

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

SATURDAY, OCTOBER 25, 1919.

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

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

Present: Senators Warren (chairman) and Lenroot.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER—Resumed.

Gen. CROWDER. Gentlemen, I have a duty to perform to the American Bar Association, and particularly to the committee of that association charged with the investigation of military justice during the war, which it would have been more courteous to perform when I first appeared before this committee.

This committee admitted as relevant to the inquiry it is conducting a letter addressed by Gen. Ansell to Judge Page, president of the American Bar Association, on July 17, 1919, embodying his complaints against the committee of that association and its procedure (pp. 211-214), and there was considerable colloquy in the testimony respecting that letter, a part of which I wish to bring to your attention. This is an inquiry addressed to Gen. Ansell:

Senator CHAMBERLAIN. Did you not, as a matter of fact, charge the committee itself with being a packed committee?

Mr. ANSELL. I did. (Record, p. 211.)

Gen. Ansell puts in his letter of accusation of July 17, 1919 (pp. 211, 212, 213, 214), and follows that by stating:

Two of the members were committed from the beginning to the other side, and had so declared themselves, and they were chosen as the result, whether they knew it or not, of strenuous effort being made by the War Department to bolster up their cause. It is true. (P. 214.)

In the matter of expenses of witnesses called by that committee, Gen. Ansell in his letter to Mr. Page of July 17, 1919, made the following statements:

Of course, if the hearings were to be fair and impartial, the committee should have been equally desirous of hearing witnesses on both sides and should have, if possible, secured equal facilities for their appearance. * * * The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense. (Letter to Mr. Page of July 17, 1919; p. 213.)

These matters * * * are nevertheless not only significant of the attitude of the committee and the department, but were very real obstacles to a fair presentation of

the question as well. In my own case, having nothing of this world's goods and having expended already too much of my meagre salary in behalf of the advancement of the cause of military justice, it would have been a hardship for me to go to Chicago at my own expense. (Letter to Mr. Page of July 17, 1919; p. 214.)

In his testimony before this subcommittee, Gen. Ansell says further:

* * * I did suggest witnesses to the committee of the American Bar Association, but in their telegrams or letters sent out, about which some of the witnesses have told me, they put the cautionary statement, "We have no funds to pay for your attendance here, and if you do so you will do so at your own expense"; * * * Whatever respect anybody else may have for such a committee, I, for one, as long as I live, will not express any respect for any such committee (p. 214).

Answering Senator Chamberlain's question referring to the "uneasiness" which induced the Secretary of War to appoint a strictly military tribunal (the Kernan-O'Ryan-Ogden board), Gen. Ansell replied:

* * * It was thought—it was in the air—that this bar committee report might be unfavorable to the department. That was not so obvious to me, because two of the members were stacked, and the personnel had been picked; the committee had been hand picked and personally conducted by the department satellites (pp. 214-215).

Gen. Ansell's letter of July 17, 1919, to Mr. Page, president of the American Bar Association, embodied many other complaints against the committee of the American Bar Association appointed by him. Mr. Page referred the letter to Judge Gregory, president of the association committee appointed to investigate military justice.

I learned these facts, and inquiry was made of the secretary of the American Bar Association to know if Mr. Gregory had answered these charges. He said that he had no reply. You are aware that he resides in Baltimore, and the inquiry was made over the telephone. Further inquiry was made over the telephone of Col. Hinkley, likewise a member of that committee and a resident of Baltimore, who had not a copy of it.

I then caused inquiry to be made over the telephone of the next nearest member of that committee, Mr. Conboy, of New York, and he procured a copy of Mr. Gregory's reply, which he sent me.

Senator WARREN. His reply to whom?

Gen. CROWDER. To Mr. Page.

Senator WARREN. From Mr. Gregory to Mr. Page?

Gen. CROWDER. Yes, sir. I then telegraphed Mr. Gregory to know if it would be proper to put it in the record, and he wired back his permission, and in a letter he said that he had consulted Judge Page, of the American Bar Association, who agreed with him as to the propriety of putting in his reply to these charges, and I now offer it in the hope that it will be received and given the same prominence as was the accusation. I ought to say, before submitting it, that Mr. Gregory not only replies to complaints, but questions of personal veracity between himself and Gen. Ansell are discussed.

(The letter referred to is here printed in full in the record, as follows:)

AUGUST 12, 1919.

HON. GEORGE T. PAGE,

*President American Bar Association,
Federal Building, Chicago.*

DEAR JUDGE: I duly received copy of letter of Gen. S. T. Ansell, to you, dated July 17, in which he protests and insists considerably as to the investigation made by the special committee on military justice of the Bar Association, appointed by you, and of which I was chairman.

So far as the fitness and qualifications of the members of the committee are concerned, I do not deem it proper to say anything. You appointed the committee. I am not aware that any member of it sought that appointment. So far as I know, and as I fully believe, no one of them did.

As to the manner in which the committee discharged its duties, I can only say that so far as my observation has extended the committee, made up as it was of busy lawyers, did the best that it could to conduct a fair, and, so far as time admitted, thorough inquiry as to the subject of the administration of military justice in the Army. No doubt men who have reached the age of members of the committee have their prejudices and preconceived notions, which can not be altogether laid aside, but so far as the action of the committee is concerned, I believe that it will be found upon inquiry to be fair and impartial in seeking information on this topic. That its members do not altogether agree is due probably to the inherent difficulties of this subject.

I wish to say a few words as to the specific statements made by Gen. Ansell in this letter. He is a man with a grievance. He feels that he has been unjustly treated by the military authorities. As to that, the committee has made no investigation, and so far as I am concerned, I have no knowledge as to whether this is so or not. I do say, however, that it seemed to me to be rather inconsistent with efficiency either in the Army or elsewhere to keep a man at the head of an important department who was continually railing at everybody in that department and denouncing its methods publicly and persistently, and also criticizing with great severity, and, as it seems to me, sometimes with marked injustice, his official superiors. Gen. Ansell seems to have understood that this committee was constituted to try the great case of Ansell *v.* Crowder; that as plaintiff he was entitled to take charge of his side of the case, to have an issue framed, and to prosecute it—the committee to act as a court. This was not the understanding of the committee. We did not propose to have Gen. Ansell take charge of our inquiry and run it, but we proposed to run it ourselves, in our own way, giving him every opportunity to be heard and to have people that he thought should be heard brought before the committee, or their views presented, as they saw fit.

First. Gen. Ansell's first charge is that the committee immediately got in touch and conferred fully with the Secretary of War, Chief of Staff, Judge Advocate General of the Army, and the Acting Judge Advocate General of the Army. Facts in this regard are well known to Gen. Ansell, as I personally stated them to him, and they are largely known to you. You never acted in this matter at all until you had seen Gen. Ansell and conferred with him fully. You and I saw Gen. Crowder at Washington and had an interview with him, I suppose of two hours, before the committee was appointed. I have never seen him since, and I have no knowledge that any member of the committee has seen him since. I have never seen the Chief of Staff, and would not know him if I saw him. Judge Bruce and I did confer with the Secretary of War once, and in our presence he dictated a letter to Brig. Gen. Kreger, Acting Judge Advocate General, requesting him to furnish the committee everything in the way of attendance of witnesses and records, etc., that the committee asked for. Prior to this, the committee on my invitation met Gen. Kreger at luncheon. As we were anxious to find out what methods obtained in the office of the Judge Advocate General, we had endeavored to get into communication with Gen. Crowder, thinking he might be back from Cuba. He was not, so we took the matter up with Gen. Kreger. We had no power to compel the attendance of witnesses, and the War Department could have largely forestalled any adequate inquiry had it seen fit to do so, by preventing the attendance of men in the military service. We were not familiar with the organization and personnel of the Judge Advocate General's office, and naturally sought to get that for the purpose of ascertaining what methods did obtain in that office before we proceeded to criticize. I think now and still think that this was the proper course to take.

Second: Gen. Ansell states that it was known in the War Department, whether the committee knew it or not, that, while the committee was sitting in Washington, the highest military authority in the department said that they were ordering before the committee those who could give it the military view; that is, the departmental view, and the committee got little else. This is not the fact. In the first place, while Gen. Kreger suggested the names of officers who were connected with the Judge Advocate General's Department, and one or two others, so that we might get at first hand the knowledge of the usual methods employed in that office, beyond this the selection of witnesses was made almost entirely by myself, and everyone that we asked to have appear before us was produced as a witness, except as in the case of Gen. Edwards, where there appeared to be some reason why this was not convenient or practicable. The first witness, I think, that appeared before the committee was a very excellent and accomplished officer—Col. Beverly A. Read. He was chief of the division of military justice in the Judge Advocate General's office, and Gen. Kreger suggested

that we should call him. The great point which Gen. Ansell insists on is that there should be an appellate tribunal, not subject to military direction, with plenary authority over the action of general courts-martial, the judgments of which shall be binding and conclusive on the War Department, the President, and the rest of mankind, and that is the great point about which controversy has been raging in the War Department for perhaps over a year. Col. Read, being one of those witnesses selected by the authorities, according to Gen. Ansell, to establish that he was wrong, declared emphatically in favor of such a court. When I called his attention to the fact that Gen. Crowder took the contrary view, he promptly said, "I dissent," and said he had never seen Gen. Crowder's letter until that time, when I think I showed it to him. This all appears in the evidence. I may add that nearly all the witnesses who spoke on the subject recognized that excessive sentences had been imposed. Maj. Sanner referred to them as terrific. Col. Read said they were some of them grotesque—that this was not the way to enforce discipline; and numerous other witnesses and officers now in the service expressed the same opinion. So the statement that these men supported the existing system—referring to the witnesses whom we summoned in Washington—is absolutely unfounded, and if, as Gen. Ansell says, he has read the record, this statement is a gross impeachment either of his candor or his intelligence.

Third: Another absolutely unfounded statement made by Gen. Ansell is that if one could have believed the witnesses appearing before the committee, courts-martial were all but unknown in our Army. It appears by the testimony of Maj. Rigby before the committee that prior to the war, for a certain period of years, we had in the Regular Army an average of 4,600 general courts-martial a year, or 1 to every 30 men in the Army. Not only is this true, but it appears by the statement of Gen. Crowder in his letter of March 10 to the Secretary of War, which has been printed and given extensive circulation, that in the year ending June, 1917, in our Regular Army of 127,000 men, we had 6,200 trials by general courts-martial—practically 1 for every 20 men. Both of these facts are referred to in the minority report of the committee, and these facts appear in the evidence before the committee.

I may say, in addition, that very many witnesses, including, I think, Gen. Wood, deprecated the unnecessarily large number of court-martial trials in the Army. That the number was excessive and ridiculous, I think, was perfectly apparent from the testimony, and I must leave Gen. Ansell to explain what he means by the impudent statement that if one could have believed the witnesses appearing before the committee, such were all but unknown in our Army. It is a statement inspired by ignorance or mendacity, and absolutely without foundation.

Fourth: Gen. Ansell complains that the bill that he has drawn amending the Articles of War was subjected to prejudiced and uncomprehending criticism, and a hostile and uninformed analysis by Col. West, of the Judge Advocate General's office. He also states positively that the committee had it subjected to such analysis in that office. The latter statement is absolutely untrue. Col. West was summoned before the committee at Chicago. He had made quite a careful study of this bill, and he gave the committee the benefit of his criticisms. I did not agree with all of them, and do not now. I do not undertake to express any opinion of this bill as a whole, but I do say that in many respects the criticisms of Col. West seem to have some considerable foundation.

Fifth: Gen. Ansell says that many high ranking officers in the Regular Army appeared before the committee; and that on inquiry of several he finds that their appearance was regarded by the department as a military duty, and that appearing on duty in accordance with direction of the department, they received their pay and traveling allowances; that the committee did not ask the department, so far as he is advised, to direct any officer of the Army whose name was cited by him to appear before it, and consequently any officer or other person whom he desired called in opposition to the system could appear only by taking leave, if entitled, and at his own expense.

It is necessary to consider in this connection the facts as to our communication with Gen. Ansell. On Thursday, the 17th of April, at about 10 o'clock in the morning, all the committee then in Washington went from Gen. Kreger's office to that of Gen. Ansell. We invited him to appear before us, and as Judge Bynum had expected to go home that evening, and was very anxious to hear Gen. Ansell, he asked him if he could not go on that afternoon. He answered that he could not. We did not intend holding a session Friday, the 18th, and asked him if he could go on Saturday, but he indicated that he could not, and that he would prefer to go on Monday morning. This date he asked to have changed for Monday afternoon, and he appeared Monday afternoon and was heard before the committee for three days—something more, I think, than a third of the time that the committee was in session in Washington. When I saw him Thursday morning, the 17th, I told him that if there was anyone that he desired to have called to appear before us he should give us their names.

We were not, as stated by Gen. Ansell in this letter, then about to conclude our hearings, because we remained in Washington through the whole of the week following, concluding our hearings at 6 o'clock or after on Saturday evening, April 26. We got these names from Gen. Ansell on Friday, the 24th, just one week after I had requested that he give us these names. I wired all those living anywhere in the vicinity of Washington on that date, asking them if they could appear before the committee at Washington on Friday or Saturday. Only one of them, Lieut. J. B. W. Gardner, did so appear. We received statements from others, however, in writing, particularly Judge E. C. Raymond, of Newcastle, Wyo., Hon. Henry A. Wise, 11 William Street, New York City, and W. T. Chantland, then with the Federal Trade Commission at Washington, and those statements are on file with the secretary as part of the record in this case. There were others also. On the 29th of April I addressed to each of the gentlemen whose names had been given to us by Gen. Ansell, at the address that he had given, a letter in the following form:

"As you are probably aware, a committee appointed by Judge George T. Page, president of the American Bar Association, has been conducting an inquiry into the administration of military justice. In appearing before that committee, on the 24th of this month, Lieut. Col. S. T. Ansell, at the conclusion of his statement, in response to suggestions from the committee, made a week beforehand that he do so, requested that we invite yourself, among others, to convey to the committee, in such way as you deem proper, your views upon this important topic.

"I shall be glad to receive them in writing, if you care to submit them. It is not improbable, however, that the committee may hold some further sessions in this city early in June next. If you think it likely that you would prefer to attend before the committee and convey your views orally and will so advise me I will see that you are notified of the date and place of such session, if we have one."

