APPENDIX.

REPORT OF INSPECTOR GENERAL TO SECRETARY OF WAR—INVESTIGATION OF CONTROVERSIES PERTAINING TO THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, May 8, 1919.

From: The Inspector General of the Army.
To: The Secretary of War.
Subject: Investigation of controversies pertaining to the Office of the Judge Advocate General.

The basis of this investigation was a memorandum for the Inspector General from the Secretary of War, dated March 7, 1919 (exhibit 1) as follows:

"Certain controversies have arisen with regard to the presentation of facts growing out of the administration of military justice to the Secretary of War, and with regard to the administration of military justice itself in the Office of the Judge Advocate General during the war. It may be roughly said that these controversies began with the presentation of a brief in behalf of a certain construction of section 1199 of the Revised Statutes of the United States by Gen. Ansell, and reply brief thereto by Gen. Crowder. The legal question involved in that difference of opinion was definitely settled by the Secretary of War, and need be given no consideration in the inquiry which you are herein directed to make.

"It is conceded that the curative power of clemency existed in the President, and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's Office for recommendations growing out of their examination of records of court-martial trials. I, therefore, desire to have you conduct a thorough investigation into the following questions:

"(1) What machinery was organized in the Office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?

"(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?

"(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the Office of the Judge Advocate General?

"(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective reorganizations may be made of all the forces of the Judge Advocate General's Office for the performance of its duties.

"In making the foregoing inquiries you will proceed on the fact that I recognize fully the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee of the Congress, and do not desire any adverse inference to be drawn from the fact of such testimony where it is frank and straightforward.

"Please proceed with the inquiry at your earliest convenience, and report the facts in full to me."

Upon receipt of this order, I made know to Maj. Gen. E. H. Crowder, Judge Advocate General, and to Brig. Gen. S. T. Ansell, Judge Advocate General's Department, senior assistant, the fact of the investigation and requested certain information. Gen. Crowder responded to this request and has rendered every possible assistance. In addition to a personal conversation with Gen. Ansell upon this subject, he was handed a memorandum, dated March 8, 1919 (Exhibit

2), setting forth the scope of the investigation and affording him an opportunity to submit such information, written or otherwise, as he might desire to submit, relating to the organization and functioning of the Judge Advocate General's Office during the present emergency. In reply Gen. Ansell submitted the following (Exhibit 3):

MARCH 10, 1919.

Memorandum for the Inspector General of the Army.

Responding to your memorandum of the 8th, I beg to say:

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

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

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

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

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

S. T. ANSELL.

Subsequently Gen. Ansell was summoned as a witness. To the first and only question propounded to him he replied as follows (Exhibit 27):

"General, I feel that as a matter of self-protection I have the right to decline, and I ought to decline, and I therefore do decline, to answer this question, or any other questions asked me by the Inspector General in this investigation, inasmuch as I believe the purpose of it is to lay the foundation for disciplinary action against me."

It is to be regretted that the Inspector General has been deprived of the cooperation and assistance which could have been rendered by Gen. Ansell in this investigation. However, Gen. Ansell's testimony before the Senate Military Affairs Committee and his signed statements have become public documents, and it must be assumed that he has made a full presentation of facts to the public, from his viewpoint, in so far as relates to this investigation. Fortunately, the files are so complete with respect to all matters of controversy as to make possible the rendition of a full report.

Before proceeding to a consideration of the case it is not only proper but imperative to here make clear a matter intimately connected with this investigation, although somewhat divorced from the subject matter thereof. In his memorandum above set forth, Gen. Ansell declares the Inspector General to be disqualified to make a "full, fair, and impartial investigation," citing certain reasons therefor. In charging bias against the Inspector General, Gen. Ansell stated: "In my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of

War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed."

Early in November, 1917, certain noncommissioned officers were jointly tried for mutiny at Fort Bliss, Tex., and, when the record of trial reached the Judge Advocate General's Office, Gen. Ansell was of the opinion that the 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. As the result of his review of the proceedings of the case, he took action as expressed in the following language (Exhibit 5, p. 6):

"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."

When the court-martial proceedings in the case of these noncommissioned officers were under consideration, the views of the inspector general were called for. On November 15, 1917, he submitted the following memorandum (Exhibit 6):

Memorandum for the Chief of Staff:

1. The court, consisting of seven field officers and five captains, embraced what I believe to be a personnel well above the average of military courts.

The accused were represented by counsel, presumably of their own choice, and, so far as appears, this counsel has made no claim to the reviewing authority that the men did not receive a fair trial.

2. While the conduct of the case is, as stated by the Acting Judge Advocate General, open to grave censure, yet it can not be assumed that the members of this court were influenced thereby in their action.

It is also true that Capt. Harvey, the battery commander, is an officer of very short service and that his actions in this case were illadvised, unjustifiable, and clearly demonstrate his unfitness to command men.

3. Stripped of all technicalities, the evidence is believed to show conclusively that these men, in concert, deliberately refused and failed, and persisted in failing, to obey the orders of their commanding officer, and that they did this in the presence of the entire battery. There is, and can be, no doubt as to the fact that they fully understood that they were disobeying orders.

4. The action proposed by the Acting Judge Advocate General would, in my judgment, have a most demoralizing effect upon discipline. It is believed that these men are guilty of an offense which, under normal peace conditions, would be very serious and which, under war conditions, is even more so, but, in view of the actions of the battery commander, and of the whole circumstances surrounding the case, the exercise of clemency by the Secretary of War appears to be demanded.

It is suggested, first, that the unexpired portion of their sentences be remitted and that they be restored to duty as privates if same can be done legally; second, that Capt. Harvey be severely reprimanded and that he be relieved from command of Battery A, 18th Field Artillery, if this has not already been done, and that he be assigned to duty elsewhere.

J. L. CHAMBERLAIN.

This memorandum pertained to the specific cases under consideration and contained no word of reference to the general question of departmental supervision and control of courts-martial. It is probable that the views of the Inspector General in these cases were called for, because of the fact that he had recently visited Fort Bliss and, upon his return, had invited the attention of the Chief of Staff to the unsatisfactory conditions in the Field Artillery at that place. It was not until January, 1919, when this matter became of public notoriety, that the Inspector General knew that a controversy existed, or ever had existed, relative to the interpretation of section 1199, Revised Statutes. Until then he had had no knowledge of the order assigning Gen. Ansell to duty as Acting Judge Advocate General or of the subsequent revocation of same. In fact, until January, 1919, the Inspector General had believed that perfect harmony existed in the office of the Judge Advocate General

The files of the offices of the Judge Advocate General and The Adjutant General were freely consulted and, in addition, the following witnesses were examined:

Maj. Gen. E. H. Crowder, Judge Advocate General. (Exhibit 10.)
Col. J. Easby-Smith, J. A. G. D. (Exhibit 11.)
Brig. Gen. Lytle Brown, G. S. (Exhibit 12.)

Col. B. A. Read, J. A. G. D. (Exhibit 13.)
Lieut. Col. E. R. Keedy, J. A. G. D. (Exhibit 14.)
Lieut. Col. C. C. Tucker, J. A. G. D. (Exhibit 15.)
Maj. W. H. Kirkpatrick, J. A. G. D. (Exhibit 16.)
Maj. S. Moreland, J. A. G. D. (Exhibit 17.)
Maj. J. S. Sanner, J. A. G. D. (Exhibit 18.)
Col. L. W. Call, J. A. G. D. (Exhibit 19.)
Col. E. G. Davis, J. A. G. D. (Exhibit 20.)
Col. John H. Wigmore, J. A. G. D. (Exhibit 21.)
Lieut. Col. R. W. Millar, J. A. G. D. (Exhibit 22.)
Maj. W. H. Keith, G. S. (Exhibit 23.)
Col. A. E. Clark, J. A. G. D. (Exhibit 24.)
Maj. S. Heckscher, J. A. G. D. (Exhibit 25.)
Col. W. S. Weeks, J. A. G. D. (Exhibit 26.)
Lieut. Col. S. T. Ansell, J. A. G. D. (Exhibit 27.)
Maj. A. J. Copp, jr., J. A. G. D. (Exhibit 28.)
J. S. Lyon, civilian clerk, J. A. G. D. (Exhibit 29.)
Col. J. J. Mayes, J. A. G. D. (Exhibit 30.)
Mr. E. L. Brown, clerk, J. A. G. D. (Exhibit 31.)

In order that the facts may be presented in their logical sequence, they will be considered in the following order:

I. Difference of opinion in the office of the Judge Advocate General.

II. The administration of military justice and the machinery organized in the Judge Advocate General's office to further the same.

III. Answers to the questions in the memorandum of the Secretary of War.

I. DIFFERENCE OF OPINION IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

The principal difference of opinion in the Office of the Judge Advocate General has been between Maj. Gen. E. H. Crowder, Judge Advocate General, and Brig. Gen. S. T. Ansell, formerly senior assistant. This difference had its inception in the interpretation of section 1199, Revised Statutes. Subsequent disagreements relate back to that subject. The matters, therefore, which were examined into were:

1. Interpretation of section 1199, Revised Statutes.
2. Appointment of Gen. Ansell as Acting Judge Advocate General.
3. Issuance of General Orders, No. 169, War Department, 1917.
4. Issuance of General Orders, No. 7, War Department, 1918.
5. Establishment in France of branch of Judge Advocate General's Office.
6. Issuance of General Orders, No. 84, War Department, 1918.
7. Opposition of Gen. Pershing to General Orders, No. 84, War Department, 1918.
8. Alleged relief of Gen. Ansell from duty in connection with the administration of military justice.
9. Four cases arising in France wherein sentences of death were imposed.
10. Report of Gen. Ansell on his trip abroad.
11. Amendment to fiftieth article of war.
12. Establishment of Clemency Board.

They will be considered in the order indicated above:

1. *Interpretation of section 1199, Revised Statutes.*—Lieut. Col. S. T. Ansell, Judge Advocate General's Department, became senior assistant in the Office of the Judge Advocate General on August 29, 1917, and acted as Judge Advocate General during the absence of Gen. Crowder. He accepted his commission as brigadier general on October 6, 1917. So far as can be deduced from the records, the first difference of opinion between Gen. Crowder and Gen. Ansell arose in November, 1917. As stated above, Gen. Ansell was then, and for some time had been, acting as Judge Advocate General. Gen. Crowder, while nominally Judge Advocate General, had been almost completely absorbed, both as to time and energies, by his duties as Provost Marshal General. War conditions had led Gen. Ansell to the conclusion that, in order to prevent injustices, the Judge Advocate General must give to general court-martial records a closer legal supervision than theretofore had been the practice. He desired a complete and effectual appellate supervision of courts-martial, and professed to find such a grant of jurisdiction in section 1199, Revised Statutes. That statute, dating back to the year 1864, reads as follows:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commis-

sions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

In a brief under date of November 10, 1917, Gen. Ansell presented his interpretation of the statute. (Exhibit 32.) This was concurred in by a number of officers serving in the department. The Secretary of War asked for the opinion of Gen. Crowder, which was submitted by a memorandum under date of November 27, 1917 (Exhibit 34), and disagreed with Gen. Ansell's interpretation. That the disagreement was as to the meaning of the law and not as to ultimate purpose is shown by a part of Gen. Crowder's concluding paragraph, wherein he said: "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." The Secretary of War, on November 27, decided definitely and finally the question of law involved, in the following language: (Exhibit 34, p. 11.)

"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."

The cases referred to by the Secretary of War were those, among them that of the Texas mutineers, wherein Gen. Ansell attempted, without consulting the Secretary of War or the Judge Advocate General, to exercise a power which, according to his interpretation of the statute, was vested in the Judge Advocate General. (Exhibit 5, p. 6.)

Notwithstanding the final decision of the Secretary of War, Gen. Ansell, on December 11, in effect asked for a rehearing and submitted, through Gen. Crowder, a supplemental brief (Exhibit 38) further supporting his views and combating those of the Judge Advocate General. That Gen. Crowder gave Gen. Ansell's arguments full and sympathetic consideration is shown by a letter from him to the Secretary of War bearing date of December 17, 1917 (Exhibit 37), wherewith he transmitted Gen. Ansell's reply brief. That statement indicates very clearly what the issue was in Gen. Crowder's mind. His complete agreement with Gen. Ansell's ultimate purpose is further expressed in the same letter in the following language:

"He (Gen. Ansell) first addresses 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. * * * 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 the 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 (from Texas) * * * and says, 'I think justly that there are other cases * * * 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."

Pending this argument, and under date of December 6, 1917, Gen. Crowder submitted to the Secretary of War a memorandum (Exhibit 35), which was the first result of the "further study" that he had given the matter. The study had actually been made by Col. E. G. Davis and Col. A. E. Clark, Col. Davis at that time being in charge of the military justice division of the Judge Advocate General's Office. Both of these officers had concurred in the original brief of Gen. Ansell with respect to section 1199, Revised Statutes. In this memorandum, the result of their further consideration of the subject, they dealt not only with section 1199, Revised Statues, but, going to another statute, the thirty-eighth article of war, concluded that, by virtue of the power given the President to "prescribe the procedure" of courts-martial, rules could be formulated to effect the result which all agreed was desirable, i. e., an adequate revisory supervision of courts-martial. The views thus expressed were adopted by the War Department and resulted, first, in the issuance of General Orders, No. 169, December 29, 1917 (Exhibit 53) and, later, General Orders, No. 7, January 17, 1918 (Exhibit 54). The former was the forerunner of the latter, and both will be considered later in this report.

In order that Congress might put the whole matter of appellate power beyond question, the Secretary of War on January 19, 1918, transmitted to the chairman of the Committee on Military Affairs of the Senate and House of Representatives a proposed amendment, prepared by Gen. Crowder, to section 1199, Revised Statutes, which was in the following form, new matter being indicated by italics, to wit:

"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."

There accompanied the draft of amendment in each instance a letter explaining fully the purpose of the proposed legislation. (Exhibits 48 to 51, inclusive.) This amendment failed to become a law.

2. *Appointment of Gen. Ansell as Acting Judge Advocate General.*—On November 8, 1917, an order was made, but not published in the War Department, appointing Gen. Ansell as Acting Judge Advocate General. When the Secretary of War learned of this order, he directed its revocation, and it was revoked on November 19. Concerning this order, both as to its original procurement and its revocation, there is a very distinct and bitter issue. The clear facts of record are as follows:

On November 3, 1917, Gen. Ansell wrote a letter (Exhibit 55) to Gen. Crowder, expressing his embarrassment, and the impediment of public business besides, by the fact that, although performing the duties of Judge Advocate General, he (Gen. Ansell) was not charged with full responsibility for its policies and general administration, and suggesting that Gen. Crowder join him in a memorandum to the Secretary of War recommending that Gen. Ansell be designated in orders as Acting Judge Advocate General. The following day Gen. Crowder replied in writing, as follows (Exhibit 56):

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday. For your information, I would say that since taking charge of this office I do not recall that I have been consulted by outsiders in a single instance respecting any matter pertaining to the Judge Advocate General's Department, except in respect of appointment to the Reserve Corps, nor otherwise, except as you yourself have consulted me."

On November 6, 1917, Gen. Ansell, by memorandum (Exhibit 57) to the Chief of Staff, requested the publication of an order designating him Acting Judge Advocate General, and concluded the same with the following words:

"I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention."

The Acting Chief of Staff, in a Staff memorandum dated November 6, 1917, to The Adjutant General, directed that the order be published. (Exhibit 59.) Its publication was suspended. (Exhibit 62.) Gen. Crowder charges that the order was obtained by Gen. Ansell "surreptitiously," and states that the "coincidence" of his not attempting to exercise the appellate power which he claimed was to be found in section 1199, Revised Statutes, until after he had procured the order appointing him Acting Judge Advocate General, "is so remarkable that an inference of deliberate and ambitious planning for personal power, and only for personal power, is unavoidable." (Exhibit 72, p. 56.) Gen. Ansell by oft-repeated statements, both direct and indirect, charges that the revocation of his appointment as Acting Judge Advocate General was connected with, or attributable to, his attempted assertion of supreme appellate power under section 1199, Revised Statutes. The facts of the case are as follows:

The record in the case of the Texas mutineers was received in the Judge Advocate General's Office on October 23, 1917. On October 30 a memorandum (Exhibit 5) was prepared by Gen. Ansell, in which he attempted to exercise the appellate power of revision for the first time and set aside the judgment of conviction and the sentence in the case of each defendant. This memo-

randum bears the following office mark: "Received A. G. O., Nov. 8, 1917." Notwithstanding the fact that the memorandum was dated October 30, it was not received by The Adjutant General until the very day—i. e., November 8—that Gen. Ansell was appointed Acting Judge Advocate General. Gen. Ansell's memorandum on the interpretation of section 1199, Revised Statutes, bears the date of November 10. It reached the War Department not later than November 13 (Exhibit 7), but the exact date upon which it was first brought to the attention of the Secretary of War has not been definitely determined.

About November 17 Gen. Crowder was called to the office of the Secretary of War and saw for the first time a list of recommendations for appointment of officers to the Judge Advocate General's Department, submitted by Gen. Ansell. It appears, and Gen. Crowder was so informed by the Secretary of War, that when this list was submitted by Gen. Ansell he was asked whether it had been passed upon by Gen. Crowder. Gen. Ansell, by way of reply, exhibited to the Secretary of War the order designating him Acting Judge Advocate General. This was the first knowledge that the Secretary of War had of Gen. Ansell's appointment, and Gen. Crowder's first knowledge of the same was at the date of his interview with the Secretary of War; i. e., November 17. On this same date, by letter to Gen. Crowder (Exhibit 64), the Secretary of War inquired if he could not devote more time to the duties of Judge Advocate General, inasmuch as the great machine (the Provost Marshal General's Office) necessary for the mobilization of the selective army had been organized and the work so far advanced as to be more nearly automatic. Gen. Crowder replied, on November 18 (Exhibit 65), that he did not anticipate great administrative duty in connection with the future administration of the Provost Marshal General's Office and stated that he could at once give at least one-half of his time to the office of the Judge Advocate General. Thereupon Gen. Ansell's appointment, although the order announcing the same was still under suspension, was revoked by the Secretary of War, to wit, on November 19. Up to this time Gen. Crowder was ignorant of Gen. Ansell's attempted assertion of appellate power. His memorandum of November 10 appears not to have reached the attention of the Secretary of War until November 23, for on that date he called for Gen. Crowder and stated, in effect, that he had received from the Acting Judge Advocate General a very powerful brief in re appellate power in court-martial cases existing in section 1199, Revised Statutes.

From the foregoing it is obvious that Gen. Ansell's charge that he was relieved from duty as Acting Judge Advocate General by reason of the difference of opinion as to section 1199, Revised Statutes, is without foundation in fact. It is likewise obvious that Gen. Crowder's allegation that Gen. Ansell had obtained his order of appointment surreptitiously is erroneous. It appears and is probable that in his letter of November 4, 1917, Gen. Crowder gave his approval with certain mental reservations and with the intent that the matter was to be taken up personally with the Secretary of War. However, Gen. Ansell could not have known of such mental reservation, and, it is believed, was justified in presenting his case to the Chief of Staff, the recognized channel of communication with the Secretary of War. It is my opinion that responsibility for the issuance of this order, without reference to the Secretary of War and without his knowledge, rests with the then Acting Chief of Staff, and not with Gen. Ansell.

3. *Issuance of General Orders, No. 169, War Department, 1917.*—As early as October 18, 1917, Gen. Ansell was alarmed by the large number of court-martial cases resulting in dishonorable discharge and long terms of confinement. In a memorandum of that date (Exhibit 66) he called the attention of the Chief of Staff to the situation and suggested the policy of suspending all sentences of dishonorable discharge until the pleasure of the War Department was known. He also suggested the idea of divisional disciplinary battalions. Later specific recommendations of Gen. Ansell were approved, and the following instructions, an exact copy of those proposed by Gen. Ansell, were, on December 22, 1917, confidentially issued to all convening authorities (Exhibits 67 and 68):

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the Disciplinary Barracks. Where the offense is not sufficiently grave to warrant a

long term of confinement, it should be assumed that the offender has within him the elements of military service and he should be made to serve.

"(c) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

Before proceeding further, it should be said that the Judge Advocate General has long followed the practice of recommending to the Secretary of War and the President that proceedings of courts-martial, even though finally approved by the reviewing authority, be set aside for want of jurisdiction. This practice was based, not upon any views of the War Department, but upon a series of rulings by Attorneys General, beginning with one by Mr. Cushing in 1854. Such a limitation of power was the real object of Gen. Ansell's criticism. He maintained that, if there was a power to set aside for want of jurisdiction, there should be a similar power to vacate for failure of evidence or errors substantially prejudicing the rights of the accused. Not only did no one dissent from Gen. Ansell's purpose in that respect, but, as it appears from the record, on the suggestion of Gen. Crowder as approved by the Secretary of War, further study was made in order to effectuate it, as far as possible, within the law. The first result of the further study given the subject by Gen. Crowder was the issuance of General Orders, No. 169, War Department, December 29, 1917, but there was another and more important contributing event. About the middle of December the public press announced the execution of 13 colored soldiers who were tried in Texas for mutiny and homicide. Their trial was conducted with the utmost care. They were ably defended and surrounded by all legal safeguards. The record was scrutinized day by day during the trial by an experienced staff judge advocate, who, upon the conclusion of the trial, was able to assure the reviewing authority that there was no possibility of a claim of injustice. The case was a particularly flagrant one. Eighteen persons, 11 of them civilians, had been killed. Proceeding under the forty-eighth article of war, authorizing in time of war confirmation by the commanding general of a territorial department or division of a sentence of death for mutiny, the reviewing authority confirmed the sentences and they were executed within 48 hours after confirmation. There was no review of the records by the Judge Advocate General. Notwithstanding the care with which the trials had been conducted, it was realized by the War Department that, in other like cases, similar freedom from prejudicial error could not be assured and that such sentences ought to be stayed until the trial records could be reviewed by the Judge Advocate General.

On December 22, 1917, Gen. Ansell submitted to Gen. Crowder a forceful memorandum (Exhibit 39) which may be considered as also contributing to General Orders, No. 169, for in that memorandum he said, in part:

"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."

Gen. Ansell's views, in so far as they related to staying the execution of sentences of death pending review, were adopted, and Paragraph I, General Orders, No. 169, as issued, reads in part as follows (Exhibit 53):

"I. 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 order then provides for the procedure of suspending the execution of sentences until receipt of advice that there is no legal objection to carrying them into execution.

4. *Issuance of General Orders No. 7, War Department, 1918*—Immediately after the issuance of General Orders, No. 169, Gen. Ansell, to-wit, on January 9, 1918, submitted to Gen. Crowder a memorandum in which he stated in part (Exhibit 40):

"I have just been advised of the step taken by the Secretary of War to prevent the execution of possibly 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.

"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."

He then proceeds to recommend the establishment in France of an office representing the functions of the Judge Advocate General. This recommendation was adopted, as will later appear, without dissent from anybody.

Referring to his recommendation for a broader reviewing activity than was contemplated by General Orders, No. 169, which, as he indicated, suspended only the execution of death sentences in the United States, Gen. Ansell said in conclusion:

"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."

In the meantime, Col. E. G. Davis, Chief of the Military Justice Division, by direction of Gen. Crowder, undertook the working out of a system of revision, the necessity for which was first suggested, as indicated above, by Gen. Ansell. In a memorandum dated January 10, 1918 (Exhibit 41), prepared by Col. Davis, but submitted to the Secretary of War over the signature of Gen. Crowder, certain changes were recommended in rules of procedure. It announced finally that, under the thirty-eighth article of war, giving the President power to regulate court-martial proceedings, a system had been devised which would adequately provide for all war-time necessities. It will be remembered that, in his memorandum of January 9, 1918 (Exhibit 40), relative to General Orders, No. 169, Gen. Ansell referred to the latter as a step in the right direction, but criticized it because it did not extend to dismissal and dishonorable discharge. In Gen. Crowder's memorandum of January 10, 1918, the same thought was set forth as follows:

"The question to be disposed of resolves itself, therefore, into one of preventing sentences of death, dismissal of an officer, or dishonorable discharge of an enlisted man from being executed before final review of the record of trial in this office. The scope of the difficulty is very much reduced by the fact that, in the great majority of cases where dishonorable discharge is suspended by the reviewing authority until the soldier is released from confinement, under the authority contained in the fifty-second article of war. Where this is done the correction of injustice is easy of accomplishment."

In a memorandum to Gen. Crowder dated January 12 (Exhibit 42), Gen. Ansell, referring to the former's memorandum of January 10, expresses his disapproval and concludes as follows:

"I have given this question of revisory power the best that is in me. I see no reasons 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 the office as what the law requires. I do not believe as much as I should like to believe that what Maj. Davis proposes is sound in law and will prove safe in practice. I regret, therefore, that I can not advise you to adopt it."

Gen. Ansell's principal opposition to the plan was that it was "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," and that it was "fundamentally wrong as a matter of law." His principal contention was that, in reviewing the cases for errors of law, the Judge Advocate General was denied the power of correction. He was of the

opinion that the system, resting upon mere comity, was not likely to stand. How well practical justice was accompli hed will hereinafter be set forth.

On January 15 the Secretary of War returned Gen. Crowder's memorandum of January 10, with the following remarks (Exhibit 41, p. 4):

"The entire plan has my approval. Please have letters written transmitting proposed legislation to appropriate committees. Put orders in course of promulgation."

It will be remembered, as heretofore stated, that effort was made to amend section 1199, Revised Statutes, by vesting in the President the power of revision. That was the "proposed legislation" referred to above by the Secretary of War. General Orders, No. 7, War Department, January 17, 1918, were promulgated, and necessary steps were taken to establish in France a branch office of the Judge Advocate General. (Exhibit 54.) General Orders, No. 7, provided that not only the execution of all sentences of death, as provided in General Orders, No. 169, 1917, but also all sentences of dismissal and dishonorable di charge be stayed until the records of trial could be reviewed in the office of the Judge Advocate General and their legality there determined. In the event that the record was not sufficient to sustain the findings and sentence of the court, provision was made to return the same to the reviewing authority with a clear statement of the error, omission, or defect which was found. If such error, omis ion, or defect admitted of correction, the reviewing authority was to be advised to reconvene the court for such correction, otherwise he was to 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 might be appropriate in the premises. Provision was made that any delay in the execution of any sentence, by reason of the foregoing, should be credited upon the term of confinement or imprisonment impo ed. A branch office of the Judge Advocate General was establi hed in France to consider those cases arising in the American Expeditionary Forces.

Gen. Ansell has given public utterance to the following statements. In a letter, dated February 17, 1919 (Exhibit 69), to Representative John L. Burnett and published in the Congressional Record of February 19, 1919, he stated:

"In September I ordered the boards of review to break away from the office interpretation (which, however, was probably correct) of the administrative method heretofore referred to, which had been construed to forbid this office to make any recommendation or suggestion as to clemency. And I ordered that in a proper case, despite the order, clemency should be sugge ted to commanding generals."

The provisions of General Orders, No. 7, became effective on February 1, 1918. From that date until April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action be taken where illegality appeared in the proceedings but brought to their attention, with a view to mitigation, sentences which were unduly severe. During this period, all cases arising under General Orders, No. 7, before final action thereon, were handled either independently by Col. Davis, Chief of the Military Justice Division, or by Gen. Crowder upon recommendation from Col. Davis. This was partly because Col. Davis had drafted the orders and was in sympathy with them, and also because Gen. Ansell, after publication of the orders, was plainly antagonistic to them. Col. Davis in his testimony stated (Exhibit 20, p. 5):

"Whenever a case involving the application of General Orders No. 7 would be sent to his desk, Gen. Ansell * * * would contend that the action recommended was improper or ineffective or wrong in theory, or something of that kind, and would again go over * * * the old argument that his action under 1199 was the only correct one after all and that the office was simply compromising with principle by trying to make any other solution work * * * ."

Col. Davis further stated (Exhibit 20, p. 5):

"After General Orders No. 7 went into effect there never arose any case in the Judge Advocate General's office, so far as I know, in which it could be fairly claimed that the department was without power to do full and exact justice to the defendant."

Gen. Ansell left for France in the middle of April, 1918, and Col. J. J. Mayes, Gen. Ansell's assistant, became the senior officer in the Judge Advocate General's office. He gave orders that all cases arising under General Orders No. 7, should pass over his desk, and directed that they be returned to

reviewing authorities only where illegality was discovered. Upon Gen. Ansell's return from France, he overruled the practice established during his absence, and gave orders to suggest to commanding generals the exercise of clemency with respect to unduly severe sentences. (Exhibit 70.) He simply revived the practice based upon Gen. Crowder's and Col. Davis's interpretation of General Orders No. 7, which existed for two months and a half subsequent to the date when these orders first became effective, and his inference that the liberal views were entirely his own is misleading.

The following appears on page 32, "Hearings before the Committee on Military Affairs, United States Senate Sixty-fifth Congress, Third Session," relative to the operation of General Orders No. 7:

A SENATOR. 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 action of the Judge Advocate General under General Orders No. 7 is purely one of recommendation. There is no power to compel the reviewing authorities to follow his advice. Since February 1, 1918, the date when General Orders No. 7 became effective, 212 cases have been referred back to the reviewing authorities under its provisions. (Exhibit 71.)

The records indicate only seven instances where the recommendations of the Judge Advocate General were not entirely followed. In three of these his recommendations were partly followed, and in four disregarded. It will thus be seen that in 96½ per cent of the cases his recommendations have been adopted in their entirety.

That the Senate committee, by answer of Gen. Ansell, the substance of which is repeated elsewhere with similar lack of frankness, did not receive the complete information or that correct conception to which it was entitled is apparent from what appears on page 131 of the report. Without correction or protest from Gen. Ansell, a Senator stated:

"There have been a great many cases, as the general has testified here, in which they have * * * made a recommendation to the convening power, and those recommendations have been disregarded."

The answer of Gen. Ansell that the recommendations were followed generally in the extent of indicating the majority, while literally true, was wholly misleading and tended to create, in the mind of any uninformed auditor, a conclusion entirely contrary to the facts.

In Gen. Ansell's letter to Representative Burnett, he further stated (Exhibit 69, p. 6):

"The Judge Advocate General recommended and the department finally adopted an administrative method known as General Orders No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative * * *."

In order to ascertain the results accomplished by General Orders No. 7, 500 consecutive records of trial received by the Judge Advocate General immediately prior to the publication of the same were examined. Five hundred cases were selected after the provisions of General Orders No. 7 became operative, and 500 additional cases which reached the Judge Advocate General's Office several months later. These cases represented 9 Departments, 38 divisions, and 15 other miscellaneous general court-martial jurisdictions. Certainly they were representative of the twenty thousand and odd cases tried during the war. A table, indicating the number of dishonorable discharges imposed by the courts, and those executed, suspended, remitted, or set aside by the reviewing authorities, is given below:

Dishonorable discharges.

	First period.	Second period.	Third period.
Imposed by the court	230	188	233
Executed	131	84	33
Suspended	47	59	140
Remitted	39	41	46
Set aside	13	4	14

The beneficial results derived from the operation of General Orders No. 7 are apparent. During the first period, viz, prior to the issuance of General Orders No. 7, 58 per cent of the dishonorable discharges imposed by the courts were ordered executed, 43 per cent during the second period, and only 14 per cent during the third period. On the other hand, 20 per cent of the dishonorable discharges imposed during the first period were suspended; 32 per cent during the second period, and 60 per cent during the third period.

It appears that the first suggestion that reviewing authorities stay the execution of sentences of death, dismissal, and dishonorable discharge until review of the records of trial in the Office of the Judge Advocate General originated with Gen. Ansell. His statement, repeatedly made, that General Orders No. 7, adopted to carry out the very views which he himself first advocated, were "an administrative palliative" is not in accord with the facts and is another instance where the public has been misled.

5. *Establishment in France of branch of Judge Advocate General's office.*— In his letter to Hon. John L. Burnett, House of Representatives, Gen. Ansell states (Exhibit 69, p. 6):

"In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, in our own forces in France, which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subject to question."

Gen. Ansell refers above to General Orders, No. 84, War Department, September 11, 1918, amending General Orders, No. 7, War Department, January 17, 1918 (Exhibit 91). Gen. Crowder charges that the issuance of General Orders, No. 84, which will presently be considered, was obtained surreptitiously by Gen. Ansell, and that its language embodies precisely the grant of mandatory appellate power in the Judge Advocate General for which Gen. Ansell had been contending in his brief of November 10, 1917, "a contention which was at that time explicitly repudiated" by both the Secretary of War and the Judge Advocate General. (Exhibit 72, p. 57.)

Paragraph II, General Orders, No. 7, provided for the establishment in Paris, France, of a branch of the office of the Judge Advocate General. The purposes of the branch office are fully set forth in the following language of the orders (Exhibit 54):

"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."

Due to a misunderstanding caused by an error in the War Department's cablegram No. 663, of January 20, 1918, or in the decoding of same, a delay was caused in the opening of the branch office. (Exhibits 77 and 89.)

On March 24, 1918, Gen. Pershing's first and only objection to the provisions of General Orders, No. 7, was in the form of a cable, as follows (Exhibit 80):

"With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace, and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as

here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

In a joint memorandum to The Adjutant General, dated April 1, 1918, Gen. Ansell and his assistant, Col. Mayes, took exception to the views expressed in Gen. Pershing's cable. (Exhibit 83.) They stated that his objection was based upon a misconception of the law establishing the relation of the office of the Judge Advocate General to military authorities of whatever rank and power to convene general court-martial. They stated further that the action taken was the result of the most thorough consideraion in the War Department, that it was organic in character and required by law, and that even if it were within the power of the administration to do so the revocation of such orders would constitute a serious reflection upon the administrative capacity of the department.

With respect to the length of time intervening between the War Department's original cable to Gen. Pershing and the latter's cabled reply, they remarked as follows:

"A conclusion so long delayed should weaken the confidence the department might otherwise have had in Gen. Pershing's judgment upon the matter."

Notwithstanding Gen. Ansell's previous opposition to General Orders, No. 7, in the United States, having declared them an administrative palliative only, we find him criticizing Gen. Pershing's opposition to these orders, stating that the action taken was the result of most thorough consideration by the War Department, was organic in character, and required by law.

In a momorandum, dated April 3, 1918, to the Chief of Staff (Exhibit 85), Gen. Crowder discussed the question, believing that if Gen. Pershing had fully understood the purpose and operation of General Orders, No. 7, his cablegram would not have been sent. Gen. Crowder concluded his memorandum with the recommendation that a cablegram, hereafter quoted, be sent to Gen. Pershing. This was done on April 19. The cable reads as follows (Exhibits 82 and 82A):

"The order which included the establishment of a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution. It is desired that conference be held with Gen. Kreger."

In a letter to Gen. Crowder, dated April 15, Gen. Kreger stated that he had explained to Gen. Pershing his views regarding General Orders, No. 7. (Exhibit 87.) On May 1, Gen. Kreger was appointed Acting Judge Advocate General, American Expeditionary Forces, relieving Gen. Bethel from further duty in the branch office.

6. *Issuance of General Orders, No. 84, War Department, 1918.*—No further objection to the operation of General Orders, No. 7, was interposed by Gen. Pershing, but another matter arose which gave the War Department no little concern. On July 11, 1918, the Acting Judge Advocate General in France forwarded to the Judge Advocate General case No. 118312, in which the convening authority refused to accept the opinion of the Acting Judge Advocate General that the record was not legally sufficient to support a conviction of desertion, and declined to follow his recommendation that appropriate action be taken in view of the illegality. (Exhibit 93.) The convening authority, on the contrary, stated to his staff judge advocate in writing: "I have read the entire proceedings and the several memoranda herewith analyzing the case, and I am satisfied that the original action was sound. Let it stand." The Acting Judge Advocate General stated that he was unable to see how the purposes of General Orders, No. 7, were to be fully accomplished if reviewing

authorities were to be free to disregard the advice of his office with respect to the legality of findings and sentences. If the opinions of his office were to control, he recommended that reviewing authorities be advised to that effect. General Orders, No. 7, required that only those records of general courts-martial carrying sentences of death, dismissal, or dishonorable discharge be forwarded in the American Expeditionary Forces to the branch office for review. On July 14, 1918, Gen. Kreger, Acting Judge Advocate General, American Expeditionary Forces, wrote a letter to Gen. Crowder in which he recommended that orders be issued requiring that the records of all cases tried in the American Expeditionary Forces be transmitted to his office for review. He stated as follows (Exhibit 94.):

"Before I left Washington I understood that you expected after this branch had been established for some little time to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Orders No. 7 now requires such action."

Gen. Crowder had written Gen. Kreger on June 21, 1918, requesting from him an opinion on this very subject. (Exhibit 95.) Gen. Bethel, in concurring in Gen. Kreger's views, stated as follows (Exhibit 96):

"The European branch reviews for the Judge Advocate General's Office the records in cases of the three sentences named above. (That is, death sentence, dismissal of officers, and dishonorable discharge not suspended); but all other records, sentences involving forfeiture, ordinary confinement, and dishonorable discharge, where suspended, go to the Judge Advocate General's Office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served, or if it is desired to reconvene the court for correction of an error it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make the review of all court-martial cases."

Gen. Ansell concurred in the recommendations of Gens. Bethel and Kreger and, on August 29, 1918, made them the basis for a memorandum to the Chief of Staff, recommending an amendment of General Orders No. 7, so as to require all records of trial in the American Expeditionary Forces to be sent to the branch office for review (Exhibit 98). He went further than that in his draft of amendment submitted to the Chief of Staff. He made provision for the exercise in the American Expeditionary Forces of the selfsame appellate power which he urged so strongly in his memorandum of November 10, 1917, and which the Secretary of War, after careful consideration, disapproved. The only difference was this: Instead of the Acting Judge Advocate General exercising the power himself, the War Department directed that the convening authorities set aside all sentences, or any part thereof, found by the Acting Judge Advocate General to be invalid or void. There was no choice left to the convening authority, so that exactly the same purpose was accomplished as though the power had been exercised by the Acting Judge Advocate General. The actual draft of the amendment was as follows (Exhibit 99):

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence invalid or void in whole or in part. Any sentence or any part thereof so found

to be invalid or void shall be set aside, and the execution of all sentences of death, dismissal, or dishonorable discharge shall be stayed pending said review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General for permanent file."

Gen. Ansell's memorandum and draft were sent to the War College, and, on September 8, 1918, were returned to the Chief of Staff by the Director, War Plans Division, General Staff, recommending approval and issuance of the order as drafted by Gen. Ansell. (Exhibit 100.) A staff memorandum, dated September 11, signed by the Chief of Staff, directed the issuance of the order as drafted. (Exhibit 101.) On September 13 a carbon copy of the original order prepared for the Public Printer was furnished the Acting Judge Advocate General. On September 17 The Adjutant General sent a requisition to the Public Printer, and on September 21 a page proof of the order was received from the Government Printing Office. (Exhibit 102.) On the draft of the general order in the files of the Judge Advocate General's Office appears the following notation: (Exhibit 99.)

"Mr Smith instructed us to substitute third indorsement, attached to 321.4 (8/29/18), instead of this draft of amendment.

"L. G. H."

The original records show a revised draft of this amendment (Exhibit 103), approved by order of the Secretary of War, signed by the executive assistant to the Chief of Staff. The date of this approval is not of record, but this draft is identical with the amendment as published in General Orders, No. 84, and differs radically from the draft originally submitted by Gen. Ansell and approved by the War Plans Division, General Staff, and by the Chief of Staff. The order as published reads as follows, new matter being underscored and rejected matter appearing in brackets (Exhibit 91):

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence [invalid] *illegal* or void in whole or in part. The execution of all sentences [of] *involving* death, dismissal, or dishonorable discharge shall be stayed pending [said] *such* review. Any sentence, or any part thereof, so found to be *illegal, defective* [invalid], or void, *in whole or in part*, shall be *disapproved, modified, or* set aside, *in accordance with the recommendation of the Acting Judge Advocate General.* The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file."

Paragraph IV, General Orders, No. 84, as published is radical in its provisions and gives to the Acting Judge Advocate General in France powers not possessed by the Judge Advocate General of the Army. General Orders, No. 84, came to the attention of Gen. Crowder for the first time in January, 1919.

Notwithstanding the radical changes made in the amended draft, the latter was duly approved by the executive secretary to the Chief of Staff. If, therefore, Paragraph IV, General Orders, No. 84, was issued without its provisions being fully understood and concurred in by the Chief of Staff and the Secretary of War, responsibility rests not with Gen. Ansell but with the office of the Chief of Staff.

During August, 1918, Gen. Crowder's time was fully occupied by his duties as Provost Marshal General, and he gave little or no time to his duties as Judge Advocate General. The fact remains that, at the time the order was issued, Gen. Crowder was Judge Advocate General of the Army and should have been consulted by his assistant, Gen. Ansell, in regard to a change of policy so radical as that effected by General Orders, No. 84, and known by Gen. Ansell to be contrary to the declared policy of the Judge Advocate General and the Secretary of War.

(7) *Opposition of Gen. Pershing to General Orders, No. 84, War Department, 1918.*—With respect to the statement of Gen. Ansell that General Orders, No. 84 are now "being opposed by the commanding general American Expeditionary Forces," the facts are as follows (Exhibit 69, p. 6):

In a letter under date of November 14, 1918, to Gen. Pershing (Exhibit 104), which was forwarded through The Adjutant General to the Judge Advo-

cate General, it appears that Gen. Bethel opposed the principle of General Orders, No. 84, in that it took from the reviewing authority the finality of decision reposed in him by the thirty-seventh article of war. Gen. Bethel did not believe that the Acting Judge Advocate General had any authority to decide as a matter of law what shall be the effect of competent testimony, or what weight is to be given it, or to determine what competent evidence shall, and what shall not, be deemed sufficiently convincing to support a conviction. Quoting from the thirty-seventh article of war as follows:

"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."

Gen. Bethel stated that the above provision of law was so clear as to require no comment; that the reviewing or confirming authority is the officer authorized to approve or confirm the sentence; and that decision as to the effect of the improper admission of evidence rests with him, and can not be made by any other person.

Gen. Bethel's letter was forwarded by the Chief of Staff, American Expeditionary Forces (acting for the commander in chief), to the War Department, by indorsement, as follows:

"The remarks of the Judge Advocate, American Expeditionary Forces, in this letter are concurred in and decision is requested."

A copy of Gen. Bethel's letter was, at the same time, transmitted to Gen. Kreger, Acting Judge Advocate General, American Expeditionary Forces, so that he might submit to the Judge Advocate General his views, which he did in a letter dated November 16, the concluding paragraph of which was as follows (Exhibit 105):

"Gen. Bethel's communication, in effect, calls into question the legal validity of General Orders, 7, War Department, 1918, as amended by Section IV, General Orders, 84, War Department, 1918. In my opinion that order is well founded upon section 1199, Revised Statutes, and upon the power of the President, acting through the Secretary of War, to order a sentence to be executed only in mitigated form, or to forbid its execution entirely. However, it seems entirely unnecessary for me to discuss the validity of the order in question. That, no doubt, was fully considered by your office and by the Secretary of War before the order was issued."

There was no further opposition from either Gen. Pershing or Gen. Bethel. They acquiesced in the action of the War Department. In this connection it should be stated, however, that on March 25, 1919, Paragraph IV, General Orders, No. 84, was amended by Paragraph I, General Orders, No. 41 (Exhibit 106), so as to bring it within the law as interpreted by the Secretary of War.

8. *Alleged relief of Gen. Ansell from duty in connection with the administration of military justice.*—In his letter of February 17, 1919, to the Hon. John L. Burnett, House of Representatives, Gen. Ansell stated, referring to his memorandum of November 10, 1917, to the Secretary of War (Exhibit 69, p. 3):

"Thereupon I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting the administration of military justice."

It will be recalled that, in his letter of November 18, 1917 (Exhibit 65), to the Secretary of War, Gen. Crowder stated that he would be able to assume his duties as active head of the Judge Advocate General's Department, and that he could devote to those duties one-half of his time. Gen. Crowder found, however, that, due to the increased demand for men under the draft, his duties as Provost Marshal General were such as to occupy the greater part of his time, and that he was not able to devote any considerable portion thereof to the Office of the Judge Advocate General. In his testimony Gen. Crowder further states that his recollection was that Gen. Ansell continued with undiminished authority in handling all matters arising in the section of military justice, and determined himself what cases would be passed up to the Judge Advocate General as needing the latter's personal attention. He recalled no instruction, either from himself or the Secretary of War, curtailing the au-

thority or initiation which Gen. Ansell had previously exercised as senior officer in the office.

Col. E. G. Davis, Chief of the Military Justice Division, testified before the Senate Committee on Military Affairs (p. 204, Hearings before the Committee on Military Affairs) that Gen. Ansell's statement that he was relieved from responsibility in connection with the administration of military justice was not correct, for the reason that all cases connected therewith continued to pass through Gen. Ansell's hands. The latter signed many of them himself as Acting Judge Advocate General and actually exercised the discretion of deciding what, if any, cases were to go to Gen. Crowder for his action. Col. Davis further stated that Gen. Ansell exercised final authority in all such cases from November to April, except where he did not wish to take the responsibility of determining a particular case himself. He had the discretion in every instance to determine whether a case was to be disposed of finally by himself or whether it should go to Gen. Crowder. Col. Davis, testifying before the Inspector General, said:

"As I said before, every court-martial case that left my desk for higher action went to Gen. Ansell. * * * The only exception that could possibly exist to the statements I have made is this: That during the period when we were working in the office over the establishment of General Orders No. 7 and formulating the rules for carrying it into effect I frequently consulted directly with Gen. Crowder, and frequently placed the result of investigations I had made on Gen. Crowder's desk. These did not go through Gen. Ansell's hands, for the reason that he was entirely out of sympathy with what we were trying to do and Gen. Crowder had directed us to make the investigation, and we felt this had nothing to do with Gen. Ansell's position in the office and we did not consult Gen. Ansell about anything we did in connection with that order, in getting it established or the rules for getting it into effect. But as to actual action on cases, no case went to Gen. Crowder that did not first pass through Gen. Ansell. There were certain cases in which I assumed the right to act; for instance, when I found that a court-martial record was incomplete; that the record did not show that the judge advocate had been sworn, etc., I exercised the authority of sending it to the reviewing authority for correction; but all matters where correction action was taken or where clemency was recommended, or where anything of that larger nature was involved, those matters passed through Gen. Ansell to Gen. Crowder, according to office memorandum." (Exhibit 20, p. 11.)

Col. Davis further states (Exhibit 20, p. 4), referring to Gen. Ansell's statement that, from some time in November until the time he left for France, about the middle of April, he had nothing to do in connection with the administration of military justice and that the proceedings did not come over his desk, "that statement is not correct * * * As a matter of fact, Gen. Ansell was the senior assistant in the office of the Judge Advocate General but, in this capacity, he signed possibly 50 to 75 per cent of all papers signed in the office, and signed as Acting Judge Advocate General, even though Gen. Crowder was present and at the head of the office."

Col. A. E. Clark, Judge Advocate General's Department, on duty at that time as assistant to Col. Davis, and for a portion of the time during the absence of Col. Davis, Acting Chief of Military Justice Division, states (Exhibit 24, p. 8):

"When I was acting head of the section for a short time in March, I followed the practice of signing these opinions, returning the records in accordance with the practice that Col. Davis had established. Everything was routed over Gen. Ansell's desk except the opinion returning records under General Orders, No. 7. Everything that went up to higher authority, to The Adjutant General, the Chief of Staff, the President, or the Secretary of War, was routed through him and over his desk."

Maj. William H. Keith, chief clerk in the Judge Advocate General's Office until September, 1918, in his testimony to the Inspector General confirms the statement that, during the period November, 1917, to April, 1918 papers intended for the action of higher authority passed over Gen. Ansell's desk. (Exhibit 23.)

On April 10, 1918, a memorandum, subject "Office Organization," was issued by the Judge Advocate General's Office. After prescribing the duties of the various divisions, there appears the following (Exhibit 107):

"Upon receipt of papers in the Chief Clerk's office they are stamped, numbered, precedents attached and charged to the officer handling them. When

completed they are returned to the chief clerk, where the charge against the officer is removed, thus showing the time the officer had them; then they are passed to Col. Mayes, to Gen. Ansell, and to Gen. Crowder. After approval they are sent out either by mail or in jackets by messenger."

In the testimony of Maj. Keith, former chief clerk, and Mr. J. S. Lyon, clerk in charge of the court-martial section of the Judge Advocate General's Office, it appears that this memorandum represented not new rules of procedure for the office but rather a confirmation of the established rules. (Exhibits 23 and 29.)

Col. J. J. Mayes, who was Gen. Ansell's assistant up to the time the latter departed for France in April, 1918, and who succeeded Gen. Ansell as senior assistant in the office, testified (Exhibit 30) that all cases arising under General Orders No. 7, with some exceptions, there being some that were sent through Gen. Ansell's and Col. Mayes's desks, were acted upon by the Disciplinary Division. He stated that all cases requiring the action of the President were passed over their desks, although there may have been some exceptions to that rule. When Col. Mayes became senior assistant he gave instructions that all matters (including those arising under General Orders No. 7) pertaining to the Disciplinary Division should pass over his desk. When asked if there was any reason to believe that the same result could not have been accomplished if Gen. Ansell had so desired, he replied, "No, I don't know of any reason. In fact, I don't know how the other system grew up. I felt that if I would be charged with the responsibility of the office I should know what went out of it, therefore, I permitted nothing to go out expressing the opinion of the office except over my signature, or in important cases Gen. Crowder's signature." He stated that Gen. Crowder had made no objection to the instructions that he had issued, and, moreover, Gen. Crowder was at the time occupied at the Provost Marshal General's Office so that he did not have very much time to be at the Judge Advocate General's Office.

The Judge Advocate General furnished the Inspector General a list of memoranda prepared in that office, containing reviews of court-martial cases during the period November 17, 1917, to April 10, 1918, giving in each instance the name of the officer preparing the memorandum and that of the officer approving the same. (Exhibit 108.) Many signed by Gen. Ansell as Acting Judge Advocate General contain recommendations to the Secretary of War or to The Adjutant General relative to mitigation, remission, approval and disapproval of sentences and declaring null and void proceedings. Fifty-three memoranda contain the signature of Gen. Crowder during the period stated as against 130 bearing the signature of Gen. Ansell. In addition to the papers above referred to, voluminous correspondence from the files of the Judge Advocate General's Office was furnished this office. These papers include memoranda on court-martial cases, letters and indorsements, all relating to the administration of military justice. Forty per cent show the signature of Gen. Crowder, 35 per cent that of Gen. Ansell, and 25 per cent of various other officers in the department.

When, in July, 1918, Gen. Ansell returned from his trip abroad, he automatically reverted to his former duties as senior assistant, and without orders of any kind proceeded to reorganize the office, created boards of review (Exhibit 109) and ordered them "to break away from the office interpretation" of General Orders, No. 7. He proceeded to perform those very duties from which, during the period November to April, according to his statement he was relieved. (Exhibit 70.)

From the records and from all obtainable evidence, it appears that Gen. Ansell's statement that, from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts. On the contrary, it appears that his initiative and authority as senior assistant remained undisturbed and that he was in no degree hampered in any changes which, within the law, he desired to make.

9. *Four cases arising in France wherein sentences of death were imposed.*—In his letter to Representative Burnett, dated February 17, 1919, Gen. Ansell, in conclusion and more particularly by way of reply to Representative Burnett's statement, "Why did he (Gen. Ansell) not appeal to Gen. Crowder? Why did he not appeal to the President to vindicate him? Why did he go on here until he was called before a committee of the Senate to do it?" stated (Exhibit 69, p. 6):

"You seem to think that under these circumstances I should have gone directly to the President. Upon a little reflection you will appreciate, I am

sure, the impossibility of such course. I think, however, that, resting under the charge which you have made against me, I am justified in saying this, that on one occasion I well remember—and doubtless there are others—when four sentences of death were pending in the department for confirmation, and when this office had recommended execution, 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 those unprotected men that their lives might be spared."

These cases have been frequently referred to in the public press. The facts as shown by the official records and the testimony follow:

On or about February 27, 1918, records were received in the office of the Judge Advocate General in cases Nos. 110751–2–3–4, tried in France, in which the death penalty was imposed. Two men were tried for sleeping on post, and two for disobedience of orders. Upon receipt of these records, they were reviewed by Maj. Rand, of the Division of Military Justice. He wrote a review on each case, stating that the proceedings were regular, the verdict sustained by the evidence, and recommending that the sentences be carried into effect. The records, with the reviews, then went to the desk of Col. Davis, chief of the Division of Military Justice, and from his desk to the office of Gen. Ansell and his assistant, Col. Mayes. The exact date the reviews reached Gen. Ansell's office is not known. In forwarding the records of trial, Gen. Pershing, in a letter to the Judge Advocate General, urged the execution of the sentences as absolutely necessary for the safety and success of the Army in France. (Exhibit 114.) Maj. Rand incorporated in but one of the reviews the text of Gen. Pershing's letter. In the other three this letter was simply referred to. The reviews were returned from the office of Gen. Ansell, through Col. Davis, to Maj. Rand, with the suggestion that Gen. Pershing's recommendation be incorporated in all four. They were accordingly rewritten and returned, through Col. Davis, to Gen. Ansell's office. Col. Mayes approved the reviews, concurring in the recommendation that the death penalty be executed in each case, and the papers for the first time reached the Judge Advocate General without either oral or written dissent from anyone. The usual rule of the office, as testified to by Col. Davis, was that any paper that passed Gen. Ansell and reached Gen. Crowder's desk had met with Gen. Ansell's approval, unless the opposing view was indicated in a memorandum or verbally communicated. Whether, up to this time, Gen. Ansell had seen the papers is not known.

Gen. Crowder, not being satisfied with the review by Maj. Rand, called upon Col. Clark for an independent examination of all four cases and the preparation of a review of each of them, indicating also the necessity for a study of other similar cases from the American Expeditionary Forces.

On March 29 there was prepared in the Office of the Judge Advocate General a four-page memorandum summarizing for the Secretary of War the very numerous letters and petitions which had been received urging clemency. (Exhibit 115.)

The next step was the submission by Col. Clark of his reviews. Two bear date of March 29 (Exhibits 116 and 117) and two of April 4 (Exhibits 118 and 119). Gen. Ansell was not in Washington when these reviews were submitted to Gen. Crowder. He was absent from the office from on or about April 1 until on or about April 6. (Exhibit 133.) Col. Clark's reviews stated the facts of each case much more in detail than anything that had been submitted before. They were without formal recommendation, and on April 5 were submitted by Gen. Crowder to the Chief of Staff, accompanied by a memorandum of that date, which reads in part as follows:

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

"It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended."

The memorandum concluded with the request for an interview. Gen. Crowder, immediately upon his return to the office of the Judge Advocate General, asked Col. Clarke to "search the records of The Adjutant General's Office and ascertain some facts outside the records which might weigh in the final disposition of the case." As the result of the work so undertaken, Col. Clark, on April 10, submitted another memorandum (Exhibit 121), which was the first formal and definite statement of reasoned and forceful opposition to the imposition of a death penalty made by any of Gen. Crowder's subordinates. The circumstances of the four cases were again referred to. The youth of all the accused was emphasized, and several other cases, more or less parallel both as to time and nature, were cited to show that not only other courts but the same court had either acquitted or, upon conviction, had imposed much lighter sentences. For example, it was stated that the same court acquitted two other soldiers of the same regiment who were tried within a few days of those under consideration, and for the same offense, viz, sleeping on post. In these acquittals the evidence came in part from the same witnesses whose testimony convicted two of the men condemned to death.

On or about April 10, the date of Col. Clarke's memorandum, Gen. Crowder expressed to Gen. Ansell his anxiety with respect to these four cases and requested that he, after a thorough study, submit his views. The evidence is conclusive that prior to this date no word in opposition to the execution of the sentences of death in these cases, either verbal or written, was voiced by Gen. Ansell.

Gen. Ansell's views were evidently first expressed orally to Gen. Crowder shortly before April 15. Of this there can be no doubt, for on that date Gen. Ansell submitted a written memorandum based on "reading these records," referring to an oral statement of his reasons "the other day" and stating that those reasons were produced in writing "at the request of Gen. Crowder." (Exhibit 122.) He then proceeded to consider the cases briefly and strongly opposed confirmation. On April 16, the day after the receipt of Gen. Ansell's memorandum, for which apparently he was waiting, Gen. Crowder submitted another and final memorandum to the Chief of Staff. (Exhibit 123.) He set forth therein the data gathered by Col. Clark concerning the four cases in hand and the other similar cases already referred to, and restated the substance of the arguments advanced by Col. Clark and Gen. Ansell against the execution of the sentences. He called attention to the fact that not one of the accused made any fight for his life, and said: "I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel I should have strongly advised that they plead not guilty and required the Government to maintain its case at every point." He closed this memorandum by referring to Gen. Pershing's urgent request for a confirmation of the sentences and called attention to the propriety of bearing in mind "the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution but as commanding general, anxious to maintain the discipline of his command."

On the next day, April 17, the Chief of Staff submitted the record thus made to the Secretary of War, recommending the confirmation and execution of the sentences. (Exhibit 124.) On May 1 the Secretary of War submitted the whole matter to the President, with a lengthy letter (Exhibit 125) strongly recommending the pardon of the two soldiers convicted of sleeping on post and the remission to confinement for three years of the sentences of the two convicted of disobeying orders. The relationship of this final act of the Secretary of War to the preceding action in the office of the Judge Advocate General, and as an effect thereof, is clear from the documents themselves. The Secretary of War pointed out that the Judge Advocate General had limited his concurrence "to the technical correctness of the proceedings," and that, in a subsequent memorandum, he had called the attention of the Chief of Staff to the other cases already referred to. The final memorandum of the Judge Advocate General of April 16 (Exhibit 123) is quoted and repeatedly referred to, and what was suggested by that officer is by the Secretary of War argued to the President as conclusive against both the justice and expediency of confirming the sentences.

On May 4 the President expressed in writing (Exhibit 126) his entire agreement with the Secretary of War, and made mention of the latter's "very full and convincing letter," and pardoned, unconditionally, the two soldiers convicted of sleeping on post (Exhibits 127 and 128) and commuted the sentences of the two convicted of disobedience of orders to confinement for three years. (Exhibits 129 and 130.)

In Col. Davis's testimony before the Inspector General he made the following positive and unequivocal statement (Exhibit 20, p. 16):

"The next time I had any conversation with either of them about this matter was along about the 10th of April, 1918. I was in Gen. Ansell's room for some other purpose and he came out of Gen. Crowder's room and sat down at his desk and said to me, in words about as follows: 'What in the hell is the matter with Gen. Crowder about those death cases?' I explained to him that he had Col. Clark at work reviewing these cases, and he seemed very anxious to be sure of his ground before making definite recommendations, and that Col. Clark had come to the conclusion that the sentences ought not to be executed. To this Gen. Ansell replied that he did not agree with Col. Clark; that he thought the sentences ought to be executed, and he further stated that Gen. Crowder had directed him to make a review of the cases himself. Those two events stand very clear in my mind, and there is no possible confusion between them."

Col. Clark, the officer who first stated the conviction that the death sentences should not be carried into effect, and who, by direction of Gen. Crowder, expressed his views in the form of a memorandum, testified in part as follows (Exhibit 24, pp. 7 and 8):

"I had talked with Col. Mayes and Gen. Ansell and had taken occasion, although the cases were not then in my hands for review, to express the settled conviction that it would be a great mistake and an injustice to carry these sentences into effect. At that time these officers did not agree with me but were of the opinion that the views of Gen. Pershing with respect to the propriety and the expediency of carrying these sentences into effect should be followed. While these cases were under consideration in the office, and before the records came to me from Gen. Crowder for review, as I have just stated, I discussed them with Gen. Ansell and other officers on more than one occasion, and Gen. Ansell had stated to me, during those discussions, that he thought the sentences should be carried into effect. * * *

"Some time after the records in the death cases from France came to me from Gen. Crowder for further study, Col. Davis informed me of a conversation which he had just had; I mean by that a conversation he had shortly before he spoke to me about it. Col. Davis stated in substance that Gen. Ansell had used some profanely forcible language in connection with these cases. I would not undertake to give the language of the conversation but my recollection of its effect or substance is that he objected to or resented the fact that the sentences were not being promptly carried into effect in accordance with the recommendations contained in Maj. Rand's reviews, instead of which they had been returned to me for further study and report by Gen. Crowder."

In this connection Col. Mayes states (Exhibit 30, p. 5):

"Gen. Ansell was not there when those reviews came in and I passed those records to Gen. Crowder concurring in the reviews. The reviews, I think, recommended the execution of the death penalty. I concurred in that view. Then, when Gen. Ansell came back, Gen. Crowder asked him to review it. Gen. Ansell read the reviews and did not concur. * * * Gen. Ansell and I were in the same office and when these cases were turned over to him to read, he immediately took the view that he afterwards maintained. I do not believe that there was any change in his views. That idea may have grown up from the fact that they were sent to Gen. Crowder by me, concurring in the imposition of those death sentences. Ansell and I differed on those cases and I am sure that Ansell was not here when they were passed to Gen. Crowder. * * * I have held to the view that where a soldier was found sleeping on sentry duty in the front line he should receive the most severe penalty authorized for that offense, which is death unless there was some very mitigating explanation of his conduct. I have held to this view because a sentinel in such position holds the lives of his comrades in his hands. Having stated my opinions I will say that I do not remember of Gen. Ansell ever disagreeing from that view. His disagreement on the four cases from France was upon the sufficiency of those cases and not upon the principle. I can not

say that Gen. Ansell ever said anything to me about this, but it is very probable, in fact extremely probable, that we have discussed the abstract proposition as I have outlined above."

"Q. Was Gen. Ansell in the habit of expressing his views on subjects generally, freely, and forcibly?—A. He was."

Mr. Earle L. Brown, Gen. Ansell's stenographer, testified as follows (Exhibit 31):

"You ask me if I can recall any discussion on the four death cases in France. I can't recall any definite discussion. I do think, though, that when those cases were first discussed that Gen. Ansell, before reviewing the cases at all, had really expressed himself that the conviction ought to be sustained, but I know that after he reviewed the cases and found the circumstances of them, or rather when the circumstances showed those men had, as I recall it, been exposed to so much fatigue and long duty, that on that ground his opinion was altered. I can't say anything definite, but that is my impression."

The question as to whether or not, prior to April 10, 1918, Gen. Ansell entertained, and on that date affirmatively expressed, the views that the death penalty in these specific cases should be executed is not definitely determined by the evidence.

The question of veracity raised by the conflicting testimony is, in my belief, apparent rather than real. Considering the length of time which has elapsed, the fallibility of memory, and considering the circumstances as a whole, it appears reasonable and is believed that, prior to April 10, no special attention had been given to these cases by Gen. Ansell. On general principles he entertained the views that any man found asleep on sentry duty in the presence of an active enemy should be executed. He doubtless expressed those views, and they were interpreted as referring to these specific cases.

So far as revealed by the evidence, Gen. Ansell made no attempt to interview the Chief of Staff or the Secretary of War or the President in regard to these cases. Careful search and inquiry have failed to discover evidence that his memorandum was brought to the attention of the President or the Secretary of War by a Member of Congress. The above facts, stripped of all elements of uncertainty, lead to the conviction that Gen. Ansell's statements, as to his attitude and activities in connection with the cases above considered, are misleading and widely variant from the facts.

10. *Report of Gen. Ansell on his trip abroad.*—In his letter of February 17, 1919, to Representative Burnett, Gen. Ansell says (Exhibit 69, p. 5):

"Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our allies, I filed with the Judge Advocate General a report which among other things, treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War."

On April 17, 1918, Gen. Ansell was directed to proceed not later than April 20 to France and such other countries in Europe as might be necessary for the purpose of observing the principles and practices of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. He was directed to report his observations in writing to the Judge Advocate General of the Army. (Exhibits 134 and 134A.)

Gen. Ansell proceeded to Europe, in compliance with said orders, and his report, prepared at sea, bears date of July 8, 1918. (Exhibit 135.) He visited the armies in the field and the capitals of France, Italy, and England. That his studies were assiduous and thorough-going is apparent from his report. He obtained his data first hand. To a large extent they were drawn direct from the war offices of the Allies. The report is without recommendations as such. It covers war administration generally, with particular attention to military justice. The French systems are gone into in considerable detail. Those of the British are dealt with to a lesser degree. The consideraton of the Italian methods is limited to those of the "Bureau of Military Justice."

In dealing with our problems in France, Gen. Ansell points out the difficulty of maintaining on French soil and amid French people an army of upward of a million Americans under American Government. He deals at length with the application to them, in many of their activities, of the French civil law. By way of illustration, he cites the levying of a tax by certain municipalities upon the food taken into them for the use of American soldiers.

The most important feature of his report, so far as it concerns France, is its explanation of the very broad theory there applied of the legal liability of

the Government to its citizens. The French theory is much more liberal than ours. In France, according to Gen. Ansell, there is practically no limit to the extent to which the Government must answer to a citizen for loss sustained by him from Government activities.

He then raises the query as to whether the liability of the United States to French citizens, growing out of the presence of our Army, is to be determined under French or American law, and urges that steps be taken to gather and record the facts (contemporaneously with their occurrence), with a view to forehanded preparation against unjust claims, and excessive damages for just ones.

The foregoing indicates, sufficiently for present purposes, the nature and comprehensive character of the report. Notwithstanding that it is the result of three months' effort of a general officer, it has, thus far, served no useful purpose. At least, it does not appear that it has ever received the studious attention, or any particular attention, of higher authority.

So far as the records indicate, the history of the report is as follows:

It was submitted to Gen. Crowder, according to Gen. Ansell, in July, 1918. Gen. Crowder's testimony concerning it is as follows (Exhibit 10, p. 11):

"Q. Gen. Ansell states, referring to the report which he made upon his return from Europe, 'This report never reached the Secretary of War.'—A. That statement, as I recollect, first came to my knowledge reading the Congressional Record of recent date, and I think in a letter addressed by Gen. Ansell to Mr. Burnett. I came to the office and asked for the report, as I did not remember to have ever seen it. It is true that, upon his return, Gen. Ansell came to my office and submitted a document which contained a number of observations which he had made, explaining that it was more or less a personal document which he thought I would be interested in. I read it over and it is the one that has been used a lot in public addresses, but he never brought in his official report and I did not see any official report until I instituted this search after noticing the Congressional Record. I called upon the executive officer to get me the report. He brought a carbon copy. I asked him where was the original. He said he did not find it on file. Later he came to me with the original and said it was on Gen. Ansell's desk. It was addressed to me, as I remember not to the Secretary of War. I do not remember to have ever seen that report and know he never personally submitted it as he did the informal report. It is true that up to that time it had never been forwarded to the Secretary of War."

The original report bears no date of receipt to indicate that it ever reached the files of the Judge Advocate General's Office. The carbon copy has the following notation: "J. A. G. O. Jan. 8, 1919, 319.1 Personal Reports." That there was a supplemental report is established by the testimony of Mr. Brown, Gen. Ansell's stenographer. (Exhibit 31, p. 2.) It appears that this supplemental report is not of record in the Judge Advocate General's Office or elsewhere.

In the absence of any specific statement from Gen. Ansell, it is difficult to fix, definitely, the responsibility for the nonpresentation of his report to the Secretary of War. It seems safe to say that he himself took no affirmative steps to insure its transmittal to higher authority. It is also clear that Gen. Crowder was remiss. He was Judge Advocate General, to whom the Secretary of War directed that Gen. Ansell's report be submitted. If, as Gen. Crowder suggests, no formal report was ever submitted to him by Gen. Ansell, that officer should have been ordered to prepare and submit a proper report. If the report was prepared and submitted to Gen. Crowder, it was his duty to forward it to the Secretary of War, with his own appropriate comment thereon. In whatever light the matter is viewed, responsibility rests with both Gen. Crowder and Gen. Ansell.

11. *Amendment to 50th Article of War.*—Another matter having a direct bearing on the administration of military justice, rather a difference of opinion between the War Department and the Judge Advocate General's Office than between Gen. Crowder and Gen. Ansell (the former having had, so far as the records indicate, no connection with the subject matter), was the amendment to the 50th Article of War. On July 27, 1918, Gen. Pershing cabled the War Department as follows (Exhibit 142):

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

The thought originated with Gen. Bethel, for, in writing to Gen. Crowder under date of June 24, 1918 (Exhibit 143), he concluded by saying that there have been a number of death sentences recently requiring the confirmation of the President, but the cases were not of such a character as to justify execution of the sentences. In view of the time necessary for the cases to reach Washington they were sent back to the courts for imposition of a milder sentence. Gen. Bethel stated that it would greatly facilitate the administration of military justice if Gen. Pershing had the power to commute death sentences, not only in the cases where he had authority to confirm them, but also in those cases requiring the President's confirmation. He stated that Army commanders in the field should also have the power to commute sentences of dismissal of an officer.

A copy of Gen. Pershing's cablegram was referred to the Acting Judge Advocate General for recommendation. Gen. Ansell expressed his views in a memorandum bearing date of September 5, 1918. (Exhibit 144.) He opposed the suggested amendment, saying in part:

"Commutation, unlike mitigation and remission, * * * is a pardon granted on a condition subsequent that the offender undergo a punishment of a different nature. As such it involves the pardoning power of the President. * * *

"The existing statute * * * deals with fundamental principles which do not undergo modification with every change of circumstances; it is old, has stood for a long time substantially unmodified, and in the absence of a considerable showing of its lack of wisdom or workability, is entitled to deference * * *. It should be changed * * * only upon thorough consideration and in the light of conclusive experience. * * *

"The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army. * * * Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request."

He concluded the memorandum by remarking that, while he was not called upon to draft the proposed legislation, he would take the liberty to suggest the advisability of so drafting it as to confer this power upon such commanding generals in the field as the President might himself designate.

The papers were forwarded to the War College, and, on September 19, 1918, Col. E. G. Davis, formerly Chief of the Military Justice Division of the Judge Advocate General's Office, prepared a memorandum (Exhibit 145) expressing the opinion that no sound reason could be advanced why an officer, who was given power to approve and carry into effect a sentence of death or of dismissal of an officer without reference to higher authority, should not be given the lesser power of commuting such a sentence to one of lower degree, nor could any good reason be assigned why he should not directly exercise the power of mitigation without reference to the President, in those cases requiring the latter's confirmation. He invited attention to the fact that the fiftieth article of war speaks of the "mitigation" or "remission" of sentences of death or of dismissal of officers, and stated that, as mitigation of either of these sentences requires a substitution of some other and distinct form of punishment, mitigation in such a case becomes the "commutation" discussed in the opinion of the Judge Advocate General.

The Director, War Plans Division, in forwarding the papers to the War Department (Exhibit 145), stated that his division was of the opinion that the recommendations of Gen. Pershing could be complied with and that the inconsistencies in the present Articles of War could be remedied by amending the fiftieth article. The proposed change in the fiftieth article of war was set forth, the substance of which is found in the following paragraph of the amended article:

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President, before the same may be executed."

It will be observed that, although Gen. Ansell opposed the amendment, his suggestion that, if it were to become a law, the conferring of power not only upon the commanding general American Expeditionary Forces, but upon such other generals in the field as the President might himself designate, was adopted. On September 19 (Exhibit 146) the Acting Secretary of War trans-

mitted the draft of the bill to Congress and the same became a law on February 28, 1919. (Exhibit 147.)

12. *Establishment of clemency board.*—In his letter of March 8, 1919, to the Secretary of War, Gen. Crowder states (Exhibit 136, p. 6):

"As you were aware, shortly after my resumption of full charge of the office of the Judge Advocate General, I recommended the convening of a board of clemency to undertake with the greatest expedition the adjustment of war-time punishments to peace-time standards."

The facts are these:

On January 11, 1919, by a memorandum (Exhibit 138) to the Secretary of War, Gen. Ansell invited his attention to eight cases, seven from Camp Dix and one from Camp Grant, wherein grossly excessive penalities had been imposed. No additional machinery was suggested for the reviewing and correction of excessive sentences. The memorandum is without recommendation. The introductory paragraph concluded, however, with the statement that, while he was inviting the attention of convening authorities to the great severity of the punishment in those cases in which the punishment appeared to be so disproportionate to the offense as to shock the conscience, yet he did not regard that such an administrative course taken in specific instances was sufficient to achieve and establish military justice. He concluded his memorandum as follows:

"Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed; at least, I believe I have observed, during this war."

Gen. Ansell's memorandum of January 11, 1919, was, by the Secretary of War, transmitted to Gen. Crowder on January 13, accompanied by a letter wherein it was stated (Exhibit 139):

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him (Gen. Ansell) which have been imposed during the war, and are characterized by severity which would not be the case in time of peace."

This suggestion of the Secretary of War was the first one looking toward action concerning cases already finally passed upon, and must, therefore, be accepted as having initiated the Clemency Board as it is now functioning.

Acting upon the suggestion of the Secretary of War, Gen. Crowder, on January 28, published an office memorandum (Exhibit 141). He referred first to the instructions which had been proposed by him and which were published on January 22 (Exhibit 140), the effect of which was to put into operation the Executive order of December 15, 1915, establishing maxima for sentences of courts-martial. He then proceeded with the language establishing the Board of Clemency. That action was expressly stated to be in compliance "with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment, but to adjust that punishment to present disciplinary requirements." The purpose of the board was thus expressed:

"To undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him."

Gen. Ansell does not claim that he originated the idea, but that the basis for the plan was his memorandum, dated January 11, 1919. That is true. The Secretary of War, however, himself made the initial suggestion, and the order creating the board followed the lines laid down by him.

II. THE ADMINISTRATION OF MILITARY JUSTICE AND THE MACHINERY ORGANIZED IN THE JUDGE ADVOCATE GENERAL'S OFFICE TO FURTHER THE SAME.

A study has been made of the functioning of the Judge Advocate General's Department during the present war. The machinery provided in the office of the Judge Adocate General in Washington for the review of general court-martial cases forwarded there by law was examined. Fifteen hundred records of trial were scrutinized, not with an idea of reviewing the evidence—a function not pertaining to this office—but for the purpose of regarding the composition of the court, the kind of counsel provided the accused, the exercise of the right of challenge, the pleas, findings, and sentences, the action of the various reviewing authorities, and, finally, the action of the Judge Advocate General and the Secretary of War. The time required for the records of trial after final action by the reviewing authority to reach the office of the Judge Advocate General

was recorded in each case. Three different periods were chosen and 500 successive cases were selected from each period. These cases represented nine departments, including Panama, Hawaii, and the Philippine Islands; 38 divisions, some in the United States and others in France; and also 2 disciplinary barracks and 15 other miscellaneous general court-martial jurisdictions. It is believed that these are representative of the twenty thousand-odd cases tried during the war.

An effort has been made to ascertain the cause of recent criticism, some of it unquestionably just, as will hereinafter be indicated, of the system of military jurisprudence, which has existed for more than a century. Our military code enacted by Congress in the early Revolutionary days came to us almost intact from the British articles of war, and although restated in the Revised Statutes of 1874, when certain amendments and additions enacted during the Seminole War, the War of 1812, and the Civil War were incorporated, underwent no substantial change until 1916, when, after the unsuccessful attempts of the present Judge Advocate General, covering a period of five years, to bring about a recodification, Congress finally reenacted the American articles into their present form. Before the war an Executive order prescribed the peace-time limits of punishment which could be imposed by court-martial, and, in addition, an intimate knowledge of military law was a prerequisite to graduation from the Military Academy and to advancement through the lower commissioned grades in the Army. With these two safeguards, the legal rights of the accused were protected, and he received substantial justice. If fault was found with the present system, certainly no criticism was offered. With the raising over night of an army of several million men, the drawing of officers from every walk of life, their training undertaken in three months, their knowledge of military law based upon a hasty perusal of the Manual for Courts-Martial, with all Regular officers promoted to the field grades, and the courts composed entirely or preponderantly of captains or lieutenants, with these same officers acting as judge advocates and counsel for the defense, and especially with the Presidential check on limits of punishment removed, it is not surprising that if the system was subject to abuses the latter should at this time become apparent. To what extent these abuses existed and to what extent higher authority failed to check or eradicate them has been made the subject of special inquiry. The trial of the accused, from the preferring of charges until final action on his case, will therefore be considered in light of the facts developed by this investigation.

The accused can be tried only on charges preferred by a commissioned officer. These charges are referred to the officer exercising summary court-martial jurisdiction, usually the regimental or, in a small command, the post or camp commander, who is required by paragraph 76, Manual for Courts-Martial, either to investigate them himself or refer them to a disinterested officer for that purpose. This officer is usually one of experience, who, after an examination of the witnesses, including the accused, if the latter waives his constitutional right to refuse to testify, states whether in his opinion there is sufficient evidence to warrant the reference of the case for trial. The commanding officer, in forwarding a case to the reviewing authority, must forward the statement of testimony and report as follows: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken.

Criticism has been offered that charges are not thoroughly investigated prior to their being forwarded to the convening authority. The critics certainly can have no direct knowledge of this fact, except such as may be gained from an examination of the results of courts-martial. The records of the 1,500 cases examined, of which 82 were those of officers and 1,418 were those of enlisted men, indicate 164 acquittals. Of the 82 officers tried, 14 (17+ per cent) were acquitted. Of the 1,418 cases of enlisted men tried, 151 (10+ per cent) were acquitted. These percentages are not so large as to form a basis for general criticism. As hereinafter shown, abuse has existed in isolated cases, due to failure on the part of the responsible officers to carry out the plain provisions of the Manual for Courts-Martial.

The charges, upon reaching the convening authority, are referred to the staff judge advocate, whose duty it is to determine if the facts presented

warrant reference of the case for trial. It is safe to say that it very rarely happens, if ever, that the convening authority sees or examines the charges before their reference for trial. The staff judge advocate is a lawyer, of not less than the rank of major, carefully selected by the Judge Advocate General of the Army for the very duty of impartially examining the evidence to determine if a prima-facie case has been presented. Many of these officers have had years of experience at the bar in civil practice. The charges, if warranting trial by general court-martial, are forwarded directly to the trial judge advocate. This is usually an officer of the line not above the grade of captain. He is supposed to be the legal adviser to the court and to safeguard the rights of the accused. Before the war, there were but few officers who were not competent, as a result of their education in military law, to perform this important duty. Since the war, unless the trial judge advocate was a lawyer in civil practice, he was manifestly unfit to undertake this duty. It was practically impossible for any captain or lieutenant to acquire, in the short time at his disposal, sufficient knowledge of military law to act in any legal capacity.

The 1,500 cases examined indicate that the following officers acted as trial judge advocate:

	Officers' trials.	Trials of enlisted men.
Colonels		2
Majors	18	71
Captains	36	518
First lieutenants	18	522
Second lieutenants	10	245

The following acted as assistant trial judge advocate:

	Officers' trials.	Trials of enlisted men.
Captains	9	24
First lieutenants	13	177
Second lieutenants	11	312

The accused is very rarely without a commissioned officer as counsel. He is supplied one, unless he states to the court that he does not desire counsel. The record must affirmatively show that he was offered counsel and declined. Counsel for the accused is not a detail sought by officers, is not a pleasant duty, and is usually performed by roster. It is believed that, as a rule, the officers detailed serve the accused to the best of their ability, but their incapacity, since the outbreak of the war, judging by their rank, has been apparent, except in those cases where the counsel assigned was a lawyer in civil practice prior to his entrance into the Army. The cases examined by this office reveal the fact that the following officers have served as counsel:

	Officers' trials.	Trials of enlisted men.
Majors	22	48
Captains	20	232
First lieutenants	17	345
Second lieutenants	10	433
Lieutenants (grade not stated)	6	214
Chaplains	1	33
Enlisted men		3
Civilians	2	11
None	4	99

In addition to the foregoing there were 29 assistant counsel, of whom 8 were civilians.

What has been said of judge advocate and counsel applies equally to members of the court, except that it is an exceptional case where at least one member of the court is not of field rank. Four important cases, Nos. 110751-2-3-4, arising in France, have been the subject of considerable comment in the halls of Congress and in the press. Two soldiers found guilty of disobedience of orders and two of sleeping on post were sentenced to be shot. The sentences of the first two were commuted by the President and the latter two were pardoned. The two soldiers tried for disobedience of orders were permitted to plead guilty. The composition of the court in the first two cases, with the qualifications of the officers to act as members of the court and judge advocate, was as follows (Exhibit 132):

Members of the court.—Colonel, 21 years' commissioned service, Regular Army; first lieutenant, appointed from ranks, Regular Army, graduate of Maryland Agricultural School, civil engineer; first lieutenant, appointed from ranks, Regular Army, high-school education, shipping clerk, salesman, farmer; first lieutenant, graduate of University of Vermont; first lieutenant, record not obtainable.

Judge advocate.—First lieutenant, attorney at law, graduate of law school.

Assistant judge advocate.—Second lieutenant, newspaper reporter, no legal education.

In the other two cases in addition to the foregoing the following officers also sat: Lieutenant colonel, graduate of West Point, 12 years' commissioned service; major, formerly quartermaster sergeant, high-school education; first lieutenant, graduate of Harvard University and Massachusetts Institute of Technology.

The counsel were, in grade and ability, as follows: Case No. 1, second lieutenant, no professional, legal, or business training; case No. 2, second lieutenant, no professional, legal, or business training; case No. 3, second lieutenant, chemist, high-school education; case No. 4, second lieutenant, graduate of University of Maine, no legal education.

The cases were summed up by counsel as follows: Case No. 1, no summing up; case No. 2, no summing up, soldier's statement two lines; case No. 3, counsel's address six lines; case No. 4, counsel's address eight lines.

Had the same careful review, which was submitted for the consideration of the President, been presented to the court, it is safe to assume that the findings and sentences would have been other than as given. It is hard to believe that the soldiers had a fighting chance for their lives. These cases, however, were exceptional.

The actual composition of the courts-martial, after the right of challenge had been exercised, was, for the trial of the 1,500 cases under consideration, as follows:

	Officers' trials.		Trials of enlisted men.	
	Number.	Per cent.	Number.	Per cent.
Brigadier generals	14	1.8	18	0.1
Colonels	105	13.5	201	1.6
Lieutenant colonels	113	14.6	472	3.8
Majors	232	29.9	1,637	13.0
Captains	262	33.8	4,465	35.6
First lieutenants	42	5.4	3,731	29.7
Second lieutenants	8	1.0	2,027	16.2

For the trial of enlisted men, 81.5 per cent of the officers composing the courts consisted of captains and lieutenants, and, inasmuch as only 73 officers of the grade of major or above served as trial judge advocates in the 1,500 cases under examination, it is apparent that the trials of enlisted men were largely in the hands of junior officers and, in a great majority of cases, those with little knowledge of military law. On numerous occasions, the court was composed exclusively of lieutenants. In many instances, however, the original detail contained officers of higher rank, but they did not sit as members of the court by reason of absence or challenge. On the other hand,

there were times when the court was made up of field officers in its entirety. One court contained two colonels, five lieutenant colonels and six majors. The unavailability for detail for courts-martial duty of more officers of experience has been advanced in many instances where the court has been composed almost entirely of lieutenants. While it would be impossible, even were it thought advisable to do so, to detail a court such as the one last mentioned, except in a large command, nevertheless the right of an accused certainly should not be prejudiced by failure to provide a competent tribunal for the consideration of his case. For the trial of officers, only 40.2 per cent of the composition of the court was below field rank. This is accounted for by the fact that, where the accused is an officer, the court is invariably composed of officers senior to him in rank.

The right of challenge was exercised 257 times, and in only 26 instances did the court fail to sustain the objections. Frequently officers arose in court and stated their own disqualifications to sit, although this fact was unknown to the accused. The Judge Advocate also from time to time challenged for cause in behalf of the accused, the latter being unaware of the disqualifications.

The following table will indicate the pleas and findings in the 1,500 cases referred for trial:

	Officers' trials.		Trials of enlisted men.	
	Pleas.	Findings.	Pleas.	Findings.
Guilty	26	117	784	1,769
Not guilty	165	69	1,579	488
Guilty minor included offenses	.....	5	220	326

It is interesting to note that the court returned a finding of guilty to 1,769 specifications, and that the accused pleaded guilty in 784 of them, which is nearly half. In serious cases the court called for the evidence in spite of the accused's plea of guilty. In 15 instances the court returned a finding of not guilty, although the accused pleaded guilty to the offense charged. The accused was found not guilty to 488 specifications, and in 326 instances the court returned a finding of guilty of an offense of a similar nature to, but less serious than, the one charged. Certainly the charge can not be made that the courts do not give careful consideration to questions of fact, even though they are subject to the criticism as above stated, that they are in many instances incompetent to pass upon questions of law.

Two officers and 480 enlisted men were charged with desertion. Of these 201 enlisted men were found guilty, 15 enlisted men not guilty, and two officers and 264 enlisted men guilty of absence without leave.

The periods of confinement awarded by courts and approved by reviewing authorities were as follows:

	Awarded by courts.	Approved by reviewing authority
No confinement	69	.....
0-3 months	202	210
3 months to 6 months	285	343
6 months to 1 year	158	132
1 year to 2 years	144	100
2 years to 3 years	108	88
3 years to 5 years	166	120
5 years to 10 years	108	75
10 years to 15 years	19	11
15 years to 20 years	18	7
20 years to 25 years	10	7
Over 25 years	14	8
Number of cases wherein total confinement was remitted	.....	59
Number of cases wherein total confinement was suspended	.....	16
Number of cases wherein total confinement was set aside	.....	58

It will be observed from the above table that, in some instances, the figures in column two exceed those in column one. This is especially true with reference to the lighter sentences, and is explained by the fact that many heavy sentences were reduced by the reviewing authorities to less severe ones. In practically all cases where confinement was of long duration, dishonorable discharge was imposed. The holding of a soldier to a long period of confinement with an organization without separating him from the service is not in the best interests of discipline and has seldom been resorted to in the Army. An examination of the 1,500 cases indicates that dishonorable discharge was imposed, executed, suspended, remitted, or set aside by the reviewing authorities as follows:

Imposed by court	651
Executed	248
Suspended	246
Remitted	126
Set aside	31

The establishment of disciplinary barracks, to which soldiers found guilty of military offenses, as distinct from common-law felonies, are sent, has made it possible for many young men with elements of military service to win their way back to the colors with an ultimate honorable discharge. To accomplish this, the original dishonorable discharge is suspended until the expiration of the soldier's confinement. Many soldiers, with sentences carrying long periods of confinement, are thus enabled to be restored to duty after serving but a few months at the disciplinary barracks. (Exhibits 148 and 149.)

In 105 cases the reviewing authority returned the records to the court for reconsideration because of failure to return findings of guilty, for the imposition of a heavier sentence than that awarded, or for addition to the sentence of a dishonorable discharge or forfeitures. Of these cases the court in 27 instances adhered to its original findings. In 7 cases it changed the finding of not guilty to guilty, and in 71 cases returned a heavier sentence. In case No. 108614 the reviewing authority, after the court had imposed a sentence of four months' confinement with forfeitures, returned the case for reconsideration, suggesting a specific sentence of dishonorable discharge and two years' confinement. The court declined to change its sentence. In case No. 111094 the court imposed a sentence of three months' confinement and forfeiture of two-thirds pay for one month. The record was returned by the reviewing authority for reconsideration of this sentence, but the court adhered to the one originally imposed. Again the case was returned, and the court, this time stating that it considered the opinion of the reviewing authority controlling, reconsidered its sentence and awarded confinement for two years, with forfeiture of one-half pay for like period. The court was reconvened a third time, and the court informed that it had failed to impose a dishonorable discharge. Upon its third meeting, in revision proceedings, a dishonorable discharge was awarded, including total forfeitures and confinement for two years. The convening authority, upon the unanimous recommendation of the court for clemency, mitigated the sentence to six months' confinement at hard labor and forfeiture of two-thirds pay per month for a like period. More pernicious practices than these can not be imagined. Such instances have brought the court-martial system into disrepute.

Although in 668 cases of the 1,371 cases resulting in conviction, the reviewing authorities reduced the sentences imposed by the court, a striking example wherein the exercise of this power by the reviewing authority would have failed to do full justice to the accused was case No. 108540. The court imposed a sentence of dishonorable discharge and five years' confinement. The record was returned with the statement that, while the department commander did not wish it to be understood that he was enjoining particular action or desiring the court to substitute his opinion for its judgment, nevertheless he was convinced that there was insufficient evidence of record to warrant conviction and he was affording an opportunity to the court to reconsider its former findings and sentence before final action was taken. The court acquitted the accused. While the department commander could have disapproved the findings and sentence, nevertheless the stigma of conviction would have attached to the soldier. By the action of the reviewing authority and the subsequent action of the court the soldier was honorably acquitted. While cases of the latter class were less frequent than those of the former, they all indicate

the extremes to which the practice of returning records for reconsideration has been exercised.

Criticism has been offered that the department or division judge advocate, after recommending reference of the charges for trial, acts as trial judge advocate, then returns to headquarters and prepares a review of the case for the department or division commander. Such instances were exceedingly rare in the cases under examination. This practice, however, has existed. Case No. 114492, wherein the assistant division judge advocate acted as trial judge advocate, resulted in acquittal. A review of the proceedings was prepared for the division commander by this same judge advocate, wherein it was set forth that four of the specifications had been proven. Thereupon the case was referred back by the division commander to this self-same officer by indorsement, in practically the same language as was found in the review, with instructions that the court be reconvened for reconsideration of its findings. The court met in revision and adhered to its former finding of acquittal. A subsequent review was prepared by the assistant judge advocate (trial judge advocate), wherein he stated in writing to the division commander that the court erred in adhering to its original findings, and recommended that they be disapproved, which was done by the division commander in his final action on the case, adding that the findings of not guilty by the court on the four specifications in question were without justification.

An other instance in this same division, case No. 114485, resulted in precisely the same action, except that in this case the division commander approved the acquittal after the court had declined upon proceedings in revision to change its original findings.

This unfortunate procedure can not be defended from any standpoint and certainly calls for the adoption of such measures as will prevent the possibility of its recurrence.

If failure to do justice has occurred in the trial court or at the hands of the reviewing authority, it is to appellate power that the soldier must look for relief. What relief on appeal exists and the measure in which it has been exercised has been especially examined into. Appellate review is especially necessary during war, when great latitude is granted courts-martial and reviewing authorities in adjudging sentences by the automatic removal of the presidential order prescribing limits of punishment, and, moreover, the power of execution of death sentences, lodged by law exclusively in the President in time of peace, is extended by the 48th Article of War, in cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies, to the commanding general of the army in the field or to the commanding general of the territorial department or division, who confirms the sentence. Prior to the war, all cases of general court-martial arriving in the office of the Judge Advocate General (and every case must be sent there after final action by the reviewing authority) were carefully examined by a commissioned Judge Advocate for jurisdictional errors (which, if existent at the time, caused the proceedings to be set aside by the Secretary of War), and for errors of law prejudicial to the rights of the accused. In cases of excessive sentences, or where mitigating circumstances appeared within or outside of the record, recommendation was made to the Secretary of War to exercise the power of clemency by remission or mitigation of the sentences. After entrance into the war, and coincident with the raising of the large Army under the draft, errors of law in court-martial proceedings became more frequent, due to the causes heretofore related. The correction of the same by the pardoning or clemency power naturally fails to remove the stigma of conviction. The Acting Judge Advocate General, believing that the power to reverse, modify, and set aside was lodged in the Judge Advocate General by section 1199, Revised Statutes, exercised the same on October 30, 1917, by setting aside the judgments of conviction and the sentences in the cases of the Texas mutineers, on account of prejudicial error due to failure to substantiate, by the evidence of record, the offenses charged. This same power was exercised in several other contemporaneous cases. The Secretary of War held that such power was not to be found in section 1199, Revised Statutes, and prepared a draft of amendment to that section providing for the lodging of the power in the President, and sent a copy of the drafted amendment, on January 19, 1918, to the Military Affairs Committees of the House and Senate, recommending its enactment into legislation. It failed to become a law.

An examination of numerous memoranda bearing the signature of the Acting Judge Advocate General reveals the fact that recommendation was frequently made to the War Department to declare findings null and void. In case No.

107250 the accused challenged one member of the court and the record failed to indicate if he objected to being tried by any other member. The Acting Judge Advocate General recommended "that the findings and sentence in this case be declared void and of no force or effect and that the accused be released from confinement and restored to duty." In case No. 107490 the same recommendation was made, where the court erroneously found a soldier guilty of a lesser included offense, one for which he was not tried, it being held that such irregularity was fatal to the validity of the proceedings of the court. In case No. 107828 the Acting Judge Advocate General recommended that the findings and sentence of the court be declared null and void, where the accused pleaded guilty and was so found to a specification which did not state a military offense. In case No. 107814 the Acting Judge Advocate General recommended that the sentence be set aside and the accused restored to duty, where in its findings the court eliminated certain words in a specification to such an extent that no offense, civil or military, was stated. In case No. 107800 the president of the court made no explanation to the accused as to the effect of his plea of guilty nor advised him of the maximum punishment imposable by the court as required by paragraph 154, Manual for Courts-Martial. The Acting Judge Advocate General held that the requirements of this paragraph can not be ignored without prejudice to the fundamental rights of the accused. It was recommended accordingly that the findings and sentence in the case be declared invalid and the accused released from confinement and restored to duty. To cite other cases would only encumber the record. It should be stated, however, that all of the above recommendations were approved by the Secretary of War.

Another serious matter arose which caused anxiety in the War Department. About the middle of December, 1917, the public press announced the execution of 13 negro soldiers in the Southern Department for murder and mutiny. Their execution occurred within 48 hours after the approval and confirmation by the department commander of their sentences. There was no opportunity for appeal in these cases. This action was denied the accused by their summary execution. The entire action was regular and lawful. No error was later found in the records of trial. The possibilities of injustice, incapable of future correction, were, however, so exemplified in these cases that G. O. No. 169, War Department, 1917, were issued on December 29, 1917, providing that, after the commanding general of a territorial department or division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been received and reviewed in the office of the Judge Advocate General and the reviewing authority 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. Thus the principle of automatic appeal was established, and henceforth all death sentences were stayed until careful review could be had of the records of trial in the office of the Judge Advocate General. About this same time hundreds of cases were reaching the War Department wherein sentences of dishonorable discharge were being imposed with short periods of confinement for comparatively trivial offenses, indicating that a large percentage of the men could be sufficiently disciplined and punished within their organizations during training for active military service without branding the soldier with the stigma of dishonorable discharge and imprisonment and without denying the Government the use of the man power which was so obviously necessary. Therefore, on December 22, 1917, confidential instructions were issued to all general court-martial jurisdictions providing that close scrutiny in all cases be exercised in order that no sentence of dishonorable discharge should be approved where the offender had capacity for military service and where other appropriate form of punishment was sufficient to meet the requirements of the case; and, further, that dishonorable discharge should be imposed only in those cases where the nature of the offenses demanded a long term of confinement in the penitentiary or in the disciplinary barracks and that where dishonorable discharge was not accompanied by a long period of confinement it should be suspended or remitted. (Exhibit 68.)

At the same time, additional measures were being considered in the Office of the Judge Advocate General for safeguarding the rights of the accused, and on January 17, 1918, General Orders, No. 7, were issued, directing that not only the execution of all sentences of death, as provided in General Orders, No. 169, 1917, but also all sentences of dismissal and dishonorable discharge be stayed until the records of trial could be reviewed in the office of the Judge Advocate General and their legality there determined. In the event that the

record was not sufficient to sustain the findings and sentence of the court, provision was made to return the same to the reviewing authority with a clear statement of the error, omission, or defect which was found. If such error, omission, or defect admitted of correction, the reviewing authority was to be advised to reconvene the court for such correction, otherwise he was to 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 might be appropriate in the premises. Provision was made that any delay in the execution of any sentence, by reason of the foregoing, should be credited upon the term of confinement or imprisonment imposed. A branch office of the Judge Advocate General was established in France to consider those cases arising in the American Expeditionary Forces. The order became effective on February 1. The action of the Judge Advocate General was purely one of recommendation. There was no power to compel the reviewing authorities to follow his advice. Since February 1, 1918, the date when General Orders, No. 7, became effective, 212 cases have been referred back to the reviewing authorities under the provisions of those orders. The records indicate that there were only seven instances where the recommendations of the Judge Advocate General were not entirely followed (Exhibit 71). In two of three cases tried in the United States his recommendations were followed in part. In the third case they were disregarded in their entirety. In one of four cases tried in France the recommendations of the Acting Judge Advocate General were followed in part and in the other three absolutely disregarded. One case in the American Expeditionary Forces, No. 118312, where the reviewing authority flatly refused to take the action recommended by the Acting Judge Advocate General of the American Expeditionary Forces was made the basis of a letter from that official on July 11, 1918, stating that if the reviewing authorities are to be free to disregard the advice of his office with respect to the legality of findings and sentences, he was unable to see how the provisions and purposes of General Orders, No. 7, were to be accomplished. Accordingly, on September 11, 1918, the War Department amended General Orders, No. 7, by providing that in the American Expeditionary Forces all sentences of courts-martial or any parts thereof found by the Acting Judge Advocate General to be illegal, defective, or void shall be disapproved, modified, or set aside in accordance with the recommendations of that officer. This order has recently been revoked as being contrary to the decision of the Secretary of War, that the power to reverse, modify, or set aside sentences does not rest with the Judge Advocate General.

During the period February 1 to April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action should be taken where illegality appeared in the proceeedings, but brought to their attention, with a view to mitigation, sentences which were unduly severe.

From April until July it appears that cases were returned only for illegality, but that subsequently the matter of unduly severe sentences again was made the basis for recommendation to the reviewing authorities that the power of mitigation and remission be exercised.

The 1,500 cases selected for examination were chosen as follows: Five hundred immediately prior to the publication of General Orders, No. 7, 500 after the provisions of General Orders, No. 7, were in full operation, and 500 several months later.

The table on page 755 of this report indicates the cases wherein dishonorable discharge was imposed, executed, remitted, or set aside. The following table shows the assignment of these cases to their respective periods:

Dishonorable discharge.

	First period.	Second period.	Third period.
Imposed by the court	230	188	233
Executed	131	84	33
Suspended	47	59	140
Remitted	39	41	46
Set aside	13	4	14

The beneficial results derived from the operation of General Orders, No. 7, are apparent. During the first period, viz, prior to the issuance of General

Orders, No. 7, 58 per cent of the dishonorable discharges imposed by the courts were ordered executed—43 per cent during the second period and only 14 per cent during the third period. On the other hand, 20 per cent of the dishonorable discharges imposed during the first period were suspended, 32 per cent during the second period, and 60 per cent during the third period.

Dishonorable discharge was executed in the following cases:

	First period.	Second period.	Third period.
Murder, attempted murder, manslaughter, or assault	11	1	
Burglary, robbery, larceny, forgery, embezzlement, or fraud	52	46	18
Introducing drugs, immorality, or moral degeneracy	2	3	6
Drunk and disorderly conduct		4	1
Mutiny or sedition	12	2	2
Desertion, absent without leave, escape, or attempted to escape	40	25	5
Sleeping on or quitting post	8		
Disobedience of orders or disrespect	6	3	1
	131	84	33

An examination of the above table will indicate that dishonorable discharge, especially in the third period, could not have been suspended with due regard for the best interests of the service.

In addition to the remission and mitigation of sentences by the convening authorities upon the recommendations of the Judge Advocate General, numerous recommendations were made from that office to the Secretary of War to exercise the presidential power of clemency, and to set aside and declare null and void the proceedings in those cases where illegalities were discovered. Of the 1,500 cases examined, 50 during the first period carrying 162 years of confinement were sent to the War Department with the recommendation by the Judge Advocate General to remit the sentences in whole or in part, with the result that 84 per cent of the years of confinement were remitted. During the second period, 33 cases with 133 years of confinement were forwarded by the Judge Advocate General for presidential action, and, as a result of his recommendations, 91 per cent of the years of confinement were remitted. In the third period, 39 cases with 228 years of confinement were returned to the Judge Advocate General, approving his recommendation and directing that 95 per cent of the years of confinement be remitted. It will be recalled that, during the first period the provisions of General Order No. 7 were not in force, and in the second and third periods that they were in operation. Neither were the boards of review nor the clemency board at this time in existence. Of all cases tried during the war, and forwarded to the War Department with specific recommendations by the Judge Advocate General, either to set aside, modify, or carry into execution the sentences imposed, in only 13 were his recommendations not followed. In three cases the Secretary of War differed from the Judge Advocate General with regard to the points of law involved therein. In four cases there was a difference of opinion as to the propriety of a commutation of sentence. In one case, where the sentence of dismissal was recommended for confirmation, the President, on the recommendation of the Secretary of War, exercised the power of remission. In five cases tried in France, the Judge Advocate General recommended confinement in the United States Disciplinary Barracks, and the Secretary of War directed that the sentence be served at military posts in France. (Exhibit 71.)

On February 13, 1918, the Judge Advocate General, by circular letter to all department and division judge advocates, urged upon them the necessity of thorough investigation of charges before reference for trial, in order that none might be laid which could not be substantiated by sufficient legal evidence; that endeavor should be made to limit the number of trials by general court-martial, and that no case should be tried where the offense could be adequately punished by a minor court or by the administrative punishments authorized by law. They were further urged to guard against ordering offenders to trial who were lacking in mental responsibility. In all cases wherein it appeared that the accused was lacking in physical, mental, or moral equipment as an efficient fighting man, it was suggested that the psychiatrist assigned to duty with their commands be called into consultation for advice. Department and division judge advocates were informed that it was their duty to thor-

oughly study the records of trial, and, where it was found that the accused had within him the elements of service, the following principles should govern in deciding upon the punishment to be awarded in time of war (Exhibit 74):

I. Guardhouses are breeding places for crime. They are not designed to foster self-respect. Men should be kept out of them in all cases except where restraint is necessary.

II. Time spent in confinement is time lost from training. Our task is to turn out in the shortest possible time the greatest possible number of trained men.

III. Whenever and wherever possible, men sentenced to undergo confinement or hard labor should be drilled with their organizations and required to serve punishment when other men are resting or off duty.

Department and division judge advocates were cautioned to make every possible effort to bring those offenders whom it was deemed necessary to try to trial at the earliest practicable date, to the end that the period between arrest or confinement and the date of trial might be held down to the lowest possible limit, and they were enjoined to expedite, in every possible way, the preparation of the records of trial, their review of the same, the action of the reviewing authority, and the forwarding of the records to the office of the Judge Advocate General. So thorough were the instructions given by the Judge Advocate General that responsibility for failure to carry them out certainly can not be charged against the central office. That failure, in some instances, to follow the plain instructions given, existed is indicated by the fact that, on March 22, 1918, the chief of the military justice division, Lieut. Col. E. G. Davis, informed the Judge Advocate General that many judge advocates, officers of the Judge Advocate General's Department, in the field were failing to properly scrutinize charges referred for trial, with the result that many trials were being held on irregular or insufficient specifications. Too many men were being tried by general court-martial whose cases could be properly disposed of by minor courts or by administrative punishments authorized by the one hundred and fourth article of war. The actual trial of cases was in many respects poorly planned; joint offenders were being separately charged and separately tried by the same court, and important cases were frequently referred to incompetent trial judge advocates. Col. Davis further reported as follows (Exhibit 150):

"More important, however, is the evident failure on the part of judge advocates to understand the policy of the department with reference to the conservation of man power. Men are still being tried and dishonorably discharged the service for trivial offenses, which could be otherwise adequately punished. In many divisions there seems to be an unsympathetic use of the power to suspend sentences of dishonorable discharge. It is my view that, during this war at least, in every case where confinement is to be in a disciplinary barracks the dishonorable discharge should be suspended and the officers of the disciplinary barracks made responsible for saying that the man should not ultimately be sent back to serve with the colors."

It was recommended that the closest possible cooperation and understanding exist between the office of the Judge Advocate General and its representatives in the field. Col. Davis explained the necessity for unity of purpose and understanding between the Judge Advocate General's Office and the commanding officers of the disciplinary barracks on the question of restoration to duty, in order that as many men as possible could be given an opportunity to redeem themselves through actual service. He strongly advised that a representative of the Judge Advocate General's Office be sent on a tour of inspection and instruction to the various division and department headquarters, and the headquarters of the several disciplinary barracks. He recommended that no judge advocate be sent thereafter to a division or department until he had received a course of training in the office of the Judge Advocate General. The Judge Advocate General approved the recommendations of Col. Davis, and this latter officer himself was sent on April 18, 1918, to accomplish the purposes above set forth.

On May 5, 1918, the commanding general American Expeditionary Forces cabled the War Department recommending that in order that exemplary action might be taken in said forces, the forty-eighth article of war be amended in such a manner as to authorize him to confirm all death sentences and order their execution, citing the fact that full authority as to death sentences in the French and British Armies was vested in the military authorities. It will be recalled that, under the forty-eighth article of war, the President alone has

power to confirm death sentences, except in cases of murder, rape, mutiny, desertion, and spying, committed in time of war, and in these cases sentences of death may be carried into execution by the commanding general of the army in the field and by the commanding general of a territorial department or division. The Judge Advocate General advised against this action, and, on May 16, 1918, recommended that the commanding general American Expeditionary Forces be informed that the President had decided not to urge upon Congress any extension of the present authority of the commanding general of an army in the field as to such sentences. (Exhibit 151.)

On July 9, 1918, Congress amended the fifty-second and fifty-third articles of war, and thereby authorized the convening authority to suspend the execution, in whole or in part, of any sentence not extending to death, and to restore the offender to duty during such suspension. Authority was granted to remit, in whole or in part, a sentence, or any part thereof, which had been so suspended, except in cases of persons confined in the disciplinary barracks. Authority was granted to vacate such order of suspension at any time, and order the execution of the sentence or the suspended part thereof, in so far as the same had not been previously remitted. The same power, with respect to prisoners in the United States Disciplinary Barracks, was lodged in the President. The War Department thereby authorized the convening authority to exercise a broader policy of suspending sentences and then finally remitting them, and means were thus provided to avoid, as far as possible, the sending of enlisted men to penal institutions with the consequent branding of them with obloquy.

Subsequently, on July 27, 1918, the commanding general American Expeditionary Forces cabled the War Department for authority to commute those sentences which he was authorized to confirm, and also those which it was necessary to forward to the President for confirmation. Theretofore the power of commutation rested solely with the President. The commanding general was of the opinion that the administration of justice would be facilitated by the exercise by him of said power. A number of death sentences requiring confirmation by the President were being imposed in the American Expeditionary Forces, where the offense was not of such character as to justify so severe a penalty, but required a lesser measure of punishment. Great delay would of necessity be caused by transmitting the cases to Washington for presidential review and action. Accordingly, the Secretary of War transmitted, on September 26, 1918, to Congress a draft of amendment to the fiftieth article of war, empowering the President to delegate, whenever he deemed it advisable to do so, the power to mitigate or remit sentences which, under the Articles of War, required his confirmation before execution, to the commanding general of the Army in the field or to the commanding general of a territorial department or division. (Exhibits 142 to 147, inclusive.)

In the early part of August, 1918, there was established in the military justice division of the Judge Advocate General's office a board of review for appellate consideration of the most serious cases. Prior to this time if the case, by reason of error or the seriousness of the offense, required a written review, the same was prepared and submitted to the chief of the military justice division. The function of the board of review, consisting of three specially selected officers, was to consider the case after the first review and before it reached the chief of the military justice division. Due to the rapid increase in the number of cases received in the office, a second board of review was created, and an idea of the thoroughness of appellate examination of records can be had from the following brief outline of the functioning of the office (Exhibits 109 and 154):

The military justice division is divided into eight main sections. Four of these sections have to do with the review of court-martial proceedings in the first instance. As each case arrives in the office of the Judge Advocate General it is assigned, according to its nature, to an officer in the appropriate section, who makes a careful examination of every step in the proceedings. If the case does not fall in the group of those serious ones which require a written review, and if the record is free from error and nothing else is discovered requiring appellate relief, it is initialed by the officer who examines it, and then passes through the chief of section to the files. If the case is one requiring it, a written review is prepared and submitted to the chief of section, who, if he concurs, forwards it to the proper board of review. These two boards are sections of the military justice division. The board of review may adopt the preliminary review as its own, may modify or rewrite it, or may direct that it be modified or rewritten so as to express its views. Each member of the board must concur

in the approval of the opinion, or note his dissent before the review is transmitted to the chief of the division of military justice. Any dissenting member may indicate the reasons for his dissent, either orally or in writing, to the chief of the division, and, when he so desires, to the Judge Advocate General. The approved opinion must be passed upon by the chief of the military justice division before it reaches the Judge Advocate General. In cases of death, or of dismissal of officers, the record is frequently examined and reviewed independently by two sectional officers before being passed through the chief of section to the appropriate board of review. A more thorough system of appellate review would be difficult to find. Every court-martial case receives appellate review automatically, and through no initiative or act of the accused.

How carefully the interests of the accused are guarded by the review of the records of trial, and how thorough is the examination of the cases in the office of the Judge Advocate General, is indicated in No. 107387. In this case it was discovered that, in relieving and adding members of a general court-martial in a certain department, due to transfer from that department of officers destined for service abroad, one general court-martial had in its composition at the date of trial 14 members, 1 in excess of the number allowed by law, although but 10 officers were actually present for duty in the department at the time. The defect was not discovered by the court, the trial judge advocate, the counsel for the defense, or the department judge advocate. Although the accused was guilty of a serious offense and sentenced to dishonorable discharge with three years' confinement, the Judge Advocate General recommended to the Secretary of War that the findings and sentence be declared null and void and that the accused be released from confinement and restored to duty. The recommendations of the Judge Advocate General were approved.

The average time required after final action by the reviewing authorities for the cases to reach the office of the Judge Advocate General was 18.1 days. Cases tried in the Philippine Islands, Panama, China, and France entered into the computation of this average. During the first period the average time was 16 5 days. As the number of troops in France increased, the average time required for all records to reach the Judge Advocate General's office became greater. In the third period the average time was 22.9 days. It will be recalled, however, that, in aid of the revisory power, a branch of the Judge Advocate General's office was established in France by General Orders, No. 7, January 17, 1918, and that the cases arising in France received their first review in that office. From the foregoing it appears that no great amount of time intervenes before automatic review of trials takes place, and the accused is not compelled to remain long in confinement pending action on his case by the Judge Advocate General.

The clemency and restoration section considers all appeals by prisoners, their relatives or friends, for clemency or restoration to the colors, and prepares in writing for the head of the division its recommendations upon such appeals. Every soldier in the disciplinary barracks is entitled to apply for clemency once every six months. His relatives and friends can apply for the same at any time. This is in addition to the automatic appellate review above referred to. The clemency and restoration section also considers recommendations for clemency referred to it by officers of other sections of the military justice division, who, in reviewing a case as to its legality, believe it to be a proper one for the exercise of clemency.

That many cases of excessive punishments were permitted to stand, even after review, in the office of the Judge Advocate General, no recommendation for the exercise of the power of clemency having been made, is true. The clemency board, composed of three officers best suited to carry out its purposes, is actively engaged in reviewing sentences imposed for offenses committed during the war period, with a view not only to equalizing punishments but to adjust said punishments to present disciplinary requirements.

An examination of the sentences imposed during the periods from which the cases were selected indicates some instances wherein heavy punishments were awarded. Some of these sentences were mitigated by the reviewing authorities. Others were permitted to stand. Some were completely set aside. In case No. 108973, where the accused was found guilty of desertion, advising another to desert, attempt to kill, and for carrying a concealed weapon, a sentence of 20 years' confinement was imposed. The reviewing authority, after stating that the judge advocate had erroneously introduced in evidence in a capital case testimony taken before another court-martial in a former and uncom-

pleted trial of the case, and that this action resulted in a complete miscarriage of justice, disapproved the sentence and restored the accused to duty. Instances have been frequent where sentences of long duration have been materially reduced by the reviewing authorities. In many instances sentences of 10 years were reduced to as low as six months. In cases Nos. 114221 and 114398, sentences of 15 years, and in case No. 114364, one of 20 years, were reduced to six months. On the other hand, cases have been cited in the public press—and there are unquestionably others which have not been published—wherein the sentences imposed and approved have been severe beyond all reason. Sentences of undue length have been imposed and permitted to stand when it was known that the offender would never serve more than a small fraction of this imprisonment. The sentences were undoubtedly given for their deterrent effect. The offenses towering above all others wherein unusually heavy sentences were imposed were those of desertion and absence without leave. It is interesting to note in this connection that various expediencies were resorted to in order to prevent these serious offenses, committed, many of them, upon the eve of departure of organizations for France. In one division, in the month of January alone, the number of desertions was 234. The division commander was unusually successful in reducing the number of desertions in the succeeding months. In his report he stated as follows:

"I always approve severe sentences for desertion but reduce the severity when it is shown that the man voluntarily returned. These cases are published to the command. I also make an effort to have all of these cases published in the newspapers, so that the soldiers' relatives and friends can be made to realize the seriousness of desertion in time of war."

The following table indicates the number of cases of desertion in the period January 1 to August 18, 1918, the date of the division commander's report:

January	234
February	82
March	80
April	91
May	67
June	46
July	30
Aug. 1–18	21

As a result of an investigation made by an officer of this department and from his report, dated January 18, 1919, it appears that, from the establishment of the stockade at the Port of Embarkation, Hoboken, N. J., in April, 1918, to November 13, 1918, two days after the signing of the armistice, 9,280 enlisted men were confined therein. The stockade was constructed on account of the alarming increase in the number of absences without leave. One regiment alone departed for overseas service leaving 400 men behind absent without authority. One company had 25 absentees at the date of departure. Before the establishment of the stockade, one soldier absented himself six successive times from as many different casual organizations bound for overseas service. This will give an idea of the difficulties under which the War Department was laboring, due to the frequency of soldiers deserting their commands or absenting themselves therefrom on the eve of departure overseas.

In case No. 120910 the accused was tried (at Camp Gordon, Ga.) for twice absenting himself without leave, for breaking arrest before he was set at liberty by proper authority, all this in spite of the fact that his organization had been instructed to hold itself in a constant state of readiness for overseas service. He pleaded guilty to these offenses, and the only defense offered by him was in the following words:

"I just want to make a statement without being sworn. I went home for the purpose of seeing my father, mother, and sister. I was likely to never see them any more. That is all, I reckon."

He was found guilty and sentenced to dishonorable discharge, and, in addition, to 10 years' confinement. The convening authority approved the sentence of confinement but suspended the dishonorable discharge, and the soldier was sent to the United States Disciplinary Barracks, Fort Leavenworth, Kans. The accused was 30 years of age. After serving five months of his confinement the commandant of the United States Disciplinary Barracks recommended a remission of eight and one-half years of his sentence. The clemency board in the office of the Judge Advocate General recommended restoration to duty.

The Adjutant General concurred in the recommendation of the commandant and recommended that eight and one-half years of the sentence be remitted and that the matter of restoration be allowed to take its normal course. A member of the clemency board stated, in writing, as follows:

"The man ought to be restored at once, first, because apparently he ought never to have been tried at all, and, secondly, because according to every conception of natural justice he has long since expiated his offense. His offense was not serious at the worst. He was absent without leave less than three days, and the memorandum sheet shows that he broke arrest and went absent without leave for the purpose of telling his parents and sisters good-by. He pleaded guilty to these offenses. He had been in the Army but one month when he committed this delinquency. Justice requires that he be restored, and it is only an adherence to routine and mere formalism that suggests that he should be retained longer for the purpose of determining whether he should be restored or not. The whole truth of the matter is the military authorities should never have put him in a position where he would have to be restored. He should have been with the colors all the time. Administration that balks at immediate restoration is the kind that brings military justice into disrepute."

There is nothing in the record, except the unsworn statement of the soldier, to indicate that he went home to say good-by to his father, mother, and sister. On March 4, 1919, six months after the soldier's trial, his father made affidavit in connection with an application for restoration of his son to duty. He stated as follows:

"Just prior to his desertion from Camp Gordon he came home, and deponent undertook to quiet him and explain to him the situation with reference to his duties and the reasons why he should remain with his company, and that his said son resolved firmly that he would stay with them, but in the opinion of deponent as the time approached and he heard the boys talking his fear became uncontrollable. He further says that the practice on the rifle range completely unnerved him, and his son told deponent that he just could not stand it, and his mental condition was very bad."

The Secretary of War concurred in the recommendation of the clemency board, and the soldier, on April 11, 1919, was restored to duty.

The treatment of military offenders at the Disciplinary Barracks is so closely associated with the system of military justice that a brief outline of the functioning of the Atlantic branch, based upon a report from the commandant of that institution, dated April 15, 1919, will be set forth. (Exhibit 148.)

Every military prisoner, upon admission to the Disciplinary Barracks, is given a thorough mental and physical examination. Every possible source of information is made use of to obtain a complete history of the offender, so that, at the end of a month or six weeks, a reasonably accurate estimate of the soldier, his ability and requirements, can be arrived at. Some offenders are mentally deficient, such as the insane, the epileptic, the feeble-minded, and those addicted to drugs and alcoholics. Others show character defects, or inability to adjust themselves to any environment, as shown by truancy in school life and lack of persistence in employment.

The treatment of the military offender in the Disciplinary Barracks has a twofold object, first to return him to the colors a better soldier, and secondly, if unfitted for military service, to return him to civil life, if possible, a better citizen.

Any prisoner, regardless of his offense or length of his sentence, is eligible to the disciplinary battalion, if, after a thorough study of his case, he appears capable of being reclaimed to the military service. The battalion is removed from the general barracks population, and is quartered in a cantonment building. This building has neither bolts nor bars. The battalion cooks and serves its own rations and does its own guard duty. It is under the supervision of one commissioned and several noncommissioned officers. The discipline in the battalion is very strict, yet the members are given considerable liberty. If, after three months' intensive military training, a member of the battalion is certified as capable of taking his place in a regular military organization, he is recommended for restoration to the service.

The numbered men consist of those whose examinations show that they are not desirable for the disciplinary battalion, although some, after further observation, may prove to be so. The treatment of these men is along educational and vocational lines. Classes are conducted by experienced Y. M. C. A. teachers.

In connection with the educational system, an honor system has been instituted among the prisoners. A recognized organization with the better element

of the prisoners in control, subject to the supervision of the officers, was created. The lawless and antagonistic element is placed at a disadvantage. The association has its rules and regulations and its tribunals for trial. Privileges are the reward for good conduct and punishments are the penalty for misbehavior. Every new arrival is met by a member of the Honor Association. Previously, the disgruntled and antagonistic element was the first to approach the newcomer. Recently the honor committee notified the commandant that the organization was having some difficulty with its offending members, who preferred trial by the prison court instead of by the honor court. Recommendation was made that the punishment prescribed by the former be made equal in severity to that of the latter. The commandant reported as follows:

"It is possible, and has happened, that prisoners sentenced to serve upward of 20 years have been restored to the colors in fewer months. In fact, it is possible for a prisoner with a life sentence to be restored to a regular organization in five months. In the case of numbered men, recommendations for their release have been made for various reasons—on account of youth, mental inferiority, inadequate personality, nervous instability, and the financial condition of their dependents—so that in the case of these prisoners, as well as the battalion men, the sentence really cuts but little figure. This practice of recommending prisoners for release, as outlined above, was the general policy of this institution months before the present clemency board was appointed.

"As a matter of fact, we are confronted by a much greater administrative problem by the short sentences now imposed than by the longer ones. Men with short sentences are generally apathetic as to restoration. Six months' sentence, with good-conduct time deducted, releases a man by expiration of his sentence in five months, too short a time for the corrective and disciplinary measures applied to him to become sufficiently effective to warrant restoration. A shorter sentence than six months, and some are shorter, practically precludes the possibility of extending restoration. * * *

"No man shall be sent to the disciplinary barracks for a shorter period than one year. Men with longer sentences have something definite to work for, which is not the case with shorter-term men. The longer sentence awakens the prisoner to a healthy, laudable endeavor, while the shorter sentence stifles ambition. The short-term prisoner sits back and waits for the end of his term, appeals to work for restoration fall on deaf ears, and the morale of the institution is, in consequence, lowered."

The Honor Association of prisoners concluded a recent review of the objects and results of their association in the following language:

"We owe a debt of gratitude to the officials of this institution for the assistance they have rendered us in accomplishing our ideal, and we sincerely hope that the facts and conditions as described in this article will serve as an inspiration and incentive to the inmates and officials of institutions of similar character throughout our beloved United States."

The location of the United States Disciplinary Barracks is at Fort Leavenworth, Kans., to which in far the greater number of prisoners is sent. One branch, the Atlantic, is situated at Governors Island, N. Y.; another, the Pacific, is established at Alcatraz, Calif. The number of men restored to duty during the 12 months ending April 17, 1919, at each place was as follows (Exhibit 149):

Original length of sentence and number of men restored and average time actually served to restoration.

Year.	Fort Leavenworth Barracks.		Atlantic Branch.		Pacific Branch.	
	Number restored.	Average time.	Number restored.	Average time.	Number restored.	Average time.
		Months.		*Months.*		*Months.*
1 to 2	190	6	48	7	69	7
2 to 3	93	7	51	8	35	9
3 to 4	10	9	43	8	11	8½
4 to 5	103	8	8	8	2	10
5 to 10	111	8½	70	7	23	9
10 to 20	51	8	6	6	4	11
Over 20	32	8	1	5	1	1

For the fiscal year ending June 30, 1918, the number of men restored from Fort Leavenworth was 374, of whom only 24 were reported as failures.

The following table prepared by The Adjutant General indicates the extent to which the power of executive clemency has been exercised as a result of the operation of the clemency board in the office of the Judge Advocate General. It covers a period of seven weeks immediately prior to April 26, 1919. (Exhibit 152.)

	Fort Leavenworth Barracks.	Atlantic Branch.	Pacific Branch.	Penitentiary.	Posts.	Total.
Unexpired part of sentence remitted	668	53	11	25	2	759
Portion of sentence remitted	1,373	95	67	103	1	1,639
Restored to duty	351	49	13	7	1	421
Discharged (A. R. 139)	60	5	1			66
						2,885
Transferred from penitentiary to Disciplinary Barracks	12					
Transferred from penitentiary to Disciplinary Barracks and part of confinement remitted	45					57
Total						2,942

It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose. That these instances have occurred is partly due to the failure of the Articles of War, and the machinery provided by law for the administration of military justice, to completely function in the rapid assembling of an army, undisciplined and uninstructed, of several million men. Whatever injustice has been done is now being remedied in so far as it is possible to do so in the absence of legislative action. That such legislation is necessary to prevent like injustice in the future can not be denied. This matter is now receiving the attention of able jurists within and without the army, and it is believed that, in the light of the experiences of the recent war, the military code can, without a great deal of legislation, be made proof against those pratices which have been shown to be unjust.

III. ANSWERS TO THE QUESTIONS IN THE MEMORANDUM OF THE SECRETARY OF WAR.

"(1) What machinery was organized in the Office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?" (Exhibit 1.)

This question is fully answered on pages 51 to 53, inclusive, of this report. An early review of court-martial records has always been provided in the office of the Judge Advocate General, with a view to detection of error in the proceedings, and to discovering such facts as call for the exercise of executive clemency. Formerly, the review was made by an officer of the Judge Advocate General's Department, who made his recommendations to the divisional chief or directly to the Judge Advocate General. Later boards of review were created, thereby insuring a greater thoroughness of the examination of records of trial. No act of the accused is necessary to insure review of his trial record. The review is, and always has been, entirely automatic. The Judge Advocate General is not limited to the evidence of record in the appellate review.

The establishment of the clemency board provides means for the consideration of records of trial subsequent to their original review in the office of the Judge Advocate General, and also, and in connection therewith, those facts existing prior or subsequent to trial, which called for the exercise of executive clemency. The conduct of the accused at the Disciplinary Barracks or penitentiary has great weight in arriving at the recommendations to be made to the Secretary of War. This review is in part automatic in the sense that many cases are considered without initiation on the part of the accused. The latter has always had the privilege of submitting an application for clemency every

six months, and at any time he had new matter to present which warranted consideration. The machinery in the office of the Judge Advocate General has functioned effectively in accomplishing its purpose.

In a memorandum, dated February 19, 1918, for Capt. K. S. Wallace, War College, dictated by Gen. Ansell and signed by Lieut. Col. R. P. Spiller, Gen. Ansell, referring to the functions of the Judge Advocate General's Department in connection with the present war, states:

"Fundamental rights are involved. Military jurisdiction is to be exercised with care and caution, yet with cautious regard which must be exercised with certainty and assurance. This office has called to its aid some of the most distinguished lawyers of the country. * * *

"But it is as a bureau of military justice that the functions of the department touch personally and individually each officer and enlisted man of the establishment. The rights, duties, and obligations of all military persons are established and regulated by a military code consisting of both written and unwritten law. A member of the establishment is required to conform not only to this special code, but also the general law of the land, and such conformity may in a general way be designated as discipline. Discipline is maintained in the last analysis by the exertion of military power through regularly established military tribunals which function in accordance with a penal code, technically known as the Articles of War. This code is enacted by Congress under its power to make rules and regulations for the government of the Army. An offender against it is charged, arrested, tried, sentenced, and punished in strict accord with the articles. The code is a complete code of penal law, both substantive and adjective. Discipline must be maintained in strict accordance with the code, and with justice.

"The proceedings of every case tried by court-martial must be accurately and completely recorded and forwarded to the office of the Judge Advocate General for review, and that authority makes necessary revision in order that justice may be done every accused man. All human tribunals are imperfect, and especially imperfect will be the military tribunals of our newly created Army. The officers constituting the court have not been experienced in the school of war and in military law, but have only recently come from civil life. Besides, this is the first democratic Army that America has ever raised. Its members come from the fields and the factories, from every class of society, and from every walk of life. Both officers and men alike are uninured to military methods and requirements. The spirit of such an Army is bound to be of the highest quality, notwithstanding there will be abundant opportunity for the exercise of authority upon the part of those who have it, and for numerous infractions of discipline upon the part of men who have had no opportunity to acquire the necessary appreciation of discipline. Courts-martial may be expected to be rather frequent and errors in procedure numerous. The review enjoined by law to be carried out in the office of the Judge Advocate General must be made with all the more cautious regard for the rights of individuals so strangely circumstanced in a new institution. This the people will demand; this, in justice to the Army and the individuals thereof, this office must do; and this this office is equipped to do."

Gen. Ansell, in his report of July 8, 1918, relative to his trip abroad, stated:

"In passing I should like to say, and, considering the nature of this report I think that with entire propriety I may say, that as a result of my observations and study here I have been surprisingly struck with the provision with which the office of the Judge Advocate General of our Army has been administered for the past several years, including the period of this war. Without particular opportunities for so doing, and without the advantage of actual war experiences had here, it has anticipated necessities of administration which as a rule only experience develops; and, more remarkable still, there is a surprising consonance between the principles of administration which our office had recommended to be adopted and which doubtless in the end will be adopted in the department and those principles which are found to be an approved basic part of the military administration of the allied nations."

It would appear from these statements that at the time they were written, viz, February and July, 1918, Gen. Ansell had full confidence in the military code and in the ability of the Judge Advocate General's Office to protect the interests of the Army.

It is pertinent to here state that the present military code enacted in 1916 is substantially the same as that which on February 6, 1914, was reported to the Senate by the Senate Committee on Military Affairs. In that report the

Senate Military Affairs Committee adopted the unanimous report of its subcommittee which, in conclusion, stated as follows:

"Convinced that the revision embodies many essential reforms in our military law, and that it presents an *adequate and modern military code*, your subcommittee earnestly recommends that the project, as set forth in the amended draft, be recommended for enactment."

"(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?" (Exhibit 1.)

The difference of opinion concerned only a question of statutory construction. There has never been a controversy in the office of the Judge Advocate General over the necessity for exercising as complete a revisory or appellate jurisdiction over courts-martial as was possible without interfering with the necessary disciplinary powers of officers commanding, and therefore responsible for the discipline of, troops.

For a long time after, and in spite of, the adverse ruling by the Secretary of War in November, 1918, Gen. Ansell persisted in his view, under his "reinterpretation" of an old statute, that the Judge Advocate General was the only lawful court of last resort in all court-martial cases, and as such supreme—not subordinate even to the Secretary of War or the President. That view he pressed upon his subordinates while they were acting under General Orders, No. 7. These orders he insisted were wrong in legal principle. This persistence in opposing the announced and final decision of the Secretary of War was marked, and continued with gradually decreasing obtrusiveness until Gen. Ansell departed for Europe in April, 1918. Gen. Ansell's assertion that, during this period, he was relieved from duty in connection with the administration of military justice is not based upon fact. He never was so relieved, nor were his duties in the Judge Advocate General's Office ever curtailed in the slightest degree by the Secretary of War, the Chief of Staff, or the Judge Advocate General. While it is true that, in November, 1917, the Secretary of War was desirous, and expressed the hope, that Gen. Crowder might give more of his time to the office of the Judge Advocate General, it has been seen that the duties of the Provost Marshal General's office prevented. From February until April, 1918, Gen. Ansell's duties and authority remained undiminished, except in so far as he voluntarily failed to have anything whatever to do with the operation of General Orders, No. 7.

Upon his return from Europe in July, Gen. Ansell gave the provisions of General Orders, No. 7, the same liberal interpretation that prevailed when the orders first became effective. While the provisions of General Orders, No. 84, were contrary to the interpretation of section 1199, Revised Statutes, as approved by the Secretary of War, the administration of military justice did not suffer during the period that those orders remained in force.

Until recently, what was first a mere difference of opinion went no further. The opposing views were urged with force, but with dignity. Such opposition as existed was an opposition of opinion, of judgment, and not of personality. There was no diffusion of energies nor conflict of loyalties. The work was carried on with marked diligence and unanimity of purpose by all concerned.

The disagreement did not at any time affect the functioning of the machinery to which it related. It is clear that all the recommendations of Gen. Ansell received most careful consideration by the War Department and there has not been a single instance, except with respect to section 1199, Revised Statutes, and the fiftieth article of war, where his recommendations on matters of policy relating to the administration of military justice have not been adopted in whole or in part.

Recently, there has developed, among the officers now in the Judge Advocate General's Office, a feeling of resentment over the one-sided and unfair discussion of the whole matter in the public press. The testimony to that effect comes in part from officers who concur, or at least concurred originally, in Gen. Ansell's construction of the statute. Most of those officers are lawyers who left positions of prominence at the bar, on the bench, or the faculties of colleges of law to accept their commissions. They have labored with unceasing diligence. They have reviewed all of the thousands of general court-martial cases. Needless to say, not being military men, their intellectual medium of examination, their standard of justice (if there is more than one such standard), has been that of the civilian rather than the soldier.

Feeling as they do that they have accomplished their mission, which has been to prevent injustice, they do not take kindly to an attack from any

source, especially from the man who, more than anyone else, has directed their energies. They frankly point out certain errors and weaknesses of the system. What they resent is the fact that, so far, those errors and weaknesses, the existence of which has been demonstrated by the war, have been the only aspect of the situation which has been presented to the public by their own chief; by that one of their number who, more than any other, was qualified to speak of the good points of the system as well as the bad. But this feeling of resentment, now existing, is restrained and repressed. Its effect, if any, on the work of the office is negligible.

Gen. Crowder did not let the difference of opinion interfere with his sense of duty and justice to Gen. Ansell, as is indicated in his letter of January 2, 1919, to The Adjutant General, recommending Gen. Ansell for a distinguished-service medal as follows (Exhibit 153):

"I recommend that Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, United States Army, be presented the distinguished-service medal for exceptionally meritorious service to the Government as acting head of th Judge Advocate General's Department during this war.

"Gen. Ansell's services have been, in my judgment, preeminently of the kind that the statute contemplates thus to be awarded. His duties have been of fundamental importance and great responsibility, and he has shown himself exceptionally qualified in the performance of them. His legal ability, his general qualifications and attainments, his personality, energy, and capacity for scientific organization and vigorous administration, his judgment and prevision, enabled him at the outset to appreciate and encompass the legal duties involved in the raising, maintenance, and administration of a vast military establishment, and to organize the department for the proper performance of those duties. Those same qualities have enable him at all times to perform them in a way that has appreciably contributed to victory.

"His hundreds, even thousands, of thoughtful opinions on the records of the departmet show that he has been a powerful instrument in aiding in the organization of the new establishment within the law, in keeping it within its proper relation to civil instructions and the law of the land, in conforming military administration to the requirements of law, and in maintaining law and justice within the Army. This he has done without placing impediments in the way of rightful administration, but instead, such administration has been given legal direction and effectual impulse."

He then related in detail those accomplishments of Gen. Ansell which were the basis for the above remarks.

"(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the Office of The Judge Advocate General?" (Exhibit 1.)

