approved by the commanding general comes up to them for review. It has been approved by the commanding general, and yet these gentlemen, with Mr. Lenroot, who is a distinguished lawyer, and Justice White, who is a distinguished judge, take that record up by the four corners and they find that there has been prejudicial error, that the defendant was not properly represented, that evidence was excluded that ought to have been admitted, hearsay evidence was admitted that ought not to have been admitted, and that there was gross error in the trial of the case; in other words, that the man did not have a fair trial. They make their finding to that effect. It may not be that they can enforce the judgment of the lower court, but they can at least advise the court of the errors, whether these men had the rank of major or no rank at all.

Gen. KREGER. If the law officers properly advise the commanding general, he will never, in anything like a clear case, give effect to a different view of the law of the case.

Senator LENROOT. That is exactly what we want an appellate tribunal for.

Gen. KREGER. It is not necessary to depart from the theory of military command in order to get the result. It is not necessary to assume to deprive the President of the power to command the Army in order to get the result. It is not necessary to put the division commander in the position of commanding the division, minus the Judge Advocate, in order to get the result. In practice, the advice of the law officers is followed, except in the rare cases as to which two law officers may or do disagree.

Senator LENROOT. So far as the interpretation of the law is concerned, is there any more reason why the President should not be bound by the interpretation of the law of some other body in the military side of the Government than he is bound, as he is bound now, by the very men that he appoints, the Supreme Bench of the United States?

Gen. KREGER. That is a coordinate branch of the Government. But the President is not bound by the opinion of the Attorney General; neither is the Secretary of War bound by the opinion of the Judge Advocate General, nor the Secretary of the Navy by the opinion of the Solicitor.

Senator LENROOT. No; but Congress is given the power to make laws for the government of the Army. I do not see why it is not just as competent for Congress to create a body for the authoritative interpretation of the law as applied to a given case as it is in the civil branch of the Government. I want to be thoroughly understood. I appreciate fully the objections that have been made to mingling the power or jurisdiction of the appellate court, the substitution of its judgment for that of the court-martial, to take a sentence and do with it whatever in its judgment it thinks ought to be done. I can see how that would interfere with discipline. I am unable to see why a competent authority, however constituted, that merely interprets the law as to a given case, could possibly interfere with the military command.

Gen. KREGER. Are we able, Senator, entirely to disassociate law and fact in the trial of a case?

Senator LENROOT. Exactly; the same way that the appellate tribunals are able to do in civil law. They do not disturb the judgments of the lower courts except for errors of law. They do not attempt to substitute their judgment of the facts.

Gen. KREGER. Neither is that the rule in the administration of military justice.

Senator CHAMBERLAIN. There have been absolutely some of the grossest errors committed in cases where men have been convicted that I have ever seen anywhere. And there is no use in shutting our eyes to that fact, and yet the commander is absolutely supreme in those cases?

Gen. KREGER. Error has been committed occasionally and sentences have been imposed that I should not regard as necessary; but the corrections authorized by law have also been applied.

Senator CHAMBERLAIN. Well, now, do you see any objection to making those errors as few as possible?

Gen. KREGER. Not only do I not see any objection to such a course, but I believe thoroughly in making them as few as possible.

Senator CHAMBERLAIN. It seems to me that that proposition which you now advocate, and which was recommended to the Military Affairs Committee in January, 1918, is simply an appeal to Philip drunk and Philip sober. In other words, instead of limiting the power of the Judge Advocate General, it broadens it and gives greater power for errors than existed before.

Gen. KREGER. The power of the Judge Advocate General?

Senator CHAMBERLAIN. Yes; and the military régime, I do not care what you call it. In the last analysis, the President would be governed in 99.9 cases by the advice of the Judge Advocate General or the Chief of Staff, or both. It is still the military machine that is functioning under the plan that you propose.

Gen. KREGER. It is the legal side of the military machine that is functioning. Does a man necessarily cease to be a lawyer because he puts on a uniform?

Senator CHAMBERLAIN. No; but there is the military viewpoint that you spoke of a while ago that you find cropping out all the time, of making a superior officer obey the command of a junior officer.

Gen. KREGER. That situation, of course, can not exist in a military establishment that is to function effectively.

Senator CHAMBERLAIN. It does exist. I will tell you what I mean by that. Here is the commanding officer, who may be the colonel of a regiment, or he may be a higher authority. He appoints a court inferior to him. He appoints the judge advocate who prosecutes the case. He appoints the man who defends the accused. All these men are in the Military Establishment and subordinate to him. The wishes of the commanding officer may be known by these subordinate officers. Is it humanly possible that those men are not influenced at all by what they know the wishes to be of the commanding officer in the case that comes before them?

Gen. KREGER. I do not think that that would influence, in an unlawful way, the judgment of a sworn member of the court.

Senator CHAMBERLAIN. You know there have been cases where the commanding officer has disapproved the findings and had the court reconvened and the accused tried over?

Gen. KREGER. I have never heard of a case, once legally tried, being tried over.

Senator CHAMBERLAIN. To reconsider the case?

Gen. KREGER. To consider the evidence received before the original verdict was arrived at? If a commanding general sent down an order to the court to find otherwise than it had found, if he did more than point out cogently wherein he believed the court had erred, we should have no hesitation in holding the proceeding invalid.

Senator CHAMBERLAIN. That is advisory?

Gen. KREGER. That is ancient history now, because no commanding general is now permitted to send a case back with a view to substituting a finding of guilty for one of not guilty, or to revise a sentence upward.

Senator CHAMBERLAIN. Well, I wish you would examine the case of a young man down in Natchez, Miss., named Winchester. I think you will find in his case that in France he was charged with embezzlement and absence without leave. He was found not guilty of embezzlement, and guilty of absence without leave, and dismissed from the Army, but the commanding officer reconvened the court—that is possible, as you say—and ordered the reconsideration of it by the court, with the result that he was convicted of embezzlement and absence without leave, dishonorably dismissed from the Army, and sentenced to the penitentiary, on the suggestion merely of the commanding officer that a man who was charged with embezzlement ought to be convicted on general principles. If I have misstated the case, I should like to have you give the record of it.

(NOTE BY GEN. KREGER.—A statement respecting this case, prepared from records on file in the Judge Advocate General's office, follows:)

1. First Lieut. Eugene K. Winchester, 155th Infantry, was tried in France on October 23 and 24, 1918, before a general court-martial convened by order of Maj. Gen. Hodges, commanding the 39th Division, American Expeditionary Forces, upon the following charges and specifications, viz:

Charge I: Violation of the 93rd article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, A. P. O. 904, on or about the 10th day of October, 1918, fraudulently convert to his own use and benefit and knowingly embezzle company funds to the value of about \$1,225.00, the property of Company A, 155th Infantry, intrusted to him as company commander of said Company A, 155th Infantry.

Charge II: Violation of the 61st article of war.

Specification 1: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, without proper leave, absent himself from his command from about nine o'clock a. m. October 5th, 1918, to about seven o'clock p. m., October 5th, 1918, by going to the city of Bourges, France.

Specification 2: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, without proper leave, absent himself from his command from about seven o'clock a. m., October 10th, 1918, until about seven o'clock p. m., October 10th, 1918, by going to the city of Bourges, France.

Charge III: Violation of the 96th article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, having been intrusted with the care and custody of the company council book of Company A, 155th Infantry, as commanding officer of said Company A, 155th Infantry, did, in France, at some time between the 3rd day of September, 1918, and the 10th day of October, 1918, while he was charged with the care and custody of said council book, negligently lose or thru design destroy the said council book, together with all vouchers connected therewith.

Charge IV: Violation of the 69th article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, having been placed in arrest by his commanding officer on account of being charged with a crime, did, at Masseurve, France, on or about the 17th day of October, 1918, break his arrest before he was set at liberty by proper authority.

2. Lieutenant Winchester, who was represented at the trial by First Lieutenant Maurice L. Geisenberger, 155th Infantry, as counsel, pleaded not guilty to all of the charges and specifications.

3. The court found Lieutenant Winchester guilty of Charges I, II, and IV, and the specifications thereunder, not guilty of Charge III and the specification thereunder, and sentenced him "to be dismissed the service."

4. In a written review, dated October 27, 1918, Major W. W. Thompson, division judge advocate, expressed the opinion that the record was legally sufficient to support each of the findings of guilty. With reference to the charge of embezzlement, after reviewing at some length the evidence of record, Major Thompson said:

"There can be no question in my mind about the guilt of the accused on this charge."

Major Thompson concluded his review as follows:

"On the question of punishment I am of the opinion that the court has not given proper consideration to the seriousness of the offenses of which it has convicted the accused. To my mind it is still immaterial that the accused did, on the day of the trial, refund what he claims to be the amount he is due the company fund. He occupied the responsible position of company commander and was charged with the obligation of caring for the company fund of that company. Not only did he fail to do that but in some manner he lost the fund, and from what he stated to Colonel Hoskins, we may surmise in what manner he lost it, for he said he had gotten drunk and lost the funds. Could it be argued that if an enlisted man stole a thousand dollars that he would be given a dishonorable discharge and told to go home. Is it any more reasonable in morals or law that this accused should be permitted to escape the consequences of his criminal act. I am of the opinion that this record should be returned to the court and that the reviewing authority should call the court's attention to the fact that the punishment awarded is absolutely and ridiculously inadequate for the offenses of which it convicted the accused."

5. Pursuant to the foregoing recommendation of the division judge advocate, the reviewing authority, Major General Hodges, on October 27, 1918, returned the record to the court by means of an indorsement reading as follows, viz:

"The reviewing authority is of the opinion that the sentence awarded in this case is absolutely and entirely inadequate for the offenses of which the court has properly convicted the accused. The evidence is convincing beyond any question of a doubt that the accused embezzled his company funds. It is likewise clear that he absented himself without leave on two occasions and that when placed in arrest for embezzlement he had so little regard for the restriction that he broke that arrest. In the opinion of the reviewing authority, embezzlement is one of the most reprehensible and detestable offenses which any man may commit.

"The accused was entrusted with this company fund. He was occupying the honorable position of an officer in the United States Army. He violated that trust and dishonored that position by embezzling that company fund. Could it be argued that if an enlisted man had embezzled one thousand dollars or more or property or funds entrusted to him by the Government that a simple dishonorable discharge would be sufficient for the offense? Can it be argued with any more a degree of reason that simple dismissal is sufficient for this offense of embezzlement? The object of all punishment is its deterring effect on others. The reviewing authority is of the opinion that this sentence is not sufficient to impress upon the mind of the accused or upon the minds of others the grave seriousness of the crime which this accused committed by embezzling the fund.

