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TO THE HONORABLE
THE SECRETARY OF WAR

June 16

REPORT OF
WAR DEPARTMENT
ADVISORY COMMITTEE ON MILITARY JUSTICE

13 December 1946

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TABLE OF CONTENTS

| | <u>Page No.</u> |
|---|-----------------|
| I. INTRODUCTION | 1 |
| II. GENERAL RECOMMENDATIONS | 4 |
| 1. Greater emphasis upon operation of the Army system of justice | 4 |
| 2. Substantial enlargement of Army legal department, the Judge Advocate General's Department..... | 6 |
| III. SPECIFIC RECOMMENDATIONS | 6 |
| A. The checking of command control | 6 |
| 1. Forbid exercise of influence | 7 |
| 2. Prohibit reprimand | 8 |
| 3. Inform courts as to sentence duty | 8 |
| 4. Law member and defense counsel | 8 |
| 5. Final review in J.A.G.D. | 8 |
| 6. J.A.G.D. to appoint courts | 9 |
| 7. Power of command to extend clemency | 10 |
| 8. Judge advocates to be independent of chain of command .. | 10 |
| 9. Promotion of judge advocates | 10 |
| 10. Special courts-martial | 10 |
| B. Discrimination in officer punishment | 11 |
| 1. Amendment of AW 104 to include officers | 11 |
| 2. Trial of officers by special courts | 11 |
| 3. Reduction of officers to the ranks in wartime | 11 |
| 4. Amendment of AW 85 | 12 |
| C. Enlisted men and courts-martial | 12 |
| 1. Broaden instruction | 12 |
| 2. Advertise open sessions of courts | 12 |
| 3. Remove bar against enlisted men serving on courts | 12 |
| D. Summary courts | 13 |
| E. Preliminary investigations | 13 |
| F. Additional recommendations | 13 |
| 1. Amendment of AW 43 as to votes to convict | 13 |
| 2. Repeal of AW 44, 87, 88, and 91 because now obsolete ... | 13 |
| 3. Amendment of AW 92 as to punishment for rape | 13 |
| 4. Discretionary dishonorable discharge upon sentence over six months | 13 |
| 5. Blue discharge | 13 |
| 6. Adopt Federal rule of evidence as to entry in due course of business | 13 |
| IV. RECOMMENDATIONS FOR FURTHER STUDY IN WAR DEPARTMENT | 14 |

TO THE HONORABLE
THE SECRETARY OF WAR:

REPORT OF ADVISORY COMMITTEE ON MILITARY JUSTICE

I. INTRODUCTION

On 25 March 1946, this Committee was appointed by War Department Memorandum No. 25-46, reading as follows:

Memo 25-46

MEMORANDUM)
No. 25-46)

WAR DEPARTMENT
Washington 25, D. C., 25 March 1946

WAR DEPARTMENT ADVISORY COMMITTEE
ON MILITARY JUSTICE

1. An Advisory Committee, whose membership has been nominated by the American Bar Association, is established in the Office of the Secretary of War to consist of the following members:

Mr. Arthur T. Vanderbilt, Newark, New Jersey, Chairman
Mr. Justice Alexander Holtzoff, Washington, D. C., Secretary
Mr. Walter P. Armstrong, Memphis, Tennessee
Honorable Frederick E. Crane, New York, New York
Mr. Joseph W. Henderson, Philadelphia, Pennsylvania
Mr. William T. Joyner, Raleigh, North Carolina
Mr. Jacob M. Lashly, St. Louis, Missouri
U. S. Circuit Judge Morris A. Soper, Baltimore, Maryland
Mr. Floyd E. Thompson, Chicago, Illinois

2. The function of the Committee will be to study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army.

3. The Committee is to have full freedom of action in the accomplishment of its mission and is authorized to hold such hearings and call such witnesses as it may deem desirable, and to call upon the Office of the Under Secretary of War, The Judge Advocate General, and any other appropriate agency of the War Department for information or assistance needed in the conduct of its activities.

(AG 334 (22 Mar 46))

BY ORDER OF THE SECRETARY OF WAR:

OFFICIAL:
EDWARD F. WITSELL
Major General
The Adjutant General

DWIGHT D. EISENHOWER
Chief of Staff

Since March 25, 1946 the members of this Committee have been engaged in studies, investigations, and hearings. We have availed ourselves of voluminous statistical and result studies by the Judge Advocate General's Department, including a two-volume History of the Branch Office, The Judge Advocate General, European Theater, and by the General Board, United States Forces, European Theater. We have studied other material furnished at our request.

At full committee hearings in Washington, we have heard the Secretary of War, the Under Secretary of War, the Chief of Staff of the Army, the Commander of the Army Ground Forces, The Judge Advocate General, the Assistant Judge Advocate General, and a number of Generals, Lieutenant Generals, Major Generals, Brigadier Generals, Colonels, and representatives of five Veterans' organizations.

We have received and have examined and digested hundreds of letters. We have had numerous personal interviews. We have received, and have digested, 321 answers to mimeographed questionnaires from officers of all grades, enlisted men and civilians.

We have held widely advertised regional public hearings at New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. At those hearings there was adduced testimony reported in 2,519 pages of transcript.

At all times we have received complete cooperation from the officials of the War Department and from the officers of the Army. There has been no attempt to restrict our inquiry. There has been no attempt to prevent officers from expressing their individual views with complete frankness. And the views of officers have differed sharply on many points. The Committee has had a free hand.

As the result of this general survey, and particularly as the result of regional hearings and personal interviews, it is thought that the Committee is now able to respond to the invitation of the Secretary of War. That invitation was doubtless provoked by public criticism of the Army system of military justice, and by the desire of the War Department to profit by its experience and introduce desirable improvements, as indeed it did in a similar situation after the First World War. The approach of this committee must of necessity be critical since we have been asked to suggest "changes in the existing laws, regulations, and practices" for the improvement of the administration of military justice in the Army; and our report may seem an ungracious reflection upon military leaders who have won a great victory for the American people. We can only say that we speak in answer to the Army's request and that we join our countrymen in general acclaim of the Army's achievements; and especially on behalf of the thousands of young lawyers who served in the Army courts and to a far greater extent on the field of battle, we express our profound obligation to the brilliant generalship that led to the successful outcome.

We desire to make it clear at the outset that our findings are not based on the testimony of convicted men or their friends. Complaints from that source were considered by the committee headed by former Justice Owen J. Roberts

who examined court-martial sentences for severity after the war and in many instances reduced them. Our information comes from general officers, staff judge advocates and in large part from men who served as members of the courts and as counsel for the respective parties. Many of them are known by us to be young men of unquestioned character and ability, who have become or will become leaders of the legal profession in the future, the sort of men upon whom a greatly expanded army must rely in time of war and who, in giving their testimony, had no grievances to air or desire to impair or destroy the existing system but were moved to offer sympathetic and constructive suggestions for its upbuilding. We append as an excellent example of their suggestions a copy of a letter received from a Committee on Courts-Martial of the Chicago Bar Association.

Almost without exception our informants said that the Army system of justice in general and as written in the books is a good one; that it is excellent in theory and designed to secure swift and sure justice; and that the innocent are almost never convicted and the guilty seldom acquitted. With these conclusions the Committee agrees. We were struck by the lack of testimony as to the conviction and punishment of innocent men. This is doubtless true because, speaking in general terms, the system is designed to accord a fair trial. It includes a preliminary investigation to determine whether a formal charge should be laid; the formulation of the charge in precise terms in case a prosecution is needed; the appointment of a general court by the commander of the division, consisting of at least five officers of whom one must be a law member with the qualifications of an experienced lawyer, all sworn to give a fair and impartial trial to the accused; the appointment of counsel for the prosecution and the defense; an automatic review of the judgement of the court by the appointing authority, after receiving the advice of his staff judge advocate, who may set aside a verdict of guilty or reduce a sentence but not increase it; and finally an additional automatic review in the more important cases in the Judge Advocate General's Department. It cannot be doubted that such a system is capable of speedy action and the safeguarding of rights of the accused.

The Committee noted, however, amongst the constructive critics of the system, a surprising lack of enthusiasm for its operation. On the contrary there was often a disquieting absence of respect for the operation of the system in its tremendous expansion under the impact of war. There was considerable indignation at some of the current and all too frequent breakdowns. The general comment was that the system laid down in the Manual for Courts-Martial of the Army was not followed as closely as it should have been and that the system not infrequently broke down because of two things: (1) a failure on the part of the Army to foresee the needs of its system of military justice and a reluctance to utilize available men of legal skill so that the courts were frequently staffed with incompetent men; (2) the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgements, and who conceived it the duty of the command to interfere for disciplinary purposes.

The result, in the opinion of many of the witnesses, was that although the innocent were not punished, there was such disparity and severity in the impact of the system on the guilty as to bring many military courts into

disrepute both among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed. The leading and most frequently occurring criticisms which we have heard are listed here:

1. There was an absence of sufficient attention to and emphasis upon the military justice system, and lack of preliminary planning for it.
2. There was a serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court.
3. The command frequently dominated the courts in the rendition of their judgment.
4. Defense counsel were often ineffective because of (a) lack of experience and knowledge, or (b) lack of a vigorous defense attitude.
5. The sentences originally imposed were frequently excessively severe and sometimes fantastically so.
6. There was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences.
7. Investigations, before referring cases to trial, were frequently inefficient or inadequate.

These criticisms were testified to at each of the regional hearings by numerous witnesses and were repeated so frequently in the correspondence and answers to the questionnaires received by the Committee as to indicate a definite pattern of defects in the actual operation of the court-martial system. The Committee is of the opinion that these criticisms are well founded and reflect actual breakdowns in the operation of the system. It can and should receive correction; and the Committee has given consideration to recommendations to this end.

II. GENERAL RECOMMENDATIONS

Our first recommendations are general:

1. We recommend that the Secretary of War, the General Staff, and the Army place greater emphasis upon the operation of the Army system of justice.

The impression which the Committee got in all of its hearings was that for one reason or another the Army system of justice was pushed well into the background, not only in wartime but in prewar peacetime. Nearly every witness, including almost all of the generals, testified that there was a very great lack of officers properly trained in courts-martial duty.

It was clearly proven that, frequently, officers with no legal training were used as law members, trial judge advocates or defense counsel of general

courts; and yet it is perfectly clear that there were available to the Army a sufficient number of competent men with legal training to have staffed all of the courts everywhere. The failure to produce these legally trained men for court members or officers was due primarily to failure to make proper plans for the courts. Indeed high ranking officers have expressed a reluctance to make use of civilian trained lawyers in the Army system. We were told that more than 25,000 lawyers applied for commissions in the Judge Advocate General's Department, but the applications were not received with favor. At the beginning of the war the Army was relying on the hope, which proved illusory, that some 500 judge advocates in the Officers' Reserve Corps would prove sufficient. The Judge Advocate General's School was established February 6, 1942, but the Officers' Candidate School was not activated until March, 1943, and while the schools did good work they were insufficient to fill the need. It is quite certain that the Army planning organization very badly underestimated the number of legally trained men needed in the Judge Advocate General's Department.

The starving of the Army's legal branch and other evidence convince us that high Army circles did not properly evaluate the importance of the system of justice to be established in a large army drafted from the American people; and that this oversight occurred the more easily because of the traditional fear of Army men that adherence to legal methods, even in courts-martial, would impede the military effort in time of war. A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, and he does not always perceive that the more closely he can adhere to civilian standards of justice, the more likely he will be to maintain the respect and the morale of troops recently drawn from the body of the people.

Some of the critics of the Army system err on the other side and demand the meticulous preservation of the safeguards of the civil courts in the administration of justice in the courts of the Army. We reject this view for we think there is a middle ground between the viewpoint of the lawyer and the viewpoint of the general. A civilian entering the army must of course surrender many of the safeguards which protect his civilian liberties. The Army commander must be ready to retain all of the safeguards which are consistent with the operation of the army and the winning of the war. The civilian must realize that in entering the army he becomes a member of a closely knit community whose safety and effectiveness are dependent upon absolute obedience to the high command; and that for his own protection, as well as for the safety of his country, army justice must be swift and sure and stern. He must realize the truth of what was well said by Lord Birkenhead in commenting on the British system of military justice that "where the risks of doing one's duty is so great, it is inevitable that discipline should seek to attach equal risks to the failure to do it."

On the other hand the commander of an American army must realize that he is dealing with men whose initiative, ingenuity, and independent self-respect have made them the best soldiers in the world. Nothing can be worse for their morale than the belief that the game is not being played according to the rules

in the book, the written rules contained in the Articles of War and the Manual of Courts-Martial. The foundation stone of the soldier's morale must be the conviction that if he is charged with an offense, his case will not rest entirely in the hands of his accuser, but that he will be able to present his evidence to an impartial tribunal with the assistance of competent counsel and receive a fair and intelligent review. He is an integral part of the army, and the army courts are his system of justice. Everything that is practicable should be done to increase his knowledge of the system and to strengthen his respect for it, and if possible, to make him responsible in some particular for its successful operation. These "justice" considerations are important to a modern peacetime army as well as to a wartime army. As our outlook upon world affairs and our concepts of military service have broadened, National Defense has become a matter of concern to every citizen. The nearer our approach to universal military service the greater is the need to emphasize the military justice system. We believe that the special recommendations subsequently made herein will, if adopted, aid in improving the system.

2. We recommend a substantial enlargement of the Army legal department, the Judge Advocate General's Department. We recommend an increase in the number of technicians in the administration of the Army system of justice.

The witnesses before our Committee were almost unanimous in this general recommendation. Almost all said that they observed a real need for more lawyers in the administration of the Army system of justice. The Judge Advocate General's Department needs more lawyers, more clerks, more reporters and more statisticians.

Nearly every witness said that it would be desirable, if practicable, to have with every general court a law member, a trial judge advocate, and defense counsel, who are trained lawyers and members of the Judge Advocate General's Department. We will refer later to the personnel problem involved. Here we make the general recommendation for substantial enlargement of the Department.

In time of war, the problem of securing adequately trained experienced and competent trial lawyers should present no great difficulty. In the last war the shortage of lawyers was due to two things: (a) the Army did not seek enough lawyers, and (b) many of the very best trained lawyers preferred to go into the line and did not wish to disclose the fact of their law experience. In meeting this situation cooperation between the army and leaders of the legal profession may be of real assistance. Certainly the legal profession could assist the War Department in the selection of properly qualified young lawyers and the Army would be clothed with ample authority to assign them to the duties for which they are best qualified.

III. SPECIFIC RECOMMENDATIONS

A. The checking of command control

The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence

their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the late war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas. Not infrequently the general reprimanded the members of a court for an acquittal or an insufficient sentence. Sometimes the reproof was oral and sometimes in writing by way of what the Army has come to know as a "skin-letter." For example, one lieutenant general of unquestioned capacity voluntarily testified that he wrote a stinging letter of rebuke to the members of a court who had imposed a sentence of five years upon a soldier who deserted his division while in training in the United States. The general was incensed because the sentence was not twenty-five years and considered it his duty to chastise the court for extreme leniency.

There were instances in which counsel were appointed to defend an accused who possessed little competence for the task, especially when compared with that of the prosecuting officer; and there were instances in which it was believed that the well-known attitude of the commander minimized the independence and vigor of the defense. There is no doubt that defendants' counsel were frequently incompetent and the tendency of the commander in certain units to influence the courts led not unreasonably to the suspicion that a competent and vigorous defense was not desired. Communications received in answer to questionnaires from generals, judge advocates, and enlisted men produced the following results in answer to the question, "To what extent are court-martials under the domination of convening authority?": Of forty-nine generals, fourteen replied that the courts were dominated and thirty-five that they were seldom dominated. Of forty-five judge advocates, seventeen replied that the courts were dominated and twenty-eight that they were seldom dominated. Of twenty-nine enlisted men, twenty-two replied that the courts were dominated and seven that they were seldom dominated.

So far as the committee is informed, no steps have been taken in the Army to check or prohibit commanding officers in the exercise of their power and influence to control the courts. Indeed the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution. To this end we recommend:

1. The Manual for Courts-Martial, United States Army, should provide that it is improper and unlawful for any person to attempt to influence the

action of an appointing or reviewing authority or the action of any court-martial, general, special, or summary, in reaching its verdict or pronouncing sentence, except persons connected with the work of the court, such as members of the court, attorneys, and witnesses; and this prohibition should be made expressly applicable to the appointing or reviewing authority. It should be stated that any violation will be considered conduct of a nature to prejudice military discipline and to bring discredit upon the military service in violation of Article of War 96.

2. The Manual should also contain an express prohibition against the reprimand of the court or its members in any form. The reprimand sometimes given a jury by a judge in a civil court for an erroneous verdict furnishes no parallel or excuse for the present Army practice. The jury upon its discharge returns to the body of the people, but the members of a court-martial remain in the service subject to the will of superior officers as to promotions, assignments to duty, and transfers. The statement on page 74 of the Manual that the reviewing authority may properly advise members of a court by letter of his nonconcurrence in an acquittal should be expunged. It is a relic of the power formerly possessed by the reviewing authority to return a record of trial to the court for reconsideration of findings of not guilty. This power was taken away in the amendment of the Articles of War and regulations after the First World War and the spirit of the repeal should be respected.

These recommendations are not intended to alter the duty or authority of the command to instruct the officers and enlisted men in respect to the court-martial system and its operation.

3. The Manual should contain a statement that it is the duty of courts-martial to exercise their own judgment in imposing sentences and that they should not pronounce sentences which they know to be excessive, relying on the reviewing authority to reduce them.

4. It should be a jurisdictional requirement that the law member and the defense counsel of a general court-martial shall be trained lawyers and commissioned officers detailed by the Judge Advocate General's Department. It should be required that the law member be actually present throughout the trial. The ruling of the law member on legal questions, except as to the sufficiency of the evidence, should be binding on the court. An adverse ruling by the law member on the sufficiency of the evidence would result in an acquittal and this question should therefore be left to the whole court subject to the subsequent automatic review.

It should be made mandatory that the defense counsel should always be a lawyer. It is unfair to the accused to assign a laymen as defense counsel when the trial judge advocate is a lawyer. The authority appointing the court should designate defense counsel but the right of the accused to select his own counsel should not be disturbed. There should always be available a list of all lawyers connected with the command to which the accused belongs, who should be given the privilege of selecting defense counsel from the list, if available, to act in preference to or in association with the defense counsel designated by the appointing authority.

5. The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be

made by The Judge Advocate General or by the Assistant Judge Advocate General for a theater of operations, or by such board or boards as shall be designated by The Judge Advocate General or the Assistant. This reviewing authority shall have the power to review every case as to the weight of the evidence, to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentences and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.

In order to make this recommendation effective, Article of War 50 1/2 should be amended. In its present form it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clearer and more definite. There seems to be no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended.

6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for prompt trial to a court appointed by a judge advocate should be absolute. The commander should, of course, be furnished with a judge advocate to advise him with reference to the disposition of the charge. The right of the command to control the prosecution, and to name the trial judge advocate, who should be a trained lawyer, should be retained. The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of the command. For this purpose the present organization of the Judge Advocate General's Department may be sufficient and the power to select and review its judgment should normally rest with the Staff Judge Advocate at Army level, so that the members of the court may be selected from a wider area and the perennial problem of disparity of sentences in similar cases may be at least partially solved. It may be best in certain instances to place the authority on a higher level, or in case of war or in case of units established at a distance from the command, to delegate the authority to a division or smaller unit. We believe that the flexibility of such a system will aid in the solving of many problems and will permit the establishment of permanent courts or traveling courts if they be found desirable. Article of War 8 should be amended to accomplish this purpose.

We realize that the officers of a division or command may have a special understanding of local conditions and be best qualified to try local offenders and also that officers must not be appointed to courts-martial duties if, in the opinion of the commander, they are unavailable. These requirements may be met by the establishment of a panel of available officers by the commander, subject to change from time to time, from which the selection of members of the court may be made. The determination of the commander as to availability must, of course, be final. It is not meant that the selection of the members of the courts-martial shall be confined to the division or command in which the offense occurs.

We have no fear that this arrangement will impair the proper authority or influence of the commander. The absolute right to refer the charge for speedy

trial and to control the prosecution will satisfy the demands of discipline. Further than that the command should not go. The present Articles of War do not contemplate that the commander shall control the action of the courts. The members of the court take an oath under Article of War 19 to well and truly try and determine, according to the evidence, the matters submitted to them without partiality, favor, or affection, according to the rules and articles for the government of the armies of the United States. The right to fix the penalty in case of conviction is specifically lodged in the court and the surrender of this power to the commander is an act which the court has no legal right to perform, and the commander no legal justification to require.

The need for the prompt appointment of a court and a speedy trial when the command refers a charge for trial must be recognized. Moreover, the deterrent effect of punishment must not be overlooked and the need for severe sentences under conditions prevailing in an army in a state of war cannot be denied. But there is no reason to think that the members of the Judge Advocate General's Department will not be keenly alive to all these necessities. They will be army men selected and trained by army men. In time of war they will be in the field in close association with the command and cognizant of all the considerations of safety and success which influence the command itself. The time is past when a court-martial might be deemed merely as an advisory council to the commander. The court-martial, as conceived by the Articles of War, is an independent tribunal; and if the commander controls the prosecution, the appointment and functioning of the court may be safely left to the legal department of the Army.

7. The special understanding that officers of a division or command have of local conditions lead us also to recommend that the general or other officer who referred the case for trial should have the power to mitigate, suspend, or set aside the sentence. In order to effectuate this recommendation the record should be first sent by the court to the officer who referred the case for trial so that he may have an opportunity to act upon the sentence and it should be his duty to act promptly and forward the record to the reviewing authority for final action. The power of the command in this respect should be limited to the question of clemency.

8. The members of the Judge Advocate General's Department should be governed as to promotions, efficiency reports and specific duty assignments in the chain of command of the Judge Advocate General's Department and not by the commanding officer of the organizations in which they may be serving.

9. In order to overcome the difficulty of securing and holding trained lawyers in the Judge Advocate General's Department in time of peace, it is specifically recommended that they be afforded the same privileges regarding promotion as is now afforded to the other professions whose personnel are at present on a separate promotion list and that necessary legislation to effect this be initiated without delay, in order that the proposed enlargement of the department may be coordinated with these new privileges.

10. Special courts-martial should be governed as far as practicable by the same requirements as general courts-martial.

B. Discrimination in officer punishment

A great deal of testimony which we have heard tended to show that officers were not prosecuted as consistently or punished as severely as enlisted men. The critics did not always understand the difficulties of the situation or appreciate the severity of the punishment inflicted upon an officer by the imposition of a fine or the loss of promotion or reduction in rank, and the devastating effect of this punishment upon his career. Nevertheless, we are convinced that in some instances and in some areas there was foundation for the complaint and it was a general source of criticism among the troops and seriously impaired their morale.

In general, we believe that officers would be less likely to offend if they were subjected to a greater extent to the deterrent influence of punishment which in army circles is deemed so effective in dealing with enlisted men.

In particular, we make the following recommendations:

1. Article of War 104 should be amended to provide: (a) that warrant officers, flight officers, and field officers shall be punishable thereunder; (b) that the punishment shall be imposed by an officer with the rank not less than that of Brigadier General or by an officer who has general court-martial jurisdiction under Article of War 8; (c) that the maximum fine be increased to one-half month's pay for each of three months.

The right of the officer to demand a court-martial and to appeal to the next higher commander should of course be preserved.

2. The trial of officers by special courts should be authorized in order to bridge the gap between punishment under Article 104 and punishment by a general court. The existence of that gap was given by many witnesses as the reason why officers did not receive more punishment. The only court punishment available was that imposed by general court after trial and, in many instances, such a trial was considered too drastic. We see no adequate reason why an officer should not be tried by special court. Some witnesses took the position that an officer should not be tried unless conviction was to be followed by dismissal from the service, since a convicted officer is no good to the service. Records of general court-martial officer trials and conviction do not bear out that conclusion. In the European Theater there were 1737 officers tried, 1396 were convicted. Of those convicted 74 per cent were not dismissed from the service but were retained in the service and, presumably, continued to render valuable military service.

Information should be given out as to the use of reprimand and Article of War 104; in order that the impression, that officers are not punished for offenses for which enlisted men are punished, may be corrected.

3. In time of war a general court-martial should be authorized in its discretion to inflict as officer punishment, loss of commission, and reduction to the ranks. In numerous instances officers would prefer it and we see no reason why this should not be left to the discretion of the general court.

4. Article of War 85 should be amended so that it will read as follows:

"Art. 85. Drunk on Duty. Any person subject to military law who is found drunk on duty shall be punished as a court-martial may direct."

The purpose of this amendment is to eliminate a motive for the unwarranted acquittal of an officer charged with drunkenness on duty. As the article is now written an officer convicted of drunkenness in time of war, must be sentenced to dismissal.

C. Enlisted men and courts-martial

We have already stressed the fact that courts-martial perform an absolutely necessary disciplinary function and that good discipline presupposes just treatment. If the trials are conducted in such a way or punishment of such severity is imposed as to create a feeling among the troops that courts-martial are arbitrary and unjust, the disciplinary effect will be impaired or destroyed. It is necessary not only that the system function fairly but that its fairness be recognized by the men in the service. To this end we make the following recommendations:

1. Special emphasis should be placed upon the education and instruction of enlisted men with respect to Army justice. The Articles of War should not only be read; they should be explained. The instructions should not be confined to Articles relating to punishment of enlisted men, but should include the Articles dealing with the rights and the protection of enlisted men, such as Articles of War 24, 97, and 121.

Further, the nature and the function of general courts-martial, special courts-martial, summary courts-martial, and company punishment should be explained. The enlisted man should be taught that army discipline and army courts-martial are necessary for his comfort, protection and safety; and that the Army judicial system is not something for use against him, but something which works for him.

2. The sessions of general, special and summary courts should not only be open (except where security or special policy reasons require otherwise), but they should be bulletined so that the attendance of spectators be encouraged. Special effort should be made to conduct army courts with impressive decorum.

3. Qualified enlisted men should be eligible to serve as members of general and special courts-martial and should be appointed thereon to the extent that in the discretion of the appointing authority, it seems desirable to do so. We realize that there is a sharp division of opinion on the subject. The generals and commissioned officers generally are divided as to the desirability of the proposal, while a preponderant majority of the enlisted men favor it. Those opposed to it contend that since the movement of qualified men in the Army is upward, the appointment of enlisted men will lower the quality of the courts and give rise to personal antagonism and recrimination in army units when enlisted men participate in the conviction and sentence of their fellows. We think, however, that some improvement of the morale of the enlisted men may

follow from increasing their knowledge of the functioning of the Army system of justice, their confidence in its operation and their feeling of responsibility for the enforcement of Army discipline.

D. Summary courts.

We recommend that summary court officers should be selected from captains or officers of field grade, if available, and that the selection of junior and inexperienced officers for this purpose should be avoided. If necessary, summary court officers should be appointed from a larger area or a larger unit than is at times done at present.

The accused should be allowed to have counsel of his own selection before a summary court, if he so requests, but the appointment of counsel should not be required.

E. Preliminary Investigations.

The provision of Article of War 70, that no charge will be referred to a general court-martial for trial until after a thorough, impartial investigation thereof shall be made, should be enforced. Trained and mature officers should be regularly assigned to carry on preliminary investigations under this Article; and this function should be regarded as part of their regular duties. While legal training is not indispensable for this purpose, it is preferable that either a lawyer or an officer with investigative experience should be assigned to this work.

F. Additional Recommendations.

1. Article of War 43 should be amended so as to state clearly and unambiguously the number of votes necessary to convict.

2. Articles of War 44, 87, 88 and 91 should be repealed because they are now obsolete.

3. Article of War 92 should be amended so as to provide that a person convicted of rape shall suffer death or such punishment as a court-martial may direct.

4. The present mandatory requirement contained in the Manual for Courts-Martial, 1928, page 96, that a sentence of imprisonment of an enlisted man for over six months must be accompanied by dishonorable discharge should be abolished and in lieu thereof it should be provided that a dishonorable discharge in such a case is discretionary with the general court.

5. There should be introduced an additional type of discharge; namely, a discharge for unfitness similar to a so-called "blue discharge" in order that a sentence of dishonorable discharge should be reserved for exceptionally grave and heinous offenses.

6. The rules governing the admissibility of documentary evidence should be liberalized, particularly with reference to the admission of entries made in the usual course of business. We recommend the elimination of the confusing reference to personal knowledge and the adoption of the rule now prevalent in the Federal courts.

IV. RECOMMENDATION FOR FUTURE STUDY IN WAR DEPARTMENT

It is recommended that a Board of Officers be constituted to consider other advisable changes in the Articles of War and in the Manual of Courts-Martial and that such study be a continuous process so that further changes may be made as the need for them appears to develop. Suggestions were made to the Committee which interested it very much but involved questions that the Committee does not now feel qualified to decide. Among the things to which we think the War Department should give further serious consideration are:

a. The enlargement of the authority of commanding officers under Article 104 to extend punishment to enlisted men. To this is tied the further suggestion of increasing the power, authority, and dignity of the summary court and providing that summary court officers must be of field grade. We think that the balancing of the advantages of the diminution of summary court trials against the danger of abuse by new and untried company commanders can only be done by officers of the Army. We recommend that they consider the trial of this experiment.

b. The elimination of all mandatory minimum punishments specified in the Articles of War or regulations so as to give wider discretion in passing sentences.

c. The creation of permanent, general courts-martial for territorial units to be used as rotating courts wherever practicable and wherever experience proves it desirable.

d. The taking of depositions at the earliest possible moment in time of war, subject to the limitation that defendant must have counsel and that both sides have notice of the taking of the deposition and an opportunity to participate in it.

e. Amendment of Article of War 25 to contain a final proviso following the present proviso which permits the defense to introduce depositions in a capital case, the new proviso to read as follows:

"Provided, further, that a deposition may be read in evidence by the prosecution in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such case a sentence of death may not be adjudged by the court-martial."

f. The removal of the statute of limitations on prosecution for absence without leave occurring in time of war.

g. Provision that all courts-martial should announce their findings as soon as reached and, in case of conviction, should hear arguments of counsel on questions of sentence and that upon reaching a determination as to sentence, should announce the sentence.

h. Provision in the Manual defining what portions of unofficial record of general court-martial and of the reviewing authority shall be available to inspection of defense counsel.

i. Provision that upon direction of the law member there shall be included in the transcript of record of every general court-martial the opening statements and/or closing arguments of counsel where the precise position of either party is not sufficiently emphasized in the record.

j. The extension of the doctrine of condonation where a soldier is committed to actual combat with knowledge of the pending charge.

CONCLUSION

There is attached to this report (a) a document consisting of 30 pages with a 14 page appendix entitled "A summary of constructive criticisms received by the War Department's Advisory Committee on Military Justice," and (b) a document consisting of 71 pages entitled "Topical Outline - Compilation of Answers - Generals, Judge Advocates, Enlisted Men."

It is hoped that our report will help to improve the administration of Military Justice and increase its beneficial effect upon the discipline and morale of the men in the Army.

Respectfully submitted,

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13 December 1946

WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE

TOPICAL OUTLINE

-oOo-

COMPILATION OF ANSWERS

Generals
Judge Advocates
Enlisted Men

FOREWORD

This compilation is a tabulation and summary discussion of answers received before 14 October 1946 to the Topical Outline questionnaire mailed out by the War Department Advisory Committee on Military Justice. It represents the viewpoint of more than 200 writers as expressed in 193 separate replies. Eighty-one of these replies were from Generals, 66 were from active and former Judge Advocate officers, and 46 were from Enlisted Men.

In some instances writers failed to answer all of the questions. In other instances replies were of such a nature that they could not be classified, these authors weighing both sides of an issue without striking a balance. This type of answer has found a place in the summary discussions of the individual questions.

I N D E X

Page

I. GENERAL

1. Purposes of court-martial system: maintenance of discipline or administration of justice? 1
2. Merits and weaknesses or defects of existing system. 2
3. Causes of weaknesses and defects: (a) the system, organization, and procedure in themselves; (b) the administration of the system; or (c) personnel. 10
4. Are weaknesses and defects found in time of peace to the same extent as in time of war? If not, why? Is the difference, if any, to be explained by the difference between professional officers and temporary officers? 13
5. Are officers, both permanent and temporary, given sufficient training in ideals, purposes, rules, and practical administration of military justice? If not, what improvements are desirable? 14
6. Should there be any difference in dealing with offenses at the front during actual military operations and offenses committed behind the lines or in training areas? 16
7. Should there be any difference in dealing with military and non-military offenses? 17
8. Does the present system in actual operation often result in actual miscarriages of justice; (a) are the innocent convicted?; (b) are the guilty punished excessively, or too leniently; and (c) are the guilty acquitted? 18
9. Does the present system in actual operation often result in inequalities of treatment as between officers and enlisted men: (a) in respect to filing charges and ordering trial; (b) in respect to convictions and acquittals; (c) in respect to sentences? 19
10. To what extent, if at all, do inadequacies of company commanders result in trials by court-martial? Is there any difference in this respect as between (a) permanent and temporary officers, and (b) officers commissioned directly from civil life and officers who rose from the ranks? 22
11. Is there a tendency to assign less capable officers to court-martial duty? 23

INDEX (Continued)

| | <u>Page</u> |
|--|-------------|
| 12. Advisability of expanding Judge Advocate General's Department, making it more independent and increasing its authority. | 24 |
| 13. Advisability of increasing the use of capable, experienced, retired officers, and those partially disabled for court-martial duty. | 26 |
| 14. Advisability of assigning enlisted men to serve as members of courts-martial. | 27 |
| 15. Is there a marked disparity in the sentences imposed in different commands? | 28 |

II. JURISDICTION OF COURTS-MARTIAL

| | |
|--|----|
| 1. To what extent are cases tried by general courts-martial that might be advantageously disposed of by special or summary courts or by company punishment? | 30 |
| 2. For the purpose of maintaining discipline, should there be an increase in the authority of company commanders to impose company punishment, and an expansion in the jurisdiction of summary courts and special courts, leaving to general courts-martial only the trials of heinous military offenses, such as cowardice in the face of the enemy and desertion; and grave non-military crimes, such as murder, rape, robbery, etc. | 31 |
| 3. Should summary courts or at least special courts-martial be granted some jurisdiction over officers? | 32 |
| 4. Should more non-military offenses be turned over to civil courts for trial? | 33 |

III. FILING AND INVESTIGATION OF CHARGES

| | |
|---|----|
| 1. Are any changes desirable in the procedure of filing charges? | 34 |
| 2. Is present system of preliminary investigation of charges adequate or are any changes desirable? | 35 |
| 3. Does the present system of preliminary investigation of charges operate properly in actual practice? | 36 |

INDEX (Continued)

Page

IV. DIRECTING TRIAL OF CHARGES

1. Is the present system adequate? 37
2. Are there undue delays in determining whether the accused should be tried? 38
3. Are arrest and confinement of the accused before trial used unduly and unnecessarily? 39

V. ORGANIZATION OF COURTS-MARTIAL

1. Are summary courts properly organized? 41
2. Are special courts-martial properly organized? 42
3. Adequacy of present mode of selection of defense counsel. 43
4. To what extent are courts-martial under the domination of convening authority? 44
5. The advisability of withdrawing from field command the authority to convene general courts-martial, except possibly in battle areas in cases of emergency, and the establishment of permanent general courts-martial in each area, such courts-martial to be organized by the Judge Advocate General's Department and to be independent of command. 45
6. The advisability of appointing as the law member, the trial judge advocate, and the defense counsel only trained officers who belong to the Judge Advocate General's Department; the trial judge advocate, and the defense counsel to be of the same rank, if at all possible; such assignments to be permanent and full-time, rather than temporary part-time details. 46
7. The advisability of vesting in the law member full authority to rule finally on all questions of law but giving him no vote on the court; and leaving to the remaining members of the court only the functions of determining guilt or innocence and determining what sentence should be imposed in case of conviction - in other words, assimilating the functions of the law member to those of a judge, and the functions of the remaining members to those of a jury. 47

INDEX (Continued)

| | <u>Page</u> |
|---|-------------|
| <u>VI. COURT-MARTIAL PROCEDURE AND PRACTICE</u> | |
| 1. Are any changes in trial procedure desirable? | 49 |
| 2. Do defense counsel have adequate opportunity to defend the accused, or is vigorous defense discouraged? | 50 |
| 3. Does the defense have adequate opportunity to procure compulsory attendance of witnesses? | 51 |
| 4. Should the use of depositions by the prosecution be permitted? | 52 |
| 5. To what extent, if at all, should the new Federal Rules of Criminal Procedure be used by courts-martial? | 52 |
| 6. Should unanimous vote be required to convict? | 54 |
| 7. To what extent, if at all, does the practice prevail of imposing severe excessive sentences, leaving it to the reviewing authority to reduce the sentence, instead of endeavoring to impose a proper sentence in the first instance? If the practice exists, should it be eliminated, and, if so, how? | 55 |
| 8. Are court-martial records complete and accurate verbatim transcripts of actual proceedings? | 57 |
| 9. Are there undue delays in court-martial proceedings? | 58 |
| 10. Should there be a change in existing practice which makes it mandatory for a general court-martial to impose a dishonorable discharge in case a sentence of imprisonment of six months or more is also imposed? | 58 |
| Should the power to inflict a dishonorable discharge in such cases be discretionary? | |
| 11. Should general court-martial be given power, which it does not now have, to suspend sentence and place the accused on probation? | 59 |
| Should the use of dishonorable discharges generally be reduced, as part of a court-martial sentence? | |
| 12. Is it desirable to introduce a discharge, such as the bad conduct discharge of the Navy, which would rid the Army of an undesirable soldier, and yet not have a disastrous permanent effect on him? In that event, should dishonorable discharges be reserved for more grave and heinous cases? | 60 |

INDEX (Continued)

| | <u>Page</u> |
|--|-------------|
| 13. Is some species of pre-sentence investigations feasible? | 61 |

VII. REVIEW OF COURT-MARTIAL PROCEEDINGS

| | |
|--|----|
| 1. Is the present system of review adequate as to (a) summary courts, (b) special courts-martial, and (c) general courts-martial? | 62 |
| 2. Should the trial judge advocate and the defense counsel be accorded an opportunity as a matter of routine to submit briefs or memoranda to the reviewing authority and to the Judge Advocate General? | 64 |
| 3. Is any change desirable in the method of review of death sentences? | 64 |

VIII. SUBSTANTIVE LAW

| | |
|---|----|
| 1. Advisability of amending Articles of War and Courts-Martial Manual in respect to definitions of offenses and provisions for penalties. | 66 |
| 2. Advisability of modifying Articles 95 so that dismissal would not be mandatory penalty in case of conviction of an officer. Consider the possibility that such modification might minimize the reluctance to court-martial an officer. | 68 |
| 3. Advisability of making Article 96 more specific. | 69 |
| 4. In case of trials for non-military offenses committed in foreign countries, what substantive law should govern? | 70 |

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I. GENERAL1. Purposes of court-martial system: maintenance of discipline or administration of justice?GENERALS:

Fifty-two Generals indicated that the purpose of the courts-martial system was a combination of justice and discipline. Only four Generals emphasized discipline as the primary purpose, and six emphasized justice.