The disagreement has had no effect upon the presentation of facts to the Secretary of War. It has, however, created in the minds of the public incorrect ideas as to the administration of military justice. During the entire controversy, until the occasion of the appearance of Gen. Ansell before the Senate Military Committee, the records are free from intemperate language or apparent disposition to question honesty of purpose. In giving to the Senate Military Committee, and thereby to the public, full and complete information, and expressing his views fully and freely, Gen. Ansell performed his full duty and rendered a real service to the Army and to the country. In his testimony before the Senate committee and in his letter to Representative Burnett, Gen. Ansell made statements, some of which were exaggerated and misleading, and without apparent cause or provocation referred to the Judge Advocate General, the Chief of Staff, and the Secretary of War in terms which were intemperate, direspectful, and insubordinate. His letter to Representative Burnett was admittedly called forth by criticisms of Gen. Ansell made by Mr. Burnett on the floor of Congress. With respect to the exchange of these personal recriminations between Gens. Crowder and Ansell, unfortunate as they are, the public is not concerned. They are not covered in this report. The public has been misled by Gen. Ansell's magnifying certain admitted defects in isolated cases, as a result of which the administration of military justice has been brought under severe criticism, some of which is, but most of which is not, deserved.

"(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective organization may be made of all the forces of the Judge Advocate General's Office for the performance of its duties." (Exhibit 1.)

There have been no defects of administration or conduct which should be called to the attention of the Secretary of War, requiring any change in the organization of the Judge Advocate General's Office for the performance of its duties.

J. L. CHAMBERLAIN.

WAR DEPARTMENT,
Washington, May 12, 1919.

From: The Secretary of War.
To: The Inspector General of the Army.
Subject: Investigation of controversies pertaining to the office of the Judge Advocate General.

I return herewith the report of the Inspector General of the Army, dated May 8, covering the investigation of controversies pertaining to the office of the Judge Advocate General, directed by my memorandum of March 7, 1919.

This report is thoroughgoing and complete and deals in the most satisfactory way with all the questions submitted. It should be filed in the office of the Inspector General to be available for use in connection with the various studies now being made by agencies created by the War Department and by outside bodies with a view to suggesting betterments in the substance and administration of military law. Pending the completion of those studies and the presentation of the matter in full to the Congress, no present action will be taken upon the report.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 1.

WAR DEPARTMENT,
Washington, March 7, 1919.

Memorandum for the Inspector General.

Certain controversies have arisen with regard to the presentation of facts growing out of the administration of military justice to the Secretary of War and with regard to the administration of military justice itself in the office of the Judge Advocate General during the war. It may be roughly said that these controversies began with the presentation of a brief in behalf of a certain construction of section 1199 of the Revised Statutes of the United States by Gen. Ansell and reply brief thereto by Gen. Crowder. The legal question involved in that difference of opinion was definitely settled by the Secretary of War and need be given no consideration in the inquiry which you are herein directed to make.

It is conceded that the curative power of clemency existed in the President and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's office for recommendations growing out of their examination of records of court-martial trials. I therefore desire to have you conduct a thorough investigation into the following questions:

(1) What machinery was organized in the office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?

(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?

(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the office of the Judge Advocate General?

(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective reorganizations may be made of all the forces of the Judge Advocate General's office for the performance of its duties.

In making the foregoing inquiries you will proceed on the fact that I recognize fully the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee

of the Congress, and do not desire any adverse inference to be drawn from the fact of such testimony where it is frank and straightforward.

Please proceed with the inquiry at your earliest convenience and report the facts in full to me.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 2.

MARCH 8, 1919.

Memorandum for Brig. Gen. S. T. Ansell.

I have been directed by the Secretary of War to investigate certain controversies which have arisen in the Office of the Judge Advocate General with regard to the administration of military justice during the war.

In making this investigation I shall proceed on the fact of full recognition of the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee of the Congress, and no adverse inference will be drawn from the fact of such testimony when same has been given in good faith.

At the time that your testimony was given before the Military Committee of the Senate I was absent from Washington—ill in Florida. I therefore have almost no information as to the controversy as it appeared in the public press, but from comments which have appeared I judge that there have arisen certain questions as to facts. All such questions will be fully considered in this investigation. The investigation will also embrace generally the administration of the Judge Advocate General's department in so far as same pertains to matters of military justice.

Conceding that the curative power of clemency exists in the President and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's office for recommendations growing out of their examination of records of court-martial trials, information is requested as follows:

1. What machinery has been organized during the present emergency in the Office of the Judge Advocate General for the consideration of records with a view to making appropriate recommendations for clemency?

2. Has such machinery functioned satisfactorily and effectively? If not, wherein has it failed, and reasons for same?

After examining the records in the case I will take the matter up with you with a view to clearing up any disputed points. In the meantime, if you desire to submit any statement, I should be glad to have it. I should also be glad to have any information, written or otherwise, which may bear upon this controversy, as well as the names of any witnesses who may have information of value.

J. L. CHAMBERLAIN,
Inspector General.

EXHIBIT 3.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 10, 1919.

Memorandum for the Inspector General of the Army.

Responding to your memorandum of the 8th, I beg to say:

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

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

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

War Department or any bureau of it, and which are entirely beyond your legal competency.

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

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

S. T. ANSELL.

EXHIBIT 4.

Record of a general court-martial convened at Fort Bliss, Tex., pursuant to paragraph 13, Special Orders, No. 240, Headquarters, Southern Department, August 31, 1917, in the cases of various noncommissioned officers and privates charged with mutiny. Trial was held September 17, 1917, at Fort Bliss, Tex. Sentences approved October 16, 1917, by Maj. Gen. John W. Ruckman, National Army, commanding:

General Court-Martial Order No. 1174.

HEADQUARTERS SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex., October 16, 1917.

Before a general court-martial which convened at Fort Bliss, Tex., pursuant to paragraph 13, Special Orders, No. 240, Headquarters, Southern Department, August 31, 1917, were arraigned and tried:

Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Orel Perrier, Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, 18th Field Artillery.

Charge: Violation of the sixty-sixth article of war.

Specification: In that Sergts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Oral Perrier, Corpls. Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, 18th Field Artillery, acting jointly, and in the pursuance of a common intent, did, at Camp Fort Bliss, El Paso, Tex., on or about the 22d day of August, 1917, voluntarily join in a mutiny which had been begun in Battery A, 18th Field Artillery, against the authority of First Lieut. Harry A. Harvey, the commanding officer thereof, and did refuse to assemble for drill.

PLEAS.

Each: To the specification and charge, "Not guilty."

FINDINGS.

Pvt. Clarence Maheu, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Calvin Kunselman, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Ralph K. Green, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Wilfred Kight, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. John J. Poryanda, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Frank J. Adamik, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. John Van De Vooren, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Orel Perrier, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Not guilty."

Pvt. Andrew J. Brown, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Wilburn L. Monson, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Not guilty."

Pvt. Henry C. Park, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Not guilty."

Pvt. William F. Hess, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Not guilty."

Pvt. Roger Graves, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Guilty."

Pvt. Rupert P. Orndorff, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Guilty."

SENTENCE.

Pvts. Clarence Maheu, Wilfred Kight, and Frank J. Adamik, Battery A, Eighteenth Field Artillery, each 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 seven years.

Pvts. Calvin Kunselman, Ralph K. Green, John Van De Vooren, Andrew J. Brown, and Rupert P. Orndorff, Battery A, Eighteenth Field Artillery, each 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 four years.

Pvt. Roger Graves, Battery A, Eighteenth Field Artillery, 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 three years.

Pvt. John J. Poryanda, Battery A, Eighteenth Field Artillery, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentenec, and to be confined at hard labor at such place as the reviewing authority may direct for five years. (Three previous convictions considered.)

And the court therefore acquits the accused Pvts. Orel Perrier, Wilburn L. Monson, Henry C. Park, and William F. Hess, all of Battery A, Eighteenth Field Artillery.

In the foregoing case of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Andrew J. Brown, Roger Graves, and Rupert P. Orndorff, all of Battery A, Eighteenth Field Artillery, the sentence of each is approved and will be duly executed. The United States Disciplinary Barracks, Fort Leavenworth, Kans., is designated as the place of confinement. The acquittal in the case of Pvts. Orel Perrier, Wilburn L. Monson, Henry C. Park, and William F. Hess, all of Battery A, Eighteenth Field Artillery, is approved (201, J. A., S. D.).

By command of Maj. Gen. Ruckman:

MALVERN-HILL BARNUM,
Colonel, General Staff, Chief of Staff.

Official:

RALPH HARRISON,
Colonel, Adjutant General.

EXHIBIT 5.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, October 30, 1917.

Memorandum for The Adjutant General.

Subject: Trial of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Orel Perrier, Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, Eighteenth Field Artillery.

1. The men named above were tried by a general court-martial at Fort Bliss, Tex., September 17, 1917, for violation of the sixty-sixth article of war. There was but one specification under the charge, in which it is alleged that these men "acting jointly and in pursuance of a common intent did, at Camp Firt Bliss, El Paso, Tex., on or about the 22d day of August, 1917, voluntarily join in a mutiny which had been begun in Battery A, Eighteenth Field Artillery, against the authority of First Lieut. Harry A. Harvey, the commanding officer thereof, and did refuse to assemble for drill."

The first eight of the accused were sergeants at the time of the commission of the alleged offense and the remainder were corporals, but between the date of the charges and the date of trial a regimental order had been issued reducing all of them to the grade of private. A copy of this order was introduced in evidence and made a part of the record, and they were found and sentenced as privates. The court found Pvts. Maheu, Kunselman, Green, Kight, Poryanda, Adamik, Van De Voren, Brown, Graves, and Orendorff guilty as charged, and found Pvts. Perrier, Monson, Park, and Hess not guilty. The court pronounced sentence as follows:

Pvts. Maheu, Kight, and Adamik "each 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 seven years."

Pvt. Poryanda to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for five years.

Pvts. Kunselmn, Green, Van De Vooren, Brown, and Orndorff to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for four years.

Pvt. Graves to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for three years.

Pvts. Perrier, Monson, Park, and Hess were acquitted.

The reviewing authority approved the finding, sentences and acquittal, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kans., as the place of confinement (G. C. M. O. No. 1174, Headquarters Southern Department, Fort Sam Houston, Tex., Oct. 16, 1917).

2. A simple narrative, gleaned from the record, of the events leading up to and constituting the alleged mutiny may be stated as follows: On the evening of August 21, 1917, Capt. Harry A. Harvey was the commanding officer of Battery A, Eighteenth Field Artillery, the organization to which these men belonged. About 7.15 or 7.30 of that evening Capt. Harvey in passing through the streets of his battery noticed, as he states, that practically all of the men present in the battery at that hour were congregated around a "crap game" in the battery street. The number of those actually playing does not appear; neither does it appear that there was any disturbance or disorder as a result of the game. He stopped this game and ordered all the men then present in the battery to go to bed and put out their lights. He further placed, not only these men, but all other men of his battery in arrest, whether present or not, and appears to have directed that as fast as the men returned to camp they should be directed to report to their tents in arrest. The only justification found in the record for this extraordinary action on the part of Capt. Harvey is contained in this statement, made by him while testifying as a witness:

"The reason was—I would like to change that last. There were two reasons: First, that I might get the battery together and have all the men present the next day, and, second, to prevent a recurrence of a rather general disorder and fight which had occurred two nights previous to this between mine and the adjoining battery, which had required the personal attendance of the officer of the day and the commanding officer of Battery B, which kept the latter up

until about 3 a. m. of that morning, and finally necessitated his putting a guard on with night sticks."

There is no allegation and nothing in the record upon which to found a belief that the noncommissioned officers who were tried and convicted, as above set out, were engaged in this disturbance that Capt. Harvey referred to, or that they were participants in the "crap game," which seems to have been the immediate cause of the general arrest ordered by him. It clearly appears from the record that he intended to include in this general order of arrest the entire personnel of his battery from the first sergeant down, although the first sergeant was at the time absent from the post with a provost guard in the city of El Paso. (See p. —.) The next morning at reveille some of the noncommissioned officers of the battery did not leave their tents, but others did, and, of the latter, some, at least, had not then learned of the status of arrest in which the battery had been placed. Similarly, at the formation of the battery for stables, some of the noncommissioned officers formed with the battery for this duty and others did not. Between stables and the formation of the battery for morning drill, the first sergeant seems to have been made aware that the noncommissioned officers of the battery, other than himself, were laboring under a belief that while in the status of arrest it was not proper for them to perform duty, and he sent a message to this effect to the battery commander, who directed the first sergeant to report to him in person. Just what report the first sergeant made to the battery commander does not appear, but the record shows that the battery cammander told the first sergeant to release the noncommissioned officers from arrest "until after drill." The first sergeant then returned to the battery and summoned all the noncommissioned officers to report at the battery office, which they did. He told them that Capt. Harvey had directed that they be released from arrest until after drill. Here again the record does not afford a clear indication of just what happened, but it may be inferred, from what is shown, that these noncommissioned officers protested against the performance of duty until their status of arrest had been definitely terminated. Practically all of the noncommissioned officers who testified as witnesses and who were present at the battery office at this time agree in stating that the first sergeant told them, as they were leaving the office, that he was sending for the battery commander and that they were to "stick around until the battery commander comes." The first sergeant states that he did not make this remark, but claims to have said, "all right, I'll send for the battery commander." At any rate, he appears to have sounded the call for drill, which consisted of two long blasts on a whistle, immediately after this gathering which he had ordered. While the privates of the battery formed for drill, the noncommissioned officers remained near the battery office in a group, where, as they state, the first sergeant had told them to "stick." Capt. Harvey then appeared upon the scene. He states that he went immediately "to the orderly room of the battery and met the first sergeant and asked him what the trouble was." The first sergeant told him that the men were not going to drill, and immediately thereafter stepped toward these noncommissioned officers, who were still standing near the battery office, and said: "Are you men going to drill?" The testimony indicates that there were some replies of "No" from the assembled noncommissioned officers. They explain this by stating that they did not intend to refuse to go to drill, but only to indicate that they did not believe it was proper to require them to attend drill in their official capacities until their status of arrest had been properly terminated. The captain testified that at this point he told the first sergeant "not to ask the men if they were going to drill, to order them to go to drill," and that the first sergeant then began to order them individually to go to drill. The exact form of the order which was given at this time does not appear from the record, but the captain states that after he had ordered about half of them personally and individually to go to drill, "I told him that that would be sufficient, and then I talked to the men for several minutes, I should say probably four or five minutes about the situation." The testimony of other witnesses here is that the first sergeant ordered from two to five or six of the men to go to drill. Capt. Harvey states that in this talk he explained to the men "that they were committing a grave offense, that their conduct was mutinous, and that the crime of mutiny was next to treason, the most serious in the category. I told them that in my opinion they would probably receive as much as 10 years' punishment if they were convicted."

After finishing this talk Capt. Harvey does not appear to have given any further order to any of these men, either collectively or individually, to join their battery for drill, but states that he walked away from the men and

went a short distance, where, after remaining in thought "a moment or two," he called the first sergeant and asked him "if he was sure that he told these men that they were released from arrest," and that, having received a reply in the affirmative, he waited "about a minute longer" and then "told them to fall in a column of file," and marched them personally to the guard tent and turned them over to the officer of the day. There appears to have been no disturbance of any kind when this order was given or refusal, in any form, to obey the same.

3. The situation thus presented is deplorable in the extreme. Capt. Harvey is a young officer, having graduated from the Military Academy in 1915. The accused men were all serving in their first enlistment. Maneu enlisted September 19, 1913; Kunselman, December 27, 1913; Green, November 29, 1916; Kight, January 14, 1916; Poryanda, July 20, 1915; Adamik, February 10, 1916; Van De Vooren, February 7, 1916; Brown, November 23, 1914; Graves, December 12, 1916; and Orndorff, December 22, 1913. The general character of these men is shown by the fact that only one of them (Poryanda), was there any evidence of previous convictions. The only fair inference that can be drawn from the record is that these men were of a desirable type and constituted excellent soldiers in the making. Simple justice demands that their careers should not be blighted and a most henious military crime fastened upon them unless the proof of its commission is clear and unmistakable.

It is not clear upon just what authority they acted in believing, as they seem to have done, that noncommissioned officers in arrest are not required to attend drill, but this seems to be the clear intent of the regulations. Paragraph 929, Army Regulations, provides as follows: "* * * When placed in arrest they (noncommissioned officers) will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement they will not be sent out to work."

Winthrop, in discussing the arrest of noncommissioned officers, states that "the phrase, 'placed in arrest' evidently imparts a mode of arrest similar to that prescribed for officers," and in discussing the status of an officer in arrest, he remarks: "An arrest once duly imposed detaches the officer from the functions of his office. He may not assume to command or to perform any military duty." Whatever the exact status of these noncommissioned officers may have been as a result of the order placing them in arrest, it is clear that the regulations do not contemplate that a noncommissioned officer, once placed in arrest, shall be required, while this status continues, to perform the functions which pertain to his office. To release a noncommissioned officer from arrest for a period of drill or other duty to enable him to perform duty which he could not properly perform while in arrest is but to trifle with the law.

4. These men have been charged with and convicted of a very serious military offense. Mutiny is a thing not lightly to be considered in the military service, and when it occurs must be punished severely. There is little to indicate in this case, however, that anything approaching mutiny was really intended by these noncommissioned officers. Winthrop defines mutiny: "* * * as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same." (Vol. II, p. 892.)

The thing which distinguishes a mutiny from other offenses of a military character is the intent "to usurp, subvert, or override" superior military authority. Conduct may well be mutinous, "such as defiant behavior or threatening language toward superiors, muttering or murmuring against the restraints of military discipline, * * * or declining to perform service in the honest belief that the term of enlistment has expired" (Id. p. 893) without actually amounting to mutiny. In commenting upon offenses of this character, Winthrop further says: "Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offense of mutiny, but are commonly to be treated as 'conduct to the prejudice of good order and military discipline.'" (Id. p. 894.)

He further states: "The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offense as understood at maritime law," and cites several cases which have been held not to constitute mutiny, such as "violence against the officer, without proof of intent to override his authority," or "mere disobedience of orders, unaccom-

panied by such intent." It is clear from what has been said that the conduct of these men did not amount to mutiny, but that it was merely mutinous, and that the same should have been charged as an offense under the ninety-sixth article of war.

5. With reference to Capt. Harvey, it should be stated that his conduct in this case was opposed both to law and the regulations. The sixty-ninth article of war, dealing with arrest and confinement, provides in part as follows: "* * * A soldier charged with crime or with a serious offense under the Articles of War shall be placed in confinement, and when charged with a minor offense he may be placed in arrest."

The authority to place soldiers in arrest is predicated, therefore, upon a commission by them of an "offense." If one or more men, acting singly or in concert, commit an offense, one or all may be placed in arrest; and if an entire battery should join in committing the same offense, it would be a proper exercise of authority to place the entire battery in arrest. It would not be proper, however, to place an entire battery in arrest merely for the purpose of "having all the men present the next day." Neither would it be proper to place an entire battery in arrest in order to prevent the occurrence of some anticipated event. The result desired in either of these cases should be accomplished in some other and proper manner. The Army Regulations provide in paragraph 2 that "military authority will be exercised with firmness, kindness, and justice," and in paragraph 3 that "superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language." In considering all the elements of this case, the conclusion is inevitable that the conduct of Capt. Harvey in placing his battery in arrest was not only capricious and unwarranted, but that it resulted in bringing about a situation which an officer of greater experience would have avoided, and which placed a number of young soldiers in a situation they did not understand and which formed the basis of an alleged offense they did not intend to commit. Nothing could be clearer than that these men did not intend to mutiny, but were merely seeking to ascertain from their commanding officer why they had been placed in arrest and whether or not it was proper for them to attend drill while their status of arrest had not been terminated but only suspended during the period of the duty which they had been directed to attend. One of these noncommissioned officers, Sergt. Maher, it appears in the evidence, attempted to speak to the battery commander on this subject when he approached them near the battery office. The testimony is that the captain told his sergeant to shut up; that he would do the talking; and that all the others remained quiet until marched off to the guardhouse. It appears of record that Capt. Harvey did not ask or order these men to join their battery for duty after he had explained to them the nature of their conduct, but merely waited a brief interval for action on their part. This not being taken within the minute or so during which he so waited, he formed them in line and marched them to the guardhouse and turned them over to the officer of the day. Clearly the conduct of the men was not mutiny, but the conduct of the officer, under all the circumstances indicated and of the fact that he was dealing with young and inexperienced men, was not creditable to him or to the service of which he forms a part.

6. The conduct of this case on the part of the prosecution is also open to grave censure. Indeed, the atmosphere that seems to have surrounded the trial of this case was such that it is impossible to believe that the defendants were given a fair trial. The conduct and attitude of the judge advocate (the court permitting) were arbitrary, oppressive, and injurious to those rights of the defendants which the law attempts to guarantee. His conduct was calculated to intimidate the witnesses for the defense to the point where the whole course of justice is rendered uncertain. (Record, pp. 30, 34, 36, 38, 40, 44, 45, 49, 54.) Fairness of trial suffered; fundamental rights were trespassed upon.

7. 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.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 6.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, November 15, 1917.

Memorandum for the Chief of Staff:

1. The court, consisting of seven field officers and five captains, embraced what I believe to be a personnel well above the average of military courts.

The accused were represented by counsel, presumably of their own choice, and, so far as appears, this counsel has made no claim to the reviewing authority that the men did not receive a fair trial.

2. While the conduct of the case is, as stated by the Acting Judge Advocate General, open to grave censure, yet it can not be assumed that the members of this court were influenced thereby in their action.

It is also true that Capt. Harvey, the battery commander, is an officer of very short service and that his actions in this case were ill-advised, unjustifiable, and clearly demonstrate his unfitness to command men.

3. Stripped of all technicalities, the evidence is believed to show conclusively that these men, in concert, deliberately refused and failed, and persisted in failing, to obey the orders of their commanding officer, and that they did this in the presence of the entire battery. There is, and can be no doubt as to the fact that they fully understood that they were disobeying orders.

4. The action proposed by the Acting Judge Advocate General, would, in my judgment, have a most demoralizing effect upon discipline. It is believed that these men are guilty of an offense which, under normal peace conditions, would be very serious and which, under war conditions, is even more so, but, in view of the actions of the battery commander, and of the whole circumstances surrounding the case, the exercise of clemency by the Secretary of War appears to be demanded.

It is suggested: First, that the unexpired portion of their sentences be remitted and that they be restored to duty as privates, if same can be done legally; Second, that Capt. Harvey be severely reprimanded and that he be relieved from command of Battery A, Eighteenth Field Artillery, if this has not already been done, and that he be assigned to duty elsewhere.

J. L. CHAMBERLAIN.

EXHIBIT 7.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 13, 1917.

Memorandum for the Chief of Staff.

Subject: Authority of the Judge Advocate General to set aside the judgment of conviction and the sentences of a general court-martial.

1. Herewith are the proceedings of a general court-martial held in the cases of 14 enlisted men of Battery A, Eighteenth Field Artillery, charged with the crime of mutiny, together with an opinion of the Judge Advocate General, which concludes 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."

2. The case is one involving a most flagrant miscarriage of justice. The men were tried for mutiny, when they had not committed mutiny. They were driven into the situation which served as a basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery, who had barely two years' service. In fair justice to the men accused there should and it would seem must be some agency with power to restore them to the status possessed by them prior to their trial and conviction.

3. It is hardly within the province of the undersigned to express an opinion as to the legality of the action indicated by the Judge Advocate General, but a careful reading of the extended opinion of the Judge Advocate General on the exercise of his power under section 1199, Revised Statutes, and submitted under date of November 10, 1917, for the personal consideration of the Secre-

tary of War, leads to the conviction that his authority to act in the manner stated is undoubted.

4. When officers of the Regular Army of long experience, such as most of the members of the general court-martial in question, commit such grave errors as are indicated in this case, how much more danger of miscarriage of justice will there be at this time when the great majority of officers are new to the service and have little knowledge of military law or procedure. Therefore, in this time of war, it is considered highly expedient, as well as legal, that the power of the Judge Advocate General as herein expressed be fully exercised.

5. One criticism to the concurrence in the opinion of the Acting Judge Advocate General is that it may detract from the disciplinary power of commanding generals, who have the power to convene court-martials and review their proceedings; but in view of the fact that injustice has been done in the case in question as well as in many preceding cases, it is believed that the rendering of such justice is paramount and should overrule the above consideration.

6. Action is recommended as indicated in memorandum for The Adjutant General herewith.

R. I. REES,
Lieutenant Colonel, General Staff.

NOVEMBER 13, 1917.

Memorandum for The Adjutant General.

Subject: Trial by court-martial of 14 enlisted men of Battery A, Eighteenth Field Artillery.

The Secretary of War directs that the action indicated in paragraph 7 of the attached memorandum from the Acting Judge Advocate General be executed and that the necessary orders be issued restoring to duty each of the men convicted and whose sentences were approved in General Court-martial Order No. 1174, Headquarters Southern Department, Fort Sam Houston, Tex., October 16, 1917.

———,
Major General, Acting Chief of Staff.

EXHIBIT 8.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 17, 1917.

Memorandum for the Chief of Staff:

The accompanying papers are the record of the trial by general court-martial of certain enlisted men of Battery A, Eighteenth Field Artillery, on the charge of mutiny, in violation of the sixty-sixth article of war.

There are two phases of the case which merit careful consideration before the action taken and recommended by the Acting Judge Advocate General is carried into effect.

First. The conclusion of the court.

Second. The action of the Acting Judge Advocate General under section 1199, Revised Statutes of the United States.

The court that tried these men was composed of 12 officers of experience. The senior member of the court was commissioned in 1884 and the junior member in 1904.

Mutiny is defined in Digest of Opinions of the Judge Advocate General as follows:

"Mutiny at military law may be defined to be an unlawful opposing or resisting of lawful authority, with intent to subvert the same, or to nullify or neutralize it for the time * * *."

The first sergeant, through whom the battery commander gave his orders, testified as follows:

Q. What signal did you give the battery to form?—A. Two long blasts of the whistle, sir.

Q. Was that signal generally understood by every member of the battery?—A. Yes, sir.

Q. Did any of these accused men respond to that signal and fall in for drill?—A. Corpl. Parks was out in front of the battery sitting down.

Q. Did he remain with the battery from that time until the battery went out to drill?—A. No, sir.

Q. What did he do after that time?—A. He went over and joined the rest of the noncommissioned officers in front of the orderly room.

Q. After you gave these noncommissioned officers the instructions of the battery commander to the effect that they were released from arrest for the purpose of attending drill, were they given ample opportunity to join the battery and go to drill?—A. Yes, sir.

Q. What occurred, Sergeant, immediately after you gave them this order that they were released from arrest and would attend drill?—A. When I delivered the order, sir, all the noncommissioned officers filed out of the office, sir, and went down the other side of the orderly room. I lined the battery up, and there were no noncommissioned officers present. I went back over to the noncommissioned officers and asked them if they were going to drill or not, to which they replied: "No, not under those conditions of being released for just until after drill. * * *"

The action of these soldiers as testified to by the first sergeant, if true, seems to constitute mutiny as defined in Digest of Opinions as quoted above.

The lack of judgment of the battery commander undoubtedly created the situation which finally resulted in the trial of these soldiers. I can not, however, see that this lack of judgment on the part of the battery commander can justify the act of these soldiers. It may, in my judgment, very properly be taken into consideration in awarding sentence by the court and in action by the reviewing authority.

Gen. Ruckman, an officer of long experience, approved the sentence as awarded by the court. These men are at United States Disciplinary Barracks, Fort Leavenworth, Kans., serving sentence.

The proceedings of the court were sent to the office of the Judge Advocate General of the Army, who reviewed the case and concludes his review by stating:

"* * * 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, * * *."

Section 1199, enacted in 1866, provides as follows:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The Judge Advocate General concludes that the word "revise" in the above-quoted statute gives him the authority to set aside and completely nullify the action of a court composed of 12 experienced officers, which action had been approved by the department commander.

The definition of "revise" as given in Standard Dictionary is as follows:

"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."

As the authority exercised by the Judge Advocate General has, within the memory of the officers of the Army now on the active list, been exercised only by persons who have by law authority to exercise command, it is believed the intent of the law should be beyond question before such radical action is taken. It is believed doubtful if Revised Statutes, 1199, gives the Judge Advocate General the authority he has taken.

The justification for this belief is also found in the Articles of War, contained in the act of June 3, 1916. Articles 46 and 48 provide who have authority to carry into execution the sentence of courts-martial.

The commanders mentioned in articles 46 and 48 have power to disapprove a finding.

Nowhere in the Articles of War can I find the Judge Advocate General is given authority to nullify the acts of courts-martial. As the action of the Judge Advocate General, if permitted to stand, establishes a precedent which may be far-reaching in its bearing on the discipline of the Army, I recommend his action be disapproved.

If it be decided that the Judge Advocate General has the legal right to take the action taken, there is nothing to do but restore these men to duty and order them back to their battery.

I recommend that Capt. Harvey be informed that the evidence in the record of the trial of these men discloses the fact that he was entirely lacking in judgment

in his handling of the men of his battery, not only at the time they committed the offense but the evening before; that the lack of discipline in his battery, which he must have known, should have indicated to him the necessity for absolute justice and the exercise of wise discretion in the handling of the situations that arose; and that he has been woefully lacking in some of the qualities his superiors have a right to expect of all officers, and especially one who has had the advantage he has had.

WM. S. GRAVES,
Colonel, General Staff, Secretary.

EXHIBIT 9.

OFFICE OF THE JUDGE ADVOCATE GENERAL,
December 11, 1917.

Restoration to duty of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Andrew J. Brown, Roger Graves, Rupert P. Orndorff.

The COMMANDING OFFICER UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.

1. Upon the review in this office of the cases against the above-named men, it was held that they had been improperly convicted of the offense charged. The Secretary of War has directed that these men upon their written application therefor, be restored to duty as promptly as possible to complete their enlistment.

2. Will you please, therefore, inform them of this fact and direct each of them should he so desire to make written application for restoration to duty and forward same through proper channels for the action of the Secretary of War.

E. H. CROWDER,
Judge Advocate General.

DECEMBER *22, 1917.*

The COMMANDING OFFICER UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.

Refer to my letter of December 11 in which you were requested to inform the men therein named that upon their written application to that effect they would be restored to duty. Please advise me by wire as to present status of this matter.

E. H. CROWDER,
Judge Advocate General.

OFFICIAL:

_____,
Major, Judge Advocate.

[Telegram.]

FORT LEAVENWORTH, KANS.,
December 23, 1917.

JUDGE ADVOCATE GENERAL,
Washington:

Written applications for restoration to duty of men named in your letter December 11 mailed Adjutant General December 17.

RICE.

[War Department telegram—Official business.]

WASHINGTON, *December 27, 1917.*

COMMANDANT UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.:

Reference my telegram December 22 and letter December 11, Adjutant General's Office advises applications of men in question received and approved. Kindly advise me by wire when they are restored.

CROWDER,
Judge Advocate General.

Official:

E. G. DAVIS,
Major, Judge Advocate.

[Telegram.]

FORT LEAVENWORTH, KANS.,
January 5, 1918.

JUDGE ADVOCATE GENERAL,
Washington:

Men named your letter December 11 restored to duty January 5.

RICE.

EXHIBIT 10.

MARCH 12, 1919.

Questions by Gen. J. L. Chamberlain; answers by Gen. E. H. Crowder.

Q. When you took up the duties of Provost Marshal General, leaving Col. Bethel, the senior officer in the Judge Advocate General's Office, in charge, was he given any specific instructions relative to the administration of the office in so far as it related to matters of military justice, or did he automatically take up those duties as senior officer?—A. The latter. As senior in the office he assumed charge, leaving it to be determined by the volume of work developed just how much of the burden of Judge Advocate General I could carry consistent with performing the duties of Provost Marshal General. The record of opinions in the office should disclose during this period the amount of attention I gave to the office of Judge Advocate General.

Q. About the middle of August, 1917, when Gen. Ansell became the senior assistant in the office of the Judge Advocate General, did he receive from you, either in writing or verbally, any specific instructions as to the administration of the office or did he assume those duties and perform them automatically as the senior officer?—A. The latter. I do not recall issuing any instructions on the subject at all, either orally or in writing.

Q. In November, 1917, at the time that the order appointing Gen. Ansell Acting Judge Advocate General, was revoked, at which time you resumed active charge of the office, did Gen. Ansell receive from you or, so far as you know, from the Secretary of War or the Chief of Staff any instructions relative to the duties which he should perform in the office, or did he automatically continue, as he had been doing before, his duties as senior officer?—A. I do not recall any such instructions, and his initiative and authority, previously exercised as senior officer, remained undisturbed. (Added.) The records of the office as to opinions signed and as to court-martial cases acted upon will disclose whether there are any exceptions to be made to the statement I have just recorded—that the initiative of Gen. Ansell was left undisturbed as senior officer.

Q. In some paper which I have recently examined I found a statement made by Gen. Ansell to the effect that upon the occasion referred to the duties and responsibilities pertaining to reviews of courts-martial and other matters connected with the administration of military justice were placed in the hands of his junior in the office, and that from that time until his departure for Europe—in fact, until his return from Europe—he had no responsibilities respecting the administration of military justice.—A. My recollections as to that are in substantial accord to the testimony of Col. E. G. Davis, then lieutenant colonel or major, who has covered this point fully in his testimony before the Senate Military Committee, and is to the general effect that he continued with undiminished authority in handling all matters arising in the section of military justice, and determined himself what cases would be passed up to me as needing my personal attention.

Q. Who was the junior officer to whom Gen. Ansell referred?—A. It must be Col. E. G. Davis.

Q. Upon his return from Europe, in July, 1918, did Gen. Ansell resume his duties in the office as the senior officer automatically, or did he receive from you definite instructions relative to the scope and limitations of such duties?—A. He received no such instructions and resumed his former relations with the office automatically.

Q. The point I wish to make is: Between November, 1917, and July, 1918, except during his absence in Europe, was Gen. Ansell performing his duties as senior officer in exactly the same unrestricted manner that he was prior to and subsequent to those dates?—A. Precisely; so far as I had any knowledge and I am not on my warning that he considered that he was in any way re-

stricted, except in so far as he was restricted by the decision of the Secretary of War in section 1199 of Revised Statutes.

Q. He never actually exercised the authority which, under that statute, he claimed?—A. I believe that in more than a dozen cases which remained he exercised and promulgated decisions under that statute.

Q. This without having submitted for interpretation that statute to higher authority?—A. I think while the proper consideration of that was pending that he exercised the authority in probably more than a dozen cases.

Q. Do you recall whether or not the case of the noncommissioned officers of Field Artillery at El Paso was the first case in which he exercised or attempted to exercise this function?—A. I do not.

Q. From the records it appears that the order of November, 1917, detailing Gen. Ansell as Acting Judge Advocate General was never actually issued, or at least given publicity, but that it was a suspended order. Have you any knowledge as to the reasons for that peculiar way of handling an order; by whom, or why?—A. Why it was marked for suspended publication nearly two months later?

Q. Yes.—A. I have no idea. [Gen. Crowder, referring to this suspended order.] There was a memorandum of November 3 (I think the dates are accurate) from Gen. Ansell to me which was delivered to me in my office at Seventh Street, reciting the reasons why he thought an order should be issued under the provisions of 1132 of the Revised Statutes, relieving me from duty as Judge Advocate General and detailing himself as Acting Judge Advocate General. A reply from me on November 4, the following day. On November 6 the submission by him to the Acting Chief of Staff of a formal order necessary to accomplish my relief and his detail, concluding with the statement that he was authorized to say that the issue of this order would be agreeable to Gen. Crowder. The subsequent procedure I am not clear about, for I understand informally that the order submitted by Gen. Ansell was referred to the General Staff and reported back in a modified form. Whatever the facts may be an order of this character was approved by the Acting Chief of Staff, Gen. Biddle, and marked for suspended publication. The first information that I had that such an order had been approved and marked for suspended publication was about November 17, when I was informed of the fact by the Secretary of War in person, the occasion being an interview on the question of appointments to be made in the Judge Advocate General's Department. The Secretary of War passed to me a list of recommendations submitted by Gen. Ansell and asked me if I approved of that list. I glanced over it and saw that most of the names thereon were names of men whose qualifications I had personally inquired into. I handed the list back to the Secretary with the statement that the appointments recommended were, I thought, all well-qualified men. He then acquainted me with the fact that he had asked Gen. Ansell whether the list had my approval; that Gen. Ansell left his office and came back with a copy of this order that had been approved by the Acting Chief of Staff, Gen. Biddle, relieving me from duty as Judge Advocate General and detailing Gen. Ansell. It was the first information the Secretary said that he had had of the issue of such an order. At that time I acquainted the Secretary of War with the correspondence that had passed between Gen. Ansell and myself, recommending the issue of such an order, and my statement to Gen. Ansell in my letter that he should take the matter up directly with the Secretary of War in his own way. I said that, *directly the Secretary of War*, realizing that the question of who should be bureau chief was one upon which the Secretary of War would expect to function personally, and especially as to who should be Judge Advocate General, in view of the large civic jurisdiction of the Judge Advocate General not handled through the Chief of Staff at all. There followed some conversation between the Secretary of War and myself, which was supplemented, I understand, by conversation between the Secretary of War and the Acting Chief of Staff, Gen. Biddle, who undertook to state his personal recollection of the statements made by Gen. Ansell to him at the time he submitted this order. At that time I did not know that there was a written memorandum of submission of the question by Gen. Ansell to the Acting Chief of Staff, which written memorandum settles in a very definite way the representation that Gen. Ansell made to the Chief of Staff in regard to my personal attitude toward the subject.

Q. Did you have any conversation with Gen. Biddle at this time relative to the issuing of this order?—A. I do not remember; I may have had some conversation with him but do not recall it.

Q. So you do not know what lead to that peculiar situation of this suspended publication?—A. No. I remember that the impression that it made upon me was that perhaps that was customary at that time because of the rush of business and was a concession made to the Government printers as to the amount of printing they had to do.

* * * * * * *

MARCH 12, 1919.

Q. What was the proceedure in the four death cases of the A. E. F.?—A. When the records came in they went to the Disciplinary Section and were reviewed therein by Maj. Rand, a lawyer of New York City, recently commissioned in the Judge Advocate General's Department, who is a man who had had extensive criminal practice and was associated with Jerome of New York City in the trial of very important criminal cases which claimed the attention, at that time, of the Nation. He turned in a review all too brief, I thought, sustaining the proceedings. When the review reached me I remarked, to whom I can not say now, that the review in such an important case should be drawn in such a way as to show all the facts of the case necessary to convince the reader that the case had been examined with thoroughness and great care. I am here depending altogether upon my recollection, as I have not attempted to go through the records of the office and follow the administration as accurately as I might do after conference with the officers who were directly charged with this important line of work. Anyway, the cases went back with instructions for a more exhaustive review and when that review came up I was still in a doubtful frame of mind, not because of the insufficiency of the record, although I would have been glad if the cases had been tried with greater attention to that greater detail which the serious character of the offenses required, but I had before me a letter sent directly by the commanding general of the A. E. F., asking that the sentences should be approved and that he be given authority to carry them into execution. I carried the final review up to the Chief of Staff in person and had quite a prolonged conference with him.

The interview between us commenced with a statement by me to him to this general effect: "Gen. March, you are but recently returned from the theater of war. You know the conditions there first hand; you may have some personal knowledge of these cases. The extreme sentence of death has been imposed. They are the first sentences of this character to reach us from the theater of war. I know the public interest that will attach to these cases, and the public attention that will be given to any execution of these sentences. I know also how serious a thing it is to disagree with the commanding general of an army in the field on a question of this character. I have brought the cases to you with a report which concludes without a recommendation, because I wish to leave this question of clemency to be settled after conference between you and me, and later on between us and the Secretary of War. It would be very unfortunate if we went before the President in such a matter with divided counsel if it is possible for us to reach a common conlusion."

Gen. March then and there expressed a view on the cases. The extent to which he claimed personal knowledge of these cases is now dim in my mind, but that he knew generally of conditions over there and proclaimed that he had that knowledge is very distinct in my mind. He announced then his view that the sentences should be approved and carried into execution and that was his final state of mind at the end of the conference. This led me to leave the review with him in the form in which I submitted it, that is, with the statement that the records were sufficient but without a recommendation as to the course which should be pursued respecting clemency.

I returned to my office and gave orders to an officer, whose name I do not recall, but I think was Col. A. E. Clarke, to visit The Adjutant General's Office and obtain from the records of that office some facts respecting the ages of these boys, the length of their service, the amount of training they had, and also to examine our own office to see how many cases of disobedience of orders or sleeping on post had come up from the theater of war in which sentences of less severity had been given, and to examine generally into the rank of punishment. When Col. Clarke (if he were the man) reported back I was advised of the fact that two were under 20 and two under 19 and that they had short periods of service.

I was apprised of the fact that there had been other cases coming up from the theater of war, trials for these same offenses, and that in none of the cases had the death penalty been awarded. I was left in doubt in my own mind

as to whether the officers of the A. E. F. had given these newly enlisted soldiers instructions as to the gravity of these two offenses—disobedience of orders and sleeping on post. Later, I submitted the case to Gen. Ansell, expressing to him the feeling that I had about the execution of these sentences, and asking him to submit me a memorandum. This he did in rough form, which is now in the hands of the Inspector General, and which speaks for itself. My recollection is that he submitted this memorandum on the 15th day of April, 1918, and that on the following day I submitted a supplemental memorandum on these cases incorporating what I thought was the essential part of Gen. Ansell's memorandum to me. My recollection is that the Chief of Staff had not reported on the cases and that when he did report he referred, not only to my original memorandum but to my supplemental memorandum.

In addition to what is stated here I had more than one conference with the Secretary of War as to the final action to be taken upon these cases in respect of clemency. My recollection is that there were three such conferences and that in the last conference between us the Secretary of War stated that his mind was made up not to execute the death penalty, notwithstanding Gen. Pershing's urgent request for authority to carry the sentences into execution.

Q. After his return from France Gen. Ansell issued certain written instructions to the boards which were operating in the department. Did any reason exist whereby he could not have issued those instructions or similar instructions in regard to any matters in the office, except during his absence?—A. No; as I was consulted on the orders he issued.

MARCH 17, 1919.

Q. Do you know the source of the article which appeared in the New York World on January 19?—A. I do not, but I do know personally the man under whose name it was published, Roland Thomas. He called at my office with the Secretary of War's visiting card, and asked to see a limited number of records, which I do not think exceeded six. I gave him access to the records and in the course of an hour, and I think in less than half an hour, he returned with two court-martial orders in his hand. At that time Col. Reed, the head of the Section of Military Justice, was in my office conferring with me. Mr. Thomas said, "Here is a confirmation of what the papers are saying, namely, that there is grave inequality of punishment. I have in my hand," he said, "two court-martial orders showing proceedings in two cases tried in two courts at Camp Dix, N. J., both trials for desertion. In one case the man is sentenced to 25 years; in the other to six months." Col. Reed said to him, "Let me see those orders." Thomas passed them to Col. Reed, who looked at them and handed them back. That ended the conversation and Mr. Thomas went out and a few days thereafter there appeared the article in the New York World, occupying the entire first page of the editorial section of the Sunday edition, January 19, and invaded two or three interior columns. I think the total length of time he was in my office did not exceed an hour, and I feel it did not exceed half an hour.

Q. What were your conclusions relative to the preparation of that article?—A. That it was prepared by some one who had access to the records of my office.

Q. You stated that you had no knowledge as to the identity of the person who prepared it?—A. Absolutely not.

Q. Is there anyone in your office who would be in a position to possess that information?—A. Every officer on duty in the office would have access to those records and they would be particularly available to officers at work in the Section of Military Justice and in the clemency section.

Q. Then an article of that kind could be prepared by any one of those officers without it being apparent to anyone else that they had prepared same?—A. I should say so; and add that it might be prepared by any clerk who had the ability to write such an article.

Q. It appears in the evidence that at the time Gen. Ansell was appointed brigadier general, and by virtue of such appointment became senior assistant in the office of the Judge Advocate General that he received certain verbal orders of the Secretary of War regarding his duties. Have you any knowledge regarding that subject?—A. I do not recall ever having heard of such orders being issued, but would not undertake to recollect every conversation I had at that time.

Q. In the order, which was issued on November 8, assigning Gen. Ansell to duty as Acting Judge Advocate General appears this statement: "The verbal

orders of the Secretary of War, dated August 11, designating Brig. Gen. Samuel T. Ansell judge advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record." Have you any knowledge as to those verbal orders?—A. None at all.

Q. My attention has been called to a mimeographed office memorandum of April 10, 1918, signed by you (shown later that same was not signed) as Judge Advocate General, in which is described the organization of the office, in which you are shown as Judge Advocate General; Gen. Ansell as Assistant Judge Advocate General, and Col. Mayes as assistant. It shows Col. Davis as the Chief of the Division of Military Justice. Was that memorandum showing and confirming the organization which then existed or did that memorandum effect a reorganization of the office and refer to a condition which went into effect at that time?—A. I do not recall a memorandum of that date and would like to see it. I do not recall the issue of this memorandum of organization. I can not recall that the subject of the new organization of the Judge Advocate General's Department was discussed at that particular time. My impression is that this is simply confirmatory of an existing organization which had been in force for an indefinite period prior to the date of same, April 10, 1918. I might be permitted to state that Col. Davis, who, as Chief of Military Justice Division, handled probably 50 per cent of the papers coming into the office, and would be able to give definite information as to how long this had been in force. It seems to me that in the rather cursory reading of his testimony before the Military Committee of the Senate recently he covered that point.

Q. Do you happen to recall the approximate date upon which Col. Davis was assigned to that section?—A. He was almost the first choice and had been on duty in that section continuously for a period of several months, except a few weeks that he was absent on a tour of inspection, during which he was substituted by Col. A. E. Clarke. Their administration of the section must cover a period of several months prior to April 10.

Q. In Gen. Ansell's testimony before the Senate committee, he states, "Referring to the occurrences of November, 1917, I was then told that matters of policy, such as this, would not be passed upon by me, except after conference with my chief." In answer to Senator Frelinghuysen's question "Who told you that," Ansell answered, "The Secretary of War; probably also the Chief of Staff and the Judge Advocate General. I know the Secretary of War told me and it was generally understood." Have you any knowledge on that subject; any more than you have already stated?—A. No; except that immediately following my interview with the Secretary of War about November 17, when we discussed the merits of applicants proposed for appointment in the Judge Advocate General's Corps, the Secretary of War addressed me a letter, which I presume you have or can get, discussing these questions, expressing his desire that I give more time to the duties of Judge Advocate General and less time to the duties of Provost Marshal General. In the conference about November 17 he made it very clear that he never contemplated that I would not be in charge of the policies. Referring to Gen. Ansell's memorandum of November 10, 1917, here was the thought: I got my first knowledge of the memorandum of November 10 from the Secretary of War on November 23 or 22, and not at the interview of November 17. I never asked the Secretary of War where that memorandum or brief of Gen. Ansell's of November 10 had been. I have allowed myself to believe that it was one of a large number of papers, perhaps, submitted to him near the date of it, but not taken up by him about the time he spoke to me about it, to wit, November 22 or 23. I say he supposed I was in charge of the office because he apparently had learned on November 17 from a conversation with Gen. Ansell of the issue of the Executive Order No. 1132 of the Revised Statutes, detailing him to Judge Advocate General, the effect of which was to relieve me. Now, it would be strange and something to be explained if he had that brief of Gen. Ansell's dated November 10 on his desk when he talked on November 17, and had not mentioned it. I never, as I say, made any inquiry, but just assumed that he had not yet reached it and that he reached it some time before November 22 or 23, when we had our conversation about the brief.

Q. And after November 17?—A. Yes.

Q. What are the circumstances which led to the clemency board?—A. The whole thing is set forth in correspondence between my office and the Secretary of War direct. My recollection is that during the period I was absent in Chicago, to which place I had gone at the direction of the Secretary of War to address the Selective Service Board, Ansell turned in some kind of a report, which I found on my desk when I returned, and which led to additional cor-

respondence, as the result of which the board of clemency was organized. That correspondence ought to show who made the original suggestion. It should be said that the time for convening such a board of clemency came with the signing of the armistice and resulting conditions approximating those of peace, the matter of convening the clemency board is interwoven in my mind with the further admonition that I caused to be issued about this time to all courts and reviewing authorities, that as to offenses committed after November 11 they would observe the limits of punishment established in the peace-time order, except in those cases where the courts and reviewing authorities could enter on record a valid reason why the punishment imposed in a particular case was in excess of those limits. Both orders were intended to operate in the same field of excessive punishment, the last one mentioned to take care of offenses after the signing of the armistice, and the other to reduce the war-time punishments, that is, punishment for offenses committed during the period of war, to peace-time standards. In my inquiry as to why an order had not been issued of admonition to courts on the question of courts I learned that such an order had been suggested by Col. Read, of my office, to Gen. Ansell in September of 1918, the purpose of the order being to admonish courts, particularly in this country, that less severe punishment would meet the situation here. Col. Read, in giving me this information, submitted the rough of the suggestion he at that time laid before Gen. Ansell, with the remark that Gen. Ansell regarded the suggestion favorably but that at his direction the memorandum went to a board of review to be passed upon there, and that the board of review, probably because of excessive work, had never reached it and the matter died. I used this memorandum that Col. Read said he submitted to Gen. Ansell in September of 1918 in preparing the order admonishing courts in regard to quantum of punishment respecting offenses committed after the signing of the armistice.

Q. Gen. Ansell states, "In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, which would control the commanding general, unless overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and the propriety in procuring the issue of this order is being subjected to question."—A. I am familiar with the memoranda and draft of order which was submitted by Gen. Ansell upon this subject, and also have the draft of the order signed by Col. Brown, General Staff, after revision. I find that the order, as it reads, is quite different from the memorandum which he submitted, and that the order as it reads practically gives to the senior officer of the Judge Advocate General's Department over there the very authority which Gen. Ansell's interpretation of 1199 would have given. Yes, it is the very authority, but sought to be deduced from other sources.

Q. Have there been any circumstances connected with that which do not appear in the records?—A. Yes. Shortly after returning to duty in the office there came to my desk a request from France, from the Board of Review, an opinion rendered upon a controversy which had arisen between Gen. Bethel, the judge advocate on Gen. Pershing's staff, and Gen. Kreger, in charge of the branch office of the Judge Advocate General's Department in France. It appears that Gen. Kreger, in a number of cases, had returned the proceedings under General Order 84, and under the mandatory provisions of that order the reviewing authorities were compelled to give effect to Gen. Kreger's decision. This was the subject of protest and dissent by Gen. Bethel. In looking over the opinion and the accompanying correspondence I learned for the first time of the issue of General Order 84. I sent for Gen. Ansell and asked him as to the origin of that order. He replied that the order had originated with him. I then asked why he had not conferred upon the Judge Advocate General at Washington the same power that he conferred upon the Acting Judge Advocate General in France with respect to the right given by that Order No, 84 to control the action of reviewing authorities. He answered, "I did not think I could get such an order through." My next question was, "Do I understand that this Order No. 84 was issued by the department unwittingly?" His reply I remember with the greatest accuracy, "Most unwittingly." He explained that when the proof of the order came to the office for revision certain of the officers who had helped him consider the original order desired to make some amendments therein, but that he had limited the amendments to what could be described as "verbal changes," so that he might, if interrogated by the Assistant

Chief of Staff, say that there had been no change in the substance. The conversation between us terminated about that point. It was late in the afternoon. The next morning when I returned to the office I dictated a memorandum order to Gen. Ansell asking him to put in writing what he had said to me the evening before, and, as I remember, said with respect to the order having been issued unwittingly by the War Department. In the early morning hours he came to me with my order in his hand and said he did not quite understand why I asked him to put that conversation in writing; that I ought to understand that it would be embarrassing for him to do so. He seemed wrought up and to some extent agitated. It was evident that he desired to avoid compliance with order, and I said to him, "All right, Ansell, just so you and I have the same recollection of the conversation." He left, carrying the order with him, and it must be in his possession. I think he had both the original order and the copy. I have no copy in my office. I expected him to leave the order with me, but he carried it away with him and I never called upon him to return it.

Q. Did you have any conversation with the Secretary of War relative to the issuing of that order?—A. I heard a conversation between the Secretary of War and Gen. Ansell on the subject.

Q. What was its purport?—A. His statement differed in some respects from the statement that I have made. The point was not pursued because during the conversation the Secretary of War stated that he was not particularly concerned with words used, but had sought the interview with Gen. Ansell for the purpose of ascertaining his real state of mind and that he would not indulge in any controversy about words. Gen. March was present at that interview.

Q. Was that order allowed to stand after the Secretary of War and Gen. March learned of it?—A. No immediate action was taken for a few days, perhaps three or four; the matter was left undecided, and the next information I had came from the Secretary of War himself when we were leaving the War Department Building one afternoon. He said to me at that time, "I think the best thing to do is to discontinue the branch office in France and that will automatically repeal General Order No. 84." I said to him, "That will require serious consideration." The next information I had was from a telegram which had gone to Gen. Pershing discontinuing the office in France and revoking all orders and instructions relative thereto. That order was not issued upon my recommendation. A proposition is now pending to revive the office in France, but with the jurisdiction similar to the jurisdiction of the office here, minus this extraordinary power to control the action of the reviewing authorities, respecting their action upon sentences.

Q. Referring to the statement that this order is now being opposed by the Commanding General in France you state, "But it is not true to a certain extent that the order is being opposed by the Commanding General, American Expeditionary Forces. On the contrary no word of opposition is on record nor can any trace be found." In the files which you handed me to-day I found some cablegrams which refer to that matter. I have not been able to digest them and am not able to question you very intelligently on that subject, but in looking it over it occurred to me there were cablegrams which appeared to be a protest to the Judge Advocate General.—A. The protest you found in that bunch of papers, if you could call it a protest, was against the establishment of the office in the first instance, and refers to a prior date and not to this action at all. Our first orders over there were misunderstood and for more than a month action was delayed in establishing the branch office in France, and some inquiries came up which indicated that Gen. Pershing thought it was unnecessary for an army operating in the theater of war. In respect of this last incident, which was a recent incident, the Commanding General of the Expeditionary Forces was not brought into the controversy between Gen. Bethel and Gen. Kreger, in any way that I noticed. It seemed to be a difference between two lawyers and two Judge Advocates General, which had been certified for the opinion of the Judge Advocate General of the Army. I am not aware that Gen. Pershing had the matter brought to his attention and in that sense I made this statement.

Q. Will you state briefly the sequence of events in connection with the four soldiers who were sentenced to death in France?——A. You are entitled, in answer to that question, to an exact chronology of executive administrative action on those four cases, which I am not in a position to give, not having recently revived my recollection by recourse to documents, but can state with substantial accuracy.

Q. Are there documents on file which will cover that completely?—A. Yes; it can be covered completely, but there is an accusation which I saw in the Congressional Record which I would like to cover in my reply. I well remember my first attitude on the question of those four death cases that came up from France. Of course we had administered the office in expectation that cases of that character would reach the office. My attention was particularly attracted to them by the fact that the commanding general of the Expeditionary Forces had addressed a letter to the Judge Advocate General upon the question of execution of the death penalty, and favored the execution of these four men.

The first review of the cases was prepared, as I now recollect, by Maj. Rand, who was working in the section of military justice. Maj. Rand's place at the bar of New York City is an enviable one. He had participated in the trial of notable criminal cases and his assignment, when he reported to be commissioned, was naturally to this section of military justice. He found no prejudicial error in the cases and stated that the findings and sentences were legal. I was dissatisfied with the review because of its brevity, feeling certain that we would not have a proper record of official action unless the review of the case was exhaustive and furnished evidence to the reader that the cases had been carefully considered. My recollection is that in the first draft the unusual letter to which the commanding general of the Expeditionary Forces had sent in was not incorporated. That was one thing that I asked to have incorporated. Just how many times the report was rewritten I can not say, but I remember to have taken the precaution of submitting the records to Col. Wigmore, who was on duty in the office of the Provost Marshal General, and not at all in the office of the Judge Advocate General, for examination, because of the fact that he is the author of a standard work on evidence. I received back a report from him that the records were sufficient to sustain the findings and sentence. I then took the record to the Chief of Staff and submitted them in person, expressing to him the doubt that was in my mind as to the final action to be taken respecting clemency, but assuring him that the best talent in my office pronounced them free from error. I said to him on that occasion that it would be unfortunate to pass up to the President a divided opinion on these cases if by conference we could reach agreement. I referred to the fact that he had but recently returned from the theater of war and knew the conditions there, and might have some knowledge of these four cases. We had a conference, in which he revealed himself of the opinion that the four men should be executed in accordance with the recommendation of the commanding general of the American Expeditionary Forces. I said to him, "If that is your final opinion I shall leave this report with you, to go to the President." I did so and returned to my office. Almost immediately after my return I called in Col. Clarke and asked him if it would not be wise to search the records of The Adjutant General's Office and ascertain some facts outside of the record which might weigh in the final disposition of the cases. I mentioned to him that I particularly desired to know the ages of these men, their earlier environment, and also to search the records of our own office to see how similar cases had been handled in the theater of war. About this time I walked into Gen. Ansell's office and talked about the cases to him and asked him if he would not make an examination of those records and give me his opinion. He made up his report and submitted it to me in the rough, that is, it was not reduced to the form that reports are when intended to be part of the records of the office, but was the kind of report that is given to the head of the office upon request.

Q. Gen. Ansell states, referring to the report which he made upon his return from Europe, "This report never reached the Secretary of War."—A. That statement, as I recollect, first came to my knowledge reading the Congressional Record of recent date, and I think in a letter addressed by Gen. Ansell to Mr. Burnett. I came to the office and asked for the report, as I did not remember to have seen it. It is true that upon his return Gen. Ansell came to my office and submitted a document which contained a number of observations which he had made, explaining that it was more or less a personal document which he thought I would be interested in. I read it over and it is the one that has been used a lot in public addresses, but he never brought in his official report and I did not see any official report until I instituted this search after noticing the Congressional Record. I called upon the executive officer to get me the report. He brought a carbon copy. I asked him where was the original. He said he did not find it on file. Later he came to me with the original and said it was on Gen. Ansell's desk. It was addressed to me, as I remember,

not to the Secretary of War. I do not remember to have ever seen that report and know he never personally submitted it as he did the informal report. It is true that up to that time it had never been forwarded to the Secretary of War.

Q. In connection with the publication of the order of November 8, designating Gen. Ansell as Acting Judge Advocate General, were you, upon any occasion, present during interviews between the Secretary of War and Gen. Biddle?—A. I have a little difficulty in answering the question. My difficulty arises from the fact that I am unable to say whether the Secretary of War repeated to me some conversation that he had with Gen. Biddle, or whether I talked directly with Gen. Biddle. I do recall that I heard about this time that Gen. Biddle said that Gen. Ansell had represented to him that we were agreed that the order should be issued and when he was asked more particularly he remarked, "That is the impression I have carried with me all this time; but if Gen. Ansell should say he did not use language of that kind I would not be in a position to dispute him." I dismissed the thing from my mind after I saw the memorandum Gen. Ansell handed Gen. Biddle and which contained what Gen. Biddle had seemed to recollect.

Q. That, then, was Gen. Biddle's explanation presumably of why he passed that order without bringing it to the attention of the Secretary of War?—A. Yes.

Q. What connection had Gen. Ansell with the revision of the Articles of War?—A. I was appointed Judge Advocate General on February 15, 1911. I do not remember just when Gen. Ansell came to duty in the office, but I think in 1913. The first revision was submitted, I think, in May of 1913, but it was in the course of preparation for probably a year before it was submitted. During that time if I had any correspondence with Gen. Ansell it ought to be on the files of the office or he may have copies of it. I have no recollection of the correspondence to which he refers. It would be quite natural for me to consult him, for his legal abilities had attracted my attention even prior to the date of my appointment. If he has the correspondence it ought to answer your question. I have not it. I have two or three memoranda that he submitted to me upon articles which we were considering for incorporation in the code. I have them put away in a file in which I keep all of the official memoranda I receive from Gen. Ansell that do not become final—of which there are a large number—just as for every other subordinate in my office. I have looked them over to see what evidence they contain and find two or three memoranda on two or three different Articles of War. I have asked questions of the men in the office at the time whether they heard these views of Gen. Ansell's respecting the scope of revision. I have not learned of any expression he made at that time of dissent from the revision on account of it being lacking in scope and fundamentals. I think I have covered your question. He never was aggressive in making suggestions and had the most ample opportunity, because not until 1916 did we get the revision through. Perhaps he has memoranda which would elucidate the subject further.

Q. In that connection can you give the names of the officers of the Judge Advocate General's Department who were especially engaged in the revision of those Articles of War?—A. Gen. Kreger took a more active part than anyone else. He helped on them while yet acting judge advocate of the Department of Colorado. Later, when he entered upon duty in the office, he frequently was consulted thereon. The office was a small one in those days and I do not instantly recall the names of others, but perhaps I could with the aid of my records. Gen. Kreger ought to be asked about this, because his recollection would be better than my own.

EXHIBIT 11.

MARCH 15, 1919.

Questions by Gen. CHAMBERLAIN.

Q. Give your name and rank.—A. James Easby-Smith, colonel, judge advocate, at present on duty in the office of the Judge Advocate General.

Q. How long have you been on duty?—A. I was commissioned a major in July, 1917; on account of being chairman of the district board of the District of Columbia I did not accept same until September 20, 1917, and was then ordered to report to the Judge Advocate General personally for assignment to duty. Was ordered to duty in the Office of the Provost Marshal General, and remained on duty in that office until November, 1918, when I went abroad, and on my return from abroad, the latter part of February, 1919, I was verbally as-

signed to duty in the office of the Judge Advocate General's Department, where I am now on duty.

Q. On what date in November, 1918, did you leave the Provost Marshal General's Office for France?—A. I left on the 27th of November.

Q. During the month of November, 1917, an order issued but never published to the Army, relieving Gen. Crowder from his duty as Judge Advocate General and detailing Gen. Ansell as Acting Judge Advocate General. Some controversy has arisen as to the issuance of that order and other matters directly connected with same. What information, if any, have you bearing upon that subject?—A. Well, I knew nothing about the issuing or revocation of the order, except by hearsay, until recently, when, in compliance with Gen. Crowder's directions, I inspected and secured copies of the original papers in the Office of The Adjutant General, and Chief of Staff, but I can fix certain dates on account of the following facts: On a date, which I have now fixed as Saturday morning, November 24, 1917, Gen. Crowder, whose office was in the room next to the one I occupied, called me in early in the morning, probably 8.30, and handed me a brief, which had been submitted by Gen. Ansell to the Secretary of War dated November 10. I am very positive that he had received it from the Secretary only the day before for the reason that he stated to me that he had been very much humiliated the evening or night before by the Secretary handing him the brief and stating in surprise that it was remarkable that Gen. Crowder had been Judge Advocate General for nearly two terms and was not aware of a power residing in his office. Lieut. Col. Johnson, subsequently brigadier general, was then executive officer, and either at the beginning or during the interview, Gen. Crowder called him in. The general stated that the brief proceeded from false premises and directed Gen. Johnston and myself to drop everything in hand and devote ourselves exclusively to the investigation of the facts and the authorities, and to prepare a memorandum brief for him covering the entire subject. I immediately began an investigation of all statutes by which Congress had vested appellate power in any court or courts, and Gen. Johnston began an investigation of the records of the Judge Advocate General's Office. The next day, which was Sunday, November 25, Gen. Johnson and I spent practically the entire day in the record office of the Office of the Judge Advocate General, examining the action which had been taken by Gen. Holt and others from the sixties to the eighties. Sunday night and the next day, Monday, the 26th, Gen. Johnston and I prepared the reply brief and submitted it to Gen. Crowder, either Monday, the 26th, or Tuesday, the 27th of November. The way that I fixed the dates is that Gen. Crowder's reply brief is dated November 27 and I am positive that the day that I worked in the record office was Sunday, because no one was present in the office and the offices were closed, so that I fixed the date when the brief was handed Gen. Crowder as Friday, November 23, the evening or night before he handed it to me.

By hearsay, which, I think, however, is admissible as establishing the fact itself of receiving information, I will state that when Gen. Johnston and I were working on the brief he then told me that Gen. Ansell had, a short time before, obtained an order from the Chief of Staff appointing him Acting Judge Advocate General and that the order had been revoked by the Secretary. By this information I am sure that the revocation had been made prior to the submission of the brief by the Secretary to Gen. Crowder.

Q. Have you any knowledge or have you heard anything to indicate the date upon which that brief was submitted by Gen. Ansell?—A. No; I have no information concerning that. I observed this concerning the brief: It is dated November 10, 1917. Gen. Ansell has stated, as I understand, that he submitted it on November 10. Before submitting the brief to the Secretary Gen. Ansell passed it around among the officers on duty in the office of the Judge Advocate General. They all signed their concurrence except Col. H. A. White, who signed it at the end with the explanatory words after his signature, "As explained." In the file of the papers is a memorandum dictated and signed by Col. White, under date of November 12, 1917, not concurring altogether with the opinions expressed in the brief. It must therefore have been subsequent to Col. White's memorandum of November 12 that the brief was submitted, but as to the exact date I have no information.

Q. On this occasion, did Gen. Crowder say anything regarding the circumstances under which the order detailing Gen. Ansell as Acting Judge Advocate General had been secured?—A. Gen. Crowder never mentioned that subject to me until within the last two or three weeks. At the time he handed the brief to me he made no reference whatever.

Q. You had no knowledge of it?—A. No; the statement above was made by Gen. Johnston.

Q. Have you any further information which would throw any light upon this controversy which has arisen?—A. I don't think I have any information except what I have gained by an examination of the records recently.

Q. What recent examination have you made?—A. As soon as I returned from France about three weeks ago, Gen. Crowder asked me to examine the entire controversy and all files and records bearing upon the questions in the controversy, and I have done so, submitting a number of memoranda. I also secured, with some difficulty, through Col. Kelly, of The Adjutant General's office, who I think obtained it from the office of the Chief of Staff, the entire file relating to Gen. Ansell's designation as Acting Judge Advocate General and his revocation, but the only information which I ever had, until recently, was in regard to the preparation of the brief, and my presumption is that Gen. Crowder designated Gen. Johnston and myself to prepare this brief because of the fact that all of the officers on duty in the Judge Advocate General's office had signified their concurrence with Gen. Ansell's views. Being in the Provost Marshal General's office I never at any time was connected with the working of the Judge Advocate General's office, except in that one instance.

Q. Referring to the memorandum you mention and to the memoranda which you prepared and the information which you have obtained from the records, has that practically all been embodied by Gen. Crowder in his statements in the courts?—A. I have not seen his statements in the courts, but I presume they have, because they were all submitted to him, and on each occasion he stated that it was exactly what he wanted, and I assume he was satisfied. Some of these memoranda were signed by me and some were not. I don't think, General, I know anything of any importance, except that I feel sure I can definitely fix the dates.

* * * * * * *

Col. SMITH. I have been on the most intimate and friendly terms with Gen. Ansell for many years. Shortly after my work on the brief in November, 1917, he exhibited a very distinct coldness toward me, which, however, seemed to have worn off by the time I went abroad, in November, 1918.

Upon my recent return to this office I met him in the corridor. My son, who had also been to France and also well acquainted with Gen. Ansell, was with me. To my great astonishment he attempted not to speak to me on that occasion and his manner was observed by my son.

About two hours later, on the same day, I passed him in the corridor with Maj. Howard Adams, who had also been on duty in the office of the Provost Marshal General, and Maj. Adams spoke out directly and said, "Good morning, General." Gen. Ansell looked us full in the face and passed on without changing expression.

On two occasions since then, within the past week, Gen. Ansell has declined to speak to me, although of course I have made no approach after the previous rebuffs.

Maj. Adams had nothing to do with it, but during the whole of his time in the Army was chief of one of the divisions in the office of the Provost Marshal General.

I state as hearsay that nearly every officer who was on duty in the office of the Provost Marshal General and closely associated with Gen. Crowder, who are now on duty in the Judge Advocate General's office, has stated to me that Gen. Ansell has ceased to speak to him or recognize them.

Q. Do you know whether this change of attitude on his part has been exhibited in connection with any of the officers who had been connected with the Judge Advocate General's office prior to the return of Gen. Crowder to the office?—A. I know those men very slightly and have no occasion to converse with them.

EXHIBIT 12.

MARCH 17, 1919.

Brig. Gen. Lytle Brown, General Staff, after being duly sworn, testified as follows:

(Questions by Gen. Chamberlain.)

Q. In August, 1918, on account of certain differences of opinion between Gen. Bethel and Gen. Kreger, regarding the force of recommendations made by Gen. Kreger in his review of court-martial cases, Gen. Kreger submitted

a memorandum for the amendment of General Orders No. 7. Gen. Ansell, in submitting the case, states:

"I concur in the views of these two officers, and recommend that the above designated order be amended, so as to require all cases tried by general courts-martial in the American Expeditionary Forces to be reviewed, to determine their legality, by the Acting Judge Advocate General of those forces. The substantive portion of a draft of order to accomplish this purpose is herewith."

In the draft of that order it was provided that "any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General." That order, as it was drawn and issued, gives to the Acting Judge Advocate General in France a power far greater than that possessed by the office of the Judge Advocate General in Washington, and gives, practically, the power which would have been given had Gen. Ansell's interpretation of section 1199 been accepted. You are familiar with that matter?—A. Yes, sir.

Q. It has been claimed that it was never intended to give such a power. Have you any information on that subject.—A. No; I have no information that would clear that up exactly, but I am of the opinion that the object of the order was thought mainly to be the throwing into the Judge Advocate General's office in France the business which should be attended to there without the necessity of referring it to Washington—thereby lightening the work of the Judge Advocate General's office in Washington and expediting the work of the administering of justice in the Expeditionary Forces. I am quite certain that the study of the question in War Plans Division did not contemplate giving authority in France which would be denied the Judge Advocate General's office in Washington. I have no information whatever that anything was inserted in this order surreptitiously. The War Plans Division simply approved the order, as written by Gen. Ansell's office, and sent it up, in the exact form as written by Gen. Ansell, to the Chief of Staff. It was approved in the Chief of Staff's office and sent to The Adjutant General for issue, exactly as it was sent up to that office. In examining the order which was issued, I find that there is a slight change of phraseology, but to my mind not a change of meaning from the order as it left the War Plans Division and passed through the office of the Chief of Staff. There is a slight alteration in the wording and phraseology of the order issued by The Adjutant General. Why that change occurred is not known by me.

Q. Was it that change which made it incumbent upon the commanding general to carry out the recommendations of the Acting Judge Advocate General?—A. The change involved that part of the order. There was a change in the phraseology of that part of the order.

Q. Have you copies of those papers that would——A. I have the copy, the one duplicate copy of the paper that went from the War Plans Divisions to the Chief of Staff, and there signed by Gen. McIntyre and stamped with Gen. March's name and sent to The Adjutant General for issue.

Q. Please have a copy made and sent to this office.

EXHIBIT 13.

WASHINGTON, D. C., *March 17, 1919.*

Col. Beverly A. Read, Judge Advocate General's Department, Chief Military Justice Division, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your full name, rank, organization, and duties?—A. Beverly A. Read, colonel, Judge Advocate General's Department, Chief Military Justice Division.

Q. How long have you been chief of this division?—A. I succeeded Col. Davis in April, 1918.

Q. Before or after Gen. Ansell left for Europe?—A. After, sir. Col. Mayes was in charge of the office at the time I was detailed in charge of that division.

Q. (Inspector handed Col. Read a copy of an office memorandum dated April 10, giving the organization of the Judge Advocate General's office.) Are you familiar with that?—A. Yes, sir.

Q. Do you know by whom that was prepared?—A. No, sir.

Q. What is the significance of this circular? Is it simply confirmation of an organization which already existed, or does it signify reorganization going into effect at this time?—A. On this particular date, April 10, I was a member of the Legislative Division, and I had been a member of that division for some time prior to this date, and I don't recall definitely whether this organization as outlined here in this circular took effect from April 10 or not.

Q. Were you on duty in the office in November, 1917?—A. No, sir.

Q. When did you come on duty?—A. I came back from France the latter part of January, 1918, and for a short while was unassigned and then was on duty in the Provost Marshal General's office for a short while. My recollection is that it was the latter part of February when I was assigned to duty in the Judge Advocate General's office.

Q. The question has arisen during this controversy as to the exact status of Gen. Ansell during the period November, 1917, to about April 20, 1918, when he departed for Europe; whether or not his duties in the office as senior assistant were in any way curtailed or whether his responsibilities and duties were such as would ordinarily fall to a senior officer during a temporary absence of the chief. Can you throw any light on that subject?—A. No, sir.

Q. When you came on duty in the office did you find, so far as appeared to you, cooperation and teamwork and good feeling in the office?—A. Yes, sir. I did not see anything to the contrary.

Q. What are the conditions in the office at the present time in that respect as you know them?—A. Well, sir, I can only speak for my own division, which is, of course, the largest and the most important division, there being about 50 officers in that division, and they are all officers from civil life except myself—I am the only Regular officer on duty in the division—and I have seen nothing to indicate on the part of these officers lack of what you refer to as teamwork. Of course, they have been somewhat upset and disturbed on account of this controversy, and particularly on account of what they regard, and I think very properly regard, as unjust criticism of the court-martial system as that criticism appears in the public prints. They feel that it is a reflection on them as lawyers and as officers. They feel that a wholly erroneous and unjust impression has gotten abroad throughout the country that the court-martial system is entirely wrong, and that is is unfair to the enlisted men, and that the soldiers are frequently unjustly treated. I say they believe that that is the impression prevalent in the country, and they think that impression is due to the statements that have been made in Congress and that have been published in the newspapers and other periodicals. They believe that a few cases where apparent injustice has been done have been brought to the attention of the people as indicating the usual way that military justice is administered, and their experience here has convinced them that that impression is not correct, that it is unfair, unjust, and they think, as I said a moment ago, that it reflects on them, because they believe that their friends at home consider that they are here in Washington sitting complacently in the office of the Judge Advocate General and seeing all sorts of outrages committed in the way of punishment by court-martial, and that they are doing nothing to remedy this evil. Having those impressions, they have been considerably disturbed, but it has not, of course, affected the amount or the character of their work or their efficiency in any way, but simply been a disturbing element to the extent that I have mentioned.

Q. You have stated the views and the impressions regarding welfare of the officers of your sections, regarding the justice and effect of these criticisms which appeared in press. Does that voice your own views upon that subject, as well as those of the department?—A. Yes sir; I think that. As I explained very briefly to the Senate committee, so far as my knowledge goes there has been no excessive portion of any severe sentence executed. I may say briefly during my time in France as judge advocate of the First Division, and during my time here, I have recommended against the imposition of these extremely severe sentences, not that I expected they would be served, but simply because I thought it would create the wrong impression on the public mind; and, secondly, it has never been my idea that that is the way to enforce discipline. I think, of course, that sentences in time of war must in many instances be more severe than in time of peace, but they ought to be, of course, within reason and not be imposed simply for their disciplinary effect, as these sentences were. Officers who imposed them, of course, did not expect they were to be served, and everybody understood that; but it did create a wrong impression. I may say that I have been frequently told by the officers who have come to my division that when they first joined and encountered those severe

sentences they would be somewhat shocked until they found that they were imposed only for the disciplinary effect and never with any idea of being carried out; then their whole viewpoint changed.

Q. Since you have been at the head of the Division of Military Justice in the office of the Judge Advocate General have there been any instances in which recommendations made by the Judge Advocate General's Office which could properly be made under the law as interpreted have actually been turned down by higher authority?—A. Well, there have been some very few instances where, as I recall it, the recommendations of the Judge Advocate General's Office have not been followed. Those instances are covered in the statistics that were prepared in our office and are already of record.

Q. Since you have been at the head of this division various memoranda and recommendations have been made by the Acting Judge Advocate General, the senior assistant in the office of the Judge Advocate General, Gen. Ansell, relative to changes of policy and relative to what he believed to be changes in connection with the administration of the military justice. Do you recall any such recommendations made by him which have not been carried out in effect by the Judge Advocate General or by the Secretary of War?—A. No, sir; I have no knowledge of those matters.

Q. Were those recommendations probably passed over your desk?—A. Not necessarily. Whatever changes of administration of the office Gen. Ansell desired to put into effect he did without reference to superior authority, as far as my knowledge goes. I am speaking, of course, of my own division. There was really no reason why he should have taken those matters up with superior authority, as he was in charge of the office.

Q. During your service in the Army do you recall any instances where the trial judge advocate of a court-martial was at the same time the judge advocate on the staff of the reviewing authority?—A. Occasionally.

Q. Was that a situation which frequently occurred or one which was of a very infrequent occurrence?—A. Extremely rare, and there was usually good reason for it.

Q. Going back again to the question of coordination in the office, have you observed since this controversy arose any marked lack of personal coordination or friendliness between Gen. Ansell and any members of your section?—A. No, sir.

Q. So far as you know, this controversy has not taken on a personal phase?—A. No, sir; not so far as I have observed.

Q. So far as you know there are no instances where there is failure to recognize or speak between Gen. Ansell and members of your section?—A. I never have heard of any such instances.

Q. Then any friction or any unpleasant feeling which may occur, if such does occur, has not been apparent to you?—A. No, sir; it has not.

Q. You are familiar with the provisions of General Orders, No. 7, 1918, also of General Orders, No. 84?—A. Yes, sir.

Q. Have you any knowledge as to the steps taken by Gen. Ansell to secure any provision in General Orders, No. 84, which amended General Orders, No. 7? Have you seen the memorandum submitted by Gen. Ansell regarding that amendment?—A. Yes, sir.

Q. You are familiar with all of that?—A. Yes, sir.

Q. Have you any knowledge as to what led to the difference between the wording of the memorandum and that of the orders issued?—A. I remember when this amendment was in process of preparation in the office, but I have a very hazy recollection of the facts connected with it. My recollection is that Gen. Ansell took the matter up personally with the General Staff and possibly with Gen. McIntyre, but I don't know that to be a fact; that is my recollection. I remember when the order was prepared in the office there was some mistake in the order which I discovered, or if not a mistake something in the order that did not appear to me should be there, and we had some discussion of the matter with Gen. Ansell. I think that Col. Power, Col. Keedy, and Col. Tucker were present with me when we discussed this with Gen. Ansell. Col. Keedy and Col. Tucker are still on duty in my office, and probably can throw some light on the matter.

Q. Where is Col. Power?—A. He is in France, sir.

Q. Did you hear Gen. Ansell or anyone else make any remarks to the effect that this particular form of order had been put over, as it were?—A. I don't recall anything of that sort.

WASHINGTON, D. C.,
March 25, 1919.

Recall of Col. Read.

Q. After the record in the case of a court-martial leaves the board of review, what becomes of it?—A. In those cases in which an opinion in writing is rendered, as, for instance, cases involving the dismissal of an officer, death penalty, confinement in the penitentiary, and in all cases of conscientious objectors, the opinion is prepared by the officer to whom the particular case is assigned. After he completes this opinion he submits it to the chief of his section of the Military Justice Division. If the chief of that section concurs in that opinion it then goes directly to one or the other of the two sections of the board of reviews. The section of the board of review concerned then considers that opinion in the same way that an appellate court would consider a case sent to it. If the board of review concurs in that opinion it then goes directly to me as Chief of the Military Justice Division, and also as ex-officio member of each of the two sections of the board of review. The opinion I may say is still in the rough. If I concur with the board then the opinion, the rough copy, is marked "final" and it is written up, initialed by me, and if the case is one for submission to the President, as, for instance, the death penalty or dismissal, or in the infrequent cases where the President himself is the convening authority, the record goes from my office to the Judge Advocate General or the Acting Judge Advocate General, and if he concurs he signs the opinion and it then becomes the opinion of the office and is forwarded to The Adjutant General for transfer, through the Chief of Staff, to the Secretary of War and finally to the President. In those cases which come up to this office under General Orders, No. 7, we deal directly with the reviewing authority concerned through the Judge Advocate General or the Acting Judge Advocate General, as the case may be.

In connection with the review of the records of trials by general court-martial in my division there is, I think, one defect or weakness in the system which, however, it seems to me, is practically unavoidable and irremediable. It is this. The vast majority of the cases which come there for review are those cases in which the dishonorable discharge imposed has been suspended and those cases in which no dishonorable discharge was imposed. No written review is prepared in those cases unless an error is discovered which necessitates either setting the conviction aside or returning the record for certain corrections. Here is where the defect lies to which I refer. The determination as to whether or not the record is legally sufficient to support the findings and sentence is practically a matter submitted to the judgment of the officer who reviews the record and the chief of that particular section of the Military Justice Division. If they should make a mistake, that mistake may not be discovered at all or may only be discovered when the case comes before the office again on an application for clemency, and the record is then again reviewed. There have been occasional instances of this sort, very infrequent, but there have been instances. Of course, with efficient lawyers—officers—to reveiw the record a mistake of this sort should never occur, but we have not always been fortunate in having all high-class lawyers in those lower sections of the division. It would be impracticable, of course, for the hundreds and thousands of records of general courts-martial which come to this office to be reviewed by the boards of review as at present constituted. As a matter of fact, it is almost a physical impossibility for them to keep up with the work, which is properly assigned to them as it is.

Q. That you regard as the only defect?—A. Yes, sir.

Q. This, however, is more a defect of possible personnel than of system?—A. Yes, sir; except that if the sentence is found to be illegal, the accused would have served part of an illegal sentence before the error could have been discovered and the necessary corrective action taken.

Q. When you became Chief of the Division of Military Justice, in the spring of 1918, did you receive any specific instructions relative to the handling of the cases under General Orders No. 7?—A. No, sir.

Q. What was your policy in those cases?—A. Shortly after I took charge of the Division of Military Justice I called Col. Mayes's attention to the fact that quite a number of the sentences imposed by general courts-martial appeared to me to be unnecessarily severe. He agreed with me, but stated that under the provisions of General Orders No. 7 he thought we were limited to passing on the legal sufficiency of the records and that we had no authority under that order to make any suggestions to reviewing authorities as to the quantum of

punishment. He suggested, in view of this limitation, that whenever a record was reviewed and the officer reviewing it considered the punishment too severe he should make a memorandum to that effect, signed by himself, and appended to the record, so that it would immediately attract attention when the question of clemency arose in that particular case. This was the practice of the office. After Gen. Ansell returned from France and assumed charge of the office, I called his attention to this matter and told him the construction which Col. Mayes had placed on General Orders No. 7, and which construction I thought was legally correct. We discussed the matter several times, according to my recollection. Gen. Ansell agreed that the sentences in some instances were too severe, and, if possible, some action should be taken to bring about a correction in this regard. Shortly after he instituted the first board of review, which was in the early part of August, 1918, the board of review and I discussed the question with Gen. Ansell on one or more occasions, and my recollection is that he some time thereafter verbally directed that in those cases which came before the board of review we would not be bound by the limitations of General Orders No. 7 in regard to recommending a reduction in the amount of punishment if we thought that course advisable. Some time in October, however, he formally reduced those instructions to writing and we have followed that procedure since that time. I subsequently informed him that the instructions did not authorize me to make recommendaions in the matter of the reduction of sentences in those cases which did not go before the board of review and he directed me to follow the same policy with regard to all cases where we thought the punishment was too severe. I might say right here that in August I submitted a memorandum to Gen. Ansell, prepared by myself, in which I called attention to some of the sentences which, in my judgment, were too severe, and in that memorandum I referred to the fact that while I thoroughly realized that the sentences were imposed by courts for their disciplinary effect and that the courts in imposing the sentences were actuated undoubtedly by the very highest motives, I thought, among other things, that unduly severe sentences might have an unfortunate effect upon the civil community. Some time after I submitted this memorandum we had a conference in Gen. Ansell's room, at which were present, if my memory is correct, Gen. Ansell, Col. Morrow, Col. Davis, Col. Power, Col. Keedy, Col. Tucker, and myself. There may have been one or two others, but I am not sure. My recollection is that it was understood at that conference that a general order be prepared by me for submission to the War Department, with the recommendation that it be promulgated to the service, calling attention to the severity of certain sentences and suggesting the advisability, particularly within the continental limits of the United States, of adhering wherever possible to the limits-of-punishment order, which, of course, was no longer in effect; it being limited to a time of peace. In September I prepared this general order myself, and submitted it to the board of review, but due to the overwhelming press of work before that board, and which press of work subsequently necessitated the formation of the second board of review, they were unable to complete consideration of the proposed general order prior to the time of the armistice on November 11.

Q. Is General Orders No. 84 in force at the present time as originally promulgated, so far as you know?—A. No, sir; it has been amended within the last few days by a new general order, which was prepared in my division under my direction. It was in force up until the time when the branch office was discontinued, March 1.

Q. In one of his statements Gen. Ansell says that about 10 days before his appearance before the Military Committee, all matters pertaining to military justice were ordered routed in other channels. What was the situation with regard to that?—A. I would have no information about this. All papers leaving my division normally go to the Judge Advocate General or the acting head of the office direct.

Col. B. A. READ. Referring to Gen. Ansell's report, made as a result of his observations while in Europe, I personally have never seen that document. On at least two occasions, once while the office of the Judge Advocate General was located in the State, War, and Navy Building, and once since the office was moved to the Mills Building, he has assembled the officers of the department and delivered a talk, or lecture I presume it might be called, based on his experiences and observations abroad. At the time he delivered the lecture in the Mills Building I recall that he had in his hand and read from a typewritten document which contained, from its appearance, a good many pages, and this

document I understood was his report. That, so far as my knowledge goes, is the only time I have ever seen it. I know nothing about what disposition he made of it, or to whom he submitted it, or in fact if he submitted it to anyone.

Q. Have you any knowledge of a second document prepared by him in connection with his trip; possibly a summary of this report.—A. No, sir.

EXHIBIT 14.

WASHINGTON, D. C.
March 17, 1919.

Lieut. Col. Edwin R. Keedy, Judge Advocate General's Department, member of the board of review, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your full name, rank, organization and duty?—A. Edwin R. Keedy, Lieutenant Colonel, Judge Advocate General's Department, member of the board of review.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. One year; I reported as I recall, on the 16th day of March, 1918.

Q. Have you been on duty in the Division of Military Justice during this entire period——A. Yes. The only time I was absent was when I was ill for a short time with influenza.

Q. How long have you been a member of the board of review?—A. From its inception, which so far as I recall was August 9, 1918.

Q. You are doubtless familiar with the controversy which is in progress and the various accusations and charges which have been made in the public press and elsewhere regarding the administration of military justice. Of course military justice in the Army is being administered under the laws as they exist and not as they might exist. Under the laws as they exist I would like your opinion as to the manner in which military justice is administered in the Army, as learned by you in the review of cases which come before you from all parts of the Army.—A. I would like to speak first, sir, of one thing which impressed me very much as a civilian coming into the service, by way of the distinction between the review accorded a case by court-martial and one accorded a civil case. In the civil courts there is an appeal or a review of the case only upon the initiative of the accussed and only when he is able to employ counsel to appeal the case for him. In the military law, as a result of the provisions of 48th A. W. and G. O. No. 7, as well as section 1199 of the Revised Statutes and the orders promulgated under it, in all cases by general court-martial the accused is given a review of his case automatically and as a matter of right. When the sentence involves death, the dismissal of an officer, or the unsuspended dishonorable discharge of a soldier, this review takes place before the sentence is ordered to be carried into execution. In other cases the review occurs subsequently to such action. All records of trial by general court-martial are sent to the Judge Advocate General's Department and are there reviewed. In cases where the sentence is death, dismissal, or dishonorable discharge, unsuspended—the only cases regarding which I am in a position to express an opinion—I think that taken as a whole the results of the administration of the law by the Judge Advocate General's Office during the time I have been connected with it have been at least as satisfactory so far as justice is concerned as the administration of justice by the appellate civil courts; in fact I would say on the whole I would think it has been more satisfactory because of this fact that as actually administered the Judge Advocate General's Department did a very great deal toward reducing sentences which civil appellate court has no power to do.

Since the creation of the board of review the Judge Advocate General's Office has had in effect a real appellate court. The functions of that board of review have been those of an appellate tribunal, and that phrase was used in the order promulgated by the then acting Judge Advocate General creating that board of review, and so far as I recall the recommendations of that board of review have been approved by the Judge Advocate General and acting Judge Advocate General in all but one or two cases; and what is even more significant so far as results are concerned, the recommendations of this board of review as approved by the Judge Advocate General have been approved by the Secretary of War and the President in practically all cases. So far as has been brought to my attention and so far as I recall, the recommendations of

the board of review, as approved by the Judge Advocate General or the acting Judge Advocate General, have been overruled by the War Department on questions of law in but two cases. So far as recommendations for the commutation of punishment are concerned I only recall six cases where the Secretary of War did not concur in the recommendation of the Judge Advocate General's Office, and in three of those the President followed the recommendation of the Judge Advocate General's Department instead of that of the Secretary of War. In cases where the commanding general of a territorial department, camp, or tactical division has had the power under the Articles of War to carry the sentences into execution, the recommendations of the Judge Advocate General's Department, so far as I know, have been followed in practically all cases. I only recall three cases—there may be more but I don't think there are many more—where the recommendations were not followed.

Q. You refer now to the review of those cases here?—A. Yes, sir. The great significance of the fact that the recommendations of the Judge Advocate General's Department have been followed in practically all cases is this, that although under the law the Judge Advocate General has not the power to act by way of disapproval of findings and the reduction of sentences, yet practically the views of his office have been carried into effect. Where the sentence imposed by court-martial has involved death or the dismissal of an officer, or penitentiary confinement of either an officer or an enlisted man, the review of the record of trial in the office of the Judge Advocate General, since the creation of the board of review, is, in my opinion, as thorough as that ordinarily accorded the record of trial in a civil appellate court. To be exact, the character of the review is substantially this: The record of trial is assigned to a judge advocate, whose duty it is to read and study the record, considering both questions of law and also the question as to whether or not the evidence is sufficient to support the finding. After he has thus studied the record he prepares what is known as an original report, which is in the form of an opinion. such as is written by an ordinary appellate court. This report and the record are then studied by the immediate superior of the officer who prepared the report. The second officer, after such study, expresses his opinion as to whether the report prepared by the first officer is correct. After this has been done the record of trial, with the report prepared by the first officer and the opinion thereon by the second officer, goes to the board of review, where it is carefully studied by three officers acting in practically the same capacity as an appellate court. After the board of review has determined on what in their opinion is the proper disposition of the case and has prepared or had prepared the complete review of the record, this review and the record are then presented to the head of the Military Justice Division, who expresses his opinion thereon. The record of trial and the review then go to the Judge Advocate General or the Acting Judge Advocate General for his consideration. Since the Judge Advocate General has returned to duty in many instances the opinion of the former Acting Judge Advocate General has been secured by the Judge Advocate General. If the record of trial is one which requires the action of the President, the record of the trial, with the review thereon, is sent to the Secretary of War for his opinion; afterwards to the President. If the record of trial is one to be acted upon by the commanding general of a department, camp, or tactical division, the Judge Advocate General communicates his opinion with the proper recommendation to such commanding officer, and, as has beeen said above and may be appropriately repeated here, the recommendations of the Judge Advocate General have been in practically all cases carried into effect by the particular official whose power it is, under the Articles of War, to carry sentences of general court-martial into final execution. During my service in the office of the Judge Advocate General I have been impressed by the fact that both the Judge Advocate General and the Acting Judge Advocate General have constantly had in mind the proper administration of the military law. So far as has come to my notice both of these officers have striven to secure an administration of the military law that will produce real justice, and in my opinion this result has been substantially accomplished, at least so far as the cases which have come under my observation are concerned.

Q. What apparent effect, if any, has this controversy had upon the question of coördination and teamwork in the Military Justice Division of the office?—A. In my opinion the morale of the office has been very little affected. Of course it is natural that there should be a certain amount of discussion—that is inevitable—but I am unable to see that the real work of the office has been impaired to any appreciable amount. The head of the Military Justice Divi-

sion, who, in my opinion, is an officer of unusual ability and capacity, has insisted at all times that no discussions in connection with this controversy should affect the work of his division. I think I can speak with assurance that it has in no way colored the action of the Chief of the Military Justice Division or the board of review acting under him.

Q. To what extent, if any, has this controversy and the discussions to which you refer affected the personal relations of the officers in the Division of Military Justice?—A. So far as I know, sir, they have not affected the relations of the officers of the Military Justice Division at all.

Q. Have they, so far as you know, in any degree affected the personal relations between Gen. Crowder or Gen. Ansell on the one side and other officers in the department on the other?—A. It is rather difficult, sir, for me to answer that question because most of the communications which either Gen. Crowder or Gen. Ansell have had with the Military Justice Division have been through the head of the division, Col. Read, and I have seen no indication that the relations which existed before this situation arose have been affected by it. I have not noticed that either Gen. Crowder or Gen. Ansell have given any signs of personal feeling toward any officer growing out of the situation in question.

Q. You are familiar with General Order No. 7, 1918, and General Order No. 84?—A. Yes, sir.

Q. Are you familiar with the discussions of memoranda from the Judge Advocate General's Office preliminary to and in connection with the issuance of General Order No. 84 amending General Order No. 7?—A. I don't believe, sir, that I can say that I am. I was present at a discussion with reference to the provisions of General Orders, No. 84, but I recall no information by way of memoranda or otherwise preliminary to that except one case, where the commanding general of the S. O. S. refused to follow the recommendation of the Acting Judge Advocate General in France.

Q. Just what do you mean by saying you were present at a conference regarding the wording of General Order No. 84?—A. I was present at a conference where, as I recall it, some time ago the question of phrasing an order that would go somewhat further than General Order No. 7 had gone would be prepared, and the question of my connection with it was merely as to the matter of phraseology, as to how it should be worded to accomplish what it actually did accomplish. In regard to the question as to whether there was anything of a surreptitious character in connection with the preparation of that order, I recall that somebody made a suggestion as to whether Gen. McIntyre would agree with that, and in my own mind, as it was published, I concluded that Gen. McIntyre approved it.

Q. Do you associate that particular case with a discussion relative to the wording of General Orders, No. 84?—A. That I do not recall, sir. That was 'the very thing, sir, I was trying to recall, and I can't recall whether that was the exact occasion or whether they were simply coincidental.

Q. Is there anything further you wish to state?—A. In addition to the experience of one year as an officer in the Judge Advocate General's Department, I have been interested in the administration of the civil criminal law for about 13 years and have made studies of the systems in England, Scotland, and Canada, the first two under the auspices of the then President Taft. From the point of view of a civilian lawyer with this experience, as well as an officer of the Judge Advocate General's Department, I have been impressed with the fact that both Gen. Crowder and Gen. Ansell have done a great deal to improve the administration of the military law and toward making it accord in spirit and in practice with the improvements in the administration of the civil criminal law. For instance, Gen. Crowder, I understand, was responsible for the creation of the disciplinary barracks, with the accompanying feature of the indeterminate sentence, and also instituted the system of the suspended sentence, both the indeterminate sentence and the suspended sentence being regarded as progressive of modern penology. Gen. Ansell during my connection with the office on a number of occasions referred to the fact that in instances courts-martial were imposing what seemed to be excessive sentences and took steps in so far as he had the power or influence to bring about the reduction of such sentences. To my mind, although I speak with certain hesitancy regarding this particular matter, the creation of the board of review by Gen. Ansell, giving it in effect and in substance, though of course not officially, the functions of an appellate tribunal, was a most important step toward securing an adequate review of court-martial records and toward the consequent securing of substantial justice in the administration of the military law. In view of these considerations it

has been a source of regret to me that any apparent controversy between these two officers, with the consequent publicity and distorition of the facts relative to the administration of the military law, particularly by reason of the fact that they have been unduly featured by the newspapers, has appeared to cast doubt and discredit upon the real achievements of these two officers.

Q. As the result of your experience in the office of the Judge Advocate General, is it your belief that the interpretation placed upon section 1199 produced an effect which in any degree lessened Gen. Ansell's efforts to improve conditions in so far as he was able to do so under the law?—A. Of course, I am unable to answer as to whether or not the matter referred to lessened his efforts. I can only say that I was impressed by his efforts.

WASHINGTON, D. C.,
March 18, 1919.

Recall of Lieut. Col. Edwin R. Keedy.

Q. What was the date that you went on duty in the Division of Military Justice?—A. About March 16, 1918.

Q. In the application of the provisions of General Order No. 7, did any material change take place upon the occasion of Col. Davis being relieved as chief of that division and Col. Mayes taking up those duties?—A. After I reported for duty to the Military Justice Division, Col. Davis remained as chief of that division for only about four weeks. During that period I did not have the opportunity to form any definite opinion as to the policy pursued by Col. Davis with reference to recommendations under General Order No. 7, as most of the cases reviewed by me during that period had been forwarded for action of the President under the forty-eighth article of war. During the time that Col. Mayes was Acting Judge Advocate General I formed the general opinion that the function of the Judge Advocate General under General Order No. 7 was considered to be less broad than had previously been considered. After Gen. Ansell returned from France and became Acting Judge Advocate General, he undoubtedly gave a more liberal interpretation, so far as the function of this office was concerned, to General Order No. 7 than had been given it under Col. Mayes. More extensive recommendations were made to commanding generals by Gen. Ansell under General Order No. 7 than had been made by Col. Mayes.

As the result of my subsequent inspection of opinions signed by Col. Davis during the period that he was chief of the Military Justice Division, I have formed the opinion that Col. Davis felt more free to make recommendations under General Order No. 7 than did Col. Mayes.

EXHIBIT 15.

WASHINGTON, D. C.,
March 17, 1919.

Lieut. Col. Charles C. Tucker, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, inspector general, and testified as follows:

Q. What is your full name, rank, organization, and duty?—A. Charles C. Tucker, lieutenant colonel, Judge Advocate General's Department, on duty in the office of the Judge Advocate General, Washington, D. C., in the Military Justice Division.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since March 28, 1918.

Q. How long have you been on duty in the Division of Military Justice?—A. Since that date.

Q. As a result of your experience in the Division of Military Justice and as a member of the board of review, what have been your observations and what are your views relative to the manner in which military justice is administered, with special reference to whether or not, within the limitations of the law, everything within reason is being done to protect the interests of officers and enlisted men come to trial before courts-martial?—A. At or about the time that I received a commission as major, Judge Advocate General's Department, a large number of civilian lawyers like myself were commissioned to serve in the Military Justice Division. At that time there were in the Judge Advocate General's Office not more than five Regular Army officers—Gen. Ansell, Col.

Mayes, Col. Morrow, Col. Davis, and Maj. Weeks. The personnel of the office other than these Regular Army officers consisted of civilian lawyers. Roughly speaking, there were in the neighborhood of a hundred civilian lawyers in the department, of whom between 40 and 50 were serving in the Military Justice Division. These men brought to their work the experience, training, and ideals of civilian lawyers. They were instructed, as I was, that their chief duty was to see that the accused in all cases were given the benefit of legal principles and legal safeguards. I found that in the review of general court-martial records by my associates, and this is equally true of myself, we had more in mind the safeguarding of the accused than military discipline. This for the reason that none of us or few of us had had any military experience; certainly I had had none. In other words, I brought to bear in the work of these reviews, and I am sure my associates did the same thing, the ideals, training, and experience solely of the civilian lawyer. After the establishment of the board of review, of which I was made a member, I observed that the men in preparing reviews were acting largely as counsel for the accused rather than writing such opinions as would emanate from an appellate court. This was so apparent that from time to time we had to issue instructions that the reviews should not be in the nature of briefs but rather in the nature of opinions.

Q. Referring to the safeguards placed around an accused, what is the effect of the safeguards in the administration of military justice as now applied compared to those in civil practice?—A. As a result of the reviews of general courts-martial cases in the office of the Judge Advocate General, I am certain that the accused have received as much, if not greater, consideration than the accused receive in appellate civil tribunals. The reviews in the office of the Judge Advocate General are much more carefully prepared than most opinions in civil appellate tribunals; that is to say, the accused receives more careful consideration and his case the scrutiny of more lawyers in the Judge Advocate General's office than it does in any appellate court that I know of. I may add here that for 20 years I have been a reporter of the Court of Appeals of the District of Columbia and accordingly am familiar with its opinions. Every case in the office receives the scrutiny of at least five or six men before it is put in final shape.

Q. What has been the impression produced by this unfortunate controversy upon the officers on duty in the Military Justice Section, so far as you have observed?—A. It has to a certain extent affected the morale of the office and has disorganized it to some extent. The dominant feeling is one of indignation that an impression should be left upon the public that the men of the office have been derelict in their duty in safeguarding men and officers tried by military tribunals.

Q. You say it has affected the morale of the office. Can you explain fully what you have in mind?—A. In the first place, it has resulted in many discussions among the men based upon newspaper reports concerning the controversies between their superior officers. I would not say there have been any factions in the office, but there has been more or less difference of opinion as to the right and wrong of the controversy; the whole thing has been so involved in obscurity that it necessarily has given rise to a great deal of talk and discussion. Few, if any, of the men have understood what the real issues were in the controversy; that is to say, whether they involved personal questions only, or whether they were based solely upon a desire for reform.

Q. Have these discussions led to any personal unpleasantness?—A. Absolutely none, so far as I know. Every man in the office that I have heard discuss the matter has expressed himself in terms of very great admiration for the ability displayed by Gen. Ansell while he was acting as Acting Judge Advocate General and for Gen. Crowder for the work that he has done. I know of no man in the division who has taken any sides in the matter at all.

Q. Do you know of any instance of any man or men in the division who, as the result of this controversy, are not on entirely friendly terms with either Gen. Ansell or Gen. Crowder?—A. Not one. I do know, of course, that since this controversy began the relations between the men and Gen. Ansell have not been as close—that is to say, he has not as often sent for them and consulted with them since Gen. Crowder's return to the office—their relations have been almost entirely with Gen. Crowder. That is perfectly natural under the circumstances.

Q. You do not attribute that to any ill feeling, but rather to his change of status in the office?—A. Exactly.

Q. Do you consider that the conditions which you have just mentioned have interfered with the administration of that division?—A. To a certain extent, yes. Of course, the matter has died down now to a considerable extent, and there is much less discussion and interference with the work of the office than there was when the controversy began.

Q. You are familiar with General Order No. 7, and also General Order No. 84?—A. Yes, sir.

Q. Have you any knowledge as to the discussions or the conditions concerning the issuance of General Order No. 84 in so far as it amended General Order No. 7?—A. My recollection of the matter is this: Some time in the latter part of August or early part of September, as the result of letters received from Gen. Kreger, in which were pointed out differences between himself and Gen. Bethel over the authority of Gen. Kreger in the review of general court-martial records; the matter of granting Gen. Kreger greater authority was discussed by Gen. Ansell with Col. Read, chief of the division, and the members of the board of review, which then consisted of Lieut. Col. Power, Maj. Keedy, and myself. At an interview, at which I think we were all present, the draft of a modification of General Order No. 7 was prepared, dictated, I think, by Gen. Ansell, with numerous suggestions on the part of the rest of us. Col. Read desired to see a copy of this modification that was dictated by Gen. Ansell, and we left, some of us, including Col. Read, with the impression that copies of this dictation would be sent to us for further revision. It appears that Gen. Ansell understood that we all agreed upon the modification of the order as then dictated by him and submitted that to the Chief of Staff. Thereafter, when it was ascertained that a misunderstanding on this point existed, Gen. Ansell sent to the Chief of Staff and procured the papers that he had submitted to it, and Col. Read, Lieut. Col. Power, Maj. Keedy, and I went over the paper again and made some further changes, and finally submitted to Gen. Ansell the modification of General Order No. 84, which met with our approval, and this last paper, which was identical with the General Order No. 84 as published, was then submitted to Gen. Ansell, and I understand submitted by him to the General Staff.

Q. Was that the form of amendment which at that time was agreed upon by Gen. Ansell and you officers, which was identical with the form in which it appeared in General Order No. 84 when it was published?—A. Yes, sir; as finally revised by us. The draft as originally submitted to the Chief of Staff, as I recall it, differed slightly with the final draft that we prepared.

Q. Do you recall the points of difference?—A. No; I do not. They were merely verbal.

Q. But the original draft embodied that feature which compelled the commanding general to abide by a recommendation of the Acting Judge Advocate?—A. Yes; that particular provision was considered the most important part of the whole order.

Q. Was there at that time any discussion of the ruling of the Secretary of War on section 1199?—A. I don't recall section 1199 being discussed. It was recognized that it gave Gen. Kreger a power that was not possessed by the Judge Advocate General of the Army. There is no doubt about that. It was done with that intention—of giving him that greater power. In fact, I remember in the discussion that the expression was used that it was a wedge that perhaps would result finally in a greater power being given the Judge Advocate General of the Army.

Q. Is there anything further you wish to state?—A. It is to be regretted that the public has not been made better acquainted with the actual work of the revision that has been done in the last year by this office and what has been accomplished. It is unfortunate that the impression should be left on the public mind that all of the severe sentences that have been pronounced by courts-martial have been carried into effect; as a matter of fact, they have not been. To illustrate by a concrete case: Czarnechi, a soldier was sentenced to death for desertion last summer. I happened to write the review. The review disapproved the finding or rather modified the finding to absence without leave. The man was sent to the disciplinary barracks for a term of several years. Just a day or two ago I was asked whether there was any reason why the man should not be restored to the colors. I said there was not, and I believe he has been or is about to be restored to the colors. There you have a man sentenced to death a few months ago now at liberty or who will shortly be restored to liberty. This is typical of innumerable cases of that sort, and it is true of many of these cases of alleged barbarous and severe sentences. If the

public were only made acquainted with the fact that the mere imposition of a sentence means practically nothing, it would aid, it seems to me, in placing the office in a very much better position. I went to Gen. Crowder and expressed myself as I have expressed myself to you. I asked him for permission to make public a memorandum prepared by Col. Wigmore on the subject of the administration of military justice, and was told it might be used. After taking up the matter with the correspondent of the New York Times, Gen. Crowder concluded that the memorandum had better be made public by Senator Chamberlain.

Q. Was that memorandum prepared by Col. Wigmore sent to Mr. Chamberlain?—A. Yes; it was sent to the Secretary, and by the Secretary sent to Mr. Chamberlain.

Q. That all was made public?—A. It was put in the Congressional Record, but otherwise not made public.

EXHIBIT 16.

MARCH 17, 1919.

Q. Give your full name, rank, and the duties upon which you are engaged.—A. William H. Kirkpatrick, major, a member of the board of review, Judge Advocate General's Office, second division.

Q. How long have you been on duty in the Judge Advocate General's Office?—A. I was commissioned August 27, 1918, and reported on September 6, 1918.

Q. Have you been on duty during this period continuously in the division of military justice?—A. I have.

Q. Under the military code as it now exists does the organization of the Judge Advocate General's Office, in the division of military justice operate efficiently and effectively in guarding the rights of officers and enlisted men?—A. I should say that it does; without the slightest question.

Q. The protection which the present system gives compares how, in your mind, with the protection given in cases tried by civil courts? I am speaking now of the appellate end of it.—A. Speaking merely from the standpoint of the appellate authority, I should say that the accused receives fuller protection under the present system than does the accused in the civil courts. The only restriction that I meant to make was that I was confining what I say to the appellate end of the proceeding.

Q. State briefly what you have in mind.—A. I think that the entire system of military justice as administered within my experience, works more efficiently and more successfully than justice as administered in the civil courts, for the reason that it has removed a great many of the technical protections, so called, which the accused in civil court proceedings may avail himself of, and thereby frequently defeat the ends of justice.

Q. In your observations has this controversy in any way reacted to affect the morale or efficiency of the division of military justice of the Judge Advocate General's Office?—A. The controversy has, of course, created differences of opinion in the office, but so far as I have observed has not resulted in lowering the morale or creating dissent.

Q. Have these differences in opinion and discussions resulted at all in personal unpleasantness in the relations of the officers, between themselves or the officers and either Gen. Crowder or Gen. Ansell?—A. Only to this extent, sir: That I believe there is some feeling that the published reports of Gen. Ansell's testimony did not do justice to the work which has been done by the officers of this division. I say the published reports, because every time I hear it discussed it has been with the reservation that Gen. Ansell, in his actual testimony, may have actually done full justice to the work of officers in the division. I don't think that at any time Gen. Ansell has been charged with the full newspaper reports.

Q. You say justice has not been done to the officers on duty there. What is the office general opinion as to whether or not justice has been done to the functioning of the office?—A. If you please, General, I did not say that in my mind justice has not been done, but that discussions were based on the fact that the newspaper reports did not do justice to the work, according to Gen. Ansell's testimony. What I mean to say is not to the officers themselves, but to the work which they have done, in that the newspaper reports have, of course, dwelt upon the crudities of the actual court-martial proceedings and did not make anything of the corrective action taken in the office here.

EXHIBIT 17.

MARCH 17, 1919.

Maj. Sherman Moreland, Military Justice Division, Judge Advocate General's Office, after being duly sworn, testified as follows:

Questions by Gen. Chamberlain:

Q. Under the military code, as it now exists, what is your opinion as to the operation of the organizations of the Division of Military Justice of the Judge Advocate General's Office, in the protection of the enlisted man who has disobeyed the laws?—A. I think that, taking the system of military justice from top to bottom, the accused gets justice oftener than he gets it in the civil courts. It possibly is the fact that he gets injustice done to him, in the first instance, more frequenly than he gets it done to him in the civil courts, but, on the other hand, he gets justice done to him more frequently in the first instance in military trials than he does in trials in civil courts, and the injustices which are done to him in the first instance in military courts are corrected. I think, in a manner that is deserving of the highest commendation, and I think can compare very favorably with the protection which he gets in civil courts.

Q. Has this unfortunate controversy, which has arisen in connection with the Judge Advocate General's Office, operated to affect the morale of the Division of Military Justice or to affect the efficiency of its operation?—A. Due to things that occurred about the time the controversy opened, I do not think it has affected the morale or the efficiency of the office.

Q. Has it, so far as you have observed, affected the personal friendly relations between the officers of that division or between such officers and either Gen. Crowder or Gen. Ansell?—A. I do not think it has. I believe that the published reports of Gen. Ansell's attitude have produced a good deal of resentment in the minds of many officers of the department of military justice.

Q. Because of what?—A. The reason being that it was regarded by such officers as, if not an unfair, at least not a full statement of the work of the department and reflected on many who had reason to believe that they were acting, not only legally, but conscientiously in regard to the matters put before them. As an illustration of the effect of the published reports of Gen. Ansell's testimony, the two boards of review met together and requested Gen. Crowder to permit them to make a statement to the press, and also requested him to obtain an opportunity for them to testify before the Senate committee, the members of those boards believing that the published report of Gen. Ansell's testimony had placed them in a false light with the people from whom they came, and that, in order to protect themselves, they would have to clear that up in some way or other.

EXHIBIT 18.

MARCH 17, 1919.

Q. Give your full name, rank, and present duties.—A. James Sidney Sanner; major; member of the second board of review, Division of Military Justice, Judge Advocate General's office.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since the 28th or 29th of October, 1918.

Q. Have you been on duty in the Division of Military Justice during that time?—A. Continuously.

Q. As a result of your service in the Division of Military Justice, what is your opinion as to the protection given to officers and enlisted men tried by court-martial? Does the system in force operate effectively and efficiently to give to these men all the protection which the law permits?—A. I know nothing whatever about officers' cases. My duties are concerned altogether with cases affecting enlisted men. As to them I would say that on review by the Judge Advocate General's office the machinery is extraordinarily elaborate for the protection of accused and convicted persons. In so far as the machinery before review may be involved, the system, in my judgment, functions as well as systems of judicature do generally, that is to say, here and there will be found miscarriages and mistakes, which the Judge Advocate General's Office is busily correcting.

Q. So far as you have observed has this controversy affected the morale of the office, or has it in any way interfered with cooperation and affected the efficient working of the machinery?—A. So far as I have been able to observe,

not in the slightest degree. At the outset of the organization of the second board of review we were given certain liberal and human standards of judgment, both by Col. Reed, chief of the division, and by Gen. Ansell, the acting head of the office, which standards have been in no sense modified by the taking over of the office by Gen. Crowder.

Q. Are you aware of any personal unpleasantness which was brought on by this controversy between officers of the division themselves, or between such officers and either Gen. Crowder or Gen. Ansell?—A. All controversies create partisanship in a sense, and there have been differences of opinion in the office respecting this controversy, but nothing of a bitter character or at all of a character that entered into the execution of the work. I can say that there has been no division into parties or camps, or any division that has the slightest effect upon the point of view or the getting out of the work.

WASHINGTON, D. C., *March 25, 1919.*

Recall of Maj. Sanner.

Q. You are amember of the special board of review, are you not?—A. Yes, sir.

Q. State briefly the functions of that board.—A. A board ordered by Gen. Crowder to consider the legal sufficiency of records criticized by the board of pardons as being either poorly tried or badly tried, or weak, or not convincing upon the evidence. The board is required to advise the general in each instance of such criticism whether the same is just.

Q. State briefly the conclusions which you have formed as to the efficiency of this system.—A. Just what proportion of the whole number are criticized by the clemency board in the first instance I am not able to say except by hearsay. My opinion is that not more than 1 in 10, if that many, are so criticized. The board finds that between 1 and 2 in 10 of these criticisms is justified, so that the proportion of bad trials to the whole number of cases is extremely small—way below the common experience of appellate procedure in the civil law. As the result of four years' experience on the trial bench of Montana and nearly six years' experience upon its appellate bench, my observation is that no system of judicature exhibits any better, if as good a record.

EXHIBIT 19.

WASHINGTON, D. C., *March 18, 1919.*

Col. Lewis W. Call, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. Lewis W. Call; colonel; Judge Advocate General's Department.

Q. You are on duty at the present time in the office of the Judge Advocate General?—A. I am, sir.

Q. How long have you been on duty in the office?—A. As a commissioned officer?

Q. Yes.—A. I have been on duty as a commissioned officer since August 20, 1917.

Q. During the entire period have you been on duty in the Division of Military Justice?—A. No, sir.

Q. Have not been on that duty at all?—A. No, sir.

Q. What duty are you on?—A. I have been chief of the Division of Contracts, Claims, Accounts, and Fiscal Affairs.

Q. You are familiar with this controversy which is going on in connection with the office of the Judge Advocate General?—A. Simply as it appears in the public press.

Q. So far as you have observed, has this controversy affected the morale of the office? —A. I think that it has not to any appreciable degree. The matter is talked over more or less, but I have not noticed that it affects the loyalty to the office of any officer.

Q. Do you consider that it has affected operations to such an extent as to have affected the efficiency of the office?—A. I do not.

Q. So far as you have observed has it affected the personal relations of the personnel of the office?—A. I have not observed that it has.

Q. You tell me you have never been associated with the Division of Military Justice so that you would not be familiar with the details of the operation of that division?—A. Only in this way, that the questions arising in the Division of Military Justice have been discussed in conference, including officers of other divisions.

EXHIBIT 20.

MARCH 18, 1919.

Questions by Gen. J. L. Chamberlain. Answers by Col. E. G. Davis.

Q. Give your full name, rank, and present duties.—A. Col. E. G. Davis, Judge Advocate General's Department; retired officer serving at the present time under the grade of colonel.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. I was in the office of the Judge Advocate General from the 1st of June, 1917, to about the 9th or 10th of September, 1918, since that time I have been on duty with the General Staff.

Q. During what portion of this period were you on duty in the Division of Military Justice?—A. From about the middle of October, 1917, until the middle of May, 1918. Those dates are approximate only.

Q. Are you familiar with the controversy pertaining to the administration of military justice which has arisen and which has become such a prominent feature in the public press?—A. I am.

Q. Will you state briefly, please, any facts which you may have bearing upon this controversy? Going back to October, 1917.—A. As I stated, I took up my duties in the Judge Advocate General's Office on the 1st of June, 1917. I held various positions, including that of executive officer until some time, I think, about the middle of October, 1917, when I was placed in charge of the Disciplinary Division of the Judge Advocate General's Office. At that time Gen. Ansell was Acting Judge Advocate General. He had consulted me freely during the time that he had been in charge of the office and had told me that he was not satisfied with the way in which that office was being administered, in that he thought that a too rigid adherence was being observed toward the Regular Army ideals; that he wanted to find a man more liberal in his tendencies, and who would be less bound by the traditions of the office than the former incumbent had been (referring to Col. White); and he wanted me to try out the work. At the time I took over that branch of the office there were but three or four officers besides myself on duty there, and two or three civilian clerks. The work increased very rapidly from that time on, and the force in the office increased very rapidly also. I had not been there very long when a case known as the "mutiny case" came to the office. The defendants in that case had been sentenced to dishonorable discharge and terms of imprisonment ranging from two to five years. I reviewed the record in that case and wrote the opinion of the Judge Advocate General's Office. We decided, after full consultation, that the men had been improperly convicted of mutiny, and that the fullest kind of restoration which the law authorized should be had in that case. I wrote the review after the customary form and terminated with a recommendation that any unexecuted portion of the sentence be remitted, and that, upon their written application to that effect, the men be allowed to reenlist. Gen. Ansell was dissatisfied with this solution. He argued that it did not do full justice to the men, and he began to hunt around to determine whether or not some fuller remedy could not be found under existing law. He directed that I make a search of the statutes and the decisions to see if something could not be done along that line, and, among other things, I examined section 1199, Revised Statutes, and reported to him that I thought a higher power could be deduced from that statute, if thought advisable. I prepared a brief along that line and submitted it to him, and Gen. Ansell used this brief as a basis of a more elaborate brief which he prepared and submitted to the Secretary of War on this same subject. Briefly, the contention of Gen. Ansell was that the word "revised," as found in 1199, Revised Statutes, conferred authority upon the Judge Advocate General to set aside, vacate, modify, or reverse any sentence of a court-martial, no matter at what stage of execution the sentence might be when the record came to the Judge Advocate General's Office. That brief was submitted to the Secretary of War and by him referred to Gen. Crowder. I might say that before being submitted to the Secretary of War it was submitted, in an office conference, to all officers on duty in the Judge Advocate General's Office, and all of us, I think, including myself, assented to the brief.

My own assent was in effect that the power could be deduced from the statute, if the Secretary thought it advisable to attempt it at this time, but I advised Gen. Ansell against the form of action which he proposed to take in that and similar cases. He believed that the power should reside in the Judge Advocate General to take any corrective action that might be found necessary in a court-martial case. He was not satisfied with the procedure which had theretofore been followed of making recommendations to the Secretary of War, or through him to the President, and letting the corrective action be taken in obedience to an order issued by the Secretary of War, or under the direction of the Secretary. In this mutiny case, to which I referred, he accepted my review of the case, but changed the concluding paragraph of the review. He introduced language of this kind, which, I think, had never before been used in a review prepared in the Judge Advocate General's Office: "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." It was Gen. Ansell's contention that this ultimate power of saying whether the verdict of a court-martial should stand should be vested in the Judge Advocate General rather than in the Secretary of War or in the President. From that particular view I strongly dissented at the time the brief was prepared and advised Gen. Ansell against taking that position. I told him that the logical outcome of such a position would be that he (the Judge Advocate General)would be asserting the right to reverse or modfy or set aside the completed action of even the President of the United States in cases where he might be the reviewing or confirming authority. Gen. Ansell replied that he would not hesitate on that account; that he thought the principle was right, and he was willing to go to the extreme limit. This opinion, which Gen. Ansell submitted to the Secretary of War in support of his position was, by the Secretary of War, referred to Gen. Crowder, and almost immediately thereafter Gen. Ansell received a note from the Secretary of War which he (Gen. Ansell) showed me, in which the Secretary said that Gen. Crowder had found it possible to so divide his time that he could give a part of each day to the office of the Judge Advocate General, and that he was sure Gen. Ansell would be glad to welcome Gen. Crowder back to his official family. Gen. Crowder thereupon returned to the Judge Advocate General's Office and resumed control.

Q. Upon what date was Gen. Ansell's memorandum of November 10, relative to the construction of section 1199, Revised Statutes, submitted to the War Department?—A. I would say, from my recollection of the matter, that it was probably submitted on that same date, or not more than one or two days thereafter. I mean by date—November 10. I might say in fuller explanation of that that the memorandum which had been prepared in the mutiny case, and which bears the date of October 30, 1917, was held in the Judge Advocate General's office and submitted to the Secretary of War with the memorandum which Gen. Ansell prepared in support of his views as to the construction of section 1199, Revised Statutes.

I discovered that Gen. Crowder had prepared and submitted to the Secretary of War an opposing brief of his views prior to his return to the Judge Advocate General's office. Within a day or two after his return he gave me a copy of his brief and asked that it be made the subject of study in the Disciplinary Division of his office. This was done. He, about that time, or shortly thereafter, directed Col. Clarke, who was my principal assistant, and myself to make a further study for the purpose of ascertaining and stating at length the arguments which could be deduced from a study of the law and the decided cases in support of his view of the statute. Col. Clarke and myself made this thorough study and investigation and we discovered what had been overlooked in the first study of this matter and what, I think, Gen. Ansell had also overlooked; that the very point he was contending for had been made the subject of a decision in one of the Federal courts in a district of New York and decided adversely to his contention. We collected these authorities for Gen. Crowder and began the study of what action could be taken by the War Department to prevent the infliction of hardships in any case tried by military court which might result in a change of status before the case was reviewed by the Judge Advocate General's office. It had been Gen. Ansell's contention that full justice could not be done the men in the mutiny case because they were dishonorably discharged and the discharge had been executed and the men could not be put back until they themselves applied for restoration. We made this study for the purpose of determining whether there was a method of staying

the execution of sentences which could be made of force and effect under the statutes as they then existed, and thus prevent the occurrence of any case which could not be fully corrected by the processes of the Judge Advocate General's office and the War Department, as they had theretofore been exercised. About that time the Houston riot cases came to a climax by the execution of 13 negroes at Fort Sam Houston, Tex. That case had been tried and the sentences executed before the War Department knew what the result of the trial had been. That came as something of a shock to the War Department and it was anticipated that a great deal of objection over the country would arise as to what seemed like a summary execution of the court-martial judgment without opportunity to appeal to the pardoning power for clemency. I think that apprehension was not well founded, because the objection which we expected did not develop, but it emphasized the necessity of having some power of review in the Judge Advocate General's office before a sentence of that character could be executed, and we prepared and asked the War Department to issue a general order, which was paragraph 1 of General Order 169, War Department, 1918. This was an order which stayed the execution of any sentence of death until reviewed in the Judge Advocate General's office. That was simply a first step in the formulation of what later was issued as a General Order No. 7, 1918.

Col. Clarke and I continued our study of that matter, and when we finally had our data together and agreed upon what could be legally done, I drafted what was later General Order No. 7, 1918, and submitted it to Gen. Crowder for approval, together with a memorandum which was prepared for his signature, to be submitted to the Secretary of War, in support of this corrective action. General Order No. 7 was designed to stay the execution of any sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man until such sentence could be reviewed as to its legality in the office of the Judge Advocate General. Gen. Ansell objected to the issuance of this order. He objected to it on the ground that it was not based on correct legal theory; that it was an interference with the power of reviewing authorities conferred by statute, and he filed a memorandum with Gen. Crowder in which he opposed the issuance of this order and stated that in any event it did not go far enough and would not work out the corrective action that was necessary.

Gen. Ansell still contended that his view of section 1199 was correct. He never accepted the other theory and never willingly supported it. When the action of the Federal court of New York was called to his attention, it was found that the exact point had been there passed upon. That was the case, General, of Sergt. Mason, who tried to shoot Guiteau, the assassion of President Garfield. If I remember correctly, the Judge Advocate General decided in that case that there was something irregular with the proceeding and had recommended that they be set aside. The Secretary of War, or the President, had refused to follow his recommendation, and the contention in the civil court was that the ruling of the Judge Advocate General was decisive of the matter; that his views must be followed, or, in other words, that he had the power to set aside and reverse this finding. The Federal court practically laughed the contention out of court, did not treat it seriously, and decided that no such power had been conferred upon the Judge Advocate General.

Gen. Ansell disposed of this case by saying that it was only the decision of an inferior Federal court and not the decision of the highest court of last resort, and he still contended for his own view. After General Order No. 7 had been made effective, Gen. Ansell was in a position intermediate between myself and Gen. Crowder. I disposed of, over my own signature, all cases which were reviewed by the office and found correct. I sent up for his signature all cases in which we found corrective action necessary, or in which we found some error of law which had to be passed upon by the opinion of the head of the office. All of these cases which went forward for action passed through Gen. Ansell's hands. Gen. Ansell has stated in his testimony before the Senate Military Committee that he was relieved of all responsibility for the administration of military justice from some time in November, 1917, until about the middle of July, 1918. I quote these words from his testimony: "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." That statement is not correct. During all the time that he was in the office as Acting Judge Advocate General, every——

Q. When you use the words "Acting Judge Advocate General," do you use it advisedly or do you mean as senior assistant in the office of the Judge Advocate General?—A. As a matter of fact, Gen. Ansell was the senior assistant in the office of the Judge Advocate General, but in this capacity he signed possibly 50 to 75 per cent of all papers that were signed in the office, and he signed himself as Acting Judge Advocate General, even though Gen. Crowder was present and at the head of the office. Therefore, when I referred to Gen. Ansell as Acting Judge Advocate General, I mean that he assumed to act as the Judge Advocate General in the final disposition of papers and signed himself as the Acting Judge Advocate General.

Q. Was the status of Gen. Ansell, by virtue of being the senior assistant from the period, November, 1917, until the middle of April, 1918, in any way different from his status prior to November, 1917?—A. His status was in no wise different, except that after Gen. Crowder returned to the office of the Judge Advocate General in November, 1917, Gen. Ansell had ceased to be the highest ranking officer in the office and had become the senior assistant. In all other respects his position was the same.

* * * So that, as I say, from the middle of November until the middle of April, all cases which I passed up for the action of higher authority passed through Gen. Ansell's hands, and he finally disposed of and signed many more cases than he passed on for the action of Gen. Crowder. If the general courts-martial reviews for the months between November and the middle of April were examined they would show that Gen. Ansell's signature will be found appended to a very great many.

My position in the office during this period was a very difficult one, for the reason that all of these cases had to pass through Gen. Ansell. Whenever a case involving the application of General Order No. 7 would be sent to his desk, Gen. Ansell would send for me and would contend that the action recommended was improper or ineffective or wrong in theory, or something of that kind, and would again go over on every possible occasion the old argument that his action under 1199 was the only correct one after all, and that the office was simply compromising with principle by trying to make any other solution work.

Q. Were any memoranda prepared by Gen. Ansell, or is there anything on record which would show that he had persistently adhered to his views and resisted the application of views contrary to same?—A. I am not sure whether anything was made of record in that connection or not. After General Order No. 7 went into effect there never arose any case in the Judge Advocate General's office, so far as I know, in which it could be fairly claimed that the department was without power to do full and exact justice to the defendant. The criticism which has been lately made public that a great many severe sentences were imposed by general court-martial is not, in my judgment, in any way related to the administration of justice under the law as it existed, and under the law which Gen. Ansell found so much fault with. That whole difficulty could have been corrected by a simple suggestion from the War Department as to limits of punishment which should be applicable in time of war. I discovered early in my administration of the disciplinary division that many sentences were excessive; that punishments were widely varying; that in two cases of perhaps the same nature one would be punished mildly and the other severely, and I asked Gen. Ansell in the fall of 1917, many times, as to whether our office should attempt to take corrective action for the purpose of equalizing punishment and making such adjustments, as we could make at the time these sentences were imposed. The answer to that was always that it would perhaps be inadvisable to attempt to make all of those corrections at that time; that many of these men who were sentenced to long terms of confinement would go to the disciplinary barracks for a time, and shortly thereafter return to duty, and long sentences would automatically take care of themselves; that when the war was over would be a more opportune time to make these general corrections.

I perhaps ought to say, in justice to Gen. Ansell on this point, that he was not entirely clear in this matter. Although he never gave any positive directions as to what should be done, there were times when he very much doubted the wisdom of approving a sentence without attempting to reduce it to a punishment more suited to that particular case.

I also consulted Gen. Crowder about this matter, and Gen. Crowder was of the opinion that it would be unwise, with all the work we had to get through with, to attempt to make adjustment at the time the sentences were passed upon; that if the sentences were legal and valid it was well, unless the sen-

tence was extremely excessive, to let it alone. In many cases we recommended substantial reduction, and so far as I know, these were carried into effect by the War Department upon the recommendation of the Judge Adovcate General.

Q. You stated a moment ago that after the issuance of General Order No. 7 the Judge Advocate General's Office found no case which, under the law, they were not able to correct any injustice which was done. Were there any cases in which the recommendations of the Judge Advocate General to undo injustice or to do justice which were not carried out by the War Department?—A. I do not at this time remember a single case in which recommendation was made by the Judge Advocate General for a remission or mitigation of a sentence of an enlisted man that was not carried into effect. There were several recommendations made by Gen. Ansell, while Acting Judge Advocate General, that were not approved by the War Department, but I think the failure to approve was rather because his recommendations would work injustice than otherwise.

I refer to a number of cases in which officers were tried for offenses involving the use of intoxicating liquor. Gen. Ansell adopted the policy early in his administration of the office that whenever an officer was tried for any offense involving the use of intoxicating liquor, no matter what the action of the court was, no matter what the sentence of the court was, if it appeared from the evidence that he had used it, or that he probably used it, Gen. Ansell insisted upon submitting a recommendation that that officer be summarily discharged. Many recommendations of that kind were disapproved by the War Department, but are the only ones disapproved during my incumbency of that position. Yes; there was one other—a case involving the trial of cadets at West Point, recommendations, which were prepared at the direction of Gen. Ansell, were not approved, but they were in the nature of increased punishment rather than a recommendation for clemency. I know of no recommendation for clemency that was disapproved.

Certain cases of considerable importance that have recently been discussed in the public press occurred during my administration of the Disciplinary Division of the Office of the Judge Advocate General. These were known as the four death cases which came from France. Two of them involved a sentence of death for sleeping on post, and two a sentence of death for disobedience of orders. This case has been cited to show the attitude of the Judge Advocate General's Department toward the doing of justice, and inasmuch as this case was reviewed while I was in the office, I think it proper to mention the facts in that connection. Gen. Ansell, in his letter to Congressman Burnett, made it appear that it was necessary for him to go over the head of Gen. Crowder and the Secretary of War and make a sort of special appeal to the President through a member of the judiciary committee of the House in order to prevent the execution of these sentences. Those cases arose under General Order No. 7, and the execution of the sentences was naturally stayed until the record could be reviewed in the office of the Judge Advocate General. More than this, the cases were of that character which required the action of the President as confirming authority before they could be executed.

When these cases first came to the office I assigned them to Maj. Rand for review. Maj. Rand is an exceptionally good lawyer, and reviewed these cases, wrote a brief review in each case, and finally recommended that the sentences be carried into execution. These four cases, as prepared by him, were sent by me to Gen. Ansell. A letter had been written by Gen. Pershing recommending the execution of the sentence of death in these cases. Maj. Rand embodied this letter in the review of one of the cases, and merely referred to it in the review of the other three. Shortly after these cases were submitted to Gen. Ansell I was called to his office, I think by Col. Mayes, who was then acting as Gen. Ansell's assistant, and who read over all papers before they were finally signed by Gen. Ansell or passed on by him for Gen. Crowder's signature. Col. Mayes stated they had decided that it would be better that Gen. Pershing's letter should be embodied in the review of each of the four cases, instead of merely being referred to in three of them. The reviews were sent back for that particular change. No other suggestion was made, either as to the recommendation or as to any other feature of the review. After this correction had been made I again submitted the cases to Gen. Ansell, and they passed through him to Gen. Crowder for his signature. The rule of the office was that any paper which passed Gen. Ansell and got to Gen. Crowder's desk for his signature had met with Gen. Ansell's approval, unless the opposing view was indicated in a memorandum or verbally communicated.

Q. Were such papers initialed by him?—A. I think, if I remember correctly, that Gen. Ansell did not make a practice of putting his initials on the papers but would append a slip of paper and put his O. K. on that.

After these cases had been passed on to Gen. Crowder, he (Gen. Crowder) brought them to the disciplinary division with the statement that he could not sign such reviews; that they were entirely too brief and that it would be an injustice to ask the President to send four men to death without stating fully all the facts and circumstances surrounding the trial, so he would have a complete picture of what he was doing. Gen. Crowder assigned Col. Clarke to a special study of these cases and Col. Clarke reviewed them in connection with all other trials coming from that same division at about the same time. He rewrote the reviews and again submitted them to Gen. Crowder, this time, I think, direct. Gen. Crowder was still dissatisfied and required further elaboration, and finally Col. Clarke prepared them in a manner satisfactory to Gen. Crowder and submitted them, with the concluding paragraph of the review omitted, the idea being that would be inserted by Gen. Crowder in his own words. These cases finally reached this stage along in the early days of April, 1918. One morning about that time I was called into Gen. Ansell's office and Gen. Ansell asked me, "What's the matter with Gen. Crowder?"—I think he said, "What the hell, etc.—about these cases." He said, "He just directed me to write a review in those cases." I said, "Gen. Crowder is very anxious about those cases. He does not want to sign a recommendation that the sentences be executed until he knows that that is justified," and I remarked further that Col. Clarke, who had been studing these cases, thought that these sentences should not be executed, and Gen. Ansell then remarked, "Well, I don't agree with Clarke. I think they ought to be."

The review which he prepared, however, in the manner I have indicated, simply embodied the statement of the case which had been made by Col. Clarke and ended with his own statement that he thought the sentence ought not to be executed.