Some of these letters were answered, some were not. None of the persons named, as I remember it, appeared before the committee at Chicago, though, as already indicated, several of them submitted their views in writing. There were a few that I addressed, care of the War Department, or The Adjutant General, and that I assumed from their titles and their addresses were in the Army. These gentlemen made no response whatever to my communications. Had they done so and indicated that they wished to attend I would have been glad to ask the necessary order from the War Department, as I did in other cases. Where they lived near New York I put in also a provision that they might confer, if they preferred, with Mr. Conboy, who was vice chairman of the committee, as he lived in New York. I think there were only two of the gentlemen that Gen. Ansell named that were connected with the service; they were Gen. Eugene F. Ladd and Col. H. H. Sargent.

When the committee met in Chicago I personally made special efforts to secure, and did secure, the attendance of a number of privates and noncommissioned officers as witnesses, so as to get, so far as I could, their side of this controversy. I suppose these are the witnesses referred to by Gen. Ansell as "those pitifully few, and generally of inferior rank and humbler station in life, who expressed opposition to the system." I would like to say to the General that before an American lawyer sitting in any kind of a judicial capacity, if he is true to the ideals and standards of his profession, the voice of a poor corporal or humble private is just as audible as that of a major general bedizened with all the blazon of rank that a military tailor can equip him with. I doubt whether he is enough of a lawyer to appreciate how true this is.

Sixth: Gen. Ansell admits that the committee notified him that they would hear him at Chicago, if he chose to appear, but says that the committee did not request the department to send him to Chicago; his appearance, of course, would have had to be on his own time and at his own expense, and that he had already expended too much of his meager salary in behalf of the advancement of the cause of military justice, and it would have been a hardship to go to Chicago at his own expense. I take it that anyone reading this statement, and having no other information on the subject, would assume that the committee simply offered Gen. Ansell the right to be heard. As a matter of fact, what occurred was that on the 29th of April, when I wrote the gentlemen whom Gen. Ansell had requested that we summon, I wrote him a letter, telling him that I was writing to all these proposed witnesses, except Lieut. Gardner, who had appeared before the committee, and giving him a copy of the letter. I concluded that letter with this paragraph:

"I will also say for your information that it is not impossible that the committee will hold a session in this city on or before the 10th of June next; that if you desire to attend and make some further statement on that occasion, I think the committee would be disposed to allow you about half a day, and if it would facilitate your attendance, to ask that the necessary orders detailing you for that purpose be issued by the proper authorities."

I am unable to see how a self-respecting man, mindful of what is due from an officer and a gentleman, can be guilty, in view of the plain facts, of making a statement such as that made by Gen. Ansell in regard to this incident. To that letter I never had the common courtesy of a reply.

I wish to say in conclusion that I endeavored to treat Gen. Ansell with great consideration. I publicly commended his efforts to secure reforms in the administration of military justice, and spoke highly of what he had done in that regard. He at once followed that up by a most impudent and insolent public attack upon the committee of such a character that we would have been justified in declining to hear a word from him, but out of regard for his somewhat overwrought condition, and assuming his sincerity and earnestness in a good cause, the committee ignored all this, although what he said did not go without rebuke, and listened to him for three days, and then offered to give him a further hearing, and to have him directed by the War Department to come here, so that he could get his pay and allowances, with the result that he has made the statement to you to which I have just referred. I write this not with any purpose of endeavoring to satisfy Gen. Ansell, because he has got himself into a state of mind and a state of exaggerated self-appreciation where nothing would satisfy him, except complete submission to his ideas; but I do wish to have you and the executive committee understand that your special committee endeavored to treat him considerately, to make a careful and absolutely impartial investigation upon this important subject, and to report honestly and fairly the conclusions of the members of the committee as a result of this investigation. So far as I am concerned personally, my own recommendations were so far in advance of Gen. Ansell that he could not agree to them, as he stated when he was before the committee. Therefore my withers are unwrung; but I can not understand how an officer and a gentleman who refers with apparent pride to his professional reputation and well-known record in the Army, can conduct a controversy in the manner in which Gen. Ansell has conducted the controversy with this committee, which he has himself created, after the most liberal and considerate treatment at the hands of this committee, and after they had ignored conduct of such grossly offensive character as was entirely sufficient to forfeit every right to consideration, or even to a hearing which Gen. Ansell might otherwise have had. I do not wish to magnify this matter, nor to make much out of nothing. The statements of this eminent lawyer and mighty warrior do not worry me in the least, but I propose to have the facts as they actually existed stated to you, so that they will be available to you and to the executive committee. Let the gallant general fret his little hour upon the stage—it will be brief—and let him extract all the satisfaction and glory he can out of it.

Yours, truly,

S. S. GREGORY.

I find I am in error as to Col. Sargent. He did reply, but said never having considered the subject he had no views to impart.

Gen. CROWDER. When the committee adjourned yesterday, we were discussing the nonapplicability of the Bill of Rights to military accused, and the extent to which Congress by special enactment had extended to military accused by statutory law the protection of the Bill of Rights. It occurs to me that I ought to connect up what I said there with the pending bill which you gentlemen are called upon to consider. You would expect that the pending bill prepared by Gen. Ansell would respect the theory as to the applicability of the Bill of Rights to military accused announced by him. But this bill does not secure to the accused, other than to one who is charged with a capital offense, the invariable benefit of the constitutional guarantee of being "confronted with the witnesses against him." (Sixth amendment.) Article 30 of the bill makes admissible in evidence against the accused, on trial for any noncapital offense before a special or summary court-martial or before a military commission, the depositions of witnesses taken at distant places to which the accused, as a practical matter, could not possibly go, and at which, in at least a large proportion of the cases, he would be unable to procure the services of counsel to cross-examine the witnesses for the prosecution.

The bill seeks, apparently, to justify depriving the accused of this protection on the ground that it occurs only in trials for minor offenses. But this explanation is not satisfying for two reasons:

(1) An officer or soldier is triable under article 14 of the bill before a special court, and a soldier under article 15 before a summary court, for the most serious, noncapital offenses known to the law; offenses for which, if the case were tried before a general court, the latter might inflict a very serious punishment under the terms of the bill; for instance, by imprisonment for 20 years (arts. 78, 79), or for 5 years (arts. 88, 92). It is true that a conviction for these very serious offenses in a special court could not result in more than six months' imprisonment and in a summary court could not result in more than one month's imprisonment. But a light sentence by a court incompetent to punish more severely, is slight comfort to a man of fine feeling whose career is wrecked by the stigma of conviction of what is the equivalent of a grave felony. A military accused needs the protection against conviction for such an offense, and if he is entitled to it as of constitutional right, how can he be denied it in this class of cases by statute law as provided in the pending bill?

(2) But depositions may, under the terms of the pending bill, be admitted in evidence in disregard of the alleged constitutional safeguards, not alone in the class of cases already mentioned, but also in cases that may result in long-term imprisonment. For military commissions are among the tribunals in which depositions are made admissible against the accused by the terms of article 30 of the Chamberlain bill; and military commissions are empowered under the bill not simply to convict on depositions for grave offenses amounting to serious felonies, but to inflict long-term sentences of imprisonment commensurate with such offenses. Before military commissions, depositions are admissible against the accused under article 30 in any noncapital case.

So it is that the very bill which is before this committee does not respect the theory of the applicability of the Bill of Rights, which has been claimed by Gen. Ansell to be universally applicable to cases of military accused.

I now come to the third subject that I wish to talk about, courts-martial as executive agencies, and to answer the criticism under this head.

I quote the following from Gen. Ansell's brief of December 11, 1917 (p. 76 of the hearings):

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. * * * 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.

Frequently throughout his testimony he recurs to this view of Winthrop and severely condemns it. On page 112 I find the following:

The ultra-military bureau chiefs of the War Department came to the support of the existing system, as they have ever done, with the slogan that the relationship between courts-martial and the power of military command for the enforcement of discipline must be conceded; that the courts can not be independent of the military command; that the law of the courts is the will of the military commander, and is subject to his judgment and discretion and his command.

And again on page 123, I find the following:

But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of a military commander.

And, in his brief, he lays down that it was an inevitable corollary of Winthrop's doctrine that:

Being Executive agencies, they are subject to the power of command.

Adding that these teachings of Winthrop were all wrong, and that the sooner we abandon them the better (p. 124).

And then proceeds to announce the conclusion which he says follows logically upon the reasoning of Winthrop, namely: That courts-martial "are only agencies of military command, not courts of law." That "their proceedings are not regulated by law;" that "their findings are not judgments of law" (p. 103).

This general line of criticism runs through his whole argument. If there ever was a case of Don Quixote charging a windmill, we have it here. He misstates the doctrines laid down by Winthrop, and then proceeds to demolish his own man of straw.

Let us first deal with his unfairness to Winthrop. The excerpts from Winthrop first above quoted are taken from his chapter entitled: "The Court-Martial—Its History and Nature."

In this connection I wish to place upon your table the two volumes which constitute the life work of Winthrop, whom Gen. Ansell in another part of his testimony speaks of as the military Blackstone, and refers to his intellectual power.

A perusal of this chapter discloses to even the most casual reader that that illustrious text-writer, having in contemplation the scheme of Government of the United States with respect to its three coordinate branches, namely, the executive, judicial, and legislative, was seeking one of these branches into which he might place our system of courts-martial. It is equally apparent that Winthrop, as he was frequently wont to do, was discussing the particular subject more or less discursively.

It is inexplicably astounding that Gen. Ansell displays what appears to be a careful and studied discrimination in the selection of excerpts from the text, by quoting only those portions thereof which seem to support his criticisms and contentions, and by adroitly omitting those portions in which the author claims a judicial character and quality for the court-martial. Remarkable as it may seem in the light of Gen. Ansell's arraignment, Winthrop, in the same chapter, denominates the court-martial as "A court of law and justice," and says:

Notwithstanding that the court-martial is only an instrumentality of the Executive power having no relation or connection in law with the judiciary establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully

a court of law and justice as is any civil tribunal. As a court of law it is bound, like any other court, by the fundamental principles of law and, in the absence of special provision on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts. * * * In the words of the Attorney General courts-martial are—"In the strictest sense courts of justice" (pp. 61-62, vol. 1).

Again, in the same chapter and under the heading, "As Assimilated to a Civil Judge and Jury," the illustrious writer says:

As illustrating the function of a court-martial to administer law and justice, it may be noted that this court, though an "exceptional forum," is not without close analogies in its personnel to the ordinary civil tribunals. Thus it has been frequently compared, as to some of its powers and proceedings, to a judge and, as to others, to a jury. Indeed, in its taking of statutory oath, its being subject to challenge, its hearing and weighing of evidence, its findings of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of special pleas to its jurisdiction or competency as a court and objections to the sufficiency of the pleadings and the admission of testimony, its authority to grant continuances and to adjourn, and its power to impose sentences, it is more clearly assimilated to the judge. The further comparison by Attorney General Cushing of a court-martial to a "grand jury" in that its members are "changeable in numbers and personality within certain limits," is a much less obvious analogy (pp. 62-63, vol. 1).

The foregoing significant quotations make it obvious that Winthrop did, in fact, ascribe to courts-martial those very qualities which Gen. Ansell claims that Winthrop and the Judge Advocate General deny to them, of functioning as judicial tribunals with a special and limited jurisdiction.

He is equally unfair in his statement of my own position, for in his letter of March 11, 1919, he says:

He [the Judge Advocate General] insists that courts-martial shall be subjected from beginning to end to the power of military command (p. 218 of these hearings).

What are the facts? Gen. Ansell had before him and was directly replying to my two letters of February 13, 1919, and March 8, 1919. In the former I express myself on the subject as follows:

* * * 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 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."

But once this difference of theory and purpose is conceded, the two systems proceed in identical methods, 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.

* * * * *
 This 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 ruling on revision represents the application of all those legal principles which are required by the 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.

In my letter of March 8, 1919, I express myself on the subject as follows:

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 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.

Certainly there is nothing in these two excerpts from my letters, which constitute an expression of my views in the exact point of the controversy, that would justify Gen. Ansell in saying that I was of the view that courts-martial should be subjected from beginning to end to the power of military command.

“But Col. Winthrop was first a military man” (p. 123).

Here is a statement of the military service of William Winthrop, late of the United States Army, compiled from the records of The Adjutant General's office:

He served as a private of Company F, Seventh New York State Militia, from April 17 to June 3, 1861; first lieutenant, First United States Sharpshooters, October 1, 1861; captain, First United States Sharpshooters, September 22, 1862; honorably mustered out September 16, 1864; major and judge advocate of Volunteers, September 19, 1864; transferred to Permanent Establishment, February 25, 1867; major and judge advocate, United States Army, February 25, 1867; lieutenant colonel and deputy judge advocate general, July 5, 1884; colonel and assistant judge advocate general, January 3, 1895; retired, August 3, 1895; died, April 8, 1899.

Brevetted lieutenant colonel of Volunteers March 13, 1865, “for faithful and meritorious services in his department in the field,” and colonel of volunteers March 13, 1865, “for faithful and meritorious services in the field and in the Bureau of Military Justice.”

It is a career limited, so far as military service in the line is concerned; and a very extended and distinguished career so far as legal service in the legal department of the Army is concerned.

Senator WARREN. He served until 1864 in the line?

Gen. CROWDER. And after that in the Judge Advocate General's department.

Senator WARREN. Yes.

Gen. CROWDER. Now, if there is dictation by military authorities to courts-martial; if commanding generals do control their deliberations and their decisions, it ought to be evident in some specific act charged against them. I have tried to find from the testimony before this committee some arraignment of some military man for some arbitrary act in his relations with courts-martial convened by him. I have found one concrete charge of this character. Gen. Ansell says that in recommending clemency to the President and the subordinate commanders in General Order No. 7 cases “frequently we got very sharp retorts from them to the effect, ‘You had better mind your own business; we know what this requires.’”; (p. 182, Hearings).

I have had a diligent search made of the records of the department to see what evidence there was of resistance by the President and department commanders to the recommendations of the Judge Advocate General, and especially for examples of the curt language which was attributed to them. Col. Rigby called your attention to the fact (p. 531, Hearings) that in all cases handled from October 1, 1917, to August 31, 1919, there were 28,463 cases examined and 275 returned to commanding officers, and there were 4 instances where the commanding officer refused to follow the advice of the Judge Advocate General for modification or disapproval of sentence on legal grounds. I have here two cases illustrative of the kind of so-called "sharp retorts" from commanding generals, alleged by Gen. Ansell. I brought them along with me in order that you might see just what kind of "sharp retort" there was in those two cases.