"Having the foregoing views of this case, the reviewing authority is returning the record to the court for a reconsideration of the sentence in the light of the foregoing remarks."

The court having reconvened on October 30, 1918, revoked its former sentence and sentenced the accused "to be dismissed the service of the United States and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five years."

The reviewing authority approved this sentence, and forwarded the record of trial to the commander in chief of the American Expeditionary Forces for action under the 48th article of war.

Gen. KREGER. Did the commanding general order a finding of guilty against the accused?

Senator CHAMBERLAIN. No; he does not have to make an order. Fortunately those cases do not happen often, but they do happen, and it ought to be made impossible for them to happen at all.

Gen. KREGER. It has been.

Senator CHAMBERLAIN. I do not think so. I do not agree with you, General. I would like to have you state how it has been made impossible. You mean by this recent order of the President after the war was over?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That is locking the door after the horse has been stolen, and the very discussion of this subject, I have no doubt, caused the adoption of that order. What is the number?

Gen. KREGER. General Order No. 88, War Department, 1919, paragraph 1.

Senator CHAMBERLAIN. I should like to have that put in the record.

(The order referred to is here printed in the record 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; or

(b) A finding of not guilty of any specification; or

(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.

\* \* \* \* \*

By order of the Secretary of War:

PEYTON C. MARCH,  
General, Chief of Staff.

Official:

P. C. HARRIS,  
The Adjutant General.

Senator CHAMBERLAIN. That is a mere regulation, which, in my opinion, was adopted because of criticisms of the administration of military justice. Now, the next President who comes in may be a splendid man, honest in every purpose, and yet he may be a strict military man, and may have that order revoked. It ought not to be possible that that should lie in the power of any one man to administer justice.

Gen. KREGER. I have not the slightest objection to this regulation being embodied in a statute, because it is something that I have stood for since coming into the Army, possibly due to my training as a lawyer.

Senator LENROOT. General, if it were not for the fact, as you state, of an apparently incongruous situation of a subordinate officer controlling the action of a superior officer, would you be in favor of the action of the Judge Advocate General's office upon the review of cases for errors of law being made final?

Gen. KREGER. If it were entirely possible to divorce the whole procedure from any effect upon the necessary all-inclusiveness of the power of command, then perhaps it would make no difference, but that is practically impossible.

Senator LENROOT. I can not see, General, how the matter of prejudicial error of law can affect command, except—I do not think that affects it—the idea of the subordinate officer controlling the action of the superior officer. In that sense it might perhaps affect command, but so far as the command itself is concerned, how can securing the rights of an accused affect command?

Gen. KREGER. If the commanding general can not be trusted in respect of one thing he can not be trusted in respect of another. The moment we begin to take from him the power to decide in respect of everything, of course always under the law, in respect of everything that has to do with his command, we weaken his control over his organization. The commanding officer must be responsible for everything in connection with his organization. It is only where he is in fact the commanding officer that he can get the best out of his command.

Senator LENROOT. So in theory he must be an absolute autocrat?

Gen. KREGER. No; because we do nothing autocratically.

Senator LENROOT. In theory—I am not speaking of what you do—he must be an absolute autocrat.

Gen. KREGER. Not in theory even; because he acts always under the sanction of the law.

Senator LENROOT. Acts under the law when it is admitted that he himself may be absolutely independent to interpret the law?

Gen. KREGER. That is proceeding upon the assumption that he not only knows no law himself, but will not consider any legal advice. The commanding officer acts upon the advice of his staff officers in a very large proportion of the decisions that he makes, the things that he orders. If we are to permit the judge advocate to be final in respect of certain things said to be within his jurisdiction, why not make the quartermaster final in respect of his, and the ordnance officer in respect of his?

Senator LENROOT. Do you make no distinction, General, between protecting the rights of a citizen accused of crime and carrying out an ordinary policy, attempting to make a comparison between the conduct of the Quartermaster's Department and the court-martial trial?

Gen. KREGER. They are two different functions, each of which ought to be performed in the best possible manner. The difference seems to be that I take the view that the commanding general will perform his duties according to law, and that there is a theory on the part of others that he will not, that he will be autocratic, and arbitrary, and will disregard the law. In my 20-odd years of service in the Army, I have served under no commanding officer that would arbitrarily override considered legal advice.

Senator CHAMBERLAIN. Do you think that the British discipline is impaired by the fact that the judge advocate general of Great Britain holds his position for life, with a large salary, and the cases are reviewed by him and he determines whether or not there was error, and wherein the error consists, and his finding goes through the assistant adjutant general to the minister of war, and the opinion of the attorney general may then be asked by him, but not in all of the cases, the judge advocate general is followed, his opinion is followed? Do you think the British discipline is impaired by the fact that he is a civilian and that his opinions are followed in the administration of military justice?

Gen. KREGER. He is a subordinate of the prime minister, responsible to him, indirectly it is true.

Senator CHAMBERLAIN. Well, the appellate tribunal that Senator Lenroot is suggesting here has only the power to find whether or not there has been error. It does not propose—

Gen. KREGER. But that is establishing a separate, independent tribunal; whereas the judge advocate general of England simply reports to the Secretary of State for War through the deputy adjutant general—through a military channel—to the supreme executive authority.

Senator CHAMBERLAIN. Senator Lenroot was not here when that system was gone into, but the rights of the accused are further protected in the British system in this way, that if the court goes ahead and imposes a sentence in violation of the advice of the judge advocate who attends the trial, the court subjects itself to liability for damages.

Gen. KREGER. I suspect that if a court were to proceed without jurisdiction with us the same result would occur.

Senator CHAMBERLAIN. Then it would "break" some of the officers of the Army if it were pursued relentlessly.

Gen. KREGER. Following the Milligan case were there not a number of civil actions against the members of the commission?

Senator LENROOT. I think there were. I do not know what became of them.

Gen. KREGER. The Supreme Court held that the military commission that tried Milligan was without jurisdiction to do so; and I think that later there were civil proceedings for damages against the members of the commission with judgment for Milligan.

Senator CHAMBERLAIN. That is a provision of law and regulation in Great Britain.

Senator WARREN. Have you anything to offer that has occurred to you bearing on this general subject, as to the other angles of it?

Gen. KREGER. Nothing occurs to me at the present time.

Senator LENROOT. General, you are familiar with how this bill proposes to constitute the court, allowing enlisted men to sit on the court. What would you say about that?

Gen. KREGER. I think that would not be a satisfactory means of securing both justice and discipline.

Senator LENROOT. Would you think that the sentences or that the attitude of those enlisted men would be more or less severe toward the accused as a rule?

Gen. KREGER. I am inclined to think that their attitude would not be as consistent as those of the officers. They would be more likely

to be swayed by what might be termed a local view of the offense, the offender, or the occasion; because naturally the view of the enlisted man is somewhat more circumscribed than that of the officer.

Senator LENROOT. On courts-martial generally, is it your experience that officers of a court are more sympathetic to officers that are accused than to enlisted men, or otherwise?

Gen. KREGER. Taking it by and large, I do not see that there is any material difference. In some instances it has seemed to me to be manifest that the court was swayed by sympathy for an officer; in others it was quite manifest that the court was swayed by sympathy for an enlisted man, especially his family.

Senator LENROOT. It would depend on the facts in the particular case?

Gen. KREGER. Yes; it would depend on the facts in the particular case. The proceedings in the cases of officers are ordinarily more extended than in the cases of enlisted men. The issues in the cases of officers are usually the more complex, affording more opportunity for the activities of counsel and for a harder fight.

Senator LENROOT. But you do not think that the mere classes, the fact that one is an officer being tried and the other an enlisted man, without reference to the personality of either, makes any difference?

Gen. KREGER. I do not think that that appears as a consistent thread running through the administration of military justice. It is possible that when an officer is dismissed, and also sentenced to confinement, or in a case where confinement might be authorized in addition to dismissal, the period of confinement may sometimes be tempered on the theory that dismissal is, by itself, a substantial punishment. However, that is not a theory that has appealed to me. To my mind, the dishonorable discharge adjudged in the case of an enlisted man stands on a par with and amounts to as much punishment for the enlisted man as dismissal does to an officer. The two are identical, except that the words descriptive of the judgment are different.

Senator LENROOT. In addition to that, in case of two identical crimes, one by an officer and the other by an enlisted man, as a rule would it not be said that the officer should be held to a higher standard?

Gen. KREGER. That is my theory. If an officer and an enlisted man were concerned in the same offense, I should be inclined to try the officer and let the enlisted man go with an admonition.

Senator WARREN. There has been some difference of opinion and some discussion as to whether the list of specific crimes and misdemeanors and the punishments named should be enlarged, or whether the trials and the sentences and the punishment should rest upon the circumstances under which the offense occurred, the situation and surroundings when the offense was committed. What would you say about that?

Gen. KREGER. It might be practicable to enlarge somewhat the specific description of offenses, though the revision of 1916 goes considerably further than the prior form of the Articles of War did. But to lay down a specific punishment for each particular offense I think is, in the long run, impracticable, because the circumstances under which an offense may be committed vary so widely as to make it necessary to leave a very wide discretion in the court.

Senator WARREN. Now, on the whole, would the sentence be liable to be more or less severe, taken by and large, if such transgression were enumerated in the law, or if it were left to the court to provide a maximum?

Gen. KREGER. My own theory is that the statute itself should describe the various offenses and indicate maximum limits of punishment somewhat generally, and that the executive should have the power to define the limits of punishments, not only in peace time, but also in war time.

Senator WARREN. Do you mean to have some standard maximum or not?

Gen. KREGER. Yes.

Senator WARREN. If you have that standard there are times, of course, when you want to reach above that standard and times when it seems desirable to go below it. What I was getting at was, what would be the probable effect, especially with the newer officers in time of war and the surrounding excitement—whether they would be less liable or more liable to go to that maximum, or to consider the line from zero to the maximum entirely within their decision.

Gen. KREGER. I am inclined to think, from observing what occurred at the beginning of this war, that if there were a list of maximum limits in the statute, sufficiently high for all possible conditions, the courts would crowd the limit pretty closely. The necessarily high statutory limit would serve as a suggestion, whereas, without that, perhaps the effect of peace-time limits, defined by the executive, would not be entirely lost even though the army were extended. Does that in anywise answer your question, Senator?

Senator WARREN. Yes; that answers it. Now, if you care to, I think you, perhaps, would have more knowledge of the comparison between the severity of sentences over on the other side, in the trials by courts-martial, with those here, in the preliminaries, when these men were being trained, than perhaps would any other officer or any other one who has come before the committee. You have had those cases come to you both from the United States and from the other side, have you not?

