

Volume 1

REVISION OF THE ARTICLES OF WAR  
1912-1920  
(In two volumes)

Hearing.

Committee on Military Affairs.  
House. 62d Cong, 2d sess. on  
HR 23628

Senate Report 229 - 63d Cong. 2d  
session

Senate Report 130 - 64th Cong. 1st  
session

Hearing before subcommittee of  
Committee on Military Affairs.  
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Trials by courts-martial.  
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} REPORT  
No. 130.

## REVISION OF THE ARTICLES OF WAR.

FEBRUARY 9 (calendar day, FEBRUARY 11), 1916.—Ordered to be printed.

Mr. LEA of Tennessee, from the Committee on Military Affairs,  
submitted the following

### REPORT.

[To accompany S. 3191.]

The Committee on Military Affairs, to which was referred Senate bill 3191, to amend section 1342 and chapter 6, Title XIV, of the Revised Statutes of the United States, and for other purposes (Articles of War), have carefully considered the same and adopt the unanimous report of the subcommittee which considered this bill and recommend that the bill do pass as amended.

A BILL To amend section thirteen hundred and forty-two and chapter six, Title XIV, of the Revised Statutes of the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section thirteen hundred and forty-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

"SEC. 1342. The articles included in this section shall be known as the Articles of War, and shall at all times and in all places govern the armies of the United States, including all persons belonging thereto and all persons now or hereafter made subject to military law.

#### "I. PRELIMINARY PROVISIONS.

"ARTICLE 1. DEFINITIONS.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

- "(a) The word 'officer' shall be construed to refer to a commissioned officer;
- "(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man;
- "(c) The word 'company' shall be understood as including a troop or battery;

and  
"(d) The word 'battalion' shall be understood as including a squadron.

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles:

"(a) All officers and soldiers belonging to the armies of the United States, including regulars, army reserve, militia called into the service of the United States from the date of notice of such call, and volunteers;

"(b) Cadets, veterinarians of Cavalry and Field Artillery, and pay clerks of the Quartermaster Corps;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the Articles of War for the government of the Navy prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment cases:

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles:

"(e) All persons under sentence adjudged by courts-martial:

"(f) All persons admitted into the Soldiers' Home, all inmates of the National Home for Disabled Volunteer Soldiers, and all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, and in the hospital at Fort Bayard, New Mexico, while patients in said hospitals: and

"(g) All persons now or hereafter declared by law to constitute a part of or to belong to the armies of the United States or to be subject to the Articles of War or to trial by courts-martial.

## " H. COURTS-MARTIAL.

"ART. 3. COURTS-MARTIAL CLASSIFIED. Courts-martial shall be of three kinds, namely:

"First, general courts-martial;

"Second, special courts-martial; and

"Third, summary courts-martial.

### " A. COMPOSITION.

"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—Officers of the Regular Army, of the militia when called into the service of the United States, of the Volunteer Army, and of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

"ART. 5. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of officers from seven to thirteen, inclusive.

"ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of officers from three to five, inclusive.

"ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer.

### " B. BY WHOM APPOINTED.

"ART. 8. GENERAL COURTS-MARTIAL.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, field army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 10. SUMMARY COURTS-MARTIAL.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary.

## " C. JURISDICTION.

"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by statute or by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

"ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months nor to adjudge forfeiture of more than six months' pay.

"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

"ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

"ART. 16. OFFICERS; HOW TRIABLE.—Officers shall be triable only by general courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

## " D. PROCEDURE.

"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall enjoy the right to have the assistance of counsel for his defense, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights.

"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused and by the judge advocate, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

"ART. 19. OATHS.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the Armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 20. CONTINUANCES.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty.

"ART. 22. PROCESS TO OBTAIN WITNESSES.—Every judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

"ART. 23. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, begin duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

"ART. 25. DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testify by deposition may be adduced for the defense in capital cases.

"ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

"ART. 27. COURTS OF INQUIRY—RECORDS OF, WHEN ADMISSIBLE.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

"ART. 28. RESIGNATION WITHOUT ACCEPTANCE DOES NOT RELEASE OFFICER.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"ART. 29. ENLISTMENT WITHOUT DISCHARGE.—Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

"ART. 30. CLOSED SESSIONS.—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court.

"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank.

"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in Article XIV, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.

"ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate, but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.

"ART. 34. RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the president may from time to time prescribe.

"ART. 35. DISPOSITION OF RECORDS—GENERAL COURTS-MARTIAL.—The judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army.

"ART. 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the president may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of special and summary courts-martial may be destroyed.

"ART. 37. IRREGULARITIES—EFFECT OF.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and

other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

#### "E. LIMITATIONS UPON PROSECUTIONS.

"ART. 39. AS TO TIME. Except for desertion committed in time of war, or for murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"ART. 40. AS TO NUMBER. No person shall be tried a second time for the same offense.

#### "F. PUNISHMENTS.

"ART. 41. CERTAIN KINDS PROHIBITED. Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited.

"ART. 42. PENITENTIARY SENTENCES—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted constitutes an offense of a civil nature under some statute of the United States or of the District of Columbia, or at the common law as the same exists in said District, or by way of commutation of a death sentence, nor unless the period of confinement authorized and adjudged by such court-martial is one year or more: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States.

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members present and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

"ART. 44. COWARDICE; FRAUD—ACCESSORY PENALTY.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe.

#### "G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

"ART. 46. APPROVAL AND EXECUTION OF SENTENCE.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"ART. 47. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall be held to include, *inter alia*:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

"ART. 48. CONFIRMATION—WHEN REQUIRED.—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

"(a) Any sentence respecting a general officer;  
 "(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

"(c) Any sentence extending to the suspension or dismissal of a cadet; and

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include, *inter alia*:

"(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to confirm or disapprove the whole or any part of the sentence.

"ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the authority competent to appoint, for the command in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.

"ART. 51. SUSPENSION OF SENTENCES OF DISMISSAL OR DEATH.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

"ART. 52. SUSPENSION OF SENTENCE OF DISHONORABLE DISCHARGE.—The authority competent to order the execution of a sentence, including dishonorable discharge, may suspend the execution of the dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command in which the soldier is held or by the Secretary of War.

"ART. 53. SUSPENSION OF SENTENCES OF FORFEITURE OR CONFINEMENT.—The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the authority competent to order the execution of like sentences in the command to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted.

#### "III. PUNITIVE ARTICLES.

##### "A. ENLISTMENT; MUSTER; RETURNS.

"ART. 54. FRAUDULENT ENLISTMENT.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

"ART. 55. OFFICER MAKING UNLAWFUL ENLISTMENT.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"ART. 56. FALSE MUSTER.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

"B. DESERTION—ABSENCE WITHOUT LEAVE.

"ART. 58. DESERTION.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 59. ADVISING OR AIDING ANOTHER TO DESERT.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and; if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

"ART. 61. ABSENCE WITHOUT LEAVE.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

"C. DISRESPECT—INSUBORDINATION—MUTINY.

"ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

"ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

"ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

"ART. 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

"ART. 66. MUTINY OR SEDITION.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

"ART. 67. FAILURE TO SUPPRESS MUTINY OR SEDITION.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

"ART. 68. QUARRELS; FRAYS; DISORDERS.—All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him shall be punished as a court-martial may direct.

"D. ARREST; CONFINEMENT.

"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct.

"ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who willfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion, shall be punished as a court-martial may direct: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

"ART. 71. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, or the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

"ART. 72. REPORT OF PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct.

"ART. 73. **RELEASING PRISONER WITHOUT PROPER AUTHORITY.**—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

"ART. 74. **DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.**—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

#### "E. WAR OFFENSES.

"ART. 75. **MISBEHAVIOR BEFORE THE ENEMY.**—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camps, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

"ART. 76. **SUBORDINATES COMPELLING COMMANDER TO SURRENDER.**—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

"ART. 77. **IMPROPER USE OF COUNTERSIGN.**—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

"ART. 78. **FORCING A SAFEGUARD.**—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

"ART. 79. **CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.**—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

"ART. 80. **DEALING IN CAPTURED OR ABANDONED PROPERTY.**—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

"ART. 81. **RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.**—Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.

"ART. 82. **SPIES.**—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

#### "F. MISCELLANEOUS CRIMES AND OFFENSES.

"ART. 83. **MILITARY PROPERTY—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION OF.**—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

"ART. 84. **WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.**—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

"ART. 85. **DRUNK ON DUTY.**—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

"ART. 86. **MISBEHAVIOR OF SENTINEL.**—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

"ART. 87. **PERSONAL INTEREST IN SALE OF PROVISIONS.**—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 88. **INTIMIDATION OF PERSONS BRINGING PROVISIONS.**—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

"ART. 89. **GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.**—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depreciation or riot shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

"ART. 90. **PROVOKING SPEECHES OR GESTURES.**—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

"ART. 91. **DUELING—ATTEMPTS TO COMMIT SUICIDE.**—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority or who attempts to commit suicide shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

"ART. 92. **MURDER—RAPE.**—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

"ART. 93. **VARIOUS CRIMES.**—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury,

assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

"ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures, or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

"Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

"ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, or conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

#### "IV. COURTS OF INQUIRY.

"ART. 97. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

"ART. 98. COMPOSITION.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

"ART. 99. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is being inquired into and by the recorder, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time.

"ART. 100. OATH OF MEMBERS AND RECORDER.—The recorder of a court of inquiry shall administer to the members the following oath: 'You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you, God.' After which the president of the court shall administer to the recorder the following oath: 'You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you, God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 101. POWERS; PROCEDURE.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

"ART. 102. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

"ART. 103. RECORD OF PROCEEDINGS.—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

#### "V. MISCELLANEOUS PROVISIONS.

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

"ART. 105. INJURIES TO PERSON OR PROPERTY.—REDRRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

"ART. 106. ARREST OF DESERTERS BY CIVIL OFFICIALS.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

"ART. 107. SOLDIERS TO MAKE GOOD TIME LOST.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

"ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs or by the commanding officer when no field officer is present; and no discharge shall be given to an enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

"ART. 109. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: 'I, \_\_\_\_\_, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.' This oath or affirmation may be taken before any officer.

"ART. 110. CERTAIN ARTICLES TO BE READ AND EXPLAINED.—Articles one, two, and twenty-nine, fifty-four to ninety-six, inclusive, and one hundred and four to one hundred and nine, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

"ART. 111. COPY OF RECORD OF TRIAL.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

"ART. 112. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law, the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to convert such effects into cash, by public or private sale, not earlier than thirty days after the death of the deceased, and to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposit, accompanied by any will or other papers of value belonging to the deceased, an inventory of the effects secured by said summary court, and a full account of his transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers or enlisted men of the Army; but if in the meantime the legal representative or widow, shall present himself to take possession of decedent's estate the said summary court shall turn over to him all effects not sold and cash belonging to said estate, together with an inventory and account, and make to the War Department a full report of his transactions.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

"ART. 113. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

"ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

"ART. 115. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the judge advocate of a court-martial or military commission, or the recorder of a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the judge advocate of a court-martial or military commission, or summary court, or the recorder of a court of inquiry may appoint an interpreter, who shall interpret for the court or commission.

"ART. 116. POWERS OF ASSISTANT JUDGE ADVOCATES.—An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court.

"ART. 117. REMOVAL OF CIVIL SUITS.—When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

"ART. 118. OFFICERS—SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof, nor discharged except in pursuance of statutes now in force or which may hereafter be enacted; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the

Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of the Organized Militia in the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in the Organized Militia in the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; but the rank of officers of the Regular Army under their commissions in the Organized Militia shall not, for the purposes of this article, be held to antedate muster into the service of the United States.

"ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to join or do duty together the officer highest in rank of the line of the Regular Army, Marine Corps, Organized Militia, or Volunteers there on duty shall, subject to the provisions of the preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President."

SEC. 2. That hereafter the provisions of section twenty-six of the act of February second, nineteen hundred and one, as modified for the Ordnance Department by section two of the act of June twenty-fifth, nineteen hundred and six, by acts of March third, nineteen hundred and nine, and by the act of February twenty-fourth, nineteen hundred and fifteen, shall be held to include the Judge Advocate General's Department: *Provided*, That the board of officers which is to recommend officers for detail in the Judge Advocate General's Department shall be composed of officers of that department: *Provided further*, That acting judge advocates may be detailed for separate brigades and other separate general court-martial jurisdiction, and when not immediately required for service with the geographical department, tactical division, separate brigade, or other separate general court-martial jurisdictions, acting judge advocates may be assigned to such other legal duty as the exigencies of the service may require.

SEC. 3. That the following sections of the Revised Statutes and the following acts and parts of acts are hereby repealed:

(a) Sections twelve hundred and two, twelve hundred and three, and thirteen hundred and twenty-six of the Revised Statutes;

(b) That part of an act entitled "An act making appropriation for the legislative, executive, and judicial expenses of the Government for the year ending June thirtieth, eighteen hundred and seventy-eight, and for other purposes," approved March third, eighteen hundred and seventy-seven, which reads as follows:

"*Provided, however*, That hereafter the records of regimental, garrison, and field officers' courts-martial shall, after having been acted upon, be retained and filed in the judge advocate's office at the headquarters of the department commander in whose department the courts were held for two years, at the end of which time they may be destroyed."

(c) Section three of an act entitled "An act to amend the Articles of War, and for other purposes," approved July twenty-seventh, eighteen hundred and ninety-two;

(d) Sections one and four of an act entitled "An act to amend an act entitled 'An act to promote the administration of justice in the Army,' approved October first, eighteen hundred and ninety, and for other purposes," approved June eighteenth, eighteen hundred and ninety-eight;

(e) Section one of an act entitled "An act to prevent the failure of military justice, and for other purposes," approved March second, nineteen hundred and one; and

(f) Section eight of an act entitled "An act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, as amended by section six of an act entitled "An act to further amend the act entitled 'An act to promote the efficiency of the militia, and for other purposes,' approved January twenty-first, nineteen hundred and three," approved May twenty-seventh, nineteen hundred and eight.

Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts in so far as they are inconsistent with the provisions of this act are hereby repealed.

SEC. 4. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of this act, under any law embraced in or modified, changed, or repealed by this act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this act had not been passed.

The bill consists of four sections. Section 1, subdivided into five parts, "Preliminary provisions," "Court-martials," "Punitive articles," "Courts of inquiry," and "Miscellaneous provisions," carries a revision of the Articles of War and is a substitute for section 1342,

Revised Statutes. Section 2 provides for placing the Judge Advocate General's Department under the detail system now applicable to the Ordnance Department. Sections 3 and 4 embody the necessary provisions as to repeal of existing law and the prosecution of offenses committed prior to the taking effect of the new legislation. This order will be observed in the report.

## SECTION 1.

Section 1 of the bill is identical, except in minor regards, with H. R. 23628, introduced in the Sixty-second Congress, second session, at the request of the War Department, on April 22, 1912, by the chairman of House Committee on Military Affairs, Mr. Hay; and with S. 6550, introduced three days later by the chairman of the Senate Committee on Military Affairs, Mr. du Pont, and with S. 1032, Sixty-third Congress.

The House committee conducted a series of hearings on H. R. 23628 between May 14 and May 27, 1912. The report of these hearings was printed; and with the report was printed a letter of the then Secretary of War, Mr. Stimson, presenting the project of revision and recommending its enactment; and likewise a very full exposition by the Judge Advocate General of the Army of the necessity for the revision, its scope and character, and the principal changes embodied therein.

The subcommittee in considering this bill had hearings at which Judge Advocate General Crowder made a clear and forceful presentation of the urgent necessity of an immediate revision of the Articles of War. These hearings and a letter from the Secretary of War to the Hon. George E. Chamberlain, chairman of the Committee on Military Affairs, United States Senate, under date of January 3, 1916, are printed as an appendix to this report. The subcommittee unanimously concurs in the view of the Judge Advocate General.

The Articles of War as a code have not been comprehensively revised by Congress since 1806, the so-called revision of 1874 being limited to the elimination of redundant provisions, the supplying of obvious omissions, the reconciling of contradictions, and the curing of imperfections in form and language. In no sense should the congressional action of 1874 be regarded as a revision of the Articles of War.

The Articles of War as originally adopted reflected the experience of our military authorities at the close of the Revolutionary War and the adaptation of the regulations governing the Continental Army to the then new Constitution of the United States.

In no other line of human endeavor has the intervening century made as great changes as in warfare. The musket has yielded to the new Springfield rifle; the 6-pounders have been supplanted by the 42-centimeters; the aviation corps has taken the place of the old scouts; and in every branch of warfare science has made all but magic changes. Yet in governing, controlling, and punishing men and officers under these radically changed conditions the military authorities have been bound by these archaic and in many instances obsolete Articles of War codified more than a century ago. The few changes that have been made by Congress have been due

to some particular phase of stressed conditions of war or the necessity of providing a remedy or of prescribing a punishment in some special case.

The enactment of the 10 new articles in the act of March 2, 1913, supplied an urgent need relative to courts-martial, but went no further.

Many of the provisions of the code therefore are physically unworkable or have of necessity been given such administrative construction as to enable the authorities to deal with the modern conditions existing to-day under the provisions prescribed more than a century ago.

A striking example of the archaic provisions of the code is article 39, which provides that a court-martial may inflict the death penalty upon a sentinel for the peace-time offense of sleeping upon his post.

The subcommittee embodies, as far as it is applicable to the present proposed revision of the Articles of War, the admirable analysis of the revision of these articles proposed in S. 1032, Sixty-third Congress.

The scope and character of the revision is sufficiently indicated by references to the more important changes, which may be summarized as follows:

(1) The subject matter of the new code has been classified under five principal headings, thus bringing together related provisions and remedying a notable defect in the existing code.

(2) Twelve separate sections of the Revised Statutes and 19 separate legislative provisions enacted by Congress since the revision of the statutes in 1874 have been incorporated in the restatement of existing articles or made the basis of new articles.

(3) Much has been done in the way of condensing and combining old articles. Examples of this may be found in new article 61, which takes the place of existing articles 31, 32, 33, 34, 35, and 40; in new article 2, which represents a consolidation of related provisions from existing articles 60, 63, and 64, sections 1361 and 1621, Revised Statutes, and six other statutes; and in new article 56, which is a consolidation of existing articles 5, 6, 13, and 14.

(4) Thirteen articles of the existing code have been omitted as obsolete for all practical purposes or as embracing matter properly left to regulations.

(5) Although 12 sections of the Revised Statutes and 19 other legislative provisions have been incorporated in the revision, the latter contains but 120 articles as against 128 in the existing code.

(6) It is the effect of the revision to extend the jurisdiction of courts-martial.

(a) As to persons—over militia called into the service of the United States from date of notice of the call (new article 2, paragraph (a)), instead of from the date of arrival at rendezvous under the call and muster in, as now provided; and over retainers to the camp and camp followers *outside of the territorial jurisdiction of the United States in time of peace* (new article 2, paragraph (d)), over which military jurisdiction is not extended by the existing code in time of peace, a fact that has led to some embarrassment under conditions like those which obtained in Cuba after peace was restored following the Spanish War, and also during the second Cuban intervention.

(b) As to offenses—over the capital offenses of murder and rape committed by persons subject to military law in time of peace in places *beyond the geographical limits of the States of the Union and the District of Columbia* (new article 92). At present courts-martial can take cognizance of these offenses only in time of war.

(7) Greater promptness in the trial and disposition of charges is secured by (a) penalizing the failure of responsible officers to act promptly in preferring, forwarding, and disposing of charges (new article 70); (b) extending the authority to take depositions (new article 25); and (c) enlarging the powers of reviewing authorities in their action upon review of records giving the power to approve or disapprove the findings in part and to substitute a finding of a lesser and included offense (new articles 47 (a) and (b) and 49).

(8) The number of capital offenses has been reduced from 5 to 3 in time of peace and from 15 to 12 in time of war. The number of cases in which the death sentence is mandatory is reduced from 2 to 1, the single offender for whom this sentence is mandatory being the spy (new article 82).

(9) The revision (new article 43) requires the concurrence of two-thirds of the members of the court-martial to support a finding of guilty of an offense for which the death penalty is made mandatory by law. The present code (old article 96) permits a finding of guilty of such offense by a bare majority of the court, though requiring the concurrence of two-thirds of the court in the imposition of the death penalty.

(10) The statute of limitations under article 39 has been modified and simplified. It retains the two-year limitation provided by existing law for purely military offenses, except for repeated desertions in times of peace. For the excepted offense and for all civil crimes of which court-martials have concurrent jurisdiction with the civil courts it adopts the three-year limitations of the Federal courts. Desertions in time of war and capital offenses under the code are expressly excepted from the operation of the statute, as is the case in the civil statutes as to the offense of murder. In no other respect has existing law been changed.

(11) The principle of the suspended sentence is introduced in the revision. (See new article 53.)

(12) Statutory sanction is given (new article 104) to the imposition of mild disciplinary punishments by commanding officers without the intervention of a court-martial for minor offenses not denied by the accused. The imposition of such punishments has been authorized for some time by regulations, and has been the means of securing discipline without subjecting offenders to the humiliation of trial by a court-martial.

(13) The removal of civil suits from a State to a United States court is authorized where such suit is brought against officers, soldiers, or other persons in the military service of the United States, on account of any act done under the color of office or status (new article 117). The article extends to persons in the military service the same rights in respect of such suits as is now extended by law to officers of the Revenue Service by section 33 of the act of March 3, 1911 (36 Stat., 1097).

(14) Other changes, less fundamental but still important, are to be found in new article 65, which makes insubordinate conduct to-

ward a noncommissioned officer the subject of a special article; in new article 38, authorizing the President to prescribe rules of procedure, including modes of proof, following the practice of United States courts of admiralty and maritime jurisdiction; in new article 37, providing that irregularities in pleading, practice, and procedure must be prejudicial to the substantial rights of the accused in order to affect the validity of the findings or sentence of a court-martial, following the practice of United States courts of criminal jurisdiction; in new articles 93 and 99, making the grant to courts-martial of jurisdiction to try certain noncapital offenses more definite; in new article 110, in which the requirement of the existing code that all the articles be read and explained to an enlisted man at the time of or within six days after enlistment is modified so as to require the reading to him of only those articles which determine the soldier's relations to the service and his amenability to the code; in new article 112, providing a simplified method of administering upon the effects of deceased persons in the military service; and in new article 113, which confers upon summary court officers the jurisdiction of a coroner respecting deaths by violence or under suspicious circumstances on reservations under exclusive jurisdiction of the United States.

(15) And in new article 114, which undertakes to vest in certain designated Army officers general notarial powers in respect of the administration of oaths, the execution and acknowledgement of legal instruments and similar papers by officers and soldiers when the Army is serving in foreign countries.

(16) There have been omitted from the revision articles 1, 10, 11, 12, 29, 30, 36, 37, 52, 53, 76, 87, and 101 of the existing code. Certain of these articles have never met any real need in our service and may for all practical purposes be regarded as obsolete; the remainder embrace only matters properly found in the Army Regulations.

DETAIL SYSTEM FOR THE JUDGE ADVOCATE GENERAL'S DEPARTMENT—  
SECTION 2.

Section 2 of the bill in reference has for its object the placing of the Judge Advocate General's Department under the detail system. The detail system of recruiting staff corps and departments of the Army was inaugurated by the act of February 2, 1901 (31 Stat., 755); but the Judge Advocate General's Department, except in so far as the grade of captain is concerned, was excepted from the operation of the system, although it was made applicable to the Ordnance Department, which, like the Judge Advocate General's Department, is a technical corps. The success of the system as applied to the Ordnance Department has led to the opinion that an identical system for the Judge Advocate General's Department is advisable. Your subcommittee is convinced that the greatest zeal and industry and the most efficient performance of duty can be secured from men who enter the law department of the Army as the result of competitive examination, and who are compelled to defend their tenure by high-grade work.

Due to the consolidation of Territorial departments in 1913 the War Department found its authority to detail acting judge advocates under the provisions of section 15 of the act of February 2,

1901 (31 Stat., 751), which authorizes the detail of an acting judge advocate "for each geographical department or tactical division of troops not provided with a judge advocate from the list of officers holding permanent commissions in the Judge Advocate General's Department," considerably curtailed, so that in the present condition of the law authority for the detail of the number of acting judge advocates requisite for the efficient administration of military justice is lacking. The concluding provision of section 2 serves to authorize the detail of acting judge advocates for separate brigades, and other general court-martial jurisdictions, and will permit of the detail of a sufficient number of acting judge advocates.

The bill here presented has the approval of the Secretary of War, of the Chief of Staff, and of the War College General Staff, except in minor provisions pointed out in the hearings. Its substantial equivalents (H. R. 23628, S. 6550, 62d Cong., and S. 1032, 63d Cong.) had the approval of the preceding administration. The revision has the endorsement of 12 general officers, who, on January 13, 1913, in a letter addressed to the Secretary of War (Cong. Rec., vol. 49, p. 2465) said:

We are \* \* \* of the opinion that the proposed new Articles of War are in every way a great and much-needed improvement upon the present articles, and that the sooner they are enacted into law the better it will be for the interests of prompt and efficient administration of military justice in the Army.

The need of this revision is urgent. If the Army is by other legislation to be placed in a better condition of preparedness it is all the more necessary that the Articles of War be revised so as to enable the military authorities to meet changed and modern conditions.

The following letter from the Secretary of War and the hearings held before your committee are hereto appended as a part of this report:

JANUARY 3, 1916.

SIR: I have the honor to transmit herewith a revision of the Army's criminal code—the Articles of War—and, because of the urgent need of this legislation, to request consideration, if practicable, at this session of the Congress.

The revision here transmitted is substantially identical with H. R. 23628, Sixty-second Congress, second session, upon which extensive hearings were had by the House Military Committee May 14 to 27, 1912; also with S. 1032, passed by the Senate February 9, 1914, and again passed by the Senate at the last session of the Sixty-third Congress as a rider to the current Army appropriation act. During the past summer the bill has been carefully considered first by a committee of the War College division of the General Staff and thereafter by the entire War College division. The revision here transmitted is that reported by the War College division. The principal changes introduced by the division are noted below with my comment.

*Article 39, Senate bill.*—This article of the Senate bill sought to authorize the President to prescribe rules of procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals. The War College division omits this provision in the view that its effect would be to delegate to the President the power to alter the more essential rules of evidence. I do not so construe the phrase, "To prescribe rules of procedure, including modes of proof." Should there be doubt in the minds of the committee as to the proper construction of this phrase, I recommend that it be amended so as to exclude the construction of the General Staff, and article 39 retained.

*Article 41, Senate bill, statute of limitations.*—This article of the Senate bill provided for a three-year period of limitation within which offenses, both military and civil (except capital offenses), were to be brought to trial, and provided, following the analogies of civil practice, that this period should cease to run when charges were duly received at the headquarters of an authority competent to appoint a court-martial for their trial. The War College division retains the two-year period of the

existing code for military offenses, adopts the three-year period for noncapital, common-law, and statutory offenses over which courts-martial have jurisdiction, and provides that the period shall cease to run with arraignment. The reduction in the period for military offenses is not of material importance, in view of the fact that soldiers have the benefit of the settled and accepted construction that a discharge from an enlistment operates to terminate amenability before courts-martial for offenses committed during that enlistment, which amenability is not revived by reenlistment. I accept the War College amendment. (War College revision, art. 39.)

*Article 94, Senate bill, ducting and attempt to commit suicide.*—Out of deference to views expressed by members of the House committee during the hearings held May 14 to 27, 1912, there was included in this article of the Senate bill a provision punishing attempts to commit suicide. The War College division has recommended the omission of this provision. I do not deem the matter of great importance, for the reason that should the law finally enact omit this provision the offense would remain punishable under the general article, and I therefore accept this amendment. (Idem, art. 91.)

*Article 95 and 96, Senate draft.*—Under the existing code courts-martial may try persons subject to military law for civil capital offenses only in time of war. Article 95 of the Senate bill sought to extend this jurisdiction to civil capital offenses when committed outside the geographical limits of States of the Union and the District of Columbia in time of peace, the purpose being to give our soldiers on foreign station immunity from trial by courts administering an alien jurisdiction in language which they did not understand. The War College division reports in favor of extending this jurisdiction still further to include civil capital offenses wherever and whenever committed. The reason for the extension proposed by the General Staff is not apparent. It ought never to be embarrassing to the military service to have exclusive jurisdiction of civil capital offenses committed within the States of the Union and the District of Columbia, by persons subject to military law, vested in the civil courts. The offenses being capital and against the civil as well as the military community, should be tried, I think, under all the safeguards of the civil courts and finally determined under the provisions of civil codes. (Idem, art. 92.)

Article 96 of the Senate draft enumerated the more important noncapital civil crimes of which courts-martial have had concurrent jurisdiction both in time of peace and war when committed by persons subject to military law, irrespective of the place of commission. The War College division has sought to combine the two articles (95 and 96), as under their revision the jurisdiction of military courts is as ample to try capital as noncapital crimes. I think these two classes of civil offenses triable by military courts should be covered by separate articles, and I recommend in lieu of article 92 of the War College draft the insertion of the original articles 95 and 96 of the Senate bill, and that the enumeration of the articles be changed accordingly.

*Article 130, Senate bill.*—This article was intended to authorize the removal of civil suits commenced in State courts against persons subject to military law on account of acts done under color of office or status. The War College division has amended the article so as to include also criminal prosecutions. I see no necessity of extending the provision of the article to include criminal prosecutions, inasmuch as under existing law in a proper case, Federal tribunals may intervene by means of the writ of habeas corpus and, when justified, discharge the defendant from custody. (Idem, art. 116.)

*Article 122, Senate draft.*—This article carried the provision that in time of war or of public danger when two or more officers of the same grade are on duty in the same field, department, or command, or of any organization thereof, the President may assign the command of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. This was a reenactment of joint resolution of Congress of April 4, 1862 (12 Stat., 617), and the authority it conferred was found to be very necessary during the Civil War period. It was introduced in the articles in the firm conviction that it ought to survive as permanent legislation. The War College has improperly and, I think, for insufficient reasons, stricken this provision from the Senate bill. I recommend that it be reinserted. (Idem, art. 118.)

I am informed that the War College division favors the placing of the Judge Advocate General's Department under the detail system of the Ordnance Department, as provided in section 4 of the Senate draft of the current Army appropriation bill as originally passed by the Senate. I recommend that said section 4 be inserted as section 2 of the War College revision in the following amended form:

"Sec. 2. That hereafter the provisions of section twenty-six of the act of February second, nineteen hundred and one, as modified for the Ordnance Department by

section two of the act of June twenty-fifth, nineteen hundred and six, by the act of March third, nineteen hundred and nine, and by the act of February twenty-fourth, nineteen hundred and fifteen, shall be held to include the Judge Advocate General's Department: *Provided*, That the board of officers which is to recommend officers for detail in the Judge Advocate General's Department shall be composed of officers of that department: *And provided further*, That acting judge advocates may be detailed for separate brigades and other separate court-martial jurisdictions, and when not immediately required for service with a geographical department, tactical division, separate brigade, or other separate court-martial jurisdiction, acting judge advocates may be assigned to such other legal duty as the exigencies of the service may require."

Very respectfully,

LINDLEY M. GARRISON,  
*Secretary of War.*

HON. GEO. E. CHAMBERLAIN,  
*Chairman Committee on Military Affairs, United States Senate.*

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APPENDIX.

REVISION OF THE ARTICLES OF WAR.

HEARING BEFORE THE SUBCOMMITTEE ON MILITARY AFFAIRS,  
UNITED STATES SENATE, SIXTY-FOURTH CONGRESS, FIRST  
SESSION, ON S. 3191, BEING A PROJECT FOR THE  
REVISION OF THE ARTICLES OF WAR.

# REVISION OF THE ARTICLES OF WAR.

MONDAY, FEBRUARY 7, 1916.

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

The subcommittee met at 10.30 o'clock a. m., pursuant to the call of the chairman.

Present: Senators Lea (chairman) and Colt.

## STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, UNITED STATES ARMY, JUDGE ADVOCATE GENERAL OF THE ARMY.

Gen. CROWDER. Mr. Chairman, when I was before the House committee in 1912 the committee indulged me in an initial statement, in which I indicated the scope and purposes of the revision. I found that that initial statement was of great value in anticipating a great deal of inquiry. There are certain essential differences between a military criminal code and a civil criminal code. I have prepared a short initial statement for the purpose of directing the attention of the committee to these essential differences and to the salient parts of this revision. Would you care to have me put that in the record?

The CHAIRMAN. I think that would be a very good idea.

Senator COLT. I do, too.

Gen. CROWDER. It is not long.

The CHAIRMAN. We should like to hear it.

Senator COLT. Can you state, in a word, what is the purpose of this revision, General?

Gen. CROWDER. The revision reaches nearly every article. I have stated the purposes as briefly as possible in this initial statement (reading):

### STATEMENT.

The pending bill before the subcommittee for consideration is a revision of the Army's criminal code. It is substantially identical with S. 1032 of the Sixty-third Congress, reported by the Senate Military Committee February 6, 1914, and passed by the Senate February 9, 1914; and passed again by the Senate February 22, 1915, as a rider to the then pending Army appropriation bill, H. R. 20347.

When the revision was first presented to Congress, April 12, 1912, I stated to the committee that the then existing code sought to be revised was substantially the code of 1806; that the code of 1806 was little more than an adaptation to the Constitution of the Revolutionary War articles of 1776, amended to some extent by the Continental Congress in 1783; and that the Revolutionary War articles were copied from the British articles of 1765, many of which were traceable back through earlier British codes to the code of Gustavus Adolphus. With the exception of 10 articles relating to the composition, constitution, and jurisdiction of courts-martial, selected from the revision then offered and enacted by the sixty-second Congress, that statement remains

true to-day. Eighty-seven of the 121 articles of the code of 1806 survive in the existing code without change, and several others without substantial change. Such amendments as the code of 1806 has undergone have been enacted piecemeal, mainly during periods of war and under the stress of war needs.

The existing articles are sometimes called the code of 1874, for the reason that they were restated in the revision of the Revised Statutes of that year, with all amendatory legislation prior to that date incorporated in the restatement—section 1342, Revised Statutes. There was, however, no real revision of the code in that year. The compilers of that revision had no general authority to revise, but only the limited authority to omit redundant matter, to bring related provisions together, and to make the minor alterations necessary to reconcile contradictions, supply obvious omissions, and amend imperfections. It will be conceded by anyone who takes the trouble to investigate that the revisers of 1874 did their work on the Articles of War in a very imperfect manner. Many obsolete articles were retained, arrangement and classification were not improved, punitive articles being often associated with administrative and procedural articles. Many provisions of law in the nature of articles of war were left by the revisers in the general body of the statutes. What the revisers of 1874 did was to carry forward the code of 1806, with the amendatory legislation enacted since 1806, which, as I have noted, was piecemeal legislation enacted during periods of war and under the stress of war needs.

The urgent necessity of a comprehensive revision has been repeatedly recognized. The first formal recognition which I have found is contained in a letter from Gen. Winfield Scott to Secretary of War Calhoun, dated December 2, 1818. O'Brien, one of our standard military law writers, in his work on military law, published in 1845, set forth the necessity for revision and published therein a statement of what he conceived to be the essentials of an adequate revision. Winthrop, our standard authority on military law, writing in 1886, recommended extensive amendments (Winthrop's Military Law and Precedents, p. 1107), a recommendation which he repeated 10 years later in the second edition of his work (idem, vol. 2, p. 1201). In 1888 a board of officers was convened by Secretary of War Endicott to consider the general subject of a revision of the Articles of War, and this board reported a complete revision. There is no record of its approval by Secretary Endicott, or of its having been brought by him to the attention of Congress. The next comprehensive revision was submitted by me while a member of the General Staff in 1903; but the exigencies of foreign service from 1903 to 1909 prevented me from following up the attempt then made.

The revision now before you was submitted by me to the Secretary of War on April 12, 1912, accompanied by a letter explanatory of the necessity of revision and stating its object and scope. That revision had the favorable indorsement of Secretaries of War Dickinson and Stimson, of 12 general officers who were constituted a board by Secretary Stimson for its examination and study, of the General Staff of that period, of a board of line officers convened at Fort Myer, Va., and of many line officers of rank and experience. This revision as a whole was universally commended. Some criticisms was expressed of specific articles, and all these criticisms have been considered in the revision here presented. The pending bill, which is substantially identical with that bill, has the favorable indorsement of Secretary Garrison and of the entire War College Division of the General Staff, who have given it exhaustive study during the past summer.

#### SCOPE AND CHARACTER OF THE REVISION.

Fourteen articles of the existing code, all derived from the British code of 1765, except one enacted by the Continental Congress in 1786, have been omitted. The subcommittee will find a ready reference to these omitted articles on page 77 of the committee's comparative print. Some of the omitted articles have never at any time met any real need in our service, and for all practical purposes may be considered superfluous or obsolete. Others embrace only matters within the field of regulations. The necessity for the omission of many of these articles was recognized by Winthrop as early as 1885. (Winthrop's Military Law and Precedents, p. 101.)

Clearly the military code should be broadly inclusive of all legislative provisions in the nature of articles of war. A search of the Revised Statutes and of the Statutes at Large reveals 12 sections of the former and 19 provisions of the latter of this character, and they have been embodied in this revision. The comparative print shows the particular articles of the revision which are thus based, and the attached memorandum gives a reference to all legislation of this character that has been incorporated or made the basis of new articles.

When these exclusions of obsolete and superfluous articles, and the inclusion of related matter from the Statutes at Large had been made, there remained the work of grouping related articles. As has already been noted the existing code is notably deficient in arrangement and classification. In the project here submitted related articles have been grouped under five principal headings: "Preliminary provisions," "Courts-martial," "Punitive articles," "Courts of inquiry," and "Miscellaneous provisions," and where subheads would serve a useful purpose they have been employed. The result is shown on pages 1 and 2 of the comparative print. The last table on page 2 indicates very clearly the large amount of transposition found necessary to a proper rearrangement.

#### SPECIFIC CHANGES INTRODUCED.

A comparison of the revision here submitted with the existing code which it is designed to replace, discloses the following more important changes which have been made:

Article 2. Subhead (a), which corresponds to article 64 of the existing code, sections 7 and 9 of the act of January 21, 1903 (32 Stat., 776), as amended (35 Stat., 401), has been so framed as to make the militia subject to the code from the date of notice of the call, and its service under such a call compulsory service, enforceable in terms of specific performance. Under the law, as it now stands, the militia is so subject only upon muster in, and it has been held that:

"No department or officer of the Government of the United States could, under these laws, compel a drafted militiaman to be mustered into the service or to attend a place or muster, or to undergo punishment beyond prescribed penalties, or submit to ulterior military detention." (McCall's Case, No. 8669, 15 Fed. Cases, p. 1225.)

The opinion followed that of the Supreme Court of the United States in *Houston v. Moore*, which distinctly recognizes that the call into the service of the United States by the President places the militiaman in that service, and further that these laws recognize—

"That a fine to be paid by the delinquent militiaman was deemed an equivalent for his services and an atonement for his disobedience." (5 Wheaton, 21.)

This was the judicial construction that the act of February 28, 1795, received. That act, in section 5, provided that every militiaman failing to respond to a call into the service of the United States by the President should be subject to certain forfeitures to be adjudged by a court-martial. Its language is not dissimilar from the corresponding provision of the Dick bill. Under the ruling of the court to which I have called your attention, it is clear that the obligation of the militiaman to serve under a call of the President was not enforceable in terms of specific performance. The theory is that militia service is purely a compulsory service; in fact it is not. In the case of *Houston v. Moore*, the court recognized, in the clearest possible language, that Congress might, by law, have fixed the period for the submission to the authority of the United States at any time, instancing the order given to the militia officer as a date which might have been fixed. The new article, to which I here invite your attention, is drafted in accordance with this opinion of the court, and the date of notice of the President's order calling the militia into the service of the United States has been fixed as the date from which the draft is effective and the subjection of the man to the Articles of War begins. Clearly, with this provision written into our statute law, the obligation of the militiaman under a call of the President will be enforceable in terms of specific performance; that is, it can not be evaded, as it may be now, by undergoing a punishment adjudged by a court-martial for delinquency in failing to report.

Senator COLT. Can the Government, under the Constitution, call the militia into service except in time of invasion? Can they do so at any time of peace?

Gen. CROWDER. Only to execute the laws of the Union, suppress insurrection, and repel invasion.

Senator COLT. I thought so. I meant that. You are not dealing with that?

Gen. CROWDER. I am simply dealing with the call for constitutional purposes.

Senator COLT. But when they are called into service, then they come under the martial law the moment the call is made?

Gen. CROWDER. Yes; under the law I propose instead of after they are mustered in, as is now the case. Now, of course this does not touch any of the new schemes of federalization that are pending before the various committees.

Senator COLT. No.

Gen. CROWDER. This relates simply to the constitutional call of the militia; and by the introduction of three or four words into the article I have made their subjection to military discipline and to the Government of the United States complete from date of the notice of the President's call, instead of from muster in.

Senator COLT. There never has been any objection raised to this, has there?

Gen. CROWDER. No, sir. By the committees I have been before it has been accepted as a very necessary power for the Government to have. [Reading:]

Subhead (d) of article 2, which corresponds to article 63 of the existing code, introduces the words "All persons accompanying," so as to make subject to the article a class of persons who do not fall under the designations, "retainers to the camp," and "persons serving with the armies in the field," employed in the existing law, and additional words are introduced so as to confer jurisdiction over all three classes of persons, to wit, (a) retainers (b) persons accompanying, and (c) persons serving with the armies of the United States in the field, in time of peace, whenever the Army is serving outside the territorial jurisdiction of the United States. At present jurisdiction is limited to classes (a) and (c) and to a period of war. The purpose is to give full disciplinary authority over these three classes of persons when the army may be in peaceful transit through a foreign country, or where, as in Cuba in 1906, there is intervention in a foreign country falling short of war.

Article 5. In article 5, corresponding to the act of March 2, 1913, the word "seven" has been substituted for the word "five." The effect of the substitution is to make seven instead of five the minimum number of officers who may compose a general court-martial, and the law has been thus modified out of deference to a recommendation of the General Staff, who have revised these articles and who are of the opinion that the larger minimum is advisable in the interests of an accused.

Article 22. This article corresponds to section 1212 of the Revised Statutes. Under the latter statute process to obtain witnesses is limited to courts-martial having judge advocates and such process is therefore not available for a summary court. As it is clear that all courts-martial should be invested with this power, article 22 has been amplified so as to include the summary court. Under said section of the Revised Statutes the process that a court-martial is authorized to issue to compel the attendance of witnesses is like process to that which a civil court of criminal jurisdiction of the State, Territory, or District in which the court-martial may be sitting may issue. It is therefore effective only within the boundaries of such State, Territory, or District where the court-martial may be sitting. The new article removes this limitation. This modification was made at the suggestion of Secretary of War Dickinson.

Article 38. This article deals with irregularities arising in the prosecution of courts-martial and corresponds to section 1023, Revised Statutes, and to Senate bill pending in the Sixty-third Congress (S. 5197). Its effect is to adopt for courts-martial the rule which prevails in civil courts, that improper admission or rejection of evidence, or error in any matter of pleading or procedure, shall not be made the basis of a formal disapproval of the findings or sentence of such courts, unless it shall appear that the error or irregularity complained of has injuriously affected the substantial rights of an accused. Certainly courts-martial should have as liberal a rule in regard to irregularities of procedure as civil courts of criminal jurisdiction.

Article 38a. This article corresponds to section 862 of the Revised Statutes. Its effect is to authorize the President to prescribe the procedure, including modes of proof, in cases before military courts. The General Staff recommends the omission of this article, but the Secretary of War thinks it should be included.

I should like to state, as I go along, that when we take up the consideration of the code article by article I will enter into more detailed explanation of some of these changes. I am simply trying to give you a survey of the revision. (Reading:)

Article 39. This article is the military statute of limitations. It corresponds to article 103 of the existing code, as amended by the act of April 11, 1893. The existing code fixes a two-year period of limitation for all offenses except desertion in time of peace, where the period is two years from the expiration of the enlistment in which the man deserts. The new article retains this two-year period for military offenses, except for desertion in time of peace, and adopts for this excepted offense and for noncapital crimes or offenses of which courts-martial have concurrent jurisdiction with Federal civil courts the three-year period of limitation which governs in such civil courts. Desertion in time of war, and murder which, by exceedingly doubtful construction, have been held to be not within the provision of the existing code, are, following the analogy of civil criminal codes, expressly excepted from the operation of the statute.

Article 42. This article corresponds to article 97 of the existing code, as amended by the act of March 3, 1915. It is the effect of the existing law to prohibit penitentiary confinement for purely military offenses, and to authorize it in the case of civil offenses only when such offenses are by some statute of the United States, or by some statute of the State, Territory, or District in which the offense may have been committed, or by the common law as the same exists in such State, Territory, or District, made subject to this kind of punishment. It thus appears that courts-martial have the burden of applying in the trial of civil offenses the laws of 48 States, 3 Territories—Alaska, Porto Rico, and Hawaii—and the District of Columbia, in determining whether penitentiary confinement may be awarded. This burden on the administration of military justice should be lifted, if it can be done, and the principle underlying this legislation preserved. I think that principle would be preserved if we adopted the statute law of the United States and of the District of Columbia and the common law of the District of Columbia, thus making the Army subject to one uniform law respecting the imposition of penitentiary confinement. There seems to me to be especial propriety in adopting the law of the District of Columbia, as Congress is directly responsible for that law.

Articles 52 and 53. These articles correspond, respectively, to the act of April 27, 1914, and paragraph 6 of the Executive order published in G. O. 70, War Department, 1914. Their effect is to introduce the principle of the suspended sentence into our code.

Article 43. This article regulates death sentences and corresponds to article 96 of the existing code. Under the terms of this latter article no person can be sentenced to suffer death except by the concurrence of two-thirds of the members of the court, and in cases where such sentence is expressly mentioned. But for one military offense, being a spy, the death sentence is mandatory. Obviously a two-thirds vote should be required to sustain the finding in such a case, and I think it best in all cases that a two-thirds vote should be necessary for a finding of guilty of an offense which the law permits to be punished by death. New article 43 expressly so provides.

Article 74. This article corresponds to article 59 of the existing code and regulates the delivery of military offenders to the civil authorities to answer for crimes committed against the civil law. The purpose of the article has been to prevent the Army from becoming an asylum for civil criminals who may manage to pass a recruiting officer and enlist in the service. The article is also expressive of the subordination of the military to the civil authorities.

The existing article shows as well as any other the archaic character of some of our military legislation. For example, it requires delivery only when the soldier may be accused of a capital crime or of an offense against persons or property, and does not cover offenses against society or the public, or offenses against the Government; but it does not cover even the offenses named except where they are committed against any citizen of the United States, thus leaving out of consideration citizens of the Territories and of our insular possessions, and aliens residing within our jurisdiction and entitled to the protection of our laws. It is further to be observed that the machinery of the existing article is set in motion and the surrender required to be made only upon an application duly made by or in behalf of the party injured, thus harking back to early days when crimes were punished at the instance of the

individual against whom committed. The new article removes all these defects, but limits the application of the article to the geographical limits of the States of the Union and the District of Columbia, for the reason that outside of such geographical limits the courts-martial will, under the proposed code, have concurrent jurisdiction with the civil courts to try the offense, and it is thought that in these latter cases, where the demand would largely come from civil courts administering an alien jurisprudence in a language which our officers and soldiers do not understand, there should be no mandate to the military authorities to turn over a soldier for trial. It should be left to the exercise of sound discretion.

The CHAIRMAN. You refer particularly to what Territory?

Gen. CROWDER. I refer to the Philippines, Hawaii, Porto Rico, Panama, etc. [reading]:

Article 85. This article corresponds to article 38 of the existing code, which was copied from the British code of 1765. The changes here introduced are for the purpose of making the article conform as to punishment imposed to the corresponding article for the government of the Navy, and to the British code as it has been amended, but with this difference; that mandatory dismissal for the offense of drunkenness on duty is reserved in this revision for the war offense, leaving the punishment discretionary in time of peace. Mandatory dismissal is not a requirement of the naval articles for either the war or peace offense of drunkenness on duty, nor is it a requirement of the present British code.

Article 92. I come now to a provision of the code which I think will claim the very special attention of this subcommittee, of the full committee, and of the Senate. I refer to article 92, which confers upon courts-martial jurisdiction over civil crimes when committed by persons subject to military law. As the law now stands courts-martial have concurrent jurisdiction with the civil courts to try noncapital crimes of persons subject to military law at all times and wherever committed, and concurrent jurisdiction to try capital civil crimes of such persons in time of war. In the revision, which has passed the Senate twice, the jurisdiction of courts-martial was extended to include civil capital crimes in time of peace when committed outside the geographical limits of the States of the Union and the District of Columbia, where the alternative would be trial by courts administering an alien jurisprudence, without a jury, but leaving civil capital crimes committed by military offenders within those geographical limits within the exclusive jurisdiction of the civil courts.

The General Staff has further revised the article so as to vest this jurisdiction in courts-martial, thus making the jurisdiction of the court-martial concurrent with the civil courts, as to both capital and noncapital crimes. I do not concur in this extension of the court-martial's jurisdiction, and the Secretary of War has expressed disapproval of the change in his letter transmitting this revision to the Congress.

In other words, the General Staff has undertaken to say that capital crimes committed here at Fort Myer or anywhere else within the geographical limits of the country shall be tried as well by court-martial as by civil courts. We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. But I am very much in favor of doing it when the Army is outside of our geographical limits proper; and that is the proposition that I stand for, and not the proposition that is here submitted.

The CHAIRMAN. What reasons do the General Staff assign?

Gen. CROWDER. I have not seen any reason. They simply recorded a recommendation. I can easily understand the reason, viz, a desire that the Army may handle its own criminal business and doubtless border conditions to the south of us entered into their consideration and influenced their conclusions. I concede the necessity for autonomy in these matters when the Army is serving under unusual conditions, away from the protection of constitutionally guaranteed rights.

Senator COLT. Yes.

Gen. CROWDER. But not when they are serving here. I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes.

Senator COLT. That runs all through the common law, the civil law, in regard to capital crimes, I think. Of course I can understand that the General Staff perhaps would like to take all the power they could in a court-martial.

Gen. CROWDER (reading):

Article 103. This article is new. Its purpose is to give the sanction of statute law to the exercise of minor disciplinary powers by commanding officers without resort to courts-martial. The Navy has a corresponding provision, but the Army exercises these powers now under authority of regulations alone. These regulations exist in contravention of a general principle that without the authority of statute law punishment can be administered only in execution of a duly approved sentence of a court-martial following trial and conviction. It is a vital necessity of our service that commanding officers should be invested with disciplinary powers, and the existing system is an instance of where necessity has broken through the restraints of a legal principle. The system now existing should be placed on a legal basis, and this is all the proposed new article attempts to do.

Article 116. The only important change remaining to be noted is new article 116, based on section 3 of the act of March 3, 1911. If accepted and enacted into law the effect will be to authorize the removal of civil suits instituted in the courts of a State against persons in the military service on account of any act done under color of military office or status, or in respect to which such persons claim any right, title, or authority under a law of the United States respecting the military forces or under the laws of war, thus extending to officers and soldiers of the Army the same immunity from civil suits in the courts of a State which the statute cited gives officers of the Revenue Service. As the law now stands suits may be removed only on the ground that a Federal question is raised or on the ground of diversity of citizenship (but only in the event the defendant is a nonresident), and in each case only if the amount in question exceeds \$3,000.

The most frequent application of the proposed law will be when the Army is cooperating with the civil authorities of a State in the suppression of disorder. As the authority of the officer or soldier is to be measured by Federal law or by the law of war, it would seem to be appropriate that he should be privileged to have his liability adjudicated in Federal courts.

Many other articles than those above enumerated have been changed in important regards, but the enumeration which I have read embraces the more fundamental changes. Before the subcommittee proceeds to a consideration of the revision, article by article, I desire, in order to facilitate an understanding of the code as a whole, to point to certain essential differences which distinguish a military from a civil penal code. These differences are constitutional in character, or grow out of the necessities of military service, and will be summarized under these heads:

#### CONSTITUTIONAL DISTINCTIONS.

The fifth amendment to the Constitution provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Article I, section 8, of the Constitution provides that:

"The Congress shall have power \* \* \* to make rules for the government of the land and naval forces" (clause 12); and "for governing such part of them (the militia) as may be employed in the service of the United States." (Clause 16.)

Winthrop, our standard military law writer, states that it is the effect of these provisions to withdraw the entire category of military offenses from the cognizance of civil courts and turn over the whole subject to be dealt with by military courts, citing *Trask v. Payne* (43 Barbour, 569); *Dynes v. Hoover* (20 How., 70; 105 U. S., 700). In the *Dynes v. Hoover* case, supra, the Supreme Court said:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are independent of each other." (20 How., 70.)

It has been authoritatively held and is now the accepted construction that the guaranties of the fifth and sixth amendments to the Constitution against double jeopardy and self-incrimination and of the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the wit-

nesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, apply only to prosecutions before the criminal courts of the United States, and that trial by military courts is not included within these provisions (Winthrop, Vol. I, pp. 241, 430.)

These considerations explain the presence in the revised code of articles which guarantee to a military accused every one of the rights which a civil accused has under constitutional provisions.

#### DISTINCTIONS GROWING OUT OF THE NECESSITIES OF MILITARY SERVICE.

The more essential differences between a military and civil criminal code grow out of the necessities of the military state and the special purposes which any military code is intended to serve. Col. Birkhimer, author of Military Government and Martial Law, defines the purpose of a military code in this language:

"A military code prescribes a rule of conduct to a body of men who consecrate their lives to the profession of arms. The camp is the fittest field of its application. It may be very objectionable in some respects, contemplated from the purely legal standpoint, and yet be admirably adapted to the purpose of uniting, governing, and directing to a single object, the armed force of the United States." (Military Service Institute, vol. 13, p. 760.)

Judge Advocate Gen. Lieber, writing in 1879, says:

"Military law is founded on the idea of a departure from the civil law, and it seems to me a grave error to suffer it to become a sacrifice to principles of civil jurisprudence at variance with its object. A limit exists somewhere, a limit within which it should be possible to say that military law has its own common law, and is not controlled by the common law of another system."

Gen. W. T. Sherman, commenting upon this expression of view by Gen. Lieber, said:

"I agree with him perfectly and that it will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

"The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation.

"These objects are as far apart as the poles, and each requires its own separate system of laws—statute and common. 'An army is a collection of armed men obliged to obey one man.' Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civilian lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deduction from civil practice.

\* \* \* \* \*

"It is greatly to be desired that the common law for the armies of the United States should be compiled—not from the doctrines and experience of civil lawyers, but from the experience of the best ordered and best governed armies of Europe and America.

\* \* \* \* \*

"Civilian lawyers are too apt to charge that Army discipline is tyranny. We know better. The discipline of the best armies has been paternal, just, and impartial. Every general and every commanding officer knows that to obtain from his command the largest measure of force and the best results he must possess the absolute confidence of his command by his fairness, his impartiality, his sense of justice, and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command. Without this quality no army can fulfill its office, and every good citizen is as much interested in maintaining this quality in the Army as any member of it.

"Therefore, I repeat that the time is opportune for all who seek to honor their profession to study these subjects and help to establish the result that the 'common law of the Army be not controlled by the common law of another system,' proceeding from an opposite principle."

These discussions of Col. Birkhimer and of Gen. Lieber and Gen. Sherman bring out with great emphasis the essential and fundamental differences between civil and military penal codes. The differences which will claim your special attention will, I think, include the following:

1. In a military code there can be, of course, no provision for courts of appeal. Military discipline and the purposes which it is expected to subserve will not permit

of the vexatious delays incident to the establishment of an appellate procedure. However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be in addition the confirmation of the President.

2. Neither can we have the vexatious delays and failures of justice incident to the requirement of a unanimous verdict. Our code, and I think all military codes that have preceded it, have recognized the principle of majority verdicts. To this there is one exception. Death sentences and the finding of guilty of the crime on which they are based must have the concurrence of two-thirds of the court.

3. In our military code we have provisions for taking depositions, as of right, in cases not capital, and upon reasonable notice to the accused. Before civil courts the accused would have the right in all cases to be confronted by the witnesses against him.

4. For the reasons already sufficiently indicated, the military code takes no cognizance of peremptory challenges. Every challenge must be for cause.

This revision is offered to Congress at a time when reform in the criminal codes of the several States is being much agitated. It has, however, little in common with the revisions which State legislatures are considering. They are concerned primarily with the reform on the procedural side. Their effort is to do away with those technicalities of pleading, practice, and procedure which encumber and often defeat the administration of criminal justice. Due to the fact adverted to above, that we have no appellate court, and only a limited appellate procedure, the administration of military justice has never been similarly encumbered. It is to be noted, however, that such reforms as have engaged the attention of State legislatures have for their object the adoption of certain of the features of our military system. This is true in so far as they favor brevity in pleading, presentment instead of indictment, abolish unanimity of juries, and curtail right of appeal.

#### Statutes, provisions of which have been incorporated in the proposed Articles of War.

Section 183, Revised Statutes (36 Stat., 898).....	Article 113.
Section 1025, Revised Statutes.....	Article 38.
Section 1202, Revised Statutes.....	Article 22.
Section 1203, Revised Statutes.....	Article 114.
Section 1229, Revised Statutes.....	Articles 117.
Section 1326, Revised Statutes.....	Articles 11, 48.
Section 1343, Revised Statutes.....	Article 82.
Section 1361, Revised Statutes.....	Article 2.
Section 1621, Revised Statutes.....	Article 2.
Section 4824, Revised Statutes.....	Article 2.
Section 4835, Revised Statutes.....	Article 2.
Section 5313, Revised Statutes.....	Article 80.
Act of Mar. 3, 1877 (19 Stat., 310).....	Article 37.
Section 4, act of June 16, 1890 (26 Stat., 158).....	Article 107.
Act of Sept. 27, 1890 (26 Stat., 491).....	Article 45.
Section 2, act of July 27, 1892 (27 Stat., 278).....	Articles 19, 31.
Section 3, act of July 27, 1892 (27 Stat., 278).....	Article 54.
Section 4, act of July 27, 1892 (27 Stat., 278).....	Article 113.
Section 1, act of June 18, 1898 (30 Stat., 483).....	Articles 7, 10, 14, 35.
Section 3, act of June 18, 1898 (30 Stat., 484).....	Article 50.
Section 4, act of June 18, 1898 (30 Stat., 484).....	Article 37.
Section 5, act of June 18, 1898 (30 Stat., 484).....	Article 2.
Section 6, act of June 18, 1898 (30 Stat., 484).....	Article 105.
Section 1, act of Mar. 2, 1901 (31 Stat., 950).....	Article 24.
Section 7, act of Jan. 21, 1903 (32 Stat., 776), as amended by section 5, act of May 27, 1908 (35 Stat., 401).....	Article 54.
Section 8, act of Jan. 21, 1903 (32 Stat., 776), as amended by act of June 12, 1906 (34 Stat., 255).....	Article 2.
Act of June 30, 1906 (34 Stat., 750).....	Article 111.
Act of May 11, 1908 (35 Stat., 109).....	Article 106.
Act of Jan. 19, 1911 (36 Stat., 894).....	Article 117.
Act of Mar. 3, 1909 (35 Stat., 748).....	Article 2.
Section 33, act of Mar. 3, 1911 (36 Stat., 1097).....	Article 116.

I believe that with this preliminary statement we shall be in better position to take up the code, article by article, and discuss in detail the changes that are to be made.

Senator COLT. I think that is a most admirable statement.

The CHAIRMAN. It is very clear.

Senator COLT. It is admirable in its analogies, in its historical review, and in the clear and concise way in which you state the distinction between the Civil Code and the Military Code. It is a very interesting subject.

The CHAIRMAN. Very interesting, is it not? What do you say, Senator Colt? Shall we take up this code section by section?

Senator COLT. I should follow whatever course you think is proper, Mr. Chairman.

The CHAIRMAN. Then, Mr. Judge Advocate General, we will do that.

Gen. CROWDER. I will first ask your attention to the comparative print which is before you, and to the table of contents on the first page. This will reveal to you the reclassification and rearrangement of the articles. The entire code has been grouped under five principal headings, and the subheads carry the classification further. If the revision had no other merit than the grouping of the articles scientifically, it would I think merit consideration for that reason alone. It will greatly facilitate a study and understanding of the code by young officers entering the service. On the second page you will find a table giving the present and the proposed number of the articles. A glance at it will indicate the amount of transposition, reclassification and rearrangement which was found necessary.

Senator COLT. This is a very difficult piece of work.

Gen. CROWDER. It has involved a great deal of painstaking effort.

Senator COLT. I refer to this synthetically constructed work.

Gen. CROWDER. Now, if you will turn to page 3 you will find the proposed legislation in the left-hand column, the existing law which it is proposed to replace in the right-hand column, and following each group of articles, the explanation of the changes made. You will observe that article 1 is a substantial restatement of the existing law. It embodies definitions. In article 2 an attempt is made to enumerate the several classes of persons that are subject to military law and to include these in the descriptive phrases "any person subject to military law" and "persons subject to military law," which it has been found convenient to employ in drafting subsequent articles. It is in this article, subhead (a), that we find the provision referred to in my initial statement, which makes the militia when called into the service of the United States by the President subject to the Articles of War from the date of notice of such call. I have called attention to the fact that, as the law now stands, if the militiaman neglects or refuses to report under such call and to be mustered in, he may be tried by a court-martial and punished therefor; but he is not placed thereby any nearer to the Federal service or military control. Of course, if the call is to be effectual, that is, is to result in specific performance of military service, the militiaman must be subjected to the Articles of War from the date of notice of the call, so that he can be treated as any soldier absent from his command.

Further on in the article, subhead (c), you will find new language. It reads as follows:

*Provided*, That no officer or soldier of the Marine Corps when so detached [that is, for service in the Army by order of the President], may be tried by a court-martial for an offense committed against the Articles of War for the government of the Navy prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases.

The necessity for this provision was revealed by our experience last year at Vera Cruz. The Marine Corps cooperated with the Army at that place and, under the authority of an act of Congress, was placed on duty with the Army by order of the President. During the period detachments of the Marine Corps are so placed on duty with the Army they become subject to the Articles of War for the government of the Army. On the last day that the Marine Corps was so detached and serving at Vera Cruz, a soldier of that corps committed a very serious offense—an assault of the grade of felony. Pending action in his case, the order of detachment was revoked and he resumed his place with the naval forces and came under the Articles of War for the government of the Navy. The Navy Department assumed that it could bring him to trial for his offense committed while he was on duty with the Army, as the offense committed by him was likewise an offense denounced and punished by the Naval Code. He was subsequently arraigned before a general court-martial of the Navy, and there plead to the jurisdiction of the court, claiming that his offense was committed while on duty with the Army and was an offense punishable only under the Army Code. The court overruled this plea and proceeded with his trial. He was found guilty and sentenced to imprisonment. He sued out a writ of habeas corpus before the United States district court of Philadelphia. The judge took the view that the naval court was without jurisdiction, and discharged the man. The usual procedure would have been for the Navy to have turned the man over to the Army for trial. Had this been done we would undoubtedly have had a plea of double jeopardy to deal with. The case was not followed up, and the result was that the man got off without adequate punishment. The proviso inserted here is to clear up that situation, or rather to make it impossible of occurrence in the future.

We now come to subhead (d), and here there is a change in the law which will claim your attention. In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.), and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace

in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906-7 in Cuba.

I wish to elaborate a little. I served during the second intervention in Cuba. A civilian clerk of the Commissary Department embezzled six or seven hundred dollars of the public funds. It was not discovered until the auditor discovered it here, and at that time the man had been relieved from duty in Cuba. However, let us suppose the embezzlement had been discovered while he was yet in Cuba. The laws of the United States were not operative there to denounce and punish the offense, and no civil court of the United States had jurisdiction of offenses committed there. No military court had jurisdiction over a civilian accompanying the Army there. In the assumed case the alternative would have been to ask the Cuban courts to take up the burden of that man's trial, his offense being also an offense against the Cuban law. He escaped trial by the Cuban courts by reason of the fact that he had come back to the United States. We sought to have him extradited and taken back there for trial; but when we had filed our application, and the Cuban Government came to consider it, it was found that they had issued an amnesty proclamation upon the evacuation of Cuba in 1909, which covered this man's case. He is here at large in the United States, and no trial is possible. Under the article I propose such a case would have been triable by court-martial as a person accompanying the Army—though in time of peace.

Another case: It has happened, and may happen again, that the Army will be found in peaceful transit through Canadian territory. When a foreign Government gives permission for the troops of another nation to pass through its territory the permission itself carries exemption from the local laws; but in the assumed case no law of the United States would be operative in Canada to punish retainers, camp followers, and other persons accompanying the troops through that country.

The Canadian Government has permitted us to reinforce Alaska by the overland route. The situation may arise that the Army at some time may be engaged in the peaceful occupation of foreign territory in this hemisphere. To that extent we are compelled to recognize the necessity for the amendment which I have introduced here and to which I think there can be no objection.

There remain to be noted no further changes in article 2 from the existing law. I have covered all the changes.

We may pass over articles 3 and 4 by the statement that they are simply a reenactment of provisions of the act of April 25, 1914.

The CHAIRMAN. Yes; I served on the conference committee when that appropriation bill was before it.

Gen. CROWDER. These are 2 of 10 articles that were accepted by Congress at that time, and I have no change whatever to suggest in them.

The same is true of articles 5, 8, and 12, relating to the composition, appointment, and jurisdiction of general courts-martial.

Articles 6, 9, and 13, relating to special courts-martial, are likewise parts of this group of 10 articles that Congress enacted in 1913. I have introduced one change. That change is to state the punishing power of the special courts-martial in the form of a limitation upon the punishing power rather than in the form of a grant. You will notice that every one of our punitive articles terminates with the phraseology "shall be punished as a court-martial may direct"; and if we want to limit the power of a court-martial we must state it in the form of a limitation, and not in the form of a grant.

The same remarks apply to articles 7 and 10. They are a reenactment of existing law, without change.

You will notice that in article 14, which deals with summary courts-martial, I have broadened the application of the existing law to include persons that were not included under the terms of the existing law. In article 2 we have defined the phrase "persons subject to military law" as including numerous classes of persons who are attached to armies or serving with them; and we have included inmates of such institutions as the soldiers' homes and the Army and Navy hospitals. Now, there is no reason why the summary courts should not try these persons. As at present organized it is a soldier's court. I have so amended the articles as to bring all persons embraced within the definition "persons subject to military law" within its jurisdiction except officers and certain other excepted classes. It tries only minor cases.

The CHAIRMAN. These are noncapital offenses?

Gen. CROWDER. The minor cases that you try in your police courts.

Senator COLT. I should suppose that all this proposition that you are now speaking about might have been subject at some date to objection about including this class of people within it.

Gen. CROWDER. They are included under the existing law.

Senator COLT. They are?

Gen. CROWDER. Yes; all except persons accompanying an Army.

Senator COLT. Very well.

Gen. CROWDER. I have not extended the jurisdiction of courts-martial over anybody not now included except in the single instance to which I called your attention, viz, persons accompanying the Army but not serving with it and who do not fall under the special designation of "retainers." You have no idea, Senator, unless you have been with an army, how many people manage to attach themselves to it; and they have the same capacity to embarrass the operations of the Army that the retainers and camp followers have, or that the teamster has who is serving with the Army. They are accredited sometimes by letters from the Secretary of War.

Of course, I have stated the punishing power of the summary court, like that of the special court, in terms of limitation, rather than terms of grant, and for the same reasons.

Article 11 deals with the appointment of judge advocates. The present code says that "Officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same."

Senator COLT. Where are you now?

Gen. CROWDER. I am on page 11, article 11.

Senator COLT. Yes; I see.

Gen. CROWDER. The article has been recast so as to give the right to appoint assistant judge advocates. It not infrequently occurs that we try very important cases, and the accused appears with an array of civil as well as military counsel. Under the present code we can only appoint one judge advocate, and it is sometimes necessary for him to have an assistant. Then, again, I wanted this provision for the further reason that I could use it to educate officers in the duties of prosecuting officers. It carries no emolument or pay. It simply enables you, while naming the judge advocate of a court, to name one or more assistants to help him carry the burden of the prosecution.

Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced:

ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's *Military Law and Precedents*—

The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (*Ex parte Vallandigham*, 1 Wall., 243, and *Coleman v. Tennessee*, 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. Its composition, constitution, and procedure follows the analogy of courts-martial. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.

Yet, as I have said, these war courts never have been formally authorized by statute.

Senator COLT. They grew out of usage and necessity?

Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.

Senator COLT. Yes.

The CHAIRMAN. Article 16 is merely a restatement of article 79?

Gen. CROWDER. Yes, sir.

We come now to the general subject of procedure and to article 17. That article deals in part only with the right of the accused to counsel. We have always had, in our articles of war, a provision that the judge advocate or prosecuting officer should take on certain duties toward a military accused. In the absence of counsel for an accused soldier the judge advocate is charged with his defense, but the existing law imposes upon him only limited duties.

The CHAIRMAN. That is, to advise him not to incriminate himself?

Gen. CROWDER. It provides: "But when the prisoner has made his plea" the judge advocate "shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself." That was article 69 of the code of 1806, and it was inserted in the code in 1786 by the Continental Congress. I say, in regard to that (reading):

The article seems to assume that an accused would be unrepresented by counsel and was introduced into our code in 1806, at a time when it was unusual for an accused to be represented by counsel. It is now the rule rather than the exception that an accused person is represented before a court-martial by counsel of his own selection, either civil or military. Since 1890 orders have imperatively required the demand of the accused for military counsel to be met, except in the single instance where the individual officer desired by an accused was not available. In the case where an accused is represented by counsel of his own selection the law should not impose upon the judge advocate any part of the counsel's duties; and clearly where the accused is unrepresented by counsel the judge advocate should be required to look after and safeguard all his legal rights and not two of them. The new article so provides.

The CHAIRMAN. The only suggestion I would make there is to inquire whether just at this point you would insert the right of the accused to be represented by counsel, rather than leave it by implication, or for another article. You can tell me whether it is covered later on or not.

Gen. CROWDER. I should like to deal with that later on, if I may.

The CHAIRMAN. Certainly. My idea was, in presenting it to you here, to suggest that after the end of the third syllable of "proceedings," in line 5 you insert, "the accused is entitled to be represented by counsel," so that it would read:

The accused is entitled to be represented by counsel, but should the accused be unrepresented by counsel the judge advocate—

And so forth.

Gen. CROWDER. It occurs to me at once to accept such an amendment. At present the accused has not this statutory right, although he does not suffer from the fact that he is lacking in the statutory guaranty. As I have said, orders issued as early as 1890 imperatively require the detail of counsel on the application of the accused, and counsel of the choice of the accused, if such counsel be available. But right here we come up against a practical difficulty. It not infrequently occurs that an accused officer or soldier will apply for

the detail of an officer of the Army as counsel who is not available by reason of the duty upon which he is engaged or the distant station at which he may be serving. Two or three years ago an officer was being tried in Alaska for the embezzlement of quite a large sum of money. He had been the disbursing officer of the Alaskan Road Commission. He asked for the services of a particular officer as counsel who at that time was performing very important duty at the School of Application at Fort Leavenworth, Kans. Of course, the Government could not assume the burden of sending that officer, at a great expense of mileage, all the way to Alaska to represent the accused officer before a court-martial, and the officer making the application was advised that he could have counsel of his own selection, provided he confined himself to a field of selection where it would be reasonable and proper for the Government to assume the incident expense. I mention this as an extreme case. Ordinarily military accused are not unreasonable in their demands for counsel and select from officers immediately available and serving at the place where the trial is had. Whatever provision is inserted in the code giving the accused a statutory right to counsel, it should certainly be no broader than the right of a civilian accused. No civil judge having the duty to appoint counsel in any criminal case would permit an accused to draw upon a distant State or a distant quarter of the State in which he was being tried for counsel, but would confine him in his choice to lawyers immediately available and ordinarily in attendance upon the court.

I can assure the committee that, as a matter of practice, every request of this kind is granted, unless it involves the Government in heavy transportation charges to get counsel selected by the accused to the place of trial. I think there is little or no complaint in the service on this score. In practice, a great majority of military accused are represented by counsel, even when there is a plea of guilty.

The CHAIRMAN. My suggestion was not broad enough to cover counsel of his own selection, but merely, if there was no affirmative statement that he was entitled to counsel—whether of his own selection or selected for him—that an affirmative statement should be made somewhere in the Articles of War.

Gen. CROWDER. I do not just at this moment recall the particular place in this code where that matter may come up again; but if you will pass that question until we get to it, and remind me at the conclusion of the hearing, if I have not covered it, that I have the duty of covering it, I shall be prepared for a meeting of minds on that subject.

Senator COLT. Do you follow the analogy of the civil courts there, and provide that the court-martial shall appoint counsel?

Gen. CROWDER. The court does not exercise the power of appointment of counsel with us. The application of the accused for counsel ordinarily precedes the convening of the court, and is addressed to the local commander or to the convening authority. If, however, the case has advanced to the point where the accused is ready to be arraigned, and he has no counsel, he can make his application directly to the court, and the court will communicate it to the local commanding officer or to the convening authority, and the counsel is furnished.

Senator COLT. Right on the surface of it, I should favor a provision that the accused should have counsel, rather than trust to the

judge advocate. I do not doubt that perhaps in practice he does have counsel.

The CHAIRMAN. You mean, in the event that he did not employ counsel of his own, or select counsel, that counsel should be appointed by the court-martial in criminal cases?

Senator COLT. Yes; exactly.

Gen. CROWDER. That it should be given to him as a matter of statutory right?

Senator COLT. Yes.

Gen. CROWDER. That is exactly what he has to-day; so there would be no objection to putting it into law.

The CHAIRMAN. It is obligatory?

Gen. CROWDER. It is obligatory to appoint counsel for him upon his request.

Senator COLT. Does not that strike you favorably, Mr. Chairman?

The CHAIRMAN. Yes; it does. We will leave this article open, then, until after the close of the hearing, and will not discuss it further at this time.

Gen. CROWDER. You will notice, when you come to deal with article 18, that it is a substitute for existing article 88, and that that article gave the right of challenge only to the prisoner. But from time immemorial the judge advocate has exercised that right also, so that the analogy to the civil court is complete. Both prosecution and defense can challenge any member of the court for cause. If this practice of the judge advocate challenging members of the court is to survive, I think it ought to have the express sanction of statute law. Its present basis is in the common law military.

The CHAIRMAN. Now that you are extending the jurisdiction of the court-martial; you would not think it wise to include there, say, one peremptory challenge? He has only challenges for cause. He has no peremptory challenge.

Gen. CROWDER. No peremptory challenge at all. I should deprecate the introduction into the military code of the right of peremptory challenge, and I will ask you to think particularly of how that would operate in time of war, and also to consider that there is an absence of complaint against that provision of our statute law which excludes the peremptory challenges. These latter have never been known to our military code and never sanctioned by, I believe, by any military code of England or America.

The CHAIRMAN. My question was not intended as a criticism, but merely for information, in view of the enlargement of the jurisdiction.

Gen. CROWDER. We come now to article 19, which prescribes a form of oath of members of a court-martial and the judge advocate.

The oath is archaic in form. I have not thought it necessary to change it, except to give the right to affirm instead of to swear. You will notice that we are required to swear that we will administer justice not only impartially but "without favor or affection." That comes down to us from the British code of 1765.

Senator COLT. "Or hope of reward."

Gen. CROWDER. You will notice that I have broadened the application of the articles to include everywhere a provision for affirming as well as for swearing; and I have cut out of the old law so much of it as requires the judge advocate to take an oath that he will not disclose or discover the vote or opinion of any particular member of the

court-martial. That was the provision of the article of 1806, which was copied from the British articles; but these early articles were in force at a time when the judge advocate was permitted to sit in the closed sessions of the court, and hear the discussion of the members upon guilt or innocence, or any question of the admissibility or rejection of evidence. You passed a law here a few years ago which excluded the trial officer, the judge advocate, from the court during its closed sessions; so he has no longer any opportunity which is not the public's as well to know what the vote or opinion of a member of the court is.

I have, therefore, eliminated that from the oath. He is now required to swear only that he will not divulge the findings and sentence of the court to any but the proper authority. The findings and sentence are communicated to him by the court at the conclusion of the trial, but not until then.

Now, article 20: The existing law says that—

A court-martial shall, for reasonable cause, grant a continuance to either party, for such time and as often as may appear to be just: *Provided*, That if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days.

That was Civil War legislation. It is preserved in new article 20 except the proviso which provides that in case of close confinement trial must not be delayed longer than 60 days. Trial must of necessity be delayed more than 60 days in certain cases or other distant possessions in order to secure evidence from Alaska or the Philippines for use in the United States, or the reverse. The right of the accused to a speedy trial has, however, been carefully guarded by proposed article 70, under the terms of which any officer who is responsible for unreasonable or unnecessary delay in carrying the proceedings against an accused to a final conclusion "shall be punished as a court-martial may direct."

Senator COLT. I always like a general phrase in a code, rather than to have a limitation put upon it, where circumstances may be such that you may have to make an exception.

The CHAIRMAN. Senator, these articles are so very logically and comprehensively drawn that I feel considerable diffidence even in making suggestions.

Senator COLT. So do I.

The CHAIRMAN. Here is one thing we must consider, however: When these articles as revised come upon the floor of the Senate, certain difficulties may be experienced in view of the fact that we are enlarging the jurisdiction to cover certain civilians, which it seems to me very necessary to do. Such is presented by this very broad power of continuances on both sides while the accused is confined and not subject to bail. Would not it be wise to make some broad limitation there, in the absence of war, and in the States as distinguished from the Territories?

Gen. CROWDER. May I ask you please to turn over to page 41, article 70, to show you how the rights of an accused have been guarded? The new law there says:

The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. Any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided*, That in time of

peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. The accused shall be furnished a copy of the charges against him on his request therefor.

That is the provision of this new code which looks to prompt arraignment of an accused and prompt settlement of all matters preceding his arraignment. Is it sufficient, in your judgment?

Senator COLT. That provision would not specifically apply, would it, to a court-martial itself? Article 20 says "a court-martial." Does not the provision which you have just read have application to the steps leading up to the court-martial?

Gen. CROWDER. Yes; to the steps leading up to it.

Senator COLT. Now you are before a court-martial. The accused is before the court being tried, and there is the general provision:

A court-martial shall, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

You could or could not insert in there some limitation on this general provision.

Gen. CROWDER. The General Staff is responsible for article 70 in the form in which it appears in this revision. As I had it drawn and as the Senate has twice passed it, it provided time limits upon every step necessary to get the man before a court-martial for trial and required the officers responsible for taking those steps to report at the end of the prescribed period why he had not been able to bring about arraignment within the period prescribed. I preferred that provision. It gave us all the advantages of a definite time schedule and it introduced the element of elasticity which would enable a man, for cause duly established, to vary the time limits imposed. I should like to bring to your attention at our next hearing this earlier form, which I think will silence all objection as to any tyranny or bad treatment of an accused in the matter of delay. In drafting this early article I followed the provisions of the latest British code, but this early form of article will not reach the case of the man who is already before the court. Every code has left to the discretion of the court-martial the matter of continuances.

The CHAIRMAN. If it meets with your approval, Senator Colt, I should like to ask the Judge Advocate General to present his substitute at the next meeting so we can consider it.

Senator COLT. Yes; by all means.

Gen. CROWDER. I should like to do it, because personally I should like to see it put back into the code. I did not choose to make an issue with the General Staff. They did not want these time limits put upon their action. Now, you will notice that the existing article has some time limits:

When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

That is the existing law.

The CHAIRMAN. Article 93, on page 14, contains a further limitation:

A court-martial shall, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just: *Provided*, That if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days.

Gen. CROWDER. We found it absolutely impossible to comply with that proviso after the Philippines were acquired. We had to delay trial longer than 60 days, because we could not get mail out there and back and get depositions in his case in that time. Ordinarily, a man is not in arrest when he is before a court-martial for trial, except in the very gravest cases.

The CHAIRMAN. Would this limitation be too radical?

*Provided*, That except in the case of offenses committed in the Territories, or during war, or when the prisoner is in close confinement, the trial shall not be delayed for a period longer than sixty days.

Gen. CROWDER. You mean to make the proviso inoperative as to offenses committed outside of the geographical limits of the States of the Union and the District of Columbia?

The CHAIRMAN. Yes.

Gen. CROWDER. The trouble with that is that in many cases, the man would commit the offense out there and be brought back here and tried in the United States; or, committing his offense here, he is transported out there and is tried there for offenses that are not discovered until he reaches there, or that are committed upon the eve of embarkation.

Senator COLT. Is there any phrase in the Constitution itself, or the first 10 amendments, that the accused shall be entitled to a speedy trial?

Gen. CROWDER. "A speedy and public trial in the district in which the offense is committed."

Senator COLT. Yes; I do not know that there is any provision which goes specifically to the point that the court itself, when the prisoner is before the court, shall not interpose with any unreasonable delay.

Gen. CROWDER. The discretion of the court to take care of the rights of the accused after he is arraigned has, I think, been generally relied upon.

Senator COLT. Of course, I have been in that atmosphere so much that I agree with you about it. I do not require any provision.

Gen. CROWDER. This article has a very interesting history.

Senator COLT. But this article, as framed here, rather looks to a continuance rather than to immediate trial. It says, "as often as may appear to be just," as if they could continue along a court martial and keep the prisoner confined. I do not know whether any general expression could be put in there saying that the trial should not be unreasonably delayed, or anything of that kind, or whether it would help the accused any.

The CHAIRMAN. You see, in the adoption of article 20, we eliminate the proviso of article 93, which says that if the prisoner is in close confinement the trial shall not be delayed beyond 60 days.

Senator COLT. Yes; exactly.

Gen. CROWDER. I will say that there is no real ground for any solicitude on that question, because during my 38 years of service there have been, I think, few, if any, complaints as to a court-martial delaying trials. There have been complaints against commanding

officers for not expediting the preliminary proceedings; but take into consideration the conditions under which our courts meet. Officers are assembled, anywhere from 5 to 13 of them. They are as anxious to get through with the case as anybody can be, and they proceed expeditiously in the hearing of the evidence and recording their findings. The delays occur not there, but in the preliminary steps, and sometimes in the action of the reviewing authorities on the case.

The CHAIRMAN. Is the granting of continuances frequent in military trials?

Gen. CROWDER. They grant continuances under about the same limitations as a civil court does and with the same freedom. I suspect that our practice is more liberal, perhaps, than in the civil courts, for we are a little bit chary of denying applications of an accused. There have been many instances where the reviewing authorities set aside proceedings, instances where it is thought the substantial rights of an accused have not been preserved. Courts-martial are very chary about turning down an application for a continuance. So I would say that you could not find any part of this code where there was less criticism to deal with than in this particular article; but I am anxious to render the committee all the aid I can toward writing in the statute law a very mandatory requirement tending toward securing expedition as to all steps necessary to bring a man before a court and give him his judicial chance.

(Thereupon, at 12.20 o'clock p. m., a recess was taken until 8.45 o'clock p. m. of the same day.)

AFTER RECESS.

At the expiration of the recess, at 8.45 o'clock p. m., the subcommittee reassembled.

Present: Senators Lea (chairman) and Colt.

#### STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, UNITED STATES ARMY—Continued.

Gen. CROWDER. I should like to go back to article 17, on page 12, which deals with the subject of counsel, and correct some misapprehension that my comments on that article may have led you to entertain.

First, I will say that this article is the first one that we encounter in this code where we are reminded that a military accused has not certain constitutional rights of a civil accused. Under the sixth amendment to the Constitution, I believe, a civil accused is entitled to the aid of counsel at his trial. The courts have decided that the guaranty applies only to prosecutions before the civil courts of the United States, and has no application to military courts. So, with us, counsel is a privilege; it is not a right; and at present it is regulated by paragraph 961 of the Army Regulations, which reads as follows:

The commanding officer of the post where a general or a special court-martial is convened will, at the request of any prisoner who is to be arraigned, detail as counsel a suitable officer. If there be no such officer available, the fact will be reported to the appointing power for action. An officer so detailed shall perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. As such counsel, he should guard the interests of the prisoner by all honorable and legitimate means known to the law, so far as they are not inconsistent with his military relations.

That is an order by the President of the United States, and it is always obeyed; so that the man, while he has not the statutory right to counsel, has the right given him by the order of the President. I believe, as legal adviser to an appointing authority, that in any case which showed on its face that the accused had been denied counsel under that order I should recommend setting aside the proceedings. I am not certain that a statute law is needed, for it is a part of the common law military that a man should be entitled to counsel, the same as it is a part of the common law civil. But I am perfectly willing to see this article amended in such a way as to make it a statutory right; and if you think it should be done, I will bring in and incorporate in the revision an article to that effect. It is a privilege that in practice is never denied.

The CHAIRMAN. What do you say, Senator? Do you not think it would be favorably received?

Senator COLT. It strikes me that it would. I think it would help.

The CHAIRMAN. I do, too.

Gen. CROWDER. Then we may pass that article, with the understanding that I will incorporate an article or an amendment which will give the accused counsel as a matter of right?

The CHAIRMAN. Yes; if you will.

Gen. CROWDER. Now, Senators, I should like to turn to the article we were considering when we adjourned, which is article 20, dealing with the subject of continuances.

You observed in respect to that article, as I understood you, that through the power of granting continuances a court might, unless restricted by law, unduly prolong the trial of an accused; and Senator Colt spoke of the mandatory form in which the article appears, as if it rather commanded than authorized a court-martial to grant continuances. I went to my office and looked up the corresponding provisions of the civil codes of certain States, and I find this:

*Minnesota.*—When an indictment shall be called for trial, or at any time previous thereto, upon sufficient cause shown by either party, the court may direct the trial to be postponed to another day in the same term, or to another term, and all affidavits read upon the application shall be filed with the clerk at the same time. (Gen. Stat., 1913, sec. 9201.)

*Missouri.*—Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. (Ann. Stat., 1906, sec. 2599.)

*Idaho.*—When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day of the same or of the next term. (Rev. Code, 1908, sec. 7795.)

*Maine.*—The trial of any criminal case, except for a crime punishable by imprisonment for life, may be postponed by the court to a future day of the same term, or the jury may be discharged therefrom and the case continued if justice will thereby be promoted. (Rev. Stat., 1903, p. 971.)

*North Dakota.*—When a criminal action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, direct the trial to be postponed to another day in the same term or to the next term. (Comp. Laws, 1913, sec. 10787.)

I encountered notes and annotations to these statutes, as follows:

NOTE IN IDAHO CODE.—An application for continuance is addressed to the sound judicial discretion of the court, which will not be reviewed unless abused.

NOTE IN MISSOURI CODE.—The action of the court in disposing of the application will not be reversed unless it clearly appears from all the facts and circumstances that there has been an abuse of discretion operating to the prejudice of the party.

NOTE IN MINNESOTA CODE.—An application for a continuance is addressed to the discretion of the trial court and its action will rarely be reversed on appeal.

I cite these as showing that in the corresponding provisions of civil codes the discretion of the court is appealed to, and is supposed to be ample to protect an accused against any undue delays; and that is what our own statute does, which reads:

A court-martial shall, for reasonable cause, grant a continuance to either party, for such time and as often as may appear to be just.

The CHAIRMAN. My suggestion was due to the fact that, as I understand, very often prior to the convening of courts-martial the accused is in close confinement, while in the case of the civil law the accused is at least subject to being granted bail.

Gen. CROWDER. There is some misapprehension there.

Senator COLT. General, as you have read those statutes, they seem to be limited to the term.

Gen. CROWDER. The term, or the next term.

Senator COLT. The term, or the next term; yes.

Gen. CROWDER. There is some misapprehension to deal with in that report that has come to you. In the case of officers brought to trial I think probably 75 per cent of them are not in arrest when they are brought to trial. It is only when escape is apprehended that they are placed under restraint. So, too, in the case of enlisted men. A large number of these are not undergoing confinement at the time of their trial. It all depends upon whether, in the discretion of the commanding officer, escape is to be feared; but when they are brought before the court they have entire liberty. You do not get the idea that they are brought there in shackles, or anything of that sort?

The CHAIRMAN. No; I did not mean that. I was looking at it purely from the standpoint, not of the practice, but of the possibility, under such a provision as this, of the trial being continued indefinitely, and the accused remaining in close confinement. My suggestion would be that perhaps using the word "may," instead of "shall," would meet some of the criticisms of Senator Colt on the mandatory character of the provision.

Gen. CROWDER. I think the word "shall" would be construed as "may" in this article; but I think it might well be changed to correspond to the civil statutes that we have considered.

The CHAIRMAN. Of course my attention was directed to it more on account of article 93, which is published on the right-hand margin:

If the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days.

Gen. CROWDER. That will take us again to article 70 of this code, and I think we might consider both together. I have shown you, by the statutes I have read to you, that in the civil courts they make no attempt to expedite a trial through this authority to grant continuances. They do not regulate the authority to grant continuances with a view to expediting trial. The appeal there is to the discretion of the court. Now, there is a way to get a man before a court; that is, to expedite arraignment; and it is the object of article 70 to accomplish that.

The CHAIRMAN. Have you the substitute with you?

Gen. CROWDER. Yes; I brought it with me. I have it right here. Let us first consider the two articles of the existing law which article 70 is designed to replace.

Article 70 of the existing code says:

No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.

But as the concluding clause is addressed to the discretion of the officer whose duty it is to convene or assemble a court-martial, there is no particular merit in the provision that he shall not be continued in confinement more than eight days.

The CHAIRMAN. I see that.

Gen. CROWDER. When you get down to article 71, it says:

When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial, and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served or the arrested officer be not brought to trial as herein required, the arrest shall cease. But officers released from arrest under the provisions of this article may be tried whenever the exigencies of the service shall permit within twelve months after such release from arrest.

This article has a history connected with our Civil War period which is rather interesting. It was intended to meet a single case. Northrop states the history in this way (citing Blaine's Twenty Years in Congress, vol. 1, p. 390):

The occasion of the enactment of this article is understood to have been the protracted arrest and confinement at Fort La Fayette of Brig. Gen. Charles P. Stone, United States Volunteers, who had been so held without trial for about 150 days, when Congress, having been advised of the facts, inserted this provision for his benefit in an act relating to the Army. After its passage he was held 30 days longer, the limit allowed by the statute, and then released, after a confinement of 188 days in all.

The existing articles (70 and 71), like the new article which replaces them (70), represent an attempt to extend by statute, to a military accused, the right to a speedy trial. The objections to the existing law (70 and 71) are: (a) That the articles are lacking in penal sanction; (b) that they prescribe time limits often impossible to observe and which, if observed, would in certain graver cases lead to escape; and (c) that they were enacted when foreign service was not in view and, therefore, did not take into consideration evils which are now inseparable in the administration of justice. The General Staff, believing that it would be impossible to insert superior time limits which could be observed in emergent conditions of military service and at times under normal conditions, declined to insert any, and, in their article, which is the article before you, made no attempt of this character.

They limited the provision of the article to the requirement that charges should be investigated promptly and immediate steps taken to try and punish, and holding the officer responsible for unreasonable or unnecessary delay on a trial by court.

The corresponding article of the bill, already twice passed by the Senate, was based upon the existing English article, and reads as follows:

*Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest or confinement. In every case where a person remains in military custody for more

than five days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer, in the manner prescribed by regulations, and a similar report shall be forwarded every five days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who willfully or negligently fails to do so promptly and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided*, That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

The General Staff, in considering this article, criticized the five-day periods established as too short, and wrote in, tentatively, a period of eight days. Further reflection convinced them that any prescribed periods would prove embarrassing, and they therefore reported the article in the form in which it appears in the bill before you. Personally, I favor the article as already twice passed by the Senate and which, as passed, reads as follows, substituting eight-day periods for five:

ART. 72. *Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest and confinement. In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to render such report who willfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided*, That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of eight days subsequent to the service of charges upon him.

I see no other way to establish that rigid accountability to superior authority for expedition in trial than by incorporating time limits as they are proposed in this article, which, as I say, the Senate has already passed twice.

Senator COLT. And passed it in the form which you read?

Gen. CROWDER. Yes, sir.

The CHAIRMAN. If it meets with your approval, Senator, I should like to ask Gen. Crowder to redraft the section in that form.

Senator COLT. I am willing.

Gen. CROWDER. It is perfectly acceptable to me in this form, more acceptable than in the form in which it appears here.

The CHAIRMAN. Will you let us have that, then, in lieu of this?

Gen. CROWDER. Yes.

The CHAIRMAN. That brings us to article 21.

Gen. CROWDER. Gentlemen, if you see ways of expediting my handling of these articles, I wish you would tell me, because I know we are all anxious to get through.

Article 21 will not detain us long, I think. It substitutes article 89, which says:

When a prisoner, arraigned before a court-martial, from obstinacy and deliberate design stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.

I have substituted for the word "prisoner" the word "accused," because it so often happens, as I have said, that the men before our courts are not prisoners.

The CHAIRMAN. Yes.

Senator COLT. Exactly.

Gen. CROWDER. So there is nothing further to call your attention to in connection with that article.

Now, we come to process to obtain witnesses. The existing law—and you will notice here that I have made an article out of a section of the Revised Statutes—section 1202, which provides that—

Every judge advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit may lawfully issue.

This section appears to give the judge advocate of a court compulsory process to compel witnesses not only to appear but to testify; but because the process was given to the judge advocate, who is simply a trial officer, and not to the court, we reached the conclusion that that statute did not confer any authority to use force against a witness to compel him to testify. If Congress had intended that, they would have given the power to the court, and not to a trial officer.

The CHAIRMAN. You mean that courts-martial have not the power to punish for contempt?

Gen. CROWDER. They have a limited power, but that is the subject of a separate article to which I will call your attention when we reach it. I have amended the article which we are now considering by substituting for the phrase "which courts of criminal jurisdiction within the State, Territory or District \* \* \* may \* \* \* issue," the phrase "which courts of the United States, having criminal jurisdiction, may lawfully issue." Secretary Dickinson called my attention to the necessity of inserting this further phrase:

But such process shall run to any part of the United States, its Territories, and possessions.

Senator COLT. Why is not that better as you have it?

Gen. CROWDER. That is the way I want it, so that our process will run like the process of the Federal courts.

Coming to article 23, which provides the oath of witnesses, you will notice that I have not taken any liberty with the existing law, article 92, except to broaden it so as to include affirmation.

Senator COLT. Yes; that is all.

Gen. CROWDER. Article 24 is so closely related to article 22 that they might have been placed together. Here is our compulsory process. When we had reached the conclusion that section 1202 of the Revised Statutes, which I have already read, would not permit us to compel witnesses to testify, we had recourse to Congress for legislative relief. The act of March 2, 1901, was passed giving us a right to certify the witness's refusal to appear or testify to a United States district court and to have the issue tried there and the

punishment adjudged there. The act of March 2, 1901, carried that provision. I have made of this act an article of war, but with some changes. The act of 1901 had no application to persons residing beyond the State, Territory, or District in which such general court-martial is held.

Take the case of a court out here at Fort Myer. The compulsory process authorized by the act will reach a man anywhere in Virginia. It will not reach a man in Washington, D. C. In other words, and continuing the illustration further, it will not reach a witness residing in Kansas City, Mo., to testify before a court-martial sitting at Fort Leavenworth, Kans.; nor does the act of 1901 have any application in the case of a witness subpoenaed to appear before an officer designated to take a deposition to be read in evidence before a court-martial. It could not have been the intention of Congress to leave these cases unprovided for and thus jeopardize the right of a military accused to have the benefit of effective compulsory process to obtain witnesses in his favor, more especially in view of the fact that the court-martial does not have under the existing law, nor will it acquire under the proposed law, any additional power to punish civilian witnesses for refusal or failure to appear and testify, that power being reserved to civil courts of the United States. Accordingly, in the proposed article 24, the proviso of the existing law, supra, that said law shall not apply to persons residing beyond the State, Territory, or District in which the court-martial is held, has been eliminated and the scope of the article broadened so as to make it applicable irrespective of State lines, and also in case of a witness subpoenaed to give his deposition; and in order that the article may be effective in such places as the Hawaiian Islands, Porto Rico, the Philippine Islands, and the Panama Canal Zone, jurisdiction has, for the purposes of the article, been conferred upon civil courts of original criminal jurisdiction in those localities.

Now, one thing further about this article. You will notice that the act of March 2, 1901, concludes with this proviso:

That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him.

Appearing, as it does, as a proviso, the construction was advanced that this language would not apply to any other witnesses than those named in the act itself. It thus did not protect any and all witness against self-incrimination but only those described in the act in which the proviso appears. So I struck out that proviso and have put it in the next article, where it will be of general application.

Now we come to the compulsory self-incrimination article.

The CHAIRMAN. What would you think of transposing articles 24, 25, and 23?

Gen. CROWDER. I think it would be better. I think they ought to come together, because they are so closely related in subject matter, and there is no reason why the oath of the witness should be sandwiched in between them there.

Senator COLT. Exactly.

The CHAIRMAN. I will ask you to rearrange that, too.

Gen. CROWDER. Yes.

Here is our general statute against compulsory self-incrimination. It is a new article, based on the proviso to which I have referred and is made broadly general in these terms:

No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

Senator COLT. It is very broad.

Gen. CROWDER. Now we come to depositions; and here, again, we are reminded of the fact that we are legislating into this code an authority to use deposition evidence, where in the civil courts a man would be entitled to have the witnesses confront him. Here the power to take depositions is given as a matter of right. It is a necessity of our military service. It is confined, as you will see, to noncapital cases and to depositions taken after due notice.

The existing law says:

The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.

Here again we have that limitation, "State, Territory, or district," so that I could take the deposition of a man living in Washington, D. C., for use before a court-martial at Fort Myer, while I could not take a deposition if the witness lived in Richmond or in the southern part of the State, and when you get down to a large State like Texas the situation is absurd. We have a large number of troops stationed at Fort Bliss. I can cross the line there to New Mexico and take the deposition of a witness who resides 20 miles away from Fort Bliss; but if the witness happens to reside at Galveston, at the other end of the State, I can not take his deposition under this law, although he lives nearly 900 miles away.

You are familiar with the Federal law relating to the taking of depositions in civil cases, which establishes a 100-mile limit (R. S., 863). I have taken that section of the Revised Statutes and have made an article of war out of it, so that my article now reads as follows:

A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides—

Here I fall into the actual language of that statute—

is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing—

And at the suggestion of Secretary of War Dickinson I put in this proviso:

*Provided*, That testimony by deposition may be adduced for the defense in capital cases.

Senator COLT. Conceding the principle that you can use depositions under military law, I think this form of 100 miles is much

better, in view of the largeness of Texas and such conditions as you have stated.

Gen. CROWDER. That provision about taking depositions was first enacted by the Continental Congress in 1786.

Senator COLT. And, as you say, it is a necessity in the military service.

General CROWDER. Yes. It constituted article 74 of the code of 1806, and received the last attention by Congress in 1863, during the Civil War period. I do not know how we could get along in the administration of military justice if we did not have that authority.

Senator COLT. Do you not think so, too, Mr. Chairman?

The CHAIRMAN. I do not see how a court-martial could be conducted without the right to take depositions; and, as you say, conceding that, the provision is safeguarded in every way, and it is very much more workable than the other one.

Gen. CROWDER. I think so.

Senator COLT. It is very much more workable and better.

Gen. CROWDER. The next article, 27, is a new article. The existing law carries no provision as to the officials before whom a deposition may be taken, and we had to supply the practice by analogy. We conform as nearly as practicable to the provisions of the civil law touching the subject. Here I provide that—

Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

There is only one change in the existing law in the next article. It establishes the principle that an officer can not tender his resignation and then leave without waiting for its acceptance. It was a Civil War statute, enacted at a time when a great many officers were resigning from the Union Army and going south. Congress, on August 5, 1861, enacted this law:

Any officer who, having tendered his resignation, quits his post or proper duties without leave and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

It simply is a rule of evidence. It prescribes what shall in a given case constitute a desertion. I have scratched out the words "and punished as," because if the character of deserter is given to the man he will be punished under the article relating to desertion. The only change therefore is in scratching out the words "and punished as," so as to read "shall be deemed a deserter."

Article 29 is related in subject matter, for it lays down the rule in regard to enlisted men enlisting in other organizations. The existing article 50 seems to have contemplated a man leaving his organization in the Regular Army to enlist in another organization in the Regular Army. It consists of two parts, one of which is a rule of evidence, and the other is punitive. I have preserved only the first part of article 50 in the new article 29, and have broadened its application to include the militia when in the service of the United States, the Navy, or the Marine Corps, or in a foreign army, so that the article in its amended form reads:

Any soldier who, without having first received a regular discharge, enlists in the Army, or militia when in the service of the United States, or in the Navy or Marine

Corps of the United States, or in a foreign army, shall be deemed to have deserted the service of the United States.

The effect of the new article is to establish his character as a deserter so that he can be handled under the punitive articles dealing with desertion; so I have transferred this last article to another part of the code.

This article is very useful. It occasionally happens that a man dislikes his organization, and he quits in a moment of petulance and goes to another distant post and enlists there; and he can repeat that performance indefinitely, without much consequence to himself, unless the law fixes upon his act of leaving the organization to which he regularly belongs, and enlisting in another organization at another place, the character of desertion. The words "in a foreign army" are inserted to reach the case of reservists who have left the United States and enlisted in one or another of the belligerent armies.

Coming down to article 30, it deals with the oaths of reporters and interpreters. It was an omission of our existing code that no oaths were prescribed for those persons, and I have inserted the form of oath here for both reporters and interpreters. Nothing further is to be said about those articles, except that I have broadened their application to include affirmation, as in case of the other articles prescribing forms of oaths.

Article 31 is based upon section 2 of the act of July 27, 1892, broadened so as to include assistant judge advocates. Up until 1892, as I remarked to you this morning, a judge advocate sat in the closed sessions of the court. It was just like a prosecuting attorney sitting with a jury. It finally became recognized that that was grossly improper, and Congress enacted this law for the exclusion of judge advocates from closed sessions; but, as I have provided assistant judge advocates, the new article likewise excludes them.

The next article will not detain you long.

The CHAIRMAN. Referring for just a moment to the oaths of reporters and interpreters, what would you think of classifying the three articles in regard to oaths together? I see you have prescribed the form of the oaths of members of courts-martial, the oaths of judge advocates, the oaths of witnesses, and the oaths of reporters and interpreters.

Gen. CROWDER. There would not be any objection to it, I think.

The CHAIRMAN. Let us see how it would come in there. First is "Oath of members and judge advocate." Next is article 23, "Oath of witnesses," and then "Oaths of reporters and interpreters."

Gen. CROWDER. Let us see how the heading I have employed here would apply.

The CHAIRMAN. It is all under "Procedure."

Gen. CROWDER. There is no objection at all to that. I rather think it would be better.

The CHAIRMAN. What do you think, Senator Colt?

Senator COLT. I think it would.

Gen. CROWDER. I think it would be an improvement in the arrangement.

In article 32 I have simply corrected an error in military terminology. The old article, which came down to us from the British code of 1765, said:

Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

I have made that "junior in rank." I suppose I know what "youngest in commission" means. The phrase "junior in rank" has a very definite meaning.

We come now to the article which deals with the power of a court-martial to punish for contempt. The existing law limits that power to "any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder," but confers an unrestricted power to punish "at discretion." We retain the provision for punishing contempts committed in the face of the court, contempts of that character, but place the punishing power of the court under rigid limitations.

The reference here is to article 14 of this code:

A court-martial may punish at discretion, subject to the limitations contained in article 14.

We passed article 14 this morning. It fixed the limit of punishing power of the summary courts at three months' confinement and forfeiture, and this will constitute the maximum punishment for contempt. This is an article that has been rarely used. No court-martial would think of imposing at discretion any heavy punishment for contempt; but I thought it just as well that a limit should be imposed upon the power of the court to punish for contempt.

The CHAIRMAN. I think that limitation is very good.

Gen. CROWDER. It is a singular omission of our existing articles that they do not prescribe that a general court-martial shall keep a record and prescribe what the record shall be, but they do prescribe it for the inferior courts. So I have put in article 34 a new article, which lays down the statutory requirements for a record and shows how it shall be authenticated. I take it that there can be no objection to that article.

Article 36 repeats substantially the provisions of existing article 113, except that it corrects some errors. You will notice that article 113 requires the judge advocate of a general court-martial to forward, "with such expedition as the opportunity of time and distance of place may admit, \* \* \* the original proceedings and sentence of such court to the Judge Advocate General of the Army, in whose office they shall be carefully preserved." He can not comply with that law, because other provisions of the code require the completed proceedings to go to the convening authority for his approval, and they only come to my office after they have received his approval. So we never have been able to comply with that statute. It is one of those archaic provisions that we find occasionally as we come to the code. In the new article he is required to "forward to the appointing authority or to his successor in command the original record of the proceedings," and it is provided that "all records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army."

Article 35, "Records—special and summary courts-martial." There is nothing particular in that article to call your attention to. It is practically a restatement of the existing law, but the existing law relates solely to summary courts, as the special court had not been created at the time this act of June 8, 1898, was enacted.

Article 37 deals with the disposition of records of special and summary courts-martial. You will note that the existing law

allows the records of regimental and garrison courts, which were superseded by the special court, to be destroyed after two years, while in regard to the records of the summary courts it is provided that they may be destroyed when no longer of use. I have made the rule in regard to the summary court the rule in regard to both courts in the new article; left it to the discretion of the Secretary of War and to regulations, how long we shall keep our files encumbered with these records of minor trials.

Article 38 deals with irregularities arising during the conduct of a trial. An article has been built on section 1025 of the Revised Statutes and the pending Senate bill. The Revised Statute reads:

That no indictment found and presented by the grand jury in any district or circuit court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

The pending Senate bill, which has been favorably reported, I think, more than once, provides:

No judgment shall be set aside or reversed or a new trial granted by any court of the United States in any case, civil or criminal, on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. (S. 5917.)

Now, here is the new article. The rule is applied to court-martial cases without any substantial change. A proviso limiting it a little bit has been added:

*Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles.

A further proviso has been added carrying into this same article related matter appearing in section 3387 of the act of March 4, 1899, the United States Penal Code, as follows:

*Provided further*, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

Sometimes our own courts will omit to adjudge hard labor in connection with imprisonment, and under existing law we must send the case back to the trial court to be revised.

I come now to article 39, which is our military statute of limitations. It is an important article. I think we will make better progress by examining the provisions of the existing law, which is found in article 103, and in the act of April 11, 1890. I invite your attention first to article 103. That provides as follows:

ART. 103. No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself or of some other manifest impediment, he shall not have been amenable to justice within that period.

First I ask your attention to the fact that this article 103 is broadly inclusive of every offense within the jurisdiction of the court-martial. It did not, like civil statute of limitations, except capital offenses. I know of no civil statutes of limitation which includes murder. By bold construction we held that this article did not cover our capital offenses, and we have been so applying the article.

Desertion was not expressly excepted, and was therefore included within the letter of the article. But it was sought to hold that desertion was a continuing offense; that a man committed the offense anew every day he was absent in desertion. The Attorney General in an opinion rendered in the seventies held against this view but the then Secretary of War refused to follow the opinion of the Attorney General, and for a long time we considered the deserter, all deserters, to be without the pale of this statute. Finally the discussion culminated in the passage of the act of April 11, 1890, which I will now read:

No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service, (Art. 88, Code of 1806, as amended by act of Apr. 11, 1890.) (P. 221, Brit. Mutiny act, 1765.)

At the time this statute was enacted, the term of enlistment was five years, so that if a man deserted in the first week of his enlistment his liability was for a seven-year period. Since then you gentlemen have increased the term of enlistment to seven years, so that in case of the man who deserts in the first part of his enlistment the period of the statute is about nine years. I have examined the statistics of the department, and I find that about 50 per cent of our deserters come back to the colors, through apprehension or voluntary surrender, and that we get all but about 1 per cent of those so returning in three years. After that we get practically none. All these considerations, and the advice of Winthrop, our standard authority, brought me to the conclusion that we had better fix a definite period for peace desertion, and I fixed it at three years. I think three years is long enough for a man to remain liable for that offense. So the article, as I have it drawn here—and I have excepted, of course, our capital offenses of desertion in time of war and murder—is as follows:

(E) LIMITATIONS UPON PROSECUTIONS.

ART. 39. *As to Time*.—Except for desertion committed in time of war, or for murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace, or for any noncapital crime or offense punishable under articles ninety-two and ninety-three of this code, the period of limitations upon trial and punishment by court-martial shall be three years.

I see that I have gotten a little bit ahead of myself in discussing this article. You will encounter, as we proceed with this division, articles which confer upon courts-martial a concurrent jurisdiction with the civil courts in noncapital crimes. The United States penal code establishes a limit of three years for trial and punishment, and I thought it was fair that the courts-martial, which had concurrent jurisdiction, should have a limitation of three years. That is what is meant when I speak of articles 92 and 93 of the code.

Then there is the following proviso:

*And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

That was necessary because of the change in the law.

The CHAIRMAN. Yes.

Gen. CROWDER. I think that statute in that form is much more satisfactory than anything we have ever had before.

The CHAIRMAN. It seems to be a great improvement upon what you have had before.

Senator COLT. I think so. I note that in the next article we come up against another one of the constitutional rights of the accused.

Gen. CROWDER. Yes; article 40, which gives a military accused protection against double jeopardy. He may not be tried a second time for the same offense. It is satisfactory in the form in which it is here. We have used it for 125 years, and I am perfectly satisfied to have it in this code in this form.

We now come to the general subject of punishments, and the first article we have to consider is article 41. It replaces article 98 of the existing law, which is based upon an act of Congress approved August 5, 1861. That act provided that:

Hereafter it shall be illegal to brand, mark, or tattoo on the body any soldier by sentence of a court-martial.

It was preserved in the Revised Statutes in the form you find it in article 98. There the language is:

No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

The CHAIRMAN. Why do you have "tattooing on the body"?

Gen. CROWDER. These punishments came down to us from the early British codes. Much more severe punishments characterized the provisions of some of those early codes, but flogging, branding, and marking survived longer than any of them. The marking of deserters with the letter "D" dated from the Roman law and was authorized by the British mutiny act of an early date. Another form of punishment authorized by that act was the marking of offenders discharged from the service with ignominy with the letters "B C," meaning "Bad character." In our service, at a very early date, soldiers were sentenced to be branded for both desertion and drunkenness. Winthrop states that sometimes the letters "H D" were used for habitual drunkenness; "M" for mutineer; "W" for worthlessness; "C" for cowardice; "I" for insubordination; etc. Sometimes these letters were marked upon the body by a form of tattooing instead of branding.

The CHAIRMAN. That was not exactly my question. I wondered why there was that limitation "on the body." Tattooing on the face would seem to be very much more objectionable.

Gen. CROWDER. Usually the branding, we are informed by Winthrop, was done on the hip. Sentences to be branded on the cheek and on the forehead have been adjudged. Sentences of this kind were adjudged by courts-martial during the Civil War period.

These would be called cruel and unusual punishments to-day. But branding passed into complete disuse in our service only when forbidden by statute, the last statute on the subject being enacted in 1872. This punishment was resorted to in a very few cases in 1870 and 1871. There is a necessity, I think, to keep this prohibition for a while in our articles, although it is almost inconceivable that a court could be found to-day that would adjudge such a punishment. How-

ever, as our punitive articles provide that punishments shall be "as a court-martial shall direct," and as any punishment that is sanctioned by military custom or usage could be lawfully adjudged by a military court in the absence of any restriction, it is just as well to classify these three forms of punishment as forbidden punishments.

Senator COLT. Did flogging exist down to a recent date?

Gen. CROWDER. Yes; down until the early seventies. Our original code of 1775 expressly authorized "whipping not to exceed 39 lashes." The code of 1776 provided that "not more than 100 lashes shall be inflicted on any offender at the discretion of a court-martial." But at the time this form of punishment was practiced in the Army, public-whipping was authorized by certain civil statutes as a punishment for sundry civil offenses. I am not certain but that it survives in some of them to-day.

You will note that I have restated the article. In the existing article it applies only to persons in the military service. We have seen, in article 2 of this new code, that there are numerous retainers to the camp, and persons serving with the army in the field, who are subject to these articles, and I think they, as well as soldiers, should be protected against this form of punishment, so in restating the article I have made the prohibition absolute.

The CHAIRMAN. That, of course, means punishment after conviction.

Gen. CROWDER. No; the provision is that "Punishment by flogging, or by branding, marking, or tattooing" is prohibited. In this form it prohibits this kind of punishment following a conviction, and also, it is a prohibited administrative punishment. It is scarcely necessary to make this latter statement, as administrative punishments are resorted to in a very limited way at the present time.

The CHAIRMAN. You mean in the military service?

Gen. CROWDER. Yes; in the military service.

The CHAIRMAN. I regret to say that they are not unknown in civil penal institutions.

Gen. CROWDER. We will come later to an article in this code in which a very limited authority is given to punish administratively without recourse to trial by court-martial. But the authority is extremely limited.

The next article, 42, is an important one. And in connection therewith I shall have to discuss provisions of existing law which it is designed to replace at some length. The existing law (art. 97) will be found in the right-hand column, and in order to fix attention upon its provisions I shall read the article in its entirety:

No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment. (Act of July 16, 1862.)

As will be seen, the article deals with the subject of penitentiary sentences. I referred to this general subject in my initial statement to you this morning. The purpose of the existing law is identical with that of the new article, viz, to prohibit courts-martial from adjudging penitentiary confinement for military offenses. There is no desire upon the part of anyone to change the law in this regard.