Gen. Arthur Murray, commanding the Western Department, at San Francisco, said in a letter of April 23, 1918, to the Judge Advocate General, as follows, with reference to one of those cases. It appears that it was a case where our office had recommended that the dishonorable discharge be suspended. The letter is as follows:

WAR DEPARTMENT,
HEADQUARTERS WESTERN DEPARTMENT,
San Francisco, April 23, 1918.

From: Commanding general.

To: Office of the Judge Advocate General.

Subject: United States v. James E. Meline (J. A. G., No. 112698).

Reference: Your letter of April 8, 1918.

1. Copies of the orders promulgating the case are inclosed.

2. In view of the fact that the prisoner, in case discharge is suspended, must be carried on the rolls of his organization as a soldier absent in confinement, for the term of his confinement, which in this case is 10 years; of the fact that under statutory authority the Secretary of War may restore the prisoner to duty when discharge has not been suspended to the same extent as when it has been suspended; of the fact that section 340 of the Court-Martial Manual states that the War Department policy there set forth carries no substantial mitigation as to other than peace deserters; and of the further fact that section 393 requires discriminating action on my part in passing upon sentences, I considered it proper exercise of discretion to omit suspension of the discharge in this case and I am still of such opinion.

ARTHUR MURRAY,
Major General Commanding.

Senator WARREN. Gen. Murray was formerly at the head of the Coast Artillery?

Gen. CROWDER. He was the Chief of Coast Artillery before he became a general of the line.

Senator LENROOT. Have you the recommendation of the Judge Advocate General's Office in that case?

Gen. CROWDER. I have not. It could be procured.

Senator LENROOT. Perhaps you could tell me, anyway: There was no recommendation as to remission of sentence?

Gen. CROWDER. Apparently none, because the order is not responsive to that. It is responsive to a recommendation that the dishonorable discharge be suspended.

Senator LENROOT. It was not based upon prejudicial error in the case?

Gen. CROWDER. No.

Senator LENROOT. It was a matter of disagreement as to the punishment, or what the punishment should be, and not a matter arising out of any errors in the trial?

Gen. CROWDER. No, sir.

Senator LENROOT. I think it might be well, if you can find the letter, to put it in.

Gen. CROWDER. I shall insert it at this point in the record:

APRIL 8, 1918.

From: The Office of the Judge Advocate General.

To: The commanding general headquarters Western Department, San Francisco, Calif.

Subject: Record of trial in the case of Pvt. James E. Meline, Coast Artillery Corps, Eighth Company, San Francisco, Calif.

1. The record of trial in the case of the man named above has been examined in this office and found legally sufficient to sustain the findings and sentence of the court.

2. It is the opinion of this office, except in very rare and exceptional cases, whenever a soldier is sentenced to confinement in a disciplinary barracks, that it is best to suspend that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, unless sooner ordered by competent authority, so that he may be saved to the colors in the event that his conduct while in confinement shall merit restoration to duty. It is thought that this case falls within the spirit of this policy.

3. The file number of the record of this case in the office of the Judge Advocate General is 112698. For convenience of reference and to facilitate attaching the published orders in this case, when received, to the record, please place the said number in brackets at the end of the published order, as follows: [J. A. G. O. 112698.]

E. G. DAVIS,

Lieutenant Colonel, Judge Advocate,

Assistant to the Judge Advocate General.

Gen. CROWDER. The second letter from Gen. Murray bears the same date and is couched in practically identical language. I will insert that letter and the office letter to which it was a reply.

APRIL 8, 1918.

From: The Office of the Judge Advocate General.

To: The commanding general headquarters Western Department, San Francisco, Calif.

Subject: Record of trial in the case of Recruit Antonio Forcelini, Coast Artillery Corps, Fortieth Company, San Francisco, Calif., National Army.

1. The record of trial in the case of the man above named has been examined in this office and found legally sufficient to sustain the findings and sentence of the court.

2. It is the opinion of this office, except in very rare and exceptional cases, whenever a soldier is sentenced to confinement in a disciplinary barracks, that it is best to suspend that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, unless sooner ordered by competent authority, so that he may be saved to the colors in the event that his conduct while in confinement shall merit restoration to duty. It is thought that this case falls within the spirit of this policy.

3. The file number of the record of this case in the office of the Judge Advocate General is 112699. For convenience of reference and to facilitate attaching the published orders in this case, when received, to the record, please place the said number in brackets at the end of the published order, as follows: "[J. A. G. O. No. 112699]."

E. G. DAVIS,

Lieutenant Colonel, Judge Advocate,

Assistant to the Judge Advocate General.

WAR DEPARTMENT,
HEADQUARTERS WESTERN DEPARTMENT,
San Francisco, April 23, 1918.

From: Commanding General.

To: Office of the Judge Advocate General.

Subject: United States v. Antonio Forcelini (J. A. G. No. 112699).

Reference: Your letter of April 8, 1918.

1. Copies of the orders promulgating the case are inclosed.

2. In view of the fact that the prisoner, in case discharge is suspended, must be carried on the rolls of his organization as a soldier absent in confinement, for the term of his confinement which in this case is 10 years; of the fact that under statutory

authority the Secretary of War may restore the prisoner to duty when discharge has not been suspended, to the same extent as when it has been suspended; and of the further fact that section 393 requires discriminating action on my part in passing upon sentences, I considered it proper exercise of discretion to omit suspension of the discharge in this case, and I am still of such opinion.

ARTHUR MURRAY,
Major General, Commanding.

Senator LENROOT. Those letters you have are both from Gen. Murray?

Gen. CROWDER. Both from Gen. Murray.

Now, out of 182 cases submitted to the War Department with recommendations based on grounds of illegality, the Secretary of War gave effect to the recommendation of the Judge Advocate General in 176 cases, and disagreed with the Judge Advocate General in 6 cases; so that is the amount of resistance by the Secretary of War that was encountered by the Judge Advocate General between October 1, 1917, and August 31, 1919, on the recommendations that he had made.

The Secretary of War, I think, is prepared to speak on the question of his difference of opinion. He told me when he consulted me about it—of course I had nothing to do with those cases—that it was a difference of opinion as lawyers.

Senator WARREN. That was while you were serving as Provost Marshal General?

Gen. CROWDER. I was on duty as Provost Marshal General. I had nothing to do with the cases. The points of difference were not developed in any case of which I was in charge, or which I presented.

Senator LENROOT. What would you say of the cases where the recommendation was followed, in cases where it was based upon prejudicial error; did even the granting of the recommendation secure justice?

Gen. CROWDER. I want to be sure I understand you.

Senator LENROOT. Would the granting of the recommendation be a remission of a sentence or remission of whatever verdict there might be?

Gen. CROWDER. It might be a disapproval of the findings of the court.

Senator LENROOT. It might be.

Gen. CROWDER. Yes, frequently; and it might be a disagreement upon the approval of the sentence. In fact, it might happen, and frequently has happened, that it was a disapproval of both the findings and sentence.

Senator LENROOT. Then, can you tell me, where the Judge Advocate General's Office has made a recommendation based upon prejudicial error, whether in all cases where a recommendation has been followed at all it has been a disapproval of the findings?

Gen. CROWDER. A disapproval of the—

Senator LENROOT. Wherever the Judge Advocate General's Office has recommended a disapproval of findings, that recommendation has been granted except in cases—

Gen. CROWDER. There are 10 cases, according to this table, to be looked up, and I can assume, for the purposes of this discussion, that all 10 of them dealt with reversible prejudicial error. Let us assume that. The record is, 10 instances of disagreement in a total of 457 cases returned with the review of the Judge Advocate General, 4 of

which have been by department commanders or reviewing authorities below, and 6 of which have been disagreements with the Secretary of War.

Senator LENROOT. Then let me ask you this as to the practice of the department. Whenever your department is of the opinion that prejudicial error has been committed, does it then recommend disapproval of the verdict—of the findings?

Gen. CROWDER. Oh, yes; when it is a reversible error; that is, affects the substantial rights of the accused. Since General Order No. 7 was issued, in January of 1918, we have reserved the power in the very terms of the approval of the commanding general below to reach out against the findings and the sentence in all cases involving death, dismissal, or dishonorable discharge, which are all the graver cases, and disapprove findings as well as sentences.

Senator LENROOT. How was it prior to that time?

Gen. CROWDER. Prior to that time the review of the reviewing authority below was final as to prejudicial error, but not as to jurisdictional error.

Senator LENROOT. And the other was merely a carrying out of the power of clemency?

Gen. CROWDER. Yes, sir. Before that, unless the error was jurisdictional, our only remedy was clemency; and I am glad you asked the question, because there ought not to be any doubt in anybody's mind about it. Prior to the issue of General Order No. 7, where the error was not jurisdictional, the finding of the authority below was final, and the only power which we had was constitutional pardon, or executive clemency.

I encounter another statement of Gen. Ansell's in his testimony, which is germane to this topic. He says:

The French punishments are comparatively very light indeed (p. 275).

He cites no authority for this statement and gives no statistics. It has been found impossible to get statistics from the French authorities covering the severity of sentences and the number of death sentences imposed during the war. The impression of American officers in touch with the French who have made inquiries on the subject is that the French habitually imposed heavy sentences during the war and that it is for that reason that the present government is not willing to give out statistics on the subject. Col. Rigby informs me that it has been authoritatively stated verbally, for instance, that approximately 1,600 death sentences were imposed during the war for the one offense alone of "misconduct in the face of the enemy," and that between 1,000 and 1,100 of these death sentences were actually carried into execution. That is the best information we can get on the subject.

But recurring to our problem, all the time there existed this power of clemency that could have been invoked at any time as against any excessive sentence. I find Gen. Ansell stating on page 186 of the record as follows:

The man who did institute the procedure (i. e., clemency) was myself, * * * a man who had had to fight to get such clemency as we had already. (Hearings, p. 186.)

There were cited on the floors of Congress, in debate, 6 cases of severity of sentence, and the country was asked to form an impression of court-martial procedure from what was said in regard to those

6 cases. Three of them were sentences in which Gen. Ansell himself had denied clemency. These cases are as follows:

C. M. No. 113076, Pvt. Walworth, 10 years' sentence for sleeping on post, letter of Gen. Ansell, November 7, 1918, recommending against clemency.

C. M. No. 115506, Pvt. Sabbri, 10 years' sentence for sleeping on post, letter of Gen. Ansell, November 22, 1918, recommending against clemency.

C. M. No. 119328, Pvt. Robbins, 25-year sentence for desertion, absence without leave, and breaking arrest, letter of Gen. Ansell, November 8, 1918, recommending against clemency.

The Walworth and Sabbri cases were among those cited by Senator Chamberlain in his speech in the Senate December 30, 1918, as being unduly severe; and the Robbins case was cited in the House of Representatives by Representative Burnett, February 19, 1919, as unduly severe.

I expect, of course, that we will recur to these several topics later on when we get to discussing the pending bill, and I am not attempting to complete the presentation at the present time, but to make a general statement which will introduce the subject in such a way that inquiries and answers may be concrete.

I come next to the subject of prejudicial error.

Senator LENROOT. Do you intend to take up the case of these four boys?

Gen. CROWDER. Yes. I intend to.

Gen. Ansell's statements to the committee on this subject of prejudicial error are as follows:

* * * Under the practice of the War Department, as suggested at that time, although the proceedings might contain errors of law that at least measured up to reversible error if not annihilating error, it was the practice of the War Department to say, and to act accordingly, that notwithstanding such error it was not reviewable and was therefore incurable. In other words, the War Department at that time held that the proceedings, findings, and judgment of a court-martial are final beyond all remedial, curative power, when those proceedings and final judgment are once approved by the commanding general who brought that court into being, regardless of whatever errors of law were committed in the proceedings; and that, conceding that the record was full of such errors, it could not be examined (p. 55) * * *

So, that the situation at the beginning of the war was—and it is still largely the situation—that a court-martial judgment can not be modified by any power on earth no matter what prejudicial errors of law were committed in the proceedings. It is around that proposition that the whole controversy—if we can refer to it as a controversy—and I presume we may—revolves (p. 56).

Elsewhere in his testimony Gen. Ansell states:

* * * Well, in any event, the situation when this war began was this: No matter how illegal the judgment, it could not be reviewed (p. 99) * * *

These statements which I have read of Gen. Ansell illustrate the misuse that can be made of language the literal accuracy of which can not be disputed. He speaks of reversible error and leaves you undisturbed in the view that that term "reversible error" describes the same class of error in civil jurisprudence as in military jurisprudence. [He fails to remind you in this connection that the term jurisdictional error in military jurisprudence is much more broadly inclusive of error, particularly upon the procedural side, than is this term as applied in civil jurisprudence.] He fails to give you in this connection a distinction between the court-martial as a court of special and limited jurisdiction and the civil court of general

jurisdiction, in so far as this distinction affects the question of jurisdictional error. He fails to remind you that the court-martial is of the class of inferior courts of limited jurisdiction, and not on the same high ground with superior courts of record. (*Ex parte Watkins*, 3d Peters, 207.)

I am speaking now with citations to decisions of courts.

Jurisdiction generally: A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved (3 Greenl. Ev., sec. 470; *Brooks v. Adams*, 11 Pick., 441, 442; *Mills v. Martin*, 19 Johns., 33; *Duffield v. Smith*, 3 S. and R. (Pa.), 590, 599).

To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it has jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law. (*Dynes v. Hoover*, 20 How., 65, 80; *Mills v. Martin*, 19 Johns., 33.)

There are no presumptions in its favor, so far as these matters are concerned; and it is not enough that they may be inferred argumentatively. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet., 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: "The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively. (*Runkle v. U. S.*, 122 U. S., 543; 7 S. Ct., 1141; 30 U. S. (L. ed.), 1167. *McClaghry v. Deming*, 186 U. S., 49, 22 S. Ct., 786; 46 U. S. (L. ed.), 1049.)

A court-martial is wholly unlike a permanent court created by the Constitution or by a statute and presided over by one who has some color of authority although not in truth an officer de jure, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected.

(See "Courts," vol. 7, *Ruling Case Law*, pp. 976, 999; "Judges," vol. 15, *ib.*, pp. 519, 542.)