Gen. KREGER. Yes.

Senator WARREN. Well, now, taking it as a class, and especially in the minor offenses, has there been a difference, and if there has been a difference which has been the more severe, taken as a lot, those abroad or those at home?

Gen. KREGER. I should have to give my impression. It is something that I asked the statistical section, some little time ago, to investigate with a view to getting something definite to back up my impression. The section has not yet found the time to make the necessary examination. My impression, however, is that the sentences adjudged in Europe did not include so large a proportion of what may be regarded as severe sentences as was the case over here.

Senator LENROOT. It ought to have been the other way.

Senator WARREN. You took the words out of my mouth. That is the reason why I am making this inquiry, and of course we should like to get the testimony back as soon as we can, but we should like to have you give some information on that and as specifically as possible, because I have had the impression, from listening to this

testimony, and also from what I have seen from time to time in the press, but more especially from the statements made here, that at the front, right up under the guns, those sentences have been far less in the whole aggregate of years or months of imprisonment than they have been over here. I should like to be set right about it.

Gen. KREGER. I will try to have such a statement prepared.

Senator WARREN. It is not entirely a matter of curiosity, but while these younger men who are associated with me on this committee will see more wars, I do not expect to see more than a dozen more, and I think this legislation ought to be founded not only on our experience of what we have had, but on the practices that might be adopted in another war, judging from this last one. For instance, if we are going to bring in another large army, we shall have to do it as we did this time, from the body of the people, those that do not volunteer but who are willing to do their duty; and matters will be left largely in the hands of officers that will be taken from such a body of men, some from the Regular Army and some from the new army, and I want to see what the tendency was this time in order to guard against it in the next, if necessary.

Gen. KREGER. Discipline and justice must go hand in hand. No organization that is without discipline can dispense justice, and no organization that does not dispense justice can have discipline. The question or the difference of opinion is how may we best secure the desired result.

Senator WARREN. Now, from reports we get, it would seem that out of the thousands of cases—and there must be thousands—there must be some erroneous judgments, and there have been some sentences that seem to me have not only verged on the absurd and ridiculous, but have exceeded ordinary absurdity. Of course, if that is only occasionally, here and there, that is one thing. But on the other hand, if the general current is in that direction, I think we ought to seek a way to check it. Discipline must accompany justice and there must be in the face of the enemy a way of reaching it and reaching it quickly.

Gen. KREGER. I have some statistics that touch indirectly on that subject. During the period from April 6, 1917, to August 31, 1919, 30,916 men were tried by general courts-martial.

Senator CHAMBERLAIN. General courts?

Gen. KREGER. General courts-martial. These trials resulted in 24,668 approved convictions. The approved convictions included 5,991 cases in which dishonorable discharge or dismissal was executed; 6,674 cases in which dishonorable discharge was adjudged but the execution thereof suspended; and 12,003 cases in which the judgment did not include death, dismissal, or dishonorable discharge, what may be termed minor sentences, involving ordinarily terms of confinement not in excess of six months, and in approximately 3,000 cases no confinement whatever.

Senator WARREN. It must be less than six months in certain courts, must it?

Gen. KREGER. Yes. Of course the general court-martial can adjudge anything from reprimand on upwards. Speaking of general court-martial cases, of the approved convictions, approximately half carried neither dishonorable separation from the service nor confine-

ment for terms in excess of six months. Of the 30,916 trials, 6,248 resulted in acquittals or disapproved convictions. This does not include the cases in which the records were found legally insufficient to support the sentences when they came on up to the Judge Advocate General's office.

Senator WARREN. That 31,000 covered what—the entire force on the other side; 2,000,000 men?

Gen. KREGER. That covered the entire United States Army, all over the world.

Senator WARREN. For how long a time?

Gen. KREGER. For the period from April 6, 1917, to August 31, 1919, barring a few cases that are still in the office here in the course of examination, and which therefore have not been included.

Senator WARREN. Well, then, that comprehended 4,000,000 men that were being demobilized during that time?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Did those cover life sentences?

Gen. KREGER. Yes. Cases of life sentence would come in with the dishonorable discharges or the dismissals.

Senator CHAMBERLAIN. Have you the aggregate of the number of years of sentence passed on those 31,000 men?

Gen. KREGER. I can give it to you in an indirect form, I think. This is a table prepared a day or two ago covering 21,111 convictions involving confinement, and therefore not covering the total number of convictions. It runs from April 6, 1917, to September 20, 1919, and is divided up into three periods. During the period from April 6, 1917, to June 30, 1918, 8,840 convictions carried an average of 2.66 years as the term of confinement.

Senator CHAMBERLAIN. That is the original sentence?

Gen. KREGER. That is the original sentence.

Senator WARREN. Those were to disciplinary barracks as well as to the penitentiaries?

Gen. KREGER. Yes. This is a statement prepared by Lieut. Col. Dinsmore, the chief of the statistical section of the office, showing the average sentence to confinement adjudged by general courts-martial and approved by reviewing authorities from the beginning of the war up to and including September 20, 1919.

Senator WARREN. Now, that is the sentence that was given?

Gen. KREGER. Yes.

Senator WARREN. Of course, I presume you can not tell exactly the actual service under those sentences, and I suppose a great many of them were changed.

Gen. KREGER. I have some figures here; but possibly you would like the figures for the other two periods.

Senator WARREN. Yes.

Gen. KREGER. From July 1, 1918, to June 30, 1919, the average term of confinement adjudged in 11,016 cases was 3.95 years. During the period from July 1, 1919, to September 20, 1919, it was 1.92 years.

Senator CHAMBERLAIN. That is the average?

Gen. KREGER. Yes; by periods.

Senator CHAMBERLAIN. What is an average, how many years?

Gen. KREGER. The average sentence for the 21,111 cases is 3.29 years.

Senator WARREN. Now, what we want to get at is the actual service. I suppose a good many are still serving.

Gen. KREGER. I think I can put a statement in the record, after reference to the records in the office, touching that.

Senator WARREN. Do that.

Gen. KREGER. I have a showing here as to the average length of time served by 1,107 men who were honorably restored to duty through the disciplinary barracks at Fort Leavenworth. The average sentence originally adjudged upon those men was 7.4 years. The average period actually served in confinement before their honorable restoration to duty was .43 of one year.

Senator WARREN. A little less than 6 months.

Gen. KREGER. Yes; a little less than 6 months.

Senator WARREN. That is for Leavenworth. What about the other two?

Gen. KREGER. I do not happen to have the figures for the other two.

Senator WARREN. You can insert them, can you?

Gen. KREGER. Yes; if the transcript does not have to come back too soon, I can get the information.

Senator WARREN. I suggest that you wire for it.

Gen. KREGER. I would have to telegraph to Jay and Alcatraz for the figures.

Senator CHAMBERLAIN. Are there only three prisons?

Gen. KREGER. Only three disciplinary barracks; yes. Here is a statement showing the number of men restored to the colors from the disciplinary barracks.

Senator WARREN. The ones that served out their sentences and received dishonorable discharge? What proportion should you say of the whole was passed out at the end, dishonorably discharged; that is, dishonorably discharged from the Army? Of course the figures are all staggering, because of the size of the Army.

Gen. KREGER. Those figures I do not happen to have at hand; but I do have some that are indicative of the speed with which convicted men have flowed through the disciplinary and penal institutions. On April 1, 1917, there were 2,101 general prisoners in the disciplinary barracks, and 212 in penitentiaries.

Senator WARREN. That was about the commencement of the war?

Gen. KREGER. Yes; April 1, 1917. During the period from April 1, 1917, to July 31, 1919, there were received from all sources at the disciplinary barracks 11,492 men, and in the penitentiaries 1,352 men.

Senator WARREN. That is, inclusive of the first?

Gen. KREGER. No; those are the new receipts. The total to be accounted for for the period is: In the disciplinary barracks, 13,593 men, and in the penitentiaries, 1,564 men.

Senator LENROOT. Does that include those in France?

Gen. KREGER. Yes; with comparatively few exceptions. This report was made as of July 31, and on August 16 there were only 34 general prisoners in France.

Senator LENROOT. It does not amount to much.

Senator WARREN. They are supposed to bring the prisoners home as fast as possible?

Gen. KREGER. The homeward movement of the general prisoners in France began in May and was practically carried to a conclusion by the end of July. The whole number of men in confinement in disciplinary barracks on August 30, 1919, was 3,728.

Senator WARREN. Four weeks ago?

Gen. KREGER. Yes.

Senator WARREN. How many in the penitentiaries?

Gen. KREGER. Eight hundred and fifty-five in the penitentiaries.

Senator WARREN. That would be over a thousand more than there were at the commencement of the war in both.

Gen. KREGER. The total at the commencement of the war was 2,313 in both classes of institutions; and in both classes of institutions on August 30, 1919, there were 4,583 men. In other words, the increase through the 4,000,000 citizen army was about 2,200. That is the increase up to August 30, 1919.

Col. Rigby told me that there had been some inquiry about the restorations to duty. We have sufficient figures upon which to base a statement by quarters: During the quarter, April to June, 1917, 172 men were restored to duty; July to September, 1917, 136; October to December, 1917, 237; January to March, 1918, 153; April to June, 1918, 160; July to September, 1918, 270; October to December, 1918, 267; January to March, 1919, 427; April to June, 1919, 453; July and August, 1919, 200.

Those figures give the most definite information our office had last night on restorations to duty at the three disciplinary barracks.

I gave you, a short time ago, the average length of time that men had served at Fort Leavenworth prior to restoration.

Senator WARREN. Well, General, I can not figure how you should have so very many to go through the penitentiaries and disciplinary barracks in the short time of this war and come out with so few left if they have served the time that you have given us, on the average.

Gen. KREGER. I am giving the average sentences adjudged.

Senator WARREN. I thought you were giving us the length of service as you went along.

Gen. KREGER. No.

Senator WARREN. I am very glad to see the way it is. I am not finding fault.

Senator LENROOT. The majority were short sentences?

Gen. KREGER. Yes; as indicated a bit ago, out of the twenty-four thousand and some hundreds of approved convictions there were 12,000 sentences that were minor sentences, six months or less.

Senator WARREN. That would bring it down, all right.

Gen. KREGER. And then, of course, the clemency agencies have been operating on these sentences.

Senator LENROOT. Has the clemency board acted upon practically all of the cases? Of course, they act upon them over and over again, more than once. Have all of the cases been gone through, practically?