One General stated: Discipline is maintained by many means, outstanding among which is the proper administration of justice. There is no such thing as a choice between maintenance of discipline and proper administration of justice by the courts-martial system. Justice is administered through courts-martial in the interest of maintaining proper disciplinary standards.

A second General stated: The purpose is to increase an Army's ability to fight successfully. It provides orderly procedure for functions of command through administering justice. This is compatible with pure justice, since an unjust application will result in loss of morale and of combat strength. "The court-martial system is the commander acting in his capacity of judge."

A third General stated: The purpose is neither to maintain discipline nor to administer justice per se. Rather, it is to implement the Articles of War for the guidance and conduct of the Army, to determine violations thereof, and to prescribe punishment for offenders. Discipline in itself is maintained by effective, responsible leadership through command, and indoctrination of all intelligent individuals with principles of personal responsibility for self-discipline and conduct.

A fourth General stated: The administration of justice is the primary purpose, but maintenance of discipline is closely integrated thereto. Without discipline, need for administrative punishment increases. Qualified and competent leaders use punishment only as a last resort, as this is the poorest way to handle men.

JUDGE ADVOCATES:

| | <u>both</u> | <u>discipline</u> | <u>justice</u> |
|---------------------------------|-------------|-------------------|----------------|
| Combat Judge Advocates | 5 | 0 | 1 |
| Regular Army Judge Advocates | 9 | 3 | 1 |
| Board of Review Judge Advocates | 12 | 4 | 3 |
| Staff Judge Advocates | 9 | 3 | 1 |
| <u>Totals</u> | <u>35</u> | <u>10</u> | <u>6</u> |

ENLISTED MEN:

Three enlisted men emphasized discipline as the primary end, 17 emphasized justice, and 13 emphasized both discipline and justice.

Some of the amplifications of their answers were as follows:

The purpose is the administration of justice, which in turn means impartial adherence to truths, facts, and unimpeachable authorities. Strict discipline results from justice.

The real purpose is the administration of justice, but frequently maintenance of discipline would appear to be the object-- particularly during wartime. The present military justice system is designed for a small professional Army operating under normal conditions. It does not allow for increase to size of wartime Army consisting of inductees as distinguished from professionals. A draftee Army, not thoroughly indoctrinated in military law, cannot be handled the same as a smaller professional peacetime Army.

Discipline is maintained by administration of justice. Discipline is not always punishment. A commendation may result in the highest form of discipline.

Without trial and punishment, enforcement of discipline would be impossible. Many soldiers are good only because they are afraid of a swift, sure trial, and probable conviction and punishment for disobediences. Justice is served in the enforcement of discipline and law.

A "happy medium" somewhere between the two poles mentioned should be the goal of a satisfactory court-martial system. In any effective military organization the maintenance of discipline is essential, but it must be tempered with justice, if for no other reason than to maintain high morale and esprit de corps.

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2. Merits and weaknesses or defects of existing system:

GENERALS:

Merits: The system provides the best obtainable balance between accomplishment of military missions and the interests of the community, while protecting individual rights. It offers an expeditious administration of justice under difficult circumstances, and enables commanders to maintain discipline. It places administration of justice in the chain of command, where responsibility

for the maintenance of discipline rests. The system proved its fundamental soundness during World War II. It is a moderate and reasonable approach to an age-old problem. It is valid and impartial--comparable, in a way, to a family settlement of child delinquencies. A proof of its success is that the system does work.

The guilty are normally convicted, and the innocent go free. Civilian legal technicalities do not block the way to justice. Courts are impartial, and are not easily influenced by oratory. Trials are prompt and simple. There is no requirement that the prosecutor present only the evidence which is adverse to the accused. The system of pre-trial investigation prevents innocent persons from being brought before courts-martial. Court members generally have intelligence superior to that found in civilian juries. There is an "automatic appeal." Expert testimony is readily available. Accused has the right to confront and cross-examine witnesses at his pre-trial investigation. He has the right to his own counsel, either civilian or military. He gets a verbatim copy of his general court-martial record of trial without cost. The Staff Judge Advocate, reviewing a case before sentence, acts somewhat as an equity judge, weighing evidence as well as considering law.

The Articles of War are clear, and there is justness in the limitation of sentences.

Weaknesses: As will be emphasized in the answers to the next question, the main weakness was one of personnel, which in turn sometimes led to inadequate administration of the court-martial system as set up. This was chiefly caused by the necessities of hasty mobilization, and an inability to train the average civilian officer sufficiently re the court-martial system. This was particularly true in the lower operating echelons.

One General noted that many commanding officers attempted to influence their courts, and when those courts did not make findings in accord with their desires, arbitrary changes of court membership were made. Another pointed out that untrained officers are permitted to pass on questions of a purely legal nature, without being fully aware of their legal implications.

A third General listed the following weaknesses: a. Officers exercising general court-martial jurisdiction function both as district attorney and judge. While abuses may be rare, the possibility of abuses results in criticism. Some commanding generals, having once sent a case to a general court, are loath to reverse a finding of guilt. b. Reviewing Authorities appoint court members. A commanding general with general court-martial jurisdiction should be permitted to try a member of his command only on the advice of the "district attorney," and thereafter it should be sent to the next higher administrative command echelon for general court-martial trial. Members of a division should be tried before an Army general court-martial (this is practica-

ble during combat, because most Division offenders are held in Army stockades). c. Defense counsel need not be attorneys. Army should use a "public defender" system, with officers so assigned having no other duties. d. Defense counsel should be permitted as a matter of right at pre-trial investigations. e. Rape punishment should be discretionary. f. Boards of Review have no reviewing powers where a dishonorable discharge has been suspended, regardless of the years of confinement imposed. g. Some commanders demand maximum sentences. h. Lay members on a court may overrule the law member on certain matters of law. i. Regiments and similar units might well have a Judge Advocate officer, with the principal duty to supervise summary and special courts.

A fourth General pointed out: The summary courts are the most unsatisfactory in practice. The summary court officer may not be able, fairminded, and bequeathed with good judgment. His action is too frequently arbitrary, and results in considerable resentment during wartime. Since summary courts are necessary, the defects should be remedied by defining and limiting their power, by using experienced officers on summary courts, and having stricter supervisions--perhaps sometimes permitting appeal to special courts, or permitting accused to immediately demand a special court trial. Special courts are stated to have operated in a substantially satisfactory manner, although their jurisdiction might be increased to cover minor offenses of warrant officers and company grade officers. General courts are stated to have operated in a satisfactory manner, with this one serious defect: that commanding generals in a chain of command have no power over lower echelon general courts--this resulting in a lack of sentence uniformity.

A fifth General found that the principal weakness resulted from effort to comply with regulations. Pre-trial investigation requirements were difficult to satisfy. There was a lack of trained stenographers, and a difficulty (particularly during combat) of keeping in touch with witnesses.

A sixth General found a double standard--with too much difficulty to convict officers. Defense counsel were usually less competent than trial judge advocates.

A seventh General noted the need to amend the Table of Maximum Punishments, to extend AW 104 coverage to the first three grades and warrant officers, to permit peacetime AW 104 fines, and to have a lower court for officers.

An eighth General thought that an excessive amount of officer-time was required to handle the cases; that there were too many technicalities, with consequent opportunities for miscarriages of justice. He found an uneven administration, with too much "law" in the system.

JUDGE ADVOCATES:

Merits: The system is fundamentally sound, when carried out as prescribed and in the spirit intended. It is of good basic design, even though it may require some alterations, and is the best system yet devised for military use. It is the only way to maintain discipline. Trial by civilians would not result in the same understanding. It sets up a definite, clear code; provides and demands proper investigation; centralizes discipline and justice in one commanding officer; utilizes court members who are acquainted with the actual situations; permits leniency; and establishes a dual review of general court-martial cases. It makes speedy justice possible, under a variety of conditions. Few guilty escape; few innocent are convicted. It is based on the experience of 100 years.

At the pre-trial investigations, "weak" cases are weeded out--to thereby permit a higher incidence of convictions before general courts-martial. There are adequate inquiries re the question of an accused's sanity. There is frequent clemency consideration and rehabilitation, and also frequent suspensions and remissions of sentences. Accused's rights are fully protected during trial. Inferior as well as general courts function quickly and efficiently. There is no possibility of "hung juries." The rules are relatively simple, and are understood. These rules are not designed to be technical. There are disinterested and understanding judgments, a relative certainty of punishment for wrong-doing, fair penalties, and a careful and automatic review of records of trial. The system is superior to most civilian criminal trial procedure today. There is a freedom from political influence, and an impartiality of administration.

Weaknesses: The court-martial system was geared to peacetime operation, rather than to wartime. It never had an adequate legal staff to operate it, and the American Bar Association was slow in attempting to get one. Some professional soldiers could not reconcile themselves to working with draftees, and would not learn that an iron fist would not work against them. The human equation was always present.

It was cumbersome to form a court, to try a man near the scene of his offense, and to get witnesses. Sometimes, there was domination by commanding officers. Trial judge advocates, defense counsel, and law members were frequently untrained and inexperienced. There were poor investigations. There was improper presentation of evidence, and weak and inadequate defense. There were improper rulings on legal points occurring during trial, and irregular and improper findings. Sentence excesses existed--some being too severe, and others too lenient.

The system was particularly weak in its coverage of civilian type offenses, such as black-market, smuggling, and illegal currency transactions.

Several Judge Advocates commented at great length on the weaknesses. These follow:

First Judge Advocate:

Weaknesses are:

- a. Assignment of the unwanted or less desirable personnel to be court members.
- b. Nonavailability of a member of the JAGD to be law member.
- c. Assignment of personnel to positions of prosecutor and defense counsel from unwanted class thereby forcing the SJA to cripple his own force by using his own office personnel.
- d. Delays due to lack of trained court reporters due to failure of Organization to provide therefor.
- e. Inability of the B/R of the JAG on review to weigh the evidence or to take action on an unreasonable or excessive sentence other than to write a letter of suggestions to the officer who ordered the execution of such excessive sentence.
- f. The practice in many headquarters of having court-martial papers pass through G-1 and the Chief of Staff for their recommendations before action by the Commanding General, who, in cases of disagreement, nearly always will follow the recommendations of his Chief of Staff rather than his legal adviser.

Second Judge Advocate:

- a. Remove from military commanders all powers or duties in regard to military justice except, perhaps, as to petty or minor offenses.
- b. Establish a department directly under the Secretary of War for the administration of military justice and the giving of legal advice to the Army. The head of this department should be a civilian lawyer or jurist of experience and standing. His staff should be trained men from civil life with actual legal experience.
- c. Provide courts composed of experienced men of said department. These men should be qualified to sit alone as judges and have authority to call in not more or less than a specified number of officers or enlisted men, or both, as a jury to decide with the judge questions of fact and determine the sentence to be imposed. The judge would decide questions of law. Commanders would not select personnel for the "jury," but would make persons available upon request. Any interference by a commander or others with a court should be made an offense.
- d. A "jury" should be mandatory in specified cases unless waived by the accused. It should be optional with the court in other cases.
- e. If of sufficient experience a judge might be designated to

act as a judge in any of the two or more courts which should be established. Less experienced personnel could be detailed to inferior courts only.

- f. Appeals, in specified cases or under certain conditions, from lower to higher courts might be provided. Serious cases should be finally reviewed by the department and briefs should be permitted.
- g. Charges should be drawn, investigated, and preferred by an experienced or trained attorney assigned as a prosecutor. He would be responsible for all phases of the prosecution beginning with the report to him of the commission of an offense. The intervention of commanders, other than to make witnesses and evidence available, would not be required or permitted.
- h. The department would also supply attorneys as defense counsel.
- i. The element of command would have no effect upon the courts. The judges, prosecutor, and defense counsel could operate wherever sent by the department.
- j. Commanders and other should be allowed to recommend clemency after sentence and the courts should be allowed to grant paroles in proper cases, and pending appeal if such action appeared desirable. Courts should also be empowered to determine paroles. Action on paroles must not be limited to the judge who tried the offender because of the continual movement of military personnel.
- k. When an offender is paroled he should be restored to duty at once.
- l. Sentences of over five years should be remitted only through the head of the department. Sentences of five years or less could be remitted within the discretion of the court.

Third Judge Advocate:

- a. The power of the commanding general under AW 104 to impose punishment on officers should be increased. He should be given power to punish officers of field grade the same as officers of company grade and this should include the power to forfeit at least $\frac{2}{3}$ of the pay of the officer per month not to exceed 3 months, in addition to restriction and deprivation of privileges not to exceed 30 days, and a reprimand.
- b. Enlisted men, not to exceed one-third of the court, should be appointed on general courts-martial with the provision that no person tried by general court-martial should be tried by any person inferior in grade to him.
- c. Some system of selecting members of a court by jurywheel should be devised thus obviating the complaint that courts are hand-picked in order to accomplish the will of the commanding general.
- d. Officers should be subject to trial by special court-martial but no powers of confinement or dismissal should be authorized in such cases.
- e. The commanding general exercising general court-martial jurisdiction should be given the authority to commute a sentence of death or dismissal.

- f. The power to order a rehearing should be given to the general court-martial appointing authority where the evidence in any case is declared insufficient under AW 50 $\frac{1}{2}$ or where there has been substantial error in the case. For instance, in cases where the Board of Review has held that the statute of limitations was applicable and the accused was tried by AWOL during the time of war and the general court-martial order has been published directing the execution of the dishonorable discharge, a retrial should be authorized so that charges could be referred for desertion rather than AWOL if desired.
- g. AWOL and desertion should by statute be made continuing offenses since it is clear that when a soldier is gone from his organization he is actually absent without leave every day he is gone. Construction otherwise is not consistent with the true facts of the case. This becomes important in cases where limitations is applicable. If a soldier succeeds in remaining AWOL for two years and one day, he is free because the limitation runs from the date he went AWOL. Yet the soldier is just as much AWOL the day he was apprehended as the day he left.
- h. The power of supervision over summary and special courts-martial cases should be increased. The officer exercising general courts-martial jurisdiction should have the power to review the case and not only remit, vacate, and suspend the sentence, but to order a rehearing where it is apparent that legal errors were committed in the trial of the case.
- i. The 92nd AW should be amended to authorize a sentence less than life imprisonment.
- j. Military courts-martial, including the officer appointing the court and acting as reviewing authority, should enjoy the same immunity from interference and have the right to punish for contempt as federal judges are entitled to. Interference and pressure brought on courts-martial should be illegal as the same pressure brought on Federal Judge appointees.
- k. All noncommissioned officers should be subject to trial by summary courts-martial without their consent or the necessity of direction by the officer exercising general court-martial jurisdiction.
- l. Separate brigades, regiments, and separate battalions and comparable organizations should have legal officers assigned.
- m. Each general court-martial jurisdiction should have a JAGD officer assigned as Investigation Officer to act especially in investigations required by AW 70.
- n. Each general court-martial jurisdiction should be furnished one or more properly qualified court reporters for use at courts-martial. This has been one outstanding weakness in foreign theaters of operation in this war. Civilian reporters are not available here.

- o. An officer should be defined to include 'warrant officer' if such grade is to be continued in the Army.
- p. The power to adjudge fines as well as forfeitures of pay should be given courts-martial for all offenses.
- q. Attendance of the law member at all general courts-martial should be mandatory.
- r. One peremptory challenge should be authorized for each accused in a joint as well as in a common trial.
- s. Circumstances under which common trials may be had should be defined.
- t. Court decisions have too narrowly restricted the use of confessions. The use of confessions should be liberalized.
- u. Some form of court-martial order for summary courts-martial should be devised. This could then be distributed the same as special court-martial orders.
- v. Retention of records of summary courts-martial by both the appointing authority and the officer exercising general court-martial jurisdiction should not be required. Since a copy of the record is now sent to the Adjutant General, authority to destroy the other copies at such time as they are no longer needed should be authorized. Present regulations do not authorize this.
- w. AW 39 should be amended to further clarify the language 'any absence of the accused from the jurisdiction of the U.S., and also any period during which by reason of some manifest impediment the accused shall not be amenable to military justice shall be excluded.' I believe that limitations for the prosecution of crimes should be tolled during the period of war. Also, the statutes should be tolled so long as the accused is outside of the continental limits of the U.S., its dependencies, or possessions.
- x. The complete administration of clemency in the Army should be under supervision of the JAGD. It is believed that legally trained officers would be better prepared for such work.
- y. At least five years experience as a practicing attorney should be one requirement for a commission in the JAGD.
- z. Definite regulations should be published stating what general prisoners will not be eligible for restoration to duty in the Army. Thus, any person convicted of murder, rape, or other heinous crime should not be deemed eligible for restoration and should serve their sentences in civilian prisons.
- aa. Laws should be passed definitely defining the jurisdiction of federal courts over court-martial proceedings. In my opinion, there have been recent tendencies by courts to encroach upon the constitutional jurisdiction of courts-martial. Military courts are under the Executive Branch of the government and are on an equal constitutional plane with the Judicial Branch of the government. While the Supreme Court would undoubtedly have certain powers, I believe a legislative statement would be better than allowing the courts to legislate by judicial construction.

- bb. Definite qualifications for membership on Boards of Review created under AW 50 $\frac{1}{2}$ should be stated. If the Army court-martial system is to remain above just criticism, only carefully selected officers of ability and experience should be on the Boards. "I do not mean to criticize the present set-up or any members on Boards. I merely want to make clear the importance of these Boards in the military justice system."

ENLISTED MEN:

Merits: The system seems to have proved itself in the past, i.e. in the peacetime Regular Army. It works satisfactorily when administered by competent and conscientious officers. It is as fair and impartial as it is possible to be. It is impossible to achieve perfection when the human equation is involved. Military justice is comparable to civilian justice. The system is prompt. It is brief and concise enough so that the average person can understand it, and does not require a great amount of education or legal ability on the part of the administering officers below the level of Staff Judge Advocates or general courts. Its provisions for review afford a good method for correcting many of the main trial defects.

Weaknesses: A main weakness stems from the fact that administration of military justice is not separate and distinct from regular military administration. To be effective, the judiciary must be separate from other branches of Government.

In small posts, camps, or stations, court members are familiar with cases before the accused is brought to trial. Personnel frequently lack adequate training, particularly law members, trial judge advocates and defense counsel. Many officers participating in court-martial work have not the time to devote to a case. The system fails to thoroughly indoctrinate men in military law. Enlisted men should have a voice in trials of both enlisted men and officers. All court members should be Judge Advocate General men. AW 13 should be broadened, to give special courts more power. Many defects are "operational," and due to a wide divergency in interpreting and applying War Department policy in lower echelons.

In applying AW 104 punishments, too many officers are ignorant, dilatory, or just "don't give a damn." Others let their personal feelings enter too much into the punishment application.

3. Causes of weaknesses and defects: (a) the system, organization, and procedure in themselves; (b) the administration of the system; or (c) personnel.

GENERALS:

Fifty-four Generals felt that inadequate and inexperienced personnel were the chief blame for the weaknesses. Thirteen blamed it on the administration. Three blamed it on the system. In interpreting these figures, a number pointed out that administration was poor because of the personnel problem, and that those two faults were therefore intermingled.

In large part, personnel inadequacies were stated to have resulted from the necessity of speedy mobilization, which failed to permit adequate training. A number of Generals also noted that the human equation is always present, and that even trained men will vary among themselves.

One General stated that, while there was ignorance on the part of hastily-trained men, yet he was equally confident that the power of military punishment could not have been transferred into a host of lawyers, hastily converted into Judge Advocates, without doing far more damage to the war effort. He added that no group of lawyers could have appreciated the problems while sitting aloof from the war itself. Rather, we probably would have had a paralysis while commander endeavored to explain to the lawyers the most fundamental necessities of military life in wartime.

A second General noted: In wartime, care was not exercised by some high commanders in selecting court personnel, particularly in rear areas. Too often, rear area personnel consisted of officers found inadequate on the line. These officers often lacked real appreciation of the importance of discipline. All officers should be indoctrinated with the need for being tough during wartime. Once men know their commander will tend to overlook battle derelictions, the problem of control becomes magnified.

A third General found that lack of interested, qualified personnel was a great defect. Yet an even greater defect was the idea that nothing--not even court-martial--should interfere with training. As a result, courts-martial trials were often held at night or on holidays with inadequately prepared prosecution and defense. The court personnel had other primary duties, and were too frequently uninterested, distracted, and in hope that the trial would be over quickly. Additionally, there was lack of proper court facilities, such as dignified court-rooms, court reporters, etc.

JUDGE ADVOCATES:

Forty Judge Advocates felt that personnel was to blame; 23, administration; and 6, the system. In interpreting these figures, it must be remembered that sometimes the answers interrelated the problems of personnel and the administration.

Complaint about personnel was divided--some of the criticisms going to non-judge advocate officers, and some going to the inadequate number of Judge Advocate officers themselves. In this latter regard, it was pointed out that the Judge Advocate School for officer-candidates was not started until June 1943. As to the court members, it was said that some Generals used their poorest officers for this purpose.

Administration was found to vary with the abilities of the local Staff Judge Advocate. When he enjoyed the confidence of the General, there was little trouble.

Practical administration was found to have been improved by the new technical manual, TM 27-255, MJ Procedure, which supplemented the Manual for Courts-Martial.

One Judge Advocate found inadequacies in all three--the system, its administration, and personnel. There were few War Department policies which were announced, and even these were frequently ignored or interpreted differently. There was almost no "administration." Too many different groups had their fingers in it. The nebulous over-all activities of the Assistant Chief of Staff, G-1, further clouded general staff doctrines. "A divided responsibility is no man's responsibility." Staff Judge Advocates merely filed inferior court records.

Another Judge Advocate criticised the system as follows: a. Appointing and reviewing authority is usually the same individual. b. Higher headquarter reviews were inadequate, and usually limited to legal sufficiency. Evidence was not weighed. There was no means to correct an inadequate or incorrect record. Counsel arguments were not included in the transcripts. c. Boards of Review and the Judge Advocate General's Department had no power to do other than make recommendations in Published Order cases. d. There was only a limited means to set aside or vacate erroneous convictions. Complete satisfaction was not to be obtained from exercising clemency. e. The Staff Judge Advocate had two incompatible duties, one before, and the other after, trial. He criticised administration as follows: a. The unwritten law that clemency is exclusively a Review Authority task, and frequent insistence upon maximum sentences. b. The Reviewing Authority really acts as a judge in his post-trial duties. He is not always of judicial temperament. His Staff Judge Advocate does not always have personal contact with him. He criticised personnel as follows: a. Lack of adequate personnel is the greatest single weakness. b. Law Members are seldom qualified Judge Advocates.

A Board of Review member commented: Subservience of military justice personnel to military command and a lack of an adequate

system to select and train personnel are the greatest difficulties. Reasons: Historically, domination is inherent, yet it is inconsistent with the basic principles of democracy, "recently adverted to by General Eisenhower himself, that civilian authority should ultimately control military power. By and large, this domination has been accepted by the American public until fairly recently. Until it is effectively challenged, it will undoubtedly continue and even grow. Naturally the whole administration of the system is affected by this basic anachronistic fallacy."

ENLISTED MEN:

Enlisted Men replies were almost unanimous in placing blame on personnel, with a large number also stressing inadequacies of administration. Not one reply blamed the system as a whole, although some individual defects in the system were noted, such as lack of enlisted men on courts, limitations imposed by the Table of Maximum Punishments, limited special court-martial jurisdiction, etc.

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4. Are weaknesses and defects found in time of peace to the same extent as in time of war? If not, why? Is the difference, if any, to be explained by the difference between professional officers and temporary officers?

GENERALS:

Six Generals thought the difficulties exist both in peace and in wartime to the same extent. Fifty-six Generals thought they were more prevalent in wartime.

The following wartime difficulties were emphasized: There was inadequate time to give ample court-martial training. The Army could not be stabilized and static. Its size had expanded vastly, and there was a faster tempo. There were more crimes than in peacetime, and these were of a wider variety. There was a more hurried performance of duty, particularly in combat. There were constant personnel changes. Witnesses moved, or became casualties. Officers were not "jacks-of-all trades." The enlisted personnel were mainly inductees, as distinguished from volunteers. Capital offenses had to be tried, whereas in peacetime the Army did not try them. There was political pressure and wide publicity.

The majority of the replies indicated that the professional officer was the better qualified, with emphasis on his longer training and on his leadership abilities. One General stated: "The only difference between the professional and the temporary officer is in experience and in concepts of justice--the professional soldier's attitude being one of great strictness and greater abstractness in approaching a

I-4
I-5

judicial problem. The temporary officer is more apt to be influenced by sentiment and leniency which invade our civil communities. Another General noted that in wartime the gain in officers with civilian legal experience tended to offset the lack of training on the part of other temporary officers.. A third General found little difference between professional and temporary officers.

JUDGE ADVOCATES:

Combat Judge Advocates felt, 8 to 1, that difficulties were greater in wartime. Regular Army Judge Advocates felt, 14 to 5, that difficulties were greater in wartime. Board of Review members replying to the question were equally divided, 2 to 2. Staff Judge Advocates felt, 6 to 2, that they were greater in wartime. Total score: 30 to 10, in favor of wartime.

One unusual reply from a Staff Judge Advocate said that the difficulties were greater in peacetime, pointing out that during war a large number of highly-trained legal men were available, and did a superior job in key court-martial positions.

While a number of answers considered the professional soldier to have been better trained in regard to court-martial procedure, at least half of those replying stated that they could see little difference between the professional and the temporary officer. A Division Judge Advocate commented that neither group knew enough about courts-martial, regardless of their grades or their responsibility. A Board of Review Judge Advocate stated, "My experience is that permanent officers are just as bad or even worse than temporary officers when they lack training and common sense."

ENLISTED MEN:

The Enlisted Men were unanimous in their belief that the weaknesses were more prevalent in wartime, although some indicated that they do exist in a lesser degree in peacetime.

There was almost a unanimity among those replying that the professional officer was better than the temporary officer for the following reasons: more training and background; an impartial judgment; more experience; more knowledge of the psychology of the soldier; more leadership ability.

5. Are officers, both permanent and temporary, given sufficient training in ideals, purposes, rules, and practical administration of military justice? If not, what improvements are desirable?

GENERALS:

Yes 7. No. 38. In-between position 19.

A number of Generals stated that Regular Army officers received sufficient military justice training, although some of their replies emphasized the importance of refresher courses from time to time. One writer looked back to a former 2-year course given at Leavenworth, which he found to have been of inestimable value to himself. While he considered that it was impossible to revive that course now, he thought that it might be substituted by some other type of court-martial training.

The negative replies chiefly emphasized the fact that temporary officers did not receive sufficient military justice training. The "in-between" replies amplified the differences in training and experience between regular and temporary officers. While more training was thought to be desirable, however, the practical situation existing in wartime was also emphasized, i.e. that there was not enough time to train temporary officers adequately in everything. One General explained his belief in this regard by stating that, to carry an example to an absurdity, we might so emphasize court-martial training that we would have a perfect administration of military justice, but would lose every battle. Another General concluded that training would improve, but would never cure, the initial problem of selecting officers who have character, moral courage, judgment, health, imagination, and professional education. He added that, while physical bravery is rather commonplace with Americans, moral courage is not so common and deserves a premium. A third General felt that, because it was impossible to fully train temporary officers in military justice, the better solution would be to place more professionally-trained lawyers in key positions in the administration of justice, and to make those assignments full-time.

JUDGE ADVOCATES:

All classes of Judge Advocate officers were unanimous in believing that the ordinary officer (distinguished from Judge Advocate officers) had inadequate military justice training. The practical problem of sufficiently training the average officer in court-martial work during the rush of wartime was admitted, and some writers felt that the only solution would be to use specially-trained officers for this work.

The shortage of Judge Advocate officers was frequently noted, although it was generally felt that those who did receive commissions in that branch of service were adequately trained. Several writers criticized the American Bar Association for the shortage. Only one writer was critical of the Judge Advocate School, and his criticism was solely that it dealt too much in theory. At the same time he regretted that

it had already been closed, and suggested that it be reopened at once, to conduct courses for non-military justice Judge Advocates, Courts and Board officers, military justice Judge Advocates, and a Revision and Review special section. This writer recommended a "breaking-in" period in actual military justice work for all Judge Advocate officers before they were assigned to key positions. He also recommended that no Judge Advocate officers be used in higher echelons like Branch Offices or Theater Headquarters until they had been thoroughly indoctrinated by actual experience in the field.

ENLISTED MEN:

The Enlisted Men were unanimous in their belief that more military justice training was needed. Several emphasized that the defense counsel should be better trained. When they made the distinction, a number of writers thought that only the temporary officers needed more training. However, an equal number thought that both professional and temporary officers could be better trained. Various writers felt that the ultimate solution would be to have permanent courts with trained personnel sitting on them.

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6. Should there be any difference in dealing with offenses at the front during actual military operations and offenses committed behind the lines or in training areas?

GENERALS:

Yes 33. No 26.

It was generally noted that military offenses take on a different aspect when committed at the front, in that there they may jeopardize the safety of an entire operation or unit. This applies to offenses such as desertion, misconduct before the enemy, the refusal of a combat flier to fly, etc. Those offenses automatically become more serious because of the conditions which then surround them, and punishment must be more severe and more prompt, in order that they be stamped out immediately. On the other hand, several writers felt that civilian-type offenses committed during the strain of combat should be dealt with more leniently than if they occurred during noncombat conditions. One General emphasized that medical channels for psychiatric cases should be extensively used during combat. A second General pointed up the necessity of more severe punishment during combat, by stating that a jail sentence seemed to some combat men to be a reward and a means to get out of the front lines.

JUDGE ADVOCATES:

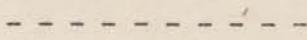
| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 8 | 2 |
| Regular Army Judge Advocates | 12 | 8 |
| Board of Review Judge Advocates | 2 | 4 |
| Staff Judge Advocates | 7 | 5 |
| <u>Totals</u> | <u>29</u> | <u>19</u> |

The replies of the Judge Advocates generally followed the viewpoints expressed by the Generals.

ENLISTED MEN:

Yes 19. No 16.

One writer suggested that we have separate war and peacetime manuals of military law. A second writer would enlarge summary court maximum punishments at the front. A third suggested less paper work at the front. A fourth wanted more consideration of combat fatigue and extenuating circumstances surrounding front-line offenses. A fifth would impose maximum punishments for all front-line offenses. A sixth suggested that the difference in standards to be applied to front-line offenses be limited to those offenses of a strictly military nature.



7. Should there be any difference in dealing with military and non-military offenses?

GENERALS:

Yes 15. No 29.

Several writers suggested that non-military offenses should be turned over to civilian authorities during peacetime. One noted that during war, recent inductees did not fully understand the seriousness of military offenses. Another was critical of the severity of sentences for non-military offenses. Two thought that some difference in the application of clemency would be justifiable.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 4 | 8 |
| Regular Army Judge Advocates | 6 | 13 |
| Board of Review Judge Advocates | 1 | 4 |
| Staff Judge Advocates | 4 | 8 |
| <u>Totals</u> | <u>15</u> | <u>33</u> |

Some writers emphasized that military offenses should be interpreted in the light of military experience and needs, but that non-military offenses should be interpreted in the light of civilian practices. One pointed out that civilian maximum punishments might be applied to non-military offenses. A second would place a limit on maximum military punishments even in wartime, because he doubted whether too severe sentences were as effective as speedy and just sentences. This same writer felt that combat military officers were essential court members in trials for military offenses. A third would extend a commander's authority during wartime. A fourth pointed out that civilians criticize the Army's severe punishments for military offenses such as AWOL because they do not understand the necessity therefor. The average civilian is not subjected to punishment when he fails to report to work. Nor is the Labor Union punished when it defies Government. A fifth writer believed that rehabilitation was more appropriate for military-offense offenders when no moral turpitude was involved.

ENLISTED MEN:

Yes 16. No 25.

Replies of the Enlisted Men varied, from turning all civilian offenses over to civilian authorities, to retaining all cases in the Army. One writer felt that military offenders should receive greater punishment, because of the necessities of national security. Several writers stated that the handling of non-military offenses should be consistent with Federal laws and procedure. Another writer would obtain some sort of coordination so that double jeopardy would be impossible.

8. Does the present system in actual operation often result in actual miscarriages of justice: (a) are the innocent convicted?; (b) are the guilty punished excessively, or too leniently; and (c) are the guilty acquitted?

GENERALS:

The present system almost never results in actual miscarriages of justice. (a) The innocent are seldom if ever convicted, although rare miscarriages will result in the best of systems. One General limited his answer in this regard to general and special courts-martial. A second General noted that there are three occasions on which the question of an accused's guilt is considered: the pre-trial investigations; the actual trial; and the post-trial Staff Judge Advocate review. (b) Almost all replies stress that there were sentence disparities. About as

many Generals felt that at times there was too much lenience shown as well as too much severity. But a number explained that the eventual sentence actually served was more moderate. There were various ways in which excessive sentences were reduced: the Review Authority; the Boards of Review; the Clemency Boards; and the rehabilitation programs in disciplinary training centers. (c) Most of the writers believed that the guilty were not often acquitted, although such instances did occur. Several Generals summed up by stating that it was believed that a guilty man had a better chance before a civilian court; an innocent man a better chance before a military court.

JUDGE ADVOCATES:

The views of the Judge Advocates on this question were similar to those of the Generals (see preceding paragraph).

ENLISTED MEN:

The views of the Enlisted Men were similar to those of the Judge Advocates and the Generals (see two preceding paragraphs). One writer pointed out that prejudice occurs far less frequently in the military than in the civilian courts. Another blamed miscarriages on the administration and interpretation of military justice, rather than on the system itself. A third felt that the main miscarriages spring from inadequate pre-trial investigations. A fourth felt that miscarriages are ultimately eliminated by corrective action in higher echelons.

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9. Does the present system in actual operation often result in inequalities of treatment as between officers and enlisted men: (a) in respect to filing charges and ordering trial; (b) in respect to convictions and acquittals; (c) in respect to sentences?

GENERALS:

(a) Yes 34. No 26.