But the court-martial that has jurisdiction over any offense must, in the first place, be legally created and convened. Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. This court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when he appoints as members of a court-martial persons whom the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over

either the subject matter of the charges or over the person of the accused. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacks any statutory authority for its existence, and it lacks, therefore, all jurisdiction over the defendant or the subject matter of the charge against him.

(*McClaghry v. Deming*, 186 U. S., 49, 66; 22 S. Ct. 786; 46 U. S. (L. ed.), 1049.)

It is a well-recognized principle of law as applicable to trials in the civil courts that where a court is without jurisdiction of the subject matter, such jurisdiction can not be conferred on the court by the consent of the parties. In such cases the question is not whether a competent court has obtained jurisdiction of a party triable before it, but whether the court itself is competent under any circumstances to adjudicate a claim against the defendant.

(See "Courts," vol. 7, Ruling Case Law, p. 1039.)

This principle applies with full force to a court-martial, and if such tribunal is convened in direct violation of statute, as where a court-martial under the former statute to try a volunteer officer was constituted of Regular Army officers, no consent on the part of the accused will give the court jurisdiction. The objection may be raised at any time and is not waived by a failure on the part of the accused to object thereto at the time of the trial.

(*McClaghry v. Deming*, 186 U. S., 49; 22 S. Ct., 786; 46 U. S. (L. ed.), 1049.)

Persons belonging to the Army and the Navy are not subject to illegal and irresponsible courts-martial when the law for convening them and directing their proceedings or organization and for trial have been disregarded. In such cases, everything which may be done is not merely voidable, but void (*Dynes v. Hoover*, 20 How., 65; 15 U. S. (L. ed.), 838), and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment of a court-martial. (*Wise v. Withers*, 3 Cranch, 331; 2 U. S. (L. ed.), 457. *Dynes v. Hoover*, 20 How., 65; 15 U. S. (L. ed.), 838.)

What is the application of all these opinions? I take it that it is this, that wherever a procedure has been violated—a statutory procedure—it becomes jurisdictional error. Take the case of a failure to give a man, Senator Lenroot, the full right of challenge. That would be prejudicial error in a civil court. It is jurisdictional error in a military court.

Senator LENROOT. That is because the statute specifically gives him that right.

Gen. CROWDER. Yes; wherever in such case there is a substantial right and that right is violated, it is jurisdictional error in a court of special limited jurisdiction.

Senator LENROOT. Yes; but let me put this case to you and get your view of it: Suppose in a trial there is admission of evidence of some other offense. That would not be permitted in civil courts, and in that case it would be treated as reversible error because of the probability that it would influence the minds of the court.

Gen. CROWDER. Yes.

Senator LENROOT. What would you say in this case?

Gen. CROWDER. That is prejudicial error.

Senator LENROOT. But not jurisdictional error?

Gen. CROWDER. Not jurisdictional. That is prejudicial error, against which we had no remedy until General Order No. 7.

Senator LENROOT. That is what I was getting at.

Gen. CROWDER. Yes. But, take the case of an insufficient charge—where no offense has been stated. I would classify that as jurisdictional error.

Senator LENROOT. Yes.

Gen. CROWDER. Take the case where the evidence failed to support the charge at all; where there was a failure of proof. I should say that error was jurisdictional. The man has not been tried. The line of demarcation between the two—jurisdictional and prejudicial error—is sometimes difficult to trace; but extreme liberality in classifying error as jurisdictional error, i. e., fatal to the validity of the trial, has always characterized our court-martial system. The point I want to make is this, that fatal error is much larger in the case of a court of special and limited jurisdiction than it is in the case of a court of general jurisdiction, where the law presumes so much in favor of the sufficiency of the record.

To show the classes of error which we have held as invalidating the record I will read here from a book, a military law textbook, under the heading entitled "Fatal Defects in the Record," for which the reviewing authority is to set aside the proceedings. I know that this book was written in the eighties; I know I am in disagreement with some of the statement; but it will show you how far the practice was carried in the direction of recognizing what is sometimes called prejudicial error, as error fatal to the validity of the trial. [Reading:]

1. Where the record does not contain a copy of the order appointing the court, or copies of all orders modifying the detail in any manner.

I think ordinarily the reviewing authority would take judicial notice of the orders that had issued at his own headquarters. [Continuing reading:]

2. Where the copy of the order in the record does not show by what officer the court was convened.

4. Where the record does not show that the court met pursuant to the order constituting it.

Where the record does not show that the court was organized as the law requires. To state in the record, "The court being in session proceeded," etc., does not sufficiently set forth the organization.

Where the record does not show how many members were present each day and took part in the trial, or how many were present at a reassembling for revision.

Where the record does not show that the judge advocate was present during the trial.

Where the record does not show that the order convening the court was read in the presence of the accused or that he had opportunity of challenge afforded him, either to a member then sitting, or to one who subsequently took his seat.

Where the record does not show that the members of the court were severally duly sworn by the judge advocate in the presence of the accused.

Where it does not show that a member who subsequently took his seat was thus sworn.

Where the record does not show that the judge advocate was duly sworn by the president in the presence of the accused or that a new judge advocate who subsequently took his seat was similarly sworn.

Where the record does not contain a copy of the charges and specifications upon which the accused is tried.

Where the record does not show that the accused was allowed to plead, or shows that he was tried without pleading to the merits, or does not contain his entire plea.

Where the record shows that the accused was arraigned and pleaded prior to the organization of the court.

Where the record does not show that the witnesses were sworn.

That they were not sworn in the presence of the accused would not constitute a fatal defect.

Where it does not set forth the testimony of the witnesses.

It is not sufficient to set forth a summary or such portion as the judge advocate deems material. The full testimony of the witness in his own language should be given.

Where the record does not show that a clerk, or reporter, who recorded the proceedings of the court, was sworn to a performance of his duties.

Where it does not show that an interpreter was so sworn.

If an interpreter was called to interpret the testimony of a single witness, and the record did not show that he was sworn, it would not be a fatal defect, provided there was sufficient evidence to convict without the testimony of this witness.

Where the record does not show that the court was closed for deliberation on findings and sentence.

Where there is a fatal variance between the name of the party in the specification and in the finding or sentence.

Where, in the case of a capital sentence, the concurrence thereon of two-thirds of the members of the court does not appear from the record.

Where the proceedings are not authenticated by the signature of both the president and judge advocate.

When proceedings are not signed by the president of the court, and the court is dissolved, the sentence is wholly invalid, and the order approving it must be revoked.

The record of a trial by a military court is, furthermore, incomplete and insufficient where the reviewing officer fails to state his "decisions and orders" at the end of the proceedings. And it is not sufficient to state such decisions, etc., at the end of a series of cases passed upon by the same reviewing officer: it must be stated independently at the end of each case. To annex a copy of the general order promulgating the proceedings to a collection of records is not deemed a compliance with the law.

Senator WARREN. Has your manual anywhere in it that matter or similar matter?

Gen. CROWDER. Not in the detail which is contained in this book.

I am not going to read any more of this. The author (Ives) lists 25 fatal defects in the record calling for disapproval, which illustrates the liberality of the legal authorities of that day in finding fatal defects in the record. (Instead of illustrating the harshness of military justice, it illustrates the extreme liberality in classifying as fatal defects errors of procedure leading to decrees of nullity.

Now, it is fair to say that most of these are on the procedural side. I do not want to give you the impression for a moment that prior to the issuance of General Order No. 7 we had any adequate remedy against prejudicial error in the admission or rejection of testimony.

Senator LENROOT. Let me ask you, in that connection: Prior to the issuance of General Order No. 7 was it the position of the department that there was no jurisdiction to issue such an order under the law?

Gen. CROWDER. On the part of the President or superior authority?

Senator LENROOT. Yes.

Gen. CROWDER. Prior to the revision of 1916; yes, out of deference to the doctrine laid down by Winthrop, who says (p. 687):

Whether and how far the proceedings and sentence, or any part of the same, shall be approved, etc., is a subject wholly within the discretion of such officer (referring to the reviewing officer). As to this he is invested by the article with the sole authority, and can not therefore be directed either by the President or other superior. While deferring to any known views of a superior as to any question of law or dis-

cipline involved in the particular case, it is yet his duty, as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment and in the light of the facts and the law as understood and held by himself.

The legal sanction of G. O. 7 is found in new articles 37 and 38 of the revision of 1916. Since then we have had authority to issue such an order; but unquestionably the practice down to the beginning of this war was as laid down by Winthrop. I do not mean to say that the Winthrop doctrine had the concurrence of all military men. I have always felt that it was an open question whether this power did not inhere in the office of the President of the United States; and, even further, whether or not discipline was not an essential part of command, and that the President as Commander in Chief could exercise the appellate authority over these tribunals that was necessary to give effect to his own judgment respecting the findings and sentences of courts-martial. But I have always approached the subject with hesitation, because I believed it would take a decision of the Supreme Court of the United States to put the question at rest, and therefore when the necessity of this appellate power became manifest my first instinct was to come to Congress with a proposition to confer it upon the President, so that it would not be the subject of cavil or dispute.

I wish next to take up some inaccurate statements that have been submitted to the committee respecting the British court-martial system. I find on page 271 the following statement of Gen. Ansell:

Now, a field general court-martial is the general court-martial which accompanies the army when it is actually fighting in the field, for the trial of enlisted men—not officers. The law does not provide for this law officer with that court.

(Referring to the law officer who, under the British system, attends meetings of courts-martial and passes upon the admissibility of evidence.)

Senator WARREN. I will say, as you go along, that we have had Col. Rigby here, and he went very fully into the British system, etc., and he has had an opportunity to look over his notes, but unfortunately there was so much going on at the time on the floor of the Senate in which Senator Lenroot was interested that he was not able to be present much of the time. I say that as you go along so that you may elaborate a little more in what you are saying. I am telling you that so that you may remember to make your statement as full as you can, as you go along.

Gen. CROWDER. I so understood. To continue with what Gen. Ansell says [reading]:

The law does not provide for this law officer with that court; but the regulations have done so, and every field general court-martial for the trial of enlisted men for any offense, however slight—they do not try them for the slight offenses we do, however—has this law officer, and he is commissioned because his position is rather unstable, as you will see by reading this article and as I saw it (p. 271). (Italics supplied.)

The truth is that the British field general court tries officers as well as enlisted men without distinction.

The truth is that the "law officer," that is, the court-martial officer attached to the headquarters of the command, who is detailed as an additional "specially qualified member" of the court, does not attend every trial. On the contrary, he will be appointed to membership in every field general court organized within the command, but is not required nor expected to attend every session of every court of

which he is a member. The regulation provides: "No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers." (Circular Memorandum on Courts-Martial on Active Service, August, 1918, sec. 12-(b).) The convening authority determines which cases are so "difficult, complicated, or serious" as to require the attendance of the specially qualified member of the court.

Gen. Ansell says further:

We see that at the top of the (British) judicial hierarchy is a civilian, a barrister, answerable now to the secretary of state for war, and never to any military commander (p. 271).

Never any report of the judge advocate general of England goes to the commander in chief of the army or to any military commander (p. 271).

The authority that is actually exercised over him by the secretary of state for war is a formal one (p. 272).

The truth is, to the contrary, that the judge advocate general of England reports to the secretary of state for war through the deputy adjutant general (of the army council, the body corresponding to our General Staff), who carefully examines the record in each case and sometimes disagrees with the recommendation of the judge advocate general. The practice is substantially the same as that in this country, as appears from the signed statements of the British judge advocate general, and of Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B., in evidence before this subcommittee, introduced by Lt. Col. Rigby.

Senator LENROOT. That has been the practice since general order No. 7?

Gen. CROWDER. Both before and since. But Gen. Ansell's proposition is largely to divorce the administration of military justice from the command of the Army. The English code has been cited as a precedent, and the facts have been inaccurately stated.

Now, passing to the French system, Gen. Ansell says as follows:

The French * * *. A man may not be court-martialed there until a quasi-judicial officer does look over the charges, and does look over the evidence to see whether there is a prima facie case (p. 275).

The truth is that, in the armies on active service, no preliminary investigation whatever is required, but the commanding general may, in his discretion, order any soldier or other military person before a court for trial, without any investigation whatever, by what is known as a "direct order," under article 156 of the Code de Justice Militaire.

Gen. Ansell further says:

Such officer is not under the control of military authority either (p. 275).

Again, the truth is to the exact contrary of Gen. Ansell's statement. The "rapporteur," whether in the territorial armies or in the armies in active service, is required to be an army officer and is appointed either by the minister of war or by the commanding general; and in the armies on active service he must be taken from among the officers serving in that command. (Code de Justice Militaire, arts 7, 9, 22, 34.)

Gen. Ansell says further:

The French * * *. And after the man is tried, as I have indicated, he gets this review (p. 275).

The clear inference of this statement, and of all of Gen. Ansell's other statements, in his testimony before the subcommittee about the French system, is that the right of review is secured to every soldier before their military courts, always.

The truth is quite to the contrary.

1. There is no automatic review, such as we have; and no review at all unless, within 24 hours, the convicted soldier formally prays an appeal. (Code de Justice Militaire, secs. 141, 143.)

2. The right of appeal may be wholly cut off at any time by presidential decree in time of war or of a state of siege, or by the commanding general of a place actually besieged (Code de Justice Militaire, art. 71), as was actually done several times during the war.

3. No appeal whatever was allowed from the emergency war courts ("special courts") established for the war under the presidential decree of September 6, 1914 (decree of Sept. 6, 1914, art. 6; "Guide Pratique et Sommaire," p. 72). These "special courts" were extensively used during the war until abolished in the spring of 1918.

4. In time of peace the appeal is to the court of cassation, instead of the court of revision. In such case the appeal must be prayed within three days from the date of judgment.

Our system has been held up to unfavorable comparison with the French system, which, as I have pointed out here, was lauded as a system in which a man gets a review. Whether or not he gets a review depends upon accident. It may be shut off altogether, and it may be shut off altogether by the commanding general in a besieged place; so that there is no rigid statute under which the French soldier gets a review.

Gen. Ansell, speaking still of the French Army, says:

My recollection of it is that, in time of war, they may have, and do have usually, on their court of military appeals men who are commissioned in the army; that is, **ar my men** (p. 274).

Gen. Ansell's inference clearly is that the regular thing in the French Army is to have a military appellate tribunal composed normally of civilians, but that, in time of war only, it is permissible to have some military men on the court.