Penitentiary confinement should never be adjudged for a purely military offense unless it should be desertion in time of war and in time of peace when repeated or some like offense. But the existing law prohibits penitentiary confinement for military offenses in terms which furnish us great embarrassment in the administration of military justice. It says we may adjudge penitentiary confinement only when the offense of which the person may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject the person to penitentiary confinement. We have the burden, thus, of looking up all this statute and common law—that is, the statutes of the United States and the statutes and common law of the District of Columbia and of 48 States and 3 Territories, dependent on where the court may be sitting. This is a very heavy burden which ought to be lifted from the administration of military justice, if it can be done and observe the underlying principle of this legislation, viz, that military offenses, and also civil offenses, triable by a court-martial in the exercise of its concurrent jurisdiction with civil courts, but which the civil law does not punish with penitentiary confinement, shall not be so punished by a court-martial.

It occurred to me, after a rather prolonged study which I gave this general subject, that there was one body of criminal law in this country which was wholly under the control of Congress, and that is the criminal law of the District of Columbia. Here, in the District, you have your penal code and you have your common law, and it is easy, by recourse to the statute and common law of the District, to find when a given offense is punishable by penitentiary confinement. There is no reason, it seems to me, why we can not take the United States Penal Code, the laws of the District of Columbia, statute and common, as the standard for the military service. And, if we do, we shall only have to look to the laws of one place to determine whether or not a court-martial shall award penitentiary confinement, and, if this course be followed, we shall have our courts-martial consulting a body of law for which Congress is responsible. The criminal law of the District of Columbia is as liberal as is found elsewhere, but there is no other law entirely under the control of the Congress of the United States which could be adopted.

Senator COLT. What is the abuse of it? I do not know that I quite understand that.

The CHAIRMAN. It is not the abuse so much as it is the burden that is placed upon courts-martial of searching through the criminal law, the statute law, and the common law in 48 States.

Gen. CROWDER. Let me illustrate. Suppose we are trying a man for a civil felony in Texas. We examine the code and the common law of Texas, but the trial may be held in any other State or Territory. If we are holding it in Panama, we would look up the code of Panama; in the Philippines, we would consult the code of the Philippine Islands, and, in each instance, to find out if penitentiary confinement as a punishment can be awarded. The soldier is subjected to the laws of any one of 48 States and 3 Territories, accordingly as he may be stationed in one or the other. I have tried to subject him to but one set of laws—namely, the law, statute and common, of the District of Columbia.

The CHAIRMAN. You have put it under the criminal law of the District of Columbia?

Gen. CROWDER. Yes.

The CHAIRMAN. And you think that is comprehensive enough?

Gen. CROWDER. Yes.

Senator COLT. I was going to ask that same question.

Gen. CROWDER. Before reaching this conclusion and drafting the new article, we studied the criminal law of the District of Columbia very carefully and compared it with other criminal codes:

Senator COLT. It seems to me that is right in line with the Federal law.

The CHAIRMAN. Yes; I think that is correct.

Gen. CROWDER. There is one thing further to call to your attention, and it is quite a departure. Article 42, as it appears in this code, reads:

ART. 42. *Penitentiary sentences—When lawful.*—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement,

And so forth. There are three military offenses which under the terms of the proposed article will be punishable by penitentiary confinement. I put "desertion in time of war," and mutiny because they are capital offenses. I put "repeated desertion in time of peace," because of the element of fraud perpetrated on the Government by these repeaters. I am willing to concede that the first desertion should be punished as a military offense, notwithstanding the Government loses the money that is invested in equipping the deserter and transporting him to his first station. He usually disposes of his equipment before he deserts. That loss will average about \$100. But when this deserter reenlists and then deserts again, I think the time has come to take cognizance of the amount of fraud that is involved in his repeated desertions; and that that man on conviction ought to go to the penitentiary. I have no sympathy for these repeaters. I do not know anything that will have a more deterrent effect upon these repeaters than the realization that under the law they can be sent to the penitentiary, just as if they had committed burglary or grand larceny or any offense of that character.

The CHAIRMAN. They have really defrauded, in this way, the Government of enough to constitute grand larceny?

Gen. CROWDER. Yes. In all other respects this is a reenactment of the existing law.

We come now to the death sentences. I referred to this article in my initial statement to-day. The present law is:

ART. 96. No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned: (Art. 87, Code of 1806.) (Art. 8, Sec. XV, Brit. Code, 1765.)

We have in our present code two offenses—military crimes—for which the death penalty is mandatory. Let us suppose cases of that kind are on trial. The court by a majority verdict can convict the man on trial of a military offense, but the law steps in and says, "You must inflict the death penalty"; so that the law as at present framed does not give the accused any real protection in such cases. I have made this section read:

ART. 43. *Death sentence—When lawful.*—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law,

nor sentenced to suffer death, except by the concurrence of two-thirds of the members present and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

You will note the concluding clause of this article expressly authorizes majority verdicts with the exception noted in the article. We have majority verdicts in our court-martial system—have heretofore rested, not on statute, but on custom. It is our common law military. But courts-martial have for all time reached their findings and determined upon a sentence by a majority vote. There has never been any authority of statute law on the subject at all, and I thought we had better put into this code an express recognition of majority verdicts except in cases where the death penalty is mandatory. Do I make that plain, Senator?

The CHAIRMAN. Yes; I understand that.

Senator COLT. Yes.

Gen. CROWDER. Article 44 is an article that will invite your special attention, not because it is so intrinsically important, but because it will be probably an unusual law to you. In 1775 this article found its way into our code:

ART. 100. When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. (Art. 85, Code of 1806.) (Art. 4, American Code—additional—1775.)

That has been in our law for all time, and I would not have anybody underestimate its value to the service, especially in regard to the offense of cowardice. It is not a pleasant thing to contemplate that bad behavior on the field of battle will be noted in one's home papers. It has a military value, that article, and I can see great propriety in establishing the same rule in cases of conviction of fraud on the Government. The deterrent effect of that law, I think, is considerable. The only fault I have to find with the present article is that it provides that "the sentence shall further direct," etc. Now, this publication ought to result from the operation of the statute. The court has no discretion in the matter. The requirement here is mandatory: "The sentence shall further direct." If those words "the sentence shall further direct" are left out, and the statute made self-executing, providing that "when the officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers," etc., that will do away with that objection.

The CHAIRMAN. Have courts-martial judicially construed "fraud"?

Gen. CROWDER. That means embezzlement or like offenses. The fraud there mentioned is a financial fraud. That is what the statute means. It does not mean any other kind of fraud.

Senator COLT. I suppose this construction has been settled by the practice of the last 50 years, as to the meaning?

Gen. CROWDER. Yes; articles come to have a very definite meaning.

Senator COLT. It would naturally mean some form of financial fraud.

Gen. CROWDER. Yes, sir; I do not think I can be incorrect about that. Winthrop says:

When the dismissal is for cowardice or fraud, as where it is adjudged on conviction of misbehavior before the enemy, in violation of article 42, or of some offense against the United States, as presenting a fraudulent claim, or embezzlement, in violation of article 60, the sentence should further direct.

That is from our most standard work, Winthrop on Military Law and Precedents.

Senator COLT. The old law provided that the sentence should direct, and now this provides who shall direct.

Gen. CROWDER. It makes it an administrative duty. It makes it the duty of the convening authority to publish the sentence. I do not see why the court should be required to write that in its sentence every time. The statute law should be self-executing. The court can not do anything toward publishing it. That duty necessarily devolves upon the approving power.

Senator COLT. Who would direct that the sentence of the court should be carried out? You simply provide "shall be punished."

The CHAIRMAN. It would be the appointing power, would it not?

Senator COLT. Whom do you mean by "the appointing power"?

Gen. CROWDER. That would be the commander who convenes the court and who acts upon the sentence. He would take the necessary steps.

Senator COLT. Do you mean the officer who convenes the court-martial?

Gen. CROWDER. Yes; and who would have to approve its sentence before its sentence could have any validity whatever. He would have that duty.

Senator COLT. Would it come up to the Judge Advocate General?

Gen. CROWDER. It would come up to the Judge Advocate General in most cases. All cases come here eventually for revision and file, but those cases which require confirmation from the President come here for final action. These are serious cases we are discussing here, and practically 90 per cent of them would come right here and the Secretary of War would issue directions for the publication of it.

Gen. Crowder referred to the antecedent provision, article 4, 1775, additional [reading]:

In all cases where a commissioned officer is cashiered for cowardice or fraud it shall be added in the punishment that the crime, name, place of abode, and punishment of the delinquent be published in and about camp and of that colony from which the offender came or usually resides, after which it shall be deemed scandalous in any officer to associate with him.

(An informal discussion followed.)

Senator COLT. I think we had better leave that. I do not think we could qualify it and make it any better.

Gen. CROWDER. No. We now come to a case where, having made an article out of a statute, I have occasion again to call your attention to the fact that where we come to consider the punitive articles we will find every one of them concluding with the phrase, "shall be punished as a court-martial shall direct"; and until the year 1890 there was absolutely no limit of punishment except that death could not be adjudged except where it was expressly authorized. The result was that courts sitting in different parts of the country had different ideas as to what punishments should be adjudged for given offenses. The punishment for absence without leave for 10 days might be severe in one place and not at all severe in another. It became something

approximating a scandal. Efforts were made by department commanders in their several jurisdictions to hold down the punishment to some common standard through admonition, the exercise of pardon, and mitigation of sentence. It finally came to be recognized that we needed the assistance of statute law. It would have been very difficult to amplify the code after the manner of civil codes so as to prescribe maximum punishment for each offense. In 1890 Congress passed this law:

That whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offense is left to the discretion of the court-martial the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe. (Act of Sept. 27, 1890; 26 Stat., 491.)

In pursuance of that statute the President issues from time to time what are called maximum punishment orders. It covers all offenses punishable at the discretion of the court and fixes limits of punishment. In framing these limits we try to observe the limits that Congress has established in the Federal penal code, where we are dealing with civil offenses; and the President exercises his judgment as to what the maximum punishments shall be for military offenses. The existing law deals only with "military offenses," but we have also construed that phrase "military offenses" as embracing every offense of which a court-martial had jurisdiction. I have changed the article so as to substitute for that phrase, "a military offense," the phrase "a crime or offense made punishable by these articles." There is nothing important about the change, but it is more accurate to speak of it in that way.

We now come to consider the relations of the officers who convene courts-martial to cases tried by courts convened by them. Article 104 is the existing law. It is as follows:

ART. 104. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being. (Art. 65, Code of 1806, amended by act of July 27, 1892.) (Art. 10, sec. XV, Brit. Code, 1765.)

That, you see, came to us from the Code of 1806 and from the British Code of 1765. The new article is substantially the same:

ART. 46. *Approval and execution of sentence.*—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

Article 47 is new. It defines the powers that are incident to the power to approve. It is an important article and, I think, a defensible one. I have said in that:

ART. 47. *Powers incident to power to approve.*—The power to approve the sentence of a court-martial shall be held to include, inter alia:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve the evidence of record requires a finding of only the lesser degree of guilt.

In regard to that, I want to point out to you what the existing procedure is. Gen. Wood at Governors Island is in command of the Eastern Department. He convenes a court, say, at Fort Myer. A private soldier is tried before that court for desertion. Evidence is heard, and the court finds him guilty and makes up its record and sends the case to Gen. Wood. Gen. Wood reads over the case and he reaches a different conclusion upon the evidence. He finds that

the essential element of desertion; that is, the intent to permanently abandon the service, is not made out from the record. He knows he can not approve that conviction. Our present practice is to return the record to the court and ask them to reconsider their finding and sentence, stating that the reviewing authority finds the evidence not sufficient to convict the accused of desertion at all, but it is sufficient to convict him of absence without leave. The court may adhere to its former finding of guilty of the major offense of desertion, and when the case comes back to Gen. Wood, all he can do is to disapprove, and there is a failure of justice.

Now, in the usual case it is conceded that the man is guilty of absence without leave. The court could, if they had adopted the view of the convening authority, Gen. Wood, have found him guilty, not of desertion, but of absence without leave. I want to give Gen. Wood in such cases authority to write in the finding "guilty" of the lesser offense, but never under any conditions the authority to write in a finding of "guilty" of a greater offense; only of some lesser and included offense. I can not impress upon you in one statement the amount of time we lose in cases such as I have cited in returning a case for revision. It would expedite trials greatly if we could have this additional authority. The House committee and the Senate committee both have heard me heretofore very tolerantly on this point. It can never operate to the disadvantage of a man, but only to his advantage. It saves time.

Senator COLT. I do not quite follow that. Under the present practice, if Gen. Wood sends the case back, then what would be done?

Gen. CROWDER. The court would reconvene, and there would be read to them by the judge advocate the indorsement of Gen. Wood, and his expression of views, and the court would then be cleared, the judge advocate would withdraw, and they would consider the views of the department commander.

Senator COLT. Supposing they adhered to their original decision that the accused was guilty of the major offense of desertion; then what would be done?

Gen. CROWDER. The case would be returned.

Senator COLT. It would be returned to Gen. Wood?

Gen. CROWDER. Yes; and then of course he would have to disapprove it, because he had already made up his mind that he could not approve the finding of guilty of the major offense.

The CHAIRMAN. Then there is no conviction?

Senator COLT. No approved conviction?

Gen. CROWDER. No; the man escapes punishment. I have also written in here, in paragraph 6:

"The power to confirm or disapprove the whole or any part of the sentence."

The law says that no sentence shall be carried into effect until the same shall be approved. It might be argued that the whole sentence must be approved. I want the right to approve the whole or any part of it. For instance, dishonorable discharge, total forfeiture, confinement at hard labor for six months—to approve or disapprove any part of that sentence. There is no doubt but that the reviewing authority should have that authority; but I want to remove all question as to the existence of this authority by incorporating it here in express terms.

I am going to ask you to omit paragraph "c" because of some recent legislation enacted by Congress which gives us the right to suspend sentences, and makes it no longer important that we should have subdivision "c." Just transpose the word "and," up here, and stop it there.

Now we come to a case where the President must act by way of confirmation; where the action of the commanding general—Gen. Wood, for example, in a case like that—is not final. The existing law says:

ART. 109. All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles. (Art. 65, Code of 1806.)

The reading of that article necessitates the reading of several other articles to show when confirmation is required. I have gathered all those articles together, and you will find them printed on page 28 of the bill in the righthand margin. They are articles 108, 106, 107 and 105. I have gathered all those into a single article, which reads like this:

ART. 48. *Confirmation—When required.*—In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

(a) Any sentence respecting a general officer.

The existing law says:

No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer shall be carried into execution until it has been confirmed by the President.

He has a special status before courts-martial. Article 48 continues as follows:

(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or division.

That is a reenactment of the existing law.

Senator COLT. Yes.

Gen. CROWDER. In time of war we trust the commanding generals of our field armies to pass finally upon a sentence dismissing an officer below the grade of general, but in time of peace any dismissal, no matter what the rank of the officer—he may be the junior second lieutenant in the Army—must go to the President for confirmation before that officer can be put out of the service. To continue:

(c) Any sentence extending to the suspension or dismissal of a cadet.

That is, again, the existing law. It reads:

The superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentences of suspension and dismissal, subject to the same limitations and conditions now existing as to other general courts-martial.

The next paragraph reads:

(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies, and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general

of the Army in the field or by the commanding general of the Territorial department or division.

We have always had that authority. It is reenacting the existing law.

The CHAIRMAN. I think article 49 is merely giving the same powers of the appointing power to the confirming power.

Gen. CROWDER. Yes.

We already have the power in the existing articles to pardon or mitigate the punishment. That word "pardon" is inaptly used. It requires you to consider the pardon of a punishment, not a pardon of an offense. It is more accurate to use the phrase "mitigate or remit," in speaking of punishments. I am inserting that phrase in article 50.

There is one limitation upon the present law in the second paragraph of article 50, where it is said:

But no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

Of course, when the department commanders try officers, and they are sentenced to a loss of files, it may be 10 or it may be 50 files, they lose that much rank on the lineallist. That sentence remains under the control of the department commander so long as the officer remains in his command, and he may remit or mitigate it at any time; but the sentence is immediately given execution here at the War Department and the lineal lists of the Army are rearranged. When a department exercises this power of remitting or mitigating such a sentence, his action disturbs the War Department administration. That I have provided that where the sentence is in the nature of a loss of files, it must go to the President for his mitigation.

Article 51 relates to "Suspension of sentences of dismissal or death." It substantially repeats the provisions of article 111. It provides that in case of a sentence of death or of dismissal of an officer, the convening authority may suspend the sentence until the pleasure of the President may be known.

When we come to article 52, it repeats the provisions in the existing law of April 27, 1914, introducing the principle of a suspended sentence of dishonorable discharge. There is nothing new to note about it. It is just a reenactment of the existing law, in order to give it its proper place in the code.

Coming now to article 53, we have here in form of statute law an existing general order of the War Department. I think we stretched our authority to the utmost when we issued it. I suppose you are familiar with the judicial controversy that has waged in some States as to whether the power to suspend sentence is an inherent power. We have assumed in this order that it rested with the convening authority, and we then said where disciplinary sentences were imposed upon soldiers, the convening authority might in such a case bring the man before him and say: "I am going to suspend this sentence during good behavior, and I will eventually remit it if you make good." That authority has been questioned in courts. We are doing this under authority of a War Department order, alone. It is desirable to have express statutory authority for such a practice. The effect will be to introduce into our military code the principle of suspended sentence, which is finding expression in every reformed penal code in the United States.

The concluding provision of the article reads:

At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the authority competent to order the execution of like sentences in the command to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted.

I am a great believer in the efficacy of suspended sentences. Many men are reformed in that way. It is desirable that all commanding officers shall have this authority.

We come now to the punitive articles. The first deals with fraudulent enlistments. The constitutionality of this article has been questioned, and the issue reached finally a Federal court in the case "In re Carver, 103 Federal Reporter, page 635." In that case the court said:

It may well be doubted whether under the Constitution fraudulent enlistments can be made offenses punishable by a court-martial, but there can be no question that the receipt of pay or allowances after fraudulent enlistment may be made so punishable—and refused to discharge on habeas corpus a minor who had been convicted under the statute.

This statute was the result of a long-continued agitation. "Frauders"—that is the term by which they are known—would go about recruiting stations and enlist, misrepresenting their qualifications for enlistment. They succeed in getting into the Army for brief periods of time, when the fraud is discovered and they are brought to trial. Some of them are convicted felons. Some of them are married men deserting their families. Some are minors.

We found out that we were spending a great deal of money upon men who had frauded their way into the service by one means or another. I estimated at one time the amount of money lost annually to the United States through the operations of these men. An act was passed to meet that situation.

Senator COLT. What constitutional provision is brought in question there?

Gen. CROWDER. Only cases arising in the land and naval forces may be tried by courts-martial. Other cases must be tried by civil courts. In such a case as enlisting under fraudulent representations the act of fraud precedes or coincides with enlistment. The question is, Does such a case arise in the land forces?

Senator COLT. Oh, yes.

Gen. CROWDER. But that fraudulent act, connected with his receipt of pay and allowances under the fraudulent enlistment, is what our statute makes a military offense. I suppose we could get along with an article which would say that a person who having fraudulently enlisted in the service of the United States, shall receive pay and allowances thereunder, shall be punished as a court-martial shall direct; but the statute has served every purpose in this form, and so long as the courts have sustained it in this form—

Senator COLT. Why not leave it?

Senator LEA. Yes.

Gen. CROWDER. In article 55 I have consolidated the provisions of eight different statutes or regulations. The first of the statutes consolidated was article 3 of the existing code. It punished officers of the Army who knowingly enlisted into the military service certain

classes of persons. After that statute was passed other statutes were enacted which prohibited enlistments of certain classes of persons. It so happens that under the present code, if we try a man—an officer—for making one of the prohibited enlistments under article 3, we charge him under that article, but if he is being tried for making one of the enlistments in these other statutes or regulations we must charge him under the general article. I grouped all in one provision, as follows:

ART. 56. *False muster.*—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

In article 56 you will observe that four articles of the existing code are consolidated into one article. We are dealing here with false musters. I think a very hasty examination of this will show that we have combined, to very great advantage, all these articles into one, and made it a much simpler matter to charge an accused for these offenses.

Article 57 is a condensation of articles 7 and 8 of the existing code and deals with false returns and omission to render returns.

Now we come to the article respecting desertion. The present statute deals with officers or soldiers. The new statute deals with any person subject to military law. People who are serving with the Army as retainers to the camp, or such persons as are serving with armies in the fields, may desert in times of war with all the disadvantage to the service that results from desertion of soldiers—may even desert to an enemy. The commanding general should have control over them. The only control that would be effective is to classify them with the soldiers, and punish their desertion the same as the desertion of a soldier. The Army is threatened as much by one desertion as by the other.

Senator COLT. "In time of war," you say, I see?

The CHAIRMAN. The death penalty is prescribed, but the death penalty is limited to time of war.

Gen. CROWDER. Yes; the existing law has a peculiar provision. It says:

Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death.

Reading that article literally, it does not make any difference when the desertion took place, the punishment in time of war is death.

The CHAIRMAN. It is very inaptly drawn.

Gen. CROWDER. Of course we have always given the other interpretation to it, that it is desertion *committed* in time of war that is intended. The new article expressly so states.

The next is article 59. The existing law reads:

ART. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States shall, in time of war, suffer death or such other punishment as a court-martial may direct, and in time of peace any punishment, excepting death, which a court-martial may direct. (Art. 23, code of 1806, as amended by act of May 29, 1830.) (Art. 4, Sec. VI, Brit. Code, 1765.)

I have put it—

Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States, etc.

The proposed article broadens the scope of existing article 51, so as to include "all persons subject to military law," as defined in proposed article 2, and also to include "knowingly assisting" desertion. It may be observed that the offense of assisting a deserter is not only what is likely to be committed as "advising" and "persuading," but the overt act of assistance may be satisfactorily established, whereas "advising" and "persuading" are difficult of proof, even with the testimony of the deserter himself, which testimony, for apparent reasons, must be generally unsatisfactory. The proposed article (like proposed articles 39 and 58) also observes the distinction between advising, persuading, or knowingly assisting another to desert in time of war upon the one hand and when committed in time of peace upon the other.

Article 60 relates to the offense of entertaining a deserter; that is, in receiving him. I have made it read:

ART. 60. *Entertaining a deserter.*—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

Article 61 relates to "Absence without leave." Here is an instance of condensation of six articles into one. I do not know any cause which has produced more error in pleading than these six articles dealing with different forms of absence without leave. The first one punishes any officer or soldier who lies out of his quarters, garrison, or camp without leave from his superior officer; the second, any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer; the third, any officer or soldier who fails, except when prevented by sickness or other necessity, to repair at the fixed time at place of parade, exercise, or other rendezvous, and so forth; the fourth, any soldier who is found 1 mile from camp without leave in writing from his commanding officer, as a court-martial may direct.

All these refinements in stating the offense of absence without leave grew up at an early date. One article has been substituted for them all, article 61, which reads:

ART. 61. *Absence without leave.*—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

The CHAIRMAN. Ought there not to be an exception of physical disability?

Gen. CROWDER. No; because that is always a matter of defense.

There is no change in article 62 except that we have included among those against whom contempts may be committed the Secretary of War and the governor or legislature of any State, Territory, or other possession of the United States.

There has been a slight change in article 63. The words "commanding officer" have been changed to read "superior officer." Certainly the disrespect that the article punishes is quite as great if directed toward a superior officer as when it is directed against a

commanding officer. It will rarely happen that the superior to whom a subordinate has been disrespectful stands to him in the relation of a commanding officer.

Article 64 takes the place of article 21. The only material change is that the word "willfully" has been put in before the word "disobedience" in the third line of the original article 21 to make the letter of the law accord with the construction it had in practice received. The article is one that authorizes the punishment of death, and it was argued from that fact that it was not every slight disobedience that the article took cognizance of, but disobedience of a willful character, which exhibited the individual in the attitude of defiance against superior authority.

Article 65 is new. It punishes "any soldier who attempts or threatens to strike or assault, or willfully disobeys the lawful orders of a noncommissioned officer," and so forth.

The insertion of this article was suggested from many sources. The purpose of it is to enhance the respect of the private soldier for his noncommissioned officer. The opinion of most officers who have to do with these things in a practical way is that it will do very much toward establishing the noncommissioned officer in a position of authority over enlisted men to have this special article. I have inserted it out of deference to their views.

In article 66, which deals with mutiny, the substantial change is the insertion of the words "attempts to create." The old article punished mutiny in several forms, but did not punish an attempt to create mutiny. The old article specified "mutiny or sedition in any troop, battery, company, party, post, detachment, or guard," and following that I have inserted the words "or other command." Those are the only changes in that article.

Article 67 relates to failure to suppress mutiny or sedition, which is punished in substantially the same way as in existing article 23, which it replaces, except that the article has been extended so as to penalize the withholding of facts which would cause a reasonable belief that a mutiny or sedition was about to take place. It makes it an offense for any officer or soldier in possession of such information to fail to reveal it to the proper authority.

Article 68 deals with quarrels, frays, and disorders. The new article substantially repeats the existing article 24. We have had a good deal of discussion about the construction of the old article 24, which says: "All officers of what condition soever."

It was finally established by authoritative construction that phrase included noncommissioned officers. I put it in here to shut off discussion, and that our young officers who come into the Army will not have to read whole pages of discussion to find out that the non-commissioned officers have this power to part and quell frays and disorders. It is the common law as to affrays applied to the military service.

Article 69 deals with arrests and confinement of accused persons. In one article here there are consolidated two articles of the existing code, 65 and 66. The accepted construction of the existing law (articles 65 and 66) is that the word "crime" employed in both articles includes all military offenses denounced and punished by any of the Articles of War, and includes, therefore, civil crimes of which courts-martial have concurrent jurisdiction with the civil courts, as well as purely military offenses. (Winthrop's Military Law and

Precedents, vol. 1, p. 152.) These two articles make no distinction based on the gravity of the crime, but in terms require arrest in all cases. And it is further to be observed that under the terms of article 65 the officer is entitled, of right, to be confined in a particular place, viz, in his barracks, quarters, or tent, no matter how insecure it may be.

The article reads:

ART. 65. Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer.

That might be the most insecure place in the garrison to keep them. Sometimes it is necessary to arrest an officer for a serious offense, where you are under the almost certain apprehension that he will avail himself of any opportunity to escape; but as this article is mandatory that he shall be confined to his barracks, there is no alternative.

In all cases, regardless of the circumstances of the officer's offending, he must be deprived of his sword at the time the arrest is imposed. The practice of the service has always arrayed itself against these mandatory requirements. In many cases officers are not put in arrest prior to trial, and, in the limited number of cases where arrest is imposed, it is usually the kind of arrest which the service recognizes as "open arrest"—analogous to enlargement on bail. It is entirely accurate to say that the arrest of officers, their confinement in barracks quarters, or tent, and depriving them of their swords, are in the practice of to-day entirely matters of discretion. In other words, the service simply disregards these provisions.

While commanding officers have not hesitated, where the probability of an attempt to escape was great, to confine officers in places of greater security than their barracks, quarters, or tents, the class of arrests imposed upon them, as stated above, has generally been "open arrest," while in a large number of cases no arrest is imposed at all; and a similar rule has been followed in case of soldiers. Proposed article 69 is drawn in accordance with the execution which the existing law has received, and it has been expanded, for obvious reasons, to embrace within its provisions persons subject to military law and to trial by court-martial who are neither officers nor soldiers. The one other important change made is the change of the punishment for breach by an officer of his arrest and confinement. Under the existing law—article 65—the punishment of dismissal is mandatory for this offense, while under proposed article 69 it is authorized but discretionary with the court.

The CHAIRMAN. You insert in article 69 what had been the construction of the other articles?

Gen. CROWDER. Yes. That brings up one fact. This code is, as I have been reminded several times, an archaic code, but as the service conditions have changed, we have had to resort to pretty bold construction to make the old code fit the new conditions. Here is one instance where, by construction, we have built up a rule which the service recognizes as a necessary one, but which is not in accordance with the statutory law. The cases of that kind are rather numerous. That is one of the reasons why I have been urging revision so strongly. I shall have other articles than this one to call your attention to where that is very prominent.

(At 11 o'clock p. m. an adjournment was taken until 10.30 o'clock a. m., to-morrow, Tuesday, February 8, 1916.)

TUESDAY, FEBRUARY 8, 1916.

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

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m.

Present: Senators Lea (chairman) and Colt.

STATEMENT OF BRIG. GEN. ENOCH H. CROWDER, UNITED STATES ARMY—Continued.

Gen. CROWDER. Mr. Chairman, at the conclusion of our session last night we had reached article 70, on page 41. Article 70 has already been considered, and you have instructed me to write a new article in lieu of this article on the lines of the one that passed the Senate at the last session; so I presume I may turn at once to article 71.

Article 71 is one of a group of three articles relating to the commitment of prisoners, reports concerning them, and their release. The changes made are so slight that I think they may be passed over without comment.

The CHAIRMAN. There are no substantial changes?

Gen. CROWDER. No substantial changes have been made.

Article 74, however, is an important article. I wish to invite your attention to the condition of the existing law, which you will find in the right-hand column, article 59. It is perhaps one of the most archaic provisions of the code. It is important in its subject matter, viz, the surrender of offenders to the civil authorities and is expressive of the comity which prevails between civil and military authorities. The existing law requires the turning over of officers and soldiers accused of civil crimes, in these terms:

When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States which is punishable by the laws of the land, the commanding officer and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

This article is expressive of the subordination of the officers and soldiers that constitute our Army to the civil authorities. It recognizes the amenability of all military persons in their civil capacity to the civil jurisdiction for breaches of the criminal law of the land. The article was copied from the British code of 1765 and it reflects the condition of the criminal law of that period. We have had to read into it a great deal by construction of doubtful validity, to the end that the law might conserve the principle underlying its enactment. The principal defects of the article are these:

It specifies capital crimes and offenses against persons or property only. It does not cover, therefore, offenses against society or the public, or offenses against the Government, except where, in addi-

tion to having this character, they also affect individual persons or their property. But the article covers this class of offenses only when committed against citizens of the United States. It does not cover the offenses when committed against citizens of our territories, or against aliens residing within our jurisdiction and who are entitled to the equal protection of our laws. Then again we have to deal with the archaic provision that the application for the surrender must be made "by or in behalf of the party injured." This harks back to the days when crimes were punished at the instance of the individual against whom committed, and ignores the fact that under modern law all crimes are punished at the instance of the State and the application is regularly submitted by the State authorities.

Senator COLT. The crime is an offense against the State, under the modern jurisprudence, and not against the individual?

Gen. CROWDER. Against the State; yes.

I have remedied all those defects by providing in the new law:

When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial.

Then follows the penal provision against any commanding officer who, having the custody of any such person, willfully refuses or neglects to discharge his duties under this article. I have written into the new article one exception expressive of the construction of the existing article which has always prevailed. You will note that from the mandatory requirement of the article that officers and soldiers accused of civil crimes shall be turned over there is excepted any officer or soldier who is held by the military authorities to answer or who is awaiting trial or the result of trial or who is undergoing sentence for a crime or offense punishable under the Articles of War. In respect of this excepted class it will remain discretionary whether or not they shall be turned over upon demand, and the rule of comity is left to govern. In the ordinary case where the soldier is wanted upon a charge of greater gravity in the civil court than the military court is taking cognizance of in his case he would, of course, be turned over; but where the military charge was of the greater gravity he would be retained. There has been little trouble in determining upon a course of procedure in such cases. The civil authorities are not usually found in the attitude of urging that a man be turned over by the military authorities to them for a misdemeanor when he is being held by the military authorities for a felony, and the converse of this proposition is true. Military authorities do not insist upon retaining a man upon a trivial military charge where the civil authorities wish his surrender for trial for a serious civil offense.

The CHAIRMAN. Does that not seem proper to you, Senator Colt?

Senator COLT. It does to me. I do not see how he could be punished twice.

Gen. CROWDER. That issue is not always or even generally presented. The two offenses, military and civil, may be very different offenses. For example, let us suppose the soldier is held under military authority at Fort Myer, Va., for mutiny. That is a very grave military offense—a capital offense. Along come the civil authorities of Washington, D. C., and want him for larceny. Under the mandatory requirements of the existing law we would be required to turn over this man to the civil authorities. I do not think you want to require that. It is always competent under the article as I have drawn it for the military authorities to recognize the requisition of the civil authorities when the conditions are reversed and the graver offense is on the civil side, and the military authorities are required under the mandatory requirements of existing law, and under the law as proposed, to turn over offenders when they are not accused before the military authorities.

Senator COLT. Yes.

Gen. CROWDER. We have gotten along with amicable relations generally with the civil authorities in this matter. The rule of comity has been quite adequate to maintain those relations.

Senator COLT. We must leave considerable to the rule of comity. We do in the conflict between the State and the Federal authorities, you know.

Gen. CROWDER. Yes.

Senator COLT. Foreigners wonder how we can work such a complex system, but comity plays an important part. Looking at what you call your archaic provision, assuming that is sound, and taking that as a basis, it seems to me that your article is a great improvement upon it.

Gen. CROWDER. Of course it was absolutely necessary to get rid of those archaic provisions which recognize that the surrender must be made only upon the demand of the party injured.

The CHAIRMAN. Is not article 59, as a matter of fact, really unworkable?

Gen. CROWDER. Yes; that is quite true.

Senator COLT. It is more a method of enforcing it.

Gen. CROWDER. The concluding provision of the new article is new. It reads:

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

A present the court-martial sentence runs while the military offender is in the hands of the civil authorities.

The CHAIRMAN. I noticed that.

Gen. CROWDER. And, of course, he would not be entitled to that. I have inserted this concluding provision, and under its terms, when the civil courts are through with a military offender who has been turned over to them, that man will be returned to face his record that he made in the Army.

The war offenses are set forth in a group of eight articles, articles 75 to 82. Article 75 relates to misbehavior before an enemy; article 76 to subordinates compelling their commander to surrender;

article 77, improper use of the countersign; article 78, forcing a safeguard; article 79, care and custody of captured enemy property; article 80, dealing in captured or abandoned property; article 81, relieving or corresponding with, or aiding the enemy; and article 82, spies. I have made but slight changes in these articles. The changes made introduce no innovations. Of course, where in the existing law, as in article 41, I find the offense of occasioning false alarms stated in such terms as to be committed by officers only, I have broadened the application of the article to include enlisted men. Where the phrase of limitation "which he is commanded to defend" operates to restrict so much of article 42 as relates to the abandonment of posts and positions, I have substituted the phrase "which it is his duty to defend," making the article applicable whether the officer is "commanded" to defend a place or not.

New article 75, which substitutes articles 41 and 42, has been further broadened so as to include any kind of command, instead of the particular commands "fort, post, or guard," which we find mentioned in the existing law. It will be found, I think, that in new article 75 we have combined the provisions of old articles 41 and 42 in such a way as to preserve the substantial provisions of both, and broadening the application of both the existing articles in such a way as to conserve the best needs of the service.

New article 76 substitutes old article 43 and deals, as does the latter article, with "subordinates compelling commanders to surrender." The application of the old article 43 is to the commander of a "garrison, fortress, or post." It has no application to any other form of command. I have added the words "camp, guard, or other command," thus broadening the application in a way which I think it will be conceded the article should be broadened. This is practically the only change.

In respect of article 77, which deals with improper use of the countersign, I have made one important change. You will notice that the existing article 44 punishes with death the misuse of what its archaic phraseology calls the "watchword," and also the misuse of the parole with death, both in peace and war. It is a fact that a soldier who should violate this article at Fort Myer to-morrow, in a period of profound peace, would have committed a capital offense, for which this article authorizes the death penalty. It is not limited to the war offense. In new article 77 I have made it a war offense only.

Senator COLT. I see there is a saving clause there. It says "or such other punishment as a court-martial may direct."

Gen. CROWDER. Yes; the death sentence is not mandatory, but the death penalty is authorized. In other words, it is a capital offense, just as murder is. The death penalty is not mandatory in the case of murder.

Article 78 relates to forcing a safeguard. It substitutes article 57 of the existing law. The existing law is operative both in peace and war. While safeguards, which are certificates of special privilege of protection granted by military commanders to private persons deemed to have a claim upon the protection of the Army, to corporations, public institutions, etc., are not ordinarily issued in time of peace, as the article is drawn should a commander in a period of joint maneuvers, for instance, issue such safeguards and they were to be violated

by any officer or soldier, that officer or soldier would have committed a capital offense, for which the death penalty in this case is mandatory. Note the language of existing article 57, "shall suffer death." The alternative, "or such other punishment as a court-martial may direct," is not found in this article.

Senator COLT. You know there is a rule running through jurisprudence that where a law has remained obsolete for a good many years the court holds that he can not enforce it. Take the law of England with regard to the banishment of Jesuits. The court held that that law could not be enforced, and it would not enforce it.

Gen. CROWDER. It was regarded as repealed by nonuser?

Senator COLT. Exactly.

Gen. CROWDER. The same considerations would probably influence the construction of our existing article 57.

New article 79 restates article 9 of the existing code. Our experience in the Philippines and China has indicated that there should be emphatic declaration, and thereby a warning to all persons subject to military law, that "all public property taken from the enemy is the property of the United States." This has been inserted in new article 79, and immediately precedes the provision of article 9 that such property so taken from an enemy "shall be secured for the service of the United States." I think that with this unequivocal declaration of a principle of law we shall attract the attention of the service in a way that will be of material aid in stopping looting and in protecting and preventing the neglect of such property. Of course, the concluding provision of old article 9 was objectionable, "and for neglect thereof the commanding officer shall be answerable." The new article provides that for such neglect, or for any wrongful appropriation of such property, the military offender shall be punished as a court-martial may direct.

Article 80 deals with captured or abandoned property. It is built upon a Civil War statute, and was found very necessary during that period. That Civil War statute undertook to punish violators of its provisions, military and civil, by "any court, civil or military, competent to try the same." Of course, this statute should have been made the basis of an article of war when the Revised Statutes of 1874 were compiled. I say it should have been done at that time because the revisers did make an article of war out of sections 1 and 2 of the act of March 2, 1863, entitled "An act to prevent and punish frauds upon the Government of the United States." The article they then made constitutes article 60 of our present code and article 93 of this revision. Our new article 80, which is carved out of the Revised Statutes, confers no new jurisdiction upon courts-martial. I am simply giving the Civil War statute a place in the military code, where students of military law may become familiar with it.

Article 81, which deals with "relieving, corresponding with, and aiding the enemy," is a consolidation of articles 45 and 46 of the existing code. As the offenses denounced by the present article may, and usually will be, committed by persons outside of the Army, I think the jurisdiction of a military commission for their trial should have been recognized in the old statute, because the military commission will in time of war try most of these offenses. The new article is drafted so as to recognize the jurisdiction of a military commission in such cases.

Article 82 deals with the general subject of "Spies." I have taken no liberties with this statute, which is section 1343 of the Revised Statutes.

Senator COLT. Is there no limitation there?

Gen. CROWDER. You refer to the death sentence in article 82, relating to spies, I suppose. No, there is no limitation; but this is the only offense which a court-martial tries where it is mandatory to pronounce the death sentence. It may be remarked in connection with this article that the legislation of the Continental Congress on this subject denounced as spies persons who were "not members of or owing allegiance to any of the United States of America," and in the form this article appeared in the code of 1806, no person was designated a spy except those "not citizens or owing allegiance to the United States of America." It was not until the Civil War period was reached that the article was so amended as to apply to citizens of the United States.

In regard to these miscellaneous offenses, we will pass over article 83, a consolidation of existing articles 15 and 16, and article 84, which is a reenactment of article 17, with the statement that no substantial changes have been made.

We come now to an article which deals with the offense of drunkenness on duty, new article 85. The existing law requires mandatory dismissal upon conviction of this offense. I have retained this mandatory sentence of dismissal for the war offense and authorized, but left discretionary with the trial court, the imposition of the sentence of dismissal for the peace offense.

I have been criticized in the public press of the country for taking a view which was characterized as sympathetic with drunkenness. My motive was exactly the contrary—that is, to get a greater amount of punishment for the offense. At present the law punishes with mandatory dismissal every case of drunkenness on duty. To certain officers the law assigns a continuous status of duty. A post surgeon, for instance, is always on duty. The commanding officer of a post is always on duty. If that officer violates this article, a court has no discretion. It must sentence him to dismissal.

In my remarks under this particular article I have reviewed the Articles of War for the purpose of discovering the principles that have governed Congress in prescribing mandatory dismissal, and I would like to read into this record just what I have said on the subject [reading]:

The existing law, under authoritative and accepted construction, covers the offense of drunkenness of an officer on all descriptions of military duty, and makes mandatory in every case of conviction the sentence of dismissal. The proposed article reserves this extreme penalty for the offense of drunkenness on duty in time of war, and authorizes, but leaves discretionary with the court, the imposition of the extreme penalty for this offense committed in time of peace. The question of where the line of distinction should be drawn between mandatory and discretionary dismissal in such case involves a consideration of other related provisions of the existing and proposed articles.

The existing articles make the sentence of dismissal mandatory in the following cases: The taking of money or other consideration in connection with mustering of troops (art. 6); signing a false certificate relating to the absence or pay of an officer (art. 13); laying duties on victuals or necessary supplies for his command for private advantage (art. 18); the making of false muster of man or horse, or signing, directing, or allowing the signing of any muster roll, knowing the same to contain a false muster (art. 14); the making of false returns (art. 8); and disgraceful conduct rendering the officer unfit to associate with gentlemen (art. 61). It will be readily conceded that

in all these cases it is entirely fitting that the law should speak a final word and require the sentence of dismissal. (It is pertinent to note in this connection that cases in which such sentence has been disturbed are rare and limited to those where the President, as confirming authority, has been in disagreement with the trial court as to the sufficiency of the evidence to establish guilt as charged or has found invalidity or prejudicial irregularity in the conduct of the trial.) The corresponding articles of the revised code preserve in all these cases the requirement of mandatory dismissal.

Mandatory dismissal is further provided for in the existing code as follows: Failing to report a deserter (art. 50); breach of arrest (art. 65); refusal to deliver to a civil magistrate, upon proper demand, soldiers accused of crime (art. 59); and sending or accepting a challenge to fight a duel (art. 26). The commission of any one of these offenses does not conclusively establish unfitness to continue in the service, and as to them the law should not speak the last words and imperatively require a sentence of dismissal. The corresponding provisions of the proposed revision authorize, but leave discretionary with the court, the imposition of the sentence of dismissal.

The distinction which should be drawn between mandatory and discretionary dismissal is here indicated to be that where the offense committed establishes disqualification in character for continuance in the military service, the law should make dismissal mandatory and in other cases discretionary. In which category does the offense of drunkenness on duty fall? It is to be considered in this connection that we are not dealing with drunkenness which manifests itself in disgraceful conduct, triable under the 61st Article of War (proposed article 85), as conduct unbecoming an officer and a gentleman, but with drunkenness on particular occasions of duty, i. e., isolated acts of drunkenness. Having regard to this fact and to the further fact that the article covers all descriptions, of duty however unimportant, and that military law assigns to certain classes of officers, notably commanding officers, a continuous duty status, it would seem that mandatory dismissal, which everyone concedes to be appropriate for offenses involving moral turpitude, should not be an invariable rule established by law for the offense of drunkenness on duty, but that the trial court should be vested with discretion in such case. To this it is believed that one exception should be made. In war, because of the increased responsibility under which the Army acts, there can be no temporizing with any class of misconduct which imperils its safety and the success of its operations. The reasons which justify punishing the war offenses of misuse of the countersign, sleeping on post, desertion, etc., more severely than the corresponding peace offenses, justify a more severe penalty or drunkenness on duty in war, and the new article is drawn in accordance with this view. If enacted into law it will be for the trial court with all the circumstances, character, and degree of offending in evidence before it, to say whether an officer convicted of this offense should be dismissed, subject, of course, to the confirming authority of the President, or retained in the service with disciplinary punishment. It can not be doubted that under a law making dismissal for the officer discretionary there will be less reluctance in bringing officers to trial for this offense than there is under a law which provides for mandatory dismissal, and that there will be more real punishment for the offense, and greater deterrent effect, because of the greater probability of trial, than obtain under the existing law.

It is pertinent to note in this connection that article 5, section 14, British Code of 1765, providing for mandatory dismissal for this offense, and from which we copied our existing article, has been revised so as to provide for *discretionary* dismissal in all cases of drunkenness of an officer, whether on duty or off duty and whether committed in peace or in war (Art. 19, British Code of 1914); and that mandatory dismissal for this offense is not a requirement of the Articles of War for the government of the Navy of the United States.

(The committee further discussed this article informally.)

The CHAIRMAN. That brings us to article 86.

Gen. CROWDER. Article 86. I broaden that article. It is a reenactment of article 39. Article 39 makes the offense of sleeping on post out at Fort Myer, for instance, a capital crime. To-day, in time of peace, if a soldier should go to sleep on post out there he would be guilty of an offense punishable under this article with death. I have changed that so as to provide for both the war and peace offense. In time of war it is very properly punished with death. A sentinel who is guarding the safety of an army and goes to sleep on post ought to

incur that penalty, but certainly the peace offense ought not to be so punishable.

You will notice further that I have broadened the article so as to include the word "drunk" as well as the word "sleeping." As amended it provides that if any soldier is found drunk or sleeping on post in time of war he shall be punished with death or by such other punishment as the court may direct.

Here is an article [art. 87] which prohibits a personal interest in the sale of products. It is rather an obsolete article, but I have not felt like excluding it from the code. It found its way into our code at a time when armies lived upon communities and the people were encouraged to bring victuals and other products into the limits of the camp, and it was aimed at any commanding officer who undertook to get a "rake-off" or profit.

At one time I had marked this for elimination, but I was advised that it might have application when an army was serving in certain parts of the country, remote from lines of communication, and that it had better be left in. I have broadened the application of the article to include all places where the troops may be serving, and thus removing the limitation flowing from the phrase "garrison, fort, or barracks."

In its present form it says—

The CHAIRMAN. It applies to troops in garrison, fort, or barracks?

Gen. CROWDER. Yes; to troops in garrison, fort, or barracks. There is very little occasion for regulation in places like those, where there are general supplies. So I have broadened it to include any place where troops may be serving.

This same article of the existing law makes the sentence of dismissal absolutely mandatory, just as in the case of drunkenness on duty, and it is the only sentence which can be imposed. The new article likewise provides for mandatory dismissal, but I have added the phrase "such other punishment as a court-martial may direct."

The CHAIRMAN. You have added "and suffer such other punishment as a court-martial may direct."

Gen. CROWDER. "And suffer such other punishment," and so forth, but leaving dismissal mandatory. I do think that a man who does anything dishonest like that should go out, but there is no reason why if he has done that dishonest thing—and it is grave dishonesty—he should not be punished for the civil offense, so I have provided that he may be imprisoned.

The CHAIRMAN. I imagine the same reasoning virtually controls article 88?

Gen. CROWDER. That is true as to article 88, which is a reenactment of article 56, except that article 56 was applicable only in foreign parts. Of course, I have made it applicable whether a man is at home or abroad.

We now come to article 89, "Good order to be maintained and wrongs redressed." Articles 54 and 55, which it is designed to replace by this new article, are perhaps the most archaic provisions of our code. The existing provisions of our statute law were taken from the British articles, and date in our law from 1775. Their purpose is to protect civilians from disorderly and riotous acts on the part of the military. Winthrop refers to the existing law as—

incomplete and unsatisfactory, especially as it leaves in doubt what classes of injuries are in view—whether injuries to the person only or injuries to the property as well as person; and also fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effected.

But this is only a very partial enumeration of the defects of the existing law. For example, the application of the existing law is to "citizens of the United States." If the soldier damage anyone who does not occupy the status of citizen, the remedy of the article does not avail in such a case. This was perhaps its most notable defect, but there were many other indefinite and obscure provisions, and commanding officers have sometimes been reluctant to act upon it. The usual application of the article is to conditions like this: A command is marching across the country and makes temporary camp. The property of some citizen adjacent to the camp is raided or disturbed. This article says to the commanding officer, "You shall see that reparation is made so far as a part of the offender's pay will go toward such reparation." Ordinarily there is the element of concealment to deal with. Members of the raiding party protect each other. The law takes the view that where there is such concealment, so that the individual trespassers can not be discovered, the trespass is chargeable to the command, and under prescribed procedure of general orders we have heretofore undertaken to assess damages and to make payments. We have been going ahead without authority of statute law to make stoppages of pay against the entire command to reimburse a citizen for whatever loss he may have sustained. It is time that this practice received the definite sanction of statute law. What the new article provides is fairly summarized as follows:

Article 89 is a consolidation of the punitive parts of existing articles 54 and 55. It omits certain language of the existing articles archaic in character and not descriptive of modern conditions. Likewise there has been omitted the provision which limits the application of the law to "citizens of the United States," inasmuch as all persons resident within the United States are equally entitled to the protection of its laws. The word "degradation" has been inserted with a view to making the article cover all injuries to property. The words "part of" preceding the words "the offender's pay" have been omitted in order to make the article more definite and effective. The words "beating or otherwise illtreating any person" have been omitted, for the reasons (a) that as offenses against persons they are denounced in proposed articles 92 and 95; and (b) because of the difficulty in fixing the money value to constitute reparation for personal injuries, particularly in view of the fact that the actual extent of physical injury is by no means immediately apparent, and because, further, of the comparatively infrequent claims for reparation for purely personal injuries which have been made in the past. The proposed article is made applicable to all persons subject to military law, as the offense here denounced is quite as likely to be committed by retainers to the camp and persons accompanying or serving with the armies in the field as by officers and soldiers.

The administrative part is provided for in the next article, which I am considering out of its place. It is article 104. +

The CHAIRMAN. Let me ask, Gen. Crowder, in finally preparing this bill, is it your suggestion that article 104 should be renumbered? For instance, I notice that article 104 follows article No. 90.

Gen. CROWDER. It should go back to its place as article No. 104. I put it in here because I knew that we could not consider one without the other; but in the reported bill it will take its old place. It comes under the miscellaneous provisions, while article 90 is punitive. We are here considering the punitive part of the code. Article 104 is a reenactment of a general order, as I have said, and we

will get the best idea of what it contemplates and provides if I read the article:

ART. 104. *Injuries to person or property—Redress of.*—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

That is something unusual, but generally when you start a body of armed men across the country, passing through the civil population, they have an infinite capacity to do mischief as an organized body which individuals have not. This remedy is born out of that condition and must be as unusual as the situation is unusual. I know of no way to reach the situation properly except by way of holding the detachment responsible under statute law for the conduct of its men—I mean in damages only.

Now, we have been using that authority, I will say, under sanction of an order alone for some time. There have been comments upon it. It is very desirable to have it in the form of statute law, but if it is not enacted we will go right back to the general order and continue this practice. We can not help it.

Senator COLT. How long has the general order been in force?

Gen. CROWDER. I can tell you in just a moment.

Senator COLT. No matter as to the exact date, but approximately what number of years?

Gen. CROWDER. Since 1868.

The next article is article 90, "Provoking speeches or gestures." I have made no special change in article 90.

Article 91 relates to dueling. I have consolidated two or three articles of the existing code relating to dueling into a single article, preserving the substance of all and introducing no material change except that I have penalized the fighting of a duel, which the old law did not. We penalized everything in connection with dueling except the actual fighting of the duel. There is always one man left to be punished, so I have substituted a provision in that article. Of course, I have broadened it to include anybody who is with the Army, instead of having it apply only to "officers or soldiers."

It is fair to you to state that when this was before the House committee I invited their attention to the fact that all these three articles of the existing law were copied from the British code of 1765, and that the British, who in their annual army act are compelled to consider their code once a year, have finally substituted for these three articles of the earlier code of 1765 the following:

38. Every person subject to military law who commits any of the following offenses; that is to say—

- (1) Lights or promotes or is concerned in or connives at fighting a duel; or
  - (2) Attempts to commit suicide—
- shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this act mentioned. (British Code of 1914.)

The House committee favored the incorporation in our code of the provision of this British code respecting attempts to commit suicide. The General Staff has asked to have that eliminated and that the article before you does not include it. As Judge Advocate of the department, I have passed upon three cases where we have, under the general article, tried men for attempts to commit suicide, and I presume we can go ahead under the authority of the general article alone to handle those cases.

The CHAIRMAN. What is your judgment about the inclusion of a provision relating to attempts to commit suicide?

Gen. CROWDER. I think it would precipitate a debate to put it in. The point is not worth contending for; it is not of enough importance to the service. If the House in which the idea originated wishes to reinsert it, it will not furnish the conferees any trouble, but if that article were included somebody would wonder about it and it would involve an examination of the penal codes of the several States to see to what extent they cover attempts to commit suicide.

The CHAIRMAN. It is a crime in a good many of the States.

Senator COLT. It is, yes.

The CHAIRMAN. My judgment is that it should go in. I think in the case of an officer who attempts to commit suicide a certain quality is lacking that would at least require the matter to be reviewed by a court-martial.

Gen. CROWDER. Yet it is a virtue in some armies. We have been reminded quite recently in military literature of how officers, feeling that their living as wounded men on the field of battle would be disturbing to their commanders have committed suicide. One instance of that kind is reported to have occurred in the Japanese Army. A general officer severely wounded found that his aide was disposed to stay with him. He wanted the aide to go back to carry a message to a division commander. Under these conditions he committed suicide. This incident is reasonably well attested.

Senator COLT. The Japanese take rather a different view of such matters than we do.

Gen. CROWDER. Yes.

The CHAIRMAN. But the question is, being actuated by those worthy motives, but failing to consummate the act, are such men not a burden to the service?

Gen. CROWDER. I left this provision out because it would precipitate this kind of an argument and would invite discussion of what would be referred to as an unusual feature. Certainly it is unusual enough for most men not to be familiar with it and how other codes deal with it.

The CHAIRMAN. It was the view of the General Staff as well as your own to drop it?

Gen. CROWDER. That was the view.

The CHAIRMAN. I understood you to say that it had been inserted in the House.

Gen. CROWDER. I inserted it out of deference to views expressed by members of the Committee on Military Affairs of the House. Let me see the form in which it has passed the Senate heretofore.

Here is the way the Senate passed it before:

ART. 94. *Duelling—Attempts to commit suicide.*—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, or who attempts to commit suicide, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct, and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

The CHAIRMAN. I have rather strong convictions in regard to suicide. I believe it is due to either one of two causes—the worst form of cowardice or to mental derangement—either one of the causes renders a man unfit for further service. If an officer should attempt to commit suicide and fail, it would be almost impossible for him to command the complete respect or confidence of his troops. If there are provisions under general orders by which such a case can be dealt with, then I should not think it would be necessary to insert it; but if there is no such provision, it would seem to be wise to provide for it in this revision.

Gen. CROWDER. I do not think general orders would reach it; I do not think we could handle the case in that way.

The CHAIRMAN. I was under the impression that you had stated that some such cases had been handled under general orders.

Gen. CROWDER. Of attempts to commit suicide?

The CHAIRMAN. Yes.

Gen. CROWDER. They have been handled by courts-martial. We have in our military code a general article sometimes called in the service parlance "the devil's article." After proceeding with the enumeration of offenses and providing for their punishment we have a concluding article which provides that all other crimes (not capital) and all other disorders and neglects of which officers and soldiers may be guilty, shall be punished as a court-martial may direct.

Senator COLT. That is an omnibus clause?

Gen. CROWDER. An omnibus clause, but it is a good deal like the provisions of State codes adopting the common law of crimes as to offenses not expressly covered. You go ahead in the statutes and enumerate crimes to be punished, but there is always the fountain of the common law to draw upon for offenses not expressly covered unless the statute expressly abolishes common-law crimes. Under the general article we have tried three cases of attempts to commit suicide of which I have personal knowledge.

Senator COLT. It is your opinion that leaving that provision in would excite the discussion or opposition?

Gen. CROWDER. I think so.

Senator COLT. You think it had better be left out, so far as discussion is concerned?

Gen. CROWDER. Yes, provided you agree with me that it will provoke a discussion in Congress. I think that debate on such a provision is detrimental and unfavorable to the passage of the code, and it would hardly be worth while if it were going to be obstructive. As I have said, we can handle attempts to commit suicide under the

authority of the general article which you will find concluding the punitive articles.

The CHAIRMAN. My judgment is that it would not excite debate if it were inserted, and if that supposition should be wrong, then it could be immediately withdrawn.

Gen. CROWDER. It would be easy to withdraw it if it were inserted in the form of the article which passed the Senate before and then striking a line through the words "or attempts to commit suicide." I have no objection to it going in except that which I have already stated. I would rather appeal to your judgment as to how much of an obstacle it might prove to be.

Senator COLT. I do not feel competent to speak about that.

The CHAIRMAN. Suppose we reserve this, then, for future discussion.

Senator COLT. Very well; so far as I am concerned I will leave it with you to include it or omit it, just as you think best.

The CHAIRMAN. I will speak to Senator Chamberlain about it and get his judgment as to the effect of inserting such a provision.

Gen. CROWDER. Gentlemen, we come now to probably the most important article in the code, and I think that when we get over this we will be pretty well over the more important provisions. From articles 58 and 62 of the existing code we receive our grant of jurisdiction to try civil crimes. I will read article 62 first, because it is the one that is operative both in peace and war. It gives authority to military courts to try—

ART. 62. All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. (Art. 99, Code of 1806) (Art. 3, Sec. XX, Brit. Code, 1765.)

This is a general article that I was talking of a moment or so ago. What is the grant as to civil crimes? It is of "all crimes not capital."

The grant of article 58 is of jurisdiction to try certain enumerated crimes—some capital and some not capital—but the grant is operative only during periods of war, insurrection, or rebellion. You will observe at once the overlapping character of the two articles, 58 and 62. Every noncapital crime enumerated under article 58 is likewise included in article 62 in the designation "all crimes not capital." It thus happens that when war is declared we have to stop charging those noncapital crimes enumerated under article 62, and charge them under article 58.

In other words, we must make, when war comes—a period of great confusion—a change in our method of pleading these noncapital crimes, and it is always a matter of embarrassment and a prolific source of error in pleading. It is very desirable that the two articles should be restated in the code in such a way that their provisions will not overlap in the respects I have indicated. But this is a matter of detail.

The jurisdiction which these two articles grant to military courts to try civil crimes is, of course, a concurrent jurisdiction with the civil courts. In other words, the grant to military courts is not a grant of exclusive jurisdiction, and it is important to keep in mind, as the law now stands, that the jurisdiction of a military court to try capital civil

crimes exists only during a period of war, insurrection, or rebellion. In the first revision submitted to Congress, and twice passed by the Senate, it was provided that this grant to military courts to try civil capital crimes should have a limited execution even in time of peace; that is, should cover capital crimes committed by persons subject to military law when committed outside the geographical limits of the States of the Union and of the District of Columbia. The reason is a plain one. Outside those limits, wherever the Army is stationed, our officers and soldiers would, if tried for capital crimes, be tried by courts administering an alien jurisprudence and in a language which they do not generally understand, and often by a single judge without a jury. I believed that it was not the intention of Congress that the capital crimes of our officers and soldiers on foreign service should be exclusively triable in courts of that character. I therefore drew up a revision of these articles in which I conferred upon military courts jurisdiction to try capital crimes outside the geographical limits of the States of the Union and of the District of Columbia, in these terms:

ART. 95. MURDER—RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

I restated the law respecting noncapital crimes in this form:

ART. 96. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm shall be punished as a court-martial may direct.

And of course this grant of authority to try noncapital crimes was operative both in peace and war and at home or abroad, retaining the jurisdiction we have to-day. And of course I added a general article which would catch unenumerated noncapital crimes.

I think the arguments in support of the articles above set forth are convincing. If an officer or soldier of our Army commits a capital crime in the Philippines, he must be tried by a court consisting of one judge, and without a jury; in Porto Rico, by a court consisting of one judge. The officer and the soldier are not sent there at their own volition, but have been sent there at the call of their country. It seems to me that we should, under these conditions, secure to them a trial by their peers.

Senator COLT. How is it with regard to Alaska?

Gen. CROWDER. I have classified Alaska with Porto Rico, the Philippines, Panama, and Hawaii. I have done this because of the unsettled conditions that prevail there.

This was the character of the revision which was submitted to the General Staff. The General Staff, as I told you, considered this revision during the past summer, first by a special committee and afterwards the entire War College Division participated in the consideration. They have combined my articles 95 and 96 into a new article, 92, of this revision, which reads:

ART. 92. VARIOUS CRIMES.—Larceny, embezzlement, forgery, robbery, burglary, arson, mayhem, manslaughter, murder, assault with intent to kill or to do bodily harm, wounding by shooting or stabbing with an intent to commit murder, rape or assault with intent to commit rape, shall be punishable by a general court-martial when committed by persons subject to military law, etc.

It will be noted that they classify the capital offenses of murder and rape along with the noncapital offenses to be tried by courts-martial both in peace and in war and wherever committed, whether at home or abroad. Of course, the grant of jurisdiction is not exclusive, but is concurrent with that of the civil courts.

The CHAIRMAN. So that I may be sure to understand this, I will ask you then if this provision as it reads would not, even in times of peace, give to a court-martial concurrent jurisdiction over any of these crimes?

Gen. CROWDER. Yes; that would be its effect.

The CHAIRMAN. And whether the civil or military authorities tried the case would depend on which obtained jurisdiction first?

Gen. CROWDER. Yes.

Senator COLT (to Senator Lea). What was your question?

Senator LEA. I say, whether the crime was tried by the civil or military authorities would depend on which took jurisdiction first.

Gen. CROWDER. Yes. Of course it would be competent for either jurisdiction to waive its claims, even though jurisdiction had attached.

The CHAIRMAN. But in the absence of a waiver, the authority that took jurisdiction first would try the case.

Gen. CROWDER. Yes.

The CHAIRMAN. That is quite a broad change.

Gen. CROWDER. Yes, but only when applied to the capital offenses of murder and rape.

The CHAIRMAN. It is quite a change from articles 95 and 96.

Gen. CROWDER. Yes. The Secretary of War in forwarding to the Senate committee this proposed bill, the one you are now investigating, expressed dissent from the War College view and recommended that the articles, in the form in which they have twice passed the Senate, be restored. I have also expressed this view. I do not favor this extension of jurisdiction of courts-martial to capital crimes committed within the geographical limits of the States of the Union and the District of Columbia.

Senator COLT. Do courts-martial ever exercise that jurisdiction?

Gen. CROWDER. Only in time of war. The provision I have suggested would give them that jurisdiction in time of war and, of course, they must have it in time of war, for we can not then be dependent for the trial of any crime in the civil courts.

The CHAIRMAN. If it would meet with your approval, Senator Colt, my suggestion would be that we ask the Judge Advocate General to redraft this section along the lines of articles 95 and 96 of the Senate draft, so as to provide that in time of war the military authority would have exclusive jurisdiction of all these offenses, committed by those subject to military authority and that, in time of peace, they would have exclusive jurisdiction only in the Territories of the United States.

Gen. CROWDER. It is not drawn in terms to be exclusive, but concurrent.

The CHAIRMAN. Yes; concurrent would be better.

Gen. CROWDER. We have not attempted to take away jurisdiction from the civil courts. We simply commit jurisdiction to the court-martial.

The CHAIRMAN. Except in time of war.

Gen. CROWDER. Except in time of war.

The CHAIRMAN. I suggest that you redraft it along these lines.

I think it was in connection with article 41 or 42 in regard to procedure that you asked us to lift from the shoulders of the courts-martial the burden of examining into the different laws of the several States, such as you cited in the case of some trials at Vera Cruz, I believe. Would it not be well to provide that punishment, for the offenses referred to in this article shall be the same as provided for under the laws of the District of Columbia?

Gen. CROWDER. That brings us to the concluding clause of this article, which reads:

And the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, District, or other place in which such offense may have been committed.

That language is taken from the act of 1861. The effect of that language is to say to the court-martial "You may inflict more punishment than the State statute provides, but you can not inflict less." I have doubted the wisdom of retaining such a provision for this reason: The State statutes are rarely drawn so as to establish a minimum penalty. The familiar phraseology is "shall be punished by a fine not exceeding so much, or by imprisonment not exceeding so long, or by both such fine and imprisonment." That kind of provision of law carries no mandate to a court-martial. It is only when a State statute sets forth a minimum that we have the obligation to adjudge not less than that minimum. So that the statute has little or no application. If the State statute should make confinement in the penitentiary necessary, we would have to impose confinement in the penitentiary; but I think if it is to be retained, there is wisdom in your suggestion that punishment in any case shall not be less than the punishment provided for the like offense by the penal code of the United States or of the District of Columbia, or of the common law as it exists in said District.

The CHAIRMAN. Let me suggest that you make it a little broader than that so that the punishment shall be in the manner provided for, so that where there is a variation between the minimum and maximum the court martial would have that discretion also.

Gen. CROWDER. Shall be of the kind provided?

The CHAIRMAN. Yes.

Gen. CROWDER. I think that is a good provision, Senator.

The CHAIRMAN. I am a great believer in the indeterminate sentence, and wherever we could avail ourselves of that, even where there are two extremes which are rigid and fixed, I think it would be a good idea to do so.

Gen. CROWDER. Why not say the punishment shall be as provided for the like offense by the laws of the United States or of the District of Columbia?

Senator COLT. I think that would be a good provision.

Gen. CROWDER. Or that punishment shall be authorized as provided by the laws of the United States or District? I am ready to accept that. I think it is a good suggestion. I always disliked it in this form. We can not give less but we can increase it indefinitely. There was no limitation in this language.

Senator COLT. That struck me. I do not think that the court-martial should be placed in that position. I would rather limit it in some way and have it more definite.

Gen. CROWDER. Article 93 deals with frauds against the Government. It is a reenactment, almost verbatim, of article 60 of the existing code. The only change I have made is to authorize the punishment by dismissal of an officer who may have committed any of these frauds. That was lacking in the existing article.

The CHAIRMAN. And yet does not this classification, "Frauds," apply to the article we passed over last night in regard to publication of those separated from the service for these offenses.

Gen. CROWDER. Yes. These are the frauds that the article that we examined yesterday had especially in mind. It was enacted during the Civil War period to deal with the frauds that developed in the military establishment during that period.

We turn over three pages and come to article 94—"Conduct unbecoming an officer and a gentleman." You will notice that I have introduced the words "or cadet," for the reason that cadets are under training as officers, and when they are guilty of ungentlemanly conduct I think they ought to be tried under the same article.

Then I come to article 95, called the "General article":

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

The purpose here is to have an article which shall include all offenses not specifically enumerated and to invoke as to them the common law military. It has always been in our code. It was copied from the British code, and it is simply expressive of the rule that prevails generally on the civil side of the administration of justice, namely, that you can refer to the common law for offenses and punishments which the code does not cover, unless the code expressly abolishes common-law offenses.

You will notice some transposition of language. The phrase "to the prejudice of good order and military discipline" is put in in such a way that it qualifies only "all disorders and neglects." As the law stands to-day it was often contended that this phrase qualified also "all crimes not capital." There was some argument about whether it would reach back through that clause, "all disorders and neglects," to the clause "all crimes not capital" and qualify the latter clause.

As I say, there was a good deal of argument upon that point; but Justice Harlan, in the decision in the Grafton case, seems to have set the matter at rest, and I am proposing legislation along the lines of Justice Harlan's decision. He said, with reference to the existing article:

The crimes referred to in that article embrace those not capital committed by officers and soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by the officers or soldiers are excepted by the above article from the jurisdiction conferred upon courts-martial except those that are capital in their nature.

Showing that he regarded the grant to the court-martial as full and complete and as not qualified by the phrase, "to the prejudice of good order and military discipline." So I have drawn the article along the lines of Justice Harlan's opinion.

Gentlemen, I think we may pass over the entire Part IV, which relates to courts of inquiry, with the statement that I have introduced

no substantial changes. In the form it here appears it has the approval of prior committees which have examined it.

That carries us down to the "Miscellaneous provisions," on page 61, article 103. Winthrop, our standard military-law writer, took the view that in the absence of statute law authorizing it no system of disciplinary punishments—that is, punishments imposable at the will of military commanders without the intervention of courts-martial—can exist in our service, relying upon the principle of law that "punishment can be administered only in the execution of the approved sentences of military courts," citing in support thereof numerous authorities.

Notwithstanding this view the necessities of the service broke through the restraints of this legal principle, and by regulation a system of disciplinary punishments in the Army was established. It seems impossible to administer an army without recourse to disciplinary punishment. We can not have recourse to a court in case of minor infractions.

The Navy have long had this power, but the authority in the Army has been restricted always by the provisions of the twenty-fifth, fifty-second, and fifty-third Articles of War to summary punishments of (a) arrest, (b) requirement to ask pardon, and (c) small forfeitures to be imposed administratively and without trial for the offenses of using reproachful or provoking speeches, irreverent conduct at divine worship, and profanity. Under the naval article the authority extends in the case of a commissioned or warrant officer to (a) private reprimand, (b) suspension from duty, arrest, or confinement (not to continue longer than a prescribed period); and in case of petty officers and other subordinates, to reduction, confinement, deprivation of liberty, and imposition of extra duty. The need for similar system in the Army has long been recognized, and Army Regulations have, for a considerable period, assumed to authorize it in terms similar to Army Regulations 953.

Article 103 gives me that system.

Senator COLT. You see, there you are running across the principle of the common law that no man can be punished for any misdemeanor except by a regular court or tribunal. That is the very essence of the common law.

Gen. CROWDER. Yes.

Senator COLT. A man must be tried, whether the President of the United States or anybody else, by the ordinary courts of law. That lies at the foundation of the common law and distinguishes it from the civil law, where they have administrative law, you know, so that a Government official is tried by one kind of a law, administrative law, whereas the ordinary citizen would be tried by another. We have no such distinction as that in the common law; but in the common law every individual is tried by the ordinary courts, and must be. That is "due process of law," you know.

Gen. CROWDER. Yes.

Senator COLT. That rule may not be applicable to military affairs, however.

Gen. CROWDER. It is not.

Senator COLT. Therefore I quite agree with Winthrop that it would be without authority, perhaps, unless it grew up either through custom or through statute.

Gen. CROWDER. Custom, of course, has always defended the right of a commanding officer to exercise disciplinary authority, without recourse to courts-martial, in certain classes of cases.

In view of the point that Winthrop raised, and in view of the naval legislation, I have sought to draft an article which would give the sanction of statute law to the existing practice, and I have drawn article 103 so as to confer only minor disciplinary powers. Under the proposed article we can not impose forfeiture of a man's pay; we can only reach him by a class of punishments known as military punishments. The service wants this article very much. It is a daily need in our service. You can well imagine how impossible it would be to run West Point or Annapolis, or any great collegiate institution, without what is called "college discipline"; and this applies there.

The CHAIRMAN. As I understand it, the accused has the right to demand a court-martial, has he not?

Gen. CROWDER. I think that is important enough to read it over:

Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

Unless the accused admits the offenses, you can not do anything. He can avoid the operation of this article if he desires. In the first place, it has no application to him unless he says "I am guilty;" and then it has no application to him if he demands trial by court-martial.

Senator COLT. I do not see any harm in that.

The CHAIRMAN. None in the world. I do not see how you can get along without it.

Gen. CROWDER. Article 105 deals with apprehension of deserters and repeats existing law, broadened so as to be applicable outside of the United States. Under the old law it was applicable only in the "State, Territory, or District."

Article 106 but repeats existing law.

Article 107 but repeats existing law.

The same remarks applies to article 108.

In article 109 there has been a change of which you will approve, I think when it is stated. The existing articles require the entire code of 129 articles to be read every six months to "every garrison, regiment, troop, or company in the service." Of course the soldiers were interested only in a small number of articles, and these should be read to them. This new article selects the articles in which the soldiers are interested, and reduces the burden of convening the command every six months and having the articles of war read to them. It is a very burdensome thing.

Article 110 is simply a repetition of existing law.

We come now to article 111, which prescribes our probate jurisdiction. Perhaps we have not three more archaic articles in our code than articles 125, 126, and 127, which article 111 replaces. You will notice in article 125 that "in case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command, \* \* \* shall \* \* \* secure all his effects," etc. That law was enacted at a time when every officer belonged to a regiment. We now have a large staff corps.

The same remark applies to article 126. "In case of the death of any soldier," it is provided that "the commanding officer of his troop, battery, or company" shall do certain things. We have about 7,000 or 8,000 men who do not belong to troops, batteries, or companies. They belong to staff corps. We have about 3,000 men in the Medical Corps, more than 5,000 men in the Quartermaster's Corps, and something less than 1,000 men in the Ordnance Corps that could not be handled under the old article. I have summarized the defects in this way:

Articles 125, 126, and 127 of the existing code \* \* \* are defective in the following respects:

- (1) They apply in terms only to officers and soldiers of regiments, and it is only by liberal construction that they have been made to include in their provisions a considerable number of officers and soldiers who do not belong to regiments;
- √(2) They do not cover other persons subject to military law;
- (3) They devolve the duty upon certain officers quite irrespective of their qualifications to discharge the duty—

The company commander in one instance, and the second officer in command in another. Ordinarily, the man who is doing duty as the summary court officer is the proper man to handle it, and I have so provided in this article.

The fourth defect is:

They confer upon the officer charged with the administration no authority to collect debts due the estate or to pay charges against the same.

I have supplied that, so that I have made it a modern provision.

Article 112 is entirely new. We had a good deal of trouble when deaths occurred at a post, and there was no civil coroner to give the certificate necessary when we have to transport the remains. We were obstructed by the civil authorities in sending the remains of soldiers and officers from the place of death to the place of burial because we did not have a certificate of death which their law recognizes. This provides that the summary court officer shall have the authority to exercise the usual jurisdiction of coroners and issue a certificate of the cause of death.

The authority to administer oaths has been extended considerably, to include a number of officers who have not at present the authority to administer oaths for general purposes.

Article 114 concerns the appointment of reporters and interpreters. The appointment of reporters and interpreters, which has heretofore been authorized by regulation alone, is restated in this article.

The powers of assistant judge advocates are defined in article 115. It is necessary to fix the status before a court-martial of the assistant judge advocate authorized by article 11.

Article 116, as to removal of civil suits, provides:

When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending, etc.

I have here built an article of war on the corresponding statute giving the right of removal to a Federal court to officers and agents of the Revenue Service who have instituted against them civil suits or criminal prosecutions on account of acts done by them under color

of their office. I have, however, confined the provisions of the article of war to civil suits instituted; in other words, have extended to officers and soldiers of the Army the same immunity from civil suits in the courts of a State which this statute of 1911 gives officers of the Revenue Service. The application which I contemplate for the article will usually occur when the Army is cooperating with the civil authorities in the suppression of disorder. It may and probably will frequently happen that persons dissatisfied with the acts of officers and soldiers on such occasions will bring suits against them in damages. Their only authority is found in Federal law or the law of war, and I think it is proper that they should have the right of removal of such suits, in order that their rights and obligations under the United States law and the law of war may in every case at the election of the officer or soldier sued be determined by a Federal court.

The CHAIRMAN. In nearly every case he would have the right of removal anyhow, would he not, on account of diverse citizenship?

Gen. CROWDER. As I understand the law, Senator, suits may now be removed only on the ground that a Federal question is raised, or on the ground of diversity of citizenship, and in the latter case only in the event the defendant is a nonresident, and in both cases only if the amount in question exceeds \$3,000.

The CHAIRMAN. I thought the limit was \$2,000.

Gen. CROWDER. It is \$3,000, I think.

Senator COLT. The principle is right.

The CHAIRMAN. I think the principle is right.

Gen. CROWDER. I will insert in the record the result of my search.

The CHAIRMAN. Will you do that?

Gen. CROWDER. Yes.

Gen. CROWDER. I find that I have covered the matter already in my comments on Article 116, in the initial statement made to the committee.

Article 117 is a reenactment of the existing law, without substantial change.

Article 118 deals with rank and precedence of commissioned officers. This subject has always been regulated by the Articles of War, though I think very improperly. It is more particularly a statute pertaining to the organization of the Army. This is recognized, and the exact provision here pending (art. 118), though differing somewhat in arrangement, is found in the Hay reorganization bill now pending before Congress, and in the Chamberlain militia pay bill, pending before the Senate Military Committee. I think there is substantial agreement of all parties that the provisions of this article [art. 118] should be enacted into law. If it avails in the general legislation above referred to, it should be retained here. But, as I have said, it really had no place in the Articles of War. The statute has, so far as I can inform myself, the approval of militia officers, volunteer officers, and regular officers, and the same thing is true of article 119.

On the next page of the revision you will find two articles which the General Staff omitted, and which the Secretary of War, in his letter transmitting this revision to the full Senate committee, asks you to reinstate in the bill. Article 28 deals with the use of the records of courts of inquiry as evidence. We have always had the

right to utilize the records of courts of inquiry as evidence before a court-martial in cases not capital or extending to the dismissal of an officer. This is the provision of article 92 of the existing code. I think it should be retained. Of course, ordinarily oral testimony will be resorted to, but it might be that a witness had testified very fully before a court of inquiry preceding a trial, and the exigencies of the service might find him at the time of trial in the Philippine Islands, or Hawaii, with the court-martial sitting in New York. The witness has testified before the court of inquiry under oath, and under cross-examination in the usual case, and the testimony may be much more reliable, that is, much better sifted, than it is in the ordinary deposition. It would be strange indeed if we should continue to receive depositions and rule out the records of courts of inquiry.

The CHAIRMAN. What were the reasons of the General Staff for wanting to eliminate that?

Gen. CROWDER. I do not know that they recorded any reasons, but I can well conjecture that it was out of deference to the principle they possibly had in mind of the right of an accused to be confronted with his witnesses, a principle which, as I have pointed out, is infringed in the right given by this code, and which we have always enjoyed, to take depositions. I do not think they thought of the inconsistency of ruling out the records of courts of inquiry and at the same time retaining the provision for taking evidence by deposition.

The CHAIRMAN. The admission of the record of a court of inquiry, then, only applies to noncapital cases?

Gen. CROWDER. Only to noncapital cases, and to those not extending to the dismissal of an officer.

The CHAIRMAN. It is suggested by the Judge Advocate General that we should eliminate the proviso?

Gen. CROWDER. I mean by that to eliminate the proviso of the existing law; that is, of article 121.

The CHAIRMAN. And leave the proviso in here?

Gen. CROWDER. Yes. The proviso to which you now refer is the proviso of the new article, heretofore numbered 28. It reads:

*Provided*, That such evidence (records of courts of inquiry) may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

You will recall that this proviso is inserted in the article dealing with depositions, and it should be inserted here for precisely the same reasons.

The next article, which has formerly been numbered article 39, the Secretary of War was much interested in retaining. Its effect will be to authorize the President to prescribe rules of procedure, including modes of proof, in cases before military courts. Even in time of peace military courts are separated from libraries and their only recourse is to manuals to ascertain the proper procedure and the rules of evidence. We wish the authority of this article in order that the President may proceed, with the sanction of statute law, but under authority of Congress, to promulgate modes of proof, so that officers of the Army will be informed through promulgated rules of simple methods of proof, where, for example, handwriting is to be established or documents are to be introduced in evidence. I refer particularly to rules of that character.

The CHAIRMAN. Is not that a good deal broader than the power of courts to make rules of procedure?

Gen. CROWDER. I do not think it is broader than the power that Congress has given to the Supreme Court in section 862 of the Revised Statutes. You will see that section on the opposite page.

Senator COLT. This is analogous to the power to modify rules of procedure that is here given to the President.

Gen. CROWDER. Yes, the President will exercise in respect of rules of procedure before courts-martial and modes of proof the authority that the Supreme Court exercises under the statute to which I refer. It must be remembered that the President is at the head of our system of military justice, and all important cases involving the death or dismissal of an officer, or any sentence of a general officer, must receive his personal attention. It could be anticipated, I think, that he will exercise the authority here sought to be conferred in a very conservative way, but every order that he issues will be brought directly to the attention of Congress under the concluding provision of that article, which requires that "all rules made in pursuance of this article shall be laid before the Congress."

Senator COLT. Is not such a power, subject to the limitation made you have given there, almost necessary?

Gen. CROWDER. I think it is.

The CHAIRMAN. I think I like Gen. Crowder's proviso better than the one that is inserted here. He has just suggested to us that the rules made in pursuance of this article should be annually submitted to Congress.

Gen. CROWDER. I think it is proper to put it in this way, that all rules made in pursuance of this article shall be laid before Congress.

The CHAIRMAN. I understood that it was your purpose to have them annually laid before Congress?

Gen. CROWDER. Yes; the word "annually" should be put in there. This corresponds to the existing British article. They give to the Crown the power to prescribe rules, and it is required that they be laid before Parliament each year. It is the same kind of supervision that Congress has over the legislation of the Territories.

Senator COLT. You know, General, we do not realize how society changes or how the conditions of military procedure may change, and when you come to such a matter as procedure the rule should be more or less elastic, in a way.

Gen. CROWDER. Yes.

Senator COLT. Power conferred upon the Supreme Court or the President should not be an unlimited power, but some provision, it seems to me, is necessary for attaining the ends of justice. Procedure is the most important branch, of course, of jurisprudence. I approve of that.

Gen. CROWDER. I thought it very important to have it. The General Staff was afraid that the President might exercise his power in a way that would jeopardize the interest of the accused.

Senator COLT. Have you ever thought of the fact that in the history of this Government no one of the departments—the executive, the legislative, or the judicial—has ever undertaken broadly to usurp the powers that did not belong to it? It is a remarkable thing.

Gen. CROWDER. Yes.

Senator COLT. All the predictions of those who were fearful of such things at the time of the framing of the Constitution have proven

false; they have never come to pass, and those dangerous things which have actually happened were not foreseen.

Gen. CROWDER. I doubt if it is necessary for me to direct your attention to section 2 of this bill. You will find it on page 73. I have undertaken to give the Judge Advocate General's department a reorganization. But this legislation is also pending before the House Committee on Military Affairs and before the Senate committee. If it should be dropped out there I should want to retain it here. I have not heretofore encountered any opposition to the proposed reorganization, and it may all be summarized in this. I want to be placed under the detail system of the Ordnance Department in filling vacancies in my corps; that is, I want competitive examinations for entrance to the Judge Advocate General's Department, and I want a man to defend his tenure therein by successful work, otherwise to be relieved. At present an officer appointed into my department is appointed for life, and he stays there, and I have no control over him if he becomes indifferent in the performance of his duties, and as long as he is appointed permanently; appointments are to some extent influenced by political considerations. Every time a vacancy occurs in my department considerations of this kind enter. I want to be placed on the same basis as other detailed staff corps of the Army, so that I can get men into the department by detail, but only after competitive examination. This statute gives me that system.

Now we are through except the repealing clauses, which I take it you will not want to go over particularly, as I worked those out with a great deal of care; and we come at once to the omitted articles. I have omitted from the existing code the articles which you find listed on pages 76 and 77. They are nearly all obsolete. Those that are not obsolete are in the nature of regulations, or have fallen into disuse so that they are no longer applied in our service.

The CHAIRMAN. I should like to ask you to insert a list of the omitted articles in these hearings, so that we may have them before us.

Gen. CROWDER. Yes, I will. I think you are entitled to the special notice that I have omitted this article:

I want to ask you to go back to article 113 and consider the propriety of adding an amendment thereto. Article 113 deals with the authority to administer oaths, and it provides as follows:

ART. 113. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration.

This is the existing law amplified so as to include a number of officers who it seems necessary should have the power to administer oaths in order to expedite that part of our administration where oaths have to be administered.

When we went to the Philippines in 1898 with our Voluntary Army there was the greatest necessity for somebody to administer oaths in civil matters. Many officers and a great many of the private soldiers of those volunteer regiments had to execute papers, some of which were necessary in litigation, and others in the settlement of estates,

and there were no notaries public in the Philippine Islands except the Spanish notaries, before whom they could go. It was a great burden to the Army. I have thought of adding this language: "And in foreign places where the Army may be serving, shall have the general power of a notary public and of consuls in the administration of oaths, acknowledgments and attestations, and other notarial acts," so that if the Army goes again to any foreign country, these men can take care of this burden.

The CHAIRMAN. So that the men designated in Article 113 shall have the power of notaries public in foreign parts?

Gen. CROWDER. In foreign parts where the Army may be serving.

The CHAIRMAN. I think that is all right.

Senator COLT. That facilitates things.

Gen. CROWDER. Yes. If there is a deed to be acknowledged or a transfer of property or a bill of sale, where the statute requires that somebody with notarial powers shall act, this gives these officers the power, but provides that it shall only be exercised in foreign parts. I will add that, then. I am very much obliged to you.

(At 12.20 o'clock p. m. the subcommittee adjourned.)

#### EXISTING ARTICLES OMITTED FROM THE PROPOSED REVISION.

Article 1. Every officer now in the Army of the United States shall, within six months from the passing of this act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles. (Art. 1, Code of 1806; art. 1, American Code, 1775.)

Article 10. Every officer commanding a troop, battery, or company is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident or in actual service. (Art. 40, Code of 1806.) (Art. 5, Sec. XIII, Brit. Code, 1765.)

Article 11. Every officer commanding a regiment or an independent troop, battery, or company not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such times as he may deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company in the field may grant furloughs not exceeding thirty days at one time to five per cent of the enlisted men for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field officer, grant furloughs to the enlisted men for a time not exceeding twenty days in six months and not to more than two persons to be absent at the same time. (Art. 12, Code of 1806, as amended by act of Mar. 3, 1863.) (Art. 2, Sec. IV, Brit. Code, 1765.)

Article 12. At every muster of a regiment, troop, battery, or company the commanding officer thereof shall give to the mustering officer certificate, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit. (Art. 13, Code of 1806.) (Art. 3, Sec. IV, Brit. Code, 1765.)

Article 29. Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of, and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon. (Art. 34, Code of 1806.) (Art. 1, Sec. XII, Brit. Code, 1765.)

Article 30. Any soldier who thinks himself wronged by an officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial: but if upon such second hearing the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial. (Art. 35, Code of 1806.) (Art. 2, Sec. XII, Brit. Code, 1765.)

Article 36. No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him or be excused from duty except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct. (Art. 47, Code of 1806.) (Art. 7, Sec. XIV, Brit. Code, 1765.)

Article 37. Every noncommissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct. (Art. 48, Code of 1806.) (Art. 8, Sec. XIV, Brit. Code, 1765.)

Article 52. It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one-sixth of a dollar; for each further offense he shall forfeit a like sum and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied by a captain or senior officer of his troop, battery, or company to the use of the sick soldiers of the same. (Art. 2, Code of 1806.) (Art. 1, Sec. I, Brit. Code, 1765.)

Article 53. Any officer who uses any profane oath or execration shall, for each offense, forfeit in pay \$1. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided. (Art. 3, Code of 1806.) (Art. 2, Sec. I, Brit. Code, 1765.)

Article 76. When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall thereupon order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled. (Art. 86, Code of 1806.) (Art. 23, American Code, 1786.)

Article 87. All members of a court-martial are to behave with decency and calmness. (Art. 72, Code of 1806.) (Art. 7, Sec. XV, Brit. Code, 1765.)

Article 101. When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offense. (Art. 84, Code of 1806.) (Art. 21, American Code, 1786.)

#### EXPLANATION OF OMISSIONS.

Articles 1, 10, 11, 12, 29, 30, 36, 37, 52, 53, 76, 87, and 101 of the present code have been omitted from the proposed revision. Some of these articles have never met any real need in our service and may for all practicable purposes be regarded as obsolete; others embrace only matters properly within the filed of Army Regulations.

# TRIALS BY COURTS-MARTIAL

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## HEARINGS

BEFORE THE

### COMMITTEE ON MILITARY AFFAIRS UNITED STATES SENATE

SIXTY-FIFTH CONGRESS

THIRD SESSION

ON

### S. 5320

A BILL TO PROMOTE THE ADMINISTRATION OF MILITARY  
JUSTICE BY AMENDING EXISTING LAWS REGULATING  
TRIAL BY COURTS-MARTIAL, AND FOR  
OTHER PURPOSES

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Printed for the use of the Committee on Military Affairs



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1919

## TRIALS BY COURTS-MARTIAL.

THURSDAY, FEBRUARY 13, 1919.

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

The committee met, pursuant to call, in the committee room at the Capitol at 10.30 o'clock a. m., Senator George E. Chamberlain presiding.

Present: Senators Chamberlain (chairman), Myers, Thomas, Beckham, Warren, Sutherland, McKellar, New, Frelinghuysen, Weeks, Johnson, and Knox.

The CHAIRMAN. Gentlemen of the committee, there were a great many letters that came to me, and I assume came to other members of this committee, complaining about the administration of military justice. I received a great many letters from parents of young men who had been court-martialed and sent to prison and from the young men themselves who were in prison, and from those letters I concluded, as you must have concluded, that there were inequalities in the administration of military justice and much harshness and severity of sentence for the crimes committed, many of which were simple breaches of discipline, such as absence without leave, and so forth. These letters induced me to mention this subject in a little address I made in the Senate on the 30th of December, and later on to introduce a bill on January 13, 1919, to meet the situation, if possible. That bill was tentative. This hearing is on that bill in the hope that it or some other measure that will meet the situation may be enacted.

I ask to have printed in the record the bill that is now under consideration.

Senator WEEKS. What is the number of the bill, Mr. Chairman?

The CHAIRMAN. Senate 5320.

(The bill is as follows:)

A BILL To promote the administration of military justice by amending existing laws regulating trial by courts-martial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That article 11 of the Articles of War is hereby amended to read as follows:

"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate. No person shall be appointed judge advocate for a general court-martial unless at the time of his appointment he is an officer of the Judge Advocate General's Department, except that where an officer of that department is not available the authority appointing the court shall appoint an officer of the Army recommended by the Judge Advocate General as specially qualified. by reason of legal

### COMMITTEE ON MILITARY AFFAIRS.

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learning and experience, to act as judge advocate. The officer appointed as judge advocate for a general court-martial shall not be a member of the court, but shall sit with it at all times in open session and shall fairly, impartially, and in a judicial manner perform the following duties and such others not inconsistent herewith as may be prescribed by the President in virtue of article 38 of the Articles of War:

"(a) Rule upon all questions of law properly arising in the proceedings.

"(b) Advise the court and the convening authority of any legal deficiency in the constitution and composition of the court or in the charge before it for trial.

"(c) At the conclusion of the case and before the court proceeds to deliberate upon the finding sum up the evidence in the case and discuss the law applicable to it, unless both he and the court consider it unnecessary.

"(d) Take care, equally with the court, that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to present his own case, and for that purpose the judge advocate, with the permission of the court, may call and examine such witnesses as may appear to him necessary or desirable to elicit the truth.

"His rulings and advice, given in the performance of his duties and made of record, shall govern the court-martial.

"If the judge advocate dies, or from illness or any cause whatever is unable to attend, the court shall adjourn and another judge advocate shall be appointed by the proper authority, who shall act as judge advocate for the residue of the trial or until the judge advocate returns."

SEC. 2. That article 17 of the Articles of War is hereby amended to read as follows:

"ART. 17. APPOINTMENT OF PROSECUTORS.—For each general or special court-martial the authority appointing the court shall appoint a prosecutor, and for each general court-martial one or more assistant prosecutors when necessary. The prosecutor of a general or special court-martial shall prosecute in the name of the United States and shall, under the direction of the court, prepare the record of its proceedings. Such prosecutor may be an officer of the Judge Advocate General's Department. In all court-martial proceedings the accused shall have the assistance of and be represented by counsel of his own selection. Such counsel may be either a civilian lawyer or an officer of the Army. If military counsel be not selected by the accused, the court shall assign military counsel to assist in his defense if such counsel be reasonably available."

SEC. 3. That articles 22, 30, 33, and 116 of the Articles of War are hereby amended by substituting the word "prosecutor" for the words "judge advocate" wherever they appear in the said articles, and by substituting the words "prosecutor or any assistant prosecutor of a general or special court-martial" for the words "The judge advocate or any assistant judge advocate of a general or special court-martial" wherever they appear in the said articles.

SEC. 4. That if the authority authorized to appoint general courts-martial has an officer of the Judge Advocate General's Department present for duty on his staff, he shall not refer any charge to a general court-martial for trial unless the said officer of the Judge Advocate General's Department shall indorse in writing upon the charge that in his opinion an offense made punishable by the Articles of War is charged with legal sufficiency against the accused, and that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged.

SEC. 5. That article 18 of the Articles of War is hereby amended to read as follows:

"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time: *Provided*, That if the accused at any time before the arraignment shall file in the proceedings an affidavit of prejudice alleging specific grounds to show that the court by reason of matters touching its constitution or composition can not do justice, the court shall proceed no further in the case, but shall report the matter to the appointing authority for his decision."

SEC. 6. That when a court-martial shall find the accused not guilty upon all charges and specifications it shall not reconsider, nor shall the appointing authority direct it to reconsider its findings; but the president of the court or the summary court shall immediately inform the accused and the officer by whose authority he may be in custody of his acquittal, and such officer shall thereupon immediately release the accused from custody, unless he is in

custody for reasons other than the pendency of the charges of which he has been acquitted.

SEC. 7. That section 1199, Revised Statutes of the United States, is hereby amended to read as follows:

"SEC. 1199. The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army. The power to revise the proceedings of courts-martial conferred upon the Judge Advocate General by this section shall be exercised only for the correction of errors of law which have injuriously affected the substantial rights of an accused, and shall include—

"(a) Power to disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the record requires such finding;

"(b) Power to disapprove the whole or any part of a sentence;

"(c) Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any. If upon revision, under this section, all the findings and the sentence be disapproved because of error of law in the proceedings, the convening or confirming authority may lawfully order a new trial by another court-martial.

"Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment."

SEC. 8. That the Judge Advocate General of the Army shall prepare and submit to Congress, at the earliest practicable date, a revision of the Articles of War consistent with the provisions of this act, and shall also prepare and submit to Congress a draft of regulations providing for the procedure of general courts-martial.

SEC. 9. That all laws or parts of laws inconsistent with this act are hereby repealed.

The CHAIRMAN. Gen. Ansell is here. He has been acting as Judge Advocate General since Gen. Crowder was appointed Provost Marshal General, and I am going to ask him to discuss the situation and the remedy that ought to be applied.

Gen. Ansell, will you give your full name, rank, and present assignment?

#### STATEMENT OF BRIG. GEN. SAMUEL T. ANSELL.

Gen. ANSELL. Brigadier general, Judge Advocate General's Department, United States Army, on duty in the office of the Judge Advocate General.

The CHAIRMAN. You have been acting as Judge Advocate General since when?

Gen. ANSELL. The office was turned over to me by Col. Winship, judge advocate, by virtue of my seniority in the office, in the latter days of August, 1917. I have been the senior officer in that department from that time, excepting the period of three or four months in which I was in Europe, and excepting the times when Gen. Crowder himself has been present. I ought to say that Gen. Crowder himself has, of course, been at all times Judge Advocate General. I have been responsible for the administration of the office only as a senior officer is always responsible when his chief is physically absent.

The CHAIRMAN. General, have you read the bill S. 5302, which has been printed in the record?

Gen. ANSELL. Yes, sir. I read it when it first appeared. I have reflected upon it since. I have not had time to make a thorough study of the bill. I think it would be helpful for me to say that in the light of my experience as an officer of the Army and of my experience as one especially interested in the administration of military justice throughout my commissioned service, and as one most particularly interested in the administration of military justice during this war, the bill meets with my general approval.

The CHAIRMAN. You think, Gen. Ansell, that the law as now on the statute books needs amendment?

Gen. ANSELL. I do, decidedly.

The CHAIRMAN. Will you go into the subject at length, in your own way, to show why and wherein the present law is in need of some amendment? I would rather you would take this subject up in any way you see fit, because the committee wants to get at the facts, and if the law is insufficient or inefficient, or if it is not properly administered so as to cause harshness in the inflicting of penalties, we want to know the whole facts.

Gen. ANSELL. Proceeding in the usual way when we are contemplating a project to amend existing law, it would be helpful to point out what I conceive to be the existing striking deficiencies and give you my views, at least, of the remedies that ought to be applied.

In the first place, there are two diametrically opposed legal theories as to courts-martial. One is that a court-martial is an executive agency, belonging to and under the control of the military commander, and is but a board of officers appointed to investigate charges and report their findings to the commander for his approval. Under such a theory a commander exercises a large and almost unrestrained discretion in determining (1) who shall be tried, (2) the sufficiency of the charge, (3) the prima facie sufficiency of the proof, (4) the composition of the court-martial, (5) passing upon all questions of law arising during the progress of the trial, and (6) reviewing the record for what he may conceive to be its sufficiency in law and fact. All of these questions are controlled under such a theory, not by law, but by the power of military command.

The other theory is that a court-martial is inherently judicial, its functions from beginning to end are judicial, and are to be regulated and limited by the established principles of jurisprudence which govern the exercise of judicial functions in our system.

Obviously the first theory would better accord with those governments which are classed as arbitrary, while the judicial theory is the one which would seem best adapted to our own liberal institutions. Yet the former theory, the arbitrary system, is the one which we still have, an inheritance of reactionary days. The Supreme Court has always recognized the inherent judicial quality of courts-martial; Congress, however, doubtless reflecting largely the military view, has legislated rather upon the other theory, and the other theory is the one maintained in our Army in practice. Our system of courts-martial, while subjecting every man in the establishment to the direst penalties, even death, proceeds to do so without requiring or contemplating the participation of a single man of legal qualifications at any phase from the filing of the charges to the moment of execution. As I see it, that fact alone is sufficient to condemn the system, regardless of what we may think of the results.

Of course, much error must be committed and injustice done by such crude boards. What is done now administratively to modify their asperities and correct their blunders is done extralegally, is insufficient, and is subject to change at the mere whim of military power. Prevention of injustice is better than any attempted cure of it after it has once been inflicted, and the way to avoid error is to put the case at the start in the hands of a man who knows what error is. In such a system as ours the errors accumulate from bottom to top, and at the top there is no authority for their correction.

As a result of my insistence in the early days of this war that we should bring these trials under legal subjection and supervision, some administrative action was taken to palliate, but not remedy, the situation. Under it many of the most serious cases are reviewable by our boards of review, composed of excellent lawyers, organized by my order. They have labored with the utmost diligence; under all the limitations of the existing system and practice they have performed well their task; they have saved much injustice by the force and persuasiveness of their arguments; without them and their efforts, bad as the situation now is, it would have been shockingly worse. But they have no authority whatever; their functions are extralegal and are no more than mere suggestions or advice to a military commander. A revisory power at the top of the system, carrying with it the incidental power of supervision, would have resulted in bringing these courts within legal subjection.

I had occasion shortly after I came to be the senior officer in the office of the Judge Advocate General to point out what I conceived to be the worst possible deficiency in the existing code and in the existing system of military administration. I endeavored at that time to deduce out of a section of the Revised Statutes a power which I thought was properly deducible, but which, if it were so deducible, had remained unused for many years; that is, the long-established practice of the War Department was opposed to the view which, as Acting Judge Advocate General, I took.

I expressed myself at that time fully as to what I thought the law fairly construed was, or as to what I thought it ought to be. I think that, with the permission of the committee, and pursuant to what the chairman has said, if I should read to the committee the views that I then expressed there would, in the long run, be a saving of time and a reading of those views would probably result in a clearer presentation of what I conceive to be the chief difficulties of the existing system. Of course, I disclaim any desire to read these views of my own for the purpose of accentuating any difference that I may have with any officers of the Army or with any persons in authority. I present them only because it is the best way of presenting my views.

The CHAIRMAN. Have you got the memoranda with you?

Gen. ANSELL. I have.

The CHAIRMAN. To whom was that presented, or for whom was it prepared?

Gen. ANSELL. It was presented to the Secretary of War.

Senator WEEKS. When?

Gen. ANSELL. In the latter days of October or early November, 1917.

Senator WEEKS. What action did he take?

Gen. ANSELL. The action taken by the Secretary of War was in effect to deny the existence of the power, to direct Gen. Crowder, not me, to make a further study, and ultimately, later, there was transmitted to the two committees of Congress a draft of a bill which was designed, in part at least, to meet the objections to the existing deficiencies which I had voiced.

The CHAIRMAN. That was in January, 1918?

Gen. ANSELL. Yes, sir.

Senator NEW. By whom was that bill submitted, Gen. Ansell?

Gen. ANSELL. That bill was submitted by the Secretary of War.

Senator NEW. Prepared under his direction?

Gen. ANSELL. Doubtless.

Senator WEEKS. Did he reply in writing to you?

Gen. ANSELL. Yes, sir. His views will appear in this memorandum.

Senator WEEKS. In your memorandum?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Did he reply to your report with a written memorandum or letter?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Have you a copy of that?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. You will file it after you read your report?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. The bill to which you refer is pending on the calendar of the Senate committee as Senate 3692, and purports to be a bill to amend section 1199 of the Revised Statutes of the United States. That is the one to which you refer?

Gen. ANSELL. That seems to be the one, sir.

I wish, if it be appropriate and in order, to present my own views on this subject, to say something at the proper time regarding this bill to amend section 1199.

The thing which struck me and which seems to me to challenge general attention, was this: and it is what I conceive to be a great legal fact: When we entered upon this war this was the state of the law. The War Department had no power, according to the practice, to revise any judgment of a court-martial, however erroneous and however prejudicial, when measured by established standards of law, that judgment might be to the accused. The War Department would see that a sentence was not carried into execution if it was awarded by a court that was without jurisdiction, but according to the departmental view no matter how gross and prejudicial the errors committed were, no matter how lawless the proceedings, when judged by established principles of law, no matter how shocking the error, if the court had jurisdiction the sentence must stand. This is shown to be so by the digest of opinions of the Judge Advocate General, and this was said to be the fact by the Secretary of War and the Judge Advocate General when they proposed the bill to which the chairman latterly referred. That is, it had been the settled construction and practice of the War Department and its law officers to regard as final and beyond all appellate or corrective action the judgment of courts-martial when approved by the authority appointing the court, except-

ing in cases where the proceedings were clearly coram non jure. It has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority was final and could not be reviewed or set aside by the President or any department of the Government unless the court was without jurisdiction.

Shortly after I came to be in charge of the office there was a case that came to the office which challenged sharply my attention and the attention of the 14 or 15 associates who were at that time serving in the office. Those assistants consisted of lawyers who had recently come to us under commissions in the Judge Advocate General's department from civil life. Used as they were, of course, to a system of jurisprudence which provided for the correction of errors other than those that were jurisdictional, they naturally remarked upon the existing situation, all conceding that this case was particularly flagrant with error and such that any court of appeals anywhere in the land could not have permitted the judgment and sentence to stand.

Senator WEEKS. Would it be difficult to point out just what this particular case referred to?

Gen. ANSELL. I will undertake to do so from memory at the present time.

There was, as I remember it, a regiment of field artillery stationed somewhere in Texas, in that department. In those days our young regular officers were just coming to high command. I speak in this respect subject to correction, but the very firm impression that I have is that this particular regiment had fallen under the command of a very young officer, not long since out of the Military Academy. It is further my impression that the particular command to which these accused belonged was also under a very young officer, the command being, I think, a battalion.

As I recollect it, these accused, all of whom were noncommissioned officers of the command—most of them, at least, were noncommissioned officers—were found engaged, perhaps in the company street, in shooting craps or some such form of gambling amusement as that, doubtless in violation of the usual camp order. They were told to stop this, and something occurred, perhaps other than a prompt obedience to this direction, but which, as I recollect it, was not at all serious, that caused the officer, the accusing officer, to put these noncommissioned officers and the others, if there were others—privates—in arrest. The next morning when the officer came down to drill his command these noncommissioned officers were not at the place of drill. He sent for them and got into communication with them, and found that these noncommissioned officers were relying on the general regulation that a noncommissioned officer in arrest will perform no duty; at least, none except by order of an authority who can dispose of their case in arrest. The officer ordered them to drill, and they still relied upon what they conceived to be their rights under the general regulation. They were told that their conduct savored of mutiny; they thought otherwise, and in a respectful way said so. They were tried for mutinous conduct. They were, as I recollect—

Senator WEEKS (interposing). By whose orders?

Gen. ANSELL. Charges, of course, had to be preferred by that officer. Those charges, with the usual extract of evidence, went to the depart-

ment commander—the officer commanding the Department of Texas—and by him a court was ordered for the trial of these men.

Senator WEEKS. I assume, of course, that they went through the regular military channels and were approved by the colonel of the regiment?

Gen. ANSELL. Doubtless.

Senator WEEKS. Was this regiment a National Guard regiment?

Gen. ANSELL. It was a Regular Army regiment.

Senator WEEKS. A Regular Army regiment?

Gen. ANSELL. Yes, sir.

They were tried and convicted of mutiny or mutinous conduct and sentenced to imprisonment ranging, according to my recollection, from three to eight years, together with dishonorable discharge and the usual forfeitures of pay and allowances.

When that case came to be reviewed by our office it presented to us gross illegalities and deficiencies which were such, when judged according to law, as to require a setting aside of the judgment in their cases, because the charge itself was, as I recollect it, insufficient to charge mutiny or mutinous conduct, for the reason that the evidence did not reasonably support the findings. There was, we thought, judged by any rule, no appreciable evidence to sustain the finding of guilt. The judge advocate himself we found guilty of highly improper conduct as a prosecutor. These things I now recall, and they probably were the principal ones leading to our conclusion. Under, as I say, established rules of the War Department nothing could be done in those cases to modify the judgment of that court-martial; I mean legally to modify the judgment of the court-martial.

This being the first important case, we had office conferences upon it. It was the beginning of the war. We knew there would be many others like it. It was essential to discover if we could find some method of establishing legal control over such court-martial judgments. It was a matter of vast importance, and after conferences extending over two or three weeks with the officers on duty with me, we prepared this memorandum with the usual formality. It is a memorandum for the Secretary of War, for his personal consideration, and the subject is: Authority vested in the Judge Advocate General of the Army by section 1199, Revised Statute, to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." The memorandum, which with your permission I will now read, is as follows:

It is my duty to bring to your attention and present to you my view upon a long-existing situation which arose of an ill-considered and erroneous change of attitude upon the part of this office that occurred within a score of years after the close of the Civil War—a situation which has endured ever since in the face of the law and in spite of attending difficulties but without reexamination, and which has profoundly affected the administration of military justice in our Army. I refer to the practice of this office, adopted it seems in the early eighties, to the effect that errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review.

This nonuse of power which Congress authorized and required this office to exercise, has, in numberless instances of courts-martial of members of our Military Establishment, resulted in a denial of simple justice guaranteed them by law. Under the rule, concededly illegal and unjust court-martial sentences,

when once approved and ordered executed by the authorities below, pass beyond all corrective power here and can never be remedied in the slightest degree or modified, except by an exercise of executive clemency—an utterly inadequate remedy, in that it must proceed upon the predicate of legality, can operate only on unexecuted punishment and, besides, has no restorative powers.

The last and most flagrant case of the many recent ones which have moved me to exercise an authority of this office which has long lain dormant, perhaps denied, in respect of which I direct you this memorandum, was the recent case of the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery, resulting in sentencing them to dishonorable discharge and long terms of imprisonment. Those men did not commit mutiny. They were driven into the situation which served as the basis of a charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate—

The CHAIRMAN. You are speaking of the Judge Advocate there?

Gen. ANSELL. Yes. [Continuing:]

which also appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years. The court had jurisdiction, and its judgment and sentence for that reason could not be pronounced null and void, but its conduct of the trial involved the commission of many errors of law which appeared upon the face of the record, and justified, upon revision, a reversal of that judgment.

Senator WEEKS. May I interrupt you at that point? You say that that could not be corrected by the reviewing authority? Could not the President set aside that sentence entirely?

Gen. ANSELL. No, Senator.

Senator WEEKS. Does he not do so in the case of trials in the Navy?

Gen. ANSELL. I can not speak advisedly of the Navy. I can speak very advisedly of the Army. It is only when the President, by virtue of being either the convening authority himself or by virtue of being the confirming authority of certain sentences, can set aside the judgment.

Senator WEEKS. Isn't he the confirming authority in all cases of general courts-martial?

Gen. ANSELL. No, sir; not at all—only very few. [Continuing:]

This case showed the extreme and urgent necessity of reexamination of my powers in such cases, and, after thorough consideration and with the concurrence of all my office associates, I took action in that case and concluded my review as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

Since this involves a departure from long-established peace-time administration of this office, I deem it my duty to acquaint you with the reasons therefor.

You, Mr. Secretary, and your immediate military advisers, never appreciate, I think, the full extent of the injustice that has been done our men through the operation of this rule. Officers of our Army, however sympathetic, can not approach a proper appreciation of the depth, extent, and generality of the injustice done, unless, through service in this office, they have seen the thing in the aggregate. A proper sense of the injustice can be felt only by those who exercise immediately the authority of this office. Indeed, those thus experienced can gather the full impression of the wrong done only by a complete mental inclusion of that vast number of cases where concededly corrective power ought to have been but was not exercised in each year of the past forty-odd years.

My entire service, during all of which I have been keenly sensible and morally certain that the office practice was wrong, my six years' service in this

office, during which I have borne witness to hundreds of instances of conceded and uncorrected justice—all of this has never served to impress me with the full sense of the wrong done to the individual and to the service so much as has the experience of my present brief incumbency of this office during this war. What is true in my case is true, so they advise me, of my associates. During the past three months, in scores, if not hundreds of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend executive clemency.

Senator NEW. Those errors were pointed out previously, you say?

Gen. ANSELL. I say I have done so, and frequently errors had to be pointed out for the purpose of having the authorities mitigate the punishment as much as they could by an extension of clemency.

Senator NEW. You have?

Gen. ANSELL. Yes, sir.

Senator NEW. Those instances were made matters of record?

Gen. ANSELL. They were; yes, sir.

Senator FRELINGHUYSEN. They were pointed out to the commanding officers who ordered the courts-martial?

Gen. ANSELL. As a rule, they were not, sir; because at that time, before we published an order requiring the commanding officers to stay the sentence in cases which would put the accused beyond the power of restoration, their action became final, the sentence was approved, and it was up then to the usual clemency power. Frequently, of course, the various convening authorities, upon their own initiative, as well as ours, sometimes long after the case had been reviewed and the judgment had gone into effect, did exercise the power of mitigation which the articles of war authorize them to do. [Continuing:]

All of this, of course, has been utterly inadequate. It has not righted the wrong. It has not made amends to the injured man. It has not restored him, and could not restore him, to his honorable position in the service. It could do no more than grant pardon for any portion of the sentence not yet executed. Such a situation commands me to say, with all the emphasis in my power, that it must be changed and changed without delay. This office must go back to the law as it stands so clearly written, and in the interest of right and justice, exercise that authority which the law of Congress has commanded it to exercise.

The Judge Advocate General of the Army is to revise all courts-martial proceedings for prejudicial error and correct the same. The law as it exists today is to be found in section 1199, Revised Statutes, wherein it is provided that:

The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army.

The word "revise," whether used in its legal or ordinary sense, for both are the same, can have but one meaning. It signifies an examination of the record for errors of law upon the face of the record and the correction of such errors as may be found.

Senator FRELINGHUYSEN. You are rendering your quotation of the law?

Gen. ANSELL. The quotation ends with the words "Judge Advocate General of the Army."

Senator SUTHERLAND. How long had that law been in effect?

Gen. ANSELL. The antecedents of that law, I think, are to be found in an act of 1862, of 1864 and of 1866, in other words?

Senator FRELINGHUYSEN. The statute has been on the books ever since 1862?

Gen. ANSELL. Yes, sir; Senator. [Continuing:]

"Revise," or its exact synonym "review," is a word so frequently found in the law and so familiar to all lawyers that its meaning can never be mistaken. When used in connection with judicial proceedings, it can involve no ambiguity. I am justified in entering upon a construction of the word only by the fact that this office for so long a time has ignored its meaning.

Senator FRELINGHUYSEN. May I interrupt you a moment? By that you mean the Judge Advocate General has appellate authority?

Gen. ANSELL. That was the proposition.

Senator FRELINGHUYSEN. That is your holding?

Gen. ANSELL. That is my holding.

Senator SUTHERLAND. Though he had not exercised it for 40 years?

Gen. ANSELL. For 40 years.

Senator WEEKS. Did the Judge Advocate General's office ever exercise it?

Gen. ANSELL. My inspection of the record, such as I could make of it in the two or three weeks we were studying this, caused me to make the statement in here that Judge Holt, Judge Advocate General of the Army during the Civil War period and for some time thereafter, did exercise this power of revision. That has been questioned, however, and I think properly so, as to whether Judge Holt did more in effect than recommend to reviewing authorities and to the Secretary of War what action they should take, is, in the light of studies that have been made since, doubtful. I can only say that in form, at least, his pronouncements seem to be a declaration that this sentence should be set aside or this sentence is invalid.

Senator FRELINGHUYSEN. Who served as Judge Advocate General during this period of 40 years?

Gen. ANSELL. There have been several judge advocates general succeeding Gen. Holt. There have been Gens. Dunn, Lieber, Davis, and Crowder; and I am conscious of having omitted some one.

Senator SUTHERLAND. I suggest you supply a complete list for the record.

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Has any one of these ever held with this construction you are going into?

Gen. ANSELL. Expressly held with me?

Senator FRELINGHUYSEN. Yes.

Gen. ANSELL. No.

Senator FRELINGHUYSEN. Has anyone ever held directly against you?

Gen. ANSELL. Yes, sir; but it seems to me a sort of sub silentio holding, but necessarily against the view I advance.

Senator FRELINGHUYSEN. Has any expert in military law ever held to your construction?

Gen. ANSELL. Not unless you should consider that officers, both regular and newly commissioned, who have been associated with me during this war, fall within your classification.