A number of explanations were included in the answer to this question. One General pointed out the frequent resort to AW 104 punishment in officer cases, for offenses which would send an enlisted man to an inferior court--the latter courts not being open to officer trials. A second General commented that the inequalities were explainable. Court members were familiar with an accused officer's position, and the effect on his family and friends. An officer benefitted by better preparation and a more carefully selected defense counsel. Mandatory sentences of dismissal were a deterrent to an officer's punishment. A third General found a tendency to protect enlisted men's rights more than officers. A fourth General stated that he

seldom sent an officer before a general court unless he anticipated a dismissal, whereas enlisted men would be sent even though their dishonorable discharge was not expected. A fifth General noted that an officer stood to lose much more from court-martial than an enlisted man. A sixth General stated: "As a man rises in rank, he undoubtedly gets the benefit of having his greater responsibilities credited against his sins, and is entitled to have a balance struck. However, he favored more drastic power to deal with delinquent and inept officers. A seventh General stated: In military circles, trial of an officer is a very grave matter resulting in serious consequences to his career. This factor must be given weight. The trial of an enlisted man carries less weight. But once before a court, an officer is liable to receive even less consideration than an enlisted man.

(b) Yes 18. No 22.

A number qualified their answers to point out that while differences did occur, they were rare. Some believed that officers were more often acquitted, and some that enlisted men were more often acquitted.

(c) Yes 21. No 17.

As to disparity of sentences, seven Generals felt that officers were treated more severely than enlisted men, and three thought that officers were treated more leniently. One General commented that one of the difficulties in punishing an officer was that a court could not reduce him to enlisted status and his dismissal meant his loss to the service.

JUDGE ADVOCATES:

| (a) | Yes | No |
|---------------------------------|-----------|-----------|
| Combat Judge Advocates | 8 | 4 |
| Regular Army Judge Advocates | 9 | 10 |
| Board of Review Judge Advocates | 4 | 3 |
| Staff Judge Advocates | 9 | 6 |
| <u>Totals</u> | <u>30</u> | <u>23</u> |

One writer noted that a large number of officers were reclassified and thus discharged without honor, without resort to the court-martial system. Another noted some tendency of leniency toward fellow officers as toward fellow club-members, although this tendency was tempered by a greater use of AW 104 against officers. A third believed that Regular Army officers were treated more leniently than temporary officers, and another noted protection of high-ranking officers.

| (b) | Yes | No |
|---------------------------------|---------------|-----------|
| Combat Judge Advocates | <u>4</u> | <u>8</u> |
| Regular Army Judge Advocates | 6 | 14 |
| Board of Review Judge Advocates | 4 | 2 |
| Staff Judge Advocates | <u>9</u> | <u>1</u> |
| | <u>Totals</u> | <u>23</u> |
| | | <u>25</u> |

One writer noted a reluctance to confine officers, due to the feeling that dismissal is more keenly felt by them than by the average enlisted man. A second believed that the effect of an officer's dismissal might be overvalued by Regular Army officers, but undervalued by civilians. A third thought that less evidence was, in practice, needed to convict an officer than an enlisted man. A fourth felt that the remedy was not to make it easier to court-martial an officer during wartime, but to provide an easier administrative process to get rid of incompetent officers. A fifth concluded that it was difficult to get a conviction against an officer of many years' standing. A sixth noted that, whereas an enlisted man would go unpunished for drunkenness, a similarly drunken officer would get dismissed. A seventh stated that the selective processes used in getting officers necessarily result in a higher caliber of man, with whom you do not have so much trouble.

| (c) | Yes | No |
|---------------------------------|---------------|-----------|
| Combat Judge Advocates | <u>8</u> | <u>3</u> |
| Regular Army Judge Advocates | 9 | 10 |
| Board of Review Judge Advocates | 7 | 2 |
| Staff Judge Advocates | <u>9</u> | <u>5</u> |
| | <u>Totals</u> | <u>33</u> |
| | | <u>20</u> |

One writer noted that a dismissal for an officer was usually final, whereas the average enlisted man who went to jail had his dishonorable discharge (if any) suspended. A second felt that there should be some sort of adequate intermediate punishment for an officer, which did not carry dismissal. A third thought that, in view of the officer's greater responsibility, a sentence against him should be relatively more severe. A fourth concluded that, because of the sentence disparities, a trained and oriented Law Member alone should determine the sentences. A fifth found that more political pressure from Washington was brought to bear in officer cases. A sixth concluded that, while discrepancies may exist, they also exist in civil criminal jurisprudence. A seventh would institute some sort of officer rehabilitation program comparable to disciplinary training centers. An eighth would have a Table of Maximum Punishments applicable to officers.

ENLISTED MEN:

- (a) Yes 22. No 5.
- (b) Yes 18. No 8.
- (c) Yes 24. No 6.

Discussion of the three parts of this question was generally joined. One writer felt that a reason for a tendency not to charge officers more frequently was because the present system required the officer's dismissal if he was to be confined. A second noted that officers are given more severe punishment than enlisted men in certain types of cases (i.e. unbecoming conduct), whereas in others enlisted men receive more severe punishment. He felt that, while this is inequality, it is not injustice.

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10. To what extent, if at all, do inadequacies of company commanders result in trials by court-martial? Is there any difference in this respect as between (a) permanent and temporary officers, and (b) officers commissioned directly from civil life and officers who rose from the ranks?

GENERALS:

Only ten of the replying Generals specially felt that the permanent officer was best, and only three specifically made a statement on differences between officers from civilian life and those who rose from the ranks. Instead, the almost universal viewpoint was that company commander inadequacies were to great extent responsible for courts-martial trials and, as stated by one General, the best officers have leadership qualities with which they were born, and which their education, both civil and military, have sharpened. Several commented that Regular Army officers during World War II were in most cases higher than company-grade, and were out of immediate personal contact with enlisted men. One General stated that a good commander used courts-martial only as a last resort--that some, deficient in leadership, used courts-martial too much and some too little. As to temporary officers, it was felt that those who had previously had experience in leadership were best qualified. As to all officers, it was felt that there was variable skill in handling men, dependent on the officer's background, intelligence, training, experience, and knowledge of human nature.

JUDGE ADVOCATES:

The almost unanimous opinion of the Judge Advocates was that inadequacies of company commanders did result in courts-martial. As with the Generals, there was no clear expression of opinion as to

the relative qualities between regular and temporary officers, and between officers from civilian capacities and from the ranks. Rather, there was the repeated comment that leadership ability was dependent upon a man's innate abilities, his training, and his experience. One writer emphasized difficulties with colored troops resulting from company commanders who did not understand the particular problems of that type of command.

ENLISTED MEN:

It would appear that the Enlisted Men generally felt that the permanent officer is better than the temporary officer, and that the officer from the ranks is better than the officer from civilian life. However, there were few clear-cut replies. One writer placed the responsibility for good company organization on its noncommissioned officers, stating that when they were "on the ball," few cases got beyond the First Sergeant. As with the Generals and the Judge Advocates, the importance of leadership ability of the commanding officer was emphasized. One writer pointed out that the necessary leadership qualities were understanding and tact, and suggested "off-the-record" meetings between officers and enlisted men at which the necessity for Army disciplinary steps was fully thrashed out. Another stated: A good company has a good company commander, and has esprit de corps. The men are proud of their unit. A good commanding officer studies his men, commends the deserving, while attempting to raise the standard of those with faults. This same writer also felt that temporary officers generally rule according to the "letter," without regard for morale, feelings, etc.

11. Is there a tendency to assign less capable officers to court-martial duty?

GENERAL'S:

Yes 13. No 48.

One writer stated that in peacetime his answer was no but in wartime it was yes. Several others assigned courts-martial duty by roster. Some had to use administrative officers solely while their commands were in combat. A number found that many officers had to sandwich in court-martial duty between other duties, which made it impossible to devote their full time to the court-martial duty. One writer replied that all officer personnel should have court-martial assignments in order to give them that necessary training.

I-11
I-12

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 9 | 3 |
| Regular Army Judge Advocates | 13 | 5 |
| Board of Review Judge Advocates | 6 | 2 |
| Staff Judge Advocates | 8 | 4 |
| <u>Totals</u> | <u>36</u> | <u>14</u> |

ENLISTED MEN:

Yes 23. No 17.

12. Advisability of expanding Judge Advocate General's Department, making it more independent and increasing its authority.

GENERALS:

| | <u>Yes</u> | <u>No</u> |
|--------------------|------------|-----------|
| Expand JAGD | 30 | 26 |
| Make Independent | 1 | 19 |
| Increase Authority | 2 | 22 |

Most of the Generals' answers considered only the question of expansion of the Judge Advocate General's Department, with a slight majority favoring expansion. Generals who specifically replied were almost unanimous against making the Department independent or increasing its authority. However, a number qualified their answers to ask that the Department supply Law Members and Defense Counsel for courts. In answering in the negative re the issue of independence and authority, one General pointed out that in the Army there can be only one commander. He felt that the average Judge Advocate officer has a typical legal mind, too interested in the technicalities of his profession; that he is not a soldier and does not often understand the soldier's viewpoint. A second General replied a most emphatic "no" re increasing Judge Advocate independence and authority, and based this reply on an alleged inferiority of Regular Army Judge Advocate officers. He pointed out that generally only lawyers who have failed in civilian life have sought commissions in the Regular Army; that once they are in they have sought rank and power rather than being content with "pick and shovel" work; that they alternated back and forth, spending half their time in Washington; that in 35 years he had yet to see one acting as Trial Judge Advocate, Defense Counsel or Law Member of any court; that a Judge Advocate officer should not be able to qualify until he has served with troops. In recommending expansion, several Generals wanted to see Judge Advocates available in lower echelons than Divisions. One writer set up a Table of Organization in which a Division would include a Staff Judge Advocate,

an Assistant Staff Judge Advocate who would act as Law Member on general courts-martial, two Judge Advocate officers who would be Trial Judge Advocate and Defense Counsel respectively, and one Judge Advocate officer for each regiment.

JUDGE ADVOCATES:

| | Expand JAGD | | Make Independent | | Increase Authority | |
|---------------------------------|-------------|----------|------------------|-----------|--------------------|-----------|
| | Yes | No | Yes | No | Yes | No |
| Combat Judge Advocates | 9 | 2 | 2 | 5 | 3 | 6 |
| Regular Army Judge Advocates | 18 | 1 | 4 | 5 | 5 | 7 |
| Board of Review Judge Advocates | 6 | 1 | 6 | 1 | 6 | 1 |
| Staff Judge Advocates | 11 | 1 | 6 | 1 | 8 | 1 |
| <u>Totals</u> | <u>44</u> | <u>5</u> | <u>18</u> | <u>12</u> | <u>22</u> | <u>15</u> |

The Judge advocates emphasized the need for greatly expanded Judge Advocate personnel. In a peacetime Army, one colonel would expand its pre-war strength by three times--to number 1,200 JAGD officers among the 50,000 Regular officers. He would also provide it with a complement of court reporters. But he would not increase its authority, and would increase its independence only to the extent of placing it on Special Staff level. A number of writers wanted to see Judge Advocate legal advisers within a Division at regimental level. One pointed out that Judge Advocates have to serve for numerous tasks other than in military justice work, i.e. claims, procurement, interpretations of international law and the laws of war, occupational questions, and legal and domestic problems of the individual soldier. He concluded, "The JAGD should be greatly expanded not only to carry out efficiently its functions relating to military justice but likewise to administer the legal department of one of the largest business and administrative organizations in the world." As a reason for its necessary expansion, various writers cited the necessity of using Judge Advocate officers as Law Members, Trial Judge Advocates and Defense Counsel. Some would even have them act as summary court officers. One would have a Judge Advocate available wherever there are 1,000 or more soldiers.

As to expansion of JAGD authority, it is to be noted that the combat and the Regular Army Judge Advocates take a negative view. One writer suggested an in-between position. He would increase their authority in higher echelons such as War Department or Army Groups. But he would not expand their authority in lower echelons such as Armies, Corps, Divisions, Service Commands, etc. The reason: These lower echelons have specific combat missions which require independence and self administration in disciplinary matters.

In their replies to this question, a number of Judge Advocates detailed matters which they subsequently discussed elsewhere.

ENLISTED MEN:

| | Yes | No |
|--------------------|-----|----|
| Expand JAGD | 39 | 6 |
| Make Independent | 31 | 4 |
| Increase Authority | 32 | 4 |

The Enlisted Men were in favor of expanding the Judge Advocate General's Department, making it more independent, and increasing its authority. Their reasons were varied: the need of a disinterested corps of legal officers to serve the Army by administering justice independently; the need of training men as investigators, as an appeal board in AF 104 matters, and as summary court officers. Several suggested that special training be given both officers and enlisted men to serve in these capacities. One would limit the use of enlisted men within his proposed Judge Advocate Corps to the handling of claims, the providing of clerk-typist and stenographic services, and for administrative work.

13. Advisability of increasing the use of capable, experienced, retired officers, and those partially disabled for court-martial duty.

GENERALS:

Yes 33. No 21.

Among those who replied in the affirmative, some qualified their answers as follows: only in wartime; only if they are properly schooled; only in review boards or high commands, but not in troop units; only in the Zone of the Interior in wartime. Those replying in the negative emphasized that retired officers are frequently out of touch with current conditions and requirements; that their use would deprive active officers of necessary court-martial experience; that they would not be properly indoctrinated and trained.

JUDGE ADVOCATES:

| | Yes | No |
|------------------------------|-----------|-----------|
| Combat Judge Advocates | 7 | 5 |
| Regular Army Judge Advocates | 14 | 6 |
| Boards of Review | 7 | 1 |
| Staff Judge Advocates | 8 | 6 |
| <u>Totals</u> | <u>36</u> | <u>18</u> |

Comments paralleled the answers of the Generals. Additionally, one writer stated that they should never have majority representation on courts. Another required their special qualification in military justice matters. A third stated that his experience using convalescent officers in Paris was that they were usually too severe.

ENLISTED MEN:

Yes 30. No 14.

Two writers stated that they did not want to use disabled officers, although they were in favor of retired officers. Writers frequently qualified their answers to permit the use of only specially qualified retired officers. Another would use the retired officers only to train younger active officers.

- - - - -

14. Advisability of assigning enlisted men to serve as members of courts-martial.

GENERALS:

Yes 20. No 30.

There was a noted apathy in the affirmative answers to this question. Typical of the replies which failed to give a clear-cut answer were the following: First General: Personally, I have no objection. But a number of soldiers questioned reply in the negative, feeling that officers given them a fairer trial. The Doolittle Board response was instigated by a few disgruntled, inexperienced soldier. As an alternative, I would suggest a "judge and jury" system. Second General: It might work, but barracks-room pressure on enlisted men chosen to serve on courts might be excessive.

Writers answering in the affirmative frequently emphasized these points: Enlisted men serving on the courts should be either equal to or senior in grade to the accused; enlisted men should not serve in the trials of officers; enlisted men so selected should be specially trained for this work; enlisted men should be used on courts only when the accused requests; enlisted men should be in the minority.

Of those replying in the negative, it was pointed out: that enlisted men do not have the required court-martial training; that those chosen would be subjected to excessive enlisted men's pressure; that enlisted men who were ambitious enough got to be officers anyway. One General stated: Nothing would be accomplished by lowering standards required of members of courts-martial. The courts-martial should not be a trysting place for class struggle. A second General stated: "If the masses are going to sit in judgment . . . , then we shall have a mob and not an Army." If officers have proven to be incompetent on courts-martial, then we would merely enlarge the number of incompetents by including enlisted men, in the majority of cases. In my present command of 6,000 negro troops, 74% are in AGCT Classes 4 & 5.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 3 | 9 |
| Regular Army Judge Advocates | 9 | 8 |
| Board of Review Judge Advocates | 4 | 5 |
| Staff Judge Advocates | 6 | 9 |
| Totals | 22 | 31 |

Among those replying in the affirmative, there was again a general apathy toward the suggestion, with some feeling that to do so might relieve public pressure against the courts-martial system and would improve morale. One writer suggested that, if requested, a negro should be permitted to have negroes on his court; a WAC to have WACs on her court; etc. Another would use them only if they served in a capacity similar to jurors in civilian courts. Several would use only the first three grades of non-commissioned officers, and these would have to be specially trained.

ENLISTED MEN:

Yes 41. No 10.

While the Enlisted Men were overwhelmingly in favor of having other enlisted men serve on courts-martial, there were a large number of qualifications to their affirmative answers. These were: Only specially trained enlisted men should serve; only non-commissioned officers should serve; only enlisted men with ASOT score below Grade III should be allowed to serve; enlisted men selected for this duty should serve permanently; only enlisted men with ten years' service and a clean record should be selected; they should serve only when requested; they should serve only for the trials of inferiors.

The negative view: One writer stated that few enlisted men have the necessary educational background, and that in the interest of good and fair discipline only officers should be court members. Another was afraid that social barriers between enlisted men and officers would prove to be too strong to permit them to come to impartial solutions.

15. Is there a marked disparity in the sentences imposed in different commands?

GENERALS:

Yes 37. No 6.

It was frequently asserted that the disparities in sentences were in part due to different situations and circumstances surrounding the offense; in part due to differences of court personnel. It was pointed out that there was no over-all yardstick which could be applied; that local conditions might justify a more severe sentence than would be imposed in another locality. It was noted that higher authorities do act to equalize sentences. One General thought it advisable and necessary that The Judge Advocate General be vested with authority to reduce, suspend, or modify all sentences at the time of his final review. Another General stated that he had to instruct his courts, in order to get uniformity.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 6 | 4 |
| Regular Army Judge Advocates | 16 | 0 |
| Board of Review Judge Advocates | 9 | 0 |
| Staff Judge Advocates | 12 | 1 |
| <u>Totals</u> | <u>43</u> | <u>5</u> |

In the qualifications to this answer, it was stated: Disparities did not apply to commands in the same locality; there were disparities between Air Force and Ground Force sentences; there were disparities in inferior court sentences more than in general court sentences. Eventual equalization in higher commands was noted. One Staff Judge Advocate was emphatic that the Assistant Judge Advocate General within a Theater of War should be able to state sentence policy to commanding officers rather than to merely advise them as now. He felt that uniformity of sentences is a matter of War Department policy, and that the War Department's representative in a Theater should have an official say on the question.

ENLISTED MEN:

Yes 30. No 6.

Enlisted Men felt quite generally that there were marked sentence disparities. One wrote that this could be partially eliminated if the Judge Advocate General's Department was made a separate unit or organization. Another felt that the disparities resulted on some posts because of fixed policy for set punishments regardless of extenuating circumstances.

II. JURISDICTION OF COURTS-MARTIAL

1. To what extent are cases tried by general courts-martial that might be advantageously disposed of by special or summary courts or by company punishment?

GENERALS:

| | |
|--------|----|
| None | 8 |
| Seldom | 37 |
| Often | 3 |

JUDGE ADVOCATES:

| | <u>None</u> | <u>Seldom</u> | <u>Often</u> |
|---------------------------------|-------------|---------------|--------------|
| Combat Judge Advocates | 4 | 8 | 0 |
| Regular Army Judge Advocates | 2 | 15 | 0 |
| Board of Review Judge Advocates | 0 | 4 | 3 |
| Staff Judge Advocates | 2 | 10 | 1 |
| <u>Totals</u> | <u>8</u> | <u>37</u> | <u>4</u> |

One writer stated that sleeping at an unimportant post should only carry a maximum six-month sentence, and should be tried by special courts. Another found too large a gap between special court and general court jurisdictions. A third noted the gap between AR 104 punishment for company grade officers, and general courts-martial for field grade officers.

ENLISTED MEN:

| | |
|--------|----|
| None | 5 |
| Seldom | 18 |
| Often | 8 |

One writer pointed out that sometimes AR 615-368 and AR 615-369 should have been applied rather than courts-martial. Another supported his view that general courts-martial were too often used by stating that many general courts-martial imposed sentences for cases tried therein which might have been adjudicated by special courts-martial. A third writer took the unique view that there were not enough courts-martial.

2. For the purpose of maintaining discipline, should there be an increase in the authority of company commanders to impose company punishment, and an expansion in the jurisdiction of summary courts and special courts, leaving to general courts-martial only the trials of heinous military offenses, such as cowardice in the face of the enemy and desertion; and grave non-military crimes, such as murder, rape, robbery, etc.?

GENERALS:

Yes 21. No 30.

A large number favored the increase of AW 104 disciplinary powers, particularly in regard to officers. They felt that it should be extended to cover peacetime as well as wartime; should cover flight and warrant officers; and perhaps should cover all officers up through field grade (in some instances, would cover Colonels). One General would permit company commanders to include AW 104 forfeiture of one half of one month's pay of enlisted men. Others had varying ideas in this regard. This same General would also increase special courts-martial jurisdiction to 18 months. A number of others would increase special court jurisdiction to 12 months. A second General would restrict summary and special court powers unless those bodies are more closely supervised by assigning Judge Advocate officers to regimental or similar level. A third General would abolish the garrison prisoner. Instead, he would use various punishments other than confinement for lesser offenses. A fourth General would abolish the special court altogether, transferring its jurisdiction to summary courts. He would reduce the membership of general courts in all except for trials of heinous offenses. A fifth General would use AR 615-368,369 more frequently for habitual troublemakers.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 6 | 6 |
| Regular Army Judge Advocates | 14 | 5 |
| Board of Review Judge Advocates | 5 | 4 |
| Staff Judge Advocates | 10 | 2 |
| <u>Totals</u> | <u>35</u> | <u>17</u> |

The Judge Advocate viewpoints resembled those stated in the preceding paragraph for the Generals.

ENLISTED MEN:

Yes 32. No 12.

Many Enlisted Men felt that AW 104 company punishment should be expanded. One wanted company punishment to be imposed only by the next higher commander. Another would permit an appeal to a higher court.

II-2
II-3

A third recommended that company punishment be imposed by a committee or board appointed by the company commander. Three men would give company commanders blanket authority to act as summary court officers.

3. Should summary courts or at least special courts-martial be granted some jurisdiction over officers?

GENERALS:

Yes 8. No 36.

Fifteen Generals who failed to answer either yes or no in effect replied with a qualified yes by stating that they would give special courts jurisdiction over officers, with various limitations. One of these limitations was to permit that jurisdiction only over company grade officers. A second was that a special court's powers would not include the imprisonment or discharge of officers. A third was that special courts would have to be enlarged if they had jurisdiction over officers. A fourth was that only the less serious officer offenses should be so tried. A number of the Generals here emphasized again the importance of extending their AW 104 disciplinary powers over officers, to include officers through field grade or higher, to include warrant and flight officers, and to include peacetime as well as wartime. One would permit inferior courts to have "police court" jurisdiction over officers. Another thought that an entirely new "officers' court" should be set up.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|-----------|
| Combat Judge Advocates | 7 | 5 |
| Regular Army Judge Advocates | 10 | 8 |
| Board of Review Judge Advocates | 2 | 6 |
| Staff Judge Advocates | 10 | 2 |
| <u>Totals</u> | <u>29</u> | <u>21</u> |

Judge Advocate answers to this question partially parallel the Generals' answers noted in the preceding paragraph. Additionally, it was pointed out that special courts can now have jurisdiction over officers. Several writers indicated their preference for "traffic violation" officer jurisdiction in inferior courts.

ENLISTED MEN:

Yes 29. No 5.

One Enlisted Man favoring trial of officers by special courts stated that, if convicted, they should be automatically transferred to another unit. Their record of trial should be confidential. In lieu of confinement, their rank should be lowered by one grade for a period equal to the term of confinement which

might be imposed against an enlisted man for a similar offense. A second writer would make sure that there was a right of appeal for the officer tried by special court.

4. Should more non-military offenses be turned over to civil courts for trial?

GENERALS:

Yes 18. No 37.

A number of the Generals felt that present procedure for turning military offenders over to civilian authorities is sufficient (Change 3, AR 600-355). Some would have it optional; some would have it in peacetime only; some would have it for offenses which are sufficient to justify a dishonorable discharge; some would have it for all civil-type offenses committed off military posts.

Those replying in the negative felt that the present system is adequate (AW 74); that it would be prejudicial to the Army's reputation to have its soldiers in civilian courts; that there would be too much delay in civilian courts; that the accused soldier is better protected in Army courts; that many small civilian communities do not have the court set-up to try military offenders from a large nearby Army post. In all events, it was pointed out that military offenders should not be turned over to civilian authorities in foreign countries.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 7 | 5 |
| Regular Army Judge Advocates | 8 | 11 |
| Board of Review Judge Advocates | 1 | 8 |
| Staff Judge Advocates | 5 | 8 |
| <u>Totals</u> | 21 | 32 |

Reasons behind the Judge Advocate replies paralleled the Generals' replies summarized in the preceding paragraph. One Judge Advocate desired that procedure to turn soldiers over to civilian authorities be outlined in detail.

ENLISTED MEN:

Yes 18. No 26.

III. FILING AND INVESTIGATION OF CHARGES1. Are any changes desirable in the procedure of filing charges?GENERALS:

Yes 8. No 58.

Suggested changes: Make legal advice always available to any man desiring to file charges. Speed up and simplify the procedure. Make four copies of the charge sheet, serving the fourth copy on the accused. Permit higher commands to redraft charges in order to increase the seriousness of the charged offenses, without having to refer them back to the subordinate commands where they arose. Permit action to be initiated by letter, with a Judge Advocate officer drawing up the final formal charges.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|----------|-----------|
| Combat Judge Advocates | <u>1</u> | <u>11</u> |
| Regular Army Judge Advocates | 2 | 18 |
| Board of Review Judge Advocates | 0 | 8 |
| Staff Judge Advocates | <u>1</u> | <u>8</u> |
| <u>Totals</u> | <u>4</u> | <u>45</u> |

Suggested changes: Prepare charges at regimental level. Force the speedy filing of charges. Require a trained Judge Advocate to draft the formal charges. Prepare four copies of the chart sheet, serving one copy upon the accused immediately. Some single individual should be primarily and solely responsible for the filing of courts-martial charges.

ENLISTED MEN:

Yes 10. No 29.

Suggested changes: Expedite and simplify. Require that charges be filed within 72 hours. Require that all charges be reviewed by a legal officer before trial. Require that all charges be investigated by a disinterested officer, and his recommendation received. Prohibit higher commanders from ordering company commanders to prefer charges against their men, unless such charges be tried in a court other than one appointed by that higher commander; and at such trials require that the higher commanders appear and testify. Require that charge sheets pass directly from accuser to the Judge Advocate office, rather than through channels. Prohibit the "double jeopardy" of "busting" a man and then trying him.

2. Is present system of preliminary investigation of charges adequate or are any changes desirable?

GENERALS:

Present system adequate? Yes 52. No 7.

Comments: Make MW 70 requirement for investigations mandatory. Difficulties in present pre-trial investigations are chiefly due to inadequate administration and personnel. Trained officers, or the assistance of a Judge Advocate officer would be advisable. There should be a means to compel the attendance of witnesses at investigations, and a means to permit payment of civilian witnesses there. Present investigations are too often a means to gather prosecution evidence, to be later presented at trial. The present system results in delay. The present system sometimes becomes inadequate because speed is over-emphasized. A regimental commander should have a staff legal officer and a full-time law clerk, and these men could handle investigations.

JUDGE ADVOCATES:

| Present system adequate | Yes | No |
|---------------------------------|-----------|----------|
| Combat Judge Advocates | 13 | 0 |
| Regular Army Judge Advocates | 17 | 3 |
| Board of Review Judge Advocates | 7 | 0 |
| Staff Judge Advocates | 7 | 5 |
| <u>Totals</u> | <u>44</u> | <u>8</u> |

Comments: The system is cumbersome. There are undue delays. Investigations are perfunctory and superficial. There should be one qualified Battalion investigating officer. An accused should have to state in writing that he desired no more pre-trial investigation testimony, before such investigation could be completed. There should be an end to duplications, i.e. Military Police reports, Criminal Investigation Division reports, Counter-Intelligence Corps reports, Investigating Officer reports, etc.

ENLISTED MEN:

Present system adequate? Yes 23. No 14.

Comments: There is a need of trained investigating officers. Many investigations are treated too lightly. Investigations should be made by a committee of both officers and enlisted men. An accused should be allowed to appoint his own investigator. Accused should have the right to have defense counsel present at investigations. Investigations should be the principal duty of someone in the Courts and Board Section. Statements made at investigations should be in writing.

3. Does the present system of preliminary investigation of charges operate properly in actual practice?

GENERALS:

Yes 52. No 10.

Comments: Too frequently, investigators lack fitness for their job. The system works well only when properly administered. There is some tendency for a court to feel that, because of the pre-trial investigation, an accused who is actually sent to trial must be guilty. The system is "damned cumbersome." The system works poorest in wartime, when it is most needed. There is a need of closer contact between the Staff Judge Advocate and the investigating officer.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 9 | 4 |
| Regular Army Judge Advocates | 12 | 7 |
| Board of Review Judge Advocates | 4 | 3 |
| Staff Judge Advocates | 8 | 4 |
| <u>Totals</u> | <u>33</u> | <u>18</u> |

Comments: Investigating officers were frequently inadequate, untrained, and inexperienced. There was too much duplication with other investigating branches. There was a failure to follow prescribed procedures. Some investigations were handled too speedily, whereas others caused delay. Very often, high pressure was used at investigations, to accused's eventual detriment--often, to get a confession from him. On the other hand, some investigations were too cursory, perfunctory, and superficial. AW 70 investigation requirements should be made jurisdictional. At his trial, an accused should be permitted to explain his AW 70 pre-trial statement at length. No AW 70 pre-trial statement of an accused should be admitted at his trial unless his defense counsel was present at the investigation.

ENLISTED MEN:

Yes 14. No 13.

Comments: The outlined system is satisfactory but frequently it does not work well in practice, chiefly due to inexperienced personnel. Given reasons are similar to those commented upon by the Generals, and in the answers to the preceding question.

IV. DIRECTING TRIAL OF CHARGES1. Is the present system adequate?GENERALS:

Yes 61. No 4.

Comments: A Staff Judge Advocate should be able to finally prevent trial when he believes that a prima facie case does not exist. A Staff Judge Advocate who recommends trial should not thereafter be allowed to review the record of that trial. It should be mandatory that trial be had when the Staff Judge Advocate has so recommended. The system is adequate when AW 70 provisions are enforced. There is too much delay in some cases, due to administrative procedure and mail difficulties.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 10 | 3 |
| Regular Army Judge Advocates | 18 | 1 |
| Board of Review Judge Advocates | 6 | 1 |
| Staff Judge Advocates | 11 | 2 |
| <u>Totals</u> | <u>45</u> | <u>7</u> |

Comments: Many inadequacies exist below Division level. There should be regimental courts-martial sections. Using enlisted men, there should be pre-trial investigations for special courts-martial. Too often, untrained persons are able to refer inferior court cases to trial. There is some jurisdictional overlapping. There should be a closer scrutiny of AW 70 requirements. All charges should be routed through Judge Advocate officers. The Staff Judge Advocate should be permitted to finally prevent a case from going to trial. The Staff Judge Advocate who recommends trial should not be permitted to review that record of trial. While the system made be adequate, it is cumbersome and wasteful. There is a tendency to whitewash officers. There is a need for more trained personnel. Justice should not be sacrificed in the interest of speed. There is a need of at least primary military justice training for officers exercising special courts-martial jurisdiction. There should be a clarification and emphasis of accused's right to make a statement of what might be expected from a summary of other persons' testimony.

ENLISTED MEN:

Yes 34. No 8.

Comments: A JAGD officer should make the final determination re which

type of court should try a man. Defense counsel do not have adequate time in which to prepare their cases. The system is adequate but slow. Sometimes appointing authorities are absent, and seconds-in-command are hesitant about acting. Intangibles such as friendship sometimes influence decisions re whether cases should be tried. Summary court officers should be of at least field grade. There is too much delay in the filing of some charges.

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2. Are there undue delays in determining whether the accused should be tried?

GENERALS:

Yes 14. No 30.

Comments: When delays do occur, they are caused by one or more of the following reasons: During active combat conditions, some delay will necessarily occur. It is sometimes difficult to assemble witnesses. Records often have to come from distant posts or even from the War Department in Washington. Demobilization presents problems. There are frequent misunderstandings, errors, and omissions which, in part, could be eliminated by greater utilization of Judge Advocate officers.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 0 | 13 |
| Regular Army Judge Advocates | 9 | 11 |
| Board of Review Judge Advocates | 2 | 5 |
| Staff Judge Advocates | 1 | 10 |
| <u>Totals</u> | <u>12</u> | <u>39</u> |

Comments: Trials could be speeded up by use of trained pre-trial investigators. Too often, cases have to be returned for reinvestigation. Obtaining expert testimony from criminal laboratories sometimes results in delay. Delays result from missing records, missing witnesses, and combat conditions. Delays also result because of a need for trained reporters.

There is a need to key-number and codify in one system the Manual for Courts-Martial, TM 27-255, Digest of Opinions JAG and Bulletins. The JAGD should publish its Bulletins in Commerce Clearing House form, with insert sheets. Either the Bulletin or the volume on Military Laws should include the District of Columbia Code and pertinent Federal Code provisions. Coordinate or "Shepardize" Digest of Opinions JAG to the Manual for Courts-Martial.

ENLISTED MEN:

Yes 27. No 19.

Comments of the Enlisted Men parallel those of the Generals and the Judge Advocates to great extent. One writer believed that a survey should be conducted to speed up the obtaining of records from the AGO, and added that those records should be edited for accuracy before they leave the AGO office. Another believed that the occasional delays which do occur are to be blamed on the lack of an independent, well-trained JAGD.

3. Are arrest and confinement of the accused before trial used unduly and unnecessarily?

GENERALS:

Yes 17. No 41.

Comments: There is no such tendency where there are competent commanders. Some "green" officers do have such a tendency. Strict supervision must be exercised to prevent it. Those who have committed heinous offenses or have escapist tendencies must be confined.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 3 | 9 |
| Regular Army Judge Advocates | 9 | 11 |
| Board of Review Judge Advocates | 3 | 4 |
| Staff Judge Advocates | 5 | 9 |
| <u>Totals</u> | <u>20</u> | <u>33</u> |

Comments: Confinement should be restricted to non-military-offense offenders and military-offense offenders awaiting general court-martial trial. In disobedience cases, immediate confinement is sometimes necessary. Occasionally, pre-trial confinement is used as an extra-legal means of control. Officer cases are held up for a long time pending review after trial. Inexperienced officers occasionally cause delay.

Proper directives re undue confinement appear in AW 69, MCM Pars. 18 and 19, and AR 600-355. See also AAF Ltr 35-92, 20 Aug 46, "Conf of Personnel Awaiting Trial."

ENLISTED MEN:

Yes 22. No 23.

Comments: Existence of undue confinement is indicated by the Army having to recently issue WD Ltr AGPE-R-A 250.3, 2 Aug 46, against this abuse. The Sixth Army's Memo 84 prevented this abuse. Sometimes, confinement is both justifiable and necessary. On the other hand, restriction to quarters would be sufficient in many cases. There have been situations in which a man more than serves the term of his ultimate sentence during pre-trial confinement. Under combat conditions, speedy trials are often impossible.

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V. ORGANIZATION OF COURTS-MARTIAL

1. Are summary courts properly organized?

GENERALS:

Yes 61. No 1.

Some of those not specifically replying stated that the summary court system is good when the summary court officer is adequate. One writer registered his complaint against the "police-court" set-up used in the larger European cities, in which accused's rights frequently were not fully explained, and in which occasions existed when the accused was not even aware that he was being tried.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 10 | 2 |
| Regular Army Judge Advocates | 17 | 2 |
| Board of Review Judge Advocates | 6 | 1 |
| Staff Judge Advocates | 7 | 4 |
| <u>Totals</u> | <u>40</u> | <u>9</u> |

Comments: Make summary court-martial procedure more dignified. Subject summary court trials to review by a regimental officer, giving him some legal aid in this regard. Use older, more tolerant, experienced and trained officers for the summary courts. If regimental Judge Advocates are added, make them the summary court officers. Serve summary court charges prior to trial. Clarify summary court procedure by having TM 27-255 on Military Justice include a model transcript.

ENLISTED MEN:

Yes 30. No 11.

Comments: Summary court officers should be experienced and trained men. The summary court should consist of one officer and one enlisted man. The summary court should consist of three officers. This is particularly necessary should summary court jurisdiction be expanded. Summary courts should be abolished. They are not legal trials at all, because rules of evidence are not observed and accused is not given the benefit of counsel. Accused should have a more adequate right to present data or witnesses in his behalf, and he should be given more adequate explanation of his rights.

2. Are special courts-martial properly organized?GENERALS:

Yes 58. No 4.

