

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

SATURDAY, NOVEMBER 8, 1919.

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

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 11 o'clock a. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman) and Chamberlain.

### STATEMENT OF MR. E. M. MORGAN, PROFESSOR, LAW SCHOOL, YALE UNIVERSITY, NEW HAVEN, CONN.

Senator WARREN. Col. Morgan is here this morning, and we shall hear him now. Col. Morgan, I suppose you know that this subcommittee is considering the military justice law that exists, and suggested amendments thereto, particularly as proposed in Senate bill 64, introduced by Senator Chamberlain, which I presume you have seen.

Mr. MORGAN. I have seen that; yes, sir.

Senator WARREN. The committee would be glad to have you, in your own way, make any observations you care to make about the present law and the proposed bill.

Mr. MORGAN. Do you want me to state my experience with the Judge Advocate General's Department, first?

Senator WARREN. Of course, so far as the law is concerned, that is what we are particularly concerned about now. Any incident that you wish to state we would be glad to have; but what we are trying to do is simply to see what we should do in way of legislation.

Senator CHAMBERLAIN. Let me suggest, first, as a basis, that Col. Morgan state what his connection with the Army was and what his experience has been.

Senator WARREN. I assumed that he would do that.

Mr. MORGAN. That is what I was asking about. I wanted to know if you desired me to state my experience.

Senator WARREN. State what you have been doing in connection with the administration of the law.

Mr. MORGAN. In September, 1918, I was commissioned as a major in the Judge Advocate General's Reserve Corps, and I was ordered to duty in Washington as assistant to the Judge Advocate General. Later in the month, I was made chief of a new division, called the War Laws Division, in the Office of the Judge Advocate General.

Senator WARREN. What rank were you given?

Mr. MORGAN. Major, judge advocate.

As chief of the War Laws Division, one of my duties was to go over all of the current opinions of the Judge Advocate General and to select those that were of sufficient importance to be sent out to the service, either by way of abstracts or mimeographed copies. At first the reviews of cases in the military justice division did not come over my desk. The extent to which I was concerned with them was simply in passing upon certain suggested notes upon the administration of military justice which the chief of that division thought ought to go to the service.

Senator WARREN. You are speaking of going to the service; do you mean abroad, or here?

Mr. MORGAN. All the judge advocates in the field.

Senator WARREN. In this country and abroad?

Mr. MORGAN. Every place. On our mailing list we had all the judge advocates who were in the service. Later, all the reviews of court-martial cases came over my desk, with the idea that I should select therefrom statements of the new or important principles that were being applied, and send them out to the service.

Thereafter, I was detailed to organize the war risk insurance division of the Judge Advocate General's Department; and after that was organized, I was made chief of the general administration division of the office, which was also designated the miscellaneous division.

While I was chief of that division I was getting out, among other things, notes on military law. These were sent to the service. They dealt with the proper interpretation of the Articles of War, the interpretation being based upon accepted American military writers, such as Col. Winthrop, Gens. Davis, O'Brien, and Benet, and the English writers, particularly upon the decisions of the Judge Advocate General during this war. In that way, I became familiar with practically all the important decisions of the Judge Advocate General upon the administration of military justice. Furthermore, when the force was comparatively small, we had frequent conferences on the really important cases, and in that way I kept somewhat in touch with them.

Later I was made chairman of the general board of review of the office, which reviewed all opinions of officers before they went to the Judge Advocate General for signature. This did not include the military justice opinions, however.

Afterward I was detailed as acting chairman of the special clemency board. I acted in that capacity for three or four weeks immediately prior to my leaving the service on May 31, 1919.

I left the service with the rank of lieutenant-colonel, which was merely one grade above that in which I entered, having been promoted in July, 1918. That, I believe, gives my qualifications.

Senator WARREN. I will state that this subcommittee consists of three members, but Senator Lenroot is also a member of an important conference which is sitting this morning, and he can not be here. I told him that Senator Chamberlain would be here, and he said to go on without him.

Mr. MORGAN. My experience firmly convinced me that the existing system is defective in four or five particulars. To begin with, the procedure for preparing charges and bringing the accused to trial, as it was practiced during a greater part of the war, seemed insufficient.

Senator WARREN. You say the greater part of the war. Will you explain when?

Mr. MORGAN. Yes; during the entire period of hostilities it seemed to me that the cases all showed that the charges had been preferred without any particularly thorough preliminary examination. That was attempted to be changed by an amendment to paragraph 76 of the court-martial manual, and the introduction of paragraph 76-a. That change was made in response to a memorandum of the Acting Judge Advocate General of April 4, 1919, and it finally got through the General Staff and the War College, I believe, after I left the service in July, 1919.

The new paragraphs promulgate a regulation requiring a thorough investigation of the facts, before a charge is preferred. They also require the officer, who is to appoint a general court-martial, to seek the advice of his judge advocate as to whether or not a prima facie case is made out and as to whether or not the charge states a violation of law. He was not, therefore, required to do that, and under the regulation he is not bound to follow the advice given.

The new bill makes additional safeguards there, in that it requires charges to be preferred under oath, and makes the opinion of the legal officer binding.

Senator WARREN. I understand you to say that that was promulgated before you left, and not put into practice until after you left?

Mr. MORGAN. No, it was not promulgated before I left. It was suggested before I left, by a memorandum of April, 1919. I left on May 31, and the particular changes in the court-martial manual came out in July.

Senator WARREN. Yes.

Mr. MORGAN. The guaranties of impartiality of the appointing authority and the court struck me also as being defective. There was, as you all know, on the statute books a provision which prevented the appointment of a court by a person who was the accuser or the prosecutor. That had been on the books since the passage of the act of May 3, 1830. But there was, and is yet, no provision disqualifying an appointing authority for actual bias or constructive bias, unless he is the accuser or prosecutor. In the same way the members of the court are subject to challenge by the accused only for cause. There is no peremptory challenge, and there is not any challenge of any kind to the panel. There is nobody to determine the truth or falsity of challenges except the remaining members of the court. The result was, as occurred in a great number of cases—that is, in enough cases, anyway, to cause my attention to be especially attracted to it—where three or four persons were charged separately and were to be tried separately for having committed a joint offense, all the cases were referred to a general court. This court would try case A, for example. When case B came up for trial, since the evidence would be practically the same and would concern the same transaction, counsel for the defense in case B must challenge only one member at a time. When he challenged one member of the court, the other members of the court, who were subject to exactly the same challenge, would have to pass upon that challenge. It would seem fairly obvious that those other members were disqualified to pass upon that particular challenge, and that there really ought to be some basis for challenging the whole panel in a case of that character. At least, it strikes a civilian lawyer that way.

That was one of the things that I found that most military lawyers could not be made to see. They could not see why a jury or a court which had tried A for an offense in which B, C, and D were all involved could not go right on and try B for that same offense, and then try C for the same offense, and then try D for the same offense, where the testimony would be practically identical in all the cases.

Senator WARREN. Your idea is that the fact of trying A and finding him guilty would so bias their minds that they would not try the remaining cases upon the facts as they appeared?

Mr. MORGAN. I could not think, Senator, that they could try the second, third, or fourth cases impartially. At any rate, by the time that they got to the fourth case they would know just exactly what testimony was going to be introduced, and they would have their minds all made up just as soon as the case began.

Senator WARREN. What would be the consequence if A was found guilty, and if for the case of A the panel was challenged and a new panel found B not guilty; what about challenging the panel then? Of course the accused would not do it, but the Government would have a right to.

Mr. MORGAN. I should think that the Government ought to have a right to.

Senator WARREN. In trying 3 or 4 men for the same offense, to get a panel in some of these smaller cases would be quite difficult. I realize the justice in your contention, but I wondered whether, if legislation read that way, there would have to be exceptions made of those cases where there are not sufficient officers. Of course in important cases, you understand, they would have to go until they did have men enough.

Mr. MORGAN. Yes; and you understand an accused can be sent to any place in the country for trial, and that, of course, would take care of any real practical difficulty with reference to that matter.

Senator WARREN. And as to the peremptory challenges, you think that they should have the privileges that they have in civil life?

Mr. MORGAN. Yes. I do not know that they should have so many peremptory challenges as are given in actual practice in civil life, because, of course, there the challenges run sometimes to a very great number; but undoubtedly your experience has been that of other men who are interested in the law, that it is impossible, frequently, to get men, who are really biased, off a jury, because of the answers that they make to the questions put to them; and furthermore, there may be a perfectly good reason why an accused should have them off without disclosing fully to the court the reasons therefor. That is, there ought to be some basis for peremptory challenge, and the thing that strikes me is that there ought to be, of course, some method of trying challenges for cause, other than that of leaving it to the remaining members of the court.

Senator WARREN. Simply a peremptory challenge?

Mr. MORGAN. You ought to have peremptory challenges; yes, sir.