Senator FRELINGHUYSEN. You mean subordinates on your staff or in your office?

Gen. ANSELL. I do.

Senator SUTHERLAND. The great increase in the number of the cases and the importance of them at this time has caused you and your associates to want to consider this question more deeply than, perhaps, it has been considered heretofore?

Gen. ANSELL. This is doubtless true.

Senator FRELINGHUYSEN. Has any court of the United States ever considered and construed this statute as you construe it?

Gen. ANSELL. Yes, sir.

Senator THOMAS. Do you quote it there?

Gen. ANSELL. Later on.

Senator THOMAS. I think it would be well to go on, then.

Senator FRELINGHUYSEN. When you come to quoting those cases, will you simply indicate them in your answer?

Gen. ANSELL. It probably will come rather late. It is a long discussion.

Senator THOMAS. It is a very interesting one.

Senator JOHNSON. Do you tell as well where the contrary view has been held?

Gen. ANSELL. I think I have treated the question fairly. Of course, I intended to treat the question fairly. I think I ought to say in fairness to the Senator who just asked me about whether any civil court had had occasion to construe this statute, that in the original brief, the one I have here, I did not consider that case, because while doubtless we had known of it and it was cited in Winthrop, it did not challenge my attention. Its reference is in a little footnote.

Senator FRELINGHUYSEN. You will cite that case?

Gen. ANSELL. Later on we consider that case.

The CHAIRMAN. Those who were associated with you agreed with you in your view that the law gave power of revision and correction. Were there any of them associated who differed from you?

Gen. ANSELL. There was none. They were unanimous; but Col. White, a regular judge advocate, appended to his concurrence a statement that, while he had no question about the legal correctness of my view, he was a little fearful lest the Army be disturbed by the holding that the final judgment of a court-martial approved by the reviewing authority could be disturbed by the Judge Advocate General. He wondered if that would not be very disturbing.

Senator THOMAS. It ought to be, and I hope it will be.

Senator FRELINGHUYSEN. Will you please indicate the names of the officers who concurred with you?

Gen. ANSELL. I shall do that if you permit me to do so as we go along. They are shown here.

Senator FRELINGHUYSEN. Very well.

Gen. ANSELL (continuing to read):

The word "revise," by the Standard Dictionary, is defined thus:

"To go or look over or examine for correction of errors or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

And the word "review," given therein as a synonym for revise, is defined as:

"To go over and examine again; to consider or examine again (as something done or adjudged by a lower court) with a view to passing upon its legality or correctness; reconsider with a view to correction, as the court of appeals reviewed the judgment, the judge reviewed and retaxed the bill of cost; to see or look over; again; a literal meaning now rare."

In 34 Cyc., at page 1723, the word "revise" is defined as:  
"To review or reexamine for corrections; to review, alter, or amend. See also 'revision.'"

And the word "revision" is therein defined as:

"The act of reexamination to correct, review, alter, or amend."

And in Black's Law Dictionary "revise" is defined as:

"To review, to reexamine for correction; to go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it."

And "review" is therein defined as:

"A reconsideration; second view or examination; revision; consideration for the purpose of correction. Used especially of the examination of a cause by an appellate court."

And in Anderson's Law Dictionary the word "revise" is defined as:

"To reexamine and amend, as to revise a judgment, a code, laws, statutes, reports, accounts. Compare 'review.'"

And the word "review" is defined in the same dictionary as:

"Viewing again; a second consideration; revision; reconsideration, reexamination to correct, if necessary, a previous examination."

And in the same dictionary a "court of review" is defined to mean:

"A court whose distinctive function is to pass upon (confirming or reversing) the final decisions of another or other courts."

And in "Words and Phrases" (vol. 7) the word "revise" is defined as follows:

"To revise is to review or reexamine for correction, and when applied to a statute contemplates the reexamination of the same subject matter contained in a prior statute and the substitution of a new and what is believed to be a still more perfect rule." Citing *Casey v. Harmed*, 5 Iowa (5 Clark) 1, 12.

"Revise as contained in the Constitution, Article XV, section 11, providing that 'three persons learned in the law shall be appointed to revise and rearrange the statute laws of the State,' means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence." Citing *Visart v. Knopps*, 27 Ark., 226-272.

"A law is revised when it is in whole or in part permitted to remain and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect or to fit it better to accomplish the object or purpose for which it was made, or some other object or purpose." Citing *Falconer v. Robinson*, 46 Ala., 340-348.

I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, 30 Stat., 553 (bankruptcy law), provides in part as follows:

"The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

The word "revise" as used in the bankruptcy act is universally held to be something broader than the power to review by writ of error. In *In re Cole*, 163 Fed. 180, 181 (C. C. A., first circuit), a case typical of all, the court, after adverting to the usual limitations upon the power to review by way of writ of error, contrasted that method with the statutory power to revise, as conferred by that act, saying:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And the court then said:

"We feel safe to adopt the broader view, and it is our present opinion that it is our right so to do," and concluded that, upon revision—

"We can revise any question of law as to which we may justly infer that the district court reached a conclusion, whether formally expressed or not and whether or not formally presented."

Senator SUTHERLAND. Those are judicial decisions and findings that you are quoting from?

Gen. ANSELL. Yes, sir.

Senator SUTHERLAND. You are quoting from the words of judges?

Gen. ANSELL. I was quoting; yes, sir.

Senator THOMAS. It has been the subject of innumerable legal decisions, and all of them are in the same direction.

Gen. ANSELL. It seems to be so, sir.

Senator FRELINGHUYSEN. You are citing the cases?

Gen. ANSELL. They are cited.

Senator WEEKS. May I ask a question? Do I understand you to say that this has been submitted to the Secretary of War?

Gen. ANSELL. I did say so; yes, sir.

Senator THOMAS. This opinion?

Gen. ANSELL. Yes, sir.

Senator WEEKS. That was submitted to the Secretary of War?

Gen. ANSELL. Yes, sir.

Senator WEEKS. Has Gen. Crowder examined this opinion?

Gen. ANSELL. Oh, yes, sir.

Senator WEEKS. Do you know whether or not he agrees with you?

Gen. ANSELL. Gen. Crowder does not agree with me.

Senator SUTHERLAND. Is the point of difference solely the one you suggested in the beginning of the opinion as to the right of review?

Gen. ANSELL. Probably I would not be justified in saying that was the sole difference, Senator. The difference here was, of course, the difference between lawyers as to the power of that office. That leaves open the question as to any difference there may be as to what the law ought to be. I can only say what I think the law ought to be.

Senator JOHNSON. As to what the law is, your difference arises on the proposition as to whether there is the right of review and revision?

Gen. ANSELL. Yes, sir; exactly.

Senator SUTHERLAND. As to what the law should be, you take the view that it should be cleared up and made specific?

Gen. ANSELL. Yes, sir; absolutely.

Senator THOMAS. The general insists that the word "revise" means what it says; the others say that it means something else.

Gen. ANSELL. I say that there ought to be the power, whether the statute confers it or not, to review.

The CHAIRMAN. Under your view you do not need any statute to revise or review?

Gen. ANSELL. Under my view, we would not have needed any legislation to establish revisory power if the existing statute had been properly construed at the beginning of the war. [Continuing to read:]

The language of that statute is the very language of this, except that the revision there is expressly limited to matters of law. Inasmuch as in the statute before us there is no express limitation, it could hardly be held that the revisory power of this office is less than the revisory power conferred by the bankruptcy act. The word "revise" as used in the bankruptcy statute has always been held to signify power to reexamine all matters of law imported by or into the proceedings of the case, and a very liberal view has been taken of what constitutes the record and proceedings in such matters. (See the many cases cited in Federal report digest, "Bankruptcy," vol. 5, from secs. 349 to 448.)

The revisory power there conferred is something broader than that invoked by writ of error, though, of course, not so broad as to justify a reexamination of mere controversies or questions of fact. Doubtless, in any view of the case, the question whether the evidence sustains the verdict—that is, whether there

is any substantial evidence at all upon which the verdict may rest—is a question of law which may be reviewed under this power, and such at least must be the power of this office.

The history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word "revise" in the present instance. It is not necessary now to say whether such revisory power existed in the Judge Advocate in the early days of our Army, though, especially in view of the English military law, this seems to have been so; nor to advert to the fact that after the War of 1812, and also after the Mexican War, the duty of the Corps of Judge Advocates seems to have been primarily that of military prosecutors. Nor is it necessary, except to indicate the proper setting, to say that military prosecution had ceased to be the primary function of the Corps of Judge Advocates at the beginning of the Civil War, if not before. Nor is it more than suggestive that the Judge Advocate General of the Army has always presided over both the Corps of Judge Advocates and the Bureau of Military Justice, and that this corps and this bureau were consolidated by the act of 1884 (23 Stats., 113) into what is now the Judge Advocate General's Department. It is important to note that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War and expressly invested its head, the Judge Advocate General of the Army, with this revisory power; and it is important to note that Congress redeclared this power in 1864 (13 Stats., 145), and in 1866 (14 Stats., 334), and again in section 1199, Revised Statutes, of which the former acts were the antecedents. Now, taking up these antecedents: In the act of July 17, 1862 (12 Stats., 598), which was an act "calling forth the militia to execute the laws of the Union, to suppress insurrection, etc.," it was provided—

"That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry, to whose office shall be returned for revision all records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

This provision speaks very plainly. It not only directs the Judge Advocate General to revise the records and proceedings of courts-martial, but it further directs that officer to keep a record of "all proceedings had thereupon"; that is, upon the revision. It is clear that this intended something more than a perfunctory scrutiny of such records, and that it, in fact, vested this office with power to make any corrections of errors of law found to be necessary in the administration of justice. The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated.

The CHAIRMAN. Do you discuss the Sergt. Mason case?

Gen. ANSELL. Later on it is adverted to, but it is not much discussed.

The next legislative expression is found in the act of June 20, 1864 (13 Stats., 145), of which sections 5 and 6 are as follows:

"Sec. 5. There shall be attached to and made a part of the War Department, during the continuance of the present rebellion, a bureau to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

"Sec. 6. That the President shall appoint, by and with the advice and consent of the Senate, as the head of said bureau, a Judge Advocate General, with the rank, pay, and allowances of a brigadier general, and an assistant Judge Advocate General, with the rank, pay, and allowances of a colonel of Cavalry. And the said Judge Advocate General and his assistant shall receive, revise, and have recorded all proceedings of courts-martial, courts of inquiry, and military commissions of the armies of the United States, and perform such other duties as have heretofore been performed by the Judge Advocate General of the armies of the United States."

Just as the title of the judge advocate is in itself significant in this connection, so is the title of the bureau thus created—the Bureau of Military Justice. It will be noticed that this act preserves all the requirements of the

act of July 17, 1862, supra, concerning the duty of the judge advocate in the matter of revising the records of general courts-martial, and keeping a record of "all proceedings had thereupon," meaning, of course, proceedings upon such records in revision. And at the close of the war, in the legislation looking to the peace establishment, Congress enacted the act of July 28, 1866 (14 Stat., 334), the same being "An act to increase and fix the military peace establishment of the United States," in section 12 whereof it was provided—

"That the Bureau of Military Justice shall hereafter consist of one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and one assistant Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry; and the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army \* \* \*"

This act does not change the duties of the Judge Advocate General with reference to the revision of records of courts-martial. It omits the phrase found in the two acts immediately preceding to the effect that "a record shall be kept of all proceedings had thereupon," but introduces for the first time the direction that in addition to revising and recording the proceedings of all courts-martial, the judge advocate shall "perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." It will be observed that this last cited expression, as carried into section 1199 of the Revised Statutes as quoted above, still remains the law on the subject. In referring to the duties "heretofore performed by the Judge Advocate General of the Army," the statute included, *inter alia*, the duties prescribed by the statute, for the presumption is that the duties thus prescribed were in fact performed. It follows that included within this direction is the mandate that a record be kept of all proceedings had in the revision of courts-martial proceedings in the office of the Judge Advocate General, and the force of this mandate must be added to the ordinary meaning of the word "revise" in determining the scope of the duties of the Judge Advocate General as now defined by law.

The legislative history of all the antecedent acts, brought forward as 1199, Revised Statutes, shows that the word "revise" has the meaning here indicated. As to the act of 1862, see Congressional Globe, part 4, second session Seventeenth Congress, pages 3320, 3321. This was especially true of the debates upon the act of 1866, of which there was considerable, owing to the objection taken to the legislative recognition contained in that bill of military commissions. An effort was made to strike out and otherwise defeat the entire provision for the Bureau of Military Justice during peace, and the strongest argument made in support of its retention was found in the fact that it had and had freely and satisfactorily exercised this revisory power. The whole tenor of the debate clearly shows what Congress understood had been the revisory power of the Judge Advocate General of the Army since the act of 1862. It was said by one Senator (Mr. Lane of Indiana):

"It is utterly impossible for the President, in the multiplicity of his duties, to look into all these cases; it is physically impossible for the Secretary of War to do so; and to facilitate the administration of criminal justice it was found necessary to establish this bureau."

And another Senator (Mr. Hendricks) said:

"I am not prepared to vote to abolish the court of military justice. If that court be properly constituted and discharges its duties legitimately within its jurisdiction, as the court was organized under the act of two or three years ago, it will be a blessing, and I will not vote to abolish the court because of such wrong decisions that it may have made."

And further on the same Senator referred to the case of one officer in whom he was interested, in which there had been an erroneous conviction, and said in that connection:

"I went with him to see the Judge Advocate General. The case was called up before the Judge Advocate General and reviewed, and at once he decided that the testimony was not sufficient, and restored the young man to his position in the Army."

Further on, referring to this power, the same Senator said:

"I think it is a protection to the military men of the country to have such a court. It will come to be, when the hour of passion, to which my colleague has referred, shall have passed away, a court deliberate in its proceedings and, I

hope and have no doubt, wise in its adjudication. Then it will be a blessing to the country and a protection to our military men. Necessarily, when our Army shall come to be 50,000 strong, there will be many military trials for military offenses of military men. There ought to be a court of appeal, and this is intended to be a court of appeal—a court in which the judge of the courts-martial may be reviewed and, if improper, revised. Such a court seems to me ought to be in the Army." (See Cong. Globe, pt. 4, 39th Cong., 1st sess., 1866, pp. 3672-3676, *et passim*.)

It was these legislative antecedents that were brought forward, without substantial change of language, as the existing law (sec. 1199, Rev. Stat.), now under discussion.

This office, while ignoring its right and duty to revise for prejudicial other than jurisdictional error, has, with strange inconsistency, been quick to assert its power to declare a judgment and sentence null and void on the ground that the proceedings were, in its judgment, *coram non jure*. After the large armies of the Civil War had been demobilized and their activities were no longer a matter of immediate concern to this department, and the Army had become, in point of size, but a small national police force, this office, for reasons unexpressed and unknown, restricted itself to the correction of such jurisdictional error alone.

The practice seems to have been adopted without thoughtful consideration of the law or policy involved or the resulting injustice. The opinions of this office, beginning with the early eighties, assume, without argument or reason, that the office was so limited. It can not fairly be said that upon this specific question the office has ever fairly and thoughtfully expressed itself. Extracts from two of the opinions, typical of all, will be sufficient to show the general character and nature of these holdings.

In an opinion under date of August 10, 1885, approved by the Secretary of War, Acting Judge Advocate General Lieber held as follows:

"As the whole matter is understood to be recommitted to this office for examination, including the letter referred to, I beg to remark that in acting upon the sentence of a court-martial the reviewing authority acts partly in a judicial and partly in a ministerial capacity. He 'decides' and 'orders' (Army Regulations, par. 918). Without his decision the sentence is incomplete. His decision is an exercise of judicial functions, and is as much beyond the control of other constituted authority as the findings of the court are beyond his. He can not be ordered to revoke it, and if it be adhered to the sentence can be removed in no other way than by the President in the exercise of his pardoning power (or set aside by the President when void by reason of a want of jurisdiction)."

In the case of Lieut. J. N. Glass, tried by general court-martial, this office in a review under date of July 20, 1886, signed by Acting Judge Advocate General Lieber, concluded as follows:

"The proceedings, findings, and sentence in this case having been approved by the reviewing officer in the exercise of his proper functions, they are beyond any power of revision on the part of higher authority, but the President, by the virtue of his pardoning power, may remit the unexecuted part of the sentence. The latter course is respectfully recommended by this office."

In the opinion first above cited, which is a fair sample of the many that have followed, the then Acting Judge Advocate General took the view that the proceedings of a general court-martial could be set aside for a want of jurisdiction. But whence came that power? In declaring it to be competent to declare the proceedings of a general court-martial void for want of jurisdiction he evidently overlooked the fact that in declaring a trial void for want of jurisdiction some functionary must sit in an appellate capacity, for which there must be some statutory or common-law authority. As a matter of fact, no statutory or other authority can be found for the exercise of the power to declare a trial void for want of jurisdiction unless it can be found in that provision of section 1199, which confers a general revisory power upon the Judge Advocate General. If the power to revise includes the power to declare proceedings void for want of jurisdiction, it must also by any fair construction include the power to declare a judgment wrong as a matter of law and reverse it. If this office has the one power it necessarily has the other, and if it has not the latter power it has not the former. By the plain language of the statute this office has both.

Nor has the power contended for ever been questioned by the civil courts or other civil authority. To be sure there are many expressions in adjudicated cases to the effect that the duly approved sentence of a court-martial when the court has proceeded within its jurisdiction and the rules governing its procedure

is as final and unassailable as a decision of a civil court of last resort. But it must be remembered, of course, that in each of these cases the court was speaking of collateral attack in the civil courts on the proceedings of a court-martial and did not have in view the power of the department itself to correct court-martial judgment by way of direct revision of it. I have also examined many expressions of opinion by the Attorney General and find that these expressions have had to do generally with cases in which the final approval has been by the President himself, and go only to the question of whether such cases can be reopened by the President or his successor for the purpose of undoing what he has once legally done. I have not found that any authority has ever questioned the revisory power of this office to correct errors of law in court-martial procedure when they amount to a denial of justice. And I may be permitted to say that should I find such holdings by any authority other than the highest court of the land, I should not hesitate to question the soundness of the decision.

In this connection I may say that it was suggested to me by the present Judge Advocate General himself that the finality attributed by the articles of war to the power of the several reviewing authorities might be thought to militate against or negative the view I advance. This could hardly be true. The statutory power of the Judge Advocate General of the Army conferred by 1199 R. S. stands unaffected by anything said in the law as to the power of appointing authorities. Indeed, the statutes are not in pari materia. They exist for entirely different purposes. They establish different functions, all of which have independent spheres. The general powers of correction conferred upon appointing authorities by the articles of war existed prior to the enactment of the statutes now brought forward in 1199 R. S., and also concurrently with them, without thought of conflict. There is, of course, a field of operation for each. The concept of finality referred to is the finality within the system, the finality with which all lawyers are familiar, and which must exist in order that there may be a review at all. A judgment of an inferior court must be a final judgment before it can be subjected to review in an appellate court. The action of the appointing or confirming authority directly giving effect to the judgment of the court itself gives finality to that judgment; that is, that completeness and integrity without which there could be nothing for this or any other authority to review. Such judgments are operative as final until and unless revised upon review. This concept of finality is so familiar to lawyers as to require no further discussion.

Such is the law, and there is a pressing necessity at this time that we go back to it, revive it, and act under it. Daily this office reviews records which show that in the trial some substantial rights of persons standing before courts-martial accused of crime have been flagrantly violated or that convictions have been secured on wholly insufficient evidence. Others show that charges and specifications are sometimes laid under the ninety-sixth (the general) article of war for acts that are not properly to be regarded as military offenses at all. And quite as frequently cases are encountered in which men have been convicted of serious offenses where upon the evidence the offense committed was not the offense charged or for which they were tried. Officers of the Army, even of the Regular Army, are persons unlearned in the law, and, as fallible beings, may be expected from time to time to commit such errors in court-martial procedure as operate to deny the accused right and justice and result in his unlawful punishment. And such errors are even more to be expected now, as our Army is expanding and thousands of new officers are brought into the service who have had no military training and no familiarity with military law and the customs of the service. For this reason alone there should be the closest supervision.

But the situation may also be viewed from another aspect. As an American institution, our Army must be maintained under law. Our Army can never be the most successful army it is capable of becoming except it have the highest regard for the rights of the enlisted men, as those rights are established by law. Indeed, the higher the regard for those rights the greater will be the popular confidence in the Army. For the first time in the history of this country we have in fact a truly democratic and popular Army. It has come from the people. Tens of thousands of homes have been affected. In the welfare of the Army millions are concerned directly and the entire public interested generally. Expediency, in the highest sense of the term, as well as law, requires that the Army itself be quick to see that justice be maintained within it. The men now drafted from all walks of life and placed, whether they will or not, in the military service of the country are wholly without previous military training

and it is only natural to expect many transgressions against discipline, certainly in the early days of their service. They are entitled to justice as established by law, and those who are giving them up to the service of the country have the right to feel, to know, that they will not be lightly charged with military offenses, nor branded while in the service of their country as criminals, except after a fair and impartial trial and on proof which can meet the legal test.

There is a revisory power here, which must be exercised. It will, of course, be exercised with all due regard for the proceedings and strictly within the limitations of the law.

Inasmuch as this opinion is the result of long and thorough conferences with my associates in this office I would prefer that each of them read it, and, for the benefit of the record, express his concurrence or dissent.

This was signed by me, and those concurring were: James J. Mayes, lieutenant colonel, J. A.; George S. Wallace, major, J. A., O. R. C.; Guy D. Goff, major, J. A., O. R. C.; Wm. O. Gilbert, major, J. A., O. R. C.; Lewis W. Call, major, J. A., U. S. A.; Edward S. Bailey, major, J. A., O. R. C.; William B. Pistole, major, J. A., O. R. C.; E. M. Morgan, major, J. A., O. R. C.; Eugene Wambaugh, major, J. A., O. R. C.; E. G. Davis, major, J. A., O. R. C.; Alfred E. Clark, J. A., O. R. C.; R. K. Spiller, J. A., O. R. C.; Herbert A. White, lieutenant colonel, J. A.

Senator SUTHERLAND. Did any of them dissent from that opinion?

Gen. ANSELL. There were no dissents.

Senator SUTHERLAND. Did any others dissent?

Gen. ANSELL. There were no dissents.

Senator THOMAS. What is the date of that opinion?

Gen. ANSELL. November 10, 1917.

Senator FRELINGHUYSEN. Do I understand from the point you make that the Judge Advocate General has power to revise, that he would have the power to impose a lesser sentence, to disapprove the findings, or that he has power to send the matter back to the court for retrial and rehearing?

Gen. ANSELL. Yes, Senator. It was my view that the Judge Advocate General of the Army could set aside, reverse, or modify any judgment or sentence of a court-martial for any error of law appearing in the record, in the judgment, or in the sentence.

Senator THOMAS. In other words, apply your judgment to what you believe to be the right conclusion as to real revision or review?

Gen. ANSELL. Exactly, sir.

Senator FRELINGHUYSEN. In that case would that deprive the President of any of his powers of review or clemency?

Gen. ANSELL. No, Senator. Clemency operates upon a sentence pronounced upon a judgment that is found to be legal.

Senator WARREN. As I understand you, that is to be an absolute determining factor.

Senator THOMAS. That is outside of the Judge Advocate General, anyhow.

Senator FRELINGHUYSEN. I understand.

Senator WARREN. Your passing upon it for the Judge Advocate General settles it for all time?

Gen. ANSELL. As to the legality, for all time.

Senator SUTHERLAND. The power of the President would come in after that?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. After you had confirmed sentence for death or imprisonment?

Gen. ANSELL. Yes, sir; after the Judge Advocate General had decided the sentence to be legal.

Senator FRELINGHUYSEN. Have you been in charge since you wrote this opinion? Have you been in entire and complete authority?

Gen. ANSELL. I have not. The situation could be stated, I think, like this, Senator: Shortly after this opinion was written my chief, Gen. Crowder, was asked by the Secretary what his views were concerning this subject, and Gen. Crowder filed a brief in opposition to this view. About that time Gen. Crowder came back and assumed a closer personal relation to and supervision over the office. He had been Provost Marshal General, and from the time that I fell in control until shortly after this brief was prepared he had not exercised any personal supervision over me and the office. The Secretary of War held that, inasmuch as there was a convenient means of doing justice in these cases—mutiny cases—by the exercise of clemency, he would exercise clemency in these cases and refer the question back to Gen. Crowder for further study.

Senator THOMAS. Would the exercise of clemency restore these men to their positions?

Gen. ANSELL. No.

Senator THOMAS. Then the remedy would not be adequate?

Gen. ANSELL. I have dealt with that, sir.

Senator THOMAS. I know you have.

Gen. ANSELL. I was then told that matters of policy such as this would not be passed upon by me, except after conference with my chief.

Senator FRELINGHUYSEN. Who told you that?

Gen. ANSELL. The Secretary of War told me that. Perhaps, also, the Chief of Staff, and, also, the Judge Advocate General. I know the Secretary of War told me that, and it was generally understood.

Senator FRELINGHUYSEN. Did Gen. Crowder disagree with and dissent from your views with regard to your power of revision?

Gen. ANSELL. He did, sir.

Senator FRELINGHUYSEN. In his brief?

Gen. ANSELL. He did, sir.

Senator FRELINGHUYSEN. Have you a copy of that brief with you?

Gen. ANSELL. Yes, sir; I think I have.

Senator FRELINGHUYSEN. I would suggest that you put it in the record. (See Exhibit B.)

(The matter referred to was subsequently submitted and is here printed in full as follows:)

EXHIBIT B.

MAJ. GEN. E. H. CROWDER'S MEMORANDUM IN OPPOSITION TO THE REVISORY POWER, AND THE SECRETARY OF WAR'S DISPOSITION OF THE INSTANT CASE.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, November 27, 1917.

Memorandum for the Secretary of War.

On November 10, 1917, there was presented for your personal consideration by Gen. Ansell, Acting Judge Advocate General, a memorandum brief in support of his action on the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery. In the discussion of the record of the case itself, Gen. Ansell had come to the conclusion that the evidence did not warrant a conviction of the offense of mutiny, that many errors of law appeared on the face of the record, and that, while the court had jurisdiction and "its judgment and sentence for that reason could not be pronounced null and void," errors in law and the unfairness of the trial

"justify, upon revision, a reversal of that judgment." Gen. Ansell, first inviting attention to section 1199, Revised Statutes, providing that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army,"—concludes his review of the case as follows:

*"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."* (Italics supplied.)

I shall not address myself for the present to the merits of the case or to the proper administrative action that should be taken in respect of it, but rather to the statement of Gen. Ansell in his memorandum brief, that an ill-considered and erroneous change of attitude on the part of the Judge Advocate General's Office that occurred within a score of years after the close of the Civil War has profoundly and adversely affected the administration of military justice in our Army; that "errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review"; that you and your immediate military advisers can never appreciate the full extent of injustice that has resulted to our soldiers through the operation of this rule; that a proper sense of the injustice can be felt only by those who exercise immediately the authority of the Judge Advocate General's Office; and that even those thus experienced can gather a full impression of the wrong done only by complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not exercised in each year of the past forty-odd years. Gen. Ansell adds:

"During the past three months, in scores, if not hundreds, of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency."

In handing the memorandum brief to me for my study, you asked my attention to these statements and expressed your surprise that such a situation as is here depicted could have existed in the face of an express grant of power to the Judge Advocate General, which Gen. Ansell finds in section 1199, Revised Statutes, to modify or reverse the approved proceedings of courts-martial. You directed me to examine the brief and make a report thereon. I have had a limited time in which to do this, but the results of my study, which I think is complete enough to answer the main propositions, follow:

The logic of Gen. Ansell's brief converges to its conclusion in these distinct channels:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning, confers upon the Judge Advocate General not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General with the power to modify or reverse the same.

2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.

3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period and apparently until the early eighties.

4. That the power has never been questioned by the civil courts or other civil authority.

5. That the power is, and for a long time has been, vested in the judge advocate general of the British Army.

Since the brief concededly purports to overturn the established practice of over one-third of a century, and to advance a doctrine as to which there is little or no previous expression or any authority or opinion outside of the brief itself it will be well to follow the outline of discussion upon which the brief is built, and to address ourselves first to the contention that the word "revise" in section 1199, Revised Statutes, confers upon the Judge Advocate General the power to review and then to modify or reverse the approved proceedings and sentences of courts-martial.

## 1. MEANING OF THE WORD "REVISE."

Practically the whole fabric of Gen. Ansell's argument is built upon an interpretation of the meaning of this single word "revise." In support of the broad meaning which he gives this word, his brief collates definitions of the word by lexicographers and jurists. On the authority of the Standard Dictionary, which defines the word "revise"—

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform"—

he classifies the word "review" as a synonym of the word "revise"; and upon this justification indiscriminate definitions of the words "revise" and "review" are quoted throughout the brief. I think the deductions he makes in this part of his brief are unauthorized.

In essential etymology the word "revise" means "to look over." It has acquired a special meaning going to the purpose of the "looking over," and imports a purpose of suggesting, or making amendments. Thus a proof reader revises copy and suggests changes. But he does not effect changes. Special committees of men learned in the law revise statutes and codes by special legislative commission, but their revisions do not give legal life to the result of their labors. The legislature must enact the revision as a law. In the same sense the "looking over," the "reexamination" of the proceedings of an inferior tribunal by an appellate court is not the reversal or the modification of the judgment, albeit the revision is for the purpose of making such a change. All this is most significant, since in the statutory grant of so wide a power as that contended for we should expect, by all the analogies of grants of appellate power, to find something more than authority "to look over" or "to examine." Such brief survey of the field of statutes conferring appellate power on the various tribunals of the several States and of the United States as I have been able to make in the limited time I have had to prepare this paper fails to disclose a single instance in which the power to modify or reverse the judgment of inferior courts is deducted from the words "review" or "revise" without the addition of apt words specifically conferring the power to reverse or modify.

Gen. Ansell's brief purports to find one such statute, which he describes as analogous with section 1199, Revised Statutes, granting the power to modify or reverse by the use of the single word "revise." Gen. Ansell says, in part:

"I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898 (cpa. 541, 30 Stat., 553, bankruptcy law), provides, in part, as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

Gen. Ansell's brief then proceeds to cite a case interpreting the bankruptcy statute (in re Cole, 163 Fed., 180, 181; C. C. A., first circuit), which he describes as "a case typical of all," in which the court says:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And from this quotation it is inferred that the court was finding in the word "revise" a broader power to "modify or reverse" the procedure of the lower court. This legislative precedent, as judicially applied, would, if it were properly and accurately set forth in the brief, be most persuasive, and for this reason I have had recourse to the statute itself. I find that the quotation of the bankruptcy act of July 1, 1898, in the brief is incomplete, being a quotation of only a portion of the section conferring appellate jurisdiction on the Supreme Court and the circuit courts of appeal and the supreme courts of the Territories. The portion quoted is from the latter part of the section, the earlier part of the section having conferred general appellate jurisdiction; the words quoted by Gen. Ansell, "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law," follow that part

of the section which confers general appellate jurisdiction. In order that you may be fully advised in the premises, I quote the entire section:

"Sec. 24. Jurisdiction of appellate courts. a. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The concluding paragraph, marked "b," quoted by Gen. Ansell, follows the underscored language which invests the courts with appellate jurisdiction in express terms. There was no necessity for the court to deduce appellate power out of that part of the section designated above "b" for it had this appellate power by express grant. The discussion of the court in re Cole should, I think, be so understood.

I do not think this part of the reply would be complete without some reference to the manner in which appellate jurisdiction has generally been conferred by statute, exemplified in the following:

(a) The act of February 9, 1893, establishing the Court of Appeals for the District of Columbia provides:

"Sec. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia \* \* \* may appeal therefrom to the court of appeals \* \* \* and \* \* \* the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just."

(b) The Judicial Code of March 3, 1911, provides for the exercise of appellate jurisdiction in the following sections:

"Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error, decisions in the district courts," etc.

"Sec. 130. The circuit courts of appeals shall have the appellate jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy,' etc.

"Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question, etc., may be reexamined and reversed or affirmed in the supreme court upon a writ of error."

"Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: \* \* \*

"Sec. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy," etc.

In the light of what has been said, I think it will be perfectly apparent to you that the court, in re Cole, was in no sense discussing its power to give effect to its conclusion upon revision. It was discussing only the scope of the matters that could be inquired into upon the petition, and found the definition of that scope in the words "revise in matters of law the proceedings of the several inferior courts of bankruptcy." It becomes, therefore, quite impossible to follow the brief we are here reviewing in its assertion that—

"The language of that statute (bankruptcy act) is the very language of this (sec. 1199, R. S.) except that the revision there is expressly limited to matters of law."

There is not even a shadow of analogy between the words of the Federal bankruptcy act investing the circuit courts with specific appellate jurisdiction and the words of section 1199, Revised Statutes, relied upon to invest the Judge Advocate General with appellate jurisdiction.

But I can not conclude this part of the brief without inviting your attention to the definitions which are quoted from Words and Phrases, volume 7. It seems to me that not a single one of the definitions quoted in the brief was addressed to grants of appellate power to courts, but that all are addressed to grants of legislative power to revise statutes, or to the scope of the authority granted to special commissions to revise codes, where it goes without saying the power to

revise confers no power whatever to give effect to the revision. There was, however, one definition of the word "revise" on that cited page of Words and Phrases that does go to the meaning of a grant of power carried to a court by the word "revise," but I do not find that this definition is in Gen. Ansell's brief. It is as follows:

"Revision, as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice requires a revision of the decree appealed from, does not mean reversal or modification, but simply review, reexamination, or looking at again."

I may add, in closing this part of my memorandum, that a rather complete survey of statutes vesting appellate power in tribunals, administrative as well as judicial, fails to disclose a single case where the power to modify and reverse is left to be deduced from such an inapt and single word as the word "revise," without the addition of appellate power granted in specific and unequivocal terms.

## 2. HISTORY OF THE LEGISLATION.

Gen. Ansell's brief asserts that—

"The history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word 'revise' in the present instance."

It is said that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War, and expressly invested its head, the Judge Advocate General of the Army, with this revisory power. Gen. Ansell's reference here is to the original statute, the act of July 17, 1862 (12 Stats., 598), in which it was provided that:

"The President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned for revision the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The same words were carried forward in the act of June 20, 1864, and no further grant of power is found in the latter statute. In the act of July 28, 1866 (14 Stats., 324), the granting word is still "revise," the only change being the omission of the words found in the earlier statutes, "a record shall be kept of all proceedings had thereupon"; and so the same words were carried forward in section 1199, Revised Statutes, where they remain to base the ground of this contention.

I find nothing in the legislative development that is even worthy of remark in this connection. The word "revise" (or "revision") is the only granting word now as it was in the beginning. There is precisely the same power, no greater and no less. If history is to be invoked, therefore, we must look to the administrative and not to the legislative history of the statute. And this brings us to—

## 3. ADMINISTRATIVE HISTORY OF THE DEPARTMENTAL PRACTICE.

This administrative history has been appealed to in Gen. Ansell's brief to the extent that it is asserted that—

"The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated."

Judge Advocate General Holt was Secretary of War before he was Judge Advocate General. His position at the bar of the United States was an enviable one. If this statement of his construction of the law is accurate, it would be most persuasive upon me, as I think it would be upon you. Gen. Ansell, however, cites no instance from the records of the Judge Advocate General's office where Judge Holt has indicated such a view, and such examination of the records of Judge Holt's action upon courts-martial proceedings during the Civil War period as I have been able to make does not disclose a single instance of the kind mentioned. Candor compels me to state that in the limited time that I have had to prepare this memorandum no systematic search of the hundreds of records bearing the stamp of Judge Holt's action could be made, and therefore the positive assertion that there exists no single instance of this kind would not be warranted. However, there was revealed from these old and interesting books very significant circumstances most emphatically indicating that Judge Holt never contended for nor exercised the power that Gen.

Ansell says was vested in him by the statute, exemplified in the following reference to Judge Holt's opinions:

(a) I find on page 269 of volume 11 of the Records of the Bureau of Military Justice (Dec. 16, 1864), over Judge Holt's own signature, a short review of the case of Pvt. Hiram Greenland, who was tried by a court-martial convened by Gen. Howe. The record failed to show the date of the trial or whether there was present a quorum of the court. If Judge Holt had been exercising an indigenous power, such as it is contended he could exercise, he would have taken the action attempted to be taken in the instant case that raises the present contention and would have reversed the judgment. Instead of doing so indorsement "To the President" reads:

"There are fatal irregularities invalidating the whole proceedings and rendering the sentence inoperative, and it is recommended that it be so declared by the President."

(b) Again I find Judge Holt writing to Col. W. N. Dunn, Assistant Judge Advocate General, under the caption "Bureau of Military Justice," and under date December 27, 1864, in reference to the case of James Scott, corporal, Ninth Michigan Cavalry, in which the record was fatally irregular in that the arraignment of the prisoner and the reception of his plea had been accomplished prior to the administration of the oath to the court. Instead of reversing the judgment, as he, of course, would have done had he deemed that the power was in him to do so, he writes as follows:

"In similar cases returned from this office, to the officer charged with the duty of revision or executing of the sentence, it has been found advisable to direct his attention to the fact that a proper course to pursue with irregularities of proceedings which can not be corrected, rendering the sentence inoperative, is to revoke the order of execution, and if the parties are not liable to be subjected to another trial to release them."

(c) In the case of W. H. Shipman, in which the charge has been drawn under the general Article of War for an offense clearly cognizable under a specific article, Judge Holt expressed the opinion that such an irregularity rendered the sentence void, but instead of reversing the judgment or attempting to give inherent effect to his own opinion he addressed the Secretary of War, under date December 22, 1864, in part as follows:

"If this opinion is concurred in, the pleadings in the case must be held to be fatally defective and the sentence imperative."

In no single case of perhaps 100 consecutive cases examined by me has there been found an instance in which Judge Holt ever attempted to reverse the judgment of a court-martial. Other cases similar to those quoted from were found in abundance.

Gen. Ansell's brief asserts that the power contended for was utilized during the Civil War period and beyond the Civil War period until the early eighties, when it was abandoned without apparent cause, argument, or reason. A rather hasty examination of the records from 1864 to 1882 fails to disclose a single instance of the exercise of such power. I shall not prolong this brief by citing the cases that I have examined. They cover the administration of Judge Advocate General Dunn and Judge Advocate General Swaim.

## 4. RULINGS OF CIVIL COURTS.

This brings us to the culmination of the whole argument in a refutation of the statement in the brief that "Nor has the power here contended for been questioned by the civil courts or other civil authority. This statement evinces a failure to make a thorough search of the records and precedents. In his "Military Law and Precedents," the leading work on the subject, Winthrop, for many years in the office of the Judge Advocate General, and for a time Acting Judge Advocate General during the incumbency of Judge Holt in the Civil War period, and hence familiar with any course of procedure followed by him, says:

"The accused always has an appeal from the conviction and sentence by court-martial to the President (or Secretary of War), but, in entertaining and determining such appeal, he is assisted and advised by the Judge Advocate General of the Army. Thus, as the tribunal is an executive agency the appeal therefrom is to a superior executive authority."

And a footnote, on page 51, adds that—

"The Judge Advocate General, under the authority vested in him by section 1199, Revised Statutes, to receive, revise, etc., the proceedings of courts-martial

has, of course, no power to reverse a finding and sentence, was held in Mason's case, United States Circuit Court, Northern District of New York, October, 1882."

Mason's case still stands as the undisturbed pronouncement of the Federal courts upon the precise point at issue. Mason, a sergeant, had been convicted by a general court-martial of discharging his musket with intent to kill Charles J. Guiteau, the assassin of President Garfield. The findings and sentence were approved by Maj. Gen. Hancock, the reviewing authority, and the Secretary of War designated as the place of confinement the Albany County Penitentiary. In his review of the case the Judge Advocate General came to the conclusion that the court was without jurisdiction and that the sentence was therefore void. It is important to note that in communicating this conclusion to the Secretary of War the Judge Advocate General did not (as it is here contended that he had the power to do) reverse the decision of the court, but he recommended that the Secretary of War should revoke the order for execution of the sentence.

In this case, however, the Secretary of War declined so to do and apparently adhered to the opinion that the court was not without jurisdiction and the sentence was valid—an opinion that was substantiated by the decision of the United States Supreme Court on a writ of habeas corpus addressed to the jurisdiction of the court. The prisoner, it seems, was not at the end of his resources. After being delivered to the warden of the penitentiary he sued out a new writ of habeas corpus based on other grounds. His contention was precisely the contention made in Gen. Ansell's brief; that is, that the Judge Advocate General is vested with an appellate power and that his decision against the validity of the proceedings of a court-martial has the effect of reversing the judgment.

His petition alleged among other things:

"5th. That the Judge Advocate General of the Army recently reviewed the evidence adduced on the trial before said court-martial, and on or about August 28, 1882, transmitted to the Secretary of War his report on the said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"1. No jurisdiction in a court-martial.

"2. Employment of the prisoner illegal.

"3. No evidence of guilt, but, on the contrary, proof of innocence.

"6. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial and that the Judge Advocate General has the judicial power, under the law, to review, revise, or reverse or affirm the findings and sentences of all courts-martial, and that his decision is the ultimate judicial judgment in all such cases.

"That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings of said court-martial the further imprisonment of the petitioner is unlawful and wrongful.

"Further, that his conviction and sentence, and the orders carrying the same into execution, are, each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of said court-martial."

In addressing itself to the contention thus made, the opinion of the court proceeds as follows:

"The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might rest our decision here, but as it has been strenuously contended by the counsel for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it the duty of that officer to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word 'revise.' Applying the rule 'noscitur a sociis,' the word revise is to be read in connection with the words that precede and follow it, and thus read,

the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of the officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

"The rule is discharged and the application for a writ of habeas corpus is denied."

I think this memorandum might well close here and with the statement that both civil and military opinion sustain the view that the appellate power in the Judge Advocate General contended for in Gen. Ansell's brief does not in fact exist. However, I have noted a further statement, which constitutes part 5 of this memorandum, to-wit:

##### 5. THE APPELLATE POWER OF THE JUDGE ADVOCATE GENERAL OF THE BRITISH ARMY.

The jurisdiction of the judge advocate general of the British army in such matters is so obscurely stated in the books which I have examined that I am not entirely clear that I understand his precise relation to the administration of military justice. It appears to be true, from the authorities I have examined, that under the British system, this official has the power to reverse and modify the proceedings of courts-martial, but that he does not find that power in any specific statute, but rather in his relations as a member of the ministry of the British Government. Such authority as he exercises in this regard seems to be not a grant of executive authority to an administrative official, but to arise out of an executive power of the sovereign himself, delegated in this instance to a member of the ministry.

You are aware, of course, of the power you have by statute law to grant upon proper application an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you. I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief, so that, instead of issuing a simple order of restoration, you may, by direction of the President, modify or disprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are that the court-martial jurisdiction is and always has been an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given to subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision. Immediate relief, however, should not await the completion of a study of this kind or the concurrence of the Attorney General, which I think you would wish in view of the consideration his office has heretofore given the general subject.

E. H. CROWDER,  
Judge Advocate General.

NOVEMBER 27, 1917.

As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER.

Gen. ANSELL. From the time we prepared the office opinion the question, Senator, then proceeded like this: Clemency was exercised in the case of these men. Then the chief of the office was directed to study still further this question. He filed his brief in opposition. The Secretary of War held with the Judge Advocate General. I then asked that no final action be taken; that this thing be not finally closed until I could have an opportunity to file another brief, having in the meantime made the most thorough study that I was capable of making, and I thought that both Gen. Crowder and the Secretary of War ought to have the benefit of that. I was permitted to file another brief. The Secretary of War, however, decided finally upon my second brief that it would be unwise to deduce such power out of this statute.

Senator THOMAS. Let me ask you a question right there. You have given great study to this subject. Does that system of procedure obtain with France or England, our two principal allies, in their administration of justice in the army?

Gen. ANSELL. A system that has no revision at the source of authority?

Senator THOMAS. Yes.

Gen. ANSELL. No, sir.

Senator THOMAS. Their systems, then, are in harmony with your view of what ours ought to be?

Gen. ANSELL. Yes, sir. The answer would have to be modified to be strictly accurate and complete.

I went to Europe in the early months of the year last past to study their emergency legislation as well as to study the thing in which of all others I was most interested—the system of administering military justice. I studied particularly the system of France. I say “particularly,” I think, because by reason of the difference of language and institutions it took me a greater time to study, and I knew less, of course, about the foreign system. I studied the British system, and I studied, but less thoroughly, the Italian system. Of course, in order to study those systems and compare them with our own, it was necessary to get their setting, and I studied in Paris, and here, so far as I was enabled to, the systems of all the European States. The sources of my study in France were the judge advocate general of France and his department, the usual publications and records. The same thing was true of Italy; the same thing was true of England. As to the other systems, of course, I was referred to books and pamphlets and to what those authorities whom I have mentioned knew of them. I reported rather fully upon the French system, rather less fully upon the British system, because that is more easily understood by us, and briefly upon the Italian system.

Before I should be called upon to discuss those systems, I should like to be permitted to refer to my report, which evidently is in the hands of some other officer of the department, as I was not able to get it.

Senator THOMAS. You can make it a part of your testimony.

Gen. ANSELL. Yes, sir.

Senator SUTHERLAND. What has been your practice since that time in matters of review? Have you not in a way been reviewing and revising these sentences?

Gen. ANSELL. Yes, sir. I had little or nothing to do with the administration of military justice until I returned from Europe. After conference with Col. Mayes, who had been acting senior during my absence, we concluded upon a reorganization of our office, the establishment of boards of review, to present in individual cases and in the most cogent way the various illegalities, and in many cases, in which the errors were flagrant and palpable and gross, we would make a most thorough review written by these lawyers whom I would call very distinguished lawyers, at least in that kind of work, and conclude those reviews not with an authoritative disposition but only with a recommendation or advice or suggestion that the judgments be set aside or modified.

Senator SUTHERLAND. Would that be prior to the execution of any part of the sentence, or would it be subsequent to the execution of some part of the sentence?

Gen. ANSELL. Both situations, but as a result of this showing of the necessity for revisory power in the War Department, and a further showing that when the sentences had once gone into effect and actually put a man out of the Army or resulted in his execution, if it were a death penalty, that no review, whatever we might say or do, could be effective, inasmuch as the man had been executed or expelled from the Army, a general order was published which directed the convening authorities to suspend sentences which would place men beyond all corrective power, and that general order would hold sentences in abeyance until somebody could be advised or induced to take some action upon them. So General Order No. 7 was, in effect, a partial recognition of the existence of this power somewhere and the necessity for it.

Senator SUTHERLAND. How many cases, Gen. Ansell, have you had under review in your department?

Gen. ANSELL. We have reviewed all courts-martial sentences of extreme seriousness, such as involve death, dismissal, and penitentiary, ever since the boards of review were created along in July last. We review them all, but the reviewers are without the slightest authority.

Senator THOMAS. Including those abroad?

Gen. ANSELL. Yes, sir; but in order to have a review which did not delay, I recommended that there be established in Europe a branch office of the Judge Advocate General's office with the same powers, whatever they may be, as those existing here in the office of the Judge Advocate General, on the ground that, of course, those powers are functional and judicial and not personal. So in the early days of last year—February or March—an officer styled as the acting judge advocate general in France, was dispatched to France to exercise the functions, ill-defined as they were, of our office. By May or June of last year that office was established and it is still established. It is reviewing the general court-martial cases coming to it, but we also, inasmuch as we have far greater facilities and a larger force and doubtless can give better judicial consideration to these cases, take them under consideration. We do not let those cases pass without our further review.

But this review and what is contemplated by General Order, No. 7 is not a review by an authoritative official. It is a review in which in certain serious cases we advise or suggest to the convening au-

thority below as to what we conceive to be the deficiencies and the illegalities of the trial. If the President should be the convening or confirming authority, in the few cases in which he is such, we address to him our recommendations as the action to be taken. In all other cases we address the officer appointing the court. That is but a recommendation; that is not an authoritative or judicial statement of the illegalities inherent in the judgment and the proceedings upon which it is based.

Senator SUTHERLAND. Have those recommendations been generally followed since you have been making them?

Gen. ANSELL. Generally, in the sense of indicating a majority; yes, sir.

The CHAIRMAN. Gen. Ansell, I was called out for a few moments to present a report to the Senate. You may have gone over this. Are you now exercising this right of revising sentences of the courts-martial, or are you undertaking to control in any way the action of the commanding officer who convenes the court?

Gen. ANSELL. I have just finished a statement along that line.

The CHAIRMAN. Do not go into it again if you have covered it.

What is the purpose of the new board that the Secretary of War has just provided for to modify the sentences?

Gen. ANSELL. The purpose of the new board is not to go into the legality of the proceedings or the sentence. The purpose of the new board is to equalize punishments, by way of an exercise of clemency in some cases.

The CHAIRMAN. That will only have reference to uncompleted portions of a sentence, as you said a while ago. That will not relieve a man where he has been serving a portion of his sentence.

Gen. ANSELL. No clemency can restore.

The CHAIRMAN. It only has the effect of equalizing the unserved portion of the sentence?

Gen. ANSELL. In the cases where men are undergoing confinement and have yet time to serve, of course clemency can help them.

Senator CHAMBERLAIN. That would be through presidential interference?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. On recommendation of this board and, probably, upon recommendation of the Secretary of War?

Gen. ANSELL. Yes, sir.

Senator THOMAS. That is a board for the modification of military injustice?

The CHAIRMAN. That looks like a recognition of the injustice of the present administration of the law.

Senator FRELINGHUYSEN. Have you reviewed all the cases during the present war?

Gen. ANSELL. No, Senator. From some time in November until the time I left for France, about the middle of April, I had nothing to do with the administration of military justice. I mean that the proceedings did not come over my desk. From the middle of April until the middle of July I was in Europe. From the middle of July until very recently I have reviewed the general courts-martial proceedings coming to my office. When I say, "I have reviewed them," I mean the boards of review that have been created made the review,

discussed the cases with me, and we finally agreed upon what our recommendations would be.

Senator FRELINGHUYSEN. Has your recommendation ever been turned down by the Secretary of War?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. And the Chief of Staff?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. How many times?

Gen. ANSELL. There are not so many cases that go to the Chief of Staff or the Secretary of War, but I can recall several cases. I am speaking only from memory. I recall one case in which we held that the joint trial of the several accused was in itself such a prejudicial error as to render the judgment reversible. I can recall, probably, four or five cases now of that kind.

Senator FRELINGHUYSEN. Can't you give us a record of those cases for our information?

Gen. ANSELL. I think, Senator, that will come out before the committee. I do not know what the scope of this hearing will be, but, doubtless, that matter will come before the committee. If others do not present it, I shall certainly try to do so.

The CHAIRMAN. Could we have the benefit of your recommendation in reference to those cases and the action of the higher authorities?

Gen. ANSELL. What cases?

The CHAIRMAN. The ones you have referred to, where you have made recommendations to the Secretary of War and they have been turned down.

Gen. ANSELL. Yes, sir. I have no doubt that they can be accumulated. More frequently, of course, inasmuch as the greater number of cases go back to the reviewing authorities with our advice, the greater number of cases of disagreement will come up from them. We have a very recent case coming from Dix in which our view was not followed. I have a case on my desk now coming from some camp in which the convening authority declined to follow our recommendation.

We have a generally bad situation in France. I asked that this general order to which I have referred be modified so that a convening authority in France would be required to follow the ruling of the Acting Judge Advocate General in France upon the matters of law falling within his review, unless he, in turn, should be overruled by the Secretary of War. I recommended that that order be issued for the reason that even when I was there the commanding general of the next to the largest headquarters there had declined to follow the rulings of the acting Judge Advocate General, holding that under the law he exercised full power in courts-martial cases; and this is still the situation notwithstanding the fact that the order has been amended so that commanding generals over there should be compelled to follow the rulings upon matters of law arising in courts-martial procedure of the Acting Judge Advocate General in France.

There is before our office now the question presented by the commanding general of our forces there whether that order is not illegal on the ground that it deprives the commanding generals over

there of their authority to pass finally upon all questions arising in courts-martial procedure, they contending that the order by reason of requiring them to be controlled in matters of law arising in courts-martial procedure by this acting Judge Advocate General, is in contravention of the articles of war which they claim confer upon them the jurisdiction to pass upon matters of law once and for all and finally. That question is before the office now.

The CHAIRMAN. The commanding officer, or the officer who convenes the court, some times where the court practically finds a party not guilty, or rather imposes a very light sentence, orders them to rehear the case and practically instructs them to return a verdict of guilty, does he not?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. Is that frequently the case?

Gen. ANSELL. Very frequently. It is an old and established practice, and I think a pernicious one. A court martial is a peculiar thing.

Senator THOMAS. It must be if that is one of its attributes.

Gen. ANSELL. Its judgments are not themselves judgments vital and valid. They must be approved by the authority who brought the court into being, who referred the charges to them for trial, and who reviews their proceedings. Now, the judgment, therefore, does not become final under the practice until he does approve. Therefore he takes the liberty, under this long-established practice, whenever he disagrees with the court as to anything that that court does at any phase of the trial, even as to their finding of not guilty or their finding of guilty of a lesser included offense only, or as to the punishment they award, of returning the record to the court with instructions to the court that it was wrong in its acquittal or wrong in its finding of a lesser included offense, or wrong in the quantum of punishment awarded; and he can order the court to reconvene, hear what he has to say about it, and reconsider their finding of acquittal or their finding of a lesser included offense, which means an acquittal of the larger offense charged, or to reconsider the punishment that they awarded. They may reconsider; they must reconsider. They may, of course, either adhere to their original action, or they may concur in the views of the commanding general.

The CHAIRMAN. Is the Navy governed by the same articles of war as the War Department?

Gen. ANSELL. No; the naval articles are doubtless similar. I speak with a great deal of hesitation when I speak of the naval articles.

The CHAIRMAN. Then I do not want you to do it. I have before me a number of cases in the Navy where men were practically acquitted by the court and their finding set aside, a rehearing had, and the parties involved convicted.

Now, I suppose the commanding officer at one of these camps in the Army, for instance, convenes a court and names the men to act as judges, does he not?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. Suppose the commanding officer feels that a man ought to be convicted of a higher grade of crime and the court-martial finds him guilty of a lesser degree; can the commanding officer set aside that sentence and require them practically to impose a higher punishment?

Gen. ANSELL. In effect that is what is frequently done.

The CHAIRMAN. Yes.

Gen. ANSELL. He does not assume to set aside the finding or verdict of the court, but returns their verdict to them with instructions and orders to reconsider what they did, in the light of his instructions.

The CHAIRMAN. Suppose the court does not, on reconsideration, carry out the wishes of the commanding officer, can not he refuse to hold them any longer for that service?

Gen. ANSELL. Oh, yes, sir; the court is absolutely in the hands of the convening authority. He may dissolve it whenever he pleases.

Senator THOMAS. Is it not very probable that where a commanding officer disapproves of or sets aside the finding of the court-martial and orders it to reconvene for a second trial, the officers will feel in a large degree required to reach a different and perhaps an opposite finding from their first conclusion?

Gen. ANSELL. I should say, Senator, that while you were incorrect in saying that he sets aside, for he does not set aside, but instructs the court as to what he conceives to be their error—

Senator THOMAS (interposing). Well, it virtually results in a setting aside if he reconvenes and requires a second trial.

Gen. ANSELL. Now, the system contemplates that the convening authority shall have just the control that you have suggested here. Of course, if he has the right to order them to reconvene and reconsider and pass upon the case in the light of the instructions that he has given them, it is their duty to do this and to be impressed by what he has said.

Senator THOMAS. In other words, the effect is that he substitutes his own opinion as to what the finding should be, and that, generally speaking, is recognized and adopted by the new court-marshal?

Gen. ANSELL. It is.

Senator SUTHERLAND. Has not in fact the general commanding our forces over there sent to your office here cases for review in which extreme penalties had been inflicted, for the purpose of having them reduced or entirely changed?

Gen. ANSELL. May I ask you, Senator, to repeat that question?

Senator SUTHERLAND. Have you not had cases sent here from abroad where extreme penalties had been inflicted and where the commanding officer himself over there wished the penalties entirely wiped out? I have reference particularly to one case which I heard of, the Steinhamer case, I think it was. It was a case of a conscientious objector, who afterwards brought a number of wounded men back to the line and who was cited for bravery by the commanding general, even while he was under conviction for desertion, and I think perhaps the death penalty ordered to be inflicted. The general over there had no power to change that sentence.

Gen. ANSELL. I should say that there have not been many cases in which the commanding general of the American Expeditionary Forces had asked for that kind of action. There have been some; yes, sir.

Senator SUTHERLAND. Do you recall that case? I think it is the Steinhamer case.

Gen. ANSELL. It is rather recent, it seems to me. I recall it only vaguely.

The CHAIRMAN. Have there been, as a matter of fact, a great many severe sentences passed on men with our troops abroad for very trivial offenses?

Gen. ANSELL. I think I ought to speak my own sentiments upon this, having reviewed as many cases as I have reviewed. The sentences of courts-martial have shocked at least my own sense of justice. If the courts themselves could have expected any such sentences to be served, or if anybody could have expected any such sentences to be served, those sentences would have been the very height of injustice, bearing no reasonable relation to the gravity of the offense charged.

The CHAIRMAN. Right in that connection I want to ask you this question: A year or two ago this committee reported out, and it was passed by Congress, a bill which provided for an indeterminate sentence, so that if a man were sentenced, say, for 25 years, he could be practically placed in a disciplinary barracks and restore himself, not only to the colors and to his former position in the Army, but to useful citizenship. Has that act been dormant, or has it been put into effect to any large extent?

Gen. ANSELL. No, Senator; I think that, to an extent, it has been applied.

The CHAIRMAN. How much?

Gen. ANSELL. I could not say. It is difficult to say. Of course, many of these convicted men are in the disciplinary barracks now. It is being applied, we may say, daily. I have no doubt the statistics of the office will show the number of restorations.

The CHAIRMAN. You know, of course, that in the criminal courts of the land in nearly every State—I know it was so in my State—under the indeterminate sentence plan men were not confined in the penitentiary at all. They were simply given opportunity, under a suspended sentence, to get away entirely from any sentence that would convict of the crime. Is that attempted in the Army under the bill that I refer to?

Gen. ANSELL. The restorations are from disciplinary barracks or its branches at Fort Jay and Alcatraz, the barracks itself being at Leavenworth. I may say that while nobody can doubt the efficacy and humanitarianism of that practice, my difficulty is this, and my criticism is pointed to this: While I wish to be humane and liberal with respect to providing for the restoration of a man who has been convicted and sentenced to imprisonment, I am more concerned, in the light of my experience during this war, with the machinery which places the man where he has to become subjected to this clemency power, which, after all, is what restoration is.

I participated in a conference just a short while ago in which it appeared that, as the result of ordinary judgment and observation applied to our prisoners as well as the result of scientific tests made of our prisoners with a view to determining their disposition, they were to become classified—some as not having elements, at least military elements, worthy of redemption within them; others who, after serving somewhat longer, might have this hope of restoration held out to them. I said there, as I say here, that the time to prevent injustice is at the very source, the very beginning of the court-martial proceeding. It should be seen that discriminating justice is done then. I spoke then along these lines, and not in a facetious way, either. Go down to eastern North Carolina, where I was born and

brought up. Take my own case. I was brought up with a good degree of freedom and independence; maybe too much. I was not used to military discipline. I came to it not easily, and was not quickly adjusted to the exactions and the necessarily meticulous requirements of any military establishment; and if, through violations of any of these sections and before I had had time for adjustment, there should be imposed upon me some of these sentences and I should be sent to Leavenworth, I am not so sure that I might not be put in the category with the man who had a predisposition to offend and who could not be integrated with military society.

That is not satisfactory to me. Take the case that I evidenced there before the conference. A man who entered the Army on October 28 was court-martialed November 23, less than 30 days after he entered. There was nothing about the man's record, so far as could be ordinarily determined, to indicate that he would not make a good soldier; that he had a predisposition to come into conflict with all legal authority; but he did violate some camp orders, or this particular camp order. He was detailed on what is known as kitchen police, to keep the kitchen clean. Maybe he was preparing some food. He smoked while doing that. An officer, a new officer of low rank, who had just got his first bar, came along and said to him, "You should not smoke on kitchen police." That was true.

I do not know what reply the man made at the moment. Then the officer said, "Give me those cigarettes." He had a package of cigarettes stuck about him somewhere; and the soldier said, "I shall not do it," and maybe with an oath. He had been in only a few days. The upshot of it was the second lieutenant, probably quite as unused to the service as the enlisted man, gave this man an order—rather inconsequential, it seemed to me—to turn over to him his cigarettes. The man refused; he was court-martialed for that and for rather raucous, crude, and unmilitary language to the lieutenant and to a noncommissioned officer; he was given an enormous punishment, somewhere between 20 and 30 years. Well, now, let that man go to the disciplinary barracks. I do not care very much about applying to that man any test to find out what class he comes into, because if we are going to discuss this thing from the viewpoint of adjustability to the existing situation I find myself wondering whether the young officer himself was not the man who had not adjusted himself to the situation. Was not this conduct the natural human reaction of the man who had been in the service only 25 days?

Senator THOMAS. Any system of laws that will produce that sort of injustice, whatever else may be said, is absolutely un-American.

Senator NEW. You say this man was primarily charged with having refused to surrender his cigarettes to a superior officer?

Gen. ANSELL. Yes, sir.

Senator NEW. But that in the course of the colloquy which followed he used what you described as "raucous" language. Now, was that soldier sentenced for refusal to obey the order to give up the cigarettes or for the manner in which he cursed his officer out, so to speak, as the result of that request?

Gen. ANSELL. My recollection is, Senator, that he was tried for disobedience of the order and disrespect to the officer and a sergeant standing by.

Senator NEW. I agree with what Senator Thomas says, in the main, that any system which permits or results in the sentencing of a man—a new soldier—to a long period of confinement in a penitentiary or in anything of that sort for refusal to give up cigarettes is un-American.

Senator THOMAS. Or for both of the offenses combined. They make Bolsheviks out of the relatives of the man.

Senator NEW. I would like to know what all the evidence is upon which the judgment is based. I would like to know what kind of language he used to his officer, because among new soldiers, even though that man was a new soldier, he was probably one of many other new soldiers; and I can very readily understand how it might be necessary to curb the resentment of a soldier in that kind of a case if he should run wild in his language toward his superior officer. Viewing it in that light, I would like to know what the exact language was.

Gen. ANSELL. I do not know that I have it. I may have a brief note.

Senator SUTHERLAND. An experienced officer would have cautioned the soldier.

Senator THOMAS. Anybody but a damned fool would have done it. [Laughter.]

The CHAIRMAN. I suppose, Senator, you do not want that in the record?

Senator THOMAS. Yes; let it stay in the record.

Senator SUTHERLAND. He may have spent his last quarter for cigarettes.

Senator THOMAS. I would like to know, by the way, whether an officer has a right to demand property from a private.

Senator NEW. I doubt very much that he has.

Senator THOMAS. I do not think he should have.

Senator NEW. I do not think he has.

The CHAIRMAN. What has become of that man? Is he in prison?

Gen. ANSELL. That case comes to my mind because it was one of the last cases I passed upon. I have no doubt that when the reviewing authority gets my statement he will take some very radical action, though I may add that in another of the cases that seemed to be equally flagrant, the reviewing authority has already declined to reduce a sentence which was approved for 10 years, although the court awarded 40 years.

The CHAIRMAN. What was that case, if you can recall?

Senator THOMAS. I can readily understand why in peace times we have not been able to keep our complement of men.

Senator NEW. You spoke of cases the severity of which had shocked you. How many death sentences have been imposed during the progress of the war?

Gen. ANSELL. Senator, I regret that I am unable to speak with accuracy as to numbers at all.

Senator NEW. Have there been any?

Gen. ANSELL. Death sentences executed?

Senator NEW. Yes.

Gen. ANSELL. Oh, yes, sir.

Senator NEW. Have there been any executed without appeal, or a chance for appeal?

Gen. ANSELL. Yes, sir. It was while the question whether or not this revisory power existed in our office or anywhere in the department that a case occurred which I think went further to sustain the correctness of my view as a human fact, if not as a legal proposition, than anything else that can be conceived of. The case, as you have seen, which provoked an expression of my views that there was a revisory power, and that a revisory power was needed, was the mutiny case occurring in the Department of Texas in the Regular Army, and the very day—

Senator NEW (interposing). The mutiny case in the Department of Texas?

Senator SUTHERLAND. That is the one stated in the brief?

Senator NEW. I was out at the time.

Gen. ANSELL. It so happened that the very day that I submitted my second brief upon the same question, namely, the necessity of locating this revisory power in the War Department, the press reports announced the hanging of a certain number of negroes—13, I think—in the Department of Texas, for murder and mutiny. I think they were familiarly referred to as the Houston riot cases. Those negroes were tried. They were court-martialed for murder and mutiny and riot, I assume, and the men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised.

Senator NEW. What was the period of time between the passage of judgment and the carrying out of the execution? Do you remember?

Gen. ANSELL. It was very brief. It seems to me it could have been no more than a day.

Senator NEW. It was practically immediately executed; that was the order?

Gen. ANSELL. Yes, sir.

Senator SUTHERLAND. Under the practice of the law or rules of your department, your department commanders have certain powers in regard to executing sentences of that kind?

Gen. ANSELL. It seems to be difficult for me to express myself so that the subject can be understood, and I can readily appreciate why it is rather difficult to understand.

Under the theory of the law that now obtains, it is that the commanding general who brings the court into being is the authority who says finally that the proceedings of that court were regular and valid, the judgment legal, and orders execution, except as to a very few cases of death penalties and dismissals of general officers, for instance, that must come to the President of the United States for confirmation before there can be an actual execution of the judgment.

Senator NEW. Generally, do you think this appellate power should be vested in the Judge Advocate General or in the President, he to be advised by the Judge Advocate General?

Gen. ANSELL. I can understand, Senator, how others just as interested in the Army as I could well raise the question. As for me, I am convinced that inasmuch as it is inherently a judicial power, it ought not to be confused with or located by any considerations of military command.

Senator THOMAS. Correct.

Senator NEW. Would not the exercise of that power by bureau chiefs control the judgment of all the convening and confirming authorities from the President down and would it be destructive of all precedent to lodge that power in a bureau chief?

Gen. ANSELL. Destructive of all precedent?

Senator NEW. Yes.

Gen. ANSELL. It would be destructive of our precedent for the last 40 years. I presume you are speaking of the more general practices of the Government?

Senator NEW. Yes.

Gen. ANSELL. I think I can state my views at some length upon that, if the committee would care to hear them now, because I do not believe, Senator, your question could be answered very briefly.

Senator NEW. Yes: make such a statement as you please concerning it, General.

Gen. ANSELL. The War Department and its sister service, the Navy Department, differ from any other executive department of the Government in this: They are governments themselves within a Government. The hierarchy under the War Department actually governs every human being occupying a military status. We frequently speak of the War Department as a mere executive department of government like the Department of Labor, the Department of Commerce, the Post Office Department, etc., without recognizing the very great distinction that the War Department, the head of the Army itself, sits in government absolutely upon every man within it. It lays down a code, or Congress does, supplemented by departmental orders, of substantive law to which it says every man in the establishment must conform. If he fails to conform, it is a crime. They indict him and charge him with that crime. They try him for that crime, and they execute a sentence which follows upon conviction of that crime.

In other words, the conduct of every man in the Military Establishment is governed by the War Department just exactly as the personal conduct of a citizen outside of the establishment is governed by the penal code of the land administered through civil courts. Therefore, there are necessarily in the War Department functions which are purely administrative and executive, just as the functions of the Department of Labor inherently are, and there are other functions, which are entirely judicial, and those functions are involved in the consideration of this question here. They are not simply executive functions; they are not simply administrative functions that enable the head of the department or bureau to discharge a clerk. They are judicial, and just as judicial as are any other functions of our Government.

The court-martial tries a man not only for the military aspect involved in his act; it tries him for the violation of the law of the land resulting from that act. For instance, if a soldier commits homicide, he is tried, not, as we used to think, for his act, in so far as it is prejudicial to the military establishment. The court-martial passes upon that unlawful homicide and every issue involved in it just exactly as, and concurrently with, a district court of the United States or as any other trial court. Now, when we come to subject a man to a

code of penal law which covers every aspect of his conduct, every activity of his life far more generally than does the usual civil penal code, when we try him not only for violation of the military law but of the law of the land, when we give him a punishment that is in every respect the same kind of punishment in quantity, in finality, and in the regard which the law entertains for it, that a civil trial court can give, those functions are necessarily, inherently, and primarily judicial; and it does not shock me to say that there shall be some judicial authority, some independent law officer, some skilled man, some man who has been designated by Congress and appointed by the Chief Executive for this purpose, to determine whether or not, in the subjection of this individual to this system of penalties, the law of the land was complied with, even to the point of restraining any power, however high, if it is simply executive power or the power of military command.

Senator WEEKS. Is there any precedent in the Government where a bureau of the department has final jurisdiction in anything, and where there is no appeal to the head of the department?

Gen. ANSELL. I know there are, of course, many laws where Congress has conferred powers upon a bureau chief in which he could not be controlled by his Secretary.

Senator WEEKS. Just give me an example of one. The reason I asked is that they do not occur to me at this moment.

Gen. ANSELL. I have known, without being able to give an example, that Congress has many times said that a contract shall be made by the Quartermaster General. I may say that when Congress said the Secretary of War should be on the Lincoln Memorial Commission he was taken in, not as Secretary of War, but it was a convenient designation, and the President of the United States would have had no authority to control that Secretary of War by virtue of the fact that the man designated by Congress belonged to his official family. There are many judicial or quasi-judicial functions established in the departments but independently of the executive hierarchy.

Senator NEW. Reverting to the cases of execution of the death sentence, you spoke of the Texas case, where those colored soldiers were executed for what became known as the Houston riots.

Gen. ANSELL. Yes, sir.

Senator NEW. Were those sentences carried out without notice of the judgment of the trial court being given to the Judge Advocate General's office?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. Or to the Secretary of War?

Senator NEW. Or to the Secretary of War?

Gen. ANSELL. Of course, I can not answer that. I can only say that if notice had been given to the Secretary of War, that notice would, in due course, have been referred to the Judge Advocate General.

Senator THOMAS. My recollection is it was all submitted to the President, who pardoned a large number and declined to extend clemency to others, and they were then shot.

Senator NEW. That is just the point. Gen. Ansell said the sentences in the case were carried out within 24 hours. It is my recollection

tion that the cases had been appealed to the President and that he had exercised clemency in some of those cases but declined to do so in others. Now that, of course, establishes the fact that there must have been some notice given either to the Judge Advocate General or to the Secretary of War. There must have been an appeal for an opportunity for clemency to be extended.

Gen. ANSELL. I beg to correct you, Senator.

Senator NEW. That is what I want you to do. I want the facts in this record.

Gen. ANSELL. There were many of the negroes tried. Speaking roughly and only by recollection, I should say 60.

Senator NEW. Yes.

Gen. ANSELL. That was the first trial. Then there was a second trial of another batch, and then there was a third trial, as I recollect it; but I confined myself to the first trial, the trial of the first batch, as a result of which some dozen or more were hanged.

Senator NEW. Fifteen or more I think, on the first trial.

Gen. ANSELL. Referring to that case and not to the trial of the subsequent batches, that case was not reported to the Judge Advocate General, and I think we could say not to the department at that time. At that time the War Department was holding that the department commander had full, final, and complete authority to carry that judgment into execution. It was not so some time after that, for as a result of my agitation of the existence of this revisory power an order was issued that death sentence should not be carried into effect until after there should have been a review of the record by the Judge Advocate General, and the subsequent trials of these negroes came to the War Department for review after that general order. That order recognized our right of review, but made it only advisory and without authority.

The CHAIRMAN. The same result might possibly have happened on the first trial—the ones hanged—if they had had a chance to review it, might it not?

Gen. ANSELL. I have not seen those records. They did not go to the War Department for several months after the execution.

Senator NEW. Can you give us the date of the Houston riot and of those courts-martial trials, approximately?

Gen. ANSELL. This brief of mine falls in the early days of November. It is dated November 10. On that day or the day before the morning press announced that these negroes had been executed.

Senator NEW. 1918?

Gen. ANSELL. 1917. The trial must have lasted two months or more.

Senator NEW. You said a moment ago that you could not tell us exactly in how many cases the death sentence had been imposed. Can you give us, approximately, the number of them, exclusive now of the Houston riot cases, which we have already dealt with?

Gen. ANSELL. Well, I can go over them and narrate them from recollection.

(At this point informal discussion occurred, and at 1.30 o'clock p.m. a recess was taken until 3.15 o'clock p.m.)

## AFTER RECESS.

At 3.15 o'clock p. m. the committee reassembled pursuant to the taking of recess.

The CHAIRMAN. Are you ready to proceed, Gen. Ansell?

Gen. ANSELL. Yes, sir.

## TESTIMONY OF GEN. ANSELL—Resumed.

Senator THOMAS. I would like to ask a couple of questions while they are fresh in my mind. I want to ask you first, Gen. Ansell, whether the American military system of courts-martial, with reference to punishments and review, is harsher or milder than those of England or Italy or France?

Gen. ANSELL. From my observation and study of those three systems I was compelled to the conclusion that notwithstanding our Government in other directions, in the realm of civil jurisprudence, is a far more liberal Government than any one of those named, in the field of military jurisprudence it is a harsher Government; and it is my conclusion from that study and observation that an enlisted man in our Army undergoing a court-martial has less protection than an enlisted man undergoing court-martial either in the French or British Army; and while I know less about the Italian system, I think that my study would incline me to the conclusion that a man undergoing trial in the Italian Army has greater safeguards and more real legal protection at every stage of the proceeding than one of our men. I am quite sure as to the correctness of my conclusion as to the French system, and I am almost equally sure as to the correctness of my conclusion as to the British system. I am less sure as to its correctness as to the Italian system.

Senator THOMAS. Is it as harsh as or less harsh than the system in the German or Russian or Austrian Armies? I mean if you know, of course.

Gen. ANSELL. Well, in Europe I discussed those questions with the authoritative heads of the bureaus of military justice. I read whatever I could find there and here, and I believe that our system is a harsher system than any system in Europe, excepting Spain, Prussia, and Russia, and some other German States. The German system, so far as I could find out, was not a unit and uniform system. It may be in time of war. I do not know about that. The last reports that I read were reports published in 1884, and they treated the Prussian system as one system and the armies of the subordinate German States as different systems. They, apparently, were much more liberal. What change may have taken place in the German Army system I can not say.

Senator THOMAS. There is just one other matter to which I desire to refer at this point. An account was given of the facts attending the court martial of a private soldier enlisted on the 28th of October, who committed an offense for which he was punished on the 23d day of November following, or thereabouts, the offense consisting, among other things, of the use of what you termed "raucous language" by the soldier to his officer. I want to ask you whether the use of what you are pleased to term "raucous" language, or pro-

fane language, is or is not more common among the officers and men, as it is in civil life, than some years ago.

Gen. ANSELL. It seems to me that profanity is rather more frequently observable now than it was some years back. Of course, that is a mere matter of impression, but I do know that we in the Army do use profanity. Enlisted men use profanity, too. We must be somewhat careful, of course, that enlisted men do not use it to an officer.

Senator THOMAS. When you say "we," you mean officers?

Gen. ANSELL. I do.

Senator THOMAS. So far as I am concerned, General, you may proceed with your discussion.

Senator FRELINGHUYSEN. Before the general proceeds, I should like to ask the reporter if the brief of Gen. Crowder, in answer to Gen. Angell's brief, has been put in the record.

Senator THOMAS. I was going to suggest that if Gen. Crowder is coming before us, it might be well to have him read it.

Senator FRELINGHUYSEN. I think that it should go in the record.

Senator SUTHERLAND. Did you put the second brief in the record?

General ANSELL. I may say that I have not put anything in physically, but I promised the reporter that anything that has been referred to or read by me or that the committee desired, if I had it, would be given to him.

(The matter referred to was subsequently submitted and is here printed in full as follows:)

EXHIBIT C.

BRIG. GEN. S. T. ANSELL'S BRIEF FILED IN SUPPORT OF HIS OFFICE OPINION, TOGETHER WITH NOTE OF TRANSMITTAL.

DECEMBER 11, 1917.

Memorandum for Gen. Crowder:

1. Here is my brief, which, with his verbal permission, I file with the Secretary of War, and which I hope you will place before him at your convenience.

2. It has been prepared under circumstances which militate against literal accuracy, but it, together with the opinion, substantially and with sufficient accuracy expresses my views.

3. The subject, as I conceive it, is one of tremendous importance. I am quite sure that if the department could change its view of the law and come to concur with me, a practical scheme for the exercise of such power could be established, to the great benefit of the administration of military justice.

4. I fear that this office under the prevailing practice, is exercising too little supervisory power over courts-martial. I cite in my brief, as I mentioned to you the other day, that in the Civil War an Assistant Judge Advocate General was established independently of military command, so that as a representative of the reviewing power of this office he could pass preliminarily on proceedings and thus prevent the execution of illegal sentences. I apprehend that something like this will have to be done again.

5. If you and the Secretary of War, upon thorough reconsideration, can not accept my view of the law, and if it should be thought advisable to seek legislation establishing this power in the department, I hope its exercise will not be subjected to General Staff supervision. Such supervision, it seems to me, would necessarily destroy the judicial character of the power.

S. T. ANSELL.

BRIEF FILED BY PERMISSION OF THE SECRETARY OF WAR IN SUPPORT OF MY RECENT OPINION CONCERNING THE REVISORY POWER OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OVER JUDGMENTS OF MILITARY COURTS.

Statement.

From my earliest interest in military law and the administration of military justice, and especially during my service in the office of the Judge Advocate General, I have seen the evident embarrassment of the department and its consequent failure to do justice according to established legal principles, brought about by the limitations imposed by the view and practice of this office to the effect that if the court had jurisdiction, no matter how flagrant and prejudicial its errors, and no matter how bad its judgment and sentence when tested by established legal principles, no corrective power existed in this office or this department or elsewhere. From time to time the officers on duty in this office, faced by such a dilemma, have turned their minds to the power of revision conferred by section 1199 of the Revised Statutes, in the hope of finding there the necessary remedial authority. But, since the Army has heretofore been small and the cases calling for such revision therefore have been comparatively few, the exigent need for such a revisory power has not until recently been sufficiently manifested to make the question an all-impelling one; and so, in the end, we have all accepted the practice, dissatisfied with it but without sufficient impulse to go to its bottom and overturn it. I should expect the other officers who have been on duty in this office with me and interested in the subject to confirm me in the statement of this attitude.

During this war, for patent reasons, the revision of the proceedings of military courts in this office has taken on an importance which it did not heretofore have. If one essential branch of administration of this office can be transcendently more important than another, it is to be found—at least while this large Army is maintained—in the supervision over these proceedings; that is to say, in the close supervision of the administration of military justice throughout the Army. If the revision is worth the name, it should be a revision for gross and prejudicial errors of law that make a conviction bad, as well as for those that make the judgment void. It should be done with such thoroughness as to carry conviction to all concerned and to secure the respect of the Army and the confidence of the people. It should be so expeditiously done as to make the remedy timely and prevent any great measure of unlawful punishment.

For reasons so obvious as to merit no allusion, our new Army must be expected to administer military justice more crudely than did our small peace-time establishment of experienced Regulars. My experience in this office thus far has shown that this is and will be true. Many cases already have been passed upon and reported to me by Maj. Davis, in charge of the Military Justice Division, and his assistants which admitted of no doubt whatever but that, on indisputable principles of law and justice, the judgments and sentences therein were based on error and ought to be revised and set aside if the power to do so existed. So flagrantly and patently illegal were many of these that I presented them to the entire body of my associates in an endeavor to discover, with the help of their counsel, some means whereby, in consonance with law as well as with the practice of the office, the judgment might be modified and the innocent victims restored, unblemished by wrongful conviction, to their honorable places in the service. It was the passing upon such cases which marked the obvious necessity for the power of revision in this office. We were driven to take up, and we did take up, for consideration with a seriousness that seems unappreciated the question of the proper construction of the statute in question, with the result that I and my office associates concluded with the utmost confidence and conviction that that statute does adequately confer upon the Judge Advocate General of the Army this very just and necessary power.

The case that of many others served most to indicate the exigent need of such power and its exercise in the interest of law and justice was the so-called mutiny case. It was upon this case we expressed the views and conclusion which the department finds unacceptable. This was an alleged mutiny of the noncommissioned officers and others of a certain battery of Field Artillery. The errors of law and the consequent injustice, as revealed by the proceedings in this case, were so palpable and prejudicial that it is difficult for me to see how any fair-minded official, having the duty to pass upon the record, could have failed to perceive them and exert all his power to remedy the error and injustice. These men did not commit mutiny. A youthful and capricious offi-

cer was responsible for the entire situation. He himself was guilty of tyrannous and oppressive conduct. Notwithstanding this, charges were preferred, not against him for his tyranny but against these men for mutiny. The charges were referred to the proper convening authority, an officer of high rank, who ordered the court for the trial of these men. A court tried and convicted them and sentenced them to long terms of imprisonment, and the reviewing officer approved the convictions and sentence. Where such chain of action as this can occur there is left no room for the surprise that I otherwise should have felt at the failure of the proper authorities to court-martial the young officer himself. I frankly confess my fear that such a failure of justice as this, under such circumstances, involving so many officers whose concern it was to see that justice was done, is symptomatic of more general deficiencies that are the usual concomitants of that institutional formalism which in my judgment so hinders our military development.

It was to correct such errors that the entire force of this office, including able and distinguished lawyers recently coming to us from civil life, devoted itself to a thorough study and consideration, extending over a period of more than three weeks, and reached the conclusion that the statute clearly confers upon this office revisory power necessary to do justice in such cases. Accordingly, convinced of the legality of that course and apprehending that no just objection could be taken thereto, I set aside the judgment of conviction in this and other pending cases and recommended that orders issue restoring these innocent men to their places in the Army.

Inasmuch, however, as this action was a reversal of an administrative practice in this office which had never before been thoroughly considered or examined so far as I knew, I sent to the Secretary of War for his personal consideration a copy of the opinion, scarcely doubting that the action taken by me would merit his entire approval as well as that of the Judge Advocate General, so necessary and expedient was the authority, so clear the law, and so humane and righteous its application.

The Secretary of War having sought his advice, the Judge Advocate General has disagreed with me, and finds no such power. Upon his advice, therefore, the judgment of conviction in this case is to stand, though, it is proper to add, quite a number of other instances in which I likewise set aside erroneous judgments have been, due to administrative methods, approved by the department and action taken accordingly.

Believing that our people who are giving up their sons to the national cause could not be content with, if they were apprised of, a system of military justice that is admittedly without power to correct conceded wrong and injustice to the most sacred rights of man and soldier; conceiving that the question is fundamental and far-reaching in its import; convinced that existing law places us in no such humiliating position and that the action of the department was wrong beyond all question and can be shown convincingly and almost to the point of demonstration to be so; and mindful that undue deference to past peace-time views and administrative practices will defer the adoption of better methods and prove highly harmful to our new Army, in an earnest desire to be helpful to the extent of my ability and use whatever of strength I have to aid in the establishment of an adequate and efficient administration of military justice, I file, with the permission of the Secretary of War, this brief of my views.

First, as to the action taken in the mutiny case.

#### I.

THE ACTION TAKEN BY THE SECRETARY OF WAR ON THE ADVICE OF THE JUDGE ADVOCATE GENERAL HAS BEEN TAKEN UNDER VERY EVIDENT MISAPPREHENSION. SUCH ACTION IS PREDICATED UPON THE CORRECTNESS OF CONVICTION, AND THE ACCEPTANCE OF SUCH AN ACT OF GRACE BY THESE INNOCENT MEN NECESSARILY IMPLIES A CONFESSION OF GUILT OF A CRIME, WHICH, UPON WELL-ESTABLISHED PRINCIPLES OF LAW AND JUSTICE, THEY NEVER COMMITTED. JUSTICE IS A MATTER OF LAW AND NOT OF EXECUTIVE FAVOR.

The Judge Advocate General, advising the Secretary of War, said:

"You are aware, of course, of the power you have by statute law to grant, upon proper application, an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you."

And immediately thereupon the Secretary wrote, adopting the suggested action, as follows:

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it."

This action can not be "a convenient means of doing justice." The Secretary, for the moment, has failed to distinguish between executive action in the nature of a partial pardon and judicial action, which goes to the erroneous judgment of conviction itself and modifies it, reverses it, or sets it aside. The statute under which the proposed action is to be taken is to be found in the statutes relating to the military prison and the prisoners therein, and is as follows:

"Sec. 1352, R. S. The commandant [that is, of the military prison] shall take note and make record of the good conduct of the convicts and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

And the modifying act of March 4, 1915 (38 Stat., 1074), as follows:

"Whenever he shall deem such action merited, the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein, and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty and may authorize the reenlistment of those who have been discharged or upon their written application to that end order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment contract for a period equal to the one not served under said contract. (Par. 7, sec. 2.)

And—

"The authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States Disciplinary Barracks and its branches, shall be extended so that such restoration may be given to general prisoners confined elsewhere; and the Secretary of War shall be, and he is hereby, authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe."

The action thus authorized was never intended to apply in cases of an unlawful conviction, and this the terms of the statute clearly indicate. It expressly applies to convicts and general prisoners dishonorably discharged from the service. It was enacted by Congress under its power to make rules and regulations for the government of the Army and to prescribe the eligibility of those who enter or are in the Army and the conditions under which they serve. Looking at it from the executive viewpoint, it is but executive favor. As I pointed out in my former opinion, in cases of such restoration the conviction stands. The restoration itself is predicated upon a lawful conviction and a dishonorable expulsion from the Army in consequence of it. It can be taken only upon the application of him who have been thus expelled. An executive action partaking of the nature of the pardon is not the proper remedy in a case where a man, concededly, has been unlawfully convicted, if there be other means of doing justice. A pardon does not proceed upon the theory of justice, but of mercy. The man who seeks a pardon does so upon an express or implied admission of guilt. The pardon itself conclusively implies guilt. A pardon is no remedy for wrong done the innocent.

Speaking to the present case, these noncommissioned officer, soldiers of excellent record, were, when judged by universally recognized legal principles, erroneously unjustly condemned; they stand convicted of an offense than which none, in a soldier, can be more heinous. Restoration to the Army does not change the judgment of conviction. Restored to the Army they ought to be; not, however, as an act of grace and mercy, but as an act of right and justice. Such a restoration is but an attempt to forgive these men for an offense which none of them ever committed; and, notwithstanding such restoration, the record against them is made and there it stands. They have been expelled from the Army unless the judgment be reversed; they have been out of the Army since the day the sentence was executed. All rights and

honors incident to their service they have lost, their records as soldiers largely ruined. In such a case the right thing to do is to set aside the conviction; to reverse the judgment of the court; to declare that these men had never been lawfully convicted; and that they have never been lawfully out of the service—a service which they had never dishonored. The power to do the right thing is to my mind unmistakably found in the section to be discussed. I hope and request that final action differing from that here prayed will not be taken until after this brief shall have been given the consideration which the subject of which it treats well merits.

The Secretary then continued to express the following general view with respect to the power to be deduced out of this statute—

“Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes, with settled and practical construction, is unwise. A frank appeal to the legislature for added power is wiser.”

I think it will be shown by this brief that the well-established general principle here enunciated has no proper application to the action taken by me under this state. It can have no application where the statute never has been interpreted by the courts; where the practical construction is not settled, but palpably inconsistent and confused; where there is such overwhelming necessity for an exercise of the jurisdiction. That these things are so can be shown quite convincingly.

## II.

IT IS AS REGRETTABLE AS IT IS OBVIOUS THAT THOSE WHO OPPOSE MY VIEWS DO NOT VISION IN THE ADMINISTRATION OF MILITARY JUSTICE WHAT THE NEW ARMY OF AMERICA WILL REQUIRE, NOR DO THEY EVEN SEE WHAT THE PRESENT IS REVEALING. THEY ARE LOOKING BACKWARD AND TAKING COUNSEL OF A REACTIONARY PAST WHOSE GUIDANCE WILL PROVE HARMFUL IF NOT FATAL.

(1) *The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.*—The opposing arguments follow administrative practice blindly and, for the most part, are but mere professional absolutisms developed under the conditions obtaining in our country since the broadening activities of the Civil War period passed away. I poignantly regret the concurrence of the Judge Advocate General, who habitually and constitutionally entertains far more progressive views. The reasoning that comes from the office of the Chief of Staff and Inspector General is but the apprehension of those who are counseled by their fears and who mistrust all that disturbs an absolute order of things. Opposition of that kind has manifested itself against every suggestion of progress throughout the development of institutions. Such argument proceeding on narrow military principle, is adduced to the support of power rather than to the human individual rights offended by an abuse of it. In its essentials it is this: The battery commander was a commissioned officer with the power of discipline over his battery; he exercises his power under an amenability to his superiors in the hierarchy, and they all, tacitly at least, approved of what he did; military justice was appealed to to vindicate his power through a court composed of excellent officers of experience and rank, and the court did vindicate him; all these officials were wise, experienced, and just, and therefore their judgment must not be impeached. The whole structure of Government recognizes the fallibility of human administration and endeavors to minimize its evil effect by placing upon it the check to be found in the thoughtful and well-considered review of those who have been trained to the detection of those fallacies.

It is only the mind of the extreme professionalist that fails to see that a man's judgment may be impeached without reflecting upon his integrity. In this case the gross misconduct of this commanding officer is conceded; and yet it is said that these men, subjects of his misconduct, must have their cases determined without reference to his oppressive and tyrannous action. The legal mind, trained to a consideration of the elements of every offense, and appreciating that mutiny must consist of an opposition to lawful authority with an intent to subvert it, could not have failed to perceive that this was not a case of opposition at all in the sense that makes mutiny, nor was there any evidence of the necessary intention to overcome and depose constituted authority. My own sense of right and justice and discipline would have impelled me to court-martial, not the men, but the officer himself, and I still think that that should be done. The human error that marked this case, judged accord-

ing to established principles known to every lawyer, has marked and is daily marking others.

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that “courts-martial are the fairest courts in the world.” The public has never shared that view. In any event, it is difficult to maintain that the judgment of this, the crudest of all courts, exercising such an extent of jurisdiction, is entitled to greater deference than those of the civil tribunals, the review of which, to insure correction, is fundamental in our law. So much as there is of summariness in courts-martial procedure is solely attributable to military necessities. But this Government should never take the life of any soldier or apply to him extreme penalties without the certainty of the correctness of judgment. If the judgment be sound and the punishment certain, nothing more should be demanded. This case in itself is of comparative little importance, but the questions raised and to be determined by it are fundamental in the administration of military justice.

(2) *The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.*—The Judge Advocate General deduces out of the power of revision which belongs to his office no substantial meaning whatever. Obviously he is led to this restrictive, indeed extinguishing, interpretation because of his fear of obtruding judicial functions within a field of authority that in his judgment properly belongs to the power of command. He would prefer to believe that such revisory power does not exist; otherwise this office must sit in revision upon the judgments of convening and reviewing authorities based upon their power to command on one hand, and in turn be controlled by the power of command of the Secretary of War and Chief of Staff upon the other. In my judgment, it is too clear for argument that courts-martial having once been brought into being their proceedings and judgments when properly completed and all that is incident thereto, are not based upon, but indeed are independent of, the power of command as such. Winthrop thought otherwise, and he has been followed blindly ever since by the War Department, though more recent decisions of the Supreme Court of the United States have exposed the fallacy of his views.

(a) Winthrop's theory was wrong in reason. Winthrop in a double-leaded heading in his work on military law says that a court-martial is “not a part of the judiciary, but an agency of the executive department.” This is the beginning and the cause of the difficulty. The only authority he quotes in connection with the assertion is a statement from Clode to the effect that in the British Army the power of courts-martial comes from the Crown, where, of course, differing from here, the King in theory is the fountain of justice. His text continues:

“Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact 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.”

The non sequitur here is absolute and obvious. “Not belonging to the judicial branch of the Government,” he says, then courts-martial must necessarily belong to the executive department, are merely instrumentalities of Executive power and utilized under his orders. Since the days of Winthrop this has been the height of orthodoxy; and we have all been steeped in the teachings that follow upon that illogical and fallacious syllogism.

It is rather surprising that an unsupported text book statement, sustained by so little logic, should have gone so long unexamined by those in military authority, even if judicial decisions had not exposed the fallacy. To be sure, courts-martial are no part of the judicial system referred to as such in the Constitution, but this does not place them under the Executive power. They are courts all the same, with their bases deep down in the Constitution. The courts of the several Territories have never been courts of the United States in the constitutional sense, nor have they ever had any other constitutional basis than the power of Congress to make rules for the government and disposition of the Territory of the United States. But who would contend that they are under the Executive power? The courts, both Federal and local, of Porto Rico and Hawaii, and the courts of Alaska and the Philippines, indeed

the courts of the District of Columbia, the United States Courts of Customs Appeals, and the Court of Claims, are not constitutional courts of the United States, in the strict sense, in as much as in them is deposited no part of the judicial power as defined in the Constitution; they constitute the courts, however, provided for by Congress under other grants of power. But no lawyer would contend, for that reason, that such courts are subject to Executive power.

(b) Winthrop's theory was wrong on principle and precedent. Courts-martial as a means of military adjudication long antedated the Constitution. They are recognized in the fifth amendment in the exception there made as to cases arising in the land and naval forces, and elsewhere in the Constitution. As they exist to-day in our land, and as they have ever existed here, they have been creatures of legislative enactment, under the power of Congress to make rules and regulations for the government of the Army and Navy. The king as a fountain of justice, military and otherwise, finds no counterpart here in our Chief Executive except to the extent that supreme powers are conferred upon him by the Constitution. Here the fountain of justice, indeed all prerogative of sovereignty, is in the people, except where conferred by them on their representatives. Except for the pardon power, Congress here is rather the fountain of military justice. Courts-martial are authorized by Congress. The powers that bring them into being are designated and authorized thereto by Congress. The offenses which they may try and the law which they apply are prescribed and enacted by Congress. Their procedure is regulated under the law of Congress. Their sentences and judgments must be in accordance with the law of Congress. All this has been said too frequently by the Supreme Court of the United States to be doubted. They are, then, tribunals created by Congress; administering the law of Congress; and responsible to that law alone. It is established by an unbroken line of decisions of the Supreme Court that a court-martial is the creature of Congress and as a tribunal it must be convened and constituted in entire conformity with the provisions of the statutes, or else it is without jurisdiction. (*Dynes v. Hoover*, 20 How., 82; *Keys v. U. S.*, 109 U. S., 340; *McCloughry v. Deming*, 186 U. S., 62.)

(3) *The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supreme Court of the United States, though this department still clings to them.*—

Those teachings were:

(a) That courts-martial were not courts at all in any proper sense of the term;

(b) That, therefore, they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(c) That, therefore, judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(d) Being executive agencies, they are subject to the power of command.

Those teachings were all wrong, and the sooner we abandon them the better.

(a) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (*Runkle v. United States*, 122 U. S. 543, 555; *McCloughry v. Deming*, 186 U. S. 49, 68; *Ex parte Reed*, 100 U. S. 13, 21; *Swain v. United States*, 165 U. S. 558; *Keyes v. United States*, 109 U. S. 336, 340; *Grafton v. United States*, 206 U. S. 333, 348; *Smith v. Whitney*, 116 U. S. 167, 178.)

(b) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (*Ex parte Mason*, 105 U. S. 696; *Carter v. Roberts*, 177 U. S. 496; *Carter v. McCloughry*, 163 U. S. 365; *Grafton v. United States*, 333, 348.)

(c) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land, is a bar against a second trial in any court of the United States. (*Grafton v. United States*, 206 U. S. 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the *Grafton* case had regarded it as settled law and justice, and sternly opposed the contrary view, that a soldier, though tried and punished by court-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and his rights to justice.

(d) The functions of courts-martial are inherently and exclusively judicial and therefore are not subject to the power of command as such, but only to judicial supervision established by Congress.

It has been said that the President has the power to establish a system of courts-martial, and that in deference to that power, therefore, courts-martial are subject to his control. This I deny. I do not say that if the Constitution had not spoken, the power and necessity of the Commander in Chief to maintain discipline in the Army would have been sufficient to authorize some system of military adjudication; and it may be that if Congress had not spoken under its power to make rules of government for the Army, the President could have filled the void. But when Congress does speak out of its power, the President may not speak within the same field. He may not array himself in opposition to the legislative rules governing the administration of military justice. Congress has designated what commanders subordinate to the President may convene courts-martial, and the President can not say otherwise. Congress has said what law they shall apply, and the President may not prescribe another.

Congress has regulated the punishment, and the President can not prescribe different penalties. The most that can be said is, inasmuch as Congress has not endeavored to deprive, even if it could deprive, the Commander in Chief of his power as a convening authority, the President may himself still convene a court-martial, and his name may, therefore, be added to that list of convening authorities designated by Congress. But that power is limited to him; he may convene courts-martial, but when convened they will be subject to all the law of Congress; he can not, by reason of that power, control courts-martial convened by others.

As was said in a report by the Judiciary Committee of the Senate, quoted with approval by the Supreme Court in *Swain v. United States* (165 U. S., 558), with respect to the acts of Congress authorizing the constitution of general courts-martial by officers subordinate to the President, such acts are not restrictive of the power of the Commander in Chief, but—

“ \* \* \* merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who without such legislation would not possess that power, and that they do not in any manner control or restrain the Commander in Chief from exercising power which the committee think in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised.”

His power of control over the judgments of courts-martial not convened by him comes itself from Congress, and on principle he can add nothing to it.

It is a fallacious reasoning to say that Congress, under its power to make rules and regulations for the government of the Army, may not confer any authority upon a subordinate official without conferring it upon the President as Commander in Chief, especially when the power conferred is inherently judicial. Such an argument was advanced by the Court of Claims, but it is to be observed that the Supreme Court did not adopt that view. On the other hand, it quoted with approval the report of the Senate Judiciary Committee, which was to the effect (1) that the subordinate authorities would not have had such judicial power without the authority of Congress, and (2) that the President did have the power to convene a court in the absence of legislation to the contrary.

(e) Court-martial procedure being judicial from the beginning to the end (*Runkle's case*, 122 U. S. 588, and all subsequent cases cited), the power of revision, if it exists, is also judicial and therefore not subject to the power of command.

It is a maxim of the law that judicial power can not be restrained; which means to say, it can be controlled by no power except by superior judicial authority drawing its power from the same source. This course of the judicial power of courts-martial is Congress; and only by Congress alone, or by some authority appointed by Congress, can a court-martial be controlled. A supervisory judicial authority Congress conferred upon the Judge Advocate General by the section discussed. The fact that the Judge Advocate General is in a military hierarchy and in an executive department does not subject his judicial or quasi judicial functions to the power of command. It is established by the decisions of the Supreme Court of the United States that an officer of an executive department charged by Congress with judicial or quasi judicial duty is not subject in the performance of such duty to any executive authority. Thus, the decisions of the Commissioner of Patents stand as the final judgment of the

executive departments beyond the control of the Secretary of the Interior. (*Butterworth v. United States*, 112 U. S., 50.)

The supervision which a superior in an executive department may have over an officer in the same department who performs judicial or quasi judicial functions is on principle limited to administrative and executive functions, and does not relate to the quasi judicial. It may be that the legal relation between the head of the department and the officer performing judicial functions is such as to make the decisions of the latter subject to the former's judicial review, but certainly not to the review of another and nonjudicial bureau of the same department.

(f) Such judicial revision is not subject, therefore, to the usual General Staff supervision.

The practice which obtains in the General Staff of passing upon the opinions of this office in such matters of pure law, is, obviously, as hurtful to proper administration as it is inconsistent with legal principles. From the common-sense point of view alone, how futile it is to direct the attention of the General Staff, military experts presumably knowing nothing of technical law, to the control and supervision of the judicial functioning of the Judge Advocate General, who presumably is thoroughly skilled in matters of law and trained to judicial functions. I can conceive a large field in the realm of military conduct and policy—not of detailed administration—in which as I see it, the General Staff was created to function and in which good results will be achieved only when they are thus confined and devoted to larger tasks. I address myself to a situation and not to sporadic instances of such administrations. Considerable time of that great body and also of this office is consumed in conferences and discussions required by reason of such assumed power of supervision of the decisions of the office in matters of technical law and judicial duty. I can recall distinctly my inability to get a General Staff officer to grasp the usual technical significance and the propriety of applying the legal principles usually expressed in *dammum absque injuria; res inter alios acta; generalia specialibus non derogant*, and like technical concepts. I can recall a recent instance of a plain case of a lack of jurisdiction in which the Chief of Staff personally functioned for a considerable part of three days in an endeavor to make up his mind whether the error was jurisdictional, rendering the judgment null and void, or was an error of law, simply requiring a reversal in my judgment. No war of any consequence can properly be conducted with such General Staff administration.

### III.

THE WHOLE ARGUMENT ON THE OTHER SIDE IS FOUND IN THE CONTENTION THAT THE WORD "REVISE" HAS NO SUBSTANTIAL MEANING BUT HAS REFERENCE ONLY TO CLERICAL CORRECTIONS.

ONE SINGLE FACT EXPOSES THE UTTER FALLACY OF THAT CONTENTION, AND HAD IT BEEN CONSIDERED MUST HAVE PREVENTED AN EXPRESSION OF THAT VIEW.

THAT FACT IS THIS: THE WORD "REVISE" IS AN ORGANIC WORD, WHICH SOLELY CREATES AND DEFINES THE DUTIES OF AN ENTIRE BUREAU. CONGRESS WENT TO THE GREAT LENGTH OF CREATING AN INDEPENDENT BUREAU IN THE WAR DEPARTMENT FOR THE SOLE AND DECLARED PURPOSE OF HAVING IT "REVISE" THE PROCEEDINGS OF ALL MILITARY COURTS, AND MADE THAT DUTY OF REVISION THE SOLE DUTY OF THAT BUREAU.

It is true that the word "revise" as descriptive of the duty of the Judge Advocate General is found associated in the Revised Statutes with other words that are not of an organic nature. But in construing the Revised Statutes, if there be doubt enough to justify construction, as there is not in this case, the antecedent legislation may and should be examined; and when examined, it can be seen that there can be no application of the doctrine of *noscitur a sociis* here; indeed, because of the established meaning of the word "revise" there could have been no application of the doctrine under any circumstances.

The act of July 17, 1862 (12 Stat., 598), was an act establishing anew the office of the Judge Advocate General, and no functions were established for that office other than that enjoining that—

"To his office shall be returned for revision all records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The declared purpose of having the records returned to this office was that the Judge Advocate General should revise them and make a record of his proceedings in revision.

Again, the act of 1864 (13 Stat., 145) created a separate bureau of the War Department for this special purpose in the following language:

"Sec. 5. There shall be attached to and made a part of the War Department during the continuance of the present rebellion a bureau, to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all courts-martial, courts of inquiry, and military commissions of the armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

And in the following section, descriptive of the duties of the Judge Advocate General, the statute uses the words, "He shall receive, revise, and have recorded all proceedings of courts-martial," etc. These words describe his duties, but the extent of revision is, of course, to be found in the fact that it was the sole and single purpose of the creation of the bureau. The duties established for that bureau in its origin are still included within those of the office of the Judge Advocate General. Is it not opposed to common sense and reason to say that the Congress of the United States went to the great length of creating a separate bureau of this War Department for no purpose at all, or, at most, in order that some inconsequential clerical change might be made upon the record?

It is to be observed that the unreported decision in the *Masons* case, a case which I have been familiar with since 1902, and which for the moment, and perhaps because of its utter lack of authority, I had forgot, holds that upon the doctrine of *noscitur a sociis* the word "revise" imports but clerical duties. All that that judge said was said without evidence of any study of the statute and without reference to antecedent legislation; and, furthermore, it was the most patent dictum.

But there is another reason why the word "revise" can not be applied to any substantial clerical change in the record. The record is made by the court; it can not be changed except by the court. The record can not be made elsewhere. There is, then, no field for any clerical revision.

To be guided by this line of argument would be to hold that Congress created an entire bureau, whose sole duty should be to dot the "i's" that had not been dotted, and cross the "t's" that had not been crossed, and correct errors of spelling and perhaps of grammar, and to substitute one's personal view of correct punctuation for that which the court reporter had adopted. In other words, Congress went to ridiculous length of establishing a bureau of the War Department where sole objection was to correct the clerical inaccuracies of a court reporter.

But Winthrop accepted this dictum, without examination, and we are engaged to-day in nodding acquiescence to a proposition which, had it come less well sponsored, would have been greeted with impatience.

### IV.

"REVISE," IN ITS EVERY SENSE—ORDINARY, LEGAL, AND TECHNICAL MILITARY SENSE—MEANS TO CORRECT, TO ALTER, AND AMEND.

The Judge Advocate General's brief, though concurring in the argument that the word "revise" represents purely clerical duties, does in a rather incidental and delicate way suggest that the word "revise" as here used may mean a review for the purpose of correction. If that were the acceptable view of the statute, then Congress must have contemplated that the power of correction existed somewhere. But he does not follow that definition up, or rely upon it to locate the power of revision. The Judge Advocate General, so far as I can find, has no real authority for any such definition. His own illustrations fail completely. If a proof reader revises a copy, he himself changes it so as to make it conform to some standard. The committee who report a proposed revision of the law to Congress do not revise the law; Congress does it. The committee do not revise the law; the legislature does, making the desired corrections as revised. Those were the practical examples the Judge Advocate General chose to rely upon.

(a) The ordinary meaning of the word "revise" is not to review for the purpose of corrections, but to perform the act of correction. Look up the word in the ordinary dictionary; look around your library at the "revised editions"; look at the "Revised Statutes," or "Revised Codes," and no doubt whatever

can be entertained of its meaning. It is an active, decisive power that results in a change in modifications of the proceedings revised. Ordinarily "revise" is a broader word than "review," especially so in the literary sense; and the two may be distinguished in that the former is active and decisive, the latter passive, informatory, and advisory. In a legal sense, "revise" while less commonly used in Anglo-American law than "review" as establishing supervising or appellate power, seems to be synonymous with it.

(b) In its legal sense the meaning of the word, as evidence by a multitude of examples of its use, is unmistakable; and if the single example heretofore given of its significance when used in statutes were "persuasive" at all, those to be given now should prove absolutely convincing.

The Judge Advocate General says that such examination as he has been able to make of legislative precedents "fails to disclose a single instance in which the power to modify or reverse the judgments of inferior courts is deduced from the word 'revise' without the addition of apt words specifically conferring the power to reverse or modify." And then, after referring to the use of the word in the bankruptcy statute cited by me, he said:

"This legislative precedent as judicially applied would, if it were properly and accurately set forth in the brief, be most persuasive."

My reference and reliance upon the word "revise," as used in the bankruptcy statute, was quite justified as showing that the word "revise" as there used means exactly what is here contended for—changing the proceedings of the civil inferior courts of bankruptcy so that they shall conform to law. And the appellate power thereinbefore conferred in the statute was not what challenged the attention of the court as a measure of their power over inferior proceedings, but it was the word "revise."

But I submit the following, which ought to be conclusive:

(a) The word "revise" is the sole word used in the Constitution of Oregon to confer full appellate jurisdiction upon the supreme court of that State, and that court has given the word a fulsome meaning, even in the face of legislation evidently designed to limit it.

(b) The word "review" is used by the Constitution of North Carolina as the sole word for conferring full appellate power upon the supreme court of that State.

(c) The word "review" is used by the Constitution of New York to confer full appellate power upon the court of appeals of that State.

(d) Randolph's plan for the Supreme Court of the United States was contained in the following resolution:

"Resolved, That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate." (Madison's Journal of Federal Convention, p. 62.)

(e) Section 24 of the Constitution of Illinois, 1818, provided "that the general assembly may authorize judgments of inferior courts to be removed for revision directly to the supreme court." This language is peculiarly similar to the language here discussed and none other was needed to confer appellate power upon the supreme court of that State.

(f) "Revise" has a meaning here contended for in Constitution of California, Article X, 1849, 1879; Constitution of Alabama, section 3, 1819, and Article IX, 1865; Constitution of Florida, Article XIV, 1838 and 1865.

(g) The Court of Customs Appeals has final appellate jurisdiction over decisions of the Board of General Appraisers, all of which is deducible out of the word "review." (Judicial Code, sec. 195.) The word as there used includes the usual appellate powers, including the reversal of the Board of General Appraisers when the court is satisfied that the finding is wholly without evidence or clearly contrary to the weight of evidence. (See *U. S. v. Riebe*, 1 Customs App., 19; *Holbrook v. U. S.*, 1 Customs App., 263; *Carson v. U. S.*, 2 Customs App., 105; *In re Gerdau*, 54 Fed., 143.)

(h) The decisions of the Comptroller of the Treasury over settlements of accounts by the decisions of auditors is described by the statute (act of July 31, 1894, 28 Stat., 207), as "a revision" and his decisions are referred to as "decisions upon such revision."

(i) Section 271, Revised Statutes, defining the power of the first comptroller, provides as follows:

"The first comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the first and fifth auditors

of the Treasury forthwith to audit and settle any particular account which such officers may be authorized to audit and to report such settlement for revision and final decision by the first comptroller."

(j) Section 482, Revised Statutes, defined the powers and duties of examiners in chief in the Patent Office and provided as follows:

"The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases; and, when required by the commissioner, they shall hear and report upon claims for extensions and perform such other like duties as he may assign them."

(k) Section 4914, Revised Statutes, defining the jurisdiction of the Supreme Court of the District of Columbia, provides:

"The court, on petition, shall hear and determine such appeal and revise the decision appealed from in a summary way on the evidence produced before the commissioner at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. \* \* \*

(l) "Review" is the sole appellate word used in section 330 of the Code of Arizona establishing jurisdiction upon the supreme court of that State.

(m) "Review" is used also to confer appellate jurisdiction upon the supreme court in section 4824, Code of Idaho.

(n) "Review" is thus used in section 7096, Code of Montana.

(o) "Review" is so used in section 654, Code of Utah.

(p) In *State v. Towery*, 39 So. 309 (Ala.), the question was as to the meaning of the word "revision" as used in a clause of the constitution requiring the legislature periodically to make provision for the revision of the statutes. The court there construes the word in the usual sense of review, alter or amend, and said with reference to the meaning of the word—"Such changes as are admissible are within the purview of the section."

(q) In *State v. King County*, 37 Pac. 489, 491 (Wash.), the court deduced its authority to review by way of certiorari an inferior court's decision out of the revisory. Even the dissenting justice in that case admitted that the word "revision" included the power here contended for, but held that in this case it had reference only to those judgments which were already within the jurisdiction of the court by virtue of some other appellate power.

(r) The word is, apparently, habitually used as defining the power of courts over municipal corporations, taxation boards, and insolvency proceedings (34 Cyc. 1723); and the word is used in that publication as indicating a revisory power over criminal sentences (12 Cyc. 783.)

The Supreme Court frequently alludes to its power "to revise the judgments" of inferior courts. (See *E. G.*, the *Dred Scott* decision, 19 How., 453, etc.)

Of course the fact that appellate power is frequently conferred with great particularity in such terms as "revise, reverse, remand, alter, amend, and set aside" places no logical or legal restriction upon the word "revise," certainly not when it is used alone.

Eleven of the State constitutions confer full appellate power in one or two words, using none of those enumerated.

The term "revise" and "revision of proceedings," having this general significance, has been known to military law and procedure from time immemorial.

It was known to the early mutiny acts prescribing that no proceedings should be returned to be revised by the court more than twice.

In *Tytler's Military Law* (1806), page 173, it is said with reference to British military law that the King has no power of revision, but that that function belongs to the courts of justice. He further says—

"All, therefore, that it is competent for His Majesty to do, if the sentence of a court-martial shall not meet with his approbation, is to order the court to review their proceedings, and even this power, as above stated, is limited; for the mutiny act declares 'that no sentence given by any court-martial and signed by the president thereof shall be liable to be revised more than once.'"

It is to be observed that even at English law the power of revision of court-martial proceedings and sentences is clearly distinguished from the Crown's power of pardon.

"Revision of proceedings" and "proceedings in revision" are terms well known to Anglo-American military law with reference to the power of courts to reconsider and correct their own proceedings, judgments, and sentences.

In 6 Op. Atty. Gen., 203, Attorney General Cushing discussed this power of revision with great thoroughness, saying in that connection:

"It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence."

citing for that authority Hough on Courts-Martial, page 29; McArthur on Courts-Martial, page 136; Griffith's Notes, page 90; Kennedy on Courts-Martial, pages 229, 290; Anon., Observations on Courts-Martial, pages 38-65; Tytler's Military Law, pages 170-338; James's Collection, page 556; Simmons's Practice, 389; De Hart on Courts-Martial, page 203; O'Brien's Military Law, chapter 23.

This procedure, with the word "revise" as descriptive of it, is an established part of our own military procedure, which occurs in daily practice, is treated of in all texts and is recognized by that name by all our courts.

See Macomb (1809); Duane's Mil. Dic., 1810; Scott's Mil. Dic., 1864; Benet's Military Law under "Revision"; also all military texts.