Comments: Substitute a judge of legal experience in the place of the Law Member. Have a trained Law Member. Transcribe the record verbatim. If regimental Judge Advocates should be added, have those officers serve as presidents of the special courts. Have trained prosecutors and defense counsel. Extend special court jurisdiction to officers.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 10 | 2 |
| Regular Army Judge Advocates | 16 | 1 |
| Board of Review Judge Advocates | 6 | 1 |
| Staff Judge Advocates | 8 | 4 |
| <u>Totals</u> | <u>40</u> | <u>8</u> |

Comments: During wartime, increase special court jurisdiction both as to sentences and over officers. A lawyer should always be Law Member on special courts. Special court personnel is now frequently inadequate and inexperienced. There is a need for better administration and more dignity. Records should be transcribed verbatim. If regimental Judge Advocates should be added, those officers should serve as presidents of special courts. Tables of Organization should provide for an enlisted man to act as permanent clerk of the court, to relieve the Trial Judge Advocate of the undue burden of having to keep a record of the trial. Defense Counsel and Trial Judge Advocates should be lawyers. Special courts are too much under the jurisdiction of commanding officers. They too often give only maximum punishments.

ENLISTED MEN:

Yes 32. No 12.

Comments: There is a lack of training and experience on the part of special court personnel. This is particularly true re the Law Member, Defense Counsel, and Staff Judge Advocate. There is influence from above. Enlisted men should be detailed as special court members for trials involving enlisted men. Special court personnel should be increased in number.

3. Adequacy of present mode of selection of defense counsel.GENERALS:

Method is inadequate: Yes 30. No 27.

Comments: When Manual for Courts-Martial provisions are followed in the selection of defense counsel, no trouble results. Despite the fact that defense may not have been expert from the lawyers' point of view, justice did result in 99% of the cases. Accused always has the right to select special counsel. ✓

Defense counsel too often lacked both legal training and time to properly prepare a defense. Judge Advocate officers should be available to act as defense counsel. Defense counsel should be of equal or superior rank to trial judge advocates. Sometimes, selection of defense counsel is merely a matter of running down a roster.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 4 | 9 |
| Regular Army Judge Advocates | 10 | 6 |
| Board of Review Judge Advocates | 2 | 6 |
| Staff Judge Advocates | <u>4</u> | <u>8</u> |
| <u>Totals</u> | 20 | 29 |

Comments: In some commands, great care was taken to see that defense counsel was a trained lawyer of equal or better ability than the trial judge advocate.

A number of writers believed that inadequacy of defense counsel was the weakest point in the court-martial system. Some believed that defense counsel should always be of equal or superior rank to the prosecutor, yet a large number felt that the more important point was that defense counsel should be equally well qualified regardless of rank. One writer would have the legal-assistance officer (AR 25-250) act as defense counsel. Another writer stated that probably in 90% of general court cases the prosecutor was a lawyer, but that defense counsel was selected from duties which would not disrupt his unit's primary functions. He added that over 80% of the convictions resulted from use of material obtained at pre-trial investigations, at which defense counsel were not even present. Besides having trained defense counsel at trials, this writer would make it mandatory that defense counsel be present at the pre-trial investigations. The following cases were cited by another writer to demonstrate inadequacy: CM 253209 Davis; 264277 Holmes, 264276 Hillgove. Some made the suggestion that there should be permanently-assigned defense counsel.

ENLISTED MEN:

Yes 12. No 22.

In general, Enlisted Men comments were similar to those by the Judge Advocates. Additionally, it was pointed out that, although an accused may now have the right to special counsel, he seldom knows where to find a good defense counsel. Therefore, while the present system may be theoretically sound, it does not work out well in practice. Another writer would have a list of permanent defense counsel from whom the accused could choose.



4. To what extent are courts-martial under the domination of convening authority?

GENERALS:

Dominated 14. Seldom dominated 35.

Some took the position that the Commanding Officer had to exercise influence, partially because of the inexperience of military personnel during wartime. Court members had to be educated. One writer, by innuendo, pointed out that even the United States Supreme Court has been dominated. Means of domination: the Commanding Officer appoints and removes court members; he is their administrative head and is in charge of promotions; he has the power to reprimand and write "skin" letters.

JUDGE ADVOCATES:

| | <u>Dominated</u> | <u>Seldom Dominated</u> |
|---------------------------------|------------------|-------------------------|
| Combat Judge Advocates | 2 | 9 |
| Regular Army Judge Advocates | 4 | 11 |
| Board of Review Judge Advocates | 6 | 1 |
| Staff Judge Advocates | 5 | 7 |
| <u>Totals</u> | <u>17</u> | <u>28</u> |

One writer stated that although the commanding general may theoretically have the power of complete domination, he actually exercises a sort of benevolent despotism. Another found that there "were an amazing number of officers of 20 years service or more who possessed utterly distorted views of their power and prerogatives in the administration of military justice." A third stated that attempted domination did little good because court members resented it and reacted accordingly.

ENLISTED MEN:

Dominated 22. Seldom dominated 7.



5. The advisability of withdrawing from field command the authority to convene general courts-martial, except possibly in battle areas in cases of emergency, and the establishment of permanent general courts-martial in each area, such courts-martial to be organized by the Judge Advocate General's Department and to be independent of command.

GENERALS:

Yes 8. No 49.

One General stated that military organizations are designed to be successful in combat rather than to administer justice perfectly, and courts-martial is a tool whereby the commanding officer maintains discipline. A second General stated that courts-martial is a command necessity; that if you gave the JAGD power to command obedience without responsibility for military performance, you would fatally wreck military efficiency. A third General felt that permanent courts might be used in rear areas overseas, but should not be used either in the United States or in overseas battle areas. A fourth General felt that to relieve the field command of courts-martial functions would be to do it a favor by ridding it of burdensome administration responsibilities.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|-----------|
| Combat Judge Advocates | <u>4</u> | <u>7</u> |
| Regular Army Judge Advocates | 9 | 9 |
| Board of Review Judge Advocates | 5 | 3 |
| Staff Judge Advocates | 6 | 3 |
| <u>Totals</u> | <u>24</u> | <u>22</u> |

Some of the answers favoring the separation of or withdrawing general courts-martial power from command were qualified. Many felt that while it might be workable in fixed installations, it would not be workable when commands moved fast (i.e. one writer's air command move 1,800 miles in three months). Instead of using permanent courts, another writer would require final confirmation of all sentences over three years by a Military Justice Supreme Court, composed of civilians appointed by the President. A third did not think that permanent courts were practical, but thought that uniformity could be obtained by having Judge Advocate officers acting as Trial Judge Advocates, Defense Counsel and Law Members who were not responsible to the field command in which a case may have arisen.

ENLISTED MEN:

Yes 34. No 6.

One writer would have separate permanent courts at all times except during the emergencies of battle. Another would have separate

permanent courts for each branch of service, with jurisdiction over that service's personnel. Another was dubious of the proposal, because he feared undue delay. Another feared undue expense. Still another thought that the JAG should organize and operate permanent, full-time courts independent of command, analogous to Federal District and Circuit Courts.

6. The advisability of appointing as the law member, the trial judge advocate, and the defense counsel only trained officers who belong to the Judge Advocate General's Department; the trial judge advocate and the defense counsel to be of the same rank, if at all possible; such assignments to be permanent and full-time, rather than temporary part-time details.

GENERALS:

Yes 50. No 12.

Among the few who answered in the negative to this question, one stated: Specialists tend to crawl into their own shells and separate themselves from the rest of the organization. Another thought that there would be increased overhead. A third added that these were not full-time jobs. A fourth pointed out that this would lead to delays.

Some of those replying in the affirmative variously commented: Such duties should neither be made primary nor exclusive. Such duties should be additional primary duties. The only reason this is not done today is because of a lack of Judge Advocate officers. Frequent responses emphasized that equal or senior grade on the part of the Defense Counsel was unimportant and that legal skill was the more important factor. One writer would use Judge Advocates as Trial Judge Advocates and Defense Counsel, but would not use them as Law Members, on the ground that this would increase JAGD power without justification.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 13 | 0 |
| Regular Army Judge Advocates | 19 | 0 |
| Board of Review Judge Advocates | 8 | 0 |
| Staff Judge Advocates | 12 | 1 |
| <u>Totals</u> | <u>52</u> | <u>1</u> |

Comments: JAGD pools should be established for duty at Division, Corps or Army levels. The JAGD duties herein listed should not be exclusive. There should also be trained investigators. More Judge Advocates will be needed. It is not necessary that Defense Counsel be of equal or superior rank to Trial Judge Advocates. These key JAGD duties should be full-time.

ENLISTED MEN:

Yes 46. No 3.

Comments: Should have a pool of trained JAGD Defense Counsel so that accused could take his choice therefrom. Also recommended that the court president and as many remaining court members as possible be JAGDs. Additionally, assign qualified court reporters. Few thought that rank makes much difference.

7. The advisability of vesting in the law member full authority to rule finally on all questions of law but giving him no vote on the court; and leaving to the remaining members of the court only the functions of determining guilt or innocence and determining what sentence should be imposed in case of conviction--in other words, assimilating the functions of the law member to those of a judge, and the functions of the remaining members to those of a jury.

GENERALS:

Yes 38. No 26.

A number of writers pointed out that they had answered in the affirmative only upon the assumption that the Law Member would be a trained lawyer. Some would also require that only the Law Member pass sentence on the accused, with the court solely determining his guilt. One General wanted to make sure that this non-voting Law Member would participate in the closed sessions of the court, freely advising the members. One would always make the Law Member the court's presiding officer. Another took the contrary view. Many saw no reason why he should not be able to vote.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|----------|
| Combat Judge Advocates | 12 | 1 |
| Regular Army Judge Advocates | 17 | 2 |
| Board of Review Judge Advocates | 6 | 2 |
| Staff Judge Advocates | 10 | 4 |
| <u>Totals</u> | <u>45</u> | <u>9</u> |

The Judge Advocates were overwhelmingly in favor of giving the Law Member full authority on questions of law. The majority of the writers, however, did not believe that he should be deprived of his vote. Some believed that the Law Member alone should determine the sentence; should be able to set aside findings of guilt; etc. Several were emphatic that the Law Member should always be able to participate in closed sessions. The idea was also expressed that the Law Member might also act as President of the court.

ENLISTED MEN:

Yes 47. No 1.

Answers were occasionally qualified to state that this idea was good only if you were assured of trained Law Members who were independent of command. Several felt that the Law Member should not lose his vote. One writer stated that the only change required to put such a system into effect would be to amend Par 51(d), Manual for Courts-Martial, by replacing with a period the comma after the word "final" in the third sentence, and deleting the remainder of the paragraph.

VI. COURT-MARTIAL PROCEDURE AND PRACTICE

1. Are any changes in trial procedure desirable?

GENERALS:

Yes 5. No 60.

Comments: If possible, shorten and simplify the procedure. Counsel arguments should be transcribed into the records of trial. Peremptory challenge matters should be settled before trial. The Law Member should act as judge and the rest of the court-martial panel as jurors.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----|----|
| Combat Judge Advocates | 2 | 10 |
| Regular Army Judge Advocates | 8 | 10 |
| Board of Review Judge Advocates | 1 | 6 |
| Staff Judge Advocates | 4 | 8 |
| <u>Totals</u> | 15 | 34 |

Comments: The necessity for reforming the court before each trial should be eliminated, i.e. the oaths and other lengthy technicalities. It takes too long to get a court started, and is too much like a lodge meeting. However, retain individual challenges for each case. Eliminate the swearing-in of the reporter, and in lieu thereof use his certificate to this effect. Change Par 81, Manual for Courts-Martial, to prohibit the public announcement of a court's sentence until it is acted upon by the Reviewing Authority. Defense Counsel should be permitted to demand a bill of particulars. Rules of evidence should be simplified. Permit more character evidence after a finding of guilty but before sentence, and permit defense to argue re clemency. Give accused a copy of the charge sheet in trials before summary courts-martial. Curb the unlimited authority of the Court President. When accused pleads guilty, require the prosecution to present evidence of a prima facie case. Eliminate the introduction of evidence of previous convictions--only the Reviewing Authority should consider these. Where there has been a defense motion for a finding of not guilty, higher authorities should not be able to sustain a finding of guilty on the basis of defense evidence which has been subsequently introduced.

ENLISTED MEN:

Yes 11. No 23.

Comments: Desirable changes have been suggested elsewhere herein. All charges involving enlisted men should be handled in open court.

Make a change of venue possible where an appointed court is too familiar with a case prior to trial. Speed up procedure by dispensing with the rereading of the order appointing the court, the oaths, etc., when that same court tries a number of cases the same day (unless the accused specifically requires that these things be repeated).

2. Do defense courts have adequate opportunity to defend the accused, or is vigorous defense discouraged?

GENERALS:

Yes 63. No 1.

Comments: Despite the unanimity of the belief that there is adequate opportunity for defense, some of the writers pointed out that Defense Counsel do not always make full use of their opportunities because of their own lack of legal ability and experience. Several writers commented on the use of the word "vigorous" in the question, stating that "vigorous defense" could be unwarranted license. Legal maneuvering must be distinguished from the administration of justice. Courts do not like dramatics and vilification. Rather, they want the truth. They seek a restrained, intelligent defense rather than "bully ragging" and flowery dramatics, trickery and hair-splitting.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 11 | 2 |
| Regular Army Judge Advocates | 19 | 1 |
| Board of Review Judge Advocates | 7 | 0 |
| Staff Judge Advocates | 10 | 3 |
| <u>Totals</u> | <u>47</u> | <u>6</u> |

Comments: Sometimes, too-successful Defense Counsel are thereafter made Trial Judge Advocates. While Defense Counsel usually have sufficient opportunity to defend (exceptions noted), they are frequently inept and inexperienced. Often, the Trial Judge Advocate is better qualified, so it is an unequal match. These practical difficulties within the present system could be eliminated by having trained Defense Counsel separated from command and on a permanent basis. Dilatory tactics and sharp legal technicalities are discouraged.

ENLISTED MEN:

Yes 21. No 21.

Comments: It was generally felt that inadequate defense resulted more from inadequate Defense Counsel who did not avail themselves of their opportunities, rather than from any discouraging of defense. One writer commented that any accused sent before a court-martial already had two strikes against him. Another writer found that defense counsel did not have time to prepare an adequate defense.



3. Does the defense have adequate opportunity to procure compulsory attendance of witnesses?

GENERALS:

Yes 58. No 6.

Comments: Occasional inability to procure witnesses resulted from unavailable funds for travel and attendance where distances intervened, and battle conditions. However, the prosecution had the same difficulties.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 11 | 0 |
| Regular Army Judge Advocates | 18 | 2 |
| Board of Review Judge Advocates | 7 | 0 |
| Staff Judge Advocates | 10 | 2 |
| <u>Totals</u> | <u>46</u> | <u>4</u> |

Comments: Par 97 of the Manual for Courts-Martial might be amended, to provide more specific procedure for obtaining witnesses. In foreign theaters, provision is needed to compel necessary witnesses to come from the United States. Lack of such authority has occasionally necessitated the dismissal of charges. TM 27-255, Military Justice, is a good guide re witness attendance and the use of stipulations. Some Defense Counsel are too inexperienced to know how to take advantage of their rights to compel the attendance of witnesses.

ENLISTED MEN:

Yes 31. No 7.

Comments: When Defense Counsel fail to secure the attendance of necessary witnesses, the reason frequently is inability, inexperience or disinterest. One writer felt that occasionally Defense Counsel had such short notice that he did not have time to get necessary witnesses. Another writer thought that the average Defense Counsel had so many other military duties that he did not have sufficient time to devote to the defense.



4. Should the use of depositions by the prosecution be permitted?

GENERALS:

Yes 64. No 1.

Comments: The dominant feeling was the depositions should be permitted only to the extent they are used now (AW 25). Their use should not be permitted in capital cases. One writer believed that we should cut down on the number of these wartime capital offenses. He gave desertion as an example, (a) that death sentences were seldom rendered for desertion anyway, (b) sometimes evidence in desertion cases could be obtained only by depositions, and (c) that in some desertion cases the statute of limitations would have run on the lesser-included offense of AWOL--thereby to effectively permit a deserter to go without punishment.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 11 | 1 |
| Regular Army Judge Advocates | 19 | 1 |
| Board of Review Judge Advocates | 6 | 2 |
| Staff Judge Advocates | 10 | 1 |
| <u>Totals</u> | <u>46</u> | <u>5</u> |

Comments: As with the Generals, the dominant Judge Advocate feeling was that depositions should be permitted only to the extent they are now used (AW 25). Their use should not be permitted in capital cases. One writer, however, would permit their use in offenses now listed as capital, but with this addition: If they were used in such cases, then the death penalty could not be imposed therein.

ENLISTED MEN:

Yes 29. No 9.

Comments: Depositions on behalf of the prosecution should be permitted only upon stipulation of the defense. They should be permitted only when prosecution witnesses are not readily available, i.e. sickness, battle conditions, distance.

5. To what extent, if at all, should the new Federal Rules of Criminal Procedure be used by courts-martial?

GENERALS:

Yes 9. No 15. Not familiar with the rules 36.

Comments: There was confusion in the replies to this question. Few of the writers indicated any familiarity with the Federal Rules. Of those replying in the negative, the feeling was that present court-martial procedure does work. Two Generals stated that the Federal Rules had not yet been fully tested in the civilian system, and that they thought a number of changes had already been recommended. Another General thought that civilian procedure would benefit by adopting the court-martial set-up. A third felt that the Federal Rules might be too complicated for military use.

JUDGE ADVOCATES

| | <u>Yes</u> | <u>No</u> | <u>Not familiar with Rules</u> |
|---------------------------------|------------|-----------|------------------------------------|
| Combat Judge Advocates | 0 | 4 | 6 |
| Regular Army Judge Advocates | 5 | 7 | 7 |
| Board of Review Judge Advocates | 2 | 3 | 1 |
| Staff Judge Advocates | 3 | 5 | 2 |
| <u>Totals</u> | <u>10</u> | <u>19</u> | <u>16</u> |

Comments: Many of the writers admitted that they were not familiar with the Federal Rules and could not answer.

One Regular Army Judge Advocate stated that the following rules could be used without major changes in the present court-martial system:

- a. Rules 10-17, under Title IV Arraignment and Preparation for Trial.
- b. Rules 32-36, under Title VII Judgment.
- c. Rule 26 on Evidence; Rule 28 on Expert Witnesses; and Rule 29 on Motive for Acquittal.

A former Staff Judge Advocate pointed out that the Federal Rules have their counterpart in present procedure outlined by the Manual for Courts-Martial, as follows:

Rule 1. Pre-sentence investigation. An investigation of the accused, his background, military experience and other factors are considered by the convening authority before approving the sentence.

Rule 2. Motions. Under the present court-martial rules, withdrawals of pleas of guilty and other comparable motions are permitted. It is the duty of the president of the court to order withdrawals of a plea of guilty inadvertently made.

Rule 3. Appeals. The appeals in a court-martial case are automatically made. They amount to a review by the convening authority and in general court-martial cases a review by the Judge Advocate General's Department.

Rule 4. Control by Appellate Court. The present control of general court-martial is in the Judge Advocate General's Department, which acts as the appellate court and thus a comparable provision.

Rule 5. Supersedeas Bond. No similar provision is provided for in our manual. A person may, however, be released from confinement pending final action by the convening authority or by the Judge Advocate General's Department. The type of confinement is a function of command.

Rule 6. Bail. A comparable provision as to paragraph 5 above appears in the manual.

Rule 7. Direction for Preparation of Record. The Manual for Courts-Martial and rules of practice and procedure in effect for the administration of military justice provide stringent rules for the preparation of the court-martial record.

Rule 8. Record of Appeal without Bill of Exceptions. Not applicable.

Rule 9. Bill of Exceptions. Not applicable.

Rule 10. Argument on Appeal. Not applicable.

Rule 11. Writ of Certiorari. The Writ has its counterpart in the forwarding of the record of trial, in a general court-martial case, for final review by The Judge Advocate General.

Rule 12. Local Rules. The local rules are standard as indicated in the Manual for Courts-Martial, and have no counterpart in the new Federal Rules.

ENLISTED MEN:

Yes 9. No 2. Not familiar with Federal Rules 40.

6. Should unanimous vote be required to convict?

GENERALS:

Yes 4. No 64.

One General noted: Where eventual sentences require unanimity or 3/4ths vote, that same unanimity or 3/4ths requirement, as the case may be, should be required for the findings of guilt. Another General noted: There is no time for "hung juries" during war.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 0 | 9 |
| Regular Army Judge Advocates | 2 | 18 |
| Board of Review Judge Advocates | 3 | 6 |
| Staff Judge Advocates | 1 | 13 |
| <u>Totals</u> | <u>6</u> | <u>46</u> |

Comments: One Judge Advocate noted: There is no time for "hung juries" during war. A number of Judge Advocates commented on MW 43, stating as did the one General: Where eventual sentences require unanimity or a 3/4ths vote, that same unanimity of 3/4ths requirement, as the case may be, should be required for the findings of guilt. Another Judge Advocate would require unanimity if the minimum required number of court members are present, but otherwise suggested a 3/4ths vote. Still another would require unanimity of vote in all capital and officer-dismissal cases. Lastly, the suggestion was made that unanimity be required when the charged offense is the equivalent to a felony in civilian jurisprudence.

ENLISTED MEN:

Yes 20. No 26.

Comments: Intermediate viewpoints were frequently expressed: One writer would require unanimity in cases involving the death sentence; another in cases involving sentences over 5 years. One writer also believed that a 3/4ths vote in all cases was preferable to either a 2/3rds vote or unanimous vote requirement. Another stated that "hung juries" were not desirable in military courts.

7. To what extent, if at all, does the practice prevail of imposing severe excessive sentences, leaving it to the reviewing authority to reduce the sentence, instead of endeavoring to impose a proper sentence in the first instance? If the practice exists, should it be eliminated, and, if so, how?

GENERALS:

Yes 31. No 23.

It was frequently stated that, despite severe original sentences, the Reviewing Authorities did downgrade and equalize them through their exercise of clemency.

Suggested means of eliminating the practice of imposing too severe sentences: a. Educate court members as to proper sentences.

b. Appoint more conscientious court members. c. Have a Judge Advocate solely determine the sentence. d. At least have Law Members who are familiar with sentence policy. e. Have a Table of Minimum Sentences, as well as a Table of Maximum Sentences. f. In the order appointing a court, have a written statement advising the members that they are the ones responsible for the determination of a just sentence. g. Consider the use of an indeterminate sentence, leaving its eventual total length to be determined by the offender's subsequent behavior.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|----------|
| Combat Judge Advocates | 9 | 4 |
| Regular Army Judge Advocates | 20 | 0 |
| Board of Review Judge Advocates | 8 | 0 |
| Staff Judge Advocates | 11 | 1 |
| <u>Totals</u> | <u>48</u> | <u>5</u> |

As with the Generals, the Judge Advocates frequently stated that, despite many severe original sentences, the Reviewing Authorities did downgrade and equalize them.

Suggested means to eliminate the practice of imposing too severe sentences: a. Have a Table of Minimum Punishments as well as a Table of Maximum Punishments. b. Have a Table of Maximum Punishments for major wartime offenses. c. Permit only the Law Member, an independent judicial body, or The Judge Advocate General to impose sentences. d. Use full-time area courts. e. Require the War Department to state a specific policy in regard to sentences. f. Have the War Department specifically state its policy that sentences should be within the maximums, with consideration given to mitigating or aggravating circumstances. g. Use only specially selected and trained court personnel, removing the system from command domination. h. Make it mandatory that when a Staff Judge Advocate recommended reduction of a sentence, the commanding officer would have to reduce that sentence. i. Reserve publication of sentence (except acquittals) until the Reviewing Authority has acted. j. Have a system of indeterminate sentences, which would automatically follow findings of guilty. k. Since one reason for long sentences during wartime is to make sure that accused remains in jail at least for a period of time after the war is over and no one then knows how long the war will last, permit sentences for military offenses during wartime to be for the duration plus a fixed term thereafter.

ENLISTED MEN:

Yes 25. No 12.

As with the Generals and Judge Advocates, the Enlisted Men frequently stated that, despite severe original sentences, Reviewing Authorities frequently reduced them. One writer pointed out that a purpose of extremely severe sentences was to discourage others from committing the same offense, but he then continued to also state that the theory did not work in practice because the average enlisted man did not think that the severe sentences would be fully served anyway.

Suggested means to eliminate the practice of imposing too severe sentences: a. Select courts from experienced personnel. b. Require that a court give greater consideration to extenuating circumstances and accused's prior record. c. Have a standardized list of punishments which may be imposed. d. Require that there be two independent JAGD reviews subsequent to every trial. e. Establish permanent courts.

8. Are court-martial records complete and accurate verbatim transcripts of actual proceedings?

GENERALS:

Yes 53. No 8.

It was felt that general courts-martial transcripts were accurate verbatim records of proceedings, although it was occasionally stated that the answer to this question depended upon the accuracy of the individual reporter. It was pointed out that verbatim transcripts are not kept for either special or summary courts. As to general court transcripts, several Generals stated that these records should also include a. all remarks and arguments of counsel, and b. all "off the record" comments.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 11 | 1 |
| Regular Army Judge Advocates | 18 | 2 |
| Board of Review Judge Advocates | 7 | 1 |
| Staff Judge Advocates | 10 | 1 |
| <u>Totals</u> | <u>46</u> | <u>5</u> |

The comments of the Judge Advocates parallel those of the Generals, noted in the preceding paragraph.

ENLISTED MEN:

Yes 33. No 6.

9. Are there undue delays in court-martial proceedings?

GENERALS:

Yes 25. No 41.

The prevalent opinion was that, when delay does occur, it may be due to one or more of the following unavoidable difficulties: combat conditions; rapid redeployment, inactivation and change of units; missing witnesses; lack of clerical assistance; slowness of the court reporter in getting out transcripts; slow pre-trial investigation; loss of documents.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 3 | 9 |
| Regular Army Judge Advocates | 6 | 14 |
| Board of Review Judge Advocates | 2 | 5 |
| Staff Judge Advocates | 3 | 7 |
| Totals | <u>14</u> | <u>35</u> |

Judge Advocate answers paralleled the Generals' answers. Suggestions to aid in speed-up: a. Weekly reports. b. Handle general court cases by a team of Law Members, Trial Judge Advocates and Defense Counsel. c. Organize the JAG as a Corps, including examiners, administrative assistants, and court reporters.

ENLISTED MEN:

Yes 11. No 31.

Enlisted Men's answers paralleled those of the Generals and Judge Advocates. One writer stated that most of the delays which did occur were due to combat conditions, etc., which could not be changed.

10. Should there be a change in existing practice which makes it mandatory for a general court-martial to impose a dishonorable discharge in case a sentence of imprisonment of six months or more is also imposed?

Should the power to inflict a dishonorable discharge in such cases be discretionary?

GENERALS:

Yes 32. No 30.

A number of writers replying in the negative pointed out that rehabilitation procedures in effect today permit the restoration of a prisoner to duty by suspending his dishonorable discharge. Among those replying in the affirmative, a large percentage would make the dishonorable discharge discretionary only in sentences under a year, and would make it mandatory in sentences of a year or over.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 5 | 7 |
| Regular Army Judge Advocates | 6 | 14 |
| Board of Review Judge Advocates | 8 | 1 |
| Staff Judge Advocates | 4 | 7 |
| <u>Totals</u> | <u>23</u> | <u>29</u> |

Judge advocate replies paralleled the Generals' replies. One writer pointed out that should the Law Member have the power to levy the sentence in the future, the Law Member should also be able to suspend that sentence and place the accused on probation. It was also noted that now it is not mandatory to accompany a sentence of six months or more with a dishonorable discharge.

ENLISTED MEN:

10a - Yes 27. No 22.
10b - Yes 30. No 14

Enlisted Men's replies paralleled those of the Generals and Judge Advocates in their comments.

11. Should general court-martial be given power, which it does not now have, to suspend sentence and place the accused on probation?

Should the use of dishonorable discharges generally be reduced, as part of a court-martial sentence?

GENERALS:

Yes 13. No 52.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 1 | 11 |
| Regular Army Judge Advocates | 4 | 15 |
| Board of Review Judge Advocates | 6 | 3 |
| Staff Judge Advocates | 1 | 10 |
| <u>Totals</u> | <u>12</u> | <u>39</u> |

Comments: Do so only if the court is independent of command. Do so only if the court consists of trained personnel. One writer suggested personal post-trial interview of every accused person by a field grade officer, who would make a written report to accompany the record of trial.

ENLISTED MEN:

11a - Yes 37. No 14.
11b - Yes 24. No 15.

Comments: Permit this first power only for first offenders. Permit it only after pre-sentence investigations.

12. Is it desirable to introduce a discharge, such as the bad conduct discharge of the Navy, which would rid the Army of an undesirable soldier, and yet not have a disastrous permanent effect on him? In that event, should dishonorable discharges be reserved for more grave and heinous cases?

GENERALS:

Yes 32. No 16.

Several writers believed that present AR 615-368-9 Army "blue discharge" and 615-366 (see II) provisions are adequate. The merits of the Army's rehabilitation program were pointed out, through which many offenders have their dishonorable discharge removed after completing their courses in a rehabilitation center. One General stated: If a bad conduct discharge would rid the Army of undesirable soldiers more easily, then it would be beneficial. But I do not believe that the dishonorable discharge portion of a sentence is nearly as important to an offender as the portion calling for confinement.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|-----------|
| Combat Judge Advocates | 0 | 8 |
| Regular Army Judge Advocates | 10 | 7 |
| Board of Review Judge Advocates | 7 | 0 |
| Staff Judge Advocates | 5 | 4 |
| <u>Totals</u> | <u>22</u> | <u>19</u> |

Comments: The Army's present "blue discharge" system is satisfactory. Permit a special court to include a bad conduct discharge as part of its sentence. Permit Reviewing Authorities to reduce the dishonorable discharge portion of a sentence to a bad

conduct discharge, as a part of the exercise of clemency. Have a discharge for mental incompetency. Use bad conduct discharge solely for military offenses.

ENLISTED MEN:

Yes 34. No 11.

The present adequacy of the Army's "blue discharge" was noted, with the comment that perhaps it might be used more often. One writer would permit a bad conduct discharge in peacetime only.

13. Is some species of pre-sentence investigation feasible?

GENERALS:

Yes 8. No 11.

Because of some confusion in the original wording of this question, most Generals were unable to make a reply. Among those who did reply, the following comment was frequently included: After findings, but before sentence, both prosecution and defense should be directed to present proof of accused's military and civil conduct, surrounding and extenuating circumstances, and neuropsychiatric reports. Others felt that the present system, in which the Reviewing Authority looks into extenuating circumstances, is adequate.

JUDGE ADVOCATES:

| | Yes | No |
|---------------------------------|-----------|-----------|
| Combat Judge Advocates | 4 | 5 |
| Regular Army Judge Advocates | 6 | 3 |
| Board of Review Judge Advocates | 3 | 0 |
| Staff Judge Advocates | 4 | 2 |
| <u>Totals</u> | <u>17</u> | <u>10</u> |

Because of some confusion in the original wording of this question, many Judge Advocates were unable to make a reply. Among those who did reply were the following comments: Such a pre-sentence investigation is both feasible and necessary. "My experience showed that the men who got into serious trouble in the Army were in serious trouble from early childhood, were usually victims of broken homes, and subject to an alcoholic condition." If a system of indeterminate sentences should be adopted, such investigations should be made after trial. Many commands already require full investigations for the use of the Reviewing Authority, i.e. psychiatric examinations, Red Cross and FBI reports, etc.

ENLISTED MEN:

Yes 8. No 6.

VII. REVIEW OF COURT-MARTIAL PROCEEDINGS

1. Is the present system of review adequate as to (a) summary courts, (b) special courts-martial, and (c) general courts-martial?

GENERALS:

Yes 55. No 0.

Most of the Generals replied "yes" without qualification to this question. Other viewpoints expressed were: Appellate review for summary courts is not adequate. Appellate review for special courts is not adequate. Appellate review for general courts is not adequate. The criticism was chiefly directed against summary and special court appellate procedure.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 9 | 2 |
| Regular Army Judge Advocates | 14 | 2 |
| Board of Review Judge Advocates | 5 | 2 |
| Staff Judge Advocates | 8 | 1 |
| <u>Totals</u> | <u>36</u> | <u>7</u> |

Satisfaction was generally expressed regarding courts-martial appellate procedure. Some of the adverse comments were: (a) Summary Courts: There should be a summary of evidence for the consideration of the Reviewing Authority. This latter officer should also have a reviewing advisor. There should be Judge Advocate officers at regimental level, which officers might act as summary court officers. (b) Special Courts: The evidence summary is inadequate to permit proper appellate review. Staff Judge Advocates should be required to accompany these records with written reviews and recommendations. Should special court jurisdiction be expanded, their appellate review should be broadened. (c) General Courts: Appointing authorities of general courts-martial should not thereafter be permitted to review decisions of those courts. Staff Judge Advocate reviews in lower echelons should not be modified to suit the viewpoints of the commanding officer. Present appellate review procedure for general courts-martial cases should be broadened, to permit a review of the facts as well as the law in all instances. Boards of Review should have final jurisdiction in "published order" cases as well as in cases where the dishonorable discharge or dismissal has been executed. This final jurisdiction should only apply when the sentence is for more than six months. Boards of Review and The Judge Advocate General should be permitted to consider clemency matters, and to reduce sentences where they see fit. They should also be permitted

send cases back for rehearing or a new trial. AW 50 $\frac{1}{2}$ should be clarified. It should additionally provide for a single "supreme court" higher than the present Boards of Review. There should be a Supreme Court of Military Justice in the place of The Judge Advocate General, the Secretary of War and the President. To do this, the new tribunal's name might be substituted wherever the words "President" and "Secretary of War" appear in AWs 45, 48, 50 $\frac{1}{2}$, 51, 52, and 53. This "supreme court" might be given these powers: a. Final automatic appeal of all death sentences; b. Jurisdiction to iron out conflicts of law between different Boards of Review. Amend AW 50 $\frac{1}{2}$, to abolish the rule contained in the third footnote following that printed AW in the 1928 Manual for Courts-Martial.

Present Boards of Review waste too much time on technicalities and not enough on substance.

One Judge Advocate criticised at great length the Theater practice of first sending AW 48 cases to the Theater Commander, and only thereafter sending them to the Boards of Review. He believed this practice was based upon an erroneous interpretation of AW 50 $\frac{1}{2}$, and suggests rewording that Article so that there can be no ambiguity. He would also combine the post of Theater Judge Advocate and Assistant Judge Advocate General with a foreign Theater.

A Board of Review officer criticised present Board of Review operations at length, chiefly blaming domination of military command for their inadequacies. He stated: Board of Review members are appointed by The Judge Advocate General, and in turn their promotion and welfare depends upon him. This makes them potentially subject to the domination. In order that they obtain necessary independence and freedom, this writer recommended that the appellate bodies be removed from the War Department, and made ultimately accountable to civilian rather than military authority. Their powers should be vested in special Federal courts composed of fully trained and qualified civilians thoroughly familiar with the practical and legal aspects of military justice; also qualified jurists. Their decisions should be final to the same extent as Circuit Courts, with appeal to the U. S. Supreme Court in appropriate cases.

ENLISTED MEN:

Yes 22. No 8.

A minority expressed the view that present reviews are too perfunctory. One writer stated that the system was all right, but that its operation during World War II was handicapped by a lack of Judge Advocate personnel. In turn, he blamed this on shortsighted Judge Advocate General Department policy. This same writer emphasized that Boards of Review should be permitted to consider facts as well as law.

2. Should the trial judge advocate and the defense counsel be accorded an opportunity as a matter of routine to submit briefs or memoranda to the reviewing authority and to the Judge Advocate General?

GENERAIS:

Yes 22. No 36.

Comments: Both sides can already fully present their views both at the time of trial and by post-trial brief. There is already too much paper work.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 6 | 3 |
| Regular Army Judge Advocates | 13 | 7 |
| Board of Review Judge Advocates | 7 | 1 |
| Staff Judge Advocates | 10 | 3 |
| <u>Totals</u> | <u>36</u> | <u>14</u> |

Comments: Manual for Courts-Martial Par 81 already permits defense briefs. The right should remain discretionary, and should not be mandatory. Reviewing Authorities should be permitted to require a brief whenever they think one to be necessary. Unless Defense Counsel were legally trained, their appeal briefs would be of little value.

ENLISTED MEN:

Yes 30. No 6.

Comments: From a practical standpoint, the opportunity could be used in only the more important cases, due to insufficient time of the average Defense Counsel.

3. Is any change desirable in the method of review of death sentences?

GENERAIS:

Yes 2. No 52.