Gen. Crowder then took all papers prepared for him and he prepared, in his own language, a memorandum for the Secretary of War setting forth all the facts and circumstances connected with the trial of these cases. Gen. Crowder had actually recommended that the sentences be carried into execution, finding that the trials were legal; that there was evidence to support the findings, etc., but his accompanying memorandum, in which he set out all the reasons why the sentences ought not to be executed, was treated by the Chief of Staff as a recommendation for clemency and he filed a memorandum, I think, stating that he did not agree with the views of the Judge Advocate General.

The Secretary of War adopted the views of Gen. Crowder and wrote a long letter to the President, explaining the case and recommending the sentences be commuted. The President wrote to the Secretary of War a letter, in which he thanked him for the clear presentation of these cases and stated that he entirely agreed with his view of the action to be taken, and that he was glad to sign the order prepared for his signature. Both the letter of the Secretary of War and the letter bearing the signature of the President are on file with those cases in the office of the Judge Advocate General.

Referring again to General Order No. 7 and Gen. Ansell's criticism of it, I noticed that in his letter to Congressman Burnett he used the following language: "The Judge Advocate General recommended and the department finally adopted an administrative method known as General Order No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative which was described by the Judge Advocate General as necessary to 'head off a threatened congressional investigation,' to 'silence criticism,' 'to prevent talk about the establishment of courts of appeal,' and to make it 'apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters.'"

He here speaks of the recommendation of the Judge Advocate General as an administrative method and as an administrative palliative which was described by the Judge Advocate General as necessary to head off "threatened congressional investigation," to "silence criticism," to "prevent talk about the establishment of courts of appeal," and to "make it apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters." The use by Gen. Ansell of these quotation marks would seem to indicate that these matters so included were used as an argument for the establishment of General Order No. 7. Inasmuch as I prepared both the order

and the argument in support of it, I am confident that no such language was used in anything that had to do with obtaining the approval of the Secretary of War in the establishment of that order.

Q. What was Gen. Crowder's actual attitude with respect to General Order No. 7?—A. So far as I know, Gen. Crowder's attitude was this: He believed that it would effectively meet any criticism which had been raised by Gen. Ansell as to a lack of corrective power in the office of the Judge Advocate General when cases were reviewed in which we discovered that errors of law had been made in the trial and disposition of the case. I do not know, of course, what the innermost attitude of Gen. Crowder toward this order was, but that was the purpose of its adoption, and it was designed as a complete answer to the contention that the War Department was incapable to do justice to the men tried by court-martial. I note also, in referring to this same order, that Gen. Ansell claims that full action under this order was not taken until September, 1918, after his return from France. He states that prior to that time the office view had been that the Judge Advocate General's office was limited in passing upon any case that came to the office under that order to technical questions of law, and that they were forbidden by the terms of the order to advise convening authorities as to punishments that had been given in particular cases. He states that notwithstanding the order and notwithstanding the view that had been taken by the Judge Advocate General's office he reversed that view and instructed boards of review to express their opinion in addressing military commanders to the effect that justice would require clemency on their part in passing upon certain sentences, and if it was a case in which the commanding general could not take action that we would forward the proceedings direct to the President, which means the Secretary of War.

Gen. Ansell is mistaken in his statement that this is the first time that this corrective action was applied under General Order No. 7. General Order No. 7 was administered during the time that I waa in the Judge Advocate General's Office and in the Disciplinary Division. We conceived it a function of the Judge Advocate General's Office to constantly advise reviewing authorities as to the action which it would be proper to take in particular cases by them. We suggested that they reverse or set aside the action of the court wherever errors of law had been exhibited inasmuch as they had reserved jurisdiction to do so, and we also suggested certain mitigation of punishment in particular cases when we thought the case deserved it.

It was exactly this procedure that Gen. Ansell so strenuously objected to as it was applied in the early part of 1918, under General Order No. 7. He stated, for instance, that a commanding general could not, under the law, reverse jurisdiction to take any further action in a court-martial case which had once passed his hands; that when he had acted on it such action was final, and if any corrective action was later taken it had to be taken by the Secretary of War, or, as he contended, it should be properly taken by the Judge Advocate General, under the power which he claimed could be deduced from 1199, Revised Statutes.

During the time that I was in the Disciplinary Division, notwithstanding these views held by Gen. Ansell, having Gen. Crowder's support for the carrying out of this policy, this action continued to be taken.

On the 18th of April, 1918, I left the office of the Judge Advocate General to make a trip of inspection of the military camps in this country, for the purpose of ascertaining how General Order No. 7 was being carried out and how military justice was administered in these camps under this order. Upon my return to the office of the Judge Advocate General, about the middle of May, I found that Gen. Ansell had, in the meantime, departed for his trip to France, and Col. Mayes had become the senior assistant to Gen. Crowder and was signing papers as Acting Judge Advocate General. Col. Mayes, in the meantime, placed Col. Reed in charge of the Disciplinary Division, and on my return I was assigned to other work, and two or three months thereafter assigned to the General Staff. Col. Mayes supported Gen. Ansell in his objection to the corrective action which the department was taking under General Order No. 7, and when he became senior assistant he reversed these corrective processes which we had established, and it was Col. Mayes's view of this order which Gen. Ansell stated that he reversed in September. His action, therefore, was simply a going back to the policy which was established in the Judge Advocate General's Office when General Order No. 7 was first published, and which he at first strenuously opposed.

Q. Could you from memory, or having access to the files, readily select a few cases that would verify this condition stated by you?—A. I don't know that I could do it from memory. By going through the court-martial records for any given month or period certain cases could be selected which would show this action.

Q. From the statements of Gen. Ansell it would appear that during the period that he was senior assistant in the Office of the Judge Advocate General, but more especially during the period from November, 1917, until April, 1918, that efforts made by him to better conditions of the enlisted man and to throw greater protection about him, were opposed, and he had been unable to bring about results which he desired to bring about. Are you familiar with that statement?—A. I might say in answer to that question that there was no opposition to any effort which Gen. Ansell or anybody made for the purpose of throwing the greatest protection around any man tried by court-martial. The whole question was as to how the greatest protection could be secured under the law. Gen. Ansell's insistence upon his view was not that justice was not done in particular cases, but that it was not done in the way he thought it ought to be done.

Q. So far as you recall was any recommendation or suggestion which was made by Gen. Ansell along the lines of corrective measures turned down or failed to receive consideration except in so far as pertained to the interpretation of section 1199, Revised Statutes?—A. No, sir. I may say that in that connection that following the mutiny case to which reference has been made that Gen. Ansell took the same action in a great many other cases immediately following; that is, he purported to set aside the sentence of the court-martial.

Q. Was that action taken by him after the question of the interpretation of 1199 had been announced by the Secretary of War?—A. No, sir; I think that action was taken in the interim, when the decision of the Secretary was pending. Some cases, I think, you will find slipped through and orders issued by The Adjutant General carrying this action of Gen. Ansell's into effect. Others, depending upon the way they were routed after they left our office, were held up and when Gen. Crowder returned to the Judge Advocate General's Office he found that several of those cases had not been acted upon, and the recommendations of Gen. Ansell that it be done in a particular way, were disapproved and the clemency which he recommended was brought about in the old method, or by doing it according to the established custom of the Judge Advocate General's Office, making the Secretary of War, rather than the Judge Advocate General the authority as to what should be done.

Q. Do you recall whether or not the case of the El Paso mutineers was the first upon which this action was accorded?—A. That was the first. I am positive about that; it was made a test case.

Q. I have here an office circular dated April 10, 1918, giving the organization of the Office of the Judge Advocate General. Do you recognize that circular?—A. Yes, sir.

Q. Can you tell me whether or not that circular confirmed an organization which, at the time existed and which for a considerable period in effect had existed, or whether it shows a new organization to go into effect at this time? When I speak of the organization I do not refer to the individual who may fill a particular place but to the organization of the office. I am speaking with respect to the Division of Military Justice.—A. This does not establish anything new in the Office of the Judge Advocate General. It is simply a statement of what had been in effect in the Judge Advocate General's Office for a long time. As nearly as I recall this was sent out very largely for the benefit of the new officers coming in so they would know what the office organization was and how to handle their work, but no new principle or new ruling is established by this order. It is practically what it was during the whole time I was in the Disciplinary Division. As I said before, every court-martial case that left my desk for higher action went to Gen. Ansell.

Q. Referring to this subject Gen. Ansell states, "He (Gen. Crowder) established for the officer in charge of that division (Military Justice) a direct relation and channel of intercourse, whereby the work of the Division of Military Justice was not subject to my supervision or to Col. Mayes, my immediate assistant. Both Col. Mayes and I believed that this method of military justice was bad, and upon April 15, just before sailing for France, having been invited by the Judge Advocate General to express myself upon the management of this office, I frankly told him so." Have you any information or knowledge on

that subject more than what you have stated?—A. The only exception that could possibly exist to the statements I have made is this that during the period when we were working in the office over the establishment of General Order No. 7, and formulating the rules for carrying it into effect I frequently consulted directly with Gen. Crowder and frequently placed the result of investigations I had made on Gen. Crowder's desk. These did not go through Gen. Ansell's hands for the reason that he was entirely out of sympathy with what we were trying to do, and Gen. Crowder had directed us to make the investigation, and we felt this had nothing to do with Gen. Ansell's position in the office, and we did not consult Gen. Ansell about anything we did in connection with that order, in getting it established or the rules for getting it into effect. But as to actual action on cases, no case went to Gen. Crowder that did not first pass through Gen. Ansell. There were certain cases in which I assumed the right to act; for instance, when I found that a court-martial record was incomplete; that the record did not show that the Judge Advocate had been sworn, etc., I exercised the authority of sending it to the reviewing authority for correction, but all matters where corrective action was taken, or where clemency was recommended, or where anything of that larger nature was involved, those matters passed through Gen. Ansell to Gen. Crowder, according to office memorandum.

Q. From the documents I find this statement made by Gen. Ansell: "I have at all times insisted upon the location of revisory power in this department and I have said, and said in the beginning, that while I preferred that that power be located in the highest law officer of the Army, I was content to have it located in the department somewhere. This was not done. From the time of Gen. Crowder's return to the office in November, 1917, I urged in several memoranda the necessity of closer supervision of court-martial procedure." Can you enlighten me on this subject?—A. I can not say what he said in memoranda after November, because he may have written and submitted a great many which I did not see, but I do know that his contention for a location of the revisory power was the old contention that it ought to be located in the Judge Advocate General. The statement that he was content to have it located somewhere in the department, or anywhere in the department does not accord with my recollection of what actually happened. About the time that General Order No. 7 was being prepared Col. Clarke and I prepared for Gen. Crowder a suggested revision of section 1199, Revised Statutes. Under this revision it was proposed to give the President, as the Commander in Chief of the Army, full power to vacate, set aside, modify, reverse, etc., any judgment of a military court, and to apply whatever corrective action he thought was necessary. The effect of this amendment, if it had been adopted by Congress, would be to carry into legal effect the recommendations which Gen. Ansell made, and the only differences would be that the supreme power would be located in the President rather than in the Judge Advocate General.

I recollect distinctly that Gen. Ansell criticized this proposal and objected to it, and did not support it.

Q. Have you any knowledge relative to issuance of General Order 84, amending General Order 7?—A. I was asked at one time after I left the Disciplinary Division to prepare a proposed amendment of General Order 7, designed to give the Acting Judge Advocate General in France a wider authority in the review of courts-martial cases, and I did prepare such a proposed amendment and submitted it to Col. Morrow, who was then the executive officer, but what was done with it after that, I do not know.

Q. You have no knowledge as to the conditions under which General Order 84 was secured?—A. No, sir.

Q. During the period that you were in the Judge Advocate General's office what were the conditions relative to the personal attitude of Gen. Ansell and Gen. Crowder in respect to each other and with respect to other officers in the department? Was there a spirit of criticism on the part of either?—A. I heard Gen. Crowder make no criticism of any officer in his department, so far as I can recall at this time. I do not even recall that he criticized Gen. Ansell's view in reference to this matter. There was a feeling, I think, in connection with my relations to Gen. Crowder, that there were certain things in connection with this whole thing that were not properly the subject of conversation and we did not discuss it, and I think I can say accurately that I never heard Gen. Crowder discuss or criticize any officers in his department for any view they might have.

I can not say this with reference to Gen Ansell, because, as I say, whenever a case came up involving an application of General Order 7, he would call me into his office and rehash the whole controversy time and time again. He would defend his views and criticize the views which Gen. Crowder had adopted, and it was an unending controversy until some time in, perhaps, March, 1918, when it reached a sort of climax and Gen. Ansell and I had some discussion about the matter, and he told me he was tired of hearing my views on the matter, and I said I was only answering his own questions; and after that he never discussed any of his opinions with me, but frequently thereafter he discussed them with Col. Clarke, my senior assistant.

Q. I am speaking as to whether or not there were any criticisms of a personal nature about the office of such character that they would create or tend to create discord in the office; interfere with cooperation and teamwork?—A. Well, I will answer that question by—I don't think there was. I think Gen. Ansell criticized Gen. Crowder for wanting to hang on to the office of Judge Advocate General—as he termed it—but that was a criticism which, so far as I know, was expressed only to myself and to two or three other officers.

Q. Have you any knowledge relative to the procedure of Gen. Ansell in securing the issuance of the order relieving Gen. Crowder and appointing him. I speak now of anything beyond the memoranda which are of official record?—A. Yes, sir; I have. Gen. Ansell consulted me before asking Gen. Crowder in writing to concur with him in a request that he (Gen. Ansell) be designated in orders as Acting Judge Advocate General. He showed me before he submitted it, and read to me a memorandum which he was sending to Gen. Crowder, in which this request was embodied, and a day or two later he showed me and discussed with me Gen. Crowder's reply. Gen. Ansell was very much disappointed and seemed a little bitter over the fact that Gen. Crowder had refused to join him in that request. I do not know what Gen. Ansell did after that to secure the issuance of the order, inasmuch as he did not thereafter show me or consult with me about its issuance. I only know what I have stated; that he proposed first to get Gen. Crowder's concurrence, and that he failed to get that. What he did after that I am unable to state.

Q. The order relieving Gen. Crowder and appointing Gen. Ansell is dated November 8, and according to the records a copy of that was delivered to Gen. Ansell on that date, or possibly the following day.

The memorandum review of the Texas mutineer cases, as I recall it, was dated October 30. This case was submitted or received in the office of the Chief of Staff on the 8th, the date of the issuance of the order and eight days later than the date of the memorandum. Has this any significance so far as your knowledge goes?—A. I don't know that it has any. My recollection of the delay in submitting the memorandum in the mutiny case was due to the fact that after it was prepared it was held up with the idea that it would go at the time that this supporting brief that Gen. Ansell prepared was submitted. Whether it had any relation to the order designating Gen. Ansell as Acting Judge Advocate General I am not prepared to state.

Q. During the period that you were in the office after November, 1917, did you observe any bad effects upon the morale or upon the efficiency of the office resulting from this controversy?—A. I do not think it did so long as I was in charge of the disciplinary division. Upon my relief from the disciplinary division that whole office went to pieces for a time, in that nobody knew where he was at or what action to take, and the whole procedure was made over again under the views of Col. Mayes, and there was very much disorganization and very much confusion. I don't think it affected the morale of the office particularly, because all the officers were anxious to serve efficiently.

Q. What officers who were on duty in the office at the time of that change would be cognizant of the changed conditions?—A. The officers who were there could tell more than anyone else. Keedy and Millar were there. Col. Clarke continued in the office while I was on a trip of inspection during the time the change was inaugurated, and could tell of the upset condition in the office which resulted.

Recall of Col. E. G. Davis.

Q. State the circumstances which led to the establishment in France of a branch of the Judge Advocate General's office.—A. The branch office of the Judge Advocate General in France was established by General Order No. 7, War Department, 1918. Some time prior to the publishing of this order the establishment of a branch office in France had been suggested. If I remember

correctly it was first suggested by Gen. Ansell. I have a distinct recollection that he found that such a branch office had been established during the Civil War and made the recommendation that such an office be established in France. When we had decided upon General Order 7, which would have the effect of staying the execution of sentences until they could be reviewed in the office of the Judge Advocate General, we realized that the establishment of a branch office in France had become important and embodied a provision for such an office in General Order 7.

Q. Gen. Ansell, referring to the execution of the Houston rioters, states: "At that time the War Department was holding that the department commander had full, final, and complete authority to carry that judgment into execution." There never was any question, was there, as to the authority that was given the department commander under the Articles of War?—A. No, sir; I think not. I think it was conceded that he had that authority.

Q. Gen. Ansell continues: "It was not so some time after that, for as a result of my agitation of the existence of this advisory power an order was issued that the death sentence should not be carried into effect until there should have been a review of the record by the Judge Advocate General." Do you recall whether or not this change was the result of his agitation? A. My recollection of that matter is about as follows: When Gen. Crowder returned to the Judge Advocate General's Office, Col. Clark and I began the study, as heretofore described, for the purpose of working out a solution of the question of administering military justice in such a way that no man could be sentenced to death or dismissed from the service or dishonorably discharged until the record of his trial had been reviewed for its legality. While we were engaged in this study the executions in the Houston riot case occurred at Fort Sam Houston, and this led to the issuance of paragraph 1, I think it was, of General Order 169, War Department, 1917. This order had the effect of staying the execution of a death sentence until the record of trial had been reviewed in the office of the Judge Advocate General. That order was prepared by me. I saw no paper or communication, memorandum of any kind, by Gen. Ansell on this question. It was prepared on my own initiative, and as a result of a study of 1199, which I was then giving to this subject.

Q. What are your recollections regarding the changes which were made in the office of the Judge Advocate General in the wording of the draft of General Order No. 84, amending General Order 7?—A. My only knowledge of that matter is this: At the time any question of amending General Order 7 came up in the Office of the Judge Advocate General I was not serving in the Disciplinary Division but was called into consultation with reference to the amendment of that order. It was agreed in this conference that the order should be amended, and it was suggested that inasmuch as I had written the original order I should prepare the draft of the amendment, and Gen. Ansell directed me to prepare such a draft. I did so and submitted my draft to Col. Morrow, who was the executive officer in the Judge Advocate General's Office, and nothing in connection with that letter afterwards came to my attention. I did not see the papers submitted by Gen. Ansell and only know that I prepared a draft of the amendment.

When the cases were first submitted to Gen. Ansell and Col. Mayes—that is, to the office in which they sat—Col. Mayes, after the papers had been there for a short time, sent for me and pointed out that the letter in which Gen. Pershing had recommended the execution of these sentences had been embodied in the review of only one of the cases, and merely referred to in the review of the other three cases. He stated that it was his opinion that this important letter should be embodied in the review of each case and the papers were taken by me from Col. Mayes's desk, for the purpose of making that change. My recollection is very clear on the point that Gen. Ansell was present in the room at that time, although I do not recall that he took any part in the conversation that ensued between Col. Mayes and myself. There was no argument about it at all; if they wanted that change made in the review, why that was all there was to it. That is so far as Col. Mayes's participation in this case went—to my knowledge.

The next time I had any conversation with either of them about this matter was along about the 10th of April, 1918. I was in Gen. Ansell's room for some other purpose and he came out of Gen. Crowder's room and sat down at his desk, and said to me—in words about as follows, "What in the hell is the

matter with Gen. Crowder about those death cases?" I explained to him that he had Col. Clarke at work reviewing these cases, and he seemed very anxious to be sure of his ground before making definite recommendations, and that Col. Clarke had come to the conclusion that the sentences ought not to be executed. To this Gen. Ansell replied that he did not agree with Col. Clarke—that he thought the sentences ought to be executed, and he further stated that Gen. Crowder had directed him to make a review of the cases himself.

Those two events stand very clear in my mind, and there is no possible confusion between them.

Q. To the best of your recollection, was Col. Mayes present at that time?—A. I do not recall whether or not Col Mayes was in the room at that time. There were other people in the room, but I have no recollection that Col. Mayes was there. I am sure he did not converse. He may have been there, but I would not state so positively.

Q. Up to the time of that conversation have you any knowledge as to what part, if any, Gen. Ansell took in connection with these proceedings?—A. I have no direct knowledge; no, sir; but I know that the rule of the office presupposed that everything that went to Gen. Crowder passed through Gen. Ansell first.

Q. You have no affirmative knowledge?—A. No, sir; I have not.

Q. You don't know, then, whether or not, when the papers originally passed through his office to Gen. Crowder, he personally examined the cases?—A. No, sir; I have no affirmative knowledge on that point, but I am quite sure he was in the office on the occasion that Col. Mayes turned the cases over to me, with the suggestion that Gen. Pershing's letter be embodied in each. The impression I received was that this was the only change they wanted made in the reviews.

Q. After that change had been made, do you recall whether you took the papers in yourself, or did they go in in the routine way?—A. I have no distinct recollection of that; I suppose, though, that they went in the usual routine way.

Q. Do you remember the circumstances of the circular which went out along in March, 1918, relative to joint trials? Was that over your signature?—A. I think it was over Gen. Crowder's signature, but I prepared the paper.

Q. Do you recall whether or not Gen. Ansell or Col. Mayes had any connection with that paper at all Did they make a protest?—A. I think they did not. That is, they made no protest. Whether or not they had anything to do with the paper or not I do not know. My recollection of it is that I turned it over to Col. Spiller, the executive officer, for office approval, before sending it out, and I am quite sure that it bore the signature of Gen. Crowder, when finally published. After it was published, and some cases came in which showed that judge advocates misunderstood the purpose of the circular there was, I think, some criticism by Col. Mayes, but none before, as I recall.

Q. Was that circular the cause of any special trouble or embarrassment?—A. A misunderstanding of that circular, I think, resulted in faulty trials in several cases which were criticized by the department; and the results, I think, were set aside. To that extent; yes. I don't know to what extent it was the subject of embarrassment. It was misunderstood by some judge advocates in the field, and they applied it in cases where it was not intended that it should be applied.

The reason for the publication of the circular was as follows: There were several cases which came to the department in which joint defendants; that is to say, men who participated jointly in the commission of crime, had been separately charged and separately tried; tried each of them by the same court. Now, it was perfectly obvious that the members of the court, after trying one defendant, would have a perfectly clear idea as to the other defendants. We sent this circular out with the idea in mind of informing judge advocates that when a situation of that kind arose, the practice should be to try them jointly.

Q. Referring back to the four death cases in France, do you recall the circumstances under which those cases first came to your desk? Were they returned by you for correction?—A. I don't recall that; but if that was the situation, I probably did, because I would want each case complete in itself. I don't even recall that there was a letter from Gen. Pershing with them; I had so many cases on hand at that time.

Q. You don't recall the circumstance of returning them?—A. No, sir. It is probable I did if that situation existed.

Q. Was this during Gen. Ansell's absence?—A. I think he was absent during all of that. I don't think those cases were called to Gen. Ansell's attention until after they had been sent to Gen. Crowder.

Q. Your idea is that they were not called to his attention until Gen. Crowder called upon him for a review?—A. Yes; unless I talked with him when he came back. I was trying to refresh my memory by talking to him, and he thinks that I told him about these cases then, and that he disagreed with me—from what I told him—and that is probably true, because I know we disagreed, and in some way or other they were turned over to him to examine, I thought by Gen. Crowder's initiative. It may be I asked Gen. Crowder to turn them over, but at any rate they had gone to Gen. Crowder before Gen. Ansell had anything to do with them and had gone to Gen. Crowder with the prepared review.

Q. Then it is your belief that Gen. Ansell never examined those cases himself until after he had been requested by Gen. Crowder to do so?—A. That is my recollection. I don't know about the request of Gen. Crowder.

Q. Was not that a case which, prior to the time it came up to your desk the first time, had been the occasion of a lot of talk in the office?—A. I can't say as to that. I think I had discussed the case with Davis and Clarke, as I frequently did with important cases, but could not say whether Gen. Ansell had talked about it or not.

Q. You are confident in your own mind that at no period during the handling of these cases he expressed or even entertained the views that the sentences should be executed?—A. I am quite sure that he did not; that is, upon the merits of these particular cases. We might have talked about the abstract question of whether a man who went to sleep on post in the presence of the enemy and endangered the command should suffer the death penalty.

Q. Have you any reason to believe that about this particular time he did or may have expressed himself that way?—A. That is a general supposition on my part—arising out of the fact that I often discussed abstract questions of that kind—especially with Gen. Ansell.

Q. You spoke the other day about the Camp Grant cases. Were those cases especially conspicuous?—A. Yes, sir.

Q. Briefly, what was the point?—A. Those are the cases of, I think, 21 Negroes who assaulted one woman and were separately charged with the offense and jointly tried, there not being even an allegation of conspiracy or joint action in any of the charges. The records had to be disapproved. A number of them were sentenced to death and deserved it—but all were disapproved.

EXHIBIT 21.

WASHINGTON, D. C., *March 18, 1919.*

Col. John H. Wigmore, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. John H. Wigmore; colonel; judge advocate, United States Army.

Q. Have you any means of fixing the date upon which Gen. Ansell's memorandum of November 10, 1917, came into the possession of Gen. Crowder?—A. I being then on duty in the office of the Provost Marshal General, the general called me into his office and showed me a memorandum which he stated had been handed to him the night before by the Secretary and that it had given him a most extraordinary shock at the doctrine contained in it. He asked me to look it over and give him my informal opinion, which I did within a day or so. The day was a Saturday; this is the only positive item as to the date that I can contribute; but I know that thereafter Col. Easby-Smith and Col. Johnson, at Gen. Crowder's direction, worked upon the materials for a brief in reply to the memorandum and that this work extended over the succeeding Sunday and Monday. The identification of this Saturday with November 24 is made out by other data contributed by the other officers.

Q. Did you assist in the preparation of the letter of February 13, 1919, submitted by Gen. Crowder to the Secretary of War?—A. I did.

Q. Referring to that letter, charges have been made in the public press that it contained certain misstatements and misinformation. What information have you in regard to that?—A. The first draft of that letter is dated February 8. On page 2 of the draft occurs the sentence, "The story was disbelieved and he was found guilty." This sentence occurs in a concise allusion to a case cited by Senator Chamberlain, the allusion being prefatory to a full explanation. The Senator's description of the case had already stated that the court-

martial had at first found the case not guilty, but afterwards, a consideration being directed by the commanding general, the court had found the accused guilty. This intervening stage in the action of the court was therefore perfectly well known to the Senator, for he himself had stated it; in the draft of the reply, therefore, the full description of the case was not thought necessary. On February 12, Wednesday, at 10 a. m., Gen. Crowder informed me that a meeting of the Senate committee had been suddenly appointed for the next day and asked me whether I could complete the draft in season to assist him at the hearing. I replied that the draft must be completed, and I worked with two stenographers until 1 o'clock that night to complete the draft. It was presented to Gen. Crowder the next morning at 8.30, February 13. In the final draft, which he went over with me, he noted the above passage and remarked that it omitted to state the intervening finding of the court. I explained to him how the omission had been made and he directed that in the subsequent copies the omission be restored. He then, as the hearing was coming on that day, signed and sent the letter to the Secretary of War for transmission to the Senator. In the meanwhile I returned to the office and caused four new sets of carbons to be made of the letter with the omission restored. That afternoon Senator Chamberlain telephoned the Secretary of War concerning this omission, and upon my meeting Gen. Crowder later that afternoon he remarked, "It has happened just as I told you. This omission has been noticed and should not have occurred in the first draft of the letter." The second series of copies were dated February 13, Thursday, the day of the hearing, and carbons were dispatched to the Secretary of War and the original containing the omission was withdrawn. As Senator Chamberlain was already aware of the omission, and as it was not deemed to be material in any event, no further notice was sent to Senator Chamberlain.

As to the second alleged erroneous statement referred to by Senator Chamberlain in his recent letter, it consisted in the statement, on the same page of the draft letter of February 12, that the review of the case in question was prepared by judge advocates "who were not commissioned in the Regular Army, but were experienced lawyers fresh from civil practice." This sentence was inserted after the first above draft dated February 8 and during the second revision in the intervening days. I had received from Maj. Rigby a statement of the case and returned that statement to him, but I recall in completing the dictation of the draft that the judge advocate at Camp Gordon was named Taylor and I immediately inferred that it must be Maj. Orville J. Taylor, of Chicago, who was known to me to be a reserve officer recently commissioned. I inserted the above sentence in the draft provisionally, knowing that if the fact were otherwise the sentence could be deleted before signing, but that if the fact were as stated it would be too late afterwards to insert the sentence in the signed letter. Meanwhile I made a memorandum to verify the fact by telephoning Maj. Rigby. Owing to interruptions of telephone service, the reply did not come until Wednesday afternoon, February 12, in the midst of the final rush of preparation and the memorandum was mislaid and failed to attract my attention. The sentence therefore remained in the draft as presented to Gen. Crowder Thursday morning, February 13. But on my return to my office on that same morning I found the memorandum from Maj. Rigby replying to my telephone, reporting that the judge advocate's name was William Taylor. Upon referring to the Army directory I discovered that Lieut. Col. William Taylor was a commissioned in the Regular Army. I therefore deleted the sentence and in the copies which were then being made, dated February 13, that sentence was omitted. I also immediately dictated a correction to be sent to the Secretary of War. A copy of this correction has been placed in your hands by Maj. Rigby. It did not receive Gen. Crowder's signature until February 17, on the succeeding Monday, and was forwarded to the Secretary of War. On February 21 the Secretary of War forwarded the correction to Senator Chamberlain in a special letter.

EXHIBIT 22.

WASHINGTON, D. C., *March 18, 1919.*

Lieut. Col. Robert W. Millar, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. Robert W. Millar; lieutenant colonel; Judge Advocate.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since March 11, 1918.

Q. In what division?—A. Military Justice Division.

Q. During the entire period?—A. Yes, sir.

Q. You are doubtless familiar with the controversy that has been going on in the public press relative to the affairs of the Judge Advocate General's Office?—A. Yes, sir.

Q. I would like to have your views briefly as to the efficiency of the Division of Military Justice as administered under the laws as they exist in protecting the interests of the enlisted man.—A. I would answer that, General, by saying that it is my judgment that, on the whole, the interests of the enlisted man have been efficiently protected by the Military Justice Division to the extent of its powers as construed by those in charge. Some difference of policy has existed from time to time with reference to the powers of the office under General Orders, No. 7, 1918. When I entered the office, the Military Justice Division, then being in charge of Col. Davis, the impression I received was that there was then a disposition to make recommendations to commanding generals more freely than later in the spring when Col. Mayes became Acting Judge Advocate General. How far such recommendations included recommendations of reduction of punishment I can not say. Col. Mayes made it plain that he considered that the function of the office was limited to passing upon the legality of the sentence under General Orders, No. 7. Later, after Gen. Ansell took charge, there came about a policy of making distinct recommendations in regard to the reduction of punishments more freely than had been the case before. In October, 1918, as I recall, a memorandum was prepared by Gen. Ansell empowering the Military Justice Division to make such recommendations where it was thought the case demanded it. I do not wish to be understood as saying that such recommendations were never made under General Orders, No. 7 during the time Col. Mayes was Acting Judge Advocate General, but I would judge that no such recommendations was had only in exceptional cases. In October, 1918, and shortly before the memorandum of Gen. Ansell was prepared I became a member of the board of review. Since the memorandum in question, there has been no hesitancy in recommending reduction of punishment wherever the case seemed to require it, at least in the cases which have come before the first section of the board of review. The board of review at the time which I became a member of it passed upon virtually all papers in the Military Justice Division except those relating to applications for clemency. Later, owing to the accumulation of business its functions became restricted to a smaller class of cases and at present it is occupied chiefly with cases involving commissioned officers. Making allowance for this fluctuation in the construction of the powers conferred by General Orders, No. 7 upon the office of the Judge Advocate General, I am of the opinion that, on the whole, the Military Justice Division, so far as its powers have extended, has protected the rights of accused to a degree which is not inferior to that protection accorded them in civil appellate courts.

Q. As to length and breadth of action, how do the operations under General Orders, No. 7 as applied at the present time compare with those which were in force prior to the advent of Col. Mayes as chief of this division?—A. Prior to Col. Mayes taking charge of the office I was doing work of a subordinate character and consequently I am not in a position to make a satisfactory answer to the question.

Q. How has the morale of the office been affected, if at all, by this controversy?—A. There has, of course, been considerable discussion among the members of the Military Justice Division, which has to some extent perhaps interfered with full attention to the work, but the resultant detriment has in my judgment been very slight and there has been in my opinion no impairment of any material character of the work of the division.

Q. Has this controversy given rise to any feeling on the part of any officers of that division, that an injustice had been done them, so far as you know, or had been done the division as a whole?—A. Speaking for myself I would say—and I think this view is shared by certain other members of the Military Justice Division, civilian lawyers—that the newspaper statements purporting to give the testimony of Gen. Ansell before the Senate Military Committee have had a tendency to unjustly reflect upon us and our work in the Military Justice Division.

EXHIBIT 23.

WASHINGTON, D. C., *March 18, 1919.*

Maj. William H. Keith, United States Army, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, organization, and duty?—A. William H. Keith; major, United States Army; on duty with Purchase, Storage and Traffic Division, General Staff.

Q. How long were you chief clerk of the Office of the Judge Advocate General?—A. I think June 1, 1914, I was appointed and resigned September 17, 1918.

Q. Were you chief clerk during November, 1917?—A. Yes.

Q. You are familiar with a controversy which took place in the Office of the Judge Advocate General about that time with respect to interpretation of certain sections of the Revised Statutes and other matters?—A. Well, I can't say that I am familiar with it, General.

Q. You know that there was such a controversy?—A. I know that a discussion took place in the Military Justice Division. I was chief clerk of the whole division and it just came to me casually.

Q. I have before me an office circular, Judge Advocate General's Office, dated April 10, 1918, which gives the organization of the office of the Judge Advocate General's Department. Do you recognize that circular?—A. Yes.

Q. Could you tell me by whom that was prepared?—A. I am not sure of it, General, but I believe it was prepared by Col. Spiller.

Q. From your knowledge of the office I would like you to tell me whether or not that circular shows an organization which at the time existed in the office, and which had previously existed, or whether it refers to the results of a reorganization of the office differing materialy from the organization which had existed?—A. This was the general organization that had been in existence for some little time. There were details in changes coming from time to time, depending upon the nature of the work or the duties assigned to the various offices.

Q. Referring to paragraph A of this order, which has to do with the routing of papers, does that give a correct statement of the method then in force and which had been in force prior to that time?—A. It gives in a general way the usual practice that has been in existence for some time. In this particular section here Col. Mayes was detailed as an assistant to Gen. Ansell, and papers passed into Col. Mayes's desk to be O. K.'d and would go on to Gen. Ansell and then to Gen. Crowder, as the case may be.

Q. Is that the policy which was followed between November, 1917, and the date of this order?—A. I don't know just the date Col. Mayes was detailed on that; it was some time, one of those dates. It had not been done like that before.

Q. How had it been done before this?—A. Before that the papers would come back O. K.'d, and then they were to be charged out to the various divisions to which they pertained, and then when the papers were completed and prepared they would be sent again to the Judge Advocate General or the Acting Judge Advocate General, as the case may be.

Q. Why do you say "as the case may be"?—A. If the Judge Advocate General was there they were sent to him; if the Acting Judge Advocate General, they were sent to him.

Q. In case both Gen. Crowder, the Judge Advocate General, and Gen. Ansell, the senior assistant, were present, would those cases probably go through Gen. Ansell before going to the Judge Advocate General?—A. Yes. They would pass in to Gen. Ansell, then when Gen. Crowder's time was taken up, mostly with the other office, he had Col. Mayes in to act as his assistant, to review the papers as they came in.

Q. During that period, did all important papers pass through the office of Gen. Ansell before going to Gen. Crowder? I am speaking now particularly of the papers which pertained to the Division of Military Justice.—A. Well, now, I would not know about that, General.

Q. In November, 1917, an order was issued detailing Gen. Ansell as Acting Judge Advocate General; subsequently, a few days after, that order was revoked and about that time Gen. Crowder took up the duties of the office, which up to that time he had to a great extent been leaving to Gen. Ansell. Is that correct?—A. Yes, sir.

Q. At that time was any change made in the channels through which the papers of the office pertaining to the Department of Military Justice passed?—A. I can not answer that, General. I don't know, because the Military Justice Division had a colonel in charge of it and he carried these papers in the important cases either to Gen. Ansell or to Gen. Crowder.

Q. That matter did not come under your personal observation?—A. That did not come under me, so I could not answer that question.

EXHIBIT 24.

WASHINGTON, D. C., *March 21, 1919.*

Lieut. Col. Alfred E. Clark, Judge Advocate General's Office, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. State your name, rank, and organization.—A. Alfred E. Clark; lieutenant colonel; Judge Advocate General's Office.

Q. During what period were you on duty in the office of the Judge Advocate General?—A. From approximately October 1, 1917, until the latter part of May, 1918, to the best of my present recollection. Since that time I have been on assignment as counsel for the War Department Board of Appraisers and other special boards.

Q. Were you at any time on duty in the Division of Military Justice?—A. Yes, sir.

Q. During this entire period?—A. Substantially so; yes.

Q. What were your special duties in that division?—A. The first two months or so, possibly a little more than two months after coming here, I was, in so far as that section is concerned, engaged in the routine work of examining court-martial records and writing opinions with respect to them and the like—general work. From, I should say, the latter part of December, 1917, or early in January, 1918, I had status of assistant to Col. Davis, Chief of the Section of Military Justice, and continued in that capacity until relieved from duty in that section.

Q. Please state fully your recollections relative to the case of the Artillery mutinies at El Paso, the action taken in connection with the interpretation of section 1199, Revised Statutes, and the order appointing Gen. Ansell Acting Judge Advocate General, subsequent revocation of same, and cognate matters.—A. Some time in October of 1917 there were two or three cases that gave rise to considerable discussion in the office of the Judge Advocate General. One of these cases involved the conviction of seven or eight noncommissioned officers; in fact, all of the noncommissioned officers of an Artillery battery at Fort Bliss, I think it was, Texas. In each of the cases—the first the Narber case and the second artillerymen—dishonorable discharge had been executed. It was the view of the Section on Military Justice, where I was then on duty, that in each of these cases, and particularly in the case of the noncommissioned officers of the Artillery battery, an erroneous conclusion had been reached by the courts. The question arose as to what disposition could be made of the cases in the absence of jurisdictional error. It was at this time, which was the latter part of October or the early part of November, that Gen. Ansell first propounded his theory that the word "revise," as found in a statute first enacted in 1862, conferred upon the Judge Advocate General full appellate power. He prepared a memorandum in support of that view, which I believe came to the attention of Gen. Crowder, to my best recollection, the last part of November. I undertake to fix that time for the reason that Col. Davis and myself, under date of the 6th of December, prepared a memorandum embodying a study of the historical aspects of the legislation at Gen. Crowder's request. Gen. Crowder prepared a memorandum, in which he controverted the legal soundness of the views of Gen. Ansell. Gen. Ansell prepared a supplementary memorandum in reply, and the matter was later submitted to the Secretary of War, who, I believe, concurred in views of Gen. Crowder that it was inexpedient to undertake to deduce from the old statute the broad appellate powers for which Gen. Ansell was contending. In the cases of the men charged with mutiny the office of the Judge Advocate General, after reviewing the records in accordance with the established practices of the office, reached the conclusion that the evidence did not sustain the findings and sentence and recommended to the Secretary of War that an order be issued setting aside, mitigating the unexe-

cuted portion of the sentence, and, upon application of the accused, restoring them to duty. It is my recollection that the Secretary disposed of the cases in accordance with this recommendation. With respect to the order which appointed Gen. Ansell Acting Judge Advocate General and the order which subsequently revoked the prior order, I have no personal knowledge whatever.

Q. Have you any definite knowledge as to the date upon which Gen. Ansell's memorandum was submitted beyond what you stated a moment ago?—A. Not just at this moment, General, but probably if I should go over my old files I could locate the date approximately by reference to some memorandum prepared about that time for Gen. Crowder; that is, locate it within two or three days.

Q. Are you familiar with General Order 169, the order which provided that death sentences should not be carried into effect until the cases had been reviewed in Washington?—A. If my identification by number is correct, that was a general order issued the latter part of December, 1917, or early in January, 1918, preceding General Order No. 7. At the time General Order 169 was issued, and for two or three weeks prior to that time, there had been under study and preparation by Col. Davis and myself the plan which was subsequently embodied in General Order No. 7. While the plan embodied in General Order No. 7 was in process of development a number of colored soldiers who rioted at Houston, Tex., were convicted. The convictions were approved by the commanding general of the Southern Department and 13 of the men executed by the department commander before the records had reached Washington for review. General Order No. 169 was a temporary expedient to prevent like occurrences until such time as General Order No. 7 or the plan which was embodied in that had been formulated and the order drawn and promulgated. General Order No. 7 reached all death cases as well as cases involving dismissal of an officer or dishonorable discharge.

Q. Did Gen. Ansell submit a memorandum which referred specifically to this case and which had important bearing upon the issuance of General Order 169.—A. I have no knowledge of any memorandum submitted by Gen. Ansell which suggested the issuance of General Order 169 or any order of like character. From November on the contention of Gen. Ansell was that the word "revise" conferred full appellate power upon the Judge Advocate General, and he vigorously opposed the plan which was embodied in General Order No. 7. I do not now recall whether he specially opposed the issuance of General Order 169, but never understood that he recommended or approved of it. . In relation to the reform accomplished by General Order No. 7 and the practices which grew up under it, Gen. Ansell opposed them. I think there will be found in the files of the office a written memorandum prepared and signed by him opposing the issuance of this order. In this connection it may be said, with respect to other proposed changes and reforms as well as that embodied in General Order No. 7, that they did not meet the favor of Gen. Ansell, because his contention seemed always to be that these several proposed reforms were in conflict with his theory as to the true construction of the word "revise." For several months following November, 1917, Col. Davis and myself worked out and proposed a number of changes in court-martial procedure. The changes then proposed embodied substantially all of the so-called reforms now proposed. None of these proposals, as far as I know, was acted upon favorably by the acting head of the office. It was the view of both Col. Davis and myself that under existing legislation there could be worked out all necessary and practical reforms, and that this could be done largely through the promulgation of rules of procedure by the President of the United States under authority of the thirty-eighth article of war. Whenever these proposed changes and reforms became the subject of discussion, it was the invariable contention of Gen. Ansell that certain revisory powers were lodged in the Judge Advocate General, and that any change or reform which would undertake to lodge appellate powers directly or indirectly with the President or any other officer or department of the War Department impinged upon the rights of the Judge Advocate General. This led to many vigorous, if not heated, discussions not only with respect to the changes and reforms that were deemed expedient by Col. Davis, myself, and others in the department, but also with respect to the disposition to be made of pending cases.

Q. In the carrying out of the provisions of General Orders, No. 7, after it was promulgated, what was Gen. Ansell's attitude, so far as became apparent?—A. Gen. Ansell took no part in the preparation of General Orders, No. 7. He was not in sympathy with it. It was prepared by direction of Gen. Crowder

and approved by him. Owing to the fact that the order and the practices which it contemplated did not meet with the approval of Gen. Ansell, the practical working out of the order and the development of the practice under it were by Gen. Crowder very largely confided to Col. Davis for some time. There was developed in that section under Col. Davis the practice of making distinct recommendations with respect to the character of sentence which should be imposed when records came up under that order. Gen. Ansell and his immediate assistant, Col. Mayes, opposed the practice of the Judge Advocate General undertaking to control, direct, or influence the disposition to be made of a case by the reviewing authority through any recommendation made by him in cases coming up under General Orders, No. 7. Practically all the opinions written by officers in the Military Justice Section first came to my desk for approval with the result that I was frequently called into the office of the acting head for the purpose of discussing some opinion with Gen. Ansell or Col. Mayes, or both, recommending mitigation or clemency, and the continued intrusion of the controversy as to the proper construction of the word "revise" into the discussion of opinions written under the practice established by General Orders, No. 7, led to a great many arguments which at times were both vigorous and heated.

Q. After Col. Davis ceased to be Acting Chief of the Division of Military Justice, what change, if any, took place in the policy governing the application of General Orders, No. 7?—A. The first time that Col. Davis went away was in March, for a period of 10 days or so. During that time I was acting head of the division, being the senior officer in that division. During the time that he was away upon this first inspection trip all of the opinions which carried recommendations under the practice established by General Orders, No. 7, had to be approved by me. All discussions relating to the propriety of the Judge Advocate General making recommendations were had between Gen. Ansell and Col. Mayes upon the one side and myself upon the other. There was a manifest disposition on the part of Gen. Ansell and Col. Mayes to undertake to stop or abolish the practice, a very beneficent one, in my judgment, of making recommendations to the various reviewing authorities in the field with respect to the character of sentence to be imposed. I insisted that during the absence of Col. Davis, inasmuch as he had built up the practice, as I understood it, conformably to the views of Gen. Crowder, that no change should be made in the practice until he returned. When Col. Davis returned I reported the situation to him, my experience, which was the same as he had been going through for some time before. My recollection is that he then took the matter up with Gen. Crowder, who approved the continuance of the practice, but that is just my recollection and may be inaccurate. A little later on, some time in April, Col. Davis left on a prolonged inspection trip. The primary purpose of the trip was to acquaint the service in the field more fully with the purposes of General Orders, No. 7, and in this way secure the thorough cooperation of the reviewing authorities and divisional and department judge advocates. In the meantime Col. Spiller had been transferred from the position of executive officer in the Judge Advocate General's Office to the Military Justice Section, and was the senior officer in that section next to Col. Davis, so that when Col. Davis left upon the inspection trip Col. Spiller became acting head of the section. Col. Spiller was acting head of the section for but a short time, perhaps a week or 10 days, when Col. Read was assigned to duty in the section, and as senior officer became the head. Immediately after Col. Davis left on this inspection trip the practice which had grown up under General Orders, No. 7, was modified, if not, indeed, in practical effect, abolished, and thereafter the office confined itself in dealing with records coming up under General Orders, No. 7, to the bare question of the legality of the proceedings. So far as I know, the change in policy was not called to the attention of Gen. Crowder at the time. The change in policy was substantially in accordance with the views which had been so many times expressed by Gen. Ansell and Col. Mayes during the many discussions while Col. Davis and myself were building up the practice I have referred to under General Orders, No. 7.

Q. During these various discussions to which you refer, did you ever hear Gen. Ansell express the views in effect that while he believed that the only proper solution of the question was his views regarding the proper interpretation of section 1199, yet that he would be content to use that power, if that power of revision were given, even though it rested elsewhere?—A. No, sir. In that connection it may be said that a lengthy memorandum was prepared in part by Col. Davis, in part by myself, which is in the files of the Judge Advocate General's Office. It dealt with the two questions, first, the inherent

power of the President to exercise appellate jurisdiction by such methods as he might adopt; and, second, his powers under existing legislation through general orders to control the progress of the case from its inception to its execution. We sought to find in the powers of the President such inherent and statutory powers as would meet all of the then needs. Gen. Ansell was vigorously opposed to these views. Not only was he opposed to the view that such inherent power was lodged in the President, but also the view that there was any legal sanction for the exercise of any such power under existing law. The memorandum prepared by Col. Davis and myself was submitted to Secretary Baker, by Gen. Crowder, who expressed his sympathy with the legal views expressed therein. The Secretary, however, suggested that in order to remove any doubt as to the power of the President to exercise full appellate jurisdiction and rather than undertake to deduce such a power from legislation, the construction of which might be open to discussion, that a bill be presented to Congress asking for such power. Conformably with this suggestion I prepared a bill by direction of Gen. Crowder which was an amendment to section 1199 of the Revised Statutes. That bill was prepared in January, 1918. In connection with the preparation of the bill I prepared, in collaboration with Col. Davis, an argument of some pages in support of the legislation.

Q. The proposed legislation did not meet with the approval of Gen. Ansell.—A. He was opposed to the amendment, which sought to confer these broad appellate powers upon the President. I discussed this matter with him several times during the preparation of the amendment and the preparation of the argument in support of the amendment. His contention was, as it had been theretofore, that the word "revise" gave certain power to the Judge Advocate General, that the proposed amendment was an encroachment upon such powers, and that he could not, therefore, favor it. Col. Davis and myself then prepared letters which embodied the argument to which I have referred in support of the bill, and these letters were signed by the Secretary of War and transmitted with copies of the bill to the Military Committee of Senate and House.

Q. What was Gen. Ansell's attitude and what position did he taken with respect to the propriety of interfering at that time during the war with long sentences which had been imposed by courts-martial and duly approved by the reviewing authority, provided the record of the case showed no legal or other irregularities?—A. Speaking generally, his attitude was that it was frequently necessary in the interest of military discipline that severe sentences be imposed; that such sentences must be frequently imposed for their salutary or moral effect upon the Army at large. I have often heard him say, in justification of a policy of not interfering during the war with such sentences, that it was not to be supposed that long sentences would be actually served out in full for military offenses after the war was over.

Q. Did you hear Gen. Crowder express any views upon this subject, or are you familiar with the views entertained by him?—A. I don't think that I ever discussed that particular subject with Gen. Crowder. He was much engaged with the work of the Provost Marshal General's Office.

Q. Are you familiar with the four cases of death sentences in France which have been so thoroughly advertised?—A. Very familiar, General.

Q. I wish you would state briefly your knowledge as to the procedure in those cases, step by step, and the part played by different officers in the disposal of those cases.—A. The cases are so familiar to everybody concerned that it is unnecessary to go into the details in regard to the case. The records in the four death cases from France reached the office of the Judge Advocate General in Washington along about February 26–27, 1918. They were sent to Maj. Rand, a well-known criminal lawyer of New York, then stationed in Washington, for review. Maj. Rand reviewed the four cases, wrote a review in each case in which he found that the proceedings were regular, the verdict sustained by the evidence, and recommended that the sentences be carried into effect. The records, with the reviews, then went to the desk of Col. Davis, chief of the section, and from his desk went to Gen. Ansell and Col. Mayes, who were officing together. In the preparation of his reviews Maj. Rand had incorporated in but one of them the text of a communication or indorsement from Gen. Pershing recommending that the death sentences be confirmed and carried into execution. In the other three reviews he had referred only to the memorandum from Gen. Pershing. The reviews thus prepared by Maj. Rand were returned through Col. Davis to Maj. Rand from the office of Gen. Ansell,

with the suggestion that there should be incorporated in all four reviews rather than in only one the full text of the recommendation of Gen. Pershing. The reviews were rewritten conformably to the suggestion and were returned through Col. Davis to Gen. Ansell and Col. Mayes. From there they must have gone to the desk of Gen. Crowder. Up to that time I had understood that the office was to recommend the execution of these sentences. Prior to this time I had discussed the cases with Maj. Rand and perhaps one or two other officers and had expressed my dissent from the conclusion that the sentences should be carried into execution. The records found their way to the desk of Gen. Crowder for his approval and signature, after having passed through the hands of Gen. Ansell and Col. Mayes with the recommendation that the sentences be carried into effect. It was on this point, and some time after the middle of March, 1918, that Gen. Crowder called me into his office and stated, among other things, in substance, that these records had come to him for his approval, that he was disturbed about the cases, and he requested me to take the records, make a careful study of them, and write reviews amplifying the statement of facts with a view to setting forth a complete history of each case in the review. He also requested me to study the records in similar cases coming in from the same and other divisions in France with the view of determining whether or not the sentences imposed in other and like cases bore any relation to the sentences upon which the office was then about to act. I prepared a full review in each case, concluding with the statement that there was some evidence which, if believed by the court, would support the verdict of conviction and that there were no jurisdictional errors. The reviews prepared by me did not contain any recommendation as to action to be taken. They were submitted to Gen. Crowder about April 10. At the same time I submitted a lengthy memorandum discussing these four cases and giving the history of a number of similar cases arising in France, and concluding with a strong expression of my views as to the disposition to be made of the cases, viz, that the death sentences should not be carried into effect. About the time these reviews and this memorandum were handed to Gen. Crowder, I think on the same morning, I had my last talk with Gen. Ansell concerning these cases. He asked me, in substance, "I understand that you are not in favor of carrying the death sentences into effect upon these men convicted in France," and I told him that I most emphatically was not and that I was satisfied that if he would take the reviews which I had prepared for Gen. Crowder and the supplemental memorandum and study the whole situation carefully that he would agree with me that these sentences should not be carried into effect. This occurred about a month and a half after the records came into the office and at least a month after Maj. Rand had prepared his reviews recommending that the sentences be carried into execution. A few days later, I understand, Gen. Ansell was requested by Gen. Crowder to submit his views to the latter upon the cases, and he prepared a written memorandum for Gen. Crowder. All of the facts that he sets forth in his memorandum, both concerning the death cases and other like cases, the character of the convicted men, etc., were taken entirely from the memorandum which I had laid before Gen. Crowder on April 10. I understand that there was a formal recommendation added to the reviews prepared by me. The exact character of that recommendation I do not know, as I never saw the reviews after they left my desk. Under date of April 16 Gen. Crowder, in connection with the records and reviews, transmitted to Secretary Baker a long memorandum. I have seen a copy of that memorandum. It embodied in very large part the text of the memorandum which I had submitted to him under date of April 10, and in addition amplified views of his own. It likewise embodied, in substance, the views which Gen. Ansell had expressed in his memorandum to Gen. Crowder under date of April 15. This memorandum, signed by Gen. Crowder, went to Mr. Secretary Baker with the records and reviews, and in very large measure furnished the basis for the communication which Mr. Secretary Baker wrote about two weeks later to the President, transmitting the records and the reviews, and which, after a presentation of the facts and the history of each case, recommended that the death sentences be not executed.

Q. During the interview which you had with Gen. Ansell on this occasion did Gen. Ansell give expression to his views as to whether or not the death sentence should be executed?—A. Not upon this occasion.

Q. Did you upon any occasion hear him express his views upon this subject?—A. Yes, sir.

Q. State definitely what they were.—A. I would not be able to give the time or the exact language used. Probably the cases came to me from Gen. Crowder for further study and report, because I had been very outspoken against recommending that the death sentences be carried into effect. In fact, I had a number of arguments with Maj. Rand and other officers in which I very strongly opposed what I understood at the time was the settled decision of the acting head of the office to recommend that the sentences be carried into effect. I say I understand that that was the settled decision of the office for two reasons—first, reviews prepared by Maj. Rand and so recommended had gone across the desk of Col. Davis to Gen. Ansell and Col. Mayes and had been returned not for the purpose of changing the character of the reviews or of the recommendations but merely for the inclusion in three of the reviews of the full text of Gen. Pershing's memorandum, and with this inclusion they had been returned and had gone to Gen. Crowder's desk for his signature. The second reason is that I had talked with Maj. Rand, who was conferring with Col. Mayes and Gen. Ansell, about the cases, and I had talked with Col. Mayes and with Gen. Ansell and had taken occasion, although the cases were not then in my hands for review, to express the settled conviction that it would be a great mistake and an injustice to carry those sentences into effect. At that time these officers did not agree with me, but were of the opinion that the views of Gen. Pershing with respect to the propriety and the expediency of carrying these sentences into effect should be followed. While these cases were under consideration in the office and before the records came to me from Gen. Crowder for review, as I have just stated, I discussed them with Gen. Ansell and other officers on more than one occasion, and Gen. Ansell had stated to me during those discussions that he thought the sentences should be carried into effect.

Q. During the period that you were acting Chief of the Division of Military Justice what was the routing of courts-martial cases at the time they arrived in the office until they left or went to the permanent files, and what connection had Gen. Ansell with and responsibility for the administration of that division?—A. First, all opinions of a general nature, dealing with the administration of military justice, were routed over his desk. Second, all opinions dealing with particular cases where the communication was addressed to the Secretary of War, or to the President through the Secretary of War, or to The Adjutant General. This second class would involve all cases where sentence had been published, so that they had become effective before the record reached the Office of the Judge Advocate General, and involved a considerable percentage of all the cases coming from the office. Third, after General Order No. 7 went into effect it will be noted that the records came direct then to the Office of the Judge Advocate General for review before sentence was finally published, and the Judge Advocate General's Office had established the practice of sending them back direct to the reviewing authorities with a statement as to the legality or illegality of the proceedings and such recommendations as it was deemed proper to make. Col. Davis was then the head of the section. The practice grew up for him to sign the opinions, returning the records, and in such cases the records would not be routed over by Gen. Ansell. The reason this practice grew up was that Gen. Ansell and Col. Mayes were opposed to the practice of returning the records with a distinct recommendation by the Judge Advocate General as to the quantity of punishment to be imposed, the general policy with respect to sentences in different classes of cases, the place of confinement, and the like. When I was acting head of the section for a short time in March I followed the practice of signing these opinions, returning the records in accordance with the practice that Col. Davis had established. Everything was routed over Gen. Ansell's desk except the opinions returning records under General Order No. 7.

Q. Was everything in the way of recommendations, reviews, etc., going to higher authority, routed over his desk?—A. Yes, sir; everything that went up to higher authority, to The Adjutant General, the Chief of Staff, the President, or the Secretary of War, was routed through him and over his desk.

Q. Do you know of any orders, verbal or otherwise, which in any way curtailed the activities or responsibilities of Gen. Ansell with respect to the administration of military justice during the period November, 1917, to the time he left for Europe, April, 1918?—A. I do not.

Q. What knowledge have you relative to the establishment of a branch office in France; any knowledge except what would be of record?—A. I think none. It was a matter of general discussion in the office, but the ultimate result was embodied in the order.

Q. The records show that in the case of the Fort Bliss mutineers Gen. Ansell in his review actually put into effect the powers which his interpretation of section 1199 gave to the Judge Advocate General?—A. Yes, sir.

Q. These were the first cases in which this action appears. It also appears that similar action was taken by him in a considerable number of cases subsequent to this. Do you recall any discussions or conversations in the office regarding that act?—A. Yes, sir. The first cases in which action was taken by the Acting Judge Advocate General under his assumed powers of revisions were, I believe, the Narber case, and the case of the seven or eight noncommissioned officers of the Artillery Battery. The action taken in each of these cases was simply to reverse and set aside the sentence, or words to that effect. It was my recollection that these cases, with the action of the Judge Advocate General thereon, went up in the usual routine to The Adjutant General for formal order, and that about that time, or very shortly thereafter, Gen. Ansell prepared a memorandum in support of the power which he had sought to exercise. In the meantime, and before this memorandum was submitted, a number of other cases were disposed of in like manner. The purpose of so doing while the matter was pending before the War Department I do not know.

Q. Have you any knowledge of a conversation which took place in connection with and at the time that you were directed to prepare a review of the four France cases in which Gen. Ansell is said to have expressed affirmatively his views relative to the execution of the sentences as imposed?—A. I did not personally ever hear any such conversation between Gen. Ansell and any other officer. However, some time after the records in the death cases from France came to me from Gen. Crowder for further study, Col Davis informed me of a conversation which he had just had; I mean by that a conversation he had shortly before he spoke to me about it. Col. Davis stated in substance that Gen. Ansell had used some profanely forcible language in connection with these cases. I would not undertake to give the language of the conversation, but my recollection of its effect or substance is that he objected to or resented the fact that the sentences were not being promptly carried into effect in accordance with the recommendations contained in Maj. Rand's reviews, instead of which they had been returned to me for further study and report by Gen. Crowder.

Q. What effect did these various controversies, which took place in November, 1917, and subsequently, have upon the morale of the office or upon the efficiency of the work of the Division of Military Justice?—A. For a time, say in the latter part of November, and a considerable part of December, it left the force in doubt and uncertainty as to the policies to be followed. However, it may be said that in the main the officers in that section were trained and seasoned lawyers from civil life or men of like training and experience in the Military Establishment. They continued to do their work with zeal and efficiency, affected somewhat perhaps by the uncertainty in which the force was left for a month or six weeks.

Q. To what extent, if any, did this controversy affect the personal relations of officers in the office in so far as same became apparent?—On the surface the relations between all of the officers remained pleasant and cordial, and such as permitted of personal contact and personal conference and discussion without the embarrassment of any personal animosities being manifested themselves. Of course, there was always this factor in the situation: For several months following November, 1917, whenever an officer went to Gen. Ansell to discuss any proposed action in a court-martial case the discussion was almost certain, before it was finished, to resolve itself into an argument on his part in support of his construction of the word "revise," so that that question was intruded in almost every legal discussion.

EXHIBIT 25.

WASHINGTON, D. C., *March 25, 1919.*

Maj. Stevens Heckscher, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. State your name, rank, and organization.—A. Stevens Heckscher; major; Judge Advocate.

Q. You are a member of the so-called clemency board?—A. Not of the recently created clemency board, but I am head of the clemency section of the Military Justice Division. I ought to add, sir, that I was for a short time one of the original three members of the clemency board, but I was relieved by Gen. Crowder in order to go back to my old clemency section.

Q. Who are the members of the clemency board at the present time?—A. Lieut. Col. Ansell, Col. Easby-Smith, Maj. Conner, Maj. G. Rogers, Maj. Ashman, Lieut. Tittman, and I think one additional major whose name I do not know.

Q. State briefly the procedure in the case of the clemency board.—A. With regard to the prisoners in the three disciplinary barracks a memorandum is filled out by the commandant of the barracks in question, giving the material facts that would be relevent upon the question of clemency, together with the commandant's recommendation as to clemency. That memorandum is sent directly from the barracks to the Judge Advocate General's Office, is attached to the record of trial, and together with any other papers in the case is referred to one of the 10 or 11 officers, who reviews the case, in the first instance for the clemency board, makes a short summary of the facts attending the offense as shown by the record of trial, and also makes his own tentative recommendation as to clemency. The board then goes over this case, approves or amends the tentative recommendation of clemency, and the case then goes in to the Judge Advocate General for his approval.

In addition to this procedure there was appointed by Gen. Crowder, after I had been relieved from the clemency board, a special board of review, of three officers, of which Maj. Sannur is the head, whose duty it is to review any cases from the clemency board where the reviewing officer has indicated that the evidence is weak or not convincing or not sufficient to sustain the findings of the court. This special board reports on such cases whether in its opinion the evidence is sufficient or is convincing. I do not think it has yet been definitely decided in what way, if any, the findings of this special board are incorporated in the clemency review that goes from the Judge Advocate General's Office to the Secretary of War.

So far as my information goes, heretofore the findings of the special board have merely been set on a slip of paper, which is placed among the papers of the case, and which, of course, is the basis for the recommendation of the clemency board, but it has not been incorporated in the clemency review that goes to the Secretary of War. I understand that the question of incorporating the findings of the special board as to the evidence into the clemency review is now being taken up by Gen. Kreger.

Q. Can you give me any definite idea as to what percentage of the cases which go before the clemency board are such as to require their being sent on to this special board?—A. I really, sir, have no information upon which I could even hazard an approximation on that. The difference between the present clemency section, which is a part of the Military Justice Division, and the clemency board is that the clemency section handles all applications, letters, and petitions for clemency made by the prisoners themselves or by anyone on their behalf, while the clemency board handles cases, as it were, on their own motion which come direct from the barracks or from the penitentiaries with the momoranda as to facts that I have heretofore referred to.

Q. Who determines whether or not those cases shall actually go to the clemency board?—A. That question is determined by the record room upstairs because they see at once where a case has an application or letter or petition asking for clemency such case shall go to the clemency section, whereas the memoranda from the barracks or a list of prisoners from the penitentiary will go to the clemency board.

Q. The clemency board is not, then, under you as chief of the clemency division?—A. No, sir; I have actually nothing whatever to do with the clemency board except to try to keep in liaison with it.

Q. How long have you been on duty in the Department of Military Justice?—A. Since the latter part of 1918.

Q. As a result of your experience in the Division of Military Justice, and as a result of your observation, what are your conclusions as to the working of the system of military justice in the Army as now applied?—A. I would say that the rights of every accused are scrupulously protected in this office. First, the records are carefully examined to see that during the trial his substantial rights have been protected, and secondly, after he has been legally convicted of the offenses in question both the prisoner himself and anyone

on his behalf can make and do make applications for clemency and leniency, and I can say from my own positive knowledge that in the exercise of clemency, even during the period of the war, while I was in this office a fair and liberal attitude was exercised toward prisoners, and of course since the return of conditions approximating those of peace a more liberal attitude has naturally been adopted.

Q. In your judgment, how does this protection compare with the protection which accused prisoners get in the civil courts?—A. I would say on the whole that the prisoner is afforded as careful protection of his substantial rights when his case has finally passed through the Judge Advocate General's Office to the Secretary of War or the President as afforded him in the civil criminal courts of this country. I do not mean by this answer to intimate that no changes whatever should be made in our court-martial procedure. For instance. I believe that the presence of a Judge Advocate learned in the law at each general court-martial trial would be advisable and that his duty would be similar to that of the judge in the criminal case who would charge the court as the criminal judge charges the jury, as to the law applicable in the case and that the law as so laid down by the Judge Advocate must be accepted by the court. Again I feel that perhaps the power of the reviewing authority to reconvene a court and send back the case for reconsideration after the court has acquitted the accused is one that is of doubtful expediency and perhaps subject to some abuse.

Q. What, in your opinion, has been the effect, if any, upon the morale of the office of the Judge Advocate General of this controversy which has been going on in the public press?—A. Of course, I think that the so-called controversy has had a somewhat unsettling and disturbing effect upon the members of the Judge Advocate General's Office. I think as a whole the men have felt that the work under Lieut. Col. Ansell, as well as under Gen. Crowder and Gen. Kreger, has been well done by an exceptionally able staff of lawyers, if I may be permitted to say so, and they further feel that perhaps not intentionally but none the less inevitable the public has received a wholly wrong impression of military justice as administered under the Judge Advocate General.

EXHIBIT 26.

MARCH 26, 1919.

Q. Give your full name, rank, and present duties.—A. Col. William S. Weeks; judge advocate; executive officer, Judge Advocate General's Department.

Q. How long have you been on duty?—A. About the 1st of August, 1918—somewhere between the 1st and middle of August.

Q. At the time the question of amendment of General Order No. 7 was under consideration in the office, did you have any part in the discussions or in the preparation of this amendment?—A. No, sir.

Q. Were you present at any of the discussions pertaining to that amendment?—A. I think not, sir; I have no recollection of having been present at any discussion of that matter at all. It was all taken up in the Division of Military Justice and was discussed by those officers. I have nothing to do with that work.

Q. Explain definitely what has been the status of Gen. Ansell in the office of the Judge Advocate General since you became executive officer and up to the present time?—A. When I first went to the office I acted as assistant to Col. Morrow. At that time Col. Mayes was senior assistant, under Gen. Crowder, and Col. Morrow was executive officer. That lasted for about a month. During that time Gen. Crowder was in charge of all matters pertaining to departments and personnel, and went over all the important cases. After Gen. Ansell's return to the office Col. Mayes was ordered to France and, as I remember, that was about the last of August, or 1st of September. Shortly thereafter Col. Morrow was also ordered to France. After Gen. Ansell's return the running of the office remained about the same as when Col. Mayes was in charge. Gen. Crowder, as I understood it, retained charge of the appointment of all officers. I know that all recommendations were approved by him and it was my understanding that matters of policy were referred to him. That continued, in a general way, up to sometime about the middle of January, when Gen. Crowder came back and took charge of the office.

Q. Upon the return of Gen. Crowder to the office what changes were made as to the duties of Gen. Ansell with respect to the administration of military justice?—A. Shortly after his return to the office Gen. Crodwer issued a memorandum changing the routing of certain classes of papers, as I remember. (Memorandum herewith.)

Q. To what extent have you been associated with the Division of Military Justice in the Judge Advocate General's Office?—A. When I was first ordered to duty in the Judge Advocate General's Department I was assigned to the Division of Military Justice, under Col. Read. I remained on that duty for about three weeks. During that time I reviewed some records, but my principal duty was preparing indorsements to letters pertaining to military justice and acting as a sort of executive officer to that division—assigning rooms, desks, checking up the record room, etc.

Q. So far as you have observed in your capacity as executive officer, what has been the effect, if any, upon the morale and efficiency of the office of this controversy which is going on, with respect to the administration of military justice?—A. So far as affecting the morale of the office I noticed no particular change. There have been several officers from the office and some officers assigned from the Provost Marshal General's Office on some special duty, whose functions I know nothing about. Prior to the time that this discussion arose I gained the impression from talking to officers from civil life on duty in the department that they believed that changes in the court-martial manual and in the Articles of War, should be made. Since this controversy arose I have not taken occasion to express any views, nor to receive any.

Q. Explain fully what disposition was made of Gen. Ansell's report of his European trip?—A. Along about the last of August, I can't be sure of these dates, but I know it occurred before we moved into this building, Gen. Ansell gave a lecture to all of the officers of the department on his trip abroad; this was shortly after his return. As I remember the circumstances he went through the executive office into Gen. Crowder's office and got that report from Gen. Crowder's desk, and then went on through into the library, where the lecture was given.

Q. Was that the original or a copy of the report?—A. That was the original. After we moved into the office over here he gave another lecture on that report to the officers who had come in since that time. When Col. Morrow and Col. Power went abroad they asked me to get that report and have copies made. I had those copies made one Sunday morning, and as I remember I had four of them made by Mr. O'Neil, a stenographer in the office, who came to work Saturday night and Sunday morning as they were leaving on Sunday afternoon. I furnished each with a copy and I kept two copies, one for myself and one I attached to the original. I found that that report had never been put on file, and later on, some one else who was going abroad (I think it was Col. Goff), asked for a copy. In the meantime I thought that Gen. Ansell had the report in his file, and I suggested that he had better put it in the files of the office—and that was done. I furnished Col. Goff a copy, I think I gave him my copy.

Q. You don't know when this report came into the hands of Gen. Crowder?—A. No, sir; I do not.

Q. When was the report, if at all, forwarded to the War Department?—A. It never was forwarded so far as I know. The last I saw of it was in the files of the office.

Q. In that report Gen. Ansell calls attention to the liabilities which are liable to grow out of the presence of our Army in France, and urged steps be taken to gather and record facts with a view to forehanded preparation against unjust claims and excessive damages for the just ones. Do you know whether any action was ever taken along those lines?—A. None so far as I know.

Q. You don't know what is being done along those lines in France?—A. I don't know, sir.

Q. Have any steps been taken by the office of the Judge Advocate General in Washington to bring about any such action?—A. None; so far as I know. It may have been taken and gone out direct from the Judge Advocate General's office without my knowing it.

Q. Is it probable that in matters of that kind that correspondence would go out without passing over your desk?—A. It could go out without passing over my desk. Does not necessarily pass through me. Ordinarily I would hear something about it, but it is not necessary.

Q. Going back to the memorandum of January, 1919, changing the routing of work in the office, do you recall what effect that had upon Gen. Ansell's duties,

with respect to military justice?—A. As I remember that memorandum it read something like this: "Until further orders all matters, except those pertaining to military justice, shall be routed through Gen. Ansell. Those pertaining to military justice shall go direct to Gen. Crowder."

Q. Did this take place before or after Gen. Ansell appeared before the Senate committee?—A. This I could not say.

Q. Do you know why this change was made by Gen. Crowder?—A. No; I do not know why he made the change. I think he said something about expediting the business of the office.

EXHIBIT 27.

WASHINGTON, D. C., *March 26, 1919.*

Lieut. Col. Samuel T. Ansell, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, as follows:

Q. The draft of the order of November, 1917, designating you as Acting Judge Advocate General contains this statement: "The verbal orders of the Secretary of War under date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell," etc. Can you tell me anything about those verbal orders?—A. General, I feel that as a matter of self-protection I have the right to decline, and I ought to decline, and I therefore do decline to answer this question or any other question asked me by the Inspector General in this investigation, inasmuch as I believe the purpose of it is to lay the foundation for disciplinary action against me.

EXHIBIT 28.

MARCH 31, 1919.

Q. Give your full name and rank.—A. Maj. Andrew J. Copp, jr.; Judge Advocate General's Department.

Q. State briefly the duties upon which you have been engaged since you have been in the Judge Advocate General's Department.—A. My commission is dated July 30, 1918. My first assignment to duty was at Camp Dix, N. J., as camp judge advocate; on duty there one week; then transferred to the office of the Judge Advocate General's Department, at Washington, D. C., and was on duty there for one month, reviewing records of trial by general court-martial. The six months following I was camp judge advocate at Camp Sheridan, Ala., and on March 5 I was transferred again to the office of the Judge Advocate General and have served as a member of the special board of review.

Q. As a result of your experience, what are your views as to the protection given to the accused by the military code, as it is administered at the present time?—A. I consider the administration of military justice entirely adequate to meet the needs of the Army in times of both war and peace, and it is entirely adequate, in my opinion, to afford the accused protection at every stage of the proceedings, but because of its flexibility there is the possibility that the accused may be not afforded the protection he is entitled to. It is like any other machine which is capable of being operated either for good or for bad. There is one criticism, however, I think I wish to make, and I know that my views are concurred in by many of the officers at Camp Sheridan, with whom I was in close touch during my tour of duty there, and that is that there is frequently too long a delay between the time of confinement of the accused, and the final disposition of his case; that is, the action of the reviewing authority. Under the seventieth article of war, it is required that the charges be served upon the accused within 8 days after confinement or arrest, and trial 10 days thereafter, meaning 10 days after his confinement or arrest; or if that is impracticable that he be brought to trial not more than 30 days after those 10 days, making 40 days in all as the maximum period of confinement. It frequently occurs that this period is exceeded and there seems to be no remedy for it under the code as it now exists. I believe the remedy can be found in making the seventieth article of war a penal article, and so that an officer who causes the arrest or confinement of an accused under charges may be brought to a trial for his neglect if he allows those limits to be exceeded, but I believe the code in other respects is entirely adequate, if properly handled, and I am convinced that it should be flexible in order to enable a commanding general or reviewing authority considerable latitude in maintaining the discipline of his command. From my experience at Camp Sheridan as judge advocate I concluded that the accused was amply protected at every stage of the proceedings,

particularly in view of the fact that the charges are, or should be, thoroughly investigated before he was brought to trial. From my experience on the present board of review I feel that if there is evidence of any want of protection or of any miscarriage of justice in any case that it is possible to detect by this office. There are certain standards by which a case may be determined; whether it was poorly or well tried. A well-tried case is one in which the prosecution made at least a prima facia case and counsel has done for his client all that it appears could be done under the circumstances. This appears from every record of trial as it comes to the Judge Advocate General's Office, and I believe that if the convening authority in the first instance is discreet I don't see how a serious error involving the protection of the accused could happen. There are only three elements to a well-tried case, if the court proposes to sustain the findings that is apparent from the face of the record. If the court neglects to duly advise the accused of his rights, the effect of his plea of guilty, or makes erroneous rulings in other respects; if counsel for the accused does not give protection to the client, it may or may not be discovered from the record. It is not discovered if certain facts were not brought out, as for insance, the history of the accused, or possibly the immediate cause of his committing the offense; the matter of humanity, and if that is not developed to advise the court properly why the accused committed the offense, it might not be discovered here. This office can not read anything not in the record. That would be an error of omission rather than commission on the part of the accused.

EXHIBIT 29.

Q. What is your name?—A. John S. Lyon.

Q. And your duties?—A. I am in charge of the General Court-Martial Section of the Judge Advocate General's Office.

Q. I have here a copy of an office memorandum dated April 10, 1918, giving an office organization. Can you tell me whether this circular simply confirms an organization which was in existence at the time of its issue or whether it puts into effect a new organization? This question has reference, particularly, to subparagraph A, paragraph 11.—A. I think I have seen this or something similar to this a time ago. I think it was run off, of course after the office began to increase in volume of work. They did get up a memorandum of this kind with instructions as to how to be handled. I think that that carries about the usual way of the work now as since the war commenced. That one particular section is all that I am speaking about.

Q. You doubtless are familiar with the facts connected with the controversy which is going on with respect to the Judge Advocate General's Office?—A. Well, I have seen a little in the papers and heard of it; yes.

Q. Were you on duty in the Division of Military Justice between the period November, 1917, and April, 1918?—A. Yes, sir.

Q. And prior to November?—A. Yes, sir; have been in this office 17 or 18 years.

Q. Was there any material difference in the character of the duties performed by the senior assistant in the office subsequent to November, 1917, and prior to that date?—A. Well, I can not say about that part of it myself.

Q. You handled the papers?—A. I know they went through the office and I am under the impression that he signed them during that time, but I could not be positive whether or not they went to him. I would look at the last paragraph which would give me all the information I wanted, and I am under the impression that Gen. Ansell signed them.

Q. Had there been at that time—November, 1917—any radical change in the system of handling these papers? Would it not probably have impressed you?—A. Well, if there had been any radical change I should have noticed it.

Q. You are not cognizant of any radical change?—A. No, sir.

EXHIBIT 30.

WASHINGTON, D. C., *April 21, 1919.*

Col. James J. Mayes, Judge Advocate General's Department, appeared before Maj. Gen. J. L. Chamberlain, Inspector General, and being duly sworn, testified as follows:

Q. How long were you on duty in the office of the Judge Advocate General?—A. I came on the 3d of April, 1914, and remained until the 10th of August, 1918.

Q. What was your status in the office?—A. Until the war came on I was an ordinary assistant in the office. Then I went with the division and in November, 1917, came back and was a sort of a special assistant to the Acting Judge Advocate General, Gen. Ansell, and then when he went to Europe I was practically in the same position that Gen. Ansell had been; that is, I signed myself as Acting Judge Advocate General. Of course, that was a mere administrative title.

Q. You were senior assistant and as such in the absence of the Judge Advocate General was the Acting Judge Advocate General?—Yes, sir; that was my position.

Q. And you continued in this status until Gen. Ansell's return from Europe?—A. Yes, sir; and then I went to Europe.

Q. You are familiar with General Orders, No. 7, of 1918, are you not?—A. Yes.

Q. What was the policy of the office relative to the application of General Orders, No. 7, prior to the time that Gen. Ansell went to Europe?—A. I can answer that only by what I found was going out of the office. When I took charge of the office upon Gen. Ansell's departure I insisted, since I was responsible, that everything pass over my desk. In that way I found what had been going on. The disciplinary division had not been sending its matter through us except, I might say, occasionally. I found that they were advising reviewing authorities with reference to matters clearly under the law, and under that order within the discretion of the reviewing authority. General Orders, No. 7, gives no room for such advice, neither does the law where punishments are discretionary and where the law has not been vided. The discretion as to the amount of punishment is in the court and the reviewing authority. I directed that such advices be stopped and the application of General Orders, No. 7, be limited to its stated purpose. The assumption of an authority to advise a reviewing authority that a sentence is too heavy carries with it the necessary corollary that this office could advise a reviewing authority that the sentence was too light and that would be unspeakable. It was for this reason that I directed that that be stopped.

Q. I understand you to state that you found the policy of the disciplinary division had been to make such recommendations?—A. Yes. They had gotten into the habit of signing their reviews themselves. Col. Davis signed them and sent them to the reviewing department. The great majority of them we never saw in our part of the office, Gen. Ansell and I. They had a direct connection with Gen. Crowder.

Q. You are referring now to the cases which came under General Orders, No. 7?—A. Yes.

Q. You are not referring to cases which were reviewed and went forward?—A. Not to the cases that go to the President; no. I can not vouch for absolute accuracy, but I think this statement will cover it, that those cases which were forwarded by reviewing authorities having authority to take final action on them were forwarded to The Judge Advocate General merely for the review and advice directed by General Orders, No. 7, concerning which a letter would go back to the reviewing authority, advising him as to the result of the examination, and upon which the reviewing authority would then take final action. All these cases, with some exceptions—there were some of them sent through our desks—were acted upon by the disciplinary division and a letter sent to the reviewing authority by the disciplinary divison. All cases requiring the action of the President were, I am quite sure, passed over our desks. There may have been exceptions to that rule.

Q. Was it your understanding during that period that Gen. Ansell was relieved from all responsibility with respect to the administration of military justice and all matters pertaining to courts-martial?—A. I have to answer that question practically. There was no order relieving him, but the disciplinary division took things directly to Gen. Crowder and assumed to send out these letters, whether by Gen. Crowder's knowledge or not I do not know. The effect was to practically leave us out of the disciplinary cases except as they went up to the President.

Q. As I understand from what you say, it practically left you out in so far as pertained to the cases which came under General Orders, No. 7?—A. Yes, sir.

Q. Do you know why that condition of affairs existed?—A. No, sir. The letter that caused us so much trouble with respect to joint trials went out in that same way. We never saw it until long after it had gone out.

Q. Which letter was that?—A. It was a letter which advised concerning joint trials and made reference to cases properly joined, urged more joint trials, and said that joint trials should be had in all cases where accused were jointly charged or where charges were properly joined. That letter seemed to have induced a number of errors. We never saw that letter at the time. Gen. Crowder signed that letter.

Q. About when did that letter go out?—A. I don't know. That letter played a part, I think, in the Camp Grant cases.

Q. From the correspondence and from the testimony that has been taken it appears that Gen. Ansell was very much opposed to General Orders, No. 7, and to its provisions; that is correct, is it not?—A. I know that he never thought very much of the ethics of General Orders, 7; as to active opposition I never heard him say much.

Q. Did you ever connect that fact up with the fact that the cases under General Orders, No. 7, never went through your office? The fact that he was not friendly to the order—did that question ever come up for discussion at all?—A. No, sir.

Q. Now, in matters generally affecting administration of military justice outside of General Orders, No. 7, did they or did they not come under the supervision of your office?—A. You mean Gen. Ansell's office?

Q. Yes; you were his principal assistant at that time.—A. I can hardly answer that question. I know many of them did and I know some of them did not. For instance, the letter I just spoke of and numerous letters of advice were sent out from the Judge Advocate General's Office that we had not seen but I suppose most of them are all right. I do not believe this question is susceptible of answering.

Q. During the period that Gen. Ansell was absent in Europe and you were senior assistant you gave to General Orders, No. 7, the strict legal interpretation? Upon the return of Gen. Ansell from Europe what occurred, respectively?—A. I was not here.

Q. Did you leave immediately upon his return?—A. Yes, sir.

Q. You are not familiar then with the changes which he made in the application of that order?—A. No, sir. I would like to say in connection with my application of General Orders, No. 7, that I realized there were many sentences being imposed which were excessively heavy, what you may call sentences produced by war hysteria, but I considered the reduction of a sentence an attribute of the pardoning power and as not being a function of our office in advising upon the legality of the sentence. However heavy those sentences were, they were in all cases that we let them stand within the legal authority. I appreciated that all sentences ought to be coordinated, that there should be a determination of what was the adequate punishment for an offense, and that the sentences that had been imposed for that offense should be cut down so as to bring them within reasonable limits of what we determined was an adequate punishment for that offense. With that end in view I was establishing, with Gen. Crowder's concurrence, what is known as the disciplinary section of the disciplinary division. I believe that has now grown to considerable proportions. My idea being that that section should take of its own initiative an examination of cases and recommend to the Secretary of War that such sentences as were excessive should be relicted down to the proper measure of punishment, I realized when I was doing this, instead of making recommendations as the cases came along, that men in some cases would be resting under heavier sentences than should be imposed upon them for some time but the sentences had already been imposed, the ignominy of the heavy sentence was already upon the man and I did not consider it any great injustice to let the sentence stand for a sufficient time to allow such an accumulation of cases, such a study as would enable the proper measure of punishment to be arrived at, especially in view of the fact that all these men truly deserved a year's punishment; where a man had been given a sentence of say, 15 or 20 years, there is no reason to believe after his case is reviewed and found to be sustained that his sentence should be reduced below a year. Of course where I found a case which demanded immediate action, I did take action by recommending reduction of a sentence through the mitigating power of the President but not through the reviewing authority

Q. You stated that when you became senior assistant and believing that all matters pertaining to the disciplinary division should pass over your desk, you gave instructions to that effect and after that they did pass over your desk?—A. Yes, sir.

Q. Have you any reason to believe that that same result could not have been accomplished if Gen. Ansell had so desired?—A. No; I don't know of any reason. In fact, I don't know how the other system grew up. I felt that if I would be charged with the responsibility of the office I should know what went out of it, therefore I permitted nothing to go out expressing the opinion of the office except over my signature or in important cases, Gen. Crowder's signature.

Q. There was no objection made to that when you made the proposition?—A. No; Gen. Crowder was at that time occupied at the Provost Marshal General's Office so that he did not have very much time to be at the Judge Advocate General's Office.

Q. Upon the return of Gen. Ansell from Europe, did he automatically assume the duties of senior assistant, or did he receive any special orders so far as you know?—A. So far as I know he automatically assumed his duties.

Q. You do not know of any specific instructions which he received relative to the scope of his duties?—A. No; I probably would not know unless he told me and I do not remember him saying anything about it.

Q. Do you recall the cases of Ledoyen, Fishback, Sebastian, and Cook of the American Expeditionary Forces, known as the four death cases of France?—A. I remember those cases; yes, sir.

Q. Do you recall the circumstances connected with the review of those cases in the office of the Judge Advocate General?—A. They were reviewed and the death penalty was sustained as I remember. I am speaking of the original review.

Q. The cases were originally reviewed—I am speaking now of what the evidence shows and the examination of records—by Maj. Rand and then they passed over the desk of the chief of the division, who was Maj. Davis, to your office (Gen. Ansell's office) and finally to the Judge Advocate General, and then from the Judge Advocate General there were a lot of ramifications, there was a memorandum submitted by Col. Clark, and finally went to Gen. Ansell, etc. Do you recall what action was taken in Gen. Ansell's office on those papers when they originally passed from the division of military justice to Gen. Crowder?—A. I believe that my recollection is clear to this extent: Gen. Ansell was not there when those reviews came in and I passed those records to Gen. Crowder concurring in the reviews. The reviews I think recommended the execution of the death penalty. I concurred in that view. Then when Gen. Ansell came back Gen. Crowder asked him to review it. Gen. Ansell read the reviews and did not concur. Now, as to whether he disagreed in all the cases I am not sure, but the memorandum he filed at that time would show what his holding was.

Q. Do you recall whether or not, prior to being called upon by Gen. Crowder to review these cases, he had expressed himself verbally regarding the advisability of carrying out these sentences?—A. I am quite sure there was no change of view. I base that conclusion upon this: Gen. Ansell and I were in the same office and when these cases were turned over to him to read he immediately took the view that he afterwards maintained. I do not believe there was any change in his views. That idea may have grown up from the fact that they were sent to Gen. Crowder by me concurring in the imposition of those death sentences. Ansell and I differed on those cases and I am sure that Ansell was not here when they were passed to Gen. Crowder. I would like to say there that I approved the death penalties in those cases in view of the law as it now stands. I may say that I doubt the necessity of permitting the death penalty be imposed in all such cases; however, I was charged with the administration of the law as I found it and I therefore favored the execution of the sentences believing that they were flagrant cases such as was contemplated by the statute in authorizing the death penalty,

Q. I think you stated that Gen. Ansell was called upon to review those cases after they had gone up and that was what led to his view?—A. Yes, sir.

Q. How long were you in the office after Gen. Ansell returned from Europe?—A. Not over a week because I went on leave and then departed immediately.

Q. Have you any knowledge or do you recall anything with regard to the report which he submitted on his trip to Europe?—A. No; I don't think that it had been submitted when I ceased to have an interest in the office because I

divorced myself from the office when I found I was going to Europe. Of course, I talked with him, but I never read the report. I had no time nor opportunity.

Q. During the period that you were on duty in the office with Gen. Ansell do you recall any recommendations of an important nature made by him with respect to the administration of military justice which were not adopted? I except now all recommendations pertaining to the interpretation of section 1199, Revised Statutes.—A. I do not recall any. Of course, in an office of the sort there are a great many recommendations and discussions that are hard to isolate. I don't recall anything particular now. There may have been.

Q. In France you have been in the office of the judge advocate of the American Expeditionary Forces?—A. Yes, sir.

MAY 7, 1919.

Q. Referring to the question of the four death cases in France can you tell me in a general way what Gen. Ansell's views were with respect to men who would go to sleep on post in the face of the enemy?—A. I can not affirmatively state that he ever told me what his views were, but I think it is quite possible that he may have. I base this statement upon the fact that I have held to the view that where a soldier was found sleeping on sentry duty in the front line he should receive the most severe penalty authorized for that offense, which is death unless there was some very mitigating explanation of his conduct. I have held to this view because a sentinel in such position holds the lives of his comrades in his hands. Having stated my opinions I will say that I do not remember of Gen. Ansell ever disagreeing from that view. His disagreement on the four cases from France was upon the sufficiency of those cases and not upon the principle. I can not say that Gen. Ansell ever said anything to me about this, but it is very probable, in fact extremely probable, that we have discussed the abstract proposition as I have outlined above.

Q. Was Gen. Ansell in the habit of expressing his views on subjects generally, freely and forcibly?—A. He was.

EXHIBIT 31.

APRIL 29, 1919.

Referring to this matter, Mr. Earle L. Brown, who at the time was stenographer in Gen. Ansell's office, states:

"You ask me if I can recall any discussion on the four death cases in France. I can't recall any definite discussion. I do think, though, that when those cases were first discussed that Gen. Ansell, before reviewing the cases at all, had really expressed himself that the conviction ought to be sustained, but I know that after he reviewed the cases and found the circumstances of them, or rather when the circumstances showed those men had, as I recall it, been exposed to so much fatigue and long duty, that on that ground his opinion was altered. I can't say anything definite, but that is my impression."

MAY 5, 1919.

Q. Do you recall that when Gen. Ansell returned from Europe he wrote a report of his observations over there? Did you write that report for him?—A. Yes, sir.

Q. Do you know what disposition was made of the original of that report?—A. In the first place it was written coming over on the boat, and I don't know what became of it, but I know it was turned into Gen. Crowder, and my understanding was that report was made, through Gen. Crowder, to the Secretary of War.

Q. Do you know for certain that the original report was given to Gen. Crowder, or is that merely a presumption?—A. It is a presumption strong enough to satisfy me, but I can't say I saw him hand it to Gen. Crowder; but I think Gen. Ansell submitted it with a supplemental report of his personal observations, and I believe I can say with certainty that Gen. Crowder discussed that with him.

Q. Did you write that supplemental report also?—A. Yes, sir.

Q. Was that written coming over on the boat or after your arrival?—A. I think it was written on the boat.

Q. Do you recall anything as to the length or character of that report—I am speaking now of the supplemental report?—A. It was nearly as long as the other.

Q. Did it differ materially from the other in character?—A. Yes, sir. I think the longer report was more of a technical discussion of the questions surrounding points which interested the Judge Advocate General's office. It was a formal report and the supplemental was, I would say, of the character of an unofficial report in that it was outside the questions common to the Judge Advocate General's Office, and it was more about his opinions as to the standing of the armies and what his observations had been as to the military situation generally.

Q. Did you at any time in the office, after your return, hear Gen. Ansell refer to the fact that his formal report had never been acted upon or submitted to higher authority?—A. No, sir. I never heard that discussed.

EXHIBIT 32.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, 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 very 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 sentences 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 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."

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 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 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; revisement, 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 Clerk), 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., 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, Thirtieth Statutes, 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 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, contracted 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 of 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 prosecutiton 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 perfuctory 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 Stat., 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 generl, and an Assistnt 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 General 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, 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 a 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 is 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 judgment of the courts-martial may be reviewed and if improper revised. Such a court, it 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, R. S.) 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 judice. 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 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 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 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 example 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.

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 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 article 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 by 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 would 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 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. Ex-

pediency, 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.

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 law.

G. 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.

G. T. ANSELL,
Acting Judge Advocate General.

Concurring: James J. Mayes, lieutenant colonel, judge advocate; George S. Wallace, major, judge advocate, United States Reserve; Guy D. Goff, major, judge advocate, Officers' Reserve Corps; William O. Gilbert, major, judge advocate, Officers' Reserve Corps; Lewis W. Call, major, judge advocate, United States Army; Edward S. Bailey, major, judge advocate, Officers' Reserve Corps; William B. Pistole, major, judge advocate, Officers' Reserve Corps; E. M. Morgan, major, judge advocate, Officers' Reserve Corps; Eugene Wambaugh, major, judge advocate, Officers' Reserve Corps; E. G. Davis, major, judge advocate, Officers' Reserve Corps; Alfred E. Clark, judge advocate, Officers' Reserve Corps; P. K. Zilles, judge advocate, Officers' Reserve Corps; Herbert A. White, lieutenant colonel, judge advocate.

Dissenting: ———.

EXHIBIT 33.

NOVEMBER 12, 1917.

Memorandum for Gen. Ansell:

I hardly feel like giving an unqualified concurrence to your opinion of even date regarding the authority of the Judge Advocate General to revise proceedings of all courts-martial. While I am satisfied with the logic of the opinion and willing to agree that statutory power can hardly be lost by nonuse, yet I think settled procedure should be departed from only after due consideration. The legal questions in this case are fully considered in your opinion. But I feel that one reading the opinion might easily form the conclusion that errors of courts-martial leading to miscarriages of justice are rather frequent. It has been my experience that very little injustice has arisen heretofore in the service through our courts-martial procedure. It has been considered settled for some 30 or 40 years that the reviewing authority's action (a division or department commander) completely closes a case, with the exception that errors jurisdictional might be corrected; somewhat illogical reasoning, I must admit. Under the section of the Revised Statutes considered by you in this opinion, if the office of the Judge Advocate General had the machinery available to constitute itself a court of review, by which I mean a court of last resort, and the proper officers were available to constitute this court at all times, probably only beneficial results could arise from the office taking full revisory power. But I doubt if we can be continuously assured of that peculiar ability in our officers sufficient to constitute such a court of review. For it must be remembered that this court of review, even though it consists of the Judge Advocate General himself and some of the best-known officers, would be jealously regarded by department and division commanders, since they would consider that their disciplinary powers, now practically unlimited, were hampered by reference to central power. I apprehend, speaking more from the administrative standpoint than from the legal, that the destruction of a division commander's initiative in

regard to the discipline of his command might lead to more disastrous results than an occasional miscarriage of justice, which in any instance will largely be individual in character. If it can be assured that this power is to be used by the Judge Advocate General, whoever he may be, only in the clearest cases, and that it will not become such an engine as to lead division commanders to believe that the ultimate power of discipline is removed from their hands, then, of course, there is little objection. Whether this can be done is, of course, not a matter of law, but a matter of administration. I desire to emphasize these points, since, as stated at the beginning of this brief memorandum, the disturbance of settled conditions should be decided upon only after a consideration of all points that may be brought forward by one familiar with the subject.

HERBERT A. WHITE,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

EXHIBIT 34.

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 handling 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 the 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 authorized 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 whcih 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" as:

"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 imparts 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 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, chapter 541, 30 Statutes at Large, 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 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 Court 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 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 court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error decision 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 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 required 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 Gen. 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 II 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 a serts 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 is ue. 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 addre sed 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:

"Fifth. 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.

"Sixth. 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 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 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.

EXHIBIT 35.

DECEMBER 6, 1917.

Memorandum for the Secretary of War.

1. In a memorandum submitted to you under date of November 27, on the general subject of the revisory power of the Judge Advocate General under the authority of section 1199 Revised Statutes, I concluded as follows:

"I shall continue my studies 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 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."

2. In passing upon that memorandum you indicated it as your opinion that it would be unwise at the present time to attempt to deduce too wide an authority from the provisions of section 1199 Revised Statutes, since the power in the broad extent which has now been proposed to assert it has never been used. You suggested, moreover, that in your opinion it would be better at this time to frankly ask for such new legislation as may be found necessary to vest in the President such revisory powers as are necessary in order to assure the correct and orderly administration of military justice. As a result of the special study I have made of this matter, I have reached the firm conclusion that no additional legislation is necessary, but that an ample grant of statutory power already exists for the immediate establishment of a system of military procedure, the practical results of which will be to obviate the objections which have heretofore been made to the errors and injustice which sometimes results from regarding the duly approved sentence of a court-martial as beyond the corrective power of any authority so long as the court acted with jurisdiction of the person and subject matter tried, and did not violate any statutory rules prescribed to govern its procedure.

3. Under the views which I now entertain it is unnecessary to study the entire military system for the purpose of deducing in the President, as Commander in Chief, the power of appellate review, since, as has been indicated, it will be shown that this power has been conferred by statutory grant and it will be necessary only, in so far as concerns the President, to recognize and distinguish the place in the military hierarchy which he occupies by reason of the fact that he is the Commander in Chief.

It will be noted as a significant fact that until 1830 the President was not specifically vested by the Articles of War with power to convene general courts-martial. As a matter of fact, however, this power has frequently been exercised by the various Presidents in important cases, upon the principle that although the Constitution has vested in Congress the power to legislate for the regulaions and government of the Army, this provision can not rightly be regarded as per se militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which has been atached to that function by the previously existing law and by usage. Washington, for instance, as Commander in Chief, prior to the adoption of the Constitution, frequently convened general courts-martial, although his authority to do so was rested upon no express grant, but was apparently derived mainly by implication from the terms of his commission by which he was vested with "full power and authority to act as he should see fit for the good and welfare of the service," and enjoined to cause "strict discipline and order to be observed in the Army." The precedent thus established has been followed from time to time by them in peace and war down to the present, and some of the most important military cases, such as those of Brig. Gen. Hull, Maj. Gens. Wilkinson and Gaines, Gens. Talcott and Twiggs, and Brig. Gens. Hammond, Gordon, and Paine, were all convened by Presidents who ordered courts-martial by virtue of their power as Commanders in Chief and not by reason of any express statutory grant.

The power of the President in this matter was made the subject of a special investigation by the Senate Judiciary Committee in 1885, and that committee in Senate Report No. 1337, Forty-eighth Congress, second session, after reviewing the history of this power, made the following observation:

"In this state of the history of legislation and practice, and in consideration of the nature of the office of Commander in Chief of the Armies of the United States, the committee is of the opinion that the acts of Congress which have authorized the constitution of general courts-martial by an officer commanding an army, deparment, etc., are, instead of being restrictive of the power of the Commander in Chief, separate acts of legislation, and 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 of the Army from exercising the 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."

In the celebrated case of Swaim (formerly Judge Advocate General) versus the United States, Twenty-eighth Court of Claims, 173, it was contended that the President had no power to function in court-martial proceedings except as that power was especially conferred upon him by statute. The court which tried Gen. Swaim was ordered by the President, and in an effort to avoid its judgment, the plaintiff deemed it necessary to assert a lack of authority in him to appoint a general court-martial under the circumstances of that case. The matter was very ably considered in an opinion written by Judge Nott, from which the following extracts are taken:

"It seems evidence, then, to the court that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not be invested with greater authority by Congress than the Commander in Chief and a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President. The power to command depends upon discipline, and disclipine depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress, by the simple expedient of exclusively granting the authority to appoint courts-martial and approve sentence to a few officers of the Army and tacitly ignor-

ing the President, and practically defeat the express declaration of the Constitution and strip the office of Commander in Chief of all real power of command." * * *. (P. 221.)

"There can be no standing Army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant colonel, a major, or any other officer; but when Congress so enact they, without words to that effect, likewise place the command in the Commander in Chief. His name is to be understood as written in every statute which confers upon a military office military authority." (P. 224.)

This case was carried on appeal to the Supreme Court of the United States and the doctrines announced by Judge Nott were confirmed. The court considered and discussed many points that had been raised in the court below, but at the close of its opinion made the following statement:

"We have felt constrained to, at least briefly, consider the several propositions urged upon us with so much zeal and ability on behalf of the appellant, though we might well have contented ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott." (165 U. S., p. 566.)

It may then be taken as established law that the President as Commander in Chief exercises every statutory power conferred upon any subordinate commander, and indeed it will be seen on closer analysis that his power is more far-reaching and important than was indicated in the able opinion of Judge Nott, to which I have just referred. The eighth article of war as it now exists reads in part as follows:

"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, 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." * * *

This is the first time in the development of the Articles of War in which the President has been specially designated by the statute as one having authority to convene a general court-martial. As shown, however, by the statement of the Judge Advocate General before the House Military Committee at the time the present article was under consideration, the inclusion of the Commander in Chief as one having this authority was made only because the authority had been denied in the Swaim case, referred to above, although reference was made to the fact that the Supreme Court had decided that this authority was "inherent in the President as Commander in Chief, and that he could always convene a court-martial when necessary."

The command exercised by the President is all inclusive. It relates both to territorial and to tactical commands, while that of the other officers designated in the eighth article of war is in some cases territorial and in others tactical. In any case, however, the power to convene a court-martial is, strictly speaking, an attribute of "command" and not of rank or office. In our system as well as in the British, the prototype of our own, courts-martial have always been considered as "instrumentalities of the executive power." Winthrop, our best-known writer on military law, after so designating them, remarks that they are "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" (vol. 1, p. 53), and he cites from Clode (2 M. F., 361), as follows:

"It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the army."

It can not be too forcibly emphasized that the eighth article of war, which designates the officers who may convene general courts-martial, does not of itself bring a single court-martial into existence or place a single officer designated therein, other than the President (unless it be the Superintendent of the Military Academy), in position where he may convene the court-martial. The President's power of command is derived from the Constitution, and, by virtue of the fact that he is the Commander in Chief, he has full authority, at all times and wherever the forces of the United States may be serving, either to convene courts-martial himself or by appropriate orders, creating "command" for subordinate officers, to place those who are made eligible under the eighth article of war in position to exercise the authority conferred upon them by statute. Before a commanding officer of a Territorial department can convene a court-martial a department must be created of which he is given command;

and before the commanding officer of a division or army or army corps or separate brigade, or the commanding officer of any other forces or body of troops, when empowered by the President, can convene a court-martial, the designated tactical or other command must be organized and the commanding officer in question be placed at its head. It follows, therefore, that both in theory and in fact the exercise of military jurisdiction is vested in the President, who may under the authority of the statute regulate or control participation therein by the various officers authorized by the eighth article of war to convene courts-martial whenever the proper antecedent jurisdictional facts exist. It thus appears that the eighth article of war does not confer "command," and hence its attribute, the power to convene courts-martial, upon a single officer, with the exceptions noted above. In every case except that of the President, who derives his power of command from the Constitution, orders creating or conferring command must issue from the President, or under his authority, before these designated officers can be clothed with power to convene courts-martial. These orders may, in legal effect, therefore, be considered a delegation of a part of the President's power to use these "executive instrumentalities" for the enforcement of discipline in the particular command over which the officer is placed.

4. This being the general situation and an outline of the military hierarchy in so far as the enforcement of discipline is concerned, it is necessary now to inquire as to the particular limitations, if any, which exist upon the power of the President to participate in the proceedings of courts-martial which by proper orders conferring "command" he has authorized subordinate commanders to convene. As indicated in the brief prepared by Gen. Ansell on this subject under date of November 10, 1917, the President, upon the advice of the Judge Advocate General, has always asserted and exercised the right to declare the proceedings of a court-martial convened by a subordinate commander void for want of jurisdiction, although the power to correct procedural errors affecting the substantial rights of the accused has been denied. In that brief the statement was made that no clear authority exists for the exercise of the one power and the nonexercise of the other, and it was indicated that in any event some officer must sit in an appellate capacity to determine the existence or nonexistence of jurisdiction on the part of the court-martial. The position of the department in this matter, I find on careful examination, has been determined under the advice of the Attorney General of the United States. As early as 1854 the then Attorney General—Mr. Cushing—laid down the following doctrine:

"The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject matter. There is one, and but one, legal question which would be competent in this case after the final decision of the President upon it; namely, that of nullity of the proceedings, as being, for instance, coram non judice, or for other causes, absolutely void ab initio." (See 6 Op. Att. Gen., 370–371).

In the case just cited, the final decision was made by the President himself, but in later cases the doctrine there announced was followed and extended to cases in which the original confirmation had been by a commanding officer subordinate to the President. In the case of Capt. Howe, the court had been ordered and its proceedings confirmed by a commanding general and a memorial was later presented to the President, praying that Capt. Howe be restored "to his pay and emoluments, as captain of the Second Regiment of dragoons." The opinion of the Attorney General was requested upon the authority of the President to grant the relief prayed for in this case, and, among other things, it was held that—

"The decision of the court-martial upon the case of Capt. Howe was within its proper jurisdiction and rightful cognizance; and even if the point had been erroneously decided, it would have been an erroneous decision only, not a void judgment. The error would have been subject to be reviewed and corrected only by the commanding general. As the general in command affirmed the sentence, and it has been carried into execution, there is no longer any power competent to review and reverse that sentence."

This decision is dated June 3, 1854. (See 6, Op. Att. Gen., p. 514).

In Ryan's case (10 Op. Att. Gen., p. 66) Attorney General Bates, after discussing the rule that a case which had been finally acted upon could not be later reversed or set aside, remarked as follows:

"Nor is the rule confined to cases in which, by the Articles of War, the sentence of the court is required to be approved by the President, for in Maj.

Howe's case (6 Op., 514), where the sentence was approved by the commanding officer, as in the present case, Attorney General Cushing held that having been approved and executed by the President, a succeeding President could not revise it. He says (and here follows the quotation from Attorney General Cushing, 6 Op. Att. Gen., 371, supra). This opinion then proceeds:

"These authorities are certainly conclusive against your power to grant the prayer of the petitioner, unless indeed the record should show that from some cause the proceedings are absolutely null and void; for, in Devlin's case (6 Op., 371), and in the case of Capt. Downing (7 Op., 98), Mr. Cushing suggests that the only ground on which the President could interfere, would be, that of a nullity of proceedings, as being for instance, coram non judice, or, for other cause, absolutely void ab initio."

This opinion was rendered in June, 1861, and it will be noticed that it, like preceding opinions in which it has been held that the President had no power of revision, was decided prior to the passage of the act, the provisions of which are now embodied in section 1199, Revised Statutes. But even subsequent to the enactment of this statute, I find the doctrine first announced by Attorney General Cushing followed, and repeated it in the opinions of the Attorney General, in which no reference is made, however, to the revisory power conferred by section 1199. Thus, in the case of Fitz John Porter, decided in March, 1882, I find Attorney General Brewster, after referring to the preceding opinion, holding as follows:

"These opinions of my predecessors and of the Supreme Court, and also the decisions last above mentioned, all go to establish this proposition: That where the sentence of a legally constituted court-martial in a case within its jurisdiction has been approved by the reviewing authority and carried into execution, it can not afterwards, under the present state of the law, be revised and set aside. The proceedings are then at an end, and the action thus had upon the sentence is in contemplation of the law final * * *. It follows from this view that the President can confer the applicant no relief through a revision of the sentence in his case. That sentence involved immediate dismissal from the Army and disability to hold office thereafter. The dismissal is an accomplished fact and so far the sentence is completely executed." * * * (See 17, Op. Att. Gen., 303.)

The opinion of the Attorney General was to the same effect in the case of Maj. Benjamin F. Runkle, decided in 1877. (See 15 Op. Att. Gen., p. 290.)

In an early case (decided in 1 Op., 234) the following doctrine was announced:

"By the Constitution, the President is made Commander in Chief of the Army and Navy of the United States. But, in a Government limited like ours, it would not be safe to draw from this provision inferential powers by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the Constitution the President is the National and proper depository of the final appellate power, in all judicial matters touching the police of the Army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the Constitution."

THE POWER OF THE PRESIDENT UNDER EXISTING LAW.

5. Having thus surveyed the situation with reference to the place and power of the President in the military hierarchy, I now proceed to show that under existing law the President has ample authority, through the office of the Judge Advocate General, to make any revision of the proceedings of courts-martial which may be necessary to accomplish the correct and orderly administration of justice.

The thirty-eighth article of war reads:

"*The 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 with this article shall be laid before the Congress annually."

This article was introduced into the revision contained in the act of August 29, 1916 (39 Stat., 650–670). It was the subject of some discussion before the

Committee on Military Affairs of the Senate, from which the following is quoted:

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

The discussion which followed indicated clearly that the purpose of article 38 was to confer upon the President of the United States the same broad power with respect to making rules of procedure for cases tried by courts-martial as is possessed and exercised by the Supreme Court of the United States in cases of equity and admiralty.

Rules of procedure may be described as those rules which direct and control the conduct of a case from its beginning until its termination, including the review, satisfaction, or enforcement of any judgment rendered. The following is quoted from Clark's Criminal Procedure, pages 1 and 2:

"Criminal procedure is a method fixed by law for the apprehension and prosecution of a person who is supposed to have committed a crime, and for his punishment if convicted. * * * It is that division of legal things under which are regulated steps by which a legal right is vindicated or a wrong punished. The term 'criminal procedure' includes pleading, evidence, and practice. * * * The term 'practice' is usually employed as excluding both pleading and evidence, and the designating of all the incidental acts and steps in the course of bringing matters pleaded to trial and proof, and procuring and enforcing judgments on them. As applied to criminal procedure, the term includes the rules which direct the course of procedure by which the accused is brought before the court, the conduct of the court, and the proceedings after trial."

Mr. Bishop defines procedure thus (1 Bishop Cr. Pro., sec. 1):

"In the nature of things there is a difference between a right and the means by which it is enforced; an obligation and the legal steps by which the delinquent is made to atone for its violation; the law defining the crime and the course of the court in punishing it. Out of this distinction grows the law of judicial procedure. It is that division of legal things under which are regulated the steps by which a legal right is vindicated or a wrong punished."

The following definition is quoted from Bouviers Law Dictionary, page 2729, third revision:

"*The methods of conducting litigation and judicial proceedings.*—'Practice,' like 'Procedure,' which is used in the judicature acts, denotes the mode of proceeding by which a legal act is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is administered; the machinery as distinguished from its product."

The Supreme Court of the United States in Kring *v.* Missouri (107 U. S., 231) state:

"The word 'procedure' as a law term is not well understood, and is not found at all in Bouviers Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes, Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says (sec. 2): 'The term "procedure" is so broad in its significance that it is seldom used in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms pleading, evidence, and practice.' In defining practice in this sense he says, 'The word means those legal rules which direct the course of proceeding to bring parties into the court, and in the course of the court after they are brought in.' An evidence, he says, as part of the procedure 'signifies those rules of law whereby we determine what evidence is to be admitted and what rejected in each case and what is the weight to be given to the testimony admitted.'"

It may be interesting to note that the revision of Bouviers Law Dictionary, following this opinion, adopted the definition of procedure contained in Bishop's Criminal Procedure, and in the foregoing excerpt from the Supreme Court. In Thirty-second Cyclopedia, page 405, procedure is stated to be—

"A general term, including pleading, process, evidence, and practice—in fact, every step that may be taken from the beginning to the end of a case." All

law writers, speaking of the question, agree that procedure is a much broader term than practice and includes the latter. In Thirty-first Cyclopedia, page 1153, practice is stated to be "the mode of proceedings by means of which a legal right is enforced; that which regulates the formal steps in an action or other judicial proceeding; the course of procedure in courts; the form, manner, and order in which proceedings have been and are accustomed to be had; the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, etc."

See also State *v.* Caruthers, 98 Pacific, 478 (Okla.); Downs *v.* Board of County Commissioners, 124 Pacific, 383 (Colo.); Morris *v.* City of Newark, 62 Atlantic, 1005–1006 (N. J.); Clark *v.* Baxter, 108 Northwestern, 838 (Minn.).

Attention has been called to the fact, in the discussion of the thirty-eighth article of war before the Senate Military Committee, the powers sought to be conferred on the President were likened to those exercised by the Supreme Court in prescribing rules of procedure for the courts of the United States in causes in equity and admiralty. The whole course of proceedings in such causes is prescribed by rules promulgated by the Supreme Court. These rules have all the force of law, and they control and direct the proceedings in the cause from its beginning up to and including the trial and thereafter.

The case of Bremena *v.* Card, 38 Federal, 144, illustrates the extent to which such rules may go. Under the early admiralty rules a person might be imprisoned for debt on process issued in an admiralty cause. Later on the forty-seventh rule abolished imprisonment for debt on admiralty process in all cases where, by law of the State where the court is held, imprisonment for debt has been abolished in similar cases. Thus it will be seen that by a rule of procedure prescribed by the Supreme Court a person might be imprisoned for debt in an admiralty cause. Prior to the decision referred to this modification of the rules had been accomplished and rule 2 promulgated, dealing in a measure with the same subject. The court said:

"It will be noted that these rules of practice are made by the Supreme Court under the authority of the act of Congress 8th May, 1792 (1 Stat. L., 276), and that they have the force of law; that rule 2 makes provisions for a warrant of arrest of a person and is the authority for issuing such a warrant; that it deals with this subject only; and that in so dealing with it it provides for an attachment in the case of the issuance of the warrant of arrest and the inability to serve it because the defendant can not be found. In other words, the attachment calls for this predicate, the issuance of the warrant for arrest, and the failure to find the defendant."

In Bailey *v.* Sundberg, 49 Federal, 583–585, decision by the circuit court of appeals, second circuit, it was said:

"The Supreme Court, by authority of the laws of the United States, prescribes and regulates the mode of procedure in suits in admiralty by promulgating rules therefor." (R. S. U. S., secs. 913, 917.)

Admiralty rule 9 requires process in admiralty to be served not only by arresting the property, but by giving notice by publication of the arrest, of the time assigned for the return of the process and the hearing of the cause. Under this rule the notice is as indispensable as the order to confer jurisdiction upon the court to adjudicate upon the right of those interested in the property, and those who do not appear are not bound by the decree. (Cooley Const. Lin., 403.) The rule has the force of a law of Congress, and in effect declares that publication as well as seizure is as essential to constructive notice of the proceedings to all those who have the right to be heard.

It follows that the power of the President conferred by the thirty-eighth article of war, considered in connection with the provisions of section 1199, Revised Statutes, is broad enough to establish a system of revision and correction which would reach all errors affecting the substantial rights of military defendants.

6. Section 1199, Revised Statutes, reads:

"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."

This statute when enacted contemplated the revision of the proceedings of all courts-martial, courts of inquiry, and military commissions, and did in effect provide for a statutory appeal of all such cases. These provisions and the articles of war relate to the same subject matter, and must be construed together. Article of war 33 requires each general court-martial to keep a sepa-

rate record of its proceedings in the trial of each case, and such record shall be authenticated by the signatures of the president and the judge advocate.

Article of war 34 requires each special court-martial and each summary court-martial to keep a record of its proceedings, which shall contain such matter and be authenticated in such manner as may be required by regulations prescribed by the President. Article of war 35 provides that the judge advocate of each general court-martial shall forward the original trial record to the appointing authority or his successor in command, and when the appointing authority or the officer commanding for the time being has acted upon the record it shall be transmitted to the Judge Advocate General of the Army. Article of war 36 provides that the record of each special court-martial or summary court-martial shall be transmitted to such general headquarters as the President may designate by regulation, there to be filed in the office of the Judge Advocate.

The evident legislative intent was to limit the automatic statutory appeal to general courts-martial trials. The mandate of article of war 35 that all records of the proceedings of general courts-martial, after being acted upon by the appointing authority, shall be transmitted to the Judge Advocate General of the Army, is a complement to section 1199, Revised Statutes, and at the same time a limitation upon the cases which, by force of the statute, go to the Judge Advocate General for revision. General courts-martial or military courts of general jurisdiction having power to try all claims of military offenses and to impose any degree of punishment up to and including death. Special and summary courts are limited in their jurisdiction as to persons, offenses, and the punishments that may be inflicted. In the main, they deal with minor offenses and bear somewhat the same relation to the military judicial system as justice courts and municipal courts bear to the civil system. With respect to all cases tried by general court-martial, the right of revision is protected by statute and can not be taken away or impaired by any regulation. As to cases tried by special or summary courts the provisions of the Articles of War so far modify section 1199 that these cases are no longer automtically transmitted to the Judge Advocate General for revision. The right of appeal is not annexed to cases of minor consequence. This is in harmony with the tendency in the States generally to limit the right of appeal on controversies in the civil courts, or rather to deny the right of appeal in respect to trivial cases, both civil and criminal. In most of the States it is provided that there shall be no right of appeal in civil cases where the judgment does not exceed a specified amount, or in criminal cases where the fine does not exceed a certain amount, or the imprisonment is not more than a certain number of days—with this exception generally recognized, that if the case involves the assertion of some constitutional right, or the consideration of some tax statute, or other question in which the public is concerned, jurisdiction may be taken by the appellate court upon application. The argument by which this limitation of the right to appeal is sustained is that society is interested in having controversies settled and that it is better for the individual member of society to occasionally suffer some slight injustice, resulting from a denial of the right to appeal, than that society should be put to the expense, trouble, and confusion which the animosities of a multitude of trivial cases would cause. Now, in the present Articles of War the statutory right of appeal is limited to cases tried by general courts-martial. In this we see an analogy with the growing practice in the civil courts. The analogy may be carried further. The President may make regulations designating the headquarters where record of special and summary courts may be filed. Under the authority to make rules of procedure the President has authority to provide that any or all of these records of these courts shall be transmitted and filed with the Judge Advocate General, in which event they would fall within the revisory powers conferred by section 1199, Revised Statutes. Thus provision may be made by regulations to be established by the President to bring before the Judge Advocate General for revision such cases tried by a special or summary court as the Commander in Chief should deem it expedient should be so revised, just as upon application the appellate court in the civil judicial structure may hear such cases as the public interest requires it should hear, even from among those cases concerning which the right of appeal is denied. Of course, as to cases tried before a general court-martial the statutory right of appeal remains unimpaired, as the President has no authority to prescribe a rule of procedure in direct conflict with the statute.

It follows, I think, that existing legislation affords the means of establishing a complete and orderly system for the disposition of a trial by courts-martial

from its beginning up to the final termination thereof, including suspension of the execution of sentence until revision by the Judge Advocate General, and the final steps necessary to make effective the law as declared by the Judge Advocate General. When a sentence of a court-martial has been approved by the appointing authority, or the officer in command for the time being, it is ripe for revision. The Articles of War do not provide for the suspension of the execution of sentences pending revision, and a revision which resulted in the setting aside of a sentence would be more or less ineffective in any case where the sentence had been wholly executed before revision. The question is, May the President, under the authority of the thirty-eighth article of war, establish a rule of procedure that would suspend the execution of a sentence of general court-martial until the case had been revised and action taken upon such revision, affirming or setting aside the sentence? There is no prohibition in the Articles of War against such rule, although it may be argued that article 46, by implication, denies to the President the power to make such rule. This article reads:

"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."

The utmost effect of this article is to negative the power to carry any sentence into effect until approved by the appointing authority. There is, of course, a finality about the sentence of a court-marital when approved by the convening authority. There would be no completed judgment of conviction without this element of finality. It is a final judgment so far as that court or that department of the military judicial system is concerned. Until there is a judgment having the element of finality, there is nothing to execute. Clearly this article can not mean that a sentence once approved by the appointing authority must be executed, and that it is not subject to review or revision by any other authority. It may be helpful to draw an analogy from the civil judicial structure commonly found among the States, as well as in the Nation. When a case is tried in a nisi prius court, if it be an action at law, it is usually tried by jury in a court presided over by a judge. The verdict of the jury in a civil case fixes the amount of recovery; or in a criminal case, the guilt or innocence of the accused. There is no final judgment in the case until the verdict has been crystalized into a judgment pronounced and entered by the court, which, for the purposes of that court and that trial, is the officer having authority to approve, or in a proper case to disapprove, the findings of the jury. It would be wholly accurate to say that no verdict or sentence of a nisi prius court shall be carried into execution until approved by the presiding judge and the entry of final judgment. The judgment of any civil tribunal is final so far as that tribunal is concerned, and that judgment may be carried into execution unless set aside upon appeal. Indeed, the judgments of subordinate civil courts possess such a degree of finality that they may be pleaded in bar as a former adjudication in any other litigation, notwithstanding an appeal is pending. Likewise, they may be carried into execution during pendency of an appeal, unless some statute or rule of procedure suspends the right of enforcement until an appeal, if one be taken, has been heard and disposed of. The findings or judgment of a court-martial do not possess any unusual or extraordinary attributes simply because the court is the judge of both the law and fact, or because in addition to passing upon the guilt or innocence of the accused it fixes the punishment upon conviction. Indeed, there are analogies in the civil courts. For a great many years in some States in certain classes of cases, notably libel, juries were judges of both law and fact. At the present time, among the States generally juries called in the justice of the peace courts are judges both of the law and fact, the justice of the peace not being authorized to instruct them as to the law. In a number of States juries in certain classes of criminal cases are empowered to fix the punishment upon verdict of guilty. As, for instance, in North Dakota. And in Federal courts juries have always been authorized to fix the punishment upon conviction of murder in the first degree, that is to say, whether the punishment should be death or life imprisonment. In all these cases there is no final judgment in the trial courts until the verdict, whatever it may be, has been approved by the presiding judge, and formal judgment entered. But it has never been contended that such judgments possessed such finality that they could not be revised upon appeal.

There is no difficulty in reaching the conclusion that it was the intention of Congress to provide for a complete and orderly system for the administration of military justice, and that there will be found within existing law all that is

necessary to give full effect to the power of revision vested in the Judge Advocate General. By rules of procedure the President may suspend the execution of sentences by general courts-martial until they have been revised by the Judge Advocate General and direct the disposition of such cases after revision. In the event the sentence is found to be lawful and is approved, it would be carried into execution as of course, and in the event it was found to be unlawful and set aside upon revision, a rule of procedure could provide that an order as of course would issue making such disposition of the case as was consonant with the principles of law. Should it be advisable to revise certain classes of cases tried by special or summary courts, rules of procedure could bring those cases to the Judge Advocate General for revision and make provision for their disposition when revision had been accomplished.

7. If it is desired to rely upon the authority here outlined, the revisory power of the President can be fully and satisfactorily exercised through the establishment of certain rules of procedure. Time has not been taken to draw these rules with that definiteness and accuracy which they must possess before they are placed in practical operation. It is sufficient to state for present purposes that the most important provision of these rules of procedure would be one requiring all reviewing authorities, before executing a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man, to withhold publication of action until the record of the case had been reviewed in the Office of the Judge Advocate General and the reviewing authority advised of the legality of the proposed action, as based upon the record in question. All other sentences could be treated exactly as at present, since it is only in cases where one of the sentences I have indicated is imposed that injustice is sometimes done which now seems beyond the corrective power of the President. The procedure here indicated would require the reviewing officer to change his proposed action whenever the same had been held to be illegal because of errors shown by the record. But even this would involve no departure from established principles, inasmuch as it has been held that the action of a reviewing officer does not become final until the same is actually published to his command. So long as he retains within his control an order which he contemplates issuing his action has not assumed that finality which places it beyond his power to change or correct.

8. It should be frankly stated that one very serious objection to the plan here proposed is the delay that would result, particularly in time of war, in the execution of sentences of courts-martial. It is desirable, as a general rule, that these should be swift and summary and not involved in such delays as characterize the trial of cases in the civil courts. In time of peace this objection would not be of great moment, except in those departments such as the Philippine Department, far removed from the seat of government. The actual delay in the execution of sentences occasioned by the installation of this system would not ordinarily exceed 30 days at the most. It may well be, however, that this matter is of sufficient moment to make it advisable to refrain from exercising the authority here outlined and to seek instead such a clear grant of legislative authority as will make the President, acting through the Office of the Judge Advocate General, a supreme court of review in all military cases, with ample authority to revise, reverse, modify, or set aside any finding or sentence of a court-martial whenever such action may be found necessary to accomplish the ends of justice. I am accordingly submitting in a separate memorandum an alternative plan, in which is outlined a proposed amendment to section 1199, Revised Statutes, which, if enacted by Congress, will remove all difficulties and confer upon the President a power which he should undoubtedly be authorized to exercise.

———— ————,
Judge Advocate General.

EXHIBIT 36.

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.

EXHIBIT 37.

WAR DEPARTMENT.
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 17, 1917.

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 this 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 Britsh 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 power.

Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addresses 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 procedue, 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 could 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 driven 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.

The SECRETARY OF WAR.

EXHIBIT 38.

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.

Before the Secretary of War.

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 peacetime 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 that 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 officer 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 conviction 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 necessary 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. Revised Statutes. 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 following:

"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 con tract 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 has been thus expelled. An Executive action partaking of the nature of a 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 cases, these noncommisioned officers, 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 statute. 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 these 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 these 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 according 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 ribunals, the review of which, to insure correction, is fundamental in our law. So much as there is of summaries 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 lead 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 bases 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 not 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, inasmuch 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 adjudicature 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.* United States, 109 U. S. 340; McClaughry *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 are 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. 542, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; Ex parte Reed, 100 U. S. 13, 21; Swaim *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. (Granfton *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 courts-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and its 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 adjudicature, 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 the 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 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 not 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 source 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 damnum 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.

The 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 record 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 "review" 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 the 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. 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 evidenced 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 fact 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 (Art. X, 1849, 1879), constitution of Alabama (sec. 3, 1819, and Art. IX, 1865), constitution of Florida (Art. 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 findings is wholly without evidence or clearly contrary to the weight of evidence. (See United States *v.* Riebe, 1 Customs App. 19; Holbrook *v.* United States, 1 Customs App. 263; Carson *v.* United States, 2 Customs App. 105; In re Gerdau, 54 Fed. 143.)

(*h*) The decisions of the Comptroller of the Treasury over settlement 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 reissue 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 States, 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 word "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.)

(*s*) The supreme court frequently alludes to its power "to revise judgments" of inferior courts. (See, e. g., the Dred Scott decision, 19 Horn 452, 453.)

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, p. 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 in English law the power of revision of courts-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 the Anglo-American military law with reference to the power of courts to reconsider and correct their own proceedings, judgments, and sentences.

In 6 Opinions of the Attorney General (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 (p. 29), McArthur on Courts-martial (p. 136), Griffith's Notes (p. 90), Kennedy on Courts-martial (p. 229, 290), Anon., Observations on Courts-martial (p. 38–65), Tytler's Military Law (p. 170–338), James's Collection (p. 556), Simmons's Practice (p. 339), De Hart on Courts-Martial (p. 203), O'Brien's Military Laws (chap. 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 tests and is recognized by that name by all our courts.

See Macomb (1809), Duane's Military Dictionary (1810), Scott's Military Dictionary (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 imparied by non-use. 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 de-

fect 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 8 times; record is fatally defective and sentence should not, or can not, or must not, be enforced, or carried into execution, or confirmed, 16 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), volume 2, pages 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 Judge Advocate General 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 judge advocate general's department forms a final court of appeals and has the power of upsetting or "quashing," as it is called, all proceedings of courts-martial and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

"The judge advocate general 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 general courts-martial which at home must be confirmed by the sovereign are sent to the judge advocate general, and the sovereign confirms on his responsibility as a minister of the crown, and acts on his recommendation.

"The judge advocate general 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 judge advocate general 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 sentences, or as to remission, etc., is not his province, the C. in C. advises the crown on these points." (Pp. 94–95.)

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 narrow 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 3,000,000 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 uninformed 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 fellow men, 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 an 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 considerate-

ness, 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 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 relation 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.

EXHIBIT 39.

WAR DEPARTMENT,
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.

2. Another important matter is to be found in the most expeditious and at the same time lawful and just method of ridding the Army of inefficient officers. Among the large number of officers in our Army, considering the methods of selection and the inadequate knowledge of them upon the part of the appointing authority, must be many who ought to be eliminated, and the sooner and with the least disturbance to normal functioning the better. The number of cases involving the trial of officers is very large already and is rapidly increasing. In the great majority of cases the sentence awarded on conviction is limited to dismissal from the service. In view of the great time necessarily consumed in court-martial trial, the preparation for trial, serious question whether an officer shall be tried by court-martial when it is reasonably evident from all the circumstances that the judicial method will result only in a separation of the officer from the Army. My own view is that the summary Executive power of removal ought to be applied in such cases, and I think consideration should be given now to establishing the respective executive and military judi-

cial domains in such matters. Our commanding generals ought to be advised of the extent of jurisdiction which the Executive is to assume, in order that they may determine whether it is preferable to bring an officer to court-martial or submit the case for Executive action.

3. Another matter: You mentioned yesterday the question of promotion of officers below general rank in the additional forces. This office has given some consideration to that question, but apparently it was upon an informal submission, or it may be upon no submission at all. We did conclude, however, that the President might institute a system whereby he might exercise his power through selections made by subordinate commanders in accordance with the method by him established, and that resultant appointments would be beyond judicial inquiry or just criticism. It is my judgment that it would be highly injurious to the Army, large as it is and operating as it is, to hold that the Executive function must be exercised in each individual case by the Chief Executive in person. As Government grows, constitutional functions can not be thus personally exercised. Law must conform to such evident necessities.

4. There are other matters of policy that I shall take up with you whenever I shall have had time to formulate them.

S. T. A.

EXHIBIT 40.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 9, 1918.

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 possibly 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 measures 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 General Order No. 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 or courts-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 of commissions, within the Military Departments of the Ohio, the Tennessee, the Cumberland, the 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 regulations 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 correcting 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 determmine 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 41.

JANUARY 10, 1918.

Memorandum for the Secretary of War:

1. In your memorandum of December 28, 1917, relating generally to the power of revision of sentences of courts-martial, you state, after outlining to some extent your own views:

"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 views accepted by Gen. Ansell and his associates."

2. Your first suggestion may be answered briefly with the statement that at the date of the enactment of the act of July 7, 1862, and of the similar act of 1864—the acts which are the antecedents of what is now section 1199 of the Revised Statutes—the Articles of War, in so far as they relate to the power of reviewing authorities to confirm and execute sentences of general courts-martial, were the same as now. The Articles of War recently adopted made no change in this particular.

3. With reference to your second suggestion, it is my belief—in which I have no doubt Gen. Ansell fully shares—that there is no necessity whatever for an appellate review with authority to direct a trial de novo. The real need of revisory action is limited to a class of cases in which the action of the court and the reviewing authority has become final before the error or defect in the proceedings of the court has been discovered, and it is then too late to do full justice to the accused—ordinarily because of the finality of his separation from

the service. It is obvious that any remedy afforded by a pardon, mitigation, restoration to service, or authorization for reenlistment is not sufficient to reach a case where the accused has been illegally tried or erroneously convicted; and it is further obvious that the real problem before the department is to apply corrective action before it is too late.

There are three classes of cases in which this revisory action is necessary, namely: Cases involving a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man. The number of cases in which such action will be found necessary will be a very small percentage of the aggregate tried, probably less than 5 per cent. The question to be disposed of resolves itself, therefore, into one of preventing sentences of death, dismissal of an officer, or dishonorable discharge of an enlisted man, from being executed before final review of the record of trial in this office. The scope of the difficulty is very much reduced by the fact that, in the great majority of cases where dishonorable discharge is a part of the sentence, the execution of the dishonorable discharge is suspended by the reviewing authority until the soldier is released from confinement under the authority contained in the fifty-second article of war. Where this is done the correction of injustice is easy of accomplishment.

I have reached the conclusion that the problem may be easily solved by establishing rules of procedure which may be prescribed under the authority of existing legislation. The President, as Commander in Chief, has a certain power of control, through the establishment of rules of procedure, which may be deduced from the whole body of the Articles of War, but which is specifically stated in article 38, which is as follows:

"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."

Rules of procedure comprise pleading, evidence, and practice. They are such rules as control and direct the whole conduct of a judicial proceeding, from its inception up to and including trial and judgment. This is settled by many decisions of the courts. Under this authority to prescribe rules of procedure the action of reviewing authorities can be so controlled that, while we will not detract in any manner from the independence or finality of their action, we will suspend the execution of sentences in certain cases until the records of trial in those cases have been reviewed and the legality of the findings and sentences determined.

I recommend, therefore, that the rule of procedure heretofore authorized by you, and which has been published to the service, be revoked, and the following substituted therefor:

(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 tne reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission or defect which has been found. If such error, omission or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise, he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

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

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

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

It may be argued that the procedure here proposed will be more cumbersome than that at present in force, and will result in unnecessary delays in the execution of sentences. It is obvious, however, that such a contention is without real merit. But few officers or soldiers are sentenced to death; but few officers, considered in the aggregate, are sentenced to dismissal; and, in a majority of cases at the present time where a soldier is sentenced to dishonorable discharge the execution thereof is suspended by the reviewing authority under the fifty-second article of war. There may be cases where the execution of a sentence of death should be prompt, but there will be no case outside of the actual field of military operations where a prompt execution of a sentence is so imperative that time can not be taken for a careful review of the case in the Office of the Judge Advocate General; and in the case of a death sentence in the zone of actual military operations a branch of the Judge Advocate General's Office could review the case with such expedition that execution of the sentence need not be deferred more than a week at most. In cases where the death penalty is to be imposed the certainty that the proposed action is both just and legal, which will be assured by the existence of these rules, will more than compensate for the brief delay involved. In cases sent to this office for review, it is not anticipated that the delay in execution of a sentence involving dishonorable discharge need exceed 60 days from points outside the continental limits of the United States, and need not exceed 30 days from any point within such limits. Ordinarily it will be much less; and the establishment of a branch of this office in France would result in the expeditious review of all cases originating there. Cases are now reviewed promptly in this office, and it is expected that the office force will be increased as necessary so as not to permit this very important work to lag behind during the continuance of the war. The delay which would result in cases of enlisted men sentenced to dishonorable discharge is not important, because a sentence of dishonorable discharge is usually accompanied by a sentence of forfeiture of pay and allowances due or to become

due. The Government will thus be protected from loss, while the man will be protected from injustice by the rule which provides that the time so lost in obtaining a final review of the case shall be credited upon his term of confinement.