Then the point that has always struck me as being most remarkable in the court-martial system is the inadequacy of the presentation of the facts and the law at the trial. Of course, the trial is supposed to be a criminal prosecution; and your court-martial manual tells you that the rules of evidence that are applicable in Federal courts are to be applied by the court-martial, except in so far as they are

changed by the court-martial manual, which operates as a regulation of the President.

These rules of evidence, even with their changes in the chapter on the evidence in the court-martial manual, are just as difficult of application as the rules which the United States district court has to apply in the trial of criminal cases. The questions of law that are presented in these courts-martial are just as intricate, in many cases, as those that are presented to the United States district judge or any court of first instance. And yet there is no provision for any judicial supervision of the trial, there is no provision for legal learning on the part of either the members of the court or any official that corresponds to a *nisi prius* judge, nor is there any provision for learning on the part of the counsel for the prosecution or for the defense, other than that which necessarily attaches to the status of a commissioned officer. The cases really show an astounding ignorance on the part of counsel for the prosecution, of counsel for the defense, and members of the court. It would be difficult to believe, really, the facts revealed by the records.

While I was reviewing cases as chairman of the special clemency board, at times, when a case was marked "well tried," or "poorly tried," or "very poorly tried," I would dip into the record and see how the thing went. I remember striking one case, which I hardly think is a fair sample, but which is a striking example of ignorance of counsel and court. It was a case where a man was on trial for desertion. Counsel for the prosecution simply read the charges and read a provision of the court-martial manual which said that if a man was absent without leave for an extended period, that justified an inference of desertion. He did not put in a word of testimony, but he said, "We rest." Counsel for the accused called his man and said that he desired to have him make an unsworn statement; not to have him go on the stand and make a sworn statement, but to make an unsworn statement. The accused went on the stand and stated that neither at a specified time and place, nor at any other place, did he ever intend to desert the service of the United States; and then he rested. They were going to proceed to argument, when counsel for the prosecution insisted that counsel for the defense had no right to argue on that unsworn statement, as it was not testimony. Of course it was not. The court there interrupted to ask if counsel for the prosecution did not have any more testimony. He said no, that he did not have more. Then the court asked him if he did not have the testimony of the officer who arrested the man. He said, "No, that officer could not testify to anything except what was shown on the investigation." Thereupon the court closed and went into session to consider their judgment, and they came out with the startling announcement that they found there was not sufficient evidence to justify either conviction or acquittal, and they therefore ordered counsel to move for a continuance until they could get evidence that would justify acquittal or conviction.

Frequently you find cases where a counsel for the defense has made absolutely no defense, where it is shown by subsequent investigation at the disciplinary barracks that his client was an imbecile, absolutely incapable of forming the intent that was necessary for the commission of the offense with which he was charged.

I remember one case where a chaplain acting as counsel said that he was not going to make any defense on the ground of mental incapacity on the part of the defendant; that the court could see him; that they could judge of his mental capacity; and he did not believe in sending these soldiers to "nut" boards, as they call boards of psychiatry in the Army, because he believed a soldier of that kind ought either to be emasculated or to be sent to Leavenworth, anyhow. That man was defending a client on the charge of desertion, which was an offense during the war for which his client could have received a sentence of death and did receive a sentence of 10 years.

Senator WARREN. That was his defense?

Mr. MORGAN. That was his defense, and that was all.

Other cases I remember where counsel simply stated, on the trial for desertion, where a man was on trial for his life, that he had not had any time to make any investigation.

Senator WARREN. I can see, of course, the applicability of those stories, and of course it is very interesting; but explain, as you go along, or later, how we should change the law to cover that.

Senator CHAMBERLAIN. I would like to have him give those instances.

Senator WARREN. Of course, I am not cutting him off, but we want his advice about how to correct these things.

Mr. MORGAN. I am simply giving these cases as so many illustrations, and I think they are fairly characteristic of the facts.

Senator CHAMBERLAIN. The chairman speaks of them as "stories." You do not give them as stories or on hearsay, but you are speaking of cases that actually came to your attention when you were in the Judge Advocate General's Office?

Mr. MORGAN. Yes; I can give you the reference to every one of these cases.

Senator WARREN. The chairman has not any intention whatsoever of challenging that.

Senator CHAMBERLAIN. No.

Senator WARREN. The only point is, to keep in view all the time what our duty is, to propose some law to overcome this, and we want that as well as to get these instances, which are valuable. We want your advice as to how we may, by legislation, prevent those things.

Mr. MORGAN. Yes; I understand that, Senator. I am simply trying to point out that under the present system, counsel for the prosecution and counsel for the defense, and the court, who are the functionaries, of course, that have to try these really serious criminal cases, are all ignorant of the fundamentals necessary to prove an offense or a defense. Counsel for the prosecution frequently does not know what elements he has to prove; and counsel for the defense has very little idea, really, of what he should put in in order to free his client.

In other words, they do not know or appreciate either the substantive law or the rules of evidence that are applicable in the particular case. That is because, I think, the matter of attending to courts-martial is an extra duty usually put upon very busy line officers, and usually these line officers, who are for the prosecution or the defense, have to do that as extra duty and not as their chief duty. We hold courts-martial, of course, whenever it is convenient to hold them, but we do not detail men exclusively for the work.

The result under the present system seems to me to be just this, Senator: It is as if you turned loose a common-law jury to try a case, with unskilled counsel, and without any judicial supervision at the trial at all. Now, it seems to me that the proposed bill, Senate 64, does provide a remedy for that, first in providing for judicial supervision at the trial by an officer learned in the law, who shall really take the place of a *nisi prius* judge. This officer, who is called the judge advocate of the court, would decide the truth or falsity of all challenges, thus remedying one serious defect in the present system. He would also be able to rule judicially on the admission or exclusion of evidence, having proper qualifications therefor in his learning as to the rules of evidence and as to the rules of substantive law applicable to the case. You would have there at least a judge who knew the law.

Now, as to the learning of the judge advocate, in the changes to the court-martial manual that were made by changes No. 5, it is attempted by regulation to get more skilled counsel. It is provided that a man should not be a trial judge advocate—that is, the prosecuting officer—unless he has had experience at least on a court-martial and has acted as assistant judge advocate, I believe. It is also stated there that counsel for the accused should have the same qualifications as the trial judge advocate, where possible; and of course accused has the privilege of getting civilian counsel. The bill writes that into legislation and makes it mandatory on the parties to furnish trial judge advocates of learning. It seems to me that that will correct to a very great extent the crudeness of the trial.

Senator WARREN. You make that very clear. Now, so far as the other members are concerned, you have to accept them as you would a jury drawn from the body of the people?

Mr. MORGAN. Yes.

Senator WARREN. You draw them from the body of the Army?

Mr. MORGAN. Yes.

Senator WARREN. And of course you have to take them by and large, as they come, except that they are selected by the skill of the man who makes the appointments.

Mr. MORGAN. Exactly, sir. I think there is no question about that. We have got to realize that there are some drawbacks in the Army that could not possibly be overcome, I suppose, with reference to a military trial. The next thing that strikes the civilian lawyer as most peculiar is the control of the appointing authority over the court. As you know, under the present system a general court can consist of anywhere from 5 to 13 officers. A panel may be arranged with 13 officers, and those 13 officers may begin the trial. Either the appointing authority or any superior military authority may remove any one of those officers at any time during the trial, relieve him from court-martial duty, and send him to any other duty; and as long as he keeps that court above 5 members there can be no objection on the part of the accused or on the part of the prosecution; so that you might start a trial with 13 officers and end it with 5.

Furthermore, the appointing authority may add new members during the trial of a case, provided he does not exceed the statutory maximum. So that if he has 5 members on now, he may add 3 members in the middle of the trial. To these new members the testimony that has been taken will be read over.

Senator WARREN. I was going to ask you how that would be conveyed to them.

Mr. MORGAN. Yes; they just have the testimony read over. They do not begin the trial de novo. So that you might, presumably, begin a trial with 13 members of the court and end with 5, and have among the 5 members who decide the case no man who was on the original panel. These 5 might have heard most of the testimony merely by having it read over to them. O'Brien, the military writer, disapproves of this practice. O'Brien says it is entirely illegal. Col. Winthrop says that it had been in vogue in our Army for over 50 years when he was writing.

Senator WARREN. You propose to change that by having a fixed number?

Mr. MORGAN. Yes; as the bill states.

Senator WARREN. Do you allow any latitude on account of location, and so forth, as to the number?

Mr. MORGAN. I would make it as small as I thought could conveniently and justly try cases, and then fix it at that for all general courts, wherever they might be sitting.

Senator WARREN. If you put it at 10 or at 13, it must be that number?

Mr. MORGAN. Yes.

Senator WARREN. And you would not allow changes during the trial?