#### V.

THE WORD "REVISED," AS A MATTER OF FACT, IS IN NO SENSE AMBIGUOUS, AND THERE IS NO ROOM FOR CONSTRUING IT. IT WOULD HAVE MADE NO DIFFERENCE, THEREFORE, WHAT THE ADMINISTRATIVE PRACTICE WAS OR IS. THE QUALITY OF LAW IS NOT IMPAIRED BY NONUSE. AS A MATTER OF FACT, JUDGE HOLT DID, IN FORM AT LEAST, PRONOUNCE SENTENCES INVALID, AND DID NOT CONTENT HIMSELF SIMPLY WITH RECOMMENDING THAT PRONOUNCEMENT WAS BY SUPERIOR AUTHORITY. HIS VIEWS AS TO THE VALIDITY OF PROCEEDINGS WERE EXPRESSED IN TERMS THAT SAVOR OF JUDICIAL PRONOUNCEMENT, AND THE ORDERS OF THE WAR DEPARTMENT SO FAR AS EXAMINED SEEM TO RESPECT THAT QUALITY BY CONFIRMANCE.

The meaning of the word is not fairly questionable. Furthermore, Senators in debate referred to the power conferred as that of a court of review. Congress seems to have had no doubt about it. In such a case practice can not govern.

In writing the opinion I went through the record books of a part of 1863, and my notes of that search reveal that Judge Holt's reviews very frequently terminated with a declaration which, by its form and tenor, indicated, so far as his office was concerned, judicial finality. It was common to conclude with the statements: "Therefore the sentence is inoperative," "therefore this fatal defect must prevent a confirmation of the record," "the sentence is fatally defective," "for error of law committed by the reviewing authority the sentence is inoperative, notwithstanding the confirmation of Maj. Gen. Hooker," "the sentence as it stands is inoperative," "the sentence is invalid and should not be enforced," "the sentence rested upon such a record should not be carried into execution," and such like expressions.

"Sentence is therefore inoperative" occurs eight times; record is fatally defective, and sentence should not, or can not, or must not, be enforced, or carried into execution, or confirmed, sixteen times. The record shows that, in the administration of those days, the Judge Advocate General was regarded both by the President and the Secretary of War as the law adviser upon matters of military administration and justice, and at least no power of command stood between him and those supreme authorities. It also shows that the Judge Advocate General very frequently, indeed one might say, habitually, returned the record direct to the reviewing authorities with instructions as to errors of law and pointing out the necessity for correction where correction could be made in order that the sentence be held operative. That the examination, if not revision, of the records might be the more expeditiously made an Assistant Judge Advocate General, representing preliminarily the Judge Advocate General and his power, and not connected with any commander's staff, was stationed in a central situation with duty, as to proceedings, "to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commanders, that sentence may not be illegally executed." (G. O. 230, A. G. O., Aug. 16, 1864.)

#### VI.

THE JUDGE ADVOCATE GENERAL OF ENGLAND CERTAINLY DID HAVE THIS POWER OF REVISION. (I AM NOT ADVISED OF HIS PRESENT AUTHORITY.)

Clode (1869), vol. 2, pp. 359, 364, 360. While his letters patent do not clearly define his duties, it was prescribed therein—

"He exercises the powers of a Supreme Court of Review, as regards the proceedings of all district, garrison, and general courts-martial whatsoever and whensoever."

The following is quoted from Jones's Military Law (1882), p. 94:

"The J. A. G. and his deputy are always civilian lawyers, while the deputy judge advocates, who in England attend at B. C. M., are always military men.

"The J. A. G.'s Department forms a final court of appeals and has the power of upsetting or 'quashing,' as it is called, all proceedings of C. M. and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

"The J. A. G. is a member of the Privy Council. He is generally chosen from among barristers who are members of Parliament, and they stand or fall with the Government to which they are attached.

"All the proceedings of G. C. M., which at home must be confirmed by the Sovereign, are sent to the J. A. G., and the Sovereign confirms on his responsibility as a Minister of the Crown, and acts on his recommendation.

"The J. A. G. is responsible to Parliament, hence a prisoner, if wronged, can appeal at law against him, for 'the Sovereign can do no wrong.'

"The duties of the J. A. G. are confined to the examination of the proceedings as to their legality, whether the sentences are within statute laws, etc. The expediency of carrying out the sentence, or as to remission, etc., is not his province; the C. in C. advises the Crown on these points." (Pp. 94-5.)

It must be remembered, too, that the civil courts of England exercise a far larger power over the judgments of courts-martial than do our own.

#### VII.

WHENCE COMES THE ESTABLISHED POWER TO DECLARE PROCEEDINGS NULL AND VOID FOR JURISDICTIONAL ERROR? AND WHY SHOULD NOT THE LARGER POWER INCLUDE THE LESSER RADICAL ONE OF CORRECTION OF LEGAL ERROR?

Nobody essays an answer. Doubtless a reviewing authority, by statute, may "disapprove" a sentence because it is null and void or because it is bad for prejudicial error of law, and I think that frequently it is said in our texts and in our practice that a sentence is "invalid," though not for jurisdictional error. The larger power, in practice, is exercised here in the department. It is extremely difficult for me to comprehend any reason that concedes to this department the larger power but denies to it the lesser one.

#### VIII.

THE NECESSITY, IN THE NAME OF JUSTICE, OF LOCATING THIS POWER IN THIS DEPARTMENT, AND PREFERABLY IN THIS OFFICE, WHERE LOGICALLY, AND I THINK LEGALLY, IT BELONGS, MUST BE APPARENT TO ALL WHO ARE FAMILIAR WITH THE ADMINISTRATION OF MILITARY JUSTICE.

In the first half of November, while I was in charge of the office, I set aside the judgments and sentences in the cases of 19 enlisted men because of prejudicial other than jurisdictional error invalidating the judgment. The number in which on established principles such reviewing power should be invoked should be expected largely to increase.

Courts-martial are courts dealing with the right of life and liberty of all who are subject to their jurisdiction, a number already beyond a million, doubtless soon to pass into many millions, of our citizens. They are courts of law administering the law of this land, in accordance with the law of the land, for a great national purpose. Their judgments are judgments of law. Can it be said that their judgments are beyond all legal inquiry; that though they may be arrived at in contravention of all law, if the court, according to the usual nar-

row jurisdictional tests had jurisdiction, the judgment, though concededly wrong for error of law, is beyond all correction?

There is to-day, as never before, an urgent, impelling necessity for such revisory power; if not here, then elsewhere. It will not do to say that such errors of law affecting the proceedings to the great prejudice of the accused and rendering the judgment bad because thereof, are rare and for that reason may be ignored. That doubtless was the reason why the power was permitted to remain not fully used or to drop into desuetude. But this day finds the Army increased tenfold. A few more months hence it will have been increased twentyfold, and obviously a year hence the Army of the United States must necessarily, if we are to take the part in this war that this Nation purposes to take, consist of three millions of men. The officers of that Army must necessarily be largely untrained officers, conscious, of course, of their great power, required necessarily to exercise it, and exercising it necessarily without the most enlightened judgment or consideration. It will consist of men just come from the shops, the factories, and the farms, unused to Army life, with its peculiar customs and its rigorous duties, willing but uninformed. With such elements, errors upon the part of the officer on the one hand exercising disciplinary authority and on the part of the enlisted man on the other subjected to such authority, must be exceedingly numerous and resort to the disciplinary actions through the agencies of the court-martial frequent. The triers of the case will be officers of the same class, and so frequently will be the reviewing and approving authorities. Opportunity for resort to court-martial and opportunity for error in the courts-martial proceedings themselves will be largely multiplied over those that obtain in normal peace conditions. There is chance for grave error in the most enlightened legal system, but still greater chance in a legal system which necessarily must be administered by men untrained in the law, and an immeasurably greater chance in the case of such an army as ours must necessarily be. I must assume that no man with the interest of the Army and the country at heart and with the ordinary conception of the necessity of maintaining justice in our institutions could doubt the advisability and the necessity of establishing here or elsewhere such revisory power.

I have no shame in confessing that I feel strongly about this, and not in any contentious way. I am not impelled to file this brief because the Judge Advocate General of the Army disagrees with me, nor the Chief of Staff, nor other authority. I am entirely out of the field of contention. I feel strongly about it as a matter between a man and his fellowmen, between an officer and the men whom he should protect, between a man and the Army in which he serves, between a soldier and his Nation. What happened to these men can happen to me. A soldier has nothing but his service. He is honored by his professional reputation or dishonored by the lack of it. Society has established certain rules, which are its law and by which human conduct is tested. All lawyers, at least, understand the methods of applying those tests. If the test be not applied in accordance with the law, there has been no test. It is not sufficient to say that a system of administration of criminal justice may not be a fair and just system, though it provide for no appeal, though the fact remains that no enlightened system has ever permitted a judgment to remain as final when reached in contravention of the rules of law. The question here is whether or not, when, according to the well-understood principles of law and justice, a judgment is concededly and palpably wrong, it must remain and persist as the law of the land in condemnation of an individual while it is concededly wrong. It seems to me that a soldier, before suffering the extreme penalty of death or other serious punishment, should, on principle, be entitled to have the proceedings of his trial examined, not solely by the commander convening the court in the field, but by a separate and independent authority, who, skilled in the law, properly circumstanced, can with the necessary deliberation and considerateness pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such a remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed, I think, requires it to take.

## CONCLUSION.

This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance, to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relations of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

S. T. ANSELL.

DECEMBER 10.

Senator SUTHERLAND. I was going to suggest that since you referred to the brief it might properly go in the record at its proper place.

Senator THOMAS. In that connection, state as concisely as you can its general purport, to save reading it. That will be more brief.

Gen. ANSELL. I should have said that we of the office felt very keenly that we were right in the matter, and I may observe here that Prof. (now colonel) Wambaugh, of Harvard University, filed a special brief still contending for the correctness of our construction of the statute. I have that here.

Senator THOMAS. I ask, Mr. Chairman, that that also be included in the record.

The CHAIRMAN. That may be inserted in the record if there is no objection.

Gen. Ansell, is there any personal difference between you and Gen. Crowder, or is your only difference on the proper construction of the statute?

Gen. ANSELL. We have no personal difference in the world.

The CHAIRMAN. Have you personal feelings toward him because of his attitude?

Gen. ANSELL. Not in the least.

Senator KNOX. I suppose you feel like the justices of the Supreme Court who can not agree what the law is.

Gen. ANSELL. Probably I felt, by reason of the fact that I was there passing upon these questions day after day, more keenly and far more sensibly that my view was right on this than I would have felt if I had been detached and had been looking at it in more or less of an abstracted and detached way, as a judge of the Supreme Court would do. He would not be administering and applying the very law he was passing upon.

The CHAIRMAN. You come in daily contact with it?

Gen. ANSELL. Yes, sir.

Inasmuch as we are putting in all these papers, I should like to put in a proposed regulation by Col. Wambaugh designed to establish under this power that we had deduced out of the statute what he termed, and what by reason of the powers it was to exercise was properly termed, a national military court.

(The matter referred to was subsequently submitted and is here printed in full as follows:)

## EXHIBIT D.

COL. WAMBAUGH'S PROPOSED DRAFT OF REGULATIONS TO GOVERN THE COURT OF REVISION.

NOVEMBER 10, 1917.

Memorandum for Gen. Ansell.

Subject: Draft of an executive regulation establishing a national military court of revision.

1. Under the authority of section 1199 of the Revised Statutes of the United States there is established hereby in the office of the Judge Advocate General of the Army a national military court of revision with authority to revise the proceedings of all courts-martial, courts of inquiry, and military commissions.

2. The national military court will consist of three officers from time to time designated by the Judge Advocate General.

3. The national military court will take into consideration for purposes of revision such general court-martial cases as may be brought to its attention by any party in interest or by any member of the court, or by the trial judge advocate, or by the officer having power to approve or disapprove the sentence, or by any judge advocate, whether identified with the case or not.

4. The national military court will take into consideration for purposes of revision such special or summary court-martial cases as seem to be of peculiar importance.

5. The power of revision belonging to the national military court shall not include the power to deal with a case before the officer appointing the tribunal has finally dealt with it and shall not include the power to admit new evidence; but it shall include (a) the power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense which in its opinion the evidence of record requires a finding of only the lesser degree of guilt, and (b) the power to approve or disapprove the whole or any part of any sentence, and (c) such other powers as may be assigned to the court hereafter.

6. The national military court will disregard such irregularities as are not clearly shown to have injuriously affected substantial rights.

7. The Judge Advocate General will appoint from time to time officers to serve as counsel on each side of the cases considered by the national military court, and parties in interest shall also be entitled to counsel chosen by themselves.

8. The national military court will announce from time to time rules for its own procedure, not in conflict with regulations prescribed by the President, and not in conflict with the Constitution, statutes, and treaties of the United States.

9. The mere considering of a case by the national military court will not serve to suspend the execution of the sentence.

10. A decision of the national military court will not have validity until approved by the Judge Advocate General.

11. If so ordered by the Judge Advocate General a decision of the national military court will be made public and will be accompanied with an opinion stating the case and giving the reasons for the decision.

EUGENE WAMBAUGH,  
Major, Judge Advocate.

## EXHIBIT E.

COL. WAMBAUGH'S SPECIAL BRIEF FILED IN SUPPORT OF THE REVISORY POWER.

1. Section 1199 of the Revised Statutes of the United States, taking its language from acts of 1866 (14 Stat., ch. 299, sec. 12, p. 334), and of 1874 (18 Stat., ch. 458, sec. 2, p. 244), that:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

2. What is included within the power and duty of the Judge Advocate General to revise the proceedings of courts-martial?

3. The answer must depend upon the language of that section; and if the language be ambiguous or scanty, the meaning attached to it must be affected by the attitude of mind in which the language is approached. The language certainly is not verbose, though, as will be pointed out later, the chief word used is significant and enlightening, and there may be reason for discussing, in a preliminary way, whether the power of the Judge Advocate General over the proceedings of courts-martial would be intended by Congress to be narrow or to be wide.

4. In favor of a narrow consideration there are at least two things to be said. In the first place, the testimony upon which the results of a court-martial are based can not receive from the Judge Advocate General the exact weight to which it is entitled, for stenography can not communicate the appearance of witnesses, their hesitation or eagerness, and the impression by them fairly made upon the members of the court—in short, the atmosphere of the court room. In the second place, to interfere with the findings of the court-martial and of the appointing and reviewing authority may not unreasonably be deemed as endangering of the prestige of the officers thus overruled, and hence a procedure to the detriment of good order and military discipline.

5. Those considerations in favor of a strict construction of the Judge Advocate General's power and duty have been mentioned in order that they may be seen not to have been forgotten.

6. The considerations on the other side are much more weighty. To begin with, this is a remedial statute, and hence it is to be construed liberally in the light of the perceived evil or danger and in the light of the intended result. Notice the danger. It is, briefly, that skillful justice may not be received by persons peculiarly appealing to the desire of Congress that justice be done and be perceived to be done. The persons in question are, most of them, private soldiers, very young men, far from home, and from ordinary advice and influence, on the average not highly educated, not rich, performing, whether by reason of volunteering or by reason of drafting, a service which is of the highest importance to the Government. Whether language tends to achieve careful justice for such persons must be perceived to be intended by Congress to be construed liberally. Again, courts-martial, though their members are unquestionably conscientious, are composed of men not skillful in law or in the weighing of evidence, and these men sit amid surroundings not well adapted to the achieving of accurate results in such matters as these—surroundings not of books and of leisure, but of military cares, physical discomfort, and haste. In our Army the difficulties surrounding a court-martial have always been perceived; and, in consequence, the proceedings of a court-martial are, by our system of military law, inefficacious unless and until there is an approval by the authority appointing the court. Indeed, the court-martial itself—that is to say, the persons who are designated by the appointing authority, but who are commonly deemed the only members of the court—may not unreasonably be said to be treated by the law as no court at all, but as the equivalent of a commission making examinations and reporting recommendations. As the Articles of War of 1806 said (A. W. 65):

"No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being."

The articles of war in the Revised Statutes (A. W. 104) are to the same effect, viz:

"No sentence of a court-martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The words in the present article of war are substantially the same (Art. 46):

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

7. To refine, one might say that the war court is composed of both the court-martial and the appointing authority or, conceivably, that it is composed of the appointing authority alone. To go into refinements is unnecessary. What is important is to notice that though the court-martial and the appointing authority undoubtedly constitute a tribunal as regular as any other known to the law and a tribunal both argumentatively and expressly recognized in the

Constitution of the United States, nevertheless, the tribunal, in each of its parts, needs supplementing.

8. It has already been pointed out that the proceedings of the members who participate in the hearing need and receive investigation by the appointing authority. It must now be pointed out that the appointing authority, though certainly deserving high respect, can not be said to be ideal for the present purpose. The appointing authority is a busy military officer whose specialty is not the ascertaining of law and the weighing of evidence. Although he has the assistance of a department or division judge advocate, the surrounding circumstances are not perfect; and hence, it is easy to believe that Congress contemplated as desirable a substantial power of revision to the end that the soldier may find himself dealt with as carefully and skillfully as is a civilian offender. Further, even though the appointing authority be expert and full of leisure, there is a substantial danger that the appointing authorities throughout the Army will not bring to pass equivalent sentences for equivalent offenses, and that thus, taking a wide view of the whole Army, there may be such lack of uniformity as may amount to grave injustice.

9. Further, it must not be forgotten that military tribunals are administrative in their nature, and that when customs officers and other administrative officers rule upon rights—though merely rights of property—it is not uncommon to hear that due process of law requires an appeal—whether an appeal to the courts or merely an appeal to a superior officer.

10. These are reasons enough for expecting Congress to establish for military tribunals some sort of appellate procedure, bringing the whole matter ultimately before an expert.

11. Such considerations furnish the atmosphere surrounding the statute, and they show that one should receive with cordiality the provision that the Judge Advocate General shall "revise" the proceedings of all courts-martial.

12. Yet, is not the word "revise" clear? Does it not mean some active procedure by the Judge Advocate General, and some procedure regarding matters of consequence? Can the word mean that the Judge Advocate General is merely to correct spelling, punctuation, and grammar; and if he is to do something more than that, who shall say that he is to stop before he has done the whole of the task which the foregoing discussion has shown to be desirable?

13. The word "revise" is not a technical word of Anglo-American law. It is used now and then in statutes. The construction which has been given to it in statutes not dealing with military matters shows that as regards procedure the word "revise" or the word "revision" has a wide meaning. It is enough for the present purpose to notice what is the meaning given in military law to the word "revise" and to its related word "review." It will be found that the word "review" has a wide meaning in military law, and that the word "revise" has a still wider meaning. The power of the appointing authority, called in military books the reviewing authority, is thus described in the present article of war 47:

"The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence."

14. Wide as is the power of the reviewing authority, the power of revision is still wider. When the reviewing authority refers the case to the court-martial for revision—though, to be sure, that procedure is not mentioned in the Articles of War, and now rests wholly on military custom—the power of revision is understood to include a change in the finding and in the sentence. This wide meaning of the word "revision" is described in all books on military law. It is enough to cite the books from the beginning of the nineteenth century to the year of the adoption of the statute in question. The citations are as follows: Tyler's Military Law, 1806 edition, pages 169 and 338; McCombs' Martial Law, 1809 edition, page 32; Duane's Military Dictionary, 1810 edition, page 600, under the word "revise"; Scott's Military Dictionary, 1864 edition, under the word "revision"; Benet's Military Law, 1868 edition, page 169.

15. In the light, then, of the circumstances and of military custom, the Judge Advocate General's power regarding the proceedings of courts-martial, as now

given by the Revised Statutes through the word "revise," goes beyond the mere examining and filing which was the power before this statute was passed. It is not surprising to find that the statute used a word which enlarged the Judge Advocate General's power, for the statute itself recognizes that it enlarges the Judge Advocate General's duties, since it expressly says:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

EUGENE WAMBAUGH,  
Major, J. A., O. R. C.,

Assistant to the Judge Advocate General.

DECEMBER 1, 1917.

The CHAIRMAN. If there is no objection, that may be inserted here. I will say to you, Gen. Ansell, that you will have an opportunity to read over this and you may insert these records at the places where you wish them inserted.

Gen. ANSELL. I thank you very much.

I think it ought to be stated for the benefit of the Committee that this thing did not die with my filing of the brief, or the two briefs, and Gen. Crowder's reply (see Exhibit F) and the ruling of the Secretary of War (see Exhibit G).

(The matter referred to was subsequently submitted and is here printed in full, as follows:)

EXHIBIT F.

GENERAL CROWDER'S SECOND BRIEF IN OPPOSITION TO THE REVISORY POWER.

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

MY DEAR MR. SECRETARY: Herewith is Gen. Ansell's reply brief on the question of whether or not appellate power to revise, modify, and affirm findings and sentences of courts-martial is, by the terms of section 1199, Revised Statutes, vested in the Judge Advocate General of the Army.

You will recall that on November 10 Gen. Ansell submitted, for your personal consideration, a brief which purported to find in said section this appellate power in the Judge Advocate General. His conclusion was reached on five main points of argument:

(1) That the legislative history of the statute shows that the intent of Congress was to vest the Judge Advocate General with his power;

(2) That the administrative history of the statute disclosed that the power had been actually exercised by Judge Advocates General of the Army during the Civil War and until about 1882;

(3) That the word "revise" (which was the only word that could be considered as such a grant), as used in other statutes, specifically in the Federal bankruptcy statute, had been discussed by a United States court as having sufficient amplitude to convey appellate power;

(4) That the courts of the United States had never passed upon the power;

and

(5) That the Judge Advocate General of the British Army is vested with an analogous power.

You passed Gen. Ansell's brief to me and asked me to submit to you my views.

I replied to each one of the foregoing propositions, in substance as follows:

(1) That the legislative history of the statute was without significant incident;

(2) That the records of the Judge Advocate General's Office showed no exercise of this power by Judge Advocates General; but, on the contrary, disclosed many instances where such power, if it existed, would have inevitably been exercised had it been contended for, but which was not exercised.

(3) That Mr. John Tweedale, chief clerk of the War Department, in 1882, had made an affidavit for use in the case of *In re Mason*, to the effect that he, as chief clerk, knew of no instance where the Judge Advocate General of

the Army had in any official communication or report relative to the proceedings of general courts-martial, proceeded to act as an appellate judicial authority; but that his action was only to revise; in other words, to examine and make recommendations, either to the general of the Army, when that officer had appointed the court, or otherwise to the Secretary of War.

(4) That the word "revise" was not relied upon in the Federal bankruptcy act to confer appellate power, which power was granted in express terms elsewhere in the same section cited in Gen. Ansell's brief, and that in its commonly accepted definition the word "revise" did not import such a grant.

(5) That the United States Circuit Court for the Northern District of New York had considered the question almost in the precise terms in which it was presented for your consideration, and had explicitly denied that section 1199, Revised Statutes, granted any such power to the Judge Advocate General.

(6) Finally, that a study of the organization of the British Army disclosed that the judge advocate general of His Majesty's forces had not exercised such powers.

Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addressed himself to the evils he would remedy. He shows that a great number of officers, not familiar with court-martial procedure, have lately been included in the Army, and that there is danger of grave error in court-martial proceedings, even when reviewed by judge advocates and approved by duly constituted reviewing authorities. He shows that the exercise of the pardoning power is often not sufficient to restore an officer or a soldier, who has been wrongfully convicted, to his full rights. He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors of courts-martial and reviewing authorities. He cites again the mutiny case, to which your attention has heretofore been called, as an example, and says, I think justly, that there are other cases, happening particularly since the outbreak of war, which demand the exercise of such corrective power; and down to this point I follow him with substantial concurrence without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes.

Gen. Ansell's argument presents, about as strongly as it could be presented, the necessity for an appellate power. But this question is not a new one. Whether such a power should be created and whether the service would gain or lose by such provision has been discussed in service literature since 1885; but never, so far as I can inform myself, has it been suggested in this prior discussion that this appellate power could be deduced from section 1199, Revised Statutes.

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often, and too clearly to require citation of authorities, that it is no objection to a grant of jurisdiction that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedure, if it attain its primary end, discipline, must be simple, informal, and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our Armies. Such a proposition should hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be given to the necessity of doing that very thing.

You have recently issued orders which will be corrective of some of the embarrassments referred to by Gen. Ansell, and I shall shortly submit for your consideration further orders which will, I think, carry corrective action still further and perhaps afford the measure of relief called for.

E. H. CROWDER,  
Judge Advocate General.

## EXHIBIT G.

THE SECRETARY OF WAR'S RULING.

DECEMBER 28, 1917.

Memorandum for Maj. Gen. ENOCH H. CROWDER:

I have read with interest and close attention the vigorous brief of Gen. Ansell on the question as to whether or not appellate power to revise, modify, and affirm findings and sentences of court-martial is conferred upon the Judge Advocate General of the Army by section 1199 of the Revised Statutes.

It is impossible not to admire the earnestness and eloquence with which Gen. Ansell presents his view. For the most part, however, the argument runs to the necessity of the power rather than to its existence. It may very well be that this power should exist, either in the Judge Advocate General or in the Secretary of War, advised by the Judge Advocate General, but if I were asking Congress at this time to give that power, I should feel the necessity of so limiting the language of the donation as not to paralyze the disciplinary power of the commander in chief of the Expeditionary Forces who, it seems to me, is in a situation where grave consequences might be entailed by inconclusive action on his part.

Generally, the administration of justice is a compromise between speed and certainty. The close cases and majority-of-one decisions of our supreme courts would justify the belief that, if there were other courts more supreme in many of these cases different results might finally be obtained; and yet somewhere there has to be an end to litigation, and to that end, therefore, finality is always a question of judgment, resting in legislative discretion. There is nothing intrinsically abhorrent in the idea of finality in judgments of courts-martial approved by the reviewing authority. Whether or not, however, injustices are likely to arise from such a course which would outweigh in gravity the delays necessary to perfect a complete review on appeal is a question about which differences of opinion may well exist.

These considerations have little to do with the immediate question, which is whether or not the use of the word "revise" is legally a donation of appellate jurisdiction. Gen. Ansell cites the act of July 17, 1862 (12 Stat., 598, p. 20 Ansell brief), as directing the return of records of courts-martial to the office of the Judge Advocate General for purposes of revision—on page 21 of his brief, he cites the act of 1864 (13 Stat., 145) generally to the same effect. It would be interesting to know whether summary execution of judgments of courts-martial was at that time also contained in the laws of war. Obviously, if such summary executions were authorized, the subsequent return of the record for revision could not be held to be for appellate review, since it would be a vain thing to review the record after the execution of judgment.

If the word "revise" is to be held to confer appellate jurisdiction, as distinguished from jurisdiction in error, what provision has been made for a retrial or trial de novo, for the summoning of witnesses, and for doing what justice may require in the case. For instance, a report may come to the Judge Advocate General's office which contains radical errors of law. Has the Judge Advocate General the right to set aside the proceedings and direct a new trial to be had before the same or a different court, or may he summon the parties before him with the necessary witnesses and become himself a court-martial, or is he remitted to a quashing of the whole proceedings and restoration of the defendants to their original status, protected from subsequent prosecution by the bar of former jeopardy? In other words, just what procedure is contemplated in the cases which Gen. Ansell has in mind?

I have not the facts in the mutiny cases in my mind, but as I recall it, Gen. Ansell ordered the discharge of those convicted of this mutiny, and I assume he felt himself without power to direct the trial of the officer whose misconduct caused the offense. I presume he felt equally without power to examine into such minor derelictions as may have attended the conduct of the men tried for the mutiny, who, even though they may have been guiltless of mutiny, may yet have been derelict in other ways with regard to that incident, which a complete administration of justice could be in a position to take notice of.

I would be glad to have your views upon the two questions suggested here: (1) With regard to the coexistence of the power of summary execution with the power of revision in 1862 and 1864, and (2) The sort of appellate procedure involved in the power to revise, according to the view accepted by Gen. Ansell and his associates.

I am not undertaking to decide this question at this time, but I would be glad to have the further orders to which your memorandum of December 17 refers brought to my attention as early as possible, with your own recommendations as to how far we should go in this matter by executive order, and to what extent legislative redress should be sought.

I am sure that you and I both sympathize with Gen. Ansell's main purpose, which is to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of judgment at the hands of those who try him for offenses involving either his property, his honor, or his life.

Cordially, yours,

NEWTON D. BAKER,  
Secretary of War.

It was not a matter that could be thus disposed of, because we were faced every day with the necessity of doing something to secure justice and we had to break away from the practice which the strict ruling of the Secretary of War would have required. (See Exhibits "H," "I," and "J.")

EXHIBIT H.

GEN. ANSELL'S MEMORANDUM RECOMMENDING THE ESTABLISHMENT OF A REVIEWING OFFICER IN FRANCE.

OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, December 22, 1917.

Memorandum for the Judge Advocate General.

Subject: Certain administrative measures affecting justice and discipline in the Army.

1. It is my judgment that you should give immediate consideration to the following matters:

(a) Regardless of your views or mine upon the question of the revisory power of this office, orderly administration as well as justice requires that sentences of death and sentences resulting, if executed, in immediate expulsion from the Army, should not be executed until the proceedings may be reviewed for prejudicial error by an officer of and representing this bureau, and not of the administrative staff and representing the officer ordering the court and his power. In order that there might be no delay in such review of proceedings, reviewing authorities should be instructed to forward to the reviewing officer of this bureau all proceedings without a moment of delay.

(b) The above consideration would require the establishment in France of such a reviewing officer, with duties as indicated. This administrative method would involve nothing of inhibited delegation of power. Assuming, as I have held, that the revisory power is in the Judge Advocate General of the Army, it is not necessary as a matter of law, as indeed it is not practicable as a matter of fact, that that officer function personally in each case. The function is a function of office; the statute originally establishing the Bureau of Military Justice clearly so indicated, provided for assistants and empowered them, in effect, to perform the duty, under the general supervision, of course, of the head of the office.

\* \* \* \* \*  
S. T. ANSELL.

EXHIBIT I.

MEMORANDUM IN SUPPORT OF AN EXTENSION OF THE PROPOSED ADMINISTRATIVE REMEDY AND THE ESTABLISHMENT OF A REVISORY AUTHORITY IN FRANCE.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, January 9, 1917.

Memorandum for Gen. Crowder.

Subject: Revision of court-martial proceedings.

1. I have just been advised of the step taken by the Secretary of War to prevent the execution of possible illegal death sentences in the United States

by requiring that the record be transmitted to the department and reviewed here, that its legal correctness may be assured before execution. While a step in the right direction, I deem it my duty to say that in my judgment it falls short of the requisite degree of remediality in that it is not applicable generally, nor to all those sentences which, unless stayed, mean separation of a man from the Army and placing him, in a practical sense, beyond the reach of remedial power subsequently exerted.

2. I see no reason why the same measure of relief should not be extended to dismissal and dishonorable discharge; nor do I see any reason why it should not be made applicable to our forces in France, as well as elsewhere; all of which could, with the establishment of a proper and practical system of revision, be done without evil administrative result and to the advantage of law and justice.

3. This would require the establishment in France of an office representing the functions of the Judge Advocate General, the duties of which would be practically those defined in G. O. 230, July 16, 1864, establishing such reviewing office in Louisville. For your information, I quote that order.

"I. Col. William M. Dunn, Assistant Judge Advocate General, will take post at Louisville, Ky., at which place the office of Assistant Judge Advocate General is hereby established.

"All records of court martial and military commissions, which are required by Regulations to be forwarded to the Judge Advocate General, will be sent by officers ordering such courts or commissions within the military departments of the Ohio, the Tennessee, the Cumberland, and Missouri, Arkansas and Kansas to the Assistant Judge Advocate General, at Louisville.

"With reference to records of courts and commissions it will be the duty of the Assistant Judge Advocate General to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commander, that sentences may not be illegally executed. He will forward all complete records to the Judge Advocate General, but will not be expected to prepare reports on them unless specially instructed to that effect by the Judge Advocate General.

"II. The Assistant Judge Advocate General will be allowed the number of rooms as office, and fuel therefor, assigned to an Assistant Quartermaster General in paragraph 1068 General Regulations.

"By order of the Secretary of War:

"E. D. TOWNSEND,  
Assistant Adjutant General."

Such an office located conveniently to our general headquarters, could give that thorough, disinterested, and judicial review of such sentences necessary to assure their correctness without considerable or injurious delay.

4. The review of all cases, including those which carry sentences separating a man entirely from the service, should be expeditious—not so much that punishment shall be swift as that injustice be not suffered. The power of revision should not be limited to approval or disapproval, but should include all powers possessed by reviewing authorities. When I wrote the original opinion upon the subject I had several of the assistants suggest regulation to govern the exercise of such power and it was then generally agreed that—

"1. The power of revision shall not include the power to deal with the case before the officer appointing the tribunal has finally dealt with it, nor the power to admit new evidence or otherwise retry the facts.

"2. It shall be confined to a review of errors of law injuriously affecting the substantial rights of the accused, and as thus confined and for the limited purpose of corrections such errors of law it shall include—

(a) The power to declare a proceeding, finding, or sentence void for want of jurisdiction.

(b) To disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the evidence of record requires a finding of only the lesser degree of guilt.

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

(d) Such other revisory power not exceeding the general scope and purpose herein prescribed as may be found necessary for the correction of such errors.

3. In a case in which such power is inadequate for the correction of such errors the power shall include the right to return the record to the proper authority that the tribunal may make the necessary revision, or to transmit

it to the Secretary of War with a recommendation for a proper exercise of the pardoning power."

5. I think no doubt need be entertained but that such a system of revision would be workable, nor is it of more than academic interest to determine whether the power finds its source in the inherent relation of the President to the Army, or in the statutory donation of Article 38, or in the revisory functions of the Judge Advocate General established by section 1199, Revised Statutes, though, of course, I think it is clearly established in the latter section and not otherwise.

S. T. ANSELL.

EXHIBIT J.

GEN. ANSELL'S MEMORANDUM COMMENTING UPON THE PROPOSED ADMINISTRATIVE REMEDY.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, January 12, 1918.

Memorandum for Gen. Crowder:

1. You want my views upon Maj. Davis's proposed rule of procedure.

(a) It is, if legally correct, a step—though a weak and uncertain step—in the right direction, in that it gives large partial recognition to the existence of a power somewhere which will prove helpful and salutary.

(b) It is faulty as a definition of revisory power, in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed.

(c) Above all, however, it is, I regret to say, fundamentally wrong as a matter of law. The theory is for the reviewing authority to approve the judgment but suspend its execution until he can be advised of the correctness of the judgment itself; and if advised of its incorrectness, then to revise it himself. Having once approved the judgment, it passes beyond his power to amend, and such power of amendment, if it exists, must be found elsewhere. On the other hand, if the stay of execution affects the judgment itself and makes it conditional, or holds it in gremio legis, as it were, awaiting further action by the reviewing authority, then it is not final and can not be revised here at all. If the reviewing authority does not take final action, there is nothing for this department to revise. If he does take final action, then the judgment passes beyond his power to revise. Take those sentences revised in this office in due course and without stay, which will constitute the great majority of cases. In such cases the action of the reviewing authority is unquestionably final; and if there is to be revision of the judgment at all, it concededly must be done by some authority other than the reviewing authority. In such cases surely the department would have to exercise the power. Viewed from whatever angle, it is perfectly apparent that the source of the authority is in this department and must be exercised by this department, if exercised at all. No system can be devised whereby the convening authority revises his own judgment at the mere suggestion of this department.

(d) The rule, even if it were unquestioned as a matter of law, is contrary to all administrative principle. The corrections to be made are corrections of errors of law discovered upon review here. What reason can there be to require this office to review for errors of law, and then be denied the power of correction? In any system of law jurisdictions must be defined. Powers must be located, and they must be powers, not requests. If left undefined, or resting upon mere comity, the system is not likely to stand. The test would come sooner or later, after perhaps a multitude of disagreements. It adds to the administrative burden and the time required to finalize a judgment.

2. I wish I could give concurrence to something which, though less than the full power, would be satisfactory to you and the Secretary of War, and would serve, at the same time, as a partial remedy. I can not. I may be permitted to say, however, that the limitations which the rule seeks to place upon the exercise of revisory power doubtless have their origin in a fear of the consequence of a full exercise of that power. Not sharing that fear, I can not sympathize with the limitation. Even if I could agree, as I can not, that such limitation has a basis in law, the power, if it exists at all, should be exercised in full. Otherwise, it should be entirely denied. Safety lies in taking one course or the other, and not in a compromise.

3. I have given this question of revisory power the best that is in me. I see no reason whatever to hesitate at the adoption of that definition of revisory jurisdiction which is found in my recent memorandum and which was adopted after most thorough consideration upon the part of many of the assistants of this office as what the law requires. I do not believe, as much as I should like to believe, that what Maj. Davis proposed is sound in law or will prove safe in practice. I regret, therefore, that I can not advise you to adopt it.

S. T. ANSELL.

The CHAIRMAN. As a matter of fact, you have been unable to revise any of the records or sentences of the court, except in so far as the commanding officer who convened the court consented to it upon your recommendation?

Gen. ANSELL. That is true, sir.

The CHAIRMAN. You have no innate power under the other construction of the statute to do it?

Gen. ANSELL. No, sir.

Senator SUTHERLAND. Have you not recommended in many instances the confinement of prisoners to the disciplinary barracks instead of to the penitentiary?

Gen. ANSELL. Yes, sir. I think it ought to be said in fairness to the officers who have been with me in the office—and I think it can be truthfully and fairly said—that we have taken a far more liberal view of military procedure and military punishments than has ever been taken before in my time in the Army. I feel that that has been to a considerable degree due to the fact that, of course, the great majority of our officers were lawyers who were commissioned and come to us from civil life and brought to us the views of ordinary civil jurisprudence. They have, of course, recognized such differences as must be observed between military and civil jurisprudence, but it has been the controlling practice of our office, wherever we have had occasion, to see that military justice is administered as nearly as possible in accordance with those well-established principles of jurisprudence, and the methods of exercising judicial functions which are declaratory of our own sense of natural justice, as well as of the well-established common-law principles that govern us.

Now, the second brief, the brief which I filed with the permission of the Secretary of War and with Gen. Crowder's permission, is this. I shall not read it, though I would ask that it be inserted in the record. (See Exhibit C.) I would like, inasmuch as it has been suggested that I do so, to call attention of the committee to the points made here.

Point one was that the action taken by the Secretary of War upon the advice of the Judge Advocate General has been taken under very evident misapprehension. That action, I say, was clemency action, not affecting but presuming the legality or rightfulness of the judgment. I say here that such action is predicated upon the correctness of conviction; and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime, which, upon well-established principles of law and justice, they never committed. That is regarded as one of the most heinous crimes, and properly so, known to military law—mutiny. Justice is a matter of law and not of Executive favor.

Second, it is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what

the new Army of America will require, nor do they even see what the present is revealing; they are looking backward and taking counsel of a reactionary past, whose guidance will prove harmful if not fatal.

Then, under a subhead, I go on to say that the views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism. This was broad language, but I felt then, and I still feel, that, occupying the position I did, justice required me to state frankly my views. The Chief of Staff and the Inspector General of the Army have been allowed to pass upon the questions of what effect the ruling I had made would have upon the discipline of the Army. Their views, I thought, were views that could not possibly meet the requirements of the situation as it then existed and was bound to exist during this war with this large Army just brought from civil life.

The present views are anachronistic. I honestly believe it. They are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which the jurisprudence has never adopted but distinctly denied.

That text writer was Col. Winthrop, really the Blackstone of military law, and an author whose commentaries and whose judgment are entitled to the very greatest respect. He was writing many years ago. He was sound whenever he commented upon the law as it was, but he was not sound, and few men are sound, when they undertake to measure the future by the law as it has been laid down in the past or the present; and that is certainly true with respect to military law, so different was the old-time establishment from an Army such as this. Winthrop's theory was that courts-martial are not judicial but executive in character. I say, Winthrop's theory was wrong in reason; Winthrop's theory was wrong upon principle and precedent. The teachings which followed upon the premise that courts-martial are but executive agencies, have already been disapproved of by the Supreme Court of the United States, though the War Department still clings to them.

I may add that the legislation of Congress itself has proceeded out of the old-time theory and not in recognition of, but in deference to, a more recent decision of the Supreme Court of the United States, which I would like to advert to a moment later.

It was Winthrop's theory that courts-martial were not courts at all; that they were but executive agencies. He stood for that through thick and thin and for years but few were heard to question him. He argued this way: That inasmuch as courts-martial are not courts under the judiciary clause of the Constitution, as, of course, they are not, they were not courts at all, when we know that we have courts all around us that are not organized under the judiciary clause of the Constitution, but under a special clause of the Constitution. For instance, according to Col. Winthrop's theory, the courts of the District of Columbia, organized under that special provision of the Constitution that confers power upon Congress to establish the seat of government in this District, would not be courts; and he could just as logically place the courts of the District of Columbia, not being courts organized under the judiciary clause of the Constitution, under the executive department of the Government, or the Territorial courts that we were all once so familiar with, and that I am familiar

with now, because I have been counsel before the courts in the United States for the governments of Porto Rico and the Philippine Islands, in the same category. The entire Government, including these courts, has been created and established by the Congress of the United States, not under the judiciary clause but under that clause that authorizes Congress to provide for the government and disposition of the Territories of the United States. I think that that is a fundamental error, and if Congress and the War Department are to continue to legislate and administer military justice upon the idea that courts-martial are but executive agencies, then obviously it seems to me we must expect the interposition of military power to the detriment of justice.

Senator KNOX. I do not know where I read it, but I have a distinct impression that in some work on military law I have seen the distinction made that you are making now, but it was distinctly affirmed that courts-martial were courts, and it was only these boards of examination—I have forgotten what you call them—

Gen. ANSELL. Courts of inquiry.

Senator KNOX (continuing). And the courts of inquiry were executive agencies, and the question as to whether they are courts or not depends upon the nature of their functions.

Senator THOMAS. If I remember, the Milligan case discusses that along the line you suggest.

Gen. ANSELL. I had not intended to take this up here, but I think that all legislation must proceed from a clear apprehension of the distinction I am now undertaking to make and which you Senators seem to be advised of already.

The Milligan case, of course, declared that a court-martial was a court. The Milligan case did one thing which seems to be largely responsible for the erroneous idea which obtains even to this day. We are all more or less familiar with the facts in the case and the history that surrounded it, but the majority in that case intimated that none of those principles that are embodied in our bill of rights, principles which are designed to secure justice to an accused before any court, principles which reflect our sense of natural justice and which have been embodied for the most part in our common jurisprudence, and redeclared in our Constitution so that they never could be trespassed upon by any department of the Government—that case said, or intimated, that those principles are not applicable to trials by courts-martial; and the dissenting members in that case went so far as actually to declare in effect that inasmuch as in the fifth amendment courts-martial proceedings had been specially excepted from the requirement of indictment by a grand jury and trial by a common-law jury, as of course they were, it seemed to follow that the principles of the bill of rights were withdrawn altogether from courts-martial procedure. I think that that dictum, because, after all, it was but dictum, accounts to a very large degree for the regard which it seems to me that Congress has had and which, I am quite sure the Army has had, for courts-martial, not as courts, but simply as executive agencies.

In 1906 there was a case that came up to the Supreme Court of the United States from the Philippine Islands, known as the Grafton case, or *Grafton v. The United States*. The facts were these: A soldier in the Regular Army stationed in the Philippine Islands was

tried by court-martial for manslaughter, which, of course, is a lesser included element of the higher degrees of homicide, and was acquitted by a court-martial. The civil authorities there, disagreeing with the military authorities—probably there was something of the usual friction that accompanies government under those circumstances—insisted upon holding this soldier before a nisi prius court there upon an information for assassination, equivalent to our murder, and tried him and sentenced him. The Supreme Court of the Philippine Islands affirmed the judgment in that case. It thereby declared that the civil court did have jurisdiction, notwithstanding the previous trial by court-martial had been pleaded in bar of trial before the civil court. On appeal to the Supreme Court of the United States, the very question, among others, was raised whether or not a trial by a court-martial was properly pleadable on the ground of double jeopardy in bar of trial before a civil tribunal. The Supreme Court of the United States held in that case that upon the court-martial the soldier had once been put in jeopardy of life or limb, in the sense of the declaration in our bill of rights against second jeopardy. Necessarily the court had again to reconsider the quality and character of a court-martial. It was necessary to consider its proceedings, its standing when compared with and tested by civil principles and civil procedure, and to compare it with civil courts of the United States.

Now, it is true that there is an article of war which says that no man shall be tried twice for the same offense, the very existence of which proceeds upon the theory that unless the Congress itself does actually confer this guaranty by positive legislation the Constitution itself did not. The Supreme Court of the United States said that this soldier had been put once in jeopardy of life or limb; that he had been tried once; and they did not rest their decision upon the fact that there was an article of war which forbade a man to be tried a second time for the same offense, but they said they based this decision upon the proposition that the constitutional inhibition against double jeopardy is applicable as between courts-martial and civil courts of the United States, operating as they do under a single sovereignty.

Senator KNOX. Was that in existence at the time the Philippine case was decided?

Gen. ANSELL. Yes, sir; and it has been in existence many years. They gave, to my way of thinking, and it seems to me necessarily so, an entirely different standing to a court-martial. If you gentlemen would look over the articles of war or the military code, you would find that Congress has ever proceeded upon the theory, apparently, that the only rights guaranteed to an enlisted man, or anybody else on trial before a court-martial, are such as the Congress of the United States expressly and affirmatively confers; and that the Bill of Rights has no application to such trials. You will find there a clause against second trial; you will find a clause that gives rather imperfectly the right to counsel; you will find a clause that gives rather imperfectly the right to witnesses; you will find a clause that gives rather imperfectly the right for one to be heard in his own defense.

In any event, if that theory were correct and a man, before a court-martial had only such rights as Congress itself had seen fit to con-

fer, we must seek those rights, not in the great body of law, not in the great principles of jurisprudence, not in all those principles that are designed to secure for a man a fair and impartial trial with all that a trial means, but we are limited by the very terms of the statute; and what you do not find in the statute does not exist. The Supreme Court of the United States said that those principles did apply, and they said more. Notwithstanding that in the Milligan case the Supreme Court of the United States, speaking obiter, had said that Congress, under its powers to make rules and regulations for the government of the Army, could legislate practically as it saw fit for courts-martial procedure as applied to members of the Army, evidently casting aside any limitation that might be imposed upon the Congress by the Constitution, in the Grafton case the Supreme Court said exactly to the contrary; said that it was true that the Congress of the United States, under its power to make regulations for the government of the Army, could establish these courts, prescribe their procedure, and all that, but that in doing so it must keep always within the limitations of the bill of rights and constitutional provisions.

I myself believe that if we adopted that view and gave it full effect, if we had a clear conception of the judicial character of a court-martial and its place in our scheme of government, and legislated accordingly, and made rules of procedure in the departments accordingly, we should go far toward getting rid of what I conceive to be injustice in military procedure and what I believe the people generally do conceive to be injustice in military procedure.

I am sorry that I am getting off onto these things. I do not know how informative this is going to be to the committee, most of whom, I assume, are lawyers, but along that point I say that the department still clings to the old theory laid down by Winthrop and which seems to have been supported by dictum in the Milligan case.

Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect.

Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land.

As a corollary to the proposition that courts-martial are but executive agencies, or military agencies, if you please, and that it was conceived to be their sole purpose, to the extent of their jurisdiction, to try only for the military aspect of their conduct, it has been held—and an inspection of decisions of lower courts of the United States will reveal many cases of this character—that a court-martial could try a man for manslaughter, robbery, larceny, mayhem, assault, rape, or anything in violation of the then sixty-second article of war, which was conduct to the prejudice of military order, and that a civil court could come right along and try him again for the reason that he had not been tried for the real crime known to the general law. Necessarily the Supreme Court in the Grafton case had to decide that a court-martial tried a man once and for all and for all he did.

The judgment of a court-martial being an adjudication by a competent tribunal of the offense as known to the law of the land is a bar against a second trial in any court of the United States.

The functions of courts-martial are inherently and exclusively judicial and therefore are not subject to the power of command as such, but only to judicial supervision established by Congress.

It would flow from my argument that if these agencies are courts, judicial bodies, established by Congress under the Constitution to try not only for violation of the military code, but for the general law of the land, then from beginning to end the power that controls them should be of a judicial character, and not just boards to meet and fill a military need.

Court-martial procedure being judicial from the beginning to the end, the power of revision, if it exists, is also judicial and therefore not subject to the power of command.

If any of you have sufficient time and are sufficiently interested in this subject, it would be informative to read what the Supreme Court of the United States said with respect to the judicial character of the court-martial in the Runkle case. They spoke, it seems to me, prophetically of the present situation. They said that from beginning to end the functions of a court-martial are judicial; that they try the most sacred rights of a man—his life and his liberty; that they apply, and must apply, the principles of law, and must apply those principles uncontrolled by any man. They ought to be subject to legal control throughout.

Such judicial revision is not subject, therefore, to the usual General Staff supervision.

I want now to call attention to the bill that came up here that grew out of this agitation when it first began, and which was an effort to secure some corrective legislation. In my judgment—and I speak very frankly—it was a very imperfect effort, and had it been enacted our second situation would probably have been worse than the first.

The CHAIRMAN. I may say that our committee had that up at one time. They thought it did not confer any power that they did not already have.

Gen. ANSELL. That bill conferred upon the President of the United States this power of revision, and it was intimated this morning, and with the appearance of logic, that no bureau in the War Department or elsewhere could pass judgment upon superior functionaries. That does not find lodgment with me if that bureau is exercising judicial power. But, assume that the President of the United States is to exercise this revisory power. If you were to construe this act, this draft—it is pertinent to the suggestion that was made this morning—so as to place that power in the hands of the President of the United States, you must also remember that there is another act—the act of 1903. That act evidently was designed, and properly so, upon the theory that the President of the United States himself and the Secretary of War can not take personal control of all military things, and therefore they must have military advisers, and that act established for the President an advisor to be known as the Chief of Staff of the Army—a trusted, confidential adviser. That is his relation to the President. His relation to all the bureaus of the War Department is expressly prescribed by statute to be that of absolute supervision and general control.

Therefore when you legislate placing a power in the hands of the President of the United States, it may, in terms, appear that you are placing the power in the hands of the President, but in the very theory

of law you are actually placing it in the hands of the Chief of Staff, and in fact you are placing it in the hands of the Chief of Staff. While you may not think it objectionable, as I do, to place these things in the hands of the Chief of Staff, who must be presumed to be an officer of high rank, sound judgment, and great discretion, though not a lawyer, the Chief of Staff can no more go himself into all of these records than can the Secretary of War or the President of the United States, or anybody else with a multitude of other duties; and what actually happens, gentlemen—and those who know departmental administration know that it is bound to be so—is that there will be some subordinate who actually passes upon these cases and shapes the view of a superior, as subordinates are bound to shape the views of their superiors. It seems to me that any legislation must either place this power in the hands of the President of the United States, excluding everyone between him and the Judge Advocate General, or place it in the hands of the Judge Advocate General solely and independently; and inasmuch as it is a judicial power I believe it ought to be placed not in the hands of the President but in the hands of a judicial officer whose duties are prescribed by Congress, and whom the President himself must appoint.

The CHAIRMAN. What is the number of the bill that you have been discussing?

Gen. ANSELL. That is S. 3692.

The CHAIRMAN. Introduced in January, 1918?

Senator THOMAS. That is to amend section 1199.

Gen. ANSELL. Somebody called upon me to make a memorandum as to the bill. It is an unofficial memorandum. I made this memorandum. First, I said that it was unnecessary. I meant unnecessary provided our construction of the law was adopted in that direction. I will say now, because I think it is pertinent, since we want to avoid the same thing in any new legislation, that if that bill had been enacted into law it would have authorized the President of the United States to reverse a judgment of acquittal. It would have authorized the President to reverse a finding of guilty of a lesser included offense, which is tantamount to acquittal of a larger offense. It would have placed this power, in effect, in the hands of military men.

Under the law, as construed by the Secretary of War, even the judicial powers of the War Department, as exercised by the office of the Judge Advocate General, are reviewed and revised by the Chief of Staff, a military official with military power. The Chief of Staff, not being able to attend to such duties, delegates them to one of his subordinates, if he has it to do. Now, I will pass from that.

These points go still further into this power of revision and the necessities for it, the last point I made being that the necessity, in the name of justice, of locating this power in this department, and preferably in this office, must be apparent to all who are familiar with the administration of military justice.

I say that it shocked the force of my office, as it shocked me, when they came to realize that however gross and prejudicial the error committed by a court-martial; a court unlettered, untrained, and unskilled in the law, it was beyond the power of correction, except in the single case where it could be said that the court-martial was not a court-martial at all, being without jurisdiction.

With respect to the general character of this power which must be apparent, or would be apparent, if it were in any other but the military domain, there is a significant thing about the organization of many of the judge advocate generals' departments in Europe. In England, for instance, the judge advocate general must be a civilian with life tenure; he is a distinguished barrister, a man of great standing at the English bar. Before the rather recent creation of the position of secretary of state for war, when the Army of England was governed by an army board and a commanding general, the judge advocate general of England was a parliamentary official. He was a cabinet official, and he was directly responsible not to the military authorities governing the army, but to Parliament itself; and he remained so until they created a special political official known as the secretary of state for war. He, as a civilian, became responsible to Parliament. Of course, then there was no necessity or propriety in having the judge advocate general directly responsible to Parliament, but the point I make is that the position of the judge advocate general of England is judicial.

In 1870 there came to be some dispute as to whether he actually exercised the authority himself or whether his use of the secretary's name—secretary of state for war—was what gave his action validity.

That has never been settled, like so many things in British constitutional law, but I was advised there that if they should undertake to reverse the Judge Advocate of England upon a matter of pure law, there would likely be a parliamentary inquiry immediately. Though the Judge Advocate General reports, in theory at least, to the secretary of state for war, he does not report to or through any military official. No military official has the slightest thing to do with him. He goes straight to his sovereign, on the one hand, and to a parliamentary official upon the other. It is rather difficult, I confess, to understand, as so many of the customary government functions of England are difficult to understand, because they are not accurately defined. He is an officer of vast judicial power, and his judicial functions are kept separate from the military functions of the war department, and he is made a civilian because of that fact, with life tenure.

In France we have the same thing. With respect to his civilian status, the present judge advocate general of France is one of the most distinguished lawyers of all France. He is a cabinet official and a man responsible directly to Parliament. He sits there; he reports there; he is known as the undersecretary of state for military justice. He is a civilian with many military officers of high rank beneath him, and he actually takes judicial action.

I think I should like, if I were permitted, to put into my statement so much of my report as has to do with the functions, as I discovered them to be, and believe them to be, of the judge advocate generals of England, France, and Italy.

The CHAIRMAN. You may insert them in the record, if there is no objection.

Gen. ANSELL. We have moved since the beginning of the war. I want to state that fully, fairly, and frankly. I have told you that at the beginning of the war all the judgments of courts-martial were beyond modification or revision of any kind. There was administrative action taken in General Orders, No. 7, which held up and stayed the sentences of courts-martial in the cases where the penalty was

death. While it had been contended that the authority of the officer appointing the courts was final and absolute, nevertheless, by the exercise of military power, we ordered the convening authorities to stay their hands, first, upon the sentences of death, because it would be a tragic travesty to review the record of a court-martial when the accused had long since passed beyond the bourne by execution. That is what happened in the negro riot cases in Texas. Later, in virtue of a military order, they held them up and stayed the sentences of courts-martial in the cases of death, lest when we came to review the proceedings we should find upon our oaths and our consciences that they had not been lawfully convicted. Upon my recommendation we extended that military power to stay sentences in all cases of sentences which, when once executed, would place the men beyond the power of restoration; that is, extended it to include besides the death penalties, sentences of dismissal and executed dishonorable discharge, and like sentences.

This order proceeded upon the theory of providing for a stay of sentence in order that the office of the Judge Advocate General of the War Department might have the opportunity to look over the case before execution, and if it found that the principles of law had been violated in the proceeding which would cause a reversal of the judgment, to say that and to advise upon questions of pure law with the reviewing authorities below in those cases, and to say, "We think you are wrong; we think you ought to set that aside; we recommend that you do this, that, and the other." That would unquestionably give a measure of relief, not in the exercise of any authority or of a judicial power but simply as a matter of advice which the military commander down below, being the final legal authority, could regard or disregard. I said with respect to that general order that it is, if legally correct, a step—though a weak and uncertain step—in the right direction, in that it gives large partial recognition to the existence of a power, somewhere, which will prove helpful and salutary. I do not know how or whence it deduced the power to stay the sentence unless it came out of a superior power somewhere to revise the sentence which had been stayed for review.

It is faulty as a definition of revisory power, in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed.

Above all, however, it is, I regret to say, fundamentally wrong as a matter of law. The theory is for the revising authority to approve the judgment that suspended execution until he can be advised of the correctness of the judgment itself, and if advised of its correctness, then to revise it himself. Having once approved the judgment, it passes beyond his power to amend, and such power of amendment, if it exists, must be found elsewhere. On the other hand, if the stay of execution affects the judgment itself and makes it conditional or holds it in gremio legis, as it were, awaiting further action by the reviewing authority, then it is not final and can not be revised here at all. If the reviewing authority does not take final action, there is nothing for this department to revise. If he does take final action, then the judgment passes beyond his power to revise. Take those sentences revised in this office in due course and without stay, which will constitute the great majority of cases: In such cases the action of the reviewing authority is unquestionably final, and if there is to

be revision of the judgment at all, it concededly must be done by some authority other than the reviewing authority. In such cases surely the department would have to exercise the power. Viewed from whatever angle, it is perfectly apparent that the source of the authority is in this department and must be exercised by this department, if exercised at all.

No system can be devised whereby the convening authority revises his own judgment at the mere suggestion of this department. He may revise it or not, as he sees fit. The corrections to be made are corrections of errors of law discovered upon review here. What reason can there be to require this office to review for errors of law, and then deny it the power of correction? In any system of law jurisdictions must be defined. Powers must be located, and they must be powers, not requests. If left undefined, or resting upon mere comity, the system is not likely to stand. The test would come sooner or later, after perhaps a multitude of disagreements. It adds to the administrative burden and the time required to finalize a judgment.

The great defects of that order were these: It did not speak in terms of authority, it applied to but few cases, it did not reach sentences of confinement no matter how long, commanding generals can and do obviate simply by suspending the dishonorable discharge, and they can disregard it at will.

Senator FRELINGHUYSEN. Is this brief to which you have referred on this bill 3692?

Gen. ANSELL. No.

Senator FRELINGHUYSEN. What is it?

Gen. ANSELL. I wanted to advise the committee of the steps the War Department had taken to keep these judgments within the control of the administrative office; what method they had adopted to keep, to a certain extent, at least, the judgments within administrative control.

Senator FRELINGHUYSEN. Do you intend to pass upon this Chamberlain bill before you finish?

Gen. ANSELL. I hope to. I did not think it would be possible hardly to pass upon that bill without going into these things.

Senator FRELINGHUYSEN. I did not mean to interrupt you.

Gen. ANSELL. Certainly not; I understand that. I should like to put this in [referring to brief].

Senator FRELINGHUYSEN. There is one question I would like to ask you for the sake of getting some information. A number of New Jersey boys and other soldiers have written me complaining of the fact that they were held in these camps and could not get their discharges. At the same time some of these conscientious objectors who were practically in custody, were discharged and sent to the station with new suits of clothes, a buttonhole boquet, and so on, and were treated differently from the enlisted men. Now, what has been the attitude of the department toward the conscientious objector? Have you anything to do with that?

Gen. ANSELL. Yes, sir. Senator, may I be excused from answering? It would be rather embarrassing.

The CHAIRMAN. The Secretary of War can tell us about that.

Gen. ANSELL. Doubtless.

The CHAIRMAN. Where was the authority found for the exercise of the power that was exercised? Do you object to answering that?

Gen. ANSELL. I should like to be excused.

The CHAIRMAN. We will not ask you to answer, if it embarrasses you. There must be power somewhere. It was exercised in the case of the conscientious objectors, but it does not seem to be possible in the case of the enlisted men. I presume we can find out from the Secretary of War.

Gen. ANSELL. Referring to New Jersey, Senator, I had occasion to review the other day some cases that came down from Camp Dix. Of course, they were troops other than New Jersey troops. I think it would be interesting to recite these cases as illustrative of what I indicated, that while surely courts-martial, in awarding these long sentences, could not expect anybody to serve them; still something or somebody would have to intervene.

I think that here is one of the worst defects in the military code. You look over the Articles of War. A man who does this, that, and the other shall be punished as a court-martial may direct. It is within the discretion of the court-martial. There is no limit other than that. I say that the ways courts-martial have been awarding punishments during this war has resulted in nothing more nor less than one single man, namely, the convening authority of that court-martial, awarding the punishment; and I am going to give you some illustrations of it. In the case of—I prefer not to have these names go in.

The CHAIRMAN. I did not put the names of the men in the speech I made in the Senate.

Gen. ANSELL. May I strike out the names?

Senator FRELINGHUYSEN. Strike out the names, if you desire. I am in favor of being in the open, however.

The CHAIRMAN. You can indicate it by the number of the case, can't you? I would like to have it in the record so that this committee can, if it desires to later on, put its finger on the cases down there. How can we do that?

Gen. ANSELL. I will try to get the record.

Senator THOMAS. I suggest that the names be given to the chairman in confidence.

Senator KNOX. They are all a matter of public record.

The CHAIRMAN. But the public will never see these 13,000 or 15,000 cases.

(Informal discussion followed, which the reporter was directed not to record.)

Gen. ANSELL. One man was convicted simply of having a pass in his possession unlawfully. He was sentenced to be dishonorably discharged with total forfeitures, and to be confined at hard labor for 10 years.

The CHAIRMAN. That was a pass into and out of the camp?

Senator THOMAS. A pass, did you say?

Gen. ANSELL. Yes, sir. The reviewing authority reduced the confinement to three years.

The CHAIRMAN. That was the commanding officer?

Gen. ANSELL. Yes, sir.

Senator THOMAS. What was the original sentence?

Gen. ANSELL. Ten years.

Senator FRELINGHUYSEN. Just for having a pass of some other soldier in his possession?

Gen. ANSELL. I got the idea from the record it was a pass that was printed, probably, and that a man possessing it could pass in and out. It may have been that he could fill in his name. I do not know about that.

Senator SUTHERLAND. He is now serving that sentence?

Gen. ANSELL. We have not heard. I considered this a trivial offense, and this office will doubtless go so far as to "suggest" to the convening authority that, inasmuch as this soldier has already been in confinement about two months, the entire sentence should be remitted.

Senator FRELINGHUYSEN. Was that a New Jersey boy?

Gen. ANSELL. I have not the slightest idea. In another case the accused was found guilty of absence without leave from July 29 to August 26, 1918, and failing to report for duty, and also escaping from confinement on September 1, 1918. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor for 40 years. The reviewing authority reduced the confinement to 10 years. The man has evidently been in confinement since last July. Even as so reduced the sentence is altogether too severe, and our office in returning the record to the convening authority so commented upon it.

I want to say that while it may not be this case, it is in one of this batch of cases that I have already gotten back word from the convening authority, who says: "This court sentenced the man to 40 years; I reduced it to 10; I can not, with my regard for military discipline, reduce it further."

Senator THOMAS. He was a very tender-hearted man.

Gen. ANSELL. Here is another case. The accused was tried for disobeying an order to take his rifle and go out to drill on November 1, 1918, and on escaping from confinement on November 4. He was sentenced to be dishonorably discharged the service and confined at hard labor for 30 years, which period of confinement the reviewing authority reduced to 20.

In this case the accused claimed he was sick, and doubtless he was suffering somewhat from venereal trouble. It may be that he was a malingerer. In our judgment the sentence, even as reduced, was entirely too severe.

Senator KNOX. Did the reviewing authority act since the signing of the armistice or prior thereto?

Gen. ANSELL. This is recent.

Senator KNOX. What effect on the reviewing authority has the fact that the war has ended? Would not that tend to modify your view of the crime?

Gen. ANSELL. My view?

Senator KNOX. Yes.

Gen. ANSELL. Yes, sir; but I do not know how many agree with me. I do not share the view that merely because the time is a time of war that an ordinary military offense takes on an aspect of a much more heinous character. For instance, here in the United States, some 3,000 miles from the actual theater of war, suppose a man goes

absent without leave. While I can see the logic for the other view—

Senator KNOX (interposing). Don't you think it is quite evident that the courts-martial do take that view?

Gen. ANSELL. Oh, I think that is apparent. I may say that even in times of peace courts-martial do view these things very harshly, indeed. I do not think merely because an offense is committed in time of war outside of the theater of active operation we are justified in piling upon these accused this shocking and spirit-destroying punishment. Desertion is a serious offense at any time, but desertion in the face of the enemy takes on an entirely different aspect from desertion 3,000 miles from the actual theater of war. So, if a man goes to sleep at post in the face of the enemy his offense takes on an entirely different phase of seriousness from a case where a man has just recently come to our service and goes to sleep while guarding some Government property in Texas—some canvas or quartermaster's equipage. In the latter case it does not satisfy my sense of justice to talk of the death penalty.

Senator KNOX. I think we can all agree with you.

Senator THOMAS. And yet such cases have occurred where the punishment has been very severe.

Gen. ANSELL. Yes, sir; very severe.

I regret this. This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong—not the institution, but the system and the practices under it—an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based upon justice, and it has got to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.

The CHAIRMAN. That is true of every institution and every Government on earth.

Gen. ANSELL. There was another case. The accused was charged with desertion and convicted of absence without leave from the 12th day of August to the 13th day of November, 1918. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for 20 years, which period of confinement the reviewing authority reduced to 10.

Senator WEEKS. Was that in France or in the United States?

Gen. ANSELL. These are in the United States.

Senator WEEKS. All in the United States.

Gen. ANSELL. In the United States. The great difficulty is to understand just what desertion is in the Military Establishment. We all know what the definition is. It is the absenting of one's self without leave from the post, troop or command with the specific intent never to return thereto. Now, it seems to me that when you go out and transfer to the Army of the United States a great segment, as it were, of our citizens, and they find themselves yesterday citizens and to-day soldiers, they can not possibly understand all the obligations of the military status and all the implications of these obligations, not being familiar with the military code. Why, the people out in civil life in our country have but very little idea of the offense

of desertion and its seriousness. We in the Regular Army have always said that one great trouble with the civil regard for the military status—a regard which we said induced desertion—was due to the fact that the people in civil life regard this military status just as they would any other employment that a man can quit almost at will without incurring a penalty. That is abroad in the land.

Here come these young men to become soldiers. I can well remember when I went to West Point how homesick I was, having been brought up in a country place and not having become urbanized. Home had a great pull. I felt that I could not wait to get back. Sometimes I have been struck by the fact—which has no personal reference—that the better a boy is the more homesick he is likely to be. A boy naturally wants to go home. I know of one case where a boy stayed at home from the latter days of December to the early days of June, a length of absence that might well justify the presumption that he had left with the intention never to return to his command; and the court found him guilty. A lawyer sitting in review upon that case might not see that there was any evidence upon which the court should reverse its judgment. Yet the human facts in that case, which should have been brought out in a good defense, were these: The youngster had a mother and father. They were old people and humble people such as you frequently find in the South, where I came from, and the old father was paralyzed, or had some serious continuing ailment which was threatening his life every day. This boy went home, doubtless drawn there by that fact, and he stayed there every day while that old man lived, but the day after that old man died, never taking off his uniform at all in the meantime, but walking around this community not seeking to escape detention, he reported voluntarily to his command. While that is a serious offense and you can not let those things go, as your Army will disintegrate, nevertheless the question is did that man actually commit desertion, that capital offense which, even if as a consequence of it a man does not suffer death he is deprived of his rights of citizenship and things of that kind.

Senator KNOX. What was the sentence?

Gen. ANSELL. The sentence in that case, as I remember it, was death, or what was next to it, a long term of confinement. My recollection is it was death.

Senator KNOX. Did you court-martial the court?

Gen. ANSELL. Sir?

Senator KNOX. You should have court-martialed the court.

Senator WEEKS. Did all those facts come out in the trial—the facts that you have referred to?

Ben. ANSELL. Senators, those facts do not always come out.

Senator WEEKS. Did they in this case?

Gen. ANSELL. Yes, sir; they came out in a different perspective, however, from that with which I have presented them. A court of Army men, actuated by a conception of the necessity of keeping the Army intact, and very properly so, when they hear the poorly presented evidence in defense and reach a finding of guilty, do not see, in my judgment, the great human fact back of that man's absence. You can state a case on the record that will sustain, as a matter of law, I have no doubt, the finding of guilty of desertion, whereas full facts, fairly tried, would show no desertion at all.

Senator FRELINGHUYSEN. Do you know where that boy is now, and what happened to him?

Gen. ANSELL. No, sir.

Senator FRELINGHUYSEN. Was he executed?

Gen. ANSELL. Oh, no.

Senator THOMAS. Probably his mother has joined the Bolsheviks.

Senator FRELINGHUYSEN. The father probably joined them, too.

Senator THOMAS. That would justify her in so doing.

Gen. ANSELL. Many of these cases come up on an application for clemency.

The CHAIRMAN. And only congressional action would restore him to the Army?

Gen. ANSELL. No. He can be restored to the Army if he should, fortunately, be sent to the disciplinary barracks, and by serving there and by showing himself to be a good soldier.

Senator SUTHERLAND. But if he were sent to the penitentiary and not the disciplinary barracks—

Gen. ANSELL (interposing). We can transfer a man to the disciplinary barracks and put him in the way of restoration; but he has been convicted and sentenced, and, of course, some of these sentences, though not all of them—far from it—are served. The point that I was attempting to make against the existing system was that by reason of this unlimited power in the court to award whatever it pleases as punishment in time of war, it results in the convening authority sitting there and imposing his own punishment. When a court gives a man 40 years I naturally have to ask myself, "Why didn't you give him 80 years or 20?" And then, when the reviewing authority says, "Five," I ask myself, "Why didn't you give him 15 years or 5 months?"

I admit that judges and lawyers can certainly differ as to how much punishment there should be for a given offense, for, after all, there is no absolute test as to the amount of punishment to be awarded; but surely legal and reasonable judgment is not so vague and does not give such wide latitude.

Senator KNOX. Is it your view that penalties should be prescribed by the rules of war or by statute?

Gen. ANSELL. Without having made up my mind, then, as to what ought to be done, I can only say what I was about to recommend to be done, in an extra-legal way last September. You remember there is a law upon the statute books in time of peace that, notwithstanding, according to the Articles of War these offenses shall be punished as the court-martial may direct, authorizes the President to establish the maximum limits of punishment, a salutary limitation upon this power. That is applicable only, however, in times of peace. In time of war the bars are let down. I thought, and still believe, that it would be somewhat of a solution of the problem if we could have advised the courts in awarding punishment to award the punishment that had been established by the President in time of peace for the same offense, if the offense was committed outside of the actual theater of operations. Of course, we do not have any such power, but I was going to try to get the thing to work in some way or other, administratively, to see that these offenses, when committed outside of the actual theater of operations, should be subject to the punishments

that had been established by the President in times of peace for the same offenses.

Senator THOMAS. Such sentences certainly violate the constitutional inhibition against excessive fines and penalties. That protective feature of constitutional law is limited by this sort of procedure so as to exclude those in the military service.

Senator FRELINGHUYSEN. Are there different penalties in time of peace and in time of war?

Gen. ANSELL. Yes, sir; there is no limit in time of war.

The CHAIRMAN. Have you other cases there, General?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. I would like to have you go ahead with them, or else put them in the record.

Gen. ANSELL. Another case is that of a young man who was absent without leave from the 17th day of September to the 4th day of November, 1918. That was a long time. The accused testified, and in the absence of Government showing to the contrary I believe, he went home to a young wife with a sick child who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate.

Senator SUTHERLAND. Perhaps he had not been getting his allowance.

Gen. ANSELL. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3.

The other case was that of the accused that I referred to this morning—the cigarette case. I shall not refer to it again. Probably it would be just as well, inasmuch as there was some doubt as to the language used, to say what it was. I presume this is fairly accurate. He was accused of disobeying the order of his lieutenant to "Give me those cigarettes"; behaving in an insubordinate manner to one of his sergeants by telling him to "Go to hell"; and behaving himself with disrespect toward his lieutenant by saying to him that he, the accused, did not "Give a God damn for anybody."

Of course, there can be no question but that such conduct can not be tolerated in the Army, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. I conceive from my knowledge of the Army that this was simply a company rumpus which, in my judgment, might have been otherwise dealt with, or, under the circumstances of its commission, merited no very long term of confinement.

Senator SUTHERLAND. Was he sentenced in that case?

Gen. ANSELL. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10.

Senator THOMAS. I think the officer—

Senator FRELINGHUYSEN (interposing). Should have gone.

[Laughter.]

Senator THOMAS (continuing). Ought to make a tardy compliance with that order. [Laughter.]

Senator FRELINGHUYSEN. Do you know the total number of cases that have been passed upon during the war?

Gen. ANSELL. Senator, I regret that if you ask me any questions about statistics or numbers I shall have to answer you inaccurately or not at all.

Senator FRELINGHUYSEN. You can not approximate them?

Gen. ANSELL. I can not.

Senator THOMAS. Is it a fact or not that the cases to which you are calling attention are exceptional and that the great run of cases are reasonably just and merited; that is the point?

Gen. ANSELL. It is a matter of judgment, Senator; but I should not be here, I imagine, and I certainly should not express myself as strongly as I do if I believed that these were exceptions, such exceptions as we must find in any system of justice.

Senator FRELINGHUYSEN. Have you made any classification? Have you divided them into what you might term extreme cases, moderate cases, and trivial cases; and have you the number that have been referred back to the reviewing officer with your recommendation; and do you know in how many cases the reviewing officers have revised their decisions?

Gen. ANSELL. No; I can not speak on that except to say that I am impressed by the fact, having sat there throughout this war, that these sentences have been intolerably severe—even as reduced they have been intolerably severe—and that there is inadequate power anywhere outside of the Congress of the United States to change the situation.

Senator FRELINGHUYSEN. Do you believe that they have been so extreme, in the judgment of the courts, that in order to do justice, complete justice, there should be a general amnesty?

Gen. ANSELL. I myself do not take very kindly to general amnesties. I do not think there has been such general injustice, injustice beyond all correction now, as would justify Congress in coming along and striking down everything that the courts-martial have done; but the situation, as I see it, is this: Frequently, of course, the record is sufficient to sustain the finding of guilty and considerable punishment, or some punishment. We could all agree that the man should be punished. Frequently, I say, the trial has been so imperfect, it speaks so cogently by its omission, that it is readily seen that an injustice has been done. Counsel for the defense, for instance, may be a second lieutenant, an unskilled man, an inexperienced man, who brings out nothing. Frequently the judge advocate does not bring out much, resulting in a haphazard sort of trial. In such cases I find it rather difficult, except in deference to a technical rule of law—there is the record and there is some evidence and here is the punishment—I say I find it difficult to say what, if any, punishment such a man ought to receive; and there are many such cases.

Senator FRELINGHUYSEN. Let me ask you another question. Do you believe that there have been so many cases of misspent justice that there should be a general rehearing so that many of these cases could be reheard or a new trial provided; in other words, that the Chamberlain Act should be retroactive? Is it, Mr. Chairman?

The CHAIRMAN. No, sir.

Senator FRELINGHUYSEN. If a man has been sentenced to 10 years and it has been reduced to, say, five years, and a proper sentence would have been a few months, don't you think that there should be a re-trial of that case in justice to that man?

Senator SUTHERLAND. Or a revision?

Gen. ANSELL. I think doubtless there ought to be a revision, but that does not go, of course, to the legality or validity of the judgment, in the first instance. It is difficult for anybody to go back of that, even including the Congress.

Senator FRELINGHUYSEN. You were going to give an approximate idea of the number of cases that had been handled by the Judge Advocate General.

Gen. ANSELL. I am sorry, but I do not believe I made that promise. There must be some eighteen or twenty thousand general courts-martial. I am speaking in round numbers, and they are usually inaccurate. I am sure that information will be brought out in this hearing. I did not know that I was going to be the first witness, if I may use that term, and furthermore, statistics do not appeal to me. They vitalize a thing for me.

Senator FRELINGHUYSEN. I have some sympathy with you in that regard.

Gen. ANSELL. I stand by my statement based upon the experience that I have had during this war, which has ripened into a conclusion that I have tried here to state as best I could.

Senator FRELINGHUYSEN. You will admit that the statistics of the number of cases that you have handled would give us an estimate of the extent of the injustice?

Gen. ANSELL. Certainly, but there is this, I think, Senator, to be said. I think I should condemn any system of justice as to which we could say, or as to the operations of which we could say, here is 1 per cent injustice that we can put our hands on. I say it would be our duty to correct that 1 per cent. I can not proceed mathematically when I begin to talk about the number of men who have been unjustly treated. There have been enough to challenge my attention and bring me to the conclusion that I have reached, and I believe that an investigation of the records would show to this Committee, or to any other committee, the necessity of doing that which will guard against a repetition of this kind of thing.

The CHAIRMAN. Could these cases, without very much difficulty, be placed before the committee? Is there any record that could be placed before it?

Gen. ANSELL. It would be an impracticable matter, Senator, it seems to me, to do more than place before the committee the general courts-martial order showing the offenses, the sentences, and the action of the reviewing authority.

The CHAIRMAN. They are printed?

Gen. ANSELL. They are printed.

The CHAIRMAN. Even that would make an immense volume?

Gen. ANSELL. Yes, sir.

Senator THOMAS. Twenty thousand cases. That is a greater number of cases than have been brought in the Supreme Court of the United States from its inception to the present day.

Gen. ANSELL. The trouble is we have got to examine the record as lawyers. Lawyers must examine the record, in my opinion. We have got to get down to the record as judges and as lawyers and see what that record reflects. Obviously there are certain cases that you can decide almost at once—absence without leave—40 years. Who would have difficulty in saying that that was too large a penalty? I would have no difficulty in saying one year or much less, and my colleagues

would agree with me almost immediately. But there are other cases, and many of them. Take this very case here. It does sound terrible in the charges to say that an enlisted man said to an officer ———; that he was disrespectful to a commissioned officer and a noncommissioned officer; and that he blasphemed everybody and everything. That sounds terrible in a set of charges, but when we come to visualize, as we can, the circumstances—a company kitchen, new officers, new men generally, and a thousand and one exactions—it does not take on a very serious aspect.

Senator THOMAS. And the fact that profanity is now a universal science and one within the reach of all.

Senator KNOX. Are there any cases of officers being court-martialed for cursing private soldiers?

Gen. ANSELL. There have been cases during the war of officers court-martialed for abuse of soldiers. They have not been frequent, Senator.

Senator KNOX. Do you recall the length of sentence that any of them got for it?

Gen. ANSELL. No.

Senator KNOX. Was there any 40-year case?

Gen. ANSELL. No.

Senator KNOX. Any 10-year case?

Gen. ANSELL. I am making a guess—no.

Senator KNOX. Five?

Gen. ANSELL. No.

Senator KNOX. One?

Gen. ANSELL. I think I ought to say that when we come to try an officer the Army regards dismissal from the Army as a very heavy and serious punishment.

Senator THOMAS. Is it equal to 40 years for cursing an officer?

Gen. ANSELL. No; I could not say that.

I have indicated, or tried to indicate, without posing, that my interests, my anxieties, my sympathies have to do with the enlisted man. As a matter of practical government the enlisted man is the man who has to be looked out for. If I were upon trial, I have no doubt that I would have very able counsel. Every officer is capable of presenting his case very much better than an enlisted man is, first, because of the fact that he usually comes from a higher, if we can speak practically, and more affluent class, and because the circumstances within the military hierarchy itself are such as to enable an officer to get a better defense and a fairer trial.

Senator KNOX. Would not these very factors you have mentioned be a reason for holding them to stricter accountability for breaches of military discipline than enlisted men?

Gen. ANSELL. There is much to be said for that view. Speaking for myself, I share it. Throughout my service I have thought that we regard dishonorable discharge in the case of an enlisted man altogether too lightly. The military mind does. When I find a sentence of dishonorable discharge against a man I see in it a terrible punishment, and it would be a very serious offense, an extreme case, that would justify me in imposing any long term of confinement; though, of course, there is a practical element. A man might be a slacker, and in order to get out of the war and the fight altogether he would take dishonorable discharge and be glad to get out of it. That would be

rather an exceptional case. It is a fact that the punishment of dishonorable discharge, which is applicable to the enlisted man in the Army, is, in my judgment, a very much abused penalty. It means as much to the enlisted man as dismissal means to the officer. Both dishonorable discharge and dismissal are terrible punishments, for this reason—and this is a thing that I believe has not been properly appreciated by the Army—they are continuing punishments; they last as long as the man himself lasts; and we want that dishonorable discharge respected by society, by employers of labor; we want the yellow sheet that we give to a man to be a yellow sheet. It means that man has been expelled in disgrace from the Army. There is something wrong with him. He is bad. There is something that has unfit him. He has been unfaithful in his trust here. That will stay with him as long as he draws a breath of life. I have followed many of those men, and there is something that destroys the spirit and the capacity to come back in this dishonorable discharge. It has an effect upon the human being himself that makes it very difficult for him ever to rehabilitate himself in society.

Senator THOMAS. It is like the record of a convict.

Gen. ANSELL. Exactly.

The CHAIRMAN. We have had before this committee hundreds of cases of men who, during the Civil War, were dishonorably dismissed from the service, many for such petty things as these men have been charged with that you have been describing. We have restored their pensionable status, but I feel as you do, that there is a disgrace that can not be wiped out. Would it be possible for you to make up from your office a list of those cases where there ought to be a removal of this badge of disgrace, so that Congress itself might wipe it out?

Gen. ANSELL. It ought to be said, I presume, as a matter of law, that it is doubtful if Congress could say that a dishonorable discharge awarded in pursuance of a judgment of a competent court could be wiped out so that you could say it was never given. Of course, it can do what in a practical way is tantamount to that.

The CHAIRMAN. We have never undertaken to correct the record, but we have undertaken to give a man his status.

Gen. ANSELL. It ought to be said, however, in fairness to the system with which I find so much fault that the Congress passed last year, upon the recommendation of this committee, of course, an act conferring upon all convening authorities the power to suspend, in proper cases, the dishonorable discharge, and the dishonorable discharge in many cases is suspended, and therefore they are still within the power of clemency to correct.

But last year more than 40 per cent of them were executed.

The CHAIRMAN. Now, if this bill we are considering were made retroactive, would it still be in your power to review those cases?

Gen. ANSELL. Yes, sir; I do not doubt that Congress—may I look at the bill a moment in order to get my bearings?

Senator FRELINGHUYSEN. Is there a record of the number of military prisoners that have been incarcerated during this war?

Gen. ANSELL. Oh, yes, sir.

Senator FRELINGHUYSEN. Are there any men in prison on the other side, or are the prisoners transferred to America?

Gen. ANSELL. No; there are some over there.

Senator FRELINGHUYSEN. How many; do you know?

Gen. ANSELL. No. I think that information has probably been looked up by Gen. Crowder. I know that some officers are working upon that. I think it ought to be full and complete enough to furnish a response to most of the questions you have asked me to-day.

Senator FRELINGHUYSEN. Do you know whether the policy of your department is to remove prisoners from Europe to America as expeditiously as possible?

Gen. ANSELL. Of certain classes that is very true. I said this in the early days of the war—that is, before we had the suspended-sentence law—that men ought not to be dishonorably discharged from the Army, and I recommended that they establish over there what were in effect penal battalions, so that the men might be enabled to serve us and themselves, and at the same time they could earn an honorable restoration.

Senator SUTHERLAND. Similar to a disciplinary barracks?

Gen. ANSELL. Yes, sir.

Senator THOMAS. The French handle those cases very well in what is known as the Foreign Legion.

Senator SUTHERLAND. The only way this could be justified would be the deterrent effect.

Gen. ANSELL. Yes, sir.

Senator SUTHERLAND. What effect do you think such extreme sentences would have upon the morale and upon the discipline of the other soldiers?

Gen. ANSELL. I have expressed myself upon that, sir.

Senator SUTHERLAND. Wouldn't they be shocked, as we are, by these extreme sentences and resent the injustice?

Gen. ANSELL. When I examined these cases I said if these were isolated examples, they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

Senator THOMAS. That is in line with the experience of English and American criminal law. Our original conception of punishment was to make it severe, so as to act as a deterrent. Of course, under the old English common law every offense down to the larceny of property of the value of 20 shillings, almost, was punishable with death. It never had the effect of repressing crime or acting as a warning to others who might themselves violate the law; so that, if that be the purpose of it, it is doomed to failure; that is, if human experience goes for anything.

Senator FRELINGHUYSEN. The American soldiers are all under the jurisdiction of the American Army are they not?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. There are none that are in the French institutions or English institutions?

Gen. ANSELL. No, sir.

Senator KNOX. What about the jurisdiction?

Gen. ANSELL. That would not confer upon the English or French authorities any jurisdiction of this kind. If they failed to obey an English officer, we would court-martial, not for disobedience of an English officer, but for misconduct in not doing what we had told them to do.

Senator SUTHERLAND. I have understood that there were only a few death penalties executed over there.

Gen. ANSELL. There have been but few. I recall that the first case was a case of rape upon a French woman.

The CHAIRMAN. A French child, was it not, by a drunken soldier?

Gen. ANSELL. I think probably that was true. I do not think I reviewed that case. I think there has been one other case of rape, probably while I was there. Of that I am not certain. I am speaking from impression. There is pending a case of rape.

Senator SUTHERLAND. White or black?

Gen. ANSELL. The last one I knew of was black. The first one, I think, was white. If there was an intermediate one, I do not know the color of the accused. There were two executions for rape. There may have been another. There have been several cases coming up from France in which our military authorities have very vigorously insisted upon execution. They insisted upon an enlargement of the offenses for which they could resort to execution right there without reference here at all.

When I was over there, I had occasion to recall four cases that came up from France at once. They were cases in which I was intensely interested. They appealed to me, not only from the legal but from the human, personal viewpoint. I think that those cases illustrated, as well as any cases that any member of this committee will ever read, the practical difficulties in the way of the administration of military justice. The record may be rather plain, but what it omits, what it fails to say, is the important thing—the fact that the man was not well defended, the fact that the man had no appreciation of what was happening to him; the fact that the court did not appreciate the gravity of its functions, and all those things—these may be without technical legal effect, nevertheless surely they must be considered, for on them justice depends.

The CHAIRMAN. Does it not frequently happen—at least such complaints have been made from time to time—that the man who is appointed to defend these young fellows is not a lawyer himself and not infrequently has no consultation with the accused before he goes to trial?

Gen. ANSELL. That is very true.

When I come to discuss this bill, should I ever get to it, I want to express myself as forcefully as I can.

In these very cases that came up from France two men were tried for sleeping on post in an outlying trench, right in the face of the enemy. They were tried for refusing to go to drill. They were all sentenced to death; and the military authorities there made the most insistent appeal to the President that the sentences should be carried into execution. Those were sentences of death which had to come

here. All sentences of death do not have to come here. Now, I can say something about those cases as illustrative of the failure of the system to compel a proper appreciation of the terrible issues involved. I knew those cases, and I think they illustrate what I am going to say as well as any cases; for that reason I will read them right here into the record.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, April 15, 1918.

Memorandum for Gen. Crowder.

Re Death penalty in the four cases from France.

1. After reading these records I said to you the other day that were I the confirming authority I would not confirm these sentences, and that for the same reason I could not, were I you, recommend confirmation. At your request I shall now state very briefly my reasons as I then stated them to you orally.

#### LEDOYEN'S CASE.

He was charged with disobeying the lawful order to fall in for drill, and was convicted upon his plea of guilty. After plea and before finding, the accused formally stated in his own behalf that he "could not go to drill" because of the extreme exposure to which he had been subjected the day before; that is, that it was physically impossible for him to drill. This statement was plainly inconsistent with his plea of guilty; accordingly, the court should have directed a plea of not guilty and tried the case on that issue. Surely in a capital case a plea of guilty, especially when, as in all these cases, the accused has not had competent counsel, should be accepted only when it was made with the utmost comprehension of all legal implications and of all consequences and only when the plea stands finally as the full, complete, and unmodified intelligent answer of the accused to the charge. Obviously the record in this case does not meet the test, and the proceedings should be disapproved.

#### FISHBACK'S CASE.

This is in all respects a companion piece to Ledoyen's case. The military authorities have treated the two as on "all fours," and ask for the death penalty in both upon common ground. There is one difference, however. The accused in this case made no statement after his plea of guilty, and so the record does not show upon its face any statement inconsistent with the plea. Considered independently, then, the record gives no basis for the destructive opposition made to Ledoyen's case. The human facts do. The facts of the two cases are the same; the conditions and circumstances of the conduct denounced in both cases are the same. This is shown by the record and conceded and acted upon by the military authorities. Disapproval need not be based upon strict legalism. Other considerations are admissible. In view of what I have said, and following the facts of record in Ledoyen's case, I could not confirm the Fishback case.

#### SEBASTIAN'S AND COOK'S CASE.

The death penalty in each of these cases was awarded for sleeping on post after an inadequate defense. In capital cases extenuating circumstances are matters of defense. The defense in these cases set up, formally, and without force or persuasion however, the fact that the accused had been in the front-line trench for five previous nights from 4.45 in the evening until 6 o'clock in the morning, with an actual stand in the sentry post of two hours on and one hour off. Of course, little rest and no sleep could be had in such a brief respite. Night after night of vigilance, without opportunity for sleep, must rapidly bring exhaustion unless there be chance for rest and sleep during the day. The accused in one case testified that sleep was impossible in the dugout during the day, because of the chopping of wood therein. In the other case the accused testified that little or no sleep could be had because of noise, without speaking more specifically. These are matters of extenuation, the truth of

which the court made no effort to prove or disprove. A competent statement made in defense and standing unimpeached ought to be taken as true. Furthermore, in one of the cases the evidence of exhaustion is rather convincing. The accused was found evidently asleep in the early evening, around 8 o'clock. He should have been relieved then by the corporal who observed his condition. He was not relieved until discovered asleep the second time in the early morning hours.

GENERALLY.

These cases were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. I can not help recall the British rule which requires, I think, in such cases, three years' service to render an officer competent as a member of a court-martial. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (practically of none) were present. And the same court that tried Cook tried Sebastian.

The character of the record, with its brevity, is such as to leave the human understanding disturbed by the formal conviction that it carries. These were mere youth. Not one made the slightest fight for his life. Each was "defended" by a second lieutenant. Such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that means the forfeit of his life. The Government should be made to maintain its case at every point in the trial of a capital crime. Court, judge advocate, and counsel should all endeavor to see that there is a full trial as well as a fair trial, and that no matter of defense, including extenuation, be omitted.

There is another matter that, finding lodgment in my conscience, I shall express: There is an insistence upon the part of Gen. Pershing which tends to prejudice these cases. He seems to have forgot that he is not the reviewing authority. The relation between confirming authority and the President in these cases is judicial. I do not say that Gen. Pershing may not make general recommendations as to the maintenance of discipline in his command. I know he may. But his recommendation in these cases is a special thing, specially interposed in the course of justice, and characterized by great insistence. He asks that he be advised by cable of the act of confirmation, and makes a powerful argument the gist of which after all is to be found in his view of the necessity of exemplary punishment in these cases. It may be the punishment made especially drastic for the purpose of example at times has its place and value. But exemplary punishment is dangerous to justice. The execution of all military offenders would very likely decrease the number of future offenses and offenders. But such Draconian methods would destroy justice without which all else in human society is of no worth.

It is only right for me to say to you that the military mind will in my opinion almost unanimously approve of confirmation in these cases. I do not say that the military view is to be ignored by the Commander in Chief of the Army. I myself would not ignore it. But when it offends against my well considered sense of law and justice I can not follow it.

S. T. ANSELL, *Brigadier General.*

They were not executed.

Senator THOMAS. Was that because of the interference of the President?

Gen. ANSELL. The Secretary of War disagreed with the military.

Senator SUTHERLAND. Do you know what sentence was imposed upon them?

Gen. ANSELL. If I may say so, I do not know that I ought to put it on the record.

(Informal discussion followed, which the reporter was directed not to record.)

The CHAIRMAN. Is there anything else you wish to say, Gen. Ansell?

Gen. ANSELL. With respect to these cases it is very doubtful if a lawyer applying the rules of appellate practice could say that there was nothing here to sustain that finding and that judgment, unless he is enabled to go to the Constitution of the United States itself and bring into these cases the principles found in the bill of rights. First, did these men have that assistance of counsel which the Constitution of the United States provides for every man on trial? In my opinion, in a case of this kind, the young and inexperienced lieutenant attempting to defend these men, who showed he was absolutely incompetent to do so by permitting two of them to plead guilty and by not properly using matters in extenuation as they should have been used, was not a counsel at all. Although that young officer was detailed as counsel, those men were not supplied with counsel at all; they did not have the counsel which the Constitution of the United States provides and justice requires a man to have.

Now, I know that if a judge in a trial court assigned John Smith, who came to the bar but yesterday, to defend a man where the crime was murder, a court of errors would not ordinarily say that that man had been denied the assistance of counsel by reason of the fact that counsel assigned might prove to be incompetent, but in the civil forum, even if counsel is incompetent, you have the court there sitting to see that justice is done, and the court knows the law. In any event, under the circumstances in this case, without civil counsel, without experienced military counsel, while as a matter of record he did have counsel, as a matter of fact and human justice, he did not have it.

Senator FRELINGHUYSEN. Does the Judge Advocate prosecute the accused before the court?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Is the accused, taking the case of an enlisted man, entitled to civil council?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Are the proceedings regular in that regard or does the court assign him counsel?

Gen. ANSELL. Of course, most frequently an enlisted man can not get civil counsel. The court does not assign counsel. The commanding officer assigns such military counsel as he sees fit.

Senator SUTHERLAND. Are all judge advocates who are employed in these cases lawyers or merely military men?

Gen. ANSELL. They are military men, though it ought to be said that in times of war, where you have many lawyers, the Government has a better judge advocate than the accused has counsel. Judging this strictly by the law, that man entered a plea of guilty and stood on it, but immediately thereafter he made an inconsistent statement, and it was the duty of the court to strike down that plea and to proceed to try that issue.

Senator SUTHERLAND. He made the plea of guilty without that explanation?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. I do not believe there is a court in the United States that would sentence him to be hanged in that case.

Senator THOMAS. Most of the codes of the States require that the consequences of the plea shall be explained and due warning shall be given before it is accepted.

The CHAIRMAN. Gen. Ansell, is there anything further that you would like to state?

(Informal discussion followed.)

The CHAIRMAN. General, the committee has its regular meeting to-morrow, and we will not ask you to return, but we will notify you later as to when we would like to hear your views further on the bill.

(Thereupon, at 5.30 o'clock p. m. the committee adjourned to meet at 10.30 o'clock a. m. on Saturday, February 15, 1919.)

## TRIALS BY COURTS-MARTIAL.

SATURDAY, FEBRUARY 15, 1919.

UNITED STATES SENATE,  
COMMITTEE OF MILITARY AFFAIRS,  
Washington, D. C.

The committee met at 10.30 o'clock a. m., Hon. George E. Chamberlain (chairman) presiding.

Present: Senators Myers, Thomas, Weeks, Sutherland, McKellar, New, Kirby, Wadsworth, Knox, and Johnson.

The CHAIRMAN. Gen. Ansell is here to resume his testimony before the committee. Just about the time we adjourned the other day he was going to analyze or discuss the bill that I had introduced for the purpose of relieving the situation in these court-martial cases.

Senator WEEKS. I want to make an inquiry at this point. If the general is going to discuss the bill and the merits of the bill, I think the committee will be glad to hear him. I think we have had all the evidence we need on the results that have obtained during the war.

Senator KIRBY. And the necessity for relief.

Senator WEEKS. And the necessity for some consideration of some action, at least, and I think the general ought to confine himself to the merits of the legislation which has been proposed and which he advocates. I simply suggest that as a time saver; that is all.

Gen. ANSELL. I had said when I was last here, Mr. Chairman, that I would like to have read into the record the report that I had made with respect to the English, French, and Italian systems, and, I think, that was ordered to go in. I did not have it at that time. I would like to put that in as a part of my statement.

The CHAIRMAN. Without objection, that will be done.

(The matter referred to was subsequently submitted and is here printed in full, as follows:)

### EXHIBIT "K."

EXTRACTS FROM GEN. ANSELL'S REPORT UPON MILITARY ADMINISTRATION IN EUROPE.

#### FRANCE.

*The under secretary of state for military justice.*

(a) *Corresponds to but has broader functions than our own bureau.*—This under secretariat in the French ministry of war, while corresponding to our own bureau, is given a far more prominent place in the establishment than is our department. Shortly after the beginning of war it was raised from the rank of direction to its present status, where it has contact with Parliament concerning its own affairs and an independence of administration unknown to us. While corresponding absolutely to our own department, so far as our de-

partment goes, it performs very much broader duties in three respects (see Appendix "C"):

(1) It makes all inspections necessary to acquaint itself with the condition of the administration of military justice in the army and all inspections preparatory to the most important courts-martial and civil litigation.

(2) It conducts before all the tribunals all litigation in which the ministry and the military establishment may be interested.

(3) It is charged with the general inspection and direction of prisoners of war.

It is abundantly equipped for all these functions.

(b) *Methods of maintaining discipline in French Army sharply distinguishable from our own in several respects.*—

(1) *There is but one kind of court-martial.*—It corresponds to our general court. There seems to be no need of any of the inferior courts because of the established system of disciplinary punishments for all minor offenses. The French tried an inferior court, only to abandon it. Special courts of inferior jurisdiction were provided for by the decree of September 6, 1914, but they were found unsatisfactory, were abandoned in practice, and finally actually prohibited by the law of April 27, 1918. I was advised that they were opposed principally because it was thought they were the alternative whereby commanders would neglect their duty to impose summary disciplinary punishments, and also because courts-martial might become too frequent.

(2) *The system of summary disciplinary punishment (mentioned above).*—This system is an established, tried, and tested agency of French discipline. No French officer can be found who disputes its efficacy. It is contended that, properly supervised as it is. (1) it results in effective discipline without the least injustice; (2) develops the proper sense of responsibility of command in all officers and corresponding respect for them upon the part of those commanded; and (3) obviates the great loss of time and energy consumed in courts-martial, leaving officers and members of the command free for their purely military duties. This system of discipline is regulated elaborately and in detail by the decree of May 25, 1910. There is no appeal to the courts. It applies to officers as well as to enlisted men.

There is one feature of the punishments authorized worthy of remark. Corporeal punishment, bodily indignity, or public disgrace is not permitted. The appeal seems to be to the pride and dignity, rather than to the sense of shame. The system carries with it a very wise concurrence of authority and responsibility. Every man must judge as he would be judged. The kind of field punishments habitually indulged in in the British Army have no place with the French. Considering the moral quality of our soldiery, as I have seen it evidenced here, it is my view that we could safely apply the basic principles of the French rather than English discipline.

(3) *There is a far more thorough investigation prior to court-martial than there is with us.*—This is made by competent lawyers. Complaint of conduct that would subject the offender to court-martial having been made to the convening authority, or charges having been preferred to him, the whole matter, including all the papers, is turned over to a "rapporteur," who is an officer of the Bureau of Military Justice assigned to duty with the command. He makes a thorough investigation and performs all the duties of the *juge d'instruction* in the civil system, except that he himself does not finally decide whether the accused shall be subjected to court-martial or not. Upon that question he makes a report, with recommendations, to the convening authority. The convening authority may disagree with the "rapporteur," but in practice he seldom does. If it is decided to proceed to trial, the record of the case as it is made up is submitted to a "commissaire du gouvernement," who is also a lawyer appointed by the Minister of War, who sits at the trial and represents both the government and the accused in a sense unknown to us; that is, while he endeavors to see that the government's case is presented, he is no more a prosecutor for the government than he is counsel for the accused. He is there to see that justice is done between the State and the accused. This official is described as "a public minister representing justice." He should be at least of the grade of the accused. He is always a lawyer and is usually a man of considerable or even great distinction at the bar. He takes no part in the deliberations of the court. However, the court relies upon him for advice during the trial, and may, and frequently does, consult with him during its deliberations, but this must be done in the presence of all parties.

If the papers upon coming to the hands of the "commissaire du gouvernement" are defective in stating a legal case, he amends them; if, for any reason they are fatally defective, he quashes them; and if during the trial he should become convinced of the deficiency of the proceeding as a matter of law, he so signifies to the court; in such a case his view is controlling. Even upon the facts the formal expression of his view that the State ought not to prevail is sufficient to work an acquittal or dismissal.

In time of war the two legal functionaries described above are united in a single person—"le commissaire-rapporteur."

(c) *Judgments of courts-martial are subject to an independent revisory power*—

(1) The Court of Cassation has, or until recently had, jurisdiction in time of peace over the judgments of courts-martial only under exceptional circumstances in the case of persons generally subject to military law, but civilians tried by court-martial for State offenses may always in time of peace have their cases reviewed by that court.

(2) A Court of Revision sits in time of peace and war for the army. The court originally consisted of two civilian magistrates of the court of appeals and three officers of the army. I am advised at the department that not long before war broke out there was a change in the situation by decree that permitted an appeal to the Court of Cassation in place of the Court of Revision, and I am advised that in time of peace the Court of Revision had been largely, if not entirely, superseded by that court. In time of war the Court of Revision consists of five officers of proper rank, sitting at the headquarters of the army or at each army, as may be necessary.

In time of war there is no appeal to the court of cassation by military persons, and the Government may also, by decree, control appeals in time of war to courts of revision. In August, 1914, all appeals to the court of revision were suppressed. June 8, 1914, revision was reestablished for all judgments of death. On June 8, revision was suppressed again for death sentences imposed for passing or inducing one to pass to the enemy or to rebel armies and for revolt; but, as to these offenses, it was reestablished by the decree of July 12, 1917. By the decree of February 28, 1918, revision was reestablished for judgments of condemnation to hard labor for life and for deportation. The present situation is, then, that there may be revision of judgments in the following cases: (1) Death penalties, (2) hard labor for life, (3) deportation.

By telegram of April 20, 1917, it was ordered that no capital case, whether it had been revised and rejected, or not revised at all, should be executed until the record had been submitted to the decision of the President. In all these cases the under-secretary of state for military justice submits the record, with his review and recommendation, to the President of the Republic or to the minister of war directly, without the intervention of other authority. By decree of June 12, 1917, the above provision requiring submission of death sentences to the President was temporarily abrogated in certain cases, but by note of July 17, 1917, the rule prescribed by the telegram of the 20th of April, 1917, was reestablished in all respects. The present law, therefore, is that no capital sentence can be executed without the approving decision of the President of the Republic.

I am also advised that cases carrying military degradation of an officer or soldier, dismissal of an officer, or the dishonorable discharge of a soldier are, by reason of the fact that the President is the pardoning power, usually submitted to the department by the general in chief of the Army on his own motion.

Courts of revision do not retry the facts. They will annul the judgment of courts-martial, and in a proper case order a new trial, only in the following cases:

- (1) When the court was not lawfully composed.
- (2) When it has violated the rules of its jurisdiction.
- (3) When the penalty pronounced by the law has not been applied to the facts found to exist, or when a penalty has been awarded not known to the law.
- (4) When there has been a violation or omission of forms prescribed to be observed under pain of nullity.
- (5) When the court has failed to comply with the request of the accused or the "commissaire du gouvernement" to make use of a faculty or fight provided him by law.

(d) *An elaborate system of suspension of sentences.*—Except in the most heinous cases, all sentences that would deprive the Army of a man's military

service are suspended for the period of the war. There is also an elaborate system whereby an offender may be completely rehabilitated. Commendation in orders will work a complete rehabilitation. Men are not lost to the Army. They serve either in prison works or in the chasseurs d'Afrique in France. Military service thus rendered is penal but is not beyond the realm of rehabilitation. All military persons are amenable to courts-martial exclusively for all violations of law, including the common law of the land, except certain offenses against the fishery and forest laws, in which civil courts have jurisdiction.

## ITALY.

*Bureau of Military Justice.*

The personnel of the Bureau of Military Justice, presided over by a lieutenant general, is purely military. The ranking officers of the department are all eminent lawyers. The system of court-martial procedure is in general respects very similar to the French.

(a) *Distinctive features: A court of revision of all judgments of courts-martial.*—The system embraces this distinguishing feature: In accordance with law, the King, by a decree dated the 20th of July, 1917, instituted a supreme council of revision. Its rules of procedure were promulgated on the 12th of August following. The council was originally composed of one of the generals commanding a section of military justice, who is its president; of the Military Advocate General of the Vice Military Advocate General; of the colonel attached to the section of justice, of a Councilor of the Court of Appeals, designated by the Minister of Grace and Justice, and an official known as a chief reviewer, chosen by the supreme commander from among the officers of the army who are qualified lawyers. As first established, it had jurisdiction to revise all sentences involving a penalty greater than seven years imprisonment in all cases where there was not already legal recourse to the Supreme Tribunal of War and Marine. (This latter tribunal has jurisdiction only in exceptional cases.)

In April of the present year this court of revision was reconstructed and enlarged, with a larger number of councilors of the Court of Appeals, and with jurisdiction to revise all serious penalties. The decree constituting the council expressly provides that the examination in revision will not suspend the execution of the sentence. I was advised, however, that upon application, either by the accused or the Department of Military Justice, a stay of sentence could be obtained in a proper case. The jurisdiction of the supreme council of revision is final, except in certain special cases. The records are first presented to the Bureau of Military Justice and by that bureau transmitted for revision. (Concerning this court, see appendix "D" and rough translation.)

## ENGLAND.

## THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

(1) *History and place in the Government.*—Originally, before the appointment of the Commander-in-Chief in 1793, the Judge Advocate General acted as secretary and legal adviser to a board of general officers, by the aid of which the Government of the Army was carried out by the Crown; and it was apparently to discharge the duty of defending the board and the action of the military authorities taken under his advice to this board that the presence of the Judge Advocate General in the House of Commons was needed. When the board was abolished, on the appointment of the Commander-in-Chief, the Judge Advocate General continued to be the legal adviser to that official, and though at times, up until 1805, he was not a member of Parliament nor a privy councilor, yet, nevertheless, in the absence of a responsible minister he acted as such and remitted capital punishment and dismissed officers in the name of His Majesty. In order to bring this Crown functionary under parliamentary control the office of the Judge Advocate General was in 1806 made a political one, the holder became a privy councilor, a minister of the Crown. He had the duty of advising the Sovereign upon all matters coming within the scope of his office and was liable like any other minister to be called to account in Parliament for any act done in the exercise of his official function. From this time until 1851 the Judge Advocate General assumed to act judicially and

his decisions were expressed as pointing out the nature of the defect in such language as, "I have the honor to inform you that the conviction can not be legally sustained or enforced," or that the "proceedings are invalid" and recommending or suggesting that "the prisoner be released and the entry of the conviction erased;" or, "that the commanding officer be informed that the finding amounted to an acquittal and should be so recorded in the usual form of 'not guilty.'" In a brief memorandum filed with me by the present Judge Advocate General (Judge Cassel)<sup>1</sup> it is said:

"In the late sixties, however, the form used more frequently took the shape of a direction such as "Under the circumstances the proceedings are quashed." "I have to request that you will cause the prisoner to be released and the record of the conviction erased."

(2) *His place as sole legal adviser to the political head of the Department.*—In 1875 a case was submitted to the law officers, Sir John Coleridge and Sir John Jessel, who in effect gave it as their opinion that it was the function of the Judge Advocate General to give advice and not to pronounce judgment, and that in constitutional theory "his opinion is not binding, although, no doubt, in practice it is not usual to disregard it." However, this was not followed by the succeeding Judge Advocates General. Judge Osborne Morgan in a minute to the Secretary of State in 1880, when he was Judge Advocate General, while accepting in a sense the opinion of the law officers as a theoretical legal definition, nevertheless adopted as the constitutional basis of his office the definition set forth in a minute of his predecessor, Judge Ayrton, under date of the 17th of February, 1874, and held that the Judge Advocate General "was constitutionally as well as morally responsible for the legality of sentences of courts-martial." During all this time the office was a political office of a ministerial character, its holder having a seat in and responsible to Parliament. So it remained until 1873, from which date until 1905 there was an interim in which the office was held by the President of the Probate Divorce and Admiralty Division. In 1906 a further change was made and the present system initiated. The Judge Advocate General became a permanent official, debarred like other civil servants from sitting in Parliament, and with direct responsibility to the Secretary of State for War. To quote from the present Judge Advocate General—

"The result is that the responsibility of advising the Crown as to the exercise of the prerogative as respects the sentence of courts-martial is transferred to the Secretary of State, and the functions of the Judge Advocate General are to advise the Secretary of State as to the advice he shall tender to His Majesty. The Secretary of State is at liberty to disregard the advice tendered to him by the Judge Advocate General, but he will rarely, if ever, take the responsibility of disregarding the advice of that official on legal matters."

The law officers of the Government are all agreed that while the office of the Judge Advocate General is theoretically advisory to the Secretary of State, the disregard of that advice would be so unusual and would be considered so serious a matter that it could not go far without challenging parliamentary correction. It is understood that in a case of exceptional importance the Secretary of State for War may refer the opinion of the Judge Advocate General to the Attorney General and the Solicitor General and may have their advice upon the question in dispute. This course has rarely been adopted, and I am advised there has been but one reference to those law officers within the last three decades. The reorganization of the office that has taken place within the last 150 years has resulted in placing a responsible minister at the head of the War Department, who stands between the Sovereign and Parliament, and to whom, rather than to the Sovereign, the Judge Advocate General of England reports directly. His opinions are subject to no military supervision or to any other kind, except in the rare instance when his decision may be submitted for the review of the Attorney General.

(3) *He is independent of all military supervision and control.*—His sole superior is the political head of the department, namely, the Secretary of State for War, who is responsible immediately to Parliament. The office was originated in necessity as an independent check on military authority. It was established more than 200 years ago primarily to correct abuses of courts-martial and the exercise of military authority. Court-martial sentences at

<sup>1</sup> Judge Cassel was rather recently appointed. He is an eminent barrister and at the outbreak of war held a prominent place at the English bar as an equity lawyer. He was serving as an officer of the line in France when appointed.

that time were notorious for their disregard of the fundamental principles of justice of the law of the land. It is fundamentally inherent, therefore, in the establishment of this office that this official shall be amenable to no military authority whatever, but solely to the political departments of government. His appointment by the Sovereign, his authority as defined in the patent of office, his civilian status, he being no part of the Military Establishment, with life tenure and retirement, all establish his independence of military authority in the performance of the functions of his office. All this nobody in or out of the Army disputes and none can be found to question its wisdom. His opinion in matters pertaining to his official function being subject to no military scrutiny or control, he is the final legal authority on the administration of military justice.

(4) *The several deputies judge advocate general.*—The judge advocate general has a deputy judge advocate general in each of the overseas forces; that is, in France, India, Mesopotamia, Macedonia, Egypt, Cyprus, and with the various other expeditionary forces of England. This official, while representing the authority of the judge advocate general, is also upon the staff of the commander in chief of the force. There, as at the war office, rarely or never are the opinions of the deputy judge advocate general disregarded. If the commander in chief feels that he must differ with the deputy judge advocate general, the question is submitted directly to the judge advocate general himself. The opinion of the responsible law officer is accepted without question by the army. The attitude of the army is one of respect for his authority. This administrative principle has a profound influence upon administrative action. A convening or confirming authority, or any other military authority charged with an independent responsibility, may, and with the utmost freedom in practice does, submit to the judge advocate general or his deputy any question arising in due course of administration, and his opinion is regarded as authoritative by the army and by the department, and will serve as a military justification for the action by that official.

Under the secretary of state for war, alone, the judge advocate general of England is the head of the administration of military justice.

(e) *The administration of military justice.*

(1) *Thorough preliminary investigation prior to resort to court-martial.*—What is universally pronounced as one great element of strength in the British system is to be found in the thorough preliminary investigation required to be made to determine whether the accused shall be subject to court-martial. After the officer prefers a complaint the commanding officer (usually the regimental commander) conducts a preliminary hearing, at which the accused is present. The witnesses against him are called and examined under oath and cross-examined by the accused. The accused then presents his own witnesses. Upon the evidence thus taken the commanding officer decides whether to dismiss the charge altogether, or whether to resort to his power of summary punishment, or whether to forward the charges to the convening authority for trial. In case he decides to resort to summary punishment, if the offense involves one of the larger summary punishments authorized by the statute, the man must be asked if he submits to the commanding officer's jurisdiction or whether he would prefer court-martial. A well-advised man usually submits to the summary discipline. If he takes a court-martial, or if the commanding officer decides to forward the charges to the convening authority, the substance of what each witness testified to is settled in a conference between the commanding officer or his adjutant and the accused, and upon disagreement the witnesses must be recalled. All this testimony is forwarded to the convening authority, where the judge advocate looks over both the charges and the substance of the testimony and decides whether there shall be a trial or not. If he finds incompetent testimony he indicates his ruling to that effect upon the testimony sheet, or if it appears that an offense has been committed for the proof of which evidence exists but has not been included in the evidence sheet, then the file is returned to the commanding officer for further investigation and again the man has the right to be present and examine the witnesses. At any time before final disposition by the commanding officer he has the right to administer his own punishment or dismiss the charges. All papers, including the evidence sheet, are sent to the president of the court, who must be guided by the rulings of the law officer as to what is relevant and what is not. This testimony sheet also serves as a check upon the testimony of witnesses.

(2) *The punishing power of commanding officer (usually regimental commander).*—Another great element of strength in the British system is found in the punishing power of the commanding officer, which is authorized by section 46 of the army act. The exercise of this power has caused nearly all inferior courts to be superseded and has made the regimental court obsolete. Together with the required preliminary investigation, it is believed to have reduced the resort to general court-martial by about 50 per cent. "The whole trend of army opinion and military jurisprudence," says the judge advocate general, "is towards increasing the power of a commander to administer in a proper case summary discipline."