What is believed to be a particular merit of the plan here proposed is to be found in the fact that when a record is discovered to be insufficient, or to be tinged with such error or illegality that the finding and sentence of the court can not in justice be allowed to stand, these rules make it possible for corrective action to be taken by the reviewing authority when the errors are called to his attention. It can not be doubted that this officer is the one contemplated by the Articles of War as the proper officer to take the corrective action which the record of trial may disclose as necessary. A precedent for the procedure involved in obtaining a review of the case by the Judge Advocate General before the reviewing authority finally disposes of the case, is found in the rule which has been in operation for some time to the effect that reviewing authorities shall not send men to a penitentiary for confinement until this office has reviewed the records of trial and determined that penitentiary confinement is legal. Moreover, I have no doubt that the establishment of these rules will result in greater care being exercised in the disposition of cases by reviewing authorities and their judge advocates, and thus the existence of this revisory system will tend to prevent the occurrence of the errors it is designed to correct.

Finally, I may state that the revisory action which the Judge Advocate General would take under these rules of procedure would give full force and effect to the donation of power contained in section 1199 of the Revised Statutes, without detracting from the authority conferred by any of the Articles of War upon any other officer; and would assure, the need of which was suggested by you at the conclusion of your memorandum, the establishment of " such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protection 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."

JUDGE ADVOCATE GENERAL.

From the Secretary of War.
Memorandum.
For: Gen. Crowder.

The entire plan has my approval.

Please have letters written transmitting proposed legislation to appropriate committees. Put orders in course of promulgation.

BAKER.

Assistant and Chief Clerk,
January 15, 1918, War Department.

EXHIBIT 42.

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 a 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 to 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. A. ANSELL.

EXHIBIT 43.

JANUARY 14, 1918.

Memorandum for the Secretary of War:

The attached papers will claim your special consideration. They are responsive to your direction of December 28 in respect of the power of revision of court-martial proceedings by the appellate procedure suggested for your consideration by Gen. Ansell.

I think the new rule of procedure issued under new article 38 will enable us to act remedially on the class of cases as to which you share with this office the view that revisory action is necessary. It could be made immediately available by your approval of these regulations; but in order that there may be no delay in the theater of war it will be necessary for you to issue the general order which you will find attached to this memorandum and which follows a Civil War precedent in establishing a branch office of the Judge Advocate General at Gen. Pershing's headquarters.

Please consider in connection with this matter a proposed amendment of section 1199, Revised Statutes, vesting in the President of the United States the revisory power which Gen. Ansell was inclined to find already vested in the Judge Advocate General by said section of the Revised Statutes. If you approve of this draft I would request to have it brought to the attention of the chairman of the two military committees, with a request for its enactment.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 44.

JANUARY 16, 1918.

From: The Office of the Judge Advocate General.
To: The Adjutant General of the Army.
Subject: General order establishing rules of procedure for courts-martial and a branch of the office of Judge Advocate General in France.

1. I transmit herewith a draft of a general order relating to the above subject, which should be published as promptly as possible, and approximately in the form indicated. The substance of this order has received the personal consideration and approval of the Secretary of War, who has directed that the same be put in course of promulgation as promptly as possible. To the end that the contents of this order may be communicated to all officers competent to convene general courts-martial before the date set for the order to take effect, I suggest that action be expedited, and that the order be transmitted by telegram or cable where this may be necessary. The order itself indicates that it is to become effective on February 1, 1918.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 45.

General Orders, No. 7.

WAR DEPARTMENT,
Washington, January , 1918.

I. General Orders, No. 169, War Department, Washington, December 29, 1917, are hereby revoked, and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

(1) Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

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

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

(4) Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or

imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

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

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

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the Amerian 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 sentences invalid or void, in whole or in part, to the end that 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.

EXHIBIT 46.

JANUARY 17, 1917.

Memorandum for The Adjutant General.

Subject: Detail of an officer of this department to act as the representative of this office in the revision of cases by general courts-marfial originating in our Expeditionary Forces in Europe.

1. I am handing you herewith a request for the prompt publication of a general order which has received the personal approval of the Secretary of War, who has directed that it be put in course of promulgation as promptly as possible. This order is to become effective February 1, 1918, and, of course, it will be necessary to transmit it by cable to certain of our more distant court-martial jurisdictions. It will be necessary, I assume, to so transmit it to Gen. Pershing in France, and I should like a special order issued and transmitted by cable to Gen. Pershing at the time of the transmission of the general order referred to, which special order should be phrased substantially as follows:

Until further orders Brig. Gen. Walter A. Bethel, judge advocate, will assume charge of the branch of the office of the Judge Advocate General established in France by War Department General Orders, No. —, current series, and will perform the duties of Acting Judge Advocate General indicated in the said order.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 47.

GENERAL ORDER.

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.

EXHIBIT 48.

JANUARY 19, 1918.

HON. GEORGE E. CHAMBERLAIN,
Chairman Senate Committee on Military Affairs,
Washington, D. C.

MY DEAR SENATOR: I am inclosing herewith a draft of a proposal 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 (articles 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 (fifty-first 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 law officers, to regard as final, and beyond appellate or corrective action, the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice 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 court-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,

_____,

Secretary of War.

EXHIBIT 49.

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

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, of 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 sentence 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.

(The new matter is in italics.)

EXHIBIT 50.

JANUARY 19, 1918.

Hon. S. HUBERT DENT, JR.,
Chairman House Military Affairs Committee,
Washington, D. C.

MY DEAR MR. DENT: 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 court 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 miltary 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 any officer below the grade of brigadier general (articles 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 (fifty-first 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 law officers to regard as final,

and beyond appellate or corrective action, the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice 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 the 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 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,

_____,
Secretary of War.

EXHIBIT 51.

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

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.

The new matter is in italics.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MILITARY AFFAIRS,
Washington, D. C., January 22, 1918.

Hon. NEWTON D. BAKER,
Secretary of War, Washington, D. C.

DEAR MR. SECRETARY: I beg to acknowledge the receipt of your letter of the 19th instant inclosing draft of a proposed amendment to section 1199 of the Revised Statutes, which shall be given attention.

Yours, sincerely,

S. H. DENT, Jr.

EXHIBIT 52.

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 courts-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. Ansel 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 American 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.

EXHIBIT 53.

WAR DEPARTMENT,
General Orders, No. 169. *Washington, December 29, 1917.*

I.—Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execuction 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.

[250.47 A. G. O.]

II—1. Whenever an officer of the Regular Army holding an appointment in any other force of the Army of the United States is considered by his division or higher commander as unfit to hold such temporary commission, the division or higher commander will order the officer concerned before a board of officers, to be appointed in the same manner as is provided in section 9, act of Congress approvd May 18, 1917 (Bulletin 32, W. D., 1917). Final decision in each such case will be made by the War Department.

2. The board in each case will examine into and report upon the capacity, qualification, conduct, and efficiency of the particular officer ordered before it. In case the required number of officers senior to the officer considered unfit be not available within the division, the division commander will notify the next higher commander, who will order the necessary officers to report to the division commander for this duty. In each case the board will be composed of officers of the regular service and will, as far as practicable, be composed of officers of the arm of the service to which the officer considered unfit belongs. In cases where the approved proceedings of the board of officers find the officer examined unfit in the arm of the service in which he is holding a temporary commission, such officer will be held as unfit for temporary promotion in the Regular Army from the date of the termination of such prior temporary commission in the Army of the United States, and any vacancy to which such officer may become entitled will be filled by the promotion of the appropriate officer junior to the officer found unfit.

Just prior to the expiration of a period of six months from the date of termination of the officer's temporary commission his commanding officer will be directed to report to the War Department whether or not he has demonstrated his fitness for temporary advancement to the next higher grade in the Regular Army.

3. Paragraphs 1 and 2 of this order will not apply to officers serving with the American Expeditionary Forces, the commanding general of which will continue, under the authority heretofore granted him, to discharge, by order of the President, inefficient officers of all branches of the service below the grade of brigadier general, except those holding permanent commissions in the Regular Army or those given temporary promotion in the Regular Army.

[210.2, A. G. O.]

III—General Orders, No. 110, War Department, 1917, are rescinded and the following is substituted therefor:

1. In each National Army camp there shall be established one camp exchange, and additional exchanges will be organized by the camp commander for the organizations pertaining to the camp on the basis generally of one exchange to each regiment, or the approximate equivalent thereof, but where local conditions warrant it the camp commander may determine the number and location of the exchanges in his camp, and will assign to the exchanges organized the organizations which are to participate therein.

2. There shall be in each camp a camp exchange council, consisting of the camp exchange officer and one representattive for each exchange, selected by the camp commander from the organizations participating therein. It shall be the duty of the camp exchange council to regulate the general policy and management of the exchanges in the camp.

The camp exchange council shall select from among its members an executive committee of five members, who shall carry out the policy of the camp exchange council, supervise and direct the management of the exchanges by the camp exchange officer, and assure itself by frequent inspections of the efficient and satisfactory conduct of all the exchanges within the camp.

3. In each National Army camp there shall be a camp exchange officer, who shall be attached to the staff of the division commander, and whose duties shall be as follows:

(*a*) To establish and operate the camp exchange.

(*b*) To establish and supervise all of the exchanges pertaining to the camp.

(*c*) To e tablish and supervise the maintenance in each exchange of a uniform system of accounting which shall conform to the regulations pertaining to that exchange.

(*d*) To have charge of the purchase of all stock and equipment for all of the exchanges pertaining to the camp, such purchases, other than those required for the initial establishment of the exchanges, to be based on requisitions from each exchange and to be delivered to the exchanges at cost.

(*e*) Under the specific direction of the executive committee of the camp exchange council, to regulate the prices in all exchanges pertaining to the camp, with a view to establishing and maintaining a uniform price for the same article in all the exchanges.

4. There shall be appointed by the camp commander for each exchange in the camp an exchange officer, selected from an organization participating therein, who shall manage, under the supervision of the camp exchange officer, the exchange to which he pertains.

5. The purchase of initial stock and fixtures will be made on such credit terms and in such quantities as will permit a settlement in full within 60 days, after which each exchange will be conducted on a strictly cash basis.

6. The expenses of the office of the camp exchange officer shall be paid entirely from the receipts of the camp exchange.

7. The net profits of the camp exchange shall be distributed as dividends as follows: To the division headquarters fund, 10 per cent; to each brigade headquarters fund, 2½ per cent; and the remainder of any dividend declared to be distributed pro rata to organizations in the camp on the basis of their authorized strengths.

8. The camp commander shall detail one lieutenant as assistant to the camp exchange officer and such other officers and enlisted men as, in his opinion, are required for duty in the camp exchange.

9. An organization shall share in the profits of no exchange other than the camp exchange and the one in which it is participating. In each exchange dividends will be declared only upon the recommendation of the camp exchange council, approved by the camp commander. The net profits of any one of these exchanges, except the camp exchange, shall be distributed among the different organizations participating therein in proportion to their authorized strengths.

10. An organization ordered away from a camp where it has an interest in an exchange shall be paid for said interest, the value thereof being determined by a board of disinterested parties, one of whom shall be the camp exchange officer. When any body of troops is ordered relieved from duty at a camp, the procedure will depend upon whether or not such body of troops is to be replaced by other troops. If it is, the exchanges will be sold to the relieving troops at prices determined by a board of disinterested officers, one of whom shall be the camp exchange officer, who shall remain in the camp as a member of the staff of the camp commander. If it is intended not to replace the troops ordered away, and the camp is to be abandoned, then it shall be the duty of the camp exchange officer to have the business of the exchanges closed up, to sell the stock and fixtures, and to distribute the proceeds of such sales among the interested organizations.

11. The exchanges authorized in the foregoing shall be conducted in accordance with the Post Exchange Regulations, 1917 (Special Regulations No. 59), except in so far as those regulations conflict with the provisions of this order.

12. Each month the camp commander shall detail for each exchange an officer to audit, on the last day of the month, the accounts of that exchange. In each case the officer detailed shall be selected from an organization participating in the exchange, the accounts of which he is to audit.

[331.9 A. G. O.]

By order of the Secretary of War:

TASKER H. BLISS,
General, Chief of Staff.

Official:

H. P. MCCAIN,
The Adjutant General.

EXHIBIT 54.

General Orders, No. 7.

WAR DEPARTMENT,
Washington, January 17, 1918.

I. Section I, General Orders, No. 160, 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 51st Article of War.

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

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

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

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rule, either to the office of the Judge Advocte 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, de-

partment, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

[250.1, 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.

EXHIBIT 55.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 8, 1917.

Memorandum for Gen. Crowder:

1. I am at times considerably embarrassed, and besides the transaction of public business is, I think, somewhat impeded and confused, by the the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of the Provost Marshal General; the public conception being that you are, as you legally are, the head of both offices, as in fact you are not. On innumerable occasions I am sought for conference on matters that pertain to your office, and am not sought in matters which do pertain to this office. I suspect that you have a similar experience.

2. I think this ought to be done: I ought to be designated in orders by the Secretary of War as Acting Judge Advocate General during your practical detachment from this office. This is advisable, first, because it would lead to a better defined administration, as I have just indicated, and secondly, it would be in consonance with the actual situation. In theory of regulations I am here simply because I am the senior officer on duty and not by virtue of any designation. That situation is the one contemplated when the absence of the head of the office is both brief and definite. It contemplates that the head of the office is charged with the full responsibility for its policies and for its general administration. That is not the situation now, nor do I believe it can ever be the situation as long as you perform the duties of Provost Marshal General.

3. Furthermore, I believe that the conception which the service has of your relation to both offices has succeeded in minimizing the importance of each office, and that this has resulted already in considerable disadvantage to yourself, and has resulted in no advantage to me.

4. I submit this letter to you wholly disinterestedly, personally, but with the absolute conviction that the order ought to issue. If the suggestion should be agreeable to you I should ask you to join in the memorandum to the Secretary

of War asking its accomplishment. I defer to you in this matter absolutely, as I properly should, but at the same time frankly saying to you that I am entirely assured of the correctness of my views.

ANSELL.

EXHIBIT 56.

NOVEMBER 4, 1917.

My DEAR GEN. ANSELL: It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War, the subject matter of your letter of yesterday. For your information I would say that, since taking charge of this office, I do not recall that I have been consulted by outsiders in a single instance respecting any matter pertaining to the Judge Advocate General's Department, except in respect of appointment to the Reserve Corps, except as you yourself have consulted me.

Very truly, yours,

E. H. CROWDER,
Provost Marshal General.

EXHIBIT 57.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, Nov. 6, 1917.

Memorandum for the Chief of Staff. (For immediate consideration.)

1. Doubtless the Judge Advocate General of the Army is absent from this office in the sense of 1132 Revised Statutes, and has been so absent since I have been in charge.

2. In order that my past official action as acting head of this office may be ratified and future action legalized, I ask that the following order be published immediately:

General Orders, No —.

WAR DEPARTMENT,
Washington, Nov. —, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, Brig. Gen. Samuel T. Ansell, judge advocate, National Army, is hereby designated as Acting Judge Advocate General of the Army and empowered, as of the date of August 11, 1917, to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of war:

Acting Chief of Staff.

3. I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention.

(Signed) S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 58.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
November 6, 1917.

Memorandum for the Chief of Staff:

The draft of a general order substituted for that recommended in memorandum from the Acting Judge Advocate General, as indicated in memorandum for The Adjutant General herewith, is recommended.

The Acting Judge Advocate General and The Adjutant General have been consulted and concur.

R. I. REES,
Lieutenant Colonel, General Staff.

To THE ADJUTANT GENERAL.

EXHIBIT 59.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 6, 1917.

Memorandum for The Adjutant General:

The Secretary of War directs that the following be published in General Orders:

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of War.

JOHN BIDDLE,
Major General, Acting Chief of Staff.

EXHIBIT 60.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 6, 1917.

Memorandum:

The following is suggested as a substitute for the general order requested in memorandum from the Acting Judge Advocate General:

General Orders No.—

WAR DEPARTMENT,
Washington, November —, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of War.

———— ————,
Major General, Acting Chief of Staff.

EXHIBIT 61.

General Order No. —.

WAR DEPARTMENT,
Washington, November, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

J. F. J., *A. G.*

EXHIBIT 62.

General Orders, No. —.

WAR DEPARTMENT,
Washington, November, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties. (201, 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.

EXHIBIT 63.

Col. LOTT: Herewith are the papers on which the order designating Brig. Gen. Ansell as Acting Judge Advocate General of the Army was based.
The order in question has been canceled.
November 19, 1917.

E. J. B.

Order is not to be issued, Gen. McCain personally so directed.
November, 19.

A. G. L.

EXHIBIT 64.

NOVEMBER 17, 1917.

MY DEAR GEN. CROWDER: As the time approaches for the reassembling of Congress and the consideration of many actively controverted questions of legal policy affecting the military establishment, I write you this personal note to inquire something of the present character of your burdens as Provost Marshal General.

You will recall that in our discussions on your assumption of that work I had a certain hesitancy which was due to the fact that you would necessarily be withdrawn for a substantial part of your time from the active guidance of the Judge Advocate General's office, where I have learned so confidently to rely upon you; and I then expressed the hope that after the great machine necessary for the mobilization of the selective army had been organized, it would be possible for you gradually to give it less time—to leave it under your supervision still, but demanding less of your actual presence, so that you could with justice to both offices, resume your activity in the Judge Advocate General's Department.

I am writing this note not in any way to question the wisdom of the apportionment of your time which you have so far made. The fine perfections of the results of the administration of the selective-service law could have been attained in no other way than by the sleepless vigilance with which you have applied yourself to it; but I shall be happy, when that work is so far advanced as to be more nearly automatic and to leave you free to return to your task here, and so I am making this inquiry as to your own estimate of the situation.

Cordially, yours,

NEWTON BAKER, *Secretary of War.*

Gen. E. H. CROWDER,
Provost Marshal General.

EXHIBIT 65.

NOVEMBER 18, 1917.

MY DEAR MR. SECRETARY: I am deeply appreciative of the statements in your personal letter of this date respecting my resumption at an early date of my supervision of the Judge Advocate General's Office and Department.

In response to your request that I fix a date when I could with justice to both offices—the Provost Marshal General's and the Judge Advocate General's—resume my activity of the Judge Advocate General's Department, I have to advise you as follows:

The revised regulations providing for a national classification and governing the second and subsequent draft have been printed and distributed to boards. The organization of the medical and legal advisory boards in the several States is well under way and will be completed at an early date. I may say for your information that State headquarters, district boards, and local boards have been so enthusiastic in their approval of the new scheme and have evinced such a complete understanding of it, that I do not anticipate great administrative difficulty in connection with the future administration of this department.

I feel myself free to advise you that I can resume my active supervision of the work of the Judge Advocate General's Department at once to the extent of giving at least half of my time to that office and continue at the same time an efficient adequate supervision of this office. This is my estimate of the situation.

I thank you for the terms in which you have expressed yourself in your letter of this date.

E. H. CROWDER,
Provost Marshal General.

EXHIBIT 66.

OCTOBER 18, 1917.

Memorandum for the Chief of Staff.

(For the personal consideration of Gen. Bliss.)

Subject: Proper punishment during war.

1. I am concerned about the character of punishments that should be awarded to members of the Army in time of war. A great many cases are passing over my desk carrying dishonorable discharge and long terms of confinement. For the year ending July 1, 1917, 4,121 men were dishonorably discharged from the Army, about 75 a week. Now, such discharges are running more than 100 a week. This means, of course, that such men are withdrawn from the service. This is the very thing that ought not to be, because in time of war every man should be made to serve as long as and to the extent that he is capable of serving, and because it furnishes a convenient method of getting out of the Army. As long as a man has within him the elements of service he should be made to serve, and not be permitted to choose or have mere penal servitude instead. It should be remembered that the status of a soldier is a peculiar one, in that it carries with it the power upon the part of the proper authorities to compel the performance of all the obligations of the status. That is, if a man refuses to serve, refuses to obey orders, for instance, to do his duty, the military authorities are not limited simply to court-martialing him and sentencing him to penal servitude. He may be made, by physical force if need be, to perform the duty. For some time, at least, there will be no disposition on the part of the military authorities, except in rare cases, to resort to physical compulsion instead of the usual judicial method, and yet a method of maintaining discipline which results in depriving the service of its man power in time of war is fundamentally defective.

2. There are many men in the disciplinary barracks at Leavenworth, and I am advised that the department contemplates, or did contemplate, at least, the establishment of a disciplinary battalion for each division. In any event, as a result of court-martial punishment, a great number of men will, under the existing system, be withdrawn from actual service. In my judgment, this ought not to be, and the department should now take some means of preventing, or at least controlling, discharges from the service as a result of court-martial punishment.

My own view is that these disciplinary or penal battalions ought to be organized under the control of the division commander, and to these penal bat-

talions military offenders should, except, perhaps, in rare instances, be sentenced to serve, and while therein they should be made to serve not only as soldiers but under such conditions as would involve punishment. By this means the Government would save for itself the service of the soldier and furnish him an opportunity for self-redemption. Doubtless there are rare instances where men must be taken out of the Army entirely and subjected to long-term imprisonment, but I think they must be rare. As I see it, the department has the responsibility of deciding how it can utilize the services of these soldiers and at the same time keep them within a penal condition.

3. Under the existing law the matter of dishonorable discharge is within the hands of the court and the reviewing authority. The reviewing authority may suspend the sentence of dishonorable discharge until the solider is released from confinement. If it were laid down as the policy of the War Department that the department intended to avail itself of the service of men sentenced to dishonorable discharge, except perhaps in rare instances, that policy could be so imposed upon the several reviewing authorities as to have them suspend all such sentences until the pleasure of the department should be known.

4. I think the policy of the department should be determined now. At the present time men are being dishonorably discharged for offenses which are really trivial. I think you should take immediate action. For the time being further dishonorable discharges could be stayed by a communication to the service generally to the effect that it is the desire of the Secretary of War that the authorities contemplated in the fifty-second article of war to suspend the execution of all sentences of dishonorable discharge until the further pleasure of the Secretary be made known. In the meantime, this office, if advised of your views upon the policy, could formulate the plans accordingly.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 67.

NOVEMBER 14, 1917.

Memorandum for the Chief of Staff.

Subject: Proper punishment during war.

1. In a memorandum from this office addressed to the Chief of Staff under date of October 18, 1917, on the above subject, attention was invited to the fact that men were being dishonorably discharged from the service at the rate of more than 100 a week. It was there indicated, as the views of this office, that in time of war the punishment of dishonorably discharge should be very sparingly resorted to, and the suggestion was made that any method of maintaining discipline which results in depriving the service of its man power in time of war is fundamentally defective. It was further suggested that a disciplinary battalion should be established under the control of each division commander to which military offenders should, except in rare instances, be sentenced to serve and while therein be made to serve not only as soldiers, but under such conditions as would involve punishment. The idea underlying the suggestion was that any sentence of dishonorable discharge, except in the few cases where the offenders are totally unfit for military service or their retention therein would be harmful, would be suspended or remitted by the reviewing authority for the purpose of holding the men in these discliplinary units and for military service, rather than sending them to the disciplinary barracks or to a branch thereof where they are removed entirely from military service.

2. Unfortunately, the idea sought to be conveyed by this memorandum has been confused with the plan heretofore suggested, by Maj. King, of the Medical Corps, of establishing disciplinary battalions at the various cantonments which would be, in effect, branches of the United States disciplinary barracks, the necessary construction for which has been variously estimated at from $300,000 to $1,000,000. In order to obtain the views of the commanding generals of departments and tactical divisions with reference to the advisability of establishing such disciplinary battalions in the various divisions, The Adjutant General called upon each of them for an opinion. The majority of them expressed themselves as being opposed to the establishment of disciplinary battalions at the present time. The memorandum of this office above referred to, together with all other papers bearing upon this subject, was referred to the War College for study, and a conclusion was reached which has served as a basis for a

memorandum from the Acting Chief of Staff to The Adjutant General, in which it is stated that:

"The Secretary of War directs that the papers herewith regarding the above matter (disciplinary battalions for divisional cantonments and camps) be filed without further action."

The said memorandum then recites that the Secretary of War has directed that "confidential instructions be given for the information and guidance of all department, division, and organization commanders, general courts-martial, and judge advocates," calling attention, first, to the fact that a considerable number of general courts-martial are adhering to peace-time standards of punishment and imposing sentence of dishonorable discharge with comparatively short periods of confinement for offenses committed in time of war. Second, that to continue to impose such sentences is objectionable because of the resulting tendency to encourage some men, especially among those drafted into the military service, to commit offenses in order to escape such service. Third, that organization commanders, general courts-martial, judge advocates, and reviewing authorities should give close scrutiny to all cases coming before them with a view of determining whether or not the offense was committed with the object of avoiding war service, the suggestion being made that where this fact appears, the leaning of the courts and reviewing authorities should be toward giving sentences of such severity that any tendency toward this practice will be obviated.

3. This memorandum of confidential instruction does not meet the requirements of the case. Wholly regardless of the advisability of authorizing at this time such construction as may be necessary to take care of prisoners held at division camps, and wholly regardless of whether disciplinary battalions, as that term is generally understood, should be organized at this time, the necessity of discontinuing the practice of dishonorably discharging men for light offenses is clearly manifest and calls for quick action. In a great majority of the cases now arising a dishonorable discharge is not only unnecessary but futile and inappropriate. Men sentenced to be dishonorably discharged, who have within them the elements of service, should still be made to serve, and to accomplish this end the dishonorable discharge should be remitted or suspended in their cases and they should be held for training and service with their divisions. Such sentences as it is necessary to impose upon them can ordinarily be worked out in the commands, and the cases will be few in which it is necessary to remove them from their commands and confine them in a penitentiary or the disciplinary barracks. In this view of the case it matters but little whether disciplinary battalions are organized in the various divisions at this time or not; it matters still less whether or not a uniform plan is adopted in the various divisions to take care of the military offenders therein; but it is urgently necessary that division commanders should be immediately informed—

(*a*) That the department looks to them for the maintenance of discipline in their organizations;

(*b*) That it looks to them to discourage the awarding of dishonorable discharge as a punishment, except where the same is accompanied by long periods of confinement, and then only in cases where it is entirely obvious that the man so sentenced has not within him the elements of service, or that his retention in the military service is wholly inadvisable because of criminal or degenerate tendencies;

(*c*) That it advises the suspension of any sentence of dishonorable discharge awarded by courts-martial appointed by them, except under the circumstances indicated in (*b*) above; and

(*d*) That it looks to them to exercise any and all proper means within their power to bring about a condition in their commands under which those who can be properly punished only by confinement in the penitentiary or in the disciplinary barracks be given sentences commensurate with the gravity of the offenses committed by them.

In line with the views herein expressed, it is recommended that the confidential instructions to be given to department, division, and organization commanders and to general courts-martial and judge advocates, as indicated in the memorandum for The Adjutant General from the Acting Chief of Staff, a copy of which is attached thereto, be amended to read as follows:

"The attention of the War Department is forcibly called to the fact that courts-martial throughout the service are adhering, in time of war, to peace-time standards of punishment and are imposing sentences of dishonorable dis-

charge, together with comparatively short periods of confinement, for comparatively trivial offenses. The Judge Advocate General reports that men are now being dishonorably discharged from the service at the rate of more than 100 a week, and an inspection of the record in these cases indicates that a large percentage of these men can without doubt be sufficiently disciplined and punished within their organizations while they are being trained for military service. In these cases dishonorable discharge is not only futile and inappropriate but imposes a loss of man power which should be obviated. It has also come to the attention of the War Department that in some cases, especially among those drafted into the military service, there appears to be a tendency to commit offenses in order to receive a punishment which enables the offender to escape military service, but which in itself is not of sufficient severity to discourage or prevent a commission of the offense.

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain.

"(*a*) No sentence of dishonorable discharge will be given where the offender has wihin him the capacity for military service and where any other appropriate form of punishment is sufficient to meet the requirements of the case;

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied by a long term of confinement in the penitentiary or in the Disciplinary Barracks. Where the offense is not sufficiently grave to warrant a long term of confinement it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied by a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 68.

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, December 22, 1917.

Confidential.

From: The Adjutant General of the Army.
To: Commandant Atlantic Branch United States Disciplinary Barracks, Fort Jay, N. Y.
Subject: Sentences of general courts-martial.

1. The attention of the War Department is forcibly called to the fact that courts-martial throughout the service are adhering in time of war to peace-time standards of punishment and are imposing sentences of dishonorable discharge, together with comparatively short periods of confinement, for comparatively trivial offenses. The Judge Advocate General reports that men are now being dishonorably discharged from the service at the rate of more than 100 a week, and that an inspection of the records in these cases indicates that a large percentage of these men can without doubt be sufficiently disciplined and punished within their organizations while they are being trained for military service. In these cases dishonorable discharge is not only futile and inappropriate but imposes a loss of man power which should be obviated. It has also come to the attention of the War Department that in some cases, especially among those drafted into the military service, there appears to be a tendency to commit offenses in order to receive punishment which will enable the offender to escape military service, but which in itself is not of sufficient severity to discourage or prevent a commission of such offenses.

2. Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them, with a view of being able to pass intelligently,

upon them, and so to measure the punishment to the offense that the following conditions will obtain:

(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs.

3. These instructions will be communicated by you to commanding officers of regiments and separate battalions, to general courts-martial, and to judge advocates.

By order of the Secretary of War:

J. S. JONES,
Adjutant General.

EXHIBIT 69.

[Congressional Record, February 19, 1919.]

FEBRUARY 17, 1919.

Hon. JOHN L. BURNETT,
House of Representatives.

SIR: I regret to have observed in the Congressional Record of February 14 that upon that day, during the debate on the Army bill in the House you took occasion to make a bitter attack upon me, based upon your gratuitous assumption that I had made no effort to prevent or correct the prevalent injustices of courts-martial administration, and it was with even greater regret, if of greater regret I could be sensible, I observed that your attack upon me evoked the applause of your colleagues.

Despite the intemperance of your remarks and notwithstanding that you based them upon the purest assumption which the slightest investigation would have shown, even if my present attitude had not satisfactorily indicated, to be the very opposite of the truth, I shall assume, for the present at least, that you do not intend to do me a grievous wrong; that you do not wish to take advantage of your official position to my great injury; and I shall assume, in fairness to you, that the highly objectionable character of your remarks is due to the fact that you spoke out of an outraged sense of justice, and that you want to be fair, and can be fair, and will be fair even now.

If I am justified in indulging this presumption you will permit me to show you, and you will be glad to be shown and to be able to acknowledge, that your attack upon me was as baseless as it was bitter.

Your initial statement was as follows:

"Gen. Ansell, when he made the statement credited to him in the Washington Post to-day, showed that he himself was a party to the crime. Any man who would sit by as an assistant judge advocate general and see men convicted under the circumstances that Gen. Ansell detailed must either be a coward or an incompetent weakling. [Applause.]

"Now, there is no use talking about it. I think he stated facts about it, and there have been committed the enormities and atrocities by men on courts-martial which have been winked at by Crowder, and perhaps by the Secretary of War himself. These outrages are only equaled by the atrocities that the Huns themselves committed. It is infamous. The statement of Ansell shows the wickedness in the War Department among these petty officers, some of whom no doubt were men from civil life who never made $50 or $100 a month and who tried men and sent them to Leavenworth Penitentiary for years, and yet the men higher up of this department are the ones who are responsible and ought either to be impeached or court-martialed themselves."

And when reminded by another Member that you were doing me an injusice, you continued to say:

"Why did he not appeal to Gen. Crowder; why did he not appeal to the President to vindicate him; why did he go on here until he was called before a committee of the Senate to do it? Now, if he had been a brave man and an honest man he never would have held the place that he held with these atrocities and wickedness being perpetrated by men in high life. You can not get around it, gentlemen. He is a party to the crime; there is no doubt about it. * * * Those things are done, gentlemen. But who has done it? Gen. Ansell is responsible; Crowder and the whole bunch of them; Crowder, no doubt, more than any of them. Do not try to throw it on one man, but hold the whole lot of them responsible. Let the responsibility fall where it ought to fall, gentlemen, and not upon any one man."

I shall speak by the record and tell you, in part at least, of the efforts made by me since the beginning of this war to correct a situation which I believe, and which you with bitterness have proclaimed, to have produced injustice. It is not my purpose to assert that my views were right; it is my sole purpose to show you that I did not "sit back" inactive, without attempting to prevent and remedy a course of administration which is now generally conceded to have resulted in injustice to the enlisted men of the Army.

In the first place, I think I may appropriately say in this connection that throughout my service I have not been able to accept the view that our military code sufficiently establishes the rights of an enlisted man before a court-martial, or that our procedure is sufficiently protective of those rights, or that there is no reason or necessity for authoritative supervision of the precedure of courts-martial, and of revision of their judgments. Such a view I have ever rejected, as all those will attest who have been most closely associated with me in the performance of my legal duties in the Army.

In and out of season, whenever opportunity has offered, and at times with an insistence which has strained, if not transgressed, the military proprieties, I have labored to the end that courts-martial might come to be legally established and universally regarded and respected as courts administering law according to fixed and established principles of jurisprudence; that is, as courts of justice. Such was my attitude as early as 1901. Throughout my instructorship at West Point, from 1902 to 1909, I labored to that end; and the whole course of my conduct as a judge advocate has been marked by a desire to liberalize the harsh features of our military methods and subject them, to the greatest practical extent, to those guaranties that guard an accused on trial in a civil forum. When, by virtue of seniority, I came to the head of this office in September, 1917, while Marshal General, I knew that with this new and large citizen Army we should have need of the closest legal supervision of courts-martial proceedure and judgments, and I envisioned the great difficulties that must result from a continuation of our old-established methods.

At the outbreak of the war the state of the law was, as the department had for years construed it, that the judgment of a court-martial one approved by the officer in the field appointing it was final and unmodifiable; that no matter how gross and prejudicial and palpable the errors of law in the proceedings as shown upon the face of the record, there was no power in the department or elsewhere to modify, reverse, or set the judgment aside. This was the crux of the difficulty. There was no authority whatever with power to correct for prejudicial errors of law. If this were true, then, indeed, as was said by those in the department who have opposed me during this agitation, is "a military camp the fittest field of application of the military code." The camp commander's will and view become the touchstone of legality; there can be no such thing as established legal control over courts-martial and courts-martial proceedings; no means of correcting their judgments, however unlawful and however unjust. When I became the senior present for duty in the office in the early days of the war I saw, or at least I thought I saw, the necessity of breaking up such a static and intolerable legal situation, and proceeded to act accordingly. During this war I have made the following efforts, among other innumerable ones in individual cases, to that end:

(*a*) On October 18, 1917, I had the office begin a study to determine whether the power of revision of courts-martial justments and the incidental power of a close and corrective supervision over their procedure could not be found in existing law.

(*b*) On November 10 I completed and submitted to the Secretary of War for his personal consideration a formal office opinion, which held, with all my associates concurring, that such a power had been conferred upon the Judge

Advocate General of the Army by virtue of 1199, Revised Statutes of the United States.

(*c*) I immediately proceeded to revise courts-martial judgments, and on the very first day, under the opinion, I set aside several sentences on the ground of their illegality.

(*d*) I immediately took steps to establish in the office a court of revision, and to consider the drafting or regulations to govern it.

(*e*) The Judge Advocate General, who was then Provost Marshal General, and who, up to this time, had been without active connection with this office, thereupon returned to this office, wrote and filed with the Secretary of War a brief in opposition, and held that there was no such power of revision, and urged the reversal of my opinion and my action.

(*f*) The Secretary of War, for the time being at least, agreed with the Judge Advocate General, as did also the Acting Chief of Staff and the Inspector General of the Army, who apparently had been called into conference.

(*g*) Thereupon I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting the administration of military justice.

(*gg*) About this time, also, an order which had previously been issued, with the concurrence of the Judge Advocate General and the Chief of Staff, under 1132, Revised Statutes, empowering me to take full charge of the office and its policies, was revoked.

(*h*) On December 11, 1917, I asked the Secretary of War for a suspension of his decision and that I be permitted to file an extended brief in support of my views and the office opinion. This permission was granted. The brief was filed with the Secretary. As indicating its character, the following were its several points:

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.

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.

(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.

(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.

III. The whole argument of 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.

IV. "Revise" in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

V. The word "revise," as a matter of fact, is in no sense ambiguous, and there is no room for misconstruing 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.

VI. The judge advocate general of England certainly did have this power of revision. I am not advised of his present authority.

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?

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.

(*hh*) The Judge Advocate General filed a brief in opposition to my second brief, which was to the point that the power did not exist, and to the effect that the military code should better be left to be administered by the camp commander.

(*i*) The Secretary of War again held with the Judge Advocate General that the power was not to be deduced by the existing law, and directed him, not me, to make a "study" of the situation regarding revisory powers.

(*j*) About this time 13 negro soldiers were hanged in Texas almost immediately upon the completion of their trial and without review of their cases. Indeed, the proceedings under their cases did not reach the department until probably some three months after they had been executed. I took this occasion to file a memorandum with the Judge Advocate General to show what was happening and what was always likely to happen if he and the Secretary of War adhered to their views.

(*k*) The Judge Advocate General recommended and the department finally adopted an administrative method known as General Order No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative which was described by the Judge Advocate General as necessary to head off a "threatened congressional investigation" to "silence criticism," to "prevent talk about the establishment of courts of appeal," and to make it "apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters."

(*l*) I volunteered to criticize this compromise with the law and justice and again asked that revisory power be established in this office. I recommended that if the administrative method was nevertheless to be adhered to, it should be greatly extended.

(*ll*) It was upon my voluntary recommendation that a branch of this office was established in France, to make such review as departmental administration permitted.

(*m*) Several times—three times, I think—during January, February, March, and April, 1917, I called attention to the necessity of closer supervision of courts-martial judgments and proceedings.

(*n*) Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our Allies, I filed with the Judge Advocate General a report which among other things treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War.

(*o*) In August, 1918, I reorganized the office so as to be enabled to present a more thorough presentation of the deficiencies of the courts-martial records coming to the office, and by strength and thoroughness of argument, to impel the minds of the military authorities to action in individual cases. For this purpose I created the boards of review, which still exist and perform most valuable service, but without any authority to make a modification of a judgment in any case.

(*p*) In September I ordered the boards of review to break away from the office interpretation (which, however, was probably correct) of the administrative method heretofore referred to (subpar. *k*), which had been construed to forbid this office to make any recommendation or suggestion as to clemency. And I ordered that, in a proper case, despite the order, clemency should be suggested to commanding generals.

(*q*) In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice in our own forces in France, which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subject to question.

(*r*) In October the executive officer and I advocated (and the head of the office approved) the increase of the personnel of the department, so that at least the trial judge advocate should be a lawyer and could use his power as such to exert some legal control over the court.

Upon every occasion and every opportunity I have stood for an absolute legal supervision of courts-martial procedure and judgments, and even when not charged with any duty touching the administration of military justice, I have never hesitated to express my view upon any matter concerning it that might come to my attention. In certain several cases involving sentences of death, I voluntarily went to the chief of this office and opposed his recommendation for execution.

These are a part of my efforts. I hope they may serve to convince all fair-minded men that I am not a coward or weakling.

You seem to think that under these circumstances I should have gone directly to the President. Upon a little reflection you will appreciate, I am sure, the impossibility of such a course. I think, however, that, resting under the charge which you have made against me, I am justified in saying this, that on one occasion I well remember—and doubtless there are others—when four sentences of death were pending in the department for confirmation, and when this office had recommended execution, 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.

Very respectfully, yours,

S. T. ANSELL.

WASHINGTON, *February 17, 1919.*

EXHIBIT 70.

OCTOBER 25, 1918.

Memorandum for the Chief of the Division of Military Justice.
Subject: Scope of duties of the board of review of your division.

1. I understand that this office has heretofore held, or that at least you have heretofore been instructed, that the power of this office is strictly limited in its reviews of courts-martial cases sent up under General Orders, No. 7, War Department, 1918, to the question of legality of the proceedings. With this view I am not in accord.

2. I am very familiar with the origin and purpose of that order. It was never intended to operate as a limitation upon the duties of this office. On the other hand, the order itself, while in my judgment altogether too limited in its terms, was born out of an effort then being made by this office to the end that the War Department, through its proper functionaries, exercise the requisite and necessary revisory power and control over all courts-martial proceedings.

3. The language of the order, standing alone, may, indeed, limit the powers of this office to a review for the sole purpose of determining the legality of proceedings. But for the reason just adverted to the terms of the order are not all inclusive. There are still powers, organic, statutory, and administrative, which it could not have been the purpose, nor can it be the effect, of that order to mod-

ify. The President is the source of all clemency, and that power, of course, finds no limitations in the order. Furthermore, as Commander in Chief of the Army, speaking directly or through his constitutional organ, the Secretary of War, his suggestions to convening authorities are entitled to, and will, of course, receive, the most thorough consideration. It would be the extreme case in which the views and suggestions of the Commander in Chief of the Army, concerning military punishments, could justifiably be disregarded. Also this office is the office which the President and the department must rely upon for their advice and guidance in matters affecting court-martial procedure and punishment. Moreover, and aside from the realm of administration, this office has the statutory duty of revising all court-martial proceedings, a duty which it can not disregard. In view of all this constitutional, administrative, and statutory power, this office must be assumed to have the duty, by reason of its powers and its organic relation to the authorities just mentioned, to speak beyond the strict question of legality authorized by said order.

4. The administration of this office has revealed the necessity of giving this consideration concrete application. Frequently proceedings are legal in toto and admit of no question of their legality or regularity whatever, and yet the punishment awarded is such as would justify any reviewing authority or supervisory power of any kind at least to invite attention to the punishment and to suggest a modification of it or a means of modifying it. The board of review in your division, through whose hands pass all court-martial records of the trials of the most serious offenses, and to whose attention and consideration come the most serious sentences awarded by courts-martial, are, by virtue of these facts and their position as a board of review, best able, within broad limits, to weigh the relation of punishment to discipline, and frequently of specific punishment to specific offense. Besides, while uniformity of punishment may not be a fundamental consideration, it is, in the administration of military justice, a most important one by reason of the great variation in punishments awarded by courts-martial. Such variations are more or less inherent in the system—a system which is administered by officers more or less unfamiliar with the military profession itself and always unskilled in the law and in which thousands of tribunals are exercising judicial functions unguided by their own or other precedents. In my judgment, there could be no present accomplishment that would operate to the greater good of the Army or meet with greater approbation of those of our people who are interested in the administration of military justice than the establishment in this office of an administrative procedure that would result in rendering the punishments in the Military Establishment more nearly uniform, more scientific and intelligent, and better related to justice to the individual upon the one hand and military discipline in general upon the other.

5. In view of these reasons, you and the board of review are instructed to make such recommendations in all cases passing under your supervision by virtue of General Order No. 7 as will tend toward the achievement of this result, and will no longer in such cases consider yourselves limited to the sole question of legality of procedure.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 71.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
March 11, 1919.

CASES RETURNED TO REVIEWING AUTHORITIES.

To Gen. CHAMBERLAIN:

In addition to the cases cited here, there is one other, the Peters case, in which, in France, the reviewing authority did not follow the recommendation of the branch office of the Judge Advocate General's Office. A memorandum of that case will be prepared and sent to you promptly.

Very respectfully,

W. C. RIGBY, *Major, Judge Advocate.*

APPENDIX TO MAJ. RIGBY'S REPORT.

Memorandum with regard to courts-martial cases in which the Secretary of War or the reviewing authority has failed to follow the recommendations of the office of the Judge Advocate General.

An examination has been made of records of courts-martial cases, tried since the Government of the United States entered the war, with a view to obtaining figures as to the number of cases in which recommendations of the office of the Judge Advocate General with regard to the setting aside or the modification of sentences of courts-martial have not been followed by the Secretary of War or by reviewing authorities. It is not possible to procure from available records absolutely accurate statistics, but those obtained are evidently such that they furnish information on which definite conclusions can be based. Brief abstracts of the facts in cases in which the recommendations of the office of the Judge Advocate General have not been followed are set forth below.

Recommendations have been made to the Secretary of War in approximately 279 cases. Examination of these cases discloses that in 13 of them the recommendations of this office were not followed.

In three of these cases the Secretary of War differed with the views of this office with regard to points of law involved therein (Lieut. Millard M. Green, Pvt. Dan Nona, and Pvt. Edwin E. Schonofsky).

In four cases there was merely a difference of opinion as to the propriety of a commutation of sentences (Second Lieut. John C. Ward, Maj. Henry R. Freeman, jr., Second Lieut. Louis B. Hanks, and First Lieut. John B. Sisson). This office recommended a partial commutation of the sentence in each of these cases. The Secretary of War did not concur in such recommendation. In two of these cases the President directed final action in accordance with the recommendations of this office (Maj. Henry R. Freeman, jr., and John C. Ward).

In one case this office had recommended that a sentence of dismissal be confirmed (Second Lieut. Arthur Brigham). The Secretary of War disagreeing with the view of this office recommended that the sentence be remitted, and the President took action in accordance with the Secretary's recommendation.

Five cases, all tried in France, merely involved a question, identical in each case, as to the place of confinement (Pvts. Thurston C. Reynolds, Frank Malarich, Robert M. Hughett, Charles M. Gard, and Nelson Glock). The office of the Judge Advocate General recommended confinement in the United States Disciplinary Barracks instead of at military posts in France. The Secretary of War did not concur in the recommendations made in each of these cases.

Recommendations have been made to reviewing authorities in approximately 212 cases under General Orders, No. 7, War Department, 1918; and the reviewing authorities have failed to follow the recommendations in six of them. Three of these cases arose in France and three in the United States.

The records of the three cases tried in the United States show that in one of them the reviewing authority followed the recommendations of this office in part (Pvt. Charles A. McBect); in one the reviewing authority complied with the recommendations of this office in such a way that punishment was imposed on the accused in accordance therewith, and only the record of the accused was affected by the failure of the reviewing authority strictly to follow the recommendations (Pvt. Edward C. O'Neill); in one case the recommendations of this office were disregarded in their entirety (Harvey W. Janke).

The records of the three cases tried in France show that in one case the reviewing authority complied in part with the recommendations of the office of the Judge Advocate General (Pvt. James Adio); in two cases the recommendations of the office of the Judge Advocate General were disregarded in their entirety (Pvt. Delbert L. Moss and Capt. Samuel D. Mann).

In a case tried at Camp Funston, Kans., the office of the Judge Advocate General and the Secretary of War recommended that the sentence be confirmed, and the President, differing with both, disapproved the finding and sentence (First Lieut. Charles H. Mielke).

Second Lieut. Arthur Brigham, Sixth Field Artillery. Trial by general court-martial at Douglas, Ariz., July 22, 1917. Dismissal from the service.

The accused was tried under the ninety-sixth article of war under specifications relating to the taking of a false oath in making application for appointment as provisional second lieutenant, in which application he stated falsely

that he was a single man. He was found guilty and sentenced to be dismissed from the service.

The reviewing authority approved the sentence and suspended execution thereof pending action by the President, and he recommended that the sentence of dismissal be remitted in view of the frank admission of the accused apparently made for the purpose of rectifying an error made by him, and of the exemplary reputation formerly borne by the accused in the military service.

This office being of the opinion that the false oath made by the accused showed him to be untrustworthy, recommended that the sentence of the court be confirmed.

The Secretary of War disagreeing with the view of this office, recommended to the President that sentence should be remitted, and the President took action in accordance with the Secretary's recommendation.

Second Lieut. John C. Ward. Trial by general court-martial convened at Fort McDowell, Calif., August 29, 1917. Dismissal from the service.

Lieut. John C. Ward was tried by a court composed of five captains of the Regular Army. He was arraigned under the ninety-sixth article of war on the charge of drunkenness. He was found guilty and sentenced to be dismissed from the service.

The reviewing authority, the commanding officer at Fort McDowell, approved the proceedings without comment and forwarded them by indorsement for action of the President in compliance with the forty-eighth and fifty-first articles of war.

This office recommended, in view of the man's excellent service as an enlisted man since April 26, 1906, up to the time he was commissioned, shortly before his trial, that the sentence be commuted to forfeiture of $50 per month for six months and restriction to the limits of the post to which he might be stationed for a like period.

The Secretary of War was unwilling to recommend commutation, but called the attention of the President to the recommendations of this office, which the President followed.

Lieut. Millard M. Green, Engineer Reserve Corps. Trial by general court-martial convened at Camp Dix, N. J., March 19, 1918. Dismissal.

The accused was charged with violation of the ninety-fifth and ninety-sixth articles of war. Under each specification the allegations of fact were that he had married in the month of December, 1906, one Lilian Melton Greer and that afterwards, while so married to her, he unlawfully married one Edith Elder. He was found guilty and sentenced to be dismissed from the service and to be confined at hard labor for five years.

The reviewing authority approved the sentence and forwarded the record for action under the forty-eighth article of war.

This office recommended that, there being no legally sufficient evidence to prove the offense of bigamy, the findings and sentence be disapproved, but that appropriate steps be taken looking to the discharge of the officer under the provisions of section 9 of the act of May 18, 1917.

The Secretary of War did not concur in the recommendations of this office, but recommended to the President that, the offense of bigamy not having been proved, the findings and sentence under the ninety-sixth article of war be disapproved and that the accused, having been guilty of conduct unbecoming an officer and a gentleman, the findings under the ninety-fifth article of war be approved and the officer dismissed.

Maj. Henry R. Freeman, jr., Three hundred and thirty-seventh Field Artillery. Trial by general court-martial convened at Camp Dodge, Iowa, April 3, 1918.

The accused was tried on a charge of violating the ninety-fifth article of war on a specification that he was drunk. He was found guilty and sentenced to be dismissed from the service

The reviewing authority approved the findings and sentence and forwarded the record for the action of the President under the forty-eighth article of war.

This office recommended that the findings of the court be approved, but that, in view of the previous good record of the officer, the sentence be commuted to confinement for six month, forfeiture of $100 a month, and a reprimand by the commanding general of his division. The Secretary of War did not concur in the recommendation of this office, but called the President's attention thereto,

who later directed a disposition of the case in accordance with the recommendations of this office.

Pvt. Dan Nona, One hundred and thirty-fifth Machine Gun Battalion, United States National Guard. Trial by general court-martial convened at Vrecourt, France, July 17, 1918. Hard labor, without confinement, for three years, with forfeitures.

The accused was tried for violation of the ninety-third article of war under the specifications that he "did willfully, feloniously, and unlawfully commit involuntary manslaughter."

This office pointed out that the finding of the court was void for repugnancy, since if the act was willful and felonious it was not involuntary manslaughter, and it recommended that so much of the sentence in the case as remained unexecuted be remitted.

The Secretary of War disapproved this recommendation.

Pvt. Thurston G. Reynolds, Company M, Sixtieth Infantry. Trial by general court-martial in France, April 14, 1918. Dismissed from the service, forfeitures, and confinement at hard labor for three years.

The accused was tried on a charge of violating the eighty-sixth article of war on a single specification alleging that he was found sleeping on his post while on guard as a sentinel in time of war. He pleaded guilty and was found guilty on the charge and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years.

The reviewing authority approved the sentence, suspended the dishonorable discharge, and designated the station of his company as the place of confinement of the accused.

The Office of the Judge Advocate General called attention to the policy of the War Department respecting the place of confinement to be designated on conviction by general court-martial as set out in paragraphs 396, 397, and 398, M. C. M., 1917, and pointed out that paragraph 377, specifically provides for the designation of the United States disciplinary barracks at Fort Leavenworth, Kans., or one of its branches, as the place of confinement for general prisoners who are to be confined for six months or more and who are not to be confined in a penitentiary.

The view was expressed that the interests of discipline in the Army could not best be served by retaining at military posts or camps prisoners undergoing extended periods of confinement, and it was therefore recommended that the place of confinement of the prisoner be changed to the United States disciplinary barracks.

The opinion was expressed by The Adjutant General that, in view of the fact the commanding general of the American Expeditionary Forces had been specifically authorized to retain general prisoners in France, and in view of provisions in the Army appropriation act approved July 9, 1918, relating to the remission of sentences, it was not advisable to concur in the recommendation of the Judge Advocate General's Office.

Cases of Pvt. Frank Malarich, Pvt. Robert M. Hughett, Pvt. Charles M. Gard, and Pvt. Nelson Glock, tried in France.

In the cases of Pvt. Frank Malarich, Pvt. Robert M. Hughett, Pvt. Charles M. Gard, and Pvt. Nelson Glock, all tried in France, sentences were imposed similar to that imposed in the case of Pvt. Thurston G. Reynolds, the facts in which are set forth above. The Office of the Judge Advocate General made recommendations in these cases the same as that made in the case of Pvt. Reynolds. The Office of The Adjutant General of the Army by direction of the Secretary of War did not concur in these recommendations for the same reasons as were indicated by him in the case of Pvt. Reynolds.

Second Lieut. Louis B. Hanks, Quartermaster Corps, National Army. Trial by general court-martial convened at Boston, Mass., July 22, 1918. Dismissal from the service.

The accused was tried for violation of the ninety-sixth article of war, under specifications of having appeared in civilian clothing, in violation of General Orders, No. 63, and of having been drunk in a public place. He was found guilty of both specifications and sentenced to be dismissed from the service.

The reviewing authority approved this sentence and forwarded the record for trial under the provisions of General Orders, No. 7, War Department, 1918.

This office recommended that the sentence be commuted to a reprimand, to be administered by the commanding general Northeastern Department, restrictions to the limits of the accused's post, camp, or station for three months, and forfeiture of $25 of his pay per month for a like period, unless he should be discharged from the service prior to the expiration of said period, in which event so much of said sentence as provides for such restriction and forfeiture as remains unexecuted should stand remitted.

The Secretary of War did not concur in the recommendation of this office.

First Lieut. John B. Sisson, Field Artillery, United States Army. Trial by general court-martial, Camp Jackson, S. C., October 1, 1918. Dismissal from the service.

The accused was tried on charges under the ninety-fifth article of war, under specifications of drunkenness and having liquor in his possession. He was convicted and sentenced to be dismissed from the service.

The reviewing authority approved the sentence and forwarded the record for action under the forty-eighth article of war.

This office recommended that clemency be extended to the accused and that accordingly the sentence be commuted to a reprimand, to be administered by the commanding general at Camp Jackson, restriction to the limits of the post or camp for six months, and forfeiture of $50 of his pay per month for a like period, unless he should be discharged from the service prior to the expiration of the said period, in which event so much of said sentence as provided for restriction and forfeiture as remained unexecuted should stand remitted.

The recommendations of this office were not approved by the Secretary of War.

Pvt. First Class Edwin E. Schonofsky, Battery F, Eighty-first Field Artillery, and Pvt. First Class Alfons Dalloen, Battery F, Eighty-first Field Artillery. Trial by general court-martial at Camp Fremont, Calif., June 3, 1918.

These soldiers were arraigned and jointly tried under charges of having violated the fifty-eighth and ninety-sixth articles of war, by committing the crimes of desertion and larceny. Schonofsky was sentenced to be shot and Dalloen was sentenced to be dishonorably discharged from service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 50 years.

The reviewing authority approved the sentences, but stayed their execution until the record of the trial should be reviewed in the office of the Judge Advocate General and its legality determined. The reviewing authority did not forward the record for action of the President under the forty-eighth article of war so far as the accused Schonofsky was concerned, as should have been done. The Judge Advocate General decided that the proper disposition to make of the case, so far as Schonofsky was concerned, was to recommend that the President disapprove the findings of guilty of the specifications and charges against him and the sentence imposed upon him. The Judge Advocate General, upon a review of the case, found that it was a fatal irregularity to try these men jointly upon charges not alleging that they had acted in concert and in pursuance of a common design and that accordingly the trial was contrary to law and in violation of the substantial rights of the accused.

The Secretary of War did not concur in the Judge Advocate General's recommendation. While conceding that the men had some "purely technical right to separate trials," the Secretary took the position that the procedure followed in these cases violated no substantial rights of the men.

The President, in accordance with the recommendation of the Secretary of War, commuted the sentence imposed on Schonofsky to dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years, and designated the United States military prison, at Fort Leavenworth, as the place of confinement.

CASES IN WHICH THE REVIEWING AUTHORITY HAS FAILED TO FOLLOW THE RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

Pvt. Charles A. McBeet, Company H, Fifteenth Infantry. Trial by general court-martial at Fort Lawton, Wash., September 17, 1918. Five years' confinement, penitentiary.

The accused was tried for an offense under the ninety-sixth article of war. He was sentenced to be discharged from the service, with total forfeitures, and to be confined at hard labor for five years.

The reviewing authority approved the sentence, and the record was forwarded to this office for review pursuant to General Order No. 7, War Department, 1918. In view of errors in the admission of evidence and in the failure of the court to advise the accused of his rights as a witness, this office recommended that the findings and sentence be disapproved, and that the accused be released from confinement and restored to duty.

The department commander failed to follow the recommendation in its entirety, and directed that the sentence be executed except that confinement be remitted.

Pvt. Harvey W. Janke, Medical Department, United States Army. Trial by general court-martial at Fort Sheridan, Ill., November 22, 1918. Fifteen years' confinement, penitentiary.

The accused was tried and convicted (1) of desertion under the fifty-eighth article of war, and (2) of forging and uttering certain forged checks under the ninety-six article of war. The record, which was forwarded pursuant to General Order No. 7, War Department, 1918, was reviewed in this office, which reached the conclusion that the finding of guilty of desertion was not supported by the evidence, and recommended that the reviewing authority disapprove the finding of guilty of this offense and reduce to 5 years the period of confinement of 15 years, as imposed by the court, and approved by the reviewing authority. It was the opinion of this office that a charge of desertion was not proven by competent evidence.

The record was returned to the commanding general, Central Department, the reviewing authority, who declined to follow the recommendation of this office and published a general court-martial order in the case, approving the sentence as originally imposed and ordering its execution.

The sentence having been published in orders is now beyond the control of the reviewing authority to correct, but, as in the opinion of this office, it rests in part upon an illegal basis and as measured by its legal warrant, it is excessive, it was recommended by this office to the Secretary of War that the findings of guilty on the charge of desertion be set aside and that the period of confinement be reduced to five years.

Pvt. Edward C. O'Neill, alias Edward C. Joyce, Coast Artillery Corps, Eighteenth Company, Boston, Mass. Trial by general court-martial at Fort Sheridan, Ill., December 4, 1918. Twenty-five years' confinement, penitentiary.

The accused was tried for violation of the fifty-eighth and ninetieth articles of war on specifications involving, among other charges, desertion and forgery.

In view of the errors committed during the trial which injuriously affected the substantial rights of the accused and which invalidated the findings on certain charges and specifications, this office recommended that the reviewing authority revoke its approval of the findings and sentence in this case, except as concerned certain charges, and that the term of confinement of 25 years imposed by the court be reduced to 3 years. The reviewing authority reduced the sentence as recommended by this office, but did not revoke its approval of the findings on certain specifications. Only the record of the accused was therefore affected by the failure of the reviewing authority strictly to follow the recommendations of this office.

Pvt. Emmett T. Whelan, Battery D, Sixty-third Artillery, Coast Artillery Corps. Trial by general court-martial at Fort Worden, Wash., June 28, 1918. Confinement at hard labor for one year and forfeiture of pay.

The accused was tried for violation of the ninety-third article of war on a specification that he fraudulently converted to his own use certain funds belonging to other soldiers, and for a violation of the ninety-sixth article of war on a specification that he violated standing post hospital orders by retaining property received from patients for safe-keeping. He was found guilty on the second charge and 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 approved the sentence and ordered the execution thereof at the station of the soldier's company. This office pointed out to The Adjutant General that it is the policy of the War Department that such long-term sentences to confinement should also include dishonorable discharge and forfeiture of pay and allowances, that where a period of confinement is for more than 6 months, and where a penitentiary is not designated as a place of confinement, a disciplinary barracks should be designated, and that it is not believed that the interests of discipline in the Army can best be served by re-

taining at military posts or camps persons undergoing an extended period of confinement. This office recommended that so much of the sentence in this case as was in excess of six months' confinement at hard labor and forfeiture of pay as imposed for a like period should be remitted. This recommendation was approved by the War Department. The order subsequently issued by the commanding general did not carry out the recommendation, since it only reduced the confinement portion of the sentence imposed in the case and did not remit the forfeiture of pay imposed for the period in excess of 6 months. The attention of The Adjutant General was called to the action of the commanding general.

Pvt. Delbert L. Moss, Thirty-second Aerial Service Squadron, Signal Corps. Trial by general court-martial April 17, 1918, in France. Dishonorable discharge, forfeitures, and confinement at hard labor for two years and six months.

The accused was tried for violation of the ninety-third article of war on specifications that he stole a quantity of cigarettes valued at $1 and a pair of puttees valued at $17.50, and for violation of the ninety-fourth article of war on a specification that he stole a pair of shoes from the Government and sold them, and for a violation of the sixty-first article of war on a specification with regard to absence without leave. The accused was found guilty, except on two specifications, and sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for two years and six months.

The office of the judge advocate general in France returned the record with the recommendations that the findings of guilt as to certain specifications be disapproved and that the reviewing authority consider whether or not the entire sentence adjudged by the court should be approved and carried into execution. The record was subsequently returned to the office of the Judge Advocate General with a general court-martial order showing approval of the sentence and directing execution thereof. A memorandum among the records of the case indicates that the reviewing authority considered the sentence correct and understood that the recommendations of the office of the Judge Advocate General should only be considered as such, and therefore directed the execution of the sentence.

Pvt. James Adio, Company M, One hundred and sixty-sixth Infantry. Trial by general court-martial in France April 15, 1918. Discharge from the service, forfeitures, and 15 years' imprisonment.

The accused was tried for violations of the ninety-sixth and ninety-third articles of war on specifications involving disobedience of the order of a sentinel and assault with intent to commit manslaughter. He was sentenced 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 for 15 years at such place as the reviewing authority might direct.

The office of the Judge Advocate General, American Expeditionary Forces, in a review of the proceedings, stated that the findings of guilty of the charge and specification "willful disobedience of the order of a sentinel" should have been disapproved; that while the record was legally sufficient to support the findings of guilty of the two offenses charged, the court might have acquitted him on these charges; and that the sentence of 15 years was perhaps too severe to be just.

The reviewing authority disregarded some of the recommendations of the office of the Judge Advocate General, American Expeditionary Forces, and although the sentence of 15 years imposed by the court was reduced by the reviewing authority to 5 years, the reviewing authority did not disapprove the findings of guilty of certain charges as recommended.

Capt. Samuel D. Mann, Fifty-third Infantry. Trial by general courts-martial in France October 7, 1918. Dismissal from the service.

The accused was tried for a violation of the ninety-sixth article of war on a specification that he failed properly to deliver certain money in his possession to a private soldier. He was sentenced to be dismissed from the service.

The sentence was approved by the reviewing authority. The office of the Judge Advocate General in France was of the opinion that there was a complete want of legal evidence to sustain the charge, and recommended that the sentence should be disapproved, and that the sentence be reconsidered in the light of such disapproval. No action was taken on this recommendation by the confirming authority, the commander in chief of the Expeditionary Forces.

CASE IN WHICH THE PRESIDENT FAILED TO APPROVE OF THE RECOMMENDATIONS OF THE SECRETARY OF WAR AND OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

First Lieut. Charles H. Mielke, Medical Reserve Corps. Trial at Camp Funston, Kans., November 16, 1918. Dismissal from the service.

The accused was tried for violation of the eighty-fifth article of war on the specification that he was drunk while on duty. He was convicted and sentenced to be dismissed from the service. The sentence was approved by the convening authority and the record was forwarded for action by the President under the forty-eighth article of war.

This office and the Secretary of War recommended that the sentence be confirmed. The President disapproved of the finding and sentence, and directed that the restoration to duty of the accused in view of the fact the evidence of record failed "to show the guilt of the accused beyond a reasonable doubt."

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
March 11, 1919.

Memorandum: For Gen. Chamberlain, Inspector General:

Herewith is a memorandum concerning the Noel F. Peters case, C. M. No. 118312. This is the remaining case, which I mentioned to you this morning, in which the reviewing authority did not follow the recommendation of the Paris branch office of this office.

This memorandum, with what I gave you this morning, completes the statement of cases of that character, so far as the records of the statistical division of this office show.

WILLIAM C. RIGBY,
Major, Judge Advocate.

Memorandum of a case in which the reviewing authority declined to follow the recommendation of the Paris branch office of the Judge Advocate General's Office.

C. M. No. 118312. United States *v.* Noel F. Peters, private, Four hundred and sixty-sixth Aero Squadron, S. C. (A. J. A. G. O., 201–116).

1. Pvt. Noel F. Peters was tried by general court-martial convened by command of Gen. Kernan, commanding general, headquarters Services of Supply, American Expeditionary Forces, France. The court met at Air Service Production Center No. 2, May 20, 1918. The accused was charged, under one charge, violation of the fifty-eighth article of war, and one specification, with desertion, February 24, 1918, from the Third Aviation Instruction Center, American Expeditionary Forces, and remaining absent in desertion until apprehended at Toulouse, France, on or about March 10, 1918. He pleaded not guilty to the specification and the charge, but was found guilty and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years. Gen. Kernan, as reviewing authority, on May 31, 1918, approved the sentence, "though lenient"; designated the United States Penitentiary, Leavenworth, Kans., as the place of confinement; suspended the execution of the sentence under General Order No. 7, War Department, 1918; and forwarded the record to the Paris branch office of the office of the Judge Advocate General.

2. Upon review in the Paris branch office of the Judge Advocate General's Office, the record was found not legally sufficient to support the conviction of desertion, but sufficient to support a conviction of absence without leave. It was accordingly recommended by Brig. Gen. E. A. Kregar, Acting Judge Advocate General, that the approval of the sentence and the designation of a penitentiary as the place of confinement be vacated, and that so much only of the findings of the court be approved as involved a finding of guilty of the lesser and included offense of absence without leave, in violation of the sixty-first article of war, and that appropriate action be taken with reference to the approval of the sentence, or a portion thereof, and the designation of a place of confinement under military control.

3. Upon the return of the record to Gen. Kernan, with this recommendation of the Acting Judge Advocate General, the case was referred by Gen. Kernan to his staff judge advocate, Col. J. A. Hull, judge advocate, who, in a memorandum dated July 1, 1918, disagreed with the opinion and recommendations of the

Acting Judge Advocate General, Gen. Kreger, and concluded his memorandum with:

"In this case it is submitted that if the errors are such that the trial is a nullity, disapproval of the entire proceedings is the correct action, and not merely a compromise verdict. Your orders are, therefore, requested."

4. Thereupon Gen. Kernan made the following indorsement upon Col. Hull's memorandum:

"For Col. Hull:

"I have read the entire proceedings and the several memorandums herewith analyzing the case, and I am satisfied that the original action was sound. Let it stand.

"F. J. KERNAN,
"*Major General, National Army.*

"TOURS, FRANCE, *July 4, 1918.*"

5. Thereupon, under date of July 4, 1918, General Court-Martial Order No. 112, headquarters Services of Supply, American Expeditionary Forces, was promulgated, carrying the original sentence into execution.

6. The following week, under date of July 11, 1918, Acting Judge Advocate General Kreger forwarded to the Judge Advocate General, with the record of trial, a memorandum calling attention to the case and concluding:

"My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority. That question is not discussed by the judge advocate of the trial jurisdiction in his counter-memorandum pertaining to this case, but was discussed by him in his memorandum relating to the case of Pvt. Delbert L. Moss (A. J. A. G. O., 201-92). The following extract from a letter addressed to you with reference to the Moss case is quoted as especially pertinent in connection with this case, viz:

"'It has been my belief that the purpose in view in the creation by General Order 7 of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order, and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be * * * that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision.'

"Your instructions in the premises are requested for the guidance of this office, and if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they, as well as this office, be advised to that effect.

"Being still of the opinion that the record in this case is legally insufficient to support the findings and sentence, and that the advice of this branch of the office of the Judge Advocate General with reference to the legality of a finding or sentence reviewed here should be given the same effect as if the advice had been given by the office of the Judge Advocate General of the Army, I recommend that the sentence be declared null and void and that Peters be restored to duty."

7. This case is understood to have been one of the immediate occasions of the discussions preceding the issuance of General Order No. 84, War Department, 1918 (par. IV).

WILLIAM C. RIGBY,
Major, Judge Advocate.

EXHIBIT 72.

MILITARY JUSTICE DURING THE WAR.

WASHINGTON, *March 25, 1919.*

To my fellow members of the bar in the United States:

Herewith is inclosed to you a copy of a letter sent this month to the Secretary of War by the Judge Advocate General, Maj. Gen. Enoch H. Crowder. It

was evoked by recent complaints about the system of military justice, uttered on the floor of Congress and in the press.

The principal congressional speeches on this topic appeared in the Congressional Record for January 3, January 23, February 19, February 27, and March 4; and these criticisms, together with others developed by a witness before the Senate Committee on Military Affairs during February, have been given by the daily press considerable publicity of a sensational nature, notably in the New York World of January 19 and later dates, and in the Philadelphia Public Ledger.

The testimony at the committee hearings will probably not be printed for some time to come; and it will form a large pamphlet, requiring patient study for extraction of the general features of fact. Meanwhile the lack of any publicity for the defense of those criticisms will have left the intelligent public under the impression that there is and can be no defense, although the contrary is the case. It has therefore seemed proper and necessary to give circulation to this letter.

In the Official Bulletin for March 5 and March 10 will be found two letters of Gen. Crowder, addressed in reply to a letter of request from the Secretary of War. The first letter, of date February 13, deals at great length with the specific criticisms voiced in the speech of Senator Chamberlain, published January 3. The second letter, of date March 8, surveys briefly the entire field of complaint. But the subject is too large for adequate reply in a brief letter. Moreover the intelligent public needs, as the foundation of its judgment, an educative description of the system of military judicial procedure as it actually is. This is furnished by the present letter.

I commend this letter to your careful perusal. It is to be hoped that the candid judgment of the legal profession, made after hearing both sides, will impress itself upon public opinion at large.

It would be presumptuous in me to suppose that the distinguished Judge Advocate General needs any assistance from me in securing credit for his utterances. But, so far as my name is known to the American bar, I am keenly desirous to do my part in securing a just verdict for our military system in the forum of public opinion. And that part can be contributed by urging upon my fellow members of the bar a careful study of this presentation by the Judge Advocate General.

In addressing you in this direct fashion, I am deliberately breaking through the etiquette of the military service, rigorously observed by me since my call to active duty in July, 1917. I am on the point of receiving my honorable discharge (I hope) within a few weeks, and I speak to you in this letter not merely as an officer of the Army but also as a member of the bar of 30 years' standing, who has happened to have intimate observation of the methods of military justice during the war as well as of the principal personages in charge of it in Washington. Some of the court-martial records recently discussed in the public press had been submitted to my scrutiny at the time they were originally pending for action. Many of the events of 1917 and 1918 publicly discussed in Congress were the subject of personal knowledge on my part. My official duties, however, have been almost entirely in the office of the Provost Marshal General, and I have not prepared (with a single exception) any official opinions on court-martial records. I am therefore not implicated in any criticisms upon the court-martial system. I have nothing to hope and nothing to fear from the authorities of the War Department. I have always, in our civil profession, acted sympathetically and spoken frankly in the cause of the reform of justice. My record shows that I do not belong either with the reactionaries or with the Bolshevists.

These circumstances are mentioned to indicate that I have adequate grounds for a correct and untrammeled opinion, as an observer and a member of the bar, upon the comparative administration of military and civil justice, and that opinion is that the inclosed letter of the Judge Advocate General is a correct and reliable description of the facts and the spirit of American military justice during the war. I see where military justice, in the light of the war's experience, can be improved; but I will not remain silent in the presence of an unmerited attack, full of exaggeration and defamation, wholly unjust both to the system itself and to those able and faithful men who have borne the burden of its administration.

The legal profession, by its firmest traditions and daily practice, is accustomed to recognize the necessity of hearing both sides before passing final judgment. I therefore make this personal appeal to my fellow members of

the bar to peruse the inclosed letter and to give due weight to its presentation. When the entire facts shall have been brought out and the motives behind the recent press publicity become plain, you will be well satisfied that you did not allow yourselves to be carried away by first impressions gained from sensational headlines, extreme cases, and emotional epithets.

JOHN H. WIGMORE,
Colonel, Judge Advocate, United States Army.

LETTER OF THE SECRETARY OF WAR.

MARCH 1, 1919.

MY DEAR GEN. CROWDER: I have been deeply concerned, as you know, over the harsh criticisms recently uttered upon our system of military justice. During the times of peace, prior to the war, I do not recall that our system of military law ever became the subject of public attack on the ground of its structural defects. Nor during the entire war period of 1917 and 1918, while the camps and cantonments were full of men and the strain of preparation was at its highest tension, do I remember noticing any complaints either in the public press or in Congress or in the general mail arriving at this office. The recent outburst of criticism and complaint, voiced in public by a few individuals whose position entitled them to credit, and carried throughout the country by the press, has been to me a matter of surprise and sorrow. I have had most deeply at heart the interests of the Army and the welfare of the individual soldier, and I have the firmest determination that justice shall be done under military law.

I have not been made to believe, by the perusal of these complaints, that justice is not done to-day under the military law or has not been done during the war period. And my own acquaintance with the course of military justice (gathered as it is from the large number of cases which in the regular routine come to me for final action) convinces me that the conditions implied by these recent complaints do not exist and had not existed. My own personal knowledge of yourself and many of the officers in your department and in the field corroborates that conviction and makes me absolutely confident that the public apprehensions which have been created are groundless. I wish to convey to you here the assurance of my entire faith that the system of military justice, both in its structure as organized by the statutes of Congress and the President's regulations and in its operation as administered during the war, is essentially sound.

But it is not enough for me to possess this faith and this conviction. It is highly important that the public mind should receive ample reassurance on the subject. And such reassurance has become necessary, because all that the public has thus far received is the highly colored press reports of certain extreme statements, and the congressional speeches placing on record certain supposed instances of harsh and illegal treatment. The War Department and its representatives have not been in a position to make any public defense or explanation and have refrained from doing so. The opportunity recently afforded the members of your staff to appear before the Senate Committee on Military Affairs has been an ample one, and it has furnished, I hope, entire satisfaction to the members of that committee. But of the proceedings of that committee I perceived no general public notice; the testimony, when published, will be somewhat voluminous, and its publication will not take place for some time yet, and it will certainly not reach the thousands of intelligent men and women who read the original accounts. And yet it is essential that the families of all those young men who had a place in our magnificent Army should be reassured. They must not be left to believe that their men were subjected to a system that did not fully deserve the terms "law" and "justice." And this need of reassurance on the part of the people at large is equally felt, I am sure, by the Members of Congress in both Houses, who have, of course, not yet become acquainted with the proceedings before the Senate committee. It is both right and necessary that the facts should be furnished. It is indeed a simple question of furnishing the facts; for when they are furnished, I am positive that they will contain the most ample assurance.

Those facts are virtually all in your possession, on record in your office. I am aware that they are voluminous and that a complete explanation and answer to every specific complaint is impracticable. But I believe that you are in a position to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject.

I have been asked by a Member of the House of Representatives to furnish him with such a statement. And I am now calling upon you to supply it to me at your early convenience.

Faithfully, yours,

NEWTON D. BAKER,
Secretary of War.

To Maj. Gen. E. H. CROWDER,
Judge Advocate General, War Department, Washington, D. C.

LETTER OF THE JUDGE ADVOCATE GENERAL.

MARCH 10, 1919.

DEAR MR. SECRETARY: On March 1, 1919, you addressed to me a letter concerning the recent criticisms uttered upon our system of military justice, and asking me to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in the subject. On March 8 I replied to you, giving you a brief and concise survey of the field of controversy; but the limitations of that letter made it impracticable for me to deal with the subject in all its scope, The subject is one in which it needs only to set forth the facts, based on the records of my office, in order to perceive the injustice of the charges that have been made. This exposition of facts must be directed to each one of the main charges that have been voiced on the floor of Congress and in the press.

In my first letter to you, dated February 13, forwarded by you to the chairman of the Senate Committee on Military Affairs, and subsequently printed in the Official Bulletin of March 5, the six general criticisms voiced by Senator Chamberlain were dealt with at great length by statistical tables compiled from the records in my office. But these tables are, perhaps, too voluminous for ordinary perusal; and, on the other hand, the letter did not deal with a number of other specific criticisms made by other Members of Congress in the press. I have, therefore, gone over the entire subject so as to include a number of additional points of criticism, and have dealt with the specific points of Senator Chamberlain by omitting the elaborate statistical studies contained in my first letter.

It is my belief that the intelligent public, particularly the members of the legal profession and of the press, would welcome such an exposition of the facts; because the case is one in which it is necessary only to peruse the facts in order to estimate at their true value the criticisms, made in haste and based upon such imperfect and misleading data.

Before proceeding to set forth these facts, I will take a few words to indicate my own attitude toward the standards of military justice.

In 1888, while still a lieutenant of Cavalry, some years before I entered the Judge Advocate General's Department by detail, I addressed a letter to Col. G. Norman Lieber, then Acting Judge Advocate General, inviting attention to the necessity for a revision of the military code. Col. Lieber declined to take up the matter, fearing that the code might suffer in essential features by a revision which might adapt it too much to the methods and traditions of civil practice. Again in 1896, noticing that Congress had enacted a statute for the revision of all statutes, and knowing that the commission appointed under the terms of that statute would necessarily consider the Articles of War, I addressed a second letter to the then Gen. Lieber, Judge Advocate General, asking his attention to the opportunity this afforded to secure a proper revision of the Articles of War. He again declined to take up the matter, remarking that he felt that the code needed very little, if any, revision, and that if he had the entire responsibility of revising it he would limit himself to the elminating of obsolete articles and a rearrangement of the code. Again in 1903, while Chief of the First Division of the General Staff, I prepared a draft of revision of the military code and submitted it to the Secretary of War in December of that year for his recommendation to Congress. This came to nothing. In 1911, upon becoming Judge Advocate General, I renewed my efforts, which continued for the ensuing five years and through three Congresses. The revision of 1916 was the culmination of this series of proposals. This record, therefore, must be some testimony to the fact that my attitude toward the improvement of the military code has been an advanced one, at least in comparison with the attitude of others whose authority was superior to mine

at the time, and that these convictions of mine are publicly on record for a period of at least 30 years past.

These few facts will indicate that I am, at any rate, not one who has been satisfied with anything less than the highest standards of justice for embodiment in our code of military law; and that my constant and urgent efforts have been devoted to maintaining those standards and to improving their code whenever it seemed to me to fall short of those standards. It was with this spirit that my office proceeded with the administration of military justice when this country entered the Great War, and the American Army, enlarged manyfold, was certain to put our system to such a test as it had never before experienced in our entire history. The staff of the Judge Advocate General was gradually enlarged from about 30 officers to more than ten times that number; and all of the new judge advocates were, of course, taken direct from civil practice, with little or no experience in the military practice of the National Guard. Thus the assurance was plain that the spirit and traditions of the criminal common law, with all its safeguards for the accused and of its guaranties of full and fair trial, would dominate in the work of the judge advocates.

I mention these facts as demonstrating that it is humanly improbable that any state of things, even remotely justifying some of the extreme epithets recently used in public criticism, could have existed in our Army during the last two years.

I must further digress for a moment to state the extent of my own personal responsibility for the administration of military justice during the last two years. Appointed Judge Advocate General February 15, 1911, and reappointed upon the expiration of the first term of four years in 1915, I was in active charge of the Office of the Judge Advocate General from the outset of the war to the end of 1917. In the meantime, on May 22, 1917, I was detailed as Provost Marshal General and vested with the execution of the selective draft. I divided my time during the remainder of 1917 between the two series of duties. In the meantime Brig. Gen. S. T. Aswell, as senior officer on duty in the Judge Advocate General's Office, after August, 1917, acted upon a large share of the office work without submission to myself. In February, 1918, a branch office of the Judge Advocate General's Office was established in France and Brig. Gen. E. A. Kreger was appointed as Acting Judge Advocate General in that position. In December, 1917, at your request, I arranged to divide my time about equally between the Office of the Judge Advocate General and that of the Provost Marshal General; but Gen. Ansell continued to have detailed supervision over the section of military justice. Later, viz, during the months of May and June and parts of April and July, Gen. Ansell was absent in France on inspection duty, and during his absence Col. J. J. Mayes was senior officer and supervised all details of administration of military justice. The remainder of 1918, after July, Gen. Ansell again became senior officer in charge of that subject. Meanwhile the Military Justice Division of the office had been enlarged so as to comprise nearly 50 officers on duty in Washington. Thus during the latter quarter of 1917 and the whole of 1918 the rulings upon individual court-martial cases did not come to my personal attention, except in rare instances, and did not usually bear my signature. Nor were the rules of the administration, so far as framed in my office during that period, personally framed or passed upon by myself, with a few important exceptions to which I will later allude.

What I wish to make clear is that, so far as my active approval or disapproval is concerned, there was no time during the latter part of 1917 and the whole of 1918 when a court-martial ruling or a rule of practice could not have been made or put into effect by the senior officer in supervisory charge of military justice, without personal submission to myself. More specifically, had either of the above-named senior officers found reason sufficient to himself to alter the practice in any detail or to disapprove any individual court-martial sentence, he was in a position to exercise free responsibility to do so without prior approval of myself. An important exception to this statement is the rule known as General Order No. 7, 1918, of which later explanation will be made.

But this circumstance, that I was not personally responsible for the details of administration of military justice during the above period and that another officer was thus responsible, does not, of course, alter the fact that up to the latter part of 1917 I did share completely that personal responsibility. Moreover, whatever my personal responsibility, or lack of it, for individual measures or court-martial rulings, I am, of course, responsible for the structure and methods of military justice as they existed at the time of our entrance into

the war—responsible, that is, in so far as the Judge Advocate General's views were consulted by the Secretary of War and by Congress in the framing of the statutes and the regulations, and in so far as those statutes and regulations were enforced in the field and in my office. And it is because of that responsibility, and because of my firm belief in the merits and high standards of our system of military law, that I am now concerned in pointing out the facts which vindicate it from the recently published reproaches. Regardless of my share of responsibility during 1917 and 1918 for the operation of the system, I could not have performed the duties of that office up to that period without being vitally interested in vindicating the honor of the Army and War Department as involved in the maintenance of that system.

I propose now, first, to refer to certain individual cases recently criticised; next, to comment on the general defects alleged to exist in the system of military justice; and then to close with some recommendations.

(I) *Individual cases cited for criticism.*—In the recent speeches uttered on the floor of Congress, in the two or three press articles, and in some of the testimony given before the Senate committee and published in the press, certain individual cases of court-martial judgments are cited as notable instances of injustice.

In this letter it is virtually impossible for me to set forth the explanation that can be made for each of these cases. The majority of them are cases in which the sentence is said to be excessively severe; on this general topic of severity I will later offer what needs to be said. Other cases are supposed to be marked by some other form of injustice or illegality. To comment adequately on all these and other cases, which from time to time may be cited, would here be needless and impracticable. I have, therefore, gathered all these cases in an appendix which schedules each case thus cited and makes such explanation as our records afford; and this schedule of individual cases I will file with you for reference. In the meantime, I think that I can allay the apprehensions that have been excited by the public allusion to these cases if I take two or three of the most typical and show how groundless are the criticisms.

This first case cited in a speech in the Senate is that of a soldier at Camp Gordon (record No. 110595, tried January 24, 1918), who, while patrolling the town as military police, was found at midnight in a shop just after a burglary. Being charged with burglary, he asserted that he had entered the shop in search of the burglars. His story was disbelieved, and he was found guilty; the first finding had been not guilty, but at the commanding officer's request there was a reconsideration, and the second finding was guilty. On revision of the record no legal error could be found, but this office reached the opinion that though there was sufficient evidence to sustain the finding, the evidence did not go so far as to show his guilt beyond a reasonable doubt. In such a situation no supreme court in the United States (with three or four exceptions only) would interfere and set aside a jury's verdict. Nevertheless, this office recommended a reconsideration of the verdict by the reviewing authority. It was in fact reconsidered, but the reviewing authority adhered to the finding. But the feature for emphatic notice is that reconsideration was given, not by exercising the "arbitrary discretion of a military commander," but by referring the case to the judge advocate of the command, as legal adviser. The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of this office and recommending confirmation, and the commanding general followed this opinion of his law officer.

This case, therefore, instead of being, as the critic had been led to believe, an illustration of "the control which the military commander exercises over the administration of civil justice," illustrates exactly the opposite. For, in the first place, the confirmation of the sentence was made, not by the arbitrary military discretion of the commanding officer, but upon the legal opinion of his judge advocate; and, in the second place, the reconsideration which was actually given by the judge advocate, on the point of proof beyond a reasonable doubt, was a measure of protection which the law does not provide in any civil court in the United States for the control of a jury's verdict. The case is a good illustration of a feature in which the system of military justice sometimes does even more for the accused than the system of civil justice.

Another case cited on the floor of Congress is one of disobedience to orders to drill and of having seditious literature in possession for distribution. The offender was a conscientious objector who had not been given an opportunity for noncombatant service and who was not attempting nor intending to distribute the literature. The sentence was death; but the critic adds that it was "disapproved by the President and the prisoner discharged," and he expresses

the hope that "the President will exercise the same clemency and show the same mercy in many other cases." Now, the facts of the record demonstrate the precise opposite of what the critic was led to believe; because in this case (record No. 116790, tried June 17, 1918) it was not the President's clemency that discharged the prisoner; it was the effective operation of that very system of military law which the critic supposes not to exist. What happened was that the Judge Advocate General's Office recommended disapproval of the sentence, on the strictly legal grounds that the order to drill was (under General Orders, No. 28, 1918) not a lawful command, and his disobedience was therefore not an offense; and that there was no evidence of the accused's intention to distribute the literature. The sentence was therefore disapproved and the prisoner discharged on the legal grounds stated by my office. This case, therefore, far from illustrating the critic's thesis, rather affords an illustration of the operation of military law and justice in entire analogy to that of civil law and justice.

Another case, cited in the newspaper article read into the Congressional Record (Cong. Rec., vol. 57, No. 44, Jan. 23, 1918, p. 1988), concerns two death sentences imposed in France for sleeping on post in a front-line trench. There are really three distinct questions involved in those cases—first, whether a sentence of death in all cases of this offense should be the inexorable policy; secondly, whether, if not, these particular cases showed sufficient extenuating circumstances; and, thirdly, whether the cases were fairly and fully tried to get at the facts.

Upon the first question it is enough here to say that Gen. Pershing especially urged the importance of adopting this policy for the protection of his Army's welfare; and his chief law officer concurred in this message; and that under such circumstances no one could have been criticized for acceding to this urgent request and adhering to the principle handed down by all the fixed traditions of military law. I myself, as you know, was at first disposed to defer to the urgent recommendation of Gen. Pershing, but continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency.

Upon the second question it can be stated that, except for the youth of the offenders (they were about 20 years of age), there were no special extenuating circumstances. The task laid upon these soldiers was no greater in its exactions than was laid upon hundrds of others at the very same moment in the allied forces doing duty in the trenches. The Chief of Staff's memorandum states the situation with great force:

"The American Expeditionary Force is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company but of the entire command is absolutely dependent on the vigilant performance of his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of those offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night—that is, the night of November 3–4, 1917—Pvt. Sebastian was found sleeping on his post, and on the night of the 5th Pvt. Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of the 2d and 3d. This condition of affairs presented an absolute menace not only to that portion of the line held by the American troops, but to the French troops in the adjacent sectors."

That the decision to exercise clemency was a sound one I do not doubt. But no candid reader of the record could look upon these cases as anything but a distressing instance of the inevitable mental conflict that arises between the stern necessities of war discipline and the natural human sympathy for men who have incurred the death penalty—a conflict which equally agitates every civil judge and every civil executive when such a case is presented for his action. It is unconscionable that this situation should be cited as a peculiarity of the military system.

The third question—whether the case was fairly and fully tried so as to present all the facts—would require too extended a survey for giving all the

details here. I content myself with assuring you (what you indeed know already) that the record was scrutinized by several of the most experienced judge advocates of my staff, as well as by myself personally; and that, although the cases were not tried as thoroughly as they could and should have been tried, where the death penalty was involved, nevertheless no reversible error was found and there was no doubt of the facts in either case. The only issue in this case was the severity of the sentence, as above mentioned.

These illustrations must suffice for the present to show how unreliable have been the public citations of individual cases of supposed injustice. What the source of information has been for each of these cases I am not aware. But I believe that I am justified in assuring you that it would be a mistake for the intelligent public to assume, when an individual case of supposed injustice is cited, that there is necessarily any ground for believing that injustice has been done. The information seems to have come from such partisan sources, and there are so many hundreds, that it is natural to find the details gradually altering themselves, in transmission, so that the case as stated becomes one of obvious injustice, and yet the case in its actual facts was nothing of the kind. How unreliable are these citations of supposed cases of injustice can be seen in the circumstances that out of the several scores of cases recently cited in a speech on the floor of the House (Cong. Rec., Feb. 22, p. 4640) and cited with the detail of general court-martial number and place of trial and name, it has thus far proved impossible to find and identify more than a small fraction of the cases in the records of this office owing to errors in the citations.

I must, therefore, so far as individual cases are concerned, content myself with giving you the assurance first that this office is ready and anxious to investigate and supply full explanation for every case that can be identified; and, secondly, that so far as such investigation has thus far been able to be made the cases, with few exceptions, reveal that they merited no such public statement.

What is really at issue, however, is the general state of things in the administration of military justice; i. e., whether there do exist specific shortcomings of law or of method which in themselves permit and have permitted the doing of injustice in any appreciable fraction of cases. It is to that real issue that I now address myself.

(II) *General principles and methods in military justice.*—Assembling the various criticisms of a general nature they seem to be reducible to the following heads:

1. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the Criminal Code, but is according to the arbitrary discretion of the commanding officer in each case.

2. That the military Criminal Code itself is not modern and enlightened, but is an archaic code which systematically belongs to medieval times.

3. That a soldier may be put on trial by a commanding officer's arbitrary discretion without any preliminary inquiry into the probability of the charge.

4. That commanding officers do thus put on trial a needlessly large number of trivial charges.

5. That the court-martial is composed of and the defense is conducted by men not acquainted with military law.

6. That the judge advocate combines incongruously the functions of prosecutor, judicial adviser of the court, and defender of the accused.

7. That second lieutenants "knowing nothing of law and less than nothing of court-martial procedure" are assigned to the defense of "enlisted men charged with capital or other most serious offenses."

8. That a plea of guilty is received from an accused on a charge for which the sentence of death may be imposed.

9. That commanding generals, as reviewing authorities, send back for reconsideration judgments of acquittal.

10. That the judgment of the court is kept secret until after the action of the reviewing authority is taken, even when the initial judgment is an acquittal.

11. That the sentences imposed by courts-martial are as a rule excessively severe.

12. That the sentences imposed by courts-martial are variable for the same offense.

13. That the Judge Advocate General's office either partakes in the attitude of severity or makes no attempt to check it by revisory action.

14. That the action taken in the Judge Advocate General's office is ineffectual to enforce military law and procedure, because its rulings do not have the force of a Supreme Court mandate, but are only recommendatory, and are either ignored by the division commanders or vetoed by the Chief of Staff.

I will now take up these assertions briefly in succession.

1. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the Criminal Code, but is according to the arbitrary discretion of the commanding officer in each case.

The complete refutation of this assertion will appear very plainly in the answers to the other specific criticisms, which are merely details of this general charge; but in order to gather the full force of the answers which will be made to those more specific criticisms it is necessary to keep in mind the general structure and machinery of the military courts. It may be supposed that the intelligent public in general is not aware of their essentially legal nature and procedure. The public impression perhaps has been gained that there is substantial correctness in the language of one of the Members of Congress:

"The records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice; we have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer."

As a concrete demonstration of the incorrectness of this assertion, the facts, later to be cited, taken directly from the records of courts-martial appealed to by the critic, must suffice as a principal refutation.

And yet the critic's remarks call for more than the citation of concrete facts to the contrary. The substance of my counterassertion is that although the theory of military justice does differ slightly from the theory of civil justice, yet in substance and in practice both of them, in our inherited Anglo-American system, are fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law.

The only kernel of correctness in the abstract statement made in Congress is that the theory of military justice is in its general purpose somewhat different from the theory of civilian criminal justice. The contrast of theory between the two is well set forth in a statement of Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War. He says:

"The object of civil law is to secure to every human in a community the maximum of liberty, security, and happiness, 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."

This definition of Gen. Sherman shows that the objects to be attained are different, in that military justice aims to make the man a better soldier or to eliminate him from the military organization if he can not be improved, while civilian justice looks to the ultimate protection of the community at large.

But, once this difference of theory and purpose is conceded, the two systems proceed in identical method, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand, and the inflexible rigor of automatic penalties on the other hand.

The former end is obtained by a system of courts, procedure, and definition of offenses which contains the counterpart of civil justice in virtually every respect; and the latter aim, viz, to protect the offender from the harsh consequence of rigid penalties, is secured by the method of indeterminate sentences for virtually all military sentences. In a few words, let me set forth the way in which this system operates.

The system of courts, procedure, and defined offenses is one of law and order and not one of arbitrary discretion of the commanding officer. The proceedings follow the fundamentals of our criminal common law—the accused has his challenges; he may have process for his witnesses; he has counsel without cost, either selected by himself or assigned by the proper authority; he is not compelled to testify against himself; he is furnished on request a copy of the testimony and proceedings. The proceedings are so conducted as to preserve for scrutiny of a superior authority every point of law that can be raised for the protection of the accused. This record of proceedings goes up to the reviewing authority and then to the Judge Advocate General. The Judge Advocate General's rulings on revision represent all those legal principles which are required by law and regulations to be observed. How completely legalistic

is this scrutiny of the trial record can best be shown by reproducing here from Form No. 16 the fundamental points to be observed in every general court-martial trial before it receives approval in the Judge Advocate General's Office. This form is known as Form No. 16, and upon the initial examination of the record these questions must all be answered, before sending the case to the Chief of the Division of Military Justice:

Was court ordered by proper authority?
Are all orders showing membership of court properly entered in record?
Does record show place, date, and hour court convened?
Are all members of court, judge advocate, and as istant judge advocate accounted for as present or absent?
Was accused given opportunity to introduce counsel?
Was reporter sworn?
Was interpreter sworn?
Was accused extended right of challenge as to each member of court?
Was action of court upon challenges regular and properly taken?
Was the court sworn?
Was the judge advocate sworn?
Was the assistant judge advocate sworn?
Was the accused properly arraigned?
Are charges and specifications and name of officer signing charges copied into record?
Was the trial within statute of limitations?
Are pleas of accused regularly entered?
Were the witnesses sworn?
Are the findings properly entered?
Is the record properly authenticated?
Is the action of reviewing authority properly entered in record and signed?
In case of adjournment or continuance, are each day's proceedings properly signed by judge advocate?
After each adjournment during trial is presence or absence of members of court, judge advocate, assistant judge advocate, accused, his counsel, and reporter properly accounted for?
Did all members who participated in proceedings in revision vote on original findings and sentence?
Were pleas of guilty properly explained by president of the court?
Were rights of accused as a witness properly extended and explained?
Does each specification state an offense under the Articles of War?
Are the findings legal?
Is the sentence legal?
Does the evidence sustain the findings of the court?
Is the action of the reviewing authority legal and properly taken?
Does any ruling of the court on the admission of evidence or other matters affect the substantial rights of accused?
Did the court have juri diction of person and offense?

Such are the fundamental points of law which must first be verified before the record proceeds further in the office. But this is only the beginning of the scrutiny. The Office of the Judge Advocate General in the Division of Military Justice is divided into several sections according to the nature of the sentence imposed, viz., di ciplinary barracks cases, retained in service cases, penitentiary cases, death and dismissal of officers cases. In the first two branches, including the minor sentences, the case is initially verified and approved or disapproved by one officer; the allotted number during the greater part of 1918 was 10 majors in this branch; the record then goes to the chief of the section. Thus two officers under the Judge Advocate General must pass upon ca es of this class. The same is true of the section dealing with sentences not including dishonorable discharge (retained in service). In both these classes of cases written opinions are prepared only where the cases involve some new or important point of law or some serious irregularity or an unduly severe sentence. In the third section, that of penitentiary cases, to which six majors are allotted, the written opinion is required in every case; one officer prepares this opinion, and it then passes to the chief of the section for his approval; if both officers approve, it then passes to the board of review, consisting of three other officers, acting as an appellate court, each of whom must concur in approval of the opinion (or note his dissent) before the opinion is transmitted to the Chief of the Division of Military Justice; finally, the opinion must be approved by the chief of that division. Thus, for cases

of penitentiary sentences, six officers must have scrutinized the case and concurred in or dissented from the final opinion before its submission for signature to the Judge Advocate General. In the fourth section, dealing with cases where the sentence is death or (for an officer) dismis al, again a written opinion is required in every case, and in this instance the chief of the section, upon receiving that opinion, assigns it to a second officer, who makes an independent examination and review; if the second officer concurs in the first opinion, the chief of the section may then approve it and send it further upward; but if the second officer does not concur, the case is handed to a third officer for examination; not until two officers concur in an opinion does the chief of the section accept it and approve it and send it onward; it then arrives at the board of review, where each of the three officers on the board of review must concur in the final opinion; it then goes in to the Chief of the Military Justice Division for his sanction. Subject to office changes in procedure from time to time, the foregoing is substantially the course of examination of court-martial cases which has been in vogue heretofore in my office. Thus in these most serious cases seven officers must have passed upon the case before it arrives finally for the signature of the Judge Advocate General. Moreover, the board of review is a double one, like some appellate courts, having two branches, each composed of three officers; during the past six months or more these six officers represent one former chief justice of a State supreme court (who resigned his office to become judge advocate), one former justice of nine years' incumbency on the Philippine Island Supreme Court, two professors of criminal law from leading universities, who have been between 15 and 20 years at the bar, and two other eminent practitioners of equal or longer legal experience before their appointment as judge advocates. It may be safely asserted that in no State of the Union is any more thorough scrutiny given to the record of a criminal case than is given in my office, and that in most State supreme courts the scrutiny does not approach in thoroughness the methods here employed.

Moreover, it should also be kept in mind that the accused under the system of military justice enjoys an advantage which does not exist in civil justice, viz, the automatic appellate examination of every serious case. In civil justice there is no appellate or revisory action unless the accused has the moral aggressiveness to insist upon it, and possesses the money (or the friends who will contribute the money) to print the record of the case and to retain counsel who will argue the case on appeal. But every soldier is assured not only of an automatic appeal, as a safeguard against illegal or unfair condemnation, but also of a double appeal in serious cases. The proceedings (except in case of inferior courts, corresponding to petty police courts, and having power to impose only short sentences of imprisonment) are taken down verbatim, and every word of the testimony, every ruling of the court, and every claim of counsel is submitted, first, to the reviewing authority in the field. This authority is the commanding general who appointed the court and who in all serious cases (practices vary somewhat in the different divisions) submits the case to the judge advocate of the division for a quasi judicial opinion. This judge advocate, having the rank of a major or lieutenant colonel, has been, since September, 1917, in almost every instance a lawyer fresh from civil life, chosen for his high standing, and imbued with the standards and traditions of civil practice rather than those of the Regular Army; hence, likely to give fully as careful scrutiny as a civilian judge would give. If the reviewing authority approves the judgment, it then goes on, if a general court-martial case, to the Judge Advocate General at Washington for the second appellate scrutiny (if in France, to the Paris branch office of the Judge Advocate General's Office); the method of scrutiny in this office has been above described. It goes finally to the Judge Advocate General or to the senior officer acting as Judge Advocate General for military justice, who appends his signature if satisfied. Every general court-martial case thus obtains thorough scrutiny in two separate stages.

Putting together these features of the automatic appeal and the thorough scrutiny of all general court-martial cases by at least three superior officers, and in some classes of cases by eight superior officers, before final disposal, it is believed that no such guaranties for the protection of the accused, in the scrutiny of the trial courts' judgment in criminal cases, exist in any civilian system in the United States. I take consolation in believing that if the public at large and particularly the families of those men who have been subjected to military discipline during the past two years could realize the

thoroughness of this system they would feel entirely satisfied that the system is calculated in its method to secure ultimate justice for every man; and that the instances where this result is not obtained must be exceptional only. In the foregoing description I have tried to make it possible for the intelligent civilian to visualize the military procedure as it really is, and not as it exists in the fervid imagination of those who do not know it and have never tried to understand it.

The other chief stage in military justice, viz, the stage of the serving of the sentence, has for its aim, as already stated, to protect the offender from the harsh or unequal consequences of a rigid system of penalties. It attains this end by a method of indeterminate (or probationary) sentences. It is not generally known, I presume, that the only War Department prisons to-day in the United States are the three so-called Disciplinary Barracks, viz, at Fort Leavenworth, Kans., at Fort Jay, Governors Island, N. Y., and at Alcatraz, San Francisco, in which are served substantially all sentences of imprisonment for military offenses other than the short terms (less than six months) served in the camp guardhouse. In these disciplinary barracks every sentence is indeterminate as to its minimum, i. e., virtually a probationary sentence for every man whose offense is not so heinous as to require immediate separaton from the Army. Speaking generally, soldiers convicted of purely military offenses, i. e., desertion, mutiny, absence without leave, disobedience to officers, assaulting and officer, etc., are sent to these barracks; the penitentiary being used (except in rare and heinous cases) only for those offenses involving murder, forgery, embezzlement, or other civil crimes. The indeterminate or probationary sentence having no minimum, only a maximum, the confinement may be terminated at any time, and the offender (except in the unusual case where a sentence of dishonorable discharge has not been suspended) may be restored to duty in the Army whenever his record of intelligence and good conduct justifies the commandant of the disciplinary barracks in so recommending; and hundreds, if not thousands, of offenders have been so restored since the beginning of the war.

I can not forbear, at this moment, to cite as an illustration an incident recently told by the commandant of the Fort Leavenworth Barracks, while attending the conference lately held in your office on prison discipline. He cited the case of an enlisted man who had been sentenced to two years for desertion. Arriving at the disciplinary barracks on March 8, 1916, he soon acknowledged the error of his former conduct, went into the disciplinary battalion, and was restored to duty within nine months; was assigned to the Sixty-fourth Infantry at El Paso, became successively corporal, battalion sergeant major, and regimental sergeant major; landed in France March 15, 1918; anxious to get into the fighting, he began again, at his own request, at the bottom, as private in another unit; was made sergeant and fought at Chateau-Thierry in July, 1918; was sent to an officers' training camp, commissioned as second lieutenant on October 1, 1918, was promoted to first lieutenant on October 28, and ended on armistice day in command of Company L, One hundred and thirty-eigth Infantry. He wrote to the commandant a few months ago, recounting his history, and ending thus: "There is only one question which I have to ask: Do you consider that I have made a success?" And yet the entire period of time which had elapsed since his original sentence was less than three years. In other words, though sentenced for a period of two years, he had been released from confinement, restored to duty, and traveled up through the grades of noncommissioned offier and had earned promotion through two grades of the commissioned officer, and occupied an honorable status in the Army, within a few months after the nominal period of his original sentence had expired.

This incident illustrates somewhat prematurely what I shall have later to say about the length of some of these apparently severe sentences. But the incident here illustrates what I am concerned to emphasize, viz., that military justice possesses in its indeterminate sentence and its probationary methods a system that is in advance of that of probably any State of the Union. I am given to believe that very few of our States yet possess a law authorizing this indeterminate sentence with no minimum. Our disciplinary barracks should indeed be thought of as a reform school, rather than a prison; it corresponds to the term "industrial school" as used in some States. And I need hardly point out that the disciplinary barracks at Fort Leavenworth are totally distinct from the United States Penitentiary at Leavenworth. And I remember that you yourself recently stated informally at the above mentioned

conference of officials that in your opinion the disciplinary barracks at Fort Leavenworth was the best penal institution in the United States. Without claiming any personal credit for its excellent administration, I must here, as some sort of proof of my own deep and long-standing interest in enlightened military justice, take the liberty of reminding you that the probationary system, as exemplified at the disciplinary barracks, was initiated in 1913, on my own personal recommendation, two years after my first appointment as Judge Advocate General; and that the act of March 4, 1915, which transformed the formerly so-called United States military prison at Fort Leavenworth into the United States disciplinary barracks, and organized the modern system of probationary detention for military offenders, was drafted at my instance. Space does not permit me to describe more fully its methods of vocational training and of psychological and psychiatric study and attention given to all prisoners there confined. I will only mention that Maj. King, now Lieut. Col. King, who was for a long time stationed at the Fort Leavenworth barracks, and whose genius I encouraged and supported in applying his practical methods, is an officer of the Regular Army of the United States; and that the elaborate psychiatric attention given to military offenders sent there for detention is not paralleled, so far as I am aware, in any of the civilian penitentiaries now administered by the Federal Government, nor at most of the State penitentiaries.

This much ought in justice to be placed here on record, as information doubtless new to the intelligent American public, and yet calculated to assist in maintaining that public confidence in the military penal system to which it is justly entitled.

2. That the Military Criminal Code itself is not modern and enlightened, but is an archaic code which systematically belongs to medieval times.

Of this statement I can only remark that it is baseless. Those who have ignorantly repeated the statement may be perhaps extenuated for this utterance to the American people of a gross slander, not only upon the War Department and the military system, but also upon the Congress which so conscientiously revised the military code in 1916. But though extenuated they can not be exonerated; for the entire story, so plain that anyone can read, is contained in the introductory six pages to the Manual for Courts-Martial published in November, 1916, and printed with every one of the 250,000 copies that have been issued since that date. Those introductory pages state the entire history of the Articles of War, or Military Code; explain the revision of 1874, and enumerate the most fundamental of the charges introduced in the thorough revision of 1916. That introduction, however, does not state, and I will now add, that the revision of 1916 was pending in draft for four years before the Houses of Congress; that the draft was prepared in my office shortly after my appointment as Judge Advocate General; that it was founded on the most exhaustive consideration of the entire military code, as well as on a thorough comparison with the modern criminal law and its progressive tendencies; and that the hearings before the Military Affairs Committee (S. Rept. 229, 63d Cong., 2d sess., Feb. 6, 1914) showed the most conscientious discrimination of every detail; and that the testimony fills a volume of 146 pages.

The military criminal code of 1916 no more deserves the term "archaic" than the Revised Statutes of the United States under which the Federal courts since 1878 administered civil justice; and it is nearly 40 years later than the civil Revised Statutes. It represents the result of the most conscientious and constructive thought which could be brought to bear by the combined energies of the War Department and of the Congress of the United States in the year 1916.

That the experiences of this great war, with all its novel conditions, multiplying forty-fold the size of our military forces should have revealed nothing in the way of new lessons for improvement, is not for a moment to be asserted. In the light of that experience, which subjected the military code to a tremendous and unprecedented test, I readily admit that certain improvements, limited in number, have been demonstrated to be worth while introducing, and I shall conclude this letter with a suggestion of those improvements. But the statement repeatedly made, and published far and wide, that the military code of 1916 is "an archaic code which systematically belongs to medieval times" and does not "belong to this modern enlightened period," but rather "to the England of 200 years ago, whose criminal code of that time was marked by civil harshness and brutality," is not only a cruel and dangerous

slander, but is nothing less than a reflection upon the Congress which so conscientiously consummated that great task.

3. That a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge.

Every system of penal justice has some method of insuring the exercise of caution by a responsible officer in scrutinizing an accusation before an accused is put to the necessity of defending himself by a formal trial. The traditional method inherited by us, in civilian justice, for serious offenses, is the presentment of a grand jury. This method has now proved cumbrous and ineffective; it has been abandoned in perhaps a majority of our States. The modern method of those States is a so-called information by the official State prosecutor, filed after such inquiry as he sees fit to make. This modern American method is the one to which France and other continental nations arrived some centuries ago, about the time when England developed the grand jury instead. This modern American method is also the one used in our courts-martial; it arrived in the Anglo-American military system some centuries ago, said to be by adoption from Scotland, which itself had adopted the French system; for the French were the great military nation of three centuries ago.

By this Anglo-American military system, some officer must file charges before any soldier can be tried. This protection is invariable. Often the judge advocate, as legal adviser, additionally scrutinizes a serious charge before it is filed. This is exactly the protection given by the State official prosecutor in the modern American method. How essential and thorough is this protection can only be appreciated by perusing the strict terms of the law and regulations. Paragraph 62 of the Manual of Courts-Martial reads:

"By the usage of the service all military charges should be formally preferred by—that is, authenticted by the signature of—a commissioned officer."

Paragraph 75 reads:

"*Submission of charges.*—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

"(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

"(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of any offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

"They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require."

Paragraph 76 proceeds:

"*Investigation of charges.*—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself, or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority the commanding officer will include: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken."

It will, therefore, be seen that the regulations require the strictest scrutiny by a responsible officer before any accused can be put on trial by a court-martial.

In one of the speeches uttered in Congress, occurs the following sentence:

"The commanding officer may, without any investigation of the circumstances, order a man tried by court-martial; in the French Army such cases are not sent to trial until investigation can determine whether the man ought to be tried."

How is it possible for such an assertion to be made, in the face of the law and regulations represented in the quotation above from paragraph 76 of the manual? The safeguard contained in our manual of military justice stands on exactly the same footing with the safeguard contained in the modern method of the State prosecutor, and of the French system as cited by the critics.

But whatever may be the law and the regulations, doubtless it may be asserted that the regulations are not obeyed in spirit. This is, in fact, the precise assertion made in one of the congressional utterances and to that assertion I now come.

4. That commanding officers do thus put on trial a needlessly large number of trivial charges.

It has been asserted that commanding officers direct the filing of trivial charges in excessively large numbers. The precise language is: "It is not surprising, under the circumstances, that there are too many trivial cases sent to trial by court-martial."

Let us examine this assertion in the light of the facts of military justice during the past year as shown by the records.

The United States military forces raised up to November 11, 1918, numbered some 4,186,000; of these about 290,000 were already in service at the opening of the war, of whom 127,000 were in the Regular Army. Thus over 90 per cent were new men, fresh from civilian life. It must be taken for certain that their unfamiliarity with military discipline and the novelty of its rigid restraints would produce an unusual proportion of minor breaches of discipline. In other words, if commanding officers had been merely as strict and rigorous as with the Regular Army before the war in pursuing minor breaches of discipline with court-martial charges, the ratio of trials would be at least as great and presumably far greater than before the war and the accession of the new army.

But the facts show, on the contrary, that commanding officers must have been far less strict and rigorous than before.

Let us take first the serious charges brought before general courts-martial. The printed report of the Judge Advocate General for the fiscal year 1918 shows that the total number of general court-martial trials in the Regular Army of 127,000 in the year ending June, 1917, was 6,200, or about one for every 20 men, while the total in the entire Army for the year ending June, 1918, was less than 12,000, or one for every 200 men (the military forces on May 31 numbering 2,415,000 and the average for the year not being ascertainable with accuracy); and during the last six months of 1918 the total was 7,624, or at the rate per annum of only one for every 275 men (the military forces on November 11, 1918, numbering 4,185,000). As to special courts-martial, for the lesser offenses, the number in the Regular Army for the year ending June, 1917, was 2,970, or one for every 42 men, while for the year ending June, 1918, it was 14,700, or only one for every 165 men on the above annual basis. Moreover, as between the Regular Army and National Guard and the National Army, or new drafted men, the number of general courts-martial for the year ending June, 1918, was 10,363 for the former and only 1,660 for the latter, or one for every 107 men in the Regular Army and National Guard (numbering on May 31, 1918, some 1,112,000, and composed in part of seasoned men), but only one in every 785 men for the National Army (numbering on May 31, 1918, some 1,303,000, and composed entirely of new drafted men), showing conclusively that commanding officers were more lenient and liberal with the men fresh from civilian life.

Turning now to the "trivial offenses" referred to in the above utterance, they are covered by the summary courts-martial, representing the extremely petty disciplinary penalties. The number of trials for the Regular Army, viz, 48,000 in 1917 (rising from an average of 38,000 for 10 years past, due to a proportionate increase in the size of the Regular Army), rose in the year ending June, 1918, to only 212,000, or slightly more than four times the number, although the entire military forces in the year ending June, 1918, rose to

2,415,000, or nineteen times the former size. In short, the petty disciplinary penalties dropped from a ratio of 1 to each 2.7 men to a ratio of 1 to each 11.4 men, or a decrease for 1918 to less than one-quarter of that of 1917.

There could be no more conclusive demonstration that commanding officers though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did in fact use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial. The facts show, therefore, precisely the opposite of the conditions asserted on the floor of Congress.

5. That the court-martial is composed of and the defense is conducted by men not acquainted with military law.

It would, perhaps, be sufficient in refuting this criticism to point out that the court-martial, though it nominally combines in itself the functions of judge and jury, and though this combination is under military conditions absolutely unavoidable, has, nevertheless, as its essential and predominating function, that of a jury of fact. The court-martial listens to the testimony and makes findings of fact based upon the evidence. In our criminal common law it has always been regarded as a disadvantage that the jury should be technically skilled in the law; and it is a well-known practice of all experienced defenders in criminal cases to challenge and exclude from the jury members of the bar. Whether this belief is a sound one, I do not pretend to say; I only point out that the possession of legal knowledge by the jury is at least not considered vital in ordinary civil justice. In the practice of military justice the legal knowledge necessary to insure an obedience to the requirements of law as to the composition of court, the procedure, and the definition of the offenses charged is expected to be supplied primarily by the commissioned judge advocate, who acts as the judicial adviser of the reviewing authority. And the thorough scrutiny and review in the Office of the Judge Advocate General (a review, as already pointed out, more elaborate and thorough than is ordinarily supplied by any civil system) is especially calculated to insure an observance of all the rules of law. As the entire testimony is reported verbatim, including every point of law raised by objections of counsel, and as the application of all relevant rules of law must lie open to scrutiny on the face of the record, it is obvious that the court-martial's own lack of technical knowledge of law (in so far as it might exist in a given case) is amply made up, and more than made up, by the legal scrutiny supplied in the course of automatic appeal already described.

But in spite of these guaranties of legality for the court's action, the military system, none the less, takes all possible pains to insure an acquaintaince with the law by the members of the tribunal. The entire military code, with an elaborate commentary and an appendix of forms, making a volume of 400 pages, and entitled "A Manual for Courts-Martial," is distributed in abundant quantities throughout the Army and forms a part of every military officer's education. Since 1916 more than 250,000 copies of this manual have been printed and distributed; in the month preceding the armistice in November, 1918, a new edition of 50,000 copies, revised to date, were being distributed throughout cantonments and camps in this country and to the divisions in the theater of war. Every officer of the Regular Army, during his four years in the Military Academy, must pass an examination in the course of military law. Every reserve officer who graduated from a training camp in 1917 and 1918 was equally obliged to study and pass an examination upon the Manual for Courts-Martial. Thus, a fair familiarity with the substantive and the procedural portions of military law is established as a part of every officer's military training. Moreover, the regular duties of almost every officer in active service oblige him to take his turn frequently either as a member of the court or as a judge advocate or as counsel for the defense. Thus there are probably few officers in the service who have not had a greater or less practical experience in the use of the military code, and who have not thus familiarized themselves with the operation of the system which they have already studied in the Manual for Courts-Martial.

In the closing portion of this letter I am proposing an expedient which will supply an additional guaranty of technical legal knowledge in the composition of the court in cases especially likely to involve serious, difficult, or complex questions of law. Apart from such exceptional cases I am of the firm opinion that, so far as the members of the court-martial can properly need an acquaintance with the military code they are in fact ordinarily equipped with enough of such knowledge, and that the efficacy of the guaranties for the observance of

such rules of law does not depend, in the military system, upon the extent of the court-martial's legal knowledge (for they are essentially jurors of fact), but upon the legal knowledge of the commissioned (staff) judge advocate, who advises the reviewing authority, and of the commissioned (staff) judge advocates who scrutinize the record in the office of the Judge Advocate General by way of automatic appeal.

6. That the judge advocate combines incongruously the functions of prosecutor, judicial adviser of the court, and defender of the accused.

That the position of a judge advocate is a unique one may be conceded. A precise analogy does not exist in the civil system. This is because military conditions are not identical with civil conditions. But the asserton that the judge advocate combines incongruous functions which defeat each other or substantially impair his efficacy as a guardian of the military law must be emphatically denied.

The staff judge advocate is supposed to supply the professional and technical legal knowledge that is requisite to secure the observance of the law in all stages of the trial. Essentially he is a kind of superintendent of justice. From beginning to end his duty is to prevent the occurrence of illegalities. In this respect he aids the accused quite as much as he aids the prosecution; he has no more interest in securing a conviction than in securing an acquittal. He is, by his position, as impartial as is the Comptroller of the Treasry, whose principal function is to see that no moneys are paid out except according to law, irrespective of the persons to whom they are to be paid. In practice, during the present war, a commissioned judge advocate (whose rank is never less than that of major or lieutenant colonel) is attached to the staff of each commander of a division or a department or other large organization having a separate zone of jurisdiction. After a court-martial trial is ended and when the record arrives in the hands of the commanding general as reviewing authority, the judge advocate's main function in military justice is exercised; he reviews the record and advises the commanding general whether the trial has been conducted according to law in every respect; this includes the duty to advise whether the weight of evidence sustains the conviction regardless of legal error. In this aspect he is essentially an appellate judge, and it is his duty to enforce the law as fully on behalf of the accused as on the behalf of the Government. The judge advocate thus attached to the division commander's staff has other duties of legal advice corresponding to those of the Attorney General of the United States as legal advser of the Government in all civil matters, but in military criminal justice his function is essentially judicial.

The misunderstanding which has led to the above criticism is doubtless based upon a confusion of the staff judge advocate with the trial judge advocate. The latter, who bears the same title, but who is not commissioned as a judge advocate, performs actually the duties of prosecuting attorney in an ordinary criminal case. This trial judge advocate is usually a junior officer and is detailed from any branch of the service (Infantry, Artillery, etc.), but not ordinarily from the Judge Advocate General's branch; i. e., he is not commissioned as a judge advocate, though he may have had legal experience in civil life. He is detailed anew for each separate court which may remain in session for some weeks or months. He therefore usually conducts a series of trials for a certain period in that division. But he is entirely distinct in personality from the staff judge advocate, who later acts as the judicial advisor of the reviewing authority. It may be confidently asserted that (except in a few special cases) no staff judge advocate attached as judicial advisor to the commanding general has acted during the present war as trial judge advocate (or prosecuting attorney) in a court-martial trial. The few exceptions to this statement occurred in special cases (such as the Houston riots and murders in 1917), where a staff judge advocate was specially detailed to conduct the prosecution, and where also the accused were aided by counsel consisting of specially detailed officers of high rank and legal experience or by civil counsel of their own choice, but in such case the judge advocate was brought in from a different department or division.

If this distinction be kept in mind, viz, the distinction between the staff judge advocate regularly attached as legal advisor to the staff of the reviewing authority, and the trial judge advocate specially detailed for the prosecution of general court-martial trials in the various units within the division, it will be perceived that these two functions are in practice exercised by different persons. The trial judge advocate does indeed perform the duty of prosecuting attorney; he is supposed to conduct the prosecution, not indeed with the ruth-

less partisanship frequently to be observed in civil prosecuting attorneys, yet with the thoroughness suitable to a proper performance of his duties. But the staff judge advocate, in whose hands the record of the trial subsequently arrives and who reviews the record and advises the reviewing authority as to its legality, is a different personage and is in no way hampered by having formerly acted as prosecuting attorney in the same case. Such has been the universal practice in our Army during the present war. It is believed that this plain statement of facts ought to suffice to remove that natural misapprehension which seems to have been founded on a confusion of the terms.

The necessity of furnishing some legal advice by a trained military officer on many complex aspects of law and the impracticability of allowing in the staff organization more than one officer for this purpose does indeed require the staff judge advocate occasionally to give legal advice in a composite capacity. Whether these few anomalous situations can be removed, with due regard to the necessities of military organization, is a problem that has often been discussed. On that point it is enough to say that the system which we now possess has substantially stood the test of time and experience. But so far as concerns the actual administration of military criminal justice, it ought to be plainly understood that military law does not tolerate the anomaly of expecting the same man to be both appellate judge and prosecutor, and that in the practice of the present war (as above pointed out) the trial judge advocate acting as prosecuting attorney in general courts-martial is a different person from the staff judge advocate regularly attached to the staff of the reviewing authority as a judicial officer and quasi appellate judge.

7. That second lieutenants, "knowing nothing of law and less than nothing of court-martial procedure," are assigned to the defense of "enlisted men charged with capital or other most serious offenses."

In commenting on this criticism I may dispose of one part of it, viz, the statement that these officers "know nothing of law and less than nothing of court-martial procedure," by referring to what I have already stated, namely, that graduates of every training camp have studied and passed an examination upon the Manual for Courts-Martial, and that, therefore, the above criticism is upon its face groundless. The roster of Army officers during the present war contains probably thousands of young men who have been admitted to the bar and enjoyed the benefit of a longer or shorter experience as practitioners. While no direct proof by statistics can be adduced, it is common knowledge that the commanding generals in the assignment of counsel (where the accused does not make his own selection) have usually sought to utilize the services of those officers who have already had legal experience. It would be impracticable to propose that no officer shall be assigned to the defense of an accused unless he is already qualified as a civilian lawyer. Given the composition of the officers' roster, all that can be expected under the circumstances is that commanding generals shall do their utmost to select men of those qualifications, if available within the unit; and I do not for a moment doubt that such was the constant endeavor of the appointing authorities.

The other part of this criticism is that in capital or other most serious offenses the defending counsel has been an officer of the lowest commissioned rank.

In so far as it seems to assert that the defending counsel in cases where a capital sentence was actually imposed have been second lieutenants, the complete facts could only be learned by a lengthy collation of all the records. But of the 21 records now available on file in which a capital sentence was imposed the defending counsel were as follows: In four cases a second lieutenant, in nine cases a first lieutenant, in six cases a captain (aided in three cases by a lieutenant), in one case by a chaplain, and in one case by a major.

In so far as the assertion refers, not to offenses in which a capital sentence was actually imposed, but in which the offense under the military code is liable to be punished with death, the assertion is to a large extent correct, although misleading. In time of peace all offenses (except one or two heinous ones, such as murder) are strictly limited by a small maximum period of imprisonment, which for strictly military offenses can not exceed 2½ years for ordinary desertion, and for civil offenses are graded according to the usual civil limitations, such as 10 years for burglary or manslaughter or robbery. But in time of war some military offenses may rise to a degree of danger vital to the safety of the Army, and therefore in time of war the death penalty is reserved in a number of military offenses as a possible maximum penalty. It is, I believe, a fact that the death penalty has been imposed by courts during

this war in only 96 cases, of which approximately one-half were for military offenses; and that in all of these cases the death penalty for the military offenses was subsequently commuted or remitted. But it remains true that for the principal military offenses the death penalty is expressly authorized by the Articles of War to be imposed in time of war. In thousands of such offenses the penalty actually imposed (there being no minimum prescribed by the Articles of War) has been only a few months or perhaps a few years of imprisonment. In many of those cases it is true that the defense of the accused has been conducted by officers of the rank of second lieutenants. Just what proportion of cases this represents could not be stated without a complete and special examination of the 20,000 cases of general courts-martial arising since April 6, 1917.

But, assuming that the proportion is a substantial one, I must point out that the situation existing in the camps and in the theater of war presents almost insuperable obstacles to any other practice. The number of officers available for taking part in military trials is necessarily limited, for the active duties of military preparation and operation are obviously paramount. The main object of the Army is victory, not trials. Moreover, in the composition of the court it is plain that the prime requisite is to procure for the court itself the most experienced officers of adequate rank as a guaranty for the wisdom of their judgment. Having regard for both these considerations it therefore becomes a matter of great difficulty, if not impossibility, to secure for the conduct of the defense officers of equally high rank with the court. It is not to be denied that if it were feasible in every case to assign for the defense an officer of equal rank with the senior officer sitting upon the court this would be a desirable measure. But no one who has any acquaintance at all with conditions in the theater of war could suppose for a moment that this is practicable. Even as it is the organization of courts-martial makes already a serious drain on the efficiency of the strictly combatant work of the organization. The problem is a difficult one. It may be that some means can be devised for strengthening systematically the conduct of the defense in courts-martial in respect to the rank and experience of the officers so assigned. But that under the present war conditions it was feasible to obtain officers of higher rank in any considerable number must be denied.

Moreover, it is at this point that the military system offers a guaranty (not found in the civil system) of protection against the consequences of such inadequate defenses as may from time to time be found. The system of automatic appeals, already described, and the thorough scrutiny of the record given in the Office of the Judge Advocate General may be relied upon to supply that protection which in civil courts is usually given only by the skilled scrutiny of counsel for defense in the trial. Whatever point of law might have been made for accused's benefit by counsel's objection, and has failed to be made through his ignorance, can be and is habitually detected and enforced during this appellate scrutiny. The civil doctrine of utilizing only points raised by counsel's exceptions has no place in military appellate procedure. The officers of the Judge Advocate General's Office, as already shown above, scrutinize the record and insure the observance of those fundamental rules of law which ordinarily are watched over by counsel for defense, and if such rules of law are found not to have been observed the record is disapproved for legal error, regardless of whether counsel for defense took notice of it or not. Virtually this appellate review performs over again the functions of counsel for the defense, and, not only in technical duty but in actual spirit, this appellate review seeks to make good those deficiencies of defense which may become obvious to the experienced scrutiny of the appellate officer. It is in this appellate review that I find the most satisfactory assurance that such deficiencies as may have from time to time occurred through the inexperience of officers assigned for the defense have been adequately cured.

8. That a plea of guilty is received from an accused on a charge for which the sentence of death may be imposed.

I find it difficult to give a complete statement of facts in answer to this criticism, because a complete answer would require an examination of all the 20,000 records of general courts-martial since April 6, 1917, and such a complete examination can not be made in the time allotted me.

In what proportion of cases a plea of guilty has been received, and in what fraction of that proportion this offense has been one for which the death penalty might have been imposed, although not actually imposed, is impossible to say, but I firmly believe that the percentage is a small one. The common in-

stincts of fairness and justice which form the motive for such a criticism are equally entertained by the same officers, taken recently from civilian life, who sit upon the courts as judges.

But if it be meant in the above assertion that when a plea of guilty has been received it has been customary or even frequent to forego the presentation of evidence by the prosecution, I can confidently assert that such cases have not occurred. The prosecution has seldom failed to adduce the requisite evidence; and whenever it has so failed, the reviewing authority has disapproved the record for such legal error. The Manual for Courts-Martial does not permit (except in the very minor cases) a plea of guilty to exempt a prosecutor from presenting his evidence. I quote from paragraph 154 of the Manual, page 72; it is obvious that if the injunctions of the Manual are observed (and the records show that they have been) a plea of guilty does not signify that the circumstances of the case were not thoroughly examined, with a view to ascertaining both the exact effect of the plea as well as the extenuating circumstances which might affect the sentence:

"In cases where the punishment is discretionary, a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority on the sentence. In cases where the punishment is mandatory, a full knowledge of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. The court should therefore take evidence after a plea of guilty, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea of "guilty," the witnesses may be cross-examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence and in extenuation of the offense or in mitigation of punishment. After a plea of guilty, the accused will always be given an opportunity to offer evidence in mitigation of the offense charged, if he desires to do so.

"In each case tried by a general court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification the president of the court shall explain to him as to that part:

"First. The various elements which constitute the offense charged, as set forth in Chapter XVII, defining the punitive articles of war; and

"Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

"The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear in the record. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record.

"When the accused pleads 'guilty' and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and if guilt is not conclusively admitted the court will direct the entry of a plea of 'not guilty' and proceed to try the case on the general issue thus made. The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where after a plea of guilty the accused makes a statement, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away, that he expected to return when he had earned some money, or that when arrested he was on his way back to his organization, etc, or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., the court should direct the entry of a plea of 'not guilty,' but the criminality of an intent once formed is not affected by a subsequent change of intent."

9. That commanding generals, as reviewing authorities, send back for reconsideration judgments of acquittal.

This power undoubtedly does exist; and it is occasionally exercised. But only a brief explanation will be needed to show that it by no means signifies (as the criticism would imply) a subjection of the accused to injustice by placing the arbitrary discretion of the comamnding officer outside and above the guaranties of lawful procedure.

The reviewing authority, i. e., ordinarily the commanding general who has convened the court, represents essentially a first appellate stage. No sentence of court-martial can be carried into execution until it has been approved by the reviewing authority, i. e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law, and to surround the accused with an additional protection independent of the trial court. This power to approve or disapprove a finding is given great flexibility by the articles of war; it includes the power to approve a finding of guilty of a lesser offense and the power to approve or disapprove the whole or any part of the sentence. In this respect the military appellate code differs from the usual civil code. Incidentally, this power to disapprove includes the power to disapprove a sentence of acquittal and to return the record for reconsideration by the court. But, intrinsically, nothing more is here implied than the court is to reconvene and reconsider its judgment freely and independently. It is in no sense a measure which subjects the court-martial to the command of the reviewing authority in framing the tenor of its judgment upon such reconsideration; for the court is, under the law, entirely at liberty to adhere to its original decision.

That this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to an abuse of the commanding general's military prestige, will, I think, appear from the figures to be gathered from the records. In the first place, the power is exercised in the vast majority of cases solely for the purpose of making formal corrections of the record; for example, to enable the fact to be shown, if it was a fact, that a certain member of the court was present or was qualified or that a witness was sworn, or the like formal correction which will make the record of the trial correspond to the facts. In the second place, the exercise of the power in cases of an initial judgment of acquittal has been rare indeed; and in those few cases the trial court, far from exhibiting a supple obedience to the supposed hint of the commanding officer has, in the great majority of cases, adhered to its original judgment.

For the purpose of ascertaining the facts an examination was recently made in my office of 1,000 cases (taking the first thousand as they came in the files) thus returned by reviewing authorities to trial courts for revision. Out of these 1,000 cases the instances in which the original judgment was one of acquittal numbered 95. Of these 95 acquittals, 39 were returned only for formal corrections. Of the remaining 56, the court adhered to its original acquittal in 38 cases; and in only 18 cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty of any offense. It seems plain, therefore, that in no appreciable number of cases has the exercise of this power resulted in a change of verdict upon reconsideration; and it would be going further than any natural presumption would permit us, if we were to infer that those changes involved substantial injustice to the accused. My own experience in the field can recall more than one case in which the verdict of acquittal was notoriously unsound, and in which the action of the commanding general in returning the case furnished a needed opportunity for doing full justice in the case.

But even though the power is a useful one, and even though the facts show that it is seldom exercised in cases permitting an inference that possible injustice was done, and even though the facts demonstrate that the power does not necessarily signify a subjection of the court-martial to the will of the commanding general, nevertheless it can not be denied that the practice differs radically from the traditions of civil justice. Whether the practice in civil justice is not too scrupulous in favor of the accused, and whether the future may not rather witness some change of civil practice in the direction of the traditional military practice, I will not attempt to say. But the present military practice is one which on first impression is repugnant to the accustomed methods in civil trials, and for that reason I am ready to concede that the time has come to approximate the two methods. In the British system that change was made some years before the onset of the present war. I am ready to recommend a similar change in our own practice. Although the power is a useful one, nevertheless, on the other hand, it does not appear that it is a necessary or fundamental one to the maintenance of military discipline; and in that situation the solution may well be to assimilate the practice as nearly as may be to the usual civil practice. This would mean that wherever the initial judgment is one of acquittal (either of the whole offense or of any particular charge), the reviewing authority should

not have power to disapprove the finding of not guilty; and that, for the same reason, the reviewing authority should not have the power to revise a sentence upward.

10. That the judgment of the court is kept secret until after the action of the reviewing authority is taken, even when the initial judgment is an acquittal.

It is obvious that the rule upon which this criticism is founded is a natural consequence of the rule just commented upon, viz, that commanding generals as reviewing authorities may send back cases for reconsideration by the court even after a judgment of acquittal. If the initial judgment of the trial court is subject to change by the reviewing authority, it is obvious that its tenor should not be disclosed until after the reviewing authority has acted and has so notified the trial court. If, therefore, the above rule is to be changed, it would follow that the present rule should also be changed, for the one depends naturally upon the other. In view of what has been said above as to the proposed alteration of the rule permitting the reviewing authority to correct and change a judgment of the trial court, I frankly admit that the corresponding change should be made in the present rule, and that upon a judgment of acquittal, which would therefore be final and not subject to change upon review, there is no reason why an immediate announcement should not be made, precisely as in the case of the verdict of an ordinary civil jury. I am pointing out that the rule here criticized is merely a corollary of the other rule, and that its maintenance under the system hitherto in force has therefore not been subject to criticism.

11. That the sentences imposed by courts-martial are, as a rule, excessively severe.

In considering the severity of sentences (and this topic has been the main theme of the criticisms uttered on the floor of Congress) I must make my comments in the following order:

(*a*) The sentences as they have actually been imposed;

(*b*) The reasons for those sentences; and

(*c*) The measures now taken to give proper mitigation or remission of sentences.

(*a*) In considering the severity of sentences, it is, of course, necessary to examine separately the different offenses, since obviously the appropriate punishment varies widely for offenses of different moral culpability and different danger to military discipline. Space does not permit me here to set forth the facts for all of the offenses and sentences covered by the general courts-martial since April 6.