Mr. MORGAN. I should not allow these changes. Now, I do not say that there has been any manipulation.

Senator WARREN. I understand. We want to get at your ideas of the law as it should be.

Mr. MORGAN. But you can see that there is a tremendous chance for manipulation of the membership of the court.

Senator WARREN. What have you to say about the desirability of using enlisted men for any part of the membership of the court?

Mr. MORGAN. I think, theoretically, it is a fine thing, but practically, I do not know, Senator. I have talked with many regular officers, and almost all of them have, to that feature of the present bill, offered objections that seemed to me to have weight. Some of them have said this, that it would divide a court into officers and enlisted men, and there would be a sharp conflict each time. I doubt very much whether that would be true, but I do think that under our present system the enlisted men would be entirely overawed by the officers.

I have felt that some representation of enlisted men might very well be provided for, on the same theory that the French did it. They always provided that when an enlisted man or a noncommissioned officer was to be tried, one of the members, at least, should be a non-commissioned officer, the idea being to get the enlisted man's viewpoint in the court.

Senator WARREN. Yes; we have had that matter before us.

Mr. MORGAN. Yes; I suppose you have. But on that proposition I really do not feel competent to answer, because I have never had any experience in the field, and I do not know what effect that would really have upon the man when he was returned to his company after having convicted a comrade, or anything of that sort. I do not know what effect that would have.

Of course you all know that the reviewing authority under the system as it was during the whole war, and up to August 10, 1919, had practically absolute command not only over the personnel of the court, but over the findings and sentence of the court, the power of sending the case back for revision, as it is called.

Senator CHAMBERLAIN. From the commanding officer?

Mr. MORGAN. Yes, sir; that is the appointing authority sending the case back for revision; and the appointing authority would send it back with an indorsement to the effect that he did not agree with the finding of not guilty, for example. Of course he did not have to send it back if he did not agree with a finding of guilty. In such case he could disapprove the sentence, or the finding and sentence. But if he wanted to change a finding of not guilty to guilty, he would have to send the case back with an indorsement, and I have seen them accompanied with very strong arguments to the effect that the court should make another finding. I think you have statistics before you showing changes from guilty to not guilty, showing that in one-third of the cases the court made the changes suggested, and in the other two-thirds of the cases, adhered to its finding. I have seen no statistics of the number of times when the court increased the penalty at the request of the reviewing authority; that is, where the appointing authority sends back an indorsement in which he says that the court will reconvene and consider the adequacy of its sentence, and adds certain arguments or statements, or suggestions are made to show its inadequacy. Such statistics were, to my knowledge, compiled.

Senator WARREN. As I understood you, the court adhered to its findings in two-thirds of those cases?

Mr. MORGAN. No; it was only from not guilty to guilty. They changed from not guilty to guilty in one-third of those cases, and adhered to their findings in two-thirds; but where the convening authority has sent the case back for an increase of the sentence, in a large majority of such cases, they did not adhere to their sentence; they changed it. Those statistics were compiled, but I was not able to find them; and I noticed that Gen. Crowder in sending the statistics to the Senate Committee included only those where the change in the finding was from not guilty to guilty. Now, that, of course, strikes a civilian as something entirely unusual, and the War Department has finally yielded to public sentiment, in so far as to issue a general order, No. 88, which was issued in July, effective August 10, 1919, which forbids the sending back of a case for revision upward of the sentence.

Senator WARREN. I understood that to be the fact. I do not know the date when it was effective.

Mr. MORGAN. Yes; of course it is since the termination of hostilities. In fact, it became effective on August 10.

Senator CHAMBERLAIN. That general order forbade the convening authority to send not-guilty cases back for a finding of guilty?

Mr. MORGAN. Yes; or that a sentence should be sent back for revision upward, and unless this sentence was mandatory by act of Congress and the court had given a sentence under the statutory minimum. Of course, the proposed bill would take away the control of the appointing authority over the personnel of the court and over the finding; that is, so far as to prevent the court from sending back a finding of not guilty for reconsideration. In fact, the present

reviewing authority's functions, so far as the review of the particular record is concerned, are pretty well eliminated by the present bill.

Then the other matter on which there has been considerable dispute, and where the civilian lawyer is somewhat shocked, is that there is no real judicial review for the correction of errors. There is a review, of course, but it is a review by the power of military command all the way through; and during the war, of course, it was demonstrated that the review by the military command as authorized in the Articles of War was inadequate. I think General Order No. 7 and General Order No. 84 of 1918 demonstrated that conclusively. Of course, you remember the occasion of the issuance of General Order No. 7. It was on account of those cases in the South.

Senator WARREN. Yes, that has been gone into very thoroughly before the committee.

Mr. MORGAN. I need not go into that at all, then. General Orders 7 and 84 showed conclusively that some sort of review by a legal officer was an absolute necessity.

Senator WARREN. And you approve of those orders?

Mr. MORGAN. Oh, yes; I approve thoroughly of those orders. But I think that they ought not to be left to Army regulations or general orders. The matter ought to be covered by legislation. The orders do not go far enough.

Senator CHAMBERLAIN. In that connection, that brings up the construction of section 1199 of the Revised Statutes.

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. You know the contention of Gen. Crowder on the one theory of it and the contention of Gen. Ansell on the other?

Mr. MORGAN. Yes.

Senator WARREN. Do you mind expressing your views with respect to section 1199 of the Revised Statutes?

Mr. MORGAN. As an original question of statutory construction, it seems to me there could be very little doubt that section 1199 was intended to give the Judge Advocate General the power which an appellate court usually has to revise or reverse judgments of military tribunals. I think the legislative history of the act, the circumstances under which it was passed, the ordinary legislative meaning of the term "revise" and the term "review," as used in the constitutions and codes of the various States, show very clearly, very convincingly, that the words "revise" and "review" were intended to make the Judge Advocate General's Office, or the bureau of military justice as it was called at that time, a real appellate tribunal.

Senator CHAMBERLAIN. With power to reverse or modify?

Mr. MORGAN. Oh, yes; to reverse or modify; and I think that is made doubly clear by the fact that the act related to the military establishment and used the word "revise," which for at least 75 or 100 years prior to the passage of the statute had a definite, technical meaning in the military service. The power of revision in military law is much broader than the power that any ordinary appellate court has to revise. The only decision on the case was the case of *ex parte Mason*, as you know, which for a long time was unpublished but now has been published in the Federal Reporter. That case contains a dictum to the effect that no power to revise is really

given to the Judge Advocate General in section 1199. That is pure dictum, however, and an analysis of the decision will show that the court did not understand the military system at all. It thought that there was a power, some place, of review, and that the Judge Advocate General had the duty of pointing out, merely, and that the proper military authority would revise, forgetting that, in *ex parte* Mason, if the power did not rest in the Judge Advocate General, there was no power to revise anywhere, for the appointing power had approved the sentence. But there is no doubt—that is, in my opinion there is no doubt—that the military authorities from the time of the enactment of the statute down to the time when Gen. Ansell questioned its interpretation, had really construed the statute as not granting this power of revision.

The military theory has always been that the power to revise or power to control a court-martial sentence is necessarily an attribute of command; and secondly, that it can not be exercised by a staff officer, and the Judge Advocate General and the officers in charge of the bureau of military justice were staff officers. I believe it was on that theory that the Judge Advocate General's Office held that that statute was not intended to give really revisory power.

Senator CHAMBERLAIN. In your opinion is not that a strained construction of it?

Mr. MORGAN. I think, as I said before, Senator, as a matter of original statutory construction, it is very badly strained. I think it disregards not only the ordinary meaning of the word "revise" as used in civil legislation but it entirely and absolutely disregards the meaning of "revise" as used in military language and in the military law for at least from 75 to 100 years prior to the passage of the statute.

Senator CHAMBERLAIN. What would have been the effect to have placed a different construction upon section 1199—that is, the construction which would have permitted the Judge Advocate General to have reviewed, modified, or reversed a verdict of a court-martial?

Mr. MORGAN. It would have, of course, given the Judge Advocate General the right which an ordinary appellate tribunal has to say that a judgment of conviction must be set aside. The case would then, of course, go down to the lower court, the military commander, in accordance with that judgment.

Senator CHAMBERLAIN. Such a construction of that would necessarily have saved all this conflict?

Mr. MORGAN. Yes; such a construction would have saved most of this controversy.

Senator CHAMBERLAIN. And would have protected the rights of a convicted man?

Mr. MORGAN. There could not be any question in my mind that practically all of these cases that have been so much talked about would never have arisen if that provision had been interpreted in that way. We should have really had a court of military appeals; and if we had had a court of military appeals passing upon the regularity of these trials, in the way that an appellate court usually does, it would have caused the commanders below to have been more careful about the conduct of the trials, it seems to me.

Senator WARREN. It would have been, of course, still under the military arm entirely?