(3) *The different kinds of courts-martial in practice.*—Courts-martial authorized in the British system are (1) the ordinary general court-martial, (2) the field general, (3) the district court, and (4) the regimental court. Where it is impracticable to maintain the ordinary general court-martial, the field general may be resorted to; and it has been held impracticable to maintain the ordinary general court-martial in France and other fields of service for enlisted men. Officers, however, are almost invariably tried by ordinary general court-martial. The distinguishing theory is that trials of officers are so few as to be within the range of practicability. So, in France and all active fields of service there are (1) the ordinary general court for officers, and (2) the field general for enlisted men. At home there are (1) the ordinary general court for everybody, and (2) the district court for enlisted men and the regimental court. The last named court is obsolete by reason of the summary punishing power, and the district court is infrequently resorted to.

(4) *General and field general courts-martial are provided with law officers who control the court upon questions of law.*—The ordinary general courts-martial are provided with a judge advocate warranted by the judge advocate general or deputy judge advocate general. The English judge advocate is not, as with us, a prosecutor, but a law officer whose opinion may be taken by the prosecutor (counsel for the government) by counsel for the accused, and by the court. He may, and frequently does, give his opinion to the court without their request, and would do so if he believed the court needed it or was about to err. When the evidence is all in, he sums up and instructs the court upon the law in very much the same manner as a judge instructs a jury. The judge advocate is usually an eminent barrister who has had experience on the criminal bench.

The field general court is not provided with a judge advocate by law, but it is now the established practice to detail with each field general a member who is especially qualified in the law and who has all the qualifications of the judge advocate just mentioned. Out of deference to the line he is seldom or never made the president of the court, but, on the other hand, neither is he the junior member. While theoretically he has no more power than any other member of the court, under the British system he may spread his own views upon the record and may, indeed, report specially to the deputy judge advocate general any errors committed by the court on the trial.

(5) *Some weaknesses of present system.*—The present British system is weak the law authorities find in the following respects:

(a) The law does not provide for having a judge advocate on every field general. This difficulty has been obviated largely, as just said, by detailing as "law member" an officer who is an eminent barrister and of experience in the administration of criminal law, specially selected for the purpose of controlling the court in matters of law. The present judge advocate general strongly recommends the supplying of every court-martial, except the summary court, with a legal member, and would recommend it immediately to Parliament were it opportune to do so.

(b) This law member should have a controlling power in matters of law. As just explained, he does have that power in fact, but only at the expense of transcending legal theory.

(c) In cases of death sentences the law does not, as it should, provide for a stay of execution until review by the judge advocate general. Inasmuch, however, as death sentences can in no case be confirmed by any authority below the commander-in-chief, the confirming authority always has the approving view of the deputy judge advocate general. Then, too, as a matter of fact, the deputy judge advocate general will take no risk of future disagreement with his chief post executioner, and, except in the plainest case of a death sentence, he would ask for the judge advocate general's review before sentence is executed.

(d) There should be a legal stay of execution for another reason: In order that the accused may request pardon. While every convening and confirming authority has the authority at any stage in the proceedings to ask for the opinion of the judge advocate general, an authority which is very frequently availed of, there is no express authority for staying the sentence or establishing an interval between the awarding of the sentence and its execution in order that the pardoning power may be sought. The recent Army act, however, with this in view, requires the president in all sentences of death to announce the verdict upon conviction, in order that the accused man may pursue his usual remedies or ask pardon.

(e) In the matter of settling charges there is an inconsistent relation in that charges are both settled before trial and ultimately passed upon in review after trial by the same legal authority. The present judge advocate general has so organized his office into divisions that the division that settles the charges never reviews the proceedings. In fact, so independent will he keep them that he himself, since he may be called upon to review a case, never personally settles the charges. All such matters, indeed all preliminary matters of this character touching prima facie legality, are attended to by a division which acts independently of the judge advocate general and takes action in the name of its own chief. If it were convenient at the present time to do so, the present judge advocate general would propose the statutory establishment of this independence.

(f) No reason is known for the illogical position that inasmuch as an acquittal is required to be announced in the British system immediately to the accused, all convictions should not be announced also.

(6) *Judge Advocate General as reviewing authority.*—The judge advocate general reviews all cases, even those that have been reviewed by the several deputy judge advocates general in the various Expeditionary Forces, though those passed by a deputy are not scanned with such great care. The number of cases now being reviewed are about 1,100 per week, and he tries to keep the work up to date. A case received to-day should be taken up by an examiner to-morrow and passed without delay. He is guided in his power of review by the rules, vague as they are, established by the criminal appeals act as grounds of reversal or quashal. The scintilla of evidence theory has long been abandoned in England, and because of the vagueness of the rules established in the criminal appeals act, the appellate courts have very properly reserved to themselves the right to say what shall constitute grounds of reversal and quashal, keeping in view, of course, so far as sufficiency of proof is concerned, the established common-sense rule in deference to those who have heard the witnesses testify. He not infrequently reverses, however, for insufficiency of proof, and uses the formula found in the criminal appeals act, that is, "There is not a reasonable sufficiency of evidence" or when "a substantial injustice has on the whole case been done the accused."

a. *The Judge Advocate General of England has never limited himself to jurisdictional deficiencies in quashing proceedings; he will quash for other reversible error.*

b. *Practical steps in quashing.*—When he decides to quash proceedings he makes what he calls a "minute" of the deficiencies without going so much into detail as we do. In several of the cases I noted he simply said, in a nut-shell statement of the reason for his conclusion, "I find that the charge alleges no offense known to the law;" or "that the only evidence adduced for the Government was incompetent;" or that "the evidence is not reasonably sufficient;" or "the accused was denied the substantial right of counsel and witnesses for his defense;" and that "for this reason the sentence should be quashed," or, sometimes, "must be quashed." With but little more, this minute is addressed to the "S. of S." (that is, the Secretary of State for War) who returns the minute initialed. The minute is transmitted by the Army Council to the proper commander with a direction from the Army Council to see that the necessary notation is entered on the record of the accused and that all steps be taken to restore him to his former status.

Even in cases of quashing for defect of jurisdiction he seldom recommends another trial, as he leans decidedly against a second trial in such cases, though in particularly aggravated cases, where obviously the accused should not go unpunished, he does, of course, recommend trial.

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S. T. ANSELL.

Senator KNOX. Would you mind, in view of the fact that I was detained at another committee meeting the other morning when you first appeared, defining for my benefit briefly just what the issue is that we are trying, what the various contentions are and what you are trying to get at? I think I know, but I would like to have you state it.

Gen. ANSELL. The whole question, as I understand it, Senator, is whether or not the court-martial procedure shall from beginning to end be subject to a judicial control, a control that is established by Congress, or shall it be subject to the power of military command with a very limited and what I conceive to be an inefficient guide established by Congress.

Senator KNOX. And if it is to be subject to review or control by Congress, then the question is as to where that control, the appellate part, shall lie. Is that an ancillary question?

Gen. ANSELL. It is. That question was the one raised on the day before yesterday. I had assumed that it was within the powers of the Judge Advocate General. That was ruled against me. I had not supposed it was located elsewhere, but it was suggested by some Senator that it would be incongruous, if not impossible, to create within a department a bureau which should pass finally upon the entire department, it would seem difficult. Of course, that strikes at the very root of what I should contend for, if I were permitted to contend.

Senator WEEKS. I made that suggestion. I do not think the suggestion ought to have any great weight, for I am not a lawyer, but I wanted to bring that to your attention.

Gen. ANSELL. I had considered that. I think there are cases, principally, perhaps, arising in the Interior Department that illustrate that point. Some have arisen in the Interior Department with respect to bureaus which are endowed with judicial or quasi-judicial functions. I think the Supreme Court of the United States has said that in the performance of those functions those officers were not subject to the control of the departmental hierarchy or head of the department.

Senator KNOX. Of course, at the present time I am not so particular to get your argument as to get your statement of what the question is.

Senator KIRBY. We are discussing the bill.

Senator KNOX. I understand that. There seemed to be an issue between Gen. Ansell and somebody else. I do not know who he is. There seemed to be a difference as to the interpretation of the statute and as to where this right of revision should lie. That is as I understand it from the press. As I told you, I was not here the first morning that you appeared. I want to know what that issue is.

Gen. ANSELL. The first issue was as to whether there was any such power.

Senator KNOX. Any power of revision?

Gen. ANSELL. Any power of revision at all. If so, where it was. I had held when I was acting head of the office that there was jurisdiction in the office of the Judge Advocate General.

Senator KNOX. Yes.

Gen. ANSELL. Established by section 1199 of the Revised Statutes, to revise judgments of courts-martial and make the necessary corrections for gross and prejudicial errors.

Senator KNOX. That is one position. What was the other position?

Gen. ANSELL. That was my position.

Senator KNOX. What was the other position?

Gen. ANSELL. That was opposed and it was held not to exist.

Senator KNOX. Did the parties who held that the right of revision did not exist in the Judge Advocate General's office contend that it did not exist anywhere?

Gen. ANSELL. They did, and it had never been exercised, at least within the past 35 or 40 years. I contended that the history of the War Department and of the execution of the act in its early days showed that when the act was young the Judge Advocate General of the Army, or if not he, then the Secretary of War, had the power.

Senator KNOX. Do you mean to contend that until you raised this question of the right of revision in the office of the Judge Advocate General that the action of the primary courts had never been reviewed at all anywhere by any authority?

Gen. ANSELL. That is true.

Senator KNOX. What authority revised these excessive sentences that you indicated the other day?

Gen. ANSELL. That, Senator, is an exercise of the pardoning power, the power of clemency, and has nothing to do with the legality and correctness of the judgment itself, but proceeded upon the legality and correctness of the judgment.

Senator KNOX. As I understand you now, all revisions that have been made up to this time have been made under the President's power of pardon?

Gen. ANSELL. No; we have advised military commanders to make revision.

Senator KNOX. Where does the power of clemency exist, except in the President?

Gen. ANSELL. There is a minor power of clemency conferred by Congress upon military officials that I think we need hardly advert to, because it appears to a lawyer confusing and incongruous. The reviewing authority, a subordinate official who convenes the court and passes upon its judgment, is authorized by Congress to mitigate and remit punishments while they are under his control, but, of course, the pardoning power after that rests with the President, where it is fundamentally placed.

Senator KNOX. This answer to my question does not seem at all consistent with your other answer made a moment ago as to whether up to this there had been any revision of courts-martial at all. I understood you to say that there was not.

Gen. ANSELL. As to the division of the sentence with respect to its legality for errors of law upon which judgment was based, no.

Senator KNOX. So in respect to the extent of punishment inflicted there was no revisory power that has been exercised under the statute?

Gen. ANSELL. Probably not under the statute, except with respect to the subordinate officials who are passing upon the judgment, in the

first instance, and, of course, under the general pardoning power of the President.

Senator KIRBY. As I understand it, under the law of 1866, it was your contention that the Judge Advocate General's department had the right to review and revise the decision of a court-martial?

Gen. ANSELL. That is true.

Senator KIRBY. And the legal authority held otherwise, which resulted in these court-martial sentences notwithstanding they had been reviewed by your department and recommendations made by your department, being approved by the War Department strictly. I mean by that that the War Department has the last say, and they say it shall be approved without regard to your recommendation, and it generally is.

Gen. ANSELL. I would not say "generally." Otherwise, that is true. The officer appointing the courts have the last say.

Senator KIRBY. It is a War Department proposition.

Gen. ANSELL. The War Department says the Judge Advocate General has no such power. Now, it ought to be said, I think, that the War Department had held, up until the time this question was agitated, that there was no power anywhere to correct, to modify, to reverse, or to inquire into the judgment of a court-martial because of prejudicial error during a trial, which would require, under the ordinary principles of jurisprudence, a court of appeals to reverse or set aside a judgment. They held that no such power existed anywhere. No matter how erroneous the judgment, it stood. Since this agitation, the War Department has, in many instances, upon the recommendation of the officer of the Judge Advocate General's office, seen fit to exercise a power deduced from somewhere to set aside and to reverse these judgments of courts-martial, but with this very strange result. The Secretary of War and the Chief of Staff may set aside the judgment of the court-martial for errors of law committed during the trial affecting the validity of that judgment. Every time such a judgment is set aside it must result obviously in an acquittal of the man, there being no power, which is a necessary complement, of course, to the power to revise, to order a new hearing.

The CHAIRMAN. It amounts to an instruction from the War Department to the officer convening the court to retry the case or dismiss the proceeding?

Gen. ANSELL. They do not retry. They do nothing but release the man.

Senator THOMAS. What is the effect on the status of the prisoner? Is he restored in that case to his position in the Army? Or does the sentence operate to keep him out of the service?

Gen. ANSELL. Because of the fact that we have now suspended this power of the appointing officer to execute a sentence of death, discharge, or dismissal, in the exercise of a power the source of which is difficult to determine, if it exists at all, many such sentences are saved from execution by an advisory review; if not so saved, such a sentence would place the accused beyond all power of restoration, the result must be discharge or dismissal. Take for instance, dishonorable discharge. If a man has been dismissed, he has been dismissed.

So, the Department, notwithstanding it denied that it had any right to review a judgment, ordered the reviewing authorities to

withhold execution of these sentences to that they could be advised with by the War Department after the War Department had been advised as to what we thought of the legality of the proceedings, and a man would thus be retained in the service and come within the realm of restoration, if the judgment should be set aside.

Senator WEEKS. Let me ask you to take a concrete case. Every general court-martial comes to your office?

Gen. ANSELL. Yes, sir.

Senator WEEKS. Somebody reviews the proceedings?

Gen. ANSELL. Yes, sir.

Senator WEEKS. Suppose you find that the law manifestly had not been complied with in the trial, what would you do?

Gen. ANSELL. We would recommend to the reviewing authority—

Senator WEEKS. Who is that?

Gen. ANSELL. The man who appointed the court, that in our judgment these errors were errors so gross and prejudicial to the rights of the accused that he ought to set aside that judgment.

Senator WEEKS. Suppose he did set aside the judgment, what would happen?

Gen. ANSELL. That is the acquittal of the man.

Senator WEEKS. Would the acquitted go back to his position in the Army as if no trial had been held in that case?

Gen. ANSELL. Yes, sir.

Senator WEEKS. Now, suppose the sentence, in your judgment, was inadequate or too severe, what would you do?

Gen. ANSELL. Well, it was held by our office that in advising these reviewing authorities we were limited, under the orders of the War Department, simply to pointing out to the reviewing authority the illegality, from a strictly legal viewpoint, of the proceedings, and could say nothing about the quantum of punishment.

Senator MCKELLAR. You did not pass on the facts at all?

Gen. ANSELL. Under that régime, which I wish to say I changed last August or September, we examined the facts only for the purpose of determining the question of law arising from the facts.

Senator MCKELLAR. You did not regard the errors of fact?

Gen. ANSELL. Only in order to determine the legal question whether there was reasonably sufficient evidence to sustain the finding of the court. That appellate rule is expressed in different ways in different jurisdictions.

Senator MCKELLAR. Suppose you found in a particular case that there was no evidence to sustain the finding of a court-martial, what would you do?

Gen. ANSELL. I think in appellate jurisprudence that becomes an error of law.

Senator MCKELLAR. You did take that into consideration?

Gen. ANSELL. Certainly.

The CHAIRMAN. The commanding officer has a right to ignore your recommendation entirely?

Gen. ANSELL. Oh, yes, sir.

Senator MCKELLAR. Does he do it in practice?

Gen. ANSELL. Frequently. We have such a question before us right now. We had it arise in a very serious form in France, and after a great deal of effort we got an order published two or three

months ago that would cause or compel these appointing authorities to follow the views of the Acting Judge Advocate General, unless he were overruled by the Secretary of War here.

The CHAIRMAN. If that power had been granted heretofore, there would not have been all this trouble?

Gen. ANSELL. There would not have been. That is my judgment.

Senator WEEKS. Let me get back to this case where you advise the convening authority that the law has not been complied with, in your judgment. Under present conditions a man is restored to his place in the Army. Do you contend that you should direct a new trial as a result of failure to comply with the law?

Gen. ANSELL. I contend we should have authority somewhere, and I contend it should be in a judicial officer, to order a new trial; that is, to advise the executive authority who can appoint the court-martial that it is within his power, and that he ought to do so.

Senator MCKELLAR. Your idea is that you should be an appellate court to reverse a finding on the record?

Gen. ANSELL. I think so. I should say for the usual errors of law for which an appellate court reverses.

Senator MCKELLAR. I think you ought to reverse on errors of fact.

Gen. ANSELL. Not, perhaps, unless they become a question of law under rules with which we are familiar. We should when the facts are not reasonably sufficient to sustain the judgment.

Senator MCKELLAR. There may be some trifling amount of evidence on which the court-martial could be sustained under legal procedure, and yet it would be manifest from the facts that a gross injustice was being done to the man in convicting him and having a punishment inflicted. Don't you think an appellate court ought to have power to reverse for that also?

Gen. ANSELL. Yes, sir; I think they do, but I think we are familiar with this fact, also, that they go at that thing gingerly. I quite agree with you that they do review the facts. They will not confess it, however.

Senator MCKELLAR. There is no use to camouflage it.

Gen. ANSELL. I think I should have said to you the other day, Senator, if I did not say so, that I did not mean to say that every one of these sentences is served. Of course not. The difficulty that I find with the system is that the system makes it possible for these sentences to be served, and many of them are being served, and the only thing that stands between the sentence of a court-martial and the execution of the sentence is mere man, and not legal principles.

Senator THOMAS. In other words, the system is ironclad?

Gen. ANSELL. It is. It is a system that depends on the view of man, not governed by law. The law does not govern.

Senator THOMAS. It depends upon the expression of the individual and not upon the establishment of legal principles?

Gen. ANSELL. Yes, sir.

Senator WEEKS. I supposed that your office reviewed these cases, and if you found the law had not been complied with, or if you found a sentence was excessive or manifestly insufficient, you sent that to the Secretary of War, who brought it directly or indirectly, perhaps, to the attention of the President, and that the President then either set aside the sentence or reduced the sentence or took some action based upon your recommendation.

Gen. ANSELL. I think for your information and general understanding, Senator, I will go over again the situation as it existed at the beginning of this war.

Senator WEEKS. Evidently that is not the case. I simply say that is what I supposed was the case.

Gen. ANSELL. That is not true.

Senator WEEKS. I felt fairly confident that was the policy followed in the Navy.

Gen. ANSELL. I am not advised as to that.

The CHAIRMAN. Did you desire to make a general statement of any kind before you proceed with the bill?

Gen. ANSELL. Maybe after I get through with the analysis of the bill, sir.

The CHAIRMAN. You are going to discuss Senate 5320?

Gen. ANSELL. Somebody handed me a different bill.

The CHAIRMAN. It is exactly the same bill. It was introduced in the House after it was introduced here.

Gen. ANSELL. It seems to be so. I wonder if the lines are the same. I suppose not.

I think that I should like to discuss this bill so as to coordinate it with the phases of the trial of a man. That would cause me to take up section 4 of this bill. We have found that no revisory or appellate power standing alone, notwithstanding the fact that I contended so strenuously for it, can cure all the deficiencies of the existing court-martial system and practice, for the reason that the system itself lets in too many errors and we are concerned too much with the revision of those errors. Too many men are tried who ought not to be tried at all. Too many men are tried on charges that, as a matter of law, do not adequately specify any offense known to the Articles of War. Too many men are tried when evidently there could not have been reasonable grounds to believe that they were prima facie guilty of the offense with which they were charged. Too many men are tried on flimsy evidence without a prima facie case.

Senator MCKELLAR. Are those cases reviewed by your department under the present practice, and reversed?

Gen. ANSELL. No, sir. We advise the reviewing authority below.

Senator MCKELLAR. Some times they take the advice and some times they do not?

Gen. ANSELL. Some times they do not.

Senator MCKELLAR. About what proportion?

Gen. ANSELL. I think it ought to be stated in fairness that in the majority of cases they take our advice. Being without authority we can not act completely and independently.

Now, the purpose of this section I apprehend, is to coordinate to a degree the military with the civil system. Certainly a man can not be held for trial before a criminal court until there shall have been an indictment made against him or an information filed against him backed, as we all know, by the usual evidence. When you look at a court-martial trial, you find that any officer is competent to prefer a charge against a man, which corresponds in every respect to a bill of indictment or an information. That set of charges is drafted by the officer who prefers them, and the charges are transmitted to an officer of superior rank, who convenes a court-martial for the trial of

the man on those charges, if he thinks the man should be tried on them. The man who determines whether the man shall be tried at all or not and on what charges, and who determines, in the first instance, the legal sufficiency of the charges and, in the first instance, whether the proof constitutes a prima facie case that should properly subject him to the charges, is the military official who has authority to appoint the court-martial. Now, he is supplied usually with a legal officer on his staff known as the judge advocate. Frequently he is an officer of the Judge Advocate General's department, but as frequently, perhaps, in time of peace in any event, he is simply an officer who has manifested some legal aptitude and has been detailed as an acting judge advocate; but in time of war we have had the whole bar to choose from, and we have, of course, supplied every authority who could convene and appoint a general court-martial with such a law officer. There, again, the system does not require this appointing officer, in the exercise of his judgment and discretion, to rely upon this judge advocate.

Doubtless he does rely upon the judge advocate in many cases. It may be that in the majority of cases, especially where the judge advocate is rather a strong man, an aggressive man, a man who impresses himself, by reason of those qualities, upon the military commander, that he has great weight, but so far as the law is concerned, there is no requirement of the law that says that any man who knows any law or who occupies any legal or judicial position is to be upon his staff or is to advise that commanding officer, nor does the law require that commanding officer to get information as to whether the charge actually denounces an offense known to the military code, or as to whether the evidence is sufficient to justify the haling of that man before a military court. Frequently when the commanding officers do seek the advice of the judge advocate, they disregard it. Under the law they are at liberty to disregard it. The law, as it exists, places the sole question, the entire responsibility, within the judgment and discretion of this appointing power.

The case I was just talking about may be thus illustrated. A lawyer, a man whom I esteem very highly, ex-Gov. McGovern, of Wisconsin, a distinguished man, distinguished in the law, found himself the judge advocate on the staff of a division commander. A charge came in against a soldier for deserting post or sleeping at post, I have forgotten which, but they are both capital offenses. These charges came to the judge advocate. This judge advocate, a man, of course, of the very highest judgment and discretion and legal skill, looked at the charges. He looked at the preliminary extracts of evidence sent up with the charges and he saw that this man ought not to be tried. The case could not be made. There was nothing to it.

But the commanding officer said, "Well, there has been a good deal of that thing going on around here, and we are going to make an example of somebody; we are going to start this thing anyway;" and over the advice of the judge advocate to the contrary, the man is tried, the time of five to thirteen officers is consumed, and the man, of course, runs the risk of undergoing serious punishment. In other words, he is put in jeopardy when a judicial officer says he ought not to have been. In this particular case the court acquitted. I have known of other cases where the court did not acquit. Where the commanding officer has the power that he has under the existing code,

if the court feels that the man should be acquitted, he can send the case back and argue with them to do otherwise. I think that section 4 is an important section, because at the source it tends to prevent unnecessary and unjust trials.

Senator KNOX. Do you think it meets adequately the situation?

Gen. ANSELL. So far as I have been able to study it it does.

The CHAIRMAN. Without change?

Gen. ANSELL. I suggest this change. In line 14, after the word "duty," insert the words "as judge advocate." I say that for the reason that I might be on his staff as an officer, but not as a judge advocate.

The CHAIRMAN. I am going to ask you to print in the record this bill Senate 5320 with such amendments inserted as you are going to suggest. That will give us a complete record.

Senator MCKELLAR. Would it not be better to have the changes made in italics so that we would know what they are?

Senator NEW. Your suggestion is what?

Gen. ANSELL. Insert after the word "duty" the words "as judge advocate."

Senator WADSWORTH. Have you any comment to make as to the advisability of subjecting a commanding officer to the judgment of an inferior in a matter of this kind?

Gen. ANSELL. Will you kindly repeat that question, Senator?

Senator WADSWORTH. Have you any comment to make as to the advisability of subjecting the commanding officer, we will say, of a division, to the judgment of his inferior?

Gen. ANSELL. No. That is my contention, I have objections to doing so on a matter of law.

Senator WADSWORTH. On a matter of law?

Gen. ANSELL. On a matter of law.

Senator WADSWORTH. Does the element of military discipline come in? I would like for you to discuss that.

Gen. ANSELL. I think the element of discipline does come in. I think it is very much served by the knowledge upon the part of every officer and enlisted man that there is some man of judicial training, who is dispassionate, who does not appoint the court, and who has nothing to do with the court. He is dispassionate so far as a human being can be, if he performs his duty and passes as a lawyer upon the two issues. They are both questions of law that prosecuting officers and courts pass upon every day. The first is, "Do the charges as drafted specify an offense known to the law of the land and the military code?" That is purely a legal question. I do not think that any man, whatever be his class or rank or prerogative or power or authority, should ever object to having placed upon him this restraint upon questions of pure law. The law should be able to say, "That is not the law; you can not do it because it is not the law."

Now, there is still a great field for his discretion. The charges may denounce an offense known to the law of the land and the evidence may constitute a prima facie case, and still the question is open to the commanding officer as to whether the man shall be tried or not.

The CHAIRMAN. What is the second proposition? You stated the first.

Gen. ANSELL. As to the evidence. I probably got my proposition too refined. The same is true as to the evidence. I do not think

lawyers can differ greatly. There is a system which governs us, however, and that authorizes lawyers to say whether or not the evidence, in the first instance, constitutes a prima facie case. I think we ought to say, Senator, as a practical fact that a judge advocate—and the judge advocate in time of war, at least, practically always comes to us from civil life—will be inclined to respect the system. I have observed that they are so inclined. They appreciate the necessities of maintaining discipline under a system, and by reason of the personal relation between the staff officer and his chief, who is exercising authority, the judge advocate would not become personally obstructive. It would be rather a far-fetched case.

The CHAIRMAN. This same question that Senator Wadsworth raised finds illustration in the Medical Corps in the line, where the medical officer may be inferior in rank to the commanding officer of the camp, yet in matters of sanitation the inferior officer's views are respected.

Senator SUTHERLAND. That is true in every large industrial organization. Take a railroad company, for instance. The president of the company appoints the legal officers, and yet defers to them in matters of law.

Gen. ANSELL. I feel keenly on this. I can imagine that Senators would differ, because we get to thinking in terms of the military hierarchy and rank; and yet I agree with you that in matters of pure administration a law officer ought to be no more than a check upon his chief. But this is not a matter of administration. This is to be distinguished from a matter of administration, in that it involves an actual trial determinative of the life and liberty of thousands of human beings.

Senator KNOX. This section 4, however, only provides that this trial shall not take place without the approval of the judge advocate in the event that the authority appointing the general court-martial has such an officer present for duty. Suppose he does not have such an officer present for duty.

Gen. ANSELL. Of course, as I have said, we have tried to keep them supplied. If we assume that the number of convening authorities should be so numerous that we can not supply them, Congress would have to supply them.

Senator KNOX. If that is not done in every case, you would have a situation where a man may be tried on the authority of the commanding officer without having that protection thrown around him which you seem to think is important, and in which I entirely agree with you.

Gen. ANSELL. I agree with you that it would be well, if it did not become too inelastic, to say that there should be such an officer upon the staff of every officer with power to appoint a court-martial. I think, however, as a matter of practical government, that this section would result in the supplying of such an officer.

Senator MCKELLAR. Why not make it a general requirement in all cases to get the approval of a judge advocate before the indictment is made? It would be easy enough for the commanding officer to transmit the papers to Washington and get the opinion of the judge advocate on it; it probably would be much better.

Gen. ANSELL. There would be nothing impracticable, of course, about it.

Senator McKELLAR. I agree with Senator Knox about that matter.

Senator KNOX. I think this section ought to be amended so as to read in effect that there shall be no court-martial unless an officer acting as judge advocate, or an officer learned in the law, shall have passed upon the two propositions, first, as to whether an offense against the law of the land had been committed and, second, whether the charges were supported by prima facie evidence.

Gen. ANSELL. That is in line with what I believe.

Senator McKELLAR. Senator Knox, I hope you will offer an amendment along that line. I think that is absolutely necessary.

Senator KNOX. It does no injustice to the service, because in case of an offense, if there does not happen to be a judge advocate attached to the command, one could be sent there, so that there would be no loophole for persons who deserved punishment to escape.

Gen. ANSELL. It would be practicable.

Senator KNOX. It brings it in line with the civil administration of justice, because we know that no man is tried in a criminal court unless the district attorney has, in the first instance, thought that if the offense was tried it would be sufficient to justify conviction.

Gen. ANSELL. Yes.

Senator SUTHERLAND. It makes it of universal application.

Senator KNOX. That we can fix up easily, if you agree to it. You see no objection to modifying the section in that particular?

Gen. ANSELL. I am most heartily in favor of it.

The CHAIRMAN. Will you insert that amendment in the bill?

Gen. ANSELL. I will do my best to draft it and put it in.

Senator McKELLAR. Before any court-martial is confirmed an opinion must be had from the judge advocate of the department learned in the law?

Gen. ANSELL. Yes, sir.

I wish to discuss, for the moment, section 5. I think that down to the proviso that section is existing law. I wish to say to the committee that, to my mind, we have great difficulty in securing a fair court, a court whose fairness is beyond all question. You will observe that under existing law challenges are for cause and to the poll only. Every challenge is made to the individual and one at a time and each is tried this way. Here we have a court-martial. The accused is called upon to assert his challenge, if any he has, and he must challenge for cause. There are no peremptory challenges. He challenges the Senator, first, for cause. The Senator is required to step aside. That is obviously fair. He goes outside and the others try that challenge. The others are the court passing upon the question of the challenge.

Now, suppose that every other member of the court, or more than any one member of the court, are affected by the same cause that constitutes the basis of challenge of No. 1? For instance, in military practice during this war we have been exceedingly troubled with this situation: A half dozen men would be charged separately, and properly so, with an identical offense. It was an offense, at least, in which the evidence was intermingled and in which the circumstances of the commission were such as to connect them, rendering it quite impossible, humanly and legally, for the same court, having tried one of those men, to come to the trial of any subsequent one of them with a fair and unprejudiced mental attitude toward him. Yet that

court sits there. We have known them to try four, five, six, and in one case I think it ran into the teens, if not, some very considerable number. See what happened. Counsel for the third, fourth, or fifth accused comes before the court. He knows, you know, and I know, and everybody else knows that that court is not a fair court. It has got an impression, a slant. If it found the first man guilty, the second one has certainly got a considerable burden when he comes before that court.

Senator WADSWORTH. You mean the second man has?

Gen. ANSELL. Yes, sir.

Senator KNOX. It is like trying a half a dozen men before the same jury.

Gen. ANSELL. Exactly. You put your finger on it, and yet there is no other way of challenging that court. There is no way of trying the challenge. Yet, as foolish and absurd as it seems to me, they are driven, under this practice, to coming up and challenging the first man, the challenge applying equally to them all, and while the first man walks off, they, equally disqualified, sit there and pass upon their brother and their own fairness. Is there a fair-minded man in such a case?

Now, somebody has hit upon this plan, which appeals to me. I do not know who originated it. Doubtless somebody who is familiar with the difficulties, as I suppose Senator Chamberlain is. However, he has provided a remedy which we have needed a score of time, and unfortunately it has so happened that the cases in which we needed it have been the most serious cases. Rape, I remember, was one, strange as it may be.

Senator McKELLAR. Will the proviso do what your argument suggests?

Gen. ANSELL. It will do it, I think, with my amendment.

Senator McKELLAR. What is your amendment?

Gen. ANSELL. I should strike out the last three words, "for his decision." I suggest that because the same officer, of course, has committed himself by ordering that second court.

Senator McKELLAR. It was for that reason I called attention to it. I do not think if you return to the same officer who convened the court it would do the accused any good.

Gen. ANSELL. I would amend by striking out the words "for his decision" and substituting this:

Who, if he has an officer of the Judge Advocate General's department present and for duty as judge advocate on his staff, shall submit the report to said judge advocate for his decision thereon, which shall be final; and if there be no such judge advocate on the staff of such appointing authority, he shall submit the report for final decision to the Judge Advocate General of the Army or to the Deputy Judge Advocate General in cases arising in forces provided with such official.

It is, I think, a question of the same kind and exactly on a par with the questions that we discussed under section 4, and which that section was designed to cure.

Senator JOHNSON. Would the time at which this particular challenge was made, as provided by your amendment, give to the accused the opportunity that you suggest ought to be given to him?

Senator McKellar. Your provision is that if the accused at any time before the arraignment shall file, etc.

Gen. Ansell. I passed that over, Senator, for the reason that that is the proper place at which the challenge should come, but I agree with what is implied by your question, that if he should discover during the progress of the trial that this panel or array was colored against him, conclusively and affirmatively, as it would be in this case, then he should have the right to make the challenge then.

Senator Johnson. You have struck exactly what was in my mind, but if you recall in stating the specific case of a half a dozen men who would be tried by the same jury, their arraignments might have all occurred prior to the trial of any one.

Gen. Ansell. Not so under military practice.

Senator Johnson. Under any circumstances?

Gen. Ansell. I think not. It is not the law, but under a practice as old as military procedure, we do not have, as is true of civil practice, a man arraigned to-day and tried long subsequently. In civil practice many persons are arraigned to-day together and tried at some subsequent time. In military practice invariably the accused is brought before the court at the time set for the trial and he pleads there. He is arraigned there, and the trial proceeds immediately.

Senator Johnson. So that if there were six men accused of a like offense, one individual would be brought before the court and his arraignment would then occur, but the others would not be arraigned?

Gen. Ansell. Not at all.

Senator Johnson. And subsequently, at the time of the arraignment, would have opportunity to present the challenge that you suggest?

Gen. Ansell. Yes, sir.

(Informal discussion followed, which the reporter was directed not to record.)

Senator Knox. How about inserting the words "or during the trial."

Gen. Ansell. That is agreeable to me. I can not see that it would give rise to any practical difficulty.

Senator Johnson. It might lead to complexities if, in the midst of the trial, it was permitted. It meets what was in my mind, but what was probably a fanciful objection, from what the General tells me of the procedure.

Senator Knox. The undoubted rule is in civil prosecutions—that is, in prosecutions under the civil law—that a man may raise an objection to the court at any time during the trial if he is being tried by a prejudiced judge and that fact is not disclosed up to the actual verdict. He has a right to raise the question. He is not bound to raise it before the jury is sworn.

Senator New. There is no limit to the number of challenges that a man may interpose.

Gen. Ansell. I had supposed, if I may express my own impression of the law on that subject, that if the accused was not advised—and not being advised, was not guilty of laches—that the jury was a hostile panel until after the arraignment and the empanelment, he

nevertheless, upon showing that the facts were not known to him at the time of the arraignment and that he was not negligent in his ignorance of that fact, he could then make a challenge at that time.

Senator Johnson. And try his challenge in the middle of the case?

Gen. Ansell. I believe that is true. I am not at all certain.

Senator Johnson. That would not be so of our local procedure in the West.

Senator McKellar. Would not this particular section be made to accord with the views just expressed by striking out the words "at any time before arraignment"? Just strike out the words "at any time before arraignment." I believe that would be the fairest way to put it.

Gen. Ansell. Suppose this should happen, gentlemen: The second accused, not advised of the personnel of the court that tried the first one, comes before the court. He is not legally presumed to be advised, in any event, of what those officers have been doing, and his counsel does not become advised until subsequent to the arraignment. I think that that man is entitled to the protection.

Senator McKellar. That protection could be secured by striking out the words "at any time before arraignment." That would make it all right.

You understand you are to make a draft of that section as well as of the other sections?

Gen. Ansell. I understand it.

Senator Sutherland. In regard to section 4, I have stricken out some words, making the section read as follows:

No authority authorized to appoint general courts-martial shall refer any charge to a general court-martial for trial unless an officer of the Judge Advocate General's Department shall indorse it in writing, etc.

Gen. Ansell. That would seem to hit it exactly.

Senator Sutherland. That would make it general.

Gen. Ansell. Yes, sir. The first section I should like to discuss.

Senator Johnson. Which one, please?

Gen. Ansell. The first one. That is a very clear adaptation of the present British military law upon the subject. We have come to the trial now. Under the existing system the court-martial functions from the time the charges are drafted until the time the sentence is executed without any legal control established by law. These men are, in a legal sense, utter laymen. They are presumed to know no law. They do know no law. If any should have studied law, of course they are in a situation of possessing a little learning. They pass as a court, combining both the functions of a court and jury, going to the civil jurisprudence for analogy. They pass upon every question of law arising in the progress of that trial just as finally and conclusively as any court in the United States could, and more so, because their decision is not subject to any repeal or revision. It is final. It is final, no matter how difficult the question may be.

There is now nobody there on that court who knows any law in the eyes of the law. To be sure there is a judge advocate, a trial judge advocate. In our system there is an officer entitled as though he belonged to the same department to which I belong—he usually is an inexperienced line officer—passing upon those things as best he can. He is a prosecutor; he is a district attorney; he represents the

Government. That officer under our procedure is charged with the duty of prosecuting in the name of the United States and at the same time of being the legal advisor to this court when the court sees fit to ask for his advice. It does not have to. At the same time, he is charged with the duty of fairly protecting the interests of the accused. That, I think, is enough upon its mere statement to condemn any system of legal procedure. He is prosecutor; legal advisor to the court when called upon to be so; and also in a very real sense, according to the law, counsel for the accused, to see that no unfair advantage be taken of him.

As a matter of fact, I have been a judge advocate, of course. When a man gets into a case as a prosecutor he ought to be zealous in the prosecution, and there is not any lawyer in the world that can have proper zeal as a prosecutor and at the same time the dispassionate judgment that enables him to advise the court and at the same time do anything very beneficial for the man whom he is prosecuting. That is impossible as a human fact.

Senator JOHNSON. I agree with you thoroughly.

Gen. ANSELL. In civil law the prosecutor or district attorney is still conceived to be a sort of quasi officer, but in practice he is a prosecutor.

Senator MCKELLAR. In this case, under sections 4 and 5, he would be the grand jury in addition to being prosecutor. Besides being advisor to the court, he would be the grand jury.

Gen. ANSELL. We get around that in practice by doing this. The judge advocate on the staff of the convening authority who starts up all the prosecution is a different man, though, strange to say, he may be, and sometimes is, the same man. I have known this to be the case. The judge advocate upon the staff of a convening authority—indeed, I have occupied this sort of hermaphroditic rôle myself—has advised the convening authorities that the charges were good, the evidence sufficient to prima facie sustain them, and has tried the case. I was an assistant, but nevertheless I handled the case. Then the man is ordered tried upon my advice, and I am sent down to prosecute him, and I do my best to conform to the law. I prosecute him and then I come back to my headquarters and pass upon the legality of what occurred.

Senator KNOX. You were a regular Poo Bah.

Gen. ANSELL. Yes, sir. I do not say that that is usual. The law does not render it impossible, but permits it, and when judge advocates are few, why, frequently a man has to do that kind of thing.

Senator MCKELLAR. Right after the word "judge advocate," in line 7, insert this provision: "But he shall not be the judge advocate advising the convening of the court-martial."

Gen. ANSELL. I think if you will look at the bill as a whole you will find it succeeds in separating the functions of the prosecutor and the judge advocate in a way that conforms with the systems of the French and the British.

Senator MCKELLAR. If you will look on page 2, subsections C and D, it would look as though he was an advisor of the court.

Gen. ANSELL. I think I will explain what is attempted by this bill. If you will consider sections 1 and 2 together, you will find that it is the purpose and effect of section 2 to deprive this judge advocate of his functions as prosecutor and as counsel for the accused. The

functions of prosecution are conferred now upon a new official known as "prosecutor." But the judge advocate's duties now become like those of a judge sitting with the jury under our general jurisprudence. That is the British system. A general court-martial has a judge advocate sitting over here, but that judge advocate is not put there by the convening authority. That judge advocate represents the Judge Advocate General of England, the highest judicial authority having to do with military procedure. The convening authority has no control over him. He is warranted especially for the purpose by the judge advocate general of England, representing the Crown. He comes to this trial as a judge. He rules upon the questions of law as a judge. He instructs the court upon proper occasions as a judge would a jury. Those functions are intended to be prescribed by A, B, C, and D of section 1. That is an adaptation of the British Code. He is to advise the court and the convening authority of any legal deficiency in the constitution and composition of the court or in the charges brought before it for trial. Notwithstanding the fact that these charges have been passed upon by the judge advocate on the staff of the appointing authority, the court also has to determine the sufficiency of those charges, and this judge advocate is really the judge that passes upon the question.

Senator KNOX. Do you think sections 1 and 2 adequately meet that situation?

Gen. ANSELL. With such study as I have given this bill it seems to me that is true.

Senator MCKELLAR. Under section 2 there is the appointment of a prosecutor. Now, here is a court convened consisting of 13 officers who are to try a man on any charge for which he may be arraigned. Under section 2 a prosecutor is appointed. It also provides that the accused shall have a civilian lawyer, or, if he can not get a civilian lawyer, a military lawyer, and it gives him the right to have the court appoint a lawyer, if it is necessary. He must have some one to represent him. Now, why wouldn't that be sufficient? Why have a judge advocate in a half dozen different capacities or at least three different capacities, to advise the court. Why can't the court depend upon the two sides and sift the evidence, the prosecutor putting it up on the one side, representing the Government, and the accused, by his counsel, presenting his matters, and thus let a fair verdict be reached, without the judge advocate's advice, when he is connected with the prosecution of the case.

Gen. ANSELL. Not at all; he is not connected with the prosecution of the case.

Senator MCKELLAR. He is not?

Gen. ANSELL. He is now, but this is designed to prevent that. He becomes a judge.

Now, let us take this body of laymen. They are judges both of law and fact. The first question is as to the sufficiency of the charges. There are 13 laymen to pass upon that. Then let us take the question of evidence.

Senator MCKELLAR. The judge advocate who originally convened the court-martial, under the amendment that you have suggested here, has passed upon the sufficiency of the charges.

Gen. ANSELL. Just as a district attorney may, but the courts may take a whack at it also.

Senator McKELLAR. These are things that suggest themselves to my mind as you go along.

Gen. ANSELL. Aside from the sufficiency of the charges you have 5 to 13 men here. We have had this case quite recently, and a very serious one indeed. There was a question as to the capacity of an infant, in this case, to testify and the question was as to whether the preliminary foundation had been laid, and upon the testimony of that child depended the life of this man. I have had a very recent case of a dying declaration—a question of involved law, and a question where no man would feel safe in trusting life and liberty to 5 or 13 laymen or anybody but a lawyer. We have every question of evidence that can possibly be raised, and every question of law that can possibly be raised in the progress of a criminal prosecution, before a court-martial. Unless you have a judge there—and indeed it seems to me that this is one of the very fundamentals of the bill—a man who can rule upon these questions as a judge, you turn over the administration of the law to these unlearned men.

The CHAIRMAN. A man might be convicted before laymen on hearsay.

Gen. ANSELL. Yes.

Senator KNOX. He is not a member of the court. In the old English law he was called an assessor. He is called in to advise.

Senator JOHNSON. How long has this system been in vogue in England?

Gen. ANSELL. The system that I am describing now, Senator, it seems to me is of rather recent growth. I should say, making a guess, that it has been created within the last 20 or 25 years. This system that we have got here is, in its lack of legal control, the system that we took with us from England when we separated from her, and we have not changed. I mean this making of the judge advocate the prosecutor, the judge, the counsel for the accused, and everything else.

Senator JOHNSON. Has the new system that you suggest has been in existence 20 or 25 years been in actual practice in England during the war?

Gen. ANSELL. It has been, sir, and I may say also that practically the same system is established in France. I think it would be very enlightening to this committee, as indeed it was to me, to know that in most of the countries of Europe there is an officer of the law who either sits with or on the court. That is required by law. It is a part of the European system.

Outside of what I myself have learned from a personal tour of Italy, France, and England, I rely upon a report made by the brigade advocate of Norway, who was sent by his Government to investigate and report to his Government on the military system or systems of military justice of the various European states. I have compiled here what the situation is upon the question, Can an officer of law be on or sit with the court-martial: Norway, yes; Denmark, yes; Sweden, yes; Finland, yes. This was 1884. Belgium, yes; Holland, yes; France, yes. It was not so at that time.

England, no; that was 1884, and this commentary visits upon the English system the bitterest sort of comment, and so it has been changed in this respect subsequently to that report in 1884. Bavaria, yes; Wurtemberg, I could not understand; Switzerland, yes; Italy,

no. This was in 1884. I wish to say that there is no system of administration of military justice in Europe that goes so far as the present Italian system in subjecting every case to an absolutely judicial trial. I think my report will show that. Spain, yes; Portugal, yes; Austria-Hungary, yes. So, it is general that there shall be a judicial officer sitting with these courts-martial.

Senator KNOX. Have you the German system?

Gen ANSELL. The German system is mixed up. I dislike to rely upon what I have here. I have a reference to page 9, volume 1.

Senator THOMAS. You have given the several constituent states.

Senator KNOX. I was interested in the Prussian system.

Gen ANSELL. I made a statement elsewhere the other day from information I had that the Prussian system generally and the Spanish system and the Russian systems do not provide for review after you go up, but in the progress of the trial, I am not advised.

The CHAIRMAN. Would you like to have that printed in the record?

Senator THOMAS. I think it should go in.

Gen. ANSELL. I should like to have that put in the record with some changes that I have indicated where I have put an interrogation mark. If I could get a translation out in time, I think it would be helpful to place that in the hearings. There are extracts from the report of that Norwegian official that would be enlightening.

I think it is only fair to say that the English system is not clear cut. Their military procedure is almost, if not quite, as customary, as common law, in some respects as many of their other systems, notwithstanding the fact that on the civil side they have recently codified what their supreme court of criminal appeals—I have forgotten its title—may do.

I want to call the committee's attention to this difference between the English system and what this bill provides. Observe this on page 3: "His rulings and advice given in the performance of his duties and made of record, shall govern the court-martial." That refers to the sitting judge advocate general.

If you will look at the war office manual which, if I may digress for a moment, I will say is a publication compiled not only by military lawyers but by some of their most distinguished barristers, you will find that the manual does not say that. The manual says that this judge advocate shall sit there; he shall advise that court; he shall rule; he shall interpose whatever and wherever he pleases, whether the court asks him or not. When it comes to what the effect of the interposition is, here is what the manual says and here is what the judge advocate general of England told me. He said, "Well, of course, the court never goes against his advice." I said, "Why?" "Well," he said, "in the first place, I sit here, and if they should disregard his advice, I will strike it down, and they all know that." "Furtherfore," he said, "we scare the members of our court." Probably that was not the word that he used; it must have been more dignified than that. But he said, in effect, "We scare them by saying to them"—and it is so written in the manual—"if you will follow this judge, you will find therein your excuse and justification; if you do not follow him, you will not."

In England courts-martial procedure, notwithstanding the fact that the judge advocate general of the army has far more power than we, is subject in a far greater degree to the supervision and control

of the civil courts. The only way under our system that the judgment of a court-martial can be reviewed by the civil courts of the United States is collaterally, by way of a writ of habeas corpus, and no other. There a writ of prohibition will lie, and certiorari can be taken in some cases, and they operate within this knowledge that the legality of that judgment can be and frequently is questioned.

Senator KNOX. It means prohibition and certiorari from civil courts?

Gen. ANSELL. No, sir; lying directly to the military.

Senator KNOX. I say, from the civil courts.

Gen. ANSELL. Yes, sir; from the civil courts to the military courts.

Senator McKELLAR. Why isn't that a proper procedure?

Gen. ANSELL. Of course, our judiciary acts and powers are all to the contrary.

Senator McKELLAR. I know, but we are discussing a question of change now.

Gen. ANSELL. I can give you an illustration. If a man is restrained of his liberty, that is, if he is undergoing confinement by a sentence of a court-martial, you can test the validity of the judgment whereunder he is confined by way of a writ of habeas corpus; but suppose they take away a year's pay without confinement, then there is no way to test that.

The CHAIRMAN. Speaking of the English method, have you compared the punishment inflicted under our system of courts-martials with that inflicted under the English system?

Gen. ANSELL. No, Mr. Chairman; I regret that in our administration we really do not have much time for comparison. I can only say that I had heard a great deal when I went over there about the number of men who were shot and that kind of thing. I came back, however, with a changed view.

Senator WADSWORTH. A changed view?

Gen. ANSELL. Yes.

Senator McKELLAR. Why not make this officer a presiding judge of the court-martial and let him instruct in the law and not give him the right to sum up the facts? It strikes me that there should be an even-handed method of dealing with this thing, and I doubt very much whether that is even-handed justice.

Senator KNOX. That provides for practically the same functions as a trial judge performs.

Gen. ANSELL. Yes.

Senator McKELLAR. He is ready to do the same thing that is done in civil cases. It does strike me that if you have two prosecutors that virtually makes this man a double prosecutor.

Gen. ANSELL. That is not the purpose. The purpose is to express here in language—

Senator McKELLAR. This is a step in advance. There is no doubt about that. This is evidently a very great step toward progress in the matter of having a fair trial, but I think it does not go far enough. I can see the wisdom of having a presiding judge at that trial, but it seems to me that we ought to be very careful that that presiding judge is not a partisan and that he gives the court-martial, which is the jury in the case, the law as it is and guides them in that way, but does not guide them in their deliberations on matters of fact.

Gen. ANSELL. I think that was the purpose of subsection C.

Senator McKELLAR. Will you consider that when you come to revise this bill, so as to make him in truth and in fact a presiding judge?

Senator KNOX. Look at page 3, beginning at line 3. Doesn't the fact that the proposed statute makes his rulings and advice binding upon the court really make him a judge?

Senator McKELLAR. I think that is substantially a judge, but subsection C seems to me to rather give him a different status—more of a prosecutor than a judge.

Gen. ANSELL. The language used here is almost exactly that of the English system, Senator.

Senator McKELLAR. What change is made in article 11? Is it entirely different from the original article 11?

Gen. ANSELL. Oh, yes, sir; it is entirely different.

Senator McKELLAR. It is entirely different?

Gen. ANSELL. It is entirely different.

Senator McKELLAR. Have you a copy of that?

Gen. ANSELL. Article 11 had to do with the appointment of judge-advocates when they were prosecutors.

Senator McKELLAR. That is the same as the English law?

Gen. ANSELL. Yes, sir.

Senator McKELLAR. I think that is a long step in advance, but I think the presiding judge could be made more impartial by a change in the language.

Gen. ANSELL. The next section is the appointment of the prosecutor.

Senator KNOX. What section is that?

Gen. ANSELL. Section 2, page 3. In changing the functions of a judge advocate from those of a prosecutor to those of a judge, why, of course, it was necessary to constitute a prosecutor, and that is designed to be done here in section 2.

Senator McKELLAR. That is very admirable, except that there is no prohibition, so far as I can see, that this prosecutor shall not be the judge advocate presiding at the court.

Gen. ANSELL. There seems to be. You have got to have these two functionaries for each court-martial.

Senator McKELLAR. I think that probably is a proper interpretation.

Gen. ANSELL. I will read it:

"Article 17. Appointment of prosecutors.—For each general or special court-martial the authority appointing the court shall appoint a prosecutor, and for each general court-martial one or more assistant prosecutors when necessary."

Then you have section 1, part of which reads:

"For each general or special court-martial the authority appointing the court shall appoint a judge advocate."

Senator McKELLAR. In other words, you consider the judge advocate in section 1 as a part of the court, and when you direct the court to appoint, it means some other man not a member of the court?

Gen. ANSELL. Yes, sir.

I think the difficulty, as I find it in section 2, will be reflected by an amendment that I would suggest. In line 22, the third line from

the bottom, I think there should be interlined before the word "counsel" the word "military," so that that part of the section would read, "In all court-martial proceedings, the accused shall have the assistance of and be represented by military counsel of his own selection." That is an absolute right.

Now, add to that "and he may have the like assistance of civil counsel, if he so provides." Then, read on in the way that I shall read. I will indicate the changes later:

Such civil counsel shall be civilian lawyers and such military counsel shall be officers of the Army, and any officer of the Army under the command of the authority appointing the court who shall be selected by the accused, shall be assigned as counsel unless the appointing authority shall furnish the court with a certificate, which shall be placed in the record, that such assignment will work a manifest injury to the service and setting forth the reasons therefor. If military counsel be not selected by the accused, the authority appointing the court shall assign as military counsel to assist in his defense an officer who is well qualified as to rank and experience in the service and who has, if any such there be within the command, special learning in, or aptitude for, the law.

I think that that language ought to be made to meet a very serious practical deficiency which certainly has stood in many cases (and I say this after having reviewed many cases during this war) between man and justice.

The present articles of war provide that a man shall have assistance of counsel and the regulations require the commanding officer of the post at which the trial takes place to detail and assign to this accused counsel. Here, I think, is where we have had a very serious failure of military appreciations. We do not take a man as counsel who is of sufficient rank and experience in the service to impress that court.

Senator THOMAS. May I interrupt you for a moment? I would like to know whether the officers comprising these courts-martials are entirely officers of the Regular Army, or whether they are officers of the Regular Army and those of the National Guard also?

Gen. ANSELL. They are mixed.

Senator THOMAS. What is the proportion?

Gen. ANSELL. It would be difficult to say, but, of course, the very, very great majority of officers are the newer officers. I have observed—it is only an impression, however—a regular or so on nearly every court-martial. I do not know that it is always so. It is only an impression.

Senator THOMAS. I do not know that it makes any difference. The matter was suggested to me and I was requested to ask the question.

Gen. ANSELL. I think it is of extreme importance that this service be required by law to appreciate the necessity of giving a man as good military counsel as can be provided for him, and not regard it as a disagreeable and distasteful task to which the newer second lieutenant is to be assigned.

I referred the other day to these cases, and they illustrate the important difficulties, as I have observed them, as well as any others. A man on trial for his life comes up before a court consisting of five or six men. A colonel sits here. I do not think we need mince matters. A second lieutenant does not take a very aggressive stand or attitude in behalf of the law if a colonel is opposing him here. That trial indicated this. You can not miss the point. The second

lieutenant does not know what to do. In the first place, he is frightened out of doing probably what his instincts would suggest that he should do. The accused comes up charged with a capital offense. Then comes the arraignment, and the question, "How do you plead"? And the second lieutenant, flanking the accused, permits him to plead guilty; and the court promptly sentences that man to death. Everybody gets rather insistent that upon such a record he should die.

Senator SUTHERLAND. Would not the appointment of a second lieutenant in such a case show a predisposition on the part of the convening authority to be intent on convicting that man, regardless?

Gen. ANSELL. I would hardly put it that way, Senator. My own view of the difficulties, so far as human agencies are concerned in them, is this: We have gone along here for years with these legal deficiencies uncorrected. They have become the custom. I know that the duty of counsel is a disagreeable one. Because of the fact that we have got a lax system a system which itself does not establish legal appreciations, certainly men who are administering that system may be expected to fall rather below the appreciation which the law itself has not established. It is perfectly useless to expect human beings to have a high regard for the court and its functions if the law itself does not have a high regard for the court and its functions. I presume it is a bit of human experience that the law can speak in most emphatic and dignified terms but the waywardness of human beings rather lowers it in practice.

Senator WADSWORTH. In this matter of counsel for the accused, under the present system, if the accused says he does not ask for counsel, there is none, is there?

Gen. ANSELL. There is none.

Senator WADSWORTH. I have a case before me of that kind.

Gen. ANSELL. Senator, I think we might as well speak frankly about these things. It was rather a common experience when I served with the line, and I believe it is now, that the duties of a judge advocate were considered disagreeable. I mean the prosecutor. Those were duties in addition to the regular duties. The judge advocate goes down to the guardhouse and he interviews one or a half dozen or a dozen prisoners, all of whom are awaiting trial, and he is to prosecute them all. Now, to prosecute a case, of course, is a very much more difficult thing than to accept a plea of guilty. He is a sort of counsel for the accused and he is the judge advocate. He looks into the case, and very frequently, I think, the influence of that judge advocate upon these alleged offenders is such that many of them come up without counsel and plead guilty. I have known this suggestion to be made: There is not very much need of your asking for counsel in this case; it is a trivial case; or, it is a good case against you; but if you plead guilty I will do my best for you before the court, and ask its clemency.

Senator WADSWORTH. In this particular case, a man plead not guilty, but would not ask for counsel. The result was there was no testimony and he got a 10-year sentence.

Gen. ANSELL. This would cure that. Under this bill, they must assign counsel. I think the law should go so far, if we are going to correct the deficiencies of the existing law, as to say that the

appointing authority has got to assign an officer of rank and experience, a man of legal aptitude, if he has such a man. I regard it so myself. I may be a little obsessed with the idea, but I would conceive it my duty, if I were not in the Judge Advocate General's Department, if a man wanted me as counsel, to serve that man as best I could. I could conceive of no higher duty than to serve that man. If I were the appointing authority I would appoint a brigadier general to defend a man in a case regardless of rank.

The CHAIRMAN. You have suggested amendments to that section. How about the next one?

Gen. ANSELL. I would like to discuss section 6. I think that is one of the most important corrective sections of this bill. I should explain the existing situation. The one idea, I say, was that these were not courts; they were administrative or executive agencies controlled by the convening authority. As a result of the practice under that premise, if there were an acquittal by this court, the record would come to the convening authority. He may say, "I disagree with that; the man ought to have been convicted." He sends it back to the court with the insistence that a man, especially a military man, is apt to manifest when he wants a thing done. We may call it a recommendation, advice, instruction, or whatnot, but a thing like that coming from a military superior is a very potent thing.

Senator THOMAS. It is a mandate.

Gen. ANSELL. He can send it back and—

Senator McKELLAR. It will be tried by another court-martial that will do his bidding?

Gen. ANSELL. The same one. He does not convene another court.

Senator McKELLAR. The same one?

Gen. ANSELL. Yes, sir. While it may not appear so gross in the individual case, in the aggregate it is a great evil. There are many, many military offenses which consist of various elements. We know of them in the civil law. We have all those of the civil law, and more. There is murder, and the less included offense of manslaughter; assault with intent to kill, and so on; rape with assault with intent to commit rape, and so on. Among the military offenses there is desertion, which includes as one of its elements, absence without leave. There are others. The court very frequently find the accused not guilty of the larger offense as charged, but guilty of the lesser included element thereof, which, of course, is an acquittal of the larger offense charged. The appointing authority who convened that court and passed upon those charges and said that the offense was sufficient to sustain them, very frequently disagrees with considerable insistence with that court, and sends the finding back and says, "The evidence in this record does make out the larger offense as charged, and you should change the findings and sentence accordingly." If there is any reason for that section at all, in my opinion, there is abundant reason of the greatest cogency for changing it in these respects. In line 12, page 5, strike out the words "shall the appointing authority direct it," and substitute therefor the words "be directed by any authority whatsoever," so that the clause would read "nor be directed by any authority whatsoever to reconsider its findings." Then, at the end of the section add this: "And in no case shall any authority whatsoever suggest, recommend, or direct that a court-martial change a finding of guilty once made

to a finding of guilty of a more serious offense or of an offense punishable with a greater punishment, or that a court-martial increase a sentence imposed by it, nor shall a court-martial on any revision of such a finding made or sentence imposed by it have the power to make any such change of finding or to increase the sentence awarded."

At the present time we acquit a man and he is not acquitted. He knows nothing about it. The convening authority can argue with the court and impose himself upon the court, and the man does not know what has happened to him until the convening authority has approved or disapproved the judgment of that court and published it.

Senator THOMAS. I think you said when you were before the committee day before yesterday that in some instances men were convicted before a court-martial of offenses other than the offense charged. Have you made any recommendation with regard to that subject? I think any change we make should prohibit the arraignment of a man for one offense and trial for some other offense.

Gen. ANSELL. I think so, also. Senator, I have not suggested that here, probably for the reason that I have been impressed by the present practice of our office that we will not permit a court-martial to change from a specific offense to a general one, for instance, in violation of good order and military discipline. We will keep the court confined to the larger offense charged or the lesser included element of it. In the present Articles of War that is something which I think has been the subject of abuse and might well be corrected, if we were going into that.

Senator THOMAS. I do not think we should make two bites of the cherry. If we are going to correct these defects in military jurisprudence, we should make the correction as complete as the evil requires.

Gen. ANSELL. I would like to read this:

ART. 37. *Irregularities—Effect of.*—The proceedings of a court-martial shall not be held invalid nor the findings nor sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or proceeding unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles.

I think that article is subject to the greatest misconstruction and abuse, in that by implication it may be said to place beyond the realm of error the switching from the offense charged to an entirely different offense, provided the latter offense were one so denounced in the Articles of War. Speaking of that article, I do not think there was any necessity for it. I think it proceeds upon the proposition that we did declare many courts-martial invalid. We all know the history of this kind of statute as it appears in the civil law. It is to correct the meticulous reversals of courts of appeal and prevent them from saying, for instance, that the indictment was bad in that it left out the article "the." I remember that one court said the omission of the definite article "the" was enough to destroy the bill. That kind of statute has got to be a popular form of enactment in recent years. It never could have had application to courts-martial, because we were not abusing any power to declare courts-martial invalid. The opposite was the case.

The CHAIRMAN. Are you suggesting an amendment to that that will repeal it?

Gen. ANSELL. I will suggest an amendment.

The CHAIRMAN. I wish you would, so that the revised bill will show it.

Gen. ANSELL. Section 8 is designed to confer upon the Judge Advocate General of the Army a power which, obviously, everybody here by this time must understand, I think, ought to be conferred upon it. It is rather plain. It confers power upon him, a power analogous to that which any reviewing authority has under existing law. If you are the authority that can convene a court-martial, when that comes to you, you are authorized to disapprove the finding of guilty and approve only so much of the finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

The CHAIRMAN. Are you discussing section 8?

Gen. ANSELL. Section 8.

The CHAIRMAN. This does not seem to touch the subject you are now discussing.

Gen. ANSELL. I think on your print it is section 7. I am referring to the power under "A," which would authorize the Judge Advocate General of the Army, after the record of the proceeding has come to him, and he, upon revision of that record, shall find that this man ought not to have been convicted of murder, for instance, but of manslaughter instead, or ought not to have been convicted of desertion, but absence without leave instead, or ought not to have been convicted of rape, but assault with intent to rape instead, to change to that, of course, in the interest of the accused.

"B": "Power to disapprove the whole or any part of a sentence for errors of law" which, of course, is in the interest of the accused.

"C": "Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any."

That is looking to a new trial in a proper case. I have said that even if we had the power to set aside the judgment of a court-martial for error of law committed in a proceeding substantially prejudicial to the rights of the accused, the result must be to acquit, though an inspection of the record may clearly show that the man should be subjected to a legal trial.

We have just had one of the most serious cases. In fact, I doubt if there has ever been a case in the annals of criminal jurisprudence in this country more heinous than the one charged. I think every error in the calendar of errors was committed in that case from the beginning to the end. If some controlling fate had guided the progress of that trial, it could not have made a better job of guiding it invariably into error. The court never did anything right.

The CHAIRMAN. Was that in this country or in France?

Gen. ANSELL. Here. And yet every man who reads the record knows that some of these men, at least, ought to expiate the crime which doubtless was committed.

The CHAIRMAN. What was the nature of the case?

Gen. ANSELL. Rape. Here was my dilemma. Should we hang these men when I knew and every other lawyer would know who ever inspected that record that we were hanging them, however guilty in

fact they might have been, after one of the unfair and most illegal of trials? No. No man upon his conscience and oath of office could do that. And yet, if you did not do that, should they go scot free, when the record indicated that the crime was committed by some of the men, and probably by most of them? Under the rules of the War Department our dilemma was to find some jurisdictional peg upon which to hang an opinion or a decision to set the whole thing aside as though the court were coram non iudice and never existed, or work jurisdictional error out of it such as would annihilate the judgment and make it as though there had never been a trial, and yet we were running the risk of coming in conflict with the Fortieth Article of War, which says that no man shall be tried twice for the same offense after the judgment has been approved and with other fundamental principles.

Senator JOHNSON. You have aroused my curiosity. What case was that, who convened the court, and who conducted the case?

Gen. ANSELL. Your question is giving me considerable pause, and I think I will explain to you my own personal dilemma and ask you if we had not better strike all of this from the record.

Senator JOHNSON. No. If you feel that there are limitations upon your speaking in reference to a specific case by virtue of its pendency or by virtue of interfering in the matter, that would end the inquiry; but that there is such a specific case I do not think should be stricken from the record.

Gen. ANSELL. I do not know what the situation requires. I do not mind saying to you that if I could ask the committee to direct the reporters, if there be any others here, that they do not take this down—

Senator THOMAS. You have reference to the official reporter?

Senator JOHNSON. I do not want to make any inquiry that is contrary to what ought to be asked or which would in any degree militate against the action which may be contemplated, but if it can be told at all, in your judgment—and I leave it to your judgment for determination—I would like to know who convened that court, who conducted such a case, and what the case was. If it can not be done, and you say so, that is the end of the inquiry for the present.

(Informal discussion followed, which the reporter was directed not to record.)

The CHAIRMAN. There was quite an insistent demand in the Senate, General, yesterday that the names of the men who have constituted these courts throughout the Army and who have imposed these terrible sentences for trivial offenses, be given by this committee, or be obtained by this committee. Is there any way to obtain those names?

Gen. ANSELL. Doubtless that is true, Senator. But I should feel impelled to rely upon the principle which I think is applicable in such cases. With all the complaint or criticism, or whatever it may be, that I make of the judicial functions which have been exercised by the Army, I do not think I could be forgetful of the principle that these men have certain powers conferred upon them by law and as a general proposition can not be held personally responsible for anything that is actually lawful under the system, however erroneous.

The CHAIRMAN. The Congress would not have power to punish the men, but I think the country, if the people knew who they were,

would hold them morally accountable, at least. There is no question but what their names can be ascertained.

Senator THOMAS. That depends upon the extent to which the members of the courts-martial are free agents. I can readily conceive of a court-martial, the members of which are units, acting either under duress or orders, or both. If that be so, the offense is not theirs so much as it is that of those who impose the duress.

Senator NEW. And also their superiors.

Senator SUTHERLAND. He makes the point that it is the fault of the system rather than of the individuals.

Senator THOMAS. Take the new subordinate officers on a court-martial presided over, we will say, by a superior officer and dominated by a judge advocate determined to convict. I hesitate about holding the individuals composing such a court-martial to that degree of responsibility that would apply if they were free agents. That is one of the faults of the system.

Senator NEW. Who is to tell in a case of that kind just how far they were responsible?

Senator THOMAS. Suppose the record would disclose?

Senator KNOX. I do not see how you are going to excuse officers, men who are intelligent, who have been connected with the United States Army, no matter how low their rank, from a failure to discharge their own individual duties merely because some superior officer is on the court-martial with them.

Senator THOMAS. I can see how it is easy to create an atmosphere of intimidation, particularly where the finding is not in accord with what the controlling influence requires, and which they can, by reversal, secure through orders.

Senator KNOX. I did not understand him to say or to intimate that the superiors dominated the inferiors in the sense of requiring them to do anything, but it was the mere relation between the two.

Senator THOMAS. They may not expressly require it, but this kind of a case was brought to my attention some time ago: A soldier had charges brought up against him. They were submitted and he was acquitted. A superior officer, dissatisfied with the result, reversed the proceeding, reconvened the court-martial, and virtually ordered them to find to the contrary. One of the minor officers incurred the displeasure of the controlling influence because he hesitated about doing so. That is what I have reference to. You have a young fellow with his shoulder straps on in the presence of a greater military power; and I can understand it.

Senator JOHNSON. I have a similar case in mind. Apart, however, Mr. Chairman, from the question of responsibility, I think cases such as are related by the general here and that are suggested as a reason for the reform of these laws, with which I am in full accord, ought to be presented in some fashion, so that we will know the specific cases, as well as deal in the generic terms in which we have been dealing. Now, I do not ask for those specific cases while they are pending, so that the general's views, as expressed here publicly, might be taken as influencing the decision or as violating the rule that he invoked a moment ago, respecting a position of trust, power, fiduciary relation, and the like; but those cases ought to be stated so that they may be known.

Senator SUTHERLAND. The general has already testified that there are probably eighteen or twenty thousand of those cases that have been reviewed by his office. A very large number of those probably had excessive punishments inflicted. If you are going to make public the names of those who sat in those cases, where are you going to stop? It would be rather an unfair thing to single out a few cases and let others go free.

Senator JOHNSON. But I would like to know the cases where injustice has been done the individual, and without pursuing those who committed, wittingly, or unwittingly, the injustices, I would like to remedy the injustice that has been done the individual. This is the reason that I would like to have put in the record these specific cases to which we have adverted.

Senator SUTHERLAND. Couldn't that be done better by a law which would enable the Judge Advocate General to review those cases where sentence has been actually carried into effect—review and remedy injustices that have occurred?

Senator JOHNSON. I would like to get the general's opinion on that.

The CHAIRMAN. Let me suggest this. We will probably have to take a recess in a few minutes. There is a gentleman here whom Senator Wadsworth wanted to have called. This gentleman is anxious to get away. He is a young doctor who has been in the army and who has come from the other side. He passed through Brest. He was an officer in the army. He has laid aside his uniform and knows something about conditions there. It was suggested by a member of the committee that he be permitted to speak to the committee now as he is going away this afternoon.

Senator THOMAS. Before we hear from the doctor, I want to offer this amendment: At the end of the word "returns," line 11, page 3, insert the following paragraph:

The accused shall be tried for the offense or offenses charged against him and for none others. The accused shall also be promptly furnished with an official transcript or copy of the charge or charges preferred against him and upon which he is to be tried.

(Thereupon, at 12.15 o'clock p. m., the committee took a recess until 3 o'clock p. m.)

AFTER RECESS:

The committee reassembled at 3 o'clock p. m., pursuant to the taking of recess.

The CHAIRMAN. The committee will be in order. You may proceed, Gen. Ansell.

STATEMENT OF BRIG. GEN. SAMUEL T. ANSELL—Continued.

Gen. ANSELL. After section 3 there ought to be inserted a new section. I say there, because it would logically follow section 3. It would be a section that changes the oath prescribed in present Article 19, so as to make it applicable to the prosecutor. That is a formal change.

Senator SUTHERLAND. I would like to ask the general whether the language of the bill as it is now presented, or as you have mentioned

it will include the revision of those sentences which have already been imposed and put into execution during the war just closed?

Gen. ANSELL. No, Senator, while I myself feel that something ought to be done, I have not undertaken to suggest any such amendment as that here, and I think, speaking frankly, I can say that my principal reason for not doing so is because we are touching a rather delicate subject. The office of the Judge Advocate General has given the appearance of making revisions, the appearance of making legal corrections, the appearance of guiding the administration of military justice, surrounded and limited always by the deficiencies, limitations, impossibilities of the existing code.

Senator KNOX. Have you not done the very best you could under the circumstances and under the law?

Gen. ANSELL. Decidedly, Senator.

Senator SUTHERLAND. Would it not be possible, and is it not the proper thing, to so word this law now, while we are working at it, so that some of those extreme sentences that have been carried into execution can be reviewed and mitigated or remitted?

Gen. ANSELL. I believe, myself, that it is within the power of Congress, so great is its power over the government of the Army, to provide functionaries and confer powers that would result in a revision of what has been done. It appeals to me in this: Take dishonorable discharges, many of which, of course, have been executed and the men are out of the Army, branded for their lives as having rendered not honest and faithful, but dishonest, service. Notwithstanding the fact that that was in accordance with the judgment of the court-martial, it seems to me that it is within the power of Congress, and that it might be practicable, to revise, to go into that record, and confer upon some functionary or functionaries the power to amend that finding, that sentence, notwithstanding it has been executed, so that upon a declaration by this revisory tribunal that dishonorable discharge ought never to have been awarded and executed, it shall be held for all legal intents and purposes thereafter that that discharge was not dishonorable.

Senator KNOX. Is it not within the power of the President to do all that under the pardoning power?

Gen. ANSELL. No, Senator.

Senator KNOX. Why not?

Gen. ANSELL. A pardon does not restore; it does not wipe out the fact that a man was convicted, and the fact that he was dishonorably discharged. The pardoning power does not amend the judgment. It does not modify the sentence as a legal fact, as a legal proposition. It simply wipes out as a fact the punishment.

Senator KNOX. I am talking about the case that Senator Sutherland referred to, about the reduction of this outrageous sentence to a more reasonable sentence. That is clearly within the power of the President. He can commute or reduce a sentence.

Gen. ANSELL. That is true; certainly.

Senator KNOX. And he can exercise that through any officials that he may designate to examine into the facts of the cases. The pardoning power of the President is rarely, if ever, exercised by the President directly.

Gen. ANSELL. Certainly; that is true.

Senator KNOX. The Attorney General has practically the pardoning power, because he reviews the cases and makes recommendations to the President, and in ninety-nine cases out of a hundred the President follows his advice, and I have no doubt that would be the case here. So that if there are men to-day actually suffering unjust imprisonment, their sentences could be modified through Executive clemency.

Gen. ANSELL. Yes; so that they shall no longer suffer punishment.

Senator KNOX. Yes. If a man is sent up for 10 years, he can reduce it to one, or can discharge him at once.

Gen. ANSELL. Suppose a man has been dishonorably discharged?

Senator KNOX. You have raised the question on a different class of cases when you speak of those.

The CHAIRMAN. The Secretary of War must feel that the power is lodged somewhere to exercise clemency. Otherwise he could not have released these conscientious objectors. They have all been let out.

Senator KNOX. The President has the power to grant pardons or commute sentences with respect to any offense against the United States, and this was held long, long ago to apply to military offenses.

Senator SUTHERLAND. But that requires initiation on the part of the man or his friends. A great many of these young men have no friends.

Senator KNOX. I should think they would be willing to initiate it. It only means that they would make the application to the President, setting out the grounds of their request.

Senator SUTHERLAND. There have been a great many cases, as the General has testified here, in regard to which they have reviewed the testimony, gone over the record, and made a recommendation to the convening power, and those recommendations have been disregarded. Certainly in those cases there ought to be some way to have those recommendations carried into effect, and, as the General states, the action of the President in exercising clemency will not reach them.

Senator KNOX. The President could make every one of those recommendations effective by the stroke of a pen. He has ample power to do it. The only question is the question now raised by the General, as to the effect of it upon an improper conviction. It would not remedy that.

Gen. ANSELL. No, sir.

Senator KNOX. But it would release the man.

Senator SUTHERLAND. Can we not do that here now, or provide some medium through which it may be done?

Senator KNOX. You mean establish a board to review all these convictions, and give them power to determine whether or not a conviction had been proper or not, of course.

Gen. ANSELL. I should think the power of Congress to make rules and regulations for the government of the Army could provide for a court which would have just as much power over the complete proceedings as the trial court itself has. That is, it looks to me entirely possible legally for Congress to create a board or review, now, that shall take up these cases; of course, with a limitation always that a new court could never increase the punishment.

Senator WADSWORTH. General, has not some commission been authorized to do this?

Gen. ANSELL. A commission has been created to recommend clemency. That, of course, is prospective, Senator.

Senator THOMAS. It is based upon the validity of the proceeding?

Gen. ANSELL. Exactly so.

Senator THOMAS. Like asking a governor to pardon a man whose conviction has been confirmed by the Supreme Court.

Senator WADSWORTH. Has the commission been created by order of the Secretary of War?

Gen. ANSELL. Yes, sir.

Senator WADSWORTH. Who is on it? How is it formed?

Gen. ANSELL. The commission that was created to make the study, so as to lay down some sort of rules of procedure through which we could get at this great number of records, consisted of Col. Wigmore, Maj. Hecksher, and myself. Whether the board that is to actually go into these records and make the clemency recommendations is to consist of the same officers or not, I do not know.

Senator WADSWORTH. What progress has your commission made in drawing up rules of procedure by which these records may be reached?

Gen. ANSELL. We have gotten out a blank form to be sent to the commandants of all prisons, and a form to be sent to the wardens of the penitentiaries requiring certain information, and when we get those we have determined, in order to get some sort of expeditious action, to give immediate consideration, so far as the consideration of such a vast number of records can be considered immediate, to that class of cases which is indicated as being a class that something ought to be done with right now, gotten rid of. Of course it is only a guess. The indicia of those classes are rather vague. We will put over here on one pile, however, so far as we can after a preliminary examination of all these records, those records that indicate that the man ought right now to be turned out, and we will put on another side those records which give evidences that they belong to a class that ought not to get out now, and for some time to come, cases where the record was not good, and which actually indicate that the man had a settled criminal state of mind. Desertion, for instance, is not a small thing. If the man deserted in time of war, and the record shows that he is a deserter, and he knew what he was doing was desertion and intended it, nobody is going to let him out to-morrow or for some little time to come.

Then there comes this great class of cases indicating nothing as to whether they ought to go out immediately or whether they ought to continue to serve for some time to come. Of course, that will be a larger class.

It is almost a physical impossibility to go into these records and glean from the records those human facts that would enable us to make a satisfactory, conscientious recommendation for clemency. But we have got to do something. So I myself—although I think this has been agreed on—am in favor of establishing, for the time being, at least, some sort of standard or arrangement that would apply to these rare, colorless cases in which there are no extenuating circumstances, and no greatly aggravating circumstances, something like a peace-time standard. I am advised that we should not say peace-time standard, but I say that I would try to find a guide over in the

peace-time limits to enable me to get rid of some of those cases rather quickly.

Senator SUTHERLAND. As you have stated before, Gen. Ansell, there would be this distinction between an act of clemency exercised by the President in these cases which would not necessarily indicate that the sentence was not an entirely just one, and a revision, such as your office might make, which would clearly establish the fact that the conviction should never have been had.

Gen. ANSELL. Exactly.

Senator SUTHERLAND. And that it was unjust in the beginning.

Gen. ANSELL. I have a case of that right here. I did not know I had it. Here is a case that came up on an application for clemency. I was referring to a sort of embarrassment that any office has when it undertakes to review what it has once reviewed, when it has been impelled to break away from the hard and fast crystallized rules that had hitherto governed it, when, if we could speak rather plainly, the force of public opinion has made itself felt, and we are actually going to break away from the old standards. Here is a case where I do not think the man ought ever to have been convicted at all; I am sure of it. Yet he was convicted, and under the hard and fast rules then obtaining, it was not possible for our office to make even a recommendation to anybody that the conviction should be set aside. It came up, as I say, on an application for clemency. Our clemency board looked at the offense as best it could, found that it had all been approved, found that it was desertion, and they said to me in a little memorandum, "No, we do not see that we can give this man clemency now," after they had made such a review of the record as they could.

I got a bit interested in the man, somewhat because he came from the section of the country that I came from, and doubtless from a similar class of people, and I said, "I should have to disagree with your review upon this application for clemency. I should do so for the reason that, in my opinion, this man never committed the offense of desertion. The only evidence, as I see it, in support of desertion, is such as may be found in the inference that may be drawn from prolonged absence. The facts, however, all negative, that this man entertained a specific intent never to return to his command. The evidence shows why he went away and why he stayed away. He went away and stayed away to be home during a critical illness of his father, and he returned the very moment that illness had terminated.

Senator THOMAS. Pardon me. Is that the incident you cited?

Gen. ANSELL. It may be. I am not sure about this. It must be the same one. But I say, there is a case where, if we could have gone into the record again and had a more liberal and authoritative power to revise, I would have had no hesitancy in striking down that conviction, on the ground that there was not sufficient evidence to show the intent. But when up against a system that gives you no such authority, a system that is very iron-bound, a system that says, when that court has found a man guilty of desertion, if there is any appreciable evidence to sustain that conviction it must stand, and you will make no recommendation even—it had to stand.

Here is a fact that would appeal to any man exercising clemency, anybody who knows those people, the poorer people of the south, knows exactly what happened in this case. Because of this defi-

ciency in the case—I do not say it was such a legal deficiency that the Court of Appeals would in a well-tryed case have been justified in setting aside the verdict—I said, on the application for clemency that feeling as I did about it, I should have let him go home. The record revealed to me a human situation. I know this class of people. They are desperately poor, how poor may be appreciated only by those who know their condition. Now, surely, this family, in their extreme poverty, needed this man, and whatever he had done he has been punished enough for it.

Now, you take a record like that. The truth of the matter is that man ought not to have been convicted of desertion, and it appears to me that if we had had a lawyer on the staff of the appointing power and with the authority carried by this bill, he would have been tried at most for absence without leave, and even if he had been tried for desertion, he would have been convicted at most for absence without leave, and he would not have been sentenced to this terrible punishment.

Senator JOHNSON. General, because I was not here yesterday when this case was referred to, what was the punishment inflicted originally?

Gen. ANSELL. This memorandum does not show.

Senator THOMAS. This statement was made, if it is the same case, that the punishment was death.

Senator KNOX. That is my recollection.

Gen. ANSELL. It was commuted, of course, to life imprisonment. It was regarded by the triers as a clear, cold case of desertion.

Senator JOHNSON. That sentence was commuted to what?

Gen. ANSELL. It must have been commuted to some very long term of imprisonment.

Senator FRELINGHUYSEN. What was the final result of the case?

Gen. ANSELL. I have let this case go to another official for his disposition. I do not know.

It seems to me if we were actually going to review these cases, you would have this practical embarrassment. Somebody has reviewed this case applying the strict, technical rule of law that if there is any appreciable evidence to sustain this conviction, a court of appeals can not reverse. And No. 2, on application for clemency, that was unfavorably acted upon. But if a court could be created and given the power to go into these records, I think the Court would actually be justified in saying, "This man was improperly—illegally, if you please—convicted of this heinous offense of desertion in time of war." Such a court would have to have the full power of an appellate tribunal.

Senator KNOX. Can not the President do that in granting clemency?

Gen. ANSELL. No, Senator.

Senator KNOX. I beg your pardon. I know of hundreds of cases where clemency has been granted because a man was not guilty of the offense charged. I recall, for instance, a case of this kind, a man was charged with passing counterfeit money, and was convicted and sentenced to the penitentiary. The case came on application for clemency, it was referred to the Attorney General, and he reported to the President that the man was improperly convicted, because the evidence showed that what he had passed was a Confederate note, and

a Confederate note was not in the likeness and similitude of any currency of the United States, and therefore the offense was not covered by the statute defining what counterfeiting should be. He had a perfectly clear record after he had accepted clemency. You stated yesterday that to accept clemency is to admit the commission of the offense. That depends, in my judgment, altogether upon the grounds upon which clemency is awarded. If it is awarded upon the ground that he had not committed the offense, or that he was improperly convicted, it seems to me the result to the man is just the same as if that was the verdict of a reviewing court.

Gen. ANSELL. Of course, I should defer to the Senator, I am quite sure. But I myself believe the law to be such as not to distinguish among the reasons which impel the exercise of clemency. If it be awarded after conviction, while it has been said that the pardon wipes out the thing as though it never had occurred, in a practical sense that is true, but in a legal sense I still believe that the law is that the clemency, the pardon, whatever be the reason for awarding it, operates not upon the judgment. Even if the President does believe that the judgment ought never to have been rendered, and grants clemency for that reason, that judgment stands as a legal, valid judgment of that court forever.

Senator KNOX. I think, from a highly technical point of view, you are correct. But, speaking from my own experience as Attorney General, I know that in almost every case I stated the specific reasons why the President ought to grant clemency, and in many, many, many cases, it was because the man was illegally convicted, in some cases ought not to have been indicted. The result to the man is practically the same as if that same result had been reached through a technical reviewing court.

Senator SUTHERLAND. But if, at the same time, in a military case, the man had been dismissed from the service, if an officer, or discharged from the service as a private, the exercise of the clemency would not go to those penalties.

Senator KNOX. The President might order him restored, just as in all cases such as I have indicated there was always a provision for the restoration to civil rights and immunity from all of the penalties that were incident to the crime.

Gen. ANSELL. We have had many cases, I think, of that, Senator, where an officer has been dismissed, and the question has arisen, and they have been referred to the Attorney General from time to time, usually, I think I might say invariably, with one result: inasmuch as the man has been dismissed from the Army, it can not be the effect of the pardoning power to restore him to the place which he did hold; that would require a new appointment at the hands of the Executive.

Senator KNOX. Certainly.

Senator SUTHERLAND. Or an act of Congress.

Gen. ANSELL. An appointment, also. This has a very practical effect with us, even getting away from the technical concept that the pardon proceeds upon the premise that the judgment is good in all respects.

Senator KNOX. While I have no objection, General, to the creation of such a court of review as you have indicated, my whole point is

to indicate that there is no absolute necessity to wait until the court is created before a great many of these injustices can be remedied.

Gen. ANSELL. There is a board, of course, that is attempting to do that. I wanted to point out, however, some of the difficulties that we always have when we separate a man from the service by dishonorable discharge, or dishonorable expulsion of any kind.

There are a good many statutes which prescribe qualifications for admission to the Army, qualifications for office in the Army, qualifications for enlistment, and it is the long-established rule of the War Department, concurred in, I suppose, by the Attorney General, that, inasmuch as these are statutes establishing affirmative qualifications for admission to the military service, the President may pardon as he pleases, but the effect of the pardon is not to restore the qualification that the statute affirmatively requires. Therefore a man dishonorably discharged, though pardoned, will not be eligible to enlistment, and a man dishonorably dismissed would not be eligible to re-appointment.

Senator KNOX. I think you are mistaken about that.

Gen. ANSELL. I am referring to the fact of the War Department ruling, which is a very ancient one, and is adhered to.

Senator KNOX. The effect of a pardon is as if the offense had never been committed.

The CHAIRMAN. Yes; but he says under the War Department rules, notwithstanding the pardon, he can not be reinstated in the Army.

Senator KNOX. I think that is a mistake. As I say, I think the effect of the pardon is as if the offense had never been committed, and any limitations upon his right to join the Army that result from his conviction are removed by the pardon. That is my position.

Gen. ANSELL. I should like to agree with the Senator, and attempted to do so in a memorandum not long ago, but I was met the fact that there were 40 years' precedents against me. The fact is clemency does not affect the legality of the judgment.

Senator KNOX. Sometimes precedents older than that are wrong.

Senator NEW. It would seem to be, Senator, that you are absolutely right in that a pardon is no pardon unless it does that.

The CHAIRMAN. Yes; but the General says he agrees with Senator Knox, but notwithstanding the general rule of law which reinstates a man as he was before, the War Department has adopted a rule which practically says it does not do that.

Senator NEW. I quite understand that, and my attention has been more than once directed to the fact that the War Department does so rule.

The CHAIRMAN. General, have you finished with the suggestions on this bill?

Gen. ANSELL. No, sir. I regret that I do not get over it a little more hastily.

I believe that section 7 of this bill, if it were to proceed upon the principles that I believe to be correct, and which lie at the very base of this bill, ought to be amended by adding—and this is very important, because it is fundamental, and may not be agreeable; but, nevertheless, it is fundamental, and, in my judgment, necessary—at the end of that section, language like this:

Any supervision and control over the Judge Advocate General's Department conferred by existing law upon the Chief of Staff or the General Staff Corps

shall not be held to apply to the powers and duties established in any officer of said department by this act.

This section undertakes to confer this revisory or appellate power upon the Office of the Judge Advocate General, but it would have to be construed together with the General Staff act of 1903, which expressly places the office and duties of the Office of the Judge Advocate General under the same supervision and control of the Chief of Staff and the General Staff that the various supply bureaus of the Army are under. If the theory be right that these functions are judicial, these functions ought not to be subject to the supervision and control of a military commander.

After section 7 I think there ought to be a new section that should read like this:

Section 7½. For each force of the Army stationed or operating beyond the continental limits of the United States the Judge Advocate General shall, whenever the Secretary of War deems it advisable so to do, designate an officer of the Judge Advocate General's department to be the deputy Judge Advocate General of that force, and such deputy Judge Advocate General shall, under the general supervision and direction of the Judge Advocate General of the Army, have the same power to revise and act upon general court-martial proceedings in said force as is conferred in section 1 hereof upon the Judge Advocate General.

The purpose would be to enable these functions to be performed in the Philippines, Russia, France, or wherever our Army might happen to be operating in time of war. So far as we exercise any revisory power at the present time, that is the method pursued.

There is another section we have added just ahead of the last section, the purpose of which is to do nothing more than to postpone the taking effect of certain sections of this act, in order that the troops abroad, if it were enacted to-day, might be accommodated. That section is this:

That certain sections—

They are only those sections that indicate these changes from prosecutor to Judge Advocate General, etc.—

of this act shall become effective and be in force in the Army in Europe and in Porto Rico and the Canal Zone on the twentieth day after approval, and elsewhere beyond the continental limits of the United States on the fortieth day after approval, and all charges referred for trial before such sections become effective shall be tried, and all court-martial proceedings pending at the time said sections become effective shall be completed in the same manner and with the same effect as if said sections had not been enacted.

If I may indulge a general remark—because I am through with my suggested amendments to the bill—the difficulty is with the system. The system has become a thing that is crystallized to the point beyond which one may not go; he can not go successfully. This is due to adherence to precedent, honest difference of opinion springing from views that have been long held. The system does not restrain natural impulses, does not require that military justice be administered in accordance with legal principles, but, on the other hand, permits it to be administered only too frequently according to ordinary human desire. The existing system, in my judgment, is the best example of government not by law, but by man, that we can find.

From my earliest service I have been impressed with the hard and fast system of the military code and its failure to coordinate and

adopt the analogies to be found in civil procedure. Feeling that way about it, I have had to act, upon occasion and whenever I have had the authority to act, accordingly. When the Grafton case, in 1906, came to the Supreme Court of the United States, I felt so strongly that the principles of law which governed the courts-martial ought to be as nearly as practicable the principles of law which govern our ordinary civil tribunals, that I asked the War Department that I might act as counsel for that man before the Supreme Court. The question involved there, as I said to the committee the other day, was whether these great principles of fair trial found in our Bill of Rights and in the common law actually governed the courts-martial, and I was intensely interested in and anxious to see that principle established. I was not counsel in that case, but the principle was established, and now we ought to have legislation that proceeds upon that premise.

Falling in command of our office by virtue of seniority in the early days of 1917, I came across many cases which were absolutely beyond the power of correction according to the established rules of law, as construed by the department.

In October, 1917, I had the office make a study which resulted in the office opinion holding that the Judge Advocate General of the Army has authority, and should have the authority, to revise, modify, set aside, and reverse judgments of courts-martial, and pointed out the special necessity of the existence of this power during this war which was to be fought by a new army just to come from civil life.

On November 10 I filed the opinion so holding. The Judge Advocate General and the Secretary of War took the opposite view. The Judge Advocate General filed a brief in opposition. There is no reason why lawyers should not have differed about this. I myself had felt so long and intently upon it, probably my mind was closed. But again there was a lack of system. Did we or did we not have any such power? Nothing but one word in a statute. I felt so strongly that we needed this, that I sought and received special permission to file a more complete brief. This was done in early December, 1917.

Again the authorities of the Army—the Judge Advocate General, the Inspector General, the Chief of Staff, and the Secretary of War—resisted the view that such a power did exist under the law. About this time the negroes were hanged in Texas, without any review of their cases, and I again filed a memorandum to show that here was a rather tragic exemplification of the necessity of deducting from somewhere this power of judicial review and supervision, and I animadverted upon the hasty execution of these men without legal supervision, without affording them time within which they might have sought the clemency which I suppose is every man's right, had they been so disposed.

Those views were not the views of the Army, they were not the views of those in authority. I have not been charged with the responsibility of administering that office since the time that brief was filed in early November, 1917, until the middle of July, 1918, when I returned from France. But the fact of the matter is, a man there feeling as I did would have attempted to deduce, and would have deduced, the authority if his superiors had agreed, and a man feeling

differently would have resisted. But there was no explicit word of Congress that you could rely upon to see that this justice was done. It was a man's view all the time.

You could not sit there in that office and see these cases come without realizing that something had to be done, some system had to be adopted or found, for the correction of these errors.

In January and February, 1918, while discussing whether or not the administrative method adopted in General Order 7 would give us relief, I said that while I approved it as far as it went, I conceived it to be utterly inadequate; again I urged in written memoranda the necessity for greater legal supervision of courts-martial, but again the system did not permit.

The CHAIRMAN. May I interrupt you right there a moment?

Gen. ANSELL. Yes.

The CHAIRMAN. I thought I saw in the proceedings of the House a criticism of you in that you had the administration of the Judge Advocate General's office during the war, and that if there was any harshness or any injustice in the administration of it, you were responsible. Did you note that?

Gen. ANSELL. No, sir. Somebody mentioned it to me.

The CHAIRMAN. I do not know where it was, now, and I do not recall who said it. But I believe you have explained that you were simply a subordinate?

Gen. ANSELL. Exactly so. But I mention the efforts I made only to show the impossibility of getting administrative methods that will achieve what we want achieved. Of course, I was not in control from the time I wrote this brief until July. I was relieved from supervision of military justice from the time I wrote this brief until the time I got back in July. Military justice matters did not pass over my desk. Notwithstanding that, I sought at every opportunity to establish closer supervision by any means known.

Senator THOMAS. Let me understand that last answer a little more clearly. Do I understand that after you filed this brief which was introduced here day before yesterday you were relieved from consideration of a class of cases which up to that time you had charge of?

Gen. ANSELL. Yes; by reason of this, Senator, the Army was very much disturbed by this—

Senator THOMAS. By what?

Gen. ANSELL. By the fact that this effort was being made.

Senator THOMAS. By yourself?

Gen. ANSELL. By myself, and by my office. When the Judge Advocate General went to the Provost Marshal General's office, I was in charge. Under the instructions, I did not consult with anybody. I administered the office. It was while I was doing this that I wrote this opinion, which was an office opinion, I being in charge. I say that created a great deal of—

Senator THOMAS. Friction?

Gen. ANSELL. No; a great deal of fear in the War Department.

Senator THOMAS. Apprehension?

Gen. ANSELL. Apprehension lest this judicial control that I was contending for here should take away something from the power of military command, and lodge it in the hands of the judge or lawyer—an honest fear, doubtless, as voiced by the Acting and the Assistant

Chief of Staff, the Inspector General of the Army, the Judge Advocate General of the Army, and the Secretary of War.

The CHAIRMAN. In other words, it took away a large part of the supervising, reviewing power?

Gen. ANSELL. Yes; the power of military command over courts-martial proceedings.

The CHAIRMAN. If this view had been maintained?

Gen. ANSELL. Yes.

Senator THOMAS. Do you mean that due to that fear or apprehension, your power was limited, or the cases which you were considering, or the class of cases which up to that time you had been considering, were put in charge of somebody else?

Gen. ANSELL. They were put in charge of somebody else.

Senator THOMAS. Some one under you?

Gen. ANSELL. A junior to me in the office.

Senator THOMAS. So that virtually a junior in the office was substituted for you by the operation of the practice which then obtained in the department?

Gen. ANSELL. Yes. The Judge Advocate General himself returned, and the relation then between the officer in charge of the Division of Military Justice—there are many divisions in our office—became direct between him and the Judge Advocate General, whereas other matters passed through me.

Senator THOMAS. In other words, due to this position, the Judge Advocate General, who was then the Provost Marshal General also, resumed the control of the Division of Military Justice?

Gen. ANSELL. He did resume, and I was advised that this was at the direction of the Secretary of War, that these matters affecting policies of this kind would be passed upon by the Judge Advocate General.

The CHAIRMAN. Right in that connection, at the time you filed these briefs upon the subject, the Judge Advocate General himself filed a brief in opposition, expressing his views upon the subject, did he not?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. Did those briefs, all of them, reach the Secretary of War; or do you know?

Gen. ANSELL. Those briefs did; yes, sir.

The CHAIRMAN. Yours and his, too?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. And after they were submitted, the Secretary of War adopted the view of the Judge Advocate General?

Gen. ANSELL. Yes, sir; that was his view of the law.

Senator WADSWORTH. That was merely on the question of law, was it not?

Gen. ANSELL. That was on the question of law.

Senator WADSWORTH. Did the briefs discuss the question of policy?

Gen. ANSELL. Yes; my brief did very thoroughly. The opposing briefs also voiced the theory that the military law is peculiarly a law that has to be dealt with summarily, the fittest field of the application of which is to be found in the camp.

The CHAIRMAN. Would it be anything more than a guess for you to say what proportion of these harsh sentences would have been practically reversed or revised by the Judge Advocate General's office had the view you are insisting upon obtained?

Gen. ANSELL. I fear it would be a guess, Senator. But I think I could say this, judicial power ceases to be judicial power, independently and fearlessly exercised, the very moment it finds limitations in the power of any man—military commander or whoever. I have no doubt but that if this view had been adopted—and I am not criticizing anybody because it was not adopted—and we had felt free to go into those things, we would have been quick, certainly so feeling about it as I do, to detect every error of law, and wherever it was at all prejudicial to the accused, that judgment would have been reversed. With this power of supervision, court-martials could have been controlled.

Senator SUTHERLAND. During the period from November until July, was there any revision of these cases carried on?

Gen. ANSELL. Yes; a kind of revision, not as large and fulsome an administrative revision as came to be adopted after the department shook down, I might say, a bit, and I got back in July. We created some boards of review, consisting of very eminent lawyers, and made these reviews very formal and very impressive, and they must have impressed everybody who read them. But, again, they were only advice, carrying no authority, and I do not mind saying that when you are hedged in by limitations of that sort, you are bound to go at things rather timidly.

But with respect to the statement made anywhere, Mr. Chairman, that I am at all responsible for a failure to exercise legal supervision over these proceedings, such a criticism must be so far from the fact, so far from my whole course of conduct, so far from every conscientious regard that I ever had upon the subject, so far from what the record is, as to be utterly without foundation.

The CHAIRMAN. I am not sure that I saw it in the record. I thought I saw it somewhere.

Gen. ANSELL. It was just pointed out to me. But surely, whether I am right or wrong, a man who starts in prior to 1906, and who volunteers to do his best in a case then pending before the Supreme Court of the United States involving some of these very things, and who has been as active in an endeavor to establish these things as I have been at all times, can not be accused. It could probably be said of him that he may have gotten at times unjudicial, that he may have gotten at times too insistent, and may have appeared at times not to integrate very easily with an established order of things, but it could not truthfully be said of him that he was not earnest and anxious and at all times active in trying to establish what I think this bill does establish.

I was intensely interested in this thing in March, and I went abroad with that in my mind; and when I came back I filed a report, in which I set out, as best I could, the systems that I saw over there, in order that those systems might be compared with our own.

Immediately after my return, so impressed was I with the importance of establishing this legal supervision by administrative methods, which would result in giving advice, since it could be done by no other method under departmental rulings, we organized these boards of review (see Exhibits "L" and "M"), and they have done, I think, a magnificent work. But the opinions are a peculiar mixture of argument and logic and appeals to military power, putting all that you can in language to get a military authority to adopt the view. That

is, we were not speaking judicially, and we were not speaking with authority. We were trying to persuade military persons to do what we thought was right.

ORDERS ORGANIZING BOARDS OF REVIEW IN THE OFFICE OF THE  
JUDGE ADVOCATE GENERAL.

EXHIBIT L.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, August 6, 1918.

There is hereby created in the Military Justice Division of this office a board of review, to consist of such and as many officers of that division as the chief thereof, after conference with the head of the office shall designate. The duties of such board will be in the nature of those of an appellate tribunal and shall be performed with due regard to their character as such. It shall be the duty of the board, under the general direction of the head of this office and the chief of division, to review all proceedings of all general courts-martial received in this office which at present are reviewed in writing. The preliminary review of any such case, after having been made and prepared by the officer to whom the record has been assigned will be transmitted to the board of review, and thereupon the members of said board will proceed to consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in reaching and expressing their decision. The board may adopt the preliminary review as its own, may modify or rewrite such review, or may direct that it be modified or rewritten so as to express their views. When a majority or more of the board agree upon a review the review shall show the names of those who concur, but not of any who may dissent, and the review thus agreed upon shall be transmitted to the chief of division, with the record. Any dissenting member may indicate the reasons for his dissent, either orally or in writing, to the chief of division, and in important cases and where he so desires to the head of the office.

The members of the board may consult freely with the officer preparing the preliminary review and the head of the division, and may discuss the case with the head of the office when that course is agreeable to him. It is preferable, however, not to discuss the case with others. When practicable the board will be assigned sufficient room space, clerical force, and any other aid necessary and available.

S. T. ANSELL,  
*Acting Judge Advocate General.*

EXHIBIT M.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, November 6, 1918.

The board of review, Military Justice Division, created therein by office memorandum of August 6, 1918, is hereby divided into two divisions, to be known as "The Board of Review, First Division," and "The Board of Review, Second Division." The present personnel of the board will constitute the first division. The Chief of the Military Justice Division will, immediately after consultation with the head of the office, designate the personnel of the second division. The organization, constitution, procedure, powers, and duties of each division will be as prescribed in said office memorandum. Each division will function separately and independently of the other and upon cases assigned it by the chief of division, who will endeavor to see that cases of the same or similar character be referred as far as practicable to the same division.

S. T. ANSELL,  
*Acting Judge Advocate General.*

Senator SUTHERLAND. Mr. Chairman, I would like to suggest that the Judge Advocate General, in amending this bill, prepare a section which will reach those cases, that have already been decided, and

submit it to the committee for its consideration. Would there be any objection to that?

The CHAIRMAN. No. I think you could do that, Gen. Ansell, as a separate proposition, and we could consider it.

Senator SUTHERLAND. Will you do that, General?

Gen. ANSELL. Yes, sir. With respect to the pure clemency, when the department issued General Order No. 7 they issued an order which, during my absence, was held by the officer in charge of the office—and I think, as a matter of law, properly so—that we were limited in passing upon any question that came to our office under that order to the technical question of law, and as we were forbidden by the terms of the order to advise the convening authority that the punishment in this case was altogether too severe, and, notwithstanding the order, and notwithstanding that view that had been taken by our office, I reversed that view and instructed the boards of review to express their opinion, with the deference that the situation required, when they were addressing these military commanders, to the effect that justice would require that clemency upon their part in passing upon the sentences should be meted out, and that if it was a case in which the commanding general below himself could not do anything, that we would forward the proceedings directly to the President, which means to the Secretary of War. (See Exhibit N.)

EXHIBIT N.

INSTRUCTIONS TO BOARDS OF REVIEW TO RECOMMEND CLEMENCY IN CASES  
UNDER G. O. 7.

For the Chief, Division of Military Justice:

1. No system of administration of justice can be other than patently deficient which does not provide for an expeditious and, at the same time, thorough consideration of clemency; and a system which obstructs or delays the granting of clemency in a proper case is subject to severest criticism.

2. This office has within the organization of the Military Justice Division a clemency section, and this takes care of those cases which arise upon an application submitted by the prisoner himself. But this is not sufficiently general. Frequently it becomes perfectly obvious upon the review of a case in this office upon the receipt of the record, that the penalty is altogether too severe, or that for other reasons clemency ought to be granted and not deferred until an application should come from the prisoner himself. I can conceive of no better time to initiate a recommendation for clemency than upon the completion of the review of a case, when the impression of the incident of guilt is still well defined and the evidence and the circumstances of the commission of the offense are fresh in the mind. This office ought not to be limited in the performance of its functions of review to considering the strict technical question of the legality of the proceedings, but in its capacity as the bureau of military justice it should extend its consideration to include the question of clemency.

3. I have recently been advised that during my absence in Europe, it was held by this office, and the Division of Military Justice so instructed, that the functions of this office, in considering cases coming to it under General Order 7, were to be limited simply to the question of legality of proceedings and were not to be extended to the quantum of punishment and like matters affecting clemency; and that in such cases this office could not with propriety make recommendations to the reviewing authority upon matters of mitigation and remission.

4. While this may be a correct construction of the order, when it is viewed in one light, I do not think it is correct when viewed in the proper light. It could not have been the purpose of General Order 7 to impose a limitation upon this office. I am personally familiar with the origin and the administrative circumstances out of which it arose. Of course it is to be conceded

that it is the function of this office to pass upon an application for clemency after the reviewing authority shall have acted upon the receipt of our review, and his action shall have become final; and inasmuch as our review is now made before his action becomes final, it is seasonable to include within it our views upon matters of clemency. This becomes especially obvious in those cases of dismissal and dishonorable discharge which, when executed by the authorities below, pass beyond the power of clemency; and it was this very class of cases which General Order 7 reaches. If we confine ourselves strictly to the question of legality, while we have thereto assured that the sentence, if executed, is legal, it will at the same time pass beyond all restorative power.

5. I have to advise you, therefore, that hereafter your reviews shall include the consideration of clemency and your recommendations, and where, as in the case of dismissal of an officer, the authority below, even if he has the disposition, has not the power to mitigate, because of the fact that any mitigation must result in commutation, a power exclusively in the hands of the President, you will prepare your recommendation for clemency for direct presentation to the War Department.

S. T. ANSELL.

SEPTEMBER '18.

Thereafter, when I saw that these things were so poorly tried, with poor counsel, poor procedure throughout, I instructed the office to rely more upon the Grafton case to justify us in saying that we would determine upon the whole record whether a man had a fair trial or not, a fair and impartial trial, by reference to the bill of rights, and the other principles of jurisprudence that govern civil and criminal administration, and instructed the boards to review accordingly. (See Exhibit O.)

EXHIBIT O.

INSTRUCTIONS UPON THE METHOD OF REVIEW.

JANUARY 3, 1919.

Memorandum for Military Justice Division.

1. I have heretofore advised you frequently and informally, and I take this occasion to advise you more formally, of certain views of mine which I believe to be worthy of consideration and, perhaps, observation by those who have to do with the administration of military justice; indeed, in my judgment, must be observed generally in the establishment, if that administration is to be what justice requires it to be and what thoughtful public opinion would like it to be. I advise you thus that my views may not be misunderstood and that they may furnish you with a general guide in the review of proceedings and constitute your authority for action in which you and others may not personally concur.

2. Courts-martial are courts, tribunals for the doing of justice, as much so as any tribunals in the land, and they must be fairly and impartially constituted and they must fairly and impartially function. Judicial fairness in the case of courts-martial should be tested not only by the letter of the Articles of War, but by those principles established in our jurisprudence which are designed to secure fair and impartial trial and which are applicable to all hearings of a judicial character.

3. The former military view, which had received in this country considerable judicial support, was that courts-martial performed only executive functions and passed, in an administrative way, upon the military aspect of the misconduct of one subject to military law. The legal view now judicially established is quite the opposite, and is that courts-martial have full and complete jurisdiction over the conduct of all who are subject to military jurisdiction, with full power to try them not only for military offenses but for crimes against the general public law. This should bring to us in the Army, and most especially to those of us more directly interested in military justice, new appreciations.

Murder, for instance, tried before a court-martial, is none the less than murder tried before a civil court and jury, with none the less serious consequences for society and the accused, and should be tried with none the less thoroughness and fairness. Thoroughness and fairness of courts-martial should be determined with less inclination to regard courts-martial as tribunals sui

generis, and with greater regard for those fundamental safeguards with which the law beneficently surrounds every person placed in jeopardy. Articles of War having to do with rights of the accused therefore should be construed, both with respect to what they provide and what they fail to provide, more and more in the light of, and in comparison with, those constitutional principles which touch the rights of an accused in a criminal prosecution. Those principles should apply to courts-martial, except where clearly inapplicable to the military system.

4. I wish to speak now more specifically and give the general views above enunciated concrete application:

(a) My views are in conflict with the view advanced at times in argument \* \* \* to the effect that in determining the principles of fairness and impartiality to be applied to test courts-martial, those principles should be sought in the analogy of a Roman chancellor or judge. Courts-martial are criminal courts administering criminal law; they consist of from 5 to 13 members, and thus the very law of their constitution denies the analogy of the single trier of law and fact found in Roman jurisprudence, and clearly establishes on the other hand their analogy to the common law court and jury for the trial of criminal offenses; it is in that analogy, therefore, that we must seek the principles by which the fairness and impartiality of courts-martial must be tested. Applying these principles to a case now in hand, they serve, in my judgment, to prohibit the successive trial by the same court of several accused charged with the same or similar offenses, involving the same transaction, state of facts, and evidence.

(b) I further disagree with the view that article 37, as it exists in the military code, was designed to have, or does have, the curative effect which the Board of Review seems to me at times to attribute to it. That article does not permit us to register a legal conclusion that there was substantial error committed, and then to overcome it with the personal conclusion of the guilt of the accused gathered out of the entire case. No revisory power and no appellate court should ever reverse or disapprove, except for prejudicial error. The substance of the article appears nowadays frequently in civil codes, in which position it was clearly predicated upon the evil found in the disposition of some appellate tribunals to reverse for meticulous and fanciful errors, and was, therefore, designed to correct a bad judicial habit appearing in some places. It can not be truthfully said that the Army was ever given to meticulous disapproval or that there has ever been a tendency in the establishment to indulge too freely the power of disapproval. The contrary was quite true, in my judgment, and in this view I must think general public judgment concurs. This article, as it appears in the military code, is rather more of a grant of power than a limitation.

(c) In my judgment, punishments awarded by courts-martial during this war are properly criticizable in general for their undue and inexplicable severity. Frequently they are such as to shock the conscience. Such punishments violate justice and serve no proper end. They invite and merit public reproach. We frequently have to confess that nobody expects such punishments to be served. Such a confession, while true, is an admission of the injustice of the punishments, and is bound to bring courts-martial into disrepute.

I wish you would help me in determining the course which this office ought to take in making an effort to see that these unjust and severe penalties may be brought within the bounds of reason and justice.

5. The review of proceedings should be expeditious. The result should be made to turn upon substantial error, so tangible that we may have no great difficulty in discovering the principles touching it. To such, and not to inconsequential, error should our consideration be invited, and upon such should the case turn. With such error, however, justice will not permit us to compromise either by a resort to any assumed curative capacity of the 37th Article of War or any other consideration.

6. My sense of applied law and justice, with which others of course may differ, requires me to enunciate these views clearly and unmistakably and ask you to be governed by them until they may be superseded.

S. T. ANSELL,

Acting Judge Advocate General.

Everything has doubtless been done under the system, making allowances, of course, for people who are in authority, and who have a

right to differ, and who do differ—everything has been done that could be done under the system, though, as for myself, I think it would have been far better to have been less deferential to the old statutes and the old practices and the old precedents, and have torn them up, in order that justice might be done, so long as we could find a foothold to base our new construction upon.

Senator SUTHERLAND. Are you still engaged in the reviewing of these courts-martial?

Gen. ANSELL. Some of them.

Senator SUTHERLAND. Have there been any recent orders relating to that matter and changing your status?

Gen. ANSELL. Yes.

The CHAIRMAN. Do you mind stating what changes have been made? I do not want you to answer if you prefer not to.

Gen. ANSELL. An order was published routing all matters affecting military justice through other channels.

Senator SUTHERLAND. When was that order issued to you?

Gen. ANSELL. Maybe 10 days ago, I imagine. But I think it ought to be said that there is always a question as to what work is going to come to me or through me, and it was well within the province of the Judge Advocate General to decide such a matter, without any desire whatever to prevent my supervision of the administration of military justice. I do not believe that the publication of the order by the Judge Advocate General was designed to prevent my supervision of the administration of military justice, but rather done in the due course of administration and the division of work.

The CHAIRMAN. But it has had that effect—of separating you from that branch of the service?

Gen. ANSELL. Yes.

Senator THOMAS. There is something of a coincidence between the two things.

The CHAIRMAN. If there are no other questions, we will conclude the hearing.

Gen. ANSELL. I would like to add, in view of Senator Thomas's remark, that I appreciated the coincidence in November, 1917. I do not appreciate that there is this connection suggested here.

The CHAIRMAN. In other words, you think that the coincidence in November, 1917, came because of your opinion?

Gen. ANSELL. Doubtless. Because this has come up—I am a frank man, and I purpose to be frank about this—I think it was most unfortunate. I think it is always unfortunate in war to have a divided responsibility. My views were known, and they were not accepted. All well and good. But two officers can not control the same establishment to the very greatest advantage when one insists that the existing institution and order of things are wrong and ought to be changed. You may say I am a good soldier, and I am going to do what my chief says, and the Secretary of War says, and the Inspector General says. You may say all that. But, at any rate, I am not so compliant. However good or bad a soldier I may be, I kept trying, every time one of these cases comes up, to find a way of modifying it.

Senator THOMAS. That is, you mean modifying it when the facts shown by the records require it, in your opinion?

Gen. ANSELL. Exactly, trying to modify. I say that I understand the coincidence there, because of the reason that it was about that time that an order had been published, with the concurrence, I am going to say, of Gen. Crowder, that I should be designated as Acting Judge Advocate General under that statute which provides that the President may designate an officer in the department to act as the head of that department, with all the power and authority of the head of that department, when the actual head is absent; and Gen. Crowder and I, believing that he was absent in the sense of the statute, and I believing that responsibility ought to be fixed, that some one man ought to be appointed to and charged with this responsibility, I recommended, with the express concurrence of the Judge Advocate General—expressed, I mean, in my memorandum—that this order be issued putting me in charge. It was issued, and it was then revoked. I have no hesitancy in saying that the department did not agree with this view of mine, and I imagine that it largely does not agree yet.

The CHAIRMAN. You think, therefore, that your separation from that particular service at that time was all right, from the viewpoint of the differences which existed in their estimate and construction of the statute?

Gen. ANSELL. It is rather difficult for me to put myself in the place of another man in authority, Senator. I think if I had been in authority I should not have done that. But if the Secretary of War believed that this view would be harmful to the Army, it seems to me he had nothing else to do.