I handed to you on February 12 a complete table of data as to the length of sentences for the period October, 1917, to September, 1918, covering the nine principal military offenses of desertion, absence without leave, sleeping on post, assaulting an officer or a noncommissioned officer, disobeying an officer or a noncommissioned officer, mutiny, and disobeying a general order or regulation. As this table is too lengthy for inclusion in this letter, I shall content myself by taking the three most typical offenses: Desertion, absence without leave, and disobeying an officer.

(1) *Desertion.*—No one can approach the subject of sentences for desertion in time of war without keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes, acting assistant provost marshal general for Illinois, as set forth in his report printed in the report of the Provost Marshal General for the Civil War (Pt. II, p. 29). In impressive language he lays the following injunction upon us:

"Incalculable evil has resulted from the clemency of the Government toward deserters. By a merciful severity at the commencement of the war the mischief might have been nipped in the bud, and the crime of desertion could never have reached the gigantic proportions which it attained before the close of the conflict. The people were then ardent and enthusiastic in their loyalty, and would have cheerfully and cordially assented to any measures deemed necessary to the strength and integrity of the Army. They had heard of the 'rules and articles of war,' and were fully prepared to see * * * that deserters from the Army would be remorselessly arrested, tried by court-martial, and, if guilty, be forthwith shot to death with musketry.

"This was unquestionably the almost universal attitude of the public mind when hostilities began, and the just expectations of the people should not have been disappointed. Arrest, trial, and execution should have been the short, sharp, and decisive fate of the first deserters. * * * The Government was far behind the people in this matter, and so continued, until long and certain impunity had thrown such swarms of deserters and desperadoes into every

State that it was then too late to avert the calamity. * * * I state these things so that, if we have another war the Government may start right * * * put deserters to death, enforce military law, strike hard blows at the outset, tone up the national mind at once to a realization that war is war; and be sure that such a policy will be indorsed and sustained by the people.

"There are other suggestions to be made in respect to deserters, but the one I have already advanced—the nonindorsement of the penalties provided by the military code for the crime of desertion, especially at the beginning—is, beyond all question, the grand fundamental cause of the unparalleled increase of that crime, and of the inability of district provost marshals, with their whole force of special agents and detectives, to rid the country of deserters."

This solemn warning was naturally in our minds at the opening of the present war. But, in spite of its urgency, it was decided to exhibit our faith in the American people, and to place our trust in that loyalty and devotion to duty which we felt sure would characterize the vast majority of to-day's young American manhood. We believed that the "short, sharp, and decisive fate of the first deserters" should not be the extreme penalty as urged by Gen. Oakes. And the view was generally accepted in the Army that terms of imprisonment should be ordinarily deemed the adequate repressive measure for the few who might need it. And it is a fact that of the (approximately) 3,000 convictions for desertion during the war the sentence of death was imposed in only 24 cases, and in every such case it was commuted or remitted.

It must, therefore, be kept in mind at the outset that the refusal to adopt the policy of death sentences for desertion was in itself a repudiation of the policy of extreme severity; and that the practice of limiting desertion sentences to terms of imprisonment is in itself the adoption of a policy of leniency. Reproach for severity must deal with the fact that the policy adopted disregarded both the extreme penalty authorized by Congress and the warnings of the Civil War.

Turning, then, to the recorded facts, we find in the table that the total number of convictions for desertions for the year October, 1917–September, 1918, was 2,025; that the average sentence was 7.58 years; that nearly 24 per cent of these sentences were for less than 2 years; that 64 per cent were for less than 10 years; and that only 35.90 per cent were for a greater period than 10 years. The Article of War reads:

"Any person who deserts shall, if the offense be committed in time of war, suffer death, or such other punishment as the court-martial may direct."

It would seem, therefore, that in point of severity the result of courts-martial sentences for desertion can not be charged with erring on the side of severity.

You will notice that I do not here attempt to account for the justice of individual cases. Certain of the sentences for 25 years, or even for lesser periods, are open to criticism as excessively severe under the circumstances of the individual case. But it must be kept in mind that these trials and sentences were found legally valid by the Judge Advocate General's Office; that the only issue of doubt that could arise concerns the quantum of the sentence; and that the scrutiny of the clemency section in the Military Justice Division of the office may be relied upon to detect cases of excessive severity before any excessive portion of such a sentence has been served. But the excessive severity of an individual sentence is not the question here; that question would call for the scrutiny of the particular case. The question here is of general conditions. What the above figures show in respect to general conditions, or the trend of conditions, is that the practice has been one of relatively moderate penalties instead of the severest one permissible under the law.

(2) *Absence without leave.*—Absence without leave is an offense which represents, in many instances, cases of actual desertion; but, owing to the movements of the military unit and thus the difficulty of obtaining the necessary technical proof, the actual deserter is frequently convicted of no more than an absence without leave. It is, therefore, plain that the offense of absence without leave may, upon its circumstances, merit an extremely severe penalty, equal to that of desertion. In time of war this offense may lawfully be punished by any penalty short of death; in time of peace a presidential order limits the maximum penalty of six months' confinement.

For the year ending September, 1918, the total convictions for this offense number 3,362; the average sentence was 1.59 years (or only three times the small maximum allowed in peace times); 11 per cent of the offense received no penalty of imprisonment; 67 per cent received a sentence of less than two

years' imprisonment; and only 22 per cent received a penalty of more than two years in prison. When it is remembered, as above pointed out, that this offense is in many cases virtually the offense of an actual deserter, it will be seen that the number of the sentences over two years is not disproportionate to the probable ratio of cases individually calling for the higher penalties. An average sentence of 1.59 years for this offense, committed in time of war, can not be deemed an exhibition of severity, where in fact the act of Congress establishing the Articles of War leaves the court-martial absolutely untrammeled (short of the death sentence) in the penalty to be fixed to this offense.

(3) *Disobeying an officer.*—The offense of disobeying a superior officer is punishable, under the Articles of War, by "death or such other punishment as the court-martial may direct." The total number of convictions for this offense was 785; the average sentence was for 4.34 years; 6 per cent of offenses were punished by no imprisonment; 43.69 were punished by confinement of less than 2 years; and a trifle over 50 per cent were punished by some period greater than 2 years, there being one death sentence and 18 sentences for 25 years or more. Comparing the absolutely unlimited nature of the punishment permitted by the Articles of War to be imposed by the court-martial, and observing that 50 per cent of these sentences were for periods of under 2 years, it can not be that the tribunals appear to be seeking to exercise the maximum of severity allowable, but rather the contrary.

Moreover, interpreting these sentences for the offense of disobedience of an officer, it is worth while to remind the civilian public that little or nothing turns upon the nature of the command itself which is disobeyed. Much has been made in public discussion of one or two instances in which the subject of command was apparently of trivial consequence; for example, a command to an enlisted man to give up some tobacco unlawfully in his possession, or a command to clean a gun. But in military life, obviously it is not the thing commanded that is material; it is the act of deliberate disobedience. Deliberate disobedience in one thing, if unchecked, means deliberate disobedience in any and all things. It was a condition of deliberate disobedience, in small and great things alike, which caused the Russian Army to melt away and transformed Russia into the home of Bolshevism. The military officer does not rule by violence, but by moral sway. He is able to organize his men upon the battle field only because he can be confident that every command of his in matters great or small will result in instant and unquestioned obedience. Hence, an act of military disobedience is a symptom as alarming to the military commander as is the first incipient cancer cell to the surgeon—a warning that the knife must soon be applied. The War Department must invoke and expect the sympathy and support of an enlightened public in realizing that the offense of disobedience is to be ranked among the cardinal offenses of the soldier and requires the most rigid measures for its repression.

In the foregoing comments, it will be noticed that, since a charge of excessive severity implies the habitual resort to a maximum standard allowable under the law, the standard here to be taken must of necessity be the standard set by the Articles of War as adopted by the act of Congress. Judging by this standard, the practices of the court-martial, to any candid observer, must be vindicated from the charge of the habitual employment of severity; rather have they proceeded in a direction of a lenient use of their discretion.

I must freely admit that, in any discussion of the severity of sentences, notions of severity are so widely different that it will be hopeless to satisfy the standards of all varieties of critics. There exists to-day, in some minds apparently, a sentimentality toward offenders of every sort, which we could never expect to satisfy without a virtual undermining of the entire criminal law, whether military or civil. I received recently a letter, complaining of the "inhuman and outrageous punishments administered for trivial matters"; this expression being used of a court-martial sentence of 10 years for conspiracy to rob. In the particular case, four soldiers, out on leave in a city adjacent to a military camp, assaulted with a pistol and violently beat a fellow soldier at midnight in a vacant lot, for the purpose of obtaining his money by force; and upon his raising an outcry they ran away, and his wounds were attended to by the military police. To apply the term "trivial" to this act of cowardly violence, and the term "inhuman" to the sentence of 10 years, indicates such a singular standard of moral judgment that it would be impossible to reach an agreement, in estimating the severity of the sentence, with those who are willing to acknowledge such a standard of judgment. I am assuming, in what

I have now to say, that the idea of severity is always to be interpreted in the light of a rational standard of normal judgment based upon the danger and heinousness of the offender's act in comparison with the sentence imposed.

I close this comment with a forceful quotation form a recent editorial in a leading daily journal:

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

"That is what military justice is about. The sole preoccupation of any army, wherever it is, is to train its men and keep them trained to obey the will of the commander under the most trying possible circumstances and serve the will of the Nation. If disobedience had been tolerated in the United States, our Army in Europe would not have captured the St. Mihiel salient or fought six weeks in the Argonne.

"An army to be successful in the field must, from the moment it begins to train at home, have absolute control of its discipline."

(*b*) The question may still be asked, however, whether even for these serious military offenses those sentences greater than, let us say, 5 or 10 years were necessary for the morale of the Army.

I must premise by pointing out first that these long sentences represent only a minute fraction in the mass of court-martial sentences, and, secondly, that the long periods of years named in those sentences were only maximum, and were therefore nominal only.

As to the first point, I call attention to the total number of sentences for a year, including trials in all grades of courts. These were approximately 240,000, of which the military offenses were at least 200,000 in round numbers. In these 200,000 sentences the vast majority, probably about 185,000, were imposed in summary courts, and those could not by law exceed three months. Another 10,000 approximately, were in special courts, and those could not have exceeded six months. Some 7,000 were in general courts, the only court authorized to impose a sentence of higher than six months. Now, for the year October 1, 1917, to September 30, 1918, the records of this office show that there were only 532 sentences for a period of 15 years or more; that is, less than three-tenths of 1 per cent of the over 200,000 trials for military offenses. And there were only about 2,200 sentences for five years or more, or a trifle more than 1 per cent of the 200,000 sentences for military offenses. If, therefore, anything is found to be wrong about this group of severe sentences, the wrongness can only affect a very small fractional corner in the area of military justice. There may be at this moment 532 cases of smallpox in the population of the metropolis of Manhattan, with more than 4,000,000 inhabitants; but this does not signify that there is any doubt as to the general healthy immunity of the metropolis against that plague.

The second point above mentioned is that these long periods of years named in the sentences were in effect nominal only. There being no minimum number of years, the offender may be released at any time by reduction or remission of sentence on recommendation of the clemency section of this office, where the offense is a purely military one. That this is not merely a possibility, but an actuality, will be seen from the fact later to be cited, that nearly 10 per cent of the 12,000 sentences for the last calendar year have in fact been selected for remission or mitigation, and that in those sentences an average of 90 per cent of the total periods has been cut off; for examle, of the 2,035 sentences for desertion, some 577, averaging a sentence of 3.80 years, were selected for reduction, and this average was reduced, on the recommendation of my office, to an average of three months. In other words, the imposition of a 25-year sentence does not signify that 25 years of a sentence will be served; the experience of the year 1918 having shown that of the sentences selected for reduction only 10 per cent of the term is actually served. It is in this sense that I refer to these long-term figures for the maximum duration as merely nominal.

As an illustration conveniently at hand, let me take the four cases cited by Senator Chamberlain as illustrating excessive severity of court-martial sentences; he cited the case of a 25 years' sentence for absence without leave, another of 15 years for the same offense, and two cases of 10 years for sleeping on post. And yet the records of this office show that in two of these four cases the Judge Advocate General had advised that there was no legal objec-

tion to their restoration to duty, on December 10 and December 12, 1918, respectively, two weeks or more prior to the date of the Senator's speech in Congress; and the records of The Adjutant General's Office show these men actually restored to duty on December 23, 1918, one full week before the day when the Senator arose to complain of the severity of these cases; and all of this in the course of the normal operation of the system. These illustrations point to what I mean in saying that the long term named in the sentence is merely nominal, in that the offender may be, and in practice frequently is, restored to duty at an early period of a few months or more, totally regardless of the long period named in the sentence.

Why then (it may be asked) was it necessary or wise to name such long maximum terms in the sentence? The answer here must be sought in the necessities of discipline while our Army was being raised, and in the just apprehensions of responsible officers over the fulfillment of their huge task. Half a million men were taken by draft in 1917, fresh from the associations of civil life; nearly another half million were entering by enlistment; and before three-quarters of the year 1918 had passed nearly 4,000,000 men had been taken into the Army and were in the process of training. This training was conducted under circumstances of urgent haste never before known in our history—for the tide of battle was going against the Allies, and the anxieties of the civilized world awaited breathlessly the arrival of our troops. To make good soldiers out of this huge and undisciplined mass, in an average period of three or four months for each contingent, was one of the most extraordinary feats ever accomplished in the history of military training; and it has testified in the highest degree to the adaptability and versatility of the American character. But it required urgent haste, and while it was going on the curtain was not raised upon the future, and the glorious results which now lie before us were still in the realm of doubt.

Our officers, charged with the duty of bringing these undisciplined men into immediate readiness for battle, were weighted with anxiety, day and night, at the possibilities of failure. The one imperative necessity was to inculcate the sentiment of obedience—obedience instant and absolute. For those few—and they were less than 15,000 out of 4,000,000—who committed serious military offenses, and thus showed themselves recalcitrant to the requirements of military discipline, some form of absolute moral compulsion was necessary. Whether that moral compulsion ought to take the shape of a sentence of 2 years or 10 years or 20 years was a matter about which it would have been dangerous to speculate. The situation called for an absolute certainty. The sentences must be such that they imposed for any disobediently disposed soldier a penalty which would be absolutely compelling. When those officers selected occasionally (and the percentage of cases was extemely small) a long-term sentence which should have this imperative significance, they knew that this was only a maximum term and that there was no minimum, and that an early release would be easily earned by those who deserved it. And I can not bring myself to-day, nor, I think, can any man who will reflect on that situation, to question now the wisdom of their judgment. And I will even go so far as to say that probably none of these officers supposed for a moment that these long terms would ever actually be served. It was their business and duty to impose a compelling sense of discipline, and they chose those terms which, in their judgment, would do so. And it was not for them to undermine the effect of their discipline by announcing that none of these sentences need be served a moment longer than the exigency of the war required. They knew that, if the danger should pass and if victory should crown their efforts, the authorities of the Army, and particularly the scrutiny of my office, would see to it that the sentences were appropriately cut down. And I think it can be safely asserted that, so far as there is anywhere an individual long-term sentence that could have been deemed excessive, the man who received that sentence has not yet served a single day of the excessive period imposed, the injustice was never one which could not be corrected before it became in fact an injustice.

How thoroughly my office is now undertaking to apply this corrective in proper cases I will later mention. But I am concerned now, in these days of international safety and of national demobilization, to carry back in retrospect the minds of all reflecting citizens to the period of 1917, when the fate of the world trembled in the balance and the embryo armies of the United States were the hope of civilization for turning that balance in the direction of world rescue. The huge responsibility of preparing these armies almost over night lay upon these men who administered military discipline. How magnificently they dis-

charged that task has been shown by the results of the battle field. I, in common with all other intelligent citizens, shared their anxieties, and I for one can not now remain silent while they are criticised for the conscientious exercise of that judgment in applying the necessary measures. Had they failed, they might have been put to the bar to account for themselves. But they succeeded, and in a manner which has commanded the admiration of the world's veteran soldiers. It is easy to be wise after the fact. But in the light of their superb success let no one now censoriously presume to disparage the soundness of their judgment nor the wisdom of the measures by which they achieved that success.

(c) I said above that I would conclude this part of my comment by mentioning the measures now practically under way for mitigating and remitting the sentences of courts-martial, in the light of the termination of hostilities and the restoration of the natioal safety.

On the 20th of January you approved a recommendation of mine, dated January 18, proposing the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency. A board of three officers was designated by me in the Office of the Judge Advocate General on January 28. This board of officers, with a large number of assistants, is now examining the record of every sentence of courts-martial under which any soldier is now confined in any prison in the United States. The recommendations of this board will go so far as to remit the entire portion not yet served upon a sentence of confinement or to reduce it to such amout as seems suitable to the present situation in view of the necessities of miltary discipline. It is expected that at least 100 cases a day will be passed upon by this board. The completion of the work of this board, which can not require more than a few months at the most, will signalize a complete readjustment of all sentences in a manner appropriate to the termination of hostilities and the resumption of peace-time requirements for military discipline. It is certain that every sentence that might now be deemed in excess of the necessary period will be duly reviewed and that no soldier now in confinement will serve any period in excess of that just amount, so far as human powers of judgment are equal to this task.

12. That the sentences imposed by courts-martial are variable for the same offense.

When we come to the question of variability of sentences, we reach a subject which has been the fertile field for complaint and criticism in civil courts for a century past. It is notorious that the independent judgment of different courts and of different juries seems to be characterized by the most erratic and whimsical variety. Such has been the constant burden of complaint in civil justice, and it can hardly be hoped that military justice could escape a similar complaint in some degree. On the other hand, it must always be remembered that here the individual circumstances vary so widely that a variation of sentences is perfectly natural, and that the mere variation of figures in itself signifies very little where the individual circumstances remain totally unknown to the critic. Nevertheless a variability of sentences for the same offense is something which naturally excites attention and caution; and it should be the object of appellate authorities to equalize the penalties for the same offense where no obvious reason for substantial difference is found. How far the revisory authority of the Judge Advocate General and the clemency powers of the Secretary of War have been effectual to secure such equalization will be noted later in this letter. At the present the inquiry of fact is whether there has been such variability and at what points it has taken place.

The table above referred to, and already handed to you, summarizes for the nine principal military offenses the variance of the sentences, first by months of the year covered, and secondly by jurisdictional areas from which the court-martial records come up for revision. In summary of these variances it is here to be noted that such variances obviously exist; that these variances are not in themselves any more striking than those that are found in the sentences of civil courts, as already shown in the other table submitted to you; that in seeking the possible source of these variances it appears very strikingly that there has been a slight but appreciable increase in the number of higher-period sentences as we come down to the later months of the war; and that, so far as jurisdictional areas are concerned, there have been notable variances which seem in some cases to localize the higher-period sentences for certain offenses in certain specific areas.

As illustrating the foregoing inferences it will be sufficient here to take the single offense of desertion. Examining it by months it will be noticed that the

long-term sentences of 10 to 15 years, and of 15 to 25 years, and over 25 years increased slightly in their ratio to the whole of the sentences for the month as we approach the later months of the year under examination. For example, for the months of October, 1917, to February, 1918, there were no sentences over 25 years, although the number of convictions increased from 55 to 196 (the increase, of course, being due to the much greater ratio in the increase of armed forces). But during the months of April to July, with approximately the same number of convictions, averaging 225, the number of sentences for over 25 years increased from 4 to 9, to 15, and finally to 33. Apparently, therefore, some conditions in the Army changed as the months advanced so as to induce this variance in the direction of higher-period sentences. Just what those conditons were can not even be the subject of speculation without a very careful inquiry; merely the fact is here pointed out.

Again, turning to the jurisdictional areas, we find that the Central Department shows about 9 per cent of sentences for over 10 years, while the Eastern Department shows only 3 per cent; that the Twenty-eighth Division, having 21 convictions, imposed no sentences in excess of 10 years, while the Eightieth Division, with exactly the same number of convictions, imposed 14 sentences greater than 10 years.

As further indicating this variance by jurisdictional areas, a glance at the same table under the offense of absence without leave shows that, in the Twenty-eighth Division, which exhibited the above leniency for desertion, the offense of absence without leave was given a sentence of under 2 years for 127 out of 140 convictions; while the Eightieth Division, which had shown a large majority of long-term sentences for desertion, was, on the other hand, lenient for the offense of absence without leave, imposing 16 sentences of under 2 years, out of 20 convictions. Comparing again the Thirty-sixth and Thirty-ninth Divisions, with substantially the same number of convictions, viz, about 175, one finds that the former imposed about 20 sentences of above 10 years, while the other imposed 101 sentences above 10 years. This same Thirty-ninth Division had also used a majority of higher period sentences for desertion, whereas the Thirty-sixth Division showed for desertion a record that averaged with the other divisions.

It will be seen, therefore, that in many, if not in most cases, the extreme variances may be traced to difference of practice in the different jurisdictional areas. Just what conditons existed which would justify in the individual cases, or in the general trend of cases, this variance between divisions can hardly be the subject even of hypothesis. But it must be obvious to any candid observer that there do exist wide differences of conditions, not only in the racial and educational make-up of the different camps, but also in the morale and necessities of discipline prevailing in different camps. It is well known that the sentences of civil courts for civil offenses vary widely in the different States. For example, in 1910 (Census Report, 1910, "Prisoners and Juvenile Delinquents," p. 50), the percentage of sentences of 10 years or over was 9.7 in the East South Central States, but was only 0.1 in the New England States; in Mississippi it was 22.51, but in California it was only 2.3. This illustration is mentoned merely to suggest that whenever one discovers that variances in sentences have a certain relation to variances in camps or divisions, the subject becomes at once too complex for hasty judgment.

Apart from what is now being done in my office by way of the equalization of sentences by commutation in the way of clemency, I am only concerned here to point out the facts as they are found in the records relative to the action of the courts-martial themselves; and to note that such variances (apart from peculiar individual cases) as are revealed in any noticeable amount, seem to be due most largely to differences of conditions in the different camps, divisions, and other jurisdictional areas; and the greatest caution must be exercised before passing judgment upon such variances as inequitable, without being fully familiar with the conditions operating in those places.

Moreover, I must utter a further caution against the popular presumption that a difference in sentences of different individuals for the same offense signifies necessarily any inequity. The individual circumstances differ so widely that the injustice would consist, not in the variability, but in the rigid identity of the same sentence for the same offense in every individual case. This very matter of variation in sentences is one of the triumphs of modern criminal law. One hundred years ago virtually every criminal code of the civilized world was marked by a rigid fixation of penalties for each variety of offense. It was regarded as one of the great objects of criminal reform in that era to introduce

variability of the sentence and adapt it to the circumstances of the individual case. One of the first criminal codes to introduce this reform was that of the State of Louisiana, drafted just a century ago by the great Edward Livingston, recognized as the most eminent jurist of his day; this code received the approval of the jurists of the world; and one of its most remarkable features was its recognition of the variability of sentences for varying individual circumstances. Ever since that day all progress in criminal codes has included this element in an increasing degree. The particular virtue claimed and proved for the indeterminate sentence, which has now been adopted in probably three-quarters of the States of our Union, is that it gives full play for the adaptation of the sentence to the individual case. We must, therefore, always recall that the variability permitted by law is in itself a powerful feature tending to the apportionment of justice according to the circumstances of each case.

The one complementary element necessary in a criminal code in guarding against too great a variability in the action of different courts is the power of ultimate readjustment by some central tribunal. In the language of one of the very Senators who has criticized some of these sentences:

"The sure cure for it all is to have some sort of a tribunal, appellate or supervisory, that shall have the power to formulate rules and equalize these unjust sentences." * * *

Precisely this power of recommendation is now exercised, and long has been, by the Judge Advocate General's Office, in its clemency section. The explanation of this activity brings me to the next point of criticism.

13. That the Judge Advocate General's Office either partakes in the attitude of severity or makes no attempt to check it by revisory action.

The distinct implication running through the critical remarks above quoted is that there exists no central authority that can check, equalize, or correct such severity or variability as may be found to merit such action, and that the Judge Advocate General's Office, charged with the duty of revising these court-martial records, either acquiesces in the result of the court-martial sentences as approved by the reviewing authority or makes no attempt to check any excesses by revisory action.

It is, therefore, necessary to emphasize that the Judge Advocate General's Office not only scrutinizes the court-martial records for the purpose of discovering errors of law and procedure, but also, in the clemency section of the Military Justice Division, occupies itself exclusively with the scrutiny of records for the purpose of recommending for remission or mitigation those sentences which are open to question as to severty or inequality. This power has been exercised habitually ever since our entrance into the war, as well as before that date.

Inquiring into the results to see what the facts show the question presents itself: To what extent has the Judge Advocate General's Office called for a reduction of sentences by a recommendation of clemency to the Secretary of War? And I note in passing that in no instance, so far as I am informed, has such a recommendation of clemency failed to be approved and given effect by yourself.

(*a*) The extent of such recommendations as to the number of sentences is shown in the following summary, covering the clemency recommendations for the year 1918, as applied to the sentences from October 1, 1917, to September 30, 1918, for the nine principal military offenses:

Total number of such sentences imposed, 7,624; total number of such sentences selected by the Judge Adovate General's Office for reduction, 947; percentage of selected sentences on all sentences, 12.42. I see no reason to doubt that this 12½ per cent is ample enough to cover all the individual cases in which an excessive severity would have been apparent on the face of the record.

The table as placed in your hands shows the reduction in its relation to the sentences of different lengths. The table shows that the largest percentage of reduction occurred in the sentences of medium length, and that the smallest percentages of reduction occurred in the sentences of shortest and of longest periods. This result is perfectly natural and appropriate. The shortest sentences are those in which there would be the least call for reduction by clemency on the ground of excessive severity. The longest sentences are those in which the reduction on the ground of excessive severity would presumably not bring them to an extremely low period and, therefore, in which the time for recommending such reduction had presumably not arrived.

(*b*) How much reduction did this action effect in the total length of all the sentences acted upon? This will afford some gauge of the thoroughness of the action in the nature of clemency. A table already in your hands shows the

number of sentences recommended for reduction, the total years of the original sentences, the total years reduced on recommendation of the Judge Advocate General's office, and the net years of sentence as actually served; and the figures are given separately for the nine principal military offenses, as well as for the total of all offenses, October 1, 1917, to September 30, 1918.

Referring to the table for details as to the specific offenses, I will point out here merely that for all offenses, military and civil, the total reduction effected was a reduction of 3,876 years out of an original period of 4,331 years, or a reduction of 89½ per cent. In other words, action of this office, in effecting reductions in the 1,147 sentences selected on their merits for reduction, cut them down to 10.50 per cent of their original amount. Presenting the same result in another form, the average original sentence, of these 1,147 sentences, was for a period of 3.78 years (or nearly 4 years), and the average sentence served as reduced was only 0.40 of 1 year, or less than 5 months.

These figures as to reduction effected in the length of the sentences, demonstrate that the action of this office was a radical one and must have served to eliminate any excessive severity in those sentences. That the sentences selected for such recommendations of clemency included all of the sentences meriting the term "severe," neither I nor anyone else would be in a position either to affirm or deny without an examination of every record.

How extensive is the scope of reduction now undertaken for all sentences, by the special clemency board recently appointed at your instance has already been told.

14. That the action taken in the Judge Advocate General's office is ineffectual to enforce military law and procedure, because its rulings do not have the force of a supreme court mandate, but are only recommendatory, and are either ignored by the division commanders or vetoed by the Chief of Staff.

This brings me to the question which has formed the principal theme of recent discussion in Congress; and I must divide my comments under three heads covering each one as concisely as accuracy will permit: (*a*) The question of simple fact, i. e., what actually is the effect of the Judge Advocate General's action; (*b*) the question of legal theory, i. e., what is the extent of his legal powers under existing law; and (*c*) what use has recently been made of this question of legal theory by certain parties in disparaging the administration of military justice by the War Department.

(*a*) *The simple question of fact.*—The foregoing exposition of the principles of military law and procedure, as enforced through the appellate system culminating in the advisory action of the Judge Advocate General's office, is vain and meaningless to some of the critics of our military system. I find it repeatedly asserted and implied that the commanding officer of the division or department—in technical language the reviewing authority—is not obliged to follow and does not, in fact, follow these recommendations. "Court-martial sentences found, by the reviewing authorities, to be null and void for want of jurisdiction," it is stated, "have been allowed to stand." "The military commander is not obliged either to ask for legal advice or to follow it when he has asked for it and it has been given to him by the responsible law officers of the Army." "Courts-martial should be required to accept the interpretation of the law by a responsible law officer."

The records of courts-martial come to the Judge Advocate General to "revise," and what legal effect this "revision" ought to have in theory is a mooted question of law and policy on which I shall later comment; suffice it here to say that a difference of view exists, and that the judgment expressed by the Judge Advocate General in his appellate capacity is customarily phrased in terms of a recommendation to the commander in the field. But this question, after all, like many questions of fundamental principles, may become practically irrelevant in the light of the facts. The assertion made in the remarks above quoted is an assertion of fact, viz, that the commanding officer does not follow the legal advice which is given him and does not accept the rulings of the responsible law officer.

On the question of fact let the facts themselves answer.

The cases fall necessarily into two groups. One class of cases, coming to the Judge Advocate General for revision under United States Revised Statutes, section 1199, the thirty-eighth article of war, and General Order No. 7, January, 1918, require and receive no other revision or approval than that given by the Judge Advocate General. The other class of cases includes sentences of death and of dismissal of officers, which, under the forty-eighth article of war, require confirmation by the President, as well as certain other cases in which error of law has been found but the execution of the sentence has not been suspended by

the reviewing authority. The former class of records go directly back from the Judge Advocate General to the reviewing authority in the field; the latter class of cases go from the Judge Advocate General through The Adjutant General and the Chief of Staff to the Secretary of War, and sometimes to the President. The question of fact is, therefore, in what proportion of cases does purely military authority fail to give effect to these revisory rulings of the Judge Advocate General?

The results in both classes of cases are shown in the following table:

Effect of action of Judge Advocate General's office Apr. 6, 1917–Jan. 1, 1919.

Cases recommended for modification or disapproval on legal grounds.[1]	Number of cases.	Recommendations given effect.		Recommendations not given effect.	
		Number.	Per cent.	Number.	Per cent.
To reviewing authority	212	205	96.7	7	3.3
To Secretary of War	279	273	97.8	6	2.2
Total	491	478	97.4	13	2.6

[1] Does not include a few cases in which the Judge Advocate General's office recommended changes in the place of confinement.

It thus appears that out of a total for the period covered of 491 cases recommended by the Judge Advocate General for disapproval on legal grounds, there were only 13 cases in which the Judge Advocate General's ruling was not followed; of these cases, 7 were not followed by the reviewing authority in the field, and 6 were not followed in the Secretary of War's office.

In the light of these facts, I think I am justified in asserting that the records disclose no foundation for the assertion contained in the above-quoted remarks. It is not a fact that the military commander or that any military authority proceeds to follow out the dictates of his own discretion regardless "of the interpretation of the law by a responsible law officer," nor that he fails to follow the legal advice "when he has asked for it and it has been given to him by the responsible law officers of the Army." Whatever may be the legal theory of the function now placed by statute in the Judge Advocate General as the law officer or appellate tribunal for military justice in the Army, that theory becomes virtually immaterial in the light of the facts during the period of the war. The state of things supposed by critics to exist simply does not exist. Virtually the recommendations of the Judge Advocate General are given practical effect in the same manner as the trial courts in civil justice give effect to the mandate of the supreme court of the State.

(*b*) *The question of legal theory.*—The question of legal theory, stated concisely, is this: Is the Judge Advocate General's ruling mandatory, like that of a supreme appellate court, with the effect of compelling the reversal or correction of a court-martial judgment founded upon legal error? Or is it only recommendatory, in that the commanding general or the President, as the case may be, is not bound implicitly to follow and give effect to the ruling?

The question was first presented to this office, during the present war, in October, 1917, in the now celebrated case of the "Texas mutineers" (C. M. No. 106663, tried at Fort Bliss, Tex., in September, 1917). In this case certain sergeants, having been ordered under arrest by a young officer, for a very minor offense, were afterwards, while still under arrest, directed to drill; but, as the Army Regulations, properly construed, do not authorize noncommissioned officers to be required to attend drill formations while under arrest, the sergeants declined to drill as ordered; for this disobedience they were found guilty of mutiny and sentenced to dishonorable discharge and imprisonment for terms of between 10 and 25 years.

Now, it may be at once and unreservedly admitted that this was a genuine case of injustice, and that the injustice was due to an overstrict attitude of military officers toward discipline; for it is conceded by all that the young officer who gave the order to drill was both tactless and unjustified in his conduct, and it is conceded that the commanding officer who reviewed and

approved the sentence was a Regular Army officer of long experience, who failed to appreciate the justice of the situation. That this case illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice is plain enough. But that it indicates any general condition can not for a moment be asserted. Moreover, this very case serves also to illustrate the essentially law-enforcing spirit which dominates in the office of the Judge Advocate General. The impropriety and illegality of the sentence in this case was immediately recognized when the record arrived in the office for review. An opinion was prepared pointing out the irregularity and injustice and directing that the findings be set aside. But the legality of such a direction was questioned, in the face of a ruling by the Attorney General of the United States, many years ago, that a sentence of court martial, once executed, can not be set aside even by the President himself. This raised the general question of the authority of the Judge Advocate General not merely to recommend for clemency (which would not have been an adequate redress for the convicted men in this case), but to direct the setting aside of the findings, in a judgment of a court-martial, for legal error, where the sentence had been already executed (namely, in this case, the sentence of dishonorable discharge).

The Secretary of War having sustained the doubt as to the authority of the Judge Advocate General to take such radical action, clemency was extended by the President, releasing the men from confinement, and restoring them to duty, within about three months from the date of their conviction. At the same time a new measure was adopted by the Secretary of War, in the shape of General Order No. 7, War Department, 1918, taking effect February 1, 1918, which prevented the recurrence of such instances, by directing that the commanding general, upon confirming a sentence of death or officer's dismissal or dishonorable discharge, should suspend the execution of the sentence, pending a review of the case in the office of the Judge Advocate General. Thus immediate measures were taken, to go as far as could be gone under the law as conceded on all hands, to prevent the recurrence of the situation presented in the Texas mutiny case.

It would be out of place here to set forth at length the arguments pro and con upon this question of legal theory. The basic statute denning the powers of the Judge Advocate General in respect to courts-martial judgments dates from 1862, and provides (U. S. Rev. Stat., sec. 1199) that "the Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial," etc. This word "revise" was construed by the senior officer on duty under me, when dealing with the Texas mutineers' case (above cited), to signify a complete appellate authority empowering the Judge Advocate General to correct and, if appropriate, to set aside, reverse, and annul a court-martial judgment which involved some legal error. But this construction of the statute could not be accepted by me. One reason was that for 55 years my predecessors in office, beginning with Judge Holt, in Lincoln's administration, had failed to advance any such construction enlarging their powers, and that a decision of a Federal court in 1882 had expressly repudiated the propriety of such construction. A second reason was that the assumption of such a power by this office under that statute would equally operate to control not only commanding generals of a division or department but also the President, as Commander in Chief, in those cases where he has the reviewing authority under the forty-eighth article of war, and thus would render the Judge Advocate General virtually a supreme military tribunal independent of the President himself; the ultimate control of the discipline of the Army would become vested in the Judge Advocate General. A third reason was that even the President himself does not under the existing law possess such a power to set aside and annul a sentence of a court-martial when once it has been executed, the absence of such a power in the President having been constantly maintained in a long series of opinions by the Attorneys General of the United States, beginning with Caleb Cushing in 1854. (6 Op. A. G., 514; 10 Op. A. G., 66; 15 Op. A. G., 290; 17 Op. A. G., 303.) It would thus be anomalous and extraordinary to suppose that the Congress had intended to vest the Judge Advocate General with a supreme authority which they had not seen fit to grant to the President himself, the President being the "natural and proper depository of appellate judicial power" for the Army, as pointed out by William Wirt when Attorney General in 1818. Such was the issue of legal theory, and such were the controlling reasons forcing me to refuse to accept the construction of Revised Statutes, section 1199, which would vest that extraordinary power in my office.

But the lack of that power lodged somewhere, and most preferably in the President himself, was certainly to be regretted. The General Order No. 7, effective February 1, 1918, and drafted at my instance and in my office in December, 1917, virtually prevented the recurrence of injustice in most cases by requiring the reviewing authority to suspend execution of the sentence pending the review in my office. But for cases that had occurred prior to that date, and possibly for other occasional cases, a more radical remedy was needed—for example, in the above-cited case of the Texas mutineers, for whom the record of dishonorable discharge remained perforce unrevoked, although they had been already released from confinement and restored to duty.

I was ready and anxious to see the existing law so amended as to remedy this defect by a grant of power from Congress to the President. Far from opposing such remedy, I took prompt measures to secure it. My only negative attitude was to oppose the assumption of that power by myself, through mere construction, sudden and revolutionary, of a statute never before deemed to bear such interpretation.

This attitude on my part has been subjected to the most unwarrantable distortion in recent discussion, and I am therefore obliged now to place before you the facts that (as I hope) furnish my vindication.

(*c*) *The use made of the foregoing controversy.*—It has been publicly alleged, first, that I was opposed to the correction of this admitted defect in existing law, and, secondly, that I carried my opposition so far as to secure the revocation of the appointment of my senior officer as Acting Judge Advocate General because of his championship of the view which I opposed.

On the first point, a brief reference to documents long in print will supply the instant refutation. In January, 1918, you yourself, having agreed with my construction of the statute, and having concurred in the view that the situation required remedy, sent a letter, dated January 19, to the chairmen of both the Senate and House Military Affairs Committees, transmitting a bill S. 3692, H. R. 9164 (drafted in my office), amending the section of the Revised Statutes in question so as to enable the President, advised by the Judge Advocate General, to reverse or modify findings and sentences of courts-martial and, in general, to cure the existing defect of power. On February 5, 1918, I testified fully in support of the bill at a hearing before the House Committee on Military Affairs (printed as "Hearings before the Committee on Military Affairs on H. R. 9164," Feb. 4, 5, 22, 1918). During the year that has elapsed since the presentation of that bill neither the Senate nor the House has seen fit to take action upon it. So far as I am informed, it was never even reported out by either committee. I think, therefore, that in mere justice to myself I am entitled to point out that the responsibility for any injustices that may have occurred in the administration of military justice since February, 1918, and the inability to correct injustices prior to that date, due to the defect of appellate powers here in question, can not be laid at the door of the Judge Advocate General.

In January of the present year, however, was introduced a new bill, both in Senate and House, S. 5320 and H. R. 14883 (Cong. Rec., p. 1988, Jan. 23), which again proposed to correct the defect already described, but this time by vesting in the Judge Advocate General (sec. 8) this power to disapprove the whole or any part of a finding or sentence of a court-martial. The expedient proposed in this measure, viz., the grant of power to the Judge Advocate General (not the President), is identical with the construction of Revised Statutes, section 1199, urged by the senior officer on duty in my office in November, 1917, more than a year before. And speeches were now heard on the floor of Congress lamenting the errors due to the defective military law, urging the passage of this bill, and reflecting on the negligence of the War Department in failing to administer complete military justice. I am here concerned only with pointing out, in respect to this particular and conceded defect, that the responsibility surely does not lie with either yourself or myself, for the passage of the earlier bill, S. 3692 and H. R. 9164, introduced just one year before, in January, 1918, would have rendered needless either the bill or the discussion of January, 1919.

As to the second point: I said above that the bill of January, 1919, proposed to lodge this appellate power not in the President but in the Judge Advocate General, exactly as maintained by the senior officer above referred to, in November, 1917, and as repudiated by me at that time. This officer in a letter dated February 17, 1919 (Cong. Rec., p. 3982), Feb. 19), has now attempted to place both you and me in the position not only of having opposed his efforts to correct

the defect of the law but even of concurring to cause him to be "relieved of any duties in connection with the administration of military justice," because of his efforts to reform the law.

It is unpleasant to have to defend oneself against such a charge, because to set forth the facts as they were must involve the revelation of a discreditable course of conduct in an officer whose abilities had heretofore possessed my entire admiration and personal confidence. Summarizing the facts as they appear of record, they are these: In October, 1917, I was dividing my time between the duties of Judge Advocate General and Provost Marshal General, usually spending the evenings and often other parts of the day at the former office. On November 3, 1917, the officer in question forwarded to me a memorandum formally superscribed, "Memorandum for Gen. Crowder," and containing the following passage:

"I am at times considerably embarrassed, and besides the transaction of public business is, I think, somewhat impeded and confused by the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of the Provost Marshal General, the public conception being that you are, as you legally are, the head of both offices, as in fact you are not. * * * I ought to be designated in orders by the Secretary of War as Acting Judge Advocate General during your practical detachment from the office."

The reference here was to Revised Statutes, section 1132, which authorizes the President "during the absence of the chief of any military bureau" to empower "some officer of the department or corps whose chief is absent to take charge thereof." The letter continued:

"I believe that the conception which the service has of your relation to both offices has succeeded in minimizing the importance of each office and that this has resulted already in considerable disadvantage to yourself and has resulted in no advantage to me. I submit this matter to you wholly disinterestedly personally, but with the absolute conviction that the order ought to issue. If the suggestion should be agreeable to you, I should ask you to join in the memorandum to the Secretary of War asking for its accomplishment."

I am expressing it mildly when I say that the conviction thus communicated was a total surprise to myself. Its formal manner of transmission, when a personal visit from an adjacent room would have sufficed to open the matter frankly and naturally, gave me the impression of being virtually charged with a neglect of duty which others had observed but of which I was myself totally unaware, and showed me that I was hardly in a position to pass an unbiased judgment upon the propriety of my being relieved from titular charge of the office of the Judge Advocate General pursuant to the statute. I therefore resolved, without personal protest or even argument, to leave the matter entirely in the hands of yourself, the natural judge of the proprieties. My reply of November 4 read:

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

and closed with a simple sentence disclaiming knowledge of any supposed embarrassment to public business as alluded to. No further communication passed between us nor between the officer in question and the Secretary of War, for it will be noted that both his original proposal and my reply were expressly directed to his taking up the matter "directly with the Secretary of War." But on November 6, two days later, the officer presented in person to the Acting Chief of Staff a memorandum containing a draft order for his own designation, under Revised Statutes, section 1132, as Acting Judge Advocate General, and asking that the order "be published immediately." This memorandum began: "Doubtless the Judge Advocate General of the Army is 'absent' from this office in the sense of 1132 Revised Statutes, and has been so absent since I have been here in charge," and it ended thus: "I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention." The Acting Chief of Staff, taking this memorandum at its face value, corroborated as it was by certain representations from the officer, which raise a further question of veracity, on the same day made an order designating the officer as Acting Judge Advocate General; but this order was marked for suspended publication until December 9. Meanwhile neither the order itself nor any information about it from the officer himself or from any other officer was brought to the notice of yourself. On November 17, of your own motion, you addressed to me a personal letter, expressing your disinclination that I should permit my duties

as Provost Marshal General to encroach increasingly on my time, and asking whether it would be possible for me to allot my time more liberally to the office of the Judge Advocate General. On November 18, I replied, pointing out that the revision of the Selective Service Regulations, pending during October and November, was now completed and that thereafter I should expect to divide my time in even shares between the two offices. On the same day, November 18, your attention was first called to the unpublished order of November 6, above mentioned, the occasion being the presentation to you by that officer of a list of proposed appointees as judge advocates. Your inquiry of him whether I had been consulted upon those names evoked from him the revelation of the existence of that order, which had been obtained by him under the circumstances above mentioned. Neither you nor myself had up to that time been made aware of its existence. Contrary as it was to your own expressed desire in your letter of November 17 to myself, you promptly directed The Adjutant General to revoke it, and that revocation appears of record in the file of The Adjutant General, dated November 19, the next day.

This chronology, taken from each day's records, makes it plain that the revocation of the order was due solely to the fact that the order was obtained surreptitiously without your knowledge and was contrary to your express and recorded intention; that you revoked it the moment you became aware of its existence; and that I myself was not aware of its existence until you informed me.

Meanwhile, however, the memorandum of the officer in question, arising out of the Texas Mutineers' case, and claiming extraordinary powers for the Judge Advocate General, had been prepared by him in this office, but without bringing it to my knowledge. It bears date of November 10, but in the officer's own handwriting; and there is nothing to show when it was transmitted to your office; for it never passed through my hands, nor did it ever come to my knowledge, in any form, nor was the existence of such a memorandum even suspected by me, until after the completion of the entire chronology above set forth. It was on the evening of Friday, November 23, four days after the above order had been revoked by you, that I first received from your hands the memorandum in question, with the request to consider its legal argument for the power therein claimed. During the days of November 24, 25, and 26 I proceeded with a study of the precedents, calling two skilled judge advocates to my assistance, and on Tuesday, November 27, a brief, so dated, was filed with you by me. This brief exposed the legal fallacies of the above officer's memorandum, pointed out its suppression of material and conclusive authorities to the contrary, and expressed the view to which I have ever since adhered, viz, that the power did not exist under present law, and that the only source of remedy would be a grant of power from Congress. On the same day, November 27, you expressed assent to the views set forth in my brief; and your memorandum concludes: "A frank appeal to the legislature for added power is wiser." This concurrence of views between yourself and myself was reached, I note, on November 27, and not before then.

It is a peculiar coincidence that the above officer's surreptitious act of securing the order designating him as Acting Judge Advocate General took place on November 6; that his brief claiming extraordinary judicial powers for the Judge Advocate General (which he had been preparing, as his letter states, since October 18) was withheld until at least a week later than the signing of the order which placed him in the position, as he supposed, to exercise that extraordinary power; and that although the order itself which placed him in office was so managed as to be kept from your knowledge, yet the memorandum which would have added that power to his office was handed directly to you (not to me), and at a time when you still supposed that I was the incumbent, and not he. The coincidence is so remarkable than an inference of deliberate and ambitious planning for personal power, and only for personal power, is unavoidable.

At the risk of being tedious, I have thus set forth from the records the chronology of this episode; for thus alone could these recent public insinuations—reflecting both on your supposed conduct and on mine—be conclusively dispelled. It must now be clear to all that the actual reason for your revocation of the order designating that officer as Acting Judge Advocate General was that it had been surreptitiously obtained and was contrary to your initial and constant intention; that the memorandum claiming for the Judge Advocate General an unauthorized power to correct court-martial errors was not brought to my notice until four days after the above order had been revoked; that

your consensus with me as to the unsoundness of that claim was not reached until a week subsequent to that revocation; that therefore the revocation of that order could not possibly have been motivated, either in your mind or in mine, by our failure to accept his views on the subject of the legal powers of the Judge Advocate General; and, in conclusion, that the assertion or insinuation that his appointment was revoked because of your and my opposition to his views as to the proper method of improving the law, is baseless and unjust to us both.

I must, however, continue for a moment on this subject, because the same officer, in his letter of February 17, 1919 (Cong. Record, p. 3983, Feb. 19), makes a second charge of a similar sort, which is not only equally baseless but reveals on his part the same singular methods of manipulation. In that letter, setting forth his continued efforts "to break up such a static and intolerable legal situation," he continues:

"In September (1918), upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, in our forces in France which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subjected to question."

The reference is to General Order No. 84, dated September 11, 1918, amending Section II of General Order No. 7, dated January 17, 1918, the latter being the general order, above referred to, which aimed to avoid the recurrence of such dilemmas as that of the Texas mutineers' case, so far as the Judge Advocate General's powers permitted. The facts are in the first place, that this amending General Order No. 84 was also obtained surreptitiously by the above officer; but in the second place, that it has not been opposed by Gen. Pershing. A brief statement will suffice to show this. The original General Order No. 7, in its Section II, applying to the branch Judge Advocate General's Office in France, directed that office to "report" to the reviewing authority any legal errors, "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 amending General Order No. 84 substituted for the above clause this sentence: "Any sentence or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General (in France)." This amendment was prepared by the officer above referred to. Obviously, its language embodies precisely the grant of mandatory appellate power in the Judge Advocate General for which he had been contending in his brief of November, 1917—a contention which was at that time explicitly repudiated by both yourself and myself; and since February, 1918, the bill above mentioned, curing the defect of law, and granting the power to the President, was still pending in Congress.

Since his return from France in July, 1918, this officer being senior on duty in my office, had the actual supervision of all matters of military justice; the selective draft then requiring my most urgent attention, and the volume of rulings coming from the 50 officers of the military justice division being left entirely for the final signature of the officer in question. He thereupon prepared this amending order, embodying the fundamental principle already expressly repudiated both by you and by me, and took it, not to yourself nor to myself, but directly to the office of the Chief of Staff. The radical nature of the proposed change of rule in this respect was not called to the attention of that office; rather was it represented as involving merely verbal improvements. It issued on September 11; and amidst the mass of other printed general orders it never came to either your attention or mine until recently. Here, then, was a second attempt to introduce into our overseas practice, surreptitiously, the same unsound assumption of power which had been already squarely rejected nearly a year before.

This sudden and inconsidered introduction of such a fundamental novelty was indeed calculated to evoke objection from the reviewing authorities in France, more especially from a commander in the field who had been accorded in unprecedented fashion that independence of military action so wisely exercised by Gen. Pershing. The unwisdom of this act, added to its surreptitiousness, was under the circumstances extreme. But it is not true to assert that the order "is now being opposed by the commanding general American Expeditionary Forces." Had it been opposed or protested this attitude would have

been natural enough. On the contrary, no word of such opposition or objection is anywhere on record in my office, nor can any trace of it be found. The only document in which is found any objection on a point of law, on the part of the commanding general in disagreement with the Acting Judge Advocate General in France, is a memorandum of November 14, 1918, raising a question under the thirty-seventh article of war. That article, which applies equally at home and in the field, lays down the usual modern rule forbidding that an erroneous ruling on evidence or procedure shall be ground for disapproval unless it affects the substantial rights of the accused "in the opinion of the reviewing or confirming authority"; and the contention of Gen. Pershing's judge advocate was that under this statute only the reviewing authority can pass upon the question of insufficiency of evidence as a substantial error There is no mention of General Order No. 84 in the entire document, nor any reference to its contents. Neither in this nor in any other document yet received from Gen. Pershing's headquarters is there any opposition to General Order No. 84. The insinuation that here again the Army—this time the Army in France—is opposing a beneficent measure of reform in military law is baseless.

The foregoing two instances of a groundless charge that I have opposed the reforming efforts of this officer are intimately connected by him with a third instance equally groundless, in which the misrepresentation has been so significant to the public that I must in this place record its refutation. In the same letter of this officer, published in the Congressional Record, February 19, last, page 3983, column 1, the officer is supposed to be exonerating himself from criticism made on the floor of Congress that he "should have gone directly to the President" when balked in his efforts made within the department. Purporting then to explain the "impossibilities of such a course," he gives as an illustration his action when four sentences of death were pending in the department for confirmation and when this office had recommended execution: "I went to the head of the office," meaning myself, of course, presumably, "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." The story as thus told is plausible, and purports to condemn the superior authorities of the War Department, and implies that the subsequent commutation was obtained solely by this outside intervention of a Member of Congress. But a simple perusal of the official files now lying before me demonstrate that the charge is a mere fabrication and a cruel one.

These cases of the sentence of death had been pending during March, 1918, in this office. These several officers in the Division of Military Justice had, after scrutiny, found no legal error, and the record in that condition, approved by the very officer who now makes this charge, had been placed in my hands. In the meanwhile, I submitted it informally to more than one other officer, including a judge advocate, not at that time attached to this office, who had taken part in the 1916 revision of the Court-Martial Manual in the chapter upon procedure, witnesses, and evidence, and whose name is well known to the legal profession as an authority on the subject of evidence; the memorandum of the latter disclosed no reason to doubt the adequacy of the proof of the offense. Meantime, also, I had directed further inquiries to be made in my office as to the practice in respect to death sentences for the offense of sleeping on post in the theater of war; for two of the sentences were imposed for the offense of sleeping on post.

On April 5, 1918, my memorandum transmitted the four death cases to Gen. March, Acting Chief of Staff; the memorandum including this statement, "There is a very large question in my mind as to whether clemency should be extended." and calling attention to the express request of the commander-in-chief in France and of his judge advocate (already alluded to above in this letter), that the death sentences should be confirmed. On April 15 the senior officer on duty in my office (the one now making these charges) presented a memorandum to me, at my request, examining the four cases in detail. In the two cases of sentences for refusal to drill this memorandum

refers to the plea of guilty put in by the accused; then, treating together the two cases of Sebastian and Cook, sentenced for sleeping on post, the memorandum continues: "The death penalty in each of these cases was awarded for sleeping on post, after a plea of guilty." The memorandum goes on: "These cases were not well tried," setting forth the inadequate composition of the court; "those 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 meant the forfeit of his life." This memorandum of the officer in question was dated April 15. It was addressed personally to me in rough draft, and was not such a document as is usually prepared, in final form, for transmission beyond the immediate chief. On the very next day a document dated April 16, signed by me personally, was filed with the Chief of Staff; it begins: "Since our interview on the four cases from France * * * my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should be invited." The memorandum then proceeds in the fourth and concluding paragraph as follows: "Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we were called upon to act were not well tried." The memorandum then continues, using almost literally the language of the above officer's memorandum: "Each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made a fight for his life. Each of the men was defended by a second lieutenant who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty." It will be observed that this language is almost a literal reproduction of the language of the above officer's memorandum above quoted and filed with me on the very day before. On the very next day, viz, April 17, the Chief of Staff writes a memorandum to the Secretary of War.

The notable fact of chronology thus is that within 24 hours after receiving the memorandum of the senior officer on duty under me, in opposition to the confirmation of these sentences, I myself drafted and sent to the Chief of Staff a memorandum covering the very points mentioned by the above officer and using, in large part, the identical language. Furthermore, within 24 hours more, or within 48 hours after memorandum in question was dated, the Chief of Staff had filed a memorandum with the Secretary of War. On May 1 the Secretary of War forwarded the records to the President, recommending clemency, and on May 4 the President remitted, by pardon, the sentence of death for the two men sleeping on post and reduced the sentence of the other two men to three years (for refusal to drill), thus following exactly the recommendation of the Secretary of War, and explicitly thanking the Secretary for his careful presentation of the cases.

Whatever, therefore, may have been said to the President during this interval by the Member of Congress, it is obvious that the President's action was taken as the culmination of a careful study of the case within the department and of a series of memoranda initiated in my department and following their due course to the Secretary of War; and that this conclusion was the result of the united efforts of all the War Department officials concerned with that subject in which the rôle of the officer in question was only a minor one, and was at the beginning far from being a humane one.

But the specially notable fact is that I not only incorporated and presented the ideas of the officer in question, but that I was unfortunately thus led into an important blunder of fact through my reliance upon it. In paragraph 4 of my memorandum I stated, as a ground for doubting the thoroughness of the trial, "in each case the accused was allowed to make a plea of guilty." The Chief of Staff, in his memorandum opposing the extension of clemency, pointed out the blunder, as follows: "Referring to paragraph 4 of the memorandum of the Judge Advocate General, I do not find that his statement, 'I regret exceedingly that in each case the accused was allowed to make a plea of guilty,' is a fact; the record shows that two of these men, namely, Pvt. Sebastian and Pvt. Cook, did plead not guilty, and in the cases of the other two men, Pvts. LeDoyen and Fishback, although the accused pleaded guilty, the court proceeded to take evidence in the cases in spite of that plea." The significant thing about this error in the officer's memorandum was that I, relying implicity on his memorandum, was led to repeat the same error in my own memorandum for the Chief

of Staff, thus furnishing the latter the opening for his destructive criticism above quoted.

It is now apparent that the statement in the officer's above-quoted letter of February 19, "discovering that these memoranda had not been presented to the Secretary of War," is not only a gross misrepresentation, in that the very ideas and language of his memorandum were incorporated in my own memorandum, but that this document went forward within 24 hours to the Chief of Staff and within 48 hours to the Secretary of War, and that these documents were officially on file and could have been inspected in the file at any moment; so that the officer in question must have gone to the Member of Congress without any attempt to discover the facts; and one year later he has published far and wide a defamatory statement which is contrary to facts as they stare out from the face of official records.

I confess myself unable to comprehend such methods of manipulation in this agitation. Certainly, to cope with them would be endless, and I shall not attempt to continue the refutation of any others of the specific and completely groundless charges reflecting upon my supposed personal attitude.

I close this part of my comments, regretfully entered into by me, with the observation that neither in these nor in any other aspects of this issue of fundamental legal principle has there been exhibited at any time any opposition on my part to measures of real improvement in military law or procedure. The issue here was simply whether the incumbent of my office, whether acting ad interim or for the four-year term of appointment, should be vested with a power which belongs, if anywhere, in the President, and which Congress alone can grant to him. Neither ambition nor any other motive will ever induce me to assent to an illegal and unwise assumption of official power. Apart from this single instance, I have never opposed any action or proposal of the officer in question directed either to the improvement of military justice in general or to the doing of better justice in an individual case; and this for the simple reason that he has never made any such proposals to me. Except for the period of his absence in France for about 90 days in April–July last, he has been, since August, 1917, the senior officer on duty in my office, with ample opportunity to introduce general improvements of procedure or to remedy individual cases; and the moral responsibility for not initiating whatever might have been done and was done lies therefore upon him for the greater part of the war period. How ample was that general opportunity to act, unchecked either by me or by yourself, may be plainly seen by the manner in which General Order No. 84, above mentioned, was promulgated in September, 1918. And how little he did in fact avail himself of individual opportunities may be inferred from the circumstances that in the three cases recently cited on the floor of Congress as cases of excessively severe sentences in which this office is said to have harshly denied an application for mitigation by clemency (C. M. Nos. 113076, 115506, and Robbin's case), the document containing the refusal to recommend clemency bears in each of the three cases the signature of that officer himself.

I would have preferred to be spared the recital of these facts. But even as it is I have refrained from the disposal of other specific criticisms, equally groundless, in which personal mention would have been necessary. I have said no more than seemed unavoidable in refuting these unjust inuendoes, now so widely spread that it is perhaps impossible for the truth ever to overtake them.

(III). *Recommendations.*—I have not made my position clear, Mr. Secretary, if I have given the impression that in my opinion there is nothing to change or to improve in our system of military justice. My chief concern in this letter has been to remove the slurs that have been cast upon the whole system as such; to refute by plain facts the extreme and exaggerated criticisms that are calculated to undermine, unjustly and needlessly, the public confidence in that system; and to redeem, if I can assist in doing so, the honor of that admirable band of conscientious and able officers who have been called to share in its administration during the last two years. I would like the American people to know confidently and take pride in the fact that we possess a genuine and adequate system of military justice, founded upon the Constitution of our forefathers and the acts of Congress of our contemporaries—administered in the trial courts by officers required to be familiar with it—and thoroughly scrutinized in its appellate stages by professional lawyers whose sole object is to insure conformity to the requirements of law and to secure the just protection of the accused.

That military justice can not be improved in any details could certainly not be maintained by anyone. But neither does anyone maintain that civilian jus-

tice is perfect. The experience of the last two years, when carefully studied, will doubtless reveal wise measures by which improvements of the military code can be secured. The same is true of each one of our institutions, civil as well as military, that has passed through the crucible of war time. But it will first be necessary to compare divergent opinions, based on differences of local experience, and of important policies. At the present moment there lies before me a voluminous report, in manuscript, representing the collated result of suggestions of improvement, prepared at my request by each one of the officers on duty in my office, as based on his own observations and experience. In its final form this report will be of the greatest value.

Meanwhile, as it is never my preference to remain content with a defensive or critical attitude, but rather to offer constructive measures where apt and necessary, I venture to select a few proposals, representing those which in my judgment offer the greatest promise of benefit and require the least assistance from statutory change. I refrain from explaining at length in this letter the effect of each proposal; it will be fairly obvious to one familiar with the military system.

The specific proposals are as follows:

1. (*a*) By general order amend paragraphs 75 and 76 of the Manual of Courts-Martial relating to submission and investigation of charges, so as to require the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs either to personally conduct the investigation or else to depute it to an officer of experience, preferably not below the rank of captain, and to confront the accused with witnesses and prepare a summary of the evidence and settle upon it in agreement with the accused, substantially as in the British practice.

(*b*) Amend paragraph 78 of the Manual "Determination of proper trial court" by a general order providing in substance that the officer exercising court-martial jurisdiction shall not order a case to trial until he has received and considered the written opinion of his staff judge advocate or of this office.

The intent of this proposal is, by laying down with greater particularity the duties and responsibilities of investigating officers and of staff judge advocates, to guard against any possibility of (*a*) hasty, ill-considered, or arbitrary action by any commanding officer, (*b*) ordering any person to trial without full and careful, as well as impartial, investigation of the case, and until reasonable probability of his guilt has been shown, or (*c*) trivial cases going before general courts; and also to insure adequate preparation in all cases ordered to trial.

2. (*a*) Amend the forty-fifth article of war by striking out the words "in time of peace."

(*b*) By proper amendment of the Articles of War, so change the composition and increase the importance and the powers of the special court-martial, that (like the British district court-martial) it may award confinement up to two years with accompanying forfeitures of pay and allowances; and may adjudge a suspended sentence of dishonorable discharge, to be suspended until the soldier's release from confinement.

(*c*) Provide by general order further amending the seventy-eighth paragraph of the Manual for Courts-Martial by way of caution to convening authorities, as an expression of the policy of the Government, a direction, substantially in the language of the general order issued January 22, 1919, that "Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the one hundred and fourth article of war would be under all circumstances of the case clearly inadequate."

I believe the changes included in this proposal would tend powerfully to increase the number of special courts-martial, and correspondingly decrease the general courts, as in the British Army; and thereby automatically to reduce the possibility of unduly severe sentences. Striking the words "in time of peace" out of the forty-fifth article of war would enable the President to fix the maximum limits of punishments, in war as well as peace.

3. Recognizing the need, in the trial of serious, difficult and complicated cases of an impartial legal adviser to the trial court, and recognizing also the difficulties involved in the institutions of so far-reaching a change in our system of court-martial procedure, I propose, in order to try out the plan—

(*a*) A general order, modeled after the practice of the British field general court-martial, of appointing an especially qualified member on the court who is required to be present at the trial of all serious, difficult, and complicated

cases, this member to be a member of the Judge Advocate General's Department, if one be reasonably available.

4. Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War January 19, 1918, which covers the ground more completely and more flexibly than the now pending bills, and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact."

This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters, the Judge Advocate General.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

EXHIBIT 73.

EXTRACT FROM ADJUTANT GENERAL'S CABLEGRAM NO. 663, DATED JANUARY 20, 1918.

Paragraph 3. Order made directing Brig Gen. Walter A. Bethel, judge advocate, assume charge of branch office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

EXTRACT FROM ADJUTANT GENERAL'S CABLEGRAM NO. 666, DATED JANUARY 20, 1918.

Paragraph 1. General Orders, No. 7, these headquarters, publish courts-martial rules of procedure prescribed by President, effective February 1, an outline of which is furnished for your information. Rule 1: Sentence of death or dismissal of officer confirmed by commanding general of territorial department or division not to be executed until review of record in the office of Judge Advocate General or branch thereof. Action to be entered in record and to conclude with recital that the execution of sentence will be directed in orders after the record of trial has been reviewed by Judge Advocate General and that jurisdiction is retained to take additional or corrective action prior to or at time of publication of general court-martial order in case. Rule 2: Sentence of dishonorable discharge not intended to be suspended will not be ordered executed before review of record, as in rule 1, and action to conclude with same recital. Rule 3: When record of trial in cases covered by rules 1 and 2 is reviewed in the office of Judge Advocate General or branch thereof the reviewing authority will be informed as to the legality of his proposed action. Errors and omissions which admit of correction will be indicated. Proper disposition of case suggested. Rule 4: Delay in execution of sentence by reason of these rules to be credited on any term of confinement or imprisonment imposed. Rule 5: Procedure prescribed in rules 1 and 2 to apply to commanding generals in the field when the Secretary of War so decides and orders. Rule 6: Authorizes the Secretary of War to establish branches of the office of Judge Advocate General for review of courts-martial records. Section 2 of the order reads as follows: 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 Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in French, 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 reviews thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

BIDDLE.

EXHIBIT 74.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, February 13, 1918.

From: The Office of the Judge Advocate General.
To: All department and division judge advocates.
Subject: General Order No. 7, War Department, 1918, its purpose, procedure thereunder, etc.; suggestions as to office administration.

1. The procedure under General Order No. 7, War Department, 1918, was established to enable the War Department to do substantial justice in those cases in which it is found, on reviewing, in this office, the records of trial by general courts-martial, that persons have been improperly or insufficiently charged with, or convicted on insufficient or illegal evidence of, serious crimes or offenses, and dishonorable discharge or dismissal has already become an accomplished fact. Cases of this character are not numerous, but a case occasionally arises in which remedial action by way of remission of sentence with an offer of restoration to duty or reenlistment is, at best, but a futile attempt to do justice so long as a discharge or dismissal which has been finally executed can not be reached and set aside or reversed, but must remain standing forever against the record of the accused. Cases where the death sentence is imposed also fall within this class. Great embarrassment would result if it should be held that a death sentence was illegal after the same had been executed.

The necessity for a new procedure growing out of the circumstances indicated, it goes without saying that it was not intended by the publication of General Order No. 7 to magnify or increase the importance of this office or decrease the importance or responsibility of department or division judge advocates.

2. In order to bring about the necessary cooperation in the enforcement of General Order No. 7, War Department, 1918, the following suggestions are made for your information and guidance:

(*a*) In all records of trial by general court-martial falling within the purview of General Order No. 7, War Department, 1918, to wit: Cases involving a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man, in which it is not intended to suspend the dishonorable discharge, the department or division judge advocate should prepare a review of the evidence in the case. This should be as brief and concise as possible, but should outline clearly the evidence upon which the conviction must rest. A copy of this review or summary of the evidence should be attached to the record to which it pertains and forwarded for file therewith in this office.

(*b*) In all cases in which the execution of sentence is deferred until the record of trial is reviewed in this office, judge advocates, prior to forwarding the record of trial, will take the necessary data from the same, draft the general court-martial order, give it the date of action by the reviewing authority, and, upon receiving notice from the office of the Judge Advocate General, or any branch thereof, that the record is legally sufficient to support the findings and sentence, cause the general court-martial order to be published in the usual form. This will make unnecessary the return of the record.

(*c*) The action of a reviewing authority upon a record of trial which is to be forwarded to this office for review before the execution of sentence should be entered in substantially the following form, the necessary changes being made to conform the action to the facts of each particular case:

——— ——— (Place and date.)

In the foregoing case of ——— the sentence is approved (but the period of confinement is reduced to ———). The execution of the sentence will be directed in orders as of this date 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. Jurisdiction is retained to take any addition or corrective

action that may be found necessary prior to or at the time of the publication of the general court-martial order in this case.

——— ———, *Commanding.*

(*d*) When the record of trial in any case is found legally insufficient to support the findings and sentence, the record will be returned for the necessary corrective action, which will be entered on the record in substantially the following form, the necessary changes being made to conform the action to the facts of the particular case:

——— ——— (Place and date.)

In the foregoing case of ———, under the jurisdiction retained in the action dated ———, the following corrective action is taken:

(Action.)

As thus modified the sentence will be duly executed. ——— is designated as the place of confinement. (Or such final order by way of disposing of the case as the action may require.)

——— ———, *Commanding.*

(*e*) When the additional or corrective action outlined above has been taken, the necessary changes will be made in the general court-martial order prior to the publication of the same. It is needless to say that any prior action which has been changed or nullified by subsequent action will not be included in the general court-martial order as published.

(*f*) The letter of advice sent from this office will give in each case the court-martial record number given the record upon its receipt in this office. It is desired that the printed copy of the court-martial order be made to carry at the end thereof, in brackets, the number reported by this office, thus: (J. A. G. O. No. ——.) Five copies of the general court-martial order in each case will, when published, be forwarded to this office as promptly as possible.

3. The following suggestions are made with reference to the question of office administration. It is hoped they may be helpful and that their adoption will bring about greater uniformity in the administration of military justice:

(*a*) Judge advocates should not recommend the reference of charges for trial by general courts-martial until thorough investigation has shown that the charges as laid can be substantiated by sufficient legal evidence.

(*b*) They should endeavor in every proper manner to limit the number of trials by general courts-martial. No case should be so tried where the offense committed can be adequately punished by a minor court or by administrative punishments imposed under authority of the 104th Article of War.

(*c*) They should also aim to prevent the trial of cases whenever it appears on investigation that the offender is lacking in mental responsibility. In all cases where it appears probable that the accused is lacking in physical, mental, or moral equipment as an efficient fighting man, the psychiatrist assigned to duty with their commands should be called into consultation. Disposition of the case other than through trial by general court-martial should be made whenever full examination shows this to be proper. Judge advocates should realize, however, that the responsibility for decision in all cases rests upon them and not upon the psychiatrist who may be called into consultation. It should be the latter's duty to advise but not to decide.

(*d*) As the discipline of the various commands improves it may be possible to reduce trials by general courts-martial to those cases in which it is determined by the methods hereinbefore indicated that the accused who is under general court-martial charges is not a desirable soldier and that his further retention in the service is a waste of time, effort, and money.

(*e*) When a record of trial by general court-martial has been received in the office of a judge advocate, it becomes his duty to thoroughly study the case and to recommend such punishment as should be approved. Where the accused has within him the elements of service, the following principles should govern in deciding upon the punishment to be awarded in time of war:

(i) Guard houses are breeding places for crime. They are not designed to foster self-respect. Men should be kept out of them in all cases except where restraint is necessary.

(ii) Time spent in confinement is time lost from training. Our task is to turn out in the shortest possible time the greatest possible number of trained men.

(iii) Whenever and wherever possible, men sentenced to undergo confinement or hard labor should be drilled with their organizations and required to serve punishment when other men are resting or off duty.

(*f*) It is desired that judge advocates make every possible effort to bring offenders who must be tried by general court-martial to trial at the earliest practicable date, to the end that the period between arrest or confinement on the charges and the date of the trial may be reduced to the lowest possible limit.

(*g*) Judge advocates will also expedite in every possible way the preparation of records of trial, their review of the same, and action thereon by the reviewing authority. They will also endeavor to forward records to this office as nearly as possible on the date on which action is taken by the reviewing authority.

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

EXHIBIT 75.

FEBRUARY 20, 1918.

Memorandum for Gen. Ladd.

(Suggested cablegram to Gen. Pershing.)

Recently approved tables of organization provide for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our cable 666. In the event you so desire, Bethel may remain in charge of said branch office and Kreger be detailed on your staff in his stead. Wire your wishes.

_____ _____,
Judge Advocate General.

EXHIBIT 76.

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, February 20, 1918.

Memorandum for the Judge Advocate General.

DEAR GEN. CROWDER: You may recall that about two or three days ago I reported to you the instructions of the Chief of Staff, that before Col. Creager's nomination could be sent in it would be necessary to communicate with Gen. Pershing. As you were familiar with the whole situation I suggested that you prepare a cable, which you stated you would do, provided I would give you the reference to the cable recently sent Gen. Pershing relative to the establishment of a branch of your office in France. I sent you this information day before yesterday, stating that the cable number was our cable 666, and have been expecting to get your draft or a cable from Gen. Pershing, but so far have seen nothing on the subject.

Very truly, yours, LADD.

EXHIBIT 77.

[Extract from The Adjutant General's cablegram No. 816, Feb. 20, 1918.]

Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendation.

[Extract from The Adjutant General's cablegram No. 857, Mar. 2, 1918.]

Paragraph 7. With reference to paragraph 3 your 644. To avoid delay it is desired that you establish a branch office Judge Advocate General's Department in accordance with our 663, paragraph 3, and 666. Lieut. Col. E. A. Kreger has been nominated to the grade of brigadier general and has been ordered to report to you to take permanent charge of this office.

[Extract from The Adjutant General's cablegram No. 663, Jan. 20, 1918.]

Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch of office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

[Extract from Gen. Pershing's cablegram No. 644, Feb. 25, 1918.]

Paragraph 3. With reference to paragraph 2, your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663, of 20th, appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action.

EXHIBIT 78.

WAR DEPARTMENT,
OFFICE OF THE WAR COUNCIL,
Washington, February 28, 1918.

Memorandum for Gen. Crowder:

The following cable extract is furnished for your information:

Cablegram from Gen. Pershing, No. 644, February 24:

"Paragraph 3. With reference to paragraph 2, your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663, of 20th, appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action."

Cablegram to Gen. Pershing, No. 816, February 20:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendations."

Cablegram to Gen. Pershing, No. 663, January 20:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch of office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

W. FESSER,
Major, General Staff, Recorder.

EXHIBIT 79.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 8, 1918.

From: The office of the Judge Advocate General.
To: All judge advocates serving with Expeditionary Forces in Europe.
Subject: Procedure under General Order No. 7, War Department, 1918. Sending of cases to the Acting Judge Advocate General in France.

1. Lieut. Col. E. A. Kreger, judge advocate, United States Army, has been designated as Acting Judge Advocate General for the American Expeditionary

Forces in Europe, under the provisions of General Order No. 7, War Department, January 17, 1918.

Acting under the provisions of this order Col. Kreger will establish an office in France and will advise all judge advocates with our Expeditionary Forces in Europe of the location of such office. Under the said order cases in which the sentences imposed require confirmation by the commanding general of the Army in the field before being executed should be sent to such commanding officer for confirmation before being forwarded to the office of the Acting Judge Advocate General for review. Cases which do not require such confirmation should be forwarded from the headquarters of the reviewing officers direct to the office of the Acting Judge Advocate General.

Any additional advice which may be necessary in order to secure the proper enforcement and operation of General Order No. 7, War Department, 1918, will be issued by the Acting Judge Advocate General for the American Expeditionary Forces in Europe direct to the judge advocates concerned.

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

EXHIBIT 80.

EXTRACTS FROM CABLEGRAM RECEIVED AT THE WAR DEPARTMENT.

LONDON, *March 24, 1918.*

THE ADJUTANT GENERAL, *Washington.*

* * * * * * *

Paragraph 3. For the Judge Advocate General. With reference to your letter February 25, Johnson's promotion along with many others in the various staff departments seems quite out of proportion, and the line and staff officers here feel that such promotions made at home are unfair to men who are serving in France. I have tried to impress this upon the War Department, but the staff departments at Washington evidently continue to press for promotion and men promoted at home are now relatively very far ahead of men serving over here. I hope that the plan proposed in paragraph 1, my cablegram 680, and approved by the Secretary of War will receive earnest consideration and that it will be adopted. This plan will relieve us all of probable equitable commitments to individuals, so many of whom fail to achieve after promotion what was expected of them. I can not too strongly urge the adoption of the plan proposed and think it should apply to all other staffs at home as well as to our forces abroad. In the meantime no further promotions ought to be made at home until the proposed system is adopted or rejected. May I ask that this matter be discussed with Gen. March.

Subparagraph A. With reference to a branch of the Judge Advocate General's office in France to review certain court-martial proceedings after they have been acted upon by the Judge Advocate here, the reason for this is not clear. It submits to review cases [grand jurors] within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the Commander in Chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possible miscarriage of justice would be unfortunate for us and injurious to the morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here.

* * * * * * *

PERSHING.

EXHIBIT 81.

CORRECTION TO CABLEGRAM.

MARCH 28, 1918.

GEN. PERSHING TO THE ADJUTANT GENERAL:

* * * * * * *

Paragraph 3. For Judge Advocate General. * * *

Subparagraph. A. Change sentences "* * * review cases grand jurors * * * in time of peace and is in direct conflict with broad and liberal * * * President's, etc." to read: "* * * review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character President's, etc."

* * * * * * *

EXHIBIT 82.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 15, 1918.

Memorandum for the Chief of Staff:

Subject: The establishment of branch of the office of the Judge Advocate General in France.

1. Herewith is a memorandum from the Judge Advocate General, dated April 3, 1918, occasioned by a cablegram from Gen. Pershing protesting against the establishment of a branch of the office of the Judge Advocate General in France. The cablegram reads:

"Paragraph 3, subparagraph A: With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of Presdent's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here." (No. 779, March 24, 1918).

The Judge Advocate General sets out in sequence communications upon the subject of the establishment of the branch office in question. He first explains General Orders, No. 7, War Department, January 17, 1918, the effect of which is to take from department and division commanders the power of final action in cases where sentences involve death, dismissal of an officer, or dishonorable discharge of a soldier, and to require records in such cases to be examined by the Judge Adovcate General's office, or a branch thereof. In order to expedite matters in France, a branch office of the Judge Advocate General's office has been established in Paris, as directed in General Orders, No. 7.

2. On January 20, 1918, Gen. W. A. Bethel, judge advocate, American Expeditionary Forces, was directed to assume charge of the branch office established in France. On the same date there was cabled to Gen. Pershing a digest of paragraph 1 of General Orders, No. 7, and section 2 of the order was quoted in full. On February 20 Gen. Pershing was cabled in effect, as follows: That it was proposed to promote Lieut. Col. E. A. Kreger, judge advocate, to brigadier general and place him in charge of the branch office of the Judge Advocate General in France, established by General Orders, No. 7. If desired, Gen. Bethel could remain in charge of the said branch and Gen. Kreger detailed on the staff of the commanding general. Recommendation was requested.

Gen. Pershing replied, under date of February 25, that he desired Gen. Bethel to remain on his staff and that so much of the cablegram as spoke of Gen. Bethel remaining in charge of the branch office was not understood, and

that the cablegram of January 20 appeared to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, 1918, just received in the mail; that Gen. Bethel had not established a branch office and would not do so pending further instructions, and in regard to cablegram of January 20 it was desired to know when the officers might be expected who were to establish the branch office, as cases were being held for action.

Paragraph 169, Special Orders, No. 15, War Department, 1918, is, in effect, as follows: That Gen. Bethel would assume charge of the branch of the office of the Judge Advocate General established in France and would perform the duties of Acting Judge Advocate indicated in General Orders, No. 7. It is not understood by the War Plans Division how the cable of January 20 could appear to supersede paragraph 169, Special Orders, No. 15, War Department, 1918.

3. The Judge Advocate General next sets forth the reasons for the issuance of General Orders, No. 7. All that is necessary to say in this connection is that the Judge Advocate General states that "experience during the present war has led to the conclusion that in a substantial number of cases reviewing authorities have approved and carried into execution sentences based upon proceedings which are invalid or which so palpably prejudiced the substantial rights of the accused that the sentences could not be carried into execution without outraging that sense of justice which characterizes the administration of all American law, military as well as civil." He then proceeds to explain how General Orders, No. 7, was intended to prevent such action. The Judge Advocate General states that inasmuch as Gen. Pershing was fully informed of the establishment of a branch office prior to the time the order went into effect, it is not understood why the objection he now raises should have been so long delayed; that it is not believed that the general is fully informed as to the purposes and the function of the branch office in question, and that when he is, he will not persist in the objection which is raised; and the Judge Advocate General recommends the sending of a cablegram to Gen. Pershing worded as follows:

"The order establishing a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriage of justice by assuring that legality without which no serious sentence should ever be carried into execution."

4. The War Plans Division sees no reason why the cablegram as set forth by the Judge Advocate General should not be sent, and inasmuch as it is known that Gen. Kreger is now in France, the War Plans Division is of the opinion that the cablegram should be added to by stating: "It is desired that conference be had with Gen. Kreger."

5. In this connection it may be stated that the War Plans Division is at present considering Senate 3692, which is an amendment to section 1199, Revised Statutes. The effect of General Orders, No. 7, will be considered in the memorandum submitted upon S. 3692.

6. Memorandum for The Adjutant General of the Army attached.

D. W. KETCHAM,
Colonel, General Staff,
Acting Director War Plans Division, Acting Assistant Chief of Staff.

EXHIBIT 82A.

[Third indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
March 28, 1918.

To Brig. Gen. E. A. KREGER,
Judge Advocate, Branch Office Judge Advocate General,
American Expeditionary Forces.

1. The foregoing request to have the branch office of the Judge Advocate General of the Army placed on the mailing list of The Adjutant General of the

Army is forwarded inviting attention to the second paragraph hereon, wherein The Adjutant General states that all War Department publications are supplied the American Expeditionary Forces through the Commanding General Expeditionary Forces.

(Signed) R. K. SPILLER,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE WAR COUNCIL,
Washington, April 19, 1918.

Memorandum for Gen. Crowder:

The following cable extract is furnished you for your information:

Cablegram to Gen. Pershing No. 1135, April 19, 1918:

"Paragraph 4. The order which included the establishment of a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood, it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution. It is desired that conference be held with Gen. Kreger.

"MARCH."

EXHIBIT 83.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 1, 1918.

Memorandum for Gen. Crowder:

1. Gen. Pershing's cablegram No. 779, March 24, 1918, from London to The Adjutant General, Washington, is as follows:

"Paragraph 3, subparagraph A: With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

The first thing to be noticed is that notwithstanding the fact that. Gen. Pershing was advised of the establishment of this branch office of the office of the Judge Advocate General as early as January 20 last, and was in due course advised of Gen. Kreger's promotion and detail in charge of the branch office, he has voiced no objection until now. A conclusion so long delayed should weaken the confidence the department might otherwise have had in Gen. Pershing's judgment upon the matter. On January 20 the department, in a cablegram (A. G. O. 666), communicated to Gen. Pershing, paragraph 2 of

General Orders, No. 7. That paragraph, which is unmistakably explanatory of the purpose of establishing the branch office and the scope of its jurisdiction, is verbatim as follows:

"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 and be controlled in the performance of his duties by the Judge Advocate General of the Army.

"The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

"By order of the Secretary of War."

And on the same day paragraph 3 (A. G. O., cablegram 663) was communicated to Gen. Pershing, as follows:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order."

On February 2 paragraph 2 (A. G. O., cablegram No. 816) was communicated to Gen. Pershing, as follows:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire. Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendation."

In due course the department received paragraph 3 of Gen. Pershing's cablegram No. 644, dated February 25, 1918, as follows:

"Paragraph 3. With reference to paragraph 2, of your cablegram 816 desire that Walter A. Bethel (Brigadier General) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3 your cablegram 663 of 20th appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3 your cablegram 663 desire to know when officers may be expected to arrive to establish branch office as cases are being held for his action."

It has to be observed that Gen. Pershing states that he had just received and had his attention invited to paragraph 169, Special Orders, No. 15, War Department, current series, when he sent his cablegram No. 644 of February 25. That paragraph is as follows:

"Until further orders Brig. Gen. Walter A. Bethel, judge advocate, National Army, will assume charge of the branch of the Office of the Judge Advocate General established in France by the War Department, General Orders, No. 7, January 17, 1918, and will perform the duties of Acting Judge Advocate General indicated in the said order."

The action taken was the result of the most thorough consideration at the War Department; it was organic in character and required by law. Even if it were within the power of administration to do so, the revocation of such orders would constitute a serious reflection upon the administrative capacity of the department.

2. But Gen. Pershing's objection is based upon a misconception of the law establishing the relation of the Office of the Judge Advocate General to the military authorities, of whatever rank, empowered to convene general courts-martial. He has ignored section 1199, Revised Statutes, which not only empowers but requires the Judge Advocate General of the Army to revise all proceedings of courts-martial. This is a substantial function which is established by law and can not be dispensed with by administrative direction. All cases are to be reviewed and revised in this department. Besides, in the numerous cases contemplated by the forty-eighth article of war it is there supposed that final action can not be taken by any military authority but that the confirmation of the President is required. As to sentences of death imposed for rape, murder, mutiny, desertion, or spying, the President, speaking through the War Department, has expressed his will as Commander in Chief that the final authority to carry such sentences into execution, imposed by the forty-eighth article of war by a commanding general in the field or a commanding general of a territory, department, or division, shall not be exercised until an independent review of the proceedings has been made by the Judge Advocate General of the Army in the exercise of the revisory power conferred up him by law or by an officer acting for him, such as the acting judge advocate general for the expeditionary forces. It is obviously absurd to exercise a revisory power after the execution of death sentences or other sentences finally separating an officer or member of the Military Establishment therefrom.

3. Gen. Pershing says:

"Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect."

By misconduct, of course, he means something distinguishable from murder, rape, mutiny, desertion, or spying. It must be observed that sentences of death for such misconduct can not be carried into execution by any commander in the field. Our law requires in such cases the final confirmation of the President.

4. Gen. Pershing says:

"Any method that causes delay and possible miscarriage of justice would be unfortunate for us and injurious to the morale of our Allies."

Beyond argument the law clearly requires final confirmation by the President in many cases where Gen. Pershing, mistakenly, thinks he has the authority. Since all proceedings are required to be revised by this office, it must be patent that the location of a branch office in France for the purpose of that revision, carrying, as it does, the full authority of this office in such revision, makes not for delay but for expedition. Gen. Pershing's reference to possible miscarriage of justice is not understood. That review by an authority charged with that duty can result in a miscarriage of justice when justice can not be administered without such review is beyond apprehension. If Gen. Pershing means that the review by a representative of this office, whereby substantial and prejudicial errors of law are detected and corrected and legal correctness is secured and assured, will prevent the carrying into effect of illegal sentences which otherwise he would be able to carry into effect, then the need of that revision is much emphasized. It would indicate that in the administration of military justice mere summariness of execution of a sentence is to be preferred to a reasonable assurance of its legality.

5. Our law contemplates military situations in which crime may be punished on the spot and with death; but when the offense is once submitted to judicial processes established by the law of the land applicable to our forces universally, those processes can not be destroyed by considerations of summaries without violating the law and sacrificing the quality of justice. The law requires correctness to be determined by an independent review by this office or its representatives; its representative has been placed at Gen. Pershing's right hand, not that the required procedure be delayed, but, on the other hand, expedited.

Neither do I understand the last sentence but one of Gen. Pershing's cablegram, reading:

"Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous."

If Gen. Pershing means that men ought not to escape punishment awarded as a result of a trial that is found to be fundamentally illegal, his attitude could hardly fail to shock the ordinary sense of justice. On the other hand, it is conceivable that the morale of the command would be improved when assured that they will be punished only according to law and not according to hasty and ill-advised judgment. Certainty and correctness of punishment are to be desired rather than mere summariness. The implication that the review of this office

must necessarily result in men escaping deserved punishment imposed according to law is thoroughly unjustified.

S. T. ANSELL.
JAMES J. MAYES.

EXHIBIT 84.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 1, 1918.

Memorandum for the Chief of Staff.

Subject: Cablegram to Gen. Pershing.

1. I recommend, therefore, that substantially the following be dispatched to the commanding general American Expeditionary Forces:

"You evidently misapprehend your own jurisdiction in relation, in some cases, as those under the forty-ninth article of war, to that of the President, and in all cases to the power and duty of the Judge Advocate General of the Army, under section 1199, Revised Statutes, to revise court-martial proceedings with a view to assuring that they are free from prejudicial error. The order establishing the branch office was thoroughly considered by the department; you were advised of it immediately; and in none of your previous communications have you expressed any objection. The order, therefore, must be complied with. Doubtless it will not, when its purposes are thoroughly understood, be objectionable to you. Delay necessitated by the review required by law of the Judge Advocate General is reduced to a minimum by the establishment in France of the representative of the Judge Advocate General; such delay is inevitable, can not be hurtful, and will assure that legality without which no sentence should be executed."

JUDGE ADVOCATE GENERAL.

EXHIBIT 85.

[321.4 Branch Office. J. A. G. O. Apr. 4, 1918.]

APRIL 3, 1918.

Memorandum for the Chief of Staff.

Subject: Cablegram from Gen. Pershing in re establishment of branch of the office of the Judge Advocate General in France.

1. Gen. Pershing's cablegram No. 779, March 24, 1918, from London, to The Adjutant General, Washington, is in part as follows:

"Paragraph 3, subparagraph A. With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instruetions at inauguration of command. Any authority outside of control of the Commander in Chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our Allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

This cablegram from Gen. Pershing makes it necessary to review and set out in sequence previous communications on this subject. General Order No. 7, War Department, current series, was published under date of January 17, 1918. On January 20, 1918, a cablegram was transmitted by The Adjutant General

to Gen. Pershing containing a digest of section 1 of General Order No. 7 and section 2 of the said order in full. The cablegram as sent reads as follows:

"Paragraph 1, General Orders, No. 7, these headquarters, publish court-martial rules of procedure prescribed by President, effective February 1, an outline of which is furnished for your information. Rule 1. Sentence of death or dismissal of officer confirmed by commanding general of territorial department or division not to be executed until review of record in the office of Judge Advocate General or branch thereof, action to be entered in record, and to conclude with recital that the execution of sentence will be directed in orders after the record of trial has been reviewed by Judge Advocate General, and that jurisdiction is retained to take additional or corrective action prior to or at time of publication of general court-martial order in case. Rule 2. Sentence of dishonorable discharge not intended to be suspended will not be ordered executed before review of record, as in rule 1, and action to conclude with same recital. Rule 3. When record of trial in cases covered by rules 1 and 2 is reviewed in the office of the Judge Advocate General or branch thereof the reviewing authority will be informed as to the legality of his proposed action. Errors and omissions which admit of correction will be indicated. Proper disposition of case suggested. Rule 4. Delay in execution of sentence by reason of these rules to be credited on any term of confinement or imprisonment imposed. Rule 5. Procedure prescribed in rules 1 and 2 to apply to commanding generals in the field when the Secretary of War so decides and orders. Rule 6. Authorizes the Secretary of War to establish branches of the office of Judge Advocate General for review of court-martial records.

"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 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, dismissial, 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 such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

"By order of the Secretary of War."

On the same date, January 20, 1918, cablegram 663 was sent to Gen. Pershing, paragraph 3 of which reads as follows:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch office of Judge Advocate General established in France by War Department, General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order."

On February 20, 1918, cablegram No. 816 was sent to Gen. Pershing, paragraph 2 of which reads as follows:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of said branch office and Kreger be detailed on your staff in his stead. Cable recommendation."

The department received in reply paragraph 3 of Gen. Pershing's cablegram 644, dated February 25, 1918, as follows:

"Paragraph 3. With reference to paragraph 2 of your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663 of 20th, appears to supersede paragraph 169, Special Orders 15, War Department, Jan-

uary 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office, and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action."

It is to be observed that Gen. Pershing states in this cablegram that he had just received paragraph 169, Special Orders 15, War Department, January 18, by mail, and that paragraph 3 of cablegram No. 663, January 20, appears to supersede the said paragraph 169, Special Orders 15, War Department, 1918. Paragraph 169 of Special Orders 15, War Department, 1918, is as follows:

"Until further orders Brig. Gen. Walter A. Bethel, judge advocate, National Army, will assume charge of the branch of the office of the Judge Advocate General established in France by the War Department, General Orders, No. 7, January 17, 1918, and will perform the duties of Acting Judge Advocate General indicated in the said order."

A comparison of paragraph 3 of cablegram No. 663 with paragraph 169 of Special Orders 15, just cited, shows that it was not intended to supersede the order but to convey advance information that the order had been issued.

2. The action of the War Department in establishing a branch of the office of the Judge Advocate General in France was taken only after the most thorough consideration. It was organic in character and believed to be necessary in the administration of military justice. The revocation of the order establishing this branch office does not seem to be called for, and it is believed that if Gen. Pershing fully understood the purpose and operation of this order his cablegram cited at the beginning of this memorandum would not have been sent.

Under section 1199, Revised Statutes, the Judge Advocate General is required to revise all proceedings of courts-martial. Acting under this authority, this office reviews not only those cases which require the action of the President before the sentences imposed may be carried into execution, but also all cases in which the action of a lesser reviewing authority is final in and of itself. Experience during the present war has led to the conclusion that in a substantial number of cases reviewing authorities have approved and carried into execution sentences based upon proceedings which are invalid or which so palpably prejudiced the substantial rights of the accused that the sentences could not be carried into execution without outraging the sense of justice which characterizes the administration of all American law, military as well as civil. To prevent action in such cases from becoming final before the records of trial are reviewed in this office, General Order No. 7, current series, was published. Its purpose is to prevent a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man from being finally executed prior to review of the record of trial in this office. Action in all such cases under General Order No. 7 has been expedited in this office, and every effort is made to reduce delays in the administration of military justice to a minimum. The beneficial effects of this order are pointedly shown by one case which is now under consideration in this office. The accused was charged and convicted of murder, was sentenced to death, and the sentence of death would undoubtedly have been promptly executed by the reviewing authority in question had not General Order No. 7 been in force and effect. The review in this office has disclosed the fact that, although the record of trial had been passed by the department judge advocate, there was no evidence in the record upon which a conviction of anything more than manslaughter could be predicated, and for this offense the death penalty is not authorized. In one case at least, therefore, General Order No. 7 has already served to prevent the execution of an illegal death sentence.

It goes without saying, I think, that however careful or conscientious a judge advocate serving on the staff of a commanding general may be, he can not give a case which has passed through his hands, and which he has recommended for trial, the same unbiased consideration which is given by an officer who is wholly independent of such commanding general and who is directly responsible to the Judge Advocate General for the accuracy of his opinions. What has happened elsewhere may well happen in our Expeditionary Forces in France. Serious errors of the nature indicated above might well be overlooked by judge advocates serving in the field and result finally in the execution of unjust and illegal sentences if an independent review is not to be had prior to such execution. These considerations indicate the necessity for such an independent review in all cases covered by

General Order No. 7 before final execution of sentences. In order to minimize the delay a branch of the Judge Advocate General's office was located in France, with the same powers of review as exist in this office. There is every reason to believe that the operation of this branch office will in no way interfere with the administration of military justice, that it will in no way weaken the discipline of our forces, and it will not, in any case, result in a miscarriage of justice or create in the mind of any soldier the belief that it was established in order to enable him to escape punishment for misconduct. On the other hand, there is reason to believe that the office may result, as it was intended to result, in certain cases, in preventing serious miscarriages of justice.

Inasmuch as Gen. Pershing was fully informed of the establishment of this branch office prior to the time that the order went into effect, it is not understood why the objection which he now voices should have been so long delayed; but, as stated above, it is not believed when he is fully informed as to the purposes and functions of the branch office in question he will insist upon the objections he has raised. On the other hand, it is believed that he will recognize the necessity for its establishment and the useful purpose which it was designed to serve. In our governmental system it is as necessary that punishment be legal as that it be swift and summary. It is, therefore, recommended that a cablegram be sent to Gen. Pershing in terms as follows:

The order establishing a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 86.

APRIL 5, 1918.

Brig. Gen. WALTER A. BETHEL,
American Expeditionary Forces, France.

MY DEAR BETHEL: I am going to spend the necessary time out of a very busy day in an attempt to clear up the situation in respect of the establishment in France of a branch of the Judge Advocate General's Office, regarding which matter there seems to have been more or less misapprehension at your headquarters. You are, of course, familiar with the cable correspondence which has passed on the subject. For your convenience in reference, however, I inclose a copy of a memorandum that I have had prepared for the Chief of Staff, in which that correspondence is reviewed and set out in sequence.

First, let me say that it is difficult for me to understand why, upon receipt of the two cablegrams of January 20, 1918, one cabling Gen. Pershing the contents of General Order No. 7 and the other designating you as Acting Judge Advocate General, the branch office of the Judge Advocate General was not immediately established. I assumed that it was in operation from that time and continued of this view until the receipt of Gen. Pershing's cablegram of February 25, 1918, wherein he says:

"Brig. Gen. Walter A. Bethel has not establishd branch office and will not do so pending further instructions."

This leads me to comment upon the situation which is presented by Gen. Pershing's cablegram, No. 779, which seems to imply some dissent from the action here taken in establishing the branch office. He appears to view it as a possible obstruction to the administration of military justice and as a mistake of judgment.

I wish you would assure Gen. Pershing (whom I would address directly but for the reason that I know he has no time to read letters) that every thought

of this office, and I believe every thought of the War Department, is directed toward the discovery of ways and means to help him in his enormous task; that our idea was to expedite and not delay, and that he will understand better the occasion for this order if he will consider the following:

Prior to the issue of General Order No. 7 it had become apparent that due to the large increase in commissioned personnel, which included many officers with little or no experience in court-martial practice, a large number of proceedings were coming in which exhibited fatal defects. A congressional investigation was threatened, and there was talk of the establishment of courts of appeal. The remedy for the situation was immediate executive action which would make it clearly apparent that an accused did get some kind of revision of his court-martial proceedings other than the revision at field headquarters where these prejudicial errors were occurring. At this point permit me to say that very few errors have been discovered in cases coming up from your headquarters. It was primarily with reference to errors occuring at field headquarters other than in France that this step was taken.

Accordingly we formulated the scheme of General Order No. 7. The Secretary of War gave personal consideration to the matter and on three or four occasions discussed it exhaustively with this office. He finally approved the order and contemplated, as I did, the establishment of the branch office promptly upon the receipt of our two cables of January 20. I may say here that at other headquarters the scheme has worked beautifully. It has silenced all criticism, and I believe that no invalid sentences are now beyond the reach of remedial action.

Your own intimate knowledge of court-martial procedure makes it quite unnecessary for me to enter upon a lengthy discussion of the merits of the new system, which I feel quite sure will not fail to commend itself to you as a substantial step in the right direction. As stated in my memorandum to the Chief of Staff, it is believed that had Gen. Pershing fully understood the purpose and operation of General Order No. 7, his cablegram No. 779 of March 24, 1918, would not have been sent. I trust that the cablegram which I have recommended be sent him in reply, a draft of which is contained in the concluding paragraph of the inclosed memorandum, will serve to convince him of the wisdom and propriety of the issue of this order and that the procedure it contemplates will materially aid rather than obstruct the prompt and efficient administration of military justice in the American Expeditionary Forces.

With best wishes, I am,

Very truly, yours,

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 87.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
AMERICAN EXPEDITIONARY FORCES IN EUROPE,
G. H. Q., A. E. F., France, April 15, 1918.

Maj. Gen. E. H. CROWDER,
Judge Advocate General, United States Army,
War Department, Washington, D. C.

DEAR GENERAL: As indicated in my report of March 31, made pursuant to paragraph 827, Army Regulations, I arrived at general headquaters American Expeditionary Forces, and reported for duty on March 26.

Before my departure from Washington an unsigned draft of an order appointing me Acting Judge Advocate General for the American Expeditionary Forces in Europe came into my hands. The arrival of an official copy of such an order has been expected from day to day, but thus far none has been received. Maj. Rand and myself were assigned to station here upon our arrival and at once took up the work of the branch of the Judge Advocate General's Office; but, pending the arrival of my orders, Gen. Bethel remains in charge of the office and the duties of the office are being performed in his name.

Gen. Pershing being absent from headquarters at the time of my arrival, I had a preliminary conference with Gen. Harbord, Chief of Staff, and Gen. Bethel, with reference to the location of the office. I indicated a desire to be governed in the matter by Gen. Pershing's wishes. Various considerations, among which were the existing means of communication by mail and telegraph between general headquarters and the headquarters of the various commanding officers exercising general court-martial jurisdiction, the desirability of keep-

ing in close touch with the Judge Advocate of the Expeditionary Forces, and the fact that the office had been temporarily established at general headquarters, led me to the conclusion that it should remain where it is. In that conclusion Gen. Harbord appeared to concur; and I felt justified in assuming that he reflected the views of Gen. Pershing with reference to the matter. In the course of an interview I had with Gen. Pershing at a later date my impression that to have the office located here would be satisfactory to him was confirmed.

In conformity with your suggestions I indicated to Gen. Pershing the reasons for the establishment of the office, outlined its functions, endeavored to make clear that its existence would in no wise affect the exercise of discretionary powers by officers having general court-marital jurisdiction, and expressed a desire to be really helpful in the administration of military justice throughout the command.

The establishment of the office appears to have been looked upon in some quarters here with a certain degree of apprehension—possibly because the brief cablegrams on the subject did not serve clearly to disclose the functions of the office. At any rate it appeared to me that there was an impression that the establishment of the office was without precedent—represented an innovation, and that its existence might serve to curtail the exercise of the powers of commanding officers invested with general court-martial jurisdiction. The apprehension does not, in my opinion, exist now to the extent that, apparently it did exist three weeks ago, and it shall be my endeavor to bring about the entire disappearance.

While in England I had a conference with Maj. White, the Judge Advocate on duty at Gen. Biddle's headquarters in London. Since my arrival here I have had an opportunity to confer with Col. Hull and Col. Winship, and to discuss with them personally the relation of this office to the various headquarters exercising general court-martial jurisdiction, and, of course, the matter has been fully discussed with Gen. Bethel.

Though I hope soon to receive the order assigning me to duty in charge of this office, I am inclined to the opinion that it has been well to have the administration of the office controlled, for a short time after its establishment, by the Judge Advocate of the Expeditionary Forces, because that would naturally aid in allaying the apprehension that, due no doubt to misunderstanding, appears at first to have existed as to the purpose in view in establishing the office.

Very sincerely, yours,

E. A. KREGER.

EXHIBIT 88.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
France, May 1, 1918.

General Orders, No. 66.

* * * * * * *

VI. Brig. Gen. Edward A. Kreger, National Army, now on duty at these headquarters, having been appointed Acting Judge Advocate General for the American Expeditionary Forces in Europe by paragraph 126, Special Orders No. 53, War Department, current series, and directed to assume charge of the branch of the office of the Judge Advocate General of the Army, established in the city in which these headquarters are located, pursuant to General Orders, No. 7, War Department, current series, Brig. Gen. Walter A. Bethel, National Army, stands relieved from further duty in charge of said branch office.

* * * * * * *

By command of Gen. Pershing:

JAMES G. HARBORD,
Chief of Staff.

Official:

BENJ. ALVORD,
Adjutant General.

Brig. Gen. E. A. Kreger reports under date of May 1, 1918, that he was on that date assuming charge of the branch office of the Judge Advocate General of the Army at General Headquarters, American Expeditionary Forces.

EXHIBIT 89.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, May 5, 1918.

Gen. E. H. CROWDER,
War Department,
Washington, D. C.

DEAR GENERAL: I received your letter of April 5 yesterday, relating to the establishment of the branch office here. I expect to lay a number of cases before Gen. Pershing either this afternoon or to-morrow and shall take pleasure in reading to him the paragraphs of your letter relating to the reason for the establishment of the branch office.

Now, as to the misunderstanding between the War Department and these headquarters. First let me say that I am responsible for Gen. Pershing's cablegram No. 644 of February 24, 1918, but not No. 779 of March 25 protesting against the establishment of the branch office. The misunderstanding came about in the following way. War Department cablegram No. 663 (par. 3) as received here stated that Capt. John B. Richardson, Infantry, had been ordered to establish the branch office in France. This cable came at the same time as the cable announcing the contents of General Order, No. 7. We accordingly awaited Capt. Richardson's arrival and held cases for his action. Not until about a month later did we learn that the War Department had ever contemplated putting me in charge of the branch office temporarily. The first intimation of that fact was received when a copy of Special Orders No. 15 directing me to assume charge of the branch office came to me by mail. On comparing Special Orders No. 15 with the cable directing Capt. Richardson to take charge of the office it was seen that the cable bore date two days later than the order and the only reasonable conclusion under the circumstances was that the War Department had first determined to place me in charge of the office and had almost immediately thereafter decided that Capt. Richardson should establish the office. That is why I said in our 644 that the instructions in the cable appeared to supersede the Special Order No. 15. When War Department cable No. 816 was received saying it was proposed to place Kreger in charge of the office but that I might remain in charge of the office if Gen. Pershing should so desire, the word "remain" indicated to me that the War Department supposed that I had established the office and I felt it necessary to clear up the misunderstanding at once and accordingly drew and had sent Gen. Pershing's cable No. 644 of February 24. I need hardly say that we were more than anxious to have pending cases disposed of and had the first cable informed us that I was to take charge, the office would have been established promptly on its receipt. Not until Kreger's arrival was it ever known here that there was a mistake in the Richardson cable. When he told me that he had never heard of Richardson, I wondered how the Richardson cable came to be sent and found that Richardson's signal number is 17068 while mine is 1768.

With these facts before you I think it will be clear to you why the branch office was not immediately established. Without them our action here is, of course, inexplicable.

On receipt of the contents of General Orders, No. 7, by cable I submitted a long memorandum (Feb. 5) paragraphs 2 and 3 of which were as follows:

"2. I may say that although the order was a surprise to me, on reading it carefully I think its purpose is clear. Section 1199 of the Revised Statutes, to which reference is made in the order establishing the branch office, provides:

"'The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all court-martials, 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 powers and duties of the Judge Advocate General comprised in the above word 'revise' have never been judicially construed, nor had the War Department, prior to the outbreak of the present war, ever arrived at a positive determination as to just what the word signifies. I remember that the Judge Advocate General expressed doubt as to this point two or three years ago. In time of peace the matter had not the importance that it may have now. No sentences of death or dismissal could be carried into effect without the confirmation of the President, and of course in the meantime the record was

reviewed by the Judge Advocate General. Sentences of dishonorable discharge were carried into effect in large number by department commanders before the records were reviewed in the Judge Advocate General's Office, but where serious injustice had been done either as a result of illegal action or otherwise, clemency was freely exercised by the President on the Judge Advocate General's recommendation.

"It is evident from the cable received that the War Department now construes the word 'revise' as requiring, or at least making proper, an examination of the record of trial by the Judge Advocate General's Office before a sentence which permanently affects the status of a military man takes effect and is beyond recall. The order requires that before the sentence take effect the Judge Advocate General's Office, or one of its branches, examine the record to see whether or not there is a fatal error in the proceedings. The reviewing authority indorses his action as usual upon the record, but the same is tentative until the legality of the sentence has been passed upon by the Judge Advocate General's Office, whereupon, on notification to the reviewing authority that the same is legal, the action is published and takes effect.

"I think it is not improbable that this order was brought about by the execution of 13 Negro soldiers in Texas recently, almost immediately after their trial. While I have no conclusive information on the point, I infer from what I saw as to the reports in the bulletins of these cases that the execution took place before the records had reached Washington. It is not improbable that there were certain errors in the trials. The statements made in this paragraph, however, are only a surmise on my part.

"3. With reference to your proposed cable recommending that I be made Acting Judge Advocate General of the American Expeditionary Forces and that Capt. Richardson be ordered to report to me as assistant, I advise that the same be not sent. I do not regard the order itself as any reflection on myself or on these headquarters, but as having been issued merely for the purpose of giving what the War Department conceives to be the proper effect to section 1199, Revised Statutes. The War Department evidently takes the view that the revision should be made by the Judge Advocate General's Office, and the judge advocate's office of these headquarters is not, and can not in my opinion be made, a part of the Judge Advocate General's Office.

"Very sincerely,

"W. A. BETHEL."

EXHIBIT 90.

MAY 14, 1918.

From: The Office of the Judge Advocate General.
To: Brig. Gen. Edward A. Kreger.
Subject: Report dated March 31, 1918.

1. In the second paragraph of your report of March 31, 1918, you state that no order has been received appointing you Acting Judge Advocate General for the American Expeditionary Forces in France. Special Order, No. 31, dated March 5, 1918, paragraph 146, is as follows:

"Lieut. Col. Edward A. Kreger, judge advocate, is appointed Acting Judge Advocate General for the American Expeditionary Forces in Europe, and will assume charge of the branch of the office of the Judge Advocate General of the Army established in France by General Orders, No. 7, January 7, 1918, War Department, relieving Brig. Gen. Walter A. Bethel, National Army, of the temporary charge of said branch."

This special order was mailed to you through the commanding general American Expeditionary Forces on March 12, 1918. The same information was cabled to Gen. Pershing earlier in March. It is expected that before this communication reaches you the entire matter will have been satisfactorily adjusted.

By direction of the Judge Advocate General:

H. M. MORROW,
Lieutenant Colonel, Judge Advocate, Executive Officer.

EXHIBIT 91.

General Orders, No. 84.

WAR DEPARTMENT,
Washington, September 11, 1918.

I. By direction of the President the commanding officer Camp Joseph E. Johnston, Jacksonville, Fla., is empowered, under the eighth article of war to appoint general courts-martial whenever necessary. [250.4, A. G. O.]

II. Paragraph 5, section IV, General Orders, No. 149, War Department, 1917, is amended so as to prescribe that enlisted men assigned to supply trains will wear the Motor Transport Corps hat cord. [320.2, A. G. O.]

III. Section IV, General Orders, No. 64, War Department, 1918, is rescinded and the following substituted therefor:

1. Hereafter quartermasters of all forts, posts, camps, and other military stations within the continental limits of the United States under the jurisdiction of department and Coast Artillery district commanders will forward requisitions for needed supplies through their commanding officers direct to such general supply depots as are designated by the Quartermaster General from time to time. A copy of requisition will, at the same time, be sent to the department or Coast Artillery district quartermaster by all forts, camps, posts, and military stations under jurisdiction of the department or Coast Artillery district commander.

2. The depot quartermaster of a general supply depot to which a fort, post, camp, or other military station is assigned for supplies is responsible for the proper supply of the station, and is authorized to transfer surplus stocks, to prevent accumulation of shortages, from one station to another, after assuring himself that the future needs of the troops at station from which supplies are transferred and those of incoming troops are provided for. He is also authorized to correspond with and call upon quartermasters direct for reports as to status of supplies at their stations.

3. For all forts, posts, camps, or other military stations under the jurisdiction of the department and Coast Artillery district commanders, the depot quartermaster will promptly report to the department or Coast Artillery district quartermaster, in the district in which the requiring troops are stationed, for the information of the department or Coast Artillery district commanders, the action taken by him on the requisitions of such forts, posts, camps, or other military stations. The depot quartermaster will also keep the department and Coast Artillery district quartermasters advised of the surplus supplies transferred from one post, camp, or other place to another, as far as such transfer affects the department or Coast Artillery district concerned.

4. Instructions in conflict with the foregoing provisions are revoked. [300.42, A. G. O.]

IV. The last subparagraph of section II, General Orders, No. 7, War Department, 1918, is amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file. [250.47, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
Acting The Adjutant General.

EXHIBIT 92.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
France, July 5, 1918.

From: The Office of the Acting Judge Advocate General.
To: The Judge Advocate General of the Army, War Department, Washington, D. C.
Subject: United States *v.* Delbert L. Moss, private, Thirty-second Aero Service Squadron, Signal Corps. (A. J. A. G. O., 201–92.)

1. The record of trial in case mentioned above is going forward to your office under separate cover. The papers listed below accompany the record:

Statement of service; review by judge advocate of trial jurisdiction; review by this office, in duplicate; letter of advice from this office, in duplicate; supplementary review by judge advocate of trial jurisdiction; copy of memorandum by reviewing authority; and general court-martial order, five copies.

2. Pvt. Moss was tried on April 17, 1918, by a general court-martial convened by order of the commanding general, Service of the Rear, now Services of Supply, American Expeditionary Forces, upon three charges, under each of which two specifications were laid. The second charge and the specifications thereunder read as follows, viz:

"Charge II: Violation of the ninety-fourth article of war.

"Specification 1: In that Pvt. Delbert L. Moss (21196), Thirty-second Aero Service Squadron, did, at Third Aviation Instruction Center, on or about the 1st day of March, 1918, feloniously take, steal, and carry away one pair of russet shoes, value about $4.95, property of the United States, furnished and intended for the military service thereof.

"Specification 2: In that Pvt. Delbert L. Moss (21196), Thirty-second Aero Service Squadron, did, at Third Aviation Instruction Center, on or about the 1st day of March, 1918, wrongfully and knowingly sell to Pvt. Ray Van Arsdale, Twenty-sixth Aero Squadron, Signal Corps, one pair of russet shoes, value about $4.95, property of the United States, furnished and intended for the military service thereof."

The court found Moss guilty of one specification under Charge I, of one under Charge III, of both of the specifications under Charge II, and of each of the three charges, and adjudged a sentence legally justifiable without reference to the second charge and the specifications thereunder. The reviewing authority, on April 28, 1918, approved the sentence and designated a military prison camp as the place of confinement, but held in abeyance the order directing execution of the sentence, pending review of the record in this office pursuant to the requirements of General Order 7, War Department, 1918.

3. On May 11, 1918, the record was returned to the reviewing authority by this office, together with a copy of the review by this office and a letter of transmittal, carrying the following recommendations:

"(*a*) That the findings of guilty as to the charge and specifications relating to larcency and wrongful sale of Government property (Charge II and the specifications thereunder) be disapproved; and

"(*b*) That the reviewing authority consider whether or not, in view of the illegality of the findings respecting Charge II and the specifications thereunder, the entire sentence adjudged by the court should be approved and carried into execution."

Subsequently the record was returned to this office with a general court-martial order showing approval of the sentence and directing execution thereof, but containing no reference to the approval or disapproval of any particular findings. A memorandum, dated May 28, 1918, prepared by the judge advocate of the Services of Supply, in which he disagrees with the review and recommendations of this office and a copy of a memorandum bearing the initials of the reviewing authority, and reading, "Adhere to the original action and direct the execution of the sentence," also accompanied the record.

4. With reference to the conclusions stated in the review by this office (see pars. 7, 8, and 9), let me say that though ready to admit the force of the argument in the counter memorandum of May 28, I am not convinced that this office made a mistake. I am unwilling to hold that any presumption of fact arising from another presumption that Army Regulations are obeyed to the letter can take the place of evidence to support an essential element of an offense charged

as a violation of the ninety-fourth article of war. I attached no great importance to the use by the witness Griel of the expression "my shoes," as he might have so referred to the property in question, even if it had been issued to him by the Government. It was not upon affirmative evidence of property in Griel, but upon the absence of evidence of property in the United States that my conclusion was based. The inspection of the shoes by the court, even if it showed that they were of the make and character issued to enlisted men, could not have supplied this deficiency, for such shoes can be and no doubt have been bought by soldiers from manufacturers and dealers, and the change of shoes in the United States referred to by Griel may well have been such a purchase.

If my advice in this case was erroneous, I shall be glad to be so informed by your office in order that I may not repeat the error in other cases.

5. My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority, and with the portion of the counter memorandum of May 28, which deals with that point. In construing General Order No. 7, War Department, 1918, the writer of the memorandum states that:

"If the commanding general concurs in the conclusion here reached, he should approve the findings and sentence in spite of the recommendation to the contrary of the Acting Judge Advocate General. That recommendation is not controlling but merely advisory."

And again:

"The reviewing authority is required to wait until he shall receive that advice before finally deciding on his action, but there is nowhere any indication that he is to regard that advice as final."

It has been my belief that the purpose in view in the creation, by General Order 7, of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order; and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be that the writer of the memorandum of May 28 is right and that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision.

6. Your instructions in the premises are requested for my guidance; and, if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they, as well as this office, be advised to that effect.

(Signed) E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 93.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS,
American Expeditionary Forces, France, July 11, 1918.

From: The Office of the Acting Judge Advocate General.
To: The Judge Advocate General of the Army, War Department, Washington, D. C.
Subject: United States *v.* Noel F. Peters, private, Four hundred and sixty-sixth Aero Squadron, Signal Corps. (A. J. A. G. O., 201–116.)

1. The record of trial in case mentioned above is going forward to your office, under separate cover. The papers listed below accompany the record:

Statement of service, review by judge advocate of trial jurisdiction; review by this office, in duplicate; letter of advice from this office, in duplicate; supplementary review by judge advocate of trial jurisdiction; and general court-martial order, five copies.

2. Pvt. Peters was tried on May 20, 1918, by a general court-martial convened by order of the commanding general of the Services of Supply, American Expeditionary Forces, upon the following charge and specification:

"Charge: Violation of the fifty-eighth article of war.

"Specification: In that Pvt. Noel F. Peters, 25891, Four hundred and sixty-sixth Aero Squadron, Signal Corps, did, at Third Aviation Instruction Center, American Expeditionary Forces, on or about the 24th day of February, 1918, desert the service of the United States, and did remain absent in desertion until he was apprehended at Toulouse, France, on or about the 10th day of March, 1918."

He pleaded not guilty. The court found him guilty as charged and sentenced him to be dishonorably discharged, to forfeit all pay and allowance due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 10 years. On May 31, 1918, the reviewing authority approved the sentence and designated a penitentiary as the place of confinement, but held in abeyance the order directing the execution of the sentence, pending review of the record in this office pursuant to the requirements of General Order 7, War Department, 1918.

3. On June 20, 1918, the record was returned to the reviewing authority, with a copy of a review by this office. The letter of transmittal contained the following statement and recommendation:

"This office is of the opinion that the record is not legally sufficient to support a conviction of desertion, but that it is legally sufficient to support a conviction of absence without leave, in violation of the sixty-first article of war. The record is accordingly returned with the recommendation that the supplementary action suggested by the review be taken."

On July 8, 1918, the record was returned to this office, together with a general court-martial order evidencing approval of the sentence and ordering its execution, but making no special reference to the finding of guilty of desertion. A memorandum, dated July 1, 1918, by the judge advocate of the Services of Supply, in which he disagrees with the office review, and upon which is indorsed a note by the reviewing authority, reading, in part, as follows:

"I am satisfied that the original action was sound. Let it stand."

accompanies the record.

4. The counter memorandum of July 1 has not convinced me that the conclusion arrived at in the review by this office (see pars. 6, 7, and 8) is unsound. That memorandum discusses at length the probable guilt of the accused. This is beside the point. The conclusion stated in the office review is not based upon the ground that the accused is innocent, but upon the ground that he had not had a fair trial because of the admission of a great mass of incompetent and highly prejudicial testimony. It was pointed out that a sharp issue of fact as to the intention of the accused man was involved, and that the case was not one in which, if the illegal evidence had been excluded, the court would nevertheless have been compelled to a finding of guilty.

In the counter memorandum it is said that "the accused by the continued dilatory discharge of his duties convinced his superior officers that he was discontented with the service." This is not convincing. Expressions of dissatisfaction with the services are, to be sure, competent evidence of an intention to depart from it (M. C. M., p. 134); but if such dissatisfaction can be shown by the soldier's misconduct, the door is opened wide to proving as many other acts of misconduct as the prosecution can gather in proof of the offense charged, which is, of course, contrary to well recognized legal principles.

The writer of the counter memorandum appears to regard the office review as inconsistent in that it condemns a conviction for desertion and yet approves a conviction for absence without leave (see his par. 11). The reason for the distinction is plain. The accused raised no issue as to his absence without leave. On the contrary, he admitted it (see his testimony in the record, pp. 32–34). He said that he went absent from his company on the evening of February 23, at 7.30; that he did not go to Paris, because he feared the military police would arrest him; that he expected to remain away four or five days and that upon his return he would be punished and transferred. His admission that he feared arrest and expected some punishment is tantamount to saying that he had no permission to be absent and is a clear corroboration of the other testimony in the case (see office review, par. 5) that he was absent without leave. The issue of an intention permanently to remain away was, however, sharply contested; and it was for that reason, among others, that the review of this office held that the illegal testimony had prejudiced the substantial rights of the accused.

The point made in the office review that the admission of certain testimony relating to a previous trial and conviction of the accused, introduced in the course of the presentation of the prosecution's case and therefore, before the

court had arrived at a finding, was illegal and prejudicial to the accused, is dismissed by the writer of the counter memorandum of July 1 with no comment, except an indication of his failure to understand it.

In the countermemorandum there is mention of a marginal annotation made at page 25 of the record. That annotation is no part of the office review, but was made by Maj. Rand as an aid to his memory in dictating the office review. The incident referred to in the marked portion of the testimony is discussed in paragraph 7 of the office review, near the bottom of page 5, where the point is made that the declarations of the accused in December were made with reference to a particular disappointment, and were for that reason remote not only in point of time but in point of relevancy to the offense for which he was being tried.

If my advice in this case was erroneous, I shall be glad to be so advised, to the end that I may not repeat the error in other cases.

5. My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority. That question is not discussed by the judge advocate of the trial jurisdiction in his countermemorandum pertaining to this case, but was discussed by him in his memorandum relating to the case of Pvt. Delbert D. Moss. (A. J. A. G. O., 201–92.) The following extract from a letter addressed to you with reference to the Moss case is quoted as especially pertinent in connection with this case, viz:

"It has been my belief that the purpose in view in the creation, by General Order 7, of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order; and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be * * * that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of my views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision."

6. Your instructions in the premises are requested for the guidance of this office; and if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they as well as this office be advised to that effect.

7. Being still of the opinion that the record in this case is legally insufficient to support the findings and sentence, and that the advice of this branch of the Office of the Judge Advocate General with reference to the legality of a finding or sentence reviewed here should be given the same effect as if the advice had been given by the Office of the Judge Advocate General of the Army, I recommend that the sentence be declared null and void and that Peters be restored to duty.

E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 94.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS, AMERICAN EXPEDITIONARY FORCES,
France, July 14, 1918.

Maj. Gen. E. H. CROWDER,
Judge Advocate General, United States Army,
War Department, Washington, D. C.

DEAR GENERAL: To your cablegram reading "Cable total number of officers and enlisted men Judge Advocate General's Department needed in your office until January next" I have replied:

"Reference paragraph 8, your cablegram 1644. Entire personnel now authorized, seven officers and eight enlisted men, will be needed in this branch by January if jurisdiction remains unchanged. I recommend that branch be required to review all general court cases arising in American Expeditionary Forces. If this recommendation be approved, additional force of three officers

and four enlisted men will be needed by January. Recommend promotion Maj. William Rand to lieutenant colonel. Letter follows."

The terms of General Order 7, War Department, 1918, are not altogether clear with respect to cases in which the execution of sentence of dishonorable discharge is suspended. Paragraph 2 of section 1 requires that the execution of sentences in cases involving dishonorable discharge be deferred pending review in the office of the Judge Advocate General, or a branch thereof, only when the reviewing authority does not intend to suspend the execution of the dishonorable discharge until the soldier's release from confinement. The second paragraph of Section II requires that the records of all general court-martial cases in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the Expeditionary Forces be forwarded to this branch for review, and apparently does not limit the jurisdiction of the branch to cases in which the dishonorable discharge is to be executed at once, except as such limitation is to be inferred from the clause "to the end that any such sentence or any part thereof found to be invalid or void shall not be carried into effect," which, in connection with Section I of the order, seems to indicate that when it is not the intention of the reviewing authority to carry the dishonorable discharge into effect at once the record need not be sent to this branch for review. In practice the order was so construed before my arrival here and has continued to be so construed, as cases involving suspended sentences of dishonorable discharge have not been sent here. I have discussed the matter with Gen. Bethel. He holds the view that General Order 7 neither requires nor authorizes records involving suspended sentences of dishonorable discharge to be sent to this branch. However, we are agreed that such records should be reviewed here. It may well happen that within a comparatively short time after trial the conduct of a soldier in whose case a sentence of dishonorable discharge has been suspended will lead the reviewing authority to direct the execution of the dishonorable discharge. If the necessary examination were made here an opinion indicating that the record in any case of that kind is legally insufficient to support the sentence may reach the reviewing authority in time to prevent the issue of a dishonorable discharge certificate, thus avoiding a complication that may arise if the record must go to Washington for examination. I should be very glad to have the doubt resolved in favor of the more extensive jurisdiction, either by authoritative interpretation of General Order 7 by your office or by a new general order.

Before I left Washington I understood that you expected, after this branch had been established for some little time, to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and, second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and polices of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now requires such action.

The number of cases in which the execution of sentences of dishonorable discharge has been suspended has been comparatively small thus far. However, I am led to believe that the proportion of such suspensions will increase. I think that the personnel authorized on April 3—7 officers and 8 enlisted men—will be ample to meet requirements until January next under General Order 7 as now construed, and also sufficient to meet requirements if in addition to the classes of cases now coming here for review those in which dishonorable discharges are suspended are also sent here. At the time Lieut. Col. Wallace arrived I was about to request you to send over another officer. The present indications are that the three officers now regularly assigned to duty in the branch can handle the work for some weeks to come. In the course of two or three weeks more I expect to be in a better position than at present to suggest to you the time at which it will be advisable to have additional officers arrive here for duty in the branch.

An order requiring the examination here of all general court-martial cases arising in this command would increase very considerably the amount of work to be done by the branch. Less than one-half of the cases arising in the command are now coming here for review. However, it is believed that a considerable portion of the cases which involve neither death, dismissal, nor dishonorable discharge are of such a nature as not to require the preparation of a formal written review and that therefore the proposed enlargement of the duties of the branch would not, in the course of the next five or six months, call for an additional force in excess of three officers and four enlisted men. It is upon that theory that my cabled reply to your cable was based. If the suggested enlargement of the duties is ordered, one officer should be sent over for duty in the branch very soon after the change shall become effective. Applications can be made for others as the need for their services arises.

If you approve of my recommendation that additional personnel be authorized, to be applied for as needed, it is recommended that the distribution of the increase to grades be as follows: One colonel, one lieutenant colonel, one major, one regimental sergeant major, one battalion sergeant major, and two sergeants or corporals. With few exceptions the officers exercising original general court-martial jurisdictions over here are major generals. No doubt in the near future such jurisdiction will be exercised also by lieutenant generals. Chiefs of staff, who are often consulted by commanders with reference to the administration of military justice, even though the judge advocate possesses the full confidence of his commander, are of the grade of colonel or above. In order that the opinions expressed in reviews may have the benefit of the added weight that is usually given the opinion of an officer of rank, it is believed that the authorized personnel of this branch, if it is to review all general court-martial cases arising in the command, should include the number of colonels and lieutenant colonels contemplated in my recommendation.

If the jurisdiction of the office is broadened and an additional officer is ordered over here almost at once, any one of the following-named officers would be entirely satisfactory to me: Col. H. A. White, Col. J. J. Mayes, Lieut. Col. H. M. Morrow, Lieut. Col. Charles B. Warren, Lieut. Col. E. G. Davis, Lieut. Col. Guy D. Goff, Lieut. Col. William O. Gilbert, Lieut. Col. Neal Power, Maj. Grant T. Trent. I have named these officers because I have worked in cooperation with all of them, and because before I left Washington I understood from each that he desired an early opportunity to serve in France. At the suggestion of Maj. Rand the name of Maj. E. M. Morgan is added to the list. The filing of this list is, of course, not to be understood as suggesting the exclusion of others from consideration. It is understood that the requirements of the service may make it advisable for you to send some other officer.

Maj. William Rand has done excellent work here. He served here as the sole assistant from the time I took charge of the branch until the arrival of Lieut. Col. Wallace. As the grade of lieutenant colonel is now represented in the branch, I think he, as the oldest assistant, should be promoted to that grade.

Attention is invited to my letters of July 5 and 11 with reference to the question presented in cases of Pvts. Delbert L. Moss and Noel F. Peters. The records in those cases, and also the letters mentioned in the preceding sentence, were forwarded to you by ordinary mail. A copy of each of the letters, accompanied by copies of inclosures except the records, will go forward under the same cover with this letter, which will be sent by the next courier leaving here for the United States and may therefore reach your office before the original letters and the records sent by ordinary mail arrive.

Very sincerely,

E. A. KREGER.

EXHIBIT 95.

JUNE 21, 1918.

The Office of the Judge Advocate General.
The Acting Judge Advocate General, American Expeditionary Forces in Europe.
Modification of General Order No. 7, War Department, January 17, 1918, and disposition of papers relating to completed trials by general courts-martial.

1 Section 2 of General Order No. 7 of the War Department, January 17, 1918, provides that:

"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 force, will be forwarded to the said branch office for review. * * *"

The order makes no provision for review by your office in any other cases than those described. It follows that records of trials, in which there is imposed confinement or forfeiture or other punishment without dishonorable discharge or dismissal, are not reviewed by any officer other than the judge advocate for the court-martial jurisdiction prior to their receipt in this office. The result will be in a case involving, for instance, confinement at hard labor for six months that the punishment will be executed before the case is reviewed by the Judge Advocate General's Office. Of course, in that event the legality of the sentence becomes, so far as the accused is concerned, of little more than academic interest.

2. This office desires an expression from you upon the advisability of so amending section 2 of the General Order referred to as to require all cases tried by general court-martial in American Expeditionary Forces to be sent to your office for review and subsequent transmission to this office for file.

3. The filing of original charges and accompanying papers relating to completed trials by general court-martial in the offices of judge advocates of general court-martial jurisdiction creates a burdensome mass of records to be preserved and transported by those offices. Your view is desired upon the advisability of requiring these charges and accompanying papers to be forwarded with the proceedings of the trial for file either in your office or in this office.

ENOCH H. CROWDER,
Judge Advocate General, United States Army.

EXHIBIT 96.

JUDGE ADVOCATE'S OFFICE,
France, July 17, 1918.

Memorandum: For the Adjutant General.

Subject: Increase of jurisdiction of the European branch office of the Judge Advocate General's office.

1. You have referred to me for remark the following recommendation contained in a cable prepared by Gen. Kreger for transmission to the War Department:

"I recommend that branch be required to review all general court cases arising in Amex forces."

2. Under War Department orders issued in January the Judge Advocate General's Office, or one of its branches, reviews the records of general court trials in the following cases before the sentence takes effect:

(1) Death sentence.
(2) Dismissal of officers.
(3) Dishonorable discharge when not suspended.

Other sentences take effect immediately upon the approval of the reviewing authority. The European branch reviews, for the Judge Advocate General's office, the records in cases of the three sentences named above, but all other records, sentences involving forfeitures, ordinary confinement, and dishonorable discharge where suspended go to the Judge Advocate General's office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served. Or, if it is desirable to reconvene the court for correction of the error, it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make review of all court-martial cases here in Europe rather than a part. The only objection I see is that it would add probably two or three officers to the office force of the European branch, and also two or three soldiers. I have heard of but two records being found defective in the Judge Advocate General's office, one from the Service of Supply and the other from the Forty-first Division, but there may have been others, since in these matters the Judge Advocate General may correspond with the division commanders direct.

3. I see no reason for taking any exceptions to Gen. Kreger's recommendation.

W. A. BETHEL,
Brigadier General, National Army, Judge Advocate.

EXHIBIT 97.

[First indorsement.]

ACTING JUDGE ADVOCATE GENERAL'S OFFICE,
GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
France, July 31, 1918.

To the JUDGE ADVOCATE GENERAL OF THE ARMY,
War Department, Washington, D. C.:

1. In connection with the first question raised in the foregoing communication, attention is invited to the following extract from a cablegram filed for transmission on July 14, 1918, viz:

"For the Judge Advocate General. Reference paragraph 8 your cablegram 1644 * * * I recommend that branch be required to review all general court-martial cases arising in Amex forces. * * *."

And the following extract from a letter addressed to you, under date of July 14, 1918, viz:

"Before I left Washington I understood that you expected, after this branch had been established for some little time, to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and, second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now requires such action."

After mailing the letter of July 14 I learned that the transmission of the cablegram had been delayed in order that Gen. Bethel might have an opportunity to express his views respecting the proposed extension of the jurisdiction of this branch. A copy of Gen. Bethel's memorandum, dated July 17, 1918, as well as a complete copy of my letter of July 14 is inclosed herewith. The cablegram referred to above, which went forward on July 20, is quoted in full in the letter of July 14. I see no reason for modifying the views expressed in the cablegram and letter and therefore confirm the recommendation therein made that this branch be required to review, before transmission to your office, the records of all cases tried by general courts-martial in the American Expeditionary Forces.

2. In connection with the second question raised in the foregoing communication it is recommended that instructions be issued—

(*a*) Requiring the original charges in each case tried by general courts-martial to be appended to the record of trial, and (*b*) authorizing the transmission to the Judge Advocate General's Office of all papers relating to the case, either with the record but not appended thereto, or at a subsequent time if the temporary retention of the papers with the command in which the trial of the case takes place is necessary or desirable.

I think it desirable that the original charges be appended to the record, to remain with it permanently. The other papers, i. e., the statement of evidence, the indorsement referring the charges for investigation, the report of the investigating officer, the indorsements of intermediate commanders (M. C. M., secs. 75, 76), and the carbon copy of the voucher for the payment of the reporter (M. C. M., sec. 114) have, at best, only a temporary value for record purposes, until all disciplinary measures incident to the transactions which form the subject matter of the trial, or incident to the trial itself, have been disposed of. I see no reason for permanently burdening the files of the Judge Advocate General's Office, or the files of this branch, with those papers. If forwarded with the record but not appended thereto, or if subsequently forwarded, they may, on reaching your office, be filed separately and in due time disposed of pursuant to the provisions of the acts of February 16, 1889 (25 Stat., 672), and March 2,

1895 (28 Stat., 933), which seems to prohibit the destruction of such papers save as prescribed in said acts (Dig. Ops., J. A. G., 1912–1917, pp. 218, 548).

If the foregoing suggestions be considered favorably, the Manual for Courts-Martial (par. (*b*), sec. 79, and par. 3 (*b*), p. 334, and perhaps other paragraphs and sections) should be amended so as to prohibit placing upon the charge sheet any indorsement other than that of the convening authority referring the charges for trial.

E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 98.

AUGUST 29, 1918.

Memorandum for the Chief of Staff.
Subject: Modification of General Order No. 7, War Department, January 17, 1918.

1. The European branch of the Judge Advocate General's office, by authority of the above designated order, reviews for legality alone the record of general court trials in the following cases before the sentences take effect:

(1) Death sentences.
(2) Dismissal of officers.
(3) Dishonorable discharge when not suspended.