Mr. MORGAN. Yes.

Senator WARREN. You think it is better to have a controlling factor finally outside of the military line?

Mr. MORGAN. I am thoroughly convinced of that, Senator, for two or three reasons. I think the provisions of the present bill are really admirable in that respect. I base that conclusion upon my experience in what would seem to me test cases in the War Department. As long as you keep the whole matter within the military department, as long as you have military officers who form this court of appeals under the control of line officers, under the control of the military hierarchy, with the matter of promotion and preferment, and so forth, all being dependent upon these higher officers, you are bound to have the judgments of the subordinates influenced by the desires of the superiors. We have had two or three examples of that in my experience. I am quite sure you are very familiar with them, and if I am repeating too much, you just stop me.

Senator WARREN. That is all right.

Mr. MORGAN. You remember the time of the first four death cases from France that caused so much trouble—or that caused so much newspaper talk. In those cases, if there had been no civilians connected with the Judge Advocate General's department—civilians in uniform, really, as officers—I doubt very much whether anything would have happened except an execution of those sentences. In the first place, those cases went to Gen. Bethel, a Regular Army officer, judge advocate of the American Expeditionary Forces, and he recommended the approval of the conviction and attached a memorandum, as I remember it, which was a very strong argument for the execution of the sentences. The appointing authority, of course, approved them. The records were transmitted through Gen. Pershing, who was not the appointing authority, and who, as a matter of ordinary routine, would have done nothing whatsoever with the cases. Nevertheless, he attached a memorandum saying that the execution of these men was necessary, or highly advisable, at any rate. Those records came to our office with those indorsements on them. The officer who first reviewed the cases thought there was sufficient evidence to justify a conviction and that the sentence was authorized by law. They went to Gen. Crowder, who saw all these indorsements on them, and he wrote a memorandum, which was in the files, addressed to the Chief of Staff, in which he said in effect that it was highly important that the War Department should present a united front to the President on those cases, and he wanted a personal interview before he sent the records over. After he had had the personal interview he signed the review which recommended the execution of the sentences.

The only dissent from that proposition came from Col. Clark, to begin with. He was a civilian in uniform who was assisting Col. Davis, at that time chief of the military justice bureau. Col. Clark went to Gen. Ansell about those cases personally. He just happened to meet him in the hall, as I remember, and in that way those records were called to Gen. Ansell's attention. He went to see Gen. Crowder about them and was told to put his views in writing, which he did. It seems to me that if the whole matter there had been in the hands of strictly military people, without these civilians happening to interpose, those sentences would have been executed, for under the office

practice at that time Gen. Ansell would not have seen them. Now, I am assuming with reference to this, Senator, that those sentences ought not to have been executed. I know that they were not executed. They were held up by the President, and I am assuming that that action was proper. I have not, myself, read the records in those four cases.

Senator WARREN. Before you get away from that, if I do not interrupt you, I want to ask you this.

Mr. MORGAN. No, you are not interrupting.

Senator WARREN. If this committee should recommend and the Congress should pass a law to have a reviewing authority in part or altogether of civilians, you would consider it very much better than to attempt to alter the construction of the words "revise" and "review?"

Mr. MORGAN. Oh, yes; I should, certainly.

Senator WARREN. In other words, to have concluded that that language was susceptible of that interpretation, so as to give this general review that you want, would really have left us in worse shape than we may be in as a consequence of this possible legislation which you are supporting?

Mr. MORGAN. I think that is right, Senator. That is, I believe this: I believe that we should have a system which was much more faulty if section 1199 were construed as I think it should have been construed and the system left unchanged, than we shall have if you adopt this proposed bill, because I think that if section 1199 had been construed that way, we should have a system that would be fairly workable—that is, the abuses would not have challenged the attention of Congress if 1199 had been given that other construction, but I do think that the new system would be much better.

Now, the other cases in which I had that matter forcibly brought to my attention were the negro rape cases. You, I know, remember those cases, where 19 negroes were convicted of rape. It was a big, long record. The judge advocate of the division was a Regular Army officer with the rank of lieutenant colonel. I know that when he came down to the office of the Judge Advocate General with those records, he had them all ready, practically, for a rubber stamp "approved." He thought they would be approved without any question. On the board of review under Col. Reed there were three or four civilians in uniform who were greatly shocked at those records, and were absolutely convinced that there was no ground for upholding the conviction of any of those men. I know that the regular officer in charge of the military justice division, when he saw the alternative was between disapproving the conviction and approving the conviction of all, would have been in favor of approving the conviction of all of them, and then letting the matter be determined by an appeal to the clemency of the President.

The third case was a notorious case, with which you are all familiar, the Tapalina case. On the day that the Judge Advocate General wrote to the Secretary of War a letter for transmission to Senator Chamberlain here, in which he upheld the conviction of Tapalina and showed how it was entirely just, and how Tapalina had really been accorded much more protection than he would have gotten in a civil court, on that very day or the day before, he was informing the Adjutant General that the man had been unjustly convicted, that the

injustice should be righted as soon as possible, and that the man should be given a chance to be reinstated on application.

I think those three cases are enough to base a conclusion on, that if the trial is left entirely to the military, whether you put it in the Judge Advocate General, he being a staff officer, or in the Chief of Staff—however that may be—you will not get nearly as satisfactory a review on the merits, as you will if you establish a court where civilians compose part or all the court. Now, I do not know, Senators, that I have anything further. I should be very glad to attempt to answer any questions.

Senator WARREN. You have touched upon the points that we have had most inquiry about.

Senator Chamberlain, do you wish to ask some questions?

Senator CHAMBERLAIN. Have you ever formulated in your own mind a plan for the organization of an appellate tribunal? How would you have it composed, in part of Army officers and in part of civilians, or in whole of civilians?

Mr. MORGAN. I should have it composed in whole of civilians, if I had anything to do with it.

Senator CHAMBERLAIN. For instance, take the case of a man who has been convicted by court-martial; the court was convened by the commanding authority, and there were irregularities in the trial—possibly prejudicial error; and suppose that it came up to this tribunal that you have in mind, and because of errors committed at the trial, the appellate tribunal composed entirely of civilians should conclude that the judgment ought to be set aside, or that it ought to be revised or modified in some way; what would you have done with the finding of the appellate tribunal?

Mr. MORGAN. I should have it transmitted to the appointing authority to be executed, and if a new trial was granted, the appointing authority should determine whether or not the man should be tried anew or let go, so that it should not be taken out of military control.

Senator CHAMBERLAIN. You would not have the military code or military discipline transferred from the military authority, by this system, to a civilian authority?

Mr. MORGAN. No; I do not think it would be, at all. I think that judicial officers ought to rule on questions of law, and I do not believe that the decision of questions of law can ever be properly said to be an attribute of military command.

Senator CHAMBERLAIN. I am agreed with you on that.

Mr. MORGAN. And I think that is just the crux of the dispute between the two opposing parties. The military theory is just exactly what Col. Winthrop says of it in his book. He says that a court-martial is not a court; that it is a mere administrative body. I have his language here. He says that courts-martial are:

simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives.

Senator CHAMBERLAIN. That theory of it, however, has been set aside by the Supreme Court of the United States in the Runkle case.

Mr. MORGAN. Yes. Col. Winthrop, with all due respect to him—you know, he is by far the most scholarly and able writer we have on

the subject of military law—has misinterpreted those decisions of the Supreme Court which say that the court-martial is not a part of the Federal judicial system. He thought, therefore, that it must be a mere executive agency. Of course, the Supreme Court of the United States has said that courts-martial are not appointed under the third article of the Constitution; but there is nothing better settled than that the third article of the Constitution does not exhaust the power of Congress to appoint judicial tribunals. All of the courts of the Territories are appointed under a different provision of the Constitution. And the Supreme Court in the Runkle case quotes Attorney General Bate's opinion to the effect that the proceeding from the beginning to the end is judicial, and that the court-martial is a court which sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice, and that it can not be conducted according to the will of any man, but must be conducted according to law.

Senator CHAMBERLAIN. The Supreme Court of the United States decided against the theory in the Runkle case, did it not?

Mr. MORGAN. Yes, I think so. The Runkle case was decided in 1887, and Winthrop's first edition came out in 1886; so that it had not been decided when Winthrop's first edition came out. He did not change that point in his second edition. Up to the decision of the Grafton case in 1907 all military writers thought that the double jeopardy clause of the Constitution did not apply to the court-martial.

Senator CHAMBERLAIN. And it was made to apply by that decision?

Mr. MORGAN. By the Grafton decision.

Senator WARREN. You would have this appellate court send back on account of points of law or points of fact?

Mr. MORGAN. On points of law; but I consider it really a point of law where there is no evidence to justify the findings; do you not think that, Senator?