Senator SUTHERLAND. Are those boards of review functioning now as they were when you were directly responsible for these reviews?

Gen. ANSELL. I should assume so.

Senator SUTHERLAND. The work of the office is going along in about the same manner?

Gen. ANSELL. I do not know; I should assume that is true.

Senator FRELINGHUYSEN. Have you Gen. Crowder's brief which he filed? You filed your brief?

Senator THOMAS. It has been put in the record.

Senator FRELINGHUYSEN. Is it here? I want to ask one question only. I think it is in. Do you remember the indorsement of the Secretary of War when he sustained Gen. Crowder?

Gen. ANSELL. In general terms, yes.

Senator FRELINGHUYSEN. The Secretary of War sustained Gen. Crowder's views, did he not?

Gen. ANSELL. Yes.

Senator FRELINGHUYSEN. He also recommended that Gen. Crowder give a study to this subject tending to recommend legislation?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. That is part of the Secretary of War's indorsement?

Gen. ANSELL. Yes, sir.

Senator FRELINGHUYSEN. Was anything done by Gen. Crowder or by yourself in that regard?

Gen. ANSELL. I am quite sure that Gen. Crowder did something. The indorsement did not come to me, of course.

Senator FRELINGHUYSEN. You did not see it?

Gen. ANSELL. No, not until a long time afterwards.

Senator FRELINGHUYSEN. You were in cooperation with Gen. Crowder during that whole period, were you not?

Gen. ANSELL. Upon this subject?

Senator FRELINGHUYSEN. Yes.

Gen. ANSELL. I was not.

Senator FRELINGHUYSEN. You were making an effort to modify these sentences; you were anxious regarding them. Was there any effort on your part to secure any modification of the laws?

Gen. ANSELL. No, Senator; I was not connected with the administration of military justice after that, except as cases would be called to my attention as any man in an office. I remember I went to Gen. Crowder and discussed several cases. But as far as this study is concerned, so far as attempting to get any change in the law is concerned, I had nothing to do with that after I had ceased to exercise the functions connected with the administration of military justice. As I said a while ago, I was perhaps rather insistent at times in suggesting to Gen. Crowder my views about the inadequacy of the order that was issued, my views about the legislation that I think was proposed in January or February of that year as a result, I think, of the study.

Senator FRELINGHUYSEN. You were in conference from day to day with the Secretary of War on these cases, were you not?

Gen. ANSELL. No, sir; not between November 10 and the latter days of July.

Senator FRELINGHUYSEN. You had no other occasion to express your views regarding this situation and this system?

Gen. ANSELL. To the Secretary?

Senator FRELINGHUYSEN. Yes.

Gen. ANSELL. Not within that period; no. I can recall having adverted to it in personal conversations with the Secretary two or three months ago, for instance, but not in any formal or official way.

The CHAIRMAN. General, you spoke of this indorsement asking the Judge Advocate General to make a study of this subject, and submit a bill, or some relief measure. You have discussed the measure that was introduced here in the Senate in January, 1918, have you not?

Gen. ANSELL. Yes, sir.

The CHAIRMAN. That bill, which was the result, I suppose, of Gen. Crowder's study, was introduced in the Senate, some time in January, 1918, by me, and was taken up at one time by the committee and discussed a little bit, but no action was taken, because I think, as I recall it now, some of the members of the committee who were here took the view that that did not really give any more power than they already had under the act. But, at the time that bill was sent up, the Secretary of War, under date of January 19, 1918, wrote me a letter which accompanied the bill. I am going to ask to have the letter embodied in the record, here.

Senator WADSWORTH. I have no objection, of course. Has it a bearing upon what we have been just discussing?

The CHAIRMAN. It discusses this whole subject and I think that the bill that is attached to his letter, and which was introduced in the Senate, was the result of Gen. Crowder's study, and is a proposed

measure that would relieve the situation which was then in discussion between the different members of his force. The bill has already been read into the record.

Senator KNOX. I think the bill ought to go in with the letter.

The CHAIRMAN. It is attached to the letter, but it is already in the record. It is Senate bill 3692, amending section 1199 of the Revised Statutes. The note on the margin of our minutes says, "Not favorably considered." That bill was discussed by Gen. Ansell yesterday.

(The letter and bill referred to were subsequently submitted and are here printed in full, as follows:)

WAR DEPARTMENT,  
Washington, January 19, 1918.

Hon. GEORGE E. CHAMBERLAIN,  
*Chairman, Senate Committee on Military Affairs.*

MY DEAR SENATOR: I am inclosing herewith a draft of a proposed amendment of section 1199, Revised Statutes, which has my complete approval. I hope that it will likewise meet with the approval of your committee and that an opportunity may be found of securing its early enactment into law.

The general purpose of the proposed legislation is to vest in the President revisory powers in respect to sentences of courts-martial and other military tribunals. It has been the subject of thoughtful consideration by the Judge Advocate General and in the light of the new conditions which now confront us, it is believed to be both wise and necessary.

The proposed amendment involves three propositions, viz, (a) vesting in the President the power to disapprove, modify, vacate, or set aside either in whole or in part, any finding or sentence, and to direct the execution of such part of any sentence as has not been vacated or set aside; (b) the power to suspend execution of sentences in such classes of cases as he may designate until there has been opportunity to consider and act thereon; and (c) the power to return any trial record to the court through the reviewing authority for reconsideration or correction.

The first proposition finds its analogy in the civil courts, in the appellate power lodged in a supreme court. The second is a related power to suspend execution of a judgment pending appellate review, in order, when deemed advisable, to preserve the status quo. The third is to enlarge the power now exercised by the President so as to embrace cases coming to him for consideration under the provisions of the proposed amendment. At the present time the President exercises the power of returning to the court, through the reviewing authority, the record of any trial which has been forwarded to him for confirmation.

I believe that it would be wise public policy to lodge these powers in the President. He is the Commander in Chief of the Army, the supreme military authority, and bears to the Military Establishment and to the administration of military justice a relation analogous to that occupied by the Supreme Court in the structure of a civil judiciary. Upon him devolves the duty of securing efficiency and maintaining discipline in the military forces, and at the same time so to adjust the operation of the machinery of the military courts that, so far as possible, instances of injustice to the individual soldier will be reduced to a minimum.

The present Articles of War authorize any officer, competent to convene a general court-martial, to approve and carry into execution any sentence affecting an enlisted man, including noncommissioned officers, excepting the death sentence; and, in addition, the commanding general of a territorial department, or territorial division, or of any army in the field, in time of war, as the present, may approve and carry into execution a sentence of death in certain enumerated cases, or the dismissal of an officer below the grade of brigadier general (arts. 46-48). In these cases no confirmation seems to be authorized or contemplated by the President, although the officer approving the sentence may, if he sees fit, suspend execution until the pleasure of the President is known (51st article of war). In these respects the present Articles of War do not differ essentially from the prior compilations of 1806 and 1874, although in 1862, during the Civil War, it was provided by independent legislation that a sentence of death, or of imprisonment in a penitentiary,

should not be carried into execution until approved by the President. (Sec. 5, act of July 17, 1862, 12 Stat., 598.) The legislation which is now found in section 1199, Revised Statutes, originated in 1862 and thereafter went through sundry changes without affecting its essential characteristics. (Sec. 5, act of July 17, 1862, 12 Stat., 598; sec. 5, act of June 20, 1864, 13 Stat., 145.) Throughout the whole period that this legislation has been in effect it has been the practice for the Judge Advocate General of the Army to examine the records of trial by general courts-martial and other military courts primarily with the view of determining whether the proceedings were regular and valid, and to make report thereon through the Secretary of War to the President. During that whole time it has been the settled construction and practice of the War Department and its officers to regard as final and beyond appellate or corrective action the judgments or courts-martial when approved by the reviewing authority, except in cases where the proceedings were *coram non jure* or for other cause void *ab initio*. Thus it has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority, was final and could not be revoked or set aside by the President or by any department of the Government unless the court was without jurisdiction, or the proceedings were invalid, and that relief could be had only through the exercise of the executive power to pardon.

We are now assembling a large Army. Our young men are being drawn from the homes of the Nation and placed in military service, both in the ranks and as officers. A very large percentage of the officers of the new Army are of necessity drawn from civil life, and it is no reflection upon them to say that they have had little, if any, opportunity to acquaint themselves with the history, usages, or principles of military law, or the practice of military tribunals.

In our new Army, more than ever before, it is not at all unlikely that sentences may be imposed by courts-martial and approved by the reviewing authorities which, if carried into execution, will work great injustice to the individual soldier. In practice and under existing legislation the trial records now come to the office of the Judge Advocate General for review. In that office cases may be examined with deliberation far removed from the immediate atmosphere of apparent military exigency. It is the purpose of the proposed legislation, when it appears, after such examination, that the substantial rights of the accused were disregarded upon the trial, or the evidence is insufficient, or an unnecessarily severe sentence has been imposed, or for other cause the sentence should be modified or set aside, to vest in the President clear statutory authority to disapprove, modify, vacate, or set aside any finding or sentence, in whole or in part. In order that he may have an opportunity to exercise this revisory power, it is proposed to give him authority to suspend execution of such sentences until opportunity has been had for review by the Judge Advocate General and a report thereon to him. With this power conferred and this practice established, a person found to have been erroneously convicted, or upon whom too severe a sentence has been imposed, may in the one case have his innocence adjudged, and in the other the proper sentence imposed, and not, as now, be remitted for relief to the pardoning power of the Executive, which leaves the question of guilt untouched and operates only by way of Executive clemency.

It will be noted that the proposed legislation authorizes the President to designate the classes of cases in which sentence shall be suspended until the case has been reviewed by the Judge Advocate General, and report made to the President. In a great majority of cases tried by courts-martial there will be no necessity for the application of the new legislation, for instance, special and summary courts deal with minor military offenses. These courts have but a limited jurisdiction as to the sentences which may be imposed, and as to such sentences, it is believed that there is no good reason why final action may not be taken by the officer appointing the court. The classes of cases intended to be reached are those which involve a sentence of death, dishonorable discharge, or dismissal. By leaving to the President the power of designating the classes of cases in which execution of sentence may be suspended, pending his action thereon, the practice to be followed may be adjusted from time to time to meet changing conditions in the military situation.

Under the ninety-sixth article of war, courts-martial are given jurisdiction to try persons subject to military law for "all crimes or offenses not capital." Under this grant of jurisdiction persons in the military service are now frequently tried for the commission of civil crimes, and it is obvious that the

trial of these offenses by military courts, unlearned in the law, adds an element of uncertainty as to the legality of the outcome, which serves forcibly to emphasize the need of the revisory powers herein suggested for the protection of persons accused of crime, and to safeguard the administration of military justice.

When the existing Articles of War were revised in 1916 there was introduced as new matter the thirty-eighth article of war, which authorizes the President to prescribe rules of procedure in cases before courts-martial and other military courts. Under this grant of power the President has promulgated certain rules of procedure suspending the execution of sentences of dishonorable discharge, death, and dismissal until the records of trial in such cases have been reviewed in the office of the Judge Advocate General, but it is clear, for the reasons heretofore pointed out, that the exercise of this power does not meet all the requirements of the situation. In order to place the whole matter where it will be beyond cavil or dispute, and by a clear grant of statutory power to vest in the President an authority which he should, beyond all question, be authorized to exercise, the legislation requested should be enacted into law, since its whole purpose is to protect the rights of men on trial, and to remove the possibility of being compelled to say in any case that an injustice has been done for which the statutes provide no clear or adequate remedy.

I am sure the Judge Advocate General will be glad to appear in person, or by representative, before your committee, should any further explanation of the proposed legislation be desired.

Very respectfully,

NEWTON D. BAKER,  
Secretary of War.

*Proposed Amendment of Section 1199, Revised Statutes.*

[The new matter is in italics.]

The Judge Advocate General shall receive, revise and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and report thereon to the President who shall have power to disapprove, vacate or set aside any finding, in whole or in part, to modify, vacate or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army.

Gen. ANSELL. That, of course, was not the result of any study of mine, because I made no study. If it were the result of a conference with the office force, it was not the result of any conference with me.

The CHAIRMAN. I may be guessing that it was the result of Gen. Crowder's study which he made at the suggestion of the Secretary of War, because it is intended to amend the very section of the articles of war that has been discussed here.

Senator FRELINGHUYSEN. I notice at the end of the letter the Secretary says:

I am sure the Judge Advocate General will be glad to appear in person, or by representative, before your committee, should any further explanation of the proposed legislation be desired.

I should like to ask the chairman if the general appeared?

The CHAIRMAN. No.

Senator FRELINGHUYSEN. Or was requested to appear?

The CHAIRMAN. No. That was the only information the committee had.

That is all, Gen. Ansell, and we are very much obliged to you.  
 (Thereupon, at 4.30 o'clock p. m. the committee adjourned.)  
 (The matter referred to was subsequently submitted and is here printed in full, as follows:)

OFFICE OPINION OF BRIG. GEN. S. T. ANSELL, ACTING JUDGE ADVOCATE GENERAL: RE  
 REVISORY POWER OVER COURTS-MARTIAL PROCEEDINGS AND SENTENCES.

WAR DEPARTMENT,  
 OFFICE OF THE JUDGE ADVOCATE GENERAL,  
 Washington, D. C., November 10, 1917.

Memorandum for the Secretary of War.  
 (For his personal consideration.)

Subject: Authority vested in the Judge Advocate General of the Army by section 1199, Revised Statutes, to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

1. It is my duty to bring to your attention and present to you my views upon a long-existing situation which arose out of an ill-considered and erroneous change of attitude upon the part of this office that occurred within a score of years after the close of the Civil War—a situation which has endured ever since in the face of the law and in spite of attending difficulties but without reexamination, and which has profoundly affected the administration of military justice in our Army. I refer to the practice of this office, adopted it seems in the early eighties, to the effect that errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review. This nonuser of power which Congress authorized and required this office to exercise, has, in numberless instances of court-martial of members of our military establishment, resulted in a denial of simple justice guaranteed them by law. Under the rule, concededly illegal and unjust court-martial sentences, when once approved and ordered executed by the authorities below, pass beyond all corrective power here and can never be remedied in the slightest degree or modified, except by an exercise of Executive clemency—an utterly inadequate remedy, in that it must proceed upon the predicate of legality, can operate only on unexecuted punishment, and, besides, has no restorative powers.

2. The last and most flagrant case of the many recent ones which have moved me to exercise an authority of this office which has long lain dormant, perhaps denied, in respect of which I address you this memorandum, was the recent case of the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery, resulting in sentencing them to dishonorable discharge and long terms of imprisonment. Those men did not commit mutiny. They were driven into the situation which served as the basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate, which also appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years. The court had jurisdiction, and its judgment and sentence for that reason could not be pronounced null and void, but its conduct of the trial involved the commission of many errors of law which appeared upon the face of the record and justified, upon revision, a reversal of that judgment. That case showed the extreme and urgent necessity of a reexamination of my powers in such cases, and, after thorough consideration and with the concurrence of all my office associates, I took action in that case and concluded my review as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

Since this involves a departure from long-established peace-time administration of this office, I deem it my duty to acquaint you with the reasons therefor.

3. You, Mr. Secretary, and your immediate military advisers, can never appreciate, I think, the full extent of the injustice that has been done our men through the operation of this rule. Officers of our Army, howsoever sympathetic, can not approach a proper appreciation of the depth, extent, and generality of the injustice done, unless, through service in this office, they have seen the thing in the aggregate. A proper sense of the injustice can be felt only by those who exercise immediately the authority of this office. Indeed, those thus experienced can gather the full impression of the wrong done only by a complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. My entire service, during all of which I have been keenly sensible and morally certain that the office practice was wrong, my six years' service in this office during which I have borne witness to hundreds of instances of conceded and uncorrected injustice—all of this has never served to impress me with the full sense of the wrong done to the individual and to the service so much as has the experience of my present brief incumbency of this office during this war. What is true in my case is true, so they advise me, of my associates. During the past three months, in scores, if not hundreds of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency. All this, of course, has been utterly inadequate. It has not righted the wrong. It has not made amends to the injured man. It has not restored him, and could not restore him, to his honorable position in the service. It could do no more than grant pardon for any portion of the sentence not yet executed. Such a situation commands me to say, with all the emphasis in my power, that it must be changed and changed without delay. This office must go back to the law as it stands so clearly written, and, in the interest of right and justice, exercise that authority which the law of Congress has commanded it to exercise.

4. The Judge Advocate General of the Army is to revise all courts-martial proceedings for prejudicial error and correct the same. The law as it exists to-day is to be found in section 1199, Revised Statutes, wherein it is provided that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The word "revise," whether used in its legal or ordinary sense, for both are the same, can have but one meaning. It signifies an examination of the record for errors of law upon the face of the record and the correction of such errors as may be found. "Revise," or its exact synonym "review," is a word so frequently found in the law and so familiar to all lawyers that its meaning can never be mistaken. When used in connection with judicial proceedings it can involve no ambiguity. I am justified in entering upon a construction of the word only by the fact that this office for so long a time has ignored its meaning.

The word "revise," by the Standard Dictionary is defined thus:

"To go or look over or examine for correction or errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

And the word "review" given therein as a synonym for "revise," is defined as—

"To go over and examine again; to consider or examine again (as something done or adjudged by a lower court) with a view to passing upon its legality or correctness; reconsider with a view to correction; as, the court of appeals reviewed the judgment; the judge reviewed and retaxed the bill of costs; to see or look over again; a literal meaning now rare."

In 34 Cys., at page 1723, the word "revise" is defined as—

"To review or reexamine for corrections; to review, or alter or amend. See also 'revision.'"

And the word "revision" is therein defined as—

"The act of reexamination to correct, review, alter or amend."

And in Black's Law Dictionary, "revise" is defined as—

"To review, to reexamine for correction; to go over a thing for the purpose of amending, correcting, rearranging or otherwise improving it."

And "review" is therein defined as—

"A reconsideration; second view or examination; revision; consideration for purpose of correction. Used especially of the examination of a cause by an appellate court."

And the word "revision" is therein defined as—

"To reexamine and amend; as, to revise a judgment, a code, laws, statutes, reports, accounts. Compare 'review.'"

And the word "review" is defined in the same dictionary as—

"Viewing again; a second consideration; revision; reconsideration, reexamination to correct, if necessary, a previous examination."

And in the same dictionary a "court of review" is defined to mean—

"A court whose distinctive function is to pass upon (confirming or reversing) the final decisions of another or other courts."

And in "Words and Phrases" (vol. 7) the word "revise" is defined as follows:

"To revise is to review or reexamine for correction, and when applied to a statute contemplates the reexamination of the same subject-matter contained in a prior statute and the substitution of a new and what is believed to be a still more perfect rule." Citing *Casey v. Harned*, 5 Iowa (5 Clark) 1, 12.

"Revise as contained in the Constitution, article XV, section 11, providing that 'three persons learned in the law shall be appointed to revise and rearrange the statute laws of the State,' means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence." Citing *Visart v. Knoppa*, 27 Ark., 266-272.

"A law is revised when it is in whole or in part permitted to remain and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect or to fit it better to accomplish the object or purpose for which it was made, or some other object or purpose." Citing *Falconer v. Robinson*, 46 Ala., 340, 348.

5. I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, 30 Stat. 553 (bankruptcy law) provides in part as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

The word "revise" as used in the bankruptcy act is universally held to be something broader than the power to review by writ or error. In *In re Cole*, 163 Fed. 180, 181, (C. C. A., first circuit) a case typical of all, the court, after adverting to the usual limitations upon the power to review by way of writ of error, contrasted that method with the statutory power to revise, as conferred by that act, saying:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And the court then said:

"We feel safe to adopt the broader view, and it is our present opinion that it is our right so to do,"

and concluded that, upon revision—

"We can revise any question of law as to which we may justly infer that the district court reached a conclusion, whether formally expressed or not and whether or not formally presented."

The language of that statute is the very language of this, except that the revision there is expressly limited to matters of law. Inasmuch as in the statute before us there is no such express limitation, it could hardly be held that the revisory power of this office is less than the revisory power conferred by the bankruptcy act. The word "revise" as used in the bankruptcy statute has always been held to signify power to reexamine all matters of law imported by or into the proceedings of the case, and a very liberal view has been taken

of what constitutes the record and proceedings in such matters. (See the many cases cited in Federal Reporter Digest, "Bankruptcy," vol. 5, from secs. 349 to 448.) The revisory power there conferred is something broader than that invoked by writ of error, though, of course, not so broad as to justify a reexamination of mere controversies or questions of fact. Doubtless, in any view of the case, the question whether the evidence sustains the verdict, that is, whether there is any substantial evidence at all upon which the verdict may rest, is a question of law which may be reviewed under this power, and such at least must be the power of this office.

6. The history of the legislation, the early execution given it, its historic place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word "revise" in the present instance. It is not necessary now to say whether such revisory power existed in the judge advocate in the early days of our Army, though, especially in view of the English military law, this seems to have been so; nor to advert to the fact that after the War of 1812, and also after the Mexican War, the duty of the Corps of Judge Advocates seems to have been primarily that of military prosecutors.

Nor is it necessary, except to indicate the proper setting, to say that military prosecution had ceased to be the primary function of the Corps of Judge Advocates at the beginning of the Civil War, if not before. Nor is it more than suggestive that the Judge Advocate General of the Army has always presided over both the Corps of Judge Advocates and the Bureau of Military Justice, and that this corps and this bureau were consolidated by the act of 1884 (23 Stats., 113) into what is now the Judge Advocate General's Department. It is important to note that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War and expressly invested its head, the Judge Advocate General of the Army, with this revisory power; and it is important to note that Congress redeclared this power in 1864 (13 Stats., 145), and in 1866 (14 Stats., 334), and again in section 1199, Revised Statutes, of which the former acts were the antecedents. Now, taking up these antecedents: In the act of July 17, 1862 (12 Stats., 598), which was an act "calling forth the militia to execute the laws of the Union, to suppress insurrection, etc." it was provided—

"That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of Calvary, to whose office shall be returned, for revision, all records, and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

This provision speaks very plainly. It not only directs the Judge Advocate General to revise the records and proceedings of courts-martial, but it further directs that officer to keep a record of "all proceedings had thereupon"; that is, upon the revision. It is clear that this intended something more than a perfunctory scrutiny of such records, and that it in fact vested this office with power to make any correction of errors of law found to be necessary in the administration of justice. The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated.

The next legislative expression is found in the act of June 20, 1864 (13 Stats. 145), of which sections 5 and 6 are as follows:

"Sec. 5. There shall be attached to, and made a part of, the War Department, during the continuance of the present Rebellion, a bureau to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

"Sec. 6. That the President shall appoint, by and with the advice and consent of the Senate, as the head of said bureau, a Judge Advocate General, with the rank, pay, and allowances of a brigadier general, and an Assistant Judge Advocate General, with the rank, pay, and allowances of a colonel of Cavalry. And the said Judge Advocate General and his assistant shall receive, revise, and have recorded all proceedings of courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and perform such other duties as have heretofore been performed by the Judge Advocate General of the Armies of the United States."

Just as the title of the judge advocate is in itself significant in this connection, so is the title of the bureau thus created—the Bureau of Military Justice. It

will be noticed that this Act preserves all the requirements of the act of July 17, 1862, supra, concerning the duty of the Judge Advocate General in the matter of revising the records of general courts-martial, and keeping a record of "all proceedings had thereupon," meaning, of course, proceedings upon such records in revision. And at the close of the war, in the legislation looking to the peace establishment, Congress enacted the Act of July 28, 1866 (14 Stat. 334), the same being "An act to increase and fix the military peace establishment of the United States," in section 12 whereof it was provided—

"That the Bureau of Military Justice shall hereafter consist of one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and one Assistant Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry; and the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army \* \* \*"

This act does not change the duties of the Judge Advocate General with reference to the revision of records of courts-martial. It omits the phrase found in the two acts immediately preceding to the effect that "a record shall be kept of all proceedings had thereupon," but introduces for the first time the direction that in addition to revising and recording the proceedings of all courts-martial, the Judge Advocate shall "perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." It will be observed that this last cited expression, as carried into section 1199 of the Revised Statutes as quoted above, still remains the law on the subject. In referring to the duties "heretofore performed by the Judge Advocate General of the Army," the statute included, inter alia, the duties prescribed by the statute, for the presumption is that the duties thus prescribed were in fact performed. It follows that included within this direction is the mandate that a record be kept of all proceedings had in the revision of courts-martial proceedings in the office of the Judge Advocate General, and the force of this mandate must be added to the ordinary meaning of the word "revise" in determining the scope of the duties of the Judge Advocate General as now defined by law.

7. The legislative history of all the antecedent acts, brought forward as 1199, R. S., shows that the word "revise" has the meaning here indicated. As to the act of 1862, see Congressional Globe, part 4, second session Seventeenth Congress, pages 3320, 3321. This was especially true of the debates upon the act of 1866, of which there was considerable owing to the objection taken to the legislative recognition contained in that bill of military commissions. An effort was made to strike out, and otherwise defeat, the entire provision for the Bureau of Military Justice during peace, and the strongest argument made in support of its retention was found in the fact that it had, and had freely and satisfactorily exercised this revisory power. The whole tenor of the debate clearly shows what Congress understood had been the revisory power of the Judge Advocate General of the Army since the act of 1862. It was said by one Senator (Mr. Lane of Indiana)—

"It is utterly impossible for the President in the multiplicity of his duties to look into all these cases; it is physically impossible for the Secretary of War to do so; and to facilitate the administration of criminal justice, it was found necessary to establish this bureau."

And another Senator (Mr. Hendricks) said:

"I am not prepared to vote to abolish the court of military justice. If that court be properly constituted and discharges its duties legitimately within its jurisdiction as the court was organized under the act of two or three years ago, it will be a blessing, and I will not vote to abolish the court because of such wrong decisions that it may have made."

And further on the same Senator referred to the case of one officer in whom he was interested in which there had been an erroneous conviction, and said in that connection—

"I went with him to see the Judge Advocate General. The case was called up before the Judge Advocate General and reviewed, and at once he decided that the testimony was not sufficient, and restored the young man to his position in the Army."

Further on, referring to this power, the same Senator said:

"I think it is a protection to the military men of the country to have such a court. It will come to be, when the hour of passion, to which my colleague has referred, shall have passed away, a court deliberate in its proceedings and, I hope, and have no doubt, wise in its adjudication. Then it will be a blessing

to the country and a protection to our military men. Necessarily, when our Army shall come to be 50,000 strong, there will be many military trials for military offenses of military men. There ought to be a court of appeal; and this is intended to be a court of appeal; a court in which the judge of the courts-martial may be reviewed, and if improper revised. Such a court seems to me ought to be in the Army."

(See Cong. Globe, p. 4, 39th Cong., 1st sess., 1866, pp. 3672-3676, et passim.)

It was these legislative antecedents that were brought forward, without substantial change of language, as the existing law (sec. 1199, Rev. Stats.) now under discussion.

8. This office, while ignoring its right and duty to revise for prejudicial other than jurisdictional error, has with strange inconsistency been quick to assert its power to declare a judgment and sentence null and void on the ground that the proceedings were, in its judgment, coram non iudice. After the large armies of the Civil War had been demobilized and their activities were no longer a matter of immediate concern to this department, and the Army had become, in point of size but a small national police force, this office, for reasons unexpressed and unknown, restricted itself to the correction of such jurisdictional error alone. The practice seems to have been adopted without thoughtful consideration of the law or policy involved or the resulting injustice. The opinions of this office, beginning with the early eighties, assume, without argument or reason, that the office was so limited. It can not fairly be said that upon this specific question the office has ever fairly and thoughtfully expressed itself. Extracts from two of the opinions, typical of all, will be sufficient to show the general character and nature of these holdings.

In an opinion under date of August 10, 1885, approved by the Secretary of War, the Acting Judge Advocate Gen. Lieber held as follows:

"As the whole matter is understood to be recommitted to this office for examination, including the letter referred to, I beg to remark that in acting upon the sentence of a court-martial, the reviewing authority acts partly in a judicial and partly in a ministerial capacity. He 'decides' and 'orders' (Army Regs., par. 918). Without his decision the sentence is incomplete. His decision is an exercise of judicial functions, and is as much beyond the control of other constituted authority as the findings of the court are beyond his. He can not be ordered to revoke it, and if it be adhered to, the sentence can be removed in no other way than by the President in the exercise of his pardoning power (or set aside by the President when void by reason of a want of jurisdiction)."

In the case of Lieut. J. N. Glass, tried by general court-martial, this office in a review under date of July 20, 1886, signed by Acting Judge Advocate Gen. Lieber, concluded as follows:

"The proceedings, findings, and sentence in this case having been approved by the reviewing officer in the exercise of his proper functions, they are beyond any power of revision on the part of higher authority, but the President by the virtue of his pardoning power may remit the unexecuted part of the sentence. The latter course is respectfully recommended by this office."

In the opinion first above cited, which is a fair sample of the many that have followed, the then Acting Judge Advocate General took the view that the proceedings of a general court-martial could be set aside for a want of jurisdiction. But whence came that power? In declaring it to be competent to declare the proceedings of a general court-martial void for want of jurisdiction he evidently overlooked the fact that in declaring a trial void for want of jurisdiction some functionary must sit in an appellate capacity for which there must be some statutory or common law authority. As a matter of fact no statutory or other authority can be found for the exercise of the power to declare a trial for want of jurisdiction unless it can be found in that provision of section 1199, which confers a general revisory power upon the Judge Advocate General. If the power to revise includes the power to declare proceedings void for want of jurisdiction it must also by any fair construction include the power to declare a judgment wrong as a matter of law and reverse it. If this office has the one power it necessarily has the other and if it has not the latter power it has not the former. By the plain language of the statute this office has both.

9. Nor has the power here contended for ever been questioned by the civil courts or other civil authority. To be sure, there are many expressions in adjudicated cases to the effect that the duly approved sentence of a court-martial when the court has proceeded within its jurisdiction and the rules governing its procedure is as final and unassailable as a decision of a civil court of last

resort. But it must be remember, of course, that in each of these cases the court was speaking of collateral attack in the civil courts on the proceedings of a court-martial and did not have in view the power of the department itself to correct court-martial judgment by way of direct revision of it. I have also examined many expressions of opinion by the Attorney General and find that these expressions have had to do generally with cases in which the final approval has been by the President himself and go only to the question of whether such cases can be reopened by the President or his successor for the purpose of undoing what he has once legally done. I have not found that any authority has ever questioned the revisory power of this office to correct errors in law in court-martial procedure when they amount to a denial of justice. And I may be permitted to say that should I find such holdings by any authority other than the highest court of the land, I should not hesitate to question the soundness of the decision.

In this connection, I may say that it was suggested to me by the present Judge Advocate General himself that the finality attributed by the Articles of War to the power of the several reviewing authorities might be thought to militate against or negative the view I advance. This could hardly be true. The statutory power of the Judge Advocate General of the Army conferred by 1199 Revised Statutes stands unaffected by anything said in the law as to the power of appointing authorities. Indeed, the statutes are not in pari materia. They exist for entirely different purposes. They establish different functions all of which have independent spheres. The general powers of correction conferred upon appointing authorities of the Articles of War existed prior to the enactment of the statutes now brought forward in 1199 Revised Statutes and also concurrently with them, without thought of conflict. There is, of course, a field of operation for each. The concept of finality referred to is the finality within the system, the finality with which all lawyers are familiar, and which must exist in order that there may be a review at all. A judgment of an inferior court must be a final judgment before it can be subjected to review in an appellate court. The action of the appointing or confirming authority directly giving effect to the judgment of the court itself gives finality to that judgment, that is, that completeness and integrity without which there could be nothing for this or any other authority to review. Such judgments are operative as final until and unless revised upon review. This concept of finality is so familiar to lawyers as to require no further discussion.

10. Such is the law, and there is a pressing necessity at this time that we go back to it, revive it, and act under it. Daily this office reviews records which show that in the trial some substantial rights of persons standing before courts-martial accused of crime have been flagrantly violated or that convictions have been secured on wholly insufficient evidence. Others show that charges and specifications are sometimes laid under the ninety-sixth (the general) Article of War for acts that are not properly to be regarded as military offenses at all. And quite as frequently cases are encountered in which men have been convicted of serious offenses where upon the evidence the offense committed was not the offense charged or for which they were tried. Officers of the Army, even of the Regular Army, are persons unlearned in the law, and, as fallible beings, may be expected from time to time to commit such errors in court-martial procedure as operate to deny the accused right and justice and result in his unlawful punishment. And such errors are even more to be expected now, as our Army is expanding and thousands of new officers are brought into the service who have had no military training and no familiarity with military law and the customs of the service. For this reason alone there should be the closest supervision.

But the situation may also be viewed from another aspect. As an American institution, our Army must be maintained under law. Our Army can never be the most successful Army it is capable of becoming except it have the highest regard for the rights of the enlisted men, as those rights are established by law. Indeed, the higher the regard for those rights the greater will be the popular confidence in the Army. For the first time in the history of this country we have in fact a truly democratic and popular Army. It has come from the people. Tens of thousands of homes have been affected. In the welfare of the Army millions are concerned directly and the entire public interested generally.

Expediency, in the highest sense of the term, as well as law, requires that the Army itself be quick to see that justice be maintained within it. The men now drafted from all walks of life and placed, whether they will or not, in the mili-

tary service of the country are wholly without previous military training and it is only natural to expect many transgressions against discipline, certainly in the early days of their service. They are entitled to justice as established by law, and those who are giving them up to the service of the country have the right to feel, to know, that they will not be lightly charged with military offenses, nor branded while in the service of their country as criminals, except after a fair and impartial trial and on proof which can meet the legal test.

11. There is a revisory power here, which must be exercised. It will, of course, be exercised with all due regard for the proceedings and strictly within the limitations of the war.

S. T. ANSELL,  
*Acting Judge Advocate General.*

NOVEMBER 10.

Inasmuch as this opinion is the result of long and thorough conference with my associates in this office, I would prefer that each of them read it, and, for the benefit of the record, express his concurrence or dissent.

S. T. ANSELL,  
*Acting Judge Advocate General.*

*Concurring.*—James J. Mays, lieutenant colonel, J. A.; George S. Wallace, major, J. A., O. R. C.; Guy D. Goff, major, J. A., O. R. C.; William O. Gilbert, major, J. A., O. R. C.; Lewis W. Call, major, J. A., U. S. A.; Edward S. Bailey, major, J. A., O. R. C.; William B. Pistole, major, J. A., O. R. C.; E. M. Morgan, major, J. A., O. R. C.; Eugene Wambaugh, major, J. A., O. R. C.; E. G. Davis, major, J. A., O. R. C.; Alfred E. Clark, J. A., O. R. C.; R. K. Spiller, J. A., O. R. C.; Herbert A. White, lieutenant colonel, J. A.

*Dissenting.*—None.

## TRIALS BY COURTS-MARTIAL.

WEDNESDAY, FEBRUARY 26, 1919.

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

The committee met at 10.30 a. m. o'clock, pursuant to the call of the chairman, in the committee room, Capitol, Senator George E. Chamberlain presiding.

Present: Senators Chamberlain (chairman), New, Beckham, Sutherland, Wadsworth, McKellar, Knox, and Kirby.

The CHAIRMAN. The committee will now hear from Col. Clark.

### STATEMENT OF ALFRED E. CLARK, LIEUTENANT COLONEL, OFFICE OF THE JUDGE ADVOCATE GENERAL.

Senator MCKELLAR. Col. Clark, I believe you have been summoned for the purpose of making a statement about courts-martial on the part of the department, and unless someone has a suggestion to the contrary, I will just ask you to go ahead and make such statement as you desire to make, first giving to the stenographer your full name and rank.

Col. CLARK. My name is Alfred E. Clark, and I am lieutenant colonel in the Judge Advocate General's Corps.

I reported in Washington for duty in the office of the Judge Advocate General about October 1, 1917, and was immediately assigned to the Disciplinary Section, a division having to do with the examination of the records of general courts-martial. I was connected with that section until some time in May, 1918, when I was relieved from duty in that section and was assigned as counsel for the War Department in all valuation proceedings before the War Department Board of Appraisers and special boards which had to do with the fixing of compensation for properties requisitioned, commandeered or produced under obligatory orders. Since May, 1918 I have had no connection with the administration of military justice and, indeed, have had very little connection with the office in Washington, as my headquarters were in New York and my work took me to the various large cities along the Atlantic Seaboard, and to the industrial centers of the Eastern States.

Senator JOHNSON. Are you in the regular service?

Col. CLARK. No, sir.

Senator JOHNSON. When did you enter the service?

Col. CLARK. I was appointed in the Reserve Corps about the 6th day of September, 1917, and—

Senator JOHNSON (interposing). You came from the bar?

Col. CLARK. Yes; my home is Portland, Oreg., and I am senior member of the firm of Clark, Middleton & Clark, of that city, where

I have practiced law a good many years. The major part of my work for the first two or three months had to do with the examination of general courts-martial records, although during that time I did a good deal of general work such as writing opinions on various matters. I think, for several months, all opinions dealing with the construction of congressional labor legislation with regard to Government contracts, and all opinions dealing with the application of State and territorial legislation to such contracts, were either prepared by me, or under my supervision; and I wrote opinions dealing with the construction of the several requisitory statutes and the rules for fixing compensation thereunder, and upon other matters, but the major part of my time was given to the work of the disciplinary section.

From about the latter part of December, 1917, or early part of January, 1918, until relieved from duty in that section in May, my status was that of assistant to Col. Davis, chief of the section. We conferred together a great deal in relation to individual cases and matters of policy in dealing with all classes of cases, and collaborated in formulating a number of proposed changes and reforms in the matter of courts-martial procedure.

A lawyer coming from civil life into the Military Establishment, upon contact for the first time with courts-martial procedure, is inclined to be rather shocked and confused by the apparent summariness, informality, and the brevity of the record that are presented in a court-martial case. That was my reaction at first, and, frankly, I have never quite recovered from it, because, raised in the atmosphere of civil trials, it is very difficult to readjust one's conception of judicial procedure in a short time. Shortly after entering into the work I was impressed with what seemed to me, sitting in Washington, at least, the apparent severity of some of the sentences imposed, as the gentlemen of the committee probably know in time of war the quantity of punishment which may be imposed in a given case is confined to the discretion and judgment of the court. There is no minimum fixed by statute, with the limitation that there are only a few crimes for which the death penalty is authorized. In all other cases the punishment is such as the court-martial shall prescribe, short of death. Some of the sentences, measured by the standards applicable to civil life, or in civil courts, seemed to me to be disproportionate to the offenses committed, and they disturbed me. I tried to analyze them. I made it a practice to read the records of many cases other officers had examined, trying to get the psychology of the situation, to get the atmosphere in which the officers who sat upon the court worked, to put myself in their places; and I reached some general conclusions with respect to the few sentences which appeared to be extreme—and, by the way, they are but few in number compared with the total number, probably a few dozen or a few score out of a total of fifteen or twenty thousand, which would really be subject to criticism at the present time. The great majority of the men who sat upon the courts were men who had recently come in from civil life, because far and away the greater number of officers of the Army were men who came in with the National Army or the National Guard, not for the purpose of making the Army their vocation but simply to meet the immediate urgent necessities of the war. Those men were in deadly earnest. They were confronted with the almost

superhuman task of creating an army of trained, disciplined men of maximum size and maximum efficiency in the minimum length of time, and they were working under conditions which were not always the most favorable for the accomplishment of the stupendous task. They were impatient of any disposition on the part of men to decline to submit themselves to that intense discipline which seemed to the officers absolutely necessary at the time, and it seemed to me that, in the occasional cases where seemingly harsh sentences were imposed, the officers who sat upon the courts had reflected in these sentences the impatience they felt—perhaps the indignation they felt—toward men, few in number, who were defiant of military authority or lax in the discharge of their duty, or who sought to evade service.

Study of the records—and I may say I gave a great deal of thought to it at the time, because I have never been able to bring myself to the attitude of a prosecutor, even in civil practice—made it quite apparent that there were certain elements in the Army on whom leniency was largely wasted. The draft brought in a sprinkling of pacifists and pro-Germans, so-called conscientious objectors, syndicalists, internationalists, I. W. W.'s; and those we have come to classify as Bolsheviks. Some of these men were openly defiant of military discipline; others yielded sullen obedience under pressure, and still others sought to evade military service in sundry ways. You will find, as I did, that in many cases where the sentences were particularly severe, when you get the facts of the case and the history of the accused while in the Army, the man had back of him a record of sullen or open insubordination, and that he belonged to one of those classes to which I have referred; he was not in the Army because he wanted to be in the Army, and he did not intend under any circumstances, if he possibly could help it, to give unselfish service or yield obedience to military authority. This observation applies to but a very, very small percentage of the men in the Army. The overwhelming majority were eager for service and willing to submit to necessary discipline. Those in a general way were the conclusions I reached from a study of the records early in my work in the disciplinary section.

I learned from the history of military practices—and what might be called the military common law—that it had been the practice of the Judge Advocate General's Office for back at least 50 years or more to point out such defects, such irregularities, such condition of the record as would render the sentence void for lack of jurisdiction, or invalidate it because of errors which were to the substantial prejudice of the rights of the accused.

Senator KNOX. Colonel, I should have asked you this a moment ago before you got on a new subject, but when these cases reached you, you dealt with them in a reviewing capacity, as I understand?

Col. CLARK. Yes, sir.

Senator KNOX. From whom did they come to you?

Col. CLARK. They came from the reviewing authorities, as, for instance, the—

Senator KNOX (interposing). The reviewing authority in the field?

Col. CLARK. Yes, sir.

Senator KNOX. Yes.

Col. CLARK. For instance, we will say a case was tried by general court-martial appointed by the commanding general of the Central Department, or the Western Department, as the case may be.

Senator KNOX. Yes.

Col. CLARK. And, when the record was finally acted upon by that authority the record came direct to the office of the Judge Advocate General.

Senator KNOX. That is where you dealt with it. Now, when you got through with it, where did it go, to some one else?

Col. CLARK. Well, that would depend. For instance, in the case of an officer, the record would go, if it had not been finally acted upon by the department commander or by the commanding general of the Army in the field, to the President through the medium of the Secretary of War for final action; that is, in cases which required the confirmation of the President in addition to the confirmation of the reviewing authority.

Senator KNOX. That is only in the case of an officer, as I understand you.

Col. CLARK. That would be in the case of an officer, and in all cases where a death sentence was imposed in a tactical division, and in certain death cases enumerated in the forty-eighth Article of War, whether approved by the commanding general of an Army in the field or of a department.

Senator KNOX. I would like to get clearly in my head the course of an ordinary court-martial of an enlisted man. Now, see if I am correct about it. A general court-martial is appointed by the commanding officer in the field. When a man is tried before it and the decree made in his case, it is reviewed by a reviewing officer in the field; is that correct?

Col. CLARK. No; I think probably I can clear that up in a moment.

Senator KNOX. Well, if you will, please.

Col. CLARK. A man is tried by general court-martial appointed, say, by the commanding general of a department, or the commanding general of a tactical division, or any other officer having general court-martial jurisdiction.

Senator KNOX. Limit this, now, to the case of an enlisted man.

Senator McKELLAR. Take Camp Meade—the commanding officer at Camp Meade.

Col. CLARK. That is, when there was a tactical division there at the camp. Take Camp Meade—

Senator McKELLAR (interposing). Yes.

Col. CLARK. Now, suppose that a general court-martial found a man guilty of some offense and imposed a sentence of dishonorable discharge and confinement in the disciplinary barracks for a term of years—the trial record, when authenticated, goes then to the appointing authority, the commanding general at Camp Meade. Presumably the division judge advocate would make an examination of the record and advise with the commanding general. The commanding general then had one of three courses to pursue under the practices of the War Department at that time. First, he might disapprove the proceeding in toto, or second, he might find that there were clerical or formal errors or omissions, and he would return it to the court, calling attention to those defects in the record, directing the court to revise and bring into the record that which actually happened, but which

the record did not disclose; or, if he disagreed with the court as to the quantity of punishment, he might return it, expressing his views and directing the court to reconvene and reconsider its sentence with a view to imposing a greater punishment or—

Senator CHAMBERLAIN (interposing). Could he fix a lesser punishment?

Col. CLARK. The commanding general could; yes, sir. Or, third, the commanding general could approve the record as it came up to him in the first instance—and, of course, approve it as it came up to him corrected—and when it was so approved by him, he then could mitigate the sentence in any way he saw fit even down to the point of complete mitigation. The commanding general, having the power to approve, has power to mitigate any sentence to any extent he sees fit, except in the case of a sentence of death, or the sentence of dismissal of an officer.

Senator CHAMBERLAIN. He has also the power, Colonel, to set aside a verdict of acquittal.

Col. CLARK. Yes; in the manner I explained a moment ago.

Senator McKELLAR. As a matter of fact, is that not as frequently done as mitigating?

Col. CLARK. No; I should say not, Senator; and if I may digress a moment from the question of the Senator who spoke to me a moment ago, I may say I never approved the practice of sending back records for reconsideration of sentence.

Senator McKELLAR. You never did?

Col. CLARK. No; I never did.

Senator McKELLAR. Well, I think you are right.

Col. CLARK. But that is not a statutory power. No such power is referable to or conferred by any act of Congress. It is a practice that has grown up and is crystallized in a presidential regulation promulgated under authority of the revision of 1916 and could be changed to-morrow by a presidential regulation to the contrary.

Senator KNOX. Now, I was endeavoring to get the history of the court-martial of an enlisted man all the way through from the appointing of the original court-martial by the commanding officer in the field. We have got that far. Then, I am trying to get at what becomes of that—where it finally goes.

Col. CLARK. I have now reached the point where it is assumed that the commanding general has finally approved the proceedings and sentence and has perhaps mitigated the sentence pronounced by the court. The record then goes direct to the Judge Advocate General for review. Under the practice which was followed when I entered the office and which seems to have been the practice uniformly followed since the days of the Civil War when the record came to the Judge Advocate General for review, it was examined to ascertain whether or not there were any jurisdictional defects appearing in the record and also whether or not there were irregularities occurring upon trial to the prejudice of the substantial rights of the accused. Of course if there were jurisdictional defects the sentence was void. If there were errors of law occurring upon the trial, such as the admission of incompetent evidence or other irregularities which did not go to the jurisdiction, but which prejudiced the substantial rights of the accused, it was the practice to write a review, write an opinion calling attention to these matters, expressing the opinion of the Judge

Advocate General with respect thereto, and transmit the record to the Secretary of War through The Adjutant General with the recommendation that the sentence be adjudged null and void and set aside; and if this recommendation was concurred in by the Secretary of War an order would be issued to the commanding general at Camp Meade, using the specific illustration, directing him to set aside the sentence, or the War Department could enter its own order annulling the sentence without sending the record back.

Senator McKELLAR. Colonel, would it interrupt you for me to ask a question right there?

Col. CLARK. No, sir.

Senator McKELLAR. In reviewing this case you reviewed it wholly and alone upon the record as it came up. You did not take into consideration any additional proof or affidavit or facts that might be adduced?

Col. CLARK. No, sir; the case was reviewed upon the record transmitted to the Judge Advocate General's office.

Senator McKELLAR. And if the trial was regular and there was substantial evidence to support the verdict was it the rule to confirm or affirm? What is your rule about the facts?

Senator KNOX. Senator McKellar, will you pardon me—will you please let me develop this history? I think it will read better right along and make a clearer record if we can develop one thing at a time. My particular desire is to find out what is done in relation to the quantum of punishment. Now, you have spoken about examining the records for errors which appear upon its face. Now, suppose it impresses this reviewing board that the man has received too great a punishment for the offense, then what is your function? What do you do?

Col. CLARK. There is no statute or regulations which seem to prescribe the function of the Judge Advocate General in such a case, but the practice was—

Senator KNOX (interposing). That is what I want.

Col. CLARK. Where it seemed that the punishment was disproportionate to an offense, even though the record was regular, to submit a recommendation to the Secretary of War through The Adjutant General, which is the usual military course, that the sentence be mitigated in part.

Senator KNOX. Now, who makes that recommendation?

Col. CLARK. The Judge Advocate General.

Senator KNOX. Does he do it personally or through the board of which you are a member?

Col. CLARK. No; the practice was, for instance, suppose a record came to me and I was impressed with the conclusion that the sentence was too heavy.

Senator KNOX. Yes.

Col. CLARK (continuing). I would write a review to that effect with a recommendation expressing my views.

Senator KNOX. Yes.

Col. CLARK (continuing). That would go to the chief of the section, who was Col. Davis. He might disagree with me or he might agree with me.

Senator KNOX. Suppose he agrees with you. Now, go on.

Col. CLARK. It then would go to the desk of the Judge Advocate General for his signature.

Senator KNOX. Yes.

Col. CLARK (continuing). And if he concurred in what was said in the review he would sign that report and recommendation and it, with the record in the case, would then be transmitted to the Secretary of War for action.

Senator KNOX. It was a signature that was made as a matter of course. He made it without an inspection of the record.

Col. CLARK. Yes, sir; usually, and he would make it after looking at the opinion. He would assume, as a general rule—of course, he would have to in the press of his work—that the statement of facts in the review was correct.

Senator KNOX. And then it went from the Judge Advocate General's desk to whom?

Col. CLARK. It would go through The Adjutant General's Office to the Secretary of War.

Senator KNOX. Did The Adjutant General have any function in relation to it?

Col. CLARK. He would not function on it, as I understand it—

Senator KNOX (interposing). No.

Col. CLARK (continuing). But he was the executive officer of the Secretary of War.

Senator KNOX. And he would transmit it to the Secretary of War and the Secretary of War had authority to approve or disapprove?

Col. CLARK. Yes; and if the recommendation was approved and the sentence was mitigated, there would be an order from The Adjutant General by direction of the Secretary of War. The Secretary of War functioned through The Adjutant General.

Senator KNOX. Then, let me see if I understand it? A man is tried by the general court-martial. The record is reviewed by the commanding officer in the field; it is sent to the Judge Advocate General's office, where it is passed upon by a board; then it is sent by the man who passes upon it to the chief of the division; then it is sent from the chief of the division to the Judge Advocate General; then it is sent from the Judge Advocate General to The Adjutant General; and then to the Secretary of War. Is that the history of it?

Col. CLARK. That would be the way it would go—the various steps it would take, because, of course, at that time that would be the usual course through military channels prior to January, 1918.

Senator KNOX. Yes.

Col. CLARK. Now, a little later on, in a reform which was introduced by General Order No. 7, the circumlocution of the procedure was very much reduced.

Senator WADSWORTH. What elements were cut out?

Col. CLARK. We dealt with the commanding general directly.

Senator McKELLAR. When was that?

Col. CLARK. In the latter part of January, 1918.

Senator McKELLAR. 1918, a year ago?

Col. CLARK. Yes, sir.

Senator McKELLAR. So that it did not go to The Adjutant General and the Secretary of War, but directly back to the commanding general?

Col. CLARK. Yes, sir; in certain classes of cases.

Senator WADSWORTH. Did it go back in the form of a recommendation or an order?

Col. CLARK. It went back in the form of a recommendation.

Senator MCKELLAR. Have you any statistics as to how many of these court-martial verdicts were modified or changed by the reviewing officers during the war? I understand there have been about 22,000 records all told. Could you give us any information as to that?

Col. CLARK. No; I have not these statistics. I have been out of touch with the department, with the bureau in Washington, so long, that I have not kept myself informed.

Senator MCKELLAR. Do all of the records have to go back?

Col. CLARK. The records of all general courts-martial trials go to the Judge Advocate General's office.

Senator MCKELLAR. They go there regularly, regardless of whether there is an appeal or anything of the sort?

Col. CLARK. It is immaterial.

Senator MCKELLAR. They are reviewed?

Col. CLARK. The statute requires that they be transmitted by reviewing authorities.

Senator MCKELLAR. The defendant has nothing to do with it?

Col. CLARK. No, sir.

Senator JOHNSON. Do you know how many military prisoners there are?

Col. CLARK. No, sir; I do not.

Senator JOHNSON. Do you know how many resulted during the period that you were connected with your investigation?

Col. CLARK. How many were confined?

Senator JOHNSON. Yes.

Col. CLARK. No; I do not know. I have not kept in touch with the statistics. During that time it was the policy of the department, in so far as it was possible, to confine men sentenced to confinement, either at the station of their organization, when the confinement was of short duration, or in the disciplinary barracks; except in cases where there was grave moral turpitude, such as theft, highway robbery, or offenses of that character. The idea back of that policy was that in most instances, where a man was sentenced to confinement at the station of his organization or in the disciplinary barracks, dishonorable discharge was suspended, so that the man could be restored to the service at any time if he demonstrated that he had in him the qualities of a soldier. And men were going to the disciplinary barracks, undergoing a period of disciplining and intensive training, as is given at those places, and were going out into the service again after a very short period of confinement. A man might be sentenced to the disciplinary barracks for 10 years for desertion with a suspension of dishonorable discharge. He might go to the disciplinary barracks and be back in the service in three or five months, if during that short period he was able to convince the commandant of the barracks that he really had the qualities of a soldier in him. So that the number of men sentenced to confinement in the barracks would be no basis or guide at all as to the number actually confined there at any subsequent date. Men were passing in and out very rapidly.

Senator MCKELLAR. Take the case of a young man from Memphis, in, I believe, Camp Taylor, or perhaps it was in Illinois, who got a furlough for the purpose of going home to attend the marriage of his sister. The marriage was several days later than he had been advised that it would take place. I do not remember the exact date, but as I recall it, his furlough expired on Friday night at 12 o'clock. Either through a change in arrangement, or misunderstanding of the date, the sister was not married until Saturday, and he remained over to witness the marriage of his sister the next afternoon, and left for Chicago and then for the camp Saturday night, and arrived there Monday morning.

Senator SUTHERLAND. Was due when?

Senator MCKELLAR. He should have been there Friday night at 12 o'clock. As I recall the facts, he arrived there Monday morning or Sunday. He was immediately arrested and tried by court-martial and sentenced to five years' imprisonment for desertion, and from the letter that I have received he is still serving. Now, under the procedure that you have outlined, it seems to me to be difficult to understand how that young man could still be in prison with that kind of a review. There are a great many cases like that.

Col. CLARK. Well, it is very difficult for me to understand, Senator, upon that statement of facts, how he could be convicted of desertion, because he returned, and palpably his action indicated no intention to desert.

Senator MCKELLAR. Yes.

Col. CLARK. There must be something more in the record than that, because I can not conceive of any court—

Senator MCKELLAR (interposing). Well, I wrote a letter about it but have never gotten an answer from the department about it. I will be glad to send the particulars to you.

Col. CLARK. I would be very glad to look up the record of the case. It would be a most extraordinary case. I can not believe that any court-martial would find a man guilty of desertion simply because he reported two days late; when he reported voluntarily two days after the expiration of his furlough, because there was not any element of desertion in that conduct.

Senator MCKELLAR. Well, that is what it seemed to me.

Col. CLARK. And, it is impossible for me to believe that, upon those facts, any court would find him guilty of desertion. Of course, I have no doubt at all if such a case came to the office of the Judge Advocate General there would have been no difficulty in holding that there was no evidence supporting the charge of desertion upon that statement of facts. And the Judge Advocate General has repeatedly ruled that, if there is no evidence to support the conviction, it then becomes a question of law from which the Judge Advocate General may deduce that the sentence was void as it had no basis to rest upon, and unquestionably, a recommendation would have gone forward in a case of that kind that the sentence should be set aside.

Senator MCKELLAR. When were you on this reviewing board?

Col. CLARK. There was no reviewing board in the department when I was down there.

Senator MCKELLAR. Well.

Col. CLARK. I understand from what I have heard that a so-called reviewing board was constituted along about August or September of 1918.

Senator McKELLAR. Well, how long has it been since you have had to do with the reviewing of these court-martial proceedings?

Col. CLARK. Some time in May, 1918.

Senator McKELLAR. You have not had to do with them exclusively?

Col. CLARK. My duties have been along other lines of work since that time and—

Senator McKELLAR. Would the records show who reviewed it? Who had charge of that work?

Col. CLARK. Yes, the records would so show. I was not chief of the section that had charge of the work.

Senator McKELLAR. You were the reviewing officer?

Col. CLARK. What is that?

Senator McKELLAR. You were one of the reviewing officers, as I understand it.

Col. CLARK. Yes. From the latter part of December, 1917, or early in January, 1918, until May, 1918, I was acting as assistant to the chief of that section, and in the discharge of my duties wrote a good many opinions on general questions of administration and supervised and examined, and preliminarily passed upon—

Senator McKELLAR (interposing). That was from December, 1917, to what date?

Col. CLARK. May, 1918.

Senator McKELLAR. Now, what I wanted to bring out—

Col. CLARK (interposing). Just let me complete my statement, Senator—preliminarily passed upon the opinions and reviews of the various officers in that section; and from my desk they went to Col. Davis's desk. Col. Davis was the chief of the section.

Senator McKELLAR. Since you left there in May, 1918, who has had charge of that class of work?

Col. CLARK. My recollection is that about that time, or shortly after I left, Col. Davis, who was chief of the section, was transferred to another office, and Col. Read made head of the section.

Senator McKELLAR. Has he been connected with it ever since?

Col. CLARK. I understand he has been head of the section ever since.

Senator SUTHERLAND. Have there been special reviewing boards established?

Col. CLARK. I do not know.

Senator SUTHERLAND. More than one?

Col. CLARK. As I say, no reviewing board, so-called, was established in the department up to the time I was assigned to other work—

Senator CHAMBERLAIN (interposing). How many reviewing officers were there at that time, at the time you left. How many men, whose duty it was to examine the records in the manner in which you have so well described, or do you know?

Col. CLARK. I should say somewhere between 15 and 20, all lawyers from—

Senator CHAMBERLAIN (interposing). Civil life?

Col. CLARK. Civil life.

Senator CHAMBERLAIN. That was their sole occupation?

Col. CLARK. That was their sole duty.

Senator CHAMBERLAIN. To examine these records?

Col. CLARK. Yes. From about November or December the number of records coming in very, very greatly increased. About that

time the records were beginning to come in from the draft increments, and from that time on, the number of officers doing that work increased rapidly—I should say by May 1918, probably 18 or 20 officers were engaged in that work.

Senator CHAMBERLAIN. How much time should elapse between the time a court-martial hears the facts of a case and the time they pass upon it? I have a complaint here this morning of a man who was tried thirty-odd days ago and the court-martial has never yet made a finding in his case and his brother writes me about it.

Col. CLARK. Well, of course, a court-martial, immediately upon the conclusion of the evidence and the arguments, is supposed to go into session and continue in the consideration of the case until a verdict is reached and sentence pronounced. The delay may be due to the fact that the record has not been acted upon by the reviewing authority.

Senator CHAMBERLAIN. You mean the commanding officer?

Col. CLARK. Yes, sir; but of course, the court—I do not think the court would delay pronouncing sentence because that is supposed to be done at once.

Senator CHAMBERLAIN. There is no rule about it, however?

Col. CLARK. My recollection is the regulations require the court, at the conclusion of the trial, to close and proceed to consider the case at once. No case has come under my observation where a finding was not reached and the accused acquitted or sentence pronounced at the session which began immediately following the conclusion of the trial.

Senator CHAMBERLAIN. How did you construe that article 1199, which authorized the Judge Advocate General's office to review, modify and revise—I do not know that I am quoting the language correctly.

Col. CLARK. Yes; I know what you mean.

Senator CHAMBERLAIN. What did you consider that to mean? To give you the same power over the sentence of a court-martial that a supreme court, the supreme court of a State, would have over the lower courts, or the circuit courts or district courts, as the case may be; or were your functions different? Did you construe that statute to give different power, or any power to the Judge Advocate General's department?

Col. CLARK. Well, do you wish a categorical answer, or just how do you want me to go about answering it?

Senator CHAMBERLAIN. Do it in your own way.

Col. CLARK. I have a very distinct recollection of the controversy that waged in the bureau concerning that, the latter part of October, 1917.

What I am about to say preliminarily may not seem directly pertinent, but in view of the discussion as to the proper construction of section 1199, R. S., it may be interesting. The latter part of October, 1917, I wrote a memorandum, and without going into a statement of the entire text of the memorandum, I recommended that in every case, regardless of the legal sufficiency of the record, where, in the opinion of the Judge Advocate General, the sentence seemed to be more than it should have been, a recommendation should go forward to the Secretary of War for mitigation. A couple of weeks later, no action having been taken on it, I wrote another

memorandum along the same lines, because there was in practical operation under the established practices of the department, a means of reaching every sentence of that character.

Senator CHAMBERLAIN. To whom did that recommendation go?

Col. CLARK. That would go through the chief of the section to the Judge Advocate General, or to the Acting Judge Advocate General at that time.

Senator CHAMBERLAIN. To whom did it actually go?

Col. CLARK. It went to the desk of Col. Davis, and from his desk would go to the Acting Judge Advocate General.

Senator CHAMBERLAIN. Gen. Ansell?

Col. CLARK. Yes. Those matters were the subject of discussion in the office at that time.

Senator CHAMBERLAIN. Did Gen. Ansell agree as to your construction?

Col. CLARK. With my final construction of section 1199, R. S.; no. There came up two or three cases—a case in which I wrote an opinion, the Narber case; a case in which Col. Davis wrote an opinion, which involved the conviction of seven or eight noncommissioned officers of an Artillery battery for alleged mutiny. In both cases it was the view of the office that an erroneous conclusion had been reached, and there arose a discussion as to whether the Judge Advocate General could find in the practices of the department, or in the statutes, an appellate power; that is, the power to revise, reverse, modify or change the sentences of courts-martial. Gen. Ansell wrote a very powerful argument in favor of the construction that the word "revise" in an old congressional enactment, which first appeared in the statutes in 1862, was broad enough to confer appellate power. I was very much impressed with his argument, and upon first consideration of the matter agreed with him, but upon further study reached the conclusion that it was not a practical construction for these reasons, among others, the word "revise" first found its way into the statutes in 1862, and was used again in 1864 and in 1866. These several enactments provided that the Judge Advocate General should receive, revise, and cause to be recorded the records of general courts-martial.

Gen. Holt was Judge Advocate General at this time and for many years thereafter. If I remember right, he was a former Secretary of War, anyway a very distinguished jurist. The history of the legislation indicates the probability that it was not drafted by Gen. Holt. He never construed it as giving appellate power to the Judge Advocate General. During upward of 50 years, which had elapsed since the legislation was first enacted, it had not been construed by the several Judge Advocate Generals or the successive Secretaries of War or by any department or bureau of the War Department as conferring that power, and it had been repeatedly construed otherwise. The only time it came before the courts during this whole time was in the case of Mason, the man who tried to kill Guiteau, the assassin of Garfield. Guiteau was confined in the old Washington Barracks in Washington. Mason was a sergeant guarding the prisoner in the barracks and tried to shoot him. Mason was tried by court-martial and convicted and sentenced to penitentiary confinement in Albany, N. Y. The Judge Advocate General—Swaim—reviewed the case under section 1199, R. S., and in a report

to the Secretary of War said that, because of facts appearing in the record, the proceedings and sentence were illegal and should be set aside.

The Secretary of War was of a different opinion, and declined to order the proceedings and sentence set aside, and Mason then sought his discharge in habeas corpus proceedings, contending that the word "revise" in section 1199, R. S., vested in the Judge Advocate General appellate jurisdiction, and that the report and opinion of the Judge Advocate General in legal effect reversed and set aside the sentence. The circuit court of the United States for one of the New York districts declined to concur in this construction of the statute and dismissed the habeas corpus proceedings.

Senator CHAMBERLAIN. We are all very much interested in that, but we want to shorten this up as much as we can.

Col. CLARK. Very good, I can conclude this then by simply saying that I did not finally agree with Gen. Ansell.

Senator CHAMBERLAIN. That was after subsequent investigation?

Col. CLARK. Yes.

Senator MCKELLAR. How did the question arise if you had recommended now, as one of the examiners of these records, or reviewers of these records, and you had recommended to the Judge Advocate General that this sentence be mitigated, which, as I understand it, was practically revision, and a practical reversal in part of these young men in the Artillery Corps, and Ansell believed that they should be and that they had jurisdiction to so reverse—how did the question arise in that case?

Col. CLARK. The question arose in the first instance as to just how those cases would be dealt with, and it was then that Gen. Ansell propounded his theory with respect to the construction of section 1199. He held that the Judge Advocate General had a right to simply say, "This case is reversed," which would operate, as he said, to restore the men to the service notwithstanding they had been dishonorably discharged and the dishonorable discharge executed.

Senator MCKELLAR. Well, now, what was done with them?

Col. CLARK. In the Narber case—I am speaking now from memory—in the Narber case, as I recall it, the sentence was disapproved and set aside by the Secretary of War on the recommendation of the Judge Advocate General; and in the case of the seven or eight non-commissioned officers, as I remember it, the entire sentence was mitigated with the exception of the dishonorable discharge, which, having been executed, could not be mitigated, and, by direction of the Secretary of War, the young men were given permission, upon their application to be restored to the service, which was done.

Senator MCKELLAR. And they are all in the service now?

Col. CLARK. Of course, I do not know that. They were all restored.

Senator MCKELLAR. Then, what became of the records of dishonorable discharge of each one of them? Those dishonorable discharge are still there, except the fact that the Secretary of War had mitigated or remitted and ordered them restored to service.

Col. CLARK. Oh, the record, of course, of what was done in the case is there as a record. The review of the records disclosed such gross irregularities in the trial that they were restored to duty. Of course, you could not blot out the written record of the sentence of dishonor-

able discharge, but taking the proceedings as a whole, the effect of it was blotted out by the subsequent proceedings.

Senator McKELLAR. Take that as an illustration. What difference is there between the actual practice which was followed out by your department as to these cases and the opinion of Gen. Ansell as to what might be done?

Col. CLARK. Well, the fundamental difference is this: According to Gen. Ansell's construction of section 1199, the Judge Advocate General was the Supreme Court of the Army; he could reverse, revise and modify, or make such disposition as he saw fit of any case when it came up to him.

Senator KNOX. As the act of a judicial officer?

Col. CLARK. As the act of a judicial officer, and direct what proceedings should be thereafter taken in the case.

Senator CHAMBERLAIN. That might have wiped out the dishonorable discharge.

Col. CLARK. Yes; but you can not get men back into the service without their consent after a dishonorable discharge has been delivered to them.

Senator McKELLAR. Of course, you have annulled the order, set aside the finding. If there had been a dishonorable discharge, then it would have been different.

Senator CHAMBERLAIN. What provision did that construction of the law—while you might mitigate the sentence, you could not wipe out or blot out the dishonorable discharge.

Col. CLARK. Well, now, you ask me what was the difference?

Senator McKELLAR. Yes.

Senator CHAMBERLAIN. Yes.

Col. CLARK. That, as I have stated, was Gen. Ansell's theory. The other, in practice did not result in a technical annulment of the sentence unless it was affected with such irregularity as should render it invalid.

Senator McKELLAR. Which you did not think was so in this particular case?

Col. CLARK. Oh, yes; that is what the Judge Advocate General's office held, if my memory serves me right—that it was so tainted with error, substantial in its nature, that it should be set aside, and this was done in both these cases; but the men had been dishonorably discharged, and, as I understand it, their discharges delivered—

Senator CHAMBERLAIN (interposing). Yes.

Col. CLARK (continuing). And it has always been held by the War Department that when you have executed a dishonorable discharge by delivering it to the man there is no power can put him back in the service without his consent.

Senator McKELLAR. Now, let me ask you this question—

Col. CLARK (interposing). Because it operates as a cancellation of the contract of enlistment.

Senator McKELLAR. Let me ask you this further question: Do you, or do you not think that the Judge Advocate General ought to be clothed with power to reverse, annul, revise, mitigate all these sentences that come to him? Do you not think that he ought to have the power to do it by law? As I understand your contention,

it is that he has not the power. Do you not think he ought to have that power?

Col. CLARK. No; I do not think so.

Senator CLARK. Why?

Col. CLARK. I will tell you why. I first promise by saying I believe that there should be a military judicial appellate tribunal. We can agree upon that; but, I do not agree with the proposition that the appellate tribunal of the Army should consist of one man and that man the head of the whole prosecuting organization of the Army, any more than I would assent to the proposition that the Attorney General of the United States should finally review all cases tried in all the Federal courts of the United States by his assistants. The proposition is entirely inconsistent with the conception of an impartial appellate judicial tribunal. That is my view about it.

Senator McKELLAR. It sounds like a very reasonable one, too.

Col. CLARK. The assistants to the Judge Advocate General many times are prosecuting cases; assistants to the Judge Advocate General are advisors to the various commanding generals having general court-martial jurisdiction. These assistants frequently write to the Judge Advocate General for his opinion as to whether certain evidence will sustain proposed charges; as to whether certain specifications state offences, and as to the proper course to take with respect to the prosecution of charges arising in the service. And to say that the officer who advises with and directs the work of all his assistants should finally sit as an appellate judicial tribunal, is entirely repugnant to my idea of proper military or civil appellate procedure.

Senator McKELLAR. Then, what sort of a tribunal, in your judgment, should have such power? You say that some tribunal should, and I agree with you that some tribunal should. Now, how should it be constituted in your judgment?

Col. CLARK. If it should be concluded that there should be an appellate judicial military body with either the usual appellate powers that a law court has, to reverse or modify, or with power to try cases de novo upon law and fact, these are two views to take. One is that there should be a judicial body wholly independent of departmental control—

Senator McKELLAR (interposing). A civilian body?

Col. CLARK. Well, it is immaterial whether it is composed of officers of the Army or men selected from civil life, providing the members are not under any sort of departmental control; that is, subordinate or subject to the order of any military authority. If, as I say, it be determined that there should be an appellate tribunal, in my judgment it ought to be a tribunal constituted by Congress, which should provide for the appointment of the members thereof in the usual manner by the President and confirmation by the Senate, leaving to the President the discretion as to selection—whether he shall select distinguished lawyers from the Army, or distinguished lawyers from civil life, or distinguished lawyers in part from the Army and part from civil life—and constitute the personnel so appointed a judicial body subject to no military control. That is the only way you will get an appellate tribunal that would function impartially as such.

Senator KNOX. I suggest, Mr. Chairman, if the colonel does not have anything that he wants to add himself, that we proceed with another witness.

Senator CHAMBERLAIN. Is there anything that you wish to add?

Col. CLARK. There are one or two matters that I might very briefly suggest.

Senator MCKELLAR. We would be glad to have you do it.

Col. CLARK. After it had been concluded in the department that the appellate power was not lodged in the Judge Advocate General we sought to evolve a practical method, under existing legislation, by which records would be reviewed by the Judge Advocate General before the promulgation of sentence, so that the sentence as finally pronounced would conform to the recommendation of the Judge Advocate General.

There is no doubt that under existing legislation—the thirty-eighth article of war—that the President, through rules of procedure, may lawfully control the conduct of a case from its inception until the execution of final sentence in such manner as he deems proper. As a result of our study, General Order No. 7 was prepared, very largely by Col. Davis, who was the head of the section. I collaborated with him in the work. The general order directed that before sentences were published the records should come to the office of the Judge Advocate General for review. In military practice a sentence does not become effective until published, and until published is subject to change and modification by the reviewing authority. The records which came up to the Judge Advocate General for review, pursuant to this general order, included all cases involving sentence of death, dismissal of an officer, or dishonorable discharge. The class involving dishonorable discharge would reach practically all of the heavy sentences imposed upon enlisted men. It reached all cases where execution of sentence operated to change the status of a soldier.

Senator CHAMBERLAIN. Do you have anything to do with the cases on the other side—cases of men in France?

Col. CLARK. Well, there is an Acting Judge Advocate over there who functions on those cases, but a certain class of cases have come over for presidential confirmation.

Senator CHAMBERLAIN. I just have in mind a case that was tried on the other side in November, where a young lieutenant was tried by court-martial, and the court sentenced him to dismissal from the Army. Now, that did not involve the disgrace, quite as much of a disgrace, as imprisonment in the penitentiary, although it was bad enough. The commanding officer ordered the court to reconvene, as I understand it; told the court that the charge against the officer ought to require imprisonment. The court reconvened and reconsidered the matter, dismissed him from the Army and sentenced him to the penitentiary.

Col. CLARK. Well, under the articles of war as they were revised and enacted in 1916, the commanding general of an army in the field—an army in the field operating against hostile forces—

Senator CHAMBERLAIN (interposing). I happen to know about that case because he is the son of an old friend. I know there is no question about what was done.

Col. CLARK. The commanding general of an army in the field has, under the Articles of War, power to confirm and carry into execu-

tion sentence of dismissal of an officer below the grade of a general officer. Does that answer the question?

Senator CHAMBERLAIN. Yes; except this fact, it shows that the commanding officer in the last analysis disposes of the case, and the Judge Advocate General's office does not have any modifying power under his own construction.

Col. CLARK. I do not follow you to that conclusion.

Senator CHAMBERLAIN. The court-martial dismissed him from service. They did not find enough evidence to convict him or to send him to the penitentiary, but the commanding general reconvened the court and directed them to reconsider the matter, and in addition to the dishonorable discharge from the Army sentenced him to the penitentiary.

Col. CLARK. And then what happened?

Senator CHAMBERLAIN. He went to the penitentiary.

Col. CLARK. What happened—did the record go to the Judge Advocate General?

Senator CHAMBERLAIN. I do not know, but assume that it did.

Col. CLARK. I have no doubt that it did.

Senator CHAMBERLAIN. I assume it did.

Col. CLARK. Suppose the Judge Advocate General finds that the trial was regular in all respects—could he substitute his judgment?

Senator CHAMBERLAIN. He could not under your construction of 1199, but under the construction that some of the officers insisted upon that you had an appellate jurisdiction you could reverse the finding of the court-martial.

Col. CLARK. I do not understand that anybody went so far as to suggest that under section 1199 the Judge Advocate General, where the record was regular and sufficient, could substitute his judgment as to the quantity of punishment to be imposed for that of the court and reviewing authority.

Senator MCKELLAR. Well, you ought to have that power outside of the commanding officer.

Col. CLARK. That may be true, perhaps.

Senator MCKELLAR. I think we ought to give that power to somebody if they have not got it. I do not understand that an appellate court has a right, in the absence of errors of law, to substitute its judgment for the judgment of a jury. Of course, in an equity case the court tries the case de novo upon appeal, but in the ordinary case, if there is any evidence to sustain the verdict, and prejudicial errors of law have not been committed, an appellate court has no right to impose its views.

Senator CHAMBERLAIN. There ought to be some provision in the law; if it is not there, he ought to be accorded the power. With the commanding officer controlling, a man is practically acquitted; then the commanding officer tells the court to get together again and convict this man.

Col. CLARK. When you were out of the room that question came up. Now, there is no statutory authority, as I said a while ago, giving to the commanding officer power to send a record back for reconsideration of the sentence imposed. It is authorized by presidential regulation. I have always thought that practice was a bad practice, although once in a while a case comes up in which the bad

practice could be invoked with good grace. I remember very well in the cases of a couple of doctors last winter, one at Camp Funston and the other at Camp Beauregard. In one case the doctor made a casual examination of a man and passed him on with an order giving him double duty, whatever that means, and he was dead 48 hours later from double pneumonia. The officer was dismissed from the service by a sentence of a court-martial. After examination of the record, when it came to the office of the Judge Advocate General, the conclusion was reached that there was willful neglect in the discharge of a legal duty, which caused, or at least accelerated the death of an enlisted man, and that it constituted involuntary manslaughter. Upon a memorandum proposed by me, approved by the Judge Advocate, and signed by the Secretary of War, that record was sent back with direction to the court to reconvene and reconsider the case, with a view to imposing a harsher sentence. Upon reconsideration the court adhered to its former conclusion, and the same procedure was followed, with the same result in the other case referred to.

Senator CHAMBERLAIN. That was the Judge Advocate General's Office that did that?

Col. CLARK. No; it was not, Senator. It was the Secretary of War, upon recommendation of the Judge Advocate General. The President was the confirming authority in each of the cases. They came up from tactical divisions.

Senator REED. However that may be, does it not bring us to this point: that, after all that is said and done, the trial court-martial itself is subject to the command of the President and that all the elements of the trial wiped out?

Col. CLARK. Well, no, if I understand you correctly. The court need not change its conclusion. I do not ask you, Senator, to approve the practice. I have stated repeatedly that I am against it. Have always been against it, and think that it is repugnant to the ordinary practices, of course, civil or military. I merely was illustrating—

Senator REED (interposing). Yes.

Col. CLARK. The disposition to seize hold of a practice which we do not approve, when the unusual character of a case seems morally to justify such course.

Senator REED. Of course, mob law is a good thing sometimes.

Col. DAVIS (interrupting). I have a great deal of practice along the lines that Col. Clark has just spoken about. I have also sat on innumerable courts-martial. While a commanding officer has authority to return a record, he does not return it for the imposition of a greater sentence. It is simply returned with a recommendation that a more severe sentence be imposed, and I think it safe to say that in 99 cases out of 100 the court never changes its first verdict.

Col. CLARK. In this connection I refer again to the case coming up from Funston, and the case coming up from Beauregard. I think Senator Chamberlain is familiar with those cases. In each case the Secretary of War sent back the record with a very strong memorandum directing the court to reconvene and reconsider, with a view to imposing a greater punishment. In each case the court reconvened and respectfully adhered to its former conclusion, but I think the practice is not a good one, and as I said before it has no statutory sanction, and it may be done away with by a change in the regulation.

Senator MCKELLAR. Well, consider a regulation now that permits a commanding officer of an army to direct a court-martial to reconvene, and to give greater sentence—

Col. CLARK (interposing). No; they can not direct them and never do.

Senator MCKELLAR (continuing). Or recommends that—

Col. CLARK (interposing). It never does direct them—

Senator MCKELLAR. Well, I used the wrong word perhaps.

Col. CLARK (continuing). To impose a greater sentence. But there is a regulation which authorizes the commanding general, or the reviewing authority in any case, to return a record with direction to the court to reconvene and reconsider, and he may add to that his impression, his view, with respect to the adequacy of the punishment.

Senator MCKELLAR. There is no law to that effect?

Col. CLARK. No; there is a presidential regulation.

Senator REED. Well, I would like to ask one other question—I hope the interruption will be pardoned, because I can not say, Mr. Chairman, and I do not know whether this is a subcommittee—

Senator MCKELLAR. It is a full committee.

Senator REED. If it is a subcommittee—

Senator CHAMBERLAIN (interposing). It is a full committee.

Senator REED. Don't you think that the law ought to be so written that in every case upon request the record should be reviewed de novo by some appellate authority?

Senator MCKELLAR. Senator, he was just asked that question, and stated that very fully just before you came in, but I will be very glad for the witness to answer your question.

Col. CLARK. Perhaps the inquiry of the Senator presents the question from a little different angle. His inquiry now is, assuming that an appellate tribunal was desirable and was constituted, whether it should have power to try a case de novo.

Senator REED. Now, I want to add, so that the record will be perfectly clear, I did not say a tribunal, necessarily, but some appellate authority; it might be an officer, it might be the Judge Advocate General, it might be even the President acting, of course, upon the recommendation of the Judge Advocate General, but the point I am trying to bring out is whether that power ought not to be vested somewhere with a right of de novo jurisdiction; that is to say, the record having been made up, the right should exist to try the case without being bound as to findings of fact; and the right also to reopen the case for the purpose of taking additional evidence, if necessary, or correcting errors. In other words, the rule that applies in equity appeals in most States, or chancery proceedings should be applied.

Col. CLARK. On that question my mind is not settled. The officers in the field, of course, are primarily responsible for discipline. They are in the atmosphere of active operations. They are now exclusive triers of fact; they know a great deal more about the necessities of Army discipline than any one sitting comfortably in an office in Washington. I do not think anybody sitting in an office in Washington can get the same viewpoint as the man in the field who is wrestling with the real problems of Army discipline. Somewhere you will have to lodge the power to finally try and dispose of disputed questions of fact. The law now lodges that with a jury of officers in the field convened by the commanding general. I am

not prepared to say that you should give some man here in Washington, whatever may be his rank or station, the authority to retry disputed questions of facts.

Senator REED. Well, now, would you say that the rule you suggest should not at least obtain to the extent that if this board found that the findings was against the clear preponderance of the evidence it may set it aside?

Col. CLARK. Well, in some civil jurisdictions that is the rule. In my jurisdiction, for instance, if there is any evidence to support a verdict the appellate court may not consider the weight of the evidence.

Senator REED. That is the trouble.

Col. CLARK. Yes.

Senator REED. If you send a case—just let me illustrate that—I had a case presented to me before this war entirely, of an officer who was tried over in the Philippine Islands; the charge was drunkenness, and it figured down in the last analysis, when put to the acid test, that the charge was supported by one Chinaman who, under the undisputed evidence, was in a state of terror to such an extent that he could not—anybody with any good judgment would not give much weight to what he said—the charge was denied absolutely by the officer, and he was supported as to his appearance, manner, and demeanor. That is all the Chinaman had to go on. Seven or eight white witnesses, two of them doctors, happened to have met him—I think they were doctors, according to my recollection, I know they were officers—and yet the court-martial found him guilty. The case was set aside by Gen. Crowder because of errors of law, but if the rule there that if there was any evidence to sustain a charge a man might go to his death on such character of evidence as I have given; I think that it is utterly repulsive to the ideas of modern justice.

Senator KNOX. I do not see how he could go to his death without implicating the Judge Advocate General's office and the War Department and the President, because they have all got to review his case.

Senator REED. But they do not have the right.

Senator KNOX (interposing). But they do review them from the side of clemency. They do not review them judicially, but they review them from the side of clemency. There is not any case of hardship that does not automatically have to go through the hands of these special officers. If it is a case of clemency, he so recommends. That is the way I understand it.

Col. CLARK. That is correct.

Senator REED. That is simply a question of pardon.

Senator KNOX. Right along that line.

Senator REED. It was an awful case.

Senator KNOX. I never heard of a worse one.

Col. CLARK. Last January, 1918, there was prepared in the office of the Judge Advocate General—I prepared it, Senator—a bill designed to confer very full appellate power upon the President. He, of course, would probably function in the usual case upon the recommendation of the Judge Advocate General. The President is the Commander in Chief of the Army, the final confirming power in many cases, with the final and ultimate power to issue military orders. If appellate power is to be lodged in a military officer, the

proper place to lodge it is with the President. A bill was prepared and copies were transmitted to Senator Chamberlain, chairman of the Senate Military Committee, and Mr. Dent, chairman of the House Military Committee, with letters analyzing the proposed bill and setting forth the reasons in support of it with the history of prior legislation. The letters, I believe, were prepared by Col. Davis and myself, and signed and transmitted by the Secretary of War.

Senator CHAMBERLAIN. That was last January?

Col. CLARK. January, 1918. The bill was introduced in both Houses, and I never heard what the outcome was.

Senator CHAMBERLAIN. The committee did not think that it granted any further power than you already had, so that disposed of it and we did not act on it.

Col. CLARK. The proposed act provided that the President could disapprove, modify, vacate, or set aside in whole or in part any finding or sentence and direct the execution of such part of any sentence that has not been vacated or modified.

Senator KNOX. He has that power under the pardoning power.

Col. CLARK. With this distinction, Senator: It will be observed under the pardoning power he does not modify a sentence.

Senator KNOX. He may. He simply exercises clemency. Could he not modify? He can, for instance, cut off the imprisonment, and in civil cases allow the findings to stand, or he can allow the civil disabilities to stand. He can modify in any way he sees fit.

Col. CLARK. A man can have his sentence mitigated through the exercise of the Executive power of pardon to the extent of a full and complete pardon, and the effect of that is to forgive the offense. This bill was designed to give to the President the power to vacate a finding and say the man is not guilty.

The language that I have referred to was incorporated in section 1199, which provides that the Judge Advocate General shall perform certain duties. Now, the reason for this proposed amendment was this: Except in the word "revise" found in that old legislation, to which I have previously referred, there was no appellate power lodged anywhere except as suggested by Senators through the exercise of clemency. It was the view of some very good civilian lawyers who were temporarily in the service that no court would sustain the claim for appellate power in the Judge Advocate General in view of the history of the legislation and the construction given for over 50 years.

Senator CHAMBERLAIN. But some differed?

Col. CLARK. Undoubtedly. I said that a while ago—there were some very good lawyers who took the opposite view.

Senator CHAMBERLAIN. But some of those who are on this committee took opposite views.

Col. CLARK. I think they were mistaken.

Senator CHAMBERLAIN. Well, I thought your view was wrong.

Col. CLARK. That is simply a difference of opinion that frequently arises among lawyers. But, as I said when you were out of the room, regardless of whether you differed or not, the idea of vesting appellate power in the Judge Advocate General, who is the chief prosecutor of the Army, is just as fundamentally unsound as to lodge the appellate power in the Attorney General of the United

States to review and revise all cases, civil and criminal, which are tried by his various assistants in the various courts of the United States.

Senator CHAMBERLAIN. Well, the Judge Advocate General of the British Empire has that reviewing power.

Col. CLARK. I understand that the Judge Advocate General of the British Army makes a report and recommendation which goes to the Military Secretary for confirmation.

Senator CHAMBERLAIN. Do you wish to put that in the record or not; has it ever been printed?

Col. CLARK. The bill?

Senator CHAMBERLAIN. Your analysis.

Col. CLARK. My analysis of the proposed bill probably has not been printed—I will put it in the record. There was transmitted to the chairman of the Senate Military Committee and to the chairman of the House Military Committee with the draft of the proposed bill communications signed by the Secretary of War, but which were prepared by Col. Davis and myself for the Judge Advocate General analyzing the bill. I think it was a two or three page communication, but, whether or not that was ever printed I do not know, because I did not follow the history of the measure any further. My analysis referred to a moment ago was, in briefer form, incorporated into the communications transmitted by the Secretary of War. This proposed amendment was intended to put in the hands of the President beyond any question, in addition to the power to exercise clemency, which he always has, the power to vacate, modify, or set aside in whole or in part, any findings or any sentence. This law was intended to give him the broad power to vacate any finding or sentence, and when so vacated it was held for naught and wiped out in legal consequence. Now, if you are going to have an appellate tribunal in the full sense, I do not think it should be lodged in any one man, because, after all, if the President has this power, he will function through the recommendation of subordinate military officers. And if you are to have an appellate military tribunal, as I said while you were out a while ago, Senator, why not have a military court with members who have no conventional obligations to the Military Establishment, who are not subject to orders of a superior officer, who have a degree of permanency in their positions, and can exercise unbiased and impartial judicial discretion and authority?

[The memorandum referred to is here printed in full as follows:]

#### MEMORANDUM FOR GEN. CROWDER.

Subject: Proposed amendment of section 1199, Revised Statutes.

#### ANALYSIS.

The proposed amendment vests in the President these powers:

- (a) To disapprove, vacate, or set aside any finding, in whole or in part.
- (b) To modify, vacate, or set aside any sentence, in whole or in part, and direct the execution of such part of the sentence as has not been vacated or set aside.
- (c) To suspend the execution of sentence in such class of cases as he may designate until there has been opportunity for him to consider and act thereon.
- (d) To return any trial record to a court through the convening authority for reconsideration and correction.

#### HISTORY AND CONSTRUCTION OF SECTION 1199.

The legislation now found in section 1199, Revised Statutes, originated in 1862 and went through a number of changes without affecting its substantial character.

It has always been the practice of the Judge Advocate General under this legislation to examine the records of trial by general courts-martial principally with a view of determining whether the proceedings were regular and valid, and to make a report thereon through the Secretary of War to the President.

Throughout the whole history of the legislation it has been the settled construction of the War Department and its officers to regard as final the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were so irregular as to be void. Following this construction, it has been repeatedly held by the Judge Advocate General that a sentence pronounced by a court-martial and approved by the proper reviewing authority was final and could not be revoked, modified, or set aside by the President, or by any department of the Government, unless the court was without jurisdiction or the proceeding invalid. All that could be done was to mitigate or remit the sentence in the exercise of the President's power, and this action left the conviction untouched.

It may be interesting to note that during the Civil War by independent legislation it was provided that the sentence of death or imprisonment in a penitentiary should not be carried into execution until approved by the President.

#### ADVISABILITY OR NECESSITY OF THE PROPOSED AMENDMENT.

Under the present Articles of War any officer competent to convene a general court-martial is authorized to approve and carry into execution any sentence affecting an enlisted man, except the death sentence.

Additionally the commanding general of a territorial department, or territorial division, may approve and carry into execution a sentence of death imposed upon persons convicted of murder, rape, mutiny, desertion, or as spies, and the dismissal of an officer below the grade of brigadier general. For the purpose of military administration the United States, its Territories, and insular possessions, are divided into departments, and in time of war the power referred to may be exercised by the officers commanding these departments.

And the commanding general of an Army in the field in time of war may approve and carry into execution sentences of like nature.

In all these cases no confirmation by the President seems to be authorized or contemplated by the existing Articles of War. Of course, the officer approving the sentence is authorized, if he sees fit, to suspend execution until the pleasure of the President is known, but he is not required to do so.

Thus it will be seen that the President is not vested with any authority to set aside, disapprove, or modify any finding or sentence.

In time of peace, with a small Army, officered by men familiar with the customs of the service and having some knowledge of the principles of military law, this system did not develop any serious defects. Instances of injustice were rare, and on the whole the administration of military justice was satisfactory.

An entirely different situation is now presented. A large number of officers are being brought into the service through various training camps. Their training is limited to a period of three months and most of them had no previous military experience of any character. With this training they have been appointed to grades in the Army from major down to second lieutenant. A very large number of officers with little actual experience and very limited training have been brought into the Army through the draft of the National Guard organizations. A considerable number of officers have been called into active duty from the Officers' Reserve Corps. These officers are eligible to sit on courts-martial. It is no reflection upon them to say that they are in the main wholly unacquainted with the customs of the service and have had little, if any, opportunity to become familiar with the principles or practices of military law.

It is not at all surprising that as a result there have been numerous errors occurring in trial by courts-martial, many of them very prejudicial and affecting the substantial rights of accused persons. In some of these cases dishonorable discharge has been imposed, in others long sentences of confinement, in others both forms of punishment.

This situation has been materially mitigated and improved by General Order No. 7, promulgated January 8, 1918. This order provides that execution of sentence involving death, dismissal of an officer, or dishonorable discharge of an enlisted man, where it is not intended to suspend the sentence of dishonorable discharge, shall be suspended until the record has been reviewed in the office of the Judge Advocate General

and its legality determined. While this order is proving helpful and beneficial in its operation, there is still lacking the power to modify, set aside, or vacate a finding or a sentence, in whole or in part, for procedural errors occurring to the injury of the accused, not going to the jurisdiction of the court or directly violative of some mandate of statute or regulation.

The act of Congress which contained the present Articles of War was approved August 29, 1917. Eight of its articles (Arts. 4, 13, 14, 15, 29, 47, 49, and 92) went into effect at once, and the remaining articles, 113 in number, became effective March 1, 1917. Before they went into effect the present Manual for courts-martial had been prepared and by order of November 29, 1916, promulgated to the service. This manual analyzes and explains all the changes. It was in the hands of the service some little time before the new articles as a whole went into effect and the transition from the old code to the new code caused very little confusion or embarrassment. There did grow up a somewhat cumbersome procedure under the old code, and the new revision of the manual greatly simplified and clarified the procedure and was generally regarded as a very great and needed improvement.

The changed conditions which now confront us due to the magnitude of the war and the very large Army which is being assembled and the comparative inexperience of its officers have already produced other instances of manifest injustice. Inevitably they must produce many more. And this situation has brought up for discussion the question which has been somewhat discussed in the past, viz., the creation of some appellate jurisdiction competent to modify or reverse, in whole or in part, the proceedings of a court-martial after the same had been approved by the convening authority. This question has been agitated before, but the opinion of the men in the military service has so far successfully opposed the establishment of such appellate jurisdiction. This opposition was based upon the view that the primary purpose of military justice was the maintenance of discipline and that appellate jurisdiction would mean delay and thus impair discipline.

The problem has been to find some appellate jurisdiction that would avoid the consequence of unnecessary delays and at the same time give opportunity for the correction of errors affecting the substantial rights of the individuals, both officers and enlisted men. It seems to me that this can be accomplished by lodging the powers in the President. He is Commander in Chief of the Army. As such he is the supreme military authority and bears to the military establishment a relation very similar to that occupied by a supreme court in the structure of civil judiciary. Upon him devolves the duty of securing efficient service and maintaining discipline in the Army. At the same time he should be authorized to correct instances of injustice to the individual.

#### CONSTRUCTION OF AMENDMENT.

The proposed amendment vests in the President the power to disapprove, vacate, or set aside any finding, in whole or in part. To disapprove, vacate, or set aside a finding in toto is to destroy its legal existence. To disapprove, vacate, or set aside a finding in part is necessarily to reduce its quantity or severity. A familiar illustration of the exercise of this power would be to approve only so much of a finding as involved a lesser included offense, such as approving only so much of the finding of guilty of desertion as found the accused guilty of absence without leave, or approving so much of the finding of guilty of felonious assault as found a person guilty of simple assault.

The President is also vested with the power to modify, vacate, or set aside any sentence, in whole or in part. The word "vacate" and the words "set aside" are words of self-construction. The word "modify" as here used clearly means "to moderate," "to qualify," "to soften," as defined in Worcester's Dictionary. In *State v. Lawrence* (12 Oreg., 297), the Supreme Court of Oregon said:

"In a general sense, to modify means to change or vary, to qualify or reduce; and unless there is something in the text or special usage, the words are to be taken in their plain, ordinary, and popular sense. The power given to modify or abolish implies the existence of the subject matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers, or duties, purposes, or objects, of the subject matter to be modified, without touching the mode of creation. The word implies no power to create or bring into existence, but only the power to change or vary in some degree an already created legally existing thing."

So, under the power to modify, the President could not create or call into legal existence a new sentence, change the identity of a sentence, or pronounce a sentence different in character than that in being, but could only change or vary the existing

sentence by way of reduction. To change the form of punishment would be to call into existence something legally different from that pronounced by the court, and the same would be true of an attempt to increase the punishment imposed because this would be to pronounce a new sentence.

Perhaps the scope of the proposed amendment could be made clearer by suggesting some analogies. The power to reverse, modify, or set aside, in whole or in part, any finding or sentence of a court-martial finds its analogy in the civil courts in the appellate power lodged in the Supreme Court. It is proposed to authorize the President to suspend execution of sentences in such classes of cases as he may designate until there has been an opportunity for review, and this is like unto the power found in civil codes to suspend execution of a judgment pending appellate review, in order to preserve the status quo. The provision in the proposed amendment authorizing the President to return the record to the convening authority through the court for a reconsideration is simply an enlargement of the power which he now exercises in relation to the cases which are required to come to him for confirmation. In other words, it is designed to give him the same power with respect to all cases which will come to him for appellate review under the proposed amendment as he now has with respect to cases which come to him for final action.

You will observe that the proposed legislation authorizes the President to designate the classes of cases in which sentences will be suspended until reviewed by the Judge Advocate General and report made to the President. Now, in a great majority of cases tried by courts-martial, there will be no necessity for suspending the sentences. Indeed, in many classes of cases there will be no necessity for Presidential review. For instance, special and summary courts deal with minor offenses. These courts have a very limited jurisdiction as to the sentences which may be imposed and the liability of error and serious injustice is not present in these classes of cases. The classes of cases intended to be reached are those which involve sentences of death, dishonorable discharge, dismissal of an officer, long terms of confinement, and the like. By leaving to the President the power to designate the classes of cases in which execution of sentences may be suspended pending his action the practice to be followed may be adjusted from time to time. The needs of the service may differ in different localities. It may be found that one practice should be adopted in the theater of actual hostilities and that another should be adopted in localities far removed from the seat of war. It probably would be inadvisable to make any hard and fast rule applicable alike to all places and conditions, and under the proposed legislation the President will have authority to adjust the practice to be followed to meet changing conditions and the special needs of any time or place of military operations.

ALFRED E. CLARK,  
*Lieutenant Colonel, Judge Advocate,*  
*Assistant to the Judge Advocate General.*

Senator CHAMBERLAIN. There was a clause in that bill that referred to continuing the functions and power of the Judge Advocate General. What was the purpose of that? It had nothing to do with that proposed amendment.

Col. CLARK. Why, I presume—I do not recall now—but I presume the purpose was to make as simple as possible the proposed amendment which was the interpolation of certain clauses in section 1199.

Senator CHAMBERLAIN. Yes; but would it not have this effect, too: It would have combined in one man the power of Provost Marshal General as well as the powers of the Judge Advocate General, because it conferred upon him the powers that he had always exercised, as I recall the act, and I have not seen it for a year.

Col. CLARK. Why, as Judge Advocate General, yes; but I do not understand that language, continuing the duties of the Judge Advocate General as such would have any relevancy whatever to the duties of a Provost Marshal General simply because the same man happened to be holding both offices. They are distinct offices. This language has been continuously used in all the variations of the statute for something over 50 years. I may say also with respect to the use of the word "revise" in the statutes you will find that it is also used in the statute which defines the powers of the Judge Advo-

cate General of the Navy. The words "to receive, revise, and cause to be recorded," in the enactment of 1880, takes these words bodily from the old legislation defining the powers of the Judge Advocate General of the Army. I might say also that in the Navy officers having general court-martial jurisdiction exercise the power under presidential regulation to return a case to the court for reconsideration of its sentence.

Senator CHAMBERLAIN. I think there are some cases more aggravated in the Navy than there have been in the Army. I have read the records of a great many cases where the commanding officer in the Navy has practically ordered the court-martial to reconsider the case—

Col. CLARK (interposing). Well, I was reading in the New York papers the other day, Senator, in connection with one of those cases coming up from the third district a statement by Secretary Daniels saying that he was wholly dissatisfied with the sentence first imposed and that he sent it back and directed the court to reconsider and impose an adequate punishment, as the result of which the punishment was increased.

Senator CHAMBERLAIN. Well, it is not right. As a lawyer coming from civil life, do you not find that in the Military Establishment the autocratic view of it is usually imposed in the sentences and in the handling of these men?

Col. CLARK. I do not agree at all with the practice, and I think that the direction of the commanding general is very patent at times with the court. I will say, however, in fairness to the courts, that in the very great majority of cases sent back with direction that they reconsider with a view of imposing a heavier sentence, that the courts do not follow the recommendation.

Senator CHAMBERLAIN. Not always.

Col. CLARK. Oh, in the very great majority of cases they did not. I will venture the assertion that the records will not show that they follow the recommendations in one-third of the cases.

Senator CHAMBERLAIN. Does not that recommendation of the commanding officer to men who are inferior to him in rank usually go as an order, rather than as a recommendation?

Col. CLARK. I do not think so. I will tell you why; because I say, in the great majority of the cases they decline to obey it, and if it were an order they would obey it. I do not think that in one case out of three the courts have increased the punishment. There are instances, and they are not at all few, where the court actually diminished the punishment when the case went back for reconsideration. Presumably as an expression of their resentment for something said in the order directing the court to reconsider—but that does not make the practice desirable at all.

Now, I may say that under General Order No. 7, which was put in operation in January, 1918, the record came direct to the Judge Advocate General, and we built up a practice during the months of January, February, March, April, and May, while I was in that section, of not only calling attention to jurisdictional and legal defects, but also accompanying the record with a recommendation as to the place of confinement, and the quantity of punishment that should be imposed, with a view of securing some uniformity of policy in respect to the amount of punishment imposed for certain classes of

offenses. I do not know what became of that practice after I left the section, but understand that there was a change.

Senator CHAMBERLAIN. Since you left that branch of the service, you have been connected with the Provost Marshal General's office, have you not, or have you been doing some other service?

Col. CLARK. I have never had any connection whatever at any time with the office of the Provost Marshal General.

Senator CHAMBERLAIN. But you were connected with the Judge Advocate General's office, this branch of it?

Col. CLARK. I left the disciplinary branch in May, 1918, and at that time was assigned as counsel for the War Department in all matters of valuation of property requisitioned or produced under obligatory orders.

Senator CHAMBERLAIN. Do you gentlemen want to ask any further questions?

Col. CLARK. Were there any specific cases that you had in mind that came up during these months that I was connected with that department?

Senator CHAMBERLAIN. I think not.

Col. CLARK. I had to do with the death cases in France and those negro riots at Houston.

Senator CHAMBERLAIN. Those were very interesting cases. Did you review Ansell's testimony on those cases?

Col. CLARK. I have not seen Gen. Ansell's testimony at all. I have seen no testimony, and all the information I have had about this investigation I have gotten from the headlines of some of the New York papers.

Senator CHAMBERLAIN. Well, in those death cases in France, where the sentence of death was imposed, they would have been carried into execution so far as the Judge Advocate General's office was concerned and so far as the Secretary of War was concerned, would they not? They were only saved by executive order, by order of the President?

Col. CLARK. Well, of course, a part of that I can answer directly and a part I can not. I never saw the order or recommendation of the Secretary. Of course, that would be a matter between him and the President. I understand, however, that the Secretary did not recommend that the sentences be carried into effect.

Senator CHAMBERLAIN. Well, of course, I may have been mistaken.

Col. CLARK. I never saw the order.

Senator CHAMBERLAIN. It went through the Judge Advocate General's office, however.

Col. CLARK. I have a very intimate acquaintanceship with those cases, because they disturbed me for a couple of months. I wrote the memorandum, a copy of which served as the basis for all the facts stated in the memorandum written by Gen. Ansell about April 15 to Gen. Crowder, and the memorandum submitted by Gen. Crowder the next day to the Secretary of War. I understand also that some of those facts were incorporated in the report or memorandum of the Secretary of War to the President.

Senator CHAMBERLAIN. Well, you recommended, and I think Ansell recommended, that these sentences be modified, did you not?

Col. CLARK. That is partly correct and partly incorrect. Now, I can state in a few words—

Senator CHAMBERLAIN (interposing). What did you do?

Col. CLARK (continuing). What was done in those cases?

Senator CHAMBERLAIN. What did you do?

Col. CLARK. Well, I think the records came into the office of the Judge Advocate General in the latter part of February, 1918—February 26 or 27. They were sent at that time to Maj. Rand for review. Maj. Rand was a very able lawyer and was formerly first assistant to Mr. Jerome, district attorney of New York. Mr. Rand prepared reviews in which he found that the sentences were legal and justified, and submitted a recommendation for the action of the Judge Advocate General to the effect that they be carried into execution. The records had come over with a strong recommendation on the part of Gen. Pershing and the judge advocate of the division in which the cases arose that, as a matter of proper punishment for the offenses and as a matter of military expediency, these sentences be confirmed and their execution directed. That was the state of the records coming from France. As I say, Maj. Rand prepared first the reviews. In one of the reviews he set out the statement of Gen. Pershing in full. In the other three he did not, but simply referred to the fact that he had incorporated it into one of the opinions. As I now recall the matter, those records, with the reviews prepared by Maj. Rand, then went in to Gen. Ansell and Col. Mays, who were officing together.

Senator KNOX. What was Maj. Rand's recommendation?

Col. CLARK. That the sentences were legal, justified, and that they be carried into execution.

The reviews, in the usual course of things, would go to the President, through the Secretary of War, for his information. Maj. Rand's reviews went into the office of Col. Mays and Gen. Ansell shortly after the records were received, and were returned to Maj. Rand with the suggestion that he incorporate Gen. Pershing's statement in each of the reviews instead of only in one. This was done and they then went back again to Gen. Ansell and Col. Mays.

I understood at that time that it was the intention of these officers to recommend the execution of the sentences, and that the reviews came back to Maj. Rand solely for the purpose of having three of them made a little more full by putting in Gen. Pershing's recommendation that they be carried into effect.

Sometime later, I would say along about the latter part of March, Gen. Crowder called me in and said he had just gotten the reviews in these four cases, that Gen. Pershing was very insistent that, in the interest of military discipline, they be carried into effect; and that Gen. March, who had come back from France not long before—some months before, and who was familiar with the conditions—he was then Chief of Staff—was of the same view. He said he was disturbed about them and he wanted me to take the records, study them, make a careful review of all the facts, and then study other cases of like offenses that had been tried in the same and other divisions, and see what punishment had been imposed.

Senator KNOX. Had they gone to Gen. Crowder from Col. Mays and Gen. Ansell?

Col. CLARK. I assume so, because they had found their way to his desk.

Senator KNOX. And there was no suggestion of mitigation?

Col. CLARK. Not up to that time.

Senator KNOX. I want to get the thing correctly.

Col. CLARK. They had gone in for his signature and he asked me to make this examination.

Senator McKELLAR. Gen. Crowder asked you to do this?

Col. CLARK. Yes, I did so, in each of these cases, wrote a review which gave the facts quite fully, pointing out the age of the men, when they enlisted, the character of the evidence, and concluding with the statement that there was some evidence in each case which would justify a jury in finding a verdict of guilty; that is, if they believed the evidence for the prosecution. No recommendation was then included. I prepared at the same time a memorandum for Gen. Crowder's own personal information, which apparently was prepared about April 10, 1918, as it bears that date, in which I reviewed the cases more at length, called attention to a number of other cases tried in the same division, and in other divisions, in which there were acquittals or where convictions occurred and short sentences were imposed for similar offenses, and summed up my conclusions with respect to these four cases in this language:

The length of time which elapsed after the alleged offenses and before the men were brought to trial, the expeditious and seemingly formal manner in which they were tried, the lack of any apparent effort on the part of counsel for the accused to make a real defense, the circumstances of extenuation shown in the records—especially in the cases of the two men convicted of sleeping on post—altogether, and coupled with the disposition made by the same court of other cases of like nature arising in the same organization about the same time, make up a record on which it will be difficult to defend or justify the execution of death sentences by way of punishment, or upon any grounds other than that, as a matter of pure military expediency, someone should be executed for the moral effect such action may have upon the other soldiers.

That was submitted with the reviews where there was no recommendation attached.

Senator McKELLAR. Did that go to Gen. Ansell, too?

Senator KNOX. No; it came from him.

Col. CLARK. I may have given him a copy. This came from me.

Senator KNOX. What Senator McKellar wants to get at is something you said before he came in, that it went to Gen. Ansell and Col. Mays for their recommendation and they sent it in to the Judge Advocate General.

Col. CLARK. Yes; that is the original reviews by Maj. Rand that concluded with a recommendation that the sentence—

Senator McKELLAR (interposing). Be carried out.

Col. CLARK. Yes. They went through the hands of Col. Mays and Gen. Ansell first. Then they came back to Maj. Rand for some addition to his reviews. He sent them back with the additions and they found their way into Gen. Crowder's desk, and it was at that time that he asked me to take the cases and study them and make a more ample review and submit a history of other and like cases in France.

Senator McKELLAR. I understand you perfectly. As I understand you, these court-martial findings inflicting the penalty of death on these four soldiers in France had come to Gen. Pershing and he had approved them, and it had gone to Gen. March, and he approved them, and then they were sent to this reviewing officer, and from him they went to Gen. Ansell and he approved it.

Col. CLARK. No; they first went to the commanding general of the First Division, Gen. Bullard, as I remember it, and he approved them, and his judge advocate, Col. Winship, wrote a strong memorandum in favor of carrying out of the sentences. Then the records went to Gen. Pershing. He as not the final confirming authority, because these sentences could only be confirmed by the President, but Gen. Pershing attached to the records a memorandum in which he very strongly recommended, for reasons which he outlined in his memorandum, that these sentences be carried into execution, that it was necessary to inflict the death penalty upon these soldiers for the offenses which they had committed—two for sleeping on posts in the front-line trenches and two for willful disobedience of orders—in the interest of Army discipline. Then the records came to the office of the Judge Advocate General. In cases where the President has to confirm ultimately the records, in practice, go to the Judge Advocate General; and he, in practice, although there is no statute requiring him to do so, transmits his views to the President with the record so that the President may be aided and guided in the conclusion he reaches by an expression of the views of law officer. Now, the records came from Gen. Pershing to the Judge Advocate General, and that was the point at which they went to Maj. Rand for the preparation of these reviews.

Senator MCKELLAR. What did the major do with them?

Col. CLARK. He recommended that the sentences be carried into execution.

Senator KNOX. We got all that story.

Senator MCKELLAR. I've just missed it. It is rather interesting and I would like to hear it.

Col. CLARK. Then, to repeat in part what I have already said, they came back to Maj. Rand for him to include in all four of his reviews the recommendation of Gen. Pershing, which he had merely included in one and by reference included in the three others. Then they went back to the office of Col. Mays and Gen. Ansell and from there found their way to Gen. Crowder's desk, because afterwards he gave me the records, stating he wished to further review them. He wanted me to study the cases and prepare a more ample review; study like cases, and that was what I did, and in connection with that I submitted in support of it a review of many other cases of like nature.

I submitted this memorandum that I referred to a moment ago to Gen. Crowder. The reviews which I submitted concluded with no recommendations, but I understood afterwards that there was a recommendation added to each of these reports in accordance with the recommendation of Gen. Pershing; or, at least, that there was no legal objection to the execution of the sentences. I do not think I have ever seen the final recommendations submitted, but my understanding is that some such recommendation was added to each of my reports.

Now, after all of this data had been laid before Gen. Crowder, and this was along about the 10th of April, I had a talk with Gen. Ansell about the cases, because I felt very strongly about them. I differed with some of the other officers in the office, and I was ready to argue these cases with anybody who started any discussion. I had a talk with Gen. Ansell, and as nearly as I can remember, he said, in substance: "I understand you do not believe those sentences of death

from France should be executed?" I replied: "Most emphatically, I do not"; and further, "General, I wish you would take those reviews that I have prepared—they are on Gen. Crowder's desk—I wish you would take the memorandum I have prepared for his information supplemental to the reviews," and "I think you will agree with me that the sentences should not be carried into execution." I do not know whether he agreed with me at that time or not. I was of the view that he did not. Three or four days later he wrote a memorandum to Gen. Crowder in which he referred to the ages of these men, to the fact that they were young men; that they were all voluntary enlistees; to the character of the defense—in fact, all of the data found in his memorandum were taken from this memorandum of April 10 prepared by myself for Gen. Crowder; and he concluded with the statement that he did not think the sentences should be carried into execution. That was on April 15, as I remember it, five days after I had laid before Gen. Crowder all this data. On the 16th of April, or in the meantime, I understand now, Gen. Crowder added a recommendation in each case to the reviews that had been prepared recommending that the sentences be carried into execution. On the 16th of April Gen. Crowder prepared a memorandum for the Secretary of War in which he practically took the whole data in my memorandum and laid before the Secretary of War the whole history of the cases and like cases, so that the Secretary could act with full knowledge of the facts in each record, as well as full knowledge of all the facts gleaned from an examination of other records.

Senator MCKELLAR. I would like you to put that into the record.

Col. CLARK. I will be very glad to.

Senator MCKELLAR. Your private memorandum.

Col. CLARK. This is my private memorandum.

Senator MCKELLAR. Well, put all of that in.

Col. CLARK. I have no personal knowledge of the history of the cases thereafter, but I have understood, perhaps I am mistaken, though, that the Secretary of War, about the 1st of May, which would be two weeks later, recommended to the President that the sentences be not carried into effect. That, I say, is simply my understanding.

Senator CHAMBERLAIN. You do not know that.

Col. CLARK. I do not know. I never saw the memorandum. That is just simply my understanding, and I may be mistaken.

Senator MCKELLAR. Evidently so, for it contradicts that; as I recall it.

Col. CLARK. Well, there should be no difficulty in getting the facts, because whatever memorandum was transmitted by the Secretary of War would be a part of the files of the cases.

Senator WADSWORTH. Was there not a letter published in the newspapers by the Secretary of War addressed to the President recommending clemency for two of those men?

Senator CHAMBERLAIN. I only know what the testimony before us was. My understanding of it was that Gen. Pershing, the Judge Advocate General, or Gen. Crowder, or Gen. March, and Secretary Baker all concurred that the sentences should be executed. Now, that was as I understood the evidence which was before us.

Senator WADSWORTH. Well, there may have been a statement, however.

Senator SUTHERLAND. I saw that statement.

Senator WADSWORTH. There was also a statement from Gen. Ansell either before this committee or elsewhere, that two of these cases, involving sleeping on post, were brought to the attention of the President through a member of the Judiciary Committee of the House of Representatives.

Senator CHAMBERLAIN. That is right.

Senator WADSWORTH. And that was done at the suggestion of Gen. Ansell, because, in his desperation, he felt that that was the only way in which the President apparently could be reached, because the Judge Advocate General's Department had not sent forward memoranda containing the facts as he felt they should be sent, but it now appears that the Judge Advocate General's Department did send that memorandum.

Senator CHAMBERLAIN. Did Gen. Crowder recommend clemency?

Col. CLARK. No; as I said before—

Senator WADSWORTH (interposing). No, he did not recommend clemency; but for the information of the President he sent forward the memorandum which had just been put into the record written by Col. Clark and which recommended clemency.

Senator CHAMBERLAIN. My recollection of the evidence does not disagree materially with yours—not that the facts did not reach the Secretary of War and the President but that the recommendations based upon those facts were against the exercise of clemency. That is the way I understand it, but I may be mistaken.

Senator WADSWORTH. There is a distinct discrepancy between the statement of Gen. Ansell and the letter given to the press the other day by the Secretary of War and with the statement of the colonel here.

Senator CHAMBERLAIN. Yes; there is.

Col. CLARK. Yes; I understand there was a recommendation attached to those reviews that I prepared recommending that the sentences be carried into execution, but that there was also delivered to the Secretary of War an additional memorandum in the form of a letter by Gen. Crowder which embodies substantially all that was contained in my memorandum of April 10 to him, and additional observations.

Senator KNOX. You stated, did you not, that Maj. Rand had recommended that the execution be carried into effect?