Gen. KREGER. Very nearly so. A few cases from abroad have not yet been acted upon, because some of these prisoners reached home as late as the latter part of July. A small portion of the cases from France has not yet been disposed of. At the present time we are engaged to a considerable extent with the reexamination of cases that have heretofore been passed upon. We had in the office this morning 489 clemency papers.

Senator LENROOT. Does that cover definite periods, General?

Gen. KREGER. An automatic report was called for by special order of the Secretary of War in January. Some time ago I suggested that it be made the rule that, as soon as a prisoner reaches a penal institution, a report be made of his case. Such reports on recent cases are coming in now—cases that have been passed on by our board of review, and the legality of the sentences determined, within the last few weeks.

Senator WARREN. Are there any of those details that you wish to insert? Of course, you have got the meaty part of them, but would it enhance the value of the testimony to include any of those?

Gen. KREGER. I may be able to attach some additional statements.

Senator WARREN. Make it as plain as you can for us to review. Of course, a tabulated statement is always preferable to figures given in a conversational way.

(Tabulated statements touching various matters hereinbefore referred to follow:)

*Analysis of results of trials by general courts-martial.*

Number of men tried by general courts-martial from Apr. 6, 1917, to Aug. 31, 1919.....	30, 916
Approved convictions.....	24, 668
Dishonorable discharges and dismissals executed.....	<sup>1</sup> 5, 991
Dishonorable discharges suspended.....	6, 674
Other sentences.....	<sup>2</sup> 12, 003
Total.....	24, 668
Acquittals, disapproved convictions, sentences set aside, etc.....	6, 248

*Table showing the average length of sentences to confinement imposed from the beginning of the war to Sept. 20, 1919, for the whole Army.*

	Total number of convictions involving confinement.	Average term of confinement adjudged, in years.
Apr. 6, 1917, to June 30, 1918.....	8, 840	2.66
July 1, 1918, to June 30, 1919.....	11, 016	3.95
July 1, 1919, to Sept. 20, 1919.....	1, 255	1.92
Total.....	21, 111	3.29

NOTE.—These figures do not include unreduced life sentences.

<sup>1</sup> Does not include a few cases involving sentences to dismissal, which are now pending.

<sup>2</sup> Includes a few cases involving sentences to dismissal, which are now pending.

Table showing average length of sentences to confinement imposed from the beginning of the war to Sept. 20, 1919, in the United States and in the American Expeditionary Forces in Europe, respectively.

	Total number of convictions involving confinement.	Average length of confinement imposed in years.
<b>Apr. 6, 1917, to Feb. 1, 1919:</b>		
United States .....	13, 837	3. 77
American Expeditionary Forces .....	1, 221	3. 40
Total .....	15, 058	3. 74
<b>Feb. 1, 1919, to Sept. 20, 1919:</b>		
United States .....	3, 302	1. 49
American Expeditionary Forces .....	2, 751	2. 96
Total .....	6, 053	2. 16
<b>Apr. 6, 1917, to Sept. 20, 1919:</b>		
United States .....	17, 139	3. 33
American Expeditionary Forces .....	3, 972	3. 10
Total .....	21, 111	3. 29

NOTE.—These figures do not include unreduced life sentences.

Statement showing average sentence served by men who left a disciplinary barracks or a penitentiary otherwise than by escape from Apr. 1, 1917, to July 31, 1919, and average sentence remaining to be served by men in confinement on July 31, 1919, less allowance for good conduct time not forfeited.

	Disciplinary barracks.	Penitentiary.
	Years.	Years.
Average sentence served by men who left a disciplinary barracks or a penitentiary otherwise than by escape.....	1. 06	2. 94
Average sentence remaining to be served on July 31, 1919, less allowance for good conduct time not forfeited (not including life sentences).....	1. 59	3. 96

Men confined in disciplinary barracks and penitentiaries Apr. 1, 1917, to Aug. 30, 1919.

	Disciplinary barracks.	Penitentiaries.	Total.
In confinement Apr. 1, 1917.....	2, 101	212	2, 313
Received from all sources, Apr. 1, 1917, to July 31, 1919.....	11, 492	1, 352	12, 844
Total.....	13, 593	1, 564	15, 157
In confinement Aug. 30, 1919.....	3, 728	855	4, 583

Statement showing, by quarters, the number of men restored to the colors at disciplinary barracks, Apr. 1, 1917, to Aug. 31, 1919.

	1917	1918	1919
First quarter.....		153	427
Second quarter.....	172	160	453
Third quarter.....	136	270	1 200
Fourth quarter.....	237	267	.....
Total.....	545	850	1, 080

<sup>1</sup> July and August only.

Grand total of men restored to the colors, Apr. 1, 1917, to Aug. 31, 1919, 2,475.

Statement showing number of men restored to the colors at each of the three disciplinary barracks, between Apr. 6, 1917, and Aug. 31, 1919.

	United States disciplinary barracks, Fort Leavenworth, Kans.	Atlantic branch United States disciplinary barracks, Fort Jay, N. Y.	Pacific branch United States disciplinary barracks, Alcatraz, Calif.	Total.
Number.....	1,410	470	568	2,448
Average sentence in years originally adjudged against men so restored.....	8.8	2.98	2.17	5.73
Average sentence in years actually served by men so rest. red.....	.43	.59	.57	.49

NOTE.—This statement does not include 156 men who, during the period stated, were restored to the colors and at once honorably discharged, or who, during the same period, were rest. red to the colors and granted ordinary discharges, by order of the Secretary of War, under paragraphs 139 and 150, Army Regulations, for the reason that the necessary information concerning these men is not available.

Senator LENROOT. General, from a disciplinary standpoint alone, is there any material difference, in your judgment, between a sentence of 5 years and a sentence of 20 years; I mean upon the morale of the Army?

Gen. KREGER. In my judgment; no.

Senator WARREN. What about 40 years or 60 years?

Gen. KREGER. My judgment would favor the 5-year sentence, as against the 40 or 60 years, as a disciplinary measure. Justice along with discipline are dependent upon each other. If a command were to form the impression that the two are not traveling hand in hand, both will suffer.

Senator WARREN. I should consider the whole idea that the dispensation of justice is a matter of discipline; in other words, prepare the man in a way to be a better man or to retrieve him entirely unless it be a very few who, like mad dogs, ought to be penned up in the penitentiary.

Gen. KREGER. The military punishment can be combined in a very large proportion of the cases with salvage.

Senator LENROOT. What has been your observation on that and your experience in the Army?

Gen. KREGER. On the salvage proposition?

Senator LENROOT. Yes.

Gen. KREGER. The more experienced officers, I think, as a rule, are the ones that make the greater effort to save a man. Youth is likely to be somewhat intolerant of the errors or weaknesses of others.

Senator WARREN. Of other youths?

Gen. KREGER. Yes. There is a wide difference, Senator, in the extent to which the court-martial system is invoked by different officers. A number of years ago, while serving as judge advocate of the department, I found the number of summary court trials in one organization running very high. A letter was written to the company commander, inviting attention to his high summary court record. He insisted it was due to local circumstances, the character of the men, the origin of the men. However, at the same station, under identical conditions, with men from the same source, there was another company commander who was getting along with less.

than one-half as many summary court trials. Therefore it was proper to point out to the first captain that his explanation of his high summary court rate was not convincing. He began to study the problem more fully, with the result that there was a very decided reduction in the number of summary court proceedings in his command.

Two district attorneys will probably lay different budgets before their grand juries; so two company commanders will proceed differently in the matter of the trial of their men. I confess that I am somewhat inclined to gauge the efficiency of a command by the rate of trials by courts-martial. Other things being equal, the lower court-martial rate ordinarily is found in the more efficient organizations.

Senator CHAMBERLAIN. On the 26th of February last, when the subject of trials by court-martial was under consideration, Senator McKellar went into the proposition of the stigma of conviction and the question of punishment, and Gen. Crowder in answer to a question asked by Senator McKellar, on page 281 of the hearings, said:

Gen. CROWDER. Now, addressing myself to the two elements of that briefly, I want to say that before 30 days I shall have 60 per cent, or maybe 70 per cent, of these sentences remitted in their excessive portions; and within 60 days I hope to have the whole field cleared up, so that you need not consider the question of the punishment. That is the order. They will be worked out very expeditiously. So there remains to be considered only this question of removing the stigma of conviction.

Has the whole thing been cleared up within 60 days from February 26, 1919?

Gen. KREGER. With comparatively few exceptions the examination of the approximately 5,000 cases of men then confined in disciplinary barracks and penitentiaries in the United States—the cases to which, I believe, Gen. Crowder referred—was completed about June 1. About that time we began to give special attention to cases from the other side. Nearly all of the cases from the other side have now been examined. Of course, the task of the clemency agencies is not entirely completed. They are working continuously—considering the cases of men convicted since March 1 of this year, and upon application considering, for a second and even for a third time, the cases of men who had been convicted at an earlier period. From February 25 to September 12, 1919, the clemency agencies examined and reported upon the cases of 6,598 men.

(NOTE BY GEN. KREGER.—A brief statement on the subject follows:)

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington.

*Statement showing activities of clemency agencies in the office of the Judge Advocate General of the Army, during the period from Feb. 25 to Sept. 12, 1919, inclusive, in respect of cases of men sentenced to dishonorable discharge and confinement in a disciplinary barracks or a penitentiary.*

I.

Number of cases considered.....	6,598
Less number of life-sentence cases.....	106
Balance noted under subdivisions II and III.....	6,492

## II.

Average sentence to confinement originally adjudged in cases considered.....	years.....	6.93
Average sentence to confinement, in cases considered, remaining after remissions.....	years.....	1.86
Per cent of reduction.....		73.04

## III.

Number of cases in which the entire unexecuted portion of the sentence to confinement was remitted.....		1,960
Number of men recommended for or authorized to apply for ordinary discharge (A. R., sec. 139, par. 1; sec. 150, par. 3) by order of the Secretary of War, with remission of the dishonorable discharge adjudged.....		547
Number of men recommended or authorized to apply for restoration to duty.....		429

## IV.

Number of life sentence cases in which clemency was recommended.....		20
Average term sentence left in effect in the 20 life-sentence cases—years.....		13.05

## V.

Number of cases in which clemency was recommended.....		5,462
Per cent of cases in which clemency was recommended.....		82.73

JOHN P. DINSMORE,  
Lieutenant Colonel, Judge Advocate,  
Chief, Statistical Section.

It would seem to be appropriate for me to add here, with the permission of the committee, a brief statement concerning certain matters mentioned in the record at earlier stages of the hearings.