Senator WARREN. I wanted to get your view about it. We have had various opinions, usually along the line of sending cases back for errors of law alone. At the same time we have opinions on the other hand that they should have also the matter of judgment in the cases.

Mr. MORGAN. I do not agree with that. I think that the findings of this lower court should be treated as the findings of a lower court are treated by civilian appellate tribunals.

Senator WARREN. That is an error of law, where there is no evidence to sustain the conviction.

Mr. MORGAN. Yes; that is an error of law. The case ought not to have gone to the jury. The court should have directed a verdict for the defendant.

Senator CHAMBERLAIN. The greatest fear of some of our military friends in regard to any modification of authority by the appellate tribunal is that it will interfere with the discipline of the commanding officer. I can not see that this proposal of yours would take the system out of the final control of the commanding officer.

Mr. MORGAN. I do not think it would, except on questions of law.

Senator WARREN. As I understand you, your court merely says, "Here, you have not tried this according to law; go back and try it again according to law."

Mr. MORGAN. Yes, exactly.

Senator WARREN. It does nothing on findings of fact.

Mr. MORGAN. No, unless the finding of fact is entirely unsupported by the evidence.

Senator CHAMBERLAIN. You know that in the English system—Col. Rigby went into that at great length—they have a civilian tribunal, which is the judge advocate, who is a civilian officer appointed for life or during good behavior, and his recommendations do not interfere with military control.

Mr. MORGAN. No.

Senator CHAMBERLAIN. But the courts in trying these cases almost always follow his rulings.

Mr. MORGAN. Yes, they practically do, and then there is an appeal from the general court-martial to the civil courts in England.

Senator CHAMBERLAIN. Has not the system become, in Great Britain, such that if the members of a court-martial disobey the rulings of these civilian authorities, they do it at their own risk?

Mr. MORGAN. Yes. It is rather dangerous to be a member of a court-martial in England on account of the fact that if the members act illegally in the trial of a case, they can be sued civilly for damages.

Senator CHAMBERLAIN. That has actually occurred?

Mr. MORGAN. Yes, that has actually occurred. The famous case on that you will find cited in Mr. Garfield's argument in the case of Milligan, in 4th Wallace. The name of the officer who was tried was Lieut. Frye. He was tried by a naval court-martial and erroneously convicted. Afterwards he was sentenced to an excessive term of imprisonment. He had never served any part of the excess of the sentence. When he was brought back to England the errors were discovered. Thereafter he sued the president of the court-martial and recovered 1,000 pounds damages. The court informed Lieut. Frye that he had this same right of action not only against the president of the court, but against every member of it, and taking his cue from that he served summons on every one of the members of the court-martial. Some of these, Rear Admiral Mayne and Capt. Rentone, were, at time of service, members of another naval court. This court passed a resolution censuring any civilian authorities, no matter how high they might be, for daring to interfere with the functions of a court-martial. That resolution went to the king, and he approved it. Mr. Chief Justice Willes ordered every one of the members of the court-martial arrested for contempt of court. After two or three months every member of the court-martial signed a most humble apology to the court for any reflection they might have cast upon the civil court and begged leave to withdraw the resolution. Chief Justice Willes, when the apology had been read in court, ordered it to be recorded in the remembrance office, so that it would be a warning that whosoever "think themselves above the law will in the end find themselves mistaken," and in England there are many more cases of damages against members of courts-martial than here.

Senator CHAMBERLAIN. The object of it was not to induce actions against members of courts-martial, but to make them careful.

Mr. MORGAN. To make them careful. The manual of military law in the English army prints an account of the Frye case that I have referred to, with comments, showing the attitude of the civil courts toward the military and warning the officers that they must be careful to keep within the law.

Senator CHAMBERLAIN. On that I do not understand you that you wish to impose penalties as in England?

Mr. MORGAN. No. But I want to say this: I have yet to see the case where a judicial review would have interfered with the control of mere military discipline. There is a great deal of talk about its interfering with speedy trials and discipline; but, as a matter of fact, trials by court-martial are not particularly speedy. There is a provision of the seventieth article of war—which, by the way, I think ought to be changed—to the effect that the trial has to take place within 40 days after the arrest. That is the maximum limit applying to every place. Of course it is not observed.

Senator CHAMBERLAIN. It can not be.

Mr. MORGAN. It can not be observed.

Senator WARREN. I understand you have had this view in your mind while you were reviewing these cases, so that as you have passed from one case to another you have had it in your mind whether it would have interfered with military discipline or not?

Mr. MORGAN. Yes, sir; and I think that the operation of General Orders 7 and 84 has shown very clearly that it has not interfered with the administration of discipline; that General Orders 7 and 84 worked so far as speed was concerned.

Senator CHAMBERLAIN. It has shown the absolute propriety of your contention?

Mr. MORGAN. I think so. That is my deduction from it.

Senator WARREN. That would naturally be the inference?

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. Have you anything else in mind?

Mr. MORGAN. I have not any other suggestions in mind, Senator. I think I have covered the main features of the bill and of the existing system.

Senator WARREN. Do you want to inquire any further, Senator?

Senator CHAMBERLAIN. I do not recall anything now that I care to ask. There is so much of it that we might go into, but I think you have covered it pretty generally.

Senator WARREN. I think the witness has covered quite well the points that we are particularly interested in.

Senator CHAMBERLAIN. I want to ask you this question. It might with propriety have been stated in the opening. You went to Yale University as a teacher of law?

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. And you practiced law before that?

Mr. MORGAN. Yes, I practiced law in Minnesota for 8 years, and then taught law in Minnesota for 5 years.

Senator CHAMBERLAIN. At what school?

Mr. MORGAN. At the University of Minnesota Law School.

Senator CHAMBERLAIN. And you were called from there to Yale?

Mr. MORGAN. I was called from there to Yale.

Senator CHAMBERLAIN. And you were at Yale when you went into this service in the War Department?

Mr. MORGAN. I had not yet reported for duty at Yale.

Senator CHAMBERLAIN. At the completion of your service in the Judge Advocate General's office you went to Yale as professor of law?

Mr. MORGAN. Yes; that is where I am now.

Senator CHAMBERLAIN. As to the cases which you have cited here, I know that the chairman did not mean to suggest that they were rumors, but it might be inferred from the record that you were stating them as rumors. They were cases that came to your attention while you were chairman of the clemency board in the Judge Advocate General's office?

Mr. MORGAN. Yes. I can give you the file number of each one of them.

Senator WARREN. I was not thinking of that, at all.

Senator CHAMBERLAIN. I know you were not, but I was afraid that it might be so construed.

Senator WARREN. What I wanted to get at was exactly what Col. Morgan has testified to, his idea as to the changes in this law, and his reasons for it.

Mr. MORGAN. In order that there may be no misunderstanding, and in order that the specifications and basis of my criticism may be supported by specific instances, I offer as part of my testimony, and ask to have printed as such, a speech made by me before the Maryland Bar Association, at Atlantic City, N. J., on June 28, 1919:

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

#### MILITARY JUSTICE.

ADDRESS BY COL. EDMUND M. MORGAN, PROFESSOR OF LAW AT YALE UNIVERSITY, BEFORE THE MARYLAND STATE BAR ASSOCIATION, ATLANTIC CITY, N. J., JUNE 26, 1919.

Mr. Chairman and gentlemen of the Maryland bar: The indictment which I bring against the existing system of so-called military justice, which Col. Wigmore seems to consider well-nigh perfect, contains the following counts: (1) That it is not only archaic but also anachronistic and un-American. (2) That as to substantive law, it provides for a government of men not of laws. (3) That as to procedure, it affords the accused no substantial protection. It grants him no statutory safeguard against trial upon unfounded charges; it does not guarantee him a fair or impartial trial; in fact, by furnishing a court, a prosecutor, and a defender, all untrained and incompetent, it makes a fair or impartial trial almost impossible; it permits a revision of findings of not guilty and a revision upwards of punishments; it requires no judicial regulation or supervision of the proceeding at any stage. (4) That its administration during this war has been as unreasonable, as unjust, and as un-American as the system itself.

The system is not only archaic but also anachronistic.

Our Articles of War came to us through the British Code of 1765. How we got our articles of 1776 is told in the autobiography of John Adams:

"Aug. 19, 1776.—Mr. Adams and Mr. Jefferson were appointed a committee to hear Tudor and to revise the articles. It was a very difficult and unpopular subject. \* \* \* There was extant one system of articles of war which had carried two empires to the head of command, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. \* \* \* I was therefore for reporting the British articles totidem verbis. (Jefferson agreed.) \* \* \* The British articles were accordingly reported.

"Sept. 19, 1776.—This was another measure that I constantly urged on with all the zeal and industry possible. convinced that nothing short of the Roman and British discipline could possibly save us. \* \* \* In Congress, Jefferson never spoke, and all the labor of the debate on those articles, paragraph by paragraph, was thrown upon me."