Col. CLARK. Yes.

Senator KNOX. And did his recommendation go along with the record when it was transmitted to the Secretary of War?

Col. CLARK. No, sir. The final review would be the only one that would go forward, and I assume that when the review of the facts which I made was adopted as the review to which the Judge Advocate subsequently attached his recommendation, the prior reviews, which never were signed, would be disregarded.

Senator KNOX. As a matter of fact, however, when it did get to the Secretary of War the only recommendation that had been made was the recommendation that the judgment be carried out except your own personal recommendation in the private memorandum that you made up for the benefit of the Judge Advocate General. Is not that correct?

Col. CLARK. There is no doubt but that there was attached to the reviews which I formerly made a recommendation that the sentences be carried into execution, and that whatever supplemental information the Secretary obtained he obtained in this additional memorandum which Gen. Crowder submitted about April 16.

Senator CHAMBERLAIN. Does that conclude the foreign cases, the A. E. F. cases? If it does, I would like to ask a question or two about the Houston riot cases.

Gen. Ansell himself wrote quite a brief on this subject that you are now discussing—these four cases in Europe, didn't he, or was it a letter?

Col. CLARK. Gen. Ansell wrote a memorandum to Gen. Crowder in which he discussed the four cases and advised again recommending the death penalty.

Senator CHAMBERLAIN. He did that later?

Col. CLARK. That was on April 15, 1918.

Senator CHAMBERLAIN. Was that letter forwarded by the Judge Advocate General to the Secretary of War?

Col. CLARK. I do not know that, Senator, of course.

Senator CHAMBERLAIN. But you do know that your memorandum went forward?

Col. CLARK. No.

Senator CHAMBERLAIN. I think Ansell's complaint was that his letter was not placed before the Secretary.

Col. CLARK. Oh, I did not say it was. Gen. Crowder wrote a memorandum of his own to the Secretary of War, in which he incorporated practically verbatim what I had written to him plus some observations of his own.

Senator CHAMBERLAIN. Yes, go ahead.

Senator WADSWORTH. So that the recommended action finally made by the Judge Advocate General was not a rigid one?

Col. CLARK. Well, I imagine, if my understanding is correct, I imagine it was concluded with the sentence, "It is recommended that the sentence be carried into effect," or "that there is no legal objection to carrying the same into effect."

Senator CHAMBERLAIN. That is what you understood?

Col. CLARK. But with all these other facts submitted. Of course, now, I have never seen the recommendation.

Senator KNOX. Is the recommendation that judgment should be carried into effect accompanied by reasons showing why it should not be done? Have you considered that?

Senator WADSWORTH. That is what I observed—lacked a certain degree of rigidity.

Senator KNOX. I think you are right about that.

Senator CHAMBERLAIN. Now, Colonel, if that concludes those cases, I want to ask you about the Houston riot cases. My recollection of that was that a number of those sentences were carried into effect and the convicted men executed without an appeal or review of those cases. Do you know whether or not that is correct?

Col. CLARK. Yes, I am entirely familiar with the history of the first Houston riot case.

Senator CHAMBERLAIN. How many men were executed as a result of those trials?

Col. CLARK. I can only answer that as to the first trial. I have before me my rough draft of the opinion finally promulgated as the opinion of the Judge Advocate General in the case of the trial of 63. They were those charged with the mutiny and murder.

Senator CHAMBERLAIN. Pardon me, Col. Clark, there was an interruption. Did you state in answer to my question how many of them were executed?

Col. CLARK. I was just coming to that. I said I had only personally examined—

Senator CHAMBERLAIN (interposing). Pardon me.

Col. CLARK (continuing). The record of the trial of 63. There were other and later trials and I did not examine the records of those trials; but I am referring now to the first trial, and this is the case in which a number were executed upon the order of the department commander before the records were sent forward for review.

Senator CHAMBERLAIN. Who was the commander down there at that time?

Col. CLARK. My recollection is it was Maj. Gen. Ruckman at that time, but I think he was subsequently relieved and assigned to some other command, perhaps retired.

Senator MCKELLAR. They were executed before the papers got here.

Col. CLARK. Yes, sir.

Senator CHAMBERLAIN. That is what I am trying to bring out.

Col. CLARK. Now I will give you the number in just a minute. There was Sergt. Nesbitt and 12 others—Sergt. Nesbitt and 12 others—

Senator CHAMBERLAIN (interposing). They were hanged?

Col. CLARK. Yes.

Senator CHAMBERLAIN. So there might have been errors—

Senator MCKELLAR (interposing). Why were not these records brought up?

Col. CLARK. Well, of course, it would be difficult for me to say. Under the Articles of War the commanding general of a territorial department in time of war is authorized to approve and carry into effect the death sentence in certain classes of cases.

Senator MCKELLAR. What rule is that?

Col. CLARK. That is the forty-eighth article of war. For instance, under the forty-eighth article of war, in addition to the approval required by the forty-sixth article, confirmation by the President is required in certain cases before sentence of death is carried into execution. Subdivision D reads:

Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or \* \* \* as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field, or by the commanding general of the territorial department or division.

Now, the procedure followed by Gen. Ruckman in the case was this: A general court was convened; the case was tried during a period of 30 days or more; a copy of the record was transcribed from day to day as the case proceeded; Col. Dunn, the departmental judge advocate in the Southern Department examined the record from day to day as the case proceeded; and at the conclusion of the trial and the conclusion of the examination made by the departmental judge

advocate, it seemed expedient, apparently, to Gen. Ruckman to exercise the power which the forty-eighth article of war conferred upon him and approve and carry the sentences into execution.

Senator CHAMBERLAIN. Those men, then, were given no opportunity to ask for a review of their cases?

Col. CLARK. No, sir.

Senator CHAMBERLAIN. And none to appeal for clemency?

Col. CLARK. No; none whatever.

Senator CHAMBERLAIN. Why did they bring up the other cases to the Judge Advocate General's office?

Col. CLARK. The other—

Senator CHAMBERLAIN (interposing). There were—there were altogether 63 who were tried.

Col. CLARK. Well, the records came up in the usual course.

Senator CHAMBERLAIN. Oh, yes.

Senator SUTHERLAND. Only 13 of them were sentenced to death as a result of the first trial?

Col. CLARK. That is all.

Senator SUTHERLAND. And the others all had other sentences imposed upon them?

Col. CLARK. Yes; sentences ranging—there were a number that were acquitted. Some were given 3 years, some 5 years, some 10 years, some 20, and some life.

Senator KNOX. What was the charge upon which they were tried?

Col. CLARK. They were charged with mutiny and murder.

Senator KNOX. They are the classes of cases that the commanding general is authorized to execute?

Col. CLARK. Yes, sir; they mutinied, a company of them or more; stole about 50,000 rounds of ammunition and took their rifles and went down into the city and killed many unarmed, unoffending citizens—I have forgotten now how many were killed.

Senator CHAMBERLAIN. Several people.

Col. CLARK. Oh, that would hardly—

Senator KNOX. Do you know, Col. Davis?

Col. DAVIS. There were 15, I think, sir.

Col. CLARK. And it developed in the subsequent trials that there were two or three others.

Senator WADSWORTH. Seventeen.

Col. CLARK. I think it was 17 or 18.

Senator KNOX. What class of people, citizens?

Col. CLARK. Well, some young people, some men, some women.

Senator KNOX. Civilians?

Col. CLARK. No, not all civilians—they killed one or two soldiers in camp before they left and an officer, and as I now recall, two soldiers down town.

Senator WADSWORTH (interposing). It was a state of mutiny, wasn't it?

Senator CHAMBERLAIN. Did they kill an officer before they started out?

Col. CLARK. No; they killed an officer on their way down town. He went out from town to meet and if possible stop them.

Senator CHAMBERLAIN. I thought an officer was killed.

Col. CLARK. They mutinied along about 8 o'clock of a dark, drizzly night. The mutineers gathered in the streets of Company I,

that was the closest to the city, and at a preconcerted signal they rushed for the ammunition tents. In the early part of the day, because there had been mutterings of discontent, the officers had gathered in the rifles. They made a rush first for the tents where the rifles were stacked and then went to the ammunition tents and got, I think, about 50,000 rounds of ammunition. In the meantime, the officers were seeking to quell the mutiny. Volleys were fired in the company's streets. One or two soldiers were then killed; officers were beaten up. There were no lights in the company's streets, and when an officer would light a lamp, a lantern, or use a flash light, somebody would either knock him on the head or kick the light out of his hands.

The men started down town about 8.30 in semimilitary formation, with file closers and corporals in charge of squads. They probably were going down primarily to get the police of the city, with whom they seemed to have a feud. On the way down they volley fired at intervals every block or so. They would stop and fire volleys indiscriminately when they first started out. The camp was right close to a small settlement on the outskirts of the city, and practically every house and every building in that settlement, lying between the city and the camp in that district, was riddled with bullets.

Senator CHAMBERLAIN. People were killed in their beds in the house.

Col. CLARK. Yes; people ran out of the houses and were killed in the streets or in the gutters where they had sought shelter. For instance, there was a man by the name of Thompson driving past on the road in an automobile with his wife, her sister, and the latter's husband. A volley struck the automobile and punctured it in about a dozen places, killed Thompson and wounded one other in the machine. A man by the name of Carson, a workingman, was just coming home. He got off the street car near the camp, and was coming up the street accompanied by a man by the name of Neumeyer when the men broke from camp. The troops saw Carson by the light of the street lamps and riddled him with bullets. Neumeyer jumped in the ditch and escaped with a wound. A young man accompanied by his wife was visiting his parents. He went out to see what the trouble was. He thought there was a sham battle—just went out bareheaded and unarmed. He got a short distance from the house, was ordered to throw up his hands by a squad of the mutineers. He did so. As he threw up his hands they fired a volley practically taking off both arms at the elbow.

Then, as he fell they fired another volley into his body; he died. Another young man went out on the porch to see them as they went by, thinking some military maneuvers were being carried on. He was shot dead. Another man named Garedo was shot dead in his bed. There was a little girl who was working in her father's grocery store who received two bullets. She afterwards recovered. Many more were killed as the mutineers marched down town. They met two young fellows, two boys, in an automobile and ordered them to get out. One jumped out. He was shot and then he was stabbed and ripped up with bayonets as he lay on the ground. The other boy was shot and left for dead, but he lived. They proceeded a little further down and met another automobile, and, as I remember it, all of those in the automobile (there were four of them) were killed

and a couple of them were ripped open with the bayonets. Other men were killed or severely wounded.

Senator KNOX. How many days elapsed between the mutiny and the actual execution of these men?

Col. CLARK. Well, they were tried, let me see, the mutiny occurred on the 23d day of August, 1917.

Senator KNOX. When were they executed?

Col. CLARK. The trial was concluded and the sentences were approved on the 10th of December, and it is my recollection the executions occurred perhaps two or three days after the sentences were confirmed.

Senator KNOX. Well, I merely asked for information. What is the point of the review of these cases?

Senator CHAMBERLAIN. I do not know.

Senator NEW. There were 63 trials and there were about 55 convicted. Of course, 13 were sentenced to be executed, and, as to them, the power of revision or clemency had passed away, of course, but as to the remaining 40 or 45 who were given sentences ranging from two years up to life, of course, it is proper that the records should be reviewed with a view to determining whether or not there were grounds for clemency in those cases.

Senator KNOX. Of course, all upon whom the sentence of death was imposed by the general court-martial were executed and all the other cases were reviewed, is that so?

Col. CLARK. Yes.

Senator SUTHERLAND. The death sentence was imposed upon others in the later trials?

Col. CLARK. Yes; I think so.

Senator NEW. Were any of them carried into effect?

Col. CLARK. I am not clear about that, as I think those cases were finally disposed of in the department after I left the division, but my impression now is there were a number of executions after this, but I do not know the exact number of executions.

Senator SUTHERLAND. In all those cases where there were subsequent trials, were those proceedings reviewed by the Judge Advocate General's office?

Col. CLARK. I think so; yes. No doubt about that.

Senator CHAMBERLAIN. They were within the law in carrying out those executions?

Col. CLARK. Undoubtedly.

Senator NEW. Under the forty-eighth article of war.

Senator WADSWORTH. And it was an unusually flagrant case in which they were being done, so to speak.

Col. CLARK. It was a most atrocious case, there is no doubt about that.

Senator WADSWORTH. One of the worst I ever heard of.

Col. CLARK. The whole town was terrorized. It was put under martial law, and it was after midnight before the troops were gotten in there and posted around various parts of the city to protect the inhabitants from further outrages.

Senator McKELLAR. I want to ask you just one question, if he is finished with that. Now that the war is over, Colonel, what do you think of having a review de novo of all these cases? Why should that not be done?

Col. CLARK. Well—

Senator MCKELLAR (interposing). Applying the law to each of the cases that have arisen since the war began?

Col. CLARK. I am not prepared to express a very definite view on that subject, but it seems to me, Senator, those are some matters worthy of consideration before such legislation is enacted. In the first place, I think there were 12,000 or 15,000, or perhaps 20,000 sentences imposed by general court-martial. Probably over 80 per cent of those have already been completely served or executed, because many, many sentences were very small, I remember last fall in the course of our study of statistics of cases from a certain division that over 75 per cent of them were for less than six months.

Senator MCKELLAR. Many of those cases may have carried with them a dishonorable discharge from the Army, when, as a matter of fact, such dishonorable discharges ought not to have been granted, and those cases ought to be reviewed, it seems to me, and the man's record put right.

Col. CLARK. Well, upon that I would submit this for your consideration. I presume that the number of very severe sentences, such as have been mentioned in the newspapers are limited to a few dozen or a few score out of 20,000.

In the second place, answering your question directly, I would suggest this question of law: If, under the legislation existing at the time the discharge was imposed and carried into execution, that discharge operated to permanently separate a man from the service, would it be possible to enact legislation now that would restore him to the service for the purpose of giving him an honorable discharge, if the facts were differently found?

Senator MCKELLAR. No; but this tribunal under the powers, in reviewing the case, may find that, as a matter of fact, a dishonorable discharge ought not to have been given to this soldier and that he should have been honorably discharged, and enter an order nunc pro tunc.

Col. CLARK. Yes; Congress of course, could wipe out a dishonorable discharge indirectly.

Senator MCKELLAR. And, it seems to me, that that is what ought to be done, or the power ought to be given so that it could be done in proper cases.

Col. CLARK. That would involve the assumption, of course, that a great many of such cases are to be found.

Senator MCKELLAR. There ought to be some reviewing authority.

Senator WADSWORTH. Did you, in your review of the 63 cases mentioned, find errors in those trials?

Col. CLARK. No; it was well tried, because on the one side was Col. John A. Hull, a lawyer of long experience, Judge Advocate of the Central Department. He was assisted by a Maj. Stutphin, a distinguished lawyer from civil life. Maj. H. S. Greer, an able lawyer, conducted the defense. In examining the record I was struck with the fact that it was a well and closely tried case on both sides.

Senator MCKELLAR. I rather think that the burden of the testimony is to the effect that under the Articles of War as they are now framed, it would be possible to execute a man without any chance of revision. I think that was the burden of his testimony.

Col. CLARK. No doubt about it at all; and, frankly, I think the law, or practice, should be amended in that respect. However, I will say that I do not think legislation necessary, unless you simply want to have legislation that prohibits a rule to the contrary, because in January, under General Order No. 7, all of the cases involving death, dismissal of an officer, or dishonorable discharge were, before the promulgation of sentence, required to come to the Judge Advocate General for review.

Senator MCKELLAR. Then the exception I read here in rule 48, regulation 48, has been done away with by rule 7.

Col. CLARK. It has been done away with to this extent: If the record be found sufficient on the review, and there is no recommendation for mitigation, no further confirmation is necessary in many cases, but under General Order No. 7, all cases of death, dismissal of an officer, or where dishonorable discharge was imposed, had to come up to Washington for review before the sentence could be carried into execution. I think the Houston cases were a factor, but rather a minor factor, in inducing the promulgation of the order, as the order was primarily for the purpose of getting before the Judge Advocate General's office the records, with opportunity to review and make recommendation before sentence was pronounced, legally, formally pronounced, to the end that the final sentence pronounced and promulgated should be in accord, as far as possible, with the recommendation of the Judge Advocate General.

Senator CHAMBERLAIN. Gentlemen, if there is nothing further you wish to ask Col. Clark, we might take a recess until half past 2.

Senator WADSWORTH. Is Col. Davis to testify?

Senator CHAMBERLAIN. Yes; at half past 2, and then we want to go right on with others.

(Thereupon at 1.30 p. m. o'clock a recess was taken until 2.30 p. m. o'clock this day.)

#### AFTER RECESS.

The committee convened, pursuant to recess, at 2.30 o'clock p. m., Hon. George E. Chamberlain (chairman), presiding.

Senator CHAMBERLAIN. I believe Col. Davis is the next man. Colonel, please give to the stenographer your address and your present rank and present tour of duty.

#### STATEMENT OF COL. E. G. DAVIS, JUDGE ADVOCATE GENERAL'S DEPARTMENT, WAR DEPARTMENT.

Col. DAVIS. I am E. G. Davis, captain, United States Army, retired, serving during the war under an appointment as colonel in the Judge Advocate General's Department.

Senator CHAMBERLAIN. Graduate of West Point?

Col. DAVIS. Yes, sir. I graduated from West Point with the class of 1900, the year following the graduation of Gen. Ansell. I served at West Point for four years as an instructor of law. I was retired from the Army in 1910. For seven years I was in the private practice of law at Boise, Idaho, and was recalled to service in May, 1917. I reported in Washington on the 29th of May, 1917, for duty in the Judge Advocate General's office and have served in that office most of the time since. In September of last year, I was detailed with

the legislative section of the General Staff and have been on duty at the War College since that time. I have served in practically every department of the Judge Advocate General's office. From October, 1917, to about the middle of May, 1918, I was in charge of the Disciplinary Division of the Judge Advocate General's office and had charge, in the first instance, of the reviewing of all cases of trial by general court-martial coming to that office.

Senator CHAMBERLAIN. From October until when?

Col. DAVIS. October, 1917, until the middle of May, 1918.

Senator CHAMBERLAIN. That was the same time Col. Clark went out?

Col. DAVIS. Yes, sir. Col. Clark and I left about the same time.

Senator CHAMBERLAIN. You have not been in that branch since?

Col. DAVIS. I have not been there since.

Senator CHAMBERLAIN. What branch have you been in since that time?

Col. DAVIS. After leaving the disciplinary section I was in charge of that section of the office having to do with the writing of miscellaneous opinions and was on that duty until, I think, the 9th of September, when I was ordered to duty with the General Staff.

Senator CHAMBERLAIN. Who has been detailed for duty since May, 1918, in this particular disciplinary branch of the service?

Col. DAVIS. My successor was Col. Beverly A. Read.

Senator CHAMBERLAIN. Who took Col. Clark's place?

Col. DAVIS. I think no one actually took Col. Clark's place.

Senator CHAMBERLAIN. Well, what man has charge of that branch of the service?

Col. DAVIS. Col. Read is at the head of that section at the present time, and I think there are forty or more officers on duty in that section.

Senator CHAMBERLAIN. You have not had much, if anything, to do with it since May, 1918.

Col. DAVIS. No; but I was in the office and was under Gen. Ansell and Gen. Crowder during the time when this more or less famous controversy was raging in the Judge Advocate General's Office. In fact I was a sort of shuttlecock, so to speak, between Gen. Crowder and Gen. Ansell. In a way, I had to bear the brunt of the disagreement on both sides, and, I think I know more than any other man about that controversy; how it arose, what the importance of it is, and what its relation is to pending legislation; and I can give the committee, if you so desire, the benefit of my experience in that connection.

Senator CHAMBERLAIN. Of course, the committee does not care anything about their controversy, but we would like to know about—that is, any personal controversy, we do not care anything about that.

Col. DAVIS. I do not mean any personal controversy, I mean this legal controversy.

Senator CHAMBERLAIN. The legal controversy is what we are interested in.

Col. DAVIS. As Col. Clark intimated this morning, the first serious question arose over the case of the noncommissioned officers who were tried for mutiny at Fort Sam Houston. When the case came to the office, I was in charge of the disciplinary division. I may say that at that time the cases were beginning to multiply very

rapidly and the Judge Advocate General's Office had not prepared for the expansion and, and so the work was very heavy, and the number of officers very few. For some weeks I had to write many reviews myself. Later on, when we got in new men, I was able to pass that duty on to others and simply had to review their work. I reviewed this particular case myself and I called it to Gen. Ansell's special attention. He assembled all the officers in the department, read the review to them, and they all assented to the statement of facts and the statement of law, and the only question which arose was as to the form of recommendation which should be made for the disposition of these cases.

The men had been dishonorably discharged and the discharges had been executed. Under the practice of the department which then existed these discharges could not be revoked or set aside by any action of the department because of the fact that they had been fully executed. This fact seemed to disturb Gen. Ansell very much and he lamented that there was no power in the Judge Advocate General's office to nullify this judgment and correct what he regarded as grievous errors of law. In this case I had shaped the review in the usual way I had recommended at the end, in accordance with the statute, that the sentence be set aside and that these men be authorized to reenlist and complete their terms of enlistment. Upon serving honorably to the end of their terms they would thus become entitled to an honorable discharge from the Army instead of the dishonorable discharge that had been given. Now, that was the customary procedure. That was the procedure that had grown up under the statute, and I think was sanctioned by both precedent and authority. Gen. Ansell was dissatisfied, as I say, with that recommendation, and he changed the last paragraph of the review which I had prepared and substituted a paragraph reading as follows—

Senator McKELLAR (interposing). Have you got your paragraph there on the same subject?

Col. DAVIS. No.

Senator McKELLAR. Read your paragraph first, then read his.

Col. DAVIS. I have not got my paragraph. That paragraph—

Senator McKELLAR. What was the substance of it?

Col. DAVIS. The substance of it was a recommendation that the sentence be set aside, that the unexecuted portion of the sentence be remitted, and that these men, upon their application, be allowed to reenlist and be restored to their places in the service.

Senator McKELLAR. Now read his.

Col. DAVIS. Gen. Ansell submitted this recommendation:

Inasmuch as the substantive offense charged does not appear to have been made out by the evidence of record; inasmuch, further, as the situation in which these men were placed and out of which charges against them grew resulted largely from the unwarranted and capricious conduct of a very youthful and inexperienced officer; and inasmuch, finally, as the record of this case impresses me with the belief that the accused were not given a fair trial, in the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, and recommend that the necessary orders be issued restoring each of them to duty.

Now, it will be noticed that the difference between Gen. Ansell and the then departmental practice was largely a difference of method.

Gen. Ansell wanted to say that the power was invested in him, by section 1199, Revised Statutes, as Acting Judge Advocate General, to himself take action and direct what should be done.

Senator CHAMBERLAIN. You refer it to him. You emphasize it.

Col. DAVIS. The Acting Judge Advocate General?

Senator CHAMBERLAIN. Yes.

Col. DAVIS. The previous office practice had been to make report to the Secretary of War, as the representative of the President, and recommend the action which should be taken by him. When fully accomplished, the practical result would be much the same in either case.

Senator McKELLAR. That is what I was getting to. As I understand it, the facts in your opinion were precisely the same as those Gen. Ansell used. He simply used yours, but changed the last paragraph to make a different recommendation.

Col. DAVIS. Yes, sir.

Senator McKELLAR. But as a matter of fact the same result was obtained either way.

Col. DAVIS. I say—

Senator McKELLAR (interposing). Practically.

Col. DAVIS. Practically.

Senator McKELLAR. Now, what he did was to restore these men to the Army without further action on their part. Was that the only difference?

Col. DAVIS. That was the difference. He assumed the right to vacate the finding and sentence in each case. That customary departmental action was taken under the act of March 4, 1915, which contemplated the formal application of a man to be restored to duty in a case where he had been actually separated from the military service and his discharge effected.

Senator CHAMBERLAIN. There was a very great difference between the two plans though, was there not?

Col. DAVIS. Yes.

Senator CHAMBERLAIN. One left the stigma of dishonorable discharge and the other wiped it out.

Col. DAVIS. The plan advocated by Gen. Ansell would give to the Judge Advocate General authority to vacate the judgment, to say that it should be regarded as though it had never been. The other plan indicated a recognition on the part of the War Department that there should have been no dishonorable discharge, and the effect of its action in authorizing a return to duty would be the same as if no dishonorable discharge had ever been executed.

Senator McKELLAR. This difference would attach to it, that if the plan suggested or recommended by Gen. Ansell were carried out then there would be no dishonorable discharge against that man's record.

Col. DAVIS. Well—

Senator McKELLAR (interposing). There could not be, because it had been set aside and canceled. On the other hand, your recommendation that dishonorable discharge would always be there as a part of the man's record.

Senator REED. And suppose he did not reenlist, then it would remain there as the final act of his Army career—a dishonorable discharge.

Col. DAVIS. Yes, sir; that is true.

Senator McKELLAR. Your contention is that there was no power in the Judge Advocate General to set aside the dishonorable discharge—is that it?

Col. DAVIS. Yes. Gen. Ansell attempted to take this action and, using the case I have referred to as a basis for his argument, he drew up, and I assisted him in drawing it, quite an elaborate brief in support of his views. That brief was submitted to all of the officers who were then on duty in the department—including myself—and I think we all concurred with him in holding that the power could be deduced from the existing statutes if the Secretary of War and the President deemed it wise to assert that power after it had not been exercised for more than 50 years. I made a personal search to see if section 1199, R. S., had ever been made the subject of judicial construction and I could not find—or did not find—any case in which it had been construed. I overlooked the Mason case, which was unreported, but which was heard in one of the Federal courts in one of the New York districts.

Senator McKELLAR. What construction did the judge in the Mason case place on it?

Col. DAVIS. In the Mason case, the judge denied the power which Gen. Ansell sought to deduce from the statute. It was a complete denial.

Senator McKELLAR. And that is the only reported case?

Col. DAVIS. Yes, sir; the only case reported on that subject. Now, then, as I say—

Senator McKELLAR (interposing). Just one moment before we leave that. Did you say that you prepared the opinion that Gen. Ansell used in making these contentions?

Col. DAVIS. I collaborated with him in its preparation; yes, sir. I prepared the original paper, submitted it to him, and then we together, using that as a basis, went over the whole argument and redrafted it, and the argument, as redrafted, was submitted by him to the Secretary of War.

Senator McKELLAR. Well, now, after having prepared the paper, you differed with the conclusion that Gen. Ansell reached?

Col. DAVIS. The cause of that was this: Immediately the Secretary of War referred Gen. Ansell's brief to Gen. Crowder, with a query something like this: "How is it, if this power exists, that it has not been previously discovered in these 50 years?"

Following that, Gen. Crowder came back to the office and resumed his duties as Judge Advocate General, and Gen. Ansell became second in rank in that office.

Senator CHAMBERLAIN. That is, he was relieved from his position?

Col. DAVIS. As Acting Judge Advocate General.

Senator McKELLAR. When was that?

Col. DAVIS. That was in the early part of November, 1917. Gen. Crowder had written a brief in opposition to the brief of Gen. Ansell and it had been submitted to the Secretary of War. After Gen. Crowder came back to the office, he gave me a copy of his brief and directed that I further study the question, with the view of getting together for him any additional arguments that could be found on his side of the case. Col. Clark and I spent several days studying the question from every angle. We looked up all the opinions of the Attorney General and we found that in several of these opinions

similar questions had been considered and the power which Gen. Ansell sought to deduce from the statutes had been denied by the Attorney General, at least in effect.

Senator CHAMBERLAIN. There was no express decision.

Senator MCKELLAR. Except the Mason case; the Mason case or Funston case; which was it?

Col. DAVIS. The Mason case. That happened here in Washington; Sergt. Mason attempted to shoot the assassin of President Garfield.

Now, as a result of this study which Col. Clark and I gave this question at the direction of Gen. Crowder, we found the Mason case, of course, and all these opinions of the Attorney General, and we reached the conclusion that the better legal opinion was against the position which Gen. Ansell has assumed. We suggested that the difficulty which Gen. Ansell had found in the old office practice could be reached by what afterwards was published as General Order No. 7, of 1918, an order staying the execution of sentences which resulted in death, or a change in status of an officer or enlisted man until after his case had been reviewed in the office of the Judge Advocate General.

Gen. Ansell opposed the issuance of General Order No. 7. He filed a brief against it, and contended very vigorously that that form of the procedure ought not to be adopted, not because it would not protect the soldiers' rights, not because it would not serve the purposes of justice, but because he did not think it was legally correct and defensible, because he thought it was based upon a wrong legal theory. When Gen. Crowder's second brief, which was prepared largely by Col. Clark and myself, was submitted to the Secretary of War, Gen. Ansell asked permission to file a reply brief, which was done; and finally the Secretary of War, after considering all these briefs, reached the decision that this very large power which Gen. Ansell wanted to deduce from the old statute should not be deduced in view of the fact that the statute had remained unused for so long; he said, in effect: "If it is necessary to have that power we will go to Congress to get it rather than attempt to deduce it from this old statute." Gen. Ansell then assumed the position in the office of chief advisor to Gen. Crowder. All these cases which we reviewed in the disciplinary division which required the action of the Judge Advocate General, passed through the hands of Gen. Ansell before they reached Gen. Crowder. Gen. Ansell has stated in his letter to Congressman Burnett that he was relieved of responsibility for the administration of military discipline.

Senator CHAMBERLAIN. He was.

Col. DAVIS. Gen. Ansell stated in his letter to Congressman Burnett, which was printed in the record, that in November, 1917, he was relieved from responsibility for the administration of military discipline. That statement is not correct, for the reason that all these cases continued to pass through his hands. He signed many of them himself as Acting Judge Advocate General and actually exercised the discretion of deciding what, if any, cases went on to Gen. Crowder for his action. Gen. Ansell exercised final authority in all such cases during November, December, January, February, and March, except where he did not want to take the responsibility of determining a particular case himself.

Senator CHAMBERLAIN. But he was relieved as Acting Judge Advocate General?

Col. DAVIS. He was relieved as Acting Judge Advocate General. He was then the principal assistant of Gen. Crowder, and everything that went to Gen. Crowder went through his hands.

Senator CHAMBERLAIN. But he had to carry out the directions of Gen. Crowder.

Col. DAVIS. I say he decided whether a case went to Gen. Crowder or not.

Senator CHAMBERLAIN. He decided the cases along the lines of his superior officer.

Col. DAVIS. Exactly.

Senator CHAMBERLAIN. He was, therefore, deprived of his power of acting independently.

Col. DAVIS. But he still had power to decide whether cases should go to Gen. Crowder.

Senator CHAMBERLAIN. I can understand that very well, Colonel. What I am saying is that he had the views of his superior officer, and generally, when he would come to pass on these cases and determine whether he should pass it on to Gen. Crowder, it was not as to whether it stated his views but whether or not it stated his chief's views.

Col. DAVIS. That is so, of course, in all military matters, but you will understand, Senator, that each of these cases was decided upon its own facts and each case separately, so there could be no general rule which could apply to all cases. He had the discretion in every instance to determine whether it was a case for him to dispose of finally or whether it should go to Gen. Crowder; so Gen. Ansell had a large responsibility for the decision in all cases.

Senator WADSWORTH. In any event it can not be contended that he was relieved of responsibility in disciplinary cases.

Col. DAVIS. Absolutely not. All those cases which went to Gen. Crowder went through him. I may say that Gen. Ansell would pass on to Gen. Crowder about three cases in a hundred of all received—that is a little too low, but probably not to exceed seven or eight cases in a hundred.

Senator CHAMBERLAIN. All the time he was Acting Judge Advocate General?

Col. DAVIS. Yes, sir; under Gen. Crowder. Now, in the great majority of cases that were reviewed and passed upon in my division it was found that the sentence was legal; that there was sufficient evidence to sustain the finding; that the punishment was not excessive; that no question of law was raised and the case was settled finally there. It was when there was something wrong in the trial or record or clemency appeared necessary that the case went on to Gen. Ansell or Gen. Crowder.

When General Order No. 7 was finally issued and put in operation there was thereafter no difficulty in handling these cases. So far as my knowledge goes there has not arisen since that time any case in which it can be contended that there was not in the department full power to do justice to the man on trial; and so it can not be said at the present time that any change in the law is necessary in order to accomplish justice in the Army. A change may be advisable for one reason or another, but it can not be fairly claimed that this proposed change is necessary for the purpose of justice.

Now, to pass on to a concrete case, I wish to add to what was said by Col. Clark this morning with reference to the cases that came

from the American Expeditionary Forces in France—the four death cases—Col. Clark has outlined for you the details in those cases. When the cases first passed through my hands and were submitted to Gen. Ansell, the cases carried a recommendation for the execution of the sentences. Col. Clark told you they were sent back by Gen. Ansell for the purpose of having incorporated in all the reviews the letter which Gen. Pershing had written advocating execution of these sentences, and which had been placed in but one. These cases were thus twice passed upon by Gen. Ansell, once before that change and once after. They were passed by Gen. Ansell on to Gen. Crowder's desk with the recommendation that the sentences be executed.

Senator MCKELLAR. Do you remember about what dates they were passed by him?

Col. DAVIS. They were passed some time, I should say, in the latter part of February or the first of March.

Senator SUTHERLAND. April 15, 1918, is the record submitted by Gen. Ansell.

Col. DAVIS. That is a later stage of the case.

Senator MCKELLAR. Gen. Ansell passed them on to Gen. Crowder in February or March with the recommendation that the sentences be carried out as imposed?

Col. DAVIS. Yes, sir. At least he raised no opposition to the recommendations that had been made. He passed them on, and the practice in the office was that when Gen. Ansell passed a paper to Gen. Crowder without expressing any opposition thereto Gen. Crowder could safely sign it without any further consideration. These cases, however, were of such grave importance that Gen. Crowder did not sign these recommendations as submitted and it was at that stage that he called Col. Clark in and required this careful study which Col. Clark made of those cases and the collation of all the facts.

Gen. Ansell has stated in his letter to Congressman Burnett that it was necessary for him to go over Gen. Crowder's head and over the head of the Secretary of War in order to get his recommendations to the President, in order to save these men from execution. The history of that is this: When Col. Clark was called in to the case and was assigned to the duty of further study, he spent—

Senator MCKELLAR (interposing). He was called in by Crowder, not by Ansell?

Col. DAVIS. He was called in by Gen. Crowder, not by Gen. Ansell. He spent several days in a careful study of these cases, as he told you this morning, and reached the conclusion that these sentences should not be executed. He wrote two or three different reviews. Gen. Crowder was not satisfied with them the first time nor until they had been rewritten two or three times. At that point Gen. Crowder called Gen. Ansell in and directed him to make a study of those cases based upon everything that had been submitted and submit a memorandum to Gen. Crowder with his recommendations of the action that should be taken. Shortly after this was done Gen. Ansell called me into his office one morning, or at least spoke to me when I was in his office and asked me this question: "What in the hell is the matter with Gen. Crowder about those death cases from France?" I said to Gen. Ansell: "Gen. Crowder is apprehensive lest he sign a recommendation that these sentences be exe-

cuted which can not be justified. Col. Clark has reached the conclusion that the sentences ought not to be executed and, because of that fact, Gen. Crowder, I suppose, wants the most thorough investigation possible made of these cases," Gen. Ansell replied: "I do not agree with Col. Clark, I think the sentences ought to be executed."

Senator MCKELLAR. Now, what date was that?

Col. DAVIS. That was the 10th or 11th of April, along about the time when Gen. Ansell was called into these cases and directed to review them.

Senator SUTHERLAND. Is not the testimony of Gen. Ansell in those four cases of record?

Col. DAVIS. Yes, sir.

Senator SUTHERLAND. In this record [indicating proof sheets of Gen. Ansell's testimony]?

Col. DAVIS. Yes, sir. I have it right here; and I have also read his letter to Congressman Burnett, printed in the Congressional Record, in which he makes this statement:

I went to the head of the office and orally presented to him my views in opposition. I then filed with him a memorandum in which I did my best to show, what seemed to me to be obvious, that these men had been most unfairly tried, had not been tried at all, and ought not to die or suffer any other punishment upon such records. Discovering that these memoranda had not been presented to the Secretary of War, and feeling justified by the fact that I had no other forum in this department, I gave a copy of the memorandum to a distinguished member of the Judiciary Committee of the House, and was told by him that he could present the cases to the President himself. I was compelled to do this—an act inconsistent with strict military propriety—by the dictates of my own conscience, by my desire to serve justice, and by my sense of duty to my God and these unprotected men that their lives might be spared.

It is true that after he had been directed by Gen. Crowder to file a memorandum Gen. Ansell did so, and he advised against the execution of these sentences.

Senator MCKELLAR. I understand he filed that memorandum. As I understand your testimony he expressed the opinion, however, that the findings of the court-martial should be carried out.

Col. DAVIS. Yes, sir.

Senator MCKELLAR. And that the men should be hung.

Col. DAVIS. Yes, sir. That was before he had read the memorandum prepared by Col. Clark on these cases.

Senator MCKELLAR. And I understand you further that he adopted, or virtually adopted, the memorandum that Col. Clark had prepared as his opinion, and that was the opinion he presented here as his opinion?

Col. DAVIS. Yes, sir. The facts contained in Gen. Ansell's memorandum were taken bodily from the memorandum prepared by Col. Clark.

Senator KNOX. What reference, in point of time, did this event you have just detailed when Gen. Ansell wanted to know why in the hell Gen. Crowder was holding this up, and that he thought that the sentences ought to be executed, what relation in period of time did that have to his having Clark's memorandum in his hands? Was that before or afterwards?

Col. DAVIS. My recollection of it is that it was just before. Gen. Crowder had perhaps just given him Col. Clark's memorandum, and

he had not read it. As I say, he had been directed by Gen. Crowder to make a review of these cases.

Senator KNOX. Now, I understand that proposition. Perhaps it is this, I do not want to suggest this (perhaps it is so, but it may not have been, he regretted that the matter was put up to him that caused him to make this expression?

Col. DAVIS. It may have been. Of course, I can only give my impression of the meaning.

Senator KNOX. Well, I do not want to ask what was your impression, for that is not legitimate evidence.

Col. DAVIS. Of course, what he actually had in mind I do not know. I could only interpret his words.

Senator WADSWORTH. What happened in the handling of this case?

Col. DAVIS. Thereafter, after receiving the memorandum prepared by Gen. Ansell and having in his possession the memorandum prepared by Col. Clark, Gen. Crowder added to the memorandum which had been prepared by Col. Clark, carrying these cases to the Secretary of War, the final or closing paragraph in which the recommendation of the Judge Advocate General was made. That recommendation was to the effect that the cases had been legally tried; that there was evidence to sustain the conviction and that the sentence be executed.

Senator SUTHERLAND. Ansell wrote that?

Col. DAVIS. Gen. Crowder wrote that.

Senator SUTHERLAND. In order that the record may be clear the names of those four men whose sentences of execution had been recommended were Ledeyen, Fishback, Sebastian, and Cook.

Col. DAVIS. Together with the formal memorandum and formal review which Gen. Crowder submitted, he prepared for the Secretary of War a memorandum based upon the study of Col. Clark and the brief of Gen. Ansell setting out all the reasons on the other side of the case. He submitted a cold, formal, legal opinion that the sentences could legally be executed and so recommended. On the other hand he gave all the reasons and suggestions as to why they should not be executed in order that the Secretary of War could have them before him in making up his mind what should be done. The Secretary of War prepared a long letter of 10 or 12 pages for the President, made a very clear presentation of the case, and finally concluded with a definite recommendation that the sentences be not executed.

Senator SUTHERLAND. Have you a copy of that letter?

Col. DAVIS. I have not, but Maj. Rigby has there.

Senator MCKELLAR. Who wrote that letter?

Senator WADSWORTH. The Secretary of War.

Col. DAVIS. The Secretary of War wrote that letter. It is on file with the records of these cases—carbon copies of it are now with the records in the Judge Advocate General's office. There is also a letter sent by the President to the Secretary of War in which he thanked him for the very fair explanation he had made of these cases and in which he said he agreed entirely with his views as to what should be done and approved the order of mitigation which the Secretary had included for his signature.

Senator SUTHERLAND. If that letter is not in the record I would like it to be put in at this point.

Col. DAVIS. I have not the letter. I am testifying from recollection of what I have seen.

Senator SUTHERLAND. Will you just send it to the stenographer?

Col. DAVIS. I will say that Maj. Rigby has got all the information regarding that matter for the information of the committee.

Senator CHAMBERLAIN. Does that end those cases?

Col. DAVIS. That ends those cases; yes, sir.

Senator WADSWORTH. Have you any comments to make on the Houston cases?

Col. DAVIS. Yes; I make this comment on the Houston case: The action which was taken by the commanding general down there in carrying those sentences into execution without referring them to Washington was taken under full authority of law, under the statute as it existed at that time. He had authority to do what he did.

Senator CHAMBERLAIN. Under the forty-eighth article of war.

Col. DAVIS. Yes; it rather shocked the War Department, however, and the objection was raised that if it should be found in reviewing those cases that errors of law had been committed or that injustice had been done it would not help the men any to find this state of facts in the record after the man had actually been executed and that summary execution should not be carried into effect. That hastened the issuance of a little order which was the predecessor of General Order No. 7.

Senator CHAMBERLAIN. Will you please put those two orders in the record?

Col. DAVIS. Yes, sir.

(The order preceding General Order No. 7 is as follows:)

GENERAL ORDERS No. 169.

WAR DEPARTMENT,  
Washington, December 29, 1917.

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. The general court-martial order publishing the result of the trial shall recite that the date for the execution of the sentence will be hereafter fixed and published in general orders; and the fixing of the date of execution and the publication thereof shall follow the receipt of advice from the Judge Advocate General that there is no legal objection to the execution of the sentence. This rule of procedure does not relate to such action as a reviewing authority may desire to take under the fifty-first article of war.

General Orders, No. 7 is as follows:

GENERAL ORDERS, No. 7.

WAR DEPARTMENT,  
Washington, January 17, 1918.

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

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

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

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

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

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

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

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General. [250. 4, A. G. O.]

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

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into

effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file. [250.4, A. G. O.]

By order of the Secretary of War:

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

Official:

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

This order, however, was not issued primarily because of that fact, but was issued in pursuance to a recommendation which Col. Clark and I had formulated as a result of our study in the Disciplinary Division that that kind of action ought to be inaugurated; that in any of these cases where there was a definite change of status such as the dismissal of an officer, the dishonorable discharge of an enlisted man, or a sentence of death, before action could be taken the records should be sent to the office of the Judge Advocate General for review. That thing was in a formative process when this Houston riot case came along, affording a very good reason in support of our argument and it was adopted immediately. This first order was issued, I think, in December, 1917, and after further study and elaboration we got out General Order No. 7, covering all of these cases.

Now, if I may be permitted to suggest to the committee, I have taken frequent occasion in my career to recommend a revision of general court-martial proceedings. I think that there are many instances in which the procedure could be corrected in such a way as would safeguard the trials of both officers and enlisted men and would make the records less subject to objection of lawyers who read them and find these errors; but very little, if anything, is needed in the way of new legislation.

Senator CHAMBERLAIN. There was really no reason for new legislation in reference to 1199, because under the evidence there was deducible from it this power that has been mentioned.

Col. DAVIS. I do not know whether you were here, Senator, or not when I made the statement that we concluded—at least I concluded and Col. Clark concluded—after a thorough review of the authorities and after finding the Mason case that that power was not properly deducible from that statute.

We agreed with Gen. Ansell's argument in the first instance, but after more careful study and after finding the statute had been passed upon by one of the Federal courts and this power denied, we—

Senator KNOX. Did a civil court pass upon the question?

Col. DAVIS. That was a civil court.

Senator KNOX. What court was it?

Col. DAVIS. A court in one of the New York districts.

Senator KNOX. An inferior court?

Col. DAVIS. Yes, sir.

Senator SUTHERLAND. Pardon my interruption—

Col. DAVIS (interposing). I was saying that while we had agreed with Gen. Ansell in the first instance that this power could be deduced from the language of the statute, after thorough investigation and study we reached the view that the better legal argument was on the other side of the case.

Senator CHAMBERLAIN. Did you convince the other men that were in the Judge Advocate General's office to this latter view, or were they divided?

Col. DAVIS. So far as I know, the matter never was presented to anyone except Gen. Ansell and Gen. Crowder after Gen. Crowder came back. Gen. Ansell had assembled all his assistants and gone over the matter with them, but after Gen. Crowder returned to the office I do not think that was done and I do not know that I could correctly quote the view of any one of those other officers on the later phases of this controversy.

Senator WADSWORTH. Col. Clark gave it as his opinion this morning that no such power—that is, power to revise or modify sentences—should be lodged with the Judge Advocate General. Have you any opinion to express on that, Colonel?

Col. DAVIS. Well, I would be unalterably opposed to vesting in the Judge Advocate General any such authority. I think it should be vested in the President as was proposed in the amendment of section 1199 which was submitted last year.

I think the reasons for not vesting it in the Judge Advocate General stand out at every point of the case. In the first instance the Judge Advocate General is a subordinate officer of the War Department, is detailed to his position for a period of four years, he has no certain tenure of office, and it would be clearly wrong to invest in any subordinate officer of the War Department the control of discipline for which the President, the Commander in Chief under the Constitution, is ultimately responsible.

Senator WADSWORTH. What have you to say about lodging it with an officer who has charge of, and provides for, the prosecuting machinery?

Col. DAVIS. I agree with Col. Clark's statement as to that, absolutely.

Senator CHAMBERLAIN. Do you not think a Judge Advocate General ought to occupy a position similar to that occupied by the Attorney General—an advisor appointed not necessarily to prosecute a man, but to see that the man had justice done him?

Col. DAVIS. Yes, sir. That, I think, is the attitude which the present Judge Advocate General—and, so far as I know, all Judge Advocates General—try to bring to their work.

Senator CHAMBERLAIN. But he is the real prosecutor in all those court-martial proceedings.

Col. DAVIS. Do you refer to the Judge Advocate General or the trial judge advocate?

Senator CHAMBERLAIN. Trial judge advocate. He is in the same department.

Col. DAVIS. They are two different persons.

Senator CHAMBERLAIN. I know they are.

Col. DAVIS. The trial judge advocate is primarily a prosecutor. He prosecutes in the name of the United States. He is charged with the duty of protecting the rights of the accused and acting for him as counsel in so far as pertains to advising him of his legal rights in the process of the trial. That has always been the attitude that the regular officers of the Army have tried to bring to court-martial trials. I, myself, as a trial judge advocate in numerous cases have advised an accused of his rights to make certain objections; of his

right, for instance, to plead the statute of limitations or of his right to take other action which would protect him.

Senator CHAMBERLAIN. I am afraid the most of them are not so conscientious about it, Colonel, because I think the records of some of these court-martial proceedings indicate that they advised men to plead guilty.

Col. DAVIS. Yes, sir. However, I think that advice comes from the men who are detailed as counsel for the man rather than from the judge advocates ordinarily.

Senator CHAMBERLAIN. You started to talk about some article there when there was an interruption.

Col. DAVIS. I have here a reprint of the Articles of War and I was going to say that recent criticisms before this committee, as far as I can recall, and in the public press, of the results in court-martial cases, have all related to the extremely harsh punishments that have been awarded by courts-martial. I wanted to invite the attention of the committee to the fact that that can all be corrected by a very simple change in the statute, by including in it a provision to the effect that the President may be authorized to make regulations fixing limits of punishment, as the statute authorizes him to do for offenses committed in time of peace. If, during this war, there had existed limits of punishment binding upon courts-martial we would have heard of very few cases that could excite sympathy from any trained body of lawyers looking into the cases.

Senator WADSWORTH. In your opinion was the punishment in a very large percentage of those cases excessive?

Col. DAVIS. There were a few classes of cases in which I think the punishments were excessive. I think, for instance, that the punishments imposed for desertion are in many cases out of all proportion to what should have been assessed. I can conceive of cases of desertion which would be followed by a punishment of death. I think desertion in the face of the enemy merits and should receive the death penalty. In cases of desertion such as those where a man merely goes home to see his people and decides after a time not to return, and where these graver elements do not exist, I think the punishment should be relatively light—two or three years, something like that. There have been cases during this war of men convicted of desertion who have been given as high as 40 years.

Senator SUTHERLAND. Well, in that connection do you remember the case—you have heard this testimony, I believe—that Gen. Ansell recited of the boy who went home to a sick mother and father, the father being paralyzed. The boy stayed there from the 11th day of December until the 1st day of June with his uniform on all the time and then reported for duty the day after his father died, and was sentenced to death. Do you remember that case that Gen. Ansell spoke of?

Col. DAVIS. I think that case came up in the office, but personally I do not remember the facts; but I remember another case that is just as grievous as that, the case of a man who was sentenced to death and in which it was perfectly clear that there was no intention to desert. In fact, the man was apprehended by a sheriff when he was on his way back to camp, and if the sheriff had kept his hands off of him he would have been back in camp within a few hours; but

he was tried for desertion and convicted. But I say to you, Senator, if you take 25,000 cases or any like number tried before the best civil courts in the land, I think you can find a small percentage in which the results are just as objectionable.

Senator KNOX. Mr. Chairman, was not there furnished to the committee a copy of a report made by Gen. Crowder to the Secretary of War early in this month in which there was a tabulated statement?

Senator CHAMBERLAIN. Yes.

Senator KNOX. Has that been put in the record?

Senator CHAMBERLAIN. No; that has not been.

Senator KNOX. I wish that would be put in the record. If you have not got it I have a copy of it.

Senator CHAMBERLAIN. It ought to go in.

Senator KNOX. It is my recollection that that statement shows that the reviewing authorities reduced the time of punishment about 90 per cent.

Col. DAVIS. On an average.

Senator KNOX. Yes; on an average about 90 per cent. Is that correct; do you know anything about it?

Col. DAVIS. I should think if he means 90 per cent of the punishments in individual cases that it is rather excessive.

Senator KNOX. That is my recollection of my review of this table, that the time punishments had been reduced by the reviewing authorities between 85 and 90 per cent.

Senator NEW. That would be number of cases or length of time?

Senator KNOX. Length of time.

Col. DAVIS. I think it may be because many of these cases were 20 or 40 year sentences and in many of them the sentence was reduced to 10 years or less.

Senator KNOX. Yes; that would bring up the average.

Senator WADSWORTH. Colonel, do you happen to know under what regulation or authority of law the conscientious objectors were discharged honorably and paid?

Col. DAVIS. I do not think there was any authority of law for it except that was at any stage of the case the President, or the Secretary of War as his representative, may interpose and exercise clemency. In the case of these conscientious objectors, I assume that they were serving sentences and that the Secretary of War simply stepped in and directed that the unexecuted portion of the sentences in these cases be remitted and these men be restored to duty, which he could do in a very large percentage of the cases, because these men had been sent to the disciplinary barracks under suspended sentences of dishonorable discharge. If the Secretary of War wanted to exercise the power he could simply say "The unexecuted portions of these sentences are hereby remitted and the men restored to duty." That would bring them into their status as enlisted men again and they could then be honorably discharged.

Senator CHAMBERLAIN. That would not remove the former discreditable verdict against them?

Col. DAVIS. I assume that the verdicts in their cases were set aside on the theory that possibly they should not have been tried at all under the instructions that were extant and in force at the time of the actual trial.

Senator FRELINGHUYSEN. How would their discharges be written, "Honorable discharge" or "Without honor?" In what way would they be discharged?

Col. DAVIS. I do not know. I have never seen the discharges in their cases. I think some of them were honorably discharged. I want it to be thoroughly understood that I am speaking wholly without personal information on that matter.

Senator FRELINGHUYSEN. You do not know whether they all had the same kind of discharges or not.

Col. DAVIS. I understand that this procedure was followed: That a board of review was appointed to examine into the cases of conscientious objectors to determine whether or not they were really conscientious objectors or whether they were fake conscientious objectors.

Senator CHAMBERLAIN. Well, who constituted that board of review, the officers in the Judge Advocate General's Department?

Col. DAVIS. One officer of the Judge Advocate General's Department and two civilians, one of them Judge Mack and the other Dean Stone.

Senator FRELINGHUYSEN. Who was the officer of the Judge Advocate General's office?

Col. DAVIS. The officer was Maj. Kellogg.

Senator FRELINGHUYSEN. Well, in paying these men off and in expunging their dishonorable record would you not feel it to be somewhat in the nature of a reward? Were they entitled to full pay in your opinion?

Col. DAVIS. If a man has been tried without proper jurisdiction—if he has simply been taken up and been tried when he should not have been tried—we frequently have such a case as that, he may be entitled to his pay. For instance, a man might be tried on a specification which the Judge Advocate General decides does not state a case. The analogy to that in civil practice would be an insufficient indictment. The ultimate decision in the case is that the whole proceeding is null and void and the trial must be regarded as though it had never been held and, therefore, the man could not be deprived of any right on the basis of such trial.

Senator FRELINGHUYSEN. Did that happen in any of these cases?

Col. DAVIS. I do not know what actually happened in the case of the conscientious objectors because I did not actually function in any of them.

Senator FRELINGHUYSEN. The records would show.

Col. DAVIS. Yes.

Senator WADSWORTH. Do you know whether the Judge Advocate General's office prepared any regulations governing or advising the judge advocates of the departments or cantonements in the legal treatment of conscientious objectors?

Col. DAVIS. I do not think that any such instructions were prepared in the Judge Advocate General's office. Such instructions must have been prepared in the office of the Secretary of War and transmitted through the line of command to commanding officers. In my position in the Judge Advocate General's office I had to interpret the result in the case of a trial of a conscientious objector in the light of instructions that had been sent out. In this way I had knowledge that some instructions were sent out during my time in that office,

but, so far as I know, they were sent out by the Adjutant General as, in a way, confidential instructions.

Senator WADSWORTH. Are they still confidential?

Col. DAVIS. So far as I know they are. I think some of them have found their way into the public press, but so far as I know they are still confidential.

Senator CHAMBERLAIN. Under whose authority were they issued?

Col. DAVIS. The Secretary of War.

Senator CHAMBERLAIN. Have you ever seen them?

Col. DAVIS. I have seen some.

Senator CHAMBERLAIN. Would you recognize one if you were to see it now?

Col. DAVIS. I would recognize the one which was issued in October or November, 1917.

Senator CHAMBERLAIN. I will place one in your hand and ask you to glance over it and to say if that is the order to which you have reference. I will not put it in the record until you identify it [handing paper to Col. Davis].

Col. DAVIS (after reading paper). So far as I am able to say, I think that is a copy of certain instructions that were sent out, and a copy of which was furnished to the Judge Advocate General's Office for guidance in handling those cases.

Senator WADSWORTH. Is the one you have seen one that has found its way into the press?

Col. DAVIS. Yes, sir.

Senator CHAMBERLAIN. Was this prepared in the Office of the Judge Advocate General?

Col. DAVIS. No, sir.

Senator CHAMBERLAIN. Do you know where it was prepared?

Col. DAVIS. No, sir.

Senator FRELINGHUYSEN. Issued by The Adjutant General. I think it was issued in your office.

Col. DAVIS. All general and special orders are promulgated through The Adjutant General's Office.

Senator FRELINGHUYSEN. They are not usually confidential, are they?

Col. DAVIS. No, sir.

Senator FRELINGHUYSEN. They are usually posted in the various cantonments and camps, are they not?

Col. DAVIS. Yes, sir. I am unable to say where that order came from, sir.

Senator CHAMBERLAIN. I am going to say now, before putting this in the record that I wrote to the Secretary of War a number of days ago for a copy of it and asked him if the order had been issued and I have not yet heard from him. I therefore read it into the record, giving the Secretary's letter a place alongside of the one introduced here.

Col. DAVIS. May I say to you, Senator, before you read that, that the only thing I ever saw was a copy made out such as that one is, and I never saw a copy with anybody's signature attached to it. That, I think, is very much like the one we had in our office.

Senator CHAMBERLAIN. You have heard the subject discussed?

Col. DAVIS. Yes, sir. I think it had the official stamp of The Adjutant General's Office on it or we would not have been guided by it. There was no doubt about its being official.

Senator CHAMBERLAIN. Well, I reserve the right when I read this into the record to have any letter I may receive from the Secretary of War on the subject printed also. Is that satisfactory to the committee? Because he may deny knowing anything about it. The letter is as follows:

WAR DEPARTMENT,  
Washington, D. C., October 10, 1918.

Confidential.

From: The Adjutant General.

To: The commandants of all National Army and National Guard camps.

Subject: Conscientious objectors.

1. The Secretary of War directs that you be instructed to segregate the conscientious objectors in their divisions and to place them under supervision of instructors, who shall be specially selected with the view of insuring that these men will be handled with tact and consideration and that their questions will be answered fully and frankly.

The part I am reading now is italicized.

2. With reference to their attitude of objecting to military service, these men are not to be treated as violating military laws, thereby subjecting themselves to the penalties of the Articles of War, but their attitude in this respect will be quietly ignored and they will be treated with kindly consideration.

That is the language italicized.

Attention in this connection is invited to a case where a number of conscientious objectors in one of our divisions, when treated in this manner, renounced their original objections to military service and voluntarily offered to give their best efforts to the service of the United States as soldiers.

3. It is desired that after the procedure above indicated shall have been followed for a sufficient length of time to afford opportunity to judge of the results derived from it, a report of the action taken and the results obtained under these instructions is to be submitted to the War Department by each division commander. As a result of the consideration of all these reports, further instructions will be issued by the Secretary of War as to the policy to be observed in future in the case of conscientious objectors.

4. Under no circumstances are the instructions contained in the foregoing to be given to the newspapers.

(Signed) H. S. LEARNED,  
Adjutant General.

Under date of February 24, 1919, the following letter was received by the chairman of the committee from the Secretary of War regarding the above order:

WAR DEPARTMENT,  
Washington, February 24, 1919.

MY DEAR SENATOR CHAMBERLAIN: In reply to your letter of February 20, I wish to say that the confidential letter which you quote is accurate except as to the date, which was October, 1917, and as to the italicizing of the second and fourth paragraphs which, in the copies I have seen, were in regular type.

The reason for the request that these instructions be not given to the public was, of course, the desire on the part of the War Department to keep the number of such cases at a minimum. At that time we had no knowledge as to the number of men who might be tempted to profess conscientious objections for the purpose of evading military responsibilities.

Sincerely, yours,

NEWTON D. BAKER,  
Secretary of War.

Hon. GEORGE E. CHAMBERLAIN,  
United States Senate.

Senator FRELINGHUYSEN. Now, were there any other orders of a similar character that you observed?

Col. DAVIS. Yes, sir; there were others that came along at a later period.

Senator FRELINGHUYSEN. Showing the same tenderness and consideration?

Col. DAVIS. Well, I should say the purpose of these further orders was to make clear to commanding officers the attitude they should take in treating with these conscientious objectors.

Senator FRELINGHUYSEN. Do you know how many conscientious objectors were discharged?

Col. DAVIS. During the time that I was in the Judge Advocate General's Office the number of conscientious objectors tried and discharged was not very large. The policy had not been fully worked out and some of these additional orders and instructions came along about the time I left the office, and since that time, I understand, there has been quite a number of trials, but the exact number I do not know. I think it is safe to say that up to the time I left the office in April there had been perhaps not more than 30 or 40 in all the service that had been actually tried by courts-martial.

Senator FRELINGHUYSEN. The largest number of discharges of the conscientious objectors has been since the armistice was signed.

Col. DAVIS. I do not know. My impression is it occurred recently.

Senator FRELINGHUYSEN. It was after the armistice was signed?

Col. DAVIS. Yes, sir.

Senator CHAMBERLAIN. Do you gentlemen wish to ask Col. Davis any further questions?

Senator WADSWORTH. Just one more question, Colonel. Doubtless you remember that Congress defined a conscientious objector?

Col. DAVIS. Yes, sir.

Senator WADSWORTH. As a member of a well-recognized organized sect whose creed forbade participation in war, or words to that effect?

Col. DAVIS. Yes, sir.

Senator WADSWORTH. Did it come to your attention that any so-called conscientious objectors who were members of such creeds had been court-martialed and sentenced?

Col. DAVIS. I do not think I could speak definitely on that. I have a recollection of one case in which I think the man claimed that he was a member of a creed that was opposed to war, but the conscientious-objector cases that I remember most distinctly were these fellows who were objecting to war, any kind of war, these I. W. W. fellows.

Senator WADSWORTH. But they were not conscientious objectors, Colonel, under the statute.

Col. DAVIS. Well, they posed as such.

Senator FRELINGHUYSEN. Did you treat them as such?

Col. DAVIS. We did not in our office; no, sir. I did not treat them as such; no, sir.

Senator WADSWORTH. Well, were they treated as such elsewhere?

Col. DAVIS. I do not think they were, sir, where the evidence is clear that they were of that character.

Senator FRELINGHUYSEN. Where is that conscription act?

Senator WADSWORTH. I think that unless we have other witnesses we are simply wasting time. We asked these officers to come here and give their opinions as to these changes in the military bill.

Senator CHAMBERLAIN. We would be glad to have your comment on it, Colonel.

Col. DAVIS. Yes, sir; I think this legislation is both unwise and unnecessary. That is my private opinion on it. I think that it has no relation, no reasonable relation, to any conclusion that can be deduced out of the experience of the Army in this war in the handling of court-martial cases; that it would result in a very large increase in the Judge Advocate General's Department and that the benefits to be derived therefrom are very problematical. In so far as the present system is concerned I think in the first instance that the percentage of cases under the system which we now have, faulty as it is and open to objection as it is, in which substantial justice is reached is just as high as in the best civil courts of the land. I think I am safe in saying that in not more than 3 or 4 per cent of the cases tried by general court-martial is the result arrived at seriously open to objection from any point of view and that you could find as high a percentage of cases in which the results might be equally open to criticism in the criminal courts of any State in the Union. When we attempt to condemn a system on the basis of a very small percentage of the cases we are proceeding inadvisedly and are not legislating wisely and for the benefit of the country.

I think that no legislation is necessary. Any change that may be needed along the lines of this bill can be inaugurated by regulation and practically the same results obtained. For instance, this bill provides that there shall sit with each general court-martial a person designated as judge advocate who shall rule upon all questions of law arising in the progress of the trial. Practically that same result could be reached by a rule of procedure promulgated by the President to the effect that the president of each court-martial shall be detailed as such without regard to his rank and charging him with the duties which this bill would impose upon the Judge Advocate. That is a recommendation I submitted to the service as long ago as 1907 and I have intermittently urged it whenever I thought it might be heard with sympathy since that time.

Under the present system the senior officer detailed acts, by virtue of his seniority, as president of the court-martial. As a result of that the president of the court very generally has no particular knowledge of law, rules of evidence, or anything of that kind, and is no better prepared to function as the presiding officer of the court than any other member thereon.

There are a number of excellent lawyers in the service. A lot of them came in in 1898 and 1899 and a lot more have come in during this war—men with splendid legal education and experience, and it would be possible in any jurisdiction to detail a lawyer as president of a court-martial and let him decide the questions of law and evidence arising during the trial. If some such plan as that were worked out it would save a very large increase in the Judge Advocate General's Department which would make it very unwieldy.

Senator CHAMBERLAIN. But nobody in authority has ever undertaken to suggest that such a regulation be issued by the President.

Col. DAVIS. I submitted such a regulation for approval in April of last year. I sent it to Col. Mayes and, I think, Gen. Ansell, although Gen. Ansell may not have been in the office at that par-

particular time. I am not advised that it ever got as far as Gen. Crowder's desk. I went through the Court-Martial Manual and suggested the modifications that should be made in all the sections relating to this subject.

Senator CHAMBERLAIN. But it was not done?

Col. DAVIS. No, sir.

Senator CHAMBERLAIN. That is the reason this legislation was suggested—those who have the power to do these things do not do them.

Senator WADSWORTH. You have discussed it with Gen. Ansell?

Col. DAVIS. Yes, sir.

Senator WADSWORTH. Is he in favor of it?

Col. DAVIS. He seemed to be in favor of it in personal discussion; yes, sir.

Senator WADSWORTH. Did he recommend it to Gen. Crowder, do you know?

Col. DAVIS. I do not know whether he did nor not, sir. I can see, Senator, that the proposed legislation, or such change in the regulation as I have suggested, might perhaps result in a slightly better system of administering military justice in the Army, but the point I wish to make is this: That it is unfair for anybody to come before this committee and contend that this change is necessary in order to accomplish justice in the trial of enlisted men in the Army. I challenge that statement.

Senator CHAMBERLAIN. You differ from the American Bar Association?

Col. DAVIS. Yes, sir; and I think I have seen the records in thousand court-martial cases where the American Bar Association has seen one.

Senator THOMAS. If it be true, Colonel, that these enormous penalties have been assessed for comparatively trivial offenses, I must confess that your statement does not strike me as being in accord with those facts.

Col. DAVIS. But, Senator, do you not realize that these enormous penalties are assessed because the discretion of the court-martial is not controlled by law? I assume that if you gave a civil court the same liberty of giving any punishment from one day up to death that you would sometimes see just the same result.

Senator THOMAS. But a civil court in this country, no matter what its discretion might be, would not last over night if it sentenced men to 25 years for disobedience to an officer.

Col. DAVIS. My contention is this: If the discretion of a court-martial can not be controlled, it should be limited—a limit should be imposed upon the punishments it may assess.

Senator THOMAS. I quite agree with that, that there should be a limitation of discretion something like is held on the civil courts. I am not complaining of the action of those enforcing the law but criticizing the system for making this possible.

Senator FRELINGHUYSEN. The table which was submitted by Gen. Crowder showed that these sentences had been reduced about 80 to 95 per cent. I think you have admitted that these sentences by the courts-martial were excessive in a large number of cases.

Col. DAVIS. Yes, sir.

Senator FRELINGHUYSEN. Now, with so many cases in review, have not a large number slipped through and are there not enlisted men to-day serving penalties that are extreme; and what are we going to do to review those cases and mitigate that punishment? That is the thing that interests me.

Col. DAVIS. Yes, sir.

Senator FRELINGHUYSEN. The system is wrong and we are going to change it and what we are going to do where there have been sentences that now amount to persecution, and how many of them are there, and what are they, that is what we want to know.

Col. DAVIS. The number could only be determined by going to these penal institutions, the disciplinary barracks that we have scattered over the country and finding out how many military prisoners are still confined. As Col. Clark suggested this morning, many men have been sentenced to heavy penalties and they have been passed with appropriate reductions recommended by the Judge Advocate General's Office for the purpose of the deterrent effect that they might have in their commands at the time. Now these men are sent to the disciplinary barracks under, say, a sentence of 10 years, 15 years, 20 years, but in most cases the sentence of dishonorable discharge has been suspended, which makes the sentences practically indeterminate. I have one case in mind. A man was sent over from France under a sentence of 10 years and that man was restored to duty within 5 or 6 months after he went to the disciplinary barracks. There have been scores and perhaps hundreds of other cases where the man has gone to the disciplinary barracks under a sentence of 5 or 10 or may be 15 years and by proper conduct at that institution he has won his way back to duty within 5 or 6 months. So that the situation as it stands to-day could only be determined by going through those cases where punishment is still being served and recommending appropriate reductions, if reductions are merited. I may say to you, sir, that in practically all of those cases the sentence has been scaled down on the recommendation of the Judge Advocate General to what that office thought should be the case.

Since General Order No. 7 went into effect, there is not a man in the whole service sentenced to be dishonorably discharged and to a long term of confinement whose case had not been passed upon by the Judge Advocate General's Office, by the board of review since that has been constituted, and his case passed upon for the very purpose of determining the amount of punishment which that man should serve. He is in the disciplinary barracks at this time serving, not the punishment which the court awarded him, but the punishment which the Judge Advocate General's Office, after reviewing the case, thinks he ought to bear.

Senator FRELINGHUYSEN. You mean to say that is done in every case in theory. That was all right. That was the purpose of amending the Articles of War a couple of years ago so that you could meet that situation, but you know lots of these poor devils are lost in the shuffle.

Col. DAVIS. None of them, sir.

Senator FRELINGHUYSEN. They are, some of them. I have direct knowledge that some of them are.

Col. DAVIS. I will tell you why they are not. There is not a case that passes through the Judge Advocate General's Office but what is

reviewed by some officer who is supposed to be properly trained to pass judgment upon that case. He either signs the record with his initials or with his name to indicate the officer who has reviewed that case, so as to place responsibility for passing it.

Now, suppose there is a case in which a man has gone to the disciplinary barracks under a sentence which should have been reduced. He is allowed to make an application for clemency after he has been there six months, I think it is. All of those applications for clemency are sent to the Judge Advocate General's Office. The record of that man comes out of the files and it is reviewed thoroughly by another officer who then recommends that clemency should, or should not be granted. He can make a new application for clemency every six months. Some of them make it very much more frequently than that and every time an application for clemency is submitted by that man his case is given another review in the office of the Judge Advocate General; and so it is impossible, unless the man is satisfied and makes no applications for clemency, it is impossible for him to get lost in the shuffle.

Senator CHAMBERLAIN. In theory that is all right if it were done all the time, but, Colonel, there have been innumerable prisoners writing to me, and I have had a great deal to do with criminal institutions because I was head of the Oregon Penitentiary for six years—there are a lot of those fellows that can not be heard. They can not get replies from whomsoever they address—I do not know whom they addressed, whether it is the head of the disciplinary barracks—but they can not get any replies to their applications for clemency.

Col. DAVIS. I want to say this in justification of the system, that any application for clemency, a letter from any Senator or Representative, a letter from the wife of any prisoner, or from a friend of the prisoner which is addressed to The Adjutant General of the Army is always referred to the Judge Advocate General and that results every time in drawing that case out of the files and in some kind of a review of the case based upon that application or that suggestion for clemency.

Senator THOMAS. In some of these cases where clemency is granted and a sentence is reduced as to the time of service, time of punishment, is that portion of the sentence relating to dishonorable discharge reversed also or does that go into effect? In other words, take a concrete case. Suppose John Smith was sentenced for 15 years with dishonorable discharge from the Army, a concrete case, you reduce the sentence to two years. Can it, or does it, also remove that part of the sentence involving the dishonorable discharge?

Col. DAVIS. In all of those cases where the dishonorable discharge is suspended by the reviewing authority it remains suspended, and the recommendation of the Judge Advocate General usually is that a certain part of the period of confinement be remitted. I may illustrate that in this way: Suppose a man is tried out here at Camp Meade and is sentenced to be dishonorably discharged, together with 40 years confinement. Now, General Order No. 7 requires them to suspend the execution of the sentence until it is reviewed in the office of the Judge Advocate General. The Judge Advocate General reviews that sentence and advises the commanding officer out there at Camp Meade as to the result of his review. The commanding general out there may think that the man should be absolutely discharged from

the Army—suppose he is a murderer or a highway robber and has been justly convicted and they do not want to continue him on the roll of the Army but want to discharge him and that the penitentiary is the proper place in his case—he can not execute that sentence until the Judge Advocate General reviews it. If advised by the Judge Advocate General that the record is in proper form, the commanding general out there may direct that the sentence be carried into execution. On the other hand, suppose it is the case of a man who has disobeyed the order of his commanding officer or has transgressed military discipline in some other way, something akin to a misdemeanor in civil law, and he is sentenced to dishonorable discharge. The sentence of dishonorable discharge would be suspended by the reviewing authority and the man would be sent under that suspended sentence to the disciplinary barracks. The disciplinary barracks for Camp Meade would be Fort Jay, N. Y. He is sentenced to 10 years and after review the Judge Advocate General's Office recommends that 9 years of the sentence of confinement be remitted. Then the man stands under a sentence of dishonorable discharge which has been suspended until he is released. In other words, Senators, the unexecuted portion of that sentence may be remitted and the man restored to duty without being dishonorably discharged, and he can be put right back in the Army.

Senator THOMAS. Let us take that last case of which you spoke, where the sentence is reduced to one year, where the man convicted has a good record, who has not been a highway robber, but whose record has been good. After that year's sentence can he then go back into the Army unless the Secretary of War shall set aside the sentence of dishonorable discharge?

Col. DAVIS. In that case, if he is such a man as you described, after having been at the institution for six months he will submit an application for clemency. He may ask to be restored to duty and sent to join his organization. That application is reviewed in the office of the Judge Advocate General. If the commanding officer of the disciplinary barracks reports that the man has made good, the man in most cases will be restored to duty.

Senator THOMAS. Suppose he does not ask for clemency at the end of six months, but accepts the remission of the nine years and serves without making any further request for clemency, at the end of his sentence does he not automatically go back into civil life with a dishonorable discharge against him?

Col. DAVIS. Yes, sir; unless some intervening action is taken in the case.

Senator THOMAS. That is what I am asking about.

Col. DAVIS. That action might be taken either upon the man's initiative or upon the initiative of someone else. During his period of confinement he gets good-conduct time off that one year, reducing his sentence automatically to something like 10 months. At the end of that time he would be given his dishonorable discharge and be turned loose from the institution.

Senator CHAMBERLAIN. How many military prisoners are there now?

Col. DAVIS. I can not answer that question, sir. I can give you some interesting information on the results that obtained in the early stages of this war. When the war began and the Army was

increased from something less than a hundred thousand to something more than a million, we naturally supposed that the population at the penal institutions was going to jump up in proportion. At Leavenworth, for instance, at the disciplinary barracks there, there was authorized the building of a stockade and accommodations inside large enough to hold 3,000 additional prisoners; and we expected a corresponding increase at the other institutions at Alcatraz and at Fort Jay, N. Y., on Governors Island. In April of this year I made a tour—

Senator WADSWORTH (interposing). April?

Col. DAVIS (continuing). 1918. I made a tour of inspection of all the camps in the United States for the purpose of seeing how military justice was administered in the camps. I went to all these penal institutions and was very much surprised to find that at Alcatraz, in April, 1918, they actually had fewer prisoners than they had before war was declared. Up here at Fort Jay they had about the same number, and out at Leavenworth they never had had any call for the additional accommodations for prisoners that had been authorized at that place. I might say, in explanation of that, that under Gen. Crowder's authorization we adopted the policy that when a man was tried at any of these camps and was convicted of an offense which, although serious on its face, did not necessarily disqualify the man for duty as a soldier, that the commanding officer of that camp could suspend that sentence and hold the man for duty with his organization. We came to Congress last winter and obtained an amendment of the fifty-second and fifty-third articles of war which would authorize the commanding officers to exercise a broader policy of suspending sentences and then finally remitting them, the object being that no man would be sent to a penal institution and thus branded with the obloquy that always attaches to such a place, if it is possible to be avoided. We had the thing working with the result I just told you of. Now, that was the effect of General Order No. 7.

Senator CHAMBERLAIN. One reason of that, too, was that a man could not commit some slight infraction of military discipline and save himself from going to the front by being confined in the rear, was it not?

Col. DAVIS. We aimed to break that, yes, sir; but the policy, the wise policy, of treating those cases that way was reversed in April, 1917, after Gen. Crowder surrendered the control of the office the second time and the policy again instituted of adhering strictly to the formal text of the Manual of Courts-Martial which, in terms requires a man sentenced to more than six months confinement to be confined at a disciplinary institution. This largely increased the prison population. That policy was departed from under Col. Mayes, who was Acting Judge Advocate General while Gen. Ansell was in France, and was continued by Gen. Ansell after his return. I think a great deal of harm to the administration of justice in the service was caused by that reversal of policy. That policy, I might add, was coincident with my release from duty in the disciplinary division of the Judge Advocate General's Office.

Senator CHAMBERLAIN. Who relieved you?

Col. DAVIS. I was relieved by—I suppose the authority for my release was found in Gen. Crowder's order—I was actually relieved

by Col. Mayes, because he disagreed with these policies which I have indicated.

Senator WADSWORTH. Gen. Ansell believed as Col. Mayes did?

Col. DAVIS. Yes, sir. I might say, that Gen. Ansell in his letter to Congressman Burnett says that in 1918, September, 1918, he directed his board of review to suggest to reviewing authorities the very corrective action which had been applied between November, 1917, and April, 1918. It was at that time opposed by him on the ground that it was not correct procedure according to his theory of what the law authorized.

Senator CHAMBERLAIN. You may have stated it before, but I wish you would tell us again, during the war periods, how much time has Gen. Ansell been acting as Judge Advocate General, and how much of the time has Gen. Crowder, since April 6, 1917, could you tell?

Col. DAVIS. Yes, sir. Col. Winship was the second in rank in the office after the departure of Gen. Bethel for France with Gen. Pershing. That occurred in the early part of June, 1917. From June, 1917 to sometime in October, Col. Winship was Acting Judge Advocate General. From October, 1917 to November, 1917, a period of about a month, Gen. Ansell was Acting Judge Advocate General and was, for a part of that time, so designated by a War Department order which, I think, he refers to in his testimony. When Gen. Crowder came back to the office in the latter part of October or first part of November, 1917, this situation existed: Gen. Ansell passed all papers that went to Gen. Crowder. He acted upon many cases himself signing as Acting Judge Advocate General, notwithstanding the fact that Gen. Crowder was in the office and was the Judge Advocate General at the time. Gen. Ansell exercised authority to decide what cases he would put up to Gen. Crowder and what he would finally act upon himself.

Senator CHAMBERLAIN. And those were all signed: "Acting Judge Advocate General?"

Col. DAVIS. Yes, sir.

Senator CHAMBERLAIN. Very well, now—

Col. DAVIS (interposing). And then, I might add that in April, 1918, Gen. Ansell made a trip of inspection to France, and until his return to the office some time in July, an interval of three months, Col. Mayes was Acting Judge Advocate General.

Senator CHAMBERLAIN. Gen. Crowder being engaged in the draft?

Col. DAVIS. Yes, sir; Gen. Crowder for a part of that time was in the Judge Advocate General's Office during an hour or two of each day, but I think about April, 1917, he found that his duties in connection with the draft required so much of his time that he practically withdrew fully from the Judge Advocate General's Office and did not function as Judge Advocate General until his recent return to the office.

Senator CHAMBERLAIN. Well, when July came, and Gen. Ansell returned, did he become Acting Judge Advocate General again?

Col. DAVIS. Yes, sir; but not under an order issued to that effect.

Senator CHAMBERLAIN. Well, how were communications signed by him then?

Col. DAVIS. As Acting Judge Advocate General.

Senator McKELLAR. And the approval of about two-thirds of the cases were signed by him?

Col. DAVIS. He signed them all. He signed all papers after July.

Senator McKELLAR. After July until the General came back?

Col. DAVIS. This last time?

Senator McKELLAR. Yes.

Col. DAVIS. That was when the Provost Marshal General's Office was demobilized, in recent weeks, I do not know the exact date.

Senator WADSWORTH. Have you any more comments to make on this legislation, Colonel?

Col. DAVIS. I have this comment to make: That that provision of the law that aims to authorize a lawyer as a trial—

Senator WADSWORTH. You mean in the bill?

Col. DAVIS. In the bill, yes, is, in my opinion commendable. I think cases ought to be tried by men of legal training and experience, and I have always favored some change in the law which would authorize a lawyer, trained as such, for trial work. I think there should be one or more judge advocates of low rank, not as high as major, possibly first lieutenant or a captain, to begin with, assigned to duty at each department headquarters, or on the staff of officers who convene courts-martial for the purpose of acting as trial lawyers, representing the Government. I think, moreover, that the present regulations should be amended in such way as to make it obligatory upon the commanding officers at posts where cases are tried to provide the man on trial with counsel who has been trained in the law whenever that can be done, and it could be done, quite generally, because, as I say, there are plenty of officers in the service who have legal education and training. To that extent I think the purpose of this bill is wise. I would certainly oppose the addition of a judge advocate to sit with the court and interpret the law as the trial proceeds. I think that wholly unnecessary.

Senator WADSWORTH. Is there not another provision there that lodges a further power with that judge advocate?

Col. DAVIS. Yes, sir; I think the present system is all that is necessary in that respect. The present system is this: The judge advocate appointed by the convening authority must, necessarily, act as the advisor to the trial judge advocate. Officers are very frequently appointed trial judge advocate who are untrained in the law and they write to the judge advocate for advice on questions they see are going to arise in the course of the trial, or which actually do arise on the record, and the judge advocate gives them advice, and, then afterwards, when the case comes to him, he is supposed to sit in a judicial frame of mind and to pass upon the case as though he had never seen it before, and it is not always easy to do that.

Now, if the man who is actually trying the case is a lawyer who is charged with the responsibility of trying that and all other cases in the jurisdiction on the part of the Government, the judge advocate would pass on the case and review it as a judicial officer and would be relieved very largely from any responsibility for getting the case correctly tried. A great many difficulties that could be enumerated would thus be eliminated.

Senator WADSWORTH. Should there not be a provision there which lodges with the judge advocate, or the special convening authority, the power to veto the convening of the court?

Col. DAVIS. Not the convening of the court, but the power to veto the actual reference I think of a particular case to a court for trial.

Senator WADSWORTH. That is what I mean. What do you think of that?

Col. DAVIS. I think, that, in general, might work out all right in actual practice. I know of one case that occurred during the time I was in the Judge Advocate General's office in which a commanding officer refused to be guided by the advice of his judge advocate with reference to the disposition of a case, but I suppose in 99 cases out of a hundred the reviewing authority is guided by his judge advocate. Of necessity he must be, and he does not attempt to know more of the law than his judge advocate, but once in a while you find a man who does and who refuses to be bound by his judgment.

Senator CHAMBERLAIN. Is there anything else, Senators?

Senator McKELLAR. I want to ask a question or two.

Colonel, a great many punishments were inflicted during the war for disciplinary reasons were there not?

Col. DAVIS. Yes, sir.

Senator McKELLAR. Now, might not these records be reviewed for the purpose of mitigating those unusual punishments, and ought it not to be done?

Col. DAVIS. I made a rather full explanation of that while you were out, sir; but I can repeat it to you very briefly. The situation is just this: There is no man serving punishment at the present time whose case has not been reviewed in the office of the Judge Advocate General and whose punishment is greater than the Judge Advocate General concluded at the time of the review should be imposed for the offense. If the punishment actually exceeds what the Judge Advocate General thinks should be given, it is his duty to recommend clemency, and, I am pleased to say that I know of no one case in which the Judge Advocate General has recommended clemency that the Secretary of War has not granted it.

Senator McKELLAR. How many cases of clemency has been recommended since the war ended?

Col. DAVIS. I do not know, I have not been in that division since that time.

Senator McKELLAR. Well, could you tell me about how many cases have been recommended altogether during the war?

Col. DAVIS. Oh, hundreds of them, hundreds of them.

Senator McKELLAR. There are about 22,000 of these cases all told.

Col. DAVIS. Yes, sir.

Senator McKELLAR. Well, would it not be a very proper plan for some board or some reviewing authority to go over all these on the facts as well as the law?

Col. DAVIS. Senator, it is a fact that every man who is serving a sentence has a right to apply for clemency, and he can submit an application once every six months. Every time he does his application goes to the Judge Advocate General, and there is a complete review in each case passed upon by the clemency board in the Judge Advocate General's Office. A particular case may be passed upon four or five times every year.

Senator McKELLAR. I had in mind a case which happened just before the war down in Texas on the border, where an officer was tried

and convicted and dishonorably discharged from the service, and I think further punished for protecting—the substance of the charge was protecting a kinsman in the service. I do not know whether it was his brother, nephew, or what. It seems that the kinsman was accused of having stolen something and it was said that he protected the kinsman in the charge. The kinsman was indicted by the civil courts and received a verdict of not guilty, and yet this court-martial found the brother guilty of an offense based on the protecting of his brother in theft.

Col. DAVIS. Yes, sir; the name of that officer was Mays, Glenn T. Mays. I remember the case very well.

Senator McKELLAR. You probably know the facts better than I do. I would be very glad for you to state them. There was a man who has been dealt with by a court-martial on an offense that the courts have demonstrated his brother was not guilty of, and yet that man was heavily punished. That case ought to be reviewed by all means.

Col. DAVIS. The man is not undergoing punishment. Of course, Senator—

Senator McKELLAR. He has undergone the most cruel punishment that could be inflicted upon anyone in the Army, and that is dismissal from the Army.

Senator FRELINGHUYSEN. You mean mental punishment?

Senator McKELLAR. Yes; I speak subject to correction.

Col. DAVIS. As I remember the outcome of that case, this officer was accused of irregularities in connection with some company or post-exchange fund. Some checks were submitted to him which seemed to involve his brother in an attempt either to forge or beat the Government, or something—

Senator McKELLAR. Fraudulent practice?

Col. DAVIS. Fraudulent practice, and he was tried by the court and he was convicted. The case hung fire in the Judge Advocate General's Office for a long while. I admit it was a close case. It might have been decided either way. We finally decided that there was evidence sustaining the finding of the court, a sufficient amount of evidence in the record to justify the finding of the court. In the meantime, however, the man's organization had been drafted into the service of the United States under the draft, but he had not been drafted because of these charges that were pending against him at the time, and I think the recommendation of the Judge Advocate General's Office was that he be administratively discharged from his obligations to the United States, it was not a regular form of dismissal, and that he be not drafted into the service. I may say—

Senator THOMAS (interposing). Is that the man whose brother was acquitted, or the man himself?

Senator McKELLAR. It was the man whose brother was acquitted.

Col. DAVIS. I may say in that case that it came out in the trial of the case that this man had been guilty of several other offenses. Of course, he was not being tried for the other offenses, but the fact that those things did appear of record probably operated so that the department did not want him back in the service.

Senator McKELLAR. Right there let me interject this: I took that record and went up to Gen. Crowder's office and went over it very carefully and came to the conclusion that instead of it being a close

case there was not a scintilla of proof—under the scintilla doctrine in our State—that there was not a scintilla of proof to connect this officer with any offense against the military authorities; but to be on the safe side I got Senator Shields, who had been chief justice of our supreme court for many years, to take the record and go over it absolutely by himself and see what conclusion he came to about it. He came to exactly the same conclusion. We took that up with the department and the department ruled against us, and then we went before the Secretary of War. That man is living to-day under the most deadly disgrace that can come to anyone in my State, and that is a dishonorable discharge from the Army because of an attempt to cover up a brother's crime, when the man was indicted by the civil authorities for this crime and acquitted without the slightest question. Now, that is the most aggravated case I ever heard of.

Now, I have a bill here, a joint resolution, which would provide for the reexamination of these cases, now that the war is over and no disciplinary action is required, and it seems to me that some sort of a bill like that ought to be passed in order that the department can rid itself of those peculiar cases, and I would like to get your views on it.

Col. DAVIS. I say this with regard to that, that many cases tried before two different courts or two different juries might bring different verdicts.

I read your memorandum, and I read Senator Shields's brief—

Senator McKELLAR. He made an elaborate brief; I had forgotten it, but that is true.

Col. DAVIS (continuing). And, as I recall, the vote in the Judge Advocate General's Office by five officers showed that three were in favor of upholding the record and two were for upholding your view. It was that close. Col. Winship, who was then Judge Advocate General, decided the matter in that way, I think largely on the theory that the man was suffering, as he regarded it, no very substantial punishment inasmuch as he had simply been left out of the draft and was not really dismissed from the force.

Senator McKELLAR. I happen to know this: His brother, W. M. May, is one of the most prominent citizens of Jackson, Tenn.

Senator THOMAS. What was his rank?

Senator McKELLAR. He was a captain, a man who stands as high as anyone in that State.

Senator THOMAS. Was the brother an officer?

Senator McKELLAR. The brother was—

Col. DAVIS (interposing). The brother was a sergeant.

Senator McKELLAR (continuing). Sergeant.

Col. DAVIS. The fact is this: Two very important papers, I think they were checks, disappeared in the case, and they disappeared while in the custody of the captain, and never were found. It is not strange that the brother was not convicted before the civil court, because the very evidence which would secure his conviction was not forthcoming. That fact must be remembered. The court-martial knew that Capt. Mays had these papers, they disappeared in his hands, and he could not satisfactorily account for them. When they came to try his brother before a civil court the actual forgeries could not be produced, and it is no wonder the brother was not convicted.

Senator SUTHERLAND. That puts quite a different light on that case.

Senator MCKELLAR. I do not recall the fact—

Col. DAVIS (interposing). Those are the facts.

Senator MCKELLAR (continuing). That Capt. Mays ever had anything to do with the papers. My recollection is that he distinctly testified that he did not know anything about the papers at all.

Col. DAVIS. The fact was very well established that they disappeared while in his possession and they implicated his brother, and, of course, if they convicted the brother they would have to actually have the papers.

Senator WADSWORTH. Do you believe any legislation would be desirable?

Col. DAVIS. Not at this time; no, sir. I think we are at a period where sensation is too easily aroused, and we ought to wait a reasonable time after this war, and have an opportunity to digest the facts which are deducible from the large number of records.

Senator MCKELLAR. Let me ask you this: Could you furnish the committee a list of those who have been confined by court-martial, and the fines and the punishments? I think that would aid the committee very much in determining—

Col. DAVIS (interposing). I hope you will not ask me to furnish that list, because I am down in the War College.

Senator MCKELLAR. I will ask some other officer to get it for me.

Senator SUTHERLAND. You are not in favor, then, of a bill to review these cases?

Col. DAVIS. No, sir. I think the system takes care of that itself. I think after the war is over, and after we are sufficiently removed from this unstable state of the public mind to legislate calmly and intelligently we might pass upon the question of whether or not we ought to have a court of appeals in the Military Establishment.

Senator MCKELLAR. But, Colonel, just apply it to cases that have arisen during the war. That is all very well for us who are out of jail, but there are a lot of these fellows—some 20,000 of them—

Col. DAVIS (interposing). Oh, no; nothing of the kind.

Senator MCKELLAR. How many are in jail?

Col. DAVIS. Let me tell you what the facts are—

Senator MCKELLAR (interposing). I get letters from them every day.

Col. DAVIS. If you were to investigate you would find that 15,000 of these cases have been absolutely disposed of. The sentences were for one month, two months; they have been completed. Very many, probably 50 or 60 per cent, have been restored to duty or let out of confinement in one way or another, and the number of men now undergoing punishment can not be more than a few hundred.

Senator MCKELLAR. That is another matter. We would like to have the number now in jail, and know the offenses they committed. We might not want to review the other cases, but we would like to review those cases where the men are in jail.

Col. DAVIS. I understand that, Senator.

Senator FRELINGHUYSEN. That list does not include any conscientious objectors.

Senator THOMAS. The conscientious objectors were all let out in a jail delivery, discharged, and paid.

Senator MCKELLAR. The trouble about reviewing cases under the present system is that they have to be reviewed upon the facts as they appear in the record and, if there is any evidence to sustain the findings of the court-martial they can not be reviewed.

Col. DAVIS. I do not think they ought to be reviewed upon any other basis, Senator. I think it is well to review them from the point of extending clemency, now that the war is over.

Senator MCKELLAR. If a man has been unjustly convicted he is not entitled to clemency. What he wants is vindication at the hands of the Government.

Senator WADSWORTH. You think, Senator, we should pass a bill simply providing that those men shall be tried over again?

Col. DAVIS. No; but I think—

Senator MCKELLAR (interposing). Virtually that. I think these cases ought to be looked into anew, now that disciplinary action is not so necessary, and that, if there has been any mistake in the punishment visited upon him, if there has been dishonorable discharge when he ought not to have been dishonorably discharged upon the facts, he should undoubtedly be given ordinary justice and acquitted.

Senator WADSWORTH. Could not those facts be examined without trying them all over again?

Senator KELLAR. You can not do it without a record, and it would be a record which is not fair. As I understand it the Judge Advocate General can not reverse on facts; they can not mitigate on facts.

Senator WADSWORTH. In this statement it is stated that 90 per cent of them have been mitigated.

Senator MCKELLAR. That is done by Executive clemency. Now, the man is either entitled—

Senator WADSWORTH (interposing). Well, mitigation and clemency.

Senator MCKELLAR (continuing). To his vindication by other means than a pardoning power which says: "You have been found guilty and I pardon you for being guilty."

Col. DAVIS. May I say to you in that case, Senator, that some body must be constituted to pass upon the facts in the first instance.

Senator MCKELLAR. Have you read the resolution I have offered? I have offered a resolution on that subject. I would be very glad for you to read it and tell me what you think about it.

Senator THOMAS. Your resolution did not call for an appropriation, and you can not get it through this Congress.

Senator MCKELLAR. I am afraid it does not. That is a mistake. I will put one in.

Senator KIRBY. I am surprised that there is anything before this Congress that does not call for an appropriation.

Col. DAVIS. I notice, Senator, you do not indicate a new trial of the case, but only a reexamination.

Senator MCKELLAR. Yes.

Col. DAVIS. That is being done.

Senator MCKELLAR. You see, the defendants are allowed to produce affidavits here, and a reexamination has to be based upon facts as well as upon the law.

Col. DAVIS. I think it would be wholly inexpedient to reopen the case. If the defendant were allowed to produce new evidence, of

course, you would have to reopen the case and allow the Government to introduce new evidence.

Senator MCKELLAR. Now, necessarily, the Government has probably produced most of the evidence it can.

Col. DAVIS. You have got to be fair to the Government.

Senator MCKELLAR. The Government has got the man in jail, and there is many a man not in jail who ought to be in jail as a result of—

Senator THOMAS (interposing). Unfortunately we can not make the exchange. One wrong does not justify another.

Col. DAVIS. No, sir; but you have got to be fair to the Government, and if you reopen the case you have got to let the Government come in—

Senator MCKELLAR (interposing). I should think the Government's officer in passing upon all the evidence would see that the Government's rights were protected; and, if the Government has not presented its case, why, somebody has been lax.

Senator THOMAS. It can not be held that these convictions are all wrong, but even in those cases where the complaint is that the present machinery is not sufficient to afford its proper review, it ought to be done.

Senator MCKELLAR. I want to say, Senator, that this bill does not take care of the case, if you call it that, that I brought out a while ago, because this applies only to cases in the present war, and that happened before the present war, as it happened in the border trouble—the case I spoke of. The question that has been raised in reference to that resolution is whether or not it ought not to provide for a civil tribunal. Do you not think it would be better to have officers in the Judge Advocate General's Office pass upon it?

Col. DAVIS. Yes, sir; I do.

Senator MCKELLAR. Now, let me ask you another thing. It has been objected against one of the provisions of that resolution that most of the officers now in the Judge Advocate General's Office have had to do with court-martial trials or reexamination of records; is that correct or not?

Col. DAVIS. Well, a very large percentage of them have.

Senator MCKELLAR. How many would you suppose you now have in the department who have not been engaged in passing upon court-martial records, who could be appointed if these boards were provided for, the President to be authorized to appoint additional ones if necessary.

Col. DAVIS. I think several boards probably could be constituted without taking many officers who have figured very conspicuously in court-martial cases; but, may I suggest, that I would consider that rather a qualification than a disqualification.

Senator MCKELLAR. Well, if a man has examined the record, it is just as you said—I believe you or Col. Clark—this morning like the court-martial that held to its first decision despite any recommendation that the reviewing officers might send back with the record, or come to the same conclusion.

Col. DAVIS. Yes, sir; the point I make is this: If you constitute a board of officers to pass upon a case the probabilities would be about one in a thousand that the officers you selected had ever seen that

particular case before—they would have passed upon other cases, but not this particular one.

Senator MCKELLAR. That might be a qualification. It would be very probable—

Col. DAVIS (interposing). I could go down and handle hundreds of cases, no one of which I had ever seen before; but still my practical experience in passing upon other cases would be helpful rather than otherwise.

Senator CHAMBERLAIN. Have you anything further to say, Col. Davis?

Col. DAVIS. No, sir.

**STATEMENT OF BEVERLY A. READ, COLONEL, JUDGE ADVOCATE GENERAL'S DEPARTMENT, CHIEF OF MILITARY JUSTICE DIVISION, WAR DEPARTMENT.**

Senator CHAMBERLAIN. Now, who is the next witness?

Col. READ. I was directed to report here, sir. I am Chief of the Military Justice Division in the War Department at the present time.

Senator MCKELLAR. Now, Colonel, is there anything which you wish to bring before the committee?

Col. READ. I do not know what the committee wants. I was told that Gen. Crowder had requested that the three officers who had been in charge of that division be ordered to appear before this committee.

Senator MCKELLAR. Well, what position do you hold?

Col. READ. I am chief of it.

Senator MCKELLAR. You are the chief?

Col. READ. Yes; of the Military Justice Division.

Senator MCKELLAR. Chief of the Military Justice Division?

Col. READ. Yes, sir.

Senator MCKELLAR. How long have you been chief of it?

Col. READ. I succeeded Col. Davis in April of last year. I really do not know what I can say here that would be of interest to the committee other than what has been touched on, except I am not in favor of this pending legislation in the form in which it is drawn. As a matter of fact my views are different from those of any officer who has testified here in that regard, but I think they are practically in consonance with the 50 civilian lawyers who are my assistants in my office. I am the only regular officer in there.

Senator MCKELLAR. Well, Colonel, how many of these cases have been reviewed since you have been in charge of the division? A great many?

Col. READ. I have been there since April and the average would be about 1,300 a month.

Senator MCKELLAR. Now, out of the 1,300 a month about how many of those are clemency cases?

Col. READ. Well, all of those statistics either have been or will be prepared for submission to the committee and I am unable to answer that question offhand, but my recollection is that we have recommended just during the calendar year, a major portion of the calendar year 1918, about 12½ per cent.

Senator MCKELLAR. About 12½ per cent?

Col. READ. Yes, sir.

Senator McKELLAR. You give us the number of cases and the crimes for which the defendants have been found guilty and whether a dishonorable discharge was also inflicted. Have you got those cases tabulated?

Col. READ. I think that is very largely done.

Senator McKELLAR. Will you get that and make it a part of your testimony?

Col. READ. Yes, sir.

Senator McKELLAR. Give it to the stenographer. Now go ahead, sir.

Col. READ. There are certain matters here that have been discussed to-day that I think possibly were not fully developed in regard to the method of procedure there in that office. Now, that is since my incumbency. I do not know what Gen. Ansell stated by way of explanation to the committee—I have not seen his testimony save what purported to be some extracts from it in the papers, but those extracts related more or less to these specific cases which have been published in the papers and which, I fear, have created the impression in the minds of the people (I know it as a matter of fact) that these sporadic, isolated instances of severe and even harsh, cruel punishment are characteristic of military justice. That, of course, is distinctly not true; and I want to say this in justice to my office and in justice to the Army at large. No excessive portion of any severe sentence has ever been executed; never.

Senator THOMAS. You mean during the war, or ever?

Col. READ. I am now talking about the period of the war; cases that have arisen during the war. Excessive sentences have been imposed and the impression has been created that that is the way military justice is administered, regardless of right and fairness, of law or anything else. It is not true. In the first instance, the great trouble in connection with these cases and all of these sentences is due to this fact: The forty-fifth article of war, which is simply a reenactment of the statute that has existed for a great many years, authorized the President in time of peace to fix a limit of punishment for offenses which may not be exceeded. Now, Congress enacted that article of war on the 29th of August, 1916.

The first recommendation I would make would be that these four words be stricken out of that article: "In time of peace." There is no reason on earth that I can see why courts-martial in time of war should be governed by an unrestricted discretion as to the character of their punishment. It is manifestly wrong and it creates by the imposition of these excessive sentences which, of course, were imposed for their disciplinary effect solely, never with the intention that they were to be executed, it creates, I say, in the public mind an unfortunate impression that ought not to exist. I have always been opposed to that and I want to—I wish I could have testified earlier in the day because I am very tired. I have been here all day, but I would like to explain certain things that I think possibly would be enlightening to the committee.

Senator CHAMBERLAIN. Just one minute, Colonel, we will have to go and answer our names I expect, for there is the call for a roll call. We will just have to wait a minute or two.

(At this point a short recess was taken.)

Senator McKELLAR. Col. Read, I want to ask you, if I have not already done so, to furnish the statistics as to the number of men who are now undergoing prison sentences and also the number who, since the war, have been dishonorably discharged.

Col. READ. Yes, sir.

Senator McKELLAR. I am sure you heard the testimony of Col. Davis in reference to the number—of course he merely estimated it—of those who are now in prison as a few hundred. Could you tell the committee with any more accuracy about that number?

Col. READ. I should say about 5,000.

Senator McKELLAR. 5,000. Are most of them at Fort Leavenworth?

Col. READ. I should say roughly there are between 3,500 and 4,000 there; about 4,500 possibly out at Alcatraz, the Pacific branch of that institution; and slightly less than that number at the Atlantic branch, Fort Jay. That does not take into account those men who were sent to the penitentiary.

Senator McKELLAR. That would be at Atlanta or somewhere else?

Col. READ. Or the Federal penitentiary at Leavenworth. I am just giving those figures roughly. It is certainly not less than that number.

Senator McKELLAR. Colonel, would it be too much trouble to ask you to furnish us a list of those undergoing punishment separately from the others, and the terms of their punishments separately from the general list so that we may know with what to deal? In other words, so far as my inquiry is concerned I am more interested in those who are now undergoing punishment and the length of the time of such punishment, and whether there is a dishonorable discharge connected with the punishment. I am more interested in those cases than in the ones that have been disposed of. The water that has passed over the mill does not interest me. I would rather have all the information I can get in reference to the estimated 5,000 that are now in prison.

Col. READ. Yes, sir. I see what you mean exactly. I think in fairness to myself and in order that the committee may have a connected statement of operations of that division, which has been referred to here as the Disciplinary Division, during the time I have been there that I ought to state very briefly some of the facts connected with my assignment to that duty.

When Col. Davis, in April, left on this inspection trip to which he referred I was taken from another division where I was on duty and assigned in charge of that division, and I have remained in charge of it since that time. When I took over the division there were only about a dozen or 15 officers in it. The division had not been subdivided into sections and, in consequence, officers, when they were reviewing cases, would submit their review in the rough directly to me. That became impracticable in course of time because of the vast increase of the work, and it was necessary that I should have some assistance and that the system of work there should be organized in a way that would produce the best results and do it most expeditiously. Col. Mayes, who was Acting Judge Advocate General at the time during the absence of Gen. Ansell in France, divided the division into several sections. For instance, cases of death and dismissal went to one section; cases of penitentiary confinement went

to another; cases where the disciplinary barracks was designated as the place of confinement went to another; and cases where there was no dishonorable discharge, executed or suspended, went to another; and then there was the clemency division; and the statistical division, the division which is now engaged in furnishing the committee with statistics which have been called for or which it was expected would be called for.

After Gen. Ansell returned we discussed the matter, and he felt that there was too great a responsibility on me and, of necessity, too great a responsibility on him in passing on these records because, for instance, take the case of a dismissal of an officer, or the death penalty in the case of a soldier, or confinement in the penitentiary in the case of a soldier, or in the disciplinary barracks, when that record was reviewed and came to me it resulted practically in but two officers passing on that record, the officer who actually prepared the review in the case and myself. In order to insure thoroughness and accuracy Gen. Ansell constituted a board of review—three officers—and all of them able lawyers from civil life.

These cases—all the cases of death and dismissal and cases carrying penitentiary confinement—went to this board of review. After they had been reviewed by the officer and had been reviewed in the division to which they were assigned. Then, after they were acted on by that board of review, they came to me and then from me they went to Gen. Ansell. Subsequently the work increased so much that he constituted a second board of review, so that the way the office works now all cases of death and dismissal go to the first board of review and all cases involving penitentiary confinement go to the second board of review; and I may say that on that second board of review there are three equally able lawyers, two of whom have been judges of supreme courts—one of the Supreme Court of Montana and the other of the Supreme Court in the Philippines, and the third member is a prominent lawyer from Pennsylvania. On the first board of review one of the members is the professor of criminal procedure in the University of Pennsylvania; the second one professor of law at the Northwestern University; and the third one is quite a prominent member of the local bar and is also the reporter of the Court of Appeals of the District of Columbia.

Now, there was something I wanted to say right here. There was some statement made this morning by some one that left me under the impression that it was believed that when a case goes up to the President for his action that he, if he wants to mitigate or commute or set aside the sentence in any way, acts in his capacity as the pardoning power under the Constitution. Of course, that is not true. He acts judicially. It is so decided by the Supreme Court in the Runkel case in the 122 United States, where it was specifically held that the reviewing authority and confirming authority even up to the President when passing on courts-martial proceedings acts in a judicial capacity.

Now, I want to explain something about these men that go to the disciplinary barracks whether their sentence of dishonorable discharge is actually executed or whether it has been suspended and the disciplinary barracks is designated as the place of confinement—in those cases where the punishment is in excess of six months, the object, of

course, being to send those men there and give them an intensive course of military training and enable them to earn restoration to duty as soon as possible. Now, under the act of March 4, 1915, in the case of a dishonorable discharge, where it was not executed, but suspended, the Secretary of War could order the restoration to duty of that man at any time, and even if the dishonorable discharge had been executed he could permit that man on his own application to make application for restoration to duty and restore him to duty under that enlistment; and he could do that even in the case of a man who might be sent to the penitentiary. So that every man who has served a sentence in the disciplinary barracks where his dishonorable discharge has been executed or suspended is there under an indeterminate sentence so far as the confinement is concerned and his restoration to duty is practically a matter in his own hands and every possible inducement, every incentive, is given that man to win restoration and win it just as promptly as possible. Only a few days ago Col. Rice, commandant of the disciplinary barracks, was talking to me about this matter in my office and he told me that when a question of restoring a man to the colors was considered it was immaterial to him whether he was there under a sentence of 1 year or 20 years. There is hardly a day, certainly three, four, or five times a week, cases from the clemency section of my division pass over my desk where we restore men to duty under a long sentence of even 25 years when he has actually served in the barracks 6 or 8 months, or even less. So, the length of the sentence has nothing whatever to do with it. It is terrifying, but, as I said a moment ago, it is imposed by the courts for the purpose of getting discipline as promptly as possible and to impress on the men the absolute necessity of obedience to orders and never with any intention on anyone's part that that sentence should be executed. I was opposed to those sentences. I have always been opposed to them. I do not believe in them. They have just the opposite effect from that which is contemplated.

Senator WADSWORTH. Do you happen to know within your own knowledge whether any memorandum or order was furnished to the service at large that the policy of very severe sentences should be indulged in by courts-martial generally?

Col. READ. No, sir; I do not recall any.

Senator WADSWORTH. How does it happen then that the policy was so uniform? The sentencing of men in the first instance with no intention of carrying it out if the man behaved himself in jail?

Col. READ. Well—

Senator WADSWORTH (interposing). Was it a psychological condition in the commissioned personnel of the Army?

Col. READ (continuing). The only explanation I can advance for it was that these courts felt that as long as there was no discretion, that there was no limit on their discretion, and in view of the desire to establish discipline as promptly as possible that they believed a severe sentence would be merciful in the long run.

Senator THOMAS. Colonel, if that is the practice, as you say, trial always followed by a long sentence service on which is comparatively short will not the moral force for which the long sentence was imposed lose all potency? In other words, a man knows that he is only going to serve a few months when he is sentenced for a number of years.

Col. READ. He does not know it until he gets to the disciplinary barracks and finds he can win restoration. The effect is on the men of his command who know about the sentence.

Senator THOMAS. But when, after a few months, they all go back into the ranks, I should think that fact would destroy the moral force that might be expected to grow from the long sentence.

Col. READ. That was the only argument that appealed to me when I was considering the advisability of making a recommendation about not only the reduction of these sentences but the advisability of promulgating an order to the Army calling attention to these extremely severe sentences and suggesting that certainly within the continental limits of the United States the limits-of-punishment order promulgated by the President be not departed from except in very exceptional instances.

Senator WADSWORTH. You think limits of punishment should be fixed by an order?

Col. READ. No, sir; I did not think any regulation could be promulgated that would have any other than a persuasive effect. That was all because of the statute, the forty-fifth article of war, limiting the right of the President to issue and promulgate such regulations only in time of peace; but I felt that in this country particularly there was no real necessity for those extremely severe sentences which I knew very well, and every officer knew that gave it any thought at all, were never going to be executed and should not be executed, and then I do not believe in those severe sentences anyway. I do not think they accomplish anything.

Senator CHAMBERLAIN. It shocks the public conscience.

Col. READ. When I was assigned to the division I called Col. Mayes's attention to these severe sentences verbally and told him that I thought possibly something ought to be done about it. He agreed with me, but he felt that under the provisions of this General Order No. 7, which has been referred to here, we were limited to an examination of the records simply to determine their legal sufficiency and that, as there was no limitation under the law on the punishing power of the court in time of war, it might be inadvisable to promulgate or, rather, to attempt to dictate to the reviewing authorities what they should do in those particular cases; but he did give instructions, which were carried out, that whenever a record was reviewed here, and it was found or believed by the officer reviewing it that the sentence was excessive, that a notation should be made on the record by this officer, so that when this case came up in the usual manner under a clemency application it would immediately attract attention.

When Gen. Ansell came back I called his attention to the same situation and I told him Col. Mayes's views about the matter; and Gen. Ansell agreed with me that we ought to do something about it, and while we were deliberating over that he constituted this first board of review. They entertained the same views in regard to these sentences as I did and as Gen. Ansell did. Gen. Ansell then gave instructions that we would not be bound by the limitations—apparent limitations—upon review; that we would not hesitate to call to the attention of the reviewing authorities a sentence which we thought was excessive. That, however, applied only to the cases that went before the board of review, which were the death and dismissal cases

and penitentiary cases; but subsequently, when I called his attention to the fact that a great many of these sentences—the major portion of them—were those where the accused were sent to the disciplinary barracks, he directed that the same procedure be followed in those cases, and we did it; followed it in all of them whenever we thought the sentence was excessive. But, as I say, no one ever felt that shock that Members of Congress and the public generally very naturally felt when they saw some of these sentences. We did not feel it because we knew the men were not going to be permitted to serve any excessive portion of any sentence.

Senator CHAMBERLAIN. There are many of them who ought never to have been imprisoned and dishonorably discharged.

Col. READ. I made a memorandum along this line August 21, 1918, to Gen. Ansell, which I would like to read to the committee.

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, August 21, 1918.

Military Jurisdiction.

Memorandum for Gen. Ansell.

Subject: Punishments by courts-martial of enlisted men in time of war:

1. I have read with great interest the two memoranda of Col. Davis and the one of Maj. Strode, and while I agree with both those officers in certain particulars, I regret to find myself unable to give my assent to the conclusions reached by them and to proposals they have submitted as solutions, from their respective points of view, of this most important problem. I have given much time and consideration to the question of punishments in the Army imposed by courts-martial, so that the views I entertain were not hastily formed, but are the result of considerable experience, observation, and reflection. Frankly, I have no sympathy with many of the severe punishments imposed, whether in time of peace or war. In my judgment, in the vast majority of instances they defeat the very purpose had in view by those who imposed them. I think it will be generally conceded by those who are qualified to express an opinion on the subject, that it is well recognized to-day in every enlightened system of penology that it is the promptness and certainty of punishment rather than its severity which produces the desired disciplinary and reformatory effect. The day of punishments savoring of cruelty and vindictiveness has passed in all civilized countries never to return again. Surely nothing even remotely suggestive of that sort of thing has any place in the great Army of the United States we are now engaged in raising for the sole and avowed purpose of fighting for the supremacy of the right throughout the world simply because it is the right. Harsh and unduly severe punishments are not in harmony with that great ideal. And yet I have on my desk the cases of two young soldiers who were sentenced to 10 years' confinement at hard labor for absence without leave for from four to five days, and the cases of three other young soldiers who were sentenced to 25 years' confinement at hard labor and forfeiture of five-sixths of their pay per month for that period for disobedience of orders. Admittedly, as a general rule, offenses in time of war are more serious than in time of peace and should be more severely punished, but this is not unqualifiedly true.

Many offenses, particularly in this country, are more serious now than before we entered the war and they should not be more severely dealt with. No one ever contended before the war that there should not be uniformity in punishment wherever and whenever practicable. As a matter of fact, we tried to bring about that very situation because it was realized as a matter of common sense and common fairness that for the same or similar offenses men should receive the same and similar punishment. If that be true—and there does not seem to be any serious fault with the logic—why in time of war, with literally thousands of untrained and inexperienced officers of almost every grade, should we say that because the Executive order is not in force, practically any punishment in the way of forfeiture or confinement will be permitted without question provided there is no statutory inhibition against it? Good judgment and sound discretion on the part of courts and reviewing authorities, it seems to me, are more necessary in time of war than in time of peace for obvious reasons. Yet no one can sit at my desk and note the cases that daily pass across it and fail to observe that these necessary qualities are often conspicuously absent. Sentences are imposed and approved, the severity of which, from my point

of view, is so out of proportion to the gravity of the offenses as to render them positively grotesque. The courts are, of course, actuated by the highest motives in imposing such sentences. They think that is the way to enforce discipline; I think they are mistaken. In addition to being the wrong method to accomplish the purpose in view, such sentences create a most unfortunate impression upon the civil community. I am constrained to believe that it would be manifestly inadvisable from every point of view to have the impression get abroad that courts and reviewing authorities in their actions are governed only by an unrestricted discretion. This is truly the peoples' war, to be fought by the peoples' Army, and it is but just and right that they should be made to feel that the system of punishment in force in that Army is not based on the judgment, informed or uninformed, of courts, but has its foundation in wise and humane principles that have been thoroughly tested in time of peace.

Those were my views in administering my office and those were my views when I was in France as judge advocate of the first division that went over there. I made a similar memorandum in connection with the severe punishments that were imposed over there in inferior court cases.

Senator CHAMBERLAIN. It did not do much good, did it?