All other cases go to the office of the Judge Advocate General at Washington for the review which the statute and good administration require, resulting necessarily in much delay. Obviously, such a review, the sole purpose of which is to determine whether the sentence as a matter of law is valid or invalid, can not seasonably be made here. Both Gen. Kreger, in charge of the branch office in Europe, and Gen. Bethel, judge advocate, American Expeditionary Forces, recommend the extension of the duties of the branch office there to include the review of all general court trials. Gen. Kreger summarizes his view thus:

"I have considered the matter (the matter here in question) and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: in order that illegal sentence may either not be carried into effect at all, or their execution arrested at the earliest possible moment, and because examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future, orders be issued requiring this branch to review before transmission to your office the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now require such action."

And Gen. Bethel thus:

"Other sentences (that is, those which are not now required to be reviewed by the branch office) take effect immediately upon the approval of the reviewing authority. The European branch reviews for the Judge Advocate General's office the records in cases of the three sentences named above. (That is, death sentence, dismissal of officers, and dishonorable discharge not suspended); but all other records, sentences involving forfeiture, ordinary confinement, and dishonorable discharge, where suspended, go to the Judge Advocate General's office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served, or if it is desired to reconvene the court for correction of an error, it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make the review of all courts-martial cases."

2. I concur in the views of these two officers, and recommend that the above designated order be amended, so as to require all cases tried by general courts-martial in the American Expeditionary Forces to be reviewed, to determine

their legality, by the Acting Judge Advocate General of those forces. The substantive portion of a draft of order to accomplish this purpose is herewith.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 99.

JUDGE ADVOCATE GENERAL'S OFFICE,
September 5, 1918.

DRAFT OF AMENDMENT.

The concluding unnumbered paragraph, on page 3, General Orders, No. 7, War Department, January 17, 1918, is hereby amended to read as follows:

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence invalid or void in whole or in part. Any sentence or any part thereof so found to be invalid or void shall be set aside, and the execution of all sentences of death, dismissal, or dishonorable discharge shall be stayed pending said review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file."

Mr. Smith instructed us to substitute third indorsement attached to 321.4 (August 29, 1918), branch office, instead of this draft of amendment.

L. A. H.

September 25, 1918.

EXHIBIT 100.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 8, 1918.

Memorandum for the Chief of Staff.

Subject: Amendment of General Order No. 7, War Department, January 17, 1918.

1. Herewith is a memorandum for the Chief of Staff from the Acting Judge Advocate General, dated August 29, 1918, recommending amendment of General Order No. 7, War Department, January 17, 1918.

2. Under General Order No. 7 as it now stands, the European branch of the Judge Advocate General's Office reviews for legality alone the records of general court trials before sentence takes effect in the following cases:

(*a*) Death sentence.
(*b*) Dismissal of officers.
(*c*) Dishonorable discharge when not suspended.

All other cases go to the office of the Judge Advocate General at Washington.

3. The amendment recommended by the Acting Judge Advocate General is designated to authorize the records of all cases tried in France to be reviewed by the European branch of the Judge Advocate General's Office. Gen. Bethel's and Gen. Kreger's opinions are set forth in the Acting Judge Advocate General's memorandum. The change recommended is reasonable and should make for good administration.

4. The War Plans Division recommends that the order be amended as per draft of amendment submitted by the Acting Judge Advocate General. Memorandum for the Adjutant General of the Army herewith.

LYTLE BROWN,
Brigadier General, U. S. A.,
Director, W. P. D., A. C. of S.

EXHIBIT 101.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 11, 1918.

Memorandum for The Adjutant General of the Army.
Subject: Amendment of General Order No. 7, War Department, January 17, 1918.

The Secretary of War directs that General Order No. 7, War Department, January 17, 1918, be amended as per attached draft of amendment by the Acting Judge Advocate General.

MARCH, *Chief of Staff.*

Received A. G. O., Septemper 11, 1918.

EXHIBIT 102.

General Order No. 84, September 11, 1918—250.4, 320.2, 300.42, 250.47.

PRINTING AND BINDING.

Prepared by_____ Office mark_____
Date of requisition_____ Requisition No. _____
Number of copies_____ Jacket No. _____
Requisition sent to Public Printer September 17, 1918. _____
Estimate received_____ Estimated cost_____
Galley proof received_____
Galley proof returned_____
Page proof received September 21, 1918.

EXHIBIT 103.

[Sec. IV, G. O. No. 84, 1918.]

The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records; to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

Approved:
By order of the Secretary of War:

FRANK MCINTYRE,
Major General, General Staff Corps,
Executive Assistant to the Chief of Staff.

EXHIBIT 104.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, November 14, 1918.

From: The Judge Advocate, American Expeditionary Forces.
To: The commander in chief American Expeditionary Forces.
Subject: Jurisdiction of the Acting Judge Advocate General, American Expeditionary Forces.

1. The following matter is submitted in the belief there should be a decision by the War Department as to the authority of the Acting Judge Advocate

General, American Expeditionary Forces, to hold a court-martial sentence, duly approved by the proper authority, invalid on the ground that the evidence is not sufficiently convincing of guilt. The Acting Judge Advocate General has held in a number of cases, in which evidence prejudicial to the accused was improperly admitted, there was such evidence in the case as to substantially compel a conviction. Thus in the case of Sergt. Jacob J. Sonnenshein, Company F, Three hundred and sixth Infantry, the Acting Judge Advocate General said August 12, 1918:

"That all of this evidence was utterly irrelevant to the offense charged need not be argued. It remains to be considered what effect must be attributed to it. The court evidently considered it important, because in one instance it insisted upon the details, and the judge advocate thought it had some weight, because he went so far as to object to the attempt of the accused to explain why he had not resented the attacks upon his person and upon his character. Under these circumstances can a reviewer say that the substantial rights of the accused do not appear to have been prejudiced within the meaning of the thirty-seventh article of war? I think not. It is true that such prejudice is not necessarily to be implied from the admission by the court of illegal testimony. It is also true that the absence of such prejudice is not to be implied from the fact that even if the illegal testimony had been excluded enough legal evidence remained to support a conviction. The reviewer must, in justice to the accused and in compliance with the spirit of the thirty-seventh article of war, seek further and reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then, indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded."

In the case of Pvt. Noel F. Peters, Four hundred and sixty-sixth Aero Squadron, he said June 20, 1918:

"This is not a case in which, if the incompetent evidence were excluded from consideration the court would still as reasonable men have been compelled to the same conclusion. On the contrary, with the great mass of incompetent testimony, and in view of the closely contested question of fact on the subject of intent, I do not see how it can be said that the substantial rights of the accused were not injuriously affected within the meaning of the thirty-seventh article of war."

In the case of Thomas M. Murphy, cook, Company A, Second Supply Train, he said, July 18, 1918:

"What effect shall be given to these grave errors? Did they prejudice the substantial rights of the accused? The rule of military administration is not that error necessarily imports prejudice. On the contrary, to invalidate the proceedings, prejudice must appear (A. W., 37). It is impossible, however, to examine the minds of the members of the court and determine how far illegal testimony has been effective in producing a conviction of guilt. A reviewer is required to examine the record to ascertain first, whether, with the illegal testimony excluded, enough legal evidence remains to support the conviction. This is, of course, a prime essential, but it is not enough. He must further examine and be able to say that the legal evidence of guilt in the record, weighed against the defense, substantially compels a finding of guilty."

And in the case of Sergt. Joseph Kovacs, Bakery Co. No. 320, Q. M. C., he said, September 25, 1918:

"It is not doubtful that the reception of illegal evidence may render void the subsequent finding and sentence. The thirty-seventh article of war clearly so contemplates. When such an error has or when it has not injuriously affected the substantial rights of the accused are legal and strictly judicial questions, which in some cases may be delicate and difficult to answer. They can never be answered by the direct testimony of the members of the court, and there is no method of probing the state of their minds or of estimating the balance of their judgments. Prejudice is not, of course, to be presumed. On the other hand, it is not to be avoided by the presence in the record of sufficient legal evidence to justify a conviction. Such a holding would nullify the requirement of military justice that the legal rules of evidence are to be observed (M. C. M., sec. 198). Yet some rule of administration of general application must be adopted. It appears to me that the rule followed by this office is the only safe and sound guide, namely, that the reception, in any substantial quantity, of illegal evidence must be held to vitiate a finding of guilty unless the legal evidence in the record is of such quantity and quality

as practically to compel, in the minds of conscientious and reasonable men, the same conclusion (U. S. *v.* Noel Peters, A. J. A. G. O., 201-116; U. S. *v.* Claude Wilson, A. J. A. G. O., 201-176)."

2. I deem it unnecessary to discuss here whether or not the rule as stated by the Acting Judge Advocate General is the rule of the courts in the United States exercising criminal jurisdiction, or whether or not it is the rule that the officer who approves or confirms the sentence should adopt as a guide. I do not believe that the Acting Judge Advocate General has any authority to decide as a matter of law what shall be the effect of competent testimony or what weight is to be given it or to determine what competent evidence shall and what shall not be deemed sufficiently convincing to support a conviction. Congress has recently made specific provision for the determination of the effect of the improper admission or rejection of evidence in the thirty-seventh article of war, as follows:

"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 the accused."

This expression of the law is so clear as to require no comment. It can not be doubted that the reviewing or confirming authority mentioned in the thirty-seventh article of war is the officer authorized to approve or confirm the sentence. Decision as to the effect of the improper admission of evidence, therefore, rests with him and must be decided by him and can not be decided by any other person.

3. Full copies of the decisions of the Acting Judge Advocate General, American Expeditionary Forces, are not submitted herewith for the reason that they are on file in the office of the Judge Advocate General.

W. A. BETHEL,
Brigadier General, Judge Advocate.

[First indorsement.]

G. H. Q., A. E. F.,
France, November 15, 1918.

To: The Adjutant General of the Army, Washington, D. C.

1. The remarks of the judge advocate American Expeditionary Forces in this letter are concurred in and decision is requested.

For the commander in chief.

_____ _____,
Chief of Staff.

[Second indorsement.]

WAR DEPARTMENT, *A. G. O.*
December 6, 1918.

To the Judge Advocate General for decision.
By order of the Secretary of War.

J. C. ASHBURN,
Adjutant General.

EXHIBIT 105.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
ACTING JUDGE ADVOCATE GENERAL IN EUROPE,
France, November 16, 1918.

From: The office of the Acting Judge Advocate General.
To: The Judge Advocate General of the Army, War Department, Washington, D. C.
Subject: Jurisdiction of the Acting Judge Advocate General for the American Expeditionary Forces.

1. Late yesterday afternoon Brig. Gen. W. A. Bethel, judge advocate of the American Expeditionary Forces, handed me a copy of a communication dated November 14, addressed by him to the commander-in-chief of the American

Expeditionary Forces, with reference to the subject stated above. A copy of the communication is inclosed herewith.

2. My views concerning the effect of the improper admission of testimony prejudicial to the accused are expressed in reviews prepared in this office in the cases of Peters (201–116), Sonnenshein (201–148), Murphy (201–156), Wilson (201–176), Bird (201–212), and Kovacs (201–246). Gen. Bethel has quoted portions of the reviews in three of these cases. The record in each of these cases, except that of Kovacs, has gone forward to your office, each accompanied by a copy of our review. The record in the Kovacs case has not been received back from the reviewing authority. When the record is received back with the final orders of the reviewing authority all the papers in that case will go forward to you.

3. It will be noted that in five of the six cases mentioned in the preceding paragraphs the improper admission of testimony prejudicial to the accused was held to be fatal to the validity of the sentence adjudged, and in one case, that of Wilson, it was held that the legal evidence was sufficient substantially to compel the findings recorded by the court and, therefore, that the improperly admitted testimony did not serve to invalidate the findings and sentence of the court. The conclusion arrived at in the Wilson case was arrived at also in other cases of lesser importance reviewed in this office. The disposition of the office has been not to hold a sentence invalid because of the improper admission of testimony, unless it seemed clear that the substantial rights of the accused actually had been prejudiced thereby.

4. Attention is invited to the fact that in the case of Private Bird, Gen. Bethel agreed with this office that the record was legally insufficient to support the findings of the court. Attention is also invited to the fact that the point upon which the cases mentioned in Gen. Bethel's letter turned is discussed in Wigmore on Evidence (vol. 1, pp. 69–79), and that the test adopted by this office to determine the effect of error in the admis ion of testimony has the approval of Col. Wigmore.

5. Upon the two questions raised by Gen. Bethel's communication Lieut. Col. Rand has prepared a memorandum, of which a copy is inclosed herewith. I concur in his conclusions.

6. Until another rule to determine the effect of the improper admission of testimony prejudicial to the accused is authoritatively prescribed, I feel bound to follow the one we have adopted.

7. Gen. Bethel's communication in effect calls into question the legal validity of General Order 7, War Department, 1918, as amended by Section IV, General Order 84, War Department, 1918. In my opinion that order is well founded upon section 1199, Revised Statutes, and upon the power of the President, acting through the Secretary of War, to order a sentence to be executed only in mitigated form, or to forbid its execution entirely. However, it seems entirely unnecessary for me to discuss the validity of the order in question. That, no doubt, was fully considered by your office and by the Secretary of War before the order was issued.

E. A. KREGER,
Acting Judge Advocate General.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
AMERICAN EXPEDITIONARY FORCES IN EUROPE,
France, November 16, 1918.

Memorandum for Gen. Kreger.
Subject: Jurisdiction of the Acting Judge Advocate General.

I have carefully considered the copy of a communication of November 14, 1918, from the judge advocate of the American Expeditionary Forces to the commander in chief dealing with the above subject.

I have nothing to add to the expression of my views quoted in that letter from several reviews of general court-martial cases by this office. Indeed, I do not understand that Gen. Bethel disputes them as stating the proper rule for the exercise of appellate jurisdiction (see first sentence of par. 2 of his letter). What he questions is the exercise of any appellate jurisdiction by this office in cases falling within the terms of the thirty-seventh article of war. His argument is a brief one, viz, that the terms of article 37 are so explicit as to require

no argument in support of his contention. I can not agree with him, for the following reasons:

A. The prohibition of the thirty-seventh article of war is directed to the reviewing or confirming authority and its meaning is as if it began, " The proceedings of a court-martial shall not be held invalid nor the findings or sentence disapproved by the reviewing or confirming authority * * * unless in his opinion," etc. I do not think that this article added to or subtracted anything from the existing law. It merely stated the prevailing rule governing the treatment on appeal of error in criminal cases (section 1025, R. S.).

Or, if I am wrong, and the prohibition is directed to the whole military hierarchy from the President down, then the President, the Secretary of War, and the Judge Advocate General are " reviewing " authorities (section 1025, R. S.).

In either view there is nothing in the language or intendment of the article which makes the opinion of the military commander final.

B. Why does Gen. Bethel limit his protest to cases where the error is in the reception or rejection of evidence? The article deals also and similarly with errors of pleading and procedure, and his contention for the finality of opinion of the commander must apply equally to such errors. A case might arise in which an attempted specification of murder under the ninety-second article of war failed to allege the death of the victim of the assault, although the proof showed it. This would be an error in pleading, and a finding of guilty of murder would be unsupported by the specification. Or a case might arise in which the members of the court were not sworn, and therefore the sentence was illegal. This would be an error of procedure. Would Gen. Bethel contend that because in the opinion of the commanding general these errors did not injuriously affect the substantial rights of the accused the sentences must stand? If so, he necessarily contends that the approval of a commanding general in all cases is final, since evidence, pleading, and procedure cover practically the whole field of error except jurisdiction.

C. I can not distinguish as to the point made by Gen. Bethel between the thirty-seventh and the forty-sixth, forty-seventh, and forty-eighth articles of war. The three last named give reviewing and confirming authorities (commanding officers) the power to approve or disapprove sentences and findings. This function, beyond any dispute, is to be performed in accordance with the officer's honest opinion of the legality of the proceedings and sentence. Is that opinion, as expresed in the approval or disapproval, to be final? If not, why not? And why may not finality be claimed for that opinion under articles 46, 47, and 48 with as much reason as under article 37? Yet it is the unquestioned practice of the Secretary of War to review these approvals and disapprovals through the Judge Advocate General of the Army and to take appropriate action to provide remedy in cases where they are found to be illegal (section 1199 R. S.).

D. With all due respect for Gen. Bethel's opinion, I consider the above considerations so conclusive as to the true intent of article 37 that I have refrained from mention of General Orders, No. 84, War Department, September 11, 1918. The jurisdiction of your office and of the main office in Washington was plain enough before that. But there can be no possible question now. Errors in evidence, in pleading, and in procedure are illustrations (and very comprehensive illustrations) of the causes which render findings and sentences illegal. And General Orders, No. 84, paragraph 4, in explicit terms directs that—

"Any sentence or any part thereof so (by the review of your office) found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General."

E. Even if Gen. Bethel be right and the discretion lodged in the commanding officer is final and beyond review, there is nothing to prevent the President, through the Secretary of War, from issuing instructions that no general court-martial sentence which your office has held to be illegal shall be executed.

F. I have no pride of authorship in and claim no originality for the office reviews quoted by Gen. Bethel. I am prepared to surrender the rule of administration therein described at any time for a better one. It is, however, clear to me that the necessity for some general rule—the application of some consistent and permanent test—is imperative. The effect of illegal evidence upon the substantial rights of an accused is no more to be left to the individual judgment of a judge advocate reviewer in each case than to the individual judgment of a military commander. The rule which we follow, viz, that substantial

uncured error must be held to have injuriously affected the rights of the accused (plaintiff in error or appellant) unless the competent and legal evidence is of such weight as to be compelling, is the rule adopted by courts of appeal in criminal cases. Until a better rule is suggested, I recommend that you follow it (Wigmore, vol. 1, pp. 69–79).

I am aware that the question when evidence is or is not compelling is sometimes a difficult and delicate one. It is, of course, essentially a question of fact, but one of those questions of fact which courts habitually take from the jury and reserve to themselves, as when they decline to submit cases to juries or set aside verdicts. In effect they then decide that a given finding of fact is not permissible to reasonable men. Such questions of fact are decided by the Supreme Court of the United States. When it holds unconstitutional a legislative act it decides not merely that the act is forbidden by the Constitution, but, in addition, that there is no reasonable ground to believe that it is not.

Such a question of fact has very recently been decided by Gen. Bethel himself in the case of Pvt. John Bird (A. J. A. G. O., 201–212), in which, speaking for the commander in chief of the American Expeditionary Forces, to whom an appeal had been taken by the commanding general of the 92d Division, The Adjutant General advised the reviewing authority that it was the unanimous opinion of a number of legal experts, in which the judge advocate, American Expeditionary Forces, concurs, "that there is no evidence disclosed by this record of the specific intent to commit rape."

The possible difficulty and delicacy of the question of the effect of error and its essentially legal and judicial nature confirm me in the belief that it is not the intention of Congress that it shall be finally decided by a military commander, who may or may not have a legal education or any capacity derived from training or experience, to decide such a question.

WILLIAM RAND,
Lieutenant Colonel, Judge Advocate, United States Army.

EXHIBIT 106.

General Orders, No. 41.

WAR DEPARTMENT,
Washington, March 25, 1919.

I. *Review of records of general courts-martial.*—The last subparagraph of section II, General Orders, No. 7, War Department, 1918, as amended by section IV, General Orders, No. 84, War Department, 1918, is further amended to read as follows:

The records of all general courts-martial and of all military commissions originating in said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void, in whole or in part, to the end that any such sentence or any part thereof so found to be illegal or void shall not be carried into effect. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

II. *Duties of board of appraisers.*—Subparagraph (*a*), paragraph 4, section II, General Orders, No. 30, War Department, 1918, is amended to read as follows:

4. (*a*) To determine, by appropriate methods, just compensation for all property of whatever kind, real, personal, and mixed, or for the use, possession, or occupation of any such property (1) which shall hereafter during the existing emergency be ordered, requisitioned, commandeered, or otherwise summarily taken over according to law, through, by, or by direction of the Secretary of War for the direct and special use of the Army, or which was taken otherwise than by requisition, commandeering, or other summary process issued according to law, and without valid agreement fixing compensation therefor; or (2) which has heretofore, during the present emergency, been thus taken

over and the determination of just compensation for which has not been concluded, or is not under consideration by a special board of assessors.

By order of the Secretary of War:

FRANK MCINTYRE,
Major General, Acting Chief of Staff.

Official:
J. T. KERR,
Adjutant General.

EXHIBIT 107.

[Office organization: Maj. Gen. E. H. Crowder, Judge Advocate General; Brig. Gen. S. T. Ansell, Assistant; Col. James J. Mayes, Assistant.]

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 10, 1918.

The duties of the several divisions are as follows:

1. The executive officer. Room 132. Lieut. Col. H. M. Morrow. (One clerk.)

It is the duty of the officer in charge, as his designation implies, to see that the administration of this bureau is performed smoothly, expeditiously, and efficiently. He must have an intimate knowledge of the work of all the divisions, that he may advise the head of the office regarding the status of the work in any one or all of them. He should be constantly in touch with the several divisions and of the officers engaged in each division. So far as possible, he should save the head of the office from the necessity of attending to merely routine matters and unimportant matters involving internal office administration only.

2. Military jurisdiction division. Rooms 191–199. Lieut. Col. Edwin G. Davis in charge, with Lieut. Col. R. K. Spiller, Lieut. Col. A. E. Clark, Lieut. Col. Neal Power, Maj. M. A. Coles, Maj. W. B. Pistole, Maj. C. B. Parkhill, Maj. Reginald Huidekoper, Maj. A. R. Brindley, Maj. F. B. Johnson, Maj. C. L. Frailey, Maj. C. M. Fessenden, Maj. P. E. Coyle, Maj. R. W. Millar, Maj. E. R. Keedy, and Maj. C. C. Tucker as assistants. (Ten clerks.)

The duties of this division are the review of records of courts-martial; rendition of reports upon application for clemency; solution of problems relating to the disciplinary barracks and the government of military prisons; and all matters having to do with the discipline of the Army, in so far as it involves the administration of this office.

3. War laws division. Room 138. Maj. E. M. Morgan, officer in charge. (One clerk.)

The duties of this division will be to collect all war laws and decisions affecting or of interest to our Military Establishment, and also to see, after conference with the executive officer, that so much of it as would be valuable for their purpose be distributed among all judge advocates on active duty.

4. Division of accounts, claims, contracts, commandeering property, and fiscal affairs. Room 144. Lieut. Col. L. W. Call in charge, with Majs. T. Ruffin, Avery F. Cushman, and Mr. W. W. Lemmond as assistants. (One clerk.)

The duties of this division will be to give consideration to accounts, contracts, claims, expenditures, disbursements, fiscal affairs in general, and the commandeering of property for public use.

5. Constitutional and international law division. Room 138. Lieut Col. Eugene Wambaugh, officer in charge.

The duties of this division will consist of the consideration of all questions under these two special branches.

6. Civil administration division. Room 144. Lieut. Col. Edward S. Bailey in charge.

The duties of this division will be to give consideration to all legal questions submitted by the Bureau of Insular Affairs, in which all matters the officer in charge will be assisted by Mr. Lemmond, and to all questions arising under the civil jurisdiction of the War Department, including river and harbor administration, and to all those questions which arise through the contact of the military with the civil community except those falling under the constitutional and international law division.

7. Legislative division. Rooms 138 and 145. Lieut. Col. William O. Gilbert in charge, with Lieut. Col. B. A. Read and Capt. D. D. Snapp as assistants. (Three clerks.)

The duties of this division will be to give consideration to the drafting of proposed legislation, keeping in touch with, and expediting its passage through Congress.

8. Reservation division. Room 136. Mr. J. F. Defandorf in charge. (One clerk.)

The duties of this division will be to give consideration to questions affecting the titles to Government lands, military reservations, leases, permits, rents, Executive orders, etc.

9. Miscellaneous division. Room 146. Lieut. Col. George S. Wallace in charge, with Lieut. Col. Guy D. Goff and Maj. Amos R. Stallings as assistants. (One clerk.)

The duties of this division will consist of the numerous miscellaneous questions arising in the administration of the War Department and the Army which do not fall specifically within the duties of any other division of the office. It will be to the benefit of the administration of this division if the officer in charge will have frequent conferences with the executive officer or other Regular officers on duty in the department.

10. Library. Rooms 140–142. Maj. E. S. Thurston in charge. Miss N. C. Morrison, librarian.

The duties of the library are to keep available at all times a well-equipped and up-to-date law library for the use not only of the Judge Advocate General's office but for the entire War Department.

11. Personnel and property division. Room 136. William H. Keith, chief clerk and solicitor, in charge. (Two clerks.)

This division is in charge of the funds, records, supplies, property, and clerical force of the office. It will handle the estimates, requisitions, allotments, supervise and coordinate the clerical work, and will conduct the routine business of the bureau.

(*a*) Upon receipt of papers in the chief clerk's office they are stamped, numbered, precedents attached, and charged to the officer handling them. When completed they are returned to the chief clerk, where the charge against the officer is removed, thus showing the time the officer had them; then they are passed to Col. Mayes, to Gen. Ansell, and to Gen. Crowder. After approval they are sent out, either by mail or in jackets by messengers.

(*b*) Record section. Rooms 139–141. Mr. R. L. Merrick in charge. (Six clerks.)

All opinions, reports, memoranda, letters, and papers, except general courts-martial records and title papers are recorded and filed in the record rooms, Nos. 139–141.

The general courts-martial records are recorded and current records filed in room 199.

The title papers are filed in room 137.

(*c*) The stenographic section. Rooms 135–137. Mr. T. A. Smith in charge.

Except for one or two stenographers in the rooms of the chiefs of divisions, the stenographers and typewriters are located in rooms 135 and 137. Officers desiring the services of a stenographer should either phone to Mr. Smith, branch 1991, or send to him by messenger the matter they desire to have typewritten or mimeographed.

EXHIBIT 108.

NOVEMBER 17, 1917, TO APRIL 10, 1918.

107039, Dec. 3, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107045, Nov. 21, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J A. G.

107046, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107076, Nov. 16, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107084, Nov. 26, 1917.—rev., signature not shown.

107085, Dec. 17, 1917.—memo. to Secretary of War, signed Ansell, Act. J. A. G.

107086, Dec. 11, 1917.—rev., signed Maj. E. G. Davis, approved S. T. Ansell, Act. J. A. G.
107087, Nov. 26, 1917.—memo. to Secretary of War, signature not shown.
107117, Jan. 17, 1918.—clem., signed Maj. E. G. Davis.
107122, Mar. 23, 1918.—rev., signed A. E. Clark, Lieut. Col., Asst. J. A. G.
107130, Dec. 18, 1917.—clem., signed Maj. E. G. Davis, Asst to J. A. G.
107135, Mar. 18, 1918.—clem., signature not shown.
107136, Nov. 16, 1917.—memo. for Secretary of War, signature not shown, approved Ansell, Act. J. A. G.
107138, Nov. 21, 1917.—rev., signed Crowder, J. A. G.
107139, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107148, Jan. 5, 1918.—rev., signature not shown.
107153, Dec. 7, 1917.—rev., signed Maj. E. G. Davis, approved Crowder.
107163, Nov. 24, 1917.—clem., signed Maj. E. G. Davis, approved Crowder.
107168, Dec. 11, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107169, Nov. 16, 1917.—memo. for Secretary of War, signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107179, Nov. 22, 1917.—memo. for Secretary of War, signed S. T. Ansell, Act. J. A. G.
107186.—rec. in review, out of file.
107221, Nov. 21, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107222, Nov. 20, 1917.—rev., signed Maj. E. G. Davis.
107229, Dec. 8, 1917.—clem., signed Maj. E. G. Davis.
107238, Dec. 14, 1917.—clem., signed Maj. E. G. Davis.
107241, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107250, Dec. 4, 1917.—memo. for Secretary of War, signed Maj. E. G. Davis, approved Ansell.
107254, Nov. 21, 1917.—rev., signed Ansell; clem.
107264, Nov. 30, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107282, no date.—rev., signed E. H. Crowder (initialed RKS–cc).
107290, Nov. 26, 1917.—record ret'd for corrective action, E. G. Davis.
107299, Mar. 6, 1918.—clem., signed Maj. E. G. Davis.
107313, Mar. 5, 1918.—clem., signature not shown.
107315, Dec. 26, 1917.—clem., sentence remitted, signed Maj. E. G. Davis.
107324, Dec. 28, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107326, Dec. 27, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107339, Dec. 28, 1917.—rec., ret'd for corrective action, signed E. G. Davis.
107346, Dec. 29, 1917.—rec., signed E. G. Davis, approved Ansell.
107361, Mar. 9, 1918.—rev., signed E. G. Davis, approved Ansell.
107376, Jan. 30, 1918.—clem., signed E. G. Davis, approved Ansell.
107387, Dec. 12, 1917.—memo. to Secretary of War, signed Ansell, Act. J. A. G.
107393, Dec. 28, 1917.—rev., signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107395, Dec. 17, 1917.—clem., signed Maj. E. G. Davis.
107405, Jan. 8, 1918.—rev., signed Maj. E. G. Davis.
107407, Dec. 8, 1918.—clem., signed Maj. E. G. Davis.
107408, Jan. 8, 1918.—rev., signature not shown (WR–EMS).
107409, Dec. 8, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107410, Dec. 13, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107414, Dec. 4, 1917.—memo. for Adjutant General, signed Ansell, Act. J. A. G. (initialed RKS–CWM).
107424, no date.—rev., signed Maj. E. G. Davis (initialed WBT–JLL).
107425, Dec. 15, 1917.—rev., signed E. G. Davis, approved Ansell.
107436, Dec. 3, 1917.—memo. for Secretary of War, signature not shown. (Initialed RLN–CN.)
107456, Dec. 15, 1917.—rev., Davis, approved S. T. Ansell.
107472, Dec. 28, 1917.—rev., Davis, approved Crowder.
107474, Jan. 4, 1918.—rev., Davis, approved Ansell.
107476, Feb. 18, 1918.—clem., Davis.
107479, Jan. 3, 1918.—rev., Davis, approved Ansell.
107486, Feb. 26, 1918.—clem., Davis.
107490, Dec. 5, 1917.—rev., Ansell, approved Crowell, Asst. Sec. of War.
107505, Nov. 30, 1917.—Rev., Ansell.
107507, Dec. 11, 1917.—Clem., Davis, disapproved Crowell, Asst. Sec. of War.
107510, Jan. 9, 1918.—Clem., Davis.
107534, Dec. 3, 1917.—Rev., Davis, Ansell.

107537, Dec. 1, 1917.—Rev., Davis, Crowder.
107541, Dec. 1, 1917.—Rev., Davis, Ansell.
107544, Dec. 1, 1917.—Rev., Davis, Ansell.
107545, Dec. 3, 1917.—Rev., Davis, Ansell.
107549, Dec. 12, 1917.—Rev., Davis, Ansell.
107559, Dec. 6, 1917.—Rev., initialed RKS–S, not signed.
107560, Dec. 28, 1917.—Rev., signed Davis, approved Ansell.
107564, Apr. 4, 1918.—Clem., signed Davis.
107566, Apr. 4, 1918.—Clem., signed Davis.
107571, Dec. 6, 1917.—Rev., signed Davis, approved Ansell.
107575, Dec. 28, 1917.—Rev., signed Davis, approved Ansell.
107576, Dec. 8, 1917.—Rev., signed Davis, approved Ansell.
107583, Dec. 8, 1917.—Rev., signed Davis, approved Ansell.
107591, Jan. 12, 1918.—Clem., signed Davis.
107603, Dec. 11, 1917.—Rev., signed Ansell, approved Crowell, Asst. Secretary of War.
107608, Dec. 7, 1917.—Rev., signed Davis, approved Ansell.
107608, Jan. 12, 1918.—Clem., signed Davis.
107618, Dec. 7, 1917.—Rev., signed Davis, approved Ansell.
107619, Dec. 6, 1917.—Rev., signed Davis, approved Ansell.
107709, Dec. 13, 1917.—Rev., signed Davis, approved Ansell.
107711, Jan. 5, 1918.—Rev., not signed.
107717, Jan. 5, 1918.—Rev., signed Ansell (WR–WLA).
107718, Jan. 5, 1918.—Rev., signed Ansell (WR–RLB).
107720, Dec. 11, 1917.—Rev., signed Davis, Ansell.
107721, Dec. 10, 1917, Rev., signed Davis, Crowder.
107339, Dec. 11, 1917.—Rev., signed Davis, Ansell.
107744, Dec. 12, 1917.—Rev., signed Davis, approved Ansell.
107766, Dec. 10, 1917.—Rev., signed Davis, approved Ansell.
107769, Dec. 29, 1917.—Rev., signed Davis, approved Ansell.
107774, Dec. 25, 1917.—Clem., signed Davis, approved Ansell.
107800, Dec. 15, 1917.—Rev., signed Ansell, Crowell, Asst. Sec. of War.
107802, Mar. 5, 1918.—Clem., signed Davis.
107814, Dec. 14, 1917.—Rev., signed Ansell, Crowell, Asst Sec. of War.
107828, Dec. 11, 1917.—Rev., signed Ansell, Crowell, Asst. Sec. of War.
107831, Dec. 11, 1917.—Rev., signed Davis, approved Crowell.
107848, Dec. 26, 1917.—Rev., signed Davis, approved Ansell.
107850, Dec. 15, 1917.—Rev., signed Davis, approved Ansell.
107855, Dec. 27, 1917.—Rev., signed Davis, approved Ansell.
107856, Dec. 18, 1917.—Rev., signed Davis, approved Crowder.
107873, Dec. 12, 1917.—Rev., signed Davis.
108007, Dec. 22, 1917.—Clem., signed Davis.
108009, Mar. 16, 1918.—Clem., signed Davis.
108016, Feb. 4, 1918.—Rev., signed Crowder (AEC).
108017, Jan. 10, 1918.—Clem., signed Davis.
108018, Mar. 29, 1918.—Clem., signed Ansell.
108025, Jan. 2, 1918, Clem., signed Davis.
108027, Dec. 24, 1918.—Rev., signed Davis, Ansell.
108050, Dec. 18, 1918.—Rev., signed Davis, Crowell.
108058, Jan. 7, 1918.—Rev., not signed (WR–MTD).
108059, Dec. 19, 1917.—Rev., signed Davis, Ansell.
108062, Dec. 28, 1917.—Rev., signed Davis, Ansell.
108080, Dec. 28, 1917.—Clem., signed Davis.
108081, Jan. 17, 1918.—Clem., signed Davis.
108083, Dec. 21, 1917.—Clem., signed Davis.
108——, Apr. 4, 1918.—Clem., signed Davis.
108200, Dec. 26, 1917.—Clem., Ansell (RKS).
108261, Jan. 23, 1918.—Clem., Spiller, Ansell.
108273, Jan. 28, 1918.—Clem., Davis, Ansell.
108402, Jan. 4, 1918.—Memo. for J. A. G., Davis.
108403, Jan. 4, 1918.—Rev., Davis, Ansell.
108404, Jan. 15, 1918.—Rev., Davis, Ansell.
108412, Jan. 7, 1918.—Rev., Davis.
108413, Jan. 8, 1918.—Rev., Davis, Ansell.
108050, Dec. 18, 1917.—Rev., Ansell, Crowell.
108054, Dec. 19, 1917.—Rev., Davis, Ansell.
108444, Jan. 4, 1918.—Rev., Davis.

108445, Jan. 3, 1918.—Rev., Davis, Ansell.
108452, Jan. 4, 1918.—Rev., Davis.
108453, Jan. 5, 1918.—Not signed (WEP–WLA), rev.
108479, Jan. 12, 1918.—Signed Davis, Ansell, rev.
108495, Jan. 5, 1918.—Not signed (RKS–CWM), rev.
108519, Jan. 11, 1918.—Rev., signed Crowder (AEC–RLB).
108528, Jan. 11, 1918.—Rev., Davis.
108823, Jan. 16, 1918.—Rev., Davis.
108824, Jan. 17, 1918.—Rev., Davis.
108837, Jan. 18, 1918.—Rev., Davis.
108838, Jan. 19, 1918.—Rev., Davis.
108851, Jan. 17, 1918.—Rev., Davis.
108852, Jan. 6, 1918.—Rev., Davis, Ansell.
108854, Jan. 8, 1918.—Rev., Davis.
108885, Jan. 17, 1918.—Rev., Davis.
108887, Jan. 17, 1918.—Rev., Davis.
108888, Jan. 30, 1918.—Rev., Davis, Crowell.
108921, Jan. 18, 1918.—Rev., Davis.
108933, Jan. 21, 1918.—Rev., Davis, Ansell.
108981, Mar. 7, 1918.—Rev., signed Davis, approved Crowell.
108988, Feb. 8, 1918.—Rev., signed Davis.
108990, Feb. 8, 1918.—Rev., signed Davis.
108991, Mar. 12, 1918.—Clem., signed Davis.
108994, Jan. 18, 1918.—Rev., signed Davis.
108997, Feb. 6, 1918.—Rev., signed Davis, approved Ansell.
108998, Feb. 8, 1918.—Rev., signed Davis, approved Ansell.
109909, Feb. 14, 1918.—Rev., signed Davis, approved Ansell.
109014, Jan. 23, 1918.—Rev., signed Spiller, approved Ansell.
109044, Jan. 29, 1918.—Rev., signed Davis.
109046, Jan. 19, 1918.—Rev., signed Crowder (RKS–CWM).
109047, Jan. 20, 1918.—Rev., signed Davis.
109090, Feb. 7, 1918.—Rev., signed Davis.
109095, Jan. 21, 1918.—Rev., signed Davis.
109096, Jan. 21, 1918.—Rev., signed Davis.
109097, Jan. 22, 1918.—Rev., signed Davis.
109098, Jan. 21, 1918.—Rev., signed Davis.
109099, Feb. 6, 1918.—Rev., signed Davis.
109100, Feb. 1, 1918.—Rev., signed Crowder (EGB).
109104, Mar. 11, 1918.—Clem., signed Davis.
109130, Feb. 16, 1918.—Rev., signed Davis.
109151, Jan. 28, 1918.—Rev., signed Davis, approved Ansell.
108274, Mar. 11, 1918.—Clem., signed Davis.
108297, Jan. 7, 1918.—Rev., signed Davis.
108599, Mar. 14, 1918.—Clem., signed Davis.
108583, Jan. 11, 1918.—Rev., not signed (WR–WLA).
108588, Jan. 8, 1918.—Rev., Ansell (WBB–MG) approved Secretary of War.
108328, Jan. 10, 1918.—Rev., Davis, approved Ansell.
108591, Jan. 18, 1918.—Rev., Davis.
108592, Jan. 22, 1918.—Rev., Davis, approved Ansell.
108595, Jan. 11, 1918.—Rev., not signed (WR–HAD).
108597, Jan. 2, 1918.—Rev., not signed (RKS–GPH).
108599, Jan. 12, 1918.—Rev., Ansell (RKS–MTD).
108636, Jan. 8, 1918.—Rev., Davis, Ansell.
108641, Jan. 18, 1918.—Rev., Davis.
108645, Jan. 10, 1918.—Rev., Ansell (RKS–CJL).
108861, Feb. 7, 1918.—Clem., Davis.
108668, Jan. 14, 1918.—Rev., Davis.
108715, Jan. 17, 1918.—Rev., no signature (WL–JJT).
108733, Jan. 12, 1918.—Rev., Davis, Ansell.
108735, Jan. 12, 1918.—Rev., Davis, Ansell.
108759, Jan. 12, 1918.—Rev., Davis.
108762, Jan. 16, 1918.—Rev., Ansell (PGH–CWM).
108764, Jan. 14, 1918.—Rev., Davis.
108765, Jan. 16, 1918.—Rev., Davis.
108766, Jan. 17, 1918.—Rev., Ansell (RKS–EMS).
108795, Jan. 16, 1918.—Rev., Davis, Ansell.
109156, Feb. 8, 1918.—Rev., Davis, Ansell.

109174, Jan. 26, 1918.—Rev., Davis, Ansell.
109240, Feb. 6, 1918.—Rev., Davis, Ansell.
109241, Feb. 6, 1918.—Rev., Davis.
109242, Jan. 26, 1918.—Rev., Davis.
109250, Feb. 1, 1918.—No signature (WBP), rev.
109270, Feb. 6, 1918.—Rev., Davis.
109275, Jan. 29, 1918.—Rev., Davis.
109280, Jan. 24, 1918.—Rev., Ansell (RKS).
109283, Feb. 7, 1918.—Rev., Davis, Ansell.
109285, Feb. 7, 1918.—Rev., Davis, Ansell.
109289, Feb. 9, 1918.—Rev., Davis, Crowder.
109290, Feb. 9, 1918.—Rev., Davis, Ansell.
109294, Feb. 6, 1918.—Rev., Crowder (AEC).
109320, Feb. 5, 1918.—Rev., Davis, Ansell.
109412, Apr. 9, 1918.—Rev., Davis, Ansell.
109323, Feb. 5, 1918.—Rev., Davis, Crowder.
109333, Jan. 30, 1918.—Rev., Davis, Crowder.
109334, Feb. 7, 1918.—Rev., Mayes (RKS–EGD).
109382, Jan. 1, 1918.—Rev., Davis.
109386, Jan. 31, 1918.—Clem., Davis.
109390, Feb. 1, 1918.—Rev., Davis.
109423, Jan. 30, 1918.—Rev., Davis.
109424, Jan. 30, 1918.—Rev., Davis.
109425, Feb. 26, 1918.—Clem., Davis.
109460, Feb. 2, 1918.—Rev., Davis.
109462, Feb. 1, 1918.—Rev., Davis.
109464, Feb. 1, 1918.—Rev., Davis.
109489, Feb. 22, 1918.—Rev., Davis.
109490, Jan. 31, 1918.—Rev., no signature.
109492, Feb. 4, 1918.—Rev., Davis, Ansell.
109789, Mar. 27, 1918.—Clem., Ansell.
109751, Feb. 1, 1918.—Rev., Davis, Ansell.
109809, Feb. 13, 1918.—Rev., Davis.
109810, Feb. 13, 1918.—Rev., Davis.
109531, Feb. 11, 1918.—Rev., no signature (ITW).
109566, Feb. 4, 1918.—Rev., Davis, Ansell.
109567, Feb. 4, 1918.—Rev., Davis.
109579, Feb. 7, 1918.—Rev., Davis, Ansell.
109588, Feb. 9, 1918.—Rev., Davis.
109601, Apr. 4, 1918.—Rev., Mayes.
109613, Feb. 7, 1918.—Rev., Ansell.
109618, Apr. 4, 1918.—Clem., Davis.
109620, Feb. 25, 1918.—Clem., Davis.
109621, Feb. 6, 1918.—Rev., Davis, Ansell.
109623, Feb. 5, 1918.—Rev., Davis.
109638, Feb. 19, 1918.—Rev., Davis, Crowder.
109642, Feb. 15, 1918.—Rev., no signature (PJH).
109643, Feb. 16, 1918.—Rev., Davis.
109660, Feb. 13, 1918.—Rev., Davis.
109662, Feb. 13, 1918.—Rev., Davis.
109690, Feb. 13, 1918.—Rev., no signature (WBP).
109714, Mar. 9, 1918.—Rev., Davis.
109717, Feb. 7, 1918.—Rev., Davis, Ansell.
109718, Feb. 6, 1918.—Rev., Davis.
109721, Apr. 4, 1918.—Clem., Davis.
109724, Feb. 6, 1918.—Rev., Crowder (WR).
109811, Feb. 14, 1918.—Rev., Crowder (PJH–CWM).
109813, Feb. 9, 1918.—Rev., Davis.
109812, Feb. 7, 1918.—Rev., Davis.
109814, Feb. 14, 1918.—Rev., Davis.
109815, Feb. 8, 1918.—Rev., Davis.
109819, Feb. 15, 1918.—Rev., Crowder (AEC–GPH).
109837, Feb. 28, 1918.—Rev., Ansell.
109840, Feb. 8, 1918.—Rev., Davis.
109858, Feb. 11, 1918.—Rev., Davis.
109867, Feb. 5, 1918.—Rev., Davis, Ansell.
109899, Feb. 12, 1918.—Rev., Davis.

109905, Mar. 6, 1918.—Rev., Davis, Crowell.
109906, Feb. 5, 1918.—Rev., Davis.
109908, Mar. 13, 1918.—Rev., Davis.
109912, Mar. 11, 1918.—Rev., Davis.
109945, No date.—Rev., Davis.
109989, Feb. 16, 1918.—Rev., Davis.
109994, Mar. 4, 1918.—Clem., Davis.
109992, Feb. 16, 1918.—Rev., Davis.
111018, Feb. 21, 1918.—Rev., Davis, Ansell.
111059, Feb. 16, 1918.—Rev., Davis.
110060, Feb. 15, 1918.—Rev., Davis.
110061, Feb. 15, 1918.—Rev., Davis, Crowder.
110064, Feb. 10, 1918.—Rev., Davis, Crowder.
110069, Mar. 18, 1918.—Rev., Davis.
110071, Feb. 13, 1918.—Rev., Davis.
110023, Mar. 4, 1918.—Rev., Davis.
110135, Mar. 4, 1918.—Rev., Davis.
110251, Jan. 19, 1918.—Rev., Davis.
110268, Feb. 20, 1918.—Rev., Davis.
110270, Feb. 19, 1918.—Rev., Davis.
110271, Feb. 18, 1918.—Rev., Davis.
110272, Feb. 19, 1918.—Rev., Crowder (AEC).
110285, Mar. 4, 1918.—Rev., Davis, Ansell.
110289, Mar. 19, 1918.—Clem., Davis.
110295, Mar. 14, 1918.—Rev., Davis.
110298, Feb. 20, 1918.—Rev., Davis.
110333, Mar. 10, 1918.—Rev., Davis.
110473.
110186, Feb. 26, 1918.—Rev., Davis.
110236, Feb. 21, 1918.—Rev., no signature (JPS).
110237, Feb. 27, 1918.—Rev., Crowder (AEC).
110239, Feb. 19, 1918.—Rev., Davis, Ansell.
110247, Feb. 18, 1918.—Rev., Crowder (AEC).
110346, Mar. 9, 1918.—Rev., Davis.
110350, Apr. 4, 1918.—Rev., Davis.
110352, Mar. 18, 1918.—Rev., Ansell (AEC).
110353, Mar. 12, 1918.—Rev., Davis.
110355, Mar. 9, 1918.—Rev., Davis.
110362, Apr. 9, 1918.—Rev., Davis.
110368, Feb. 28, 1918.—Rev., Davis
110378, Mar. 7, 1918.—Rev., no signature (ITW).
110394, Mar. 12, 1918.—Rev., Davis, Ansell.
110415, Feb. 21, 1918.—Rev., Davis, Crowder.
110417, Feb. 25, 1918.—Rev., Davis, Ansell.
110423, Feb. 25, 1918.—Rev., Davis.
110424, Mar. 27, 1918.—Rev., Clark.
110426, Apr. 5, 1918.—Clem., Davis.
110436, Feb. 21, 1918.—Rev., Davis, Crowder.
110437, Feb. 25, 1918.—Rev., Crowder (WR).
110438, Feb. 23, 1918.—Rev., Davis.
110524, Mar. 24, 1918.—Rev., Davis.
110526, Mar. 4, 1918.—Rev., Davis.
110527, Feb. 25, 1918.—Rev., Davis.
110528, Feb. 25, 1918.—Rev., Davis.
110529, Feb. 25, 1918.—Rev., Davis.
110530, Feb. 25, 1918.—Rev., Davis.
110531, Feb. 27, 1918.—Rev., Davis.
110532, Feb. 27, 1918.—Rev., Davis.
110533, Mar. 4, 1918.—Rev., Davis.
110534, Mar. 4, 1918.—Rev., Davis.
110535, Mar. 10, 1918.—Rev., Davis.
110536, Mar. 4, 1918.—Rev., Davis.
110537, Mar. 7, 1918.—Rev., Davis.
110538, Mar. 9, 1918.—Rev., Davis.
110544, Mar. 7, 1918.—Rev., Davis.
110545, Mar. 28, 1918.—Rev., Ansell (CBP).
110547, Mar. 6, 1918.—Rev., Davis.

110548, Mar. 9, 1918.—Rev., Davis.
110549, Mar. 12, 1918.—Rev., Davis.
110550, Mar. 10, 1918.—Rev., Mayes (MP).
110551, Mar. 10, 1918.—Rev., Davis.
110554, Mar. 1, 1918.—Rev., Davis.
110555, Feb. 28, 1918.—Rev., Crowder (EGD).
110556, Mar. 4, 1918.—Rev., Davis.
110597, Mar. 3, 1918.—Rev., Clark.
110598, Apr. 3, 1918.—Rev., Clark.
110599, Apr. 3, 1918.—Rev., Clark.
110601, Mar. 1, 198.—Rev., Davis.
110602, Mar. 29, 1918.—Rev., Crowder (CBP).
110603, Mar. 4, 1918.—Rev., Davis.
110604, Mar. 14, 1918.—Rev., Davis.
110648, Feb. 28, 1918.—Rev., Davis.
110650, Mar. 15, 1918.—Rev., Davis.
110653, Mar. 29, 1918.—Rev., Ansell (CBP).
110655, Mar. 5, 1918.—Rev., Davis.
110656, Feb. 28, 1918.—Rev., Davis.
110657, Mar. 10, 1918.—Rev., Crowder (AEC).
110744, Mar. 11, 1918.—Rev., Davis.
110745, Feb. 28, 1918.—Rev., Davis.
110746, Mar. 12, 1918.—Rev., Davis.
110750, Mar. 6, 1918.—Rev., Davis.
110768, Mar. 5, 1918.—Clem., Davis.
110783, Mar. 4, 1918.—Rev., Davis.
110784, Mar. 4, 1918.—Rev., Crowder (WR).
110786, Mar. 21, 1918.—Rev., Ansell (EGD).
110790, Mar. 1, 1918.—Rev., Davis.
110791, Mar. 1, 1918.—Rev., Davis.
110794, Mar. 7, 1918.—Rev., Davis.
110795, Apr. 8, 1918.—Rev., Ansell (AEC).
110795, Mar. 6, 1918.—Rev., Davis, Crowder.
110798, Mar. 11, 1918.—Rev., Davis.
110800, Feb. 9, 1918.—Rev., Mayes, Crowder.
110803, Mar. 9, 1918.—Rev., Davis.
110822, Mar. 11, 1918.—Rev., Davis.
110845, Mar. 7, 1918.—Rev., Davis.
110846, Mar. 16, 1918.—Rev., Crowder (ARC).
110856, Mar. 9, 1918.—Rev., Davis.
110856, Mar. 16, 1918.—Rev., Davis.
110872, Mar. 6, 1918.—Rev., Davis.
110875, Mar. 6, 1918.—Rev., Davis.
110886, Mar. 28, 1918.—Clem., Ansell (PDW).
110908, Mar. 9, 1918.—Rev., Davis.
110915, Mar. 20, 1918.—Rev., Crowder (MPP).
110917, Mar. 9, 1918.—Rev., Davis.
110920, Mar. 9, 1918.—Rev., Davis.
110921, Mar. 7, 1918.—Rev., Davis.
110928, Mar. 7, 1918.—Rev., Davis.
110943, Mar. 18, 1918.—Rev., Davis.
110952, Mar. 13, 1918.—Rev., Davis.
110953, Mar. 8, 1918.—Rev., Davis.
110972, Mar. 10, 1918.—Rev., Davis.
110992, Mar. 15, 1918.—Rev., Davis.
111005, Mar. 14, 1918.—Rev., Davis.
111023, Mar. 20, 1918.—Rev., not signed (IGW).
111029, Mar. 26, 1918.—Rev., not signed (JNC).
111045, Apr. 6, 1918.—Rev., Crowder (ACF).
111085, Mar. 7, 1918.—Rev., Davis.
111092, no date.—Rev., Davis.
111100, Mar. 22, 1918.—Rev., Ansell (ARB).
111106, Mar. 28, 1918.—Rev., Ansell (AEC).
111112, Mar. 29, 1918.—Rev., Mayes (ERK).
111146, Mar. 13, 1918.—Rev., Ansell (CAB).
111148, Mar. 12, 1918.—Rev., Davis.
111149, Mar. 12, 1918.—Rev., Davis.
111160, Mar. 12, 1918.—Rev., Davis.

111162, Mar. 7, 1918.—Letter, Davis.
111175, Mar. 11, 1918.—Rev., Davis.
111180, Mar. 12, 1918.—Rev., Davis.
111181, Mar. 12, 1918.—Rev., Davis.
111182, Mar. 19, 1918.—Rev., Davis.
111188, Apr. 9, 1918.—Rev., Crowder (CCT).
111194, Mar. 8, 1918.—Rev., Davis.
111217, Mar. 16, 1918.—Rev., Davis.
111223, Mar. 16, 1918.—Rev., Davis.
111228, Mar. 14, 1918.—Rev., Davis.
111239, Mar. 18, 1918.—Rev., Davis.
111366, Mar. 12, 1918.—Rev., Davis.
111367, Mar. 8, 1918.—Rev., Davis.
111368, Mar. 8, 1918.—Rev., Davis.
111369, Mar. 16, 1918.—Rev., Crowder (AEC).
111370, Mar. 19, 1918.—Rev., Crowder (NP).
111373, Mar. 8, 1918.—Rev., Davis, Crowder.
111374, Mar. 13, 1918.—Rev., not signed (AEC).
111388, Mar. 19, 1918.—Rev., Crowder (WBP).
111412, Mar. 11, 1918.—Rev., Davis.
111420, Mar. 11, 1918.—Letter, Davis.
111422, Mar. 18, 1918.—Rev., Davis.
111442, Mar. 24, 1918.—Letter, Davis.
111454, Mar. 15, 1918.—Rev., Davis.
111455, Mar. 8, 1918.—Rev., Davis.
111459, Mar. 21, 1918.—Letter, Davis.
111460, Mar. 16, 1918.—Rev., Davis.
111461, Mar. 18, 1918.—Rev., Davis.
111465, Mar. 14, 1918.—Letter, Davis.
111466, Mar. 14, 1918.—Letter, Davis.
111496, Mar. 6, 1918.—Letter, Davis.
111499, Mar. 20, 1918.—Letter, Davis.
111500, Mar. 16, 1918.—Letter, Davis.
111501, Mar. 16, 1918.—Rev., Davis.
111503, Mar. 25, 1918.—Rev., Clark.
111504, Mar. 25, 1918.—Letter, Clark.
111508, Mar. 16, 1918.—Rev., Davis.
111510, Mar. 16, 1918.—Rev., Davis.
111517, Mar. 25, 1918.—Rev., Clark.
111518, Mar. 18, 1918.—Letter, Davis.
111519, Mar. 19, 1918.—Letter, Davis.
111520, Mar. 14, 1918.—Rev., Davis.
111521, Apr. 3, 1918.—Rev., Mayes (WBP).
111522, Mar. 15, 1918.—Rev., Davis.
111524, Mar. 18, 1918.—Rev., Crowder (AEC).
111524, Mar. 18, 1918.—Rev., Davis.
111525, Mar. 16, 1918.—Rev., Davis.
111526, Mar. 22, 1918.—Rev., Crowder (NP).
111527, Mar. 15, 1918.—Rev., Crowder (NP).
111528, Mar. 15, 1918.—Rev., Davis.
111529, Mar. 26, 1918.—Rev., Clark (WBP).
111622, Mar. 20, 1918.—Letter, Davis.
111623, Mar. 22, 1918.—Rev., Davis.
111624, Mar. 25, 1918.—Rev., Clark (RWN.
111626, no date.—Letter, Davis.
111627, no date.—Letter, Davis.
111628, Mar. 23, 1918.—Rev., Davis.
111629, Mar. 15, 1918.—Rev., Davis.
111630, Mar. 18, 1918.—Rev., Davis.
111705, Apr. 5, 1918.—Rev., Crowder (CBP).
111706, Mar. 20, 1918.—Rev., Davis.
111707, Mar. 22, 1918.—Rev., Davis.
111708, Mar. 25, 1918.—Rev., Clark (CBP).
111709, Mar. 20, 1918.—Rev., Davis.
111710, Mar. 26, 1918.—Rev., Clark.
111728, Mar. 25, 1918.—Rev., Clark.
111729, Mar. 22, 1918.—Rev., Davis.

111730, Mar. 22, 1918.—Rev., Davis.
111731, Mar. 18, 1918.—Rev., Davis.
111732, Mar. 16, 1918.—Letter, Davis.
111733, Mar. 22, 1918.—Letter, Davis.
111761, Apr. 1, 1918.—Letter, Davis.
111776, Apr. 9, 1918.—Letter, Ansell.
111782, Mar. 21, 1918.—Letter, Davis.
111784, Mar. 22, 1918.—Rev., Davis.
111793, Mar. 26, 1918.—Rev., Clark.
111799, Mar. 23, 1918.—Rev., Ansell (CLN).
111812, Mar. 23, 1918.—Letter, Davis.
111842, Mar. 25, 1918.—Letter, Clark.
111863, Mar. 23, 1918.—Letter, Davis.
111862, Mar. 11, 1918.—Letter, Davis.
111868, Mar. 23, 1918.—Rev., Ansell (ARLee).
111881, Mar. 25, 1918.—Letter, Clark.
111885, Mar. 22, 1918.—Letter, Davis.
111886, Mar. 23, 1918.—Letter, Davis.
111888, Mar. 27, 1918.—Letter, Clark.
111890, Mar. 21, 1918.—Letter, Davis.
111892, Mar. 23, 1918.—Rev., Davis.
111893, Mar. 9, 1918.—Rev., Crowder (RWN).
111895, Mar. 26, 1918.—Rev., not signed (CAD).
111902, Mar. 11, 1918.—Rev., Clark.
111903, Mar. 25, 1918.—Rev., Clark.
111905, Mar. 26, 1918.—Rev., Mayes (MP).
111908, Apr. 8, 1918.—Letter, Davis.
111909, Mar. 30, 1918.—Rev., Clark.
111910, Apr. 18, 1918.—Rev., Mayes (WBP).
111924, Mar. 29, 1918.—Rev., Clark.
111925, Mar. 29, 1918.—Rev., Clark.
111954, Mar. 25, 1918.—Letter, Clark.
111957, Mar. 26, 1918.—Rev., Clark.
111960, Apr. 5, 1918.—Rev., Crowder (ERR).
111968, Mar. 25, 1918.—Letter, Clark.
111968, Mar. 23, 1918.—Rev., Clark.
111970, Mar. 25, 1918.—Rev., Clark.
111971, Mar. 7, 1918.—Rev., Clark.
111972, No date.—Letter, Davis.
111975, Mar. 26, 1918.—Rev., Clark.
111976, No date.—Letter, Clark.
111978, Mar. 26, 1918.—Rev., Clark.
111981, Mar. 27, 1918.—Letter, Clark.
111982, Apr. 3, 1918.—Letter, Clark.
111983, Mar. 25, 1918.—Letter, Clark.
111984, Mar. 27, 1918.—Rev., Clark.
111985, Apr. 3, 1918.—Letter, Clark.
111986, Apr. 3, 1918.—Letter, Davis.
111987, Mar. 27, 1918.—Letter, Clark. Rev., not signed (WBP).
111992, Mar. 30, 1918.—Rev., Crowder (ERK).
111993, Mar. 6, 1918.—Rev., Crowder (CCT).
112058, Apr. 2, 1918.—Rev., Davis.
112059, Apr. 3, 1918.—Rev., Clark.
112060, Mar. 25, 1918.—Letter, Clark.
112064, Apr. 3, 1918.—Rev., Clark.
112100, Apr. 2, 1918.—Rev., Mayes (NP).
112125, Mar. 25, 1918.—Rev., Clark.
112141, Mar. 30, 1918.—Rev., Davis.
112144, Apr. 1, 1918.—Rev., Davis.
112146, Apr. 2, 1918.—Rev., Clark.
112147, Mar. 27, 1918.—Rev., Clark.
112148, Apr. 6, 1918.—Rev., Davis.
112152, Mar. 28, 1918.—Rev., Clark.
112153, Mar. 27, 1918.—Rev., Clark.
112170, Apr. 1, 1918.—Letter, Davis.
112229, Mar. 28, 1918.—Letter, Clark.
112237, Mar. 27, 1918.—Letter, Clark.

112280, Apr. 8, 1918.—Letter, Davis.
112281, Apr. 2, 1918.—Rev., Davis.
112282, Apr. 2, 1918.—Rev., Davis.
112283, Mar. 30, 1918.—Rev., Clark.
112204, Apr. 4, 1918.—Rev., Mayes (ARB).
112286, Apr. 2, 1918.—Letter, Davis.
112287, Apr. 4, 1918.—Letter, Clark.
112288, Apr. 2, 1918.—Rev., Spiller.
112291, Apr. 9, 1918.—Rev., Davis.
112293, Apr. 2, 1918.—Letter, Davis.
112295, Apr. 2, 1918.—Letter, Davis.
112296, Apr. 5, 1918.—Rev., Davis.
112298, Apr. 10, 1918.—Rev., Crowder (ERK).
112299, Apr. 8, 1918.—Rev., Crowder (CCT).
112339, Apr. 4, 1918.—Rev., Davis.
112346, Apr. 2, 1918.—Rev., Clark.
112349, Apr. 9, 1918.—Rev., Davis.
112420, Apr. 3, 1918.—Rev., Davis.
112422, Apr. 2, 1918.—Letter, Davis.
112423, Apr. 10, 1918.—Rev., Davis.
112427, Apr. 3, 1918.—Letter, Clark.
112428, Apr. 8, 1918.—Letter, Davis.
112459, Apr. 1, 1918.—Letter, Davis.
112482, Jan. 10, 1918.—Clem, Ansell (Hedsster).
112492, Apr. 5, 1918.—Letter, Davis.
112496, Apr. 6, 1918.—Rev., Clark.
112497, Apr. 1, 1918.—Rev., Clark.
112500, Apr. 5, 1918.—Rev., Davis.
112536, Apr. 5, 1918.—Rev., Davis.
112553, Apr. 10, 1918.—Letter, Davis.
112554, Apr. 4, 1918.—Rev., Davis.
112555, Apr. 4, 1918.—Letter, Davis.
112604, Apr. 3, 1918.—Letter, Clark.
112605, Apr. 3, 1918.—Letter, Clark.
112609, Apr. 3, 1918.— Letter, Clark.
112610, Apr. 3, 1918.—Letter, Clark.
112623, Apr. 10, 1918.—Rev., Davis.
112625, Apr. 10, 1918.—Rev., Davis.
112626, Apr. 8, 1918.—Rev., Davis.
112627, Apr. 3, 1918.—Letter, Clark.
112708, Apr. 8, 1918.—Letter, Davis.
112723, Apr. 8, 1918.—Letter, Davis.
112726, Apr. 8, 1918.—Rev., Crowder (NP).
112730, Apr. 10, 1918.—Letter, Davis.
112731, Apr. 5, 1918.—Rev., Davis.

EXHIBIT 109.

Office memorandum, 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 decisions. 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 agrees 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.

NOVEMBER 6, 1918.

Office memorandum.

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.

EXHIBIT 110.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 15, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Jeff Cook, Company G, Sixteenth Infantry.

1. Pvt. Jeff Cook, Company G, Sixteenth Infantry, was tried before a general court-martial on December 29, 1917, for violation of the thirty-sixth article of war.

Specification: In that Pvt. Jeff Cook, Company G, Sixteenth Infantry, being on guard and posted as a sentinel, in time of war in the face of the enemy, at France, on or about the 5th day of November, 1917, was found sleeping on his post.

2. The evidence of record discloses that the accused was posted as a sentry on the outpost of the first line, right behind the barbed-wire entanglements, at about 4 p. m., November 5, 1917, with a man next to him. It was a three-man listening post, having three men on it, of whom two men were always on guard, one slept one hour and then relieved one of the other two. In this way a man was on guard two hours and off one hour, from 4 p. m. till about 6 a. m. The accused had been on this guard duty about three nights. In the early hours of the morning of the 6th of November, 1917, probably about 3.30 o'clock, the corporal in charge of the post came around and found the accused leaning up against the bank, asleep, picked up his gun, shook him and he looked up and "I asked him what was the matter," and he said: "Nothing; just tired." When asked where his gun was he said he did not know. The testimony of the corporal is corroborated by the men on sentry duty next to the accused. The accused testified that he could not sleep at night, when off duty for one hour every two hours; and that during the day they were chopping wood in the dugout where he was and he could not get any sleep; that he was drowsy but not asleep on post; that he had been in the service seven months.

3. While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-

martial, gave in his indorsement as "Extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

4. The court found the accused guilty and sentenced him "to be shot to death with musketry," two-thirds of the members present concurring.

5. This is the second death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing, as I do, that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary. The warning of Gen. Frye, the distinguished Union Provost Marshal General of the Civil War, should be given careful consideration at this time. In the printed report of the operations of his office it is stated in effect that if the extreme penalty for desertion had been imposed in the early stages of the Civil War, the later scandal and danger for the country that arose out of this crime, as well as the death sentences that subsequently became necessary, would no doubt have been averted.

6. Attention is invited, in connection with the consideration of this case, to the accompanying cases of:

(*a*) Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, in which, under practically the same conditions, the death sentence is imposed;

(*b*) Pvt. Herbert Toblas, Company —, Eighteenth Infantry, in which a sentence of 10 years' imprisonment was imposed, the court giving as its reason for the light sentence, "The extreme penalty was not voted because of the following extenuating circumstances: The extreme youth of the accused, his age being 16 years. The fact that the accused was posted in a communicating trench, and not in front-line trenches. 3. Though * * *."

(*c*) The cases of Pvts. Dewey G. Brady, William Hindman, and Adam Floin, all of Company G, Sixteenth Infantry, who were acquitted.

7. I recommend that the sentences be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieut. Colonel, Judge Advocate.

EXHIBIT 111.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 16, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry.

1. Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, was tried before a general court-martial on December 29, 1917, for violation of eighty-sixth article of war.

Specification: In that Forest D. Sebastian, private, Company G, Sixteenth Infantry, being on guard and posted as a sentinel, in time of war, and in the face of the enemy, at France, on or about the night of November the 3d and 4th, 1917, was found sleeping on post.

2. The evidence of record discloses that the accused, who had been on gas guard the night before, was posted about 6 p. m. on the evening of November 3, 1917, as a sentinel in the front-line trenches with another private of his squad a few feet on the left of him. He was on the outpost, a double sentry post, four men to each post. Two men were supposed to be on two hours, and then to be relieved by the other two. The two men off were allowed to sit down and supposed to sleep if they could. At about 7 or 8 o'clock the corporal in charge of the post came around and found the accused leaning on the trench, which was nearly as high as his shoulders, asleep; took his rifle away, shook him, and asked him where his rifle was. The accused replied, "I don't know; you have it." The corporal then gave it back to him, telling him not only the danger he was in but that the men were depending on him. He returned between 10 and 11 and found the accused asleep again. The corporal took his rifle, told the sentry on his left to wake the accused later and to send him to him (the corporal). When the accused came he gave him his rifle,

and the accused stated "he was ashamed he had done that way, and he knew he should not have done it." The sentry next to the accused on the left corroborated the testimony of the corporal and stated that after the accused went to sleep the first time he warned him, as he did not want to see him get into trouble. He further stated that the accused was pretty tired from being on gas guard the night before. The sentry who was on gas guard with the accused the night before testified that chances to sleep in the daytime were scarce, and that the accused had had very little sleep, if any, during the day after being on gas guard.

3. While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-martial, gave in his indorsement as "extenuating circumstances: youth, and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

4. The court found the accused guilty and sentenced him "to be shot to death with musketry," two-thirds of the members present concurring.

5. This is the first death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing as I do that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary. The warning of Gen. Frye, the distinguished Union provost marshal of the Civil War, should be given careful consideration at this time. In the printed report of the operations of his office it is stated in effect that if the extreme penalty for desertion had been imposed in the early stages of the Civil War the later scandal and danger for the country that arose out of this crime, as well as the death sentences that subsequently became necessary would no doubt have been averted.

6. Attention is invited, in connection with the consideration of this case, to the accompanying cases of:

(*a*) Pvt. Jeff Cook, Company G, Sixteenth Infantry, in which under practically the same conditions the death sentence is imposed.

(*b*) Pvt. Herbert Tobias, Company E, Eighteenth Infantry, in which a sentence of 10 years' imprisonment was imposed, the court giving as its reason for the light sentence: "The extreme penalty was not voted because of the following extenuating circumstances: 1. The extreme youth of the accused, his age being 18 years. 2. The fact that the accused was posted in a communicating trench, and not in front-line trenches. 3. The * * *."

(*c*) The cases of Pvts. Dewey G. Brady, William Hindman, and Adam Klein, all of Company G, Sixteenth Infantry, who were acquitted.

7. I recommend that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

NOTE.—The above memorandum, embodying what I orally presented to the division commander as reasons for approval of the sentence, has been prepared for any use that it may serve in a further review of the case.

EXHIBIT 112.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 17, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry.

1. Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, was tried before a general court-martial on January 3, 1918, for violation of sixty-fourth article or war.

Specification: In that Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same.

2. The accused pleaded guilty to the specification and charge. The court found the accused guilty and sentenced him to be shot to death with musketry.

3. The evidence of record shows clearly that the accused defiantly, after full opportunity to obey, and after he had been warned that willful disobedience would lead to court-martial and a heavy sentence, committed a willful, deliberate act of disobedience.

Lieut. Logan ordered the accused, Pvt. Fishback and two others to get their packs and get ready for drill with their squad. On the refusal of the four he warned them, and two thought better of their refusal and obeyed his order. The accused, however, and Fishback persisted in their insubordination, and Ledoyen said: "I refuse. to go to drill." The accused in his defense made the following statement:

"Lieut. Logan had us out on the hill the day before and we nearly froze to death, and the next day I was so stiff that I could not drill."

The accused entered the service February 3, 1917, and had been convicted by a summary court of minor breaches of discipline on four different occasions.

4. It would be difficult to find a more exaggerated case of defiance and insubordination unaccompanied by violence that the one here shown, nor one which was calculated to have a more hurtful effect on others. We have undertaken a task, the accomplishment of which requires unhesitating and implicit obedience to orders, and no insubordination can be tolerated. The time must inevitably come—if this is not the appropriate one, which it would seem to be—when the death sentence must be imposed for willful disobedience of orders.

There is already unmistakable evidence cropping out in cases coming to this office of the willingness on the part of soldiers to accept long terms of confinement in order to avoid further service, hardships, and consequent dangers which they have not earlier fully realized. Insubordination will undoubtedly be resorted to as the readiest means, and one to which they probably consider the least obloquy will be attached in later life, for accomplishing their purpose. They will no doubt feel that, at the end of the war their sentences to a long term of confinement, if such has been imposed, may reasonably be expected to be terminated through the exercise of clemency. With all the reluctance that I must be credited with feeling in recording a recommendation that goes to the length of taking a man's life, I am nevertheless constrained, under the realization than an example must be had for its deterrent effect in such cases, to recommend that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 113.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 17, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry.

1. Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, was tried before a general court-martial on January 3, 1918, for violation of sixty-fourth article of war.

Specification: In that Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, Sixteenth Infantry, his superior officer, to get his equipment and fall in for drill, did, at France, on or about the 14th day of December, 1917, willfully disobey the same.

2. The accused pleaded guilty to the specification and charge. The court found the accused guilty and sentenced him to be shot to death with musketry.

3. This case is on all fours with that of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, and attention is invited to the memorandum filed in that case. For the reasons therein stated it is recommended that the sentence be approved

and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 114.

GENERAL HEADQUARTERS,
AMERICAN EXPEDITIONARY FORCES,
France, February 8, 1918.

From: The commander in chief.
To: The Judge Advocate General of the Army.
Subject: Trials by general court-martial requiring the action of the President.

1. I am forwarding you herewith for the action of the President four records of trial by general court-martial, in each of which cases the court has sentenced the accused to death and the sentence has been approved by the commanding general of the First Division, American Expeditionary Forces, the authority who appointed the court. In two cases the accused are convicted of willful disobedience of orders and in the other two of sleeping on post while sentinels in the front trenches and when face to face with the enemy. Each of these cases is reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division. I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

2. The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend that execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.

JOHN J. PERSHING,
General, Commanding.

EXHIBIT 115.

MARCH 29, 1918.

Memorandum for the Secretary of War.

Subject: Summary of petitions for clemency in behalf of four soldiers convicted of capital offenses and sentenced to death in the American Expeditionary Forces in France.

1. The petition asking for clemency for these soldiers proceed generally upon the assumption that all of them were convicted of sleeping on post. This is probably due to the press reports so describing the offenses.

2. The petitions take the several forms of letters from individuals, women's clubs and societies, Grand Army of the Republic posts, and other clubs. They accompany this memorandum and are thus briefly summarized:

* * * * * * *

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 116.

FIRST DIVISION, AMERICAN EXPEDITIONARY FORCES,
March 29, 1918.

United States *v.* Stanley G. Fishback, Company B, Sixteenth Infantry.

Review of record of trial by general court-martial convened at headquarters of the First Division, American Expeditionary Forces, France, January 3, 1918.

1. Stanley G. Fishback, private, Company B, Sixteenth Infantry, was arraigned and tried by general court-martial convened at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, on January 3, 1918, charged with a violation of the sixty-fourth article of war, which, so far as material in this case, reads:

"Any person subject to military law who * * * willfully disobeys any lawful command of his superior officer shall suffer death or such other punishment as a court-martial may direct."

The single specification laid under the sixty-fourth article of war reads:

"In that Pvt. Stanley G. Fishback, Company B, Sixteenth Infanty, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to go get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same."

2. Second Lieut. Black, Sixteenth Infantry, acted as counsel for the accused upon the trial. The accused pleaded guilty to the specification and to the charge. After the plea of guilty was entered the judge advocate read the several paragraphs of the manual that set out the gist of the offense with which the accused was charged and of which he had pleaded guilty. Whereupon, in accordance with the requirements of subdivision (d), paragraph 154, Manual for Courts-Martial, 1917, the president of the court made the following explanation to the accused:

"You, Pvt. Fishback, the accused, have plead guilty to the specification and to the charge, and in pleading guilty you admit that you have committed all the elements of the offense with which you are charged, the penalty for which in time of war is death or such other punishment that the court-martial may direct. In pleading guilty you stop all means that may be taken to prove yourself not guilty, although, of course, there may have been extenuating circumstances, and you make it not necessary for the judge advocate to bring witnesses before the court to prove your guilt. In pleading guilty you throw yourself upon the mercy of the court to adjudge to you the extreme penalty which I have mentioned. Having been warned in this manner, do you still wish to plead guilty?"

After this explanation was made by the president of the court, and in response to the concluding sentence, which is in the form of a question addressed to the accused, the accused answered, "Yes, sir."

3. Notwithstanding the plea of guilty, which legally established the guilt of the accused of the offense charged, First Lieut. Fred M. Logan, Sixteenth Infantry, was sworn as a witness in behalf of the prosecution. This is the officer who signed the charges and whose order was wilfully disobeyed by the accused. The testimony of this witness is short, and inasmuch as it is the only testimony in the case it will be quoted in full:

Q. Do you know the accused? If so, state who he is?—A. Yes, sir. Stanley Fishback, private, Company B, Sixteenth Infantry.

Q. State your name, rank, and organization.—A. Fred M. Logan, first lieutenant, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Pvt. Fishback an order?—A. I did.

Q. What was that order?—A. To get his equipment and fall in for drill with his squad.

Q. And he knowingly disobeyed and refused to do it?—A. Yes, sir.

Q. Did you give him this order in person?—A. I did.

Q. Did he make any reply to the order?—A. Either he or Ledoyen made the reply that they refused to go to drill.

Q. Did the accused later get his pack and go to drill?—A. No, sir; not that day.

Q. Did you immediately order him into confinement?—A. He was under guard then and placed in confinement later.

Q. Are you the accused's superior officer, his company officer?—A. I was that day.

Q. And it was a lawful order that you gave him in the performance of a military duty?—A. It was.

The defense had no testimony to offer and no statement to make. The court made the following explanation to the accused:

"Pvt. Fishback, you are to understand that you have the right to take the stand as a witness in your own behalf, in which case you will be cross-examined the same as any other witness. You also have the right to make a statement, either written or verbal, under oath, or not under oath; a statement which

may bring out extenuating circumstances. Having been instructed thus, have you anything to offer?"

In response to the concluding sentence, which was in the form of a question addressed to the accused, the accused answered: "No, sir."

The court was then closed and found the defendant guilty of the specification and of the charge, was opened to receive evidence of previous convictions which will be hereafter referred to, was again closed, and sentenced the accused to be shot to death with musketry.

4. The record recites that two-thirds of the members of the court concurred in the sentence. This recital is in accordance with the statutory requirement that a sentence of death shall not be pronounced except by a vote of two-thirds of the members of the court-martial, and it properly must be construed as a recital that at least two-thirds of the members concurred. And even though all of the members of the court had concurred in pronouncing the death sentence it would not have been proper to have so stated in the record as such recital would disclose the way in which each member of the court voted and would serve to identify each member as voting for such sentence.

5. The court was convened by Maj. Gen. R. L. Bullard, commanding the First Division of the Expeditionary Forces. The sentence was approved by him and forwarded to the commander in chief of the Expeditionary Forces for action under the provisions of the forty-eighth article of war.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who, in a memorandum addressed to Maj. Gen. Bullard, recommended that the sentence be approved, among other things saying:

"This case is on all fours with that of Pvt. Olen Ledoyen, Company B, Sixteenth Infantry, and attention is invited to the memorandum filed in that case. For the reasons therein stated it is recommended that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war."

Gen. Pershing reviewed this case in connection with three other cases in which the death sentence had been pronounced, coming from the First Division, and after referring to these four cases in his communication of February 8, 1918, transmitting the record in the trial of the case now being discussed and the records in the other three cases, said:

"I recommend that the sentences in these cases be confirmed, and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed—especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentence is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

6. Evidence of three previous convictions were considered by the court and the record thereof attached as Exhibits 1, 2, and 3 to the record of trial. These exhibits disclose the following:

(*a*) In France on July 18, 1918, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about the 17th day of July, 1917, the accused failed to repair at the fixed time to the properly appointed place for morning drill. The second specification alleged that on or about the 17th day of July, 1917, the accused without proper authority visited a certain city in France.

(*b*) In France on September 5, 1917, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about September 4, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill. The second specification alleged that on or about the 5th day of September, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill.

(*c*) In France on November 13, 1917, the accused was found guilty of a violation of the ninety-sixth article of war, in one specification thereunder which alleged that on or about November 12, 1917, having received a lawful order from

Corpl. John W. Leach, Company B, Sixteenth Infantry, to report for fatigue, the said corporal being in the execution of his office, the accused failed to obey the same.

7. The court was appointed December 15, 1917, by General Orders, No. 162, of the First Division. Nine officers were detailed as members of the court of the following grades: One colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on January 3, 1918, for the trial of the cause there were present six members of the court, the judge advocate, and the assistant judge advocate. Three members of the court were absent, reported sick. The accused challenged Maj. Phillip Remington, one of the members of the court, upon the ground that he had investigated the charges and had formed an opinion. Maj. Remington admitted the challenge and was excused. The accused was then asked if he objected to being tried by any of the remaining members of the court, to which he replied in the negative. The court was then organized by the members of the court, the judge advocate and the assistant judge advocate being sworn. Five members of the court sat upon the trial of the following grades: One colonel and four first lieutenants. No recommendation for clemency by the members of the court or by any other officer or person appears in the record.

8. The accused enlisted at Columbus Barracks, Ohio, February 17, 1917. His age at that time, as given in the enlistment papers, was 19 years and 2 months. He had no previous military service. The charge sheet gives the date of his arrest as December 13. 1917, which would be the day prior to the date of the alleged offense.

9. The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The fiendings and sentence are supported by the record and are authorized by law.

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

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 117.

FIRST DIVISION, AMERICAN EXPEDITIONARY FORCES.
March 29, 1918.

United States *v.* Olon Ledoyen, private, Company B, Sixteenth Infantry.

Review of record of trial by general court-martial convened at Headquarters of the First Division, American Expeditionary Forces, France, January 3, 1918.

1. Olon Ledoyen, private, Company B, Sixteenth Infantry, was arraigned and tried by general court-martial, convened at the Headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, on January 3, 1918, charged with a violation of the sixty-fourth article of war, which so far as material in this case reads:

"Any person subject to military law who * * * willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

The single specification laid under the Sixty-fourth article of war reads:

"In that Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same."

2. Second Lieut. Black, Sixteenth Infantry, acted as counsel for the accused upon the trial. The accused pleaded guilty to the specification and to the charge. After the plea of guilty was entered the judge advocate read the several paragraphs of the Manual that set out the gist of the offense with which the accused was charged and of which he had pleaded guilty. Whereupon in accordance with the requirements of subdivision (d), paragraph 154, Manual for Courts-Martial, 1917, the president made the following explanation to the accused:

"You, Pvt. Ledoyen, the accused, understand that in pleading guilty to the charges and specifications here you admit that you committed all the ele-

ments of the acts with which you are charged, and that you committed them of your own free will, and that you were not forced into doing it by any influence. By pleading guilty you make it not necessary for the judge advocate to prove these charges against you, the extreme penalty for which in time of war is death, or such other punishment as the court-martial may direct. In pleading guilty you throw yourself upon the mercy of the court to adjudge you this penalty. Having been thus informed do you wish your plea of guilty to stand?"

After this explanation was made by the president of the court and in response to the concluding sentence, which is in the form of a question addressed to the accused, the accused answered—"Yes, sir."

3. Notwithstanding the plea of guilty, which legally established the guilt of the accused of the offense charged, First Lieut. Fred M. Logan, Sixteenth Infantry, was sworn as a witness in behalf of the prosecution. This is the officer who signed the charges and whose order was willfully disobeyed by the accused The testimony of this witness is short, was given in answer to questions propounded by the judge advocate and the court, and inasmuch as it is the only testimony in the case it will be quoted in full:

Q. State your name, rank, and organization.—A. Fred M. Logan, first lieutenant, Sixteenth Infantry.

Q. Do you know the accused; if so, state his name, rank, and organization.—A. Olen Ledoyen, private, Company B, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Pvt. Ledoyen an order?—A. I did.

Q. He did not obey that order, did he?—A. No, sir; he did not. He refused and stated that he refused.

Q. What was the order?—A. He was ordered to get his pack and get ready for drill with his squad.

Q. Was there any reason why he would not obey?—A. No, sir. He did it willfully and was warned at the time.

Q. Did you give him the order in person?—A. I did.

Q. Did he say anything in regard to why he disobeyed?—A. No, sir.

Q. You may state any further facts or circumstances surrounding the case.—A. At that time, when he was ordered to get his pack and report for drill with his squad, he refused and stated that he would not go to drill. I then told him of the consequences of such an act and gave him another opportunity to go get his pack and drill and he again refused, saying: "I refuse to go to drill."

Q. You warned him of the consequences of his acts?—A. Yes, sir.

Questions by the court:

Q. State as nearly as you can remember the exact words that you used in warning the accused of the consequences of his act.—A. I told him that he was liabling himself to trial by general court-martial, which might impose a very heavy penalty. There were four who first refused to go to drill and two reconsidered and went to drill later. I asked the accused if he understood what he was doing and he and Pvt. Fishback still refused to drill.

Q. Did the accused know that a court-martial might impose a death penalty for his act?—A. I think not. I do not believe that I told him that.

Q. You stated a heavy sentence?—A. Yes, sir.

Q. Did this man offer any reason as to why he refused to drill?—A. No, sir.

Q. Was it simply a positive, flat refusal with no excuses?—A. Yes, sir.

The defense had no testimony to offer, but made the following verbal unsworn statement:

Lieut. Logan had us out on the hill the day before and we nearly froze to death and the next day I was so stiff that I could not drill.

The court was then closed and found the defendant guilty of the specification and of the charge, was opened to receive evidence of previous convictions which will be hereafter referred to, was again closed, and sentenced the accused to be shot to death with musketry.

4. The record recites that two-thirds of the members of the court concurred in the sentence. This recital is in accordance with the statutory requirement that a sentence of death shall not be pronounced except by a vote of two-thirds of the members of the court-martial, and it properly must be construed as a recital that at least two-thirds of the members concurred. And even though all of the members of the court had concurred in pronouncing the death sentence, it would not have been proper to have so stated in the record, as such recital would dis-

close the way in which each member of the court voted and would serve to identify each member as voting for such sentence.

5. The court was convened by Maj. Gen R. L. Bullard, commanding the First Division of the Expeditionary Forces. The sentence was approved by him and forwarded to the commander in chief of the Expeditionary Forces for action under the provisions of the forty-eighth article of war.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who, in a memorandum addressed to Maj. Gen. Bullard, recommended that the sentence be approved, among other things saying:

"It would be difficult to find a more exaggerated case of defiance and insubordination unaccompanied by violence than the one here shown, nor one which was calculated to have a more hurtful effect on others. We have undertaken a task, the accomplishment of which requires unhesitating and implicit obedience to orders, and no insubordination can be tolerated. The time must inevitably come—if this is not the appropriate one, which it would seem to be—when the death sentence must be imposed for willful disobedience of orders."

Gen. Pershing reviewed this case in connection with three other cases in which the death sentence had been pronounced, coming from the First Division, and after referring to these four cases in his communication of February 8, 1918, transmitting the record in the trial of the case now being discussed and the records in the other three cases, said:

"I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only, or, indeed, principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

6. Evidence of four previous convictions were considered by the court and the record thereof attached as exhibits 1, 2, 3, and 4 to the record of trial. These exhibits disclose the following:

(*a*) In France on July 21, the accused was found guilty of the following charges and specifications:

(1) Violation of the sixty-first article of war.

The first specification alleged that Pvt. Ledoyen absented himself without proper authority from 6 a. m., July 17, 1917, to about 5 p. m., July 17, 1917.

The second specification alleged that Pvt. Ledoyen absented himself without proper authority from about 6:30 a. m., July 18, 1917, until about 5 p. m., July 18, 1917.

The third specification alleged that Pvt. Ledoyen absented himself without authority from about 7 a. m., July 19, 1917, until about 6 p. m., July 21, 1917.

(2) Violation of the ninety-sixth article of war.

The first specification alleged that Pvt. Ledoyen upon being received from the guard and ordered by Corp. Carey, Company B, Sixtheenth Infantry, to go to his quarters and prepare for inspection, did fail to obey said order.

The second specification alleged that Pvt. Ledoyen did on the 17th, 18th and 19th days of July, 1917, visit a certain town in France in violation of standing orders.

(*b*) In France on August 22, 1917, the accused was found guilty of a violation of the sixty-first article of war with two specifications thereunder. The first specification alleged that on or about the 21st day of August, 1917, he did, without proper leave, go from the properly appointed place for drill after having repaired thereto for the performance of said duty. The second specification alleged that on or about the 22d day of August, he failed to repair to the properly appointed place of assembly for drill.

(*c*) In France on September 5, 1917, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about the 3d day of September, 1917, he failed to repair at the fixed time to the properly appointed place for

drill. The second specification alleged that on or about the 4th day of September, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill.

(*d*) In France on December 10, 1917, he was found guilty of violation of the ninety-sixth and sixty-first articles of war. The specification under the ninety-sixth article of war alleged that upon receiving a lawful order from Edd Record, sergeant, Company B, 16th Infantry, to get up and stand reveille, the sergeant in the execution of his office, he did then fail to obey the same. The specification under the sixty-first article of war alleged that on or about the 8th day of December, 1917, the accused failed to repair at the fixed time to the properly appointed place of assembly for drill.

7. The court was appointed December 15, 1917, by General Order No. 162 of the First Division. Nine officers were detailed as members of the court, of the following grades: One colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on January 3, 1918, for the trial of the accused, there were present six members of the court, the judge advocate, and the assistant judge advocate. Three members of the court were absent, reported sick. The accused challenged Maj. Phillip Remington, one of the members of the court, upon the ground that he had investigated the charges and had formed an opinion. Maj. Remington admitted the challenge and was excused. The accused was then asked if he objected to being tried by any of the remaining members of the court, to which he replied in the negative. The court was then organized by the members of the court, the judge advocate, and the assistant judge advocate being sworn. Five members of the court sat upon the trial, of the following grades: One colonel and four first lieutenants. No recommendation for clemency by the members of the court or by any other officer or person appears in the record.

8. The accused enlisted at Columbus Barracks, Ohio, February 3, 1917. His age at that time, as given in the enlistment papers, was 18 years and one month. He had had no previous military service. The charge sheet gives the date of his arrest as December 13, 1917, which would be the day prior to the date of the alleged offense.

The record in the case of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, who was convicted of disobeying an order of similar import given by the same officer at the same time as the order disobeyed by Pvt. Ledoyen, also states that Pvt. Fishback was put under arrest on December 13, which would be the day preceding the disobedience. The record in the trial of Pvt. Fishback contains a statement of the prosecuting witness that Fishback was under guard at the time the order was given, and it also appears in that record that he and Ledoyen were together at the time the order was given.

9. The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

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

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 118.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 4, 1918.

In the First Division, American Expeditionary Forces, France.

United States *v.* Jeff Cook, private, Company G, Sixteenth Infantry.

Review of record of trial by general court-martial convened at headquarters First Division, American Expeditionary Forces, France, December 29, 1917. Action of the President.

1. Jeff Cook, private, Company G, Sixteenth Infantry, was tried on December 29, 1917, by general court-martial convened at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces,

France, charged with a violation of the eighty-sixth article of war, which, so far as material to this case, reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

The single specification laid under this article reads:

"In that Pvt. Jeff Cook, Company G, Sixteenth Infantry, being on guard and posted as a sentinel in time of war, in the face of the enemy, in France, on or about the 5th day of November, 1917, was found sleeping on his post."

The charge was signed by John T. Baker, first lieutenant, Sixteenth Infantry.

Second Lieut. R. P. Cooper, Sixteenth Infantry, acted as counsel for the accused. The Government was represented by a judge advocate and an assistant judge advocate. Before being arraigned the accused was given an opportunity to challenge any member of the court, and upon being asked whether he objected to being tried by any member of the court present answered in the negative. The members of the court, the judge advocate, and the assistant judge advocate were then sworn and the defendant arraigned, a plea of not guilty entered, evidence taken, the accused found guilty of the specification and the charge, and sentenced to be shot to death with musketry.

Lieut. Col. Blanton Winship, judge advocate of the First Division, reviewed the record before its consideration by the division commander, and recommended that the sentence be approved. Among other things, he said:

"This is the second death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing as I do that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary."

Maj. Gen. R. L. Bullard, commanding the First Division, approved the sentence without comment and forwarded the record for action under the forty-eighth article of war.

Gen. Pershing reviewed this case in connection with three other cases, all arising in the Sixteenth Infantry, in which the death sentence had been pronounced by the same court, and after referring to these four cases, in his communication of February 8, 1918, transmitting the records of the trials, said:

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise n the future."

2. The accused enlisted May 11, 1917, at Fort Logan, Colo., with no previous service. His age at that time, as given in the enlistment papers, was 18 years and 11 months. His residence is stated to be Wilburton, Okla. No evidence of any previous convictions for any offense, either civil or military, was submitted to the court.

3. The following is in brief the evidence offered by the Governmnt in its case in chief:

Corpl. Marcus Walentic, Company G, Sixteenth Infantry, testified that the accused was in his squad, and was by the witness posted as a sentinel on November 5; he was posted on an outpost of the first line, about 50 yards from the dugout; the accused was on duty with Pvt. M. J. Clark, Company G, Sixteenth Infantry; the witness visited the sentinels about every 45 minutes; he visited the sentinels probably between 3 and 4 o'clock in the morning, and—

Q. What did you see when you visited Pvt. Cook?—A. I found Pvt. Cook and Pvt. Clark, and Pvt. Cook was asleep.

Q. What makes you think he was asleep?—A. I picked up his gun and shook him, and he looked up, and I asked him what was the matter, and he said, "nothing, just tired," and then I said, "Where is your gun?" and he looked around and said he did not know.

Q. When you came up to Pvt. Cook, was he standing up?—A. He was leaning up against the bank.

Q. Where was his gun?—A. Lying on the parapet.

On cross-examination, by counsel for the defense, he testified in substance that the accused was standing up; that his gun was in front of him on the parapet, within probably 10 or 12 inches away to the right; that the witness came up to the accused on the left, and when witness picked up the gun the accused made no move, but had his hands folded and his face down, and when witness shook the accused the latter looked up and said he was pretty tired. When questioned by the court the witness stated that the accused was posted in an old trench just back of the barbed wire; that the sentinels had no permission to sit down.

Pvt. M. J. Clark, Company G, Sixteenth Infantry, testified that he was posted as a sentinel with the accused at the time of the alleged offense; that they went on duty at 4 o'clock in the afternoon, and their tour of duty continued until about 6 the next morning, with one hour off and two on during this time; that they were on what is called a double-sentry post, two soldiers being on duty as sentinels at the same time and place; that at the time Corpl. Walentic made the inspection when he claimed the accused was asleep, the accused and the witness were standing up on the fire step facing toward the enemy lines, and that the accused was leaning against the bank or wall of the trench. It appeared subsequently in the record that the trench was about shoulder high, and the normal position of a sentinel when on duty was to lean over against the wall of the trench with his head down so as be exposed as little as possible; and if this was done the rifle would be to the right, resting on the parapet. The accused was in this position at the time of the alleged offense. He had his head down. The witness further testified that when Corpl. Walentic came up he took the rifle of the accused from the parapet, and—

Q. Had you awakened Cook (the accused) before this time?—A. No, sir.

Q. Did you notice that he was asleep before the corporal came up?—A. No, sir. The corporal came up and told me to get down, and that was all, and I had not noticed him before, and the corporal got up and took the gun.

On cross-examination by counsel for the accused, the witness testified that they went on duty at 4 o'clock p. m., and were relieved at 6 a. m.; that during that period they got no sleep, although relieved at intervals by other sentinels during the night. Regarding this matter, he said:

A. No, sir; we was relieved, but never got any sleep, as we did not have any place to sleep.

Q. What did you do when you were relieved?—A. We went in and sat down.

Q. Describe how you and the accused were posted. Were you on the firing step?—A. Yes, sir; we were posted looking over the bank, over the front, at the enemy. He stood on one side of me.

In answer to a question by the court, the witness stated in substance that he believed the accused was asleep.

Lieut. Baker, who signed the charge, testified as follows: That he knew the accused; that he did not know exactly where the sentinels were posted; that Corpl. Walentic had two posts, and the accused was on duty with one of them. These posts were in the the front line, were listening posts, in fact; that they were what were known as three-men posts, each man being on two hours and off one during the period from about 4 o'clock in the afternoon until daylight the next morning, and that while there were two men on post all the time, neither had authority to sleep, and, of course, were required to be on the alert.

4. For the defense the accused was sworn as a witness in his own behalf. He testified that he was on duty as a sentinel; that it was a three-man post, each man on two hours and off one between the hours stated by the witnesses; that at the time it is alleged he was asleep on post he was standing up beside Pvt. Clark, the other sentinel, with his head on his hands and his poncho on the top of his helmet to cut the wind; that his rifle was on the parapet immediately to his right; that he knew Corpl. Walentic came up and took his rifle off the parapet, and—

Q. You heard him when he came up?—A. I was drowsy, but not asleep.

* * * * * * *

Q. How much sleep did you have during the day previous?—A. No sleep at all.

Q. Did you do any fatigue duty the day before?—A. No, sir.

Q. What kept you from sleeping in this dugout?—A. Wood chopping on the inside of the dugout.

Q. How many nights had you been on post?—A. Six nights.

Q. During these nights did you get any sleep at all?—A. No, sir; not much.

Q. You did not get any sleep?—A. No, sir.

Q. You say you had not had any sleep for six nights?—A. No, sir.

Q. Had you been sleeping any during the day?—A. Not much, as it was too noisy.

He further testified that he heard Corpl. Walentic tell Pvt. Clark to step down off the fire step, that the corporal came up to him from behind and reached up and took the rifle off the parapet, and that he knew he was doing so at the time, and—

Q. What made you think he had it?—A. I realized when he was there that it was he that took it, and I had the poncho around my helmet and in my hand so I would not get cold, and I never knew he was going to take the rifle.

Q. Did you feel the corporal when he shook you?—A. Yes, sir.

Q. Did you turn your head?—A. Yes, sir.

Q. Did he have your gun in his hand?—A. No, sir; he had set it down.

The accused further testified that while he had never been on special sentinel duty before, he understood that it was his duty to remain awake and be on the alert.

5. Corpl. Walentic was recalled and questioned by the court. He described the character of the post, as did the other witnesses; said that the night was dark; again described how he took the rifle of the accused from the parapet, and—

Q. Did the accused have a poncho around his head?—A. I do not know.

That he was asleep at the time in question the accused denied. However, the circumstances described by Corpl. Walentic and Pvt. Clark reasonably supports the conclusion of the court that the accused was asleep.

6. In his review of the record, Lieut. Col. Blanton Winship, division judge advocate, states:

"While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-martial, gave in his indorsement as 'extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches.'"

7. It is alleged that the offense was committed on November 5. The charge sheet shows that the accused was placed in confinement on November 13. The court was appointed December 15, 1917, by General Order, No. 162, Headquarters, First Division. Nine officers were detailed as members of the court, with the following grades: One colonel, one major, one captain, and six first lieutenants. There was also appointed a judge advocate of the grade of first lieutenant and an assistant judge advocate of the grade of second lieutenant. When the court convened on December 29, 1917, for the trial of the case, there were present eight members, all of whom sat upon the trial, Lieut. Irwin, detailed as a member of the court, was absent, reported sick. No recommendation for clemency by any member of the court, by the reviewing authority, or the commander in chief appears in the record.

The court was lawfully constituted, the proceedings were regular, and the record discloses no substantial error. There is evidence supporting the findings and sentence.

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

E. H. CROWELL,
Judge Advocate General.

EXHIBIT 119.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 4, 1918.

In the First Division, American Expeditionary Forces, France.

United States *v.* Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry.
Review of record of trial by general court-martial, convened at Headquarters First Division, American Expeditionary Forces, France, December 29, 1917.

1. Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, was tried at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, by general court-martial, which convened December 29, 1917, charged with violation of the eighty-sixth article of war, which so far as here material reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

The single specification laid under this charge is as follows:

"In that Forest D. Sebastian, private, Company G, Sixteenth Infantry, being on guard and posted as a sentinel in time of war and in the face of the enemy, at France, on or about the night of November 3 and 4, 1917, was found sleeping on his post."

The charge was signed by George T. Phipps, first lieutenant, Sixteenth Infantry.

Upon the trial Second Lieut. R. P. Clark, Sixteenth Infantry, appeared as counsel for the accused. Before being arraigned the accused was afforded an opportunity to challenge any member of the court and upon being asked if he objected to being tried by any member present answered in the negative. All members of the court, the judge advocate, and the assistant judge advocate were then sworn. The accused was then arraigned, pleaded not guilty, evidence was taken, and accused was convicted and sentenced to be shot to death with musketry.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who recommended that the sentence be approved. From his review the following is quoted:

"This is the first death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing, as I do, that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that as a deterrent the sentence of the court is necessary."

The sentence was approved without comment by Maj. Gen. R. L. Bullard, commanding the First Division, and forwarded for action to the commander in chief of the Expeditionary Forces in France under the forty-eighth article of war.

Gen. Pershing reviewed this case in connection with three other cases, all arising in the Sixteenth Infantry, in which the death sentence had been pronounced by the same court, and after referring to these four cases in his communication of February 8, 1918, transmitting the records of the trials to this office, said:

"I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law by death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outpost keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentences is equally as necessary in their cases as in the others. I recommend the execution of the sentences in all cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

2. The accused enlisted April 18, 1917, at Jefferson Barracks, Mo., with no previous military service. His age at that time was given on the enlistment paper as 19 years and 6 months, his address 502 Madison Street, Eldorado, Ill., care of his mother. No previous conviction for any offense, civil or military, was submitted to the court, and Corpl. A. T. Shotwell, principal witness for the Government, testified:

"Q. Have you known the accused for some time while in the service?—A. Quite a bit.

"Q. Have you known him as a poor or good soldier?—A. Always a good soldier."

Col. J. L. Hines, commanding officer of the regiment to which the accused belonged, in his indorsement under date of November 22, 1917, recommending trial by general court-martial, said:

"Extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

3. The evidence in behalf of the Government may be thus summarized:

Corpl. Shotwell testified that the accused was in his squad on the night in question and at the time of the alleged offense was posted as a sentinel on one of the outposts in a front-line trench. Two sentinels were on duty at the same time and place. The sentinels were on duty for two hours and off for an interval, whether for one hour or two hours is not very clear, from late each afternoon until the following morning. The accused went on his first tour of duty about 6 o'clock in the evening. Between 7 and 8 o'clock Corpl. Shotwell visited the accused and his companion where they were posted as sentinels; the accused then had the appearance of being asleep; witness warned him of the danger he was in; again, between 10 and 11 o'clock, witness found the accused in the same condition, took his rifle from the parapet and carried it away, the accused later coming to witness and getting it; that witness visited the same post from time to time thereafter during the night and found accused awake and alert, and—

"Q. Can you swear on oath that this man was asleep?—A. I can say that I took his rifle, and the condition he was in, but I can not swear he was asleep."

Corpl. Shotwell further testified on cross-examination that the top of the trench would about strike his shoulder; that the natural position for a sentinel standing at this post would be to lean against the wall of the trench; that the position in which he found the accused was the natural position for one on duty, and that the sentinels who were on duty laid their rifles over the parapet. This was the position of the rifle of the accused when the corporal took it upon his second visit. Further, that when he visited a post he would lay his own rifle upon the parapet and take it down from the parapet when he left; that upon each visit the accused had his helmet on; that he did not ask the accused upon either occasion whether or not he was asleep, but came up and shook him; that the night was very dark.

Pvt. George Gladwell, a witness for the prosecution, testified that he was a sentinel on duty with the accused during the night in question; that Corpl. Shotwell visited the post between 7 and 8 in the evening; that witness was then standing beside the accused on the firing step at the time of the visit; that he said nothing to the accused on the approach of the corporal; that when the corporal came up accused was leaning forward on the top of the trench and the corporal took his rifle, shook him, and told him that lives were depending upon him; that the corporal came back two or three hours later and took the rifle of the accused, and——

"Q. Did he (the accused) say anything to you about being sleepy?—A. Yes, sir.

"Q. What did he say?—A. He told me he was on gas sentry the night before and that he was very tired.

"Q. Did he make any other statement?—A. No, sir.

"Q. In regard to sleep?—A. No, sir.

* * * * * * *

"Did you talk with Sebastian (the accused) while you were on post with him? Could you tell whether or not he was about all in that night?—A. He said he was pretty tired.

"Q. Did the corporal ever place his rifle upon the parapet?—A. Yes, sir.

"Q. Would you be willing to swear that Sebastian was asleep?—A. No, sir."

In answer to questions propounded by the court, the witness further testified:

"Q. Why did you tell him to keep awake if he could?—A. I did not want to see him get into any trouble.

"Q. You believe this man was asleep at any time?—A. I can not say.

"Q. You do not know whether or not he was asleep?—A. No, sir.

* * * * * * *

"Q. Did you try to shame him?—A. I told him the first time to keep awake if he could.

"Q. Did he say he was not asleep?—A. Yes, sir.

"Q. Said he was not asleep?—A. Yes, sir."

4. The only witness called by the defense was Pvt. Eggleston, of Company G, Sixteenth Infantry. He testified in substance that he was on gas guard the first night in the trenches and that the accused was on guard with him; that they went on gas guard about 8 o'clock; that they got no sleep that night, and—

"Q. The next day when you were off duty in the morning were you given a chance to sleep?—A. If we could find a place.

"Q. Were chances to sleep scarce?—A. Yes, sir.

"Q. Why?—A. Sergt. Klien said to let the men on outpost have a chance to sleep and we could not find bunks only just the best we could.

"Q. Do you know whether the accused had any sleep the day after he was on gas guard?—A. No, sir, he did not. Very little if any.

"Q. Did you get any sleep the next day?—A. No, sir.

"Q. Were you on post the next night?—A. Yes, sir.

It may be inferred from what appears elsewhere in the record that the accused was on gas guard the night preceding the night he is said to have been found sleeping on his post.

The accused did not testify or make a statement, sworn or unsworn, in his own behalf. The president of the court properly advised the accused of his rights to testify in his own behalf or to make a statement. Counsel for the accused and the judge advocate submitted the case to the court with very brief comments.

5. The specification alleges that the offense was committed on the night of November 3–4. The charge sheet shows that the accused was placed in confinement on November 14. The record shows that the accused, after the alleged offense, finished out his tour of duty as a sentinel.

The court was appointed December 15, 1917, by General Order, No. 162, of the First Division. Nine officers were detailed as members of the court with the following grades: one colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on December 29, 1917, for the trial of the accused, eight members of the court were present and sat on the trial. Present also were the judge advocate and assistant judge advocate. One officer of the grade of first lieutenant, detailed as a member of the court, was absent, reported sick.

6. The court was lawfully constituted. The proceedings are regular. The record discloses no errors affecting the right of the accused. The evidence and the inferences which the court was authorized to draw therefrom supports the conviction.

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

E. H. CROWDER.,
Judge Advocate General.

EXHIBIT 120.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 5, 1918.

MY DEAR GEN. MARCH: Here are four cases from France involving the death sentence—two for sleeping on post, two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

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

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

May we have a conference at an early date?

E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

EXHIBIT 121.

APRIL 10, 1918.

Memorandum for Gen. Crowder.
Subject: Four cases from France involving death sentence.

1. In addition to what appears in the several reviews of these four cases, the following additional facts are called to your attention as bearing upon the justice and the expediency of carrying the sentences into effect:

(*a*) All these cases arose in the Sixteenth Infantry. Two of the accused were not brought to trial for 50 days and upward after their alleged offenses. All of these cases were tried with an expedition which does not give, on the face of the records, any appearance of deliberation. In each case the defense of the accused was so indifferent as to be practically no defense.

(*b*) Upon the trial of two of the cases but five officers sat—one colonel and four first lieutenants. These two trials lasted from 8 p. m. to 9.45 p. m.—that is, from the beginning of the first trial until the conclusion of the second trial there elapsed but 1 hour and 45 minutes. Counsel for the accused made no statement or argument in either of these cases.

In the other two cases eight members of the court sat. The first of these two trials began at 1.20 p. m. and the second was completed at 5.25 p. m. In the first of these cases counsel for the accused made an argument of six lines, and in the second an argument of eight lines.

(*c*) Two of the soldiers—Fishback and Ledoyen—were tried for willful disobedience of an order to go out and drill. It does not appear that their organization was near or in contact with the enemy. Both of these men were tried the same evening between 8 and 9.45 p. m.—two trials. Fishback was first tried, and it appears in the record of that case that both of the soldiers were together when the order was given. The lieutenant who claims to have given the order testified:

"Q. Did he (Fishback) make any reply to the order?—A. Either he or Ledoyen made the reply that they refused to go to drill."

The answer leaves it in doubt as to which refused. Clearly there was but one order given, apparently directed to both. Clearly also when the court passed upon the Fishback case it necessarily had, in practical effect, decided the Ledoyen case, which immediately followed. Notwithstanding this, counsel for the accused made no challenge.

It is alleged that the disobedience occurred on November 14. The charge sheet shows that each of these men was placed in confinement on November 13. There is evidence in the records that these men were both in arrest or under guard when the order was given. Why they were in arrest and by whom placed in arrest, and whether or not they were to be released from arrest to go out to drill in obedience to this order does not appear.

(*d*) With respect to the two men convicted of sleeping on post, one—Pvt. Sebastian—is alleged to have committed the offense on the night of November 3–4; Pvt. Cook, on the following night. Cook was put in arrest November 13 and Sebastian November 14.

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 reviews—especially in the cases of the two men convicted of sleeping on post—all together, 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 ground than that as a matter of pure military expediency some one should be executed for the moral effect such action may have upon the other soldiers.

(*e*) The four convicted men entered the Army by voluntary enlistment—Ledoyen on February 3, 1917, age on enlistment papers, 18 years and 1 month; Sebastian, April 18, 1917, age 19 years and 6 months; Fishback, February 17, 1917, age 19 years and 2 months; Cook, May 11, 1917, age 18 years and 11 months. None had any previous military experience.

(*f*) Reference has already been made to other cases tried by the same court. These will now be more particularly referred to.

William Hindman, private, Company G, Sixteenth Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic, and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is, in essential respects, very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head, and, as he believed, asleep, when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses, by the same court.

Adam Klein, private, Company G, Sixteenth Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. It will be noted that all these men belonged to the same organization. Lieut. D. S. McCune testified directly that he found Klein asleep. He was on duty in the front line trench. Klein was acquitted.

Dewey G. Brady, Company G, Sixteenth Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is, in essential respects, a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than that in either the Cook or the Sebastian case, in which the men were convicted. Brady was tried by the same court and acquitted.

Pvt. Herbert Tobias, Company E, Eighteenth Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz., Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with the view to imposing a heavier penalty. Upon reconsideration the court increased the period of confinment to 10 years, and this sentence was approved.

(*g*) A number of cases have come from other organizations in France where men were convicted of sleeping on post or willful disobedience of orders. The following are some of the sentences:

Pvt. John L. Shade, United States Marine, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

Pvt. Aubroy LaLace, convicted of sleeping on post, January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months, and forfeiture of two-thirds of his pay for a like period. Gen. Coe reviewing authority.

Pvt. Enio J. Halonen, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of these cases that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed.

A number of cases have also come in from France where men were convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, sentenced to death. The sentences run from a few months to several years.

ALFRED E. CLARK,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 122.

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 CASES.

The death penalty in each of these cases was awarded for sleeping on post after a plea of guilty. 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 forgotten 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.

ANSELL,
Brigadier General.

Ledoyen's case, care of Mrs. Henrietta Rentz (aunt), 152 Oliver Street, Atlanta, Ga.

Fishback's case, care of Mrs. Sadie Doughty (sister), Cannelton, Ind.

Forest V. Sebastian, care of Mrs. Mary Sebastian (mother), 502 Madison Street, Eldorado, Ill.

Jeff Cook, care of Andrew Cook (father), Tutie, Okla.

EXHIBIT 123.

APRIL 16, 1918.

Memorandum for Gen. March.

Subject: Four cases from France involving the death penalty.

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

The following four cases of sleeping on post, three of which appear to have arisen in the same regiment, namely, the Sixteenth Infantry, on approximately the same date, and one in the Eighteenth Infantry four days later, were disposed of as follows:

(*a*) William Hindman, private, Company G, Sixteenth Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Hindman than against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head and, as he believed, asleep when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses by the same court.

(*b*) Adam Klein, private, Company G, Sixteenth Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. Lieut. D. C. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

(*c*) Dewey C. Brady, Company G, Sixteenth Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than in either the Cook case or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

(*d*) Herbert Tobias, private, Company E, Eighteenth Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical correc-

tions and with the suggestion that the court reconsider the case with a view to imposing a heavier penalty. Upon reconsideration, the court increased the period of confinement to 10 years, and this sentence was approved.

2. I think, perhaps, you would also like to know something of the state of discipline in other organizations in France as evidenced by the fact that in the following cases men have been convicted of sleeping on post, or of leaving post before being regularly relieved, with sentences adjudged which are, by comparison with the death sentence, almost trivial:

(1) Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

(2) Pvt. Aubrey LeLace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

(3) Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan reviewing authority.

(4) Pvt. Enic J. Valoren, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

(5) Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14, 1917. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

(6) Pvt. James Sadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months, with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others, the records do not show where the offenses were committed.

3. In addition to the foregoing, the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement.

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act 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. 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 (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them, I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 124.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 17, 1918.

Memorandum for the Secretary of War.

Herewith are the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, in which the sentence involves the death penalty. In two of these cases, namely, Pvts. Jeff Cook and Forest D. Sebastian, both of Company G, Sixteenth Infantry, the offense was sleeping on post. In the other two cases, namely, Pvts. Olon Ledoyen and Stanley G. Fishback, both of Company B, Sixteenth Infantry, the offense was willful disobedience of the lawful commands of their superior officers.

I have carefully examined the testimony in all these cases and have conferred with the Judge Advocate General concerning every phase of the legal questions involved. I am in complete agreement with the commanding general American Expeditionary Forces, in France, that the sentences should be confirmed and they should be duly executed.

Since my original interview with the Judge Advocate General, and under date of April 16, 1918, he has submitted to me a personal memorandum, herewith, in which without reopening the cases he invited my attention to cases of other men serving in the American Expeditionary Forces who were tried for similar offenses and whose sentences are not as severe as the four cases under consideration. The six cases enumerated in paragraph 2 of that memorandum refer to offenses which were not committed in the front-line trenches. The Judge Advocate General states that: "The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed." I am able to state from my own personal knowledge that the reviewing authorities who are cited in the brief of the Judge Advocate General indicate that all these cases were either in training camps or in the line of communications. Maj. Gen. Kernan, who approved two of the cases, was at that time the commanding general of the line of communications or, as it is now called, the Service of Supply. Maj. Gen. Bundy at the periods indicated by the date of the offenses was in training camp. Brig. Gen. Coe, on October 31, 1917, commanded the Heavy Artillery training camp at Mailly. In none of these cases, therefore, was the death sentence an appropriate sentence.

Referring to paragraph 4 of this memorandum of the Judge Advocate General, I do not find that his statement, "I regret exceedingly that in each case the accused was allowed to make a plea of guilty," is a fact. The record shows that two of these men, namely, Pvt. Sebastian and Pvt. Cook, did plead not guilty, and in the case of the other two men, Pvts. Ledoyen and Fishback, although the accused pleaded guilty the court proceeded to take evidence in the cases in spite of that plea.

The other cases mentioned in paragraph 1 of his memorandum have not appeared before me, and I do not know what additional testimony was brought out in those cases which moved the court to acquittal, but I do not think in any case that the different action of other courts has any substantial bearing upon the cases at issue.

The American Expeditionary Forces is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company but of the entire command is absolutely dependent on the vigilant performance of his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of these offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F, of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night, that is, the night of November 3–4, 1917, Pvt. Sebastian was found sleeping on his post, and on the night of the 5th Pvt. Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of the 2d–3d. This condition of affairs presented an absolute menace, not only to that portion of the line held by the American troops but to the French troops in the adjacent sectors.

With respect to the cases of the two men who willfully disobeyed orders, these are as flagrant cases as have ever come my notice, and are without excuses or extenuating circumstances.

I recommend that the sentences of the courts in these four cases be confirmed and executed.

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

Papers pertaining to each soldier were received in Adjutant General's office with this paper. Each has the order of the President with it. All are inclosures to this.

EXHIBIT 125.

MAY 1, 1918.

MY DEAR MR. PRESIDENT: I present you herewith the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, each of which involves the imposition of the death penalty by shooting to death with musketry.

These cases have attracted widespread public interest, and with the papers are numerous letters and petitions urging clemency, most of which are of that spontaneous kind which are stirred by the natural aversion to the death penalty which humane people feel. Many of them are from mothers of soldiers whose general anxiety for the welfare of their sons is increased by apprehension lest exhaustion or thoughtlessness may lead their boys to weaknesses like those involved in these cases, which the newspapers have described as trivial and involving no moral guilt, with the consequence that sons whose lives they are willing to forfeit in their country's defense may be ingloriously taken for disciplinary reasons in an excess of severity. Many of the letters are from serious and thoughtful men, who argue that these cases do not involve disloyalty or conscious wrongdoing, and that whatever may have been the necessities of military discipline at other times and in other armies, the progress of a humane and intelligent civilization among us has advanced us beyond the helpful exercise of so stern a discipline in our Army in the present war.

I examined these cases personally, and had reached a conclusion with regard to the advice which I am herein giving before I had seen any of the letters or criticisms.

The record discloses the fact that the divisional commander, the commander in chief, Gen. Pershing, the Chief of Staff, Gen. March, and the Judge Advocate General concur in recommending the execution of the penalties imposed. The Judge Advocate General limits his concurrence to the technical statement that the proceedings in the cases are regular, and expressing regret that a more adequate conduct of the defense of the several men concerned was not provided, concurs in the recommendation of Gen. Pershing. As I find myself reaching an entirely different conclusion, and disagreeing with the entire and authoritative military opinion in case, I beg leave to set out at some length the reasons which move me in the matter.

The cases must be divided into two classes, and I will deal first with the two young men convicted of sleeping while on duty, namely, Pvt. Jeff Cook and Pvt. Forest D. Sebastian, both of Company G, Sixteenth Infantry.

These cases are substantially identical in their facts. The accusations were laid under the eighty-sixth article of war, which reads: "Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

In both cases a corporal inspecting along a front-line trench found these young men standing in the proper military position, leaning against the trench, with their rifles lying on the parapet of the trench within easy reach of their hands. Each man had his head resting on his arm, and his arm resting on the parapet. The offenses were committed, in the Sebastian case on the night of November 3 and 4, and in the Cook case on or about the 5th of November. In both cases the testimony was exceedingly brief, and showed that the night was dark and cold, that the soldiers had their ponchos and other equipment on, and in one case it was a fair inference that the poncho was drawn over the ears and trench helmet in such a way as to make it difficult for the soldier to hear the approaching steps of the corporal. In each case the corporal laid

his own rifle upon the parapet, and took that of the soldier, carrying it away with him, and instructed the other sentinel, the men being posted in this outpost duty in twos, to shake the soldier and tell him to report to the corporal for his gun. In each case the corporal shamed the soldier for his neglect of duty, and pointed out to him the fact that not only his own life but those of others were at stake, and that he should be more zealous and alert. In neither case does either the corporal or the fellow sentinel swear positively that the accused was asleep, and I confess that on all reasonable grounds, taking the circumstances into consideration, it seems to me entirely likely that both men were asleep; but it is important to note that in neither case had the accused stepped away from his proper military post to sit down or lie down; both being found standing at their post of duty in what is admitted to have been a correct military position, and if they were asleep their heads literally nodded over on to their arms without any intentional relaxation of attention to their duty so far as can be gathered from any of the surrounding circumstances.

These soldiers were both young. Sebastian enlisted into the Regular Army by volunteering on the 18th of April, 1917, having had no previous military experience, his age at that time being 19 years and 6 months. He was, therefore, slightly more than 20 at the time of the alleged offense. Cook enlisted on the 11th of May, 1917, without previous military experience, his age at that time being 18 years and 11 months. He was, therefore, at the time of the alleged offense, slightly under 20 years of age.

From the testimony it appears that both of these young men had been posted as sentinels doing what is called double sentry duty, going on duty at 4 p. m., and remaining on duty until 6 a. m., with relief at intervals by other sentinels during the night, but with no opportunity to sleep during the night because of there being no place where they could secure sleep. It further appeared that neither of them had slept during the day before after having spent the previous night on gas sentinel duty, although both had tried to sleep during the day preceding the night of the alleged offenses, but found it impossible because of the noise. In both cases the commanding officers of the soldiers who forwarded the charges and recommended trials by general courts-martial added to his indorsement as extenuating circumstances the youth and failure of the soldiers to take the necessary rest when off duty on the first occupation of trenches.

It is difficult to picture to the eye which has not seen it the situation in which these young soldiers were placed. In the month of November the section of France in which these soldiers were stationed was cold, wet, and uncomfortable in the extreme. No sort of shelter of any comfortable kind could be provided near the trenches, because it attracts enemy observation and fire. Throughout one long night they performed duty as gas sentinels; during the next day, when they perhaps ought to have sought more rest than they did seek, they found it difficult to secure any sleep because of the noise and discomfort of their surroundings. As a consequence, on the night of the alleged offenses they had reached the place at which exhausted nature apparently refused to go further, and without any intentional relaxation of vigilance on their parts they dozed in standing positions at their posts of duty.

I am quite aware of the gravity of this offense, and of the fact that the safety of others, perhaps the safety of an army and of a cause, may depend upon such disciplinary enforcement of this regulation as will prevent soldiers from sleeping on sentinel duty; and yet I can not believe that youths of so little military experience, placed for the first time under circumstances so exhausting, can be held to deserve the death penalty, nor can I believe that discipline of the death sentence ought to be imposed in cases which do not involve a bad heart, or so flagrant a disregard of the welfare of others, and of the obligation of a soldier as to be evidence of conscious disloyalty.

In both of these cases the reviewing judge advocate quotes with approval some observations of Gen. Upton, who in his work on military policy points out that action taken by President Lincoln in the early days of the Civil War, pardoning or commuting sentences in cases of death penalty led to the need of greater severity at a later period in the interests of discipline; but the cases which Gen. Upton had in mind were cases of desertion in the face of the enemy involving cowardice, and cases of substantially treasonable betrayal of the Nation, and I can see no persuasion in them as an example. Rather it would seem to indicate that the invocation of this opinion of Gen. Upton indicates a feeling on the part of the reviewing judge advocate that while these particular cases might not be deemed on their own merits to justify the death sentence, that,

nevertheless, as a disciplinary example such action would be justified. I am not, of course, suggesting that any of the military officers who have reviewed these cases would be willing to sacrifice the lives of these soldiers even though innocent; but I do think that if these cases stood alone no one of the reviewing officers would have recommended the execution of these sentences; their recommendations being, in my judgment, soldierly and in accordance with the traditions of their profession, and based upon a very earnest desire on their part to save the safety of their commands, and the lives of other soldiers; but, nevertheless, to some extent influenced by the value of the discipline of the Army of the examples which their execution would afford.

I have not sought to examine the learning of this subject, and, therefore, have not prepared a history of the death penalty as a military punishment; but I think it fair to assume that it arose in times and under circumstances quite different from these, when men were impressed into armies to fight for causes in which they had little interest and of which they had little knowledge, and when their conduct was controlled without their consent by those who assumed to have more or less arbitrary power over them. Our Army, however, is the Army of a democratic Nation fighting for a cause which the people themselves understand and approve, and I had happy and abundant evidence when I was in France that the plain soldiers of our Expeditionary Forces are aware of the fact that they are really defending principles in which they have as direct an interest as anybody, principles which they understand, approve, and are willing to die for.

I venture, therefore, to believe that the President can with perfect safety to military discipline pardon these two young men; and I have prepared and attached hereto an order which, if it meets with your approval, will accomplish that purpose, and at the same time, I believe, upon its publication further stimulate the already fine spirit of our Army in France. Such an order as I have here drawn would be read by every soldier in France and in the United States, and coming from the Commander in Chief would be a challenge to the performance of duty, quite as stimulating as any disciplinary terror proceeding from the execution of these sentences. In the meantime public opinion in this country would, I believe, with practical unanimity approve such action on your part.

In the cases of Stanley G. Fishback and Olon Ledoyen the charges are substantially identical in that each of them is accused under the sixty-fourth article of war of having "willfully disobeyed any lawful command of his superior officer." The facts show that on the 3d day of January, 1918, these two young men in broad daylight in the theater of war, at a place back of the actual line, were directed to bring their equipment and fall in for drill. Each refused, whereupon they were warned by the lieutenant who gave the order not to persist in their refusal on the ground that grave consequences would ensue. They were not warned that the penalty of disobedience was death, but were advised earnestly to comply. Both persisted in their refusal. Each gave as his reason for refusing that he had been drilled extensively the day before, that they had gotten cold, the weather being extremely severe, and that they had not yet recovered from the effects of that exposure.

Both pled guilty at the trial.

It is perfectly obvious that this order ought to have been obeyed. It was a proper military order, and it seems to me inconceivable that such obstinate refusal on so trivial a matter could have been made with any consciousness that the death penalty was the alternative. Nevertheless the disobedience was willful, undisciplined, and inexcusable, and it ought to be punished with a suitable punishment.

The Judge Advocate General, in reviewing these cases, limits himself again to the technical correctness of the proceedings, but in a subsequent memorandum he called the attention of the Chief of Staff to the fact that four cases of sleeping on post arising in the same regiment at approximately the same time resulted in acquittal of the accused on substantially the same evidence as that recited in the Sebastian and Cook cases, above reviewed, and that in six cases similar offenses committed elsewhere in France had led to very moderate penalties. The Judge Advocate General says in this memorandum: "In addition to the foregoing the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and

Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement."

In other words, the Judge Advocate General, reviewing generally the state of discipline in the Army in France and the steps taken to enforce it, reaches the conclusion that up to the time of the trial of these cases the offenses of which these soldiers were convicted had been regarded as quite minor in their gravity. The Chief of Staff, in commenting upon this memorandum of the Judge Advocate General, is able from his own recollection to add that the willful disobedience cases lately tried in France did not concur in the actual theater of war, making at least that much of a distinction. But the case still remains one in which suddenly a new and severe attitude is taken without the record disclosing that any special order had been made notifying soldiers that the requirements of discipline would call upon courts-martial thereafter to resort to extreme penalties to restore discipline.

Both Ledoyen and Fishback are young. The record shows that Ledoyen enlisted on the 3d of February, 1917, without previous military experience, his age at that time being 18 years and 1 month. Fishback enlisted on the 17th of February, 1917, without previous military experience, his age being 19 years and 2 months. Each of them at the time of the commission of the alleged offenses was therefore less than 20 years of age.

The record in the Fishback case shows that there had been previous shortcomings on his part in the matter of obedience. That is to say, he had once failed to report for drill, for which he was required to forfeit 15 days' pay; a second time failed to report for drill, penalty not stated; and a third time failed to report for fatigue duty, for which he was sentenced to one month at hard labor and to forfeit two-thirds of his pay for two months. He seems, therefore, to have found it difficult to accommodate himself to the discipline of the life of a soldier, and his offense hereunder reviewed is aggravated by this previous record.

By a very extraordinary coincidence this record discloses the fact that these two soldiers were members of a company commanded by Capt. D. A. Henckes. It is from the captain of his company that the soldier most immediately learns discipline and obedience. The captain sets the example and inculcates the principles upon which the soldier is built. Now, this particular Capt. Henckes, although for many years an officer in the Regular Army, was himself so undisciplined and disloyal that when he was ordered to France with his command he sought to resign because he did not want to fight the Germans. Born in this country and for 20 years an officer in its Army, under sworn obligation to defend the United States against all her enemies, domestic and foreign, he still sought to resign; and when the resignation was not accepted, and he went to France, the commander in chief was obliged to return him to this country because of his improper attitude toward the military service and his country's cause in this war. He was thereupon court-martialed and is now serving a sentence of 25 years in the penitentiary for his lack of loyalty and lack of discipline.

I confess I do not see how any soldiers in his company could have been expected to learn the proper attitude toward the military service from such a commander. I do not suggest that the shortcomings of Capt. Henckes be made an excuse for their disobedience, but these mere youths can barely be put to death under these circumstances, and I therefore recommend that the sentence in each case be commuted to one involving penal servitude under circumstances which will enable them by confinement in the Disciplinary Barracks at Fort Leavenworth to acquire under better conditions a wholesomer attitude toward the duty of a soldier. Orders accompanying this letter are drawn for your approval which will carry out the recommendation here made.

In view of the fact that both Fishback and Ledoyen had been previously guilty of minor offenses, as disclosed by the record, the penalty suggested is three years' confinement.

Respectfully submitted.

SECRETARY OF WAR.

EXHIBIT 126.

THE WHITE HOUSE,
Washington, May 4, 1918.

MY DEAR MR. SECRETARY: I am in entire agreement with you about the cases of Pvts. Jeff Cook, Forest D. Sebastian, Stanley C. Fishback, and Olon Ledoyen,

and have taken pleasure in signing the orders which you were kind enough to have drawn up for me.

May I not thank you for your very full and convincing letter.

Cordially and sincerely, yours,

WOODROW WILSON.

Hon. NEWTON D. BAKER,
Secretary of War.

EXHIBIT 127.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Sebastian, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

WOODROW WILSON.

EXHIBIT 128.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Jeff Cook, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Cook, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

WOODROW WILSON.

Inc. 5.

EXHIBIT 129.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans., United States of America.

WOODROW WILSON.

EXHIBIT 130.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Stanley C. Fishback, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude

at the Disciplinary Barracks at Fort Leavenworth, Kans., United States of America.

WOODROW WILSON.

EXHIBIT 131.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
May 14, 1918.

Memorandum for Gen. Crowder:

I have talked over the phone with the pardon clerk in the Department of Justice. He sees no legal objection of any kind whatsoever to the method the President has here taken of granting these two soldiers a pardon. He says it is a legal pardon. He suggests, however, that a copy of the President's action should be sent to each of the soldiers and a statement obtained from them that they accept the pardon granted. The paper then to be returned to the War Department for filing in the office of The Adjutant General of the Army. It seems to me that the action of the soldiers in taking their release is sufficient to show by implication that they do accept the pardon. However, I suggest that when the order is printed the action suggested be taken by sending a copy of the printed order to each of the soldiers.

H. M. MORROW,
Lieutenant Colonel, Judge Advocate, Executive Officer.

(Notation in ink:) Approved. Take action accordingly.

E. H. C.

MAY 15.

EXHIBIT 132.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, March 27, 1919.

Maj. B. D. Spaulding; appointed from enlisted man; graduate of Maryland Agricultural School; civil engineer.

Maj. A. P. Withers; appointed from enlisted man; high school education; shipping clerk, salesman, farmer.

Maj. P. L. Ransom, graduate of University of Vermont, B. S.

Maj. Phillip Remington, former quartermaster sergeant; high school education.

Lieut. Col. J. P. Bubb, United States Military Academy, 1905.

Capt. A. F. Kingman, graduate of Harvard University; also Massachusetts Technology, electrical engineer.

Lieut. William J. Black; no professional, legal, or business training.

WM. GORDON.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, March 26, 1919.

Lieut. Paul C. Green, attorney at law, graduate of law school.

Lieut. H. W. Clarke, killed in action May 28, 1918, newspaper reporter; no college.

Lieut. R. R. Cooper, chemist, high school education.

Lieut. Robert P. Clark, graduate of University of Maine; no law.

WM. GORDON.

EXHIBIT 133.

MARCH 30, 1918.

From: The Adjutant General of the Army.
To: Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, Washington, D. C.
Subject: Travel orders.

The Secretary of War directs as necessary in the military service that, accompanied by Mr. Earle L. Brown, civilian clerk, you will proceed not later

than April 1, 1918, to Ottawa, Canada, for the purpose of observing the Canadian forces, under confidential instructions of the Secretary of War, and upon completion of this duty you and Mr. Brown will return to your proper station.

Mr. Brown will be paid $4 per day in lieu of actual expenses and the Quartermaster Department will furnish him the necessary transportation.

A. G. LOTT,
Adjutant General.

EXHIBIT 134.

[Personal.]

MARCH 20, 1918.

Gen. CROWDER: 1. I am now ready to start at any time on the proposed journey for the study of the Allies' war laws and administration. I think my departure should be hastened.

2. More time will be required than I first reckoned. A rough estimate is one week at Ottawa, three or four weeks at London, three or four weeks at Paris, two weeks in conference with our own authorities, military and civil. About 20 days will be consumed in ocean travel going and returning. I could leave for Ottawa almost immediately.

3. I have from time to time had conference with members of the various foreign missions here, whereby I am satisfied I better know what is needed, and how to get it. Maj. Innes, of the British Embassy, has been the soul of courtesy, very interested, and very helpful. With great kindness he has offered to place his chambers at the Inns at my disposal.

4. My information is that the volume and the character of the work, together with the difficulty of getting the services of a stenographer abroad, will absolutely necessitate my taking along a stenographer from this office. The volume of dictation, copying, and note taking will make the continuous services of a stenographer indispensable.

5. I am sure I do not exaggerate the benefits that will result from such a tour. There have been missions for everything else, but nothing has been done to acquaint us, especially, with the war laws and administration of the Allies. Indeed, it would be difficult to exaggerate the benefits. I am quite sure that the results of such a tour and study will be helpful to the Government, to the department, and to you, and that it will be especially beneficial and I hope creditable to you, to me, and to this office. I feel that this office, thus prepared, will thereby be enabled to exert greater influence in the department and outside of it.

ANSELL.

[Confidential.]

APRIL 17, 1918.

From: The Adjutant General of the Army.
To: Brig. Gen. Samuel T. Ansell, Acting Judge Advocate General, Washington, D. C.
Subject: Travel order.

The Secretary of War directs as necessary in the military service that you proceed not later than the 20th instant to the port of embarkation, Hoboken, N. J., and thence to France and such other countries in Europe as may be found necessary for the purpose of observing the principles and practice of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. Upon completion of this duty you will return to your proper station. Report of your observations will be made in writing to the Judge Advocate General of the Army.

A. G. LOTT, *Adjutant General.*

EXHIBIT 135.

PERSONAL REPORT OF GEN. S. T. ANSELL'S TRIP ABROAD.

(Original and carbon copy of report are now in the files of the Judge Advocate General's office. C. H. P.)

AT SEA, U. S. S. "PLATTSBURG,"
July 8, 1918.

From: Brig. Gen. S. T. Ansell, Judge Advocate General, United States Army.
To: The Judge Advocate General of the Army.
Subject: Report of a study of war law and administration of the allied nations made during a recent tour of investigation.

* * * * * * *

CONCLUSION.

The scope of this report complies with, and is limited to, the terms of the order. I am prepared, if it be your pleasure, to report to you orally on the administration of our own department in France, together with my views upon the military situation.