On pages 162 and 163 of the record it is stated in substance that Col. William S. Weeks, judge advocate, was relieved from duty in the Judge Advocate General's office in an unusual manner, without notice, and "ordered to Charleston, an insignificant place, which, of course, will carry immediate reduction." The assignment of Col. Weeks to duty at Charleston was ordered upon my recommendation, made while I was serving as Acting Judge Advocate General. In March, Col. Weeks orally expressed to me a desire to be transferred from Washington to West Point as professor of law at the United States Military Academy. Subsequently he expressed the same desire in writing. No request for his detail was received from the superintendent of the academy. Early in June Col. Weeks was offered an assignment as department judge advocate at Charleston, which he declined. He was then advised that it was my intention to request an order assigning him to duty at Charleston. In July he was again advised to the same effect. On August 21 I filed a request for the order, which was issued on the following day. The transfer did not involve a reduction in rank. He still holds an emergency commission as colonel.

On pages 192 and 193 of the record appears a statement to the effect that the commandants of the disciplinary barracks, who were very potential factors in the granting of clemency, were brought on to Washington and that they and the Acting Judge Advocate General conferred with the special clemency board and the clemency examiners, and agreed upon some principles governing the award

of clemency, but that Col. Ansell, president of the board, though present in his office, was not notified of, and was not present at, the meeting. I was Acting Judge Advocate General when the conference referred to took place, but did not arrange it; neither was I present.

On pages of 193-196 and 203-207 of the record it is suggested that Col. Ansell was denied the necessary freedom and authority in the performance of his functions as president of the special clemency board; that his views with reference to the personnel of the special clemency board and the agencies connected therewith did not receive due attention; and that I, as Acting Judge Advocate General, obstructed the exercise of clemency in appropriate measure and delayed unnecessarily the examination of the cases of general prisoners from abroad.

The facts are otherwise.

Following receipt and examination of the memoranda dated March 21 and March 24, 1919 (Ansell Exhibit S and Ansell Exhibit T, record, pp. 193 and 195), I informed Col. Ansell that by virtue of his assignment as president of the special clemency board he was vested with authority to communicate his views and instructions respecting the exercise of clemency to all of the personnel serving under him—the personnel of the special clemency agencies. No orders or instructions to the contrary were issued, at any time, by me or by my direction. On April 7, at my suggestion, and in my presence, Col. Ansell redated the memorandum of March 21 (Ansell Exhibit S, record, p. 193), modified the address by striking out my name and substituting therefor "The special clemency board, the special clemency examiners, and the special board of review," and adding, after his own name at the end of the memorandum, the title "Lieutenant Colonel, Judge Advocate, President Special Clemency Board."

By my direction the memorandum, thus dated, addressed, and authenticated, was mimeographed and distributed to the personnel of the clemency agencies of the Judge Advocate General's Office. A copy of the memorandum, as published, appears as an inclosure to my first indorsement, dated June 19, upon a subsequent memorandum from Col. Ansell, dated May 17, and therefore is not copied here but is copied later in connection with a copy of that indorsement. Throughout his service under my direction as Acting Judge Advocate General, Col. Ansell was left free to exercise all the authority that his assignment to duty as president of the Special Clemency Board implied.

In his memorandum of March 24 (Ansell Exhibit T; Record, p. 195) Col. Ansell requested that Col. Easby-Smith be relieved from duty with the special clemency board. Col. Easby-Smith was an industrious member of that board, conscientiously devoted to his task, who acted throughout with due regard for the rights and the interests of the individual as well as for the rights and interests of the Government. After careful observation and consideration I could discover no reason, other than Col. Ansell's request, for relieving Col. Easby-Smith, and therefore declined to do so, advising Col. Ansell accordingly. So far as I now recall, this is the only specific request touching the personnel of the special clemency board and cooperating agencies that was preferred by Col. Ansell and

denied by me. He was uniformly consulted with reference to the assignment of officers to duty in connection with the special clemency board or their relief therefrom, and no such assignment or relief was ordered by me against his expressed wishes.

With reference to the suggestion that due to my action or inaction examination of the cases of general prisoners from abroad was unnecessarily delayed, the records of this office show that the special clemency board, in outlining a plan for carrying on the work of the board, said:

It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examination of the cases of those serving sentences of confinement within the United States, since, it is thought, the obtaining of the necessary information and the relationship of the offense to the theatre of war are considerations which would concur in such postponement.

Col. Ansell's concurrence in this plan is indicated by the fact that his signature is appended to the report (filed February 21, 1919) without any indication of dissent. On May 15, two days before Col. Ansell's memorandum of May 17 (Ansell Exhibit U; Record, p. 204) was written, I took steps toward bringing home the general prisoners from abroad, in order that their return might coincide substantially with the completion of the examination of the cases of general prisoners confined in the United States at the time the special clemency board was organized. The homeward movement of general prisoners from abroad began during the latter part of May and was practically completed by the end of July. The task of examining into their cases was taken up coincident with the completion of the first branch of the task of the special clemency agencies. At no time since the middle of March have the clemency agencies of the Judge Advocate General's Office been without all the work they could dispose of, and at no time during that period has the personnel of those agencies been reduced so as to be unable to meet the demands of the situation.

In this connection it may be added that the cases of nearly all of the general prisoners sent home from abroad have been examined and reported upon by the clemency agencies of the Judge Advocate General's office.

The measure of the clemency granted and the extent of the field covered during the period of my service as Acting Judge Advocate General is disclosed by the "statement showing activities of clemency agencies in the office of the Judge Advocate General of the Army during the period from February 25 to September 12, 1919, inclusive," inserted in connection with some of my earlier remarks on the subject. The nature of the activities of the clemency agencies is disclosed somewhat in detail by the official correspondence which followed the filing of Col. Ansell's memorandum of May 17, 1919 (Ansell Exhibit U; record, p. 204). A copy of that correspondence is appended.

MAY 17, 1919.

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

I recommend:

1. That the special clemency work which is now limited in its considerations to prisoners confined in the United States be extended to prisoners in our Army serving sentences in Europe.
2. That a more thorough review now be made of all doubtful cases here of prisoners still having more than three months to serve; this in recognition

of the fact that the work of special clemency examination has been done so hastily as to preclude assurance of satisfactory results.

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

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

S. T. ANSELL,  
*Lieutenant Colonel, Judge Advocate,  
President of Special Clemency Board.*

[1st Ind.]

WAR DEPARTMENT, J. A. G. O., *June 19, 1919.*

To The Adjutant General of the Army.

1. Attention is invited to the foregoing memorandum for the Secretary of War, submitted by Lieutenant Colonel S. T. Ansell, judge advocate, president of the special clemency board functioning in this office, which reads as follows:

"I recommend:

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

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

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

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

2. On January 22, 1919, the following instructions, the promulgation of which has been recommended by the Judge Advocate General of the Army on January 18, 1919, were telegraphed by The Adjutant General of the Army to officers exercising general court-martial jurisdiction, viz:

"In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December fifteen, nineteen sixteen, is obvious. Where in exceptional cases a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record period. Trial by general court-martial within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the one hundred fourth article of war would be under all the circumstances of the case clearly inadequate."

Since January 22, 1919, courts and reviewing authorities have, of course, functioned with the instructions of that date in view.

3. With the approval of the Secretary of War, an office order was issued on January 28, 1919, establishing a special clemency board in this office, under the presidency of Brigadier General S. T. Ansell. That board began to pass upon cases on or about February 25, 1919, and has been engaged continuously upon the task since that time. The effect of the instructions touching the jurisdiction and functions of the special clemency board, as I understand those instructions, is to require the board to examine with a view to the extension of clemency and the adjustment of penalties to the requirements of justice and discipline, but in view of the restoration of conditions approximating those of peace, the cases of all general prisoners confined in penitentiaries or in disciplinary barracks in the United States for offenses committed on or after April 6, 1917, and tried by general court-martial on or before January 22, 1919, the

date upon which the instructions mentioned in paragraph 2, supra, were promulgated.

4. At the beginning of the work it was estimated that the execution of the plan would require consideration of approximately 5,000 cases, there being at that time 5,027 men in confinement in penitentiaries and disciplinary barracks in the United States under sentences adjudged by general courts-martial. Up to the present time the special clemency board has examined and reported upon 4,220 cases and the clemency section of the Military Justice Division, which has been engaged in like examinations under instructions identical with those addressed to the special clemency board, has examined and passed upon 1,170 cases. The total number of cases thus examined and reported upon is, therefore, 5,390. Approximately 100 cases are still pending in this office. The consideration of these cases will be completed and reports made with the least possible delay.

5. That the total number of cases reported upon and still to be reported upon exceeds the 5,027 mentioned in the preceding paragraph is due to the fact that since February 25 additional men convicted during the war period have been sent to penitentiaries and disciplinary barracks in the United States. Some of those men have come from posts and camps in the United States, and others have been returned from Europe and Asia. As soon as the examination of the cases coming within the existing instructions addressed to the special clemency board has been completed, a more detailed report of the activities of that board will be submitted.

6. With reference to the second paragraph of Lieutenant Colonel Ansell's memorandum, attention is invited to the following outline of the plan pursued by the special clemency agencies in this office. An officer of the department examined a record, made a brief abstract thereof, and indicated the action that in his opinion should be taken. The record and the examiner's memorandum then went to one of the sections of the special clemency board, each such section consisting of two officers. These two officers, after a study of the examiner's memorandum and such examination of the record as appeared to them to be necessary or advisable, entered their recommendation. Thereafter the record went either to Lieutenant Colonel Ansell as president of the Special Clemency Board or to Lieutenant Colonel E. M. Morgan as vice chairman of that board, after which it came to the head or acting head of the office for consideration. In any case in which the legal sufficiency of the record or the fairness of the proceedings had been questioned by the examiner or by the section of the Special Clemency Board the record went to a Special Board of Review, consisting of: Lieutenant Colonel James S. Sanner, formerly a justice of the Supreme Court of Montana; Major Andrew J. Copp, jr., of California, who has practiced law for 14 years; and Major Henry Buck, of South Carolina, who has practiced law for 16 years. In case the report of this board suggested action more favorable to the prisoner than had been recommended theretofore the record was returned to the Special Clemency Board for further consideration in the light of such report. It follows that the general result of the intervention of the special board of review was not to reduce the measure of clemency theretofore recommended by the Special Clemency Board, but to bring about, in certain cases, an increase in the measure of clemency so recommended. Upon completion the memorandum respecting each case considered by this office went to the office of the Secretary of War for final action.