The truth is, to the contrary, that their courts of revision (which are their military appellate tribunals) are required by law to be, in every case, composed either wholly of military men or else predominatingly of military men. Their statutes require (a) in the armies on active service, or in a "state of siege," the court of revision shall be composed wholly of officers of the army, namely, of a brigadier general, two colonels or lieutenant colonels, and two majors (C. J. M., art. 40); and (b) that in the territorial armies—that is, in armies not in active service—three out of five judges of the court of revision must be army officers, the other two being civilian judges (judges of the civil court of appeals) (C. J. M., art. 27).

But in the zone of operations the moment war breaks out they wipe out even a minority civilian representation upon their court of appeals, and make it exclusively a military court; and even then give the President of France the right to shut off all appeals.

Senator WARREN. Somewhere, as you pass along, there is in this bill 64 a proposition of using enlisted men in courts-martial, and I think of one place they argue that in one or more of the countries

abroad they have that custom; and sometime, in your evidence, you might touch upon that.

Gen. CROWDER. I will come to that in treating of the bill.

I wish to speak now of the use of prerogative writs in England, and the corrective use that is made of them over findings and sentence of a court-martial. Gen. Ansell says:

It is a remarkable fact that the courts-martial of England are subject to review by the civil courts, not only by way of the writ of habeas corpus but by writ of certiorari, by the writ of prohibition, and by the other common-law remedies; the relation of military justice to the civil judicial authority there is such as to permit that course (p. 125).

Here again you have a picture of an irresponsible military judiciary in this country operating independent of the civil courts, to an extent, at least, greater than is permitted under the English system. I propose to show that Gen. Ansell is wrong.

This statement of Gen. Ansell clearly infers that the British civil courts exercise a broader supervisory power over judgments of courts-martial than do the civil courts of the United States.

The truth is, on the contrary, that the rule as to the right of civil courts to interfere with the proceedings or judgments of courts-martial is precisely the same in the two countries. The rule in the United States, as laid down by the Supreme Court in one of the cases relied upon by Gen. Ansell in his testimony before this subcommittee (page 125), is that a civil court has no power to review the proceedings of a court-martial, "except for the purpose of ascertaining whether the military court had jurisdiction of the person and the subject matter, and whether, though having such jurisdiction, it has exceeded its powers in the sentence pronounced." (*Carter v. Roberts*, 177 U. S., 496, 498.)

That was the famous case of Capt. Carter of the Engineer Corps.

Senator WARREN. That was in a case of the embezzlement of funds?

Gen. CROWDER. Yes, sir. Now, the point is this, that precisely the same rule is laid down in the British Manual of Military Law in the following language:

The members of courts-martial and officers in the exercise of individual authority are * * * amenable to the superior civil courts for injury caused to any person by acts done either without jurisdiction or in excess of jurisdiction—

Almost the exact language of our own Supreme Court. Then the regulation continues:

Although there is not, in the ordinary sense of the word, any appeal from the decision of a court-martial or from the order of an officer. (*British Manual of Military Law*, Ed. 1914; Ch. VIII, sec. 1, p. 120.)

The writ of prohibition is available for the same purposes in this country in the same way and subject to the same limitations as in England, except only that a question has been raised as to whether our Federal courts have power, under the statutes of Congress under which those courts are organized, to grant the common-law writ of prohibition; but it has never been decided that they have not such power; and on the contrary in the cases where the question has been raised it was assumed by the courts for the purposes of the decision that the power did exist (*Smith v. Whitney*, 116 U. S., 167, 175-176; *U. S. v. Maney*, 61 Fed., 140). But the courts of superior jurisdiction of the several States of the Union have precisely the same inherent power as

the superior courts of England to issue this writ (*Smith v. Whitney*, supra, 116 U. S., 167, 176; *State v. Wakely*, 2 Nott & McCord, 410; *State v. Stevens*, 2 McCord, 32; *Washburn v. Phillips*, 2 Met. (Mass.), 296). And in discussing the conditions upon which the writ of prohibition will issue against a court-martial, the United States Supreme Court cites and relies upon the decisions of English courts as stating the rule (*Smith v. Whitney*, supra, 116 U. S., 167, 176-179, 182-186).

Now, if there is a single question which can be raised in England by certiorari or habeas corpus or prohibition, which can not be raised by the use of corresponding writs in this country, I do not know what it is. I would like to have cited one single instance where the remedy in the United States procedure has been less comprehensive than it is in England. The English system has been mentioned as something *sui generis*, having no counterpart in any other country. That has been one of the arguments against our system, that it is not under the usual supervision of civil courts.

Senator LENROOT. Let me see if I follow you. In England, take the case of a conviction without jurisdiction. Does any writ of the civil courts apply?

Gen. CROWDER. Of course, the writ of habeas corpus would lie, and probably a writ of prohibition would lie during the progress of the trial.

Senator LENROOT. Yes, but after—

Gen. CROWDER. And a writ of certiorari might run to the court-martial to certify up the record and the questions.

An attempted use of the writ of prohibition issuing out of a United States court to a court-martial is found in the case of the United States *v. Maney*. I happened to be stationed at Omaha at the time. Maney, a lieutenant of the Fifteenth Infantry, had shot and killed Capt. Hedler. He had been tried in the United States court at Chicago for manslaughter, and had been acquitted. Charges were brought against him, military charges, for the same act of manslaughter, alleged as conduct to the prejudice of good order and military discipline under the sixty-second, the general, article of war. The court was convened at Fort Snelling. I was interested in those matters at the time, and took the trip up there to observe the progress of the trial. The accused, through counsel, Frank P. Blair, came before the court and made a plea in bar of trial, alleging that the court was without jurisdiction to try him because he had been previously in jeopardy. The court overruled the plea. Counsel applied to Judge Caldwell for a writ of prohibition, but he declined to issue it. Finally counsel obtained the writ from Judge Nelson, and the case was argued before Judge Nelson. In his reported decision, he referred to the fact that the authorities were somewhat confused as to whether or not a United States court could issue the common-law writ of prohibition, but he said he would concede that the writ would issue for the purpose of examining whether it ought to issue in this case, and then pointed out what is familiar law, but was apparently not familiar to these officers, that a plea of former jeopardy does not raise any jurisdictional question; but is a matter of defense which the court-martial has jurisdiction to pass upon and, having determined it adversely to the accused, was at liberty to proceed with the trial.

Senator LENROOT. Would not the same thing have followed if the court had not determined it, if it found that it had jurisdiction to determine it; if it had not made that finding?

Gen. CROWDER. In that case the court had decided that it had no jurisdiction. Would the prohibition have then gone to it?

Senator LENROOT. No; if the writ had been asked for a military court and the court-martial had not ruled on that subject, would not the ruling have been the same under the theory that they had jurisdiction so to find?

Gen. CROWDER. Yes; the ruling would have been the same. There is no time, it seems to me, after a man has been put in custody with a view to military trial, when some writ will not issue in his behalf. The moment any restraint is applied, the writ of habeas corpus would lie. The moment that charges have been preferred it seems to me that the writ of prohibition would lie, either against the court or against the preferring officer, providing the common law writ of prohibition can issue out of a Federal court.

Senator LENROOT. Have we ever had any cases other than of the habeas corpus remedy, in the Supreme Court?

Gen. CROWDER. It has been attempted in two cases, one, the case of *Smith v. Whitney* when Mr. Whitney was in the Cabinet, and in that case a writ of prohibition was sued out of the Supreme Court of the District of Columbia against Mr. Whitney as Secretary of the Navy and a naval court-martial convened by his order, to prohibit reconsideration or revision of the proceedings of the court-martial which had been returned to it for that purpose by the Secretary of the Navy. The Supreme Court of the District of Columbia dismissed the petition for want of jurisdiction. On appeal to the Supreme Court of the United States, the latter court raised the question of the power of the Supreme Court of the District of Columbia, and of other courts organized under the laws of the National Government, to entertain writs of prohibition; but avoided a decision of the question, saying:

We are not inclined in the present case either to assert or to deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it. In deciding the case upon the facts before us, and expressing no opinion upon the broader question, because the determination of the case does not require it, we take the same course that has been followed by eminent English judges in disposing of applications for writs of prohibition under similar circumstances (pp. 175-176).

The court held that the writ could not issue against the Secretary of the Navy, and then proceeded to discuss the question whether, on the merits of that case, it should issue against the court-martial, and held, upon the merits of the case, that the writ ought not to issue, citing and relying upon English decisions relating to writs of prohibition against courts-martial. In other words, the United States Supreme Court in that case applied the same principles of law which had been laid down by British courts in like cases. (*Smith v. Whitney*, supra, 116 U. S., 167, 175-176, 176-186.)

Then there was this case of *United States v. Maney*, to which I have called your attention. They are the only two cases I know of. But there is no restraint that can not be reached by some writ, and our courts will review for lack of jurisdiction or for excess of jurisdiction, which is the sole power of the British courts. The British courts may employ more writs than we habitually do, but the military

courts-martial of the United States are under the same accountability to the civil courts of the United States as are their courts-martial to the courts of England.

I come now in natural order to the November briefs. These briefs were directed to the existence of appellate power in the Judge Advocate General. Senator Chamberlain concurs in the view that Gen. Ansell expressed, that section 1199 of the Revised Statutes confers that appellate power and, in the course of his speech on August 20, said:

The Judge Advocate General had the power, if he had seen fit to use it, without any additional legislation to modify or to revise sentences of courts-martial, notwithstanding his present opinion to the contrary. (Cong. Rec., Aug. 20, p. 4338.)

And again:

might, if he had seen fit, have alleviated the suffering and humiliation that fell to the lot of thousands of American boys. (Cong. Rec., Aug. 20, p. 4339.)

In language like this, it has been sought to convey the impression to the country that the construction adopted by the War Department was a narrow, technical one, and that we were at liberty, had we seen fit, to have exercised an appellate jurisdiction under the existing law.

Much emphasis has been placed upon the fact that 17 civilian lawyers of repute, on duty in the Judge Advocate General's office, concurred with Gen. Ansell in his construction of this statute.

It is proper to invite the attention of the committee—

(1) To the fact that 2 of the 17 lawyers concurring in the brief of Gen. Ansell have subsequently appeared before the Senate Military Committee and withdrawn that concurrence. I believe if all were summoned here that all except two would similarly withdraw their concurrence.

(2) That the Bar Association committee, appointed to examine into this case, have expressed their unanimous nonconcurrence in Gen. Ansell's construction. (See p. 20 of the report of the American Bar Association committee.)

(3) That Maj. Runcie, one of the critics, and lined up generally with the two other critics, has likewise expressed his nonconcurrence in the brief of Gen. Ansell (p. 31 of Maj. Runcie's testimony before the Senate Military Committee.)

I propose now, briefly, to review the opinion rendered and show how impossible it was for any man who had given proper study to the legal questions involved to have reached a conclusion that section 1199 Revised Statutes did confer any appellate power upon the Judge Advocate General.

Gen. Ansell says that when he was conducting these studies and conferences with the 17 officers on section 1199, Revised Statutes, I visited the office one day, and that we engaged in a conversation, he and I, in an adjoining room, and that he told me of the study that the office was prosecuting and its probable result, namely that they would agree that appellate power of the Judge Advocate General could be deduced from that section; and that I told him to go to it, and put it across; but that he might have some difficulty with military men under article 37. (Hearings, p. 220.)

I do not recall that conversation, but I seem to recall that at another time the question of whether appellate power could be found

in the Judge Advocate General came up for discussion, and a part of the language he attributes to me is language I am afraid I habitually use, namely "go to it," and "put it across"; but I know the processes of my own mind, and I know that I assumed that the sense of duty and obligation that induced Gen. Ansell to communicate to me the fact that the study was in progress, would have led him to communicate to me the results of that study before he undertook to act upon it. I never knew that he had submitted a conclusion to the Secretary of War until November 23, 1917. The date on his brief announcing his conclusion and the concurrence of these 17 officers is November 10.

On November 23 the Secretary of War sent for me and we had a conversation in his office—not in a room in the Army and Navy Club, as Gen. Ansell states. I remember the conversation well enough to be entirely accurate in presenting it, although I can not attribute to the Secretary his exact language, nor probably repeat my own, so that it could be put in quotation marks, but there will be no error of substance. The Secretary asked me how long I had been Judge Advocate General. I answered "A little over six years." The next question was, "Why have you not advised me of the existence of an appellate power in the Judge Advocate General to reverse, modify, or affirm sentences of courts-martial?" I replied that had never been the view; that no Judge Advocate General has ever expressed such a view; that one Judge Advocate General had taken the contrary view; and the department has followed that opinion; that I had followed it, as my immediate predecessor, Gen. Davis, had followed it. He said that Gen. Ansell had placed in his hands a very powerful brief on the subject which had challenged his attention, and asked me if I would take it and give it some study. I told him I would be very glad to do so. He asked me to submit my own views, and at the end of four days, on November 27, I submitted a reply brief. I want to discuss it briefly. Gen. Ansell argued for the existence of this power upon five principal propositions.

His first proposition was that the Circuit Court of Appeals of the United States had deduced an appellate power to modify or reverse in bankruptcy cases from the single word "revise" in a statute substantially similar to section 1199, Revised Statutes.

His second proposition was—I may not state them in their exact order—that the legislative history of section 1199 of the Revised Statutes supported his construction.

His third proposition was that all Judge Advocates General had acted upon that view until the days of Lieber, who, in an ill-considered opinion, had reversed the practice of the War Department.

His fourth proposition was that no civil court or other civil authority of the United States had ever questioned the existence of the appellate power he contended for.

His fifth and final proposition was that the British judge advocate general exercised this power.

Anyone accepting those five propositions of Gen. Ansell would have proceeded with him to his conclusion. My attention was especially challenged to his proposition No. 1, that the United States Court of Appeals had deduced this appellate power in bankruptcy cases from the single word "revise" in a provision of law which was substantially identical with section 1199 of the Revised Statutes.

What was my surprise to find out that Gen. Ansell had not brought to the attention of the Secretary of War a previous paragraph in the section which he was discussing, and which conferred the appellate power in express terms. The court, *In re Cole*, 163 Fed., 180, 181—the case relied upon by Gen. Ansell in his brief, on this point (hearings, p. 59)—was not deducing appellate power, because that had been given in express terms. The Secretary of War had no information from Gen. Ansell's brief that the statute from which he was arguing—the concealed part of it—conveyed appellate power in express terms, and that all the court was trying to do in *re Cole* was to deduce from the word "revise" in the second paragraph, the power, the collateral power, which would enable it to inform itself of the scope of matters that could be inquired into upon the petition in bankruptcy cases. So that his proposition No. 1 fell of its own weight.