S. T. ANSELL.

EXHIBIT 136.

MARCH 8, 1919.

MY DEAR MR. SECRETARY: I was very glad to receive your letter of March 1, calling upon me for a brief statement of the facts concerning the organization for and the practice of the administration of military justice during the war. I agree heartily with you that there has been no opportunity for our people to hear through the press more than reports of fragmentary and inflamed criticisms based on sensationalized allegations and that they are entitled to a statement of the case as it is recorded in and viewed by the department.

The circumstances that have most amazed me in my following of the press reports are that the public interest has been carried and sustained by a supposed controversy between myself and an officer of my department, Gen. Ansell, and yet that the exceedingly small margin of actual controversy is entirely lost to sight in a murk of supposed instances of harsh or unjust treatment of soldiers which bears little or no relation to Gen. Ansell's lack of concurrence with the views of the War Department. I think therefore that a clear statement of the organic basis of that difference of opinion will go far to clear the atmosphere and leave us in a position to discuss separately the allegations of harshness or injustice.

Gen. Ansell contends that there is a fault in the organic structure of the court-martial system, in the fact that after a man has been tried by court-martial, and the record of trial has been reviewed by the authority that appointed the court (usually a military officer of high rank) and by him finally approved and carried into execution, there is no further appellate body or officer who can review the appointing officer's review and modify, affirm, or reverse his action.

With this I agree and there is no controversy about it. I submitted and you approved in January, 1918, a draft of legislation vesting such a further appellate or reviewing power in the President. The draft was introduced and died in the Senate Military Committee, which no doubt considered it of less actual importance than other pressing business of the war. If this were the only alleged difference of opinion within the department, therefore it vanishes with this simple statement and it is difficult to perceive a cause for unusual interest.

The storm centers, however, about three briefs—two from Gen. Ansell and one from myself to you. Strange to say, those briefs were not addressed previously to the desirability of such a power of review. That is conceded. They were addressed solely to the question of whether that power had not actually been granted by section 1199, R. A., a law that had been on the statute books for 55 years with but a single attempt to deduce from it the grant of so broad a power in any officer of the Government. That single attempt was made in a desperate effort to obtain the release of a convicted soldier by habeas corpus. The precise question on which Gen. Ansell and I do not agree was carried into a circuit court of the United States and there decided once for all in a manner binding on all administrative officers sworn to execute the law as they find it. I shall not prolong this statement by discussion of that question. That any administrative officer would be justified in finding in the unequivocal language of a statute so old, against the reasoned judgment of a Federal court and the administrative practice of 55 years, a hidden meaning revolutionizing the entire system of military justice is simply preposterous. Gen. Ansell's argument was an eager, earnest plea for a forbidden short cut based on expediency rather

than on reason. With the desirability of such an appellate power in the President you agreed and forthwith requested it of Congress, which alone could grant it. Countenance of a plan to play ducks and drakes with a statute of the United States you refused. The briefs are in the Congressional Record or in the reports of committee hearings and they may confidently be left to the reading of any fair-minded man—lawyer or layman. That thread of the story is at an end.

But if the controversy is not over the advisability of such an appellate power and not in a substantial sense in the famous briefs, where is it? It lies in this: First, that Gen. Ansell believes that the power when granted, should be vested in the Judge Advocate General and that a complete judicial system with faithful analogies to the organization and procedure of civil courts should be substituted for the present simple and direct system of Army discipline, while the department believes that the power should be vested in the President; that with such a grant of power the faults of the existing system will be completely removed with the exercise of those powers and with the improvements that have been instituted in the last two years.

These are the real issues and the only ones.

The case is one of technical ramifications and I am sorry that limitations of space will not carry to the American people the wealth of fact and argument to be found in the files of the department. Each of the points of controversy must be discussed briefly and without available technicality.

What is proposed is to carry the principles of the civil code and civil court principles of procedure into our military system. Appeal is made to the Anglo-Saxon conviction of the net desirability for the guarded procedure, the technicalities of indictment and pleading and the stays, delays, and rights of appeal, which characterize our criminal courts. The real effect of such a charge has not been examined but it is, in fact, a divorcement of the power to control discipline from the power to command armies. Indeed an analogy has been suggested between an army and a government and it is urged that our governmental distinction and separation between the executive and judicial system must be carried into the Army and that no commanding officer should be permitted to appeal to the disciplinary measure of trial by court-martial without the concurrence of his law officer or judge advocate, who should be, and usually is, a man learned in the technicalities of civil practice. Thus if a division commander intrusted with a major part in the Argonne offensive had contumaciously declined to carry out his part of the general plan, he could not be brought to trial by Gen. Pershing unless the judge advocate of the American Epeditionary Forces concurred.

Our civil code is good. It protects our most sacred liberties, but gentlemen who contend that it should be substituted for our military code—which is also good—forget that the purposes of the two systems are diametrically opposed. The civil code is designed to encourage, permit, and protect the very widest limit of individual action consistent with the minimum necessities of organized government. The military code, and especially our military code, is designed to operate on men hurriedly drawn from the liberal operation of the civil code, and to concentrate their strength, their thought, their individual action on one common purpose, the purpose of victory.

The common purpose is the plan of action. The plan of action can not be, as we have heard it is in the Bolsheviki army, the debated sense of the Army. The plan of action is and must be the plan of the commander. Therefore individual liberty of action inconsistent with that common purpose must be restricted. The military code is designed to accomplish that purpose.

The truth is (and our people have lately seen it demonstrated in a thousand ways) that peace and war both demand sacrifices of individual liberty to a common purpose, but such sacrifices in war are infinitely greater in number and degree than they are in peace. The soldier from the day he dons his uniform must be prepared to sacrifice much of his old freedom of action, and indeed he swears to do so in his oath to obey the orders of his commander.

What is the essence of all this? It is, that for the purposes of peace we demand an intricate legal system, even at the cost of technicalities, delays, and abstruse rules of law—we demand the admirable system of checks and balances, that is illustrated by the divorce of our executive from our judicial system. We intrust ourselves to these devices rather than to the fairness and justice in the hearts of men. The very nature of war is such that men forget the sordid views that made those checks and balances necessary. They give the Nation, willingly and eagerly, their fortunes and their lives, and in such a

time of patriotic exaltation, we willingly give over, and the peril is such that we must give over, this adherence to artificial safeguard of complex rules and trust our individual rights more and more to the principles of humanity, honor, and justice in the breasts of our fellow citizens who are offering their lives and fortunes, as we are offering ours, to the perpetuation of our institutions and for the common good. On this theory the soldier is remitted to the simple and direct procedure for the enforcement of discipline in the Army. His court has its inception in the old courts of chivalry and honor, and the essential principle remains. His conduct is taken before his comrades who determine whether it is the conduct of a soldier or no.

In this lies the difference between the systems for civil and military justice. The War Department naturally adheres to the latter system. It repels the thought of an army in the field with two commanders—one in charge of its discipline and one in charge of its strategical and tactical maneuver. The picture is, to the student of war or to the man with the slightest familiarity with things military, nothing less than ridiculous.

I should be willing to rest with this statement were it not that it has been said that without such a radical change as is proposed we have witnessed atrocities of injustice and that they are traceable to faults in the existing system of military justice. I have said that there is one such fault. That fault is imposed by a statute of the United States. I presented it to Congress for correction and it was not corrected. The fault lies not in the fault of a civil judicial system, but in the lack of a power to reverse, modify, or affirm the action of a military commander on the findings and sentence of a court-martial. I think we have disposed of the contention that the power should lie in the Judge Advocate General. It should lie in the President.

But what actual harm has resulted from this fault? I have covered the facts in my letter to you of February 13. I can not repeat them here. It is only the executed portion of a sentence that the present power of the President does not reach. In order that such power as he now has may reach every case of injustice, excessive sentence, and illegality appearing in a trial by general court-martial a mechanism has been created in the office of the Judge Advocate General that gives, I venture to say, a scrutiny more far-reaching and exacting than is possible under any civil system under the sun. I shall not repeat its description or its record as shown in my letter to you of February 13, but I shall content myself with an assertion that I stand upon its record and that its record is complete and open to the public.

That mechanism added to the power of final review in the President asked for over a year ago will make the system such that I am willing to stand or fall by it.

So much for the controversy that has been magnified in the press and on the floor of Congress—this statement would not be complete, however, without reference to the allegations that have shocked the Nation and in respect of which the Nation is entitled most of all to assurance. It is asserted and attempted to be established by example that the sentences of courts-martial during the war have been atrociously severe.

Let me say first of all that the criticism that they are severe is not a criticism of the system of military justice, it is not a criticism of my administration of that system. It is a criticism of the officers who imposed, for instance, sentences of death for sentinels convicted of sleeping on post, for soldiers wilfully and contumaciously refusing to obey the direct orders of their commanding officers, and for desertion in time of war, and it is a criticism of the Congress which authorized a death penalty, in plain statutory terms to be assessed on convictions for these offenses. I do not mean to say that if criticism in the connection is due I am immune. I am not. I agree with the statute, and shall defend it, but I am not responsible for it.

Considering the charges from the standpoint of the officers who assessed the sentences, let us see who they are. Are they military zealots—men ground in an iron and heartless system until the liberal views of civil practice are ironed out of their souls? They are not. They are men taken in a general dragnet through the Nation so lately that the civilian clothes they left behind them are not yet out of style. They come from every walk of life. There are 200,000 of them. They comprise a faithful cross section of our whole people and our national life.

What is this charge of severity by them? We have seen that it can not be an indictment of the system. It is simply a difference between the opinions of well-meaning and human critics far removed from the scene of the offenses

punished and with only a partisan, inadequate and highly colored statement of that case to guide them, and the opinions of men who considered the facts under the solemn obligation of an oath to be honest, impartial, and fair, who lived in the environment of the offense and were steeped in the reasons making it grave, and who assessed the sentence in the performance of the highest civic duty of man—the defense of home and country.

These men can not merit the indictment and diatribe that has been heaped upon their action. As Burke has said, you can indict a few individuals but you can not indict a nation. These men are a portion of the Nation—the portion that has been dedicated to death if need be to save the Nation from destruction. Their expression and not that of men 3,000 miles from the field of action is certainly the voice of the Nation on the punishments that should be meted out to men who imperil its honor and its safety.

Why should the offenses by a soldier of sleeping on a post of the guard, desertion, disobedience of orders be punishable by death? Because cities and fortifications and armies have been lost through the drowsiness of sentinels; because armies have been disintegrated and nations humbled by desertion; because battles have been lost and peoples sold into captivity by the disobedience of soldiers.

I can not enter this discussion further. To us at home, in comfort and in present peace, it is next to impossible to reconcile the almost unanimous view of soldiers in the theater of war on the gravity of these and many other lesser offenses by their comrades. Therefore the execution of not one sentence of death for these things has been approved by me and not one such sentence has been executed. Also, as I showed you in my letter of February 13, heavy sentences have been reduced comprehensively and uniformly. But even with that said I can neither condemn the 100,000 officers who assessed sentences, nor the law of Congress, nor the system under that law that made them possible.

There, Mr. Secretary, are the main issues of principles. I shall discuss at this place neither individual cases nor minor principles that have been put in issue. They all come back to the essential bases that are here stated. I am willing at the proper time to take up either subject or any variation under either. I can defend them all to the satisfaction of any fair-minded citizen.

Hostile critics will undoubtedly assert that the observations I have submitted commit me to a support of excessive sentences, which of course is not true. I only speak the probable viewpoint of the officers who have assessed these sentences. But it may be said with entire accuracy that on the day the armistice was signed, November 11, 1918, no person was serving the sentence of a general court-martial who had on that date entered upon the execution of the excessive portion of his sentence. As you are aware, shortly after my resumption of full charge of the office of the Judge Advocate General, I recommended the convening of a board of clemency to undertake with the greatest expedition the adjustment of war-time punishments to peace-time standards and that an admonition was issued, upon my recommendation, to courts-martial and reviewing authorities, both at home and abroad, to conform, unless special reasons influenced them to a contrary course, to the limits of punishment observed in time of peace.

I come now, with the utmost reluctance to a few distasteful paragraphs of personal vindication. My motives and my actions have been attacked, even my veracity has been insinuated against, and I have been advertised as having hampered the efforts of Gen. Ansell. I have been set off against him as reactionary.

It has been said that the present military code is archaic. I merely say that I began what proved a tedious and heart-breaking task of years to obtain a complete revision of the old military code early in my service, personally conducted that task beginning with my appointment as Judge Advocate General and at the end of four annual disappointments obtained its complete revision in 1916.

During much of the time Gen. Ansell was one of the most promising and trusted officers in my office. During all the time that the code was in revision he never suggested to me nor, so far as I can learn, to anyone else any of the changes he is suggesting now. He participated in preparing the manual for courts-martial which was based upon the new code, but he advanced none of these new views.

Indeed, the first time that I was advised of such a view was in November, 1917, on the occasion of his presenting to you—not through me and entirely without consulting me—the first of the elaborate briefs about which so much has been made. It has been charged that, as a result of that brief an order

designating him as Acting Judge Advocate General was revoked, and further that he was relieved from his duties of supervising the administration of military justice. Nothing could be further from the truth. He was never relieved from his duties supervising the administration of military justice except to take a trip to France, which he was eager to do, and this was considerably after the submission of the brief and after the revocation of the order appointing him Acting Judge Advocate General and relieving me of my functions. That order was killed before I knew anything about the brief. It had never been published. It had been obtained by him from the Chief of Staff without consulting you and without your knowledge, and it was revoked by you because it was contrary to your wishes.

Gen. Ansell asked me in a formal written memorandum to help him secure an order appointing him Acting Judge Advocate General in charge of my functions. I did not wish to be relieved, but did not wish to embarrass you. I therefore replied in writing that he could take the matter up directly with the Secretary of War in his own way. He did not take the matter up with the Secretary of War at all. He took it up with the Acting Chief of Staff with the remark that I concurred. Upon this showing the Chief of Staff marked the draft of an order that Gen. Ansell had prepared for suspended publication. By accident I learned of this order. This was before I had an intimation from any source of the preparation of the first brief, or any intimation that Gen. Ansell had reached a conclusion as to the desirability of an appellate power in the Judge Advocate General. I called your attention to the circumstance, and you directed that the order be not published.

While it is true that Gen. Ansell's attempt to secure an order giving him my functions as Judge Advocate General was concurrent with his preparation of a brief urging a revolution in the military system, and his circulation of a document of such grave consequence among every officer in my office without giving me the slightest information of his efforts, it is not true that I knew of the brief until after you directed the rescinding of the unpublished order appointing him Acting Judge Advocate General.

It is also true that from that time forth the feeling of trust and confidence that I had in Gen. Ansell was shaken and that you asked me to spend more of my time in the Judge Advocate General's office and less at the office of the Provost Marshal General, both of which offices were under my supervision and were my responsibility. It is not true, however, that I relieved Gen. Ansell of his duties in supervision of the administration of military justice, nor is it true that he was hampered in any reforms or improvements possible under the law as Congress gave it. Except that he was disappointed in his effort to secure a revisory power in the Judge Advocate General by finding, against the decision of a Federal court and the administrative practice of 55 years, such a power in the existing statute, nothing was done to decrease his responsibility for the administration of military justice or to hamper his freedom of action. That he did not feel himself so hampered is shown by his submission, without my knowledge, of General Order 84, 1919, enlarging the revisory powers of the Acting Judge Advocate General in France, so as to give him, by delegation, the very power which you had declined to deduce from 1199 Revised Statutes.

It is further true that the brief itself did not tend to increase my confidence in Gen. Ansell. A decision was referred to a statute, quoted only in part, which, when read in full, rendered the decision of no value to the proposal it was invoked to support. Dicta, in a compendium of judicial definition, concerning the word "review" were cited from a page upon which were found more pertinent definitions absolutely refuting his view, and no reference made to the more pertinent definition. It was urged from the vantage point of the seat of the Civil War records that the power which it was contended had been granted by the statute had been used during the Civil War and for a considerable period thereafter, when the most cursory review of the records was convincing that such was not the case. It was stated that the question had not been addressed by the Federal courts, when the most frequently consulted volume in the office disclosed that such was not the case and referred directly to the instance in which the question had been addressed and the contention overruled, and further the case was found pasted in our office file of the Federal Reporter. Finally, it was urged unequivocally that such a power resides in the British judge advocate general, when exactly the reverse is true, the actual point having been authoritatively decided in a point opinion of the attorney and solicitor general of Great Britain in 1873.

When it was remembered that this was in no sense a controversial brief, but a memorandum addressed to you by an officer who stood in the rôle of your legal advisor, and that it was intended to commit you to a course as revolutionary as any ever taken by an administrative officer, I think I may be justified in the feeling of caution that replaced my former implicit trust.

I think I can fairly say, however, that this feeling of caution did not disturb my relations with Gen. Ansell and was in no way permitted then, or at any time thereafter, to interfere with the full use of his conceded talents in the task to which he had been assigned.

Except for his absence of about 90 days in France (April–July) as senior officer in my office, he has had abundant opportunity—indeed, it was his duty—to introduce improvements in procedure and to remedy the harshness of individual cases; but, notwithstanding his present protestations, the fact is that he made but sparing use of these opportunities, having personally signed, for example, the documents refusing to recommend clemency in three of the cases recently cited on the floor of Congress as examples of excessively severe sentences.

Attacks on the existing system and the furor that has been designed to shake the confidence of the American people in the system of military justice find their genesis in an article published by the correspondent, Mr. Rowland Thomas, January 19, 1919, and in press reports of a speech made by Gen. Ansell in Chicago, January 26, 1919, near the date of my resumption of the duties of the office of Judge Advocate General. From that time forward the fire of criticism was fed by an agitation contained in newspaper articles too consistently connected and too instinctively based on distorted accounts of matter on record in the Judge Advocate General's Office to allay the thought that a bitterly partisan propaganda rooted in this office was being conducted by some one therein. I do not say, I do not wish to be taken as intimating, that it was Gen. Ansell, but I do say with the utmost confidence that I am correct, that the propaganda was being fed into the hands of the press by those seeking not a reformation of the code but the accomplishment of ulterior motives.

If it were difficult for an officer of my department to obtain a hearing with me or with the Secretary of War; if there was a single reason why any situation requiring legislation should not be presented to Congress with my approval if I concurred, frankly without it if I did not concur; if any attempt had ever been made by me to make my records difficult of access to any properly accredited person entitled to inspect them, then I could understand a recourse to the bitter and unusual course that has been followed in this instance. None of these hampering contingencies exists, and therefore I can not understand the course. When there might have been a fair hearing of an honest difference of opinion in any form yet addressed, there has been an attempt by furtive and demagogic methods to inflame a public opinion against the truth. No such attempt ever succeeded and I have no fear that it will succeed in this instance.

E. H. CROWDER.

EXHIBIT 137.

JANUARY 3, 1919.

Memorandum for the Chief 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 by members of the board of review, 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 subsantial 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 appellee 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 or power than a limitation.

(*c*) In my judgment punishments awarded by courts-martial during this war are properly criticisable 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 Thirty-seventh article of war, or any other consideration.

6. My sense of applied law and justice, however, 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.

EXHIBIT 138.

JANUARY 11, 1919.

Memorandum for the Secretary of War.

1. I have just finished reviewing the general court-martial cases from Camp Dix, under General Order 7, which have been presented to me to-day by the Chief of the Military Justice Division of this office. Those cases relate, of course, to that command alone, but I fear and have reason to believe that they evidence a situation that is much more general. This condition is directly due to a failure upon the part of the court-martial—a failure which in this case appears to be absolute—to appreciate the high character of their judicial functions and a similar failure upon the part of the convening and reviewing authority. Under the limitations of law, regulations, and orders, as construed in the War Department, this office was limited to advising the reviewing authority as to whether the record of trial was "legally sufficient to sustain the findings and sentence of the court," and was not otherwise concerned with the quantum of punishment; this upon the view, of course, that the jurisdiction of the convening authority is final and beyond review. Nevertheless, impelled by the irresistible evidence found in the great number of unjust sentences passing through this office, I have presumed, with a hesitation which the delicacy of the situation demands, to invite the attention of convening authorities to the great severity of the punishment in those cases in which the punishment has appeared to be so disproportionate to the offense as to shock the conscience. In the light of what is transpiring at Dix, and doubtless elsewhere, I do not regard that such an administrative course, taken in specific instances, is sufficient to achieve and establish military justice.

2. The cases to which I now invite your attention have all come to me to-day as a part of the day's work. The officers who have handled them in this office and I are of one mind as to what they reveal and as to the necessity for the application of curative measures. I will give you a brief summary of them:

(*a*) In the case of Pvt. Sanford B. Every, Forty-ninth Company, Thirteenth Battalion, One hundred and fifty-third Depot Brigade, the accused 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 reviewing authority reduced the confinement to three. We consider 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.

(*b*) In the case of Pvt. Clayton H. Cooley, Thirteenth Company, Fourth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of absence without leave from July 29 to August 26, 1918, and from September 1 to September 8, 1918; failing to report for duty; escaping from confinement 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 this office, in returning the record to the convening authority, will so comment upon it.

(*c*) In the case of Pvt. Charles Cino, Seventy-first Company, One hundred and fifty-third Depot Brigade, 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 that he was sick, and doubtless he was suffering somewhat from venereal trouble. It

may be that he was a maligner. In our judgment the sentence, even as reduced, was entirely too severe, and this office will so comment upon it to the convening authority.

(*d*) In the case of Pvt. Calvin N. Harper, Company A, Four hundred and thirteenth Reserve Labor Battalion, 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. The period of confinement, even as reduced, is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company Thirty-six, Ninth Training Battalion, One hundred and Fifty-third Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife and a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. 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. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, Fifty-eighth Company, Fifteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty 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, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was 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. There was no evidence of previous misconduct. The court 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 for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, Forty-ninth Company, Fourteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, Base Hospital, tried at Camp Grant for insubordinate conduct, which at worst could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages in his review to show that such punishment was well merited.

3. 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 such 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.

4. If the courts are blameworthy the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to

apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this found in a camp order which provides as follows:

"Absence without leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court."

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction, *the court must realize* (italics my own) that it has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this—and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543) and Grafton *v.* United States (206 U. S., 333). There are numerous other decisions to this effect. The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.

This order contains, in effect, and was intended to convey, the following directions:

(*a*) All absences without leave will be tried by court-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay. (The limit of punishing power of a special court.)

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed—at least I believe I have observed—during this war.

EXHIBIT 139.

JANUARY 13, 1919.

MY DEAR GEN. CROWDER: I inclose herewith memorandum submitted to me by Gen. Ansell. It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose: First, very unequal degrees of punishment; and, second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

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

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

Maj. Gen. ENOCH H. CROWDER,
Judge Advocate General.

EXHIBIT 140.

HEADQUARTERS SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex., January 24, 1919.

Bulletin No. 2.

The following telegram from the War Department is published for the information and guidance of all concerned:

WASHINGTON, D. C.,
January 22, 1919.

COMMANDING GENERAL SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex.:

In view of the cessation of hostilities and the reestablishment of conditions approximately those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of court as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges, and reviewing authority approves, punishment in excess of the limits desired in said Executive order, the reasons for so doing will be made a matter of record. Trial by general court within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the One hundred and fourth Article of War, would be under all the circumstances of the case clearly inadequate.

By command of Maj. Gen. Cabell:

W. T. JOHNSTON,
Colonel, General Staff, Chief of Staff.

Official:
A. S. MORGAN,
Colonel, Adjutant General, Department Adjutant.

EXHIBIT 141.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 28, 1919.

(*Office order.*)

Under date of January 13, 1919, the Secretary of War, in returning a memorandum submitted to him by Acting Judge Advocate General of the Army, remarked as follows:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose, first, very unequal degrees of punishment; and, second, perhaps generally, a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased."

In response to this memorandum, the undersigned proposed, as a means of preventing any further accumulation of cases in which a clemency would be necessary to prevent harshness and severity which are unnecessary from the point of view of present disciplinary requirements, the issue of the following order:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

This order was approved and has been promulgated. To meet the past situation the undersigned proposed that the Judge Advocate General's Office should classify sentences imposed, and proceed, under approved rules, to equalize punishment through recommendation to clemency, which was approved by the Secretary of War.

In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment but to adjust that punishment to present disciplinary requirements, a board, to consist of (1) Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department; (2) Col. John H. Wigmore, judge advocate; (3) Maj. Stevens Heckscher, judge advocate, is appointed to undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him. The board will meet at the earliest practicable date and submit for approval a plan of procedure looking to a speedy prosecution and completion of the duty imposed.

E. H. CROWDER,
Judge Advocate General.

PLAN FOR CARRYING OUT WORK BY CLEMENCY BOARD APPOINTED UNDER OFFICE ORDER OF JANUARY 28, 1919.

1. In all cases of general prisoners the records of general courts-martial for offenses committed since the beginning of the war, excepting the cases to be reported upon in accordance with this plan by the commandants of the Disciplinary Barracks and its branches, will be examined in the first instance by a force of clerks and examining officers in the office of the Judge Advocate General, and form hereto attached will be filled out in triplicate for each case by the clerk in charge, except items 27 and 41; item 27 will be filled in by the officer examining the record, and item 41 by the board.

2. The several commandants of the United States Disciplinary Barracks and its branches at Fort Leavenworth, Alcatraz, and Fort Jay, will make a report at the earliest practicable moment to the Judge Advocate General of the Army in the case of every prisoner confined under his charge for the conviction of an offense committed since the beginning of the war, which report will be upon said form hereto attached, which will be filled out, in triplicate, in each case except as to items 27 and 41; item 27 will be filled in by the examining officer in the office of the Judge Advocate General, and item 41 by the board.

3. When the form in any case shall have been completed in the office of the Judge Advocate General, except for item 41, it, in triplicate, together with the court-marial record in the case, will be immediately transmitted to the clerk assigned to service with the board and by him placed before the board. The clemency board will thereupon make its study of the case, enter its recommendation on the form under item 41, and place the form before the Judge Advocate General for signature or other action and for transmission to the Secretary of War. In case the board is not unanimous any disagreeing member may file a briefly expressed nonconcurring recommendation.

4. As soon as the clemency board has been provided with the necessary assistance it shall proceed to give consideration to the cases of the prisoners confined in the penitentiaries and also to the cases transmitted to the office by the commandants of the Disciplinary Barracks and its branches as nearly as possible in the order in which they are received. It is understood that said commandants will give precedence of consideration to cases as the cases may in their judgment merit it. It is believed, however, and so recommended, that said commandants should consider and transmit to this office cases in the following order of precedence: (*a*) Those in which, because of the present information of the commandant, he believes the prisoners should be immediately released; (*b*) cases of desertion in which the prisoners surrendered; (*c*) cases in which the offenses were committed within the first four months of the prisoners' first service in the Army of the United States.

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

6. The personnel to assist the clemency board in this work must consist at the outset of not less than 7 officers and 10 clerks. It is not at all certain that this number of officers and clerks will be found to be sufficient. The importance of this task is such, and so much depends upon its expeditious performance,

that an inadequate commissioned clerical personnel is bound to embarrass if not render abortive the entire undertaking.

S. T. ANSELL,
JOHN WIGMORE,
S. HECKSCHER,
Members of the Clemency Board
Appointed by the Judge Advocate General.

Approved.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 142.

WAR DEPARTMENT,
Washington, D. C., July 28, 1918.

From: Headquarters American Expeditionary Forces.
To: The Adjutant General, Washington.

Copies furnished as noted: Number 1521, July 27.
Paragraph 5. For the Chief of Staff.

* * * * * * *

Subparagraph B. It is highly desirable in the interests of justice and the speedy administration of the same that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend appropriate legislation to that end. (Pershing.)

* * * * * * *

PERSHING.

To the Judge Advocate General for recommendation.

EXHIBIT 143.

JUDGE ADVOCATE'S OFFICE,
France, 24 June, 1918.

DEAR GENERAL: I am going to write you a letter about several things, and utter a cry for help. Divisions, as you know, have been arriving in great numbers, and several corps are now being organized. I have asked that Hunt be assigned as judge advocate of the Second Corps, and have named Taylor for the Fourth. I expect soon to recommend Brown for the Third, and have in mind Gullion for the Fifth, if he is not taken for general staff or line work, which I very much fear. I expect to recommend Winship for judge advocate of the First Army. The policy appears to be to impose as little administrative work on corps headquarters as possible. Corps judge advocates will perform about the same kinds of duties as division judge advocates, except that I want the corps judge advocate to supervise the division judge advocates in his corps. He will be in close touch with their offices, and should be able to give them any assistance in the way of advice needed. To that end, I hope to utilize the regular judge advocates as corps judge advocates as far as possible.

I have visited many of the divisions, in order to find out as much as I can about the disciplinary conditions, and to get the division judge advocates to do everything in their power to promote speedy trial and to adopt such policies as experience shows to be best in the American Expeditionary Forces. We must do everything we can to try our cases immediately here. We are necessarily delayed at times by the difficulty of getting the witnesses from the front-line trenches, and there has been delay in some divisions due to the difficulty of obtaining officers to sit on courts-martial, though this will, I hope, be avoided in the course of time by the appointment as members of convalescents and others fit for light duty. One division turned in 91 general court-martial records within a few days after its arrival here. The cases were tried two or three months before in the United States, and there appears to have been delay even in the trial of many of the cases. I have not been able, as yet, to find out the reasons for this very tardy administration of justice. I send you a copy of General Order 56, of these headquarters, which I drew in consultation with Hull and Winship. It is resulting in a very material reduction in the number of general court-martial trials. All capital cases must, under the law, still be tried by general court-martial, though many of them may be punished adequately with six months'

hard labor or less. I may submit a recommendation before long that the special court be given jurisdiction in such cases, subject, of course, to its present limitations as to punishment.

I am endeavoring to have the policy adopted in each division of having the assistant division judge advocate prosecute practically all of the general court-martial cases. This is the only way we can have thorough trials and perfect records. We can not educate the line officers of this temporary force to observe all of the requirements of the law in the matter of trials, and I regard the presence of a skillful trial judge advocate, who shall be to the court what the law originally intended him to be, as necessary here. I think it will be practicable for the assistant division judge advocate to prosecute all, or nearly all, of the cases in his division.

There has been some difficulty in obtaining court reporters, especially in the Regular Army divisions, where stenographers are not so abundant as in the others. Of course, stenographers are in demand at the various regimental, brigade, and other headquarters, and objection is generally made by their commanders to their being taken for duty as a reporter. In a number of divisions, however, the cases are reported by one of the noncommissioned officers of the judge advocate's office, and this I hope to see done in all of the divisions before long. With both the trial judge advocate and the reporter in the division judge advocate's office, the whole matter is under one roof, and we should have few defects in our records. The three noncoms of a division office will be sufficient to dispose of the office work and report the general court trials.

The demands of the General Staff for every officer who has a knowledge of line or general-staff work are very insistent. As you know, I rescued McNeil, but have just lost Howze, and hardly hope to hold Gullion, and, of couurse, I may be compelled to give up a number of others.

Hull has an immense task as director of the renting, requisitions, and claims service, in addition to his duties as judge advocate of the S. O. S. I have done everything I could to supply him with the necessary personnel for the reason that the R. R. and C. Service is extremely important, must have the best of men, and must take charge of a vast amount of work at once.

Just at present my greatest need is for competent assistants in my own office. Due to the coming of so many troops, the work is piling up at a rapid rate, and I must have assistants who can relieve me from even seeing a great many of the papers that come into the office. At present, I have Boughton, McNeil, and Lieut. King, of the firm of King & King. King declines appointment in our corps for the reason that he is a machine-gun expert, is young and unmarried, and wants his chance, for a while at least, at the front. He must, therefore, be relieved before long, and I expect to send a cable requesting that you send me a good man from your Financial Division. McNeil is probably as capable an assistant as I can obtain from the regulars available here, though he has not had sufficient experience to relieve me of as much of the responsibility as I should like. I was away recently on a trip to London for more than a week, and shall probably have to go again early in July. More and more it becomes absolutely necessary to have a man to take charge of the office while I am gone, and to relieve me of a portion of the work when I am present. Numerous questions come in every day from the various sections of the General Staff, and other bureaus, and, of course, they must be disposed of here. We are too far from Washington to send questions up, especially in time of war when there must be prompt action. Mayes is the man, above all others, who would fit the requirements here, and I hope you may be able to send him very soon. The work in this office is of entirely different kind from that of the various tactical commands. It is more nearly like the work in your office, and it must be disposed of promptly. As the work grows, this office should be recruited from yours so far as the same may be done without serious detriment.

There have been a number of death sentences recently, requiring the confirmation of the President, but the cases were not of such a character as to justify, in Gen. Pershing's opinion and mine, the execution of the death sentence. In view of the time it would take to send the cases to Washington, we have sent the cases back to the courts for the imposition of a milder sentence. In one case, the court could not be reconvened, and, the evidence not being as conclusive as we thought it ought to be, the division commander, under our advice, disapproved the sentence. It would greatly facilitate the administration of justice, I think, if Gen. Pershing had the power to commute death sentences, not only in cases where he may confirm them, but in those cases requiring the President's confirmation. I have not suggested the matter to Gen. Pershing as

yet, but expect to do so soon, and, if he agrees, a cable requesting the necessary legislation will probably be sent. I am aware of the view that has prevailed, that, under the Constitution, the President only may commute a sentence, but I believe that, under the power to make rules for the government of our land forces, Congress may vest military commanders with the power to commute sentences imposed by military courts, and that an exercise of this power by Congress would, undoubtedly, be held to be constitutional. An Army commander in the field should also have power to commute sentences of dismissal of an officer. Gen. Pershing is withholding confirmation of dismissals now and then, where it would be well if he had the power to commute to a forfeiture.

Very sincerely,

BETHEL.

EXHIBIT 144.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, September 5, 1918.

Memorandum for The Adjutant General.

Subject: In cable No. 1521, paragraph 5, subparagraph "b," Gen. Pershing says:

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

1. The above dispatch is referred to this office for its recommendation. The proposition involves considerations deeper than those that may first appear. Commutation, unlike mitigation and remission—all of which are artful words—is a pardon granted on a condition subsequent that the offender undergo a punishment of a different nature. As such it involves the pardoning power of the President. It is established as a general proposition that the power of pardon belongs to the President alone, and that Congress is constitutionally incompetent to exercise it itself or to confer it upon another. Whether the power of pardon for military offenses, by reason of the expressed power of Congress to make rules and regulations for the government of the Army or any other power of Congress over the Army, is subject to a different rule and may be conferred by Congress upon subordinate military commanders, has never been before the courts or decided by any authority or, so far as I am aware, been the subject of serious discussion. I personally believe that Congress has such a power. But the theory of legislation and the practice of Government seems to be to the contrary. The question is, to say the least, full of doubt.

2. There is no evidence before this office, except that inferable from the request itself, that existing law imposes difficulty upon the maintenance of discipline. Under the Articles of War the commanding general of the American Expeditionary Forces, presumably as "commanding general of the Army in the field"—and in this respect he has the same powers as a territorial department or division commander—may confirm (*a*) death sentences in cases of murder, rape, mutiny, desertion, and spies, and (*b*) dismissal of officers below the grade of brigadier general. All other cases of death and dismissal must go to the President for confirmation. Such difficulty as the commanding general apprehends or may have encountered may be assumed to be this: He disagrees with the sentence of death or dismissal imposed by a court, which adheres, however, to its view and sentence in proceedings in revision or which can not be reconvened for reconsideration. In such cases, inasmuch as such sentences yield only to commutation and not to mitigation or remission, the alternative is to disapprove or to approve for the purpose of transmission to the President—as must be done in all cases expressly requiring the President's confirmation—in order that the President, if he is so disposed, may exercise the power of commutation. The elements involved in the assumed difficulty are (1) the time consumed in obtaining the action of the President, and (2) the inability of the commanding general to substitute his judgment for that of the President as to whether in such cases punishment other than death or dismissal should be imposed.

3. The time lost, in view of the gravity of the cases and their comparative infrequency, does not, to me at least, appear to be such as seriously to affect "the interests of justice and the speedy administration of the same," and besides, there is room for argument to the effect that a case which involves such serious considerations and in which the court, after considering the commanding general's views, firmly adheres to its sentence, might better, on considerations of high public policy, be sent to the Commander in Chief of the Army, the supreme source of power in such cases. It is beside the point to say that commutation in such cases will always operate to the benefit of the offender; the public, the Army, has an interest in the punishment once guilt is established, the protection of which is of no less importance than is the pardon for the accused.

4. The recommendation is, in its logical effect, a request for a very considerable enlargement of the power of confirmation in the commanding general. The power to commute is, rationally, a larger power than to confirm. It involves the power of confirmation of the sentence awarded and, in addition, the substitution therefor of a different punishment. Commutation necessarily involves confirmation though the converse is never true. The power of commutation has never been given to any military commander in any case, not even in those wherein he has full power to approve or disapprove, or to mitigate or remit the sentence awarded. Such a power affects and seriously modifies the judgment of the court as to the kind of punishment merited, on the one hand, and involves the constitutional powers of the Commander in Chief on the other. Whether such power has never been attempted to be taken out of the hands of the President and conferred upon another is due to congressional views of policy or of constitutional limitations, or both, is only a matter for speculation.

5. The power to commute is the power to say that the sentence awarded, when considered in the realm of pardon, ought not to be executed, but that another and different penalty should be. The power to decide that a sentence should not be executed necessarily involves the power to decide, in a proper case, that it should be executed. The authority to decide what should not be done may also decide what should be done. The same judgment and discretion are involved in both instances. Therefore, the power sought by the commanding general could not logically be limited simply to commutation or confirmation for the purpose of commutation. The judgment to determine that commutation should be had, should be equally competent to determine, when convinced of the justice and advisability of that course, that commutation should not be had and that the sentence awarded should be executed.

6. The existing statute, in this respect at least, deals with fundamental principles which do not undergo modification with every change of circumstance; it is old, has stood for a long time substantially unmodified, and in the absence of a considerable showing of its lack of wisdom or workability, is entitled to deference. It pretends to discriminate as to the power of confirmation of death and dismissal sentences, and in the absence of evidence must be assumed to do so intelligently. It should be changed, if in the respect sought it can be changed, only upon thorough consideration and in the light of conclusive experience.

7. I have difficulty to find logical limitations in this request. In the light of what I have said, if this particular commanding general should have the power to commute the sentences of death and dismissal which under existing law fall within the President's power of confirmation, for even stronger reasons, of course, should he have the same power of commutation in those cases of death and dismissal falling within his own power of confirmation; and if he should have the power of commutation in such serious cases as death and dismissal, it might be well said that he should have the same power in all cases falling within his power to confirm or to approve or disapprove. The request leads, logically at least, to the consideration whether any convening authority with the power to approve or disapprove a sentence, should not, when his sound judgment and discretion dictate such a course, have the power to resort to commutation. Of course, the particular sentences under discussion—that is, death and dismissal—may be thought to be distinguishable from other sentences, in that they can not be mitigated, except by way of commutation. But even here, the policy of the law has established a single penalty to be awarded, and it can be departed from only upon considerations equally high with those that justify departure in the less serious and ordinary cases. Then, again, I find difficulty in limiting the power to this particular commanding general. I see no circumstance surrounding him that would justify conferring upon him such a power, that would not be equally justified in reposing a like power in any convening

authority similarly situated with respect to the seat of government, as, for instance, the commanding general of the Siberian Expeditionary Forces, in which case much more time would be consumed in the transmission of such proceedings to the President.

8. The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army by existing law, if not, indeed, by the Constitution. It is a matter, therefore, of such importance as to require consideration by the highest authority, and I wish my views understood with deference to that fact. Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request.

9. This office is not called upon to draft the proposed legislation. If legislation should be drafted, I take the liberty to suggest the advisability of so drafting it as to confer this power upon such commanding generals in the field as the President may himself designate.

S. T. ANSELL,
Acting Judge Advocate General.

[First indorsement.]

THE ADJUTANT GENERAL'S OFFICE,
September 7, 1918.

To the Chief of Staff.

J. S. J.

EXHIBIT 145.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 19, 1918.

Memorandum for the Chief of Staff.

Subject: Amendment of the Articles of War with reference to power to commute sentences.

1. Herewith is an opinion of the Acting Judge Advocate General based upon Gen. Pershing's cable No. 1521, paragraph 5, subparagraph (*b*). The cable in question reads as follows:

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm, and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

The Judge Advocate General in his opinion argues to the following conclusion:

"The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army by existing law, if not, indeed, by the Constitution. It is a matter, therefore, of such importance as to require consideration by the highest authority, and I wish my views understood with deference to that fact. Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request."

2. In order to understand clearly the situation here presented it is necessary to set out and have before us the provisions of existing law with reference to this matter.

The forty-sixth article of war provides:

"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."

The power to approve the sentence of a court-martial, as required by the forty-sixth article of war, is by the forty-seventh article made to include:

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

The forty-eighth article of war deals with the confirmation of sentences of general courts-martial. Its effect, in part, is to confer on the commanding general of an army in the field and the commanding general of any territorial department or division the power to confirm sentences of death awarded in

the "cases of persons convicted in time of war, of murder, rape, mutiny, desertion, or as spies." It also empowers the same officers in time of war to confirm a sentence of dismissal of any officer below the grade of brigadier general.

Under the forty-ninth article of war the power of confirmation conferred by the forty-eighth article of war is made to include:

"(*a*) * * * * * * * *

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

The fiftieth article of war deals with the mitigation or remission of sentences. That article reads as follows:

"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 military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, 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 military 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."

The fifty-first article of war deals with the suspension of sentence of dismissal or death. It provides that:

"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."

The fifty-second article of war as amended by the act of July 9, 1918 (Public 193, 65th Congress), is as follows:

"ART. 52. *Suspension of sentences.*—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted. The death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

3. It will be observed that the word "commute" or the word "commutation" is not used in this or any other article of war. It will be observed, moreover, that the fiftieth article of war speaks of the "mitigation" or "remission" of sentences of death or of dismissal of officers. Inasmuch, however, as the mitigation of either of these sentences requires a substitution of some other and distinct form of punishment, "mitigation" in such a case becomes in fact the "commutation" discussed in the opinion of the Acting Judge Advocate General.

Considering the articles of war as they now stand, the following limitations and inconsistencies may be pointed out:

Under the forty-eighth article of war the commanding general of an army in the field or the commanding general of a territorial department or territorial division may, in time of war, execute a sentence of dismissal of an officer below the grade of brigadier general, or a sentence of death in cases of persons convicted in time of war, of murder, rape, mutiny, desertion, or as spies, but he can not remit or mitigate these sentences. In other words, he may exercise the greater power but is denied the lesser.

No sound reason can be advanced why an officer who is given power to approve and carry into effect a sentence of death or of dismissal of an officer, without reference to higher authority, should not be given the lesser power of commuting such a sentence to one of lower degree.

Again, as the articles now stand, the commanding general of an army in the field or of a territorial department or division may, in a particular case, believe that a sentence of death or of dismissal of an officer is clearly excessive, but may believe that the accused has been legally convicted and that he deserves some lesser punishment. Ordinarily, he may refer the case back to the court-martial for a reconsideration of its sentence and may thus succeed in obtaining a sentence which he can, in good conscience, approve and execute, or mitigate or remit. In cases, however, where the court adheres to its original sentence, as well as in those where, owing to the exigencies of the service, it can not be reconvened, the commanding general is placed in the position of being forced to disapprove the sentence of the court where he believes a complete disapproval is not warranted, or to approve the sentence as pronounced by the court, even though he may be very much opposed to it in fact, and incur the risk that the President will not concur in his recommendation for mitigation. Should the President, notwithstanding the recommendation for mitigation, carry into execution the original sentence imposed by the court-martial, the commanding general is placed in the situation of having made it possible, by his formal approval (required by the forty-sixth article of war) of a sentence which he does not approve in fact, for the President to direct that the same be carried into execution.

It does not meet this situation to suggest that the President almost invariably follows the recommendation of the commanding general who makes it. If he does, much unnecessary paper work and administrative action are imposed on the department; and the commanding general, in so far as such cases are concerned, is reduced to a mere automaton. What good reason can be assigned why he should not directly exercise the power of mitigation without reference to the President?

Again, under the fiftieth article of war, as it now stands, no sentence of dismissal of an officer may be remitted or mitigated by any authority inferior to the President. Under the fifty-second article of war, however, as recently amended, the authority competent to order the execution of such a sentence may at the time of approval suspend the execution thereof, and having suspended it he may later remit it. He may thus do indirectly under the fifty-second article of war what he can not do directly under the fiftieth. These articles are inconsistent, and should be reconciled. The present fifty-second article of war, being the later expression of Congress on the subject, may be taken to represent the present policy of the law, and the fiftieth article should be amended to correspond therewith.

A strong argument in favor of making the suggested amendment, not considered by the Acting Judge Advocate General, is the great saving of valuable time and effort which would result. Under the law as it now stands the commanding general who must act on a sentence of death, which he does not desire to disapprove but which he can not mitigate, will probably begin by an effort to obtain a modified sentence from the court. To the time given the reconsideration of the sentence by members of the court must be added, in the event of its adherence to the original sentence, the time given the case by the Judge Advocate General and the officers of his department, by the Chief of Staff, by the Secretary of War, and, finally, by the President himself. Since all this will result ninety-nine times out of a hundred merely in confirming the recommendation made by the commanding general who submits the case, it is clear that it represents time lost in adherence to a formalism which no longer has any meaning or significance. Many cases of this character are known to have occurred during the present war and many more will doubtless arise.

4. From these considerations the War Plans Division is of the opinion that notwithstanding the fact that the law has long existed in the form in which it now stands, no sound reason has been advanced why it should not be changed in the manner suggested by Gen. Pershing. It goes without saying that any change adopted should be general in its character and not be made to apply to any particular commanding general, notwithstanding the nature and extent of his command, but should apply to all commanding generals similarly circumstanced. In the opinion of the War Plans Division the power of mitigation may safely be conferred upon commanding generals of armies in the field or of territorial departments or divisions. In cases which require the approval

of the President before sentences may be carried into execution, it will be well to provide that these officers shall exercise this enlarged power of mitigation, amounting as it does to the commutation discussed by the Acting Judge Advocate General, only when specially empowered so to do by the President. This will be a recognition of the pardoning power conferred upon the President by the Constitution, and will remove in large part any legal basis that may exist for an argument that the amendment of the article herein suggested may be in derogation of the constitutional powers of the President.

5. The War Plans Division is of the opinion that the recommendation made by Gen. Pershing can be complied with and that the inconsistencies in the present Articles of War, above pointed out, can all be remedied by amending the fiftieth article of war. As that article now stands it consists of three paragraphs. The first paragraph should be amended to read as follows:

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.

It will be noted that this proposed amendment omits the following words: "But no sentence or dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President."

The effect of this change will be to place it in the power of any convening authority to mitigate or remit a sentence which he may order executed. In practical effect it will operate only to confer upon a commanding general who may now order the execution of a sentence of death or of the dismissal of an officer the power to mitigate or remit such sentence.

The second paragraph of the fiftieth article of war should be amended by making that part of it following the semicolon read as follows:

But no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

The practical effect of this change will be to make the paragraph conform with the first paragraph, as herein proposed to be amended, and with the fifty-second article of war as it now stands. It seems obvious that no sentence which has been approved or confirmed by the President should thereafter be mitigated or remitted by any inferior authority. So, also, where the sentence involves a loss of files and has not been suspended under the authority of the fifty-second article of war, it is clear that no authority inferior to the President should be authorized to thereafter mitigate or remit the sentence. Following the second paragraph of the fiftieth article of war a new paragraph should be inserted which should read as follows:

When empowered by the President so to do the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President before the same may be executed.

The effect of this insertion will place it within the power of the President to authorize General Pershing, or any other commanding general similarly situated, and the commanding general of any territorial department or division to commute a sentence of death or of the dismissal of an officer which now requires the confirmation of the President before the same may be carried into execution. In other words, it provides the legal authority under which the President may make it unnecessary for such commanding generals to send to him for his action cases in which such sentences are involved and in which they do not believe that the sentences should be executed, but do believe that they should be mitigated, or, more technically speaking, commuted.

If the fiftieth article of war should be amended, as herein suggested, it would read as follows:

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.

An unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, 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 military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss

of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do the commanding general of the Army in the field or the commanding general of the Territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which under these articles requires the confirmation of the President before the same may be executed.

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

It should be noticed that under the fiftieth article of war any sentence fixed by a commanding general under the enlarged power herein proposed is always subject to correction by superior authority by further mitigation or remission. It is difficult to see wherein this power would or could be abused or wherein it would or could lead to results which are inconsistent with results obtained under the present system. That the administration of justice would be expedited in certain cases and that the general burden of administrative work would be lessened has been shown above.

6. The War Plans Division therefore recommends that these papers be filed in the office of The Adjutant General and that favorable action be taken looking to the amendment of the fiftieth article of war. It submits herewith appropriate letters, containing draft of a bill designed to carry this recommendation into effect, addressed to the chairman of the Committee on Military Affairs, United States Senate, and the Speaker of the House of Representatives.

LYTLE BROWN,
Brigadier General, United States Army,
Director, W. P. D., A. C. of S.

EXHIBIT 146.

WAR DEPARTMENT,
Washington, September 19, 1918.

The CHAIRMAN COMMITTEE ON MILITARY AFFAIRS,
United States Senate.

SIR: The following is a draft of a bill amending the fiftieth article of war:

[E]ted by the Senate and House of Representatives of the United States of America in Congress assembled, That article 50 of section 1342 of the Revised Statutes of the United States, as amended by the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,' approved August 29, 1916, be, and the same is hereby, amended to read as follows:

"'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.

"'Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, 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 military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President except as provided in the fifty-second article.

"'When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President before the same may be executed.

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

This amendment is designed to confer upon the commanding general of an army in the field or of a territorial department or division the power to mitigate or remit any sentence of death or of dismissal of an officer, which he now has the authority to approve and execute, without referring the same to the President for his action; and also to confer upon the President the authority

to empower such commanding general to mitigate or remit sentences of death or of the dismissal of an officer in those cases where the sentence can, under the forty-eighth article of war, be carried into effect only upon the approval of the President. It is found in actual practice that whenever a commanding general does not approve a sentence of death or of the dismissal of an officer, and recommends mitigation thereof, the action of the President is generally in accordance with such recommendation. Moreover, it appears unsound to deny a commanding general the power to mitigate a sentence which he has the authority to approve and execute.

Gen. Pershing has recommended the changes herein proposed. They have been found necessary, also, in so far as a sentence of dismissal of an officer is concerned, for the purpose of reconciling the fiftieth article of war with the fifty-second article, as amended by the act of Congress approved July 9, 1918 (Public, 193, 65th Cong.) Under the fiftieth article of war, as it now stands, no reviewing authority inferior to the President can mitigate or remit a sentence of dismissal of an officer. Under the fifty-second article, as recently amended, any such convening authority can suspend any sentence of dismissal of an officer. Under the fifty-second article, as recently amended, any such convening authority can suspend any sentence of dismissal of an officer, and having suspended it may later mitigate or remit it. These two articles are inconsistent as they now stand, and it is hoped to reconcile them by the proposed amendment of the fiftieth article of war submitted herein.

It is hoped that this matter may receive the early and favorable consideration of your committee.

Respectfully,

BENEDICT CROWELL,
Acting Secretary of War.

EXHIBIT 147.

(PUBLIC—No. 311—65TH COHGRESS.)

[H. R. 13037.]

[AN ACT TO amend the fiftieth article of war.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That article 50 of section 1342 of the Revised Statutes of the United States, as amended by the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, be, and the same is hereby, amended to read as follows:

"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.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, 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 military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which under these articles requires the confirmation of the President before the same may be executed.

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

Approved, February 28, 1919.

EXHIBIT 148.

ATLANTIC BRANCH UNITED STATES DISCIPLINARY BARRACKS,
Governors Island, N. Y., April 15, 1919.

From: The commandant.
To: Memorandum for the Inspector General, attention Col. Charles H. Patterson.
Subject: Disciplinary barracks, Governors Island, N. Y.

The military offender.—Upon the admission of a convicted offender to the disciplinary barracks two courses of action toward him are possible—one punitive, the other reconstructive.

The first means the applying of the strictest discipline and the placing of the offender at tasks which will cause him, if possible, to regret most thoroughly his ever having become involved in trouble. The other involves the relaxation of military discipline to some degree and the education of the offender by suitable methods so as to equip him the better to avoid offending in the future.

The treatment of the military offender at these barracks has been along reconstructive lines, and this course has been followed for several reasons. First, offenders are in a great majority of cases not sent to the disciplinary barracks for their first offenses. Their records usually show several previous offenses due to maladjustment to military discipline. The imposition of a stricter and harsher discipline, while it would control the offender for the time being, at the same time would not hold out assurances that the relaxation of it after release would have accomplished the desired result, namely, normal adjustment to the demands of civil or military life. This is more clearly demonstrated by our second consideration, the study of the man behind the offense.

Every military prisoner upon admission is given a thorough mental and physical examination. In addition, a correspondence field study is employed. Every possible source of information is made use of to obtain a complete history of the offender, so that at the end of a month or six weeks we are in a position to make a reasonably accurate estimate of the kind of man we are dealing with, what his requirements are, what his abilities, and are in a position to make at least a tentative prediction as to his future possibilities.

Resulting from these studies we find that some offenders are medically sick men, such as the insane, the epileptic, the feeble-minded, the drug addict, and in some cases the alcoholic. Others show character defects which have resulted in an antisocial attitude—the criminals—or an inability to adjust themselves to any environment, as shown by truancy in school life and lack of persistence in employment, nomadism, etc.

A relatively small number can be said to be normal or accidental offenders, whose delinquencies are chargeable to social or economic conditions.

Third, to treat military offenders in accordance with up-to-date recognized methods.

The first or punitive method of treatment should be the method prevailing in a regular organization and carried out by that organization, resulting in short, disagreeable sentences in the post guardhouse. It is not possible nor desirable to employ the reconstructive method of treatment in a regular military organization. However, if the repeated infliction of short punishments for offenses does not result in the permanent correction of an offender he then become a candidate for the reconstructive method of treatment as practiced in the disciplinary barracks.

The treatment of the military offender in the disciplinary barracks has a twofold object—first, to return him to the colors a better soldier, or, secondly, if unfitted for military service, to return him to civil life, if possible, a better citizen.

The disciplinary battalion.—Any prisoner, regardless of his offense or the length of his sentence, is eligible to this battalion who, after a thorough study of him as outlined above, appears capable of resuming his place in the military service. The battalion is removed from the general barracks population and is quartered in a cantonment building such as have been used during the war at the various camps. While the discipline in the battalion is very strict—in fact, much more so than in the average organization—still the members of the battalion are given considerable liberty on the theory that it is wiser to detect those who are lacking in self-control before rather than after restoration. The battalion barracks has neither bolts nor bars; the battalion cooks and serves its own rations and does its own guard duty. It is under the supervision of one commissioned and several noncommissioned officers.

If after three months of intensive military training a member of the battalion is certified as capable of taking his place in a regular military organization, he is recommended for restoration to the service.

Numbered men.—The numbered men consist of those whose examinations show that they are not desirable for the disciplinary battalion, although some after further observation may prove to be so. The treatment of these men is along educational and vocational lines. Fully 40 per cent of them show the need of education. Classes in primary subjects are conducted during the morning hours by experienced Y. M. C. A. teachers for this class. In the afternoon the same organization conducts classes for more advanced work. In the evening classes of a vocational and educational nature, such as electrical installation, vocal and instrumental music, etc., are in session.

In the vocational work advantage is taken of the existing shops. Others will be added, in which to place prisoners after examination, where some useful trade may be acquired.

The honor association.—Included in our educational system we have instituted an honor system among the prisoners. In the study of our offenders it was found that such a large percentage had shown themselves incapable of continuously adjusting themselves in a normal manner to the demands of civil as well as military, life that it was deemed wise to create among them a tangible social organization. It was recognized that wherever a body of men are in close contact for any length of time the prevailing feeling or tone of that body will be determined by the more assertive members. In prisons and other penal institutions where there is no authorized and recognized organization the antagonistic, antisocial and habitual criminal element is more in evidence. Accidental offenders and those who strive to avoid further trouble are inclined to keep by themselves and to serve out their sentences without associating much with others, even with those of their own kind. The lawless element are naturally attracted to each other and, in reality, possess the nucleus of an organization, which quickly crystallizes when any advantage can be gained. When thus crystallized the weaker characters are easily prevailed upon to follow and others are forced to join them by means of threats and other methods of intimidation. A disciplinary barracks is never free from this danger. Consequently, if a recognized organization with the better element in control of it, and subject to the supervision of the officers, can be formed the lawless and antagonistic element is placed at a disadvantage and the possibility of their quickly organizing and attracting others is reduced to a minimum. The educational value of such an organization is based on the theory that members will realize that individual misbehavior reacts unfavorably on the whole body. The association has its rules and regulations and its tribunals for the trial and punishment of its own offenders. In this way members of the honor association are taught while in the barracks a respect for constituted law and order. Certain privileges are given for good conduct and certain punishments are prescribed for misbehavior, so that it is to the advantage of the organization to keep "barracks offences" down to a minimum. It is hoped that the lessons learned in their own organization will be applied to the larger social order upon their release.

The honor association includes all but 30 prisoners. Every new arrival is met by a member of the association and is made acquainted with the benefits of its membership. In this way new arrivals are immediately brought in contact with the better element, whereas in the past it was the disgruntled and antagonistic element which first approached the new comer.

The association has regular weekly meetings. It has its own constitution, by-laws, rules and regulations and standing committees. It pledges itself through appointed sergeants at arms to maintain good order in and about the barracks and to be careful of all sanitary and other regulations. If any member of the association detects another breaking any rule of the barracks he is in honor bound to report the offense to the organization. The offending member is then brought before the association's tribunal and if found guilty is asked to sign a statement requesting that he undergo the punishment prescribed by the court.

The association has a grievance committee which meets the commandant weekly to present to him matters of interest in the association and possible grievances. As a result, no matter of dissatisfaction is harbored amongst the prisoners without the commandant's knowledge. Recently, this committee notified the commandant that the organization was having some difficulty with its offending members. These members preferred trial by the prison

court instead of trial by the honor court for the reason that the punishments by the former were less severe than by the latter. It was requested that the punishments prescribed by the prison court be made equal in severity to those of the association's court.

The benefits of this association both to the prisoners and to the barracks are many. Gambling has been eliminated from the institution, the number of trials by prison court has decreased fully 75 per cent. Better order prevails in the mess hall, the yard, in fact, the whole tone of the barracks is improved. Prisoners are more contented and misbehavior is reduced to a minimum.

Recreation.—Appropriate recreation is enjoyed by prisoners, consisting of moving pictures and other shows at regular intervals, and athletic games out of doors.

Sentences.—Much has been said in newspaper articles recently about the length and severity of courts-martial sentences and, unfortunately, nothing has been said about the practical working out of these sentences in the disciplinary barracks. The man behind the sentence is considered here more than the sentence itself. In fact, every sentence is indeterminate and indefinite. It is possible, and has happened, that prisoners sentenced to serve upward of 20 years have been restored to the colors in fewer months. In fact, it is possible for a prisoner with a life sentence to be restored to a regular organization in five months. In the case of numbered men, recommendations for their release have been made for various reasons—on account of youth, mental inferiority, inadequate personality, nervous instability, and the financial condition of their dependents—so that in the case of these prisoners, as well as the battalion men, the sentence really cuts but little figure. This practice of recommending prisoners for release, as outlined above, was the general policy of this institution months before the present clemency board was appointed.

As a matter of fact we are confronted by a much greater administrative problem by the short sentences now imposed than by the longer ones. Men with short sentences are generally apathetic as to restoration. Six months sentence, with good-conduct time deducted, releases a man by expiration of his sentence in five months, too short a time for the corrective and disciplinary measures applied to him to become sufficiently effective to warrant restoration. A shorter sentence than six months, and some are shorter, practically precludes the possibility of extending restoration. There are two or three cases that have recently come to my attention of positive victims of short sentences. One man has been continuously in the hospital with ear trouble, and no corrective or disciplinary measures could be applied before the expiration of his sentence. This is especially so on the entrance to the institution of a short-term man. He may, at first, not desire to work for restoration, but later on he may change his mind, but when this decision is made it frequently happens that there is such a short period left as to render impossible the restoring of a prisoner in the usual way.

No man should be sent to the disciplinary barracks for a shorter period than one year. Men with longer sentences have something definite to work for, which is not the case with shorter-term men. The longer sentence awakens the prisoner to a healthy, laudable endeavor, while the shorter sentence stifles ambition. The short-term prisoner sits back and waits for the end of his term; appeals to work for restoration fall on deaf ears, and the morale of the institution is in consequence lowered.

Criminals.—One of the vexatious problems with which we have to contend is presented by the ex-convicts, some of whom were released from prison to enter the Army. Such men are considered bad risks for restoration. Usually, no good grounds exist on which recommendation for clemency in their cases can be based. In consequence of their realizing that they can not be restored or pardoned they become disgruntled and are a very disturbing element. Furthermore, it is not at all desirable to have the ordinary military offender, often young and impressionable, come in contact with this class of men. They are not proper subjects for the disciplinary barracks and should have been sent originally, if possible, to a Federal penitentiary. At least some provision should be made, if they are to be held in custody, for their proper segregation.

JOHN E. HUNT,
Colonel of Infantry.

AMOS T. BAKER,
Captain, Medical Corps, Psychiatrist.

ATLANTIC BRANCH, UNITED STATES DISCIPLINARY BARRACKS,
April 15, 1919.

The foregoing article has been prepared and written by the following members of the executive committee: Edward M. Hancock (5379), George S. Schuyler (5820), Abraham Henschel (5617), Edward Schwartz (6122), Harry Lee (6033), Hyman Zimmerman (4868), Louis G. Lemley (5706). With feeling of the deepest gratitude do we hereby submit this article to the commandant, Col. John E. Hunt, United States Army.

OUR HONOR ASSOCIATION.

As men have always risen to the highest pinnacles amongst oppressing circumstances, so have we, the inmates of Castle William, in our darkest hours of life, conceived and promulgated the ideals set forth in this preamble to our constitution.

In obedience to the voice of nature, which inspires men to perfection, in compliance with the dictates of the human mind, which prompt men to activity, the honor association was organized January 26, 1919, to avoid the evils of disorganization toward what is just and right.

The objects of this organization are to create a local sentiment which will condemn local wrongdoing, to teach the men to be intolerant of evil, to obey the rules and regulations prescribed for our general conduct and discipline, to respect the authorities and to heartily aid them by a most earnest cooperation, and to be honor bound individually in the accomplishment of these aims; finally, to upbuild and uplift the character of the men, so that they be better fitted to occupy their positions as free moral agents in society.

Previous to the organization of this association, discipline was maintained and enforced by the strictest measures. This form of discipline had been known as the iron rule. Under this régime men were at all times compelled to work under duress. Minor infractions of prison regulations were drastically dealt with. The men refrained from doing wrong because of the fear of punishment, not because they had any desire to do right. This system of force only tends to make criminals out of petty offenders, instead of better citizens, because there was no appeal to the men's sense of honor.

One day toward the close of 1918, a group of inmates gathered in an assembly and discussed how they could help themselves best, the result of which formed the nucleus of the present organization. From time to time as the development of this nucleus became visible there appeared, though gradually, the opportunity for selfish advantage by some of the organization's officials, rather than for the betterment of its members as a whole. It was revealed that the men intrusted with the leadership of this organization were trying to prostitute its principles, in order to further their own personal ends. The inevitable result was that each one of these selfish leaders tried to outdo the other one in gaining every possible advantage through his position of trust. This culminated in the leaders bringing their personal affairs and grievances before the legislative assembly and attempting to sway the members by dilatory practices. The legislative body reacted in a manner hardly anticipated by these selfish leaders; the members, however, realized that in order to maintain the principles upon which the organization was created they would have to remove this dangerous element, and reconstruct the organization on a firmer basis to eliminate the possibility for individuals to use the association for furthering their personal interests.

Through the unceasing efforts and splendid example set by the members of the executive committee, there was instilled into the minds of the members the realization that discipline could be gained through the sincere cooperation of all with the officials of the institution. Ultimately the ideals embodied in the preamble became manifested materially in the deeds of the men. Gradually there evolved a spirit drawn about by the zealous efforts of the three branches of the association, namely, legislative, judicial, and executive. The resultant mental development caused members to more fully understand their duties and obligations, and more to perform these same duties and meet their obligations and responsibilities at all times under all conditions. The legislative assembly elects 10 men to sit in executive council for the purpose of representing the inmates before the officials of the institution and to convey to them their needs. The association has a judicial branch in which is embodied the honor court and the judiciary committee, the former to try all violators of the institution's rules and regulations properly brought before them, and the

latter to form and from time to time revise the court-martial manual of the honor association. This honor court is one of the greatest helps to the prisoners and the authorities. It is a help to the inmates in that they do not lose good time when tried by it, nor do they get a black mark against their record. If an offense is committed and the offender discovered by one of the members of the association, the man is brought up for trial and sentenced with his consent. The main office is absolutely ignorant of the fact that an offense has been committed or that a sentence has been meted out. It is a great help to the authorities in that it lessens by 75 per cent the number of courts-martial by their court, thus making it possible for them to conscientiously recommend more men for clemency and restoration. It protects the inmates in that they commit less offenses and take pride in the knowledge that they are law-abiding; it protects them from the brutality of medieval disciplinary methods. Since the establishment of the honor association approximately 5 per cent of the total population of this institution have been tried by the honor court for minor infractions of rules and regulations. Of these brought to trial, 60 per cent have been found guilty and sentenced to various punishments, such as sleeping three nights in solitary, a loss of privileges gained by the honor association for a prescribed period of time. It is the duty of every member to report even the smallest violation of regulations to the sergeants at arms, who prefer charges against the offenders. The same are then tried by the honor court, which is so conducted that the interests of the accused and the honor association are equally safeguarded in every possible manner. The small violations being thus promptly attended to, the more serious ones become a rare occurrence or disappear entirely. Thus the strictest discipline is maintained, based upon honor and intelligence and not on fear. The gaining of discipline without the officials of the instituton being troubled with it causes them to be more kindly disposed toward the inmates.

Through the rapid growth of the association and expansion of its activities in several fields, particularly educational and recreational, there was arranged a more elaborate program than anything heretofore attempted in the annals of an institution of this kind. Through the efforts of the executive committee all men are enabled to avail themselves of the opportunity to pursue any course of study of their election. Men are given relaxation from the day's work by being provided with wholesome entertainment.

We owe a debt of gratitude to the officials of this institution for the assistance they have rendered us in accomplishing our ideals, and we sincerely hope that the facts and conditions as described in this article will serve as an inspiration and incentive to the inmates and officials of institutions of similar character throughout our beloved United States.

THE HONOR ASSOCIATION,
Per EXECUTIVE COMMITTEE.

Therefore, in the early part of January, 1919, a new executive committee was elected, consisting of men possessing qualities which rendered them more fitted to the positions of trust to which they were elected. This committee was delegated to draft a new constitution for the organization, henceforth to be known as the honor association. This constitution was completed on January 26, 1919, submitted to and adopted by the legislative body on same date. The following is a true copy of the constitution and its amendments to date:

CONSTITUTION OF THE HONOR ASSOCIATION.

ARTICLE 1. This organization shall be known as the honor association, headed by a president elected by the executive board. The executive board shall also elect a vice president to discharge the duties of president in case of his absence, inability, or recall.

ART. 2. The organization shall be divided into three branches: (*a*) Legislative, (*b*) executive, (*c*) judicial.

The legislative branch shall be composed of the governing body, comprising all the members of the organization.

The legislative branch shall meet every Sunday evening.

The legislative branch shall enact all the laws of the organization by a majority of votes.

Any member of the association may submit to the legislative assembly, through the judiciary committee, bills necessary for the welfare of the organization.

The judiciary committee will pass on their constitutionality and report its findings.

A quorum of the legislative branch shall consist of a majority of the members.

The executive branch shall be incorporated in a board elected by the legislative body.

The executive branch shall execute all measures acted upon by the governing body and shall appoint such officers, committees, and personnel as may become necessary.

The executive branch shall function through the following committees: (*a*) Entertainment committee, (*b*) initiation and classification committee, (*c*) committee on law and order, (*d*) complain committee, (*e*) educational committee, (*f*) judiciary committee.

Members of the executive committee shall individually be appointed as heads of the respective committees.

The judicial branch shall be embodied in a committee appointed by the executive committee.

The judicial branch shall have charge, through its subdivisions, of the maintenance of law and order and the punishment of infractions thereof.

ART. 3. The executive committee shall be composed of 10 members (5 company men and 5 numbered men), who shall be elected by secret ballot by the members of the legislative body from 20 proposed candidates, i. e., 10 from the company and 10 from the numbers, 1 of each 5 being a colored man, to represent his race.

Each voter will be provided with a ballot with the two lists of 10 men, 1 from the company and the other from the numbers. Each man will designate 5 men from each list of 10 by making a cross opposite the names of 10 candidates he wants to elect, sign his name and number, and hand the ballot in to the collector.

All vacancies that may occur on the executive committee shall remain unfilled until the legislative body's earliest convention, with the exception of numbered men going into the company or company men going into the numbers, in which case they will hold their office until the expiration of their terms, when new members will be elected as aforesaid.

The term of office for a member elected to the executive committee shall not be less than four months, beginning from date of election.

Members of the executive committee shall be eligible for reelection.

In the event of an executive committee member being transferred from the numbers to the company, or vice versa, such member shall continue to represent that division from which he was elected.

Any member of the executive committee who is convicted of any violation of the Constitution or is proved to be incapable for the continuance of said office shall be subject to recall.

The executive committee shall meet the Thursday before the convention of the legislative body and the Monday following.

The executive committee shall review all matters pertaining to the welfare of the organization and present same to the president of the legislative body for presentation to the said body and to the commandant.

A quorum of the executive committee shall consist of a majority of the members.

ART. 4. An honor court shall be appointed by the executive committee, composed of five members of the legislative body.

A president of the honor court shall be appointed by the executive committee.

There shall be three supernumeraries appointed to fill respective vacancies that may occur on the honor court.

When the president of the honor court is absent the members of said court shall be empowered to elect a president pro tem.

There shall be a judge advocate, who shall have an assistant; both shall be appointed by the executive board.

There shall be a recorder appointed by the executive committe to assist th judge advocate.

ART. 5. The entertainment committee shall classify all theatrical and athletic talent of honor association, for the purpose of private entertainment and amusement.

The initiation and classification committee shall interview all newcomers and acquaint them with the honor association in all its details, and shall classify the men desiring membership.

The committee of law and order shall enforce all laws and acts as passed by the legislative body.

The chairman of the committee of law and order shall be known as the sergeant at arms.

The complaint committee shall hear all complaints pertaining to discipline, preservation of order and efficiency of any department or member thereof.

The educational committee shall: (*a*) Classify talent; (*b*) provide lecturers; (*c*) assist in general enlightenment; (*d*) encourage and conduct educational classes.

The judiciary committee shall be empowered to form and revise the Court-Martial Manual and set maximum and minimum sentences to be submitted to the executive committee for them to tender to the legislative body for their approval.

The personnel of the various committees shall be subject to the approval of the executive committee before appointment.

No man shall serve at the head of two committees except executive committee members.

The heads of the respective committees shall render a full report once a month to the executive committee.

ART. 6. The president shall call the meetings of the governing body.

The president shall not remove the chair automatically.

The president shall have charge of the correspondence of the association.

The president shall report to the legislative body once a week the doings of the executive committee.

The executive committee shall be represented at all interviews with the commandant by the president and two other members, excepting such times when the commandant should request the presence of the entire committee, or any specified member thereof.

The judiciary committee shall pass on the constitutionality of all measures before they are presented to the legislative body for enactment.

ART. 7. The members of the honor association shall consist of all those whose names appear on the roster of the initiation and classification committee.

There shall be roll call at every meeting of the legislative body; all members who absent themselves from three consecutive meetings shall forfeit their membership for a period of one month, unless such absence shall be shown to have been unavoidable.

ART. 8. Amendments to the constitution shall be passed by a two-thirds vote of the legislative body.

AMENDMENTS TO THE CONSTITUTION OF THE HONOR ASSOCIATION.

ART. 3. The executive committee shall consist of 10 members elected by the legislative body by secret ballot. There shall be one member from each disciplinary company and eight members from the numbers, one of whom shall be a colored man.

All vacancies that may occur on the executive committee shall remain unfilled until the legislative body's earliest convention.

The term of office for a member elected to the executive committee shall be four months, beginning from date of election, with the exception of numbered men being transferred into the disciplinary battalion and men of the disciplinary battalion being transferred back into the numbers, in which event their terms shall automatically expire on date of transfer.

Any member of the executive committee who violates any article of the constitution or any of the rules and regulations of the association or who is found incapable of continuance as an executive committee member, shall be subject to recall by a majority vote of the legislative body.

Recalls must be founded on some grounds and tangible facts. After a recall is moved and seconded by 20 members, a special board of 10 members not holding office in the association will be formed by the legislative body's election. This board will investigate the charges against the accused executive committee member, examine and cross-examine all the witnesses, and report its findings, with its recommendations, to the succeeding legislative body convention. This convention will act according to the light thrown upon the question by the labors of the special board.

The recall of the president of the association from that office shall be by secret ballot of the executive committee with majority of opinion concurring. Should it become incident upon the recall of the president from that office, a question as to his retention on the executive committee, action will be taken as specified above.

ART. 6, PAR. 6. The president shall at all times be guided by the opinions of the other members of the executive committee. He shall veto no measures without the approval of the executive committee, nor shall he sign any measures that the committee has disapproved of.

Should the president for any reason fail to sign a measure within 10 days after it has been passed by the legislative body, it shall automatically become a law.

ART. 8. Executive committee and members of the committee on law and order shall wear a distinctive badge of office. This shall be subject to the approval of the prison authorities.

All nominations for executive committee members must be seconded by a minimum of 20 members of the legislative body.

EXHIBIT 149.

UNITED STATES DISCIPLINARY BARRACKS,
Governors Island, N. Y., April 19, 1919.

From: The commandant.
To: Inspector General of the Army. (Attention Col. Charles H. Patterson.)
Subject: Memorandum of restored men.

1. Memorandum for the Inspector General of the Army of men restored to duty from this institution from April 18, 1918, to April 17, 1919, with length of sentence and average time actually served.

	Length of sentence, years.	Average time actually served to restoration, months.		Length of sentence, years.	Average time actually served to restoration, months.
Number of men restored:			Number of men restored—Con.		
48	1–2	7	70	10–20	6
51	2–3	8	6	(1) 30	5
43	3–4	8	1		
8	4–5	8			

[1] Or over.

JOHN E. HUNT, *Colonel Infantry.*

UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans., April 26, 1919.

From: The commandant.
To: The Inspector General of the Army.
Subject: Memorandum of restored men.

Memorandum for the Inspector General of men restored to duty from this institution from April 18, 1918, to April 17, 1919, with length of sentences and average time actually served.

	Length of sentence, years.	Average time actually served up to restoration.			Length of sentence, years.	Average time actually served up to restoration.	
		Months.	Days.			Months.	Days.
Number of men restored:				Number of men restored—Con.			
190	1–2	6	5	111	5–10	8	17
93	2–3	6	27	51	10–20	8	4
10	3–4	9	.....	32	(1)	8	4
163	4–5	7	27				

[1] Over 20.

R. C. WILLIAMS,
Colonel, Infantry, Acting Commandant.

[Night Letter.]

APRIL 22, 1919.

COMMANDANT PACIFIC BRANCH,
UNITED STATES DISCIPLINARY BARRACKS,
Alcatraz, Calif.

Wire immediately direct Inspector General, 510 Mills Building, this city, following data for year ending April 17, 1919: Number of men restored to duty and average time actually served prior to restoration where the sentences originally imposed were as follows: One to 2 years, 2 to 3 years, 3 to 4, 4 to 5, 5 to 10, 10 to 20, 20 to 30, above 30. Each class should be stated separately so as to permit tabulation under three columns as follows: Number of men restored, length of sentence, average time actually served prior to restoration.

HARRIS.

ALCATRAZ CALIF., *April 24, 1919.*

INSPECTOR GENERAL,
510 Mills Building, Washington.

Re tel. your wire relative to restored men. Total number restored to duty, 146. One to two years, 69 men; average time served, 7 months. Two to three years, 36 men, average time nine months; 3 to 4 years, 11 men, average time eight and one-half months; 4 to 5 years, 2 men, average time 10 months; 5 to 10 years, 23 men, average time, nine and one-third months; 10 to 20 years, 4 men, average time 11 months; 20 to 30 years, 1 man, proceedings set aside one month; 30 years and over, none.

GARRARD.

Number of men restored:	Length of sentence, years.	Average time actually served to restoration, months.	Number of men restored—Con.	Length of sentence, years.	Average time actually served to restoration, months.
69	1- 2	7	23	5-10	9⅓
36	2- 3	9	4	10-20	11
11	3- 4	8½	1	20-30	[1] 1
2	4- 5	10			

[1] Proceedings set aside.

EXHIBIT 150.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 22, 1918.

Memorandum for Gen. Crowder.

A study of the records of trial by general court-martial received in this office shows the following:

Many of our judge advocates in the field fail properly to scrutinize charges referred for trial, with the result that many trials are being held on irregular or insufficient specifications.

Entirely too many men are being tried by general court-martial. I think it conservative to state that at least 25 per cent of the cases tried by general court-martial could be properly disposed of by minor courts or by administrative punishments under the one hundred and fourth article of war.

The actual trial of cases is, in many respects, poorly planned. Joint offenders are separately charged and separately tried by the same court in cases where there should undoubtedly be a joint trial. Important cases are frequently referred to incompetent trial judge advocates. In many divisions entirely too much time is allowed to elapse between arrest or confinement and trial, and in many there are long delays between trial and action by the reviewing authority.

More important, however, is the evident failure on the part of judge advocates to understand the policy of the department with reference to the conservation of man power. Men are still being tried and dishonorably discharged

the service for trivial offenses, which could be otherwise adequately punished. In many divisions there seems to be an unsympathetic use of the power to suspend sentences of dishonorable discharge. It is my view that, during this war at least, in every case where confinement is to be in a disciplinary barracks the dishonorable discharge should be suspended and the officers of the disciplinary barracks made responsible for saying that the man should not ultimately be sent back to serve with the colors.

In proposing corrective action for the difficulties outlined above, I think it may be accepted as fundamental that there should be the closest possible cooperation and understanding between this office and its representatives in the field. That this office should know the circumstances under which judge advocates in the field have performed their duty and that the latter should understand fully what this office is trying to accomplish and be able to work in sympathy therewith.

There should be a unity of purpose and understanding between this office and the commanding officers of the disciplinary barracks on the question of restoration to duty, in order that in time of war as many men as possible shall be given an opportunity to redeem themselves through actual service.

To accomplish these ends it is my opinion that nothing else could be productive of so much good as personal conferences and instruction. A good plan would be to hold a conference of all judge advocates for the purpose of discussing these problems, and others which might arise, and suggesting practical solutions. This, however, would seem to be impracticable. The next best plan would be to have a representative of this office make a visit of inspection and instruction to the various division and department headquarters. Since this would take him by the disciplinary barracks, there should also be included in the itinerary a conference with the officers of these institutions. You suggested yesterday that if anyone made a trip of this kind you would want me to make it. I think myself that if I am to remain on this desk during the war I should be the one to go. I have phrased and formulated the instructions that have been sent out as the policy of the department with reference to the conservation of man-power, and I think I am in position to bring judge advocates to understand how an intelligent application of that policy would reduce the number of trials and save men to the service. It would also help immeasurably in the work of the disciplinary desk if the officer in charge had personal knowledge of the conditions which exist in the field.

Such a tour would be of value in another direction. It would enable me to make a personal report on each judge advocate and his assistant. This report, together with other valuable data, might well be made the basis of special recognition in certain cases and of getting rid of undesirable or inapt officers in others.

When this visit has been made for the purpose of inspecting those who are at present acting as judge advocates of departments and divisions, I should strongly recommend that thereafter no new man should be sent to duty as the judge advocate of a command unless he had previously had a course of training in this office. This would give him a viewpoint of the service as a whole which many of our present judge advocates seem to lack.

It would take about five weeks to make this trip properly. As to whether I can be spared from the office at this time, I suggest that I could well make arrangements to leave in about 10 days or two weeks. By that time the new men will have been pretty well broken in and the work brought up to date. I think Col. Clark could carry on the work without difficulty. There could be no question except as to purely military or administrative matters, and he has these remarkably well in mind at the present time. On any question of doubt he could take advice and need not go wrong.

As a corrollary of the matter here under question, I suggest that if you decide to authorize this trip of inspection and instruction, that Col. Clark's hands might be strengthened by bringing in Maj. Barnwell for duty in this office. He is now on duty as judge advocate of the Southeastern Department. I have several times noted the quality of his work. He seems to be a splendid lawyer. His opinions are always clear and convincing. If you decide to give Maj. Hamar a position as judge adovcate, he might be sent to the Southeastern Department, relieving Maj. Barnwell for duty here.

As to the expense involved, it would be insignificant compared with the direct benefits that would be almost immediately realized. If I could reduce the number of trials by general court-martial by a substantial percentage the expense of the trip would be saved many times over each month, to say noth-

ing of the saving to the country if we can obtain a systematic treatment of the policy of conserving and using the man-power of the country which has been brought into the service.

E. G. DAVIS,
Lieutenant Colonel Judge Advocate,
Assistant to the Judge Advocate General.

EXHIBIT 151.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington.

Memorandum for the Chief of Staff.
Subject: Amendment of the forty-eighth article of war.

1. The following cablegram has been received from Gen. Pershing, requesting action be taken amending the forty-eighth article of war, so that he may be able to confirm all death sentences and order their execution:

"Paragraph 1B, cablegram No. 1059, dated May 5, 1918. In order that prompt exemplary action may be taken in necessary cases, I recommend that forty-eighth article of war be so amended as to authorize me to confirm all death sentences and order their execution. Full power as to death sentences in French Army and British Army in France is vested in military authorities. (Pershing.)"

2. The President has already acted upon this cablegram and has stated that he declines to recommend to Congress action looking to conferring power of confirming death sentences upon commanding generals in the field further than they have at present. A cablegram to Gen. Pershing, embodying the President's views, drafted in the office of the Judge Advocate General, has been or will shortly be sent to Gen. Pershing. There remains, therefore, nothing to be done in regard to this matter.

LYTLE BROWN,
Brigadier General, N. A.,
Director, W. P. D., A. C. of S.

MAY 16, 1918.

Memorandum for the Chief of Staff.

1. I recommend the following cablegram be sent Gen. Pershing:

"Reference your 1059, paragraph 1B. The President has decided not to urge upon Congress any extension of the present authority of commanding general of an Army in the field as to death sentences."

E. H. CROWDER,
Judge Advocate General.

MAY 17, 1918.

Memorandum for The Adjutant General.
Subject: Death sentence.

1. The Secretary of War directs with reference to paragraph 1B, cablegram No. 1059, from the commanding general American Expeditionary Forces, that a reply be sent by cable as follows:

[Cablegram sent May 20, 1918.]

PERSHING,
American Expeditionary Forces, France.

No. ------.
Paragraph ------.

"Reference paragraph 1B, your 1059, the President has decided not to urge upon Congress any extension of the present authority of commanding general of an army in the field as to the death sentences. (March.)"

PEYTON C. MARCH.

EXHIBIT No. 152.

Consolidated report of general prisoner cases.

DISPOSED OF FOR THE WEEK ENDED APR. 26, 1919.

	Fort Leavenworth Disciplinary Barracks.	Atlantic Branch.	Pacific Branch.	Penitentiary.	Posts.	Total.
Unexpired part remitted	69	3	2	2	.....	76
Portion remitted	157	17	21	20	.....	215
Restored to duty	59	2	1	.....	1	63
Discharged (A. R. 139)	16	3	.....	.....	.....	19
Total	.....	.....	.....	.....	.....	373
Transfer from Penitentiary to Disciplinary Barracks	2					
Transfer from Penitentiary to Disciplinary Barracks and part of confinement remitted	8	.....	.....	.....	.....	10
Transfer from Disciplinary Barracks to Penitentiary	1	.....	.....	.....	.....	.....
Total	11	.....	.....	.....	.....	383

CONSOLIDATED REPORT FOR 6 PRIOR WEEKS.

Unexpired part remitted	599	50	9	23	2	683
Portion remitted	1,216	78	46	83	1	1,424
Restored to duty	292	47	12	7	.....	358
Discharged (A. R. 139)	44	2	1	.....	.....	47
Total	.....	.....	.....	.....	.....	2,512
Transfer from Penitentiary to Disciplinary Barracks	10					
Transfer from Penitentiary to Disciplinary Barracks and part of confinement remitted	37	47	.....	.....	.....	47
Transfer from Disciplinary Barracks to Penitentiary	1	.....	.....	.....	.....	1
Total	48	.....	.....	.....	.....	2,560

For week ended Apr. 26, 1919	383
Prior weeks	2,560
Grand total	2,943

EXHIBIT 153.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 2, 1919.

From: The Office of the Judge Advocate General.
To: The Adjutant General.
Subject: Recommendation that Brig. Gen. Samuel T. Ansell be presented a distinguished-service medal.

1. I recommend that Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, United States Army, be presented the distinguished-service medal for exceptionally meritorious service to the Government as acting head of the Judge Advocate General's Department during this war.

2. Gen. Ansell's services have been, in my judgment, preeminently of the kind that the statute contemplates thus to be awarded. His duties have been of fundamental importance and great responsibility, and he has shown himself exceptionally qualified in the performance of them. His legal ability, his general qualifications and attainments, his personality, energy, and capacity for scientific organization and vigorous administration, his judgment and prevision, enabled him at the outset to appreciate and encompass the legal duties involved in the raising, maintenance, and administration of a vast military

establishment, and to organize the department for the proper performance of those duties. Those same qualities have enabled him at all times to perform them in a way that has appreciably contributed to victory.

3. His hundreds, even thousands, of thoughtful opinions on the records of the department show that he has been a powerful instrument in aiding in the organization of the new establishment within the law, in keeping it within its proper relation to civil instructions and the law of the land, in conforming military administration to the requirements of law, and in maintaining law and justice within the Army. This he has done without placing impediments in the way of rightful administration, but instead, such administration has been given legal direction and effectual impulse.

4. His leading opinions have enunciated many great principles of law fundamental to military administration, a few of which are those which had to do with—

(*a*) The conclusiveness, as against judicial inquiry, of the legislatively established administrative methods of the selective-service system.

(*b*) Military jurisdiction over the civil personnel auxiliary to military activities.

(*c*) Restriction of the rule against the redelegation of power as necessitated by modern military administration.

(*d*) The general adjustment of peace-time legislation to war conditions.

(*e*) Unification of variant and sporadic legislation, and adapting the whole to a single organizational system.

(*f*) Military unity—"there is but one Army, the Army of the United States, of which the variously designated forces are but components."

(*g*) The modern legal concept, that courts-martial are tribunals for the trial of conduct as crime in violation of the general law of the land, and not only in its military aspect, requires that the Articles of War be construed with more and more regard to the Constitutional principles governing criminal prosecutions.

5. In view of the above, I recommend the award of the medal.

E. H. CROWDER,
Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, January 18, 1919.

Memorandum to The Adjutant General of the Army:
Subject: Recommendation for award of distinguished-service medal to Brig. Gen. Samuel T. Ansell.

1. The above officer having been awarded the distinguished-service medal prior to receipt of the attached communication, the letter is returned to you for file.

HENRY JERVEY,
Major General, General Staff, Asst. to the Chief of Staff, Director of Operations.
By P. P. BISHOP,
Brigadier General, General Staff, Chief, Personnel Branch, General Staff.

EXHIBIT 154.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 24, 1919.

From: Col. B. A. Read.
To: The Inspector General of the Army.
Subject: Present organization of the Military Justice Division of the Office of the Judge Advocate General.

1. The Military Justice Division passes upon questions that arise in the administration of justice by courts-martial, courts of inquiry, and military commissions and the reviews of all records of trial by general courts-martial. Its duties include the preparation of reports upon application of clemency; the solution of problems relating to the disciplinary barracks and the government

of military prisons, and all matters having to do with the discipline of the Army, in so far as it involves the administration of the office of the Judge Advocate General.

2. This division is divided into eight main sections, as follows:

(1) A board of review consisting of two sections, whose duties are in the nature of those of an appellate tribunal. The board of review, under the general direction of the head of this department and the chief of this division, reviews all proceedings and all general courts-martial received in this office which are reviewed in writing. The preliminary review of any such case, after having been prepared by the officer to whom the record has been assigned and after it has been reviewed and passed upon by the chief of his section, is transmitted to the proper section of the board of review, and thereupon the members of this section of the board consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in rendering their decisions. The board of review may modify or rewrite such review or may direct that it be modified or rewritten so as to express their views.

The first section of the board of review reviews all cases of officers who are dismissed from the service and all cases where the sentence of the court is death.

The second section of the board of review reviews all cases of officers not involving dismissal and cases where the sentence is to a penitentiary, and such cases as may be sent to it from the Disciplinary Barracks section, or the retained in service section, where a written review is prepared. In the present press of work this section of the board is also reviewing certain cases involving the death penalty and the dismissal of officers.

(2) *Opinions section.*—This section drafts opinions and prepares indorsements and memoranda on such miscellaneous questions as may be assigned to it by the head of the division; drafts charges against alleged offenders in special instances and examines and revises reviews of general courts-martial records on trials of conscientious objectors, written by other officers of the division.

(3) *Dismissals and capital sentences section.*—The officers of this section examine records and write reviews of such records in all trials by general courts-martial with sentences imposing dismissal, or dismissal and confinement of an officer, or death of a soldier, officer or other person subject to military law. When an officer in this division has examined the record and prepared his written review thereof, it is examined and reviewed by the chief of the section, who, if he does not agree therewith or for any reason may desire further consideration of the matter in the section, may assign the record to a third officer for his examination and review.

(4) *Penitentiary sentences and officers' cases not involving dismissal section.*—The officers of this section examine and prepare written reviews of all trials by general courts-martial, which have resulted in sentences imposing confinement in the penitentiary or punishment of officers not involving dismissal, and the procedure is similar to that had in the dismissal and capital sentences section.

(5) *Disciplinary barracks sentences section.*—The officers of this section review the records of trial by general courts-martial resulting in sentences imposing dishonorable discharge and confinement in the disciplinary barracks or in any of its branches. These records are carefully checked to see that they are legally sufficient, and if so found they are sent to the record room for filing. If, however, for any reason substantial legal error appears in the record, a review is written thereon and the procedure thereafter is similar to that in the dismissal and capital sentences section.

(6) *Retained in service sentences section.*—The officers of the section examine and review the records of general courts-martial where the sentences provide for the retention of the accused in the service, including sentences with suspension of dishonorable discharge. The procedure in this section is similar to that had in the disciplinary barracks sentences section.

(7) *Clemency and restoration section.*—The officers of this section consider all appeals by prisoners, their relatives, or friends for clemency or restoration to the colors and prepare in writing for the head of the division their recommendations upon such appeals. In preparing these recommendations, mitigating circumstances in the commission of the offense, the good conduct of the prisoner prior and subsequent to the offense; his mental or physical deficiency, and other similar matters are weighed and considered. This section also considers recommendations for clemency referred to it my officers of other

sections of the Military Justice Division, who, in reviewing a case as to its legality, believe it to be a proper case for the exercise of clemency.

(8) *Statistical section.*—The duties of this section are to record and tabulate such statistical information regarding the administration of military justice as will enable the head of the department to prepare his annual report to the Secretary of War, and to enable him to obtain at any time the state of discipline of the Army as shown by the court-martial records.

3. In addition to the main sections above enumerated, this division maintains a record room in which are filed all records of trials by general courts-martial.

4. The personnel of the Military Justice Division as at present constituted is as follows:

In charge of division: One colonel with one captain and one first lieutenant as assistants.

First board of review: Three lieutenant colonels with one major as an assistant.

Second board of review: Three majors with one first lieutenant as an assistant.

Opinions section: One lieutenant colonel, three majors, and one second lieutenant.

Dismissal and capital sentences section: Five majors.

Penitentiary sentence and officers' cases not involving dismissal section: Six majors.

Disciplinary barracks sentences section: Seven majors, two captains, and two first lieutenants.

Retained in service section: Eight majors, five captains, and four first lieutenants.

Statistical section: One major, two first lieutenants, and a number of civilian clerks, assistants.

Clemency and restoration section: One major, two captains, and two first lieutenants.

B. A. READ,
Colonel, Judge Advocate.

EXHIBIT 155.

APRIL 2, 1919.

Memorandum for Col. Patterson, Inspector General.

Subject: Acting judge advocate generals or senior assistants from January 1, 1917, to date.

The acting judge advocate generals or senior assistants from January 1, 1917, to date have been as follows:

1. Walter A. Bethel, senior assistant from January 1 to May 16, 1917, when relieved by the Secretary of War to report to The Adjutant General of the Army prepared for field service. He was assigned to duty as judge advocate, American Expeditionary Forces, by verbal orders of the Secretary of War.

2. Blanton Winship, senior assistant, from May 16, 1917, when he succeeded Walter A. Bethel, until August 29, 1917, when he was ordered to the Forty-second Division at Camp Mills, Long Island, by Special Orders, No. 201, paragraph 44, War Department, August 29, 1917.

3. Samuel T. Ansell, senior assistant from August 29, 1917, to April 20, 1918. (Note: November 9, 1917, Order No. 201, confirming action of S. T. Ansell as Acting Judge Advocate General. November 19, 1917, letter from Secretary Baker announced that he had directed the Chief of Staff to revoke this order confirming action.)

4. James J. Mayes, senior assistant from April 20, 1918, to July 15, 1918, covering the period of Gen. Ansell's absence in France.

5. Samuel T. Ansell, senior assistant from July 15, 1918, to the time of demotion to grade of lieutenant colonel, effective March 10, 1919.

6. Lewis W. Call, senior assistant from March 10, 1919, to March 14, 1919, when Gen. Kreger arrived from France.

7. Edward A. Kreger, Acting Judge Advocate General from March 15, 1919, when he reported per Special Order 57–O paragraph 38, War Department, dated March 10, 1919, assigning him as Acting Judge Advocate General on arrival in United States.

8. The above information is as accurate as to dates as it is possible to obtain from the files of this office.

By direction of the Acting Judge Advocate General.

WM. S. WEEKS,
Colonel, Judge Advocate, Executive Officer.

EXHIBIT 156.

FEBRUARY 19, 1918.

Memorandum for Capt. K. S. Wallace, War College.
Subject: The Judge Advocate General's Department of the Army.

1. In compliance with the request from your office for a brief statement showing the history and conduct of this department, Gen. S. T. Ansell has hurriedly dictated the following memorandum, which is furnished you for such use as you may see fit to make of it:

This department is older than the Government, having been established during the War of the Revolution. Its duties have grown immeasurably, both in scope and volume, and its personnel has increased from that of a single officer in the beginning to its present proportions. Before the existing war was declared the department consisted of one Judge Advocate General and 12 other officers, a force which was sufficient to administer to the small establishment then existing, but with the creation of the new Army the volume of work has increased more than proportionally with the increase in the Army itself. Today the commissioned personnel of the department approximates 200.

The duties of this department are little understood, even in the Army. It is ordinarily conceived to be simply the law department of the Army. It is that, and much more. The title itself is significant and is indicative of the quasi-judicial character of the duties of this office. Those duties may be divided into three classes: The department is adviser and counselor of the Army as an institution of government, and of all the individuals thereof, from the Secretary of War to the most recently joined recruit; it is also in a very real sense the judge of their official conduct; lastly, and of very great importance, it must see that justice under law is done each individual of the Army in the maintenance of discipline.

The department itself consists of the office of the Judge Advocate General, which is a bureau of the War Department at Washington, and all the officers belonging to the Judge Advocate General's Department on field duty attached as judge advocates to the various field commands. Each commanding general of a division or department or larger organization has upon his staff a judge advocate who performs in the first instance for that command the duties which will be described herein as those for the department in general; but such field work is ultimately and finally revised in the office of the Judge Advocate General.

The personnel of the office at Washington consists of a Judge Advocate General with the rank of major general, 1 assistant with the rank of brigadier general, and 20 other assistants of lower grades. Immediately upon the outbreak of war the bureau was reorganized for the purpose of meeting the war demands into the following divisions and duties:

1. The executive division, the function of which is the superntendence of the general administration of the bureau. Its chief must have an intimate knowledge of the working of all the divisions, that he may advise the head of the office regarding them.

2. Military justice, which attends to the review of records of courts-martial, renders reports upon applications for clemency, addresses itself to the problems of the disciplinary barracks and military prison, and all matters having to do with the discipline of the Army.

3. War law. The duty of this division is to collect all war laws and decisions affecting or of interest to our establishment and distribute so much of such matter to judge advocates in the field as would be helpful to them.

4. Titles, accounts, claims, and fiscal affairs: The duties of this division will be to give consideration to accounts, claims, expenditures, disbursements of fiscal affairs in general; contracts, leases, and questions of military reservations and public property.

5. Constitutional law: This division has to do with the consideration of the questions falling under these two special branches of the law, including the law of war.

6. Legislative drafting: The duty of this division is to keep in touch with all pending legislation in Congress and draft all legislation proposed by the department and all regulations and orders submitted to the office.

7. General administration division, which gives attention to the numerous miscellaneous questions arising in the administration of the War Department in the Army, which do not fall specifically within the duties of any other division.

8. Civil administration division: The officer in charge of this division is counsel for the Bureau of Insular Affairs, the Philippine Government, and the Government of Porto Rico. It is the duty of the division to give consideration to all legal questions submitted by the Insular Bureau and involving insular questions and to all questions arising under the civil jurisdiction of the War Department, including river and harbor administration, reservations, and all litigation in the department, the Army, or any of its officers.

9. Personnel and property division: This division is charged with the funds, records, supplies, property, and clerical force of the office and routine business of the bureau.

Each of these divisions, except the one last named, is presided over by a senior commissioned officer who is aided by the necessary number of assistants.

An idea of the great growth of the work to be performed by this bureau may be fairly indicated by comparing the present conditions with those obtaining immediately before the war. Then there were 13 officers in the department; now there are nearly 200. Then there were in the bureau at Washington 4 officers; there are now 30 officers. Then the Army consisted of less than 100,000; now of 1,500,000. The annual appropriation and expenditures which was then in the millions, to-day reaches into the billions. The volume of work of this department is easily 10 times more than it was before war began. The war has given rise to questions involving a sui generis nature. These questions grow out of an exercise of war power, and give rise to questions which few, if any, ever contemplated; and in this field there are few judicial decisions to guide us. Military activity has now touched every other activity in the land. Neither the legal phase of this contact nor the formula for guiding it are clear. Persons and property are subject to jurisdiction which, in this country at least, is not well defined or understood. Fundamental rights are involved; military jurisdiction is to be exercised with care and caution; yet, with cautious regard which must be exercised with certainty and sureness. This office has called to its aid some of the most distinguished lawyers of the country. They are continuously engaged, not only in the usual opinion writing, but they must stand ready day and night to administer what, by proper analogy, may be termed first aid to the legally wounded. Scores of requests for advise of counsel from the world over reach this office daily and must find response without that time for reflection which should, and normally does, characterize the giving of legal advice.

Not only does this bureau advise and counsel individual members of the Military Establishment in the performance of their duties, but, looked at in the aggregate and in a fundamental way, it is the immediate legal agency whereby the Military Establishment itself is kept subordinate to the civil principles of government and all of its activities kept conformable to the law of the land. The above indicates in a general way the duties of this bureau as the legal department of the Army.

But it is as a bureau of military justice that the functions of the department touch personally and individually each offense and enlisted man of the establishment. The rights, duties, and obligations of all military persons are established and regulated by a military code consisting of both written and unwritten law. A member of the establishment is required to conform not only to this special code, but also to the general law of the land, and such conformity may in a general way be designated as discipline. Discipline is maintained in the last analysis by the exertion of military power through regularly established military tribunals which function in accordance with a penal code, technically known as the Articles of War. This code is enacted by Congress under its power to make rules and regulations for the government of the Army. An offender against it is charged, arrested, tried, sentenced and punished in strict accord with the articles. The code is a complete code of penal law, both substantive and adjective. Discipline must be maintained in strict accordance with the code, and with justice.

The proceedings of every case tried by court-martial must be accurately and completely recorded and forwarded to the office of the Judge Advocate General for review, and that authority makes necessary revision in order that justice may be done every accused man. All human tribunals are imperfect, and especially imperfect will be the military tribunals of our newly created Army. The officers constituting the court have not been experienced in the school of war and in military law, but have only recently come from civil life. Besides, this is the first democratic Army that America has ever raised. Its members come from the fields and factories; from every class of society, and from every walk of life. Both officers and men alike are uninured to military methods and requirements. The spirit of such an army is bound to be of the highest quality, notwithstanding there will be abundant opportunity for the exercise of authority upon the part of those who have it, and for numerous infractions of discipline upon the part of men who have had no opportunity to acquire the necessary appreciation of discipline. Courts-martial may be expected to be rather frequent and errors in procedure numerous. The review enjoined by law to be carried out in the office of the Judge Advocate General must be made with all the more cautious regard for the rights of individuals so strangely circumstanced in a new institution. This the people will demand; this in justice to the Army and the individuals thereof this office must do; and this this office is equipped to do.

R. K. SPILLER,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

EXHIBIT 157.

[Cablegram.]

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, D. C., March 17, 1919.

No. 369—Confidential.
To: Biddle.

Reference to Gen. Ansell's memorandum of November 6, 1917, and General Order of November 8, assigning him to duty as Acting Judge Advocate General, and subsequent cancellation of that order, request following information by cable: Was memorandum presented to you by him in person and what statements, if any, were made to you which caused you to direct the issuance of this order without reference to the Secretary of War.

J. L. CHAMBERLAIN,
Inspector General.

EXHIBIT 158.

[Cablegram.]

MARCH 22, 1919.

No. 2263—Confidential.
From: Headquarters American Expeditionary Forces.
To: The Adjutant General, Washington.

Reference confidential cablegram 369, transmitted to these headquarters from London on March 18, was referred to Maj. Gen. John Biddle. His reply as follows:

"My recollection is that memorandum was presented to me by Ansell in person after having been shown Secretary of War. I do not remember the details of conversation with him, but was directed by Secretary of War to publish the order. After a few days it was found that order did not give satisfactory results and cancellation was desired. I am certain that all action taken by me was with the knowledge of Maj. Gen. Enoch H. Crowder and by direction of Secretary of War. I do not remember discussing the memorandum with Maj. Gen. Enoch H. Crowder, but clearly understood it had his sanction. I recollect positively that I discussed the cancellation with him. Without having the memorandum at hand it is hard to recall all circumstances. Biddle."

PERSHING.

EXHIBIT 159.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 13, 1918.

Memorandum for Col. Read:
Subject: Designation of place of confinement under long-term sentences.

1. Col. Davis has prepared a separate memorandum for Gen. Ansell, dated August 1, 1918, on the subject of "Designation of the place of confinement by the reviewing authority," which you have referred to me for examination and comment.

2. In it he withholds concurrence, in an accompanying joint memorandum of the same date for Gen Ansell, upon the subject of confinement of general prisoners in France, saying: "I do not concede that this office was not advised of what was, in effect, a change in the provisions of the manual with respect to the designation of the Disciplinary Barracks as the place of confinement. On the contrary, this office originated and suggested the change."

The memorandum then reviews the course of some suggestions and recommendations originating in this office respecting sentences for long terms of confinement, particularly, in regard to an accompanying dishonorable discharge; and which resulted in the following confidential instructions to the service by direction of the Secretary of War on December 22, 1917:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the Disciplinary Barracks. When the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

It will be observed (1) the instructions make no discrimination between general prisoners in France and in this country, and (2) it is only "when a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement," that "the reviewing authority should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs." The instructions do not contain anything to indicate a change in the policy of the War Department that general prisoners, under sentences of long terms of confinement, should be confined either in the penitentiary or in the Disciplinary Barracks. On the contrary, paragraph (*b*) expressly provides that this course be followed.

The question giving most concern is what shall be deemed a "long period of confinement." It may be conceded that the instructions contemplated a longer term than the period of six months provided for in the manual; and it may also be assumed that it was intended to allow some discretion to division and other commanders in the matter of determining, in particular cases, what should constitute the long period of confinement required to send a general prisoner to a penitentiary or to the Disciplinary Barracks. The memorandum in reference calls attention to a letter from this office to the judge advocate of the Eastern Department, under date of February 11, 1908, which, while "declining to express an opinion as to the proper duration of this term * * *," said, referring to a suggestion that one year be fixed as the period, if "you have erred in either direction, the term as fixed by you is too short, in the opinion of this office, rather than too long." This letter was written by Col. Davis, signed by Gen. Crowder, and a copy sent February 16, 1918, to all department and division judge advocates. From it an inference may be drawn that the interpretation (therein) by this office of the instructions of December, 1917, was that reviewing authorities were given discretion as to the places of confinement to be

designated for prisoners under sentence of dishonorable discharge with periods of confinement of as much as one year; and to that extent, at least, the requirements of paragraphs 397 and 398 of the Manual for Courts-Martial, 1917, were modified by the instructions of December, 1917, above referred to.

What has been said above, however, affords little assistance in determining what course should be pursued in regard to sentences that include dishonorable discharge and full forfeiture, with terms of confinement of from three to five years, such as were involved in the French cases that brought up the present question.

The French cases, may, however, be laid aside, conceding that the cablegram to Gen. Pershing, April 6, 1918, referred to in the papers in reference, made an exception as to those cases and gave to the reviewing officers in Europe an unlimited discretion to retain for punishment prisoners tried and convicted there, regardless of the length of the periods of confinement. It may be observed, however, that the memorandum in reference points to no record evidence that this office was advised of the contents of that cablegram prior to the time of the present investigations, and the fact that it was deemed necessary by Gen. Pershing to ask for, and by the War Department to issue, this special authority as to prisoners in France, would show that the previous policy of the War Department, as reflected in the provisions of the Manual and in the instructions of December 22, 1917, did not authorize the action desired to be taken in France in respect of general prisoners there. Paragraph (*b*) of the confidential instructions of December 22, 1917, requires that prisoners under sentence of dishonorable discharge, accompanied with a long term of confinement, be confined "in the penitentiary or in the disciplinary braracks"; while the cablegram to Gen. Pershing authorized that such prisoners who would otherwise be confined in disciplinary barracks be retained in Europe.

It may be that this authorization was pursuant to the general policy first suggested by this office, yet that fact does not carry with it the imputation of knowledge to this office that pursuant to that policy this special provision had been authorized as to general prisoners in France. It will further be observed that the cablegram to Gen. Pershing was expressly limited in its application to prisoners in France "who would otherwise be confined in the disciplinary barracks." As is clear from its terms the language used carries the inference that such prisoners in this country should be sent to the disciplinary barracks, and brings us back to what is really the question to be definitely determined, which is: what constitutes such a "long period of confinement" accompanied with dishonorable discharge as to require the sending of prisoners in this country to the disciplinary barracks and depriving the reviewing authority of the discretion to retain such prisoners for confinement and punishment at a post, station, or camp. In support of the contention advanced in the memorandum in reference that the instructions of December 22, 1917, suspended for the period of the war the provisions of the Manual requiring confinement in the disciplinary barracks in all cases where the sentence imposed exceeded six months, reference is made to the letter of February 11, 1918, which scarcely goes further than to say that reviewing authorities were thereby given an enlarged discretion in the matter, and that a period of one year is too short to be regarded as a "long term period of confinement." What, then, as to a period of, say, five years, imposed upon a soldier in this country, with full forfeitures and dishonorable discharge? Shall he be kept at a post guardhouse, without even his allowances to take care of pressing needs?

On January 17, 1918, the following letter to the judge advocate of the Southern Department, was written by Col. Davis, signed by Gen. Crowder, and a copy sent to the judge advocate of each general court-martial jurisdiction:

"1. I am just in receipt of your letter of the 10th instant, in which you discuss the above subject, apparently upon the assumption that, under recent instructions from the War Department, soldiers serving sentences of confinement, but retained with their organizations, are intended to be kept in post or camp guardhouses, under the old custom and be thus removed from military training and discipline during the time they are undergoing sentence. Nothing could be further from the fact as I understand it. It is my understanding that the instructions referred to contemplate that a soldier sentenced to serve punishment shall be required to attend drills and to perform military duty generally, in so far as this is considered safe and advisable, and that the hard labor feature of the sentence shall be applied during hours when other soldiers are off duty, thus insuring that military punishment will

not result in a relaxation of discipline or a cessation of military training. The very purpose, I might add, of these instructions is to provide that enlisted men undergoing punishment shall be held with the colors and their training for service be made continuous, in order that the man-power involved may be saved to the country and not be frittered away through confinement and detachment from training and service, except in cases where offenders are of that character that they have not within them the capacity for efficient military service, or their offenses involve such a measure of moral turpitude that imprisonment at hard labor for a long period is the only adequate punishment."

The policy outlined in this letter, if consistently carried out, would remove some of the objections to the service in garrison prisons of sentences in excess of six months, but with the execution of this policy, should go the saving to the prisoner of at least some part of his pay or allowances to meet those personal needs but which are not provided for at his station, as is the case with prisoners in a penitentiary or the disciplinary barracks.

3. Soon after I came on duty, in May, 1918, observing that some reviewing authorities were not respecting the provisions of the Manual in regard to the class of cases under consideration, I brought the matter to the attention of Lieut. Col. Spiller and asked for instructions, and was directed to hold the cases under consideration; and, pending this, was directed later to make a draft of a memorandum to The Adjutant General, drawing attention to the question raised by these records, and asking for instructions from the War Department. This I did, and the memorandum redrafted by Maj. E. M. Morgan, was under date of June 18, 1918, sent to The Adjutant General (J. A. G. O., 250.3—Place of confinement). A copy of that memorandum, together with a copy of the only acknowledgment and reply from the office of The Adjutant General, dated June 21, 1918, is hereto attached. Shortly thereafter I was instructed by Lieut. Col. Spiller, and have more recently been explicitly directed by Col. Mayes, to apply the provisions of the Manual to the class of cases in question, and also to apply in the review of such cases in this office, the general limitations of Article III of the Executive Order of December 15, 1916, Manual for Courts-Martial, page 167, it being recognized that, while these general limitations are not legally binding upon reviewing authorities, they reflect the policy of the War Department, in respect of the matters set out therein. This course has been followed for the past month, in reviewing the "retained in service" records that have come to Room 597, and it may be pertinent to note that, until these provisions of the Manual were applied to the cases from France, none was returned from The Adjutant General's Office with an indorsement showing declination to concur in the recommendations of this office. From this course of action it may be inferred that the requirements in the Manual reflected the policy which the War Department desired should be observed by this office.

More recently there have been returned from the office of The Adjutant General to this office for further comment, two cases which that office had pursuant to recommendations from this office, referred to commanding generals "for the necessary action," and which were returned by them, with indorsements inviting attention to the facts of the particular case and requesting further instructions. In one of these cases, C. M. No. 115350—Floyd—Confinement "at hard labor for two years and forfeiture of two-thirds pay per month for a like period" was imposed and ordered to "be executed at the station of his command." This office recommended "that so much of the sentence * * * as is in excess of six months and forfeiture of pay as imposed for a like period be remitted." The commanding general, in returning the record for further instructions, quoted from the letter from this office of July 11, 1918, the paragraph which expressed the opinion that one year should be considered too short for periods of long confinement, from which, this particular commanding officer concluded, that the two-year terms imposed, in the cases referred to "meets the requirements of the above quoted paragraph."

In the other case, so returned, C. M. 117138—Carter, a sentence of "confinement for six months and reduction to ranks" was imposed and the station of his command designated as the place of confinement. This office recommended that, because of the failure to include hard labor and some forfeiture of pay in the sentence, "the unexecuted portion of the sentence imposed in this case in excess of the reduction to ranks, be remitted." The indorsement of the commanding general called attention to the thirty-seventh article of war giving him authority "to require hard labor as part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishment," not-

withstanding the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement, and further called attention to the particular facts of the case showing allotments and extenuating circumstances tending to justify the failure of the court to impose any forfeiture of pay.

A letter to this office from the division judge advocate of the Thirty-first Division, dated August 5, 1918, directs attention to the recommendation of this office, in the case of Pvt. Roscoe Floyd, C. M. No. 115350, above referred to, to the letter of February 11, 1918, and states that after conference with the "commanding general" two years has been fixed as the time which should constitute a "long period of confinement," and that between February 11 and June 22, 1918, 31 cases had been forwarded from his office to this office where the period of confinement was in excess of six months, that 12 additional such cases had been so forwarded since June 22, 1918, that his office holds 10 more such cases awaiting reply from letter of the commanding general to The Adjutant General of the Army, dated July 20, 1918, and concludes with the inquiries (*a*), "Is it the policy of the War Department that dishonorable discharge should accompany all sentences of more than six months?" * * * and (*b*), "In the 10 cases now held in this office should that portion of each sentence in excess of six months be remitted before the records are forwarded to Washington?"

The perplexity which confronts the judge advocate of the Thirty-first Division, and the course taken by the two cases returned to this office last above referred to, illustrate the importance of having reduced to definite form the requirements and policies that the War Department desires to be observed both by courts-martial and by the Judge Advocate General's Department; as well as of having those requirements together with a statement of such policies specified in the Manual for Courts-Martial and so insure their systematic and permanent distribution to the rapidly expanding forces of the Army.

The records of trials coming to this office show a steadily increasing divergence from anything approaching uniformity in the apprehension or interpretation of the instructions from the office of The Adjutant General or from this office, and some of these records disclose that the courts trying the cases apparently did not know of the instructions or orders effecting the changes in the Manual for Courts-Martial.

It will be noted that the memorandum of June 18, 1918, from this office, for the Adjutant General, citing the requirements of section 397 of the Manual for Courts-Martial that confinement be executed in a disciplinary barracks, or one of its branches, in cases where confinement for six months or more is imposed, and, where the confinement is not to be executed in a penitentiary, states: "This office knows of no instruction of the War Department modifying this requirement." That memorandum of June 18, 1918, made no reference to the confidential instruction of December 22, 1917, for which failure I was responsible, and the memorandum in reference of August 1, 1918, makes no reference to the memorandum of June 18, 1918, nor to the reply thereto from the office of The Adjutant General dated June 21, 1918.

The memorandum of June 18, 1918, referred to some suggestions made and considered for modifications of the requirements of section 397, and suggested that the end in view "might be accomplished by announcing to the service, through amendments to paragraphs 340 and 397 of the manual, the course to be followed was thus clearly indicated that it was the view of this office that such changes, if made, should be put into effect through amendment of the manual." The memorandum concluded with a request that this office "be advised whether the War Department has formulated, or has in contemplation, the formulation of any policy with reference to the above matter, and whether compliance with the requirements of section 397, Manual for Courts-Martial, is to be insisted upon. This information is necessary to enable officers reviewing records of trial in courts-martial cases to properly dispose of cases of the class above mentioned." In the reply from The Adjutant General of June 21, 1918, this office was informed: "No statement can be made at this time as to the future policy of the War Department with respect to the designation of places of confinement of general prisoners."

4. In July, 1918, there was referred to this office, from the office of the Adjutant General, an inquiry from the commandant of the United States Disciplinary Barracks, Fort Leavenworth, Kans., requesting information as to

what disposition should be made by him of a soldier sentenced to be confined at hard labor for one year and six months and to forfeit all pay and allowances due or to become due, without dishonorable discharge, where the United States Disciplinary Barracks, Fort Leavenworth, Kans., had been designated by the reviewing authority as the place of confinement. The indorsement, in reply from this office, written by Lieut. Col. Weeks and signed by Gen. Ansell, referred to paragraphs 397 and 398, Manual for Courts-Martial, 1917, and expressed, "The opinion of this office that prisoners not sentenced to dishonorable discharge should be held with their organization * * *." In this connection it should be noted that, in the opinion of this office, a sentence involving confinement at hard labor for more than six months should not be approved, unless accompanied by some forfeiture of pay." In conclusion, the opinion was expressed that there was no objection to granting the commandant, United States Disciplinary Barracks, the authority requested, to return the soldier and other such soldiers under sentence without dishonorable discharge to the stations of their commands for confinement. (J. A. G. O., July 22, 1918, 253 Miscl.)

5. The Executive order of December 15, 1916, prescribing the maximum limits in time of peace of punishment of soldiers, has been held by this office to be inoperative in time of war, except as to Articles V and VIII thereof. This opinion is given in a letter from this office to the judge advocate of the Seventy-ninth Division, Camp Meade, Md., dated February 20, 1918. (J. A. G. O., 250.4). In that letter it was said:

"The second question in your communication is, which articles of the Executive order of December 15, 1916, are now operative? You are advised that articles 5 and 8 are operative and that the other articles are inoperative. The position of the War Department in this regard is stated in the following telegram which went out on June 20, or June 21, 1917:

"'COMMANDING GENERAL SOUTHERN DEPARTMENT,
"'*Fort Sam Houston, Tex.*

"'Articles 5 and 8, Executive order, remain effective, but except for these articles, Executive order ceased to be effective upon declaration of war.

"'MCCAIN.'"

Clearly, Article III, defining the general limitations of sentences, is not now legally binding upon courts-martial or reviewing authorities, but if it is suggested that these general limitations, as set out in this article, do not reflect the policy of the War Department, as carried into execution through the exercise of the authority of remission, it is highly desirable that some definite statement of the general limitations to be observed in respect of the matters covered by this article, should be formulated for application by this office, in the review of records of trial by general courts-martial unless the War Department desired to allow to reviewing authorities an unfettered discretion in this regard. The course last mentioned would not tend to uniformity in the administration of justice in the Army courts.

6. The Army appropriation bill, approved July 9, 1918, amended the fifty-second and fifty-third articles of war, "so that the authority competent to order the execution of the sentence of a court-martial may, at the time of approval of such sentences suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person, under sentence, to duty during such suspension, a sentence, or any part thereof may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks, or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the said exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence, or the suspended part thereof, in so far as the same shall not have been previously remitted." It will be observed that this amendment very much enlarges the discretion and power of commanding officers in the matter of the control of the execution of sentences, and may be taken to reflect a general policy of allowing a larger discretion to such officers in respect of administering punishments. Nevertheless, it appears wise, as a matter of policy and in the interests of uniformity, to prescribe some limits for such discretion, and it is highly important that any such limitations or other changes in the provisions of the Manual for Courts-Martial should be made specifically

as changes in the manual and promulgated as such, in order that they may have the widest possible systematic distribution to the service in a readily and permanently accessible form, thus keeping the manual complete, as far as practicable, as a guide for military officers and tribunals.

7. Summarizing, it is found that on November 29, 1916, the War Department promulgated the Manual for Courts-Martial for the information and guidance of all concerned, the provisions of this manual being ordered effective on and after March 1, 1917. The declaration of war in April, 1917, rendered inoperative, until the return of peace, the maximum limitations of punishment set out in the Executive order of December 15, 1916, and published in the manual; but Articles V and VIII of the said Executive order remained in full effect while Article III, general limitations, has been observed as reflecting a policy of the War Department until changed.

On December 22, 1917, confidential instructions were issued to the service, by direction of the Secretary of War, for the purpose of discouraging the awarding of dishonorable discharges where the offender has within him the capacity for military service, but provided that a sentence of dishonorable discharge should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks; and when a sentence of dishonorable discharge is unaccompanied by a long period of confinement, the dishonorable discharge should be suspended or remitted, and the offender held for service and punishment with his organization. It has been inferred from the language used in these instructions that the period of six months, contemplated by section 397 of the Manual for Courts-Martial, 1917, as the minimum long-term period that should be accompanied by dishonorable discharge, was intended to be lengthened; but no authoritative statement has come from the War Department indicating what shall be considered a long period of confinement within the intendment of the confidential instructions. A letter from the office of the Judge Advocate General, dated February 11, 1918, declines to give an opinion as to what should be considered such a long period of confinement except to say that one year is too short rather than too long for such a period. These confidential instructions have been interpreted by some commanders and others to change by inference the requirements of the manual and the custom of the service that general prisoners, having terms in excess of six months, should not be required to serve them at a post, station, or camp.

On June 18, 1918, this office addressed a memorandum to the Adjutant General, requesting instructions as to the policy that the War Department might wish to be followed in the review of records in respect to the place of confinement, and was advised, under date of June 21, 1918, by the office of The Adjutant General of the Army, that "no statement can be made at this time as to the future policy of the War Department with respect to the designation of places of confinement of general prisoners."

The present state of the law and procedure in the cases under consideration appears to be, having due regard to the Manual for Courts-Martial and the ruling of this office, that the provisions of the former and the customs of the service not in conflict therewith, are to be observed except (*a*) as to prisoners in France by the terms of the cablegram of April 6, 1918, to Gen. Pershing—"all prisoners who would otherwise be confined in disciplinary barracks (may) be retained in Europe." (*b*) By the terms of the confidential instructions the provisions of paragraph 397 of the Manual for Courts-Martial, 1917, conflicting therewith, only sentences of dishonorable discharge accompanied with a long period of confinement not to be served in a penitentiary, may, and should, be served in the disciplinary barracks, except as to prisoners in Europe.

The opinion of this office, as reflected in the letter of February 11, 1918, is that a term of confinement must be in excess of one year to warrant its being regarded as a "long period of confinement."

(*c*) The Executive order of December 15, 1917, is not in force in time of war except as to Articles V and VIII thereof, and except that the general limitations set out in Article III thereof, while not mandatory in time of war, may be observed as reflecting a policy of the War Department, as may also the custom of the service that a sentence involving confinement for more than one month should not be approved unless accompanied by some forfeiture of pay which may also be gathered from the acceptance by the War Department of the recommendations from this office made in the light of the general limitations and custom referred to.

8. The suggested changes in the Manual for Courts-Martial would involve changes in paragraph 311 thereof, as changed January 31, 1918 (C. M. C. M. No. 3, Jan. 31, 1918), and in paragraph 397.

If paragraph 311 is to be changed, it is suggested that it be also so changed in the matter of forfeitures affecting allotments as to conform to the comptroller's decision of April 23, 1918, in respect thereto.

If such changes are to be made it is suggested that the following forms be considered:

Paragraph 311, and the note thereto, to be as follows:

"311. Sentences for soldiers.—For soldiers, the legal sentences, depending on the nature of the offense and the jurisdiction of the court, include death, dishonorable discharge, confinement at hard labor, hard labor without confinement, forfeiture of pay, detention of pay, and reprimand; for noncommissioned officers, reduction to the ranks, for privates, first class, reduction to second-class privates and privates; for cooks of the Quartermaster Corps (where sentence is imposed by a general court-martial), reduction to the ranks; and for those holding a certificate of eligibility to promotion, deprivation of all rights and privileges arising from such a certificate. That portion of pay which is required to be allotted to dependent relatives of class A under the provisions of Article II of the war-risk insurance act of October 6, 1917, and that portion allotted to dependents of class B under the same act, Liberty loan allotments, and premiums on war-risk insurance are not subject to be forfeited by sentence of courts-martial. A sentence imposing forfeiture of a part of pay means the forfeiture of the specified part of that portion of the pay which is not so allotted.

"NOTE.—1. Confinement without hard labor should never be imposed.

"2. Sentences involving confinement for more than one month should include some forfeiture of pay.

"3. A sentence that does not include dishonorable discharge should not forfeit allowances and should specify such part of the pay as may be forfeited thereby in proportional parts of such pay per month and not in specified amounts.

"4. No sentence of dishonorable discharge should be imposed (*a*) where the offender has within him the capacity for military service; (*b*) where any other form of punishment is sufficient to meet the requirements of the particular case; (*c*) where the period of confinement is less than 18 months.

"5. A court should not by a single sentence, which does not include dishonorable discharge, adjudge against a soldier:

"(*a*) Forfeiture of pay at a rate greater than two-thirds of his pay per month.

"(*b*) Forfeiture of pay in an amount greater than two-thirds of his pay for 18 months.

"(*c*) Confinement at hard labor for a period greater than 18 months.

"6. A court should not, by a single sentence, adjudge against a soldier:

"(*a*) Detention of pay at a rate greater than two-thirds of his pay per month.

"(*b*) Detention of pay in an amount greater than two-thirds of his pay for six months.

"(*c*) Hard labor without confinement for a period greater than six months.

"7. Where that portion of a sentence that imposes confinement is suspended, or where the portion of a sentence that imposes dishonorable discharge is suspended and the disciplinary barracks is not to be designated as the place of confinement, the portion remaining should be brought within the general limitations above recommended.

"8. Convicted prisoners confined at military posts, stations, camps, or cantonments should be required to attend drills, to perform military duty generally, in so far as is considered safe and advisable, and to perform hard labor during the hours when other soldiers are off duty, to the end that military punishment may not result in a relaxation of discipline nor a cessation of military training.

"9. For forms of sentences see Appendix 9."

Paragraph 397 to be as follows:

"397. When confinement in disciplinary barracks will be directed: The United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, will be designated as the place of confinement of all general prisoners other than residents of Porto Rico, the Canal Zone, Hawaiian Islands, of the Philippine Islands, and other than general prisoners of any American Expeditionary Forces, who are confined for 18 months or more and who are not to be confined in a penitentiary pursuant to the preceding paragraph. From time to time detailed instructions will be issued as to which

of the barracks shall be designated and as to when the prisoners shall be transferred to them."

The adoption of the foregoing and the promulgation thereof as amendments to the manual would tend to make clear what is now in confusion and would supply to the service a uniform guide in terms sufficiently liberal to afford the larger discretion, it is desirable that commanding officers should have in the matters of discipline in their commands, and would at the same time, safeguard the interests of individuals against the caprice or neglect of courts-martial that might, even unthoughtfully, deprive them of such parts of their pay and allowances as are necessary to maintain their self-respect, so long as they shall not have committed offenses warranting their discharge from the service.

The course here suggested would not be out of line with the insistent contention of this office that the man power of the country be conserved through the saving to the service of many soldiers who, under the former practice, would be lost by the too frequent imposition of sentences of dishonorable discharge.

If the service under the confidential instructions of December 22, 1917, is to be released from all restrictions except the individual discretion of reviewing authorities in respect of what should be considered a "long period of confinement," and if the declaration of war has, as it has, rendered inoperative the general limitations of Article III of the Executive order of December 15, 1916, and they are not to be replaced by, at least, some admonitions of the policy of the War Department, in respect of the subject matter of those general limitations, the resulting confusion and lack of uniformity in the result of trials by general courts-martial in the class of cases under consideration will grow beyond all the bounds of an orderly administration of military justice.

On the other hand, it is possible at least to advise, if not to fix except through the power of remission, such limitations upon the discretion given as to hold it within the bounds of wise experience, without depriving it of adaptability to varying conditions in the Army.

9. The rapidly accumulating number of records of cases tried by general courts-martial, reviewed in this office and then laid aside, pending explicit determination and direction from the office of The Adjutant General as to the policy to be observed by this office in making recommendations in the class of cases under consideration, makes it highly important that early consideration be given the questions raised by these records.

10. It is recommended that a memorandum be prepared by this office for The Adjutant General calling attention to the memorandum of June 18, 1918, to the confidential instructions of December 22, 1917, and to the cablegram of April 6, 1918, to Gen. Pershing, referred to, with the request that this office be explicitly advised whether, in reviewing records of trials by general courts-martial, it shall be guided (1) by the requirements of paragraphs 396, 397, and 398 of the Manual for Courts-Martial, 1917, (2) by the general limitations of Article III of the Executive order of December 15, 1916, Manual for Courts-Martial, 1917, page 167, and (3) what different rules, if any, shall be observed in reviewing records of trials had in Europe.

It is also further recommended that such memorandum to The Adjutant General shall, in the interests of clearness and uniformity, include the suggestion that all amendments and orders which effect changes in provisions of the Manual for Courts-Martial, as now written, be carried into the Manual as formal changes thereof, and that they be promulgated as such changes. If deemed advisable, such changes might be limited in operation to the period of the present war.

It is further recommended that such memorandum to The Adjutant General include a suggestion to amend the Manual for Courts-Martial, 1917, as set out in paragraph 8 of this memorandum.

AUBREY E. STRODE,
Major, Judge Advocate.

EXHIBIT 160.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 16, 1918.

Memorandum for Gen. Ansell.

Subject: Questions relating to the administration of military discipline; office policy.

1. Recent changes in the assignment of officers in this and The Adjutant General's Office has developed the fact that our own office has suffered from

a lack of a formulated and expressed policy which should govern in the disposition of cases wherein actions of courts and of reviewing authorities seem to vary in some particulars from the strict requirements of the Manual for Courts-Martial. Doubtless, in the eyes of the service, our office has shown a lack of continuity in its policy and instructions from time to time. This has given rise to confusion and uncertainty, both here and in the field. It is the belief of your committee that this should now be eliminated in so far as possible by an approved statement of the views and policies of this office which may hereafter be intelligently followed by anyone who may hereafter handle the work of the disciplinary division of this office.

2. In order to present this situation clearly to your mind it is necessary briefly to review events leading up to the promulgation of certain confidential instructions to reviewing authorities that were sent out by the direction of the Secretary of War under date of December 22, 1917. In October, 1917, this office began an agitation of the question of the form of punishments which are proper during time of war. On October 18, 1917, you wrote a memorandum for the Chief of Staff in which you invited attention to the fact that under the existing system of punishment a great many men would be withdrawn from actual service and you stated it as your opinion that "the department should now take some means of preventing, or at least controlling, discharges from the service as a result of court-martial punishment."

You stated further that it was your view that "disciplinary or penal battalions ought to be organized under the control of the division commander, and to these penal battalions military offenders should, except, perhaps, in rare instances, be sentenced to serve, and while therein they should be made to serve not only as soldiers but under such conditions as would involve punishment."

You also stated: "Doubtless there are rare instances where men must be taken out of the Army entirely and subjected to long term of imprisonment, but I think they must be rare. As I see it, the department has the responsibility of deciding how it can utilize the services of these soldiers and at the same time keep them within a penal condition."

Under date of November 14, 1917, you signed a memorandum on the same subject which was prepared by your direction in which it was pointed out that the action suggested in your memorandum of October 18, 1918, had been "confused with the plan heretofore suggested, by Maj. King of the Medical Corps, of establishing disciplinary battalions at the various cantonments."

Your memorandum of October 18, 1917, was referred, in connection with other papers bearing upon this subject, including the papers having to do with the establishment of disciplinary battalions in the various divisions, to the War College for study, and a conclusion was reached which served as a basis for a memorandum from the Acting Chief of Staff to The Adjutant General in which it was stated that "the Secretary of War directs that the papers herewith regarding the above matter (disciplinary battalions for divisional camps and cantonments) be filed without further action."

The memorandum from the Acting Chief of Staff then recited that the Secretary of War had directed that certain confidential instructions be given for the information and guidance of all department, division, and organization commanders, general courts-martial, and judge advocates. These instructions are quoted in paragraph 2 of the memorandum of this office under date of November 14, 1917. The purpose of the memorandum of this office under date of November 14 was to secure a reconsideration of the form in which it was proposed to convey these confidential instructions to the service, and it was pointed out that they did not meet the requirements of the case. Among other things this department said:

"Wholly regardless of the advisability of authorizing at this time such construction as may be necessary to take care of prisoners held at division camps and wholly regardless of whether disciplinary battalions, as that term is generally understood, should be organized at this time, the necessity of discontinuing the practice of dishonorably discharging men for light offenses is clearly manifest and calls for quick action. In a great majority of the cases now arising a dishonorable discharge is not only unnecessary but futile and inappropriate. Men sentenced to be dishonorably discharged, who have within them the elements of service, should still be made to serve, and to accomplish this end the dishonorable discharge should be remitted or suspended in their cases and they should be held for training and service with their divisions. Such sentences as it is necessary to impose upon them can ordinarily be worked

out in their commands, and the cases will be few in which it is necessary to remove them from their commands and confine them in a penitentiary or disciplinary barracks."

In the memorandum of November 14, 1917, this office concluded with the recommendation that the confidential instructions to be issued to the service should be in pertinent part as follows:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

These instructions as formulated by this office were promulgated by the Secretary of War under date of December 22, 1917, in the form of confidential instructions to the service. These instructions are in conflict with paragraphs 396, 397, and 398 of the Manual for Courts-Martial. They were interpreted by reviewing authorities to mean that the provisions of the Manual requiring confinement in the disciplinary barracks in all cases where confinement in excess of six months had been approved were suspended for the period of the war. Immediately thereafter reviewing authorities began designating the station of the soldier's command as the place of confinement in all cases where it was believed that the soldier had within him the elements of service and in which it was not believed advisable to impose confinement in a penal institute. The question which gave the service most concern was that which naturally arose as to the meaning to be given to the phrase "a long term of confinement" as used in these instructions. In several cases this office was asked to place an authoritative construction upon these words. It declined to do so on the ground that this was a matter which had been committed to the discretion of department and division commanders.