7. A copy of a report dated June 15, 1919, made by Lieutenant Colonel Sanner as chairman of the special board of review, is inclosed herewith. In this connection it should be noted that, in harmony with the plan outlined above, the intention has been to recommend such appropriate corrective action as lay within the power of the Secretary of War in those cases in which the special board of review found the record legally insufficient to support the sentence either in whole or in part, and also to recommend similar corrective action in those cases in which that board found the record unsatisfactory, or of doubtful sufficiency, considered from a legal point of view. The files are now being examined with a view to making certain that there shall be no failure to recommend appropriate corrective action in all such cases. There is also enclosed herewith a copy of a memorandum addressed to the Special Clemency Board, the special clemency examiners, and the special board of review, under date of April 7, 1919, by Lieutenant Colonel Ansell as president of the Special Clemency Board. Consideration of the instructions under which the clemency agencies of this office have operated, in connection with my observation of the

attitude of the officers engaged in the work, has led me to the conclusion that the work has been done with care and with a desire to do justice, and in case of doubt to lean to the side of mercy.

8. Recently the four officers who, at the present time, are functioning as members of the two existing sections of the Special Clemency Board, were called upon for an expression of their views as to the manner in which the clemency work has been performed, and as to the necessity, from the standpoint of fairness and justice, of reexamining the records heretofore examined under instructions addressed to the Special Clemency Board. A like expression of opinion was requested of the Chief of the Military Justice Division and the Chief of the Clemency Section of that Division. Copies of the memoranda submitted by the six officers referred to are enclosed herewith. The opinion of those officers, as disclosed by the memoranda they filed, is to the effect that the work in question has been performed with care and solicitude and that a reexamination of the records in the mass is not necessary. This would seem to be the correct view. The Special Clemency Board is now engaged in the study of the records in nearly 200 cases in which the Secretary of War after passing upon the original clemency memoranda submitted by this office deemed reconsideration advisable. Further applications for clemency will no doubt be filed in most cases—certainly in those cases in which for any reason the accused believes that full and complete justice has not been accorded him. Action upon such application will, it is believed, bring to light any deprivation of substantial legal rights or any undue severity in sentences that may have escaped attention and corrective action in the course of the examination thus far made. It is probable that in some, at least, of the cases in which the record was found legally insufficient to support the sentence, the corrective action heretofore taken should be supplemented by further action looking to the granting of full pardons, so as to remove any disabilities that may have resulted from the convictions. Steps to that end should be taken as soon as that may be done without interfering with the performance of other tasks, that may perhaps be regarded, for the present, as more pressing. Probably also in a number of other cases substantial justice, and a regard for the future usefulness of the individuals concerned as members of civil society, will require, or at least warrant, the granting of full pardons. However, it is believed that cases of this kind are more likely to be disclosed effectively by applications for pardon on the part of the individuals concerned, generally after they shall have been restored to their civil relations, than by a reexamination of the entire file of thousands of general court-martial records. Upon receipt of such application each can be given the careful and painstaking consideration to which it is entitled. The task of first importance to be performed in the immediate future by the clemency agencies of this office would seem to be the examination of the records of trial of general prisoners not thus far examined in this office with a view to the extension of clemency; i. e., the records of trial of general prisoners now being returned, or soon to be returned, from foreign parts.

9. In a memorandum entitled "Plan for carrying out work of clemency board appointed under office order of January 28, 1919," signed by the members of that board and approved by the Judge Advocate General, it is said, paragraph 5:

"It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examination of the cases of others serving sentences of confinement within the United States, since it is thought that the obtaining of the necessary information and the relationship of the offense to the theater of war are considerations which would concur in such postponement."

Under date of May 15, this office, in a memorandum addressed to The Adjutant General, requested information as to the number of general prisoners in confinement in Europe, classified with reference to the place and term of confinement under the following heads:

1. General prisoners under sentence to be confined in penitentiaries.
2. General prisoners under sentence to be confined in the United States Disciplinary Barracks or a branch thereof.
3. General prisoners under sentence to be confined in a place under military control, other than the United States Disciplinary Barracks or a branch thereof, under—
  - (a) Sentences involving confinement for six (6) months or more,
  - (b) Sentences involving confinement for less than six (6) months,

The information thus requested was furnished this office on June 4, in the form of a cablegram dated June 1, from Gen. Pershing, reading as follows:

"Number of general prisoners in Europe: First, penitentiary, 88; second, disciplinary barracks or branches thereof, 64; third, other places under military control—first, having six months or over still to serve, 751; second, having less than six months still to serve, 195.

10. Before my departure from France on March 4, 1919, information reached me unofficially that a clemency section had been established in the office of the Judge Advocate General Headquarters, American Expeditionary Forces. Information reaching me since that date indicates that the section has continued to function. It is known that clemency has been extended in a number of cases, and no doubt clemency has been extended in other cases in which the action taken has not come to the attention of this office. Nevertheless the cases of general prisoners in confinement in Europe should receive timely attention.

11. This office has been informally advised that contingents of general prisoners are en route to the United States. In the execution of the plan of demobilization all the general prisoners now in Europe no doubt will be returned to the United States in the near future. The cases of these men should receive attention as soon as possible after their arrival in the United States, and their cases should be dealt with in conformity with the principles that have guided this office in passing upon the 5,390 cases referred to in paragraph 4, supra.

12. Recently, as the inflow of applications for clemency and of clemency memoranda from the various places of confinement in the United States has decreased, a considerable portion of the personnel originally assigned to duty with the special clemency board has been assigned to other duty in order to meet the pressing demands made upon the department for officers of legal training and experience for service in connection with the solution of problems incident to the cessation of hostilities and the consequent demobilization. When the cases of general prisoners being returned or about to be returned from foreign parts are taken up for consideration it will be necessary again to augment the personnel of the clemency agencies of this office. This may perhaps be done in part by the assignment of officers now on other duty but whose services may become available for this purpose in the near future. Any remaining deficiencies of personnel will have to be met by means of new appointments of officers qualified for the duty in question.

13. The following recommendations are submitted for consideration, viz.:

(a) That general prisoners now being held in confinement in foreign parts be returned to the United States as soon as practicable.

(b) That as to all general prisoners returning from foreign parts steps be taken to assure that a clemency memorandum be forwarded to this office by the commandant of the place of confinement with the least possible delay after the arrival of the prisoner.

(c) That the records of all general prisoners returned from foreign parts be examined as expeditiously as practicable by the special clemency board and cooperating clemency agencies in this office, in conformity with instructions heretofore addressed to said board and cooperating agencies, the work to be prosecuted as has been done in connection with the records of general prisoners in the United States since the establishment of the special clemency board in this office.

(d) That so far as practicable general prisoners having only short terms left to serve be held near ports of debarkation until their cases can be examined and reported upon.

(e) That whenever a recently convicted general prisoner files his first application for clemency the commandant of the place of confinement shall forward the application without delay, with the proper notations and his recommendation thereon.

(f) That in any case in which the commandant of the place of confinement regards the sentence as unduly severe, or in which in his opinion there is any reason making for clemency, if none has been granted, or for additional clemency if any has been granted, he shall forward a clemency memorandum with his recommendation thereon, even though no application for clemency or for additional clemency has been filed by or in behalf of the prisoner.

(g) That applications for full pardons filed by persons convicted by general courts-martial be given prompt attention; and that in cases in which the record has been found or shall be found legally insufficient to support the sentences

adjudged and in which the corrective action taken or to be taken under existing instructions should be supplemented by further action looking to the granting of full pardons so as to remove any disabilities resulting from convictions: not well founded in law, such further action be taken as soon as that may be done without delaying the examination of the records of trial of general prisoners returned from foreign parts.

E. A. KREGER,  
*Acting Judge Advocate General.*

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
*Washington, June 15, 1919.*

**Memorandum for General Kreger:**

The special board of review (cases in clemency) has examined to date 1,117 records, of which 107 were "repeaters," leaving for statistical purposes 1,010. Of these, 925 were found legally sufficient; 42 were found unquestionably bad; 12 were found very doubtful; 30 (presenting convictions for desertion) good to the extent of A. W. O. L. only. Of the 925 legally sufficient cases, 31 were found unsatisfactory (because not convincing or for some objectionable features); 71 presented one or more unsupported findings (not affecting the validity or justice of the final result).

Of the whole number (1,010), 218 presented formal irregularities of no vital consequence (these were, chiefly, failures to properly explain pleas or rights of accused as witness where it was obvious that no harm was or could have resulted from the failures); 342 were fairly characterized as "poorly" tried (included in the above "bad," "doubtful," or "unsatisfactory" classes whenever the misprisions rose to the dignity of prejudicial error).

The 1,010 records thus considered were selected as deficient out of the 4,268 cases examined by the boards and examiners. Taking the latter as the whole number, the percentages thus revealed are a trifle under one per cent bad; a trifle under two per cent bad, doubtful, or unsatisfactory; a trifle under five per cent show formal irregularities; a trifle over eight per cent were poorly tried.

Of the 342 "poorly tried" cases, the characterization was justified: In 206 cases, by the admission of improper evidence (chiefly hearsay); in 136 cases, by the inertness or inadequacy of counsel for the accused; in 69 cases, by poor preparation on the part of the prosecution; in 42 cases, by errors of the court in rulings at the trial; in 32 cases, by the fact that no evidence was presented *aliunde* the pleas of guilty; in 33 cases, by improper examination of witnesses or of the accused; in 23 cases, by the fact that the accused convicted himself; in 22 cases, by general debility or ineptitude; in 7 cases, by improper argument on the part of the trial judge advocate.

J. S. SANNER,  
*Lieutenant Colonel, Judge Advocate.*

APRIL 7, 1919.

**Memorandum for the special clemency board, the special clemency examiners, and the special board of review:**

Here are my views, briefly and roughly stated, respecting the considerations which I think should govern the clemency examiners and the clemency board itself:

1. Clemency is not a matter to be governed by technical rules of law. It is a matter of conscience rather than strict professional judgment. It is a matter which requires us to see the human being, his motives, circumstances, and condition, and our vision in this regard must not be limited by what the record, legally considered, strictly shows.

2. Too much legal deference must not be paid to any record for purposes of clemency, and this is especially true of courts-martial records. They frequently show what is only too frequently true, that however closely the forms of trial may have been adhered to, the trial itself was not a fair, full, and impartial presentation of the case. Speaking more specifically, I think we must ask ourselves, among many others, the following questions:

(a) Were the facts, as revealed on the record and as they may be fairly inferred, such as to indicate a state of mind that is really criminal, or immoral, or chronically perverted, or intolerably reckless of the military obligation?