I examined the history of the legislation, section 1199 of the Revised Statutes, in Congress, and my conclusion was, what I think yours must necessarily be, that it does not furnish any suggestion of an interpretation such as Gen. Ansell advanced.

As to his proposition No. 3, that Judge Advocates General prior to Lieber had held that this power existed, I found there was no proof of it from the records, after the examination of a great many cases; and even to-day, with all of the publicity that has been given to this, nobody has ever been able to point to a single case in which any Judge Advocate General ever sought to exercise this power.

Judge Advocate General Holt had not. He was the first Judge Advocate General we ever had, and remained in office from 1862 to 1877. Before becoming Judge Advocate General he was, as you know, Secretary of War. He was one of the distinguished jurists of this country. He is the father of our military jurisprudence. He never claimed that the power existed. He never exercised the power. So that we have to part company with proposition No. 3.

Proposition No. 4 was that no civil court of the United States, or other authority, had ever ruled on this question; when, as a matter of fact, in the case of *Ex parte Mason*, the Circuit Court of the United States for the Northern District of New York had ruled upon the precise question, and held that the power could not be deduced from section 1199.

Senator LENROOT. What case is that?

Gen. CROWDER. The case of *Ex parte Mason*, the sergeant who shot at Guiteau. These things I am not going into in greater detail because they are all in my opinion.

Proposition No. 5 was that the British judge advocate general exercised this power. We all know that that is not true. That is conceded now. You do not have to deal with it.

So that all five propositions from which Gen. Ansell argued in his November 10 brief were misleading propositions, to put it mildly; and as I say, two of the officers who concurred with him, when the facts were laid before them, and they subsequently appeared before this committee, have, I believe, withdrawn their concurrence. What the other 15 would do if they had an opportunity is a question, but I do not see how they could reasonably avoid a similar course. Certain of them I have talked to, and they have told me they acted without inquiry or question upon these five propositions of Gen.

Ansell. With such an attitude, of course, they must proceed with him to a conclusion.

Now, further, we have the concurrence of the Secretary of War as a lawyer upon this construction, we have the concurrence of the Bar Association Committee, and we have an undisturbed pronouncement of the Federal courts upon this subject. Is it any longer a question that we could have exercised this power if we had chosen to do so? I will jump as many hurdles, and as high, as anyone, to deduce a power to meet an emergency; but I do not propose to jump any hurdles when it comes to assuming a jurisdiction in a judicial procedure.

Immediately upon turning in that opinion we commenced to look around for an available means to get this power, because Gen. Ansell had certainly demonstrated that it was a necessary power in this World War. However well we may have gotten along without it before, it was a necessary power with 4,000,000 men in the field with new officers. I said to the Secretary of War, in concluding my opinion, "that I would try to find it by construction in the President of the United States under his constitutional authority to command the Army, but that it would be a difficult and prolonged study."

In the meantime I asked him to do immediate justice, as nearly as he could do justice, to the enlisted men in the Texas mutiny cases, which were the occasion of the presenting of this brief, by ordering an honorable restoration to duty in all those cases. The cases of those enlisted men I will insert in this connection, if I may. The point I wish to make is this, that Gen. Ansell has represented to this committee that they were reenlisted, and they lost their continuous service status and their continuous service pay because they were under the necessity of reenlisting. My memorandum, when submitted, will show that on the contrary they were restored to duty under the statute to which I called your attention yesterday, and that they did not lose, upon restoration, either their continuous service status, or their continuous service pay. This information I got direct from the finance department.

Senator LENROOT. Now, you restored them to all their rights and privileges as if that had not happened?

Gen. CROWDER. All the rights; and except that they had been subjected during that period to confinement, everything was as if it had not happened. It was not a complete remedy. Let us admit that. It, however, did restore them to their original status, except that one of them, I think, lost his rank. He went back as a private. He had gone out as a sergeant. The noncommissioned officers went back as privates. Whether they speedily regained their rank I do not know.

Senator WARREN. Was that one the only noncommissioned officer?

Gen. CROWDER. I do not remember; but I can say this, Gen. Ansell referred to them as men of 15 to 20 years' service. As a matter of fact, they were all in their first enlistment, I think, except one. My memorandum, when I discover it, will show all the facts.

Senator WARREN. That will contain all these particulars, will it?

Gen. CROWDER. Yes, sir.

Senator WARREN. I would like to know if there was more than one. You say one was reduced. We have heard that these men

were all old in the service, and we were told that the effect of this action was to reduce these men, to take their stripes off; in other words to reduce them to the ranks.

Gen. CROWDER. Of course that resulted from a dishonorable discharge.

I have talked here without notes and without reference to the information. This seems to be a matter upon which a great deal depends. I would like to be subjected to cross-examination upon section 1199, if it is still an open question. I do not know of anyone who has studied the authorities who adheres to the position that appellate power can be deduced from section 1199; nor do I think, although my opinion on that subject is of course not very valuable, that if the proposition was before Congress to-day to vest in the Judge Advocate General of the Army this appellate power, to reverse, modify or affirm, in a way, to conclude the President of the United States, the commanding general of the Expeditionary Forces and all commanding generals under him, it would command very many votes in either House. And I say to you this: Give the Judge Advocate General that power, and I care not whom the people may elect President of the United States or whom that President appoints as commanding general of the Army, the Judge Advocate General will administer the discipline. There will be no question about that.

Senator LENROOT. I think that would be true under the broad powers. But supposing that that power so revised was limited to revision for jurisdictional defects or prejudicial errors of law; you would not make that statement as broad, then, would you?

Gen. CROWDER. The difficulty would always be in determining what is a question of law, and I am going to bring out that difficulty as plainly as it can be brought out when I proceed with my next topic, actually to try out the application of the pending bill to a military case. That is my next subject.

Senator LENROOT. Now, to drop that, I would like to ask you, General, with reference to the General Order No. 7 and the power that you did find to be vested in the President. Upon what did you base that?

Gen. CROWDER. Of course it was manifestly opposed to the doctrine I read to you from Winthrop.

Senator LENROOT. Certainly.

Gen. CROWDER. We deduced it out of Articles of War 37 and 38 of the existing code, new articles of the Revision of 1916, and also out of the exigencies of the case as a step we must take at once awaiting the grant of appellate power from the Congress of the United States. All we said to the lower authorities was in the nature of a rule of procedure under article 38, viz: "Suspend your action, until we can pass upon the case." All we did after we passed upon the case was to address their discretion. We did not ourselves exercise the appellate power. And it seems to me that in every case where we addressed their discretion on the question of prejudicial error there was acquiescence, except in a limited number of cases to some of which I have called your attention. This may not be entirely accurate, but it is substantially accurate. In effect, we got the results of an appellate jurisdiction; but, as I say, we had the right to command them not to take final action in the case. That was unquestionably the right of the President under new article 38 of the 1916 revision;

and we had a right to address the discretion of reviewing authorities below, as to what their final orders should be, until its modification, General Order No. 84, laying down a rule for the branch offices in France, came along and directed the reviewing authorities in France, to comply with the recommendations of the Acting Judge Advocate General in France. Then the question of full appellate power was boldly presented. That was the order that was finally canceled, that was issued without full appreciation by the War Department of what it was intended to accomplish. In other words, it established the appellate jurisdiction in France, while withholding it here. I hope I make that plain.

Senator LENROOT. Yes.

Senator WARREN. Gen. Bethel was the superior over there, was he not?

Gen. CROWDER. No; Gen. Bethel was on duty with Gen. Pershing. The branch office in France was under Gen. Kreger.

Senator WARREN. Gen. Kreger was not there all the time. Who was, then?

Gen. CROWDER. Gen. Kreger was there from the time it became effectual. Gen. Bethel was there waiting for Gen. Kreger to arrive; and Gen. Kreger, when he was there, represented the Judge Advocate General over there.

Senator WARREN. Gen. Bethel was the judge advocate general of the American Expeditionary Forces there, with office in the field?

Gen. CROWDER. Yes, sir. After General Order No. 84 was issued, and until it was revoked, the acting judge advocate general in France was supposed to be vested with authority to control the discretion of reviewing authorities and convening authorities of the expeditionary forces, including Gen. Pershing.

Senator WARREN. Was there an incident something like this, after Kreger had gone there and established himself—of course I did not ask this when he appeared before us; it came up in another way—that he was brought home with the intention, at the time, of his not going back; either to discontinue the kind of service that he was there doing, or to put somebody else in his place; do you know?

Gen. CROWDER. Kreger?

Senator WARREN. Yes; Kreger.

Gen. CROWDER. I do not connect up with that thought, at all.

Senator WARREN. His service over there was continuous from first to last?

Gen. CROWDER. It was. He had a successor in office when he was drawn back here to take my place in the office when I was ordered to Cuba.

Senator WARREN. It was continuous over there, was it?

Gen. CROWDER. The office continued to function over there under Col. White, after Kreger left, and went on for some time. First they issued an order to discontinue it, but Gen. Pershing sent us some telegrams from his department, all indicating that it would be a matter of embarrassment if it were discontinued, and Col. White continued.

Senator WARREN. That is what I wanted to know, whether there was considered at the time the discontinuance of this office in the service over there?

Gen. CROWDER. Yes.

Senator LENROOT. When this General Order No. 7 was issued, was this the situation, that although the commander in chief formally disapproved of findings of a court-martial, nevertheless that finding could be ignored, and to that extent the subordinate was superior to his chief?

Gen. CROWDER. That finding could be ignored?

Senator LENROOT. Yes; disapproved.

Gen. CROWDER. By whom?

Senator LENROOT. By the commanding officer creating the court; the final power?

Gen. CROWDER. There was but one reviewing officer prior to General Order No. 7.

Senator LENROOT. Yes.

Gen. CROWDER. That was the convening authority.

Senator LENROOT. Yes. Now, the President reviews, under General Order No. 7?

Gen. CROWDER. No; under General Order No. 7 we review the case and return it to the convening authority.

Senator LENROOT. Yes.

Gen. CROWDER. And he issues the order in accordance with our opinion.

Senator LENROOT. I thought you said, if I understood you, that you found that there was in the President this right.

Gen. CROWDER. I found that there was in the President the right to issue an order to the reviewing authority below not to make his action final, but to send up the case in such a form as that it would give an opportunity for review here and recommendation to the convening authority.

Senator LENROOT. In other words, to suspend his action?

Gen. CROWDER. To suspend it, pro tanto, until we had reviewed and reached a conclusion and communicated that conclusion to the convening authority.

Senator LENROOT. Then after all, the only effect that had, legally, was to suspend the action, beyond that which the practice had been theretofore?

Gen. CROWDER. Yes, sir; to give an opportunity for a legal study of the case.

Senator LENROOT. And the action of your department, legally, was no more effectual than it was before that order—legally, I am speaking of?

Gen. CROWDER. Legally, yes. In practice it was, with the exception of the very small number of cases, effective with the exception I have stated; just as effective as if we had had the power ourselves to issue the order; because in only a very limited number of cases did the reviewing authorities disagree with us.

Senator LENROOT. At some point I would like to get your views upon the report of the Kernan Board as to the power of Congress as against the absolute power of the commander in chief that is upheld. I do not know whether you care to go into it now.

Gen. CROWDER. I think I have probably indicated my view. I am not predisposed to question the constitutionality of laws; and I am more in the attitude of assuming, and I am at present in the attitude of conceding, that Congress, in the exercise of its power to make rules and regulations for the government of the land and naval forces, may

establish a court of appeals. I am willing to assume, anyway, that they can, and rest the whole case upon the expediency and advisability of locating the power in such a way as to shut the President and the commanding generals under him off from the consideration of questions vital to the discipline of the Army.

Senator LENROOT. That was all I wanted to know.

Gen. CROWDER. I think there are certain papers that I would like to look for and introduce, at this point. Perhaps I had better take up to-day the question of the pending bill, because when I get through we are going to have all these situations we have discussed before us in very concrete form, and I think it will be very helpful in concluding my testimony on matters directly relevant to the real issues.

Senator WARREN. I want to ask you one question, and perhaps I ought not to ask it. I notice that Senator Chamberlain as a member of this subcommittee, put the question directly to Gen. Chamberlain, the Inspector General, if there was any personal feeling in the matter of his examination and report. In your examination of the case, or of this evidence, and your alluding to your relations to Gen. Ansell, is it with any special feeling of enmity between you, or is it a review of legal points, apart from any feeling?

Gen. CROWDER. I believe you asked Gen. Ansell that question at one time.

Senator WARREN. I did not, as I was not present.

Gen. CROWDER. At least it was referred to, and he answered that up to a certain time our relations were pleasant.

I had better make a frank statement, and you can judge whether you want to leave it in the record.

Before I became Judge Advocate General, some time in 1910 I had observed, though I did not know him personally, what I thought was very meritorious legal work performed by the then Lieut. Ansell. He was stationed, I think, in New York Harbor. I wrote him a letter asking him when he came to Washington to drop in and see me, that we might discuss some matters of mutual interest. In a few weeks he came. I told him about this work that I had noticed of his, conversed with him about legal matters, and turned aside to sign some papers. When I was ready to resume the conversation—

Senator WARREN. Was he in the line at this time?

Gen. CROWDER. He was in the line. When I was ready to resume, I noticed that he was visibly affected. He apologized, saying that it was an unusual experience for him to have a superior officer discover on his own motion any merit in his work; that he had thought it possible for a man to work his eyes out in the United States Army and never gain any recognition. I said to him then, "How would you like to come into the Judge Advocate General's Department?" At that time I was senior assistant, but expected to be appointed Judge Advocate General in a few weeks. He said that, of course, that was his life's ambition. I told him I had nothing to offer him except a vacancy among the Acting Judge Advocates with station in Mindanao, but that something better would develop after a while, and asked him if he would take that? He said that he would like to consult with his family about it. He went home, and in a short time wrote me that he would take it, and he was ordered out there to report to Gen. Pershing, who was in command. In about a year I got a letter from Gen. Pershing thanking me for sending him such

an able man, saying that he knew more law than all the judges in Mindanao put together. The same mail or the next one, brought me a letter from Gen. Ansell saying that Pershing was an impossible man to serve with, and asking to be relieved. I saw that there was a situation there that did not make for efficiency. I relieved him and brought him home and assigned him to duty in New York Harbor, and later, in March, 1912, my high estimate of him continuing, I brought him to the office here in Washington.