In a letter to the judge advocate of the Eastern Department, under date of February 11, 1918, this office wrote as follows:

"What shall constitute a 'long period of confinement' within the meaning of that term as used in the instructions referred to? This office has received several requests for an unofficial expression of its views as to the meaning to be attributed to this expression. You state in paragraph 8 of your letter that you have fixed one year as the period. In declining to express an opinion as to the proper duration of this term, this office has remarked that the purpose of these instructions was to place responsibility for discipline as completely as possible in the hands of department and division commanders, subject to the general instructions that dishonorable discharges should be reduced in number and that offenders should be held for service with their organizations and for the continuance of their training in all cases where this was considered possible. Subject to this general plan each department and division commander was intended to be allowed a free exercise of his own ingenuity and discretion in maintaining discipline without an interruption of training. If you have erred in either direction, the term as fixed by you is too short, in the opinion of this office, rather than too long."

3. Under these instructions, as was naturally to be expected, the administration of military discipline was far from uniform. It varied, as was inevitable, according to the widely differing standards and views of reviewing authorities in the matter of securing discipline through the agencies of military courts. Through it all, however, could be observed certain well-defined results. The idea of conserving man power was adopted and the number of cases sent to the disciplinary barracks was very greatly reduced. Buildings which had been erected at Fort Leavenworth to accommodate the expected increase in the popu-

lation of the disciplinary barracks remained unoccupied and the commandant of the branch at Alcatraz reported in May of this year that his barrack population was less than it had been in time of peace. Men having within them the elements of service were held for punishment of offenses committed with the organization to which they belonged and were given to understand that the commission of crime would not result in enabling them to escape the burdens and dangers of war. The resulting lack of uniformity in punishment was no greater than was natural to be expected; and it must be remembered that Congress assumed the responsibility for this lack of uniformity when it failed to confer upon the President the right to prescribe limits of punishment which would be applicable in time of war but allowed, instead, courts-martial to impose punishment in their discretion except in the few cases where the punishment is fixed by statute.

Under the system thus established, as administered in this office, a record of trial by court-martial was reviewed with the sole purpose of determining its legality and not with the idea of attempting to enforce any degree of uniformity on the courts in the sentences which they might impose or upon the action of reviewing authorities in passing upon the same. It was recognized that each convening authority would have his own ideas as to the proper methods of securing discipline and that many novel and perhaps seemingly unjust sentences would result. If, however, the sentences were legal and within the spirit of the confidential instructions set out above, the cases were passed to file. In a case where the status of the soldier's command had been designated for a considerable term of confinement and the man held there for training with his organization while undergoing punishment, it was assumed that in the opinion of the reviewing authority the man had within him the elements of service and that it was unnecessary to send him to a penal institution, and, to that extent, to deplete the man power of the country.

While this policy was in effect Col. Davis, of this committee, was in charge of the disciplinary division of this office and Maj. J. S. Jones was in charge of the corresponding work in the office of The Adjutant General. It happened that Col. Davis and Maj. Jones were relieved from duty at their respective desks at about the same time. Col. Read, who succeeded Col. Davis in this office did not know of these confidential instructions which had governed the policy of this office and apparently Maj. Riley, who succeeded Maj. Jones in The Adjutant General's office did not know of them. Not knowing of these instructions, it was but natural for Col. Read, upon assuming charge of the disciplinary division, to revert to the Manual as his guide, which although in part suspended by these confidential instructions, had not, in fact, been formally amended. Col. Mayes seems also not to have been conversant with the spirit of these confidential instructions for the reason that he directed Col. Read to adhere to the provisions of the Manual, suggesting that if the War Department wanted to amend the same, it should regularly do so. As a result of this changed policy this office began to recommend, in cases where the station of the soldiers' command had been designated as the place of confinement for punishment exceeding six months, that the place of confinement be changed to the Disciplinary Barracks in accordance with the literal requirements of the Manual. This was, in effect, an abandonment by this office of its policy of conservation of man power through the holding of men to service for which it had contended and which it had succeeded in getting established in the matter hereinbefore indicated. In several cases the changed recommendations were approved by The Adjutant General's Office and it was not until this office attempted to apply this changed policy to cases arising in the expeditionary forces in France that The Adjutant General's Office declined to follow the recommendations of this office. This may have resulted from the fact that Maj. Riley, who succeeded Maj. Jones in The Adjutant General's office, knew that special authority had been given Gen. Pershing to retain in France prisoners from the expeditionary forces, but may not have known or may have overlooked the confidential instructions communicated to the service under date of December 22, 1917.

4. The foregoing accounts for the conflicting views and attitudes of this office and for the seeming lack of understanding in the office of The Adjutant General as to the proper disposition of the question at issue.

Your committee firmly believes that the policy advocated by this office and established as a result of its insistence was the correct policy. It believes that in time of war division commanders should be charged, as completely as possible, with responsibility for the discipline of their divisions, and that the

administration of military punishment should be governed in time of war by the boldly outstanding facts that it is necessary to conserve man power, and that enlisted men should be made to understand that the commission of crime will not necessarily result in interruption of training for military service or escape from the dangers and hardships of war. It believes, moreover, that in carrying out this policy, inequalities and lack of uniformity are bound to result, but that this office can not too much concern itself with these matters if it is not to impose upon the service an unnecessary burden of paper work, and force division commanders to give time and attention to matters of administration which should be given to matters of training and instruction for combat with the enemy. In other words, the administration of this office should conform with war conditions, and sympathetic consideration should always be extended to the efforts of reviewing authorities to carry into practical effect the conservation and training policies which the War Department adopted upon the advice of this office. To accomplish these ends, we must not adhere too rigidly to peace-time standards or require military justice in time of war to be administered according to formulas prescribed by those who are not in touch with actual conditions in the field and who can not be held responsible for the results there attained.

5. In order to readjust this situation and to enable our judge advocates in the field properly to perform their functions, as well as to protect this office against the danger of further inadvertent change of policy and attitude, your committee recommends that the following statement be published in circular form for the information of representatives of this office both here and in the field:

The frequent but necessary shifting of personnel in this office has of late caused temporary misunderstanding and some confusion in enforcing the War Department policy promulgated to the service in the confidential instructions from The Adjutant General's Office under date of December 22, 1917. These instructions are in pertinent part as follows:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them, and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

As this office interprets these instructions, they amount to a practical suspension during the period of the war of that part of section 397 of the Manual for Courts-Martial which requires the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches to be "designated as the place of confinement of all prisoners other than residents of Porto Rico, Canal Zone, Hawaiian Islands, or the Philippine Islands who are to be confined for six months or more and who are not to be confined in the penitentiary pursuant to the preceding paragraph."

While heretofore refraining from placing a construction upon the phrase "long period of confinement" as used in the above instructions, this office has indicated that one year should be regarded as the minimum term which should be classed as a long period of confinement. In practical application it is believed that most reviewing authorities have fixed this period at two years, and this office believes that in general that period might well be adopted as the approved limit beyond which confinement must be served in a penal institution rather than at the station of the soldier's command.

This office is further of the opinion that within the limits of an approved sentence of two years' confinement, unless the record shows a high degree of moral turpitude, reviewing authorities should hold offenders to service as well

as punishment, by suspending dishonorable discharge and designating the station of the soldier's command as the place of confinement. In so far as possible full military duty should be required in connection with any sentence imposed. This will serve to retain in service those having within them the elements of service, and to emphasize the principle that commission of crime can not be relied upon to confer immunity from the hardships and dangers of war. It goes without saying that any punishment, over which a reviewing authority retains jurisdiction, may properly be mitigated in his discretion.

Punishments, such as hard labor without confinement, confinement without hard labor, forfeiture of pay without confinement, and variations of these punishments should, in the opinion of this office, be judiciously imposed, having in mind always the results to be accomplished. In any case a reviewing authority should stand ready to exercise the powers of remission conferred by the fifty-second article of war, as amended by the act of July 9, 1918 (Public, 193, 65th Cong.), whenever the ends of punishment have been attained. In this connection it is proper to remark that this amendment of the fifty-second article of war, suggested by this office, had its inception in the desire to more fully equip reviewing authorities to carry into practical effect the policies of the Department with reference to conservation of man power and continuity of training for actual service.

Inequalities and lack of uniformity in punishments imposed are to be expected, but in reviewing cases in this office, only the legality of sentences will, in general, be considered. No attempt will be made to secure uniformity of punishment throughout the service in any particular class or classes of cases, either by corrective action by the War Department or through attempting to influence the action of courts-martial or reviewing authorities. Congress has authorized courts-martial, in time of war, to impose punishment in their discretion, except where the punishment has been prescribed by statute, and no right exists at such time to prescribe limits which must be followed. A careful and intelligent application of these views will, it is believed, attain the ends both of punishment and service while at the same time reducing to the minimum the correspondence between this office and reviewing authorities, or between this office and that of The Adjutant General, in the final disposition of cases.

E. G. DAVIS,
Colonel, Judge Advocate.

———— ————,
Lieutenant Colonel, Judge Advocate.

———— ————,
Major, Judge Advocate.

EXHIBIT 161.

AUGUST 21, 1918.

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 the 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 reformative 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 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 no 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 or 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 people's war, to be fought by the people's Army, and it is but just and right that they should be made to feel that the system of punishments 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.

2. In view of the fact that the Secretary of War has authorized the commander in chief of the American Expeditionary Forces to retain in Europe all prisoners who would otherwise be confined in the disciplinary barracks, my remarks are, of course, addressed to those conditions which obtain within the continental limits of the United States and to the punishments there imposed. I believe that no one will take issue with this action of the Secretary of War. It was the necessary and obvious course to pursue. Indeed, I recommended action of that character when I was in France as judge advocate of the First Division. I realized that it was unwise and impracticable to return to this country for confinement prisoners who ordinarily would be sent to disciplinary barracks. Furthermore, it was well that it be definitely understood that no man would be able to avoid or escape his obligation to serve in France by committing an offense which might secure his return to the United States for confinement in a disciplinary barracks. There are, of course, few such men in our Army. Clearly, in the cases of other men who offended from no such motive, an opportunity should be afforded them there to win restoration to the honorable status of duty.

3. I can not subscribe to the proposition that men under a suspended sentence of dishonorable discharge with or without a short term of confinement should be left with their organizations. It is an anomalous situation with practically nothing to be said in its favor and much to be said in opposition to it. It must be borne in mind that men under a suspended sentence of dishonorable discharge receive neither pay nor allowances. In addition, they would be without means to provide themselves with those necessities which the Government does not provide even to those soldiers who are on a full pay status. I refer, for instance, to such things as laundry, barber expenses, tobacco, etc. It is needless to suggest that to keep men in that condition with troops would result in their becoming chronic borrowers and general nuisances, and, in some instances, petty thieves. The proper place for those men, as well

as those whose dishonorable discharge has not been suspended but who are eligible for restoration to duty, is the disciplinary barracks, or one of its branches. Those institutions were established for the specific purpose of reformation of soldiers under sentence of dishonorable discharge and confinement with a view to their honorable restoration to duty or their reenlistment. The splendid results of the work accomplished in those institutions have more than justified their establishment. I do not share the fears that have been expressed as to the loss of man-power due to sending prisoners to the disciplinary barracks. That loss will be inconsiderable and may be justly regarded as negligible when compared with the good results obtained in promptly restoring trained and disciplined men to the colors.

4. Briefly, then, my opinion is that an announcement should be made to the service to the effect that while the Executive order is limited to a time of peace, it is believed that the general limitations upon punishments fixed by article 3 of that order furnish a safe, sane, and conservative guide in time of war, and they should not be exceeded or departed from save in exceptional instances. Secondly, that dishonorable discharges should not be imposed except in those cases where no less punishment would be adequate and should usually be accompanied by a long term of confinement, whether the confinement is to be executed in a disciplinary barracks or in a penitentiary. Thirdly, in all cases where dishonorable discharge has been imposed and the disciplinary barracks designated as the place of confinement, and there is reason for the belief that the prisoner may be reclaimed to the service, the dishonorable discharge should be suspended. Fourthly, all men sentenced to dishonorable discharge and a term of confinement will, if a penitentiary has not been designated as the place of confinement, be sent to the disciplinary barracks, or one of its branches, whether or not the dishonorable discharge has been suspended.

B. A. READ,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 162.

SPEECH OF SENATOR CHAMBERLAIN IN THE SENATE, JANUARY 3, 1919.

Passing that, I come to another thing, Mr. President, not so much in the way of criticism, as by way of suggestion, in the hope that some remedy may be found for conditions that exist. It is with reference to inequalities in the administration of the law as it affects the soldiers. The administration of military justice during this war has developed many cases of life or long term sentences by courts-martial which either would not have been imposed at all or would have been much more lenient if the rights of the enlisted man had been properly protected in the course of his trial before the court-martial. Mere boys, some of them wholly irresponsible mentally for their acts, have been adjudged guilty of serious civil or criminal offenses and sentenced for life or long terms in the penitentiary. Court-martial sentences found by the reviewing authority to be null and void for want of jurisdiction have been allowed to stand, thereby subjecting to illegal punishment a man sentenced without justification of law.

A soldier doing military police duty who entered a shop during the night because, according to his own story, he heard a noise which he thought was made by a burglar, was found in the shop and himself accused of burglary. The court-martial which tried him found him not guilty. The commanding officer who had appointed the court disapproved the verdict and "recommended" that the court reconsider the case. The court did "reconsider" and found the man guilty and imposed a long term of imprisonment. The evidence was wholly circumstantial. On final review of the record in this case it was recommended that the verdict of guilty be set aside and the man discharged. The commanding officer, disapproving of this recommendation, has allowed the verdict to stand, and the man is now serving his sentence. This case, while not typical, illustrates the control which the military commander exercises over the administration of military justice.

A lot of those cases come to me. I have looked up many of them to verify them. I know of a case where a young lieutenant was on a court of inquiry in a certain cantonment—I will not mention where. His commanding officer said: "A. B. is charged with crime. He ought to be severely punished. He ought to be sent up for six months." The young officer, a lawyer, detailed

for court-martial duty, looked into the case, and he and his colleagues sentenced this young fellow to five days in the guardhouse. His commanding officer called him up and said: "you know, that is the man whom I told you ought to be severely punished. I see you have only sentenced him for five days in the guardhouse." The lieutenant replied, "That is all that the evidence warranted. It was a very minor offense." "That is the way military law is administered here, is it?" And in a very short time the young officer was removed from that detail, simply because he had not carried out the orders of the commanding officer. What use of a court if a commanding officer is to practically control its actions?

Senators, I am not blaming the Secretary of War for this. I blame him only to this extent: That a word from him would stop such practices.

These individual cases give the human touch to conditions, and in order to impress it upon the attention of the War Department I am just going to call attention to two or three more as illustrative of what is in my mind. I am not going to give the names of the soldiers, either.

A green country boy, a private in the machine-gun company of the One hundred and fifty-sixth Infantry, was tried and convicted of the charge of absence without leave from Camp Beauregard from May 9 to May 15, 1918. That is six days. It was shown in evidence by the prosecution that he had been notified of his selection for overseas duty. The accused testified that he went home to see his mother, probably for the last time, as she was ill in a hospital. He was sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years in a disciplinary barracks.

Now, Senators, I realize the necessity of maintaining discipline. There is not any question about that; but, in God's name, could not a boy like that have been punished a little less severely under the circumstances than 25 years in a prison, where his life in the very nature of things must be ruined?

A similar case is that of a private of Company D, One hundred and fifty-fifth Infantry, who was charged and convicted of absence without leave from May 9 to May 15, 1918—the same period of time—from Camp Beauregard—the same place—after notification of his selection for overseas duty. It was shown that the boy had gone home to his folks in Mississippi to tell them good-by. He was sentenced to dishonorable discharge, total forfeitures, and 15 years' confinement of hard labor in a disciplinary barracks.

You see, there is 10 years' difference between the punishment meted out to these young men in the same place and for the same crime. There may be aggravated circumstances connected with them that I do not know anything about, but I can not conceive how it should have been found necessary to have inflicted such terribly severe punishment. I can understand that if it was on the battle front and a boy had left his post without leave his punishment should be severe, even to sentencing him to be shot.

Mr. LA FOLLETTE. He returned voluntarily, did he?

Mr. CHAMBERLAIN. So I understand.

Now, take another case: A private of Company M, Forty-ninth Infantry, was convicted of sleeping on his post at Camp Merritt, N. J., and was sentenced to a dishonorable discharge, total forfeitures, and 10 years' confinement at hard labor in a disciplinary barracks. You see, there is the same kind of a case, and yet there are 15 years' discrepancy between the punishment meted out to the first soldier, where both crimes committed were practically the same.

Mr. WATSON. Did these men come back of their own accord?

Mr. CHAMBERLAIN. I am so informed. If the Senator from Indiana wants, I will give him the names and record, and I will give them to the Secretary of War if he wants them, but I dislike to publish these cases in the Record so that the young men may probably be discredited, because I hope that something will be done to relieve many of these sentences.

Take another case: A private of Company F, Forty-ninth Infantry, was convicted of sleeping on his post at the United States Engineers' Depot, New York City, and was sentenced to dishonorable discharge, total forfeitures, and 10 years' confinement in a disciplinary barracks. He was assigned to what was virtually a watchman's job, and he gets 10 years. I can not conceive why such severe punishment should be meted out to young soldiers for such small crimes. I believe in the strictest military discipline, but it can be accomplished without any such severity as that.

A case somewhat different from these in which the President showed mercy was that of a private of the Third Training Company, casual detachment, who

convicted of disobedience of orders to drill and of having seditious literature in his possession for distribution. He was sentenced to be shot. It appeared that he was a sincere conscientious objector and that he had not been offered noncombatant service, as provided in General Order No. 28, War Department, March 23, 1918. He had in his possession some literature in which certain passages had been condemned by the Department of Justice, but that department had ruled that such books might be retained by members of religious sects for private study, and there was no evidence that the accused attempted or intended to distribute these books. His death sentence was disapproved by the President and the prisoner was discharged; and very properly so. I hope the President will exercise the same clemency and show the same mercy in many other cases, and I believe he will. But I call attention to these cases to show the inequality of sentences by court-martial in the country; and there is no reason for it.

The commanding officer's control over the court-martial is such that he may "suggest" the action which the court should take.

It is wholly repugnant to our ideas of the administration of criminal law that anyone should have the power to set aside a verdict of acquittal. Nevertheless, this is the power of the commanding officer over a court-martial trial. He may exercise this power not only in the case of military offenses but also in the case of ordinary civil offenses, as, for example, larceny committed by a soldier.

The cases which may be sent to court-martial are not definitely defined or limited. The commanding officer may determine what offenses shall be tried by court-martial. He may, for example, subject to the disgrace of court-martial every soldier who, no matter what the justifying circumstances, has been absent from his post for five days. He may, without any investigation of the circumstances, order such a man tried by court-martial. In the French Army such cases are not sent to trial until an investigation has determined that the man ought to be tried. With us the commanding officer exercises at all stages a military disciplinary control of the administration of military justice. We do not administer military justice according to law; it is constantly under the control of a military commander, who is not obliged either to ask for legal advice or to follow it when he has asked for it and it has been given to him by the responsible law officers of the Army.

It is not surprising under the circumstances that there are too many trivial cases sent to trial by court-martial, too many unduly severe sentences, and widely varying punishments imposed for like offenses. Terms for the same or similar offenses imposed by courts-martial during the present war range all the way from life imprisonment in the penitentiary to six months confinement in a disciplinary barracks. Frequently the life term is imposed for an offense for which in other cases a few months imprisonment is imposed.

In case of the less serious offenses the punishments range from days or months of disciplinary confinement to a few years' imprisonment. There is no standard of punishment, and the changing personnel of courts-martial, and their lack of familiarity with criminal law makes anything like uniformity of punishment impossible. If we are to have a democratic army, military justice ought to be administered as it is in other countries, by courts which are constituted, whose procedure is determined and whose action is controlled by law. Courts-martial should be required to accept the interpretation of the law by a responsible law officer in the same manner that a jury in a civil criminal court accepts the interpretation of the law by the judge of the court. This is not to suggest that military discipline should be undermined, but that it should be supported by a fair and effective system of determining guilt and imposing punishments. There is no greater obstacle to discipline than the resentment which the soldier feels for unjust and arbitrary punishment.

The records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice. We have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer.

All of that responsibility does not rest on the Secretary of War; much of it may rest on Congress. We ought to enact a code that would fix the boundaries of these courts, and which would define their jurisdiction and duties; but, as it is, with these inequalities of administration, it seems to me that a word from the Secretary of War to the commanding officers would bring them very quickly to a more uniform administration of the law. There is nothing in the world that will make the members of the military establishment do their duty in a

proper way more surely than to discharge or reprimand an officer once in a while. There is a sort of free masonry amongst them, and whenever one of them is put on the tenterhooks for anything that he has done irregularly, every one in the Army who is of the same rank and grade has his ear to the ground and knows it, and governs himself accordingly.

Mr. SHAFROTH. Mr. President, will the Senator from Oregon yield to me for a moment?

The PRESIDING OFFICER. (Mr. Johnson of California in the chair). Does the Senator from Oregon yield to the Senator from Colorado?

Mr. CHAMBERLAIN. Yes.

Mr. SHAFROTH. Has not the Senator from Oregon noticed the various determinations by courts of justice in the States, and noted how vastly different are the sentences which are imposed by such courts as the result of judicial proceedings?

Mr. CHAMBERLAIN. Oh, yes.

Mr. SHAFROTH. That is true in like cases of like offenses which are prosecuted. I have noticed such variations to have been from 1 year to 14 years. Such sentences often depend upon the judge and upon the character of his impression as to what would be the proper sentence. Some judges believe in severe sentences; others believe in light sentences; while still others believe in almost no sentences. The severity of the sentence oftentimes results from the make-up of the individual. So I do not see how in such cases anyone can be properly charged with any neglect or any wrong in permitting these judge advocates to remain in office. People both in times of war and in civil life invariably hold different views as to crime. Some will say this man should be set up as an example: "I will show the people in this community that there has got to be respect for a certain law"; and such judges will impose severe sentences, while at the same time almost across the border in another judicial district there will be another judge who will impose a very light sentence. That is human nature; men are differently constituted; so it seems to me when these inequalities of sentences have occurred no one is to blame except the individual who imposes the sentence.

Mr. CHAMBERLAIN. I realize the force of the Senator's suggestion. I have had some of the same experiences the Senator has had, and, besides that, I was prosecuting officer in my State in a large district for four years, and I know the difficulty of meting out exact justice. The conditions in different communities or different counties in the same State will be entirely different; but there is the great equalizing power in the Chief Executive, and ninety-nine times out of one hundred he exercises it so as to equalize inequalities by the use of the pardoning power or in some other way. But here is a great central government with a Secretary of War entirely in charge of the military branch of it, and under whose jurisdiction all of these crimes come. He can very much relieve the situation if he will only attempt by proper order to do so. When he sees that two young men in the same cantonment, as at Camp Beauregard, are sentenced, one for 15 years and one for 25 years, for exactly the same offense, a simple word from him to the President of the United States would result in equalizing the sentences, if necessary, by the use of the pardoning power.

Mr. WILLIAMS. Does the Senator mean the same offense or the same charge?

Mr. CHAMBERLAIN. The same charge.

Mr. WILLIAMS. When two men are charged with the same offense and brought up for trial, the Senator must recognize, as I do, that the facts may appear entirely different in the two cases. The character of the two culprits, or the alleged culprits, may appear entirely different. There is not an inequality of punishment for an offense, but an inequality of punishment on a charge. One man is found guilty of killing another, another man is found guilty of killing still another, and a third of killing still a third; one man is hung, one man is sent to the penitentiary for life, and one man is convicted of manslaughter. All the Senator knows about these cases is that the charges were identical.

Mr. CHAMBERLAIN. The suggestion of the Senator is more or less true. In the very great haste——

Mr. THOMAS. Mr. President, may I inquire of the Senator whether these individual cases to which he has referred have been appealed to the Judge Advocate General?

Mr. CHAMBERLAIN. I think all of them have been.

So much for that, Mr. President. Where there is a noticeable inequality on the face of the record, and there are those under the Military Establishment

who know the facts, it seems to me they ought to be looked into, with the power of recommendation somewhere to relieve the situation; but the sure cure for it all is to have some sort of a tribunal, appellate or supervisory, that shall have the power to formulate rules and equalize these unjust sentences, under the direction, of course, of the Commander in Chief of the Army and Navy.

Mr. WILLIAMS. Mr. President, I should like to ask the Senator a question there, if he will yield.

Mr. CHAMBERLAIN. I yield.

Mr. WILLIAMS. Taken for granted that the Senator's suggestion is perfectly apropos and perfectly right, whose fault is it that there is no such tribunal? It can not be the fault of the Secretary of War.

Now, I should like to ask the Senator another question in that connection, and let him answer them both at once. Suppose he was Secretary of War, or suppose that I was Secretary of War. Does the Senator imagine that either he or I could take personal cognizance of all the thousands of cases, examine them like a justice of the peace, and go into the testimony to see just how far each individual ought to be punished? In other words, if there is not a tribunal—and there would have to be about a thousand tribunals, by the way, for one could not attend to all the business—how do you expect a man of flesh and blood, like Baker or Chamberlain or Williams, to go into all these cases?

Mr. CHAMBERLAIN. Mr. President, I realize the force of what the Senator says, and I stated before the Senator came in and did me the honor of his presence that I am delivering this one message and placing it in the Congressional Record to call the attention of the Secretary of War to conditions. I can not take up the innumerable cases that have come to me, and do not expect the Secretary of War to do so; but the secretary has never been denied anything in the way of assistance that he has asked for in this war.

Mr. WILLIAMS. Now, if the Senator will pardon me just once more, and then I hope to let him alone——

Mr. CHAMBERLAIN. I hope so, because I wish to finish.

Mr. WILLIAMS. Not only the present Secretary of War, but various Secretaries of War, have communicated to us in times of peace and in times of war, during the Revolution, the Mexican War, the war between the States, the Spanish-American War, and this war, and so far the committee over which the Senator from Oregon presides—the Military Affairs Committee—has had charge of the question of courts-martial. The whole country has agreed to substitute in time of war for the ordinary courts operative in times of peace, for justices of the peace, circuit courts, appellate courts, and various courts, so-called courts-martial. They have tried to organize them so that approximate and quick justice could be dispensed in war times. It must be quick; we can not fool with it; we have got to keep up discipline in the Army; and being determined to do that we have organized the present courts-martial. The Senator will remember that while serving upon the committee of which he is chairman and of which I was once a member, I found at one time that one officer had been the accuser, the judge, and the chief witness against a man whose rank had been taken away from him. We remedied that, and why can not the committee remedy such other injustices as suggest themselves?

Mr. CHAMBERLAIN. I think the committee will attempt to do so where legislation is necessary, Mr. President, but the committee occupies this position: The committee is limited as to its clerical force. To attend to all these things is a physical impossibility for the committee with the clerical force that the committee has, while the Secretary of War is supplied not only with a great body of legal advisers, to whom he can refer any of these matters either for advice or to draft legislation, but with as much money as he needs for any legitimate military purpose. We have amended the Articles of War during this Congress two or three times at the request of the Secretary of War. He is having these difficulties pointed out to him, and I have not any doubt that if he asks for another amendment to the Articles of War we will amend them again.

Mr. MCCUMBER. May I ask the Senator a question?

Mr. CHAMBERLAIN. Yes.

Mr. MCCUMBER. I wish to ask the Senator if, from his observation, he has not long since arrived at the conclusion that all of the punishments imposed by courts-martial, taking them as a body, are immensely more severe than punishments which would be imposed by the ordinary courts and in most cases we might say unconscionably severe?

Mr. CHAMBERLAIN. I think that is true, but I will say to the Senator that in times of war I have no objection to the severity of sentences, as a rule, because discipline is absolutely necessary to be maintained. If a soldier is guilty of an offense and is only sentenced to five days there might be 5,000 men associated with him who would commit the same offense if they knew they would only get five days' punishment.

Mr. MCCUMBER. But even in times of peace I find the punishments imposed by courts-martial immensely more severe than the punishments imposed by civil courts.

Mr. WILLIAMS. Mr. President, the Senator would not punish the Senator from North Dakota for going to sleep at all, would he?

Mr. CHAMBERLAIN. Not if he were in good company and with some one like the Senator from Mississippi.

Mr. WILLIAMS. But the Senator would punish a soldier for going to sleep when he was a sentinel, and he might have to shoot him for doing it, because it is a very serious offense.

Mr. CHAMBERLAIN. Yes, of course; there is no doubt about that in time of war.

Now, Mr. President, these remarks are just by way of suggestion with reference to the dispensing of military justice, and I do hope that the War Department will take some notice of them.

EXHIBIT 163.

LETTER OF GENERAL CROWDER.

FEBRUARY 13, 1919.

DEAR MR. SECRETARY: Upon resuming active supervision of the work of the Judge Advocate General's office early in January of this year, after a year of almost exclusive preoccupation with my duties as Provost Marshal General, I found your reference calling my attention to the remarks of Senator Chamberlain, printed in the Congressional Record of January 3, 1919, which voiced certain criticisms upon the administration of military justice during the war. I have been reflecting upon the most appropriate manner of putting you in possession of the facts on the subject dealt with in these remarks.

The subject, in general—I mean that of military justice during the war—is, of course, within my special province as Judge Advocate General of the Army; and it has been peculiarly a matter of the most conscientious solicitude on the part of myself and of the Acting Judge Advocate General, who had the direct supervision of the office during my special preoccupation with the other duties. Of the nearly 100 judge advocates attached to the office in Washington during the past year, some 50 have been assigned exclusively to the Division of Military Justice, scrutinizing the record of every one of the thousands of general court-martial cases arriving in Washington for revision. These skilled lawyers (all but two of them brought recently into the Army from civil practice, and including some eminent incumbents from the judicial bench) have been keenly alive to the demands of the situation. Months before any of these after-the-war criticisms appeared, and from the very outset of the year 1918, when the disciplinary records of the new Army were already enlarging many fold the work of this office, the Division of Military Justice had begun to apply measures adapted to safeguard the cause of justice to the individual. And, as the year went on, the progress of court-martial practice was closely and continuously followed, with a view to correcting the legal errors, equalizing the sentences in the various divisions, and exercising the appropriate clemency. How notable were the results achieved by this conscientious scrutiny before the close of the year 1918 I will later point out, noting here merely that these results were already accessible to any inquirer at this office before the close of the year 1918.

It goes without saying, therefore, that all the authentic data that would throw light on the correctness of Senator Chamberlain's complaints are to be found in the accumulated records of my office. And I could wish that he had afforded me an opportunity, however scanty, to lay before him the general tenor of these records, or any part of them, before advancing publicly the assertions contained in his remarks on military justice.

However, since receiving your reference, my own question has been whether to wait until a full and exhaustive account could be prepared for you, showing the whole range of facts in that field during the war period, or whether, with-

out waiting for that, it would be worth while to offer you, as a provisional step, the facts upon the topics concretely touched on in the Senator's remarks. I have decided to take the latter course, reserving for a later and formal report the entire body of facts concerning military justice during the war period.

The Senator's remarks run along two lines. In the first place, he cites certain individual cases having special features open to criticism. In the second place, he offers certain generalizations involving general conditions and practices. This makes it necessary to deal with his remarks under two separate heads, and, with your permission, I will do so. Whether or not these individual cases are open to the criticism as made is simply a question of the facts in each of the cases; they differ widely in their nature, and each must receive its own separate explanation, based solely on its own facts and no other. But whether the Senator's assertions as to general conditions and practices are correct is a larger and distinct question, ranging over the entire field of military justice, and these assertions must therefore be examined in the light of the entire mass of relevant cases.

I begin, therefore, by taking up the individual cases cited by the Senator for special features; and at the same time it will be convenient to include comments on a few other individual cases cited on the floor of Congress by Mr. Siegel from a newspaper article. (Congressional Record, Jan. 23, 1919, p. 1988).

1. INDIVIDUAL CASES CITED FOR CRITICISM.

1. The first case cited by Senator Chamberlain is that of a soldier at Camp Gordon (record No. 110595, tried January 24, 1918), who, while patrolling the town as military police was found at midnight in a shop just after a burglary. Being charged with burglary, he asserted that he had entered the shop in search of the burglar. His story was disbelieved, and he was found guilty; the first finding was not guilty, but at the commanding officer's request, there was a reconsideration, and the second finding was guilty. On revision of the record, no legal error could be found; but this office reached the opinion that though there was sufficient evidence to sustain the finding the evidence did not go so far as to show his guilt beyond a reasonable doubt. In such a situation no Supreme Court in the United States (with three, or four exceptions only) would interfere and set aside a jury's verdict. Nevertheless, this office recommended a reconsideration of the verdict by the reviewing authority. It was in fact reconsidered; but the court adhered to its finding. But the feature for emphatic notice is that reconsideration was given not by exercising the "arbitrary discretion of a military commander," but by referring the case to the judge advocate of the command, as legal adviser. The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of this office, and recommending confirmation; and the commanding general followed this opinion of his law officer.

This case, therefore, instead of being, as Senator Chamberlain has been led to believe, an illustration of "the control which the military commander exercises over the administration of civil justice," illustrates exactly the opposite. For, in the first place, the confirmation of the sentence was made, not by the arbitrary military discretion of the commanding officer, but upon the legal opinion of his judge advocate, an ex-civilian lawyer. And, in the second place, the reconsideration which was actually given by the judge advocate on the point of proof beyond a reasonable doubt, was a measure of protection which the law does not provide in any civil court in the United States for the control of a jury's verdict. The case is a good illustration of a feature in which the system of military justice sometimes does even more for the accused than the system of civil justice.

2. The second case cited by Senator Chamberlain is that of an absence without leave from Camp Beauregard (record No. 116490, tried June 6, 1918), in which a sentence of 25 years was imposed on a soldier who had gone home (as he claimed) to see a sick mother after the company had been notified of their impending departure for the battlefield in France; he returned to camp just after his unit had left. This offense of leaving for home when the regiment is just on the point of departure overseas is obviously one of the most disorganizing to military plans. In this case it was committed at a time when the allied forces were in daily need of American help, and our units were being rushed with all speed to the ports of embarkation. By leaving camp in this particular week, the soldier successfully evaded going into the fight with his comrades. That the seriousness of the offense must be emphasized in the sight of the Army by the penalty imposed, needs no argument.

But the Senator errs in implying that the man was dishonorably discharged, for he was not. The sentence of dishonorable discharge was suspended, which means, under the law, that his confinement has practically no minimum, and that if his conduct is good he may be released from confinement and restored to duty at any time.

3. The third case cited by Senator Chamberlain is a similar case of absence without leave at the same camp (record No. 116800) under almost identical circumstances; but in this case a sentence of 15 years, instead of 25 years, was imposed. This matter of the variability of sentence is later explained by me, in its general aspects. But the difference of periods, however, has in this case not the significance which it appears to have, because the sentence of dishonorable discharge was in this case also suspended, and the offender went to the diciplinary barracks for a period of confinement having no minimum, and upon a record of good conduct he may be restored to duty at any time, and his confinement be terminated.

4. The next case cited by Senator Chamberlain is a case of sleeping on post at Camp Merritt, the sentence being for 10 years. The Senator's brief description of the case applies to two offenders, tried nearly at the same time. (Record No. 114717, tried Apr. 25, 1918, and record No. 115506, tried May 17, 1918).

In the one case the sentence was reduced by the commanding officer to six months, probably because the soldier was a youth of 17. This reduction was apparently not known to Senator Chamberlain, for he does not mention it. There is certainly nothing harsh in military justice in this case.

In the other case the sentence was approved by the commanding general; and on November 22, 1918, the Judge Advocate General's office, on application, after a careful scrutiny of the record, declined to recommend clemency; so that it may be assumed that the circumstances of the case did not merit it. But here, too, the sentence of dishonorable discharge was suspended by the commanding general; the period of confinement has no minimum; and the offender may be restored at any time, after a record of good conduct.

5. The next case cited by Senator Chamberlain is another instance of sleeping on post, the sentence being for 10 years. (Record No. 113076, tried on Mar. 21, 1918, at Camp Merritt.) As the sentinel had been drinking whisky shortly before going on guard, had actually left his post, and was found asleep in a toilet, the case was plainly one for making an example, and the sentence is therefore hardly to be termed severe. The Judge Advocate General's office, however, after at first declining, on application, to recommend clemency, later considered the case a second time, on December 12, 1918, and notified The Adjutant General that there was no objection to his restoration to duty.

But at this point I must take notice of Senator Chamberlain's expression, applied in his remarks to the duty assigned to this soldier, of guarding a sentinel's post, as "virtually a watchman's job." I feel sure that even the civilian mind will readily appreciate the high responsibility of a sentinel's post in time of war, and that this expression will be recognized as inappropriate. The war was not only in France; it was in our own country also; and at the post where this sentinel was on guard there were millions of dollars worth of supplies, waiting for early shipment to equip the forces on the battle front, and lying open to destruction by the incendiary agents of the enemy, who lurked at every such spot in our own country. That under such circumstances the offense of sleeping on post belongs among the most serious and dangerous misdeeds of a soldier needs no further argument.

6. The next case cited by Senator Chamberlain is one of disobedience to orders to drill, and of having seditious literature in possession for distribution. The offender was a conscientious objector who had not been given an opportunity for noncombatant service, and who was not attempting nor intending to distribute literature. The sentence was death; but the Senator adds that it was "disapproved by the President and the prisoner discharged," and he expresses the hope that "the President will exercise the same clemency and show the same mercy in many other cases." Now, the facts of the record demonstrate the precise opposite of what the Senator was led to believe, because in this case (record No. 116790), tried June 17, 1918, it was not the President's clemency that discharged the prisoner; it was the effective operation of that very system of military law which the Senator supposes not to exist. What happened was that the Judge Advocate General's office recommended disapproval of the sentence on the strictly legal grounds that the order to drill was (under G. O. No. 28, 1918) not a lawful command, and his disobedience was therefore not an offense; and that there was no evidence of the accused's in-

tention to distribute the literature. The sentence was therefore disapproved, and the prisoner discharged on the legal grounds stated by my office. This case, therefore, far from illustrating the Senator's thesis, rather affords an illustration of the operation of military law and justice in entire analogy to that of civil law and justice.

This completes the list of particular cases cited by Senator Chamberlain. I turn now to the particular cases cited in the newspaper article read into the Congressional Record by Mr. Siegel. (Congressional Record, vol. 57, No. 44, Jan. 23, 1918, p. 1988.)

7. Taking these cases, for convenience sake, in the reverse order of their mention in the article, we are told of three cases of supposedly excessive sentences for the offense of desertion or absence without leave; all three of them being of the type of a return to visit the home family in distress. I should be glad to make any explanations or admissions which these cases might merit, but they are so indefinitely described in their citation that it has been impossible to identify them even after a careful search of many records.

As they are criticized, however, on no other ground than that of the severity of the sentences, I think that what has been already here said on the other cases of that sort will serve as a sufficient comment.

8. The next instance cited by the writer in question concerns two death sentences imposed in France for sleeping on post in a front-line trench. There are really three distinct questions involved in these cases; first, whether a sentence of death in all cases of this offense should be the inexorable policy; secondly, whether, if not, these particular cases showed sufficient extenuating circumstances; and, thirdly, whether the cases were fairly and fully tried to get at the facts.

Upon the first question, it is enough here to say that Gen. Pershing especially urged the importance of adopting this policy for the protection of his Army's welfare; and his chief law officer concurred in this message; and that under such circumstances no one could have been criticized for acceding to this urgent request and adhering to the principle handed down by all the fixed traditions of military law. I myself, as you know, was at first disposed to defer to the urgent recommendations of Gen. Pershing; but continued reflection caused me to withdraw from that extreme view; and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency.

Upon the second question it can be stated that, except for the youth of the offenders (they were about 20 years of age), there were no special extenuating circumstances. The task laid upon these soldiers was no greater in its exactions than was laid upon hundreds of others, at the very same moment in the allied forces doing duty in the trenches. The chief of staff's memorandum states the situation with great force:

"The American Expeditionary Force is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company, but of the entire command, is absolutely dependent on the vigilant performance of his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of those offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night—that is, the night of November 3–4, 1917, Pvt. Sebastian was found sleeping on his post, and on the night of the 5th, Pvt. Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of 2d–3d. This condition of affairs presented an absolute menace not only to that portion of the line held by the American troops, but to the French troops in the adjacent sectors."

That the decision to exercise clemency was a sound one, I do not doubt. But no candid reader of the record could look upon these cases as anything but a distressing instance of the inevitable mental conflict that arises between the stern necessities of war discipline and the natural human sympathy for men who have incurred the death penalty, a conflict which equally agitates

every civil judge and every civil executive when such a case is presented for his action. It is unconscionable that this situation should be cited as a peculiarity of the military system.

The third question—whether the case was fairly and fully tried so as to present all the facts—would require too extended a survey for giving all the details here. I content myself with assuring you (what you, indeed, know already) that the record was scrutinized by several of the most experienced judge advocates of my staff as well as by myself personally, and that, although the cases were not tried as thoroughly as they could and should have been tried, where the death penalty was involved, nevertheless no reversible error was found and there was no doubt of the facts in either case. The only issue in this case was the severity of the sentence, as above mentioned.

9. The writer also cites, in the same connection, two other cases coming at the same time from France; in these the death sentence was imposed for refusal to drill. The circumstance indicated an obstinacy amounting to aggravation. But it was decided by you that clemency should be exercised to the extent of commuting the sentences to three years' penal servitude. And as the writer of the article in question makes no tangible criticisms, but merely couples these cases with the foregoing two, I pass them over.

It should be noted, however, as a sample of the writer's unfair presentation, that he is incorrect, in point of fact, in asserting that "upon their plea (of guilty) alone these two men were sentenced to death." Both men were tried upon testimony adduced by the prosecution after their plea of guilty was entered; both men declined to call any witnesses in denial or in extenuation. The scantiness of the record, however, was of itself sufficient ground for exercising clemency.

10. The remaining case cited in the newspaper article read into the record by Mr. Siegel is that known as the "Texas mutineers" case (Record No. 106663, tried at Fort Bliss, Tex., Sept., 1917). The criticism made upon this case is that certain sergeants, having been ordered under arrest by a young officer for a very minor offense, were afterwards, while still under arrest, directed to drill; but as the Army Regulations, properly construed, do not authorize noncommissioned officers to be required to attend drill formations while under arrest, the sergeants declined to drill as ordered. For this disobedience they were found guilty of mutiny and sentenced to dishonorable discharge and imprisonment for terms of between 10 and 25 years.

Now, it may be at once and unreservedly admitted that this was a genuine case of injustice, and that the injustice was due to an overstrict attitude of military officers toward discipline, for it is conceded by all that the young officer who gave the order to drill was both tactless and unjustified in his conduct, and it is conceded that the commanding officer who reviewed and approved the sentence was a Regular Army officer of long experience who failed to appreciate the justice of the situation. That this case illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice is plain enough. But that it indicates any general condition can not for a moment be asserted.

Moreover, this very case serves also to illustrate the essentially law-enforcing spirit which dominates in the office of the Judge Advocate General. The impropriety and illegality of the sentence in this case was immediately recognized when the record arrived in the office for review. One opinion was prepared pointing out the irregularity and injustice, and directing that the findings be set aside. But the legality of such a direction was questioned, in the face of a ruling by the Attorney General of the United States many years ago that a sentence of court-martial, once executed, can not be set aside even by the President himself. This raised the general question of the authority of the Judge Advocate General not merely to recommend for clemency (which would not have been an adequate redress for the convicted men in this case), but to direct the setting aside of the findings in a judgment of a court-martial for legal error where the sentence had been already executed (namely, in this case, the sentence of dishonorable discharge). The Secretary of War having sustained the doubt as to the authority of the Judge Advocate General to take such radical action, clemency was extended by the President releasing the men from confinement and restoring them to duty within about two months from the date of their conviction. At the same time a new measure was adopted by the Secretary of War in the shape of General Order No. 7, War Department, 1918, taking effect February 1, 1918, which prevented the recurrence of such instances by directing that the commanding general, upon confirming a sentence of death or officer's

dismissal or dishonorable discharge should suspend the execution of the sentence pending a review of the case in the office of the Judge Advocate General. Thus immediate measures were taken to go as far as could be gone under the law, as conceded on all hands, to prevent the recurrence of the situation presented in the Texas mutiny case.

Meanwhile, in order to make more ample and unquestionable the authority of The Judge Advocate General over court-martial trials in matters of legal error, a bill amending the Federal statutes was drafted and was sent on January 19, 1918, by the Secretary of War, to the chairmen of the Senate and House Military Affairs Committees. Subsequently the Judge Advocate General testified at some length before the House Military Committee in support of this bill. During the year that has elapsed since the dispatch of that proposed amendment neither the Senate nor the House committee has seen fit to take action upon the proposed legislation. It is therefore apparent that, to the extent that there may exist to-day any doubt as to the amplitude of the authority to reach out and control these legal errors occurring in court-martial proceedings and to the extent that it may be desirable to amplify that authority beyond present terms of the law, the responsibility for failure to take such action is to be laid not at the door of the Judge Advocate General's Office, but at the door of the Military Affairs committees of Congress.

II. GENERAL PRINCIPLES AND METHODS IN MILITARY JUSTICE.

Assembling the various criticisms of a general nature contained in Senator Chamberlain's remarks, they seem to be reducible to the following six heads:

1. That a soldier may be put on trial by a commanding officer's arbitrary discretion without any preliminary inquiry into the probability of the charge.
2. That commanding officers do thus put on trial a needlessly large number of trivial charges.
3. That the courts-martial themselves, as a rule, impose sentences which are excessively severe and inequitably variant.
4. That the Judge Advocate General's Office either partakes in the same attitude or makes no attempt to check it by revisory action.
5. That such attempts as the Judge Advocate General's Office does make are fruitless, because its rulings are recommendatory only and are either ignored by the division commanders or vetoed by the Chief of Staff.
6. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the criminal code, but is according to the arbitrary discretion of the commanding officer in each case.

It is my belief that the candid study of the facts will show that all six of these assertions are incorrect as representing the general conditions and apart from occasional individual cases. But before setting forth the recorded facts bearing upon the correctness of the above six assertions, some general features should be kept in mind as positive features of protection for the accused, possessed by military justice, and wholly or substantially lacking in civil justice.

(*a*) In military justice there is automatically a double examination of every serious case in the nature of appellate or revisory action by superior and supreme authority. This is in sharp contrast to civil justice where there is no appellate or revisory action unless the accused insists on it. Every soldier is assured of this double safeguard against illegal or unfair condemnation. The proceedings, except in cases of inferior courts, are taken down verbatim, and every word of the testimony, every ruling of the court, and every claim of the counsel is submitted first to the reviewing authority in the field and next to the revisory authority at Washington. The reviewing authority has for his legal adviser a commissioned judge advocate of the rank of major or lieutenant colonel, and since September, 1917, almost all of these have been lawyers of high standing, fresh from civil life, and imbued with the standards and traditions of civil practice rather than those of the Regular Army; hence likely to give fully as careful scrutiny as any civilian judge would give. On arriving at Washington for the second scrutiny, the records go to a staff composed 95 per cent of officers fresh from civilian life, ranking from major to colonel. The record goes first for scrutiny to a single officer of the military justice division, who prepares a full summary and recommendation; then to a board of review of three officers, who approve or modify the recommendation; then to the chief of division, who again scrutinizes and approves or modifies; and finally to the Judge Advocate General or Acting Judge Advocate General, who appends his signature if satisfied. Every general court-martial case thus ob-

tains this thorough scrutiny in two separate stages, or virtually four distinct stages. No such guaranties exist in any civilian court of the United States or probably of the world.

(*b*) Every military sentence as to period of confinement is virtually indeterminate, i. e., it has no minimum, and it can later be reduced to a few months or nothing. After a prisoner's sentence is affirmed, he is entitled to ask for clemency every six months. Such application is forwarded automatically by the prison superintendent to Washington. The whole record is then again reviewed. How extensively this method resulted in commuting sentences will be shown later. The clemency section of the Judge Advocate General's Office automatically acts on all such applications. Thus there is a further opportunity for correcting possible errors.

(*c*) The foregoing safeguards are applied without any expense to the accused. Here again is a feature wholly unknown to civilian justice. Reformers have for generations urged that civilian justice give to accused persons the fullest benefit of appellate revision without cost. They have never succeeded. But military justice already possesses this beneficent feature.

In examining the system of military justice, therefore, to see whether it permits results and methods contrasting unfavorably with our notions of civilian justice, let it be kept in mind from the outset that the American system of military justice starts with three great safeguards which are lacking in civilian justice, viz, an automatic double appellate review of every case before sentence is executed, a virtually automatic third review after sentence, and the application of these safeguards without reference to the accused's ability to raise money to pay for them.

I now take up the supposed general shortcomings alleged in Senator Chamberlain's remarks:

1. PUTTING ON TRIAL WITHOUT PRELIMINARY INQUIRY.

Every system of penal justice has some method of insuring the exercise of caution by a responsible officer in scrutinizing an accusation before an accused is put to the necessity of defending himself by a formal trial. The traditional method inherited by us in civilian justice, for serious offenses, is the presentment of a grand jury. This method has now proved cumbrous and ineffective; it has been abandoned in a majority of our States. The modern method of those States is a so-called information by the official State prosecutor, filed after such inquiry as he sees fit to make. This modern method is the one to which France and other continental nations arrived some centuries ago, about the time when England developed the grand jury instead. This modern American method is also the one used in our courts-martial; it arrived in the Anglo-American military system some centuries ago by adoption in Scotland, which itself had adopted the French system; for the French were the great military nation of three centuries ago.

By this Anglo-American military system some officer must file charges before any soldier can be tried. This protection is invariable. Often the judge advocate, as legal adviser, additionally scrutinizes a serious charge before it is filed. This is exactly the protection given by the State official prosecutor in the modern American method. How essential and thorough is this protection can only be appreciated by perusing the strict terms of the law and regulations. Paragraph 62 of the Manual for Courts-Martial reads:

"By the usage of the service all military charges should be formally preferred by—that is, authenticated by the signature of—a commissioned officer."

Paragraph 75 reads:

"Submission of charges: All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets or ordinary paper as are required. They will be accompanied—

"(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

"(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

"They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander, into whose hands they may come, either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require."

Paragraph 76 proceeds:

"Investigation of charges. If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority, the commanding officer will include: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken."

It will therefore be seen that the regulations required the strictest scrutiny by a responsible officer before any accused can be put on trial by a court-martial.

In Senator Chamberlain's remarks occurs the following sentence: "The commanding office may, without any investigation of the circumstances, order a man tried by court-martial; in the French Army such cases are not sent to trial until investigation can determine whether the man ought to be tried." How is it possible for such an assertion to be made in the face of the law and regulations represented in the quotation above from paragraph 76 of the manual? The safeguard contained in our manual of military justice stands on exactly the same footing with the safeguard contained in the modern method of the State prosecutor and of the French system as cited by Senator Chamberlain.

But whatever may be the law and the regulations, doubtless it may be asserted that the regulation is not obeyed in spirit. This is, in fact, the precise assertion of Senator Chamberlain in a further paragraph of his remarks; and to that assertion I now come.

2. EXCESSIVELY LARGE NUMBER OF TRIVIAL CHARGES.

It is asserted by Senator Chamberlain that commanding officers direct the filing of trivial charges in excessively large numbers. His precise language is: "It is not surprising, under the circumstances, that there are too many trivial cases sent to trial by court-martial."

Let us examine this assertion in the light of the facts of military justice during the past year, as shown by the records.

The United States military forces raised up to November 11, 1918, numbered some 4,185,000; of these about 290,000 were already in service at the opening of the war, of whom 127,000 were in the Regular Army. Thus over 90 per cent were new men, fresh from civilian life. It must be taken for certain that their unfamiliarity with military discipline and the novelty of its rigid restraints would produce an unusual proportion of minor breaches of discipline. In other words, if commanding officers had been merely as strict and rigorous as with the Regular Army before the war in pursuing minor breaches of discipline with court-martial charges, the ratio of trials would be at least as great and presumably far greater than before the war and the accession of the new army.

But the facts show, on the contrary, that commanding officers must have been far less strict and rigorous than before.

Let us take first the serious charges brought before general courts-martial. The printed report of the judge advocate general for the fiscal year, 1918, shows that the total number of general court-martial trials in the Regular

Army of 127,000 in the year ending June, 1917, was 6,200, or about 1 for every 20 men; while the total in the entire army for the year ending June, 1918, was less than 12,000, or only 1 for every 200 men (the military forces on May 31, numbering 2,415,000); and during the last six months of 1918 the total was 7,624, or at the rate per annum of only 1 for every 275 men (the military forces on Nov. 11, 1918, numbering 4,185,000). As to special courts-martial for the lesser offenses the number in the Regular Army for the year ending June, 1917, was 2,970, or 1 for every 42 men, while for the year ending June, 1918, it was 14,700, or only 1 for every 165 men. Moreover, as between the Regular Army and National Guard and the National Army or new drafted men, the number of general courts-martial for the year ending June, 1918, was 10,363 for the former and only 1,660 for the latter, or 1 for every 107 men in the Regular Army and National Guard (numbering on May 31, 1918, some 1,112,000, and composed in part of seasoned men, but only 1 in every 800 men for the National Army (numbering on May 31, 1918, some 1,333,000, and composed entirely of new drafted men); showing conclusively that commanding officers were more lenient and liberal with the men fresh from civilian life.

Turning now to the "trivial offenses" referred to by Senator Chamberlain, they are covered by the summary courts-martial, representing the extremely petty disciplinary penalties not requiring a review by the division commander. The number of trials for the Regular Army, viz, 48,000 in 1917 (rising from an average of 38,000 for 10 years past, due to a proportionate increase in the size of the Regular Army), rose in the year ending June, 1918, to only 212,000, or slightly more than four times the number, although the entire military forces in the year ending June, 1918, rose to 2,415,000, or nineteen times the former size. In short, the petty disciplinary penalties dropped from a ratio of 1 to each 2.7 men to a ratio of 1 to each 11.4 men, or a decrease for 1918 to less than one-quarter of that of 1917.

There could be no more conclusive demonstration that commanding officers, though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did, in fact, use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial. The facts show therefore precisely the opposite of the condition asserted by Senator Chamberlain.

3. SEVERITY AND VARIABILITY OF SENTENCES BY COURTS-MARTIAL.

The severity and variability of the sentences are two distinct features, and I shall therefore take them up separately, and under each of the two heads I shall further set forth the facts according to the respective offenses, because there can hardly be a common standard of either severity or variability for all offenses. In order to abridge my presentation I have taken the nine most common military offenses. In the tables of figures appended to this letter will be found the detailed data, to which I shall refer in the text of my letter.

(1) *Severity of sentences.*—In considering the severity of sentences it is, of course, necessary to examine separately the different offenses, since obviously the appropriate punishment varies widely for offenses of different moral culpability and different danger to military discipline.

(*a*) *Desertion.*—No one can approach the subject of sentences for desertion in time of war without keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes, acting assistant provost marshal general for Illinois, as set forth in his report printed in the Report of the Provost Marshal General for the Civil War (pt. 2, p. 29). In impressive language he lays the following injunction upon us:

"Incalculable evil has resulted from the clemency of the Government toward deserters. By a merciful severity at the commencement of the war the mischief might have been nipped in the bud, and the crime of desertion could never have reached the gigantic proportions which it attained before the close of the conflict. The people were then ardent and enthusiastic in their loyalty and would have cheerfully and cordially assented to any measures deemed necessary to the strength and integrity of the Army. They had heard of the 'rules and articles of war,' and were fully prepared to see * * * that the deserters from the Army would be remorselessly arrested, tried by courts-martial, and, if guilty, be forthwith shot to death with musketry.

"This was unquestionably the almost universal attitude of the public mind when hostilities began, and the just expectations of the people should not have been disappointed. Arrest, trial, and execution should have been the short,

sharp, and decisive fate of the first deserters. * * * The Government was far behind the people in this matter, and so continued until long and certain immunity had thrown such swarms of deserters and desperadoes into every State that it was then too late to avert the calamity. * * * I state these things so that if we have another war the Government may start right—put deserters to death, enforce military law, strike hard blows at the outset, tone up the national mind at once to a realization that war is war, and be sure that such a policy will be indorsed and sustained by the people.

"There are other suggestions to be made in respect to deserters, but the one I have already advanced—the nonenforcement of the penalties provided by the military code for the crime of desertion, especially at the beginning—is, beyond all question, the grand fundamental cause of the unparalleled increase of that crime and of the inability of district provost marshals, with their whole force of special agents and detectives to rid the country of deserters."

This solemn warning was naturally in our minds at the opening of the present war. But, in spite of its urgency, it was decided to exhibit our faith in the American people and to place our trust in that loyalty and devotion to duty which we felt sure would characterize the vast majority of to-day's young American manhood. We believed that the "short, sharp, and decisive fate of the first deserters" should not be the extreme penalty as urged by Gen. Oakes. And the view was generally accepted in the Army that terms of imprisonment should be ordinarily deemed the adequate repressive measure for the few who might need it. And it is a fact that of the 2,025 convictions covered by the figures shown in Table C there is not a single sentence of death for desertion.

It must, therefore, be kept in mind at the outset that the refusal to adopt the policy of death sentences for desertion was in itself a repudiation of the policy of extreme severity, and that the practice of limiting desertion sentences to terms of imprisonment is in itself the adoption of a policy of leniency. There may be a reproach for variability; but reproach for severity must deal with the fact that the policy adopted disregarded the extreme penalty authorized by Congress.

Turning, then, to the recorded facts, we find (Table A) that the total number of convictions for desertions for the year October, 1917—September, 1918, was 2,025; that the average sentence was 7.58 years; that nearly 24 per cent of these sentences were for less than 2 years; that 64 per cent were for less than 10 years; and that only 35.90 per cent were for a greater period than 10 years. The article of war reads: "Any person who deserts shall, if the offense be committed in time of war, suffer death, or such other punishment as the court-martial may direct." It would seem, therefore, that in point of severity the result of court-martial sentences for desertion can not be charged with erring on the side of severity.

You will notice that I do not here attempt to account for the justice of individual cases. Certain of the sentences for 25 years or even for lesser periods are open to criticism as excessively severe under the circumstances of the individual case. But it must be kept in mind that these trials and sentences were found legally valid by the Judge Advocate General's Office; that the only issue of doubt that could arise concerns the quantum of the sentence; and that the scrutiny of the clemency section in the Military Justice Division of the office may be relied upon to detect cases of excessive severity before any substantial portion of such a sentence has been served. Indeed, by the plan already this month sanctioned by yourself and announced to the public, there is now proceeding a general revision of sentences which will include in its scope the majority of all sentences, and not merely the excessively severe ones. But the excessive severity of an individual sentence is not the question here; that question would call for the scrutiny of the particular case. The question here is of general conditions. What the above figures show in respect to general conditions, or the trend of conditions, is that the practice has been one of relatively moderate penalties instead of the severest one permissible under the law.

(b) Absence without leave (Table A, No. 2).—Absence without leave is an offense which represents, in many instances, cases of actual desertion; but, owing to the movements of the military unit and thus the difficulty of obtaining the necessary technical proof, the actual deserter is frequently convicted of no more than an absence without leave. It is, therefore, plain that the offense of absence without leave may, upon its circumstances, merit an extremely severe penalty, equal to that of desertion. In time of war, this

offense may lawfully be punished by any penalty short of death; in time of peace a presidential order limits the maximum penalty to six months' confinement.

For the year ending September, 1918, the total convictions for this offense numbered 3,362; the average sentence was 1.59 years (or only three times the small maximum allowed in peace times); 11 per cent of the offenses received no penalty or imprisonment; 67 per cent received a sentence of less than 2 years imprisonment; and only 22 per cent received a penalty of more than 2 years in prison. When it is remembered, as above pointed out, that this offense is in many cases virtually the offense of an actual deserter, it will be seen that the number of the sentences over two years may not be disproportionate to the probable ratio of cases individually calling for the higher penalties. An average of 1.58 years for this offense, committed in time of war, can not be deemed an exhibition of severity, where, in fact, the act of Congress establishing the Articles of War leaves the court-martial absolutely untrammeled (short of the death sentence) in the penalty to be fixed to this offense.

(*c*) *Sleeping on post* (*Table A, No. 3*).—The offense of sleeping on post is punishable by death in time of war, and in time of peace "any punishment except death that a court-martial may direct." There were two sentences of death imposed by courts-martial in France for sleeping on post in the zone of operations and in the front-line trenches; those two individual cases I have already commented on in the first part of this letter. Of the whole 609 convictions, some 575 of the offenses took place in the United States, where it may be supposed that the highest penalty suitable for forces engaged with the enemy would hardly be applicable. And it is a fact that of the entire 575 there was only one sentence over 15 years, and only four sentences over 10 years. For 10 per cent of the sentences no imprisonment at all was prescribed; for 62.40 per cent of the sentences, the period imposed was less than 2 years; and all told, only 27.42 per cent of the sentences were for more than 2 years. Having in view the maximum provisions of the Articles of War, it seems plain that the treatment of this offense by courts-martial can scarcely be called a harsh one.

(*d*) *Assaulting a superior officer* (*Table A, No. 4*).—The offense of assaulting an officer is punishable, under the Articles of War, by "Death or such other punishment as the court-martial might direct"; and this irrespective of a state of war or of peace. The total convictions for this offense were only 31, giving an average sentence of 4.10 years; nearly 50 per cent of them being for a period of less than 2 years. Again, one may say that in the face of the capital punishment expressly authorized as a maximum by the Articles of War, courts-martial have not followed a practice which may be characterized as harsh or severe.

(*e*) *Assaulting a noncommissioned officer* (*Table A, No. 5*).—The offense of assaulting a noncommissioned officer is liable to "any punishment that the court-martial may direct"; and this irrespective of a state of peace or war. The total number of such convictions was 132; the average sentence was 2.36 years; more than 6 per cent were punished without imprisonment, and more than 57 per cent were punished by imprisonment of less than 2 years. There are half a dozen sentences for upwards of 10 years; the justification for these must rest upon their individual circumstances. But the average sentence of 2.36 years, compared with the maximum allowable under the Articles of War, can not be admitted to exhibit a general disposition to severity, but quite the contrary.

(*f*) *Disobeying a noncommissioned officer* (*Table A, No. 6*).—The disobedience of the lawful order of a noncommissioned officer by the Articles of War placed under the same penalty as the assaulting of a noncommissioned officer; that is, the court-martial has complete discretion in choosing the penalties, except that of death. The total number of convictions was 411, and the average sentence was 3.04 years; 8.27 per cent of sentences gave no period of imprisonment; 50 per cent gave a period of less than 2 years.

In itself, this average sentence, comparing it with the maximum allowed by the Articles of War, can not be referred to as a severe one. It is notable, however, that this offense of disobeying a noncommissioned officer, received a higher average of sentence, viz. 3.04 years, than the apparently more heinous one of assaulting a noncommisioned officer, viz, 2.36 years. It may be admitted that some explanation remains to be sought for this apparently anomalous result, but it can

be pointed out here that the disobedience of a noncommissioned officer is often of a deliberate character making the offense a highly serious one, whereas the offense of assaulting an officer is often the result merely of a quick temper without any deliberate intention of resistance to authority, and that it thus deserves considerate attention by the tribunal.

(*g*) *Mutiny* (*Table A, No. 7*).—There were 51 convictions for mutiny; the average sentence was 7.93 years; 27 per cent fell between 2 and 3 years, and 43 per cent fell between 10 to 15 years; the other sentences scattering over the various percentages. The Articles of War provide that a person guilty of mutiny "shall suffer death or such other punishment as the court-martial may direct," irrespective of a state of peace or war. When committed in its most significant form, it is, of course, the most heinous offense of a soldier. But it may also be committed under much less culpable circumstances. In short, it gives an opportunity for the widest range of discretion in the imposition of sentences. This inherent quality is reflected in the wide range of sentences actually imposed. In view of the fact that, in any army numbering more than 3,000,000 men at the time covered by these records, there were only 51 offenses in the nature of mutiny or related thereto, out of a total number of offenses of 12,472, it is plain that the number of such convictions is extremely small; and it must be inferred that the commanding officers were not seeking relentlessly for offenses that could be characterized as mutiny, and that the offenses actually characterized as such were offenses which well deserved the name. From June, 1917, to June, 1918, when the Regular Army and National Guard together consisted of less than 300,000 men, the total number of convictions for mutiny was 43; and yet with an army of ten times the size, the number of convictions for mutiny increased only one-fifth. It seems obvious that the practice of courts-martial during the year of the war could hardly justify a reproach of severity for the offense of mutiny.

(*h*) *Disobeying standing orders* (*Table A, No. 8*).—This offense is punishable under the Articles of War by such sentence of imprisonment as the court-martial may direct. The total number of convictions for this offense was 208; the average sentence is 1.96 years; for 12 per cent of the sentences no period of confinement was imposed; for 60.58 per cent a confinement of less than 2 years was imposed; 10.58 per cent of sentences were between 5 and 10 years; the rest scattering in other periods. In view of the maximum limit permitted to the discretion of the court under the Articles of War, and in view of the variety of circumstances affecting the nature of this offense, it can not be said that the tendency of the courts has been to severity.

(*i*) *Disobeying an officer* (*Table A, No. 9*).—The offense of disobeying a superior officer is punishable, under the Articles of War, by "death or such other punishment as the court-martial may direct"; It is covered by the same article of war that deals with assault on a superior officer, but obviously it should usually rank as an offense of lower grade. The total number of convictions for this offense was 785; the average sentence was for 4.34 years; 6 per cent of sentences were punished by imprisonment; 43.69 were punished by confinement of less than 2 years; and a trifle over 50 per cent were punished by some period greater than 2 years, there being 1 death sentence and 18 sentences for 25 years or more. It will be noticed that the average sentence for this offense was almost identical with the average sentence for the offense (No. 4 above) of assaulting a superior officer, and that in both cases a little less than 50 per cent of sentences were for periods of confinement less than 2 years. But these two offenses were treated differently with respect to the sentences for higher periods; the bulk of the long-termed sentences for assaulting an officer lying between 5 and 10 years, while for the offense of disobeying an officer, they were spread out over the periods between 3 years and 25 years or more. Comparing the absolutely unlimited nature of the punishment permitted by the Articles of War to be imposed by the court-martial, and observing that 50 per cent of these sentences were for periods of under 2 years, it can not be that the tribunals appear to be seeking to exercise the maximum of severity allowable, but rather the contrary.

This completes my survey of the sentences for the nine principal military offenses.

In the foregoing comments it will be noticed that, since a charge of excessive severity implies the habitual resort to a maximum standard allowable under the law, the standard here to be taken must of necessity be the standard set by the Articles of War as adopted by the act of Congress. Judging by this standard, the practices of the court-martial, to any candid observer, must be vindicated

from the charge of the habitual employment of severity; rather have they proceeded in a direction of a lenient use of their discretion.

But the mind naturally seeks to test this issue of severity by any other accepted standard that may be available, apart from the intangible standards of individual notions. There appear to be two and only two such other standards available. One is the standard to be gathered from former practice in the Army; the other is the standard to be gathered from civil courts. Neither of these is entirely appropriate; but it is my duty to see what light can be thrown by them upon the present subject.

(*a*) *Former practices of courts-martial.*—Unfortunately the records available in the printed reports of former years are but scanty in their application to the present purpose. No data as to the length of sentences have been published in the former reports of my office, except in the report for the fiscal year 1917–18, and then only for the offense of desertion. Taking these data for such light as they may give us (Table XIV, page 31, Report of the Judge Advocate General, 1918), we find that the length of sentence did increase gradually during that year. The figures are as follows:

DESERTION.

Month.	Convictions.	Total months' confinement given as part of the sentence.	Average month's confinement (total months' confinements divided by sentences imposed).
1917.			
May	3	48	15
June	8	276	34.5
July	17	560	52.94
August	27	450	22.5
September	44	1,604.75	38.21
October	56	2,521.75	45.85
November	52	1,863	36.53
December	93	5,153	57.26
1918.			
January	203	9,057	48.43
February	202	8,925	50.14
March	202	13,088.75	69.25
April	228	16,906	79.75
May	194	19,109	99.53
June	224	24,399	112.96
Total	1,553	104,051.25	71.02

It will thus be seen that the average sentence for the year ending June, 1918, was almost exactly six years, as compared with an average of 7.58 years for the period October 1, 1917, to September 31, 1918, and that the average of six years for the period May, 1917–June, 1918, started at between two and three years for the first seven months of the war, and then rose steadily until it was reaching nine years in the fifteenth month of the war.

I do not pretend to be able to interpret the significance of this gradual rise in the average length of sentence for the offense of desertion. So many conditions are involved that any one of several hypotheses may account for the circumstance. I content myself with pointing out, as a possible explanation, the principles already quoted from Brig. Gen. Oakes in his report on desertion in the Civil War, viz, it is quite possible that the military tribunals began with an extremely low penalty, but that as the training of the new forces proceeded in camps a general impression obtained that the protection of the army against the spread of desertion required a somewhat more stringent penalty.

As to any other offenses than desertion, and as to any periods prior to June, 1917, it is not now feasible to ascertain what were the standards of courts-martial sentences in peace-time practices. But inasmuch as a condition of war transforms the whole situation for military discipline and puts into effect the strictest standards of military behavior, it is not possible to presume that the

sentence length imposed in former peace-time practice would afford a suitable standard for comparison with war-time practice.

(*b*) *Standard gathered from civil courts:* Here it will be necessary to depart from the list of principal military offenses, which have no counterpart in the civil courts, and to resort to the principal civil offenses represented in the military records. The criminal statistics of the United States are but imperfectly organized for study, and the only available record for the present purpose that could be found, after extensive search, is in the report of the Director of the Census for 1910, entitled "Prisoners and juvenile delinquents in the United States." Table 42, at page 64, sets forth the variance in periods of sentences imposed for the various civil offenses. Setting these side by side with the sentences imposed for the corresponding offenses by military courts during the year ending September, 1918, the result is shown in the following Table I.

TABLE I.—*Sentences for civil offenses in military and civil courts compared.*

Offense and court.		Total.	Life or death.	10 years and over.	5 to 9 years.	2 to 4 years.	1 to 2 years.	Under 1 year.
Forgery:								
Military	number	223	.....	35	63	69	20	36
	per cent	100	.....	15.7	28.3	30.9	9	16.1
Civil	number	1,290	.....	43	146	569	323	209
	per cent	100	.....	3.3	11.3	44.1	25	16.3
Perjury:								
Military	number	14	.....	.....	.....	2	3	9
	per cent	100	.....	.....	.....	14.3	21.4	64.3
Civil	number	128	.....	1	3	38	49	37
	per cent	100	.....	0.8	2.3	29.7	38.3	28.9
Embezzlement:								
Military	number	162	.....	22	31	36	23	50
	per cent	100	.....	13.6	19.1	22.2	14.2	30.9
Civil	number	487	.....	7	22	76	117	265
	per cent	100	.....	1.4	4.5	15.6	24	54.3
Robbery:								
Military	number	117	.....	42	34	28	3	10
	per cent	100	.....	35.9	29.1	23.9	2.6	8.5
Civil	number	904	2	192	205	229	133	143
	per cent	100	0.2	21.2	22.7	25.3	14.7	15.9
Larceny:								
Military	number	1,025	.....	89	131	237	188	380
	per cent	100	.....	8.7	12.8	23.2	18.3	37
Civil	number	19,136	3	120	393	1,970	2,636	14,014
	per cent	100	.....	0.6	2.1	10.3	13.8	73.2
Rape:								
Military	number	15	[1] 7	4	2	1	.....	1
	per cent	100	46.6	26.7	13.3	6.7	.....	6.7
Civil	number	763	[2] 38	181	174	149	117	94
	per cent	100	5	24	23.1	19.8	15.5	12.6
Gambling:								
Military	number	15	.....	1	3	1	.....	10
	per cent	100	.....	6.7	20	6.7	.....	66
Civil	number	671	.....	.....	1	7	20	643
	per cent	100	.....	.....	0.1	1	3	95.9
Burglary:								
Military	number	29	.....	4	8	7	3	7
	per cent	100	.....	13.8	27.6	24.1	10.4	24.1
Civil	number	4,925	7	227	750	2,015	1,062	864
	per cent	100	0.1	4.6	15.2	40.9	21.6	17.6
Threats to do bodily harm:								
Military	number	30	.....	5	4	5	3	13
	per cent	100	.....	16.7	13.3	16.7	10	43.3
Civil	number	235	.....	.....	1	2	14	218
	per cent	100	.....	.....	0.4	0.9	6	92.7
Murder:								
Military	number	24	[3] 10	4	2	2	3	3
	per cent	100	41.7	16.7	8.3	8.3	12.5	12.5
Civil	number	937	[4] 814	109	3	7	4	.....
	per cent	100	86.9	11.7	0.3	0.7	0.4	.....
Manslaughter:								
Military	number	33	.....	[5] 7	5	[6] 9	6	6
	per cent	100	.....	21.2	15.2	27.2	18.2	18.2
Civil	number	1,437	[7] 24	520	419	341	97	36
	per cent	100	1.6	36.2	29.2	23.7	6.8	2.5

[1] Hanged.
[2] 3, death.
[3] 2 hanged, 2 commuted.
[4] 118, death.
[5] 3 mitigated.
[6] 1 mitigated.
[7] 5, death.

In the above table the percentages are the significant items. On the whole, it appears that the percentage of long sentences is greater in the military

courts than in the civil courts. For example, in the offense of forgery the sentences of 10 years and over were 15.7 per cent of all sentences, while in the civil courts they were only 3.3 per cent; the sentences for 5 to 9 years were 28.3 per cent, while in the civil courts they were only 11.3 per cent.

But this general trend is marked by so many exceptions that it is hardly open to any general conclusions. For example, in perjury the military court gave a sentence of under one year for 64.3 per cent of the cases, while the civil court gave its lowest sentence in only 28.9 per cent of the cases. Similarly for burglary the military court gave its lowest sentence in a larger percentage of cases than did the civil court. So, too, turning to the highest sentence it appears that murder and manslaughter received less severity of sentence in the military courts than in the civil courts; for murder only 41.7 per cent were sentenced in military courts to the death penalty or life imprisonment, while in the civil courts 86.9 per cent received such penalty; and similarly for manslaughter the percentages of sentence of life imprisonment or imprisonment of 10 years or over or imprisonment from 5 to 9 years were only about half as large as the percentages of the same sentences in the civil courts.

Moreover, it must also be remembered that the moral heinousness and danger of even these civil offenses, common to both codes, varies more or less in military life and civil life. Larceny, for example, which to the civilian mind never receives the deepest measure of reprobation among property offenses, has long been deemed throughout the rank and file of the Army as an intolerable offense, for the safety and mutual confidence of military intimacy as fellow soldiers becomes impossible unless every soldier can be assured that his few and precious belongings can be safely left unguarded in his restricted quarters. In those sections of our country where the horse has always been indispensable to every man's daily occupation, the offense of horse stealing is visited with penalties which seem grossly severe to the residents of other communities; indeed, so far has this principle been carried that in one Southwestern State noted for its splendid horses the law (unless it has been recently changed) permits the owner of a horse to shoot the horse thief while in the act of running away with the property, a privilege not accorded by the law of any other State. It is undoubtedly due to this sentiment that in the table above the offense of larceny is found to be visited with sentences of more than two years in percentages considerably in excess of the percentages found in the sentences of civil courts.

I mention the foregoing instances only as a preface to the general suggestion that the use of longer terms of sentences in military courts than in civil courts for some of the above civil offenses may well be explained by the exigencies of internal military life and by the habitual standards of military conduct known to all soldiers, rather than by any disposition on the part of military tribunals to impose heavier sentences for offenses of an identical nature.

I close this part of my letter, therefore, by noting that the general practices of courts-martial, judged by the maximum sentences allowable by the military code, must be deemed not to merit the charge of excessive severity and that, in my opinion, they rather merit the opposite characterization.

This general condition of things, however, I repeat, must of course be sharply discriminated from the question of the excessive severity of a particular sentence measured in the light of the circumstances of the individual case. That is a question totally irrelevant to the judgment to be passed upon the propriety of the practices of courts-martial in general, as judged by their average treatment of the offenses coming before them.

(2) *Variability of sentence.*—When we come to the question of variability of sentences we reach a subject which has been the fertile field for complaint and criticism in civil courts for a century past. It is notorious that the independent judgment of different courts and of different juries seems to be characterized by the most erratic and whimsical variety. Such has been the constant burden of complaint in civil justice, and it can hardly be hoped that military justice could escape a similar complaint in some degree. On the other hand, it must always be remembered that here the individual circumstances vary so widely that a variation of sentences is perfectly natural, and that the mere variation of figures in itself signifies very little, where the individual circumstances remain totally unknown to the critic. Nevertheless, a variability of sentences for the same offense is something which naturally excites attention and caution, and it should be the object of appellate authorities to equalize the penalties for the same offense where no obvious reason for

substantial difference is found. How far the revisory authority of the Judge Advocate General and the clemency powers of the Secretary of War have been effectual to secure such equalization will be noted later in this letter. At the present the inquiry of fact is whether there has been such variability and at what points it has taken place.

Table A, above referred to and annexed to this letter, summarizes for the nine principal military offenses the variance of the sentences: First, by months of the year covered; and, secondly, by jurisdiction areas from which the court-martial records come up for revision. In summary of these variances, it is here to be noted that such variances obviously exist: that these variances are not in themselves any more striking than those that are found in the sentences of civil courts, as already shown in table B; and that in seeking the possible source of these variances it appears very strikingly that there has been a slight but appreciable increase in the number of higher-period sentences as we come down to the later months of the war; and that, so far as jurisdictional areas are concerned, there have been notable variances which seem, in some cases, to localize the higher-period sentences, for certain offenses, in certain specific areas.

As illustrating the foregoing inferences, it will be sufficient here to take the single offense of desertion. Examining it by months, it will be noticed that the long-term sentences of 10 to 15 years and of 15 to 25 years and over 25 years increase slightly in their ratio to the whole of the sentences for the month as we approach the later months of the year under examination. For example, for the months of October, 1917, to February, 1918, there were no sentences over 25 years, although the number of convictions increased from 55 to 196 (the increase, of course, being due to the much greater ratio in the increase of armed forces). But during the months of April to July, with approximately the same number of convictions, averaging 225, the number of sentences for over 25 years increased from 4 to 9, to 15, and finally to 33. Apparently, therefore, some conditions in the Army changed as the months advanced so as to induce this variance in the direction of higher-period sentences. Just what those conditions were are not even the subject of speculation without a very careful inquiry; merely the fact is here pointed out.

Again, turning to the jurisdictional areas, we find that the Central Department shows about 9 per cent of sentences for over 10 years, while the Eastern Department shows only 3 per cent; that the Twenty-eighth Division, having 21 convictions, imposed no sentences in excess of 10 years, while the Eightieth Division, with exactly the same number of convictions, imposed 14 sentences greater than 10 years.

As further indicating this variance by jurisdiction areas, a glance at the same Table A, under the offense of "absence without leave," shows that in the Twenty-eighth Division, which exhibited the above leniency for desertion, so the offense of absence without leave was given a sentence of under 2 years for 127 out of 140 convictions, while the Eightieth Division, which had shown a large majority of long-term sentences for desertion, was on the other hand, lenient for the offense of absence without leave, imposing 16 sentences of under 2 years out of 20 convictions. Comparing again the Thirty-sixth and Thirty-ninth Divisions, with substantially the same number of convictions, viz, about 175, one finds that the former imposed about 20 sentences of above 10 years, while the other imposed 101 sentences above 10 years. This same Thirty-ninth Division had also used a majority of higher-period sentences for desertion, whereas the Thirty-sixth Division showed for desertion a record that averaged with the other divisions.

It will be seen, therefore, that in many, if not in most cases the extreme variance may be traced to difference of practice in the different jurisdictional areas. Just what conditions existed which would justify in the individual cases, or in the general trend of cases, this variance between divisions can hardly be the subject even of hypothesis. But it must be obvious to any candid observer that there do exist wide differences of conditions, not only in the racial and educational makeup of the different camps, but also in the morale and necessities of discipline prevailing in different camps. It is well known that the sentences of civil courts for civil offenses vary widely in the different States. For example, in 1910 (census report above cited, p. 50), the percentage of sentences of 10 years or over was 9.7 in the East South Central States, but was only 0.1 in the New England States; in Mississippi it was 22.51, but in California it was only 2.3. This illustration is mentioned merely to suggest that whenever one discovers that variances in sentences have a cer-

tain relation to variances in camps or divisions, the subject becomes at once too complex for hasty judgment.

Whatever may have been done or may now be contemplated as to the equalization of sentences by commutation in the way of clemency, I am only concerned here to point out the facts as they are found in the records relative to the action of the courts-martial themselves, as are revealed in any noticeable amount, seem to be due most largely to differences of conditions in the different camps, divisions, and other jurisdictional areas, and the greatest caution must be exercised before passing judgment upon such variances and inequalities, without being fully familiar with the conditions operating in those places.

I can not leave this subject without inviting attention to the enlightened tenor of the principles inculcated thoroughly upon the members of courts-martial by the manual which serves as their guide. This manual is required to be studied by all candidates for appointment as officers in the training camp, and a familiarity with its contents is required. Paragraph 342, on the adaptation of punishments, reads as follows:

"In cases where the punishment is discretionary, the best interests of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; that the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which, from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required."

It is confidently believed that the principles thus inculcated upon members of the courts-martial will be found not to have been substantially departed from when tested by the results shown in the above figures for 1917–18.

4. ATTITUDE OF THE JUDGE ADVOCATE GENERAL'S OFFICE AS TO SEVERE OR VARIABLE SENTENCES.

The distinct implication running throughout the remarks of Senator Chamberlain is that there is no central authority which can check, equalize, and correct such severity or variability as may be found to be excessive; in other words, that the Judge Advocate General's Office, charged with the duty of revising these court-martial records either acquiesces in the results of the court-martial sentences as approved by the reviewing authority of the division or department or makes no attempt to check any excesses by revisory action.

It is necessary therefore to emphasize what has been already pointed out above, that the Judge Advocate General's Office scrutinizes the court-martial records for the very purpose of discovering not only errors of law or procedure, but also excesses of sentence. The law section of the military justice division besides scrutinizing the records for errors of law or procedure has from time to time made recommendations, when sending back the record to the reviewing authority, that the sentence be revised. But, furthermore, the clemency section of the military justice division occupies itself exclusively with the scrutiny of records after the man's confinement has begun and an application for clemency has been filed.

But it is not enough to point out the existence of these powers and practices of the Judge Advocate General's Office. Inquiring into the results to see what the facts show I ask: To what extent has the Judge Advocate General's Office called for a reduction of sentence by recommendation of clemency to the Secretary of War?

(1) The extent of such recommendations as to number of sentences will be found by taking the total number of sentences for all offenses classified by length of term, noting the number of these sentences recommended for reduc-

tion by clemency by the Judge Advocate General's Office, and then reckoning the percentage of offenses of each length thus reduced. This gives the following results:

TABLE B.—*Distribution of sentence reductions by Judge Advocate General's Office according to length of original sentence.*

	Total sentences, by length of terms, for 9 principal military offenses, Oct. 1, 1917, to Sept. 30, 1918.	Sentences recommended by Judge Advocate General's Office for reduction, 9 principal military offenses, Jan. 1 to Dec. 31, 1918.	
		Number.	Per cent.
Total	7,624	947	12.42
Below 2 years	3,886	330	8.49
2 to 3 years	483	174	36.02
3 to 5 years	482	135	28.00
5 to 10 years	1,064	197	18.51
10 to 15 years	626	68	10.86
15 to 25 years	373	33	8.84
25 years or more	159	10	6.28

The important thing to notice about the table is that it shows 12 per cent of the total sentences to have been reduced by clemency exercised on recommendation of the Judge Advocate General. I see no reason to doubt that this 12 per cent is ample enough to cover all the individual cases in which an excessive severity would have been apparent on the face of the record.

The above table shows the reduction in its relation to the sentences of different lengths. The table shows that the largest percentage of reduction occurred in the sentences of medium length, and that the smallest percentages of reduction occurred in the sentences of shortest and of longest periods.

This result is perfectly natural and appropriate. The shortest sentences are those in which there would be the least call for reduction by clemency on the ground of excessive severity. The longest sentences are those in which the reduction on the ground of excessive severity would presumably not bring them to an extremely low period and therefore in which the time for recommending such reduction had presumably not arrived.

(2) How much total reduction did this action effect in the total length of all the sentences acted upon? This will afford some gauge of the thoroughness of the action in the nature of clemency. Table C below shows the number of sentences recommended for reduction, the total years of the original sentences, the total years reduced on recommendation of the Judge Advocate General's Office, and the net years of sentence as actually served. The figures are given for the nine principal military sentences, as well as for the total thereof.

Referring to the table for details as to the specific offenses, I will point out here merely that the total reduction effected was a reduction of 3,876 years out of an original period of 4,331 years, or a reduction of 89½ per cent. In other words, action of this office, in effecting reductions in the 1,147 sentences selected on their merits for reduction, cut them down to 10.50 per cent of their original amount. Presenting the same result in another form, the same table shows that the average original sentence of these 1,147 sentences was for a period of 3.78 years (or nearly four years), and that the average sentence as reduced was only 0.40 of one year, or less than five months.

These figures as to reduction effected in the length of the sentences, demonstrate that the action of this office was a radical one, and must have served to eliminate the excessive severity in those sentences. That the sentences selected for such recommendations of clemency included all of the sentences meriting the term "severe" neither I nor anyone else would be in a position either to affirm or deny without a consultation of every record. But I think that it is fair to assume that the scrutiny of the officers of the Judge Advocate General's staff presumably included all of those cases in which an excessive severity was obvious on the face of the record.

TABLE C.—*Reductions of sentences recommended by Clemency Division, J. A. G. O., according to amount of reduction. Jan. 1, 1918, to Dec. 31, 1918.*

Offenses.	Number of court-martial sentences. Oct. 1, 1917, to Sept. 30, 1918.	Number of sentences recommended by Judge Advocate General's Office for reduction.		Years of original sentence in cases selected for recommendation.		Total years reduced on recommendation of Judge Advocate General's Office.		Net years of sentence as served.		Per cent of averages.
		Number.	Per cent.	Number.	Average.	Number.	Per cent on third column.	Total years.	Average in years.	
Total offenses	12,472	1,147	9.20	4,331.28	3.78	3,876.69	89.50	454.59	0.40	10.50
Desertion	2,025	577	23.49	2,193.49	3.80	2,056.56	93.76	136.93	.24	6.24
Absence without leave	3,362	112	3.33	361.67	3.23	313.72	86.74	47.95	.43	13.26
Sleeping on post	609	63	10.34	187.08	2.97	150.14	80.25	36.94	.59	19.75
Assault and attempt to assault	173	34	19.65	135.00	3.97	108.09	80.07	26.91	.79	19.93
Mutiny	51	10	19.61	49.00	4.90	46.81	95.53	2.19	.22	4.47
Disobedience, disrespect, disloyalty	1,404	151	10.75	567.17	3.75	454.57	80.15	112.60	.75	19.85
Disobedience of regulations	208	46	22.16	192.75	4.19	116.07	60.22	76.68	1.67	39.78
Disobedience of orders	1,196	105	8.78	374.42	3.57	338.50	90.41	35.92	.34	9.50
Miscellaneous, forgery, larceny, etc	4,848	200	4.13	837.87	4.19	746.80	89.13	91.07	.46	10.87

5. EFFECTIVENESS OF RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

But the foregoing demonstration of the extent of mitigation of severity effected by the Judge Advocate General's Office, through its recommendations, is vain and meaningless, according to Senator Chamberlain. In his remarks I find it repeatedly asserted and implied that the commanding officer of the division or department—in technical expression, the reviewing authority—is not obliged to follow and does not follow these recommendations. "Court-martial sentences found by the reviewing authorities to be null and void for want of jurisdiction," he states, "have been allowed to stand." "The military commander is not obliged either to ask for legal advice or to follow it when he has asked for it and it has been given to him by responsible law officers of the Army." "Courts-martial should be required to accept the interpretation of the law by a responsible law officer."

Here again we have arrived at a simple question of fact. There is, to be sure, a question of legal theory involved. The records of courts-martial come to the Judge Advocate General to "revise"; and what legal effect this "revision ought to have in theory is a mooted question of law and policy on which it is needless to enter here. Suffice it to say that a difference of view exists and that the judgment expressed by the Judge Advocate General in his appellate capacity is customarily phrased in terms of a recommendation to the commander in the field. But this question, after all, like many questions of fundamental principle, may become practically irrelevant in the light of the facts. The assertion made in Senator Chamberlain's remarks is an assertion of fact, viz, that the commanding officer *does not* follow the legal advice which is given him and does not accept the rulings of the responsible law officer.

On the question of fact, let the facts themselves answer:

The cases fall necessarily into two groups. One class of cases coming to the Judge Advocate General for revision under United States Revised Statutes, section 1199, the thirty-eighth article of war, and General Order No. 7, January, 1918, require and receive no other revision or approval than that given by the Judge Advocate General. The other class of cases includes all sentences of death and of dismissal of officers, which, under the forty-eighth article of war, require confirmation by the President as well as certain other cases in which error of law has been found, but the execution of the sentence has not been suspended

by the reviewing authority. The former class of records go directly back from the Julge Advocate General to the reviewing authority in the field; the latter class of cases go from the Judge Advocate General through The Adjutant General and the Chief of Staff to the Secretary of War, and sometimes to the President. The question of fact is, therefore, in what proportion of cases does purely military authority fail to give effect to these revisory rulings of the Judge Advocate General?

The results in both classes of cases are shown in the following Table D:

TABLE D.—*Effect of action of Judge Advocate General's Office October, 1917, to September, 1918.*

Cases recommended for modification or disapproval on legal grounds.[1]	Number of cases.	Recommendations given effect.		Recommendation not given effect.	
		Number.	Per cent.	Number.	Per cent.
To reviewing authority	125	121	96.8	4	3.2
To War Department	141	135	95.7	6	3.8
Total	263	256	96.2	10	3.8

[1] Does not include a few cases in which the recommendation referred only to the place of confinement.

It thus appears that out of a total for the period covered of 266 cases recommended by the Judge Advocate General for disapproval on legal grounds, there were only 10 cases in which the Judge Advocate General's ruling was not followed; of these cases, 4 were not followed by the reviewing authority in the field, and 6 were not followed in the Secretary of War's Office.

In the light of these facts, I think I am justified in asserting that the records disclose no foundation for the assertion which Senator Chamberlain has been led to make. It is not a fact that the military commander or that any military authority proceeds to follow out the dictates of his own discretion regardless "of the interpretation of the law by a responsible law officer," nor that he fails to follow the legal advice "when he has asked for it and it has been given to him by the responsible law officers of the Army." Whatever may be the legal theory of the function now placed by statute in the Judge Advocate General as the law officer or appellate tribunal for military justice in the Army, that theory becomes virtually immaterial in the light of the facts during the period of the war. The state of things supposed by the Senator to exist, simply does not exist. Virtually the recommendations of the Judge Advocate General are given practical effect in the same manner as the trial courts in civil justice give effect to the mandate of the supreme court of the State.

6. MILITARY LAW AS DEPENDENT ON THE MILITARY COMMANDER'S DISCRETION.

But this brings me naturally to the last and most general assertion contained in the Senator's remarks, viz, that the general treatment of accused soldiers is not according to the strict limitations of law as embodied in the military penal code, but is made to depend upon the arbitrary discretion of the commanding officer in each case; or, to use the Senator's own language, "the records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice; we have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer."

As a concrete demonstration of the incorrectness of this assertion, the foregoing facts, taken directly from the records of the courts-martial, appealed to by the Senator, must suffice as a principal refutation. And yet the Senator's remarks call for more than the citation of concrete facts to the contrary. I will, therefore, take the opportunity to point out briefly what general difference does exist between military justice and civil justice.

The substance of my counter assertion is that although the theory of military justice does differ slightly from the theory of civil justice, yet in substance and in practice both of them, in our inherited Anglo-American system, are

fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law.

The only kernel of correctness in the abstract statement of Senator Chamberlain is that the theory of military justice is in its general purpose somewhat different from the theory of civilian criminal justice. The contrast of theory between the two is well set forth in a statement of Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War:

"The object of the civil law," he says, "is to secure to every human being in a community the maximum of liberty, security, and happiness 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."

This definition of Gen. Sherman shows that the objects to be attained are different, in that military justice aims to make the man a better soldier or to eliminate him from the military organization if he can not be improved, while civilian justice looks to the ultimate protection of the community at large.

But, once this difference of theory and purpose is conceded, the two systems proceed in identical method, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand and the inflexible rigor of automatic penalties on the other hand.

The former end is attained by a system of courts, procedure, and definitions of offenses, which contains the counterpart of civilian justice in virtually every respect; and which, as already noted, is superior to the civilian system in its ample provision for automatic appellate review in every case These rules and regulations are fully set forth in the Manual for Courts-Martial; every officer is required to be familiar with this; and a new edition of 50,000 copies, revised to date, was just printed in October.

The other aim, to protect the offender from the harsh consequences of a rigid system of penalties, is secured by the method of indeterminate sentences, i. e., virtually a probationary sentence for every man whose offense is not so heinous as to rquire immediate separation from the Army. For seven years past, military justice has possessed an indeterminate sentence and probation system which is in advance of that of any State of the Union; for it possesses virtually no minimum limit. How effective it is in mitigating and commuting the sentences originally imposed has been seen in the figures already set forth.

The system of military justice thus established is one of law and orderly procedure, not one of arbitrary discretion of the commanding officer. The proceedings are so conducted as to preserve for scrutiny of the superior authority every point of law which can possibly be raised for the protection of the accused. The accused is furnished a copy of the proceedings on request. This record goes up to the reviewing authority, and then to the Judge Advocate General. The Judge Advocate General's rulings on revision represent the application of all those legal principles which are required by law and regulations to be observed—definition of offenses, organization of the court, due procedure, sufficiency of proof, limitations of penalty, and so on. And the judgment of the Judge Advocate General, embodying those principles, is practically enforced and put into effect by the commanding officers with virtually the same effect as the decision of an appellate civilian court. The picture drawn of an arbitrary commanding officer contemptuously ignoring the limitations of law as embodied in the opinion of the Judge Advocate General is incorrect. In justice to officers of the Army who have in the stress of war acted as convening authorities it should be dismissed from the minds of the American people.

The foregoing figures and facts amply show this. But another and convincing way to understand it would be to read a few records from the Judge Advocate General's Office. They bear all the familiar marks of a record in any civilian court of criminal appeal. Except for the subject being a military offense, the spirit permeating them is essentially not different from that of the records of a civilian court—the same raising of legal questions as to the allegations of the offense, the jurisdiction, the procedure, the evidence, and the judgment. The whole record is redolent of legalism. No one can read these records and not admit that the system of military justice is as full of legal limitations as any civilian system. Some might even infer that the technicalities of civilian criminal law are too prominent. But none could assert the contrary.

That military justice can not be improved in many details could certainly not be maintained. Much might be said on this subject. But neither does any one maintain that civilian justice is perfect. The experience of the past year and a half, when carefully studied, will doubtless reveal numerous details in which improvement of the military code can be secured. It will first be necessary to compare divergent opinions, based on differences of local experience and of important policies. But the same is true of each one of our institutions, civil as well as military, that has passed through the crucible of war time. What we possess is a system of military justice founded on the Constitution, the statutes of Congress, and the President's regulations, administered in the trial courts by officers required to be familiar with it, and scrutinized in the appellate stages by professional lawyers whose sole object is to insure conformity in every substantial detail to those requirements of law.

E. H. CROWDER,
Judge Advocate General.

LETTER TO SENATOR CHAMBERLAIN.

FEBRUARY 13, 1919.

HON. GEORGE E. CHAMBERLAIN,
United States Senate.

MY DEAR SENATOR CHAMBERLAIN: On the appearance of your remarks in the Congressional Record on January 3, 1919, with reference to the administration of military justice during the war, I at once directed that the Judge Advocate General's Office prepare such data as are available for your information and that of the Senate dealing with the subject. It is not unnatural that so grave a matter as this should attract widespread public attention and that the humane sentiments of Senators and the public should be stirred by such representations as were made to you and formed the basis of your remarks.

In the meantime, as I have happened to be a lawyer and to have had considerable experience as an executive in dealing with the administration of criminal law and of prison discipline, my own attention was not unnaturally attracted to the administration of military justice upon my assumption of the office of Secretary of War. Until the entry of the United States into the European war I found it possible personally to examine the records in most of the cases involving serious penalties. This became impracticable with the increasing demands upon my time, and I therefore came to rely for my action in these matters more and more upon the elaborate reviewing machinery erected in the Office of the Judge Advocate General to deal with these cases, although when any doubt was brought to my attention, either by division of opinion or from outside suggestion, I either personally examined the records or caused them to be independently examined by lawyers whose relation to the subject was purely judicial. It seemed, therefore, quite incredible that any general and widespread perversion of the principles of justice could have crept into a system with the workings of which I was thus familiar and the organization of which seemed to me so well calculated to secure thorough consideration and the application of most humane policies.

The Judge Advocate General has just handed me a letter covering such preliminary examination as he has been able to make of the situation, which is to be followed by a report much more comprehensive in character; but the inquiry so far made has developed a situation which I think ought to be brought to your attention at once and which I have no doubt you will be glad to bring to the attention of the country in order that the interest which has been aroused on this subject will have before it all the facts which ought to be considered before any judgment is formed or any apprehension created on the part of parents or friends of those in the military establishment that soldiers are subject to a harsh and unequal discipline.

In addition to the data presented in Gen. Crowder's letter, I beg leave to express my willingness to produce all other data and information within the control of the department which would be useful or interesting to the members of the committee.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

LETTER TO MR. LUNN.

WAR DEPARTMENT,
Washington, March 1, 1919.

HON. GEORGE R. LUNN,
House of Representatives.

MY DEAR MR. LUNN: I think I can answer your question about the course of military justice during the war more adequately by sending you the inclosed copy of a letter written by Gen. Crowder to me than in any other way. Immediately after the original discussion of the subject in the Senate, I asked Gen. Crowder to give me a comprehensive memorandum covering the whole matter. This letter resulted. Its statements are, I think, most reassuring.

In the meantime, I may say that during the war we investigated and acted upon the cases involving the death penalty and dishonorable discharge from the service. The great number of cases involving long terms of imprisonment could not be circumstantially reviewed under the pressure then existing. The fact of the legality and sufficiency of the trials was inquired into and the cases otherwise put aside for mature consideration. A board of officers organized in the Office of the Judge Advocate General, known as the clemency board, has been at work for some weeks reviewing these postponed matters, and I have already in a good many cases acted upon the suggestion of that board by reducing some of the longer sentences to such terms of imprisonment as would have been imposed for like offenses under the peace-time procedure in force in the department.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 164.

[From Congressional Record, Feb. 19, 1919.]

Mr. BURNETT. Mr. Chairman, a few days ago I felt called upon to criticize some of the methods of the War Department in regard to the infamous system of courts-martial that were being held in our armies. In the course of those remarks I criticized somewhat severely Gen. Ansell, who had been acting as Judge Advocate General. Facts that have come to my attention since that time have led me to believe that I was perhaps too harsh in that criticism. I have received a letter from Gen. Ansell, and the gentleman who handed that letter to me stated that I was at liberty to place it in the Record. This letter shows much of the activity of Gen. Ansell in trying to reform the infamous system.

It always gives me pleasure when I have done even a partial injustice to anyone, to admit that fact, or make reparation. I do not believe, however, that even from the letter of Gen. Ansell itself that he has been entirely blameless. He shows in the letter that he did make his appeal to Gen. Crowder, to the Chief of Staff, and to the Secretary of War, urging the correction of the system that had grown up, and which he thought, and which I think, beyond question, they had the right to revise and change. He shows that he tried to secure reconsideration in a number of cases, and was overruled. But, Mr. Chairman, my reason for now criticizing him—not so harshly as before—is that, as he knew, that those iniquities were being perpetrated, that those outrages were being committed, he ought to have notified those who were his superior officers and responsible for them that he intended to resign unless such abuses were corrected. Not having done so, I feel that he has not placed himself entirely outside the pale of just and legitimate criticism.

I know what the answer will be. The answer will be that during that time we were at war, and that is true, and that may be a partial mitigation; but we were at war when Senator Chamberlain bravely dared to criticize conditions in the military camps of this country. Attempts were made to call him down. It was even said by high authority that he had forced the Secretary of War to lose his valuable time in going before the committee of the Senate for the purpose of making explanations. But, Mr. Chairman, though that brave Senator may go down to defeat, I believe he will carry with him the blessings of many mothers of soldiers in this country whose lives he saved by that very criticism, because he brought about at least a partial reform in the infamous conditions that existed in the camps. If that action on the part of that brave

Senator shall forever retire him to the shades of private life, he will carry with him the consciousness of having saved human lives from the work of heartless tyrants. And I believe that if Gen. Ansell had then said to the War Department, "Unless these things are changed, unless these savageries are discontinued, unless these barbarous and inhuman cruelties are stopped, I will resign my position and expose to the world just what has been going on," I believe it would have had its effect in getting a correction of those conditions.

He would no doubt have been threatened with court-martial; but if the War Department had permitted that outrage, the country would have arisen in such just protest that the threat would never have been executed.

A brave man may be suppressed for a time, but the conscience of honest people, shocked by atrocity and barbarism, will rise to his vindication, and the cowards who seek his destruction will in the end be driven from the seat of power. The wicked and heartless may flourish for a season, but that justice which has its seat in the bosom of God will finally overtake them. It seems from the letter of Gen. Ansell that whenever he tried to treat soldiers like human beings he was called down and overruled. Then, how could he remain in the councils of such Huns? How could he herd with such Attilas?

Mr. Chairman, as he suggests, I was no doubt too harsh in the criticism, and I feel that it is due to me and to this House and to the country that I should read the statement of Gen. Ansell, and thus pillory the Neros responsible for these cruelties before the country.

Only yesterday I received a letter from the War Department in regard to a court-martial sentence that had been brought to my attention. I had placed before them a case where it was stated to me that a young man had, as I thought, been most cruelly sentenced to 20 years at Fort Leavenworth. The reply was that they could not reopen the case now, because more than six months had expired since he made application for clemency, and clemency had been denied. The letter stated that a reexamination at the present time is precluded under War Department orders of August 28, 1907, which prohibit the reexamination of application for clemency within six months of the last consideration, unless new and material reasons therefor are presented. Is that the system under which people in a Christian land, in a civilized country, have to live? Is it possible that the War Department has so tied itself down by inflexible rules that although a most outrageous sentence has been fixed upon a soldier, because it has been six months since clemency had been asked and denied, they could not reopen the case? The letter pointed out that the 18th of May 1919, was as early as he could make another application. Hindenburg and Kaiser Bill could hardly be more cruel. The letter is as follows:

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(Separate file.)

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Mr. GOOD. Mr. Chairman, I yield seven minutes to the gentleman from Ohio (Mr. Kearns).

Mr. KEARNS. Mr. Chairman, Gen. Ansell has recognized the injustice that has been done thousands and tens of thousands of private soldiers during this war. These wrongs have been committed in the name of justice through the medium of a military trial. He has come to this Congress and asked us to revise the military laws under which it is made possible for these wrongs to be inflicted on the enlisted man. If any Member of Congress will take the time and has the inclination to go to the War Department and investigate these alleged courts-martial he will come back to his seat in this House denouncing in most unmeasured terms the military law under which the enlisted men have been tried during this war and are still being tried.

We ought not to forget that we still have under arms more than two millions of men. Each one is subject to trial by court-martial upon the charge of violating some frivolous and absurd military rule. I will venture to guess that none of you can read the hearings in the average court-martial but will say that justice is an absolute stranger at these so-called trials.

If we adjourn this congress and leave Gen. Ansell and other officers who want to help him with their hands tied, I do not know what may be the result. If the worst should follow, the responsibility will be at the door of Congress because we have refused to heed his cry of danger.

In this connection I am going to read to you an excerpt from a letter received from the mother of one of these boys who is somewhere in Europe. The mother says:

"I am inclosing you herewith a letter that I have received from my son. Can't these boys be brought home?"

I am thinking that this thought is in the heart of many mothers to-day. I will read now a paragraph from the son's letter which was inclosed:

"This is the worst hole that I ever got into. I sleep on a board floor, as does each private. The officers are well fed while we starve. They have good beds in good quarters. If we complain, we get a court-martial. I have not been up before them yet. Don't know how soon I will be."

Here follows a warning in this letter that every Member of Congress ought to heed. Listen to the voice of this boy as it comes from over the sea. Here is his closing sentence in this paragraph:

"One thing, a time will come when the boys are home, and these officers may never know who got them."

Mr. FERRIS. Does the gentleman think that is a good spirit for the boy to write?

Mr. KEARNS. I am not discussing the spirit of this letter. I am stating a cold fact. I have sympathy for a boy put in this position, where he is made to sleep on a bare floor and the officer is furnished with comfortable quarters and well fed while the boy is being starved. I say most emphatically my sympathy is with the boy.

Mr. FERRIS. Does the gentleman's sympathy extend to the threat to assassinate the officer?

Mr. KEARNS. Of course I have no sympathy with anarchy or lawlessness in any form, but I have read to this House the language of a boy who says he has been made to suffer untold and useless hardships. He says if he complains because he is starving he is brought before a court-martial. Under our present system of courts-martial the chances are he would receive many years at hard labor in prison. To my mind, the entire system is wrong and the hardship of these boys would appeal to a heart of adamant. The only argument that I am trying to advance is the argument that we, this Congress, should act; that we should do something before we adjourn to relieve these boys. No; I am not upholding anarchy, neither do I subscribe to any veiled threat that might be expressed between the lines of the paragraph taken from this letter, whatever that threat may be. I believe in law and order; but I am telling you that these antiquated laws should be repealed. They have come down the centuries from the dark ages. We have tried to rewrite these laws here on two or three occasions within the week by way of amendment to the military appropriation bill, but each time some one made a point of order to the amendment. We wanted to rewrite these laws so that boys would not be compelled to make threats against officers, if indeed they make threats. We wanted to make the enlisted man's liberty just as sacred and as safe as your liberty and mine.

I want to say to you that there is not one private out of one hundred who is tried by a court-martial who stands a ghost of a chance of acquittal if an officer is the prosecuting witness. In support of this statement let me read to you from an argument made by a young officer in defense of his client. Before I do that, and by way of explanation, permit me to say that three officers had testified against the defendant, who was a private. When these officers had finished their testimony the prosecution rested its case. The young lieutenant who was defending the boy did not put his client on the stand, nor did he put any witness on the stand. Here I call your attention to the reason, as he said, why he did not. Let me say in praise of the young lieutenant who defended this private that he had nerve sufficient to talk straight out from the shoulder to the court. He had the nerve to tell them the situation, the environment in which he found himself in the defense of his client. Listen to the language that he defiantly slings into the very teeth of the court, composed, I think, of about seven officers. And note, too, the silence of the court when, if this statement that follows is not true, the officer making the accusation should have been himself brought to trial. Yet there are high Army officers here in Washington who will tell you this situation does not exist. Listen to the first paragraph of this argument, and then tell me what you think. The language hurled at the court was as follows. Listen to it:

"If the court please, I will take up a few minutes this morning of your time in order to sum up the evidence. I will deal mostly with the evidence of Capt. Williams, the man who prepared the charges and on whose account we are

assembled here this morning. I did not allow the defendant to take the stand in his own behalf"—Let me pause here and ask, Why do you suppose he did not? I want you to listen to the reason why he says he did not allow his client to take the stand in his own behalf to rebut the testimony of three officers. This is what he says:

"I did not allow the defendant to take the stand in his own behalf because I realize that the words of an officer are above reproach (with this court) and that any evidence that the defendant might be able to give would simply be a waste of time."

This is the first paragraph in the speech made by the counsel for the defendant, and yet officers here in Washington will tell you that what I am saying is not true; yet I have quoted from the record of a military trial wherein the defendant was found guilty and sentenced to imprisonment for eight years at hard labor, and all because an officer's word in a military court "is above reproach." All because it would be "a waste of time" to offer testimony of a private soldier in a military court. I say this is disgraceful; this is shameful, and this Congress ought to deal military autocracy a death blow while we have this chance. Gen. Ansell has defied this military aristocracy and is begging us to act. Here is a young lieutenant, M. P. O'Keefe, defending a private and has the nerve to say to the court that he did not put his client on the witness stand because he realized that the word of a private was worthless in a military court as against the word of an officer, and the court sat there and listened to the charge in silence, and by that silence, as we all know, admitted that every word that Lieut. O'Keefe said was true. [Applause.]

STATEMENT OF COL. JOHN A. HULL, JUDGE ADVOCATE, GENERAL STAFF COLLEGE, WASHINGTON, D. C.

Senator WARREN. Now, Col. Hull, will you state your name and rank to the stenographer?

Col. Hull, the members of this committee—that is, of the whole Military Affairs Committee of the Senate—have before them Senate bill No. 64, which was introduced by Senator Chamberlain, providing for a general and entire reorganization of the Articles of War, and this subcommittee is charged with the authority of recommending to the full committee approval or disapproval of changes in that bill, or suggesting changes; and, with the understanding that you had much to do with the dispensing of justice under the old Articles of War, we should like to hear from you any suggestions you may have to offer us as to that particular bill or as to the Articles of War generally. Perhaps you have seen the Kernan report or the report of the American Bar Association's committee. If you wish to refer to those reports in any way, we would be glad to have your views.

Col. HULL. I might state in introduction, Mr. Chairman, that for the last 20 years I have been a judge advocate in the United States Army, but that since last November I have been on special duty as finance officer of the American Expeditionary Forces, and since my return to the United States I have been a special student of the General Staff College, so that I have not had an opportunity, such as I would desire, before testifying specifically, either to read the bill or to study the reports mentioned by you.

Senator WARREN. You were on the other side for a year and a half or more?

Col. HULL. Yes, sir. During part of that time I was judge advocate of the S. O. S. I also organized and was for some time a director of the requisition and claims service, and after the armistice I became finance officer, as I have stated.

Senator WARREN. You will find in this print, in parallel columns, the present Articles of War and Senator Chamberlain's suggested substitute as contained in the bill.

Col. HULL. I am sorry to say that this is the first time I have seen that. I tried to get a copy of it in France, but it was not available; and since then, as I have said, I have not had the time.

The only report which I have read is the Kernan report, and any dissent that I might have from anything that is mentioned there would be of a very minor character. I believe that it is an excellent report, and have great confidence in the experience and ability of the members of that board.

Senator WARREN. You heard Senator Chamberlain's very able drawing out from the Inspector General of his opinion as to a style of appellate court, if I may term it such. We should like to hear your views about that; whether there should be greater power of revision in the hands of the Judge Advocate General, or whether there should be another man or body of men who could take up these cases for final adjustment. As stated here a few minutes ago, there seems to be no real controversy in the minds of those in question that there should be an appellate tribunal with powers to correct any injustice that might appear.

Col. HULL. Personally, I am firmly of the opinion that if that work is to be well done, for the benefit of the country, it should be subject to the control of the constituted authorities. In 20 years' experience as a judge advocate I have been fortunate in serving, as a rule, with the older and more experienced general officers of the Army. With only one have I discussed to any great degree legal questions, and that was Gen. Otis, commanding general of the Philippines, who was a distinguished lawyer in civil life before he became an officer in the Army, and whose judgment on both law and facts was of the highest order.

With the other officers in whose staff I have served, as a rule their comments have been only in applying the law to the facts, based on their long experience in the Army and their sound judgment of men and affairs. There are many court-martial cases where a knowledge of military conditions surrounding the camp and garrison is necessary for a correct understanding of the testimony, and I am sure that a body of civilian lawyers, no matter how sound they might be both in law and their experience in civil affairs, would in many cases fail to give proper estimation, either for or against the accused, to the soldier language used by the witnesses.

Senator WARREN. Senator Lenroot is very much interested in the discussion that has come up on the floor of the Senate, and he asked me to say that he wishes us to go on without him, as he will read all the testimony taken. He will be in later if possible.

Col. HULL. If you will permit me to say so, I have seen in the public press a number of statements that would indicate that some of the witnesses before the committee have almost the impression that the average officer of the Regular Army, as well as the average officer during this world's war, almost took a pleasure in treating the enlisted men under his command in a harsh and cruel way, and with special reference to courts-martial. I doubt if such statements have made any impression upon the committee, as the officers of the Army have sworn to perform their duties in just the contrary way;

and, leaving aside the sense of duty, a man's self interest as a commanding officer would require him to treat his men justly and fairly; as otherwise he can not have a well-disciplined command.

Senator CHAMBERLAIN. What were your functions, Colonel, in the Judge Advocate General's office here? Did you review cases that came up from commanding officers?

Col. HULL. I have had little or no service in the Judge Advocate General's office at Washington in my 20 years' service.

Senator CHAMBERLAIN. It has always been with the line?

Col. HULL. It has always been at department headquarters, as a rule. I was here in Washington one year in which I was mainly connected with Philippine affairs, and with the Manassas maneuvers and the claims for rental and damages growing therefrom.

Senator CHAMBERLAIN. You have not had much experience, then, in connection with cases which come up for review?

Col. HULL. No, sir; except this, that probably, in the 20 years, I have sent to Washington over 20,000 cases.

Senator CHAMBERLAIN. That is, cases where the approval of the commanding officer had been had?

Col. HULL. Yes, sir.

Senator CHAMBERLAIN. Either of convictions or acquittals?

Col. HULL. Yes, sir.

Senator CHAMBERLAIN. And practically all of those cases were approved here?

Col. HULL. So far as I know. I have never had a case returned to me from Washington, pointing out a fatal error.

Senator CHAMBERLAIN. You do know this, Colonel, that under the construction of the law as it has been interpreted by Gen. Crowder, the only power that the Judge Advocate General has, where the court had jurisdiction and where the trial was regular, is to advise the commanding officer only as to the merits of the case?

Col. HULL. Either that, or submit the case to the Secretary of War for his action.

Senator CHAMBERLAIN. Yes; but he really had no appellate tribunal for errors of law occurring at the trial?

Col. HULL. In question of language, no. Practically, yes.

Senator CHAMBERLAIN. What I am trying to get at is the fact. If the trial was wrong in the court below, if the court-martial proceedings were wrong—if the trial was wrong, but if the court had jurisdiction—then the Judge Advocate General, under his theory of the law, had no power to undertake to correct the trial or to criticise the sentence?

Col. HULL. No; nor would the appellate court have that power, under the facts as given by you.

Senator CHAMBERLAIN. A civil court?

Col. HULL. Not if the case was regular, and there was nothing the matter with it.

Senator CHAMBERLAIN. Well, prejudicial error—I will put it that way. That is what the Judge Advocate General holds, that if the trial was regular and the court had jurisdiction he has no power other than to advise. I was using the language of that office.

Col. HULL. No.

Senator CHAMBERLAIN. Even if there was prejudicial error committed against the defendant, and the commanding officer had ap-

proved the judgment, under the theory of the Judge Advocate General, he still had no power to set aside or revise or modify that sentence?

Col. HULL. Personally, no.

Senator CHAMBERLAIN. You say "personally." Has he officially?

Col. HULL. He has the official duty to report the error to the Secretary.

Senator CHAMBERLAIN. To whom?

Col. HULL. To the Secretary of War.

Senator CHAMBERLAIN. Yes; but the Secretary of War does not claim that he has any right to reverse.

Col. HULL. There have been, during my experience, a great many thousands of men whose sentences have been modified by the Secretary of War.

Senator CHAMBERLAIN. Clemency has been shown them?

Col. HULL. Yes.

Senator CHAMBERLAIN. But there have been no reversals in judgment?

Col. HULL. Except where the sentence has been held to be illegal for error of form, as a rule.

Senator CHAMBERLAIN. Do you think there ought to be any appellate jurisdiction anywhere?

Col. HULL. As I said, I believe in it; yes.

Senator CHAMBERLAIN. Where ought it to be?

Col. HULL. I should say in the Judge Advocate General's office, with power to report to the Secretary of War.

Senator CHAMBERLAIN. Do you agree with Gen. Crowder's construction of section 1199 of the Revised Statutes, or do you agree with Gen. Ansell's view of it?

Col. HULL. That question arose first to my mind definitely when I was on my way to France. Gen. Ansell spoke to me about it and told me the general views. My impression at that time was that if the case had been *de novo*, Gen. Asell had a very strong position, but that in view of the construction that had been made and the years of practice that had taken place, I thought his position was greatly weakened.

Senator CHAMBERLAIN. In what respect; what practice?

Col. HULL. Namely, from the time of the statute and the original construction, a practice that had grown from that time on, that the power to revise did not mean what Gen. Ansell claimed it did.

Senator CHAMBERLAIN. I believe that is all that I want to ask, Mr. Chairman.

Senator WARREN. Unless you have something you wish to say, Colonel, that is all.

Col. HULL. Yes; I have.

Senator WARREN. In that case we should be very glad to have you proceed, and we wish you to feel free to comment upon anything that is before us. Our duties are not in connection with anybody's differences, but they are to get before the Congress—and first before the main Committee on Military Affairs—the best form of bill to correct errors in the present law and practice, or the law which creates the practice.

Col. HULL. I have also seen in the newspapers an impression given out regarding the trial of the mutineers at Houston, Tex. I was

taken from the central department and sent to San Antonio, Tex., as judge advocate to prepare the case of the United States and to try those men. The impression has been given that there was no review of their case and that those 13 men were improperly hung. During the entire trial a copy of the daily evidence was given to the judge advocate of the Southern Department, and a copy was also sent to the Judge Advocate General.

Senator WARREN. At Washington?

Col. HULL. At Washington, D. C. Col. Dunn, the judge advocate of the Southern Department, detailed an assistant of his, a lawyer from civil life, to review this case, and this officer had no other function except to carry on a current review of the case as the case was tried.

Speaking from memory only, the court was closed for consideration about the 24th of November. They spent several days in consideration of the findings and sentence. I gave to Col. Dunn, informally, a copy of the findings and sentence at the same time I was entering them up in the record, so his review could be brought down to date. This was about the end of November. I think the proceedings were in front of Gen. Ruckman about one week before he acted. I think it was five days thereafter that the 13 were executed.

Senator WARREN. You are speaking now of the colored troops?

Col. HULL. Yes; of the Twenty-fourth Infantry. I am sorry that I have not with me here an extract of the opinion of the Acting Judge Advocate General, dated January, 1918, reviewing that case, which I understand was signed by Col. Mayes for Gen. Ansell——

Senator CHAMBERLAIN. That was after they were executed, was it not?

Col. HULL. Yes.

Senator CHAMBERLAIN. It was very gratifying to the men who had been shot!

Col. HULL (continuing). Stating that the record disclosed a perfectly free and fair trial, and that the record and the proceedings were correct as to law and fact in every degree.

It might also interest the committee to know that the 13 men who were executed, before their execution, voluntarily stated that in their opinion they had had a fair and impartial trial, that each and every one of them convicted had taken part in that mutiny, and that their punishment was just.

(The opinion of Col. Mayes, referred to by Col. Hull, is here printed in full as follows:)

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 29, 1918.

United States *v.* William C. Nesbit, sergeant, Company I, Twenty-fourth Infantry, et al.

Review of record of trial by a general court-martial convened at headquarters, Southern Department, Fort Sam Houston, Tex., on November 1, 1917.

1. In this review, and for convenience in reference, the prosecution will be designated as the Government and Sergt. William C. Nesbit and those jointly accused with him as the defendants.

* * * * * * *

18. The court was lawfully constituted. The case was well and vigorously prepared and prosecuted, and was defended with equal skill and vigor. The

rules of procedure governing trials by courts-martial were carefully observed, and the record is singularly free from evidence that is irrevelant or of doubtful competency. The record is lengthy, comprising 2,172 pages of typewritten matter, besides 67 exhibits and 63 charge sheets. It has been read and studied with much care and deliberation because of the very great importance of the case, and the conclusion has been reached that the defendants had a fair and impartial trial, and that the convictions and sentences imposed were authorized by law and fully sustained and justified by the evidence.

JAMES J. MAYES.
Acting Judge Advocate General.

Senator CHAMBERLAIN. You speak of the newspapers having said that these executions were unjust or improper—something of that kind. I have not hesitated to say in public, and possibly the newspapers have referred to that, that such a condition as that ought not to be permitted to exist in the Military Establishment or any establishment in a democratic form of government; and I repeat that. I am glad the court has an apologist in you for the proceedings that were had, Colonel. But, as a matter of fact, you speak of the abstract of the evidence being furnished the judge advocate of the department each day and copies of it being furnished to the Judge Advocate General each day here in Washington. I assume that that was not an official forwarding of the case for review to the Judge Advocate General, was it?

Col. HULL. Oh, no; it was not an abstract of the testimony. It was a verbatim copy.

Senator CHAMBERLAIN. But even if that was done, the Judge Advocate General had no power to act or recommend on that testimony, did he?

Col. HULL. No; but I did that not because it was required by law, but in addition to what was required by law.

Senator CHAMBERLAIN. Well, what was required by law?

Col. HULL. Only that the record should be forwarded at the completion of the trial.

Senator CHAMBERLAIN. Yes; but the complete record was not forwarded until after the men had been executed, was it?

Col. HULL. It was forwarded to the convening authority, as required by law, as soon as I could prepare it.

Senator CHAMBERLAIN. But that was not forwarded to the Judge Advocate General until after they were executed?

Col. HULL. No; and it was not required by law.

Senator CHAMBERLAIN. Possibly not; but suppose that the record had been forwarded to the Judge Advocate General, as the law contemplated it would be eventually, and he had found that the court was without jurisdiction, or that it was improperly constituted; it would have been too late for him to have said so, because the men were executed, would it not?

Col. HULL. Yes; certainly.

Senator CHAMBERLAIN. That is the injustice that I am speaking of. I do not mean to charge the individual officers with unfairness, but I say that was a condition that ought not to be permitted to exist. Now, the very fact that those men were executed before the record reached Washington led to the adoption of a rule to prevent it, did it not?

Col. HULL. General Order No. 7.

Senator CHAMBERLAIN. Yes; so that thereafter, because of that case, because of the apparent chance for injustice to be perpetrated,

the War Department and the commander in chief issued General Order No. 7, which required that all of these proceedings should be sent up here for review prior to the execution of the sentence?

Col. HULL. Yes.

Senator CHAMBERLAIN. Which was very proper. Do you think that a condition ought to be allowed to exist where a man could be executed before the reviewing authority had a chance to examine the record?

Col. HULL. That condition exists, I think, in pretty nearly every army, and it has existed in every army up to this time.

Senator CHAMBERLAIN. I beg your pardon; it does not exist in the British Army or in the French Army, and it does not exist now in our Army, because of General Order No. 7; and it ought not to exist in any army, if you will permit me to say so.

Col. HULL. I can imagine conditions at the front where, even in the late war, there were executions without review.

Senator CHAMBERLAIN. Oh, yes; there was a case cited here where a man was convicted in the British retreat from Mons and was executed within 24 hours after he was caught. I can conceive of such cases. But here was a case where the country was at peace.

Col. HULL. It was hardly a condition of peace existing in this case.

Senator CHAMBERLAIN. I think there was. And then, of course, there is the case of an honest disagreement of minds.

Col. HULL. But what I was trying to get at and show was that the law was complied with as it then existed, and that the officers who were charged with the unpleasant duty down there discharged their duty according to the law and according to their oaths, and between their conscience and their God.

Senator CHAMBERLAIN. That may be true; but here was section 1199 of the Revised Statutes that provides in terms that the Judge Advocate General should have power to do certain things. Now, he did not have a chance to do those things. There was no rule that required that he should have the chance, but the law was there and demanded that it should be complied with. In other words, the law contemplated that before a man was executed the Judge Advocate General should have an opportunity to look at the record.

Col. HULL. There were a great number, as I believe the records will show, during the Civil War of cases where men were executed without reference of their cases to Washington.

Senator CHAMBERLAIN. I can conceive of cases where it might have been proper during war times. But there was no excuse for this.

Col. HULL. Now, you had a witness in front of you, Mr. Thomas, who made certain comments on the operation of the Judge Advocate General's Department in the S. O. S. He speaks, on pages 301 and 302 of the record, of an officer who was alleged to have been tried at Tours. Although he states that his papers have been lost, he attempts to quote *in extenso* the words of a Maj. Elmore, who was an assistant judge advocate at Tours for a time. I do not know how he could have this exact language and not be able to give the exact name. I have tried to remember a case somewhat similar, and one of my assistants, who has been in town, also tried to remember the name of the case, but without our papers we have been unable to locate it. There was the case of an officer who picked up an enlisted

man as a barroom acquaintance, and at closing time left the café with two Frenchwomen and went to a questionable rooming house, and remained absent without leave for two or three days, and kept the enlisted man with him, absent from duty. He was tried and dismissed, according to my recollection of the case, and I believe should have been. I have no recollection of the language as quoted by Mr. Thomas. I do know, however, that Maj. Elmore was without authority to represent the Judge Advocate General's Department by the use of any such language as is alleged.

He also speaks of the general conditions that existed at Gièvres in the prison camp there. I drafted the instruction for the establishment, and the rules governing, the prison camp at Gièvres, under general instructions from Gen. Kernan. The officer in charge was an exceedingly able, conscientious, and hard-working officer.

Senator CHAMBERLAIN. Was that "Hard-Boiled" Smith?

Col. HULL. No, sir; that was Col. C. J. Symmonds, of the Regular Army. Gen. Kernan's ideas were set forth in full in these instructions, and I am sorry that I have not a copy of them with me. They provided for segregation of the prisoners, both as to the character of the offenses, and also as to white and black, to prevent any trouble; and also gave the commanding officer power to further subdivide them in order to work out the general scheme of the prison camp, which was to restore the men to duty at as early a date as practicable, as one of the main problems then confronting the senior officers of the Army in France was man power.

Senator CHAMBERLAIN. Have you seen the report of the commission that was over there?

Col. HULL. No.

Senator CHAMBERLAIN. On the conduct of the Gièvres prison?

Col. HULL. On Gièvres?

Senator CHAMBERLAIN. Yes.

Col. HULL. No; they were talking about Schelle, were they not?

Senator CHAMBERLAIN. They were talking about all of them. Do you know whether the regulations that you prepared were lived up to or carried out at the prison?

Col. HULL. I was going to say that I was down there twice subsequently and went through the prison camp, and talked to some of the prisoners, and talked to the commanding officer, whom I have known for a great many years, and also talked to several of the officers who were directly concerned in the management of the prison.

Senator CHAMBERLAIN. Of course, that is not in this hearing.

Col. HULL. I do know that the effort was to restore as many of these men to duty as it was possible to restore; that there was segregation of the prisoners according to character of offenses; and to make it still simpler, the restoration to duty, the authority to restore, was given into the hands of the commanding general of the intermediate section.

Senator CHAMBERLAIN. But that was only the exercise of mercy, of clemency, was it not?

Col. HULL. No; not any more than the exercise of mercy and clemency is coming through the disciplinary barracks.

Senator CHAMBERLAIN. But if any of those men had been convicted, there was no power here to correct the judgment, was there?

Col. HULL. I was talking about this testimony of Mr. Thomas, primarily; the testimony here that those things were not done over

there to try to restore the men to duty. On the other question, of course, they followed the actual line according to the law as written in the statutes. But I do know that they did restore to duty a great number of men from Gièvres.

Senator CHAMBERLAIN. Oh, yes; Gen. Crowder promised in February last, when he was before this committee, that there would be a general jail delivery within 60 days. I say that is an argument confirming the injustice of the system. Why deliver the jails if all these convictions had been just?

Col. HULL. I was not talking about the jail delivery at Gièvres, Mr. Senator; I was talking about the fact that in regard to those convicted and sent there we at once established a policy so that we could get as many of those men out of confinement and back on the line as the best officers that we had there could possibly do; that instead of trying to see how many men we could get into jail, we were anxious—those in authority—to see how many we could restore to duty.

Senator CHAMBERLAIN. Yes; one of those young men that was ordered to be shot over there was restored to duty and was afterwards killed in battle. Better to die as a hero than to die as a felon for sleeping at his post!

Senator WARREN. You speak of the "jail." As I understand it, as the word "jail" is used, it means the disciplinary barracks, and it would convey a little different meaning from the ordinary.

Col. HULL. Oh, yes.

Senator WARREN. What was this you speak of? It was a disciplinary barracks, you say?

Col. HULL. It was on the order of a disciplinary barracks.

Senator WARREN. Yes.

Col. HULL. The regulations of the department then required that all men convicted and sentenced to dishonorable discharge be returned to the United States. That was a loss of man power, as in spite of the high character of the enlisted force in the American Expeditionary Forces, there were some unworthy members that were desirous of getting, as they called it, a "sentence overseas."

Senator WARREN. To get home through that?

Col. HULL. To get home and avoid service in France.

Senator WARREN. Did not that occur more from the draft, which took in material of all sorts, the bad with the good? Did not that occur there more than in the Regular Army?

Col. HULL. Oh, Senator, no one can appreciate the very fine character of the enlisted force as a whole in France unless he has been over there and served with them and seen them.

Senator WARREN. I think that got to us.

Col. HULL. But notwithstanding that this was the first pressing of the grape of our young manhood, there were some members, of course, that had to be segregated from the others.

Senator CHAMBERLAIN. The commanding officer over there was given power to do that very thing.

Col. HULL. Now, also, in Mr. Thomas's testimony, if the committee will permit me, he says there was a regular policy in the S. O. S. of trying men by special court, and he charges that—let me get his exact language. On page 303 he states as follows:

They would pile up the charges in the special court.

It is doubtless unnecessary to call your attention to the fact that that practice is forbidden in the manual of courts-martial, and I am certain that no such practice obtained in the S. O. S., especially so at a camp so near the headquarters of the intermediate section. The orders were that a man convicted and sentenced to more than three months was at once to be sent to the camp; and to have held him there for repeated trials and to have given him six months on each trial would have at once been detected by the authorities. The judge advocate at Gièvres, Capt. Adams, was a civilian alwyer from Massachusetts, and as industrious and careful an assistant as I had under me.

Senator CHAMBERLAIN. Were you the judge advocate general of that department?

Col. HULL. Yes, sir. There were six or seven jurisdictions under me that had judge advocates that had authority to convene general courts-martial.

Senator CHAMBERLAIN. Was Gièvres in your jurisdiction?

Col. HULL. Gièvres; yes, sir. It was in the intermediate section of the S. O. S.

Senator CHAMBERLAIN. What was your departmental jurisdiction called?

Col. HULL. The S. O. S.

Senator CHAMBERLAIN. You were not connected with the line of the Army?

Col. HULL. I served on Gen. Kernan's staff, and afterwards on Gen. Harbord's staff as judge advocate of the S. O. S.

Senator CHAMBERLAIN. Were you the superior officer in the Judge Advocate General's Department on it?

Col. HULL. Yes, sir; from February until November.

Senator CHAMBERLAIN. You did not have much to do with the court-martial cases, did you?

Col. HULL. Every officer's case, and every case of an enlisted man sentenced to five years or more, I personally read, in spite of the fact that they had already been formally reviewed in my office—that is, of the cases that came through our headquarters, under the law and orders.

There was another case here where Mr. Thomas comments. On page 313 and on the bottom of page 314 he speaks of Gen. Patrick's review of a case. According to my recollection, Gen. Patrick at no time in France exercised general court-martial jurisdiction.

The greatest difficulty with the administration of military justice that I have encountered in 20 years has been the lack of trained officers as judge advocates, as counsel, and the absence of proper stenographers.

Senator CHAMBERLAIN. That is all the more reason why there ought to be an appellate jurisdiction, is it not?

Col. HULL. I am in favor of an appellate tribunal, Mr. Senator, as I said some time ago. But I mean, that has been in the administration the greatest difficulty that we have met. I have in mind only one case where I believe an innocent man was convicted and sentenced to confinement, and in that case he was convicted on the direct testimony of two witnesses. The members of the court themselves subsequently testified that they believed that an injustice had been

done. That kind of a conviction would have taken place under any system; namely, two witnesses had lied against a man.

Senator WARREN. Every man on trial has his counsel of his own selection, if possible, or perhaps I ought to say, always his own if it is at all practicable. If he does not select counsel, the court appoints counsel for him, does it?

Col. HULL. The post commander as representing the convening authority.

Senator WARREN. Now, suppose that counsel should be an enlisted man, suppose that an enlisted man should ask that his counsel might be another enlisted man or a noncommissioned officer; are they permitted to serve?

Col. HULL. They are permitted to serve. That has occurred only rarely and in the case of the emergency forces.

Senator WARREN. Is there any discrimination against enlisted men as compared with officers, in service of that kind, if the accused himself chooses to select an enlisted man?

Col. HULL. I should say not. The duty of counsel is a well recognized duty, and if properly performed, meets with no objection from anyone in authority.

Senator WARREN. Senator Chamberlain, have you anything further?

Senator CHAMBERLAIN. Nothing more, Senator.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned until to-morrow, Friday, October 24, 1919, at 10.30 o'clock a. m.)