Or, especially in purely military offenses, was not the delinquency due to thoughtlessness, or ignorance, or a lack of understanding of the military environment, or was it not provoked, as is frequently the case, by an unsympathetic, if not an oppressive attitude upon the part of those in authority? Frequently the two serious charges, desertion and disobedience of orders, can be so resolved, in the light of the human facts, as to indicate that there was no intention to commit the offense at all. While every charge of disobedience of orders sounds bad upon paper, very frequently the order itself was one given in a light or improper manner, or was not a necessary one, or involved some inconsequential thing not sounding in those necessitous circumstances where disobedience of orders becomes a most serious, even a capital offense.

(b) Accused may have counsel, but too frequently counsel is so limited by reason of his lack of legal qualification or a lack of that rank which gives him standing before the court, or a general lack of those inclinations and appreciations which zealous and competent counsel must have in order to make a good defense, that it can be said, as a matter of fact, if not as a matter of law, that the accused did not have the substantial assistance of counsel which every accused should have. And frequently the court will permit a man to go to trial without counsel, when any man of legal appreciations knows such a course to be unwise. What is true of counsel is frequently true of other incidents of the trial.

(c) There is nothing that courts-martial are more inclined to do than follow a natural inquisitiveness to admit masses of hearsay testimony, and at the same time so limit the counsel as to prevent proper cross-examination where, as is none too frequently the case, the counsel is inclined to indulge in one. Military counsel frequently hesitate to examine superior officers, and courts-martial as a rule seem to think that it is improper to test a witness, especially if he is a superior officer, for bias, prejudice, or credibility.

(d) Special attention must be paid to improvident pleas of guilty. Frequently the entire case is given away by such a plea made by an accused without counsel, or advised by incompetent counsel; and very frequently, after such a plea, the accused makes statements in his own defense inconsistent with the plea, which courts frequently disregard. Pleas of guilty of serious offenses should be most carefully scrutinized. Courts-martial duty is uncongential, and a plea of guilty is acceptable as a brief method of ending the trial.

(e) Of course, as a technical matter, every presumption should be made in favor of the action of the court, but frequently the action of the court, however it may appear in mere form, is not fair and its conclusion is prejudiced thereby.

(f) We should be on our guard against confessions or statements of any kind against interest, when made by a soldier to a military superior. The military relation is such as to induce confessions in such a way as to render them incompetent.

(g) I do not regard that the 37th article of war changes the rule with respect of the effect of prejudicial error, but simply redeclares it. Substantial error, in my judgment, must be presumed to affect the finding and sentence. As between evidence of the same degree of credibility, it may be that the effect of evidence erroneously admitted may be overcome by an overwhelming volume of evidence of such a nature as to compel the mind. But, for instance, take a confession which when worthy of belief is the most convincing of all evidence, if it should be improperly admitted, I should conclusively presume error.

(h) I observe that it is frequently said in the clemency memoranda that the evidence is sufficient to sustain the conviction. Evidence may be sufficient to sustain the conviction when tested by an appellate court for its purposes, and yet be so weak and unsatisfactory as to justify clemency. The tests and purposes of the tests of the evidence in the two cases are entirely different.

3. I believe that the great principles fundamentally established in our civil jurisprudence, designed for the purpose of securing a fair trial, are equally applicable, except where clearly withheld, to trials before courts-martial. A military accused is entitled to the same full, fair and impartial trial; to be informed of the nature and cause of the accusation; to have witnesses in his favor; to be confronted with witnesses against him, except in those cases where the rules of evidence reasonably prescribe otherwise; and, above all, he is entitled to the assistance of counsel for his defense, counsel that should represent him and his cause, and not simply to appear in the trial to satisfy a form of law. And a military accused is fully entitled to protection against self-incrimination, as much so as an accused in a civil court.

4. The articles of war and the military statutes are not the sole source to be sought in determining whether or not a man has had a full, fair and impartial trial. The fundamental principles of law which are a part of the common law and now a part of our Constitution must be resorted to and applied, except where by their very nature they are inapplicable to military proceeding.

5. I think our tendency should be, wherever we can justify it, to get rid of that kind of punishment which is continuing and damns a man forever, such as a dishonorable discharge. Such a punishment as that should be given only in extreme cases. It has been given altogether too frequently and we should lean towards finding a way to reduce that kind of punishment. In the ordinary case, we should try to restore a man to the colors or return him to civil life without marking him so he can never rehabilitate himself.

S. T. ANSELL,  
*Lieutenant Colonel, Judge Advocate,*  
*President, Special Clemency Board.*

JUNE 16, 1919.

Memorandum for Gen. Kreger:

Subject: Operations of Second Division, special clemency board.

The special clemency board of the office of the Judge Advocate General was subdivided, practically at the inception of its actual operations in general court-martial cases, into three coordinate divisions of two members each, and so functioned from and after March 5, 1919, under the presidency of General Ansell, who was also an ex officio member of each division. The second division was composed of the undersigned judge advocates, who since said date have continuously served in such capacity, and have functioned on approximately one-third of the entire number of cases which to date have automatically come before the said special clemency board for review and recommendation under the office order of January 28, 1919. We have endeavored to devote to the work done by the second division the best thought and consideration whereof we were capable, unrestricted by the action of those who may have preceded us in the consideration of cases from the making of the findings of the trial court to and including the action of the revisory agencies of this office, which, pursuant to established procedure, may have functioned in the case before receipt of the record by the second division for review and recommendation for clemency purposes. That is to say, we have apprehended our responsibilities and duties in the premises to be clearly quasi-judicial in nature, and hence have not viewed as conclusive or binding on us the action of whomsoever may have previously functioned in a case at any stage of the proceedings, although at all times we have been disposed to give respectful consideration to such prior action. Accordingly, whenever considerations of justice or clemency prompted us so to do, we would proceed to reopen a case as to all matters of law and issues of fact therein, and would act on each case according to our view thereof, adjusted to established War Department policy, and embody our decision in the clemency recommendation of record in the case, which would have regard to the extraneous facts and circumstances appearing in the clemency memorandum and accompanying papers prepared and submitted for our consideration in acting thereon. Contemplating in retrospect the work done by the second division, we are constrained to appraise the value of our operations and the results same have accomplished by the above-stated latitude of judgment wherewith the work was executed by us. In functioning, as aforesaid, on cases coming before the second division, we are convinced that the work was performed with reasonable thoroughness and due regard to the nature and importance of the same; that were we to reconsider such cases in the mass, we would, on the whole, but duplicate our action of record therein; and, consequently, we regard as unnecessary future reexamination, in the mass, of cases disposed of according to our recommendations.

The foregoing statement, which you desire us to make of record, we would respectfully submit for your consideration.

WM. M. CONNOR, Jr.,  
*Lieutenant Colonel, Judge Advocate.*  
WM. C. ROGERS,  
*Major, Judge Advocate.*

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL.*Washington, June 17, 1919.*

From: Colonel James S. Easby-Smith, J. A., and Captain Charles T. Tittmann, J. A. constituting division No. 1, of the clemency board.

To: The Acting Judge Advocate General.

Subject: Report concerning work which has been performed by the clemency board.

1. The following report is submitted in compliance with oral instructions that the undersigned, after reading Senate joint resolution No. 18, introduced May 20, 1919, "Providing for a review of the findings of courts-martial" etc., submit a brief report of the character of the review of court-martial cases which has been made by the clemency board.

2. Practically at the outset, from and after March 5, 1919, there were three divisions of the clemency board, each composed of two officers. The board has recently been reduced to two divisions, Nos. 1 and 2, composed of two members each. The undersigned, James S. Easby-Smith was originally a member of division No. 1; and the undersigned, Charles T. Tittmann was originally a member of division No. 3. One member each of divisions Nos. 1 and 3 have recently been relieved, division No. 3 has been abolished, and the undersigned now compose division No. 1 and make this joint report as representing division No. 1 and former division No. 3.

3. Under the procedure which has been in effect since the creation of the clemency board, the entire record of a case (not only the transcript of the evidence, but all formal orders, reviews and other accompanying papers) are submitted to the board, prefaced with a memorandum sheet, entitled "Clemency memorandum for the Secretary of War" which shows briefly the essential facts in the case, including a summary under the title "Circumstances attending offense." This summary is prepared by an examining officer who is not a member of the clemency board and is accompanied with his recommendation as to clemency. It was intended that the clemency memorandum should be so complete as to make it unnecessary for members of the clemency board to examine the record at length; but at the very outset of the work the members of the clemency board felt that the data contained in the memorandum was not sufficiently informative, and it has been the practice from the beginning for the members of the board to read the entire record and accompanying papers either exhaustively or to such an extent as to extract all the material information in the record.

4. In approaching the work of reviewing these cases with a view to clemency the board has constantly borne in mind the following statements, contained in a memorandum from the Secretary of War to the Judge Advocate General, dated January 13, 1919, commenting upon a memorandum, written to the Secretary of War on January 11, 1919, by Gen. Ansell, formerly acting Judge Advocate General:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him (General Ansell) which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last twenty months will disclose—(1st) very unequal degrees of punishment, and (2nd) perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

"I am not able to gather from General Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view."

5. The board has also borne in mind the following statement contained in an order recommended by Judge Advocate General Crowder, on January 18, 1919, and issued by The Adjutant General on January 22, 1919: "In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the pro-

priety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December 16, 1916, is obvious."

6. The board has also borne in mind the following statement contained in an order of the Judge Advocate General, dated January 23, 1919, organizing the clemency board, to the effect that the purpose of the creation of the board was, "In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only of equalizing punishment but to adjust that punishment to present disciplinary requirements."

7. The board, having approached the consideration of cases with the above enunciated principles in view, has also carefully considered not only the record, strictly so called, but all extrajudicial and extralegal facts and circumstances which appear and which, in the opinion of the board, ought to be considered in rectifying and equalizing sentences by the exercise of clemency—such as illhealth, mental deficiency or irresponsibility, youth, dependents, alienage, education, civil life record, etc.

8. As to the attitude of the clemency board toward the work in hand and its apprehension of its duties and responsibilities in the premises, the undersigned adopt, as expressing their views, the memorandum upon this subject submitted by Lieut. Colonel Connor and Major Rogers, judge advocates, under date of June 16, 1919.

9. It is the opinion of the undersigned that much of the work of the examining officers embodied in the item "Circumstances attending offense" was, of necessity, especially in the early stages of the work, so hurriedly done as to render many of the summaries of little, if any, value; but the information contained in these summaries, which was sometimes inaccurate and frequently incomplete, was supplemented by a full and exhaustive examination of the records by the members of the clemency board as heretofore described.