Comments: In certain wartime cases, the execution of death sentences should be expedited.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 2 | 10 |
| Regular Army Judge Advocates | 3 | 14 |
| Board of Review Judge Advocates | 3 | 4 |
| Staff Judge Advocates | 5 | 6 |
| <u>Totals</u> | <u>13</u> | <u>34</u> |

Comments: The death sentence should be permitted only in murder and combat-desertion cases. All death sentences should be reviewable by the President. Executions should be expedited, and full publicity given. There should be a civilian-court review of death sentences, with power to weigh the evidence and make an independent determination. Reviewing authorities should have the right to commute death sentences (and also sentences of dismissal).

ENLISTED MEN:

Yes 6. No 27.

Comments: All death sentences should be reviewed by the President. All death sentences should be handled by The Judge Advocate General, with accused having the right to appeal to the President. In time of war, expediency requires that death sentences in a Theater of War be handled by the Theater Commander, as now (AW 46, 48, 50 $\frac{1}{2}$, 51).

VIII. SUBSTANTIVE LAW1. Advisability of amending Articles of War and Courts-Martial Manual in respect to definitions of offenses and provisions for penalties.GENERALIS:

Yes 29. No 18.

Comments: a. Offenses should be defined more clearly. Changes necessary to carry out the recommendations made elsewhere herein will be necessary. b. AW 8 should be amended, to permit appropriate Air Force units to directly appoint general courts, and to permit Theater Commanders to authorize appropriate commanders to appoint general courts. c. AWs 9 and 10 should be amended, to authorize Air Force commanders to appoint special and summary courts. d. AW 23 should be amended, to authorize Disbursing Officers to make advance payments to civilian witnesses summoned by courts-martial. e. AW 45 should be amended, to include a table of maximum and minimum sentences, to include wartime punishments, to add omitted offenses, to make it applicable to both officers and enlisted men, and to add a clause limiting punishment on all offenses not listed. f. AW 46 should be amended, to permit more latitude in actions when appointing authority has ceased to exist. g. AW 58 should be amended, to remove wartime desertion from the category of capital offenses except when it is in the face of the enemy. h. AW 61 should be amended, to reconsider the wartime punishment for AWOL as well as the present statute of limitations thereon. i. AW 85 should be amended, to remove the mandatory requirement of dismissal for an officer found drunk on duty in wartime. j. AW 86 should be amended, to the extent that sentinel offenses would not be capital except when in battle or imperiling a unit's safety. k. AW 92 should be amended, to provide for degrees of murder comparable to those found in civilian jurisdictions (i.e. Fed C., Title 18, sec 452). It should also be amended, to eliminate its compulsory punishment of either life imprisonment or death. l. AW 93 should be amended, to improve definitions of attempts and assaults with specific intent. It should also be amended, to abolish the common-law distinction between embezzlement and larceny. m. AW 96 should be amended, so that offenses such as failure to salute, the improper wearing of his uniform, etc., should not be sufficient to brand a man as a criminal. It should also be amended, to improve the definition of attempts. n. AW 104 should be amended, to authorize forfeiture in peacetime as well as in wartime against officers, and to include warrant officers, flight officers, and field grade officers.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 4 | 6 |
| Regular Army Judge Advocates | 12 | 7 |
| Board of Review Judge Advocates | 4 | 4 |
| Staff Judge Advocates | 9 | 2 |
| <u>Totals</u> | <u>29</u> | <u>19</u> |

Comments: Various Judge Advocate writers duplicated the suggestions made by the Generals. Additional recommendations were as follows: a. AW 2 should be amended, to give courts-martial jurisdiction over displaced persons when in hostile territory. b. AW 45 should be amended, to prohibit accumulation of sentences when an accused's various offenses were part of a single transaction. It should be amended to permit an officer to be reduced in rank, or to permit a temporary officer from the ranks to be reduced to the status of an enlisted man again. It should be amended, to permit the reduction of a non-commissioned officer one grade at a time. c. AW 70 should be amended, to make its requirements mandatory and jurisdictional. Competent enlisted men as well as officers should be permitted to make investigations. Investigating officers should have permanent assignments. Duplication between various Army branches, such as the Criminal Investigation Division, the Counter-Intelligence Corps, the Military Police, the Inspector General, and AW 70 investigators should be ended. d. AWs 83 and 84 should be clarified. These articles should be applicable to both officers and enlisted men. e. AW 93 should be amended, to improve definitions of burglary, housebreaking, etc. An offense of "theft" should be added to cover both larceny and embezzlement. If not under this Article, then elsewhere there should be added definitions of new-type offenses such as black-marketeering, currency violations, the wrongful taking and using of military vehicles, described racketeering activities, etc. f. AW 94 should be amended, to clarify differences between misappropriation, misapplication, etc. g. AW 96 should be amended, so as to be more specific--with an added omnibus provision that all undefined criminal activity thereunder should have a maximum of a 6 month's sentence. This Article should be rewritten to provide that punishments for "crimes and offenses not capital" conform to Federal Statute; to include in this phrase violations of State laws with similar limits of punishment and requirements of proof; and to eliminate the "discredit" clause. h. AW 104 should be broadened, to include a limited forfeiture of enlisted men's pay. i. AW 110 should be amended, to include AW 24 as one of the Articles of War required to be read to enlisted men.

j. The Manual for Courts-Martial, its sample specifications (i.e. add for manslaughter, joyriding, etc.), and its index should be expanded. Various military justice publications should carry the same key numbers and perhaps should use a loose-leaf system for

additions. k. Par. 30 of the Manual for Courts-Martial should be rewritten, to make it the responsibility of the person ordering arrest or confinement to prefer and forward charges. l. The Manual for Courts-Martial provision for dishonorable discharge based on five previous convictions should be eliminated. This matter should be handled administratively under AR 615-368 or AR 615-369. m. Manual for Courts-Martial provisions re introduction of written documents (i.e. Morning Reports) and copies of documents, the impeachment of witnesses, etc. should be modernized, to facilitate proof of AWOL, desertion, etc. Likewise, provisions for the perpetuation of witness testimony should be modernized. n. II 27-255 should be expanded, to include a sample summary court trial transcript.

ENLISTED MEN:

Yes 26. No 15.

Comments: Enlisted men generally felt that definitions of offenses and their punishment should be more specific and more clearly stated. One writer felt that the phrase "as the court-martial may direct" should be eliminated. This same writer believed in alternative lesser penalties for rape, stating that mandatory penalties of death or life imprisonment are too drastic for all cases. He would also have provision made for clear-cut AW and court-martial coverage over civilian employees.

2. Advisability of modifying Article 95 so that dismissal would not be mandatory penalty in case of conviction of an officer. Consider the possibility that such modification might minimize the reluctance to court-martial an officer.

GENERALS:

Yes 30. No 34.

Comments: It was frequently noted that an officer may be tried under AW 96 instead of AW 95, and that an officer tried under AW 95 may be found guilty of a lesser-included offense under AW 96 for which dismissal would not be mandatory. Those favoring retention of AW 95 in its present form pointed out the moral effect of its mandatory wording, feeling that this in itself aided in maintaining higher standards among officers. One writer suggested two types of AW 95 dismissal--separation without honor in addition to the present dismissal provided for.

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 3 | 10 |
| Regular Army Judge Advocates | 4 | 15 |
| Board of Review Judge Advocates | 6 | 3 |
| Staff Judge Advocates | 7 | 6 |
| <u>Totals</u> | <u>20</u> | <u>34</u> |

Comments: Judge Advocates paralleled the Generals' comments. One stated: The average officer fears AW 95. Do not lessen its effect. Another officer, feeling the need of this general Article, quoted Winthrop's Military Law and Precedents as follows:

"Action or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; or action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms."

A third pointed out that in actual practice AW 95 is seldom used.

ENLISTED MEN:

Yes 31. No 9.

3. Advisability of making Article 96 more specific.

GENERALS:

Yes 14. No 50.

Comments: Should it be modified, limit it to minor offenses triable only in inferior courts.

The chief reason listed for not modifying AW 96 is that in non-static Army conditions, you cannot anticipate every type of offense which might come up. To do so would require a Manual for Courts-Martial "the size of a traveling library." At the present time, AW 96 acts as a catch-all.

(See also answers to Question VIII-1.)

JUDGE ADVOCATES:

| | <u>Yes</u> | <u>No</u> |
|---------------------------------|------------|-----------|
| Combat Judge Advocates | 1 | 10 |
| Regular Army Judge Advocates | 5 | 15 |
| Board of Review Judge Advocates | 0 | 7 |
| Staff Judge Advocates | 2 | 9 |
| <u>Totals</u> | <u>8</u> | <u>41</u> |

Comments paralleled those made by the Generals. One writer stated, "There are advantages and disadvantages. I recognize the right of the accused to know and understand the rules, a violation of which is an offense. To this extent, a more specific article would be advisable. I also recognize, however, that soldiers will at times be guilty of conduct which even the most fertile mind could not forecast, and there is necessity for a general article which will punish such offenses. We have it in the Federal Statutes relating to offenses committed by civilians. I think we need such a general article for the control of military personnel."

On the other hand, one Judge Advocate would rewrite the phrase "or conduct of a nature to bring discredit upon the military service." Another would clarify the phrase "crimes and offenses not capital." A third would make AW 96 more specific in part, yet also keep its general coverage. A fourth would be more definite as to maximum and minimum punishments.

(See also answers to Question VIII-1.)

ENLISTED MEN:

Yes 22. No 12.

Comments indicated some feeling that AW 96 should be made more specific, and yet should retain its broad "catch-all" provisions too. It was particularly felt by one writer that offenses such as the wrongful taking and possession of Government vehicles and other property, the use of fraudulent passes and furloughs, simple trespasses, assault, failure to obey acting non-commissioned officers, offenses by garrison prisoners and civilian employees should be made the subject of specific form specifications in the Manual for Courts-Martial under AW 96.

4. In cases of trial for non-military offenses committed in foreign countries, what substantive law should govern?

GENERALS:

United States Law 43. Foreign Law 2.

Comments: The Generals were overwhelmingly of the view that American law should govern. But a number qualified their answers to indicate that in some circumstances where offenses are against local foreigners it would perhaps be wise not to extend sentences beyond that called for by the local law. One example given was statutory rape in the United Kingdom, in which courts-martial punishment was usually much more severe than would have been imposed under local law.

JUDGE ADVOCATES:

| | <u>U.S.</u> | <u>Foreign</u> |
|---------------------------------|-------------|----------------|
| Combat Judge Advocates | 9 | 2 |
| Regular Army Judge Advocates | 14 | 1 |
| Board of Review Judge Advocates | 9 | 0 |
| Staff Judge Advocates | 12 | 1 |
| <u>Totals</u> | <u>44</u> | <u>4</u> |

Besides paralleling the Generals' viewpoints, some of the Judge Advocates pointed out the practical difficulties in ascertaining the foreign laws, i.e. in Persia, etc. One writer stated, "I am not prepared to accept the French standard of morality nor that of any other country just because of the circumstance that our Army is operating in that country." A second writer stated that if the offense were malum per se, follow the U.S. law, but if malum prohibitum, then follow the foreign law. A third writer would use foreign law "only to the extent and in the sense that violation of law of a host state by foreign military personnel stationed therein is a discredit to the military service of such foreign state whose troops are present by invitation or consent in the territory of its neighbor."

ENLISTED MEN:

Replies of the Enlisted Men indicated a general confusion as to the meaning of this question. The majority felt that "military law" should apply, but were not clear in their understand of what "military law" meant.

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WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE

REGIONAL HEARINGS

- - -

SUMMARY OF TESTIMONY

FOREWORD

In addition to a Washington hearing, the War Department Advisory Committee on Military Justice held regional hearings in Atlanta, Baltimore, Chicago, Denver, New York, Philadelphia, Raleigh, San Francisco, Seattle, and St. Louis. These regional hearings were conducted by individual committee members, and were attended by 244 witnesses. Their 2,519 pages of testimony is summarized herein.

The names of the individual witnesses precede the summaries of their testimony, together with brief statements of their background. The figures in parenthesis refer to the transcript pages of the individual hearings where their complete testimony may be found.

REGIONAL HEARINGS

| <u>PLACE OF HEARING</u> | <u>DATE</u> | <u>CONDUCTED BY</u> |
|-------------------------|---------------------------|--|
| Atlanta | 10, 11, 12 September 1946 | William T. Joyner |
| Baltimore | 18, 19 September 1946 | Judge Morris A. Soper |
| Chicago | 9, 10 September 1946 | Floyd E. Thompson Jacob M. Lashly Walter P. Armstrong |
| Denver | 9 September 1946 | Judge Alexander Holtzoff |
| New York | 9, 10, 11 September 1946 | Arthur T. Vanderbilt Frederick E. Crane Joseph W. Henderson Judge Morris A. Soper |
| Philadelphia | 24 September 1946 | Joseph W. Henderson |
| Raleigh | 3, 4, 5 September 1946 | William T. Joyner |
| San Francisco | 13, 16 September 1946 | Judge Alexander Holtzoff |
| Seattle | 19 September 1946 | Judge Alexander Holtzoff |
| St. Louis | 3, 4 October 1946 | Jacob M. Lashly Walter P. Armstrong |

INDEX

Places of hearing i
Witnesses at individual hearings ... i
Witnesses at all hearings vi

| <u>No. of</u> <u>Witnesses</u> | <u>PLACES OF HEARING</u> | <u>Digest</u> <u>Page</u> |
|-----------------------------------|----------------------------|------------------------------|
| 18 | Atlanta, Georgia | 1 |
| 27 | Baltimore, Maryland | 11 |
| 26 | Chicago, Illinois | 23 |
| 19 | Denver, Colorado | 41 |
| 42 | New York, New York | 53 |
| 19 | Philadelphia, Pennsylvania | 73 |
| 18 | Raleigh, North Carolina | 85 |
| 32 | San Francisco, California | 93 |
| 14 | Seattle, Washington | 109 |
| 29 | St. Louis, Missouri | 117 |

WITNESSES AT INDIVIDUAL HEARINGS

| <u>ATLANTA</u> | <u>Page</u> | <u>ATLANTA</u> | <u>Page</u> |
|--------------------------------|-------------|---------------------------|-------------|
| Bowden, Henry L. | 1 | Lindsey, C. H. | 7 |
| Conley, James H. | 3 | Morrison, Frank | 2 |
| Crespi, Joseph S. | 5 | Patterson, Harold P. | 4 |
| Dorsey, Sam | 1 | Smith, Eugene F. | 7 |
| Fendley, Mrs. Susie S. | 2 | Tuttle, Elbert F. | 3 |
| Geffen, Louis | 4 | Tysinger, Harvey H. | 7 |
| Goldstein, Elliot | 6 | | |
| Goza, Claude | 4 | | |
| Gregory, Claesburne | 2 | <u>BALTIMORE</u> | |
| Haas, Joseph F. | 5 | Allen, Franklin G. | 14 |
| Hendricks, Walter C., Jr. | 6 | Baxter, William | 18 |
| Ken, E. F., Jr. | 5 | | |

INDEX

PHILADELPHIA

Page

| | |
|----------------------------|----|
| Heffner, R. Merle | 82 |
| Hepburn, Earle | 76 |
| Jason, Mrs. Mamie J. | 80 |
| Lindsay, Robert J. | 81 |
| McDowell, Sherwin T. | 78 |
| McNally, John M., Jr. | 79 |
| Moncure, William A. | 73 |
| Mitzberg, William N. | 81 |
| Schweitzer, Henry | 81 |
| Shell, Irving R. | 78 |
| Shorter, Charles A. | 80 |

ITALICH

| | |
|-------------------------------|----|
| Bailey, James H. Pou | 87 |
| Beddingfield, Charles A. | 88 |
| Chaney, J. A. | 89 |
| Cheshire, Godfrey | 86 |
| Claridge, Frederick H. | 89 |
| Daniels, Josephus | 86 |
| Davis, Robert L. | 89 |
| Ellisberg, Bernard | 89 |
| Fitts, W. T., Jr. | 90 |
| Hatcher, H. J. | 91 |
| Hilliard, William | 89 |
| Lyon, Terry A. | 90 |
| Manning, John M. | 85 |
| McDade, Thomas | 89 |
| Pickens, Wiley M. | 88 |
| Follock, Robert F. Hoke | 87 |
| Furrington, A. L., Jr. | 86 |
| Wheeler, C. C. | 89 |

SAN FRANCISCO

Page

| | |
|------------------------------|-----|
| Alexander, Don | 93 |
| Bacigalupi, Tadini | 93 |
| Blaine, Jack L. | 105 |
| Blanckenburg, William L. ... | 99 |
| Bumgarten, Frank J. | 107 |
| Burns, Lester | 94 |
| Crittendon, Howard B. | 101 |
| Curtright, C. K. | 106 |
| DeMartini, James S. | 96 |
| Eaton, Richard B. | 100 |
| Foley, Thomas Lester | 102 |
| Genser, Joseph | 95 |
| Holmes, Paul W. | 104 |
| Howland, Wallace | 93 |
| Jackson, George J. | 101 |
| Joseph, Leonard | 106 |
| Kahn, Robert | 102 |
| Karmel, Burriss | 97 |
| Keller, Julius M. | 95 |
| Kennedy, Thomas Hart | 105 |
| Lobree, Donald | 98 |
| Moore, Douglas M. | 96 |
| Ringole, Gus C. | 98 |
| Rogers, Thomas Pierce | 96 |
| Scott, John Merrill | 105 |
| Scott, Robert M. | 108 |
| Schofield, Allison E. | 100 |
| Spiegel, Ernest I. | 97 |
| Stoutenburgh, Eliot | 98 |
| Stumpf, Felix F. | 103 |
| Symonds, Myer C. | 104 |
| Twohy, Daniel | 103 |

INDEX

WITNESSES AT ALL HEARINGS

| | <u>Page</u> | | <u>Page</u> |
|------------------------------|-------------|-----------------------------|-------------|
| Abrams, Harold J. | 124 | Conley, James H. | 3 |
| Ackerman, Paxton H. | 128 | Conway, Howard H. | 16 |
| Addleston, Albert A. | 82 | Cosper, Roy B. | 126 |
| Alexander, Don | 93 | Crespi, Joseph S. | 5 |
| Allen, Franklin G. | 14 | Crittenden, Howard B. | 101 |
| Armbruster, Norman M. | 129 | Curtright, C. W. | 106 |
| Askow, Irwin J. | 23 | | |
| Bacigalupi, Tadini | 93 | Daniels, Josephus | 86 |
| Baer, Charles S. | 49 | Davis, Herbert H. | 89 |
| Baer, Walter H. | 37 | Davis, Robert L. | 115 |
| Baetjch, Emanuel | 71 | DeMartini, James S. | 96 |
| Bailey, James H. | 87 | Dietrich, Clayton A. | 17 |
| Barden, John P. | 29 | Dorsey, Sam | 1 |
| Barkman, Francis E. | 69 | Douglass, Malcolm C. | 70 |
| Barnard, Morton John | 27 | Doyle, William E. | 44 |
| Barry, Hamlet J., Jr. | 48 | Duckett, O. Bowie | 21 |
| Baxter, William | 18 | Dunklee, Edward V. | 41 |
| Becker, George | 54 | Dunlap, Foster A. | 77 |
| Beerman, Isadore | 60 | | |
| Beddingfield, Charles A. .. | 83 | Eaton, Richard B. | 100 |
| Bell, Clarence D. | 79 | Eley, Lommen D. | 25 |
| Bergmann, Roy W. | 119 | Ellisberg, Bernard | 89 |
| Blaine, Jack L. | 105 | Espey, H. Clay | 12 |
| Blanckenburg, William L. ... | 99 | Evans, Robert D. | 125 |
| Bland, Bertram C. | 66 | Evers, Irving C. | 59 |
| Bowman, Henry L. | 1 | | |
| Erahms, Michael | 33 | Faris, James W. | 119 |
| Bravin, Hyman | 56 | Farmer, Arthur E. | 68 |
| Breitman, George | 65 | Fassler, Arnold H. | 67 |
| Bumgarten, Frank J. | 107 | Feickert, Carl W. | 130 |
| Burns, John A. | 111 | Fendley, Mrs. Susie S. | 2 |
| Burns, Lester | 94 | Fendt, Charles G. | 37 |
| | | Ferrer, Robert N. | 80 |
| Case, T. Jackson | 131 | Fillman, Henry I. | 57 |
| Castleman, Ely | 15 | Fisher, Harvey | 129 |
| Cawse, Alfred J., Jr. | 59 | Fitts, W. T., Jr. | 90 |
| Chanana, Alexander | 62 | Fitzgerald, David B. | 75 |
| Chancy, J. A. | 89 | Foley, Thomas Lester | 102 |
| Charlton, Robert D. | 45 | Frame, T. E. | 73 |
| Cheshire, Godfrey | 86 | Frampton, Sydney D. | 120 |
| Chisholm, Theodore A. | 48 | Freedman, Leo | 67 |
| Claridge, Frederick H. | 89 | Friedman, Daniel M. | 83 |
| Cohen, Edward | 74 | | |
| Cohen, William R. | 72 | Gaines, Donald L. | 114 |
| Colgan, C. Warren | 20 | Gallagher, David | 36 |

INDEX

| | <u>Page</u> | | | <u>Page</u> |
|-------------------------------|-------------|---|----------------------------|-------------|
| Gastrich, Arthur | 126 | ' | Lassers, Willard J. | 25 |
| Gates, Richard A. | 44 | ' | Lefkowitz, Eugene E. | 62 |
| Gauthier, George A. | 35 | ' | Lévy, Jack | 38 |
| Geffen, Louis | 4 | ' | Lewis, Joseph B. | 124 |
| Genser, Joseph | 95 | ' | Lieberman, Julian | 58 |
| Goldstein, Elliot | 6 | ' | Limbaugh, Rush | 123 |
| Goldstein, Hyman E. | 64 | ' | Lindsay, Robert J. | 81 |
| Goodloe, Allan McDowell | 127 | ' | Lindsey, C. H. | 7 |
| Goodstein, Irving D. | 58 | ' | Lobree, Donald | 98 |
| Goza, Claude | 4 | ' | Lowry, Frank | 124 |
| Grant, David M. | 128 | ' | Luke, J. W. | 23 |
| Green, William A. | 63 | ' | Lyon, Terry A. | 90 |
| Gregory, Claeburne | 2 | ' | MacChesney, William Nathan | 35 |
| Gutman, Arthur J. | 16 | ' | Maher, Dr. Thomas F. | 11 |
| Haas, Joseph F. | 5 | ' | Marcus, Marshall S. | 70 |
| Hall, Frank | 115 | ' | Mathieu, George E. | 114 |
| Hallett, Albert E. | 30 | ' | Manning, John M. | 85 |
| Hardy, Claire W. | 38 | ' | McClellan, Irvin R. | 33 |
| Hatcher, H. J. | 91 | ' | McDade, Thomas | 89 |
| Heffner, R. Merle | 82 | ' | McDonald, George William. | 128 |
| Hendricks, Walter C., Jr. ... | 6 | ' | McDowell, Sherwin T. | 78 |
| Hepburn, Earle | 76 | ' | McGee, Robert W. | 35 |
| Herald, Charles W., Jr. | 118 | ' | McKendrick, Charles Damer | 20 |
| Hertz, Fred J. | 34 | ' | McKeown, Maurice J. | 57 |
| Hilliard, William | 89 | ' | McNally, John M., Jr. ... | 79 |
| Hoffman, Leo L. | 67 | ' | McNally, Raymond F., Jr.. | 117 |
| Holmes, Paul W. | 104 | ' | Miles, Clarence W. | 14 |
| Howard, Joseph H. | 19 | ' | Miller, Edward T. | 11 |
| Howland, Wallace | 93 | ' | Miller, Victor A. | 47 |
| Jackson, George J. | 101 | ' | Moncuré, William A. | 73 |
| Jacobson, Daniel | 58 | ' | Moore, Douglas M. | 96 |
| Jason, Mrs. Mamie J. | 80 | ' | Morris, Nelson | 39 |
| Jester, Thelma V. | 15 | ' | Morrison, Frank | 2 |
| Joseph, Leonard | 106 | ' | Newcomb, Herbert J. | 50 |
| Kahn, Robert | 102 | ' | Nitzberg, William N. | 81 |
| Kane, Mrs. Edith | 20 | ' | Noto, Mario T. | 53 |
| Karmel, Burriss | 97 | ' | O'Brien, John J. | 113 |
| Katzenstein, Alvin | 19 | ' | O'Brien, W. F. | 46 |
| Keller, Julius M. | 95 | ' | Oliver, Jack L. | 120 |
| Ken, E. F., Jr. | 5 | ' | Paddock, C. A. | 24 |
| Kennedy, Thomas Hart | 105 | ' | Palmer, James H. | 112 |
| King, William H., Jr. | 37 | ' | Patterson, Harold P. | 4 |
| Kingsley, Robert T. | 51 | ' | Pause, Frank G. | 32 |
| Kirkwood, Joseph | 131 | ' | Pelz, Robert L. | 55 |
| Kirschenbaum, Saul | 59 | ' | | |

INDEX

| | <u>Page</u> | | | <u>Page</u> |
|-----------------------------|-------------|--|-------------------------------|-------------|
| Phelps, Horance F. | 47 | | Stumpf, Felix F. | 103 |
| Pickens, Wiley M. | 88 | | Symonds, Myer C. | 104 |
| Pollock, Robert F. Hoke ... | 87 | | Thorgrinson, Richard | 113 |
| Post, Edward Tanner | 70 | | Tuttle, Elbert P. | 3 |
| Powell, William D. | 44 | | Twohy, Daniel | 103 |
| Pressman, Hyman A. | 15 | | Tysinger, Harvey H. | 7 |
| Price, Hosea, Jr. | 17 | | Unger, Edward F. | 130 |
| Purnell, William C. | 13 | | Vance, J. Duane | 111 |
| Purrington, A. L., Jr. | 86 | | Wallstein, Leon | 61 |
| Quittner, Joseph | 54 | | Walters, Arthur J. | 127 |
| Revelle, George | 110 | | Watson, John A. | 37 |
| Resnicoff, Samuel | 68 | | Westfield, Richard S. | 110 |
| Richardson, Milton J. | 65 | | Wheeler, C. C. | 89 |
| Rignall, W. Baldwin | 21 | | Wiener, Frederick Bernays ... | 12 |
| Ringole, Gus C. | 98 | | Wiese, Edward L. | 117 |
| Rodman, Leory E. | 64 | | Wilkins, William J. | 109 |
| Rogers, Thomas Pierce | 96 | | Witte, William J. | 14 |
| Rosenberg, Herbert E. | 71 | | Works, Charles E. | 43 |
| Rosenblatt, Joseph K. | 11 | | Wright, Eugene A. | 109 |
| Roth, Benjamin | 126 | | Wykell, Leo | 31 |
| Rothgerber, Ira C. | 44 | | Young, Thomas G., Jr. | 11 |
| Rothschild, Paul W. | 129 | | Zalk, Joseph | 53 |
| Ruckert, George W. | 66 | | | |
| Ruzicka, Edward | 118 | | | |
| Sabin, James M. | 51 | | | |
| Samsel, Harold J. | 55 | | | |
| Sandberg, Milton | 66 | | | |
| Schmandt, Henry | 125 | | | |
| Schofield, Allison E. | 100 | | | |
| Schweitzer, Henry | 81 | | | |
| Scott, John Merrill | 105 | | | |
| Scott, Robert M. | 108 | | | |
| Seckler, LeRoy | 42 | | | |
| Sereyski, A. W. | 71 | | | |
| Seydel, Frank | 49 | | | |
| Shell, Irving R. | 78 | | | |
| Sherman, Abe | 18 | | | |
| Shorter, Charles A. | 80 | | | |
| Shorts, Bruce | 112 | | | |
| Silverman, Selig | 72 | | | |
| Simborg, Hugh M. | 33 | | | |
| Skeen, John H. | 18 | | | |
| Smith, Eugene F. | 7 | | | |
| Sobernheim, Rudolph | 65 | | | |
| Spiegel, Ernest I. | 97 | | | |
| Sterling, Samuel H. | 41 | | | |
| Stewart, Charles L., Jr. .. | 38 | | | |
| Stoutenburgh, Eliot | 98 | | | |

ATLANTA HEARINGMr. Joyner10,11,12 Sept 46

BOWDEN, Henry L., Atlanta; lawyer; QM Army officer for five years; court-martial experience. (p.4)

Over-all system is good but can be improved. a. A single trial should be limited to charges growing out of one act. b. Charges should be signed by lower-ranking officers close to the facts. Too much pressure results when high-ranking officers sign charge sheets. c. High-ranking commanding officers should not punish court members because of actions taken by their courts. d. Appointing authorities should not be permitted to reprimand court members. e. Accused should have two peremptory challenges to the prosecution's one, because the latter has had some voice in picking the court. f. While I know of no commanding officer's attempt to compel a court to return a finding of guilty, there have been instances of influence to secure a severe sentence. Courts should be impressed with their duty to adjudge proper sentences rather than leaving the appointing authority the duty to reduce severe ones. g. Accused should not be presumed to be guilty until proven innocent. h. General courts should have a uniform number of members--seven regulars plus one spare. i. The law member should not vote on the question of guilt or innocence. j. On evidence admissibility questions, the court should retire, leaving the law member to pass on the question without their presence. k. Law members should be JAG officers. There should be a jurisdictional requirement that they be trained lawyers. l. Defense counsel should have rank and experience equal to that of trial judge advocates. m. When the challenge of a court member has been denied, that member should take a special oath of qualification (form of oath quoted). n. Accused should receive two copies of his record of trial. o. Present prejudice against civilian counsel should be discouraged. p. Enlisted men should sit on courts if they are carefully selected. But they should not try an accused who is superior to them in rank.

DORSEY, Sam, Atlanta lawyer; EM and JAG officer in war. (p.28)

As an enlisted man, I was dissatisfied by the separation between officers and enlisted men. During wartime, the division judge advocate staff had too much to do. While the court-martial system is good, there were weaknesses. a. There is a discrepancy between court-martial treatment of enlisted men and officers. Instead of being dealt with more severely, officers are treated more leniently. There should be other officer punishment which would not carry dismissal, i.e. reduce him in rank, or return him to the status of an enlisted man. b. AW 104 powers should be increased to permit further disciplinary measures against officers. c. Defense counsel should be more qualified. d. More JA officers are required. e. During wartime especially, enlisted men should serve on courts. This would be helpful both to the courts and to morale. f. Present review system is satisfactory.

ATLANTA

MORRISON, Frank, Atlanta lawyer; EM and JAG officer in war. (p.46)

The system is good. I would prefer to be tried before a court-martial than before a civilian court. The public does not fully understand that courts-martial merely make recommendations to the appointing authority. My experience was that the appointing authorities cut down severe sentences. The JAGD should have more representation on summary and special courts. The American Bar Association is to be criticised for not having seen to it that lawyers were placed where they could be of best service in the Army. Law members should be JA officers, and this should be jurisdictional. Special courts should also have law members. Defense counsel should be lawyers. Trials would be expedited if trained men served in these various key capacities. Many courts imposed maximum sentences, expecting that the reviewing authorities would cut them down. Enlisted men should not serve on courts. This would disrupt the system, and would hurt morale and discipline.

GREGORY, Claeburne, EM and JA officer experience. (p.55)

The system is generally good. However, defense counsel should be strengthened. These men should either be lawyers or trained JA officers. There should not be the present disparity of sentences between officers and enlisted men. It is probably due to the reluctance of courts to dismiss officers. I would recommend that provision be made to reduce officers in rank, and thereafter to permit them to rehabilitate themselves. Command control over courts should be reduced. Courts should exercise their own discretion in determining proper sentences. Special court trial record-digests should be more complete. In the Pacific, records went to the confirming authority before they were sent to the Theater Judge Advocate office.

FENDLEY, Mrs. Susie S., Atlanta, mother of son who went AWOL while returning from hospital to the front lines because he "couldn't take it any longer." (p.60)

My son's AWOL was for 5 weeks. He was sentenced to 20 years; served 14 months and 21 days; is now out of the Army. Some men were sentenced severely. Others received light sentences. Why this disparity? During my son's first four months in prison, he did not get enough to eat to sustain him in the extensive physical program given prisoners. He had to be sent to the hospital, where he spent two months and was given 3000 units of blood plasma. After release from the hospital, he spent the balance of his time on permanent light duty. But they nearly killed him during those first four months.

CONLEY, James H., CCC officer and Army war officer; court-martial experience. (p.68)

Officers had inadequate court-martial training. Court members should be better trained. Certain prejudices developed among court members, to cause problems. There would be about three members who would carry on, and these would be among the worst available. Justice from the Army could not be assured. It is doubtful whether enlisted men should sit on courts, because this would merely mean adding more untrained men to their personnel. Courts should not attempt to impose maximum sentences. Should enlisted men serve on courts, it is believed that sentences would be more severe, particularly where the offenders had left greater burdens on the other enlisted men. The JAGD should be expanded, even in peacetime, to have lawyers to act as trial judge advocates, defense counsel and law members.

TUTTLE, Elbert P., Atlanta lawyer; colonel during war; field artillery commander; views problems from command angle. Was an enlisted man during first war. (p.73)

Military justice necessarily must be related to the general military system. The Army's main wartime function is to carry on the combat. Trained lawyers should sit as law members on every general court. If available, trained lawyers should be used as trial judge advocates and law members. This should not be jurisdictional because sometimes such men are unavailable. More trained lawyers should work as Army legal specialists.

In my three battalions, not a single enlisted man was sent before a general court.

Courts should fix the sentence they deem to be proper, rather than imposing too severe sentences and awaiting their reduction by the reviewing authorities. Proper sentences would engender more confidence in the system.

AW 104 powers are good, but should be changed to increase the rank of officers who may be punished thereunder, and should have substantially increased powers of punishment. Review thereof by higher authority is unnecessary.

Enlisted men sitting on courts would not improve those courts, and is not favored. Enlisted men with qualifications can become officers.

No command influence should be exercised on courts, although I am not prepared to say that commanding officers should be denied the right to reprimand their courts.

ATLANTA

PATTERSON, Harold P., Atlanta lawyer; JAG officer during war. (p.88)

AW 104 disciplinary powers should be extended to cover higher-ranking officers, including colonels, with such discipline to be imposed by Brigadier Generals or higher. AW 104 should also permit enlisted men to pay forfeitures, after approval by a higher officer, i.e. to the extent of summary court forfeitures.

Officers exercising general court jurisdiction should confer with their staff judge advocates on all cases. Defense counsel should be strengthened. They should be lawyers or JAG officers. But although defense was frequently weak, I doubt if any innocent men were convicted. There should be a jurisdictional requirement that law members be JAGs on general courts. The JAGD should be expanded.

Enlisted men should be put on courts, but should not come from the accused's own organization. They should be used to the extent of one-third of a court's membership at the request of an accused.

The JAG law member should have the right to summarize a case at the end of a trial, but should not vote on either the findings or the sentence. He should pass on evidence admissibility out of the presence of the other court members. The JAGD should not be the sole reviewing authority, but should have the right to further reduce a sentence upon review, after review by the appointing authority. To prevent appeals from being perfunctory, defense should have the affirmative right to appeal. It should be made plain, and clearly posted, that military court sessions are open to the public.

GEFFEN, Louis, Atlanta lawyer; JA officer during war. (p.108)

Courts-martial cases were handled too speedily because of competition between some posts. This frequently hurt the accused. Better quality trial judge advocates and defense counsel should be obtained. I have never seen a JAC defense counsel. Investigating officers should be better qualified, and investigations should be more adequate. Qualified enlisted men investigators would be advantageous. Disparity between sentences should be wiped out. That impaired morale. This might be done by education and better personnel on the courts. High commanders should follow the advice of their staff judge advocates. Enlisted men should serve on courts if they are properly selected.

GOZA, Claude, Atlanta lawyer; Intelligence Corps major during war; some court-martial experience. (p.120)

Defense counsel should be better qualified. They should be JA lawyers from the Theater judge advocate staff on detached service removed from immediate command control. They should have more time to prepare their defense.

Sentences were too severe. Rape punishment should be within the court's discretion. Courts should merely determine the question of guilt, leaving sentences to a separate special court of experts. This could consist of one JA officer, a second officer with command experience, and a third officer from a headquarters staff.

Enlisted men should serve on courts if the courts did not determine sentences. Otherwise, it would be to an accused's disadvantage to have enlisted men thereon.

KEN, E. F., Jr.; an auditor; EM and Air Corps officer during war; court-martial experience. (p.131)

Defense counsel should be strengthened, and should be available during investigation. The trial judge advocate should have no voice in selecting defense counsel, and should be removed from local command jurisdiction. Command influence over courts, particularly re sentence severity, should be terminated. Courts should determine fair rather than maximum sentences. Court presidents should not be selected by virtue of seniority only. Rather, their qualifications should be determined. Accused should have a specific right to appeal, with oral argument or by brief. This right should be specified in the Manual for Courts-Martial. The extension of AW 104 powers should be studied. It should be provided that an accused's pretrial statements could not be used against him during trial.