Col. READ. I got some modification of it in those cases over there. The summary courts are limited in punishment to three months' confinement and three months' forfeiture of pay. The limit of punishment which the special courts can impose is a six months. They imposed extremely severe sentences for their disciplinary effect, such as taking away all pay for several months. It was a disastrous thing I thought and it was working against the efficiency of the men. It would result in making them sullen and discontented, and in addition to that it deprived them of certain things that they ought to have and for which the Government made no provision—such, for instance, as their barber bills, their laundry bills, and tobacco. The whole result of that was to make a man under such a sentence a nuisance to his organization. He becomes a chronic borrower, and it really puts a premium on petty larceny, in my judgment, and I do not think such sentences ought to be imposed. They exasperated me every time they would come in, because, as I say, I thought it was the wrong way to enforce discipline. I do not see why, for instance, if a man was sleeping on post in this country, three or four thousand miles from the scene of hostilities, that he should get from 5 to 10 years for that. I do not see why, if a man were absent without leave over here, or, even in the case of desertion over here, that he should receive a sentence that was beyond all reason. It mattered not whether the man was going to desert or not, it was that wrong impression that it created that I thought ought to be stopped.

Senator CHAMBERLAIN. That was one of the reasons they suggested some amendment to the Articles of War.

Col. READ. And the proper procedure was to try to stop the thing which the military authorities had the right to stop.

Senator CHAMBERLAIN. But which they did not do. All you gentlemen have testified that nearly all these conditions might be avoided by regulation, but they do not regulate.

Col. READ. They can not. They can not put a limitation on the punishment imposed in time of war, except by amending the forty-fifth article of war, and that is what—

Senator CHAMBERLAIN. They have tried a lot of men by general courts who should have been tried by a summary court, and the general court has imposed these severe penalties for small offenses.

Col. READ. Of course, wherever that is done—

Senator KIRBY (interposing). Mr. Chairman, I suggest if we have finished with Col. Read, that we have Gen. Crowder make his statement.

Senator CHAMBERLAIN. General, I am sorry it is so late in the day, but we want you to have as full a hearing as you desire and we want you to take just as long a time as you need and you can cover any part of the subject you want to.

#### STATEMENT OF MAJ. GEN. ENOCH H. CROWDER.

Gen. CROWDER. I do not know what issues have been discussed before the committee except as I have learned of them from newspaper accounts. I prefer to answer questions, if that is satisfactory to you.

Senator CHAMBERLAIN. Well, if I may be permitted to state, the serious question here is the construction that ought to be given to section 1199.

Gen. CROWDER. 1199 of the Revised Statutes?

Senator CHAMBERLAIN. Yes, sir.

Gen. CROWDER. You already have the two opinions on that subject.

Senator CHAMBERLAIN. Now, it seems that some of those in the Judge Advocate General's Department placed one construction on it and others placed another construction on it—such differences as will arise in courts of justice and amongst lawyers generally.

Gen. CROWDER. Has my opinion been put in the record?

Senator CHAMBERLAIN. Your letter to the Secretary?

Gen. CROWDER. No; my reply to the brief of the Acting Judge Advocate General.

Senator CHAMBERLAIN. I am not sure, there were a great many. You might prefer to see the printed testimony of Gen. Ansell before you testify.

Gen. CROWDER. No; I prefer to go ahead this evening and close up if I can.

I shall assume that you want to interrogate me about the pending bill. These papers I have before me relate to the pending bill and I shall have to refer to them if I talk on that bill.

Senator CHAMBERLAIN. Well, then, you might discuss the bill.

Gen. CROWDER. I will come to section 1199 necessarily, in considering the last section of the pending bill.

Senator SUTHERLAND. My impression is, Senator, they did not put any general memorandum in on that, but left it for him to put in.

Gen. CROWDER. The pending bill relating to the Articles of War is, it seems to me, an attempt to engraft upon the American practice certain essentials of the English practice, but carries the English practice and its applications much further than the English themselves have carried it.

Let me describe briefly the British system of courts-martial. They have a general court-martial, field general court-martial, a district court-martial, a regiment court-martial, and a summary court-martial. The general court-martial is relied upon in time of peace to try all major offenses committed under the English code. When hostilities break out reliance is had mainly on the field general court-martial. The general court-martial operating in time of peace has a

minimum of nine members; a maximum is not stated in their code. The field general court-martial has a minimum of five.

No man can sit on a general court-martial unless he has had three years' commissioned service, and I think the same limit is applied to the field general court-martial. They provide a judge advocate for their general court-martial. The appointment of a judge advocate is mandatory and he has much the same duties as are prescribed in this bill, for the judge advocate that you would create for our general and special courts-martial.

Great Britain maintained, prior to the breaking out of the world war, a regular army of approximately 250,000 men, about one-half of which was stationed in England and the other half scattered throughout the vast expanse of the colonial empire.

In the 9-year period from 1905 to 1913, both inclusive, there were but 12 trials by general courts-martial in England and 168 outside of England, or a total of 180 trials. During this 9-year period we maintained an Army of less than one-half this size and had a total of trials by general courts-martial of 41,726, or an average of 4,636.2 trials per year. It is one thing to provide judge advocates with these powers to sit on English general courts-martial that try only 12 cases in 9 years, and quite another thing to provide judge advocates with these powers to sit on American courts-martial to try over 41,000 cases in the same period, or an average of 4,636.2 cases per year.

Senator WADSWORTH. A year?

Gen. CROWDER. Yes. We have to consider, also, the mandatory requirement of the pending bill that a judge advocate with these powers shall be detailed to sit on special courts-martial which, as our practice has developed, tries a larger number of cases than the general court. If you enact the bill as it stands, you would have to multiply the personnel of the Judge Advocate General's Department in such a way that I can not estimate its strength.

Senator SUTHERLAND (interposing). How do you account for the difference in number of trials in the English and the American systems?

Gen. CROWDER. I account for it in this way: Their general court-martial does not try any cases except those appropriately punished by a longer period of confinement than two years. Their district court-martial, operative in time of peace, has authority to try all cases which can be appropriately punished up to that limit. It is assumed in the drawing of this bill, that the analogy between the English general court-martial and our own is complete. That is the great fundamental error in article 11.

Now, continuing the discussion of proposed article 11 of the pending bill, and following the enumeration of powers that it vests in the judge advocate, I find the analogy to the English practice complete down to the top of page 3, line 3, where you come to prescribe that the rulings of the judge advocate, and the advice he gives in the performance of his duties, and made of record, shall govern the court-martial. Here is the first departure from the English practice. The corresponding English provision provided that the court-martial shall not overrule a decision of the judge advocate except for very weighty reasons. The English general court-martial is admonished that it should not ordinarily disregard the advice of the judge advocate on any legal point, and provided further that they may enter of

record that they have decided a point in consequence of a judge advocate's opinion, and the fact that the court has so followed the opinion of the judge advocate is made a defense in any action brought against the members of the court.

In practice, therefore, the adoption by the court of the advice of the judge advocate, even if wrong, practically exonerates the members of the court-martial from liability. Stated in other words the English rule is to the effect that courts-martial should be guided by the opinion of the judge advocate and not overrule it except for weighty reasons. The English court is responsible for the legality of its decision, but it must consider the grave consequences which may result from their disregard of the advice of the judge advocate on a legal question.

But in this bill you provide that the ruling and advice of the judge advocate of the American general or special court-martial "shall govern the court-martial." The judge advocate of the British court has not that authority. He can give his ruling or advice. The court can overrule him. The authority of the court to decide legal questions is retained in the English service, but here you take it away from the court and give it to this man who is to function as judge advocate. I think that is rather a weighty matter to consider, whether you want to do it or not.

Another thing, the rule here that the advice given in the performance of his duties and made of record shall govern the court-martial. There is no limitation, no qualification whatever, so that if the proceedings come back from the convening authorities, advised by his judge advocate, for reconsideration by the court on a legal point, still this man sitting as judge advocate of the trial court can overrule the convening authority. The court here is required to follow the advice of the judge advocate detailed on that court, without any qualification whatever. I assume that is error in drawing the bill.

Senator KIRBY. You construe "govern" there to mean "control."

Gen. CROWDER. It says "govern." My criticism was not to the article, but to the extent to which it carries the English precedent. I believe in maintaining the responsibility of the court for a decision of the legal questions. I am willing that this statute shall advise the court to follow in the language of the British rules, but I do not believe that you would be justified in taking away from the court the responsibility for the legality of its decision.

Senator KIRBY. There is no necessity for the court at all if you are going to have the decision not only indicated, but made, in fact, by the judge advocate, is there?

Gen. CROWDER. Passing to article 17, which is the next article, you provide for prosecutors. I have no objection to that article except I think it ought not to be required that the convening authorities appoint a minimum of two prosecutors for each general court-martial, the proposed article says: The authority appointing the court shall appoint a prosecutor, and for each general court-martial one or more assistant prosecutors when necessary. When I made my last calculations, I think I found that more than 50 per cent of the cases tried by general court-martial were tried upon the plea of guilty, and it seems unnecessary to appoint two prosecutors on a court-martial to receive a plea of guilty. I think that article requires recasting, so as to make it one of mere authorization.

Coming down further you say:

In all court-martial proceedings the accused shall have the assistance of and be represented by counsel of his own selection.

That was proposed in the House Military Committee when we were considering the revision of 1916. I have in mind a case which I brought to the attention of the House Military Committee. An officer was being tried in Alaska; he selected as his counsel a professor of law at the Leavenworth School of Application; demanded that he be taken away from his duties at Leavenworth and sent to Alaska to defend him. I suppose, under this law, we would have to do it. Or, if he should ask for a civilian counsel and applied for Mr. Root, I don't know how the trial could proceed under this article until Mr. Root came forward as counsel for him. I do not know whether it is your intention to write in an ironclad provision that a man gets the counsel of his own selection and that we can not proceed with the trial until he is furnished with the particular man he wants. It is not the rule in civil courts. Of course, a man can select, as far as counsel is available, and we wrote in the old article "when available," but it appears here "of his own selection."

There is no objection to section 3.

Section 4, that if the authority authorized to appoint general courts-martial has an officer of the Judge Advocate General's Department present for duty on his staff, he shall not refer any charge to a general court-martial for trial unless the said officer of the Judge Advocate General's Department shall indorse in writing upon the charge that in his opinion an offense made punishable by the Articles of War is charged with legal sufficiency against the accused and that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged.

Under that article, of course, President Wilson could not refer charges or bring to trial any man, unless I said that there was a prima facie case against him. I could absolutely preclude him from bringing a man to trial. I think perhaps he ought to be precluded where the charges were legally insufficient, although, if he asked the advice of his Attorney General upon it I would, under this article, be in position to overrule the Attorney General on the sufficiency of the charge.

And, so, down the hierarchy of command, no general could bring an officer to trial, or a soldier to trial, unless the judge advocate said it was a prima facie case. The English do not carry their experiment that far. In the English system the judge advocate occupies an advisory relation to the convening authority; and the attempt here to follow the English practice is overdone. They carry it too far all through this bill. They place powers in the judge advocates and the Judge Advocate General that they have not got in England.

Senator WADSWORTH. By skillfull operation, the Judge Advocate General could pretty nearly be Commander in Chief could he not?

Gen. CROWDER. I want to say this: If this bill, as it stands, were enacted into law, I do not care whom the people of the United States elect President, or whom that President appoints Commanding General of the Army, the Judge Advocate General will be in a position to administer the discipline of the Army if you pass this bill just as

it stands. That is more apparent when you come to take up section 1199. That is all I have to say about that article.

Senator WARREN. It is rather unusual for an officer to come before a committee and plead against having more authority.

Gen. CROWDER. Yes; there is an opportunity here to aggrandize myself to such a point where I would have about all the authority there is. It is the first time I have ever had an opportunity to say "no" to anything the committee has proposed to grant in the way of an increase of power and jurisdiction.

But there is a fundamental principle involved which we erect outside of the hierarchy running from the President, as Commander in Chief, down to the lowest authority competent to convene courts-martial—an independent appellate tribunal, controlling in the more important matters of military discipline, enforceable through the agency of general courts-martial. I feel sure that you would not want to enact this legislation until you have heard from the hierarchy of command personally. I am not certain but that such a provision would be in derogation of the constitutional authority of the President, as Commander in Chief, who, according to Attorney General Wirt, "is the national and proper depository of the final appellate power, in all judicial matters touching the police of the Army."

Coming now to section 5 of the pending bill, I shall have to ask a question for the reason that I do not quite understand what is meant. It is provided therein—

That if the accused at any time before the arraignment shall file in the proceedings an affidavit of prejudice alleging specific grounds to show that the court, by reason of matters touching its constitution or composition, can not do justice, the court shall proceed no further in the case, but shall report the matter to the appointing authority for decision.

I invite particular attention to the phrase "affidavit of prejudice \* \* \* touching its constitution or composition"—that is, of the court-martial.

Senator KIRBY. He could object to the method of its being constituted or to the personnel or—

Gen. CROWDER (interposing). Very well; I see, but to come right to the question, it will practically stop the trial. He already has the privilege of challenge.

Senator KIRBY. He might not. They might put some man or men on the court who would not give the fellow a fair deal.

Gen. CROWDER. Of course, you can reach that by challenge.

Senator KIRBY. I think that is what that means—to give him two grounds for challenge.

Gen. CROWDER. I do not object to the accused having one, two, or any number of grounds for challenge. But ought he to be given the right to file his affidavit of prejudice and stop the court? It does not make any difference whether the affidavit is good or bad; he can stop the court, and I do not know how long it might take to get the court started again.

Senator KIRBY. It doesn't make any difference whether the affidavit is true or not.

Gen. CROWDER. It would make no difference whether his grounds were trivial, specious, or false—

Senator NEW (interposing). With no limit as to the number—

Gen. CROWDER (continuing). The court must stop.

Senator KIRBY. That probably ought not to be so strong as to absolutely stop the court. However, the accused ought to have the right to challenge both the matters there and it ought to be brought to attention.

Gen. CROWDER. I can not think of any question that can arise respecting the question of prejudice that can not be reached by challenge or some other plea he is authorized now to make under the present system.

Senator KIRBY. The effect of provision here would be to give his challenge the effect of a mandatory provision and require that the court shall stop all business and refers it back.

Gen. CROWDER. Yes.

Senator KIRBY. That is too strong. I did not know that was in there.

Gen. CROWDER. Coming now to section 6. It provides—

That when a court-martial shall find the accused not guilty upon all charges and specifications it shall not reconsider, nor shall the appointing authority direct it to reconsider its findings.

I want to stop right there long enough to say that if the man were charged with desertion, larceny (two charges that are very frequently combined), and absence from the roll call, and he is found not guilty on the desertion charge and on the charge of larceny, but is found guilty of the absence from the roll call, he of course has not been found not guilty of all the charges; so that, under this article the reviewing authority can, as under the present system, send that case back and ask that the acquittals of desertion and larceny be reconsidered, whereas if he were acquitted of all three you could not do so. Of course, you do not mean that.

Senator KIRBY. Well, why should not it be reconsidered? Why should not he be tried on that if he is only acquitted on one or two; why not try him on the other, if you want to?

Gen. CROWDER. He has been tried and been acquitted on the two major offenses, but because he has been convicted of being absent from roll call you retain here the right for the reviewing authority to send back the case to reconsider the acquittals?

Senator KIRBY. Only on that case.

Senator WADSWORTH. On all of them.

Senator NEW. On all of them according to that.

Gen. CROWDER. Simply because he was found guilty of one rather trivial offense.

Senator KIRBY. We did not think it was so strong as that. If you have got three offenses there it only ought to relate to permitting the judge advocate to have him retried on the one in which he was not found guilty.

Gen. CROWDER. There is no question here of retrial. I think I know what was meant, viz, that a verdict of not guilty on any charge should be final; but the way it is expressed here the accused is not given the benefit of that. The article must be rewritten, if I conceive your idea correctly. It should provide that a finding of not guilty upon any charge shall not be reconsidered by the court nor shall the reviewing authority direct its reconsideration. That is doubtless what was intended.

And that brings us up against the main question: Is it right, is the present rule right, the present rule authorizing the reconsideration of

the verdict of acquittal? Let me say first, it is simply a regulation and there is no law under which it is done. The War Department could wipe out the regulation to-night and could establish this very prohibition by an order.

Senator SUTHERLAND. In actual practice is that frequently done?

Gen. CROWDER. No; I have here the record—and I want to introduce it—a summary of examination of 1,000 cases returned by reviewing authorities to trial courts for revision during this war. It showed 95 acquittals sent back for reconsideration, 95 in 1,000, distributed as follows—soldiers 86, officers 9; formal corrections 39; number in which court adhered to former findings and sentence 38, distributed as follows—soldiers 32, officers 6; number in which acquittal was revoked and the accused was sentenced 18, distributed as follows—soldiers 16, officers 2. Now, here are the cases. I have had them summarized for the benefit of the committee. I want this to go into the record. I have not had time to read it over carefully, but it just so happened that the first case listed has been commented upon as a flagrant misuse of the revisory powers as to acquittals. It was the case of Recruit David Cortesini, Second Company, One hundred and fifty-second Depot Brigade, Camp Upton, N. Y. The account of this is short and I will read it. In this case the accused was an Italian recruit, apparently very ignorant. He was directed by his commanding officer to sign an enlistment and assignment card. This he refused to do. He was charged thereupon with refusing to obey the lawful command of a commissioned officer. Upon trial he pleaded "Guilty" to so much of the specification as alleged the failure to obey the command and "Not guilty" to that part of the specification alleging that the command was lawful. The evidence showed the accused had been afforded every opportunity to comply with the order and that he persistently and obstinately refused to do so. Yet in spite of this admitted state of facts and in spite of the fact that the order was admittedly lawful, the court acquitted him. In returning the case in revision Gen. Bell said, in part:

In the present case the accused was given every opportunity to obey the order. but nevertheless disobeyed it intentionally. in defiance of authority. and accordingly such disobedience was "willful" within the meaning of this section.

The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for his act but rather he desires the court to understand that the commission of this act should be met by severe punishment, and then if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline.

Upon return in revision the court sentenced the accused to dishonorable discharge and confinement for five years.

This is the case undoubtedly referred to in the newspaper accounts as being a case in which after acquittal had been returned the accused was dishonorably discharged and given a long term of confinement in addition. However, the newspaper account does not disclose the final action of the reviewing authority in this case, which was to remit the sentence of dishonorable discharge and to reduce the confinement and forfeiture from five years to one month and forfeiture of one-third of his pay for a like period.

Now, here are the other cases, gentlemen, and in order that the committee may understand what use reviewing authorities make of

this power to return an acquittal I would like to put the paper in the record.

Senator WADSWORTH. Without objection it is so ordered.

*Summary of examination of 1,000 cases returned by reviewing authorities to trial courts for revision during the war, with reference to number of acquittals returned for reconsideration and the results.*

1. Whole number of records examined.....	1,000
Whole number tabulated.....	833
2. Number of acquittals returned.....	95
Soldiers.....	86
Officers.....	9
3. Formal corrections.....	39
4. Number in which court adhered to former findings and sentence.....	38
Soldiers.....	32
Officers.....	6
5. Number in which acquittal revoked and accused sentenced.....	18
Soldiers.....	16
Officers.....	2

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, February 24, 1919.

Memorandum for Gen. Crowder.

Subject: Return of acquittals by reviewing authority.

Press comment is to the effect that under present procedure in courts-martial many cases in which the court-martial has acquitted an accused are returned by the reviewing authority either demanding or urgently insisting that the acquittal be set aside and some punishment imposed, and that in many such cases long terms of confinement have been inflicted. One case has been particularly referred to in the press, in which it was said that after acquittal the case was returned to the court for revision, and the court imposed a sentence of dishonorable discharge accompanied by a long term of confinement.

From the commencement of the war to October 1, 1918, a total of approximately 2,500 cases were returned by reviewing authorities for revision. This number comprises all cases returned including those returned for correction of clerical errors, revision upward of inadequate sentences, and acquittals.

From these 2,500 cases, the first 1,000 records were examined for the purpose of securing the following data. That is to say, approximately 40 per cent of all cases returned by reviewing authorities for revision have been scrutinized.

Out of the 1,000 cases thus examined, it appears that 95 of the cases were ones in which the court had returned a verdict of acquittal; 39 of these 95 cases were returned for the purpose of having the court make purely formal correction of the record, leaving a balance of 56 cases of acquittals returned by the reviewing authorities for a reconsideration of a verdict of acquittal.

In 38 of these 56 cases the court adhered to its former finding of not guilty. That is to say, in 2 out of every 3 cases of acquittal returned for reconsideration the court adhered to its original finding. The remaining 18 cases of acquittal returned for revision are the subject matter of the following synopsis. Sixteen of these cases are those of enlisted men; 2 of officers.

The case referred to above in which it was said that dishonorable discharge and a long period of confinement were inflicted after an acquittal is, without doubt, the case of Recruit Davis Cortesini. An analysis of that case appears in the attached synopsis marked (1). The final outcome of that case was a sentence of confinement for one month and forfeiture of one-third pay for a like period.

An analysis of the 18 cases referred to discloses that the total confinement in all cases amounted to 27 months. In 2 cases confinement of 6 months was imposed, but in 11 cases no confinement whatever was imposed. The average confinement for the 18 cases was 1.5 months. This, of course, completely refutes the charge that long terms of confinement have been inflicted by courts in cases in which there was at first an acquittal.

In 3 of the 18 cases discussed in this synopsis all punishment was remitted by the reviewing authority. It therefore appears that out of 1,000 cases returned by reviewing authorities, or 40 per cent of all cases returned to October 1, 1918, there were 14 cases of original acquittal in which the court in revision changed its finding, imposing an average confinement of 1.5 months.

J. J. M.

(1) 116234. RECRUIT DAVID CORTESINI, 2D COMPANY, 152D DEPOT BRIGADE, CAMP UPTON, N. Y.

In this case the accused was an Italian recruit, apparently very ignorant. He was directed by his commanding officer to sign an enlistment and assignment card. This he refused to do. He was charged thereupon with refusing to obey the lawful command of a commissioned officer. Upon trial he pleaded "Guilty" to so much of the specification as alleged the failure to obey the command, and "Not guilty" to that part of the specification alleging that the command was lawful. The evidence showed that the accused had been afforded every opportunity to comply with the order and that he persistently and obstinately refused to do so. Yet in spite of this admitted state of facts and in spite of the fact that the order was admittedly lawful, the court acquitted him. In returning the case in revision, Gen. Bell said, in part:

"In the present case the accused was given every opportunity to obey the order, but nevertheless disobeyed it, intentionally, in defiance of authority, and accordingly such disobedience was 'willful' within the meaning of this section.

"The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for his act, but rather he desires the court to understand that the commission of this act should be met by severe punishment and then if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline."

Upon return in revision the court sentenced the accused to dishonorable discharge and confinement for five years.

This is the case undoubtedly referred to in the newspaper account as being a case in which after an acquittal had been returned the accused was dishonorably discharged and given a long term of confinement in addition.

However, the newspaper account does not disclose the final action of the reviewing authority in this case, which was to remit the sentence of dishonorable discharge and to reduce the confinement and forfeiture from five years to one month and forfeiture of one-third of his pay for a like period.

(2) 112155. SERGT. ARCHIE MEGEL, 126TH ORDNANCE DEPOT COMPANY, CAMP DONIPHAN, FORT SILL, OKLA.

The accused was charged with making a false statement in connection with an allotment, certifying under oath that the woman to whom the allotment was made was his wife when in truth she was not and had no claim upon him. He admitted this himself upon trial. All the facts necessary to establish his guilt were proven by other witnesses and admitted by the accused, but the court nevertheless acquitted him. In returning the case the reviewing authority said in part:

"It is not understood by what process of reasoning the original finding in this case can be harmonized with a proper conception of the duties of the members of the court under their oaths. It appears that the members of the court in this case have utterly failed to appreciate the duties laid upon them or the obligation of the oath they took at the commencement of the trial."

In revision the court found the accused guilty and sentenced him to five days' hard labor without confinement and forfeiture of five days' pay.

(3) 112350. MESS SERGT. CLAIR MCK. PRICE, 154TH DEPOT BRIGADE.

The accused in this case was charged under the ninety-sixth article of war with shoving, pulling, and beating a conscientious objector who refused to do kitchen police duty. He had been ordered by his commanding officer to have the said objector perform such duties. The conscientious objector's eardrum was punctured. He pleaded guilty to the specification describing the charge above stated, except that he pleaded not guilty to the word "beat" in the specification. The court, nevertheless, acquitted him. In returning the record for revision the reviewing authority remarked in part:

"It is not customary to find a man not guilty after he has pleaded guilty to an offense. Holding this view, it is respectfully suggested that the court find the accused guilty of the first specification, either with the word 'beat' excepted, or unqualifiedly, and there is sufficient evidence to warrant the latter course.

"In directing the attention of the court to these matters, the reviewing authority is not to be understood as enjoining any particular action, nor as desiring the court

to substitute his opinion for its judgment. It is, however, within his province, and in fact his duty, to express to the court his views in cases in which it may happen that such views appear to differ from the judgment of the court as expressed in its findings and sentence, or where the action of the court does not appear, in his opinion, to be in accord with what is generally regarded as for the best interests of the service."

"The reviewing authority, therefore, expresses the hope that the court will reconsider its action in the light of these remarks and will arrive at a sentence which will be just to the accused and at the same time will properly protect the interests of the service."

The court thereupon found the accused guilty and sentenced him to the forfeiture of one-third of his pay per month for three months.

However, the court in returning the record to the reviewing authority suggested clemency on the ground that the prisoner had received what he considered a legal order from his superior officer, and that in his ignorance of military customs and overzealousness in carrying out this order he had committed the offense and on the further ground that the prisoner bore an excellent reputation as a clean, straightforward, and manly soldier.

The reviewing authority thereupon reduced the sentence to forfeiture of one-third of accused's pay for one month.

(4) 110154. PVT. FRANK F. SMITH, COMPANY B, 109TH HEADQUARTERS TRAIN AND MILITARY POLICE.

The accused in this case was charged with desertion. Four reputable witnesses established his guilt; the accused alone testifying for himself. His veracity was impeached by reputable witnesses and the impeachment was un rebutted. The court acquitted him.

On revision, its attention having been called to the clear and unmistakable testimony for the prosecution and the flimsy defense presented by accused alone, the court found him guilty of absence without leave and sentenced him to six months' confinement and forfeiture of two-thirds pay for a like period.

(5) 114189. WAGONER LUTHER M. HAMILTON, SUPPLY COMPANY, 143D INFANTRY.

The accused was charged with feloniously striking a member of the military police on the head with a pistol. It was proven by the prosecution and admitted by the accused that this had been done. Accused was apparently drunk but his reputation theretofore had always been excellent. For this reason, apparently, the court acquitted him. In returning the case for revision, the reviewing authority said: "The evidence that accused committed the assault is uncontroverted. To permit such a crime as this to go unpunished can not fail to have a most injurious effect upon discipline. A failure to convict under the evidence in this case can not be justified. The good reputation of the accused and the circumstances which led up to the assault can not excuse the offense. They may only be considered in mitigation of the punishment."

The court thereupon sentenced the accused to three month's confinement and forfeiture of two-thirds of his pay for a like period. This sentence was reduced by the reviewing authority to confinement for three months and forfeiture of \$17.50 per month for a like period.

(6) 106601. PVT. WALTER HARDIN, COMPANY F, 2D WEST VIRGINIA INFANTRY.

The accused in this case was charged with fraudulent enlistment in that in applying for enlistment he made oath that he was not married and had no dependents, when in truth he was married and his wife was totally dependent upon him for support. At the time of making the statement, he could not have been enlisted had he stated that he was married and that his wife was dependent upon him. These facts were all admitted in the evidence. The court, however, acquitted the accused. In returning the case for revision, the court remarked that the facts in the case were undisputed. Under the procedure in force at that time with reference to discharges the accused would have necessarily been discharged the service. The question in the reviewing authority's mind therefore must have been whether after having made the untrue statement to procure enlistment, the accused should be given an honorable discharge after a verdict of acquittal by court-martial or whether he should not be given a dishonorable discharge. The court in revision sentenced the accused to be dishonorably discharged the service. No confinement or forfeiture was imposed.

(7) 111878. PVT. JOSEPH T. SPICER, BAKERY COMPANY NO. 308, NATIONAL ARMY.

The accused in this case was charged with making a false statement with regard to dependents, resulting in the payment by the Government of compensation to a person not entitled thereto. The accused certified that a certain woman was his wife and entitled to compensation, when in fact she was not. She thereupon received Government compensation. All these facts were admitted by accused on trial. But accused testified that he thought he was justified in making the statement that the woman was his wife as he intended to marry her. In returning the record for revision after acquittal, the court said:

"It is the duty of the court to make a true finding of fact and thereafter to impose a sentence commensurate with the gravity of the offense. If thereafter the court, or any of its members, desires to recommend clemency it would be entirely proper for them to do so."

The accused was then sentenced to confinement for 90 days and forfeiture of one-third of his pay for a like period.

(8) 110292. PVT. THOMAS P. SULLIVAN, SUPPLY COMPANY, 127TH FIELD ARTILLERY.

The accused in this case was charged with using insulting, abusive, and threatening language to a noncommissioned officer; with willfully disobeying the command of a noncommissioned officer; and disobeying an order of a commissioned officer. There was considerable variance in the testimony of the witnesses and the case was one of that sort in which there was sufficient evidence for either a conviction or an acquittal. The court acquitted the accused, and the reviewing authority returned the record with this statement:

"The court will reconvene for reconsideration of the findings after the entire proceedings have been very carefully read aloud to the members."

After this reading the court sentenced the accused to six months' confinement and the forfeiture of one-third of his pay for a like period. This sentence was set aside because of errors in the proceedings and the accused released from confinement without the imposition of any penalty.

(9) PVT. PATRICK A. CHILDERS, COMPANY D, 142D INFANTRY.

The accused in this case was charged with feloniously striking another soldier in the mouth with a club for the purpose of committing robbery. The facts showed that the accused and a companion, who had already served one term in the penitentiary for robbery, assaulted another soldier whom they knew had \$76 in his possession. Accused admitted the assault but denied that he had any intention of committing robbery, the soldier claiming that the soldier assaulted had provoked the difficulty. It was conclusively established that both the accused and his companion had attacked the third soldier. Upon an acquittal, the reviewing authority returned the case for revision, with the suggestion that the court "reconsider its findings and sentence with the view of determining the advisability of finding the accused guilty of simple assault, in violation of the ninety-sixth article of war." The court thereupon found the accused guilty and sentenced him to confinement for three months and forfeiture of one-third of his pay for a like period. The reviewing authority in approving the sentence remitted all confinement.

(10) 119601. PVT. VICTOR DI PIZZOL, MEDICAL DEPARTMENT.

The accused was charged with willfully disobeying the lawful command of a commissioned officer. He pleaded guilty to the specification, excepting the word "willfully," to which word he pleaded "Not guilty." The facts showed that he had not disobeyed the command of a commissioned officer but of a noncommissioned officer. The court acquitted him. The reviewing authority returned the record, suggesting that the accused be found guilty of the sixty-fifth article of war (disobeying command of a noncommissioned officer). In revision the court found the accused guilty of the sixty-fifth article of war and sentenced him to confinement at hard labor for six months and forfeiture of two-thirds of his pay for a like period. By reason of legal errors occurring in the revision proceedings, the sentence was disapproved and the accused released without any confinement or forfeiture.

(11) 116128. PVT. ROBERT L. COOPER, 112TH INFANTRY.

The accused was charged with using disrespectful language concerning a commissioned officer by making certain profane remarks in the presence of enlisted men but not in the presence of the officer. He was acquitted. The reviewing authority returned the record with the following comment:

"In the opinion of the reviewing authority, the specification under charge 1 is proved. The uncontradicted evidence of Sergt. Read, Pvt. Allison, and Pvt. Hill is that the accused went to the tent of the first sergeant for the purpose of obtaining a pass and upon being advised that he could not obtain one until after inspection and until after Lieut. McCarthy returned, the accused used the language charged in the specification. There can be no doubt that the intention of the statement is to say that if Lieut. Robinson had been in command of the company such an order would not have been issued. The law does not require that the statement be made in the presence of the officer.

"The reviewing authority desires that the court have opportunity to reconsider its findings in the light of the foregoing remarks, before final action is taken in this case."

The court thereupon found the accused guilty and sentenced him to confinement at hard labor for 12 months and forfeiture of two-thirds of his pay not already voluntarily allotted for a like period.

In confirming the sentence, the reviewing authority suspended all confinement.

(12) 119486. PVT. PHILIP VISSSESSEE, 22D CAVALRY.

The accused was charged with attempt to desert. It was conclusively shown and not contradicted that the accused bought a ticket from Chattanooga to New York City and took passage on a train bound to New York City without authority. However, there was no evidence showing an intent to desert. The court therefore acquitted him. The reviewing authority returned the record for revision with the following significant comment:

"The reviewing authority has returned the record of trial to the court for its reconsideration because of the fact that he deems it preferable in order that the court itself may have an opportunity to alter its findings and sentence if it so desires, to express to the court the impression made upon his mind upon a review of the evidence rather than to act upon the proceedings as an acquittal, especially in view of the fact that such action at the present time would result in the disapproval of the findings.

"The reviewing authority is entirely in accord with the view taken by the court that the evidence was not sufficient to show an attempt to desert. \* \* \* Still the evidence clearly established \* \* \* the commission of an offense by a soldier for which he merited punishment, namely, the buying of a ticket to New York City and taking passage on a train for New York without authority. This offense would appropriately be punishable under the ninety-sixth article of war.

"The reviewing authority does not desire to be understood as undertaking the enjoining any particular action by the court nor as desiring the court to substitute his opinion for its judgment. \* \* \* Regarding as he does the findings of the court inconsistent with the testimony and not in accord with the best interest of the service, he, however, expresses the hope that the court will reconsider its action in the light of these remarks and will arrive at a finding and sentence which will be just to the accused and at the same time will properly protect the interests of the service."

Thereupon the court found the accused guilty under the ninety-sixth article and sentenced him to confinement at hard labor for six months and forfeiture of two-thirds of his pay for a like period. The reviewing authority in approving the sentence mitigated it to three months' hard labor without confinement and forfeiture of two-thirds of his pay for six months.

(13) 111098. WAGONER JOSEPH E. MCGARRY, SUPPLY COMPANY, 165TH INFANTRY

The accused was charged with escaping confinement. The testimony clearly and undisputedly showed that while accused was under arrest and in confinement no guard was placed over him; that is to say, there was a complete absence of physical restraint. While in such confinement he walked out of the guardhouse without opposition on the part of any guard and without any pretense of pursuit. Afterwards he reported back to the guardhouse. The court acquitted him. In sending the case back for revision, the reviewing authority in part remarked:

"If such practices are condoned, upon the part of either the guards or the prisoners, discipline will be destroyed. That the accused reported back to the guard may properly and should only be considered in mitigation of the offense."

On revision, the accused was sentenced to confinement for two months and forfeiture of one-half of his pay for a like period.

(14) 111196. PVT. EDWARD M. WERLING, BATTERY A, 78TH FIELD ARTILLERY.

The accused was charged with sleeping on his post. It was admitted that he was found asleep while on duty. An effort was made by the defense to show that this might have been caused by a fit of epilepsy. This, however, the proof totally failed to show, as it was conclusively established if the offense had been committed during a fit of epilepsy the accused would not have been able to seek out a keg to sit upon, to put his gun between his knees, and to settle comfortably down before going to sleep. There was a total absence of any reasonable defense in this case, and after acquittal by the court and return by the reviewing authority the accused was sentenced to confinement for two years and forfeiture of all pay and of all allowances during that period. The reviewing authority, in approving the sentence, reduced it to six months confinement and forfeiture of all pay and allowances.

(15) 115240. PVT. JOHN C. W. H. HILLMAN, TROOP H, 9TH CAVALRY.

Accused was charged with feloniously stabbing another soldier with a knife. The two men were engaged in a fist fight, neither one of them being in danger of any great bodily harm, when accused drew a large knife and inflicted a serious wound upon the other soldier. The record showed conclusively that, while the wounded man may have provoked the fist fight, there was no occasion for the use of such a weapon as that employed by the accused. After acquittal, the record was returned by the reviewing authority, who remarked in part:

"The evidence of record shows that a mere assault and battery, without weapons of any kind, was being committed by Pvt. Hillman upon the person of Pvt. Hillman, the accused, when the latter resorted to a means and degree of force and violence unreasonably in excess of that which the defense of his person therefrom rendered necessary or justified, namely, the use of a knife with a large blade in such manner as to inflict a wound upon the person of his assailant, about 2 inches from the genital organs, which although by mere fortuity not serious, caused him to be on sick report for a period of two weeks. Had such violent act of accused resulted in the death of said assailant, the former would have been guilty of manslaughter by reason of the aforesaid excessive means and degree of force and violence employed, and consequently it is obvious that in the present case, on the evidence of record, the accused is not entitled by law to an acquittal on the ground of self-defense."

The court thereupon sentenced the accused to confinement for three months and forfeiture of two-thirds of his pay for a like period.

There were two previous convictions introduced in this case.

(16) 107954. FIRST LIEUT. CHARLES H. MIELKE, MEDICAL OFFICERS' RESERVE CORPS.

The accused in this case, a medical officer, was charged first with taking a quantity of alcohol from the dispensary for his personal use, and, second, with being drunk on duty. There was conflicting evidence in the case as to whether the alcohol which he took and drank was taken as a medicine or as a beverage. It was admitted that he was drunk, but the question in issue was whether the drunkenness was a result of an overdose of medicine prescribed by himself or whether he had consciously taken enough of it to become intoxicated. In view of the fact that he was drunk on duty beyond all question, the reviewing authority returned the record after acquittal for further consideration, commenting upon the fact that drunkenness on duty was admitted. The court sentenced the officer to be dismissed the service.

This sentence coming before the President for confirmation was disapproved and the accused restored to duty.

(17) 115345. FIRST LIEUT. C. G. CANTRELL, 124TH INFANTRY.

The accused was charged with violation of a standing order not to leave camp without permission. It was conclusively proven and admitted by the accused that he requested permission to go to Macon, Ga., outside which Camp Wheeler is situated; that he was refused permission; that he left camp nevertheless and went to town that night, where he stayed at the hotel. His only defense was that he was sick and that he went to the hotel to sleep. The court acquitted him. The reviewing authority returned the record with this indorsement:

"The accused testified that there was a standing order making it necessary to secure permission before going to the city of Macon; that Maj. Covington did not give him permission; that he did not receive permission from the regimental adjutant or the commanding officer of the regiment; that he did go to the city of Macon on Tuesday

and Wednesday night and slept in the hotel and in the city of Macon on each of said nights.

"Upon this admission the accused would be guilty of absence without leave for such period of time as he remained away from his camp."

The court thereupon found him guilty and sentenced him to be restricted to his regimental area for six months.

(18) 104647. COOK ARTHUR F. TOWNSEND, HEADQUARTERS COMPANY, 3D MISSOURI INFANTRY, NATIONAL GUARD.

The accused in this case was charged with failing to respond to the call of the President on March 25, 1917. It should be noted that the offense alleged was committed before the declaration of war. The accused was a member of a national guard organization, had knowledge of the President's call, but did not respond on account of the illness of his child, and a doubt in his mind as to the legality of requiring service from him. In view of the circumstances the court acquitted him. In returning the record for revision the reviewing authority remarked in part:

"The accused was bound by his enlistment and his oath to respond to the call of the President. He had knowledge of such call and the sickness of his child, or any doubts that he might have had as to the legality of requiring services from him did not excuse his noncompliance with the orders of the President. \* \* \* Even if the court desired to extend clemency on the ground of ignorance of the law (which is not a defense) it would not apply to this case as the accused is an old soldier and was well aware of the fact that military obligations can not be lightly undertaken or cast aside.

"The department commander trusts that the court upon reflection will award an adequate sentence in this case in order that discipline may be maintained."

The court thereupon found the accused guilty and sentenced him to be confined at hard labor for six months and to forfeit one-third of his pay for a like period. The reviewing authority approved the sentence, but mitigated it to forfeiture of one-third pay for three months.

Senator WADSWORTH. Have you any comments to make, General, generally on that power of reviewing authority returning the papers after acquittal?

Gen. CROWDER. I think this way about it: It shocks the American people to have a verdict of acquittal reconsidered, and, for that reason, I am not disposed to insist upon continuing the ancient rule of returning them. I have never known in a rather protracted period of service, of an innocent man who has suffered through this procedure, and I have certainly known of many miscarriages of justice that have been corrected.

A class of cases closely related in principle to the acquittal cases that I have been commenting upon is cases returned to the court for a revision of the sentence. It is a part of the general power that we have under regulations to return proceedings of a court for reconsideration where the record exhibits error or erroneous conclusions of any kind. As summarized by Winthrop, the occasions for returning records are mainly errors in the substance of findings or sentence—as that the findings, or some of them, are not warranted by the evidence, or are based upon the improper admissions or rejection of evidence; or that the sentence is not warranted by or consistent with the findings, or is not itself legal authority for the offense or offenses found; or that the sentence is inadequate or undoubtedly severe, or inappropriate, or inexpedient, under the circumstances of a particular case.

There have been objections voiced against this part of our procedure, which would permit a court, upon the suggestion of the reviewing authority, to revise the sentence upward. I may illustrate what I think the committee will concede to be a proper use of this

power, but I shall submit, before I finish this part of the subject, a list of 50 cases, tried during the war period, which will show the use that reviewing authorities are making of this part of our procedure. The case that I have in mind was the trial of Sergt. Maj. George A. Mayer, retired. Mayer, as a retired sergeant major, was employed by the post exchange at Fort McPherson, Ga., and was charged with the stealing of post exchange funds amounting to \$870.05 in all, taken at various times and in various amounts. He pleaded guilty to the charges and specifications, and the court sentenced him to a forfeiture of \$50 per month from his retired pay of \$67.50 per month for the period of one year, and thereafter to suffer a stoppage of \$50 per month, until the post exchange had been reimbursed in the sum of \$870.05. The reviewing authority returned the case for revision with the remark:

Sympathy of these officers for the accused, who was born in the regiment and had served all his time therein, undoubtedly impaired their proper sense of justice and duty and adequacy of sentence for such an offense. The existence and influence of this sympathy is emphasized and evidenced by the sentence of dishonorable discharge and four years' confinement which the same court awarded another noncommissioned officer for practically the same offense, and who, up to the time of his offense, had served honestly and faithfully, so far as the records show. (2799 D. J. A.)

I have a number of cases which I want to put in the record in order that you may see the use that military authorities make of this power of sending inadequate sentences back for revision upward, and see whether it is an abuse or not. I am not disposed to insist upon retention of that rule. I have sometimes thought we would be justified in revoking the present rule and try out the other system of reporting the result at the proper time, but I fear we should get all kinds of protest from the reviewing authorities, commanding officers who have authority to convene courts-martial.

(The cases referred to are as follows:)

PVT. ERNEST DEAN, TROOP D, 20TH CAVALRY.

The accused was tried at Fort Riley, Kans., for stealing a shirt and a pair of shoes. He was sentenced to forfeit two-thirds of his pay per month for six months.

The convening authority returned the record with the information that he considered the sentence was both inadequate and improper, and that he was of the opinion that it was not to the best interests of the service to retain convicted barrack-room thieves, and that the court would upon consideration impose an adequate sentence including dishonorable discharge. The court revoked its former findings and imposed the following sentence:

"To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentence, and to be confined at hard labor, at such place as the reviewing authority may direct, for six months."

CORPL. JOHN L. McDONOUGH, 1ST COMPANY COAST ARTILLERY CORPS, FORT CONSTITUTION.

The accused was tried at Fort Constitution, N. H., on a charge of being found drunk while on duty as acting sergeant of the guard. He was found guilty and sentenced to be reduced to the grade of private and to be confined at hard labor at such place as the reviewing authority might direct for six months and to forfeit two-thirds pay per month for a like period.

The reviewing authority returned the record and stated that the sentence was entirely inadequate for the offense of drunkenness while on duty as acting sergeant of the guard in time of war; that the commander of the guard in time of war needed full possession and exercise of all his faculties and should set an example to privates under his command, and that there was reason to believe that some of the offenses

brought before courts-martial at the time were being deliberately committed for the purpose of avoiding foreign service.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for one year.

FRANK REEVES, COAST ARTILLERY CORPS, 2D COMPANY, NEW ORLEANS, LA.

The accused was tried at Fort St. Philip, La., on a charge of being found asleep on his post while on guard as sentinel. He had left his beat and gone to sleep on a cot. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the record stated that he deemed it prejudicial to the interests of the service that a court-martial should upon conviction of an offense of this character award so light a sentence; that it was preferable that the court should award an appropriate sentence and then by a recommendation of clemency take steps to bring about the punishment which the court believed the accused really deserved.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two years.

PVT. JOE D. DELONY, COMPANY F, 154TH INFANTRY.

The accused was tried at Camp Beauregard, La., on a charge of leaving his post before he was regularly relieved while on guard as sentinel. He had gone about 20 feet away from his beat and had been found in an automobile on which the curtains were drawn. He was sentenced to be confined at hard labor for six months, and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record stated that while he desired to be understood as not enjoining any particular action in the case he was of the opinion that the crime of a sentinel abandoning his post in time of war was a very serious offense, justifying more punishment than was awarded in this case.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for three years.

PVT. WILLIAM RAGAN, 2D BATTERY, TRAINING BATTALION, 7TH FIELD ARTILLERY.

The accused was tried at Camp Robinson, Wis., on a charge of desertion. He remained away from camp from September 13, 1917, to September 30. He was convicted of absenting himself without leave and was sentenced to be confined at hard labor for six months.

The reviewing authority in returning the record stated that in his opinion sentences of this nature had a tendency to encourage rather than to deter the commission of offenses by certain enlisted men; that it was objectionable to give a man serving a sentence of confinement the same pay as that given to a man in the honorable status of duty, and that it was not to the best interest of discipline to impose a sentence with a period of confinement as long as that imposed in this case without the additional imposition of forfeiture of two-third pay per month for like period.

The court revoked its sentence and sentenced the accused to be confined at hard labor for six months and to forfeit two-third of his pay for that period.

PVT. MOTTIE M. THERRELL, COMPANY F, 1ST MISSISSIPPI INFANTRY.

The accused was tried at Jackson, Miss., for absence without leave for a period from August 8, 1917, to August 29. He pleaded guilty and was sentenced to be dishonorably discharged and to forfeit pay and allowances and to be confined at hard labor for six months.

The reviewing authority in returning the record stated that in his opinion the period of confinement imposed by the sentence was insufficient in time of war to prevent commission of such offenses with a view to escaping service, and that a period of confinement of at least two years would be proper.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for two years.

PVT. LEWIS C. GRANT, MACHINE GUN COMPANY, 7TH REGIMENT CALIFORNIA INFANTRY, NATIONAL GUARD.

The accused was tried at Arcadia, Cal., on a charge that he was found sleeping on his post while posted as a sentinel. He was sentenced to be confined at hard labor for three months.

The reviewing authority returned the record, stating that the sentence should be reconsidered and the question of a partial forfeiture of pay considered; that it was not considered conducive to discipline to allow a soldier to draw as much pay while undergoing confinement as he would draw in a duty status.

The court revoked its former sentence and sentenced the accused to be confined at hard labor for three months and to forfeit two-thirds of his pay per month for a like period.

PVT. CHARLES CURRY, COMPANY K, 10TH NEW YORK NATIONAL GUARD.

The accused was tried at Camp Meade, Md., on charges involving drunkenness in uniform, absence from post without leave, and insubordination to an officer. He was sentenced to be confined at hard labor for one year and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record pointed out that it was generally undesirable in cases where dishonorable discharge was not imposed to sentence a prisoner to more than six months' imprisonment, and to hold him in the service, and that on the other hand care should be taken when in time of war dishonorable discharge is imposed to sentence the accused to a long enough period of confinement so as to discourage a certain class of men from committing offenses in the hope of being discharged from military service. The reviewing authority stated that if the prisoner should be dishonorably discharged a period of confinement not less than two years would be appropriate.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for two years.

PVT. JOE D. BICKLEY, COMPANY L, 2D REGIMENT VIRGINIA INFANTRY, NATIONAL GUARD.

The accused was tried at Roanoke, Va., on the charge of sleeping on his post. He pleaded guilty and was sentenced to confinement for one day without hard labor. The fact that the accused was in bad physical condition evidently influenced the decision of the court.

The reviewing authority in sending back the record observed that the accused had been convicted of a serious offense rendered more aggravating by a state of war, and yet had been awarded practically no punishment, and he stated that the court should award adequate punishment and if grounds for clemency existed, the members so desiring should submit a recommendation therefor.

The court revoked its former sentence and sentenced the accused to confinement at hard labor for three months.

SERGT. ARTHUR TOWNES, QUARTERMASTER CORPS.

The accused was tried at Fort Oglethorpe, Ga., on charges setting forth the sale by him without proper authority to various persons of gasoline and oil, the property of the United States, furnished for use in the military service. It was not disputed that moneys received by these sales had never been turned in to the Government. He was sentenced to be dishonorably discharged and to forfeit all pay and allowances and to be confined at hard labor for one year.

The reviewing authority in returning the record stated that, while he desired that it should not be understood that he was undertaking to enjoin any particular action by the court, it was within his province to express to it his views in cases in which such views appeared to differ from the judgment of the court. He pointed out that the findings of the court convicted a soldier of crimes involving both moral turpitude and willful breaches of military discipline, and that he was of the opinion that a much longer period of confinement should have been imposed.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for four years.

## PVT. OSCAR FLETCHER, COMPANY B, 118TH INFANTRY.

The accused was tried at Camp Sevier, Greenville, S. C., on a charge of desertion. He remained from camp from August 22, 1917, to about September 5. The accused was sentenced to be confined at hard labor for 18 months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record observed that, while there were circumstances in the case that might prompt clemency, yet there were considerations of importance to the military forces which were deemed to demand a sentence including dishonorable discharge and that, while desertion in cases where the sentence provides confinement for a period of years should in accordance with the policy of the War Department also be punished by dishonorable discharge, it is within the province of the reviewing authority to suspend, especially during the continuation of the war, so much of the sentence as provides for dishonorable discharge until the completion of the sentence.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for three years.

## PVT. BENNY GELFER, COMPANY C, 1ST MINNESOTA INFANTRY.

The accused was tried at Fort Snelling, Minn., on a charge of having left his post before regularly relieved. Evidence was adduced to prove that he remained away for 25 minutes.

He was found guilty and sentenced to be confined at hard labor for one month and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record stated that the offense for which the accused had been convicted is in times of peace a serious one and in time of war one of the gravest that can be committed; that a sentry is posted for the purpose of protecting lives and property, and that to impose a sentence such as that imposed by the court would tend to destroy discipline which must be enforced in the military establishment and would lead soldiers to believe that the offense committed by the accused was one of minor importance.

The court revoked its former sentence and sentenced the accused to be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period.

## PVT. PAUL GUIDRY, COAST ARTILLERY CORPS, 2D COMPANY, JACKSON BARRACKS, LA.

The accused was tried at New Orleans, La., on a charge of having committed perjury in giving testimony in a court-martial trial. He pleaded guilty and was sentenced to be confined at hard labor for one year.

The reviewing authority in sending back the record pointed out that, in accordance with a well-established policy of the War Department, the retention in the service of a man guilty of an offense involving moral turpitude was forbidden, and he recommended that the court amend its sentence so as to include dishonorable discharge and forfeiture of all pay.

The court reconsidered its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and all allowances due or to become due while in confinement, and to be confined at hard labor for one year.

## PVT. OLLIE J. SHADLE, COAST ARTILLERY CORPS, 2D COMPANY, JACKSON BARRACKS, LA.

The accused was tried at New Orleans, La., on charges involving the theft from other soldiers of some small articles and certain sums of money ranging from 20 cents to \$1. He was found guilty and sentenced to three months' confinement at hard labor and to forfeit two-thirds of his pay for a like period.

The reviewing authority returned the record of the case with the information that the sentence was deemed inadequate and that, the soldier having been convicted of three distinct larcenies, offenses involving moral turpitude, the retention of the man in the service was deemed inadvisable in the light of a well-established policy of the War Department. And the reviewing authority suggested to the court the propriety of including in its sentence dishonorable discharge, the usual forfeitures, and such confinement at hard labor as the court deemed appropriate for the offenses of which the man had been convicted.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged the service and to forfeit all pay and allowances due or to become due.

## PVT. JOSEPH N. TURNER, MEDICAL DEPARTMENT.

The accused was tried at West Point, N. Y., on a charge of absenting himself from his command without proper leave. He was sentenced to be confined at hard labor for two years and to forfeit two-thirds of his pay for that period.

The reviewing authority pointed out that it was not the policy of the War Department to sentence to confinement in excess of six months a soldier who was to be retained in the service and stated that he did not believe that the best interests of the service would be promoted by the retention on the rolls of a soldier sentenced to be absent from his organization while serving confinement for so long a period as one year.

The court revoked its sentence and resentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for one year.

## PVT. (FIRST CLASS) ALEXANDER KAHN, COMPANY B, 55TH INFANTRY.

The accused was tried at Chickamauga Park, Ga., on a charge of stealing a gold band and a \$5 gold piece. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay per month for that period.

The reviewing authority returned the record for reconsideration of the sentence because the accused, although convicted of larceny, an offense involving moral turpitude, was not eliminated from the service in accordance with an established policy of the War Department.

The court revoked its sentence and resentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two years.

## PVT. HENRY TRIPKEN, TROOP F, 22D CAVALRY.

The accused was tried at Fort Oglethorpe, Ga., on a charge of stealing two helmets, two swords, and two robes valued at \$29.70, the property of the Independent Order of Odd Fellows, Boynton Lodge No. 306, Boynton, Ga. He was sentenced to be confined at hard labor for three months and to forfeit two-thirds of his pay for that period.

The reviewing authority returned the record for reconsideration because of the failure of the court to observe the established policy of the War Department against the retention of soldiers guilty of offenses involving moral turpitude.

The court revoked its sentence and resentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two years.

## PVT. JOHN KENNY, COMPANY E, 22D INFANTRY.

The accused was tried at Camp Merritt, Tenafly, N. J., on a charge of being found sleeping on his post while on guard as a sentinel. He was sentenced to forfeit two-thirds of his pay for three months.

The reviewing authority in returning the record expressed the opinion that the sentence was inadequate and reminded the court that, if in any case it should be deemed advisable that the accused be lightly punished, the proper course for the court to take would be to impose an adequate sentence and then make recommendations for clemency, if such action was considered desirable, and that by imposing an inadequate sentence the court in effect exercised clemency and thereby usurped a function pertaining only to the reviewing authority.

The court revoked its sentence and resentenced the accused to be dishonorably discharged to forfeit all pay and allowance, and to be confined at hard labor for two years.

## PVT. SAMUEL E. FINKLEA, COMPANY H, 1ST INFANTRY, GEORGIA NATIONAL GUARD.

The accused was tried at Macon, Ga., on a charge of stealing two shirts valued at about \$5.62, the property of another soldier. The accused was sentenced to be discharged, to forfeit pay and allowances, and to be confined at hard labor for six months.

The reviewing authority in returning the record stated that the period of confinement imposed on the accused was insufficient in time of war to prevent commission of such offense with a view to escaping military service, and that in the opinion of the department commander a period of confinement for at least two years was not inconsistent with that view in cases wherein dishonorable discharge was imposed.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for 12 months.

PVT. OWEN GONDER, COMPANY I, 4TH REGIMENT NEW JERSEY INFANTRY, NATIONAL GUARD.

The accused was tried at Newark, N. J., on a charge that he did "willfully, feloniously, and unlawfully kill" another soldier. He was found guilty of having killed a soldier through the careless discharge of a rifle while he was posted as a sentinel, and sentenced to be confined at hard labor for two months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record stated that he was unable to agree with the court in its conclusions as evidenced by the finding and sentence, and that such inexcusable carelessness as the accused had been guilty of resulting in death, and amounting to manslaughter could not be condoned if such offenses were to be reduced to a minimum and protection of life afforded from criminal carelessness.

The court revoked its former findings and sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances due or to become due while the accused was in confinement, and to be confined at hard labor for one year.

PVT. MATTHEW J. FINN, BATTERY F, 2D FIELD ARTILLERY.

The accused was tried at Camp Stotsenburg, Pampanga, P. I., on a charge of committing an assault on another soldier. He was sentenced to be confined at hard labor for six months, and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the record stated that it appeared that during the past year the accused had been convicted of deceiving a member of the provost guard and failure to obey his orders, insulting and assaulting a sentinel, willful disobedience of the orders of a noncommissioned officer, failure to obey the orders of a noncommissioned officer, breach of arrest and certain minor offenses; that he had been in the guardhouse 11 months out of 39 months in the service, and had forfeited considerable pay, and that if the offense of the accused was serious enough to demand confinement at hard labor for six months, the previous record of the accused seemed to call for a dishonorable discharge.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for six months.

PVT. FRED ACHOR, MACHINE GUN COMPANY, 33D INFANTRY.

The accused was tried at camp at Gatun, Canal Zone, on charges of unlawfully carrying a concealed weapon and of maiming himself by shooting with a revolver and of making untrue statements respecting the shooting. He was sentenced to be confined at hard labor for three months, and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the record stated that the testimony offered at the trial was sufficient to warrant a conviction, and that the sentence seemed inadequate for such a serious offense as that of willfully maiming in time of war.

The court revoked its sentence, and sentenced the accused to be confined at hard labor for six months, and to forfeit two-thirds of his pay for that period.

PVT. GUST THEODORA, MEDICAL DEPARTMENT.

The accused was tried at the Presidio of San Francisco, Calif., on a charge that with intent to do bodily harm, he feloniously struck another soldier, causing him to lose the sight of his left eye. He was sentenced to be dishonorably discharged.

The reviewing authority, in returning the record, stated that the evidence showed that the accused was guilty of a very violent and unjustifiable assault on a fellow soldier acting as guard, and that the sentence imposed was not commensurate with the gravity of the offense as proven.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for six months.

PVT. (FIRST CLASS) MEADOR P. ST. CLAIR, MEDICAL DEPARTMENT.

The accused was tried at Fort Meyer, Va., on a charge of desertion. He remained from his post from February 3, 1917, to October 22. He was found guilty of being absent without leave and sentenced to be confined at hard labor for three months and to forfeit two-thirds of his pay for that period.

The reviewing authority, in returning the record, stated that there was nothing in the case that served to remove the strong presumption of desertion raised by the protracted absence of the accused without authority, and that the fact that the accused finally determined, after hesitating for a long period, to surrender himself did not remove the presumption.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for 18 months.

PVT. LAWRENCE C. BECKER, 9TH AERO SQUADRON, SIGNAL CORPS.

The accused was tried at Fort Totten, N. Y., on a charge of having been found asleep on his post while on guard as a sentinel. He was sentenced to be confined at hard labor for six months.

The reviewing authority in returning the record made the following statement: "A number of sentences have recently been noticed in which long terms of confinement were imposed without any forfeiture or detention of pay. In addition to the general and obvious objections to paying a soldier serving sentence for the performance of duty, which because of his misbehavior has been thrust upon his better behaved comrades, there is the further consideration, which is of particular importance whenever duty is as arduous as it was in several of the instances noticed, that these sentences have a tendency to encourage rather than to deter the commission of offenses by a certain percentage of men. It is only in very exceptional cases that such sentences should be considered appropriate."

The court revoked its former sentence and resented the accused to be confined at hard labor for six months and to have two-thirds of his pay per month detained for a like period.

SERGT. CHESTER J. JAGLER, COMPANY M, 132D INFANTRY, NATIONAL GUARD.

The accused was tried at Camp Logan, Houston, Tex., on a charge of committing an aggravated assault on the person of another soldier. He was sentenced to be reduced to the ranks and to forfeit two-thirds of his pay per month for one month.

The reviewing authority in returning the record stated that the offense for which the accused was convicted was vile and degrading in character, and that it would be a travesty on justice for him to escape with such meager punishment as that imposed by the court.

The court revoked its former sentence and resented the accused to forfeit two-thirds of his pay for six months and to be confined at hard labor for three months.

PVT. RUSSEL DAVENPORT, COAST ARTILLERY CORPS, 5TH COMPANY, FORT H. G. WRIGHT, N. Y.

The accused was tried at Fort H. G. Wright, N. Y., on charges of having sent obscene and seditious matters through the mail. He was sentenced to be confined at hard labor for six months.

The reviewing authority in returning the record pointed out the objectionable character of long sentences which permitted payment to soldiers serving sentences for the performance of duty thrust upon better behaved comrades, particularly in cases in which duty was arduous.

The court revoked its sentence and resented the accused to be confined at hard labor for six months and to forfeit one-third of his pay per month for that period.

PVT. HARRY VAN KLECK, COAST ARTILLERY CORPS, UNASSIGNED.

The accused was tried at Fort Crockett, Tex., on a charge that he was found sleeping on his post while on guard as a sentinel. He was sentenced to be confined at hard labor for one and one-half months and to forfeit two-thirds of his pay per month for that period.

The reviewing authority in returning the record stated that it seemed to him that only two findings were possible under the evidence, namely, that the accused was either guilty or not guilty; that the offense charged against the accused was one of great gravity and seriousness in time of war, and that if proven by the evidence it merited severe punishment.

The court revoked its sentence and sentenced the accused to be confined at hard labor for three months and to forfeit two-thirds of his pay per month for that period.

PVT. FOY B. HUDSON, COMPANY M, 2D REGIMENT NORTH CAROLINA INFANTRY, NATIONAL GUARD.

The accused was tried at Camp Sevier, Greenville, S. C., on a charge of forging three checks and uttering them. He was sentenced to be confined at hard labor for two years and to forfeit two-thirds of his pay per month for that period.

The reviewing authority in returning the record stated that sentence for dishonorable discharge should have been given as confinement was adjudged for more than six months.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two years.

PVT. EDWARD J. BURNS, MEDICAL DEPARTMENT.

The accused was tried at Fort Oglethorpe, Ga., on a charge of being asleep while on duty as a night nurse in a base hospital. He was sentenced to forfeit two-thirds of his pay for three months.

The reviewing authority in returning the record because of the inadequacy of the sentence pointed out that the accused was found guilty of having twice during one week been guilty of an offense which might have caused the death of some sick patients.

The court revoked its sentence and sentenced the accused to six months' imprisonment and forfeiture of two-thirds of his pay per month for that period.

PVT. WILLIE D. DOBSON, COMPANY A, 4TH ALABAMA INFANTRY.

The accused was tried at Camp Albert L. Mills, Garden City, Long Island, N. Y., on a charge of desertion. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the case stated that the sentence was entirely inappropriate and that to publish it as a sentence for desertion in time of war would result in giving to the command an extremely hurtful misconception as to the seriousness of desertion in time of war.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for three years.

PVT. HYMAN H. CHRISTMAS, BATTERY B, 115TH FIELD ARTILLERY.

The accused was tried at Camp Sevier, Greenville, S. C., on charges involving specifications of desertion, forgery, and appearing in civilian clothing without proper authority. He pleaded guilty to all specifications and was sentenced to dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for two years.

The reviewing authority disapproved the sentence as inadequate.

The court revoked its sentence and sentenced the accused to be discharged, to forfeit all pay and allowances, and to be confined at hard labor for five years.

RECRUIT NELSON MANN, INFANTRY UNASSIGNED, 21ST RECRUIT COMPANY.

The accused was tried at Fort Slocum, N. Y., on a charge of desertion. He was sentenced to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for 18 months.

The reviewing authority in returning the record expressed the opinion that the sentence was wholly inadequate as a punishment for an offense of desertion in time of war.

The court revoked its sentence and sentenced the accused to be discharged, to forfeit pay and allowances, and to be confined at hard labor for three years.

PVT. ERNEST D. WILSON, COMPANY A, 1ST MINNESOTA INFANTRY.

The accused was tried at Fort Snelling, Minn., on a charge that he was found sleeping on his post. He was sentenced to be confined at hard labor for three months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record expressed the opinion that the sentence was too lenient for an offense of this kind.

The court revoked its former sentence and sentenced the accused to be confined at hard labor for eight months and to forfeit two-thirds of his pay per month for a like period.

PVT. ALEX HANEY, COMPANY L, 56TH INFANTRY.

The accused was tried at Chickamauga Park, Ga., on a charge of desertion. He was absent from his post from the 2d day of July, 1917, to the 4th day of August. He was convicted of absence without leave and sentenced to forfeit two-thirds of his pay per month for six months.

The convening authority in returning the record stated that the evidence seemed to establish beyond a reasonable doubt the accused deserted the service of the United States.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for six months.

FIRST LIEUT. CHARLES S. WENGERT, 2D MISSISSIPPI FIELD ARTILLERY.

The accused was tried on a charge of having ordered an explosive shell to be placed adjacent and in close proximity to a kitchen stove, where it exploded and inflicted wounds on a number of soldiers, one of whom died as a result of his injuries. The accused evidently thought the shell was harmless. He was sentenced to be confined to the limits of camp for a period of three months and to be reprimanded by the reviewing authority.

In returning the record the reviewing authority stated that the evidence seemed to establish inexcusable carelessness on the part of the accused for which, in view of its serious consequences, he should be punished.

The court revoked its sentence and sentenced the accused to forfeit three months' pay, to be reprimanded by the reviewing authority, and to be confined to the limits of camp for period of three months.

PVT. EDWARD P. SCARRY, TROOP H, 7TH CAVALRY.

The accused was tried at Fort Bliss, Tex., on a charge of having unlawfully sold an automatic pistol issued to him for use in the military service of the United States, and on a charge that with intent to deceive another soldier he stated to him that the pistol was wanted for guard duty, which statement was known by the accused to be untrue. The accused pleaded guilty to the first charge and not guilty to the second. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record pointed out that the accused having been convicted of a crime involving moral turpitude the sentence permitting him to be retained in the service was contrary to policy of the War Department.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for one year.

PVT. MARCUS LUMPKINS, COMPANY G, 154TH INFANTRY.

The accused was tried at Camp Beauregard on a charge of desertion. He left the service on October 3, 1917, and was apprehended on October 8. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances and to be confined at hard labor for two years.

The reviewing authority in returning the record stated that while it should not be understood that he enjoined any particular action on the court he desired to point out for its consideration that in his opinion the seriousness of the offense of desertion in time of war, especially where that offense is premeditated, justified greater punishment than was imposed in this case.

The court revoked its sentence and resentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for seven years.

PVT. ANTHONY W. REISER, COMPANY B, 1ST MINNESOTA INFANTRY.

The accused was tried at Fort Snelling, Minn., on a charge of being drunk while on duty as a sentinel. He was sentenced to be confined at hard labor for three months and to forfeit two-thirds of his pay for a like period.

The reviewing authority in returning the record expressed the opinion that the sentence was too light for a serious offense committed.

The court revoked its former sentence and sentenced the accused to be confined at hard labor for six months and to forfeit two-thirds of his pay for a like period.

PVT. EDWARD S. HALE, COAST ARTILLERY CORPS, 2D COMPANY, FORT BANKS, MASS.

The accused was tried at Fort Andrew, Mass., on a charge of being drunk on his post while on guard as a sentinel. He was sentenced to be confined at hard labor for three months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority in returning the record stated that the sentence imposed by the court in the case was inadequate for such a serious offense and called attention to a more severe sentence imposed in a similar case.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances due to or become due while the accused was in confinement, and to be confined at hard labor for two years.

PVT. IRA H. CHILDERS, COAST ARTILLERY CORPS, 11TH COMPANY, FORT MONROE, VA.

The accused was tried at Fort Monroe, Va., on a charge relating to the embezzlement of several sums of money ranging from \$2 to \$8, intrusted to him by the post exchange at Fort Monroe, Va. He was found guilty and sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority, in returning the record, called attention to the fact that it was contrary to the policy of the War Department to retain in the service men convicted of offenses involving moral turpitude, and he suggested to the court the advisability of including in its sentence upon revision the dishonorable discharge of the accused.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances due or to become due while in confinement, and to be confined at hard labor for six months.

WAGONER SPENCER W. JEWETT, 2D ENGINEER TRAIN, INFANTRY.

The accused was tried at Fort Bliss, Tex., on charges involving his wrongfully obtaining possession of certain letters, of opening a letter not addressed to him, and of converting the contents of a letter to his own use. He was sentenced to be dishonorably discharged and to forfeit all pay and allowances.

The reviewing authority in returning the record stated that the offense of which the accused was convicted was a serious crime, punishable under the Criminal Code of the United States with a fine not to exceed \$2,000 and imprisonment for five years, and that the sentence awarded by the court was entirely inadequate.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit pay and allowances, and to be confined at hard labor for six months.

PVT. ROBERT F. KELLY, COMPANY C, 110TH MACHINE GUN BATTALION.

The accused was tried at Camp McClellan, Anniston, Ala., on a charge of stealing a pistol valued at \$10 from a resident of Roanoke, Va. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for six months.

The reviewing authority in returning the record stated that the sentence was wholly inadequate, the record disclosing that the stealing by the accused man was the result of a deliberate plan.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for 18 months.

PVT. CLARENCE O. PEDERSON, COAST ARTILLERY CORPS, 2D COMPANY.

The accused was tried at Fort Morgan, Ala., on a charge of stealing a watch valued at about \$45, and a cigarette case. He was sentenced to be discharged, to forfeit all pay and allowances, and to be confined at hard labor for one year.

The reviewing authority in returning the record stated that the period of confinement imposed was insufficient to prevent the commission of such offense with a view to escaping military service, and that a period of confinement for two years was not inconsistent with that view in all cases where dishonorable discharge is imposed.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances while in confinement, and to be confined at hard labor for two years.

PVT. RAY T. JOYCE, COMPANY B, 4TH REGIMENT, NEW JERSEY NATIONAL GUARD.

The accused was tried at Newark, N. J., on a charge of sleeping on his post while on guard as a sentinel. He was sentenced to perform hard labor for one month.

The reviewing authority in returning the record pointed out that, in view of the fact that the accused had pleaded guilty to being asleep on his post, the sentence imposed was inadequate.

The court revoked its sentence and sentenced the accused to be confined at hard labor for six months and to forfeit one-half of his pay per month for that period.

PVT. WILLIAM JENSEN, COMPANY C, 4TH INFANTRY, NEBRASKA NATIONAL GUARD.

The accused was tried at Omaha, Nebr., on a charge of absenting himself without leave. He was away from his post for one month. He was convicted and sentenced to be confined at hard labor at such place as the reviewing authority might direct for one year, and to forfeit two-thirds of his pay per month for a like period.

The record was returned by the convening authority with the information to the effect that it is not good policy to confine a soldier in a guardhouse for more than six months, that only persons sentenced to dishonorable discharge can be sent to the United States Disciplinary Barracks, and that the department commander believed the case a proper one for dishonorable discharge and confinement.

The court revoked its former sentence and sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct for one year.

PVT. ORIE V. WALTERS, MEDICAL DEPARTMENT.

The accused was tried at Fort Oglethorpe, Ga., on charges of stealing a pair of leggings valued at \$5, from another soldier, money to the amount of \$31, the property of a soldier, and a hat, the property of the Government, of absenting himself from his detachment without proper leave, and of obtaining railroad transportation through false representations. He was found guilty on all specifications but one and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for one year.

The reviewing authority in returning the record stated that the period of confinement imposed by the sentence was insufficient in time of war to prevent commission of such offenses with a view to escaping military service.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two and one-half years.

PVT. NELSON W. NICHOLS, MACHINE GUN COMPANY, 2D MAINE INFANTRY.

The accused was tried at Augusta, Me., on the charge of being asleep on his post. He was found guilty and sentenced to be confined at hard labor in the guard house at mobilization camp, Augusta, Me., for one month from date of arrest and to forfeit all of his pay for a like period.

The reviewing authority returned the record, pointing out that the designation of the place of confinement should have been left to the appointing authority, and stating that the sentence adjudged was inadequate for the offense of which the accused was found guilty, and that, if on account of special circumstances connected with the case it seemed desirable that the term of confinement should be shortened, a proper sentence should be given, and a recommendation of clemency attached.

The court revoked its former sentence and sentenced the accused to be confined at hard labor, at such place as the reviewing authority might direct, for three months, and to forfeit one-half of his pay per month for a like period.

PVT. JESSE EDMONDS, COMPANY B, 115TH MACHINE GUN BATTALION.

The accused was tried at Camp Sevier, Greenville, S. C., for a violation of the ninety-fourth article of war on a specification of having stolen a pair of leggings issued by the Government to another soldier, and on a specification of having sold these leggings. He was sentenced to be confined for four months at hard labor and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the record stated that he was unable to reconcile the finding of the court of not guilty on the first specification and guilty of the

second; that the evidence clearly showed that the accused not only sold these articles, but that he sold stolen property.

The court revoked its sentence and sentenced the accused to forfeit all pay and allowances and to be confined at hard labor for one year.

PVT. LEO J. FRITSCH, COMPANY L, 5TH REGIMENT MARYLAND INFANTRY, NATIONAL GUARD.

The accused was tried at Baltimore, Md., on a charge that he did willfully, feloniously, and unlawfully kill a soldier. The shooting was an accident, but the accused had loaded his gun contrary to orders. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay for that period.

The reviewing authority in returning the record pointed out that the disobedience of the soldier constituted gross negligence, which resulted in the death of one of his comrades, and that the sentence was inadequate.

The court revoked its sentence and sentenced the accused to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for three years.

The reviewing authority mitigated this sentence to confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for 12 months.

I would like to go back and connect up again with this question of judge advocate. I want to be entirely fair to the British system. The field general court-martial is, you understand, a court of general jurisdiction and has the same power of punishment in active service as a general court-martial in time of peace, but the English law makes no provision for the appointment of a judge advocate for the field general court-martial, but it does make some provision for legal service which corresponds to the service that a judge advocate renders on a general court-martial. They maintain, at every general court-martial headquarters, a number of officers whose sole duty it is to sit on courts-martial, and one such is detailed on each field general court-martial. He is not uniformly present at the trial, but it is provided that no serious or complicated case shall be tried without his presence. When present he has the same duty in advising the court on legal questions as the judge advocate of a general court-martial.

Now, when you come down to the district court-martial which has this power of punishment up to two years, the British law provides that a judge advocate with these powers may (not "shall") be appointed, and it is within the discretion of the convening authorities to put on such an official upon the district court-martial.

Senator SUTHERLAND. They only assign to such a court a certain class of cases, I presume?

Gen. CROWDER. To the district court?

Senator SUTHERLAND. To the district court.

Gen. CROWDER. Well, it works this way—

Senator SUTHERLAND (interposing). First, they are limited by statute.

Gen. CROWDER. It is limited by statute to two years. That court can not give a punishment above two years, and the reviewing authorities send to the district court-martial cases that can be appropriately punished within that limit of punishing power.

I have stated that the English system, while requiring a judge advocate to be appointed for the general court-martial, as this bill does, permits the judge advocate to be appointed for the district court-martial without requiring it, and provides that for the field general court-martial these law officers shall be maintained at the headquarters of each field general court-martial jurisdiction, one

appointed for each field general court-martial, with the same powers and duties that the judge advocate has for the general court-martial.

Senator WARREN. That English law limits all punishment and also limits what fine could be imposed against the soldier.

Gen. CROWDER. The English court-martial has no limitation upon its power to punish except for these inferior courts. The district court can not give above 2 years; the regimental court can not give above 42 days; a summary court, I think, about 28. I am not certain that I have those limits just right.

Senator WARREN. As to the stoppage of pay—

Gen. CROWDER (interposing). Stoppage of pay goes with the imprisonment.

Senator WARREN. For a similar length of time, but not exceeding it.

Senator SUTHERLAND. Do they have any system corresponding to your disciplinary barracks system?

Gen. CROWDER. Yes; they started that system before we started ours. I had an inspection made of their system before I undertook to write our disciplinary statute, which Senator Chamberlain remembers very well, establishing our own disciplinary barracks, or rather, converting our military prisons into disciplinary barracks. I do not know how successful the experiment has been in England. We have had no recent report. Our own attempt has been very successful.

Senator SUTHERLAND. Well, do you not have military prisons that are not used and called disciplinary barracks?

Gen. CROWDER. No; we have only disciplinary barracks and the guardhouse, and some stockades in camps that serve the purpose of disciplinary barracks, but we have no military prisons left in our system at all. We have the main prison at Leavenworth and the two branches.

Senator WADSWORTH. You mean barracks?

Gen. CROWDER. Yes; the main disciplinary barracks at Leavenworth and the branch one at Castle Williams on Governors Island and the other branch at Alcatraz.

Senator SUTHERLAND. And any man sentenced for any kind of crime to any one of those barracks has the opportunity by good behavior and hard work to get a revision of sentence and a restoration to his former military status?

Gen. CROWDER. Yes; about 1,200 of them at Leavenworth alone got an honorable restoration to duty with the Army this last year. And not a few of them were men serving long-term sentences that are being so criticized throughout the country. They got honorable restoration to duty.

Senator CHAMBERLAIN. But that did not remit the sentence of dishonorable discharge.

Gen. CROWDER. Yes; they are sent there under suspended sentence of dishonorable discharge, and we simply disapproved the sentence of the dishonorable discharge and restored them to duty.

Senator CHAMBERLAIN. Has every man who has been sentenced, of these fifteen or eighteen thousand men—have all those who have been sentenced to the disciplinary barracks had their sentences suspended?

Gen. CROWDER. I think there are a few exceptions. I have noticed some in the last few days I have been on duty. I have only

recently resumed my work as Judge Advocate General. In some instances courts have sentenced soldiers for common-law or statutory felonies to penitentiaries and the dishonorable discharge adjudged has been executed. Since then they have been transferred to the disciplinary barracks, because of some mitigating circumstances discovered in the reading of the record here. In those cases they would not be serving under suspended sentence.

Senator CHAMBERLAIN. Very few cases?

Gen. CROWDER. Yes.

Senator CHAMBERLAIN. Do I understand you that with very few exceptions, all these men who have been sentenced to prison since this war began have had their sentences suspended?

Gen. CROWDER. Sentenced to the disciplinary barracks suspended.

Senator CHAMBERLAIN. The sentence of dishonorable discharge?

Gen. CROWDER. All those sentences to the disciplinary barracks with these exceptions we have noticed, I think, had their sentences of dishonorable discharge suspended.

Senator CHAMBERLAIN. Then there are practically no men sentenced to prison who have not had their sentence of dishonorable discharge suspended?

Gen. CROWDER. None except those sentenced to penitentiaries and transferred to disciplinary barracks. There may be a few others.

Senator CHAMBERLAIN. That is what I want to know: How many of them have been dishonorably discharged? What is the proportion of those who have been dishonorably discharged to those who have had their sentence suspended?

Gen. CROWDER. I can not give you that proportion, I do not know the figures, but all men who have been sent to the United States penitentiaries have had their sentences of dishonorable discharge executed, and practically all those—by far the larger number—who have gone to the disciplinary barracks, either to Leavenworth, Alcatraz, or Castle Williams, have had their dishonorable discharges suspended.

Senator CHAMBERLAIN. Well, would you say that as many as one-half of those who have been sentenced for long terms have had their dishonorable discharge sentences suspended?

Gen. CROWDER. I should think it would exceed that; about 65 per cent.

Senator CHAMBERLAIN. Sixty-five per cent, then, of those who have been sentenced and who have been dishonorably discharged have gone to the disciplinary barracks?

Gen. CROWDER. No, no; 65 per cent of the class you mentioned have gone to the disciplinary barracks with their sentence of dishonorable discharge suspended. Thirty-five per cent have gone elsewhere with the dishonorable discharges executed.

Senator CHAMBERLAIN. That is what I wanted to know.

Gen. CROWDER. I have never made a verification of those figures. I would like to. Understand, I do not vouch for their accuracy, but I consider that a reasonable estimate.

Senator SUTHERLAND. What class of cases have you sent to the various penitentiaries and where do you make the line of distinction between those and the others?

Gen. CROWDER. We draw the line at common law and statutory felonies. We can not send a man to the penitentiary unless the

offense charged against him is punishable under the Federal Penal Code or the Code of the District of Columbia with penitentiary confinement.

Now, I believe I have gotten down to this last section, which is the 1199 section, and that brings us to a discussion of the opinions that were rendered on that question.

Gentlemen, I really think that if I insert in the record at this point the reply brief that I made, the committee will have before it all that it needs to decide the question: What was the proper construction of section 1199 of the Revised Statutes? I might state, and it might be helpful in understanding the situation, just how this matter came up.

The Secretary of War sent for me in November of 1917 and asked me how long I had been Judge Advocate General. I told him about six years. He said: "How does it happen that you never advised me that we had here in the War Department a court of appeals that could reverse, modify, or affirm sentences of court-martial?" I answered "Because we have no such court of appeal in the War Department." He said: "I have from the Acting Judge Advocate General a very powerful brief on the subject and he seems to argue successfully that this power exists."

Well, I knew that the power, if it existed, had never been exercised, and told him that if that power had been discovered in 1199 of the Revised Statute it was an original discovery. He said: "I wish you would take this brief and read it over and give me your advice." That was on November, I happen to remember, November 23. On November 27, I submitted my reply brief, which is here, and which I will pass to the secretary of your committee for insertion in the record.

(The matter referred to is as follows:)

WAR DEPARTMENT,  
OFFICE OF THE JUDGE ADVOCATE GENERAL,  
Washington, November 27, 1917.

Memorandum for the Secretary of War.

On November 10, 1917, there was presented for your personal consideration by Gen. Ansell, Acting Judge Advocate General, a memorandum brief in support of his action on the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery. In the discussion of the record of the case itself Gen. Ansell had come to the conclusion that the evidence did not warrant a conviction of the offense of mutiny, that many errors of law appeared on the face of the record, and that, while the court had jurisdiction and "its judgment and sentence for that reason could not be pronounced null and void," errors in law and the unfairness of the trial "justify, upon revision, a reversal of that judgment." Gen. Ansell, first inviting attention to section 1199, Revised Statutes, providing that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army"—

concludes his review of the case as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, and recommend that the necessary orders be issued restoring each of them to duty."

I shall not address myself, for the present, to the merits of the case, or to the proper administrative action that should be taken in respect of it, but rather to the statement of Gen. Ansell in his memorandum brief, that an ill-considered and erroneous change of attitude on the part of the Judge Advocate General's Office that occurred within a score of years after the close of the Civil War has profoundly and adversely affected the administration of military justice in our Army;

that "errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review"; that you and your immediate military advisers can never appreciate the full extent of injustice that has resulted to our soldiers through the operation of this rule; that a proper sense of the injustice can be felt only by those who exercise immediately the authority of the Judge Advocate General's Office; and that even those thus experienced can gather a full impression of the wrong done only by complete mental inclusion of that vast number of cases where concededly corrective power ought to have been but was not exercised in each year of the past forty odd years. Gen. Ansell adds:

"During the past three months, in scores, if not hundreds of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long established practice has been able to do no more than point out the error and recommend Executive clemency."

In handing the memorandum brief to me for my study, you asked my attention to these statements and expressed your surprise that such a situation as is here depicted could have existed in the face of an express grant of power to the Judge Advocate General, which Gen. Ansell finds in section 1199, Revised Statutes, to modify or reverse the approved proceedings of courts-martial. You directed me to examine the brief and make a report thereon. I have had a limited time in which to do this, but the results of my study, which I think is complete enough to answer the main propositions, follow.

The logic of Gen. Ansell's brief converges to its conclusion in these distinct channels:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning, confers upon the Judge Advocate General not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General, with the power to modify or reverse the same.
2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.
3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period, and apparently until the early eighties.
4. That the power has never been questioned by the civil courts or other civil authority.
5. That the power is, and for a long time has been, vested in the Judge Advocate General of the British Army.

Since the brief concededly purports to overturn the established practice of over one-third of a century, and to advance a doctrine as to which there is little or no previous expression or any authority or opinion outside of the brief itself, it will be well to follow the outline of discussion upon which the brief is built, and to address ourselves first to the contention that the word "revise" in section 1199, Revised Statutes, confers upon the Judge Advocate General the power to review and then to modify or reverse the approved proceedings and sentences of courts-martial.

#### 1. MEANING OF THE WORD "REVISE."

Practically the whole fabric of Gen. Ansell's argument is built upon an interpretation of the meaning of this single word "revise." In support of the broad meaning which he gives this word his brief collates definitions of the word by lexicographers and jurists. On the authority of the Standard Dictionary, which defines the word "revise"—

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform"—he classifies the word "review" as a synonym of the word "revise"; and upon this justification indiscriminate definitions of the words "revise" and "review" are quoted throughout the brief. I think the deductions he makes in this part of his brief are unauthorized.

In essential etymology the word revise means "to look over." It has acquired a special meaning going to the purpose of the "looking over," and imports a purpose of suggesting, or "making amendments." Thus a proof reader revises copy and suggests changes, but he does not effect changes. Special committees of men learned in the law revise statutes and codes by special legislative commission, but their revisions do not give legal life to the result of their labors. The legislature must enact the revision as a law. In the same sense the "looking over," the "reexamina-

tion" of the proceedings of an inferior tribunal by an appellate court is not the reversal or the modification of the judgment, albeit the revision is for the purpose of making such a change. All this is most significant, since in the statutory grant of so wide a power as that contended for we should expect, by all the analogies of grants of appellate power, to find something more than authority "to look over," or "to examine." Such brief survey of the field of statutes conferring appellate power on the various tribunals of the several States and of the United States as I have been able to make in the limited time I have had to prepare this paper, fails to disclose a single instance in which the power to modify or reverse the judgment of inferior courts is deduced from the words "review" or "revise," without the addition of apt words specifically conferring the power to reverse or modify.

Gen. Ansell's brief purports to find one such statute, which he describes as analogous with section 1199, Revised Statutes, granting the power to modify or reverse by the use of the single word revise. Gen. Ansell says, in part:

"I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chap. 541, 30 Stat., 553 (Bankruptcy law) provides in part as follows: 'The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction.'"

Gen. Ansell's brief then proceeds to cite a case interpreting the bankruptcy statute (In re Cole, 163 Fed., 180, 181 (C. C. A., 1st Circuit), which he describes as "a case typical of all," in which the court says:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And from this quotation it is inferred that the court was finding in the word "revise" a broader power to "modify or reverse" the procedure of the lower court. This legislative precedent, as judicially applied, would, if it were proper and accurately set forth in the brief, be most persuasive, and for this reason I have had recourse to the statute itself. I find that the quotation of the bankruptcy act of July 1, 1898, in the brief is incomplete, being a quotation of only a portion of the section conferring appellate jurisdiction on the Supreme Court and the circuit courts of appeal and the supreme courts of the Territories. The portion quoted is from the latter part of the section, the earlier part of the section having conferred general appellate jurisdiction; the words quoted by Gen. Ansell, "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law," follow that part of the section which confers general appellate jurisdiction. In order that you may be fully advised in the premises, I quote the entire section:

"SEC. 24. JURISDICTION OF APPELLATE COURTS.—a. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The concluding paragraph, marked "b," quoted by Gen. Ansell, follows the language which invests the courts with appellate jurisdiction in express terms. There was no necessity for the court to deduce appellate power out of that part of the section designated above "b," for it had this appellate power by express grant. The discussion of the court in In re Cole should, I think, be so understood.

I do not think this part of the reply would be complete without some reference to the manner in which appellate jurisdiction has generally been conferred by statute, exemplified in the following:

(a) The act of February 9, 1893, establishing the Court of Appeals for the District of Columbia, provides:

"SEC. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia \* \* \* may appeal therefrom to the Court of Appeals \* \* \* and \* \* \* the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just."

(b) The Judicial Code of March 3, 1911, provides for the exercise of appellate jurisdiction in the following sections:

"Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error decisions in the district courts, etc.

"Sec. 130. The circuit courts of appeals shall have the appellate jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy, etc.'

"Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question, etc., may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error.

"Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: \* \* \*

"Sec. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy, etc."

In the light of what has been said, I think it will be perfectly apparent to you that the court, in *In re Cole*, was in no sense discussing its power to give effect to its conclusion upon revision. It was discussing only the scope of the matters that could be inquired into upon the petition, and found the definition of that scope in the words "revise in matters of law the proceedings of the several inferior courts of bankruptcy." It becomes, therefore, quite impossible to follow the brief we are here reviewing in its assertion that—

"The language of that statute (bankruptcy act) is the very language of this (sec. 1199, R. S.), except that the revision is expressly limited to matters of law."

There is not even a shadow of analogy between the words of the Federal bankruptcy act investing the circuit courts with specific appellate jurisdiction and the words of section 1199, Revised Statutes, relied upon to invest the Judge Advocate General with appellate jurisdiction.

But I can not conclude this part of the brief without inviting your attention to the definitions which are quoted from "Words and Phrases," volume 7. It seems to me that not a single one of the definitions quoted in the brief was addressed to grants of appellate power to courts, but that all are addressed to grants of legislative power to revise statutes, or to the scope of the authority granted to special commissions to revise codes, where it goes without saying the power to revise confers no power whatever to give effect to the revision. There was, however, one definition of the word "revise" on that cited page of "Words and Phrases" that does go to the meaning of a grant of power carried to a court by the word "revise;" but I do not find that this definition is in Gen. Ansell's brief. It is as follows:

"Revision, as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice requires a revision of the decree appealed from, does not mean reversal or modification, but simply review, reexamination, or looking at again."

I may add, in closing this part of my memorandum, that a rather complete survey of statutes vesting appellate power in tribunals, administrative as well as judicial, fails to disclose a single case where the power to modify and reverse is left to be deduced from such an inapt and single word as the word "revise," without the addition of appellate power granted in specific and unequivocal terms.

## 2. HISTORY OF THE LEGISLATION.

Gen. Ansell's brief asserts that—

"The history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word 'revise' in the present instance."

It is said that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War, and expressly invested its head, the Judge Advocate General of the Army, with this revisory power. Gen. Ansell's reference here is to the original statute, the act of July 17, 1862 (12 Stats., 598), in which it was provided that:

"The President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with rank, pay, and emoluments of a colonel of Cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The same words were carried forward in the act of June 20, 1864, and no further grant of power is found in the later statute. In the act of July 28, 1866 (14 Stats., 324), the granting word is still "revise," the only change being the omission of the

words found in the earlier statutes, "a record shall be kept of all proceedings had thereupon"; and so the same words were carried forward in section 1199, Revised Statutes, where they remain to base the ground of this contention.

I find nothing in the legislative development that is even worthy of remark in this connection. The word revise (or revision) is the only granting word now as it was in the beginning. There is precisely the same power, no greater and no less. If history is to be invoked, therefore, we must look to the administrative and not to the legislative history of the statute. And this brings us to—

## 3. ADMINISTRATIVE HISTORY OF THE DEPARTMENTAL PRACTICE.

This administrative history has been appealed to in Gen. Ansell's brief to the extent that it is asserted that—

"The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated."

Judge Advocate General Holt was Secretary of War before he was Judge Advocate General. His position at the bar of the United States was an enviable one. If this statement of his construction of the law is accurate it would be most persuasive upon me, as I think it would be upon you. Gen. Ansell, however, cites no instance from the records of the Judge Advocate General's Office where Judge Holt has indicated such a view, and such examination of the records of Judge Holt's action upon courts-martial proceedings during the Civil War period as I have been able to make does not disclose a single instance of the kind mentioned. Candor compels me to state that in the limited time that I have had to prepare this memorandum no systematic search of the hundreds of records bearing the stamp of Judge Holt's action could be made, and therefore the positive assertion that there exists no single instance of this kind would not be warranted. However, there was revealed from these old and interesting books very significant circumstances most emphatically indicating that Judge Holt never contended for nor exercised the power that Gen. Ansell says was vested in him by the statute, exemplified in the following references to Judge Holt's opinions:

(a) I find on page 269 of volume 11 of the Records of the Bureau of Military Justice (Dec. 16, 1864), over Judge Holt's own signature, a short review of the case of Pvt. Hiram Greenland, who was tried by a court-martial convened by Gen. Howe. The record failed to show the date of the trial or whether there was present a quorum of the court. If Judge Holt had been exercising an indigenous power, such as it is contended he could exercise, he would have taken the action attempted to be taken in the instant case that raises the present contention, and would have reversed the judgment. Instead of doing so, his indorsement "To the President," reads:

"There are fatal irregularities invalidating the whole proceedings and rendering the sentence inoperative, and it is recommended that it be so declared by the President."

(b) Again, I find Judge Holt writing to Col. W. N. Dunn, Assistant Judge Advocate General, under the caption "Bureau of Military Justice" and under date December 27, 1864, in reference to the case of James Scott, corporal, Ninth Michigan Cavalry, in which the record was fatally irregular in that the arraignment of the prisoner and the reception of his plea had been accomplished prior to the administration of the oath to the court. Instead of reversing the judgment, as he of course would have done had he deemed that the power was in him to do so, he writes as follows:

"In similar cases returned from this office, to the officer charged with the duty of revision or executing of the sentence, it has been found advisable to direct his attention to the fact that a proper course to pursue with irregularities of proceedings which can not be corrected, rendering the sentence inoperative, is to revoke the order of execution and, if the parties are not liable to be subjected to another trial, to release them."

(c) In the case of W. H. Shipman, in which the charge had been drawn under the general article of war for an offense clearly cognizable under a specific article, Judge Holt expressed the opinion that such an irregularity rendered the sentence void, but instead of reversing the judgment or attempting to give inherent effect to his own opinion, he addressed the Secretary of War, under date December 22, 1864, in part as follows:

"If this opinion is concurred in, the pleadings in the case must be held to be fatally defective and the sentence inoperative."

In no single case of perhaps 100 consecutive cases examined by me has there been found an instance in which Judge Holt ever attempted to reverse the judgment of a court-martial. Other cases similar to those quoted from were found in abundance.

Gen. Ansell's brief asserts that the power contended for was utilized during the Civil War period and beyond the Civil War period until the early eighties, when it was abandoned without apparent cause, argument, or reason. A rather hasty examination of the records from 1864 to 1882 fails to disclose a single instance of the exercise of such power. I shall not prolong this brief by citing the cases that I have examined. They cover the administration of Judge Advocate General Dunn and Judge Advocate General Swaim.

#### 4. RULINGS OF CIVIL COURTS.

This brings us to the culmination of the whole argument in a refutation of the statement in the brief that "Nor has the power here contended for been questioned by the civil courts or other civil authority." This statement evinces a failure to make a thorough search of the records and precedents. In his "Military Law and Precedents," the leading work on the subject, Winthrop, for many years in the office of the Judge Advocate General, and for a time Acting Judge Advocate General during the incumbency of Judge Holt in the Civil War period, and hence familiar with any course of procedure followed by him, says:

"The accused always has an appeal from the conviction and sentence by court-martial to the President (or Secretary of War), but, in entertaining and determining such appeal, he is assisted and advised by the Judge Advocate General of the Army. Thus, as the tribunal is an executive agency the appeal therefrom is to a superior executive authority."

And a footnote on page 51 adds that—

"The Judge Advocate General, under the authority vested in him by section 1199, Revised Statutes, to receive, revise, etc., the proceedings of courts-martial has, of course, no power to reverse a finding and sentence, was held in Mason's case, United States Circuit Court, Northern District of New York, October, 1882."

Mason's case still stands as the undisturbed pronouncement of the Federal courts upon the precise point at issue. Mason, a sergeant, had been convicted by a general court-martial of discharging his musket with intent to kill Charles J. Guiteau, the assassin of President Garfield. The findings and sentence were approved by Maj. Gen. Hancock, the reviewing authority, and the Secretary of War designated as the place of confinement the Albany County Penitentiary. In his review of the case the Judge Advocate General came to the conclusion that the court was without jurisdiction and that the sentence was therefore void. It is important to note that in communicating this conclusion to the Secretary of War, the Judge Advocate General did not (as it is here contended that he had the power to do) reverse the decision of the court, but he recommended that the Secretary of War should revoke the order for execution of the sentence.

In this case, however, the Secretary of War declined so to do and apparently adhered to the opinion that the court was not without jurisdiction and the sentence was valid—an opinion that was substantiated by the decision of the United States Supreme Court on a writ of habeas corpus addressed to the jurisdiction of the court. The prisoner it seems was not at the end of his resources. After being delivered to the warden of the penitentiary he sued out a new writ of habeas corpus based on other grounds. His contention was precisely the contention made in Gen. Ansell's brief; that is, that the Judge Advocate General is vested with an appellate power and that his decision against the validity of the proceedings of a court-martial has the effect of reversing the judgment.

His petition alleged among other things:

"5th. That the Judge Advocate General of the Army recently reviewed the evidence adduced on the trial before said court-martial, and on or about August 28, 1882, transmitted to the Secretary of War his report on the said proceedings in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"1. No jurisdiction in a court-martial.

"2. Employment of the prisoner illegal.

"3. No evidence of guilt, but on the contrary, proof of innocence.

"6th. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, or reverse, or affirm the findings and sentences of all courts-martial, and that his decision is the ultimate judicial judgment in all such cases.

"That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings of said court-martial, the further imprisonment of the petitioner is unlawful and wrongful

"Further, that his conviction and sentence, and the orders carrying the same into execution, are, each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of said court-martial."

In addressing itself to the contention thus made, the opinion of the court proceeds as follows:

"The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be; it is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might rest our decision here, but as it has been strenuously contended by the counsel for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it the duty of that officer to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word 'revise.' Applying the rule 'noscitur a sociis,' the word revise is to be read in connection with the words that precede and follow it, and thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of the officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

"The rule is discharged and the application for a writ of habeas corpus is denied."

I think this memorandum might well close here, and with the statement that both civil and military opinion sustain the view that the appellate power in the Judge Advocate General contended for in Gen. Ansell's brief does not in fact exist. However, I have noted a further statement which constitute part 5 of this memorandum, to wit:

#### 5. THE APPELLATE POWER OF THE JUDGE ADVOCATE GENERAL OF THE BRITISH ARMY.

The jurisdiction of the judge advocate general of the British Army is such matters is so obscurely stated in those books which I have examined that I am not entirely clear that I understand his precise relation to the administration of military justice. It appears to be true, from the authorities I have examined that under the British system this official has the power to reverse and modify the proceedings of courts-martial, but that he does not find that power in any specific statute, but rather in his relations as a member of the ministry of the British Government. Such authority as he exercises in this regard seems to be, not a grant of executive authority to an administrative official, but to arise out of an executive power of the Sovereign himself, delegated in this instance to a member of the ministry.

You are aware, of course, of the power you have by statute law to grant upon proper application an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you. I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief; so that, instead of issuing a simple order of restoration, you may, by direction of the President, modify or disapprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are that the court-martial jurisdiction is, and always has been, an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given to subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings, has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision. Immediate relief, however, should not await the com-

pletion of a study of this kind, or the concurrence of the Attorney General, which I think you would wish in view of the consideration his office has heretofore given the general subject.

E. H. CROWDER,  
*Judge Advocate General.*

Gen. CROWDER. I found that the Acting Judge Advocate had laid down these five propositions:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning, confers upon the Judge Advocate General, not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General with the power to modify or reverse the same.

2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.

3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period, and apparently until the early eighties.

4. That the power has never been questioned by the civil courts or other civil authority.

5. That the power is, and for a long time has been, vested in the judge advocate general of the British Army.

Upon those five propositions the Acting Judge Advocate General built up a very powerful brief. I think, if you would concede the accuracy of his five propositions, you would have to proceed with him to his conclusions.

The first thing that challenged my attention was the statement of the Acting Judge Advocate General "Nor has the power here contended for ever been questioned by the civil courts, or other civil authority." You all remember the case of Sergt. Mason, drawn from Washington Barracks or Fort Myer, I forget which, to stand guard over the assassin of President Garfield—Guiteau. He took a shot at Guiteau. He was tried by court-martial for an assault with intent to kill. A court-martial convicted him, sentenced him to eight years in the penitentiary, the Albany State Penitentiary was designated as the place of confinement, and after he was there he sued out a writ of habeas corpus before Judge Wallace, of the United States Circuit Court, and Judge Cox, of the United States District Court. His petition alleged that the Judge Advocate General of the Army recently reviewed the evidence adduced at the trial before a special court-martial on or about August 28, 1882, transmitted to the Secretary of War, Mr. Lincoln, his report on the said proceedings in which he rendered an opinion reversing the findings and sentence of said court on the grounds there was no jurisdiction in the court-martial. That point, you remember, was afterward decided by the Supreme Court of the United States that the court had jurisdiction.

The petitioner alleged inter alia:

5th. That the Judge Advocate General of the Army, recently reviewed the evidence adduced on the trial before the said general court-martial, and on or about August 28, 1882, transmitted to the Secretary of War his report on the said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

(1) That the court-martial had no jurisdiction to try the petitioner, because the alleged offense was not committed by him while in the discharge of his military duty, nor at any military camp, garrison, barracks, or post, nor against the person of a party under military authority or control, but at a place exclusively under the civil authorities of the Government, and was, therefore, merely a breach of the civil peace.

(2) That the employment of Battery B, Second Artillery, to guard the said jail was prohibited by the act of Congress of June 18, 1878 (posse comitatus act).

(3) That there was no evidence adduced at the trial showing the petitioner guilty of the charge and specification, but that the record of the testimony clearly establishes his innocence.

6th. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to "receive, revise, and cause to be recorded the proceedings of all courts-martial," and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over the courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, reverse, or affirm the findings and sentences of all courts-martial, and that his decision is the ultimate judicial judgment in all such cases.

That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings and sentence of the said court-martial, the further imprisonment of the petitioner is unlawful and wrongful.

Further, that his conviction and sentence, and the orders carrying the same into execution, are, each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of the said court-martial.

In addressing itself to the contentions made by the petitioner, the opinion of the court, Judge Wallace, and Judge Cox concurring, proceeds as follows:

The second ground of the application is not tenable because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might rest our decision here, but as it has been strenuously contended by the counsel for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it the duty of that officer to "receive, revise, and cause to be recorded the proceedings of all courts-martial," that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word "revise." Applying the rule "noscitur a sociis," the word revise is to be read in connection with the words that precede and follow it, and thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of that officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

The rule is discharged and the application for a writ of habeas corpus is denied.

It was rather strange, indeed, that the proposition should have been laid down in the brief of the Acting Judge Advocate General that this power had never been questioned by any court in face of that decision. As I am going to introduce my brief into the record I am not going further, unless the committee requires me to do so in the discussion of the various points, except to say that I find each one of the five statements upon which the brief of the Acting Judge

Advocate General was based to be just as erroneous as this statement was. I would prefer that lawyers—there are many distinguished ones in the Senate and on this committee—lawyers would express a legal rather than a political judgment upon the case would take those two opinions and tell me whether anybody would be justified in reinterpreting a statute that had been on our books for half a century carrying an appelled power which could decide both for and against an accused, in face of the fact that no Judge Advocate General has ever held that a statute could be construed as giving that power, and in face of the fact that the United States Circuit Court had said that the statute did not carry that power.

Senator CHAMBERLAIN. Is that the only decision on it?

Gen. CROWDER. That is the only time the case was ever in court.

Senator CHAMBERLAIN. And yet, the very thing the court suggests there is practically exercised by the commanding officer, because he is final and he may not be a lawyer there at all.

Gen. CROWDER. I am talking about whether 1199 confers the power. I am not saying that the power ought not to exist somewhere.

Senator CHAMBERLAIN. The court there says that if such power had been intended to be conferred upon the Judge Advocate General, it would have been expressed in unmistakable language, and yet that power is unmistakably conferred upon the commanding officer because, in the last analysis, he is the man that deals with sentences.

Gen. CROWDER. The power of the commanding officer to act upon the court-martial proceedings is conferred by express statutes. You do not have to deduce his powers. They do not inhere in his office; they are conferred by statute law.

Senator CHAMBERLAIN. Yes, but the court speaks of it as a judicial act.

Gen. CROWDER. Very well, and so it is that commanding generals who are convening authorities have these judicial duties to perform. Now, I do not want to be understood as saying that I am opposed to an appellate power. I recommended in January of 1918 that an appellate power be created in the President of the United States.

Senator WADSWORTH. In the person of the President, in the presidential office?

Gen. CROWDER. Yes. In doing that I had followed the opinion of Attorney General Wirt, the first Attorney General of the United States. I have that here somewhere [searching for papers]; well, I can not be inaccurate at all in telling it. Attorney General Wirt, in one of his early opinions, spoke of the President as being the national and proper depository of the final appellate power in all judicial matters touching the police of the Army.

I deprecate very much departure from so fundamental a theory as would be presented if you lodged in a staff officer outside of the hierarchy of command the authority to control the President of the United States in his action upon any court-martial proceedings, for please remember that if this power exists in the Judge Advocate General under section 1199, Revised Statutes, or is placed there by the pending bill, it looks in both directions. The President is absolutely concluded by the opinion of his Judge Advocate General.

Senator CHAMBERLAIN. He is now in practice.

Gen. CROWDER. In practice, of course, he follows it. It would mean this—I may be a little unfortunate in my illustration, but it is

the one that occurs to me—that Judge Advocate General Holt could have found the proceedings of the trial of the Lincoln conspirators irregular, recorded his decision to that effect, and concluded Andrew Jackson from the execution of anyone of them. That is the power that you are conferring in this statute. Do you want to do it?

Senator CHAMBERLAIN. Well, it is not necessary to preclude the power of the President even after you give this power to the Judge Advocate General.

Gen. CROWDER. You have done that in this proposed bill, and that was the power which was sought to be deduced from section 1199, Revised Statutes. That is the power you propose to confer upon the Judge Advocate General in this bill. Perhaps, in the study of the provisions, you have been looking downward reviewing authorities in the subordinate grades, particularly in the application of the proposed bill, without thinking that you would have to look upward to the President of the United States. It would be an anomaly indeed to provide by law that a Judge Advocate General in his decisions on legal points can control a part of the action of reviewing authorities and not all.

Senator WADSWORTH. Subdivision B of section 1199, as printed in this bill, would grant to the Judge Advocate General the power to disapprove the whole or any part of a sentence.

Gen. CROWDER. Yes; or the power to disapprove the findings if guilty, and to approve any portion of the findings.

Senator WADSWORTH. That does not deprive the President of his pardoning power.

Gen. CROWDER. Oh, no.

Senator WADSWORTH. Yes; but the Judge Advocate General could have it before him.

Senator SUTHERLAND. It passed mostly upon questions of law and legality of proceedings.

Gen. CROWDER. Even in that case, suppose the proposition should come up in this form—

Senator SUTHERLAND (interposing). The President would take action in this case afterwards.

Gen. CROWDER. The President might ask the opinion of his Attorney General on matters of this kind and he might receive an opinion that was opposed to the opinion of the Judge Advocate General. Under this law the opinion of the Judge Advocate General binds him. He can not take advice from anybody else; and I certainly would advise, if you are going to pass a law of this kind, that you make the tenure of the Judge Advocate General permanent, or I assure you that he will have many temptations to defend his tenure.

Senator CHAMBERLAIN. That would be the British system, making the tenure permanent, but, in the last analysis, Gen. Crowder, the President, while he is the titular Commander in Chief of the Army and Navy, follows his legal advisor in the department all the time. In other words, your judgment is the President's judgment in 99 cases out of 100.

Gen. CROWDER. That is true, and I hope it will always be the case that the opinions of the office will be received that way by superior authority.

Senator CHAMBERLAIN. Well, it is generally received.

Gen. CROWDER. I think it is generally so. However, I think it is not under any regulation.

Senator CHAMBERLAIN. I disagree with you. I think all of you gentlemen—I say it not discourteously or discouragingly of you, after you gentlemen get in the Army you get the militarist viewpoint—you do not see the civilian viewpoint. I have said that to you before.

Gen. CROWDER. Well, how would this remove that, by giving this power to the Judge Advocate General?

Senator WADSWORTH. It is more militarist than ever.

Senator CHAMBERLAIN. I do not think so.

Senator MCKELLAR. General, changing from what is intended to be the law in the future and applying to what is the situation now, since the war is over, a great many punishments that were inflicted during the war for disciplinary reasons and which were no doubt very proper at that time, the necessity for which has not gone by, wouldn't it be advisable to have some authority in your office to go over the records with power to look into the facts and readjust these punishments?

Gen. CROWDER. Will you pardon me if I make just a slight diversion? Let us see what the situation to be remedied is before we think of a remedy. There is no man serving sentence to-day in the disciplinary barracks, no man serving a sentence to-day of a general court-martial, the record of whose proceedings has not been passed by my office as legally sufficient to support the findings and sentence of the court. Since General Order 7 was put in operation we have had the most painstaking, careful, and able reviews by boards of review of all cases where the sentence was not suspended. In the other cases of suspended sentence one officer has gone over them and passed them as legally sufficient to sustain the findings and sentence.

Senator MCKELLAR. In cases which I reviewed as the result of an appeal if there is any evidence to sustain the finding of the court-martial then it can be legally sustained by the reviewing officer?

Gen. CROWDER. Yes, sir.

Senator MCKELLAR. Now, that is just precisely the doctrine that I want to overturn now that the war is over. As to these cases—there are about 5,000 of them, generally speaking, in your department—I want them reviewed and judgments entered in them according to the justice of the case without regard to the technical question of whether there is any evidence to support them at all.

Gen. CROWDER. You want the reasonable doubt doctrine applied by my office to all those cases?

Senator MCKELLAR. Not the reasonable doubt doctrine. I want them decided upon the equity and justice of them. In other words, here we are after a great war. There have been many infractions of the rules that were deemed at the time such infractions that severe punishments were inflicted—sometimes in isolated cases, no doubt, very much too severe; but, there is some evidence to support those verdicts and, under your rule, as I understand it, they can not be changed except by pardon where there is some evidence to sustain it. Now, with the necessity of this disciplinary action over I would have a board or boards created in your office that will act under this new law, proposed law, which provides that they can go in and examine those 5,000 cases and determine what is right and just to be done with them now that the war is over.

Gen. CROWDER. You want the stigma of conviction removed, not the punishment?

Senator MCKELLAR. No, no. I do not think it ought to be removed in all cases. I think this reviewing board should have authority to cancel and set aside the dishonorable discharge in a proper case; that they should say that this man—for instance, suppose a man has been convicted and has served six months, and in their judgment a service of six months in the prison is ample and sufficient punishment, that this board may order this man turned loose. That is my idea.

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

Senator MCKELLAR. Let me get your idea about the first one; and I am glad you divided it. It shows what a good legal mind you have got. Do I understand you to say that in 60 days, so far as the punishments are concerned, they are going to be all done away with?

Gen. CROWDER. Yes, sir; all weeded out, I hope.

Senator MCKELLAR. The 5,000 cases?

Gen. CROWDER. They are all to be taken care of in their excessive portions. Seventy per cent of them in 30 days; 100 per cent in 60 days. That will take care of the punishment.

Senator MCKELLAR. That will be only through remission by pardon of the President?

Gen. CROWDER. Through power of remission that is vested in the President which will cancel the unexecuted part of the punishment. That machinery was set in motion before this investigation commenced. It was set in motion very soon after I got back to the department. I might say that the Acting Judge Advocate General is the head of the board that is at work on that task.

Senator SUTHERLAND. Who is the head?

Gen. CROWDER. I placed him at the head. He supervised that work while he was Acting Judge Advocate General and I placed him at the head of the commission, and I had the authority of the Secretary for convening a board and the board is at work.

Senator SUTHERLAND. Five thousand prisoners is a good many men to be taken care of.

Gen. CROWDER. There are 3,600 of them at Fort Leavenworth Disciplinary Barracks. A great number of them are good clerks. They are at work briefing these cases on forms that have been printed and distributed, and I will have 70 per cent cleaned out, I think, in 30 days.

Now, there is nothing left in your resolution, then, except the reexamination of the records and acquittal of those who may have been unjustly convicted and declare the fact of his innocence. Now, the substance of the resolution that I sent to you in response to your reference of your bill provides a remedy for that, but my resolution respects the theory that this judicial authority should be vested in

the constitutional commander in chief and that all the appellate procedure should be in his name.

Senator McKELLAR. The resolution I had provided that will all be under his control through your office.

Gen. CROWDER. Yes; well, now, we purpose, if that resolution should pass, to go ahead and reexamine those cases in accordance with its mandate and we will remove the stigma of conviction where a man has been unjustly imprisoned.

Senator McKELLAR. You think some bill of that kind at least should be passed?

Gen. CROWDER. I am in favor of some bill of that kind and I am in favor of an appellate power in the President of the United States. I have been in favor of it always.

Senator McKELLAR. Such power to be exercised by some officer of your department, or, possibly, it would be well to have an appellate tribunal independent.

Gen. CROWDER. I do not think so.

Senator McKELLAR. You do not think so?

Senator CHAMBERLAIN. The first case that I cited in my remarks of the 31st of December you criticized me for not having cited the facts correctly. I think, if you will review it, you will find that I stated them correctly.

Gen. CROWDER. Senator, there was a typographical omission that was corrected on the other copies. I dictated it myself even before your telephone message came down to the Secretary of War about that omission in the statement of the first case.

Senator CHAMBERLAIN. He was acquitted as a matter of fact and later convicted.

Gen. CROWDER. That is correct, and I had that corrected even before your message had reached the War Department about that inaccuracy.

Senator CHAMBERLAIN. Did you look them over carefully?

Gen. CROWDER. I have not seen any reply that you have made.

Senator CHAMBERLAIN. Well, I have not answered it. I may answer it sometime, but I have not had time to go into those records, but that case was one where my statement was correct and yours was not.

Gen. CROWDER. We agree about that, but I say it was the result of a typographical error in transcribing a record.

Senator CHAMBERLAIN. Well, have you got anything else that you want to put in, General?

Gen. CROWDER. I believe I have put in all that I wish to say.

Senator CHAMBERLAIN. Well, then, we will take an adjournment until we are called together again.

(And thereupon at 6.50 o'clock the committee adjourned sine die.)