These articles were enacted, and, as Mr. Adams says, were in force in 1805, having survived the adoption of the Constitution. In 1806 they were reenacted without fundamental change. The so-called code of 1874, which was in force when Gen. Crowder first proposed his alleged revision of 1912-1916, is thus described by him:

"It is substantially the code of 1806, as 87 of the 101 articles which made up that code survive in the present articles unchanged, and a considerable number of the remaining articles survive without substantial change."

And a thorough examination of the present articles will demonstrate that they made not a single fundamental or systemic change in the code of 1874. To use Gen. Crowder's own words:

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

With reference to procedure, he said:

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

These articles did make prosecutions before general courts easier, and thereby operated against rather than in favor of the accused. But the chief end accomplished by the Crowder revision was merely a rearrangement and a classification of existing statutes.

The fact, therefore, is that our Army—not only the small body of professional soldiers who make up the Regular Army, but the civilians, the citizens in uniform, who won this war and who must fight every war in which this Nation engages—is governed by a code, which, to use the language of Mr. Adams, "had carried two empires to the head of command," and which was designed to enforce "Roman discipline" and the discipline of the British armies of 1776.

And that means a discipline—a system—that reflects the relation of retainer and overlord. As you know, the Roman Republic began with a citizen army, but when after the overthrow of Carthage, Rome took on imperial ambition and magnitude, the Roman army, as Coulton says, "soon settled down into a regular type to which all professional armies tend to conform." Col. Fairbanks, one of Gen. Crowder's trusted assistants, puts it thus:

"The high officers spring from the aristocracy, the mass of the Army is voluntarily recruited and is kept together by the strictest discipline. Foreigners imported in large numbers formed separate units. This army, irresistible against Rome's enemies, in time proved equally dangerous to the State itself. \* \* \* Soldiers lost all relation to civil life and recognized allegiance only to their commanders. As Coulton remarks, 'A nation in arms had formerly overthrown the kings; professional armies now overthrow the republic.'"

And Delbruck asserts that the nearest analogy to this world-conquering army of the Roman Republic is found in the English Army of the eighteenth century.

There you have it! Our army of citizens in uniform—our army of civilians protecting the Republic—subjected to a system of so-called military justice designed to fit an army of professional soldiers serving an empire for hire! Could there be a greater anachronism? Could anything be more un-American?

The existing system provides for a government, not of laws but of men. Many of the punitive articles do not define the offenses which they denounce. The fifty-eighth article does not define desertion, and the definition of that offense has been considerably broadened by interpretation during this war. The sixty-sixth article does not define mutiny. In the fall of 1917, 12 experienced noncommissioned officers were convicted of mutiny, because they did not obey an order to report for drill while in confinement under arrest. The circumstances of the case as disclosed by the record demonstrated beyond peradventure, that the men were not guilty of mutiny. But the conviction and sentence had been approved by the reviewing authority; and there was no method by which this conviction could be quashed. The only recourse for these men was through clemency, which connotes guilt. And the usual uncertainty of the specific punitive articles is made more uncertain by the so-called general article, which denounces "all disorders and neglects to the prejudice of good order and military discipline, and all conduct of a nature to bring discredit upon the military service." What constitutes such disorder, neglect, or misconduct depends upon the commanding officer, the court, or the reviewing authority, as the case may be. What one officer may consider an offense another may entirely overlook. What a particular officer may deem a violation of this article if done on Monday, he may regard as immaterial if committed on Tuesday. There is no legal test, and no legal method of enforcing any alleged or supposed test.

With the exceptions that certain corporal punishment is forbidden, that the death penalty may be inflicted only where expressly authorized, and that a penitentiary may be designated as the place of imprisonment only for certain military offenses and for civil offenses where the authorized and imposed period of confinement exceeds one year, the punishment is entirely in the discretion of the court and the reviewing authorities. The penalties imposed for the same offense exhibit the widest variance. Courts have during this war imposed for absence without leave penalties varying from 3 months to 99 years; for disobedience of orders, from a few months imprisonment

to the death penalty. The present Acting Judge Advocate General himself told me of two cases wherein the accused were charged with using contemptuous words against the President. Soldier A used the words and was tried in England; Soldier B used practically the same words and was tried in France. Soldier A was sentenced to three months' confinement. Soldier B was sentenced to 25 years. "And," said the Acting Judge Advocate General to me, "all I could do in each case was to say, 'The evidence justifies the finding; the sentence is authorized by law.'"

As to procedure, the present system affords the accused no substantial protection. First, it grants him no statutory safeguard against trial upon unfounded charges. It is true that the Manual for Courts-Martial provides for a preliminary investigation before charges are preferred. And it has been asserted that few, if any, innocent men are brought to trial, because the preliminary investigation is thorough and because only serious offenses are prosecuted. Nothing could be further from the truth. The preliminary investigations are made in the most slipshod manner by men untrained and inexperienced in the investigation of facts. To substantiate this statement I need go no further than to say that under date of April 4, 1919, the Judge Advocate General's Office sent to the Secretary of War certain proposals for the "Modification of Rules of Procedure in the Administration of Military Justice," designed, among other things—

"(a) To require an officer preferring a charge to transmit therewith over his signature a brief but comprehensive summary of the evidence upon which he bases the charge.

"(b) To insure careful preliminary investigation of charges before reference for trial to the end that only such charges as are properly referable for trial to be so referred.

"(d) To lay down with greater particularity the duties and responsibilities of investigating officers and staff judge advocates, with a view to guarding against the possibility of (1) hasty or ill-considered action by any officer exercising court-martial jurisdiction, (2) ordering any person to trial before a general court-martial without full and careful as well as impartial investigation of the case and unless a reasonable probability of the guilt of the accused has been made to appear, or (3) trivial charges being referred to a general court-martial."

It is well that number (3) was mentioned, and time that the chief law officer of the War Department should recognize the absurdity of some of the prosecutions. For example, in case 101776, a soldier was brought to trial before a general court-martial for stealing two cans of condensed milk of the alleged value of 14 cents, for which he was sentenced to three months' confinement. In case 124131, a soldier in sick quarters took \$3.10 out of the pocket of a pair of trousers hanging upon the wall. He went out of the room, became conscience stricken, and within a few minutes replaced the money. He was tried for larceny of the money, found guilty, and sentenced to dishonorable discharge and one year's confinement. But, be it remembered, that the Judge Advocate General is proposing that these safeguards be thrown around the accused, not by statute but by a general order—a general order which may be revoked by the same authority that makes it. This would be a protection that would protect only so long and in such cases as the War Department desired. The evil is recognized, but the remedy proposed is inadequate.

Second, it does not guarantee him a fair or impartial trial; in fact, by furnishing a court, a prosecutor and a defender, all untrained and incompetent, it makes a fair or impartial trial almost impossible.

This is a strong statement, but I make it advisedly, knowing that it is supported by the facts. In the first place, when we speak of a court-martial, we must rid our minds of our ordinary conception of a court. While a court-martial performs the functions of a court, and, as the United States Supreme Court said in the Runkle case, is a court which "sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice," yet it is entirely unlike our common-law court. It is more like a mere investigating committee. The general court consists of from five to 13 officers detailed usually from the line of the Army. They need not be learned in the law, and usually have no more knowledge thereof than they get from the Courts-Martial Manual. They ordinarily have no person of legal learning to guide them either in their investigation or in their deliberations. The trial of cases is with them a side issue. It is a disagreeable burden imposed upon them in addition to their normal duties, and is to be discharged with as much expedition as possible. These officers hear the evidence presented, rule upon questions of fact and law arising during the trial, and make findings and impose sentences. No one could expect these line officers, unguided by any person similar to a judge in the civil courts, to conduct trials according to law. And if one may rely upon the records, any one so expecting would be doomed to disappointment. I could cite to you numerous examples, but the following will suffice:

Case ———: The accused was on trial for murder. His plea was self-defense. The theory of the prosecution was that he had stabbed the decedent from behind while decedent was peacefully eating his breakfast. The theory of the defense was that the decedent had badly beaten the accused on the previous evening, that as accused was passing behind decedent with a bread knife in his hand decedent rose from the table and made a threatening movement toward the accused, and that accused, believing decedent to be armed and fearing injury, stabbed and killed decedent. The first witness for the prosecution described the stabbing. Upon cross-examination, counsel for accused asked the witness leading questions tending to show that the witness had paid very slight attention to the encounter. He was successfully attaining his object when the president of the court interrupted with: "Stop asking him leading questions." "But I have the right to ask him leading questions on cross-examination." "Yes, but you have no right to put the answer into his mouth. You are making this witness say whatever you want him to say." The president of the court was a fierce-looking colonel. Counsel for accused was a youngster. The record shows that he did no effective cross-examining thereafter.