HAAS, Joseph F., lawyer; Army officer with court-martial experience. (p.145)

I know of no innocent men who were convicted by courts-martial, although some guilty men went free for technical reasons. Too often, over-all discipline is an influencing factor in courts-martial.

I would substitute inexperienced courts and counsel with circuit courts-martial teams which would rotate. Each would have an administrative officer who would act as observer and would report to the senior commander. It would also be an advantage for this man to be a psychologist or criminologist--i.e. a traveling expert. The disadvantage of a traveling court would be that it would cause some delay, but the advantage of justice and sentence uniformity would outweigh this disadvantage.

CRESPI, Joseph S., Atlanta lawyer; EM and noncom during war; worked in JA section. (p.159)

Investigating officers should be selected more carefully. They did not act impartially. Punishment was severe, and was dictated by higher command. Command influence was improper. Defense counsel seldom were lawyers, although lawyers were available, and could have

ATLANTA

been secured from the ranks. In my outfit, it was the practice to consider absence of over 30 days to be desertion. So an absentee of 28 days would get 3 months for AWOL, but an absentee for more than 30 days might (and did in one instance) receive 20 years. The closer the court was to the appointing authority, the more severe its sentence. Officers were seldom punished. Generally, JAG officers were good. But trial judge advocates, defense counsel and courts members were inexperienced. Available lawyers should have been utilized. The JAG should be expanded. Sometimes punishments other than confinement were so carried out as to be injurious to morale. Enlisted men should be better advised of their rights. AW 121 was never read to them.

GOLDSTEIN, Elliot, Atlanta lawyer; FA officer in war, with court-martial experience. (p.181)

Officer punishment was inadequate, principally due to the inflexibility of AW 95, with substitution of lesser AW 96 offenses therefor. AW 95 should be amended, to permit punishment as a court-martial may direct, or reduction in rank. There was improper command control. Special courts should be appointed by battalion officers, with membership from outside of command. Courts should determine fair sentences on their own volition. Appointing authorities should not be the reviewing authorities. Rather, the latter function should be placed one echelon higher in the chain of command. Nonmilitary offenses should be tried by civilian authority or special military courts--by civilian courts in the U.S. and by the special military courts when overseas. Staff judge advocates should be removed from the direct chain of command, and should be placed on the Corps special staff rather than at the Divisional level. The present Corps JA should be moved to Army, the Army to Group, etc.

HENDRICKS, Walter C., Jr., Atlanta lawyer; infantry officer during war with court-martial experience including being a defense counsel in the Yamashita case. (p.190)

The system is generally good. Enlisted men and warrant officers should serve on courts, and should also be permitted to act as investigating officers. Warrant officers should be able to act as trial judge advocates and defense counsel. The prosecution and the defense should be legally trained. Sometimes, appointing authorities have too much command influence over their courts, with resultant bad effect. Commanding officers can almost always influence courts if they desire, by promotions, assignments and efficiency ratings.

The JAGD should have more authority, and should exercise more supervision over trials. The Department should be expanded and strengthened.

Review should be had of cases wherein the dishonorable discharge has been suspended. Reviewing authorities and the JAGD should have power to reduce sentences. This would aid in obtaining uniformity.

AW 104 power should be enlarged over officers, to include punishment for full colonels, and to increase maximum punishments, i.e. would add fines payable over several months. But company commanders should not be permitted to fine enlisted men.

TYSINGER, Harvey H., Federal attorney in Georgia; no military experience, but handled habeas corpus cases for U.S. (p.203)

Courts-martial records should be more carefully prepared, and should be clearer. Trial judge advocates, defense counsel and law members should be more competent. The qualifications and experience of each of these officers should appear clearly on the court record. This is important when such cases are being examined by civilian courts on habeas corpus proceedings. They should be lawyers with trial experience. The records should also clearly show when counsel are changed during trial, with explanation of the reasons.

LINDSEY, C.H., 21 years old; Army experience as EM and noncommissioned officer. (p.210)

Pretrial stockade confinement often ran from 30 to 90 days, with 30 days being the average. That was improper. (Note that they were not given hazardous duties.) Trial delays were due to insufficient numbers of investigating officers and courts. Investigations were usually inadequate and often too scant. Defense counsel should be more competent and more aggressive. Enlisted men should serve on courts if accused desires, up to a certain percentage of the membership. Prisoners were more interested in the quality of defense counsel than in anything else.

SMITH, Eugene F., Regular Army JA officer, present throughout the entire hearing. (p.232)

Compulsory attendance of lay witnesses before investigating officers should be provided. The AWs are already sufficiently clear re what civilians are subject to court-martial jurisdiction. Commanding officers should not be deprived of the right to reprimand a court or disagree with acquittals. The dangers of abuse are more than balanced by the necessity of occasionally instructing courts. I have never observed undue influence.

Courts-martial must be primarily considered as a part of the military disciplinary system, particularly in time of war. The statute of limitation for AWOL (2 years) in time of war should be removed. If this were to be done, a number of current desertion cases would have been tried as AWOLs. During wartime, there was too little military justice instruction for officers. There was also a tendency to limit the number of JA officers both in war and peacetime. During the war, military justice administration was relegated to too little importance, and was more of a rear echelon job. General courts should be

ATLANTA

accompanied by better instruction pamphlets. AW 121 should be read to the men.

AW 104 might be extended to field grade officers. Pay forfeiture thereunder might be applied in peace as well as in wartime. All officers exercising general court-martial jurisdiction should have AW 104 power over officers.

Officer punishments might be broadened, although I would not have a system of demotion to the ranks. A dismissed officer is still subject to the draft. Washington authorities have been too lenient to officers. Officer cases might be taken from the jurisdiction of the Secretary of War and the President, and left to the Army except where death sentences are involved.

Defense counsel should perhaps be available to an accused at his investigation. Either the AWs or the Manual for Courts-Martial should provide that no statement made by accused at his pretrial investigation be introduced against him at time of trial. There should be a means to take depositions before a case is referred to trial. As it is now, witnesses have too much opportunity to scatter.

Law members, defense counsel and trial judge advocates should be legally trained on general courts only. Special courts are insufficiently serious. It should be mandatory that the gist of the charged offense be read to the court in each trial, so that the court members would know the necessary proof which was required.

In trials of more than one accused, each should have a peremptory challenge. No clemency evidence should be introduced until after the determination of an accused's guilt has been made. Counsel arguments in general court cases should be recorded. An accused should be triable for two or more nonrelated offenses at the same time. To protect against sentence disparity, a permanent JAGD clemency board should sit at all times. This board should be independent of the present system of review. It is not feasible to limit courts to seven members, or to provide for uniform courts. It would be unwise to deprive the law member of his vote. A special oath for a challenged court member is not favored. Present provisions for open-court trials are adequate. Neither investigations nor trials should be put in a straight-jacket in so far as time of trial is concerned.

Rotating and traveling courts might be good in theory, but would be impracticable.

There is no reason to change the present prescribed penalty for rape. Military courts should not be confined to the trial of military offenses. This would be particularly inappropriate during time of war. If personnel were available, a staff judge advocate at regimental level would be desirable in wartime. However, all major

ATLANTA

posts (i.e. with 3000 or more troops) should have JA officers. During the last war, too few men were commissioned as JA officers, and those commissions which were issued were too low. No JA officer should be less than a captain.

ATLANTA

BALTIMORE HEARING

Judge Soper
18, 19 Sept 46

18 Sept 46:

ROSENBLATT, Joseph K., Jr.; Engineering officer during war with court-martial experience. (p.2)

The court-martial system was generally fair, but there was need for more equality of punishment. The average enlisted man lacked knowledge of the system, as well as his rights. There was inexperience on the part of court personnel, such as trial judge advocates, defense counsel, etc.

MILLER, Edward T., Infantry officer with court-martial experience. (From letter written to committee). (p.5)

There was too much influence and interference from command. Court members should come from outside commands. Great sentence disparity was evident. The remedy would be to use a trained JA officer on general and special courts as a "judge." Likewise, each unit of sufficient size should have assigned to it a trained defense counsel, with his primary duty to defend cases. Courts should be able to consider accused's past record of all convictions after the finding of guilt but before the sentence.

YOUNG, Thomas G., Jr., Baltimore lawyer; IG officer during war. (p.9)

While the system is good, difficulties arose in its administration. There was unfortunate command domination. While commanding officers need a certain latitude, and while administration of military justice must necessarily be more arbitrary and harsh than civilian justice, yet military justice must be tempered with sufficient abstract justice so as not to offend reasonable men. Otherwise, it will be necessary to curb command influence altogether. This in turn would require a separate judicial department, which would prove unworkable (Russia had to discard such a system).

MAHER, Dr. Thomas F., Registrar Georgetown University; Officer instructor during war, with court-martial experience. (p.13)

Defense counsel as well as court members were inadequate. The Army should have taken advantage of its wealth of lawyers in the service. Enlisted men should not be used on courts. Defense counsel need more time to prepare their cases, and should be available to accused prior to the pretrial investigation. Too many "hang themselves" before trial. There was certain unfortunate domineering of courts.

BALTIMORE

A separate legal corps of available lawyers should be set up, with full-time duties.

ESPEY, H. Clay, Washington attorney; Air Corps officer with court-martial experience. (p.27)

Army attitude: "We don't need lawyers. Lawyers are a dime a dozen." While the court-martial system is basically sound, there were imperfections. Pressures were brought to bear on defense counsel. Speed of trial impeded careful defenses. There was inherent command domination.

There was frequent impression that an accused was not brought to trial unless he was guilty. Discipline seemed a more important consideration than justice. There were "skin letters."

The handling of courts-martial trials as well as reviews should be independent of command. Law members should report direct to the JAGD or some other independent authority. Competent defense counsel should be a "must."

Residual authority should reside in the War Department to correct injustices--this is to be higher even than present reviewing authorities.

WIENER, Frederick Bernays, lawyer; JA officer during war. (p.44)

Many civilian safeguards must be subordinated in the Army, because an Army's first duty is to win wars. There cannot be a separation of powers such as we know in civilian life. We cannot indulge in the view that all men are created equal. A distinction between discipline and justice should not be made. Rather, there are two problems: the ascertainment of a man's guilt or innocence, and the object and quantum of his punishment.

I have not seen improper command domination. "Skin letters" are usually written by staff judge advocates. This is the only means a general has to criticize inadequate findings and sentences. These letters did not go into officers' 201 files. Since they cannot send a case back for reconsideration, such communications with courts were proper.

The Army should have utilized lawyers more fully. Failure to do so accounted for poor defense counsel, trial judge advocates and law members. All Army branches obtained good lawyers except the JAGD. The JAGD should have been able to get more quality from the 25,000 officer applications from lawyers. Other departments got "cracker-jack" lawyers, not merely inexperienced Law Review men. The JAGD seemed reluctant to commission men, and often made their decisions on the basis of a picture of the applicant. The JAGD seemed reluctant to expand, was adverse to using the small-town lawyer or

government attorneys. The JAGC selection committee did not consist of powerful citizens. The only way to get good men is to have good men do the picking.

The greatest weakness of the system was the unfair discrimination between officers' and enlisted men's punishments for the same offenses. The White House must be particularly blamed for leniency to officers, rather than the Army. The White House constantly reduced officer sentences.

To improve the system's administration, we must give peacetime education in military justice, including refresher courses. Permanent courts such as the Confederate Army should be had in combat. These should be appointed outside the chain of command, but the local commanding officer should retain his right to pass on and approve and reduce sentences. The permanent courts should be drawn from panels of qualified officers. The best material might come from wounded officers who understood combat conditions and had legal or court-martial training and experience. On the other hand, beware of "broken-down" old lawyers. We should have more lawyers to act as law members, and possibly as defense counsel. This might be made a mandatory requirement. Law members should not necessarily act only as judges. They should sit with the court members. But the JA should not be divorced from command.

Commanders should retain their right to decide who is to be tried, and to modify, suspend, remit, etc. sentences. It then becomes unimportant whether or not the actual court is appointed by him. But the entire court set-up should not be removed from the commanding officer. Enlisted men should not sit on courts. They would not improve the courts' quality, and they would be subject to domination. Defense counsel should not be given accused prior to trial. Preliminary investigations should not be jurisdictional. They are now too technical, and too much of an iron-clad requirement.

AW 96 should be amended.

PURNELL, William C., Baltimore lawyer; infantry officer during war with court-martial experience. (p.76)

While the military justice system was sound, there were shortcomings in its administration. While the system must not be entirely divorced from command because discipline is so necessary to the winning of battles, there was some unfortunate command influence. I was personally reprimanded by commanding generals of the highest authority on several occasions. While commanders' powers should remain over offenses of a disciplinary nature, civil-type offenses (including military crimes involving extreme penalties) should be left to courts of a permanent nature which operate out of a different chain of command, with the chief intent to get more experienced court personnel rather than to deprive the commander of his appointive powers.

BALTIMORE

The wide disparity of punishment did much to destroy respect for military justice. It resulted from several causes--the frequent turnover of court personnel and lack of preparation of those charged with court-martial duties. There was a general practice to impose maximum sentences. In my division, there was a lack of qualified legal material among officers. I do not know what the situation may have been in the enlisted men's ranks.

To remedy the administrative problems: Require compulsory military-justice training for officers more than is done at present. Study the proposal to separate the handling of disciplinary offenses of a more serious nature such as our civil law crimes, making the latter triable by a permanent or semi-permanent independent court of trained personnel.

WITTE, William J.,; letter from a wartime chief of staff to above witness; not a lawyer; little court-martial experience. (p.96)

While the present system is basically sound, danger exists because of the possibility of the appointing authority's autocratic influence over his courts. Maximum punishments were too often given to fulfill wishes of commanding officers. Court personnel should possibly be appointed from officers not under the direct jurisdiction and command of the immediate commander. The immediate commander would be responsible only for the reference of a case to trial.

ALLEN, Franklin G., Baltimore attorney; IM and G-1 officer during war, with slight experience with courts-martial. (p.98)

I was in the Army department responsible for obtaining personnel for the courts. It was difficult to hold trials promptly, and to provide the best qualified officers. Prolonged combat conditions interfere. Few competent personnel could be spared because of their necessity elsewhere or because of travel problems. Generally, a accused accepted the appointed defense counsel. It was difficult to get the best qualified defense counsel.

There should be a circuit-riding court to visit divisions and try its pending cases. The trial judge advocate should be the local commander's representative, with prosecution work his primary duty. I saw no instances of command influence or domination, and I have never felt that courts felt bound to convict and to impose unduly severe sentences.

MILES, Clarence W., Baltimore attorney; JA officer during war. (Letter)
(p.105)

There should be standing courts with specially permanent trained personnel. They should be attached to each Army in the field. This should apply to both general and special courts. This would result in uniformity of interpretation of the AWMs, and also in the sentences im-

posed. It would eliminate command influence and the present practice of appointing officers who can best be spared.

PRESSMAN, Hyman A., 2003 Bryant Ave., Baltimore; attorney; EM and non-commissioned officer during war. (p.108)

The Army did not adequately utilize its lawyers in legal duties (contrast the doctors, dentists, etc.). There was too much politics in the JAGD. Influence was necessary to get into the JA school. The key court positions should have been filled by trained lawyers instead of unqualified laymen.

The Manual for Courts-Martial was excellent, but difficult reading for a layman and seldom read. Moreover, it was not generally distributed and was hard to obtain. Too many of the key court personnel were interested only in going through the formalities, convicting, and giving maximum punishments.

The present AJs are not very unfair to enlisted men, and often gave them a better break than officers. But many men are not aware of their AJ rights. The JAGD should be expanded. Everyone connected with military justice should be a JA. There was too much command influence. This would be eliminated by having a JAGD separate from the Army. It should appoint courts and constitute the personnel thereof, as well as do the reviewing. Enlisted men should be allowed to go into the JAGD. The JAGD should have first priority over lawyers in the Army. JAGD personnel should take a three-month court-martial procedural course, and then have preliminary training as apprentices. JAGD personnel should answer only to the JAGD. It should be an AJ offense for anybody to attempt to influence courts or interfere with military justice administration.

CASTLEMAN, Ely, 3711 Forest Park Ave., Baltimore; attorney; EM Army correspondent during war. (p.125)

Courts-martial injustices chiefly resulted from inadequate court personnel. The public should be permitted to attend courts-martial trials. Although this is already permitted, public attendance is seldom. To eliminate command influence, the JAGD should be separate with personnel consisting of trained lawyers responsible to Washington only.

JESTER, Thelma V., Patapsco Rd., N. Linthicum, Md.; stenographer; WAC with overseas experience during war. (p.133)

There should be an independent JAGD with more thoroughly trained personnel. It would be preferable to have the courts travel on circuit, in order that they would be separate from command. The average enlisted man feels that he has little chance before a court-

BALTIMORE

martial, particularly the inferior courts. There is a need for making specialists of legal clerks and typists.

GUTMAN, Arthur J., Alhambra Apts., Baltimore 17; insurance broker; EM and non-commissioned officer during war; LLB degree; applied for a JA commission, but withdrew it when about to be returned from overseas via rotation. (p.141)

In a hastily mobilized Army, you are bound to have inadequacy at the top. The Manual for Courts-Martial is excellent, but it does have bad features. Reviewing authorities and appointing authorities should not be the same. Despite provisions for equal punishment, officers get light AW 104 discipline for the same offense an enlisted man would be given six months by a special court. Inferior courts should try officers, and be able to impose substantial loss of pay and privileges. There is a reluctance to send officers to general courts, because of the requirements for dismissal. It is necessary that there be an intermediate punishment not calling for dismissal.

It would be dangerous to remove the JAGD from command. Discipline would suffer. Investigating officers should be trained. The strongest men should be selected as defense counsel and not as trial judge advocates. Defense counsel, preferably lawyers, should be appointed by the JAGD in Washington. There was too much command influence, with result unduly severe sentences.

There should be a procedure whereby enlisted men could bring officers' offenses to light before the proper authorities without "sticking his neck out." Some officers got away with too much.

CONWAY, Howard H., First National Bank Bldg., Baltimore; lawyer; EM and JAGD officer during war. (p.154)

I used no influence to get into the JAG School. "I simply applied and was accepted." The lawyers at the school were fine and outstanding. Before graduation, we were interviewed in order that our assignments might be determined. Most of us successfully sought assignments near our homes (this was bad). The school was well organized, was completely staffed, and was difficult. The JAGD expanded from 122 to 2200 officers, about one-half of whom came from the enlisted ranks and went through the school. The men who administered military justice in the field were largely with civilian backgrounds. They must bear the brunt of criticism, if any.

Military justice should not be separated from command, because discipline is paramount in the Army. I do not believe in traveling courts. Rather, I would improve the present courts. Finally approved sentences were comparable to civilian punishments, with rehabilitation often being used, and the offender sent back to duty in six or nine months. I never encountered command influence or skin letters. While I

do not approve of the latter, the practice is comparable to a trial judge's criticism of a jury which displeases him. As a staff judge advocate who picked court personnel, I made sure that defense counsel, trial judge advocate and law member were all competent attorneys. The courts consisted of no members less than the grade of major. There was no shortage of men available for court duty. The commanding general invariably approved these courts. I have never seen an innocent man convicted. We never tried men unless their guilt was unquestioned. By court-martial instruction which we gave personnel, we were able to have trained men available for investigations. Further, we made an almost verbatim transcript of the pretrial investigation hearings. We had sufficient clerical help.

There should be an in-between punishment for officers--something between AW 104 and general courts. There is such in-between punishment for enlisted men. The discrimination is unfair. We attempted to counter this by bearing down as strictly as possible against officers.

Special courts could be improved by obtaining better-trained personnel. The military justice technical manual (TM 27-255) was excellent, but never reached us until after the war was over. I do not know whether special court records should be taken down verbatim. Possibly, requiring that the accused should initial his record would be an aid. General and special courts should not be combined. The Army's facilities for detecting crime should be improved. The C.I.D. was not great. AW 92 should be more flexible.

PRICE, Hosea, Jr., 919 N. Washington St., Baltimore; unemployed steel worker; EM during war who was tried by courts-martial five times. (p.182)

This witness testified at length about the five times he was court-martialed for various offenses. While he thought the system might be improved, he had no suggestions as to how this might be done.

DIETRICH, Clayton A., law school student; Air Corps officer with court-martial experience. (p.192)

All officers below the rank of general should be subject to special court jurisdiction, trial to be by senior officers. No MP officers, guard or prison officers should be eligible to sit on courts-martial. There should be a regulation to provide that charge sheets upon which no action is taken be forwarded to the officer exercising general court jurisdiction. There should be definite summary court procedure (suggested outline at pp 199-203). A form sheet should be available for investigation officers like AGO Form 116 for general courts. The Manual for Courts-Martial should be more detailed re case and text authority. Also, the Dig Op JAG 1940 should be available at all headquarters, as well as other authoritative research material.

BALTIMORE

19 Sept 46:

SKEEN, John H., Baltimore lawyer; officer during war with court-martial experience. (p.203)

There was command control. There was a general feeling that a man sent for trial before a general court must be guilty. There was a tendency to impose maximum sentences, and also a tendency not to give too much thought to the extent of sentences because it was anticipated they would be cut down anyway. In my command, each general court (and sometimes specials) was oriented before it sat as a court. While there may have been no intent upon the part of the orientating staff judge advocate to influence the court, this may have been an unfortunate result. Proper orientation of courts is desirable, but must be done conscientiously and sincerely. Maximum sentences were unfortunate. There is no need for skin letters. A commanding officer can always substitute a court of which he disapproves with another newly appointed court. It seemed to me that court decisions with which I was acquainted were proper. It would not be feasible to divorce the courts-martial from command. The present system would be adequate if personnel were trained. While an independent JAGD might be more efficient, I believe that commanding generals should have the responsibility of dispensing justice.

SHERMAN, Abe, Baltimore: EM during war. (p.227)

Defense counsel were inadequate. When an accused got a good defense counsel, his chances were good. But good defense counsel were transferred out. This witness complained at length about personal favoritism to officers such as liquor rations, etc.

BAXTER, William, Baltimore lawyer; Infantry and General Staff Board officer with courts-martial experience. (p.236)

While the system and its administrative procedures are basically sound, military justice suffered from inexperienced personnel. The Army is prejudiced against lawyers, feeling that in general they are tricksters not to be trusted too much; that they are not too interested in abstract justice, and that they are a nuisance. However, this feeling did not seem to influence anyone conducting a court-martial, and was not shared by JA officers who attempted to do their best. The Army, particularly in peacetime, should give more military justice education. While the Manual for Courts-Martial is excellent, it is too technical for the layman. It should be supplemented by a practical book.

A trained lawyer should be available for general courts, perhaps a JA officer. The JAGD should be expanded so that JAs would be available. However, courts should not be separated from command or travel in circuits. A commanding officer who cannot administer military

justice properly should be removed from his command. Military justice is a command function. The accused receive ample protection today. I never experienced command domination re an accused's guilt. But it also true and proper that court members have in mind their commander's policy re sentences. Courts-martial are instruments of justice and should not be stigmatized as administrative tribunals.

KATZENSTEIN, Alvin, 2203 Linden Ave., Baltimore; lawyer in express business; EM and QM officer during war with court-martial experience. (p.253)

This witness introduced a copy of a skin letter in which a commanding officer wrote his court members after their acquittal of an accused, and stated in part: "Had [the acquittal] been warranted by the facts and the applicable law, I would have dismissed the charge without referring it to you for trial in the first instance; therefore, I simply cannot fathom your reasoning other than conclude that you were either activated by some fact not disclosed in the record of trial, or else arbitrarily refused to perform your duty."

My experience was chiefly with special courts. These have a closer relation to EM morale than general courts. As to special courts, I recommend: Charges should be preferred and investigation made by one competently trained lawyer. Each special court should have a law member. Greater care should be taken in the selection of adequate defense counsel. The reviewing authority should be separate from the appointing authority.

Circuit courts are not the answer. Courts-martial duties should be primary duties. AW 24 and AW 104 should be included in the list of AWs which must be read to enlisted men. More attention should be exercised in the selection of summary court officers.

HOWARD, Joseph H., 301 Colonial Court, Towson; lawyer; JA officer during war. (p.262)

The primary purpose of courts-martial is to maintain discipline. While the present system is adequate and sound, the personnel who administer it should be better trained. The weakest link of the system is in the inferior courts, particularly the summary courts. These should be abolished, and AW 104 powers expanded to include pay forfeiture and confinement for minor offenses. Special courts should have a qualified officer, preferably a JA, to sit as combined president-law member.

While courts should not be separated from command, command domination should be eliminated by having trained JA officers act as law members and defense counsel. The law member's authority should be final—comparable to that of a judge. The JAGD needs to be expanded, made more independent, and given increased authority. "Skin letters" are usually constructive and are deserved, and are not reprimands.

BALTIMORE

McKENDRICK, Charles Damer, Wood Brook, Baltimore; lawyer; Infantry and IG officer during war with court-martial experience. (p.273)

Military justice is fundamentally sound, bottomed in common law principles of justice. Inadequacies resulted from a shortage of personnel and the human equation. Effective justice must be prompt, but this was difficult during wartime conditions. AW 104 company punishments were inadequate during combat, because restriction was meaningless. There was no AW 104 power of forfeiture. Summary courts were insufficiently effective. AW 104 power should include forfeiture up to a one-week period, with appeal to the next higher commander. Summary courts should have power to include forfeitures up to three months. Competent men should be used where such power is to be exercised.

Disaster would result if courts-martial were to be divorced from command. While letters of reprimand are improper, a commanding officer should be able to advise his courts re his sentence policy for particular offenses. My experience was that such guiding had little effect. I have seen regimental commanders censure inferior courts. This was very wrong.

COLGAN, C. Warren, Baltimore lawyer; JA experience during war. (p.282)

Military Justice administration as defined for the Manual for Courts-Martial is good. The AW 70 investigating officer should be a person with sufficient rank and background to do his job competently. Presently, he is usually an overworked junior officer. Too often the accused at his pretrial investigation neither sees nor is confronted by the witnesses, despite AW 70 provisions. He should have the benefit of counsel at the pretrial hearing.

While command influence generally is not good, it will be difficult to eliminate its indirect effect on courts without separating them from the direct influence of the appointing authority. There should be a standing or circuit court to take care of disciplinary breaches. Each division should have its own qualified and permanent investigating officers, defense counsel, trial judge advocates, etc. The next higher command echelon should appoint the courts to try a division's accused. The reviewing authority should be a still higher echelon in the immediate chain of command. I do not believe a separate JAGD all the way down to division level would work.

KANE, Mrs. Edith, Baltimore. (p.290)

This witness introduced a letter which she had received from Washington attorney Faul Lyne Delaney criticising the court-martial system as follows:

The Army failed to avail itself of trained lawyers in the service. As a result, defense counsel were frequently inadequate. Men were too

often convicted on evidence which would have been insufficient in a civil court. The feeling was prevalent that the men were guilty to start with. Penalties against enlisted men were too severe in comparison with those imposed upon officers. The court-martial system affords no opportunity to the accused to obtain probation or a suspended sentence. Little attention is given to previous heroism or extenuating circumstances. Incompetent counsel invariably lose certain advantages and rights which an accused does have.

DUCKETT, O. Bowie, 1412 Munsey Bldg., Washington, D.C.; attorney; JA officer. (p.294)

The JA school graduated about 2300 officer candidates. Its courses were excellent but difficult. The students were men of ability and character. The general criticisms of the court-martial system have been covered earlier in this hearing. A judge advocate's duty is to instruct and to advise, and necessarily can constitute only a skeleton crew within an individual command. General administration procedure was well handled, the courts worked satisfactorily, and defense counsel in general courts were usually lawyers.

RIGNALL, W. Baldwin, West Lake Ave., Baltimore; attorney; Air Corps officer with court-martial experience. (p.297)

My experience was that lawyer-officers were used for court personnel. The general courts upon which I sat were expeditiously handled, were properly tried, and resulted in respectable justice. I was not aware of any command influence or pressure, nor was any attempt to influence my vote ever made. In cases of substantial doubt, accused were acquitted.

Enlisted men and officers do not get the same treatment. Officers were court-martialed less frequently because of the difficulty to convene a general court in combat, because witnesses and court members were busy elsewhere, etc. Commanding officers must be able to command with respect. Many infractions resulted in no court-martial punishment at all. Some failures to follow orders resulted in the loss of life. More cases should have been tried, i.e. the more flagrant breaches of discipline. Rather in practice, social derelictions seemed to be the main subject of courts-martial. High praise is due General MacArthur. He was appreciated.

CHICAGO HEARING

Mr. Thompson; Mr. Lashly; Mr. Armstrong
9, 10 Sept 46

9 Sept 46:

LUKE, J. W., Deputy Adjutant of VFW, Illinois; EM and officer in World War I. (p.3)

No basic courts-martial changes are needed. Its defects are largely human; resulting from the hasty mobilization of a wartime Army. A postwar board is needed to correct abuses. Our experience has been that the Army is 10% wrong and 90% right, whereas the Navy is 90% wrong and 10% right. While I do not believe the Army has convicted innocent men, penalties have been too severe. Regular Army officer personnel do not understand principles of humaneness or sympathy.

ASKOW, Irwin J., 7 S. Dearborn St., Chicago; lawyer; EM and officer with JA in war; postwar work with Bar Assn. committee on military justice. (p.9)

There is too much pretrial confinement without defense counsel, ranging from five days to six or seven months. No one is ever punished for failing to hasten trials. Charges should be required to be filed within a fixed period, i.e. 15 to 30 days, with perhaps a varying scale between war and peacetime, and between combat and noncombat situations. There is too much command domination, so administration of military justice should be removed from command and vested in a separate JAGD, professionally staffed and performing functions of prosecution, defense, and judicial review. This department should be responsible only to the Secretary of War or the JAGD. Perhaps they should wear no insignia of rank. My suggestion applies to the entire court. At present commanding officer domination applies to law members as well as to the court as a whole. Law members sometimes would be the instrument of his control. Competent defense counsel are not appointed. When they were competent, they did a first rate job although, if they did too good a job, they might be transferred or made prosecutors the next time.

A distinction should be made between serious military and civilian-type offenses, and the less serious ones. AW 104 might be expanded, to take care of these minor offenses. This would leave only the more serious cases for the separate judicial set-up to handle. They should function in combat as well as noncombat areas. Commanding officers are dominated by the thought of discipline, whereas good justice will insure discipline at the same time.

There is sentence disparity between officers and enlisted men. Enlisted men should sit on the courts as they do in Germany and in France.

CHICAGO

They should sit in all cases, numbering one-third on general courts and one of the three members on special courts. They should aid in the trial of officers as well as their fellow enlisted men. I doubt that enlisted men would be more severe than officers. In the separate JAG courts-martial command, qualified enlisted men to serve on courts should be included. If the enlisted man was not included in the separate group, he should be selected on the basis of his qualifications. I do not know whether enlisted men on courts would be dominated by the officer members.

Presently, court members are not necessarily qualified, and their ignorance of military justice is a handicap, both in regard to court procedure and evidence, and disparity in sentences. Often, law members are not present. Defense counsel should have more opportunity to obtain witnesses and get them to court. Law members should be required always to be present. However, most law members of courts in which I participated had court-martial training.

I do not believe the Army command system would be injured by having a separate court system. (Discuss Inspector General system.) I found Regular Army officers to be trained in court-martial work, and they are sufficiently qualified to act as law members.

The Army could offer sufficient inducements to get an adequate number of young lawyers into its service.

PADEOCK, G. A., 201 S. La Salle St., layman insurance broker; EM and AG officer in war with courts-martial experience. (p.34)

I had an excellent 4-hour course in military law at the Adjutant General OCS. Any layman should be able to handle a court-martial case, with a little reading of the Manual for Courts-Martial and some common sense. The basic system should not be changed. Rather, policy and procedure might be changed somewhat.

Enlisted men should serve on courts. During combat period, there is an inadequate number of officers to choose as court members. There are also insufficient numbers of JA officers. Summary court officers should be first sergeants or ranking duty sergeants. Special courts should consist of enlisted men chosen because of their legal background or unusual talents. General courts should consist of enlisted men with a commissioned law member to try enlisted men. Officers should be tried by officers. Even though today most officers came from the ranks, their viewpoints changed when they got their commissions.

The function of courts should not be removed from command. Rather, have a review procedure which will catch all errors fast, and some way to correct the lack of uniformity in sentences. Severe sentences during wartime for certain offenses were proper. The deserter in

effect aids in killing the man he should be fighting alongside. Since sentences could not be increased, it was the policy to give maximums and then cut them down later. This system did not work too well. There might be substituted a letter of instruction fixing average punishments rather than maximums. Yet in wartime, different punishments are justified, due to circumstances surrounding the commission of an offense.

ELEY, Lemmen D., 10 S. La Salle St., Chicago; lawyer; EM and MA officer during war with court-martial experience; domestic posts. (p.47)

In only two of the cases which I defended did I feel that the accused should have been acquitted. In one, the investigating officer had been grossly misled. Generally, I felt that justice was done in 99% of the cases. As defense counsel, I had all the aid I needed, and had no difficulty in getting witnesses.

Enlisted men should serve on courts--particularly special courts dealing with military offenses. General courts usually dealt with civilian-type offenses, re which officer and enlisted men feeling would not differ. While some summary courts were not too good, there was a tendency to select fairly mature and well-balanced officers to serve in these posts. Where enlisted men are used on courts, lower-grade enlisted men of the same unit should not be used. Nor should a man's own noncommissioned officers participate in his trial.

During the past war, enlisted men were not perturbed about trials of other enlisted men for civilian offenses, but were re trials for military offenses. Usually, they were satisfied with the sentences. Officer prejudice did exist against enlisted men at times.

There was a failure to fully utilize soldier-lawyers on the courts.

LASSERS, Willard J., 29 S. La Salle St., Chicago; lawyer; EM during war, working for airfield legal department; court-martial experience. (p.53)

The higher a man's rank, the greater his protection. Summary courts give little protection to the accused. Officers are exempted from special court trial by virtue of a Presidential order. Special courts usually consist of untrained officers miscellaneously picked up. There is no JA law member. There is only a digest-record of trial. Prosecution and defense are seldom lawyers.

Only in general courts are accused's rights fairly well protected. There you have a law member, verbatim transcripts, etc. It is a discrimination in favor of officers that they can be tried only in these general courts where their rights are better protected.

Court members would be better if they did not rotate so often,

CHICAGO .

because continued duty would give them military justice training. Many laymen investigating officers and defense counsel were "jokes." Law members and defense counsel should be trained lawyers, and this should be jurisdictional. This should apply to special courts as well as to general courts, as to defense counsel. Injustice resulted from the present system.

Better trained trial judge advocates might also be had. I believe that innocent men possibly may have been convicted. Lack of trained defense counsel also meant a frequent failure to fully present matters of mitigation which in turn would have affected the sentence. While the system offered possibility of injustice, I am not in a position to know whether injustice actually resulted.

Summary court procedure is almost that of the star chamber. Yet summary court punishment is entered against a man's record. This should not be done. In my experience with 50 summary court cases, I never saw an acquittal. On the other hand, I do not know that any of the 50 were of innocent men. I would reduce present summary courts so that they would not be considered judicial, their results not entered on a man's record, and their power would not include that of reducing a man in grade. The "police court" setup in Europe in the larger cities was not satisfactory. Its punishments were too summary, without consideration of a man's real record.

As to pretrial confinement, policy varied as did conditions. Some men had undue pretrial confinement. Some men charged with serious offenses were not confined at all. There were no provisions for habeas corpus or bail. About the only remedy for such an accused would be to talk to the chaplain. Accused should be entitled to defense counsel right away.

There were insufficient maximum punishments stated in the Manual, with the result that there was no guide for a number of offenses. And lesser offenses were sometimes punished as severely as the major offenses.

AW 96 was a "catchall" and is inexcusable. It was sometimes used to manufacture crimes for particular purposes.

Present procedure for the administrative reduction of grade of non-commissioned officers is too arbitrary. There should be an impartial hearing. Likewise, there is insufficient protection from arbitrary AW 104 disciplinary measures. While there is the right to demand a court-martial, the average soldier feels that he is sure to lose at such a trial.

The JAGD should be divorced from the Army and staffed by civilians. It should handle all the legal work of the Army. One full-time legal officer should be available on every post with 500 or more men, his

task to include legal advice, claims, etc. as well as courts-martial. Although this would require a large expansion of the JAGD, it is necessary. While the civilians who would staff this newly-constituted JAGD might tend to identify themselves with the officers, it is at least worth trying. With trained men on courts, those courts could have fewer members. AW 104 and summary courts could be consolidated. And the special and general courts could be consolidated.