10. It is the opinion of the undersigned that no necessity exists for another review of the cases which have been examined by the clemency board, except as new and additional extrajudicial facts looking to clemency may be brought to attention from time to time in particular cases.

J. S. EASBY-SMITH,  
*Colonel, Judge Advocate.*

C. T. TITTMAN,  
*Captain, Judge Advocate.*

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
*Washington, June 17, 1919.*

Memorandum for General Kreger.

Subject: Proposed legislation for review of all court-martial and retirement cases.

1. The clemency section of the military justice division, Judge Advocate General's Department, now composed of six officers and two law clerks, has considered all applications for clemency on behalf of prisoners sentenced by general courts-martial, and has recommended remission or commutation of sentences, or restoration to duty, as the facts and justice of each case required, having due regard to the public interests.

2. Since February 10, 1919, under office order dated January 28, 1919, consideration has been given to the return of conditions approximating peace and an effort made more nearly to equalize punishments. With these ends in view, punishments have been reduced more nearly in conformity with the peace-time limits set forth in the President's order of December 15, 1916.

3. Since the order of January 28, 1919, became effective, the clemency section has reviewed and recommended action in 1,141 cases. In almost every instance, these recommendations have been approved by the Secretary of War and have been carried into effect or are in process of being executed.

4. In cooperation with the special clemency board of this office, practically all the cases of prisoners convicted by general courts-martial of offenses during the war, and confined in the United States, numbering about five thousand, have been reviewed; and almost without exception the recommendations approximating the reduction in punishments to peace-time limits have been carried out by order of the Secretary of War.

5. Sentences of summary and special courts-martial, whose jurisdiction is limited to confinement not exceeding three and six months, respectively, are not

reviewed in the Judge Advocate General's Department. In our opinion such review is neither necessary nor advisable. Nor are the so-called "retirement cases" subject to such review. But the general court-martial trials, involving the more serious offenses and punishments, have been most carefully reviewed, and, because of the return of peace-time conditions, have been mitigated and commuted in accordance with every humane and just consideration. There are of course many cases of prisoners confined in France whose records of trial have not yet reached this office.

6. As to the general court-martial cases, therefore, we are of opinion that the purpose and object of the proposed legislation have been accomplished.

B. A. READ,

*Colonel, Judge Advocate, Chief, Military Justice Division.*

S. HECKSCHER,

*Lieutenant Colonel, Judge Advocate, Chief, Clemency Section.*

WAR DEPARTMENT,  
OFFICE OF THE CHIEF OF STAFF,  
Washington, June 26, 1919.

Memorandum for the Judge Advocate General.

Subject: Recommendations of the Acting Judge Advocate General relative to administration of military justice.

1. The Chief of Staff directs that you be advised, for your information and guidance that the Secretary of War has approved the following recommendations contained in paragraph 13 of your 1st indorsement, dated June 19, 1919, to The Adjutant General of the Army on the memorandum of Lieutenant-Colonel S. T. Ansell, president special clemency board, dated May 17, 1919:

"(a) That general prisoners now being held in confinement in foreign parts be returned to the United States as soon as practicable.

"(b) That as to all general prisoners returning from foreign parts steps be taken to assure that a clemency memorandum be forwarded to this office by the commandant of the place of confinement, with the least possible delay after the arrival of the prisoner.

"(c) That the records of all general prisoners returned from foreign parts be examined as expeditiously as practicable, by the special clemency board and cooperating clemency agencies in this office, in conformity with instructions heretofore addressed to said board and cooperating agencies, the work to be prosecuted as has been done in connection with the records of general prisoners in the United States since the establishment of the special clemency board in this office.

"(d) That so far as practicable general prisoners having only short terms left to serve be held near ports of debarkation until their cases can be examined and reported upon.

"(e) That whenever a recently convicted general prisoner files his first application for clemency, the commandant of the place of confinement shall forward the application without delay, with the proper notations and his recommendation thereon.

"(f) That in any case in which the commandant of the place of confinement regards the sentence as unduly severe, or in which in his opinion there is any reason making for clemency if none has been granted, or for additional clemency if any has been granted, he shall forward a clemency memorandum with his recommendation thereon, even though no application for clemency or for additional clemency has been filed by or in behalf of the prisoner.

"(g) That applications for full pardons filed by persons convicted by general courts-martial be given prompt attention; and that in cases in which the record has been found or shall be found legally insufficient to support the sentences adjudged and in which the corrective action taken or to be taken under existing instructions should be supplemented by further action looking to the granting of full pardons so as to remove any disabilities resulting from convictions not well founded in law, such further action be taken as soon as that may be done without delaying the examination of the records of trial of general prisoners returned from foreign parts."

2. You will be furnished a copy of such instructions as may be issued by the department in order to carry into effect such of the recommendations quoted above as relate to other agencies of the department than the office of the Judge Advocate General.

FULTON Q. C. GARDNER,  
*Colonel, G. S., Secretary, General Staff.*

JUNE 26, 1919.

Memorandum for the Director of Operations:

Subject: Recommendations of the Acting Judge Advocate General relative to administration of military justice.

1. The Chief of Staff directs that the papers herewith be referred to you for the necessary action to carry into effect such of the recommendations as are contained in subparagraphs (a), (b), (d), (e), and (f) of paragraph 13 of the first indorsement of the Acting Judge Advocate General, dated June 19, 1919, herewith.

2. He further directs that a copy of such instructions as may be issued in this connection be furnished the Acting Judge Advocate General.

3. For your information there is transmitted herewith a copy of memorandum of this date to the Acting Judge Advocate General in this connection.

FULTON Q. C. GARDNER,

*Colonel, G. S., Secretary, General Staff.*

JUNE 24, 1919.

Memorandum for the Acting Judge Advocate General:

1. On May 17 I addressed to the Secretary of War, through you, a memorandum in which I recommended in effect that (1) clemency consideration be given our prisoners in France, as well as those in this country, which has not heretofore been done; (2) that, in view of the haste with which the first review was necessarily made, a more thorough review be made of doubtful cases, looking to still further clemency; (3) that another and thorough review be made with a view to granting in proper cases full pardon, and (4) that if I should be intrusted with the work, I be permitted to select, as far as possible, a personnel in sympathy with my views as to clemency.

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

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

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

3. According to your view, the application for pardon should be initiated by the individuals who deem themselves so aggrieved as to justify that course. In view of all the circumstances surrounding the administration of military justice, this, in my judgment, would be an unjust as well as an unwise course. As long as clemency was permitted to be given consideration only upon the application of the individual, little clemency was had. It is the right of the individual to seek clemency; it is the duty of authority to give it. That duty carries with it, when there has been so much injustice as there has recently been, the duty of taking the initiative and not waiting upon individual application. We took the initiative in the granting of clemency; and why should we not, for the same reason, take the same initiative in granting pardons? Taking such initiative would, in my judgment, be to the great credit of the pardoning power. Pardon ordinarily is a matter of mercy and, as such, should not be strained out just to those who may be advised to seek it, and it never should be deferred for mere convenience' sake. In many of these cases in which we can say with fair assurance that the man ought not to have been

tried or was not lawfully tried, or that the record as it stands can not fairly sustain the conviction, pardon becomes a matter not of mercy but of partial justice. In such a case we should act, not as a matter of grace, but in recognition of a high sense of justice. In such cases our sense of justice and our sense of duty should compel us to act. Furthermore, the military relation is such and the condition of the prisoner is frequently such that he has not the ability, nor the liberty, to make out the case that ought to be made for him.

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

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

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

[First Ind.]

WAR DEPARTMENT,  
(J. A. G. O.),  
July 17, 1919.

To The Adjutant General of the Army:

1. This paper was brought to my attention on the afternoon of June 26, 1919. Early the following morning I brought the paper to the attention of the Secretary of War, with the request that action upon my indorsement of June 19 upon Lieut. Col. Ansell's memorandum of May 17 be deferred until this paper could be formally indorsed over for consideration in connection with the earlier papers on the same subject. The Secretary, after reading the paper, advised me that he had already acted upon the earlier papers and directed that, after official notice of his action had reached me, this paper be forwarded for consideration by him in connection with the earlier papers. In accordance with those instructions and the request made by Lieut. Col. Ansell, the paper is forwarded, accompanied by the corresponding office file, including copies of each of the two memoranda, dated June 26, evidencing the action of the Secretary of War on the earlier papers.

2. It is requested that the accompanying office file be returned to this office.

E. A. KREGER,  
*Acting Judge Advocate General.*

WAR DEPARTMENT, Washington, July 21, 1919.

Memorandum for the Judge Advocate General:

I return herewith the memorandum of Col. Ansell and your indorsement of July 17th.

Col. Ansell presses two points: First, that all of the records which have been examined by the clemency section of the office of the Judge Advocate General should be reexamined. Second, that this reexamination should be by a group of officers personally selected by Col. Ansell and having "a personnel in sympathy with my [his] views as to clemency." In support of the first recommendation, Col. Ansell expresses the belief that the work of the clemency board has been hastily done. Frankly, this is an incredible statement. The clemency boards were organized with great care. They were composed of men of courage, ability, and zeal, and their work was done in an atmosphere with every predisposition toward a humane and merciful consideration of the facts of the cases presented. I cannot bring myself to reflect upon work so devotedly done by any hasty assumption that it was ill done because either of its volume or speed. It is not to be forgotten that Col. Ansell was himself the head of this work and I know him too well to believe that, in a matter which so fully engaged his feelings, he sat by and saw hasty, slipshod, and therefore unjust work done.

The second suggestion that the next board should be one chosen by him and having his views as to clemency seems to me at variance to all of the suggestions he has hitherto made with regard to the administration of military justice, which he insists should be characterized by its adherence to law rather than its color of personal opinion.

However these two considerations may be viewed, I am persuaded that the remedies instituted by the Judge Advocate General in these cases are adequate and careful, and that the work which has been done and is being done deserves the confidence of the Secretary of War. I am further of the belief that when these reviews shall have been completed, the recommendations which we will inevitably receive from the commandants at the several disciplinary barracks, from the psychiatrists and medical officers, and the applications for clemency from the men themselves, will bring to our attention cases in which further clemency ought to be considered. I therefore adhere to the view I verbally expressed to you of approving the arrangement set out in the earlier papers.

NEWTON D. BAKER, *Secretary of War.*

(Thereupon, at 5.10 o'clock p. m., the committee adjourned subject to the call of the chairman.)