Case ———: The defense of accused was an alibi. Accused offered two witnesses besides himself. Each of the witnesses was interrupted by the president of the court, warning him that he was under oath and explaining the offense of perjury. The accused was likewise interrupted in his testimony, and advised that perjury was a more serious offense than that for which he was on trial. Counsel for accused was reprimanded and threatened with disciplinary proceedings if he did not desist from asking leading questions, while the prosecutor was permitted to ask leading questions freely.

Case 119773: The following is a review by a special branch of the special clemency board in a case where the accused had been found guilty and sentenced to 15 years in confinement.

"The case was poorly tried in that (a) irrelevant testimony of a character to create bias against the accused was received over objection; (b) incompetent evidence of like character was also admitted; (c) counsel for the accused was checked by the court in his perfectly proper objections and motions; (d) proper and justified request for continuance to secure witnesses was denied; (e) improper argument by the judge advocate.

"The trial was irregular, unfair, arbitrary, and ridiculous."

Case 113212: Accused was charged with desertion. The prosecution rested after merely reading the charge and specification. The accused made an unsworn statement denying that he had any intent to desert the service. The court, after inquiring whether the prosecution had no more evidence, was closed. Later it reopened, and announced: "The court finds there is insufficient evidence to justify a finding of guilty or acquittal, and instructs the judge advocate and counsel for defense to ask a continuance." Imagine a real court requiring evidence from the accused where there was no evidence by the prosecution. When the court met again it convicted the accused.

The foregoing cases illustrate as well the ignorance of the prosecutor or trial judge advocate, who also is usually an officer detailed from the line. He is not required to have, and very rarely does he have, any legal training. He is expected, so far as he is able to do so, to act as legal adviser to the court, and in theory he is to see to it that the rights of the accused are not violated. In practice, the best that can be said of him is that he usually has higher rank and less unfamiliarity with the law and procedure than has counsel for the accused.

In a large percentage of the cases the accused would be better off without counsel than with the counsel assigned. The records show an almost unbelievable ignorance or disregard of the rights of the accused by his counsel. I have seen record after record, where had counsel not put on any witnesses accused must have been acquitted. Indeed, judge advocates who review records know that it is a common experience for accused's own counsel to be responsible for accused's conviction. And it is not a matter for astonishment when it is remembered that counsel is usually assigned, that he is ordinarily a comparatively young and inexperienced line officer, that this work is in addition to his regular duties and that he gets practically no credit for it. The records show that in less than 2 per cent of the cases counsel is a civilian; in about 3 per cent he is a chaplain; and in over 77 per cent he is an officer of the rank of lieutenant. These facts may explain cases like the following, but they can neither excuse nor justify them.

Case 117174: A soldier was on trial for desertion. The only action at the trial by counsel is indicated by his statement, as follows: "In view of the fact that I have had no opportunity to investigate the charges against the prisoner, I would like for the court to let him go on the stand and make an unsworn statement in his own behalf." Now, desertion in time of war is a capital offense. This soldier was on

trial for his life. Think of counsel entering a trial of such seriousness without preparation! The accused was found guilty and sentenced to imprisonment for 20 years. And the startling truth—the all-important fact, which was not brought out at the trial and which would have been decisive proof of innocence—is that the accused was an imbecile!

Case 118220: Accused was tried for desertion. All evidence except that of mere absence without leave was hearsay and inadmissible by the most well-established rules of law. Conviction and sentence to 25 years' imprisonment followed. Accused was mentally defective. A branch of the special clemency board, headed by a former judge of a State supreme court, reviewed the record and said: "The findings are not sustained by competent evidence. The record is a discredit to military justice."

Case 121043: Accused was tried for disobeying an order of a military policeman and for striking him in the face. He was found guilty and sentenced by the court to 20 years' imprisonment, which the reviewing authority reduced to 10 years. Here also the accused was an imbecile—a fact not suggested at the trial.

Case 123826: Accused was absent without leave from September 3, 1918, to October 15, 1918. He went home to see his sick mother, who died while he was there. On his way back to camp he stopped to visit his aunt, where he was apprehended. He was tried and found guilty of desertion and sentenced to 10 years' imprisonment. No mental defect was suggested at the trial. In fact, accused was an imbecile, having the mental development of a four-year-old child.

Case 119330: Accused was on trial for desertion. He was defended by a chaplain who evidently was of the opinion that accused was mentally unbalanced. His speech of defense for the accused was a simple statement that he did not think accused was mentally responsible, but that he did not believe in sending men before "nut boards" (boards of psychiatry), for such mentally irresponsible soldiers "should either be emasculated or sent to Leavenworth." The accused was found guilty and sentenced to 10 years' imprisonment. Imagine counsel in a capital case so cavalierly denying the right of his client to interpose the defense of mental irresponsibility.

The officers constituting the special clemency board, reviewing the records of trial of men in confinement, found over half the cases poorly tried. And some cases which they described as well tried were so bad as to be almost ridiculous. The plain, simple fact is that the average court-martial trial would be a comedy, were it not fraught with such tragic results for the accused.

Third. Under the present system, the officer who appointed the court and to whom the court must transmit its findings and sentence, may return for reconsideration and revision findings of not guilty or sentences which he deems too light.

The court, on reconsideration, is not obliged to change its finding or to increase its sentence; but an examination of cases chosen by Gen. Crowder at random shows that in one-third of the cases sent back for revision it did change its finding of not guilty to a finding of guilty, and that in a great majority of cases so returned, it increased the punishment to conform with the recommendation of the reviewing authority. Gen. Crowder has said that he knows of no cases where injustice was worked by such revised findings or sentences. If so, it is because he is so blind that he won't see. He need look only at the following cases, which are not exceptional:

Case No. 110526: The accused was charged with murder. The court found him guilty of manslaughter and sentenced him to 10 years' confinement. The revising authority sent the case back with a sharp indorsement to the effect that accused should have been found guilty of murder. On reconvention the court so found, and sentenced him to life imprisonment. The special clemency board found the first action of the court proper, and reduced the sentence to eight years.

Case 116691: The accused was found guilty of absence without leave and sentenced to confinement for one year and forfeiture of two-thirds of pay for a like period. The reviewing authority sent the case back for revision with an improper statement as to the effect of the evidence. The court reconvened, found accused guilty of desertion, and sentenced him to 10 years' imprisonment and dishonorable discharge.

Case 121081: Accused was charged with escape and desertion. He was found guilty of escape and not guilty of desertion and sentenced to two years' imprisonment. The reviewing authority sent the case back with an argument in favor of a finding of guilty of desertion. The court reconvened, found accused guilty of desertion, and sentenced him to 20 years' imprisonment.

In the three foregoing cases the special clemency board recommended modification of the sentences on the ground that the original finding of the court was in each case the proper finding.

Fourth. There is no judicial supervision of the proceeding at any stage.

I know this statement will be challenged, and the review of the record by the division judge advocate will be cited, and the elaborate machinery of the office of the Judge Advocate General will be described. But the division judge advocate is not a judicial officer, and furthermore he has no power of supervision. It is frequently upon his advice that the accused is prosecuted; frequently, if not usually, he directs and aids the trial judge advocate with counsel as to how to proceed, what witnesses to call, etc., and he is in no position to act judicially. As for the Judge Advocate General, he has himself decided that he has no power to review or revise. He can merely advise the Secretary of War or the President. And in the vast majority of cases the findings and sentences are final and beyond all power save that of clemency when the record reaches the Office of the Judge Advocate General. Indeed, the only cases where legally the Judge Advocate General may act before the finding and sentence becomes final are those which require confirmation by the President, namely, certain death sentences and certain sentences of dismissal of an officer. In these cases the Judge Advocate General may advise the President. As a matter of fact, however, such advice is transmitted through the Chief of Staff and Secretary of War, who may urge the President to disregard the advice. And the President has the power to disregard it.

By an extra legal order, known as General Order No. 7, War Department, 1918, reviewing authorities are required to submit to the Judge Advocate General, before executing sentence, for advice as to the legality of the finding and sentence, cases where certain punishments are proposed to be inflicted. The real power of the Judge Advocate General under this order was tested by the now famous Tapolina case, which is discussed on pages 9 and 10 of the pamphlet written by Col. Wigmore, for Gen. Crowder, entitled "Military Justice During the War."