I want to say right now that I do not know of a more acute legal mind than Gen. Ansell has. He is a very able man, and has rendered the department, and me, conspicuous service. Our relations for the next four years were as intimate as relations well could be between officers who worked in daily contact with each other and what those relations were is evidenced by some letters I received from him. These I think are the most convincing answer that could be made to your question.

Ordinarily I would hesitate to utilize these letters which, though not marked personal, breathe a personal relation, and a man ordinarily keeps such on his private files. However, these letters do establish a fact responsive to your inquiry, viz, that the most cordial, intimate personal and official relations existed between Gen. Ansell and myself, after four years of daily contact, and that these first four years of our relations can be dismissed from your mind as furnishing any incident whatever out of which the vindictive hostility he has recently expressed toward me could have grown, and by necessary inference negative many of the personal allegations against me that he has recently made.

Senator WARREN (after reading letters). Would you like to have these letters go into the record?

Gen. CROWDER. I would rather decide that question after I complete my statement.

Senator WARREN. That will rest entirely with you, whether they shall go in or not.

(The letters referred to are here printed in the record, as follows:)

(Letter undated, envelope bearing post-mark Washington, D. C., July 26, 9.30 p. m., 1916.)

STEAMER "NORHLAND."

MY DEAR GENERAL: While waiting for the "cast off" whistle, I am going to obey a present impulse and, in a word, express, however inadequately, my great gratitude for all that you have done for me.

You and your sentiments toward me have exerted a wonderful influence over my life. Without you and them, without your unflinching kindness, without your confidence in me—which has served as an inspiration—my life in the Army would have been a desert. Under you and with the opportunities so generously afforded me I no longer remember, much less experience, the restricting influence and environment of military life. Under you I have had the opportunity of developing intellectual integrity through intellectual liberty. Else than this is the meanest slavery and yet, as I saw it at least, intellectual slavery was my lot before coming to you.

This phase of my service with you means much more than I can express. Had you done nothing more for me, you had done enough.

Your little kindnesses—such as bringing me to the boat—make service with you a personal pleasure as well. In your office my life seems filled with the little things and the big in ungrudging measure. Because of these my life is one of real happiness.

I wish you but had your just deserts.

May God forever and ever bless you.

S. T. A.

Gen. CROWDER. After receipt of the foregoing letter, the following undated letter was received:

Gen. CROWDER:

I had an unexpected call this morning from Gen. J. A. Johnston (accompanied by a classmate of mine), who, though I have never known him, apparently came for no other purpose than to tell me of some very laudatory things you said of me last night in his presence.

Such praise, though it is unmerited, works in me a new and vigorous inspiration to do all that a limited capacity will permit. Praise from a discriminating superior is always gratifying, and it is especially so where, as in this case, it is the expression of a disinterested and appreciative soul.

I resort to this note to express a sentiment which I could not express orally without embarrassment and which a sense of gratitude will not permit me to leave unspoken.

Gratefully,

S. T. ANSELL.

Both of these letters were written after an intimate office association of four years.

There is one other memorandum, written on April 24, 1917, to the Secretary of War, the underscored sixth and seventh paragraphs of which would seem to bring our friendly and cordial relations down to a still later date. I insert this memorandum in its entirety for the further reason that certain of its statements furnish proof of the plan that the War Department had conceived and confidentially communicated to governors of States which Senator Chamberlain has made an issue in this investigation. The memorandum follows:

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 24, 1917.

Memorandum for Secretary Baker.

1. I have just returned from a conference with Congressman Bankhead and others, had at your direction with reference to the pending bill. I think I discern a situation in the House (or one certainly affecting many Members of it) which is of such importance and affords such an opportunity for effective service that I ought to present it to you now.

2. The bill does, as it must, and as you, we, and perhaps they, know it must, clothe the President—that is, in fact, the War Department—with extraordinary power and discretion as to the methods and means of executing the draft. This is the crux of the situation. The necessary vagueness, uncertainty, and even inability to express the details give rise to vague apprehensions. It is here that assurance is needed, and I feel that you, right now, may properly give it, and, if my judgment is worth anything, ought to give it.

3. The difficulty concerns itself more with the matter of personnel, agencies, and methods of administration than with legal principles. Conscription is, though it ought not to be, esteemed as an odious term. It suggests not only the strong arm of an all-powerful central government, but the military arm at that. The prevalent idea is that a man wearing the military uniform of his government—which is synonymous with an authority to exercise physical force and compulsion without legal limit—invades the order of civil life and ruthlessly takes from his home a free man and makes him a sort of government serf. The idea is that the military mind is mechanical, harsh, unsympathetic, with a leaning, perhaps, toward the aristocratic classes. The prevailing idea is that the central administration, the head, the agencies, the furthest tentacles of the system are to be purely military. Putting myself in the place of a Congressman, as one must do in order to understand his difficulties, I can appreciate the reasons for the inquiry and the desire to receive assurances that the methods of administration will be such as to insure absolute fairness and based upon a knowledge and regard for our institutions, our people, and their daily lives.

4. Government to our people is a fearsome thing, a thing not understood, a thing that seems to be mechanical and unhuman, a thing that takes no note of the individual except perhaps to crush him. We must tear aside the veil and reveal the fact that the President, the Secretary of War, and the highest military officers are just plain ordinary human beings, like all others, who do understand our people, who come from

them, and who are sympathetic with and for them, and who will respect as far as on principle we can respect, their human qualities.

5. While, of course, the greatest argument in favor of the draft system is that it is the only effectual one, to my mind the greatest political argument is that it is the only fair one. Ordinary human beings will be far less concerned with the effectuality than with the fairness of the system. Fairness is the greatest text, it seems to me, that a Congressman can have to convert his people to the idea.

There is a fear that this vast Executive power will be organized and exercised so as to fear some and favor some and result in unfairness. Many questions are raised. Who will determine who shall go and who shall stay? How will the fact be determined? Who are going to administer the law? Will it not be oppressively administered? Will we be approached by the military authorities in the spirit of having us cooperate or of regarding us as a driven herd?

The strong arm of the military must not be too apparent. You have planned that it shall not be. You have decentralized. You intend to intrust the execution of the law as it affects our people directly to their accustomed officials. There is to be no military member of the local boards. When all this is revealed much apprehension will be allayed.

6. But central administration must be intrusted to careful hands. The law must be administered in such a spirit of common understanding and a capacity to cooperate; with such sympathy for all civil institutions, our traditions and even our prejudices as to be worthy of and to receive the confidence of our people. I have said before that, loving the Army as I do, I can not assume, and it is no reflection upon officers of our Army for one not to assume, that the ordinary officer has the requisite qualities. I have already said that there is one man in this department whom I believe to be superbly qualified. I believe that assurances should be given that the central administration will be guided by a man who is a lawyer as well as a soldier, knows our institutions, our people, and their human qualities.

7. All this is leading up to my suggestion, which is: The letters which have been sent to the governors ought, in my opinion, to be given to the press with an appropriate statement, and assurances should further be given that the central administration is to be under legal supervision, in strict conformity with the law, with nothing omitted to insure fairness, and everything done to obviate all suggestion of oppressiveness.

S. T. A.

So far as I know, these relations continued down to his appointment as brigadier general in the Judge Advocate General's Department in October of 1917.

I never began to suspect any other than a loyal attitude toward the office and myself until there occurred the incident of his addressing me on the subject of being named Acting Judge Advocate General under the provision of section 1132 of the Revised Statutes. I was not giving much time to the office. I was very much engrossed with the selective draft.

Senator LENROOT. About when was that?

Gen. CROWDER. That was about November 3, 1917. He has put the correspondence in the record. (See pp. 52-53 and pp. 221-22, Ansell's testimony before this committee.) As I say, I was not giving much attention to the affairs of the department—I was too much engrossed with the draft. I did not know what the thoughts of the Secretary of War might be. I knew he shared my estimate of Gen. Ansell's legal ability, and it would have been reasonable if he had desired Gen. Ansell to exercise full control. We were all looking forward to the probability that the war would collapse. In this view I replied to Gen. Ansell, telling him to take the matter up with the Secretary of War directly, and whatever order the Secretary of War made would be satisfactory to me. I said "directly with the

Secretary of War" for a purpose. I suppose that 60 per cent of the Judge Advocate General's business with the Secretary of War the Chief of Staff does not see at all. It goes direct. The Secretary of War is much concerned in getting a Judge Advocate General who can handle the civil part of his jurisdiction, such as contracts, river and harbor work, real property, and execution of the law of navigable waters. Much of his civil jurisdiction presents very many complicated questions. This was well known, of course, to Gen. Ansell, and I expected that he would go direct to the Secretary of War with the proposition. Instead of doing that he went to the Acting Chief of Staff with a statement that I concurred in the issuing of an order for my relief and his designation. The Acting Chief of Staff never even submitted it to the Secretary of War, and the order was marked for suspended publication. I think that on November 10, when he submitted this brief contending for appellate jurisdiction in the Judge Advocate General, reversing the whole practice of the administration of military justice, he really believed that he was in charge of the office and was thereby absolved from the necessity of consulting me.

I never knew that the order had issued until November 17, when the Secretary of War sent for me and handed me a list of appointments that Ansell had recommended—judge advocates from civil life—and asked me what I thought of it. I looked them over and I told him I had a personal knowledge of many of the men, and that I thought they were all good appointments. He said that he had asked Gen. Ansell whether he had submitted the list to me and that Ansell had replied that he had not, and then said he had brought him an order relieving me as Judge Advocate General and designating himself. I told him of the correspondence between Ansell and myself on this subject, but that I knew of no order having issued. He replied that the order had issued without his knowledge. This, you will understand, was six days before I ever heard about these November briefs.

Senator WARREN. Who was Acting Chief of Staff at that time?

Gen. CROWDER. Gen. Biddle was Acting Chief of Staff. Well, the Secretary of War explained to me that he did not intend that I should be relieved; that he expected to confer with me from time to time about legal matters, and it would be embarrassing or inconvenient not to have me in charge of the office. There followed the following correspondence between us:

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 D. BAKER,
Secretary of War.

Gen. E. H. CROWDER,
Provost Marshal General.

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 in 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.

Upon receipt of my letter, the Secretary of War canceled the order making Gen. Ansell Acting Judge Advocate General.

It is true that Gen. Ansell's attempt to secure an order giving him my functions as Judge Advocate General was practically 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; but it is not true that I knew of the brief until after the Secretary of War directed the rescinding of the unpublished order appointing him Acting Judge Advocate General.

It is further true that the brief of November 10, filed by Gen. Ansell, did not tend to increase my confidence in Gen. Ansell. In that brief a decision was referred to and 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 definitions. It was urged in that brief that the power which it was contended had been granted by section 1199, Revised Statutes, 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 further 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 joint opinion of the attorney and solicitor general of Great Britain in 1873.

When it is remembered that this was in no sense a controversial brief, but a memorandum addressed to the Secretary of War by Gen. Ansell, who stood in the rôle of his legal adviser, and that it was intended to commit the Secretary 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 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.

And this seems to be the view of the Inspector General of the Army, who has inquired into the administration of the office, and who finds, if I read his report correctly, that on and after this incident, although his order was canceled detailing him as Acting Judge Advocate General—leaving him to function as such by virtue of seniority—his initiative was in no manner impaired or disturbed.

My own thought and feelings toward Gen. Ansell are fairly set forth in what I here say. However, Gen. Ansell interjects a matter into his letter of March 11 which connects up with this period, and which was intended to show that I had largely abandoned the office and interest in its administration; and that his actions respecting the issue of executive orders relieving me and detailing himself in full charge of the office, as well as in submitting the November brief without my knowledge, were "in due course"—I refer here to a statement which is set forth in the record of hearings, page 220, as follows:

When I came to be the head of this office in the latter days of August, 1917, Gen. Crowder at that time, doubtless placing in me the utmost confidence, came to me and said that he never intended to return to this office again; that he had always aspired to a line command, and that he intended to use his office of Provost Marshal General in the raising of this new Army to secure for himself a field command. He told me to manage the office in my own way and without further reference to him.

I particularly asked whether I should consult him upon matters of general policy, and especially upon appointments, of which many would have to be made. He said "No," but added, "If I should wish the appointment of any particular Judge Advocate for my special purposes, I will let you know" (p. 220).

I take it that there is no one within the Army with whom I was in any sort of personal contact who did not know of my very great desire for assignment to field command in this World War. But the inference which the reader of this charge of Gen. Ansell's is left free to make is that I proposed to administer the selective draft in such a way as to make necessary my assignment to a field command, and that I proposed to bestow a few appointments in the Judge Advocate General's department to further this same special purpose. Of course, no conversation between Gen. Ansell and myself, capable of being so construed, ever occurred. If it had occurred, Gen. Ansell had a very plain and obvious duty—first, to decline to take over the affairs of the department which was to be corruptly administered in part by me for such a purpose, and second, to report the matter to superior military authority with a view to my trial by court-martial. Failing to adopt either course, it must be assumed, I think, that this construction of our conversation is an afterthought, expressed by him now for the purposes connected with the present investigation.

This invention of Gen. Ansell has not even the merit of plausibility. He says that the conversation occurred in the latter part of August. The first appointments to field command in the National Army were announced on August 5, 1917. Shortly thereafter I was informed that, although recommended by Gen. Bliss, Chief of Staff, I was not recommended by the General Staff, and that the Secretary of War had adopted the view of the General Staff. My relations with Gen. Ansell at the time (August, 1917) were sufficiently direct and personal to make it probable that he knew from me the facts that I have related above and further that after these first announcements I dismissed all hope of appointment to command rank. But Gen. Ansell says that the conversation between us took place after the events above narrated occurred.

From and after the first appointments, which included many of my juniors, I had given up all thought of appointment to command rank and assignment to field duty in France. It is a fact that I never again contemplated field assignment until a year later, in August, 1918, when the press reports gave first mention of the probability of an expeditionary force to Russia. Then I took up with the Secretary of War, directly and in a personal interview, my claims for field assignment to Russia. I do not doubt that the Secretary of War will recall this personal interview and my statement to him at the time that I had regarded his decision in early August of 1917 as settling the question once and for all, that I was not to be given command rank and field assignment in France, but that I felt that the problem in Russia would be both a reconstruction and a fighting problem; and that as I had had extended experience in provisional military government, both in Cuba and the Philippines, I felt justified in being even aggressive in laying claim to the Russian assignment. If he has any difficulty in recalling the facts I think most of them can be gleaned from a letter which I sent to the Secretary of War on the day following this personal interview, confirming my statements in that interview, which letter went by reference from the Secretary of War to the Chief of Staff and is doubtless on file in the office of the Chief of Staff.