BARNARD, Morton John, 39 So. LaSalle St., Chicago; lawyer; troop commander and JA officer experience during war. (p. 82)

The fundamental weakness is in the command function which makes the commanding officer both the appointing and the reviewing authority. There should be an independent court-martial system, operating under an Assistant Secretary of War for Military Justice. It would consist of a division of pardons and paroles, a board of review for serious cases, a judicial division from which trial judge personnel would be selected, a trial division, and a defense section. Each general court would have a civilian judge assigned from the trial judicial section, a line officer and a neuro-psychiatrist. The judge should be appointed in the manner of federal judges. Capable judges will be able to absorb the military point of view. A three-man court would be ample. Such courts could ride circuits. The prosecution and defense should also be lawyers (preferably civilians) riding the same circuits. This would do away with the inadequate defense counsel we now have. Summary court officers would be JAGD officers, function in the manner of U.S. Commissioners. They would impose punishment in minor cases, and would act as investigating officers in serious cases. If a summary court case before him appeared to be serious, he could then send it on to a general court. On the general courts, there would be only challenges for cause. The judge would rule on motions, challenges and evidence admissibility. Concurrence of the judge and one other member would be necessary for a finding of guilt and the sentence. The judge could set aside the finding of guilt or the sentence, could reduce or suspend the sentence, or could order a new trial. The line officer on the court would be assigned by the Army, but not from the commanding officer in the area of trial.

The psychiatrist on the court would have to be a graduate doctor. However, the heart of my plan is the civilian judge. If a psychiatrist was not to actually sit on the court, he might be used as an independent adviser. While I would prefer to have psychiatrists on the courts, my experience was the psychiatrists were unnecessary in most non-combat cases. If they were not to be used, they could be substituted by court members. During the present war, when command influence was exercised upon courts it was generally bad.

CHICAGO

Boards of review should have power to review facts as well as law. They could combine the function as reviewing authorities. While they would not consider the facts de novo, they should have power to consider them as staff judge advocates do now in their reviews.

The mandatory provisions of AW 92 and 95 should be abolished. The punitive AWs should be revised to make a complete code of criminal and military law. (Discuss housebreaking.) Procedural changes should be made to embody the best of the federal rules of criminal procedure. Rules of evidence need changing, particularly re the use of morning reports and the proof of AWOLs. In this regard, the rules should be liberalized to make it easier to use morning reports. Too many deserters have gone free because of technicalities in this regard. Some entry in an accused's service record should be sufficient to establish his original absence. Depositions should be permitted the prosecution in capital cases. Noncommissioned officers should be treated the same as officers for all courts-martial purposes. AW 104 powers should be extended. Summary courts should have jurisdiction over officers in minor cases. AW 104 forfeitures should be abolished. General court jurisdiction over a man should not cease merely because he may have been discharged from the Army before his offense was discovered.

Enlisted men would not add to the quality of courts. As court members, they would not be more lenient to accused. In the majority of cases, the higher the rank of an officer the more sympathetic he seemed to be with accused soldiers.

Noncommissioned officers should be entitled to reclassification board hearing before they could be reduced in rank, but this is administrative in nature. As to the courts, they should be entitled to reduce a noncommissioned officer one grade as the Navy does.

The same court-martial system should be used for both combat and non-combat offenses.

It is difficult to judge whether there have been discrepancies between officer and enlisted-men sentences. It worked both ways.

HARDY, Claire W., 100 W. Monroe St., JA colonel in war. (p. 109)

As a whole, the courts-martial system is good. Officers might be tried before special courts appointed by the officer with general court-martial powers. AW 104 forfeitures should be permitted against officers through the grade of colonel. The average West Point lawyer did not have any great knowledge of military law (distinguish West Point JA officers who have also gone through law schools). On appeal, officer cases went through the President, where, unfortunately, too much leniency was extended.

As a Board of Review member, I have seen too many cases in which the accused was convicted on too little evidence. Boards of Review often strained justice to keep guilty men in jail, and thereby set bad precedents for the future. I would permit an appellate review of facts where the judgment was against the overwhelming weight of the evidence.

Defense counsel should be on a parity with the prosecution, although neither prosecution nor defense should necessarily have to be lawyers. Rather they should be intelligent officers.

I do not favor an autonomous judicial department in the Army. Nor do I favor having civilian judges. I have known of only two cases of command interference with courts. In each of those cases, sentences were vacated by me as judge advocate and the intervening officer was disciplined. Military justice could be administered efficiently if separated from command. Nor could discipline be maintained properly.

I do not approve of enlisted men on courts-martial. They would have too close post-trial association with other enlisted men. Most enlisted men I have spoken with would not want to serve on courts. As a compromise, non-commissioned officers might be rotated to sit on courts as observers as a matter of training.

The worst court I ever had included three lawyers. After that, I never permitted more than one lawyer on a court. Psychiatrists should not be required to be included as court members. I doubt if cases might be routed away from general courts by having defense counsel at the investigation. My experience was that accused had complete opportunity to have an adequate defense. I do not ascribe much to the morale factor of having enlisted men sit on courts. It would be more important to make sure that courts-martial trials were open to the public.

There is no present tendency for courts to impose severe sentences, expecting that they will be reduced by higher authorities.

Lawyers in the Army generally considered the courts-martial system in high respect.

BARDEN, John P., Asst Dean, University College, University of Chicago, 19 So. La Salle St., Chicago; representing AVD units; lawyer; EM and MP officer with some court-martial experience during war. (p. 129)

Fair trials are an essential to good discipline. This requires a single standard of justice, trained courts, and competent prosecuting and defense counsel. Courts-martial were neither fair nor impartial. Too many commanding officers used them as instruments to enforce discipline rather than justice. Mr. Wigmore in his Law Notes of 1921, took the position that the main end of courts-martial was discipline. This is erroneous.

CHICAGO

There is an Army and Navy habit of mind that a man is presumed guilty when he is charged with an offense. Accused seldom have adequate defense (Hicks v. Hiatt, 64 Fed Supp 238), and are often denied the right to select counsel. Sentences are inconsistent, and are disproportionate to the offense. Required life imprisonment for rape is too severe. Generally, officers are treated more leniently than enlisted men. There has been unfortunate pretrial confinement. Brutality is a habit in many of the prisons.

With minor amendments, the AWs and the Navy courts-martial system would be satisfactory as they stand. The committee which I represent feel that enlisted men should not serve on courts. We advocate a single JAGD to take care of prosecution, defense, and Army judicial work. We would eliminate the summary court, turning over its power to local commanders with power to imprison up to 15 days and stop payment for fifteen days. There would be no mark on the offenders record other than pay stoppage. This would go into the company punishment book but not the service record. Courts should be entirely separated from the commanders.

The AWs and Navy courts-martial rules should be combined into a single system. There should be a single legal department for both services, responsible to the Chief of Staff. Court and counsel personnel would be drawn from this legal department, and attached to inferior commands for quarters and rations only. The members would wear no insignia of rank, and would be responsible only to the Washington command. There would be only special and general courts. Each court would travel in circuits as a team which would include the prosecution and service personnel. Local commanders would have no power over the teams. However, he would have power to suspend, reduce or revoke courts-martial sentences against members of his command. There should be a defense counsel section, with duty to periodically inspect prisoners in confinement, reporting directly to Washington thereon. The JAGD would name the team members. Only lawyers should participate on the courts.

HALLETT, Albert E., Asst Atty General Illinois; lawyer and law professor; JA officer during war. (p. 146)

Generally, the system is good. Judge advocates in divisions are entirely dependent upon local command for promotions, efficiency reports and assignments. A commanding general can use any officer as his JA, and can transfer a JA officer to the line. I know of instances where this has been done. A JA's advice need not be followed. Inexperienced chiefs of staff are prone to interfere with a JA's work. Experienced chiefs are not.

JA officers should work only on JA matters, and should not be assigned to a miscellaneous assortment of other duties. Nor should commanding officers be able to use his personnel for other duties.

There should be different courts-martial treatment between military and non-military, combat and non-combat offenses.

JA officers should be put under the JAGD for promotions, efficiency reports and assignments. I doubt whether there was a tendency to assign less-capable officers to act as courts-martial members. A number of laymen officers did excellent courts-martial work. Common sense is not necessarily inherent in the legal profession, although it may sometimes be present.

Excessive sentences were eventually reduced.

AW 104 should cover field grade officers, and also the first three grades of noncommissioned officers. No enlisted men should have to go before a summary court if he did not want to. Both summary and special court records should be reviewable by higher authorities, and sentences excessive on their face (as distinguish from being excessive as a matter of law) should be corrected. General court-martial provisions to protect an accused are fair all the way up. Defense counsel should be permitted to file appeal briefs.

It is not feasible to limit court members to lawyers. Even if it were feasible it would not be desirable. However, it would be excellent if there were a lawyer law member. I am inclined to think that they should have rank. I have no definite ideas re enlisted men on court. It might or might not help. It might not hurt. I would not be opposed.

You can bust non-commissioned officers easier than officers, but even so it is not as easy as it would appear to be. It might be possible to insist that such busts be routed through JA offices. While noncommissioned may be busted down all the way, they can always be raised the next day.

Our courts-martial transcripts were accurate. We had a reporter who was also a reporter in civilian life. He made quite a little extra money for his services. Our outfit discouraged too-severe sentences in the first instance. Provision might be made in the Manual to prevent this from happening in other units.

10 Sept 1946:

WYKELL, Leo, 160 N. LaSalle St., Chicago; attorney; EM during war, both in combat and in Criminal Investigation Division; investigated courts-martial cases.

Courts-martial should be separated from command, because command influence does exist. The JAGD should be a separate corps, from which judges, prosecutors and defense counsel may be drawn. JA officers should not be burdened with outside duties. The independent corps

officer should act in teams, as was done in criminal investigation by the counter-intelligence corps. The CID was responsible to the Provost Marshal of the European Theater. CIC men were assigned to units as low as regiments, but were responsible only to the CIC chief of operations, G-2, for the theater. Claims teams were in the main responsible to the head of the claims division. All men attached to an independent JAGD should be lawyers, with both military AW training and private legal practice. I have no fixed opinion re whether enlisted men should serve on courts. I would probably have enlisted men on the courts-martial teams. There should be an available Digest of JAG Opinions.

Courts should be composed solely of lawyers. Law members were not always effective, and were not always lawyers. I would say that substantial justice was done in 75% of the cases, but that punishment was excessive in the other 25%. I know of no innocent person being convicted. This conclusion results from my experience as CID investigator on European black market and many other types of cases. It took too long to get cases to trial. There was too much pretrial confinement, with an average of perhaps two months. There was a lack of uniformity in sentences.

PAUSE, Frank G., 100 N. LaSalle St., Chicago; attorney; CID sergeant during war, investigating cases which resulted in courts-martial and in testifying. (P.179)

Court control should be centralized. In Europe, central control might have been held by the Supreme Headquarters, with teams sent out to the various armies and corps for duty. I felt that courts during the last war were at times vindictive, i.e. in the black market cases, meting out disproportionate sentences. In many instances, there was sentence disparity between officers and enlisted men. Investigations should be jointly conducted by an officer and an enlisted man. Courts should consist of permanent personnel, and it would be a good idea to include enlisted men on them. This should apply to both enlisted men and officer trials. A court member could be inferior in rank to the accused. Returning to the subject of the Paris black market, I believe the trouble there resulted from the facts that the courts were made up of previously-wounded officers. They were biased against the non-combat soldiers on trial. (Detail what happened to those accused at p.184, showing that most of them were released to duty despite the long sentences initially rendered against them.)

There should be more careful determination re whether an accused is mentally incompetent--perhaps using a board of three psychiatrists. However, they would not be court members.

BRAHIS, Michael, 160 N. LaSalle St., Chicago; lawyer; CID enlisted man during war, who aided in investigating and preparing cases. (P.189)

Ranking officers on courts-martial dominated court members of lesser rank. Officers were too rank-conscious. Courts-martial members should be competent men doing nothing but courts-martial work, particularly in regard to general courts. These members should be trained lawyers somehow devoid of rank. In the U. S., soldiers should be tried in civilian courts. CID reports should not be altered. I have never seen an innocent man convicted. Trained law members, however, might be able to adequately guide other court members who would act as jurors.

McCLELLAND, Irvin R., 180 N. Michigan Ave., Chicago; lawyer; JAG officer during war. (P.198)

The present system has no serious wrongs. It did work. I do not believe that any innocent men were convicted in my commands, although some sentences were out of line. On the other hand, severe sentences act as a disciplinary deterrent. I never experienced command domination. Enlisted men should not serve on courts. I always had lawyers as the law member, the trial judge advocate and defense counsel on all my courts. It would be quite a burden to maintain a separate administration of military justice. The better-grade line officers were best general court members. Rear echelon officers did not have a full conception of combat problems. Justice cannot be separated from discipline. It would not be an aid to morale to have a separate court system. Tables of Organization should include a court reporter in every JA section. There was a lack of competent court reporters. JA officers were never assigned other duties in my commands. Defense briefs can be submitted under the system as it exists today. It is doubtful whether combat men would want to be tried by a separate rear-echelon court. Cases had to be tried quickly, because of the mobility of units. The present court-martial system is better than the civilian judge-juror system because unanimity is not required in the voting. ~~We did use letters to remind courts of their responsibilities. We also occasionally reprimanded courts.~~ Letters to the courts were consonant with the functions of command. Old-time Regular Army officers with courts-martial experience were as good as any lawyers, even as law members and presidents of courts.

SIMBORG, Hugh M., Chicago; lawyer; domestic service during war as a JA officer (P.210)

The main court-martial faults resulted from personnel problems. The military system should have a more secure place for lawyers acting as lawyers. Too many laymen are assigned to legal positions on courts. Law members, prosecution and defense should be lawyers. The law member should be the boss of the court rather than amenable to discipline from the president. The president and law member should

CHICAGO

be the same person, acting as a presiding judge. Summary court officers should be legally trained. Special courts should have a combined lawyer president-law member. At least one court member should be an enlisted man when the accused is an enlisted man. It would be better if the enlisted man on the court was a lawyer, but this would not be required. Courts should be autonomous and independent of immediate command. To do this, I would select some court members from outside commands. Selection could be made by an area commanding general. I believe that substantial justice is presently obtained by the military courts just as often as in the civilian courts. The prevalence of convictions in the military courts is not too great, and no greater than in federal district courts. However, the penalties were more severe in many cases. Too often, they were not cut down by reviewing authorities. Court members should settle on fair sentences in the first place. While War Department policy may have been to impose only fair sentences, this was not carried out in the field. Prosecuting officers seldom sought clemency, because they were dominated by the commanding general. Sometimes, trials were had too hastily. Maximum punishments for officers and enlisted men should be identical. Reduction in grade by degrees for both officers and enlisted men should be permitted as a punishment. It would save time if courts were sworn only once after being appointed, rather than sworn in for each case. Local civil law should be used for offenses of a civil nature. Minor civil misdemeanors should be tried by civil courts. Trial briefs seeking clemency should be permitted.

HERTZ, Fred J., Chicago, lawyer; noncommissioned officer in domestic JA office during war. (P.225)

AW 4 should be amended, to permit enlisted men to serve as court members, law members, trial judge advocates and defense counsel. Appointing authorities should be required to select court personnel on the basis of legal experience and judicial disposition. While courts should not be completely separated from command, convening authorities should be detached as much as possible from the lower levels of command. (AW 8) In the U.S., I would use service commands. Overseas, I would use corps. Completely separate JAGD trials would not work out as a practical matter. AW 11 should be amended to provide trained men to act in essential courts-martial positions. The Manual for Courts-Martial should be rewritten so it would be understandable by the average layman. Local civil courts would be better qualified to handle civil-type offenses. Military courts should be restricted to the handling of matters of a disciplinary nature.

The JAGD was vastly understaffed during the war, utilizing only about 2500 of the 50,000 lawyers in the service. Even among the JAG officers, the older men who first came in with reserve commissions "were not the cream of the profession".

GAUTHEIR, George A., Chicago lawyer, enlisted man with clerical experience re courts-martial during war. (P.234)

My experience was chiefly with the inferior courts-martial. There should be a system of independent courts which would not be dominated. Better defense counsel should be chosen. Courts should not be reprimanded for returning acquittals. Generally speaking, trial judge advocates were better qualified than defense counsel. Investigating officers should be independent. There would be plenty of work to keep a separate group of lawyers busy all of the time. Sentences were too severe. In one outfit with which I served, the colonel made it a practice to try accused soldiers over again when he thought their initial sentences were not severe enough. There should be improved reporting facilities for the interior courts. The Inspector General was of little aid in correcting courts-martial abuses.

McGEE, Robert W., Chicago pipefitter; served as enlisted man in World War I.

My experience during the first World War was that 100% justice was accomplished by courts-martial. But after that war, justice deteriorated because of the inexperience of recruited officers. Enlisted men should serve on the courts, and should be selected in the same way as a civilian jury panel from their regiment.

MacCHESNEY, Nathan William, lawyer; soldier and officer for 40 years on both active and inactive duty; JAGD reserve colonel and Natl. Guard Brig. General. (Pp. 248, 272, 275)

During World War II, I served on a travelling court-martial most of the time. The 1921 Manual for Courts-Martial was a better book than the present 1928 edition. The latter is too abbreviated. The average local judge advocate officers had inadequate legal libraries. The best court-martial officer is a man of legal maturity with a military background. Regular peacetime JA officers were not too competent. Nor were reserve JA officers too competent. Although this war's JA school gave better technical training than was available in the last war, that was as far as the superiority went.

Law members should be legally trained. If their courts consist of experienced officers who are superior in rank to him, he will have little opportunity to dominate it. The law member's position should be strengthened. If possible, he should always be a JA officer. He should have final power re legal questions. The law member might also act as court president, but if he had seniority he would be president automatically. However, I would keep the two positions separate but would have both men JA officers or at least mature lawyers. A mature court of officers sitting continuously is the best solution, or at least courts with a majority of officers sitting

continuously. Keep three or four men permanently on the courts, and make up the balance with local combat men. It is generally a mistake to use technical men such as doctors as court members. I have no objection to having an enlisted man of accused's rank sitting on his court. We followed the practice of having a colored officer on courts trying colored accused at Fort Custer. The court president and law member should be responsible only to the JAGD. We should follow the British and German system more closely. I believe they protect the enlisted man better than our system does.

The only real protection an accused has is from the law member in his court rulings. Commanding generals often act in cursory manner. Their relations with their judge advocate officers often depend on the personality of the latter. Likewise, many assigned defense counsel were inadequate despite an abundance of good lawyers on the post. Most older court members resented the presence of law members on the courts. The law member should be the equivalent of a federal judge, with finality of decision and ability to dismiss a case for lack of evidence. Constantly changing court personnel is improper. Courts should not be advised by outside authority re sentence policy. There was discrepancy in sentences because court personnel changed so often. It is not customary to try accused soldiers at common trials. Military justice should be handled by the military rather than by the civilian courts, but penalties of the local area as well as local laws should be guides.

AR 95 should be modified, so that its dismissal provisions should not be mandatory and its requirement of nonassociation with other officers should not be mandatory. In my courts, I was more severe with officers than with enlisted men. Notorious cases such as the Coleman incident at Selfridge field and the Colonel Kilian case were improper. Either those accused officers were innocent or they should have been punished much more severely.

Just sentences should be imposed in the first place. It is bad for morale to have men returning to active duty after being released from serving only a small portion of a severe sentence. Appellate judge advocate reviews were too often made by inexperienced JA officers. Reviewing authorities should be advised of a court's vote, so that they would know how the members split on the issue.

GALLAGHER, David, lawyer; infantry and JA officer during war. (p.270)

If soldiers were tried before civilian authorities, a number of men would make sure that they would be held over for such trials in order to avoid going overseas. Some soldiers preferred the guardhouse to overseas duties. Courts should be more independent. While basically sound, court-martial system problems chiefly arose from personnel troubles.

KING, William H., Jr., Chairman, Chicago Bar Assn. committee; lawyer; formerly General in JAGD. (p.268, 274)

Reviewing authorities should be advised of a court's vote, so that they would know how the members split on the issue. Commanding general influence is improper. While discipline is essential, it will best be maintained if justice is accomplished by the courts-martial. Law members should be completely independent, and should be separated from command.

BAER, Walter H., physician; medical and psychiatric officer during war; now superintendent of state hospital at Manteno. (p.278)

My experience in examining 637 soldiers who had received general courts-martial sentences resulted in the conclusion that some safeguards should be set up to insure that medical cases would not be sent before courts-martial. This might be accomplished by having an independent judiciary not subject to the whims of commanding officers. A competent independent court would ask for a psychiatric evaluation in questionable cases. As it is now, "individuals who have battle neurosis, are mentally deficient, even psychotic, were given stiff sentences, and pushed around pretty badly in the disciplinary training center." The use of psychiatrists varied with the commands. However, psychiatrists should not act as court members, as has been suggested by another witness. There is a serious shortage of psychiatrists. Many men were taken into the Army who should have been rejected in the first instance. There should have been more equality of treatment between enlisted men and officers. Admittedly, psychiatrists must be on the guard against malingering soldiers. Personal equations are bound to enter. There are inadequate safeguards today to protect a person legitimately sick.

WATSON, John A., 1 N. LaSalle St., Chicago; lawyer; served in Army before and during war. (p.291)

General and special courts should be removed from local command. The system should be modified so as to provide that the prosecutors and defense counsel always be competent lawyers. Defense counsel should be chosen by the accused, or by someone with independent judgment. Defense counsel should be permitted to be civilians or enlisted men or women as well as officers. While there may be no legal objection to such practice now, there is a barrier of custom which keeps enlisted personnel from serving as defense counsel.

FENDT, Charles G., Chicago lawyer; EM and officer during war with court-martial experience. (p.295)

My activities as defense counsel in a number of cases were hampered by other duties and by interference and pressure from the outside. Court personnel should be removed from command. Trial judge

CHICAGO

advocates, defense counsel and law members should be sent out of Washington from higher authority. Area defense counsel might be assigned, with only legal duties to perform. These legal duties might include those of legal assistance officers. However, the entire court should not be composed of lawyers, even though all the members should be independent of command. They might ride circuit.

While I was not persecuted for my defense counsel diligence, I was harassed. I never got a promotion because I was a diligent defense counsel.

Too many commanding officers demanded maximum punishments. The Judge Advocate office should not act in the dual capacity of both prosecutor and reviewing authority. Rather there should be independent boards of review operated by the Inspector General's Department or the Secretary of War. An examination of Board of Review opinions will reveal a trend to find a basis to sustain sentences. The JAGD is not ready to review and reverse itself.

STEWART, Charles L., Jr., law school student and Executive Director of Chicago Division of American Civil Liberties Union; enlisted man with domestic war service; no court-martial experience. (p.302)

While discipline is a command function, safeguards for civil liberties must exist. Reviewing authorities should be different from appointing authorities. Enlisted men as well as officers should serve on courts-martial. Enlisted men should be entitled to initiate court-martial proceedings. Court membership (general and special) should come from outside of command and area. There should be trained and capable defense counsel available for accused's selection, separate from the trial JAG. There should be independent courts and independent prosecution units. There should be more careful classification of courts-martial offenses.

LEVY, Jack, Chicago lawyer; EM and officer during war with court-martial experience. (p.306)

While court independence has been discussed at length, the commanding officer's post-trial power to modify a sentence should be retained. Another reason not mentioned for separating courts from command is that local court members in many units are always familiar with all the details of a charged offense before trial. If there were independent courts of appeal, they should have the power to increase sentences as is done in English courts.

Today, officers can get away with doing things which enlisted men cannot do. An Inspector General's Department with teeth is needed.

MOHRIS, Nelson; retired banker and meatpacker; EM and officer during both wars with court-martial experience. (p.313)

Confessions obtained by accused at pretrial investigations should not be used in courts. Enlisted accused feel obligated to testify at these pre-trial investigations.

Courts which wanted to administer justice properly had a hard time of it.

CHICAGO

DENVER HEARING

Judge Holtzoff

9 Sept 46

STERLING, Samuel H., 313 1st National Bank Bldg., Denver; former Air Corps officer with courts-martial experience. (p.5)

There should be a difference in handling military and nonmilitary offenses, particularly in peacetime--to show that the Army is willing to abide by the laws of the State.

During the war, we had some incompetent commanding officers who used the court-martial system to control their men through fear.

There was a definite tendency to assign less competent officers for court-martial duty. On the other hand, this did not generally apply to either the defense counsel or the law member. Wherever I was, the law member was always a lawyer. The JAGD officers were extremely competent and fair.

Enlisted men should be used only as members of special courts. I would not use them on general courts, because of the gossip, rumor and talk that goes on among enlisted men. I also believe that enlisted men would fear noncommissioned officers on courts more than officers, although there would be exceptions, particularly as comparing noncommissioned officers with newly commissioned officers.

There was a marked disparity in sentences between different commands, as well as between officers and enlisted men. A traveling court might be an aid in improving these disparities.

DUNKLEE, Edward V., E&C Bldg., Denver; former JA officer with prewar experience. (p.10)

Between World Wars I and II, many courts presumed an accused to be guilty, and were interested only in the extent of the sentence. This attitude changed, as more lawyers entered the service and were put on courts. Courts are prone to give more weight to the word of an officer than to an enlisted man. They are too liberal re depositions and hearsay testimony. Defense rights are not adequately protected, either in the selection of defense counsel or the accused's right to subpoena witnesses.

I favor the recommendation that the JAGD be reorganized and enlarged, and set up independent of immediate commands; also the extended use of lawyers both during actual trials and as reviewing officers.

DENVER

I realize necessary differences which must exist between peace and war, and between combat and noncombat areas. Nonetheless, the rights of an accused must be protected at all times. An impartial justice will reflect itself in the morale of the Army.

The JAGD should be granted extended review powers, both as to law and as to fact.

Enlisted men should be permitted to sit upon courts, at least as to one-third of the membership--these members being of accused's rank.

The law member should be a lawyer, and should not vote upon the findings. Upon the request of the court president, the law member should sum up the case impartially for the benefit of the court.

There should be a difference of punishment between combat and normal conditions, applicable to both officers and enlisted men.

The JAGD must be increased in personnel.

SECKLER, LeRoy, 1255 Josephine St., Denver; during war both an EM and officer; now a reserve JAG officer. During war, served as defense counsel in more than 100 cases. (P.17)

The Army's inability to get men in its present recruiting program is a reflection on the court-martial system. I felt bitterness during World War II. My legal training was completely ignored. Despite my prewar legal experience of 5 or 6 years, I was told that no one under 30 years of age was eligible to get into the JAGD. Usually lawyers were made transportation or mess officers. There was no over-all plan for their use. When I went overseas with a group of 1500 men, that group had no legal department. As the only attorney therein, I was used as defense counsel. The trial judge advocate, a former law student, had no knowledge of law or procedure. Bar Associations made no effort to place attorneys in the Army.

Defense counsel, laden with other duties, have difficulty getting time off to prepare their defenses. Investigating officers are likewise burdened with other duties; frequently aid the prosecuting witness if he is their friend; seldom advise the accused of their rights. Accused should be permitted to select defense counsel from a pool of names--perhaps 3, 4 or 5 names.

Special courts do not have law members. Defense objections were frequently met with the comment, "Stop that lawyer, in this court we do not have time for that". The average layman did not understand rules of evidence.

Every investigating officer, defense counsel and law member should be a lawyer. The JAGD should be expanded both for war and peacetime service. Many younger lawyers would be glad to enter the Army (25 to 30% of law school graduates) if they were given the opportunity to serve the Army as lawyers. The JAGD should be separated from command. Army circuit courts might well be set up.

WORKS, Charles E., 1015 Corona St., Denver; Major during World War I, with Third Army experience on general courts-martial. (P.21)

On the whole, general court cases were well handled. Accused were properly represented, and innocent men were not convicted. Defense counsel were given adequate opportunities.

However, JAGD officer personnel were inadequate in number. In Third Army Headquarters, there was a lack of competent trial lawyers. JAGD legal officers are too steeped in Army law, and do not have sufficient good judgment in human affairs to properly handle cases. In a minority of cases, the general court acted as a rubber stamp to carry out the will of the commanding general.

The preliminary investigation was a piece of red tape, having little effect on ultimate disposition. Courts felt obligated to punish a man for technical guilt, even though the members had similarly offended. They also felt an obligation to render severe sentences, leaving it to the reviewing authority to reduce such sentences. In some instances, they even refused to recommend clemency.

In combat, discipline is to some extent a command function, and military justice must be severe. The average citizen at home does not fully appreciate this. On the other hand, the courts should weigh all the facts surrounding an individual case.

One reason for extended use of general courts while in combat was that special court sentences of three to six months were hard to carry out because of a lack of a place of confinement. In lieu thereof, a general court would be used and it would feel obligated to impose a five-year sentence.

Officers were punished as severely as enlisted men. An officer's dismissal from the service and one year in a penitentiary was more severe than a five-year sentence for an enlisted man because the latter had the opportunity to be returned to service and to end up with an honorable discharge. Officers were not prosecuted as often as enlisted men because of a. the difficulty of imposing minor punishments upon him, and b. the fact that his fellow-officers frequently covered up for him. Erring officers affected morale and caused disrespect. As a remedy, it is suggested that better care be exercised in selecting officers, and better means be devised to rid an unfit (as distinguished from inefficient) officer.

In my command, lawyers were always used as law members on general courts.

DENVER

ROTHGERBER, Ira C. Jr., Symes Bldg., Denver; former Lt. Col. General Staff; served with general courts-martial in a number of cases. (P.25)

In the most famous murder case in Australia, wherein a soldier was accused of murdering three local women, I was a defense counsel. Despite many prejudicial rulings of the law member and my belief that accused was insane, General MacArthur affirmed the sentence of death and the man was hanged.

A lawyer should always be law member.

In Manila in mid-1945, two general courts were constantly in session, and resembled permanent courts. However, it seemed that their members (they had no other duties) were incapable of other duties.

An accused needs more protection in special courts. Six months confinement is serious, at least to the fellow who has to serve it. Special courts seemed always to find an accused guilty and to impose the maximum sentence.

Enlisted men should not serve on courts. But while I do not think they would be more lenient, I believe that morale and discipline would be improved if they did so serve. As an alternative, it might be provided that, at accused's request, he could have a court predominantly consisting of men of equal or lesser rank.

DOYLE, William E., Empire Bldg., Denver; JAGD 2nd Lt. during War, after almost three years as an EM, chiefly in headquarters and finally in military government; limited court-martial experience. (P.28)

The JAGD is subject to command channels. It should be an independent corps. This would lessen use of court-martial justice as a weapon of discipline. A system like The Inspector General would be desirable.

Trained men should be used on courts, rather than mechanics and truck drivers. Good lawyers were available, but were used in extraneous assignments.

Enlisted men could sit on courts if properly trained.

GATES, Bernard A.; former practicing lawyer, but now National Field Secretary of the American Legion. (P.30)

In many cases, the accused did not get a fair and impartial trial. The American Legion is aiding to rectify this condition.

POWELL, William D., Tabor Bldg., Denver; former enlisted man. (P.31)

Enlisted men were afraid to testify as witnesses at one station, because of their fear of the accused in two cases. There was also a

general fear that if an enlisted man testified against an officer he would be cutting his own throat.

At OCS, I was instructed that a soldier was not tried unless he was guilty, and that he was presumed to be guilty until found innocent. I had to resign from the school because of a bad foot.

Overseas, a soldier was tried for manslaughter, but despite his 5-year sentence was eventually restored to duty. This demonstrates what good officers can do for morale.

Competent enlisted men should sit on courts. But there may be influence by the officers, i.e. reassignment if the enlisted men do not agree with the officers. Such enlisted court members would need protection.

Most soldiers returning from imprisonment in stockades made good soldiers. The bad ones among them were not returned.

Officers should be punished as severely as enlisted men. In Rome, enlisted men were punished for associating with prostitutes on the streets. But officers associated with them in private in their rooms, without danger of being apprehended.

CHARLTON, Robert D., E.&C.Bldg., Denver; officer who served five years with same outfit; some court-martial experience; was a battalion commander. (P.34)

In my command with General Richardson, no pressure was exercised on courts. The trial judge advocate and defense counsel were always lawyers. No Regular Army officers served on the court. Sometimes, he criticised what he considered to be too lenient sentences. But looking back, he may have been right.

Most new officers lacked court-martial training and also necessary actual experience. As courts gained experience, their work improved. Although some guilty men were acquitted, I do not believe that any innocent were convicted.

Courts-martial are improved when the commanding general takes a personal interest and exercises some personal supervision. Defense had adequate opportunity to obtain witnesses.

No advantage would result from separating general courts from selection by the commanding officer. Military training must be directed to success on the battlefield. The leader must have a total command function. Administration of justice, even for the more serious offenses, is a command function. Rather, the tendency should be to make punishment more summary in combat areas.

DENVER

AW 104 powers should be enlarged. This would lessen the work of inferior courts-martial. AW 104 power should include the limited forfeiture of a man's pay for the small minority of offenders within a command. Likewise, special court powers might be enlarged. Confinement of offenders for six months or less meant little, because there was no place we could confine them during combat. Rather, such offenders usually were given restriction with hard labor.

Officers should receive more courts-martial training. The trial judge advocate and defense counsel should be lawyers, who perhaps should have court-martial work their primary task.

Present courts-martial are good, but fail occasionally because of inexperienced or uninterested personnel. AW 104 powers might be used more frequently, and lower echelon commanders should be backed up in their decisions.

O'BRIEN, W. F., Symes Bldg., Denver; EM for one year and officer for three years during World War II; either trial judge advocate or defense counsel in about 400 cases. (P.41)

For me, court-martial work was an extra duty, but I always had full cooperation, with everything provided. Court-martial work should be an extra duty, and I do not favor a permanent court doing nothing else. Such permanent officers would become too hardened. Civilian judges do not become similarly hardened, because they are trained judicial men. Law members on courts seldom explain rules re presumption of innocence and reasonable doubt. These law members could be lawyers, and could deliver oral instructions to other court members. However, it is not absolutely necessary that they be lawyers, so long as they are qualified, diligent, and serious in their duties. Laymen law members are even qualified to rule on evidence.

Accused should be immediately advised of his rights under the Fifth Amendment and AW 24 as soon as he is arrested and charges have been preferred. An accused soldier has no counsel until the case is referred to trial. Many are convicted on their pretrial confessions. Moreover, there is too much confinement before trial.

Courts-martial might add something akin to jury instructions. Law members should be required to read certain provisions of the Manual for Courts-Martial to the other members, or instruct them re reasonable doubt, burden of proof, and the elements of the charged offense. He might also summarize the evidence.

West Point officers are usually qualified as court members.

It is essential that good reporters be available. Commanding officers often request maximum sentences, and then reduce them, despite

contrary provisions in the Manual for Courts-Martial. The fact that most courts act in open session is not generally known, and should be brought to the attention of all enlisted men. In closed sessions, some courts do not follow Manual procedure re secret voting. Good members are essential to proper procedure.

Enlisted men would be satisfactory on courts, but their service should be dependent upon their own qualifications rather than on rank or length of service.

Sometimes, overseas punishments were excessive as compared with foreign viewpoints, i.e. the seriousness of murder in China, Burma and India is not what it is in the United States.

MILLER, Victor A., 851 Clarkson St., Denver; Air Corps major commanding personnel varying in number from 2,000 to 10,000; had court-martial experience, mainly in training areas. (P.48)

The purpose of the court-martial system is to administer justice, with its effect on discipline only incidental. The system's main weakness is that it is too cumbersome for operation in a combat zone.

Summary and special courts should be abolished. Most of accused therein plead guilty. They should be substituted by an expanded AW 104. 98% of the matters before the inferior courts are disciplinary only.

Defense counsel are frequently most inadequate, and sometimes prove prosecution's case. In the serious cases before general courts, adequate counsel should be available. No one other than a trained lawyer should be permitted to serve as law member. Not even West Point officers should be permitted to serve in that capacity.

Initially, I was told that lawyers were the last thing the Army wanted. Once in, I found the Army always needed lawyers.

Law members should be comparable to trial judges. Reviews should be as in appellate courts, with permissible briefs and oral arguments.

Maximum sentences are often demanded by appointing authorities. The way to cure this trouble is to eliminate the inferior courts and permit company commanders to impose company punishment on their men to greater degree. In this way, those men will keep their records clean, and will benefit permanently from such discipline.

PHELPS, Horace F., 629 Bel Air St., Denver; former JAG officer. (P.56)

The court-martial system is one of the fairest devised, from beginning to end.