Tapolina was a military policeman. He was charged with burglary. His story was that he had heard the sound of breaking glass near the building in question, that he investigated, saw a broken window, heard someone moving about inside, entered, and while searching for the supposed intruders, was himself arrested by two other military policemen. The court believed his story and found him not guilty. When the finding was transmitted to the reviewing authority, who was the commanding officer convening the court, he returned the record and findings with a direction that the court reconvene for revision and reconsideration of the findings. The entire indorsement returning the record was merely an argument to show that the evidence warranted a finding of guilty. The court on reconvention found the accused guilty and sentenced him to imprisonment for five years. Since the case involved dishonorable discharge, which was not to be suspended, it came to the Judge Advocate General's office for a review as to its legality, and the officer reviewing the case in the Office of the Judge Advocate General, in paragraph 18 of his review, said:

"After a careful consideration of the evidence this office is firmly convinced of the absolute innocence of the accused. The evidence against him is wholly inconclusive and his own statements have a ring of sincerity which convinces the reader that he speaks the truth."

The review of the case containing the above quoted paragraph was sent to the commanding officer, with the statement:

"At this stage of this case the matter of the sufficiency of the evidence to sustain a conviction is within the discretion of the reviewing authority, the court having already passed thereon. However, since, in examining the case to its legality, one of the assistants in this office has made a study of the sufficiency of the evidence, it is deemed to be within the sphere of propriety to say that this office entertains grave doubts as to whether the guilt of the accused is established by the evidence. This doubt seems to have been shared by the court in its first finding and acquittal. The guilt of the accused must, of course, be established beyond a reasonable doubt. In order that the reviewing authority may have the benefit of the study referred to, a copy thereof is inclosed herewith for such consideration as he may deem advisable to give it."

The commanding officer, notwithstanding the review of the Judge Advocate General, affirmed the sentence and designated the penitentiary as the place of confinement. This he did upon the advice of his division judge advocate, who was a Regular Army officer, an officer who had been in the line from the Spanish-American War up to the time of the present emergency, and was commissioned in the Judge Advocate General's Department during the emergency. Compare these facts with the statements of the same case on pages 9 and 10 of the pamphlet above referred to, and then ask yourself whether that pamphlet was written for the purpose of putting the facts fairly before the people. Then consider also the following: Under date of February 13, the substance of the statement of this case, as printed on pages 9 and 10 of that pamphlet, was written in a letter to the Secretary of War and signed by Gen. Crowder, for the purpose of having the Secretary transmit it to Congress. Under date of February 12 the same Judge Advocate General who signed this communication to the Secretary of War,

for the purpose of assuring Congress that this man, Tapolina, had been properly convicted and all his legal rights properly cared for, signed an indorsement to The Adjutant General with reference to this same case, which contained the following: "While it can not be said that there is no evidence upon which the finding of guilty can be based, this office is strongly of the opinion that an injustice may have been done to this man, and that it should be righted as far as possible. It will be noted that Mr. Flager, field director of the Red Cross at Camp Gordon, comments upon the poor reputation of one of the principal witnesses against Tapolina. It is recommended that the unexecuted portion of the sentence in this case be remitted, and that the prisoner be released from confinement and restored to duty upon his written application to that end."

This case demonstrates two things: (1) The absolute impotence of the Judge Advocate General's Office with respect to the review or supervision of trials by court-martial; (2) the readiness of the Judge Advocate General, as a constituent part of the War Department, to uphold action taken by reviewing authorities to the prejudice of the accused, even where that action was taken in direct disregard of the opinion of the Judge Advocate General.

There is then no judicial supervision of a court-martial proceeding. There is no legal method of righting the outrageous injustices done by ignorant courts, prosecutors, and counsel. In short the present procedure affords the accused no substantial protection when he is charged with an offense. All the machinery for review (with a view to supervision) in the office of the Judge Advocate General is extra legal. Most of it was devised by Gen. Ansell, and has been in operation only since the spring of 1918. It is being continued by Gen. Kreger. It may be abolished at any moment by Gen. Crowder or his successor.

The administration of military justice during this war has been as unreasonable, as unjust, and as un-American as the system itself.

The American theory is, that an accused shall be presumed innocent until he is proved guilty. That theory is supposed to obtain in courts-martial practice. In fact just the opposite is true. The average court-martial challenges a man to prove himself innocent. The language used by the reviewing authorities in sending findings of not guilty back for revision illustrate this attitude, e. g., "it is thought that there is sufficient evidence to find him guilty as charged." (Case 112382.) "The evidence is sufficient to establish desertion." (Case 121081.) "The evidence is sufficient to support a finding of attempt to escape." (Case 125028.) It is also amply demonstrated by the records, which show that during this war about 88 per cent of the trials have resulted in convictions and that during the peace-time régime about 96 per cent of the trials resulted in convictions. These figures would not be quite so startling were the facts what some persons would have us believe, namely, that there are comparatively few trials in the Army as contrasted with the civil community. But such is not the fact. Let it be remembered that no considerable body of troops reached camp before November, 1917; that at no time did we actually have forces in appreciable excess of 4,000,000 men, and that of these 4,000,000, a considerable percentage was in camp but a few months; and it will be clear that a fair average for the war period would be between two and three millions. Then consider Secretary Baker's statement to Congress that up to February 1, 1919, there had been more than 22,000 trials by general courts-martial and 350,000 trials by inferior courts. And Mr. Baker was speaking only of records which had been reported to the War Department. A conservative estimate of the number of trials to date would exceed 400,000. Think of it, from 10 to 20 per cent of the members of our forces brought to trial on criminal charges, and 88 per cent of those tried convicted. What civil community will show so damning a record?

The cases already cited illustrate the harshness of the sentences imposed. In almost all of the cases examined by the special clemency board the sentences were absurdly severe. This board recommended reducing the sentences by more than 77 per cent and remitting a total of over 18,000 years. Think of a court sentencing a boy of 17 to be dishonorably discharged and to be imprisoned for 2½ years for stealing a shirt of the value of \$2.38, and another court sentencing another 17-year-old boy to dishonorable discharge and 3 years' imprisonment for stealing a shirt and a pair of shoes of the total value of \$5.19. If this does not arouse you, contemplate case No. 123180, in which the accused first committed the heinous offense of refusing to take off a bow tie when ordered to do so by a sergeant, and when put in arrest for this awful crime he went further and told the sergeant he would kill him if he got a chance. Upon conviction the court sentenced him to dishonorable discharge and 25 years' imprisonment. The reviewing authority reduced the sentence to 10 years. What a travesty upon common sense.

It has been attempted to explain these results as due to the new and inexperienced officers. I resent this, and assert the contrary. The indubitable facts are that the reviewing authority has the power to reduce a sentence before approving it, and that in almost every instance the reviewing authority was a Regular Army officer. Furthermore, usually a regular officer dominated the court. And, finally, so far as convictions are concerned, the percentage of convictions when the system was administered solely by regulars was 96; after the advent of the temporary officers was 88.

And woe be to him in the service who dared oppose this sacrosanct system. Everybody knows what has happened to Ansell. But not everybody knows what happened to others not so exalted in rank. Many a young officer, attempting to protect the rights of the accused has been threatened with court-martial proceedings himself. (See case 126312, Corporal S. F. Morton.) Capt. Francis M. Doyle learned what opposition to the system means. He was appointed to defend a boy before a special court-martial, composed of three officers who he deemed "unfitted to act in a judicial capacity" and one of whom was "notorious for his abuse of men." In order to protect his client he demanded that a stenographic report of the trial be taken. The commanding officer at Columbus barracks refused his request. He then appealed directly to the commanding officer of the central department, respectfully stating his objections to the court and demanding "an unbiased court-martial." For this he was himself tried by general court-martial.

There is no question that the system is bad and that its administration has been bad. There is no question that the War Department will resist, in fact, is resisting, any attempt to reform it fundamentally. The Ansell bill, which has been introduced into the Senate by Senator Chamberlain and in the House by Congressman Royal Johnson, and which is supported by all the Members of Congress who have seen service, the War Department is trying to kill in committee. It will offer all sorts of substitutes by way of regulation and reform from within. It will predict Bolshevism and the destruction of discipline. It will even go so far as to say that the object of the military system is the attainment of victory through arms and not the doing of justice to individual soldiers, as if the two were inconsistent. But I challenge the supporters of the present system to produce a single specific case wherein the granting of a fair and impartial trial under a judicial supervision, in the stead of the travesty upon justice actually granted, would have injured discipline or morale one whit. I do not discount the importance or the necessity of maintaining discipline, but I assert that when a commanding officer decides that a person subject to military law is to be tried to determine whether he has violated any civil or military law or regulation, the accused is entitled to a fair and impartial trial; that none of the demands of discipline require that he be deprived of the safeguards provided for an accused by the Constitution; that provision should be made for conducting the trial according to law; and that the question whether the accused has been given a fair and impartial trial is one of law, which should be decided by a judicial tribunal and not by a military officer claiming to act by right of command and without respect to or regard for law.

Senator WARREN. Now, Colonel, unless you have something farther you wish to offer, we shall excuse you. We are very glad you came, and we feel under obligations to you.

(Thereupon, at 12:20 o'clock, p. m. the subcommittee adjourned, subject to the call of the chairman.)