Undoubtedly I had conversations with Gen. Ansell about the conduct of the office of the Judge Advocate General. I think it quite possible that I told him that he was to have a free hand in the management of that office, and I know that it was in my mind to say, and I probably did say, to him, that in respect of appointments of judge advocates there were several cases to which I had given consideration and that I wished to be consulted in order that I might reveal the status of those applications. The statement that I used language indicating that I desired to use these appointments as a means of building up an influence which would help me to secure a line appointment is wholly untrue.

That Gen. Ansell was not fully cooperating in the administration of the approved policies of the office is evidenced by his attitude toward the issue of General Order No. 7, about which so much has been said. In respect of this order, Gen. Ansell has said of record:

But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this

order acted as a limitation to that effect, and there had been no recommendation for clemency consequent upon these reviews and studies we made since the time of the publication of General Order No. 7 until after I got back. (p. 182, Hearings).

Later on in his testimony Gen. Ansell makes a claim that this limitation upon the power to recommend clemency, which was sought to be deduced from General Order No. 7, "applied, as well, to recommendations addressed to subordinate commanders, as to the President."

I invite the attention of this committee to General Order No. 7, which is published in this record, pages 132-133, and ask your deliberate judgment as to whether that order could reasonably be construed as limiting in any way the power of the Judge Advocate General to initiate recommendations for clemency. I can not discuss a question very well which does not arise out of some concrete language of the order issued. Gen. Ansell, in his reference to this subject, cites you to no such language, and yet he says that, when he got back from his trip to Europe, he—

took the bull by the horns, because it was nothing less than that, and I reversed what the Acting Judge Advocate General had in my absence very properly, as a matter of law, held to be the limitations placed upon our office to recommend clemency, and instructed the boards to review and recommend clemency in proper cases. (P. 182.)

Now, the fact is that the practice of the Judge Advocate General's Office in recommending clemency was never interrupted. Recommendations for clemency in appropriate cases have always been made. Nothing found in General Order No. 7 prevented or restricted that practice. I never knew that such an interpretation of the order was suggested by anyone until I read the testimony and read Gen. Ansell's statement to the contrary. He did not raise that objection to General Order No. 7 in the memorandum he filed in objection to that order (pp. 93-94), although he says he was not consulted about the issue of the order; nor did he, while acting on such cases, entertain such a view. The proof of what I say is record proof. As late as April 17, 1918, two months and a half after General Order No. 7 had been put in force, and just before Gen. Ansell's departure for France, he himself returned a record to a division commander with the advice that the sentence was legal, coupled with a recommendation that it be mitigated (Case 112666, Clifton Cox, Apr. 17, 1918). During Gen. Ansell's absence in France, the Acting Judge Advocate General was Col. James J. Mayes, who certainly recommended clemency in one case within General Order No. 7 (Case 115198, James Cox, June 19, 1918). Whatever instructions Gen. Ansell gave upon his return to recommend clemency in proper cases, inaugurated no new practice in this respect, and it was never necessary to do violence to General Order No. 7 in recommending such clemency. I treat this matter more extensively in Appendix No. III(e) of my testimony, and show there conclusively by testimony given by Col. Clark and Col. Davis that the office construction of General Order No. 7 was not what Gen. Ansell states it was.

Was Gen. Ansell consulted in the preparation of General Order No. 7? On page 134 of his testimony before this committee Gen. Ansell says that he was not so consulted, in the following language: "Though I had brought them to the attention of the department, I was not invited to participate in those matters," but goes on to say:

An officer in the department, however, handed me the original draft of the order, and I felt so strongly on the matter that I took it to Gen. Crowder and said, "It is true

this is a step in the right direction, but it does not go far enough. * * *” And after some two or three weeks' argument the order was finally amended and probably published in February, so as to stay all sentences in cases not only of death but of dismissal and of dishonorable discharge, until we could study the record and advise—having no authority—the commanding general. (P. 134.)

The truth is that so far from Gen. Ansell not being consulted about these matters, there is positive evidence that he did participate in the general consideration of this order when in preparation, in a memorandum which is on file in the department, dated January 12, 1918, entitled “Memorandum for Gen. Crowder” and signed “S. T. Ansell” discussing the proposed General Order No. 7 which was known in the office as “Maj. Davis's proposed rule,” which memorandum is set forth on pages 93 to 94 of the testimony of Gen. Ansell before this committee.

When I review all of these facts in connection with your question as to the relations between Gen. Ansell and me I discover him, from and after the turning down of his November 10 brief contending for appellate power in himself, in an attitude which can not be said to have been a cooperative one with the established policies of the office. While occasionally using the power of clemency recommendations, it was not used vigorously to correct an evil which, according to his own testimony, was of growing magnitude. Unquestionably he would have dealt with these matters efficiently enough if he had been allowed himself to exercise appellate power, but his attitude seems to have been that of a man who would put out a fire with his own hose or would otherwise let the building burn.

I need not speak of later events. The utterances before this subcommittee indicate such a hostile attitude toward me as to leave you in no doubt. But it would seem that I share this hostility with practically the whole Army.

May I digress for a moment to make what appears to me a very pertinent inquiry? Why is it that the Navy, with a system of military justice identical with that of the Army, has gotten through this World War without any agitation against their system, for I assure you that the systems are identical as to fundamentals; and the conditions were more or less identical. They are lacking in this appellate power. They expanded from 50,000 to 750,000 men, or more than 1,400 per cent, while we expanded from about 200,000 to nearly 4,000,000—or about 2,000 per cent.

Senator WARREN. Now, General, right there; they did not have men at the front in battle, and that might be stated as some reason. But, if I understand you correctly, and the other witnesses that have been before the committee, these sentences—that is, on the minor offenses, and very severe sentences, long-time sentences, etc.—occurred in the Army here.

Gen. CROWDER. A good many of them occurred in the Army here. That is what makes the comparison between the naval service and our own appropriate.

Senator LENROOT. Were there such long sentences in the Navy?

Gen. CROWDER. Apparently the Navy found a way of controlling the matter of long sentences, whether by use of the power of clemency or by admonition to courts, or by duly promulgated admonitions upon the measure of punishment, I do not know. They drew their officers and jacksies from the same American homes from which we drew our officers and soldiers. They had the same problems of

discipline before them—and yet they seem to have gotten through the war without any public agitation or scandal. How did they do it? I think that the answer will be found to be that they had an energetic, alert man at the head of the Department of Naval Justice, supported by a loyal, enthusiastic personnel, and using every authority which they had under the existing law, but assuming no extraordinary authority like appellate power in the Judge Advocate General to keep down the measure of punishment. The fact is that they achieved good results by proper administrative methods under a system that is fundamentally identical with our own. If our code is a code of organized injustice, “unworthy of the name of law,” so, too, is theirs. If radical amendments are to be made in our code along fundamental lines, radical amendments should be made in the naval code as well.

Certainly the Congress of the United States is not going to extend relief to the Army in such a matter and leave the Navy to live under a code which is a code of organized injustice, “unworthy the name of law.” There would be something very inconsistent in finding the Army system fundamentally wrong, and, by new legislation, destroying its fundamentals, as it is proposed to do in the pending bill, and in leaving the Navy under the kind of a system which is so severely condemned for the Army.

Senator WARREN. Just an instant, General. I had occasion to appeal to the Navy, both in the regular naval service and the marine service, which is like our Army, of course, in two or three cases, and I have had—I will not say instant action, but action very soon, where a man has been tried and sentenced to dishonorable discharge and confinement, where the man has wanted to go back into the service and reenlist and cure his misdoing. They have been very quick to act upon it; and I know of two or three cases, one of which was in the marine service, where simply the request was all that was necessary. It was so, very, very frequently. I suppose the same thing was done in the Army.

Gen. CROWDER. It ought to have been done.

Senator WARREN. It could be done?

Gen. CROWDER. It could be done.

Senator LENROOT. Do I understand that it is your thought that the courts-martial in the Army felt that these excessive sentences were rather favored by the War Department, and that was one of the reasons for them?

Gen. CROWDER. No; I do not think they felt that they were favored by the War Department, but they thought that the deterrent effect of the heavy sentences was needed, and they found themselves unchecked by the War Department.

Senator LENROOT. And you think they were checked, probably, by the Navy Department?

Gen. CROWDER. I do not know what happened in the Navy Department. I know that they got through without any of this agitation, when they had the same kind of law to enforce that we had, and practically the same conditions to face.

There is no effective regulation by statute of maximum limits of punishment in the British service. I noticed, however, a circular issuing out of the British war office cautioning the courts upon the subject of unequal sentences during the war, and admonishing them

that punishment within certain limits would, in the judgment of the war department, meet the requirements of discipline.

Senator LENROOT. Do you think that would have been within the proper jurisdiction of the Judge Advocate General's office?

Gen. CROWDER. To suggest to the President?

Senator LENROOT. Yes.

Gen. CROWDER. To ask the issue of an order of that kind, to suggest, yes; the Judge Advocate General could have done it at any time. And when I went back to the office to catch this storm of accusation, the first thing I did was to request the issue of that kind of an order, reminding the field commanders that the armistice had been signed, that hostilities had ceased, and that the old presidential limits of punishment ought to be observed except in cases where they were willing to make of record the existence of circumstances which would justify a higher punishment than was provided in the President's limits governing in time of peace. That order was issued.

Now, when I was preparing that order I called into conference the head of the military-justice section, and he said he could supply me with the verbiage of the order, because he had submitted to Gen. Ansell the propriety of issuing or requesting the issue of that kind of an order back in September, 1918, and he said that Gen. Ansell directed that an order be prepared of that general character for submission to the War Department; but, he said, "We lost sight of it in some way, and it never was done."

Senator LENROOT. It never was submitted?

Gen. CROWDER. It never was submitted to the Secretary of War or to the Chief of Staff.

Senator LENROOT. I want to ask you, generally, so far as these excessive punishments related to this country, could there be any possible good in the way of discipline or otherwise, or what could have been in the minds of these officers on these courts, in inflicting these very excessive punishments?

Gen. CROWDER. Solely, as I see it, the deterrent effect; most of them having been adjudged after the call came from France that they needed bullets rather than bread, and when our commands were disintegrating through absences without leave and other offenses that seemed to show a lack of the discipline that the Army would have to have if it was to go up against as determined an enemy as the Hun. And they adopted the view then and there that the only means that they had to strengthen the discipline of the Army was heavy sentences of courts-martial—not the only means, but the essential one.

Senator LENROOT. Do you think, from the standpoint of deterrent effect alone, that there is any difference between a 10-year sentence and a 25-year sentence?

Gen. CROWDER. Personally, I do not.

Senator LENROOT. No.

Gen. CROWDER. I think it was a mistaken view, and that was the time to speak a word, especially to Army commanders in this country; and I believe if that word had been spoken we would have heard nothing about this, because I have yet to encounter a disposition

upon the part of commanding generals in the field to reject advice coming from the War Department, or a disposition on their part to array themselves into any kind of hostility to duly communicated instruction or request. It is true that the Secretary of War could not have directed or controlled courts as to the quantum of punishment, nor the commanding generals as to the amount of punishment they would approve, but he could have requested them to observe proper limits, and I believe that request would have been effective; and an alert man at the head of the department would have followed that course where it was necessary to keep down these heavy sentences.

Senator WARREN. As I understand it—and I want you to correct me if I am wrong—the machinery of your department when you were, as a matter of fact, the Judge Advocate General, and Gen. Ansell was acting, was somewhat out of gear during these times when this thought of severe punishments, etc., came up; there was not that harmony of action that had preceded.

Gen. CROWDER. Strange to say, I was so absorbed in the draft that I had little or no knowledge of the fact that these sentences were being given, and there was little discussion between Gen. Ansell and myself regarding them prior to the armistice, that I can now recollect; certainly, I had no adequate warning from him of the condition which he has sensationalized before the country. As I say, when they doubled the number of men to be furnished in March of 1918, trebled the number for April, and trebled it again for May and June, and then put upon me the almost insurmountable task of raising 401,000 men in July, I lost all contact with the rest of the world. I was oblivious to what was going on up there in the Judge Advocate General's office along those lines; and I never got the blow until I went back after the armistice to take control of the department. Since then I have had the duty of trying to explain this thing to the American people and to Congress, as they called for information.

I have remaining, this matter of trying to interpret the pending bill, and its application to a particular case, but I notice that it is now 1 o'clock.

Senator WARREN. Yes; I have to go into a conference with the House at 2 o'clock, and Senator Lenroot has a matter upon the floor of the Senate, so that we shall have to adjourn over.

I notice that permission was given to Gen. Ansell while he was testifying to say what he chose about anybody or anything, practically, and for that reason I wanted to say that so far as the committee was concerned there was nothing held back.

Gen. CROWDER. There is a mass of accusation and defamation to which I shall call the attention of the committee later. In stating it—quoting it—I exhausted an alphabet, and then some, as to personal accusations against myself.

Senator WARREN. Do you mean that you have assembled all that?

Gen. CROWDER. Of one witness only, Gen. Ansell, and there are personal accusations against the Secretary of War that carry you down through the alphabet to V, as I now remember; and there are personal accusations against the American Bar Association committee, against the bureau chiefs, against Gen. Kreger, against the

Inspector General, and against ex-President Taft, and I have it all extracted here; and before I get through with my testimony I want to pass up to the committee the responsibility of leaving it unanswered. If it is true, if it is only half true, yes, if it is one-tenth true, it is the duty, it seems to me, if I may be permitted to suggest it, of the House of Representatives, to present articles of impeachment, and of the Senate to organize itself into a high court of impeachment, and it is the duty of the President of the United States to take personal control of the War Department and order a few courts-martial.

Senator LENROOT. You think that court-martial would not be sufficient, and we would have to take up impeachment?

Gen. CROWDER. Yes; I think impeachment would be necessary.

(Thereupon, at 1 o'clock p. m., the subcommittee adjourned until Tuesday, Oct. 28, 1919, at 10 o'clock a. m.)