DENVER

Its main weakness is excessive legal and illegal control by the convening authority, i.e. too much identity of prosecution, judge, jury and court of review. At least the power of review should be taken away from the convening authority. (Examples of misuse are noted.) However, care should be exercised re hindering a commanding officer's command functions. Other weaknesses in the system resulted from lack of experience and training. Another weakness was in the methods sometimes used to get confessions, and their misuse in court thereafter.

The JAGD was inadequately staffed. With only about 100 officers at the war's commencement, they did not get their expansion program started despite over 10,000 applications from outstanding young lawyers. The Army did not adequately use its legal talent.

Neither summary or special courts should be abolished. Rather, their jurisdiction should be extended, i.e. special courts up to one year confinement. AW 104 powers might also be expanded.

Oral appeal arguments would seem to be unnecessary, particularly in wartime.

There was a great lack of uniformity in sentences. A revised Manual should contain more detailed rules re maximum penalties. For many offenders, a labor battalion might be the best punishment.

BARRY, Hamlet J. Jr., G.&E. Bldg., Denver; 1st Lt. Marine Corps Reserve
(P.62)

The Navy has no requirement that court members be lawyers or legally trained. Bad results and justice miscarriages have occurred. Evidence rules are disregarded, although in some cases the courts probably reached the correct result. The Navy did not provide for reporters, and those who served when requested frequently turned in unrecognizable results. In the Navy, available judicial precedents were lacking. The Navy judge advocate's duties included being almost a lackey for the courts, and there was little cooperation from the command. Legally trained defense counsel frequently were not available. Officers chosen for defense often had other tasks which engaged them more fully. Although the Navy has appellate review, there is no staff judge advocate to act as the commanding officer's delegate therefor. The Navy system is antiquated. The Navy should follow the Army in seeking to improve.

CHISHOLM, Theodore A., Ass't. Atty. General, State Capitol, Denver; formerly Col., JAGD. (P.65)

The present system of military justice is good, and compares favorably with civil criminal procedure. Difficulties chiefly arise from inexperienced personnel. On the whole, accused soldiers have more

protection than civilians. In my command, competent counsel were sought, as well as law members and court presidents. Law members were always lawyers in my command, and should be.

Enlisted men should not be court members. It would be unfair to the enlisted man for him to have to return to an outfit in which he had adjudged a man. It would reflect against constituted authority, and injure discipline. Powers of the commanding general and reviewing authority should remain as they are now. Even in civil life, Governors have commutation powers. Whereas the function of a court is primarily to administer justice, the commanding officer's primary concern is one of discipline.

BAER, Charles S., 1725 Sherman St., Denver; formerly Air Corps major, with some court martial experience in 8th Air Force in England. (P.68)

An accused soldier is as well protected as a civilian in criminal matters. The court-martial system works better in peace because there is more time. In wartime, it must be rigid. Defense counsel inadequacies may be blamed on the interference of other duties. A solution might be found by assigning full-time officers to court-martial work in certain command areas. Legal officers should be available in small organizations.

During war, stockade confinement was more of a reward than punishment. As to the Lichfield trials, while I do not believe in physical violence I would favor other rigid hardships.

More company punishment should be permitted, i.e. up to 30 days confinement, and other new types of punishment. Summary court officers should be permitted to impose up to three or four months confinement, with trained officers used in that capacity. Special court powers should also be extended re purely military offenses, using some sort of a civilian law member.

The most serious defect of the court-martial system is the domination by commanding officers. This domination starts at the top of the JAGD and goes on down through the setup. Independent courts might be satisfactory if the JAG approaches the problem from a judicial rather than military standpoint. But it was my experience that I had to go to the commanding general to avoid the domination of the staff judge advocate. West Point officers handle things better.

SEYDEL, Frank, Col., Chemical Warfare Service; Chief Judicial Branch, Legal Division, Allied Control Council, Berlin; service in both wars; reserve officer in interim. (P.75)

The greatest criticism of the courts-martial system is to be found in the influence of command. To correct this, it would be necessary to assign court members from transient officers of another command.

DENVER

The primary function of the system is disciplinary. It is not part of the American judicial system. A volunteer in the Army has agreed to take a full Army life, including courts-martial. But a draftee is in somewhat of a different status, and wonders whether he must forego his Constitutional rights.

We might abolish inferior courts, substituting command powers in this regard re military-type offenses--unless the accused demands a court-martial.

NEWCOMB, Herbert J., Midland Savings Bldg., Denver; former JAG Lt. Col. in Washington and Australia. (P.78)

An outstanding defect in military justice is conscious and unconscious influence by appointing authorities. The element is always present. It might be removed by having courts appointed from personnel outside the command. Means of domination: efficiency reports and recommendations for promotion. It would be better to have the JAGD appoint the courts, thereby divorcing them from command. The law member should rule on all questions of law, but should not participate in the vote or the sentence. Otherwise, court members tend to rely too much on the law member rather than listening to the facts.

While nonlawyer law members were sometimes quite bad, I do not think any innocent men were convicted. Law members should be lawyers. There was no shortage of lawyers in my commands. There were many competent lawyers among enlisted men. I had one man who should have had a commission without going to school, so as to be of more use to the Army. Law members should not sit in closed sessions. Rather, they should instruct the members in open court.

Officer training re courts-martial was inadequate. This applies even to high-ranking officers. Peacetime officers need more training in the practical administration of military justice. Better defense counsel should be appointed. They are rarely as competent as the trial judge advocates. This is unfair. It should be vice versa.

Probation procedures should be extended in the Army.

If company commander powers are expanded, it might be wise to subject their actions to review. There were few competent company commanders, with those coming up from the ranks being the more competent. Nonetheless, good company commanders are invaluable. Those who did file charges were sometimes doing so to pass the buck.

SABIN, James M., 1326 Pearl St., Denver; Master Sergeant in JA office; now in District Attorney office in Denver. (P.84)

The chief weakness in the courts-martial system is the difference of ability between trial judge advocates and defense counsel. As a result, improper defense often resulted. An improvement might result by having the two be of equal rank. The pretrial investigation is good, and might be adopted by civilian jurisdictions.

KINGSLEY, Robert T., 835 Monaco, Denver; formerly Air Corps 1st Lt.; now with District Attorney office in Denver; served in JA; had 4th Air Force courts-martial experience. (P.86)

The courts-martial system is to be admired. It is not as bad as painted, and should receive better publicity to show how it really works. As to disparity of sentences, the 48 states also have disparities.

DENVER

REPORT OF THE DENVER BOARD OF WATER COMMISSIONERS

FOR THE YEAR ENDING DECEMBER 31, 1904

The Board of Water Commissioners of the City and County of Denver, Colorado, has the honor to acknowledge the receipt of the report of the Denver Board of Water Commissioners for the year ending December 31, 1904, and to express its appreciation for the thorough and complete manner in which the same has been prepared. The report is a valuable contribution to the knowledge of the water supply of the city and county, and is a most interesting and instructive document.

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NEW YORK HEARING

9, 10, 11 September 46

Vanderbilt, Crane, Henderson, Soper

9 Sept 46

NOTO, Mario T., 8809 14th Ave., Brooklyn; attorney; EM and noncommissioned officer during war, with AAF court-martial preparatory duties. (p. 3)

I prepared charge sheets and conducted preliminary investigations. AW 104 should be amended to permit enlisted men to sit as court-martial members. Officers tend to misunderstand the facts surrounding offenses charged against enlisted men. Other enlisted men would more fully appreciate the surrounding circumstances. However, enlisted men court members should be qualified, i.e. be law graduates or lawyers. Likewise, I would require officer-members of courts to have the same background. I would have the courts half officer and half enlisted men. I would amend AWs 8, 9 and 10 re appointment of courts. All courts should be appointed by an echelon next higher than the command headquarters. This would be feasible even under combat conditions. In my command, too many court members would already be familiar with the facts of a case before it was tried. At present, the trained law member need not be present. And even if he is present, one man alone cannot exercise enough influence on the balance of the court members.

AW 96 should be amended, because it is now too general. I have seen several cases of its abuse. It should be framed to cover every conceivable offense. Merely to have a competent court president would not eliminate the various difficulties. While rank may not dominate, it is an important factor. All court-martial officers, including defense counsel, should be lawyers or have legal training. AW 70 investigations should be by more than one individual, i.e. by a board. Now, investigators are frequently incompetent and are influenced. One enlisted man might sit on these investigating boards.

Nonetheless, I do not believe innocent men were convicted.

ZAİK, Joseph, 280 Broadway, N.Y.; attorney; EM and MP officer during war; court-martial experience. (p. 24)

Qualified enlisted men should sit as court members for trials of both officers and enlisted men. All lawyers should be commissioned as officers, the same as dentists and doctors. But if they were not commissioned, the enlisted men sitting on courts should have legal background. Too few court members have knowledge of legal procedure. In our outfit, we were fortunate to have summary court officers who were also lawyers. Yet only a few followed Manual procedures.

Generally, special court presidents were without legal training, and frequently admitted inadmissible testimony. My experience was that on general courts the law members were well qualified. Special courts should have a lawyer to serve as president and law member. In my experience as defense counsel, I was frequently hampered by inadequate time to prepare a proper defense. I was burdened with other duties. Yet continuance was almost always permitted. There should be a ten-day interim between the filing of charges and the trial.

The trial judge advocate, defense counsel and law member should all have full-time, permanent jobs. Admittedly, difficulties could arise in combat conditions.

Inherent command domination resulted by the customary desire for promotion on the part of courts-martial officers. Likewise, skin letters were written.

As a whole, however, I felt that overall justice was achieved. Innocent men were not convicted, although some guilty men may have gone free. Some men I defended were guilty, yet I got them acquitted. I won one of these cases because of an omission in the prosecution's proof--and received a skin letter.

QUITTNER, Joseph, 36 W. 44th St., N.Y.; lawyer; Intelligence officer during war with court-martial experience. (p. 41)

Court-martial difficulties resulted from inadequate prosecution and defense, and inadequately trained court members. Courts-martial should be the same in peace and in wartime, in combat and non-combat. Prosecution and defense duties were not primary duties. There was inadequate time for preparation. There was inexperience. Once, when I complained of inadequate defense, I found myself appointed defense counsel. It was a pushover for me to get men acquitted in various cases.

Enlisted men sentences were sometimes too severe, occasionally caused by command influence upon the courts. Investigations were inadequate. While a peacetime Army might not be able to get lawyers, lawyers were available during wartime. Law members cannot be peremptorily challenged.

There should be two types of courts--one for military offenses along the line of present courts, and other courts which would travel circuit. These courts should be specially trained, as well as the prosecution and defense (a public defender would travel the circuit). These travelling courts would try offenders accused of moral turpitude crimes.

BECKER, George, 36 W. 44th St., N.Y.; lawyer; EM and officer during the

war with extensive courts-martial experience. (p. 51)

Investigating officers are too rushed in their work—usually have to report within 24 hours. They are untrained. They should be trained men from the criminal investigation department, although they need not be lawyers. Investigatorial duties should be full-time and a regular detail, independent of local command.

Officer sentences were too lenient, and usually did not stick. The sentences were reduced before the officers actually went to jail. Enlisted men lack confidence in the court-martial system. One factor is the ability of officers to evade actual punishment. Regular Army officers were seldom brought to trial. Dishonorable discharges should not be mandatory with sentences over six months. Few innocent men were convicted. Yet enlisted men had little confidence in the court-martial system. This chiefly resulted from the fact that enlisted men were more frequently brought to trial, and were given more severe sentences. Defense counsel are inadequate. There is too much pretrial haste. Accused do not see their counsel until after charges are filed against him.

Of the 1500 cases I handled, I was trial judge advocate in about 70% of them. My conscience is clear as to that 70%. This likewise applies to the 30% in which I was defense counsel. No injustices resulted, although many of the sentences were too severe.

SAMSEL, Harold J., 84-24 105th St., Richmond Hill, N.Y.; layman; EM and officer during war. (p. 73)

In modern warfare with mechanized equipment, teamwork is vital and men cannot be missing. After extensive battles, a number of the men of our outfit took off during the winter of 1944-1945. The enemy attacked while they were away. We suffered casualties, many of which would not have occurred had the missing men been present. Undoubtedly, those men were tired with combat fatigue. Nevertheless they indirectly caused the deaths of their fellow soldiers. They were court-martialled and given severe sentences. In the circumstances this was proper. As to the trials themselves, they were handled in higher echelons. Our combat outfit was not equipped to handle all the paper work. Separate combat units such as ours needed the assistance of higher echelons in this type of matter. Outside of the above isolated incident, discipline in our unit was good. There was no such thing as rank. All the men lived and worked together. Minor offenses were dispensed with in inferior courts or without resort to courts. As to separate courts, I believe that the average enlisted man in my outfit would have preferred to be tried by his own officers. I do not believe, however, that this would be true generally.

PELZ, Robert L., 20 Pine St., N.Y.; lawyer; officer during war. (p. 83)

Courts should have lawyer-law members who are completely independent of the court President. On the one court with which I served, the Regular Army officer president occasionally cowed the law member in an attempt to hasten findings of guilt. Staff Judge Advocates should appoint the law members from a higher echelon. This would not adversely affect local discipline. The law members should have final say on rulings of law, but should retain their power of voting on the evidence with other members of the court as is done now. Trial judge advocates and defense counsel likewise should come from higher echelons, and should be legally trained men. Defense counsel should be appointed the minute charges are filed. The explanation of his AW 24 rights to an accused should be simplified so that he will understand it.

Judge advocates should have the right to recommend the nolle prosequere of cases. Letters of reprimand should not be permitted. The practice was too frequent.

BRAVIN, Hyman, N.Y. lawyer; EM and infantry officer during war with court-martial experience. (p. 101)

As an enlisted man, I received no military justice instruction. In officers' candidate school, we had two hours of instruction--the last hour consisting of listening to a moot court. In a newly-activated division, I received another three hours of military justice training. This was inadequate.

As compared to enlisted men, officer punishment was inadequate.

The President should create a military justice division composed of civilian attorneys responsible only to him, with complete authority to handle courts-martial. The President should make the appointments, as distinguished from the JAGD. Formal preliminary investigations should be conducted by a civilian attorney trial judge advocate. Summary court officers should be civilian attorneys rather than Army officers. Members of this new legal division would retain their civilian status, would not wear uniform, and would have no rank. It would appoint trial judge advocates and defense counsel.

Special and general courts should have a civilian attorney who would act as a judge with final word on all legal questions. He would also determine and impose sentences. Questions of fact and determination of guilt would be the responsibility of a jury composed of Army personnel. (Note that Army already takes civilian personnel with it in the field, i.e. Red Cross.)

The above plan would make for impartiality, uniformity of punishment, and an absence of the prosecution of malicious and arbitrary charges. As the system worked in practice, there was a tendency

to often give excessive sentences, despite Manual for Courts-Martial provision (par. 80) that the initial sentence be legal, appropriate and adequate. The Manual contains maximum but not minimum punishments for described offenses.

McKEOWN, Maurice J., 1 Lenox Pl., Maplewood, N.Y.; lawyer; IG and JA officer during war. (p. 117)

In general, the courts-martial system works well. Its defects have chiefly resulted from its administration and personnel inadequacies. In my Air Forces unit, we always used competent personnel in serious cases. I tried the cases against competent defense counsel of the same rank as mine.

AW 70 investigation requirements should be modified to provide that defense counsel be present at the pretrial investigation. Restriction on the use of depositions in capital cases as outlined in AW 25 should be removed. Depositions should be permitted in capital cases. This would eliminate the practice of using stipulations. In single trials of more than one accused, each accused should be permitted a peremptory challenge. AW 95 should be abolished completely. AW 96 provisions would be a sufficient substitute. AW 85 re drunken officers should be abolished for the same reason. AW 104 powers should be increased, to permit fines against officers of any grade. Officers should be triable before inferior courts, and AW 13 should be amended to so permit.

Rather than use lawyers in a civilian capacity as the last witness suggested, I would prefer that they be better utilized by the JAGD, upon recommendations of various bar associations. It was difficult during this war to obtain a JA commission. JA officers should sit as law members on the courts in place of the present immature, inexperienced officers.

FILLMAN, Henry I., 120 Broadway, N.Y.; lawyer; Air Force officer acting as JA. (p. 128)

Military justice should be considered in the light of doing justice rather than as an arm of discipline. Courts were not free to do justice because of the inherent domination of the appointing authorities. This domination should be abolished. Better qualified officers with adequate rank and experience should be used on courts, although the size of the courts should not be increased. Defense counsel must have ability equal to that of the trial judge advocates.

The AWs should be revised. There should be separate tables of punishment for enlisted men and for officers, with differentiation in punishments for some offenses. A man who commits an offense should know the punishment he will receive. There should be maximums for the wartime military offenses.

NEW YORK

There should be district general courts-martial independent of local command in order to prevent command domination. These courts should be permanent, manned by JA members. Some of the present JA functions should be lodged in a civilian judge advocate general as is done in England. Such a civilian JAG should be independent of the Army, and should be represented at all general courts--to act as adviser to the trial judge advocate, the defense counsel and the court. He should advise on points of law, and should sum up the facts without opinion.

Company punishment should in practice be more of a trial.

There should be a Federal Rules of Military Procedure, to substitute for the Manual for Courts-Martial. If this be not done, then the Manual should be clarified re doctrines of irresistible impulse, etc. There should be more emphasis upon training of officers in court-martial matters.

GOODSTEIN, Irving D., N.Y. lawyer; EM and Air Force officer with court-martial experience. (p. 143)

Generally, justice resulted from the court-martial system and a remarkable job was done. In the main, soldiers also believed that justice resulted. There should be available to accused defense aid which had no relation to command and had only accused's interests at heart. Legally-trained men should always be available. Better determination might be made about an accused's psychiatric health.

10 Sept 46:

JACOBSON, Daniel, 110 E 42nd St., N.Y.; lawyer and member of American Legion legal committee N.Y.; EM and noncommissioned officer instructor on court-martial matters. (p. 149)

Excessive courts-martial sentences were imposed quite often, but were later drastically cut or shortened through rehabilitation processes. This meant that there was no certainty re the extent of punishment. Men generally did not expect to serve their full sentences. Sentences should be passed by a single court member--a qualified lawyer familiar with sentence uniformity and experienced. The law member should be court president and should act as a civilian judge does. Ample lawyers were available during wartime. Trained legal defense counsel should be used, and their arguments made available to reviewing authorities. The trial judge advocate should also be a lawyer. The rest of the court members would act as jurors.

LIBERMAN, Julian, 201 W 85th St., N.Y., lawyer; noncommissioned officer during war with court-martial experience. (p. 154)

Every lawyer should be given a direct JA commission in the Army. The JAGD should be independent of the War Department, and responsible

only to the President or some other body. Its members should, however, serve as officers. Three JA officers should be assigned to each unit, and these men would rotate the duties of trial judge advocate, defense counsel and law member. They would always be independent of the rest of the Army.

The summary court might well be abolished, extending the powers to company commanders as AW 104 company punishment but permitting the accused to complain to the JA officer with the unit.

EVERS, Irving C., 591 Summit Ave., Jersey City, N.J.; lawyer; officer during war with court-martial experience. (p. 167)

The court-martial system should be operated by trained personnel. The law members, trial judge advocates and defense counsel should be members of the JAGD. There is existing sentence disparity between officers and enlisted men. Officers get off too lightly. Enlisted men resent this. Justice must be impartial. Officers should be punished more severely. As it was, rank protected rank. Commanding general influence was prevalent. All personnel assigned to courts-martial work should have constant training and indoctrination. The members other than the law member would act as jurors.

KIRSCHENBAUM, Saul, Courthouse, Newark, N.J.; court reporter and representative of the court-martial record revision committee of the National Shorthand Reporters Assn. (p. 179)

Since court reporters are highly trained, the Army should commission them at least as first lieutenants, and should furnish them with typists for transcription. Since there were never enough qualified reporters in the Army, there should be a reporters' pool at regional centers to handle work not alone of courts-martial but also of other types of investigation. Reporters should be permitted to specify the equipment they need. The Army had no classification for reporters. Instead they classified all as shorthand writers, regardless of speed.

CAWSE, Alfred J. Jr., 25 Hyatt St., Staten Island; lawyer; EM and JA officer (p. 189)

All officers should have some military justice training. Excessive sentences were frequent. Courts should apply reasonable sentences. Courts seldom have mitigating circumstances before them. Although defense has the right to put them in, they seldom do so. The general practice is to announce sentences immediately. There was disparity of treatment between officers and enlisted men, with resort to AW 104 punishment for officers re offenses which had an enlisted man committed when he would have been sent before a court-martial. Likewise, not all officers are covered by AW 104, i.e. only company grade officers are covered. Even before courts-martial, twice as many officers as enlisted men were acquitted (8.7% for enlisted men; 19.7% for officers). AW 95 should be amended so that it would not include the mandatory punishment

of dismissal. This provision resulted in some acquittals of officers.

Courts-martial personnel were frequently incompetent, with the less competent officers being assigned this duty. The JAGD should be expanded to include all lawyers. Bar Associations should promote this. It took me 18 months as an enlisted man before I was commissioned a JA officer. After the commissioning of lawyers as JA officers, they should have specialized training. During this war, I understand that only 5% of the lawyer applicants for the JA school were accepted. Capable men were turned down.

With an expanded JAGD, a military justice division could be established. This would be divided into an executive section, a pretrial section, a trial section and a review section. While this should not be separate from the Army, it should be responsible only to the War Department and entirely removed from command influence. (Witness details present review procedure.)

General courts should be of either permanent or semi-permanent structure, assigned from higher headquarters. Every law member, defense counsel and trial judge advocate should be a JAGD member. The presiding court member should be the lawyer, with no vote on the accused's guilt or innocence. He should act as a civilian judge. Reviewing groups should be set up as in civilian life, with all cases having automatic appeal. Neither personal argument nor appearance would be necessary, but a defense brief might be used.

Generally, courts-martial did not result in inequities, and generally did good work. An enlisted man on the court would not increase justice. However, many enlisted men do not believe they are getting a square deal. AW 92 punishment for rape should not be mandatory.

BEERMAN, Isadore, N.Y. attorney; EM and warrant officer during war, working in JA office. (p. 214)

The court-martial system did work both at home and abroad. The guilty were convicted and the innocent were acquitted. Criticism has been chiefly directed to harsh sentences.

Inexperienced officers sometimes drove enlisted men to committing offenses. It is my belief that the Army is wrong in feeling that discipline is maintained by severe sentences. A distinction between moral turpitude offenses and military offenses should be made.

General courts should be permitted discretion to give indeterminate sentences without dishonorable discharges. A subsequent rehabilitation board should make the final determinations later. Rehabilitation processes were worked out during the war, with men being able to redeem themselves at the end of six months. The reviewing authority determined whether or not an accused would be sent to a rehabilitation

center.

Experienced JA officers should be the law members of courts, operating from a separate headquarters on a rotating basis. These law members should preside over the courts and have final say on questions of law. They should charge the court, but should not participate in the closed sessions. Defense counsel were weak, inexperienced, and rank-conscious. There should be permanent JA defense counsel, rotating from higher headquarters and responsible only to the JA office. They should have no other duties. It should be mandatory that they submit a brief or resume in every case to reviewing authorities. Court members should be appointed by panel selected by someone other than the officer who will subsequently become the reviewing authority. They should be selected as civilian authorities select jurors. Pretrial investigations should be improved, with defense counsel assigned prior to those hearings. They should be conducted by boards.

WALLSTEIN, Leonard M. Jr., N.Y. lawyer; JA officer during war. (p. 230)

Discipline must be combined with justice. Military justice worked differently in different places. Likewise, there was a more indulgent code for officers than for enlisted men. Mere procedural changes will not remedy these faults. Top control administration of military justice should be removed from the Regular Army Judge Advocate General. His experience and temperament is inadequate, and he lacks public confidence. Rather, the entire subject matter should be placed under an Assistant Secretary of War charged by statute with its responsibility. I do not think such a man would be influenced by politics.

There should be a limited appeal to a civilian court of appeals, perhaps constituted of federal judges and perhaps limited only to death cases.

Courts should be appointed by geographically-located officers, these latter also having the power of review but subject to the further appellate review just mentioned. Preliminary investigations should be supervised by lawyers. Law members, prosecutors, defense counsel, administrative men and reviewing authorities all should be lawyers. Bar Associations should assist the Army in their selection and in their commissioning. I do not favor enlisted men on courts. They would not be in a position to stand out against influences which might exist, and would be subject to command influence more than officer members.

The civilian Assistant Secretary of War for Military Justice would supervise a corps of lawyers--call it the JAGD or anything else. The ordinary court member would still be a lay officer. Law members would be the presidents of their courts, with final say on legal questions. They should charge the courts. They should also participate in the deliberations.

CHANANAU, Alexander, 52 Williams St., N.Y.; lawyer; EM and noncommissioned officer during war with JA experience as clerk. (p. 241)

Officers consider courts-martial as an arm of discipline rather than as a means of administering justice. Lawyers, or a free JAGD, should administer the courts, and then this criticism would not exist. The number of courts-martial in one command decreased when the JA was given freedom. The Army failed to fully utilize its legal talent. When I applied for JA OCS, there were 25,000 applicants, but the quota was only 75 men every three months. My application was rejected because I had only had two years legal experience.

Generally, the innocent were acquitted and the guilty were found guilty. However, there was a different standard for officers than for enlisted men, with the former being treated more leniently. The feeling was that if you sentenced an officer to jail, his future use as an officer was lost. Mandatory punishments for officers are too severe. Likewise AW 92 rape punishment should not be mandatory. Company commanders now have sufficient AW 104 powers.

There should be an independent JAGD. The mere assignment of lawyers as law members, defense counsel and trial judge advocates will not cure the present defect of command domination. The entire court must be removed from command influence.

LEFKOWITZ, Eugene E., Chairman of a military affairs committee of a Flatbush chapter of the A.V.C.; lawyer; EM whose JA application was denied; experience as a JA clerk at U. S. Disciplinary Barracks, Green Haven, N.Y. (p. 257)

My experience at a U. S. disciplinary barracks convinced me that 80 to 90% of the men confined were guilty of the offenses of which they were charged. But from 5% to 10% of the men had been "railroaded" by drumhead courts. Courts-martial were hampered by Army brass. The courts-martial system is often administered by incompetent personnel, which in turn means improper administration. There were inadequate defense counsel, law members and investigating officers. Professional officers are more prone to regard both enlisted men and temporary officers as inferior persons. Officer court members are inadequately trained. The military justice procedural manual, TM 27-255 is excellent but is seldom comprehended by lay officers. One officer (Lt. Col.) who had served as law member on general courts obtained only a 35% score at a military justice examination, despite the fact that he was permitted to use TM 27-255 during the examination.

Military and non-military offenses should be distinguished. I have seen convictions of some innocent persons, due to inadequate defense counsel. At the U. S. Disciplinary Barracks, I was told not to advise inmates of their habeas corpus rights. Company commander inadequacies also lead to courts-martial. There was a tendency to

assign less capable officers to courts-martial duties. Army courts were rubber stamps for superior command.

An independent JAGD is a good idea, but it should be composed of civilians under the War Department separate from Army brass. I would go further than putting enlisted men on courts. I would provide for a jury trial. A record should be kept of summary court evidence. Summary courts should consist of six-men juries drawn from a combined panel of officers and enlisted men and not subject to pressure. No trial delays should be permitted, and dilatory officers should be prosecuted under AW 70 provisions. Although an accused is supposed to be able to select his own defense counsel, my selection by an accused as his defense counsel was interfered with by higher command. There was marked sentence disparity. But I must admit that toward the end of my military service, I did see Army directives that sentences should conform to the District of Columbia Code.

A number of general court cases might have been disposed of in inferior courts. First offenders in non-combat zones should never be sent to higher than special courts, with sentence limited to six months. The Table of Maximum Punishments should apply to officers as well as to enlisted men. There should not be a double standard of justice. Company commander AW 104 powers should not be expanded. They already are abused. AW 96 should be more specific.

GREEN, William A., 1775 Broadway, N.Y.; lawyer; FA officer during war with limited court-martial experience. (p. 276)

My Third Army experience with general courts-martial indicated that only very serious cases were sent to the general courts. The Third Army staff judge advocate did an excellent job with what he had to work with. Lawyers were used as law members, defense counsel and trial judge advocates. The rest of the court members were taken from wherever officers were found to be available. Too much latitude is allowed individual commanders in drawing their charges against a soldier. Competent personnel should be provided to handle courts-martial matters. The commanders themselves have more important things to do. Best men could not be spared from combat duty for court-martial work. Usually court-martial work was considered by officers to be an onerous duty, and something with which he has had little experience or knowledge. He wants to get done with it quickly. I believe that the courts on which I sat listened more carefully in officer cases, feeling, "There but for the grace of God go I". Likewise, they had more sympathy for officers. Too frequently, inexperienced officers were guided wholly by the table of maximum punishments. There was some domination by rank. Courts generally did not consider mitigating circumstances. The best law member I ever saw was removed from the court on the recommendation of the president because of his insistence on excluding improper testimony. Good court reporters were difficult to obtain, as were also interpreters.

Review of general court cases was good, yet the system is dangerous because initial review is accomplished by the headquarters which appointed the courts. Separation of the JAGD, law member, trial judge advocate and defense counsel from command would not solve the problem unless there was an available pool of competent personnel. Civilian lawyers would not be the solution, because they would command no respect overseas. However, it would be an advantage to have an independent JAGD operating somewhat along the line of the Inspector General's Department.

There was much sentence discrepancy between commands. Different generals have different viewpoints. Some kind of parole and probation system would be wise. The Army should have the equivalent of habeas corpus writs. But by and large, the military justice system is good. The JAGD should be expanded. A JA officer should be attached to every unit down as low as infantry regiments. If you get better field JA personnel, you will get better and more uniform justice. Should you put enlisted men on courts, you will probably get second rate enlisted men as you now get second rate officers. Moreover, you would have to have infantry enlisted men to try infantry accused, etc.

GOLDSTEIN, Hyman E., 135 Broadway, N.Y.; lawyer; noncommissioned technician in war with court-martial clerical experience. (p. 298)

Habeas corpus procedure is not needed by the Army because AW 70 provisions for a speedy trial are already adequate. Many appointing authorities dominated their courts, particularly re findings of guilt and maximum sentences. Sometimes, a dozen trials would be held by a court after 9 p.m. of an evening. There were inadequate defense counsel. Appointing authorities should never be the reviewing authorities. There should be a separate legal department in the Army. The judge advocate, the appointing authority and the reviewing authority should be lawyers. In my local command JA officers, some of the personnel were not lawyers.

AW 104 was too infrequently resorted to other than to officers. I would do away with summary courts, and try the minor offenses by special courts of at least three men. (other than those which might be handled by AW 104)

RODMAN, Leroy E., 150 Broadway, N.Y.; lawyer; EM and JA officer. (p. 311)

The Army should have an independent judiciary. Most civilian-type offenses reach court-martial through AW 96 (other than those which come up through AW 93). The court-martial system dispenses justice as well as discipline. It should therefore be made to act as a judicial system. One Regular Army officer told me that when he was doubtful of the extent of an offense, he also resolved the doubt in favor of the greater offense. His reason: the re-

viewing authority could cut down the more severe finding of guilt. The remedy would be to create an independent judiciary within the confines of the JAGD. JA officers should be responsible to Washington for their promotions, discipline and conduct. They should send courts on circuit. Appointment of such JA personnel should be on a principal duty basis. Local commanding officers should have more AW 104 power. This new JAGD would consist of a panel of courts, a panel of prosecutors, and a panel of defense counsel. The JAGD would appoint both special and general courts.

BREITMAN, George, 580 So. 11th St., Newark, N.J.; master sergeant during war. (p. 321) ²

The primary purpose of the court-martial system is to maintain discipline. This explains the thousands of miscarriages of justice during the recent war, and why there was disparity in punishment and overly-severe sentences. It explains why trials were often out and dried, and why enlisted men were considered guilty until proven to be innocent. The system must be revised radically, rather than merely reformed. The functions of prosecutor, judge and jury must be removed from officer corps control. Instead of general courts-martial, there should be civilian jury court trials for the serious offenses. I would extend civilian courts overseas—civilian judges, lawyers and juries.

RICHARDSON, Milton J., 229 W 110th St., N.Y.; staff sergeant during war. (p. 325)

There should be civilian court trials for serious offenders. At present, summary courts are least democratic. I would abolish summary courts, and would combine summary and special courts. I would use a jury on this new court which would consist entirely of enlisted men of no higher rank than the accused. A sergeant might be tried by a court of privates. This would make both the Army and sergeants better. Negro soldiers should serve on courts trying negro accused. Men on these juries should be chosen from outside units.

We need a new set of AWs and a Manual for Courts-Martial rather than a few piddling reforms.

SOBERNHEIM, Rudolph, 24 Hix Ave., Rye, N.Y.; Army specialist and OCS candidate at the JA school. (p. 328)

Military justice functions should be separated from command. Special courts should be abolished, to leave only summary courts with their present powers, and general courts for all other offenders. There was too much sentence discrepancy. The Table of Maximum Punishments should be revised to correspond to modern criminal law. A military justice serve should be created to handle courts-martial. The Table of Punishments might include relatively narrow limits for maximum and minimum sentences. If officers are guilty of sufficiently serious

offenses to warrant dismissal, they should also be imprisoned, reduced in ranks, executed, or anything else that might be necessary.

SANDBERG, Milton, 74 Trinity Place, N.Y.; lawyer; JA officer. (p. 334)

Too many accused soldiers had inadequate defense counsel. While the Army had plenty of lawyers, too often they were unavailable. The blame must, to a great extent, be placed on the American Bar Association and other bar associations for failing at the outset of the war to develop a plan for the utilization of legal manpower. Besides inadequate defense counsel, there was too much command domination of all phases of the administration of military justice. While minor disciplinary matters should continue to be handled within the command, the more serious offenses should be tried under the supervision of Branch JAG offices within the theaters of war. The prosecution, defense and law members should be lawyers, with the law member acting as judge and the other court members as jurors.

RUCKERT, George W., 638 Lenox Ave., Westfield, N.J.; salesman; CA officer. (p. 340)

The present system is generally satisfactory. The courts-martial must remain an integral part of command, in order that necessary discipline be maintained. Men were given a fair break, although perhaps they were awed by the court to some extent. I thought that many accused did not feel so much a sense of injustice as a sense of resentment that they had been caught. As a small unit commander, I would recommend a trained man (not necessarily a lawyer) at regimental level. That man should know military law. He would act as investigator at special court level. As to general courts, there should be special defense counsel at division level whose total work would consist of defense.

BLAND, Bertram C., 128 Market St., Newark, N.J.; QM officer during war with court-martial experience. (p. 345)

Courts-martial should emphasize justice rather than discipline. Their use should not be permitted to cover up weaknesses of command. Severe sentences were improper. As to heavy sentences, I found that the Third Army made a sincere effort to cut them down. The men did not know of these later reductions, because their only information came from the posting of the initial sentences.

The JAGD should be expanded and made independent. JA officers should be available in the lower echelons, such as groups, battalions and companies. Courts-martial should have independence. Enlisted men should participate as court members. A private should be permitted to be a court member in the trial of a sergeant. Court members should come from a panel of officers and

enlisted men in charge of the JAGD. The great mass of enlisted men would gladly serve on courts, and would not be subject to domination any more than officers. On the whole, innocent men have not been convicted. Law members should have final say on legal questions. He should act as judge, with the rest of the court members the jurors. The law member should not vote on the findings. The entire military record of a man should be considered before sentence.

FASSLER, Arnold H., 51 Chamber St., N.Y.; lawyer; warrant officer with JA during war. (p. 359)

There were instances of JA law members who had knowledge and pre-conceived ideas re the cases which were before their courts. This could be eliminated by having preliminary papers so signed that the higher authorities appointing the courts would know who had earlier knowledge of the cases about to be tried.

Inferior courts should be improved. Summary court trials should be followed up by a summary of the evidence therein for a reviewing authority. The JAGD should be enlarged. There was disparity in officer and enlisted men sentences. Inequity resulted when we imposed more severe offenses for offenses against foreign civilians (i.e. statutory rape in England) than would have been imposed by the local courts. There should be some flexibility.

HOFFMAN, Leo L., 570 Seventh Ave., N.Y.; attorney; infantry officer during war with court-martial experience. (p. 371)

The present system is good. As trial judge advocate and defense counsel in a number of cases, I had ample time to handle the work. There was cooperation by command. I aided in selecting defense counsel and the courts. However, a JA officer should be the law member of general courts. The trial judge advocate and defense counsel should come from local command, after having been given an adequate course in military justice. Unfortunately in a hastily mobilized Army fighting an important war, other duties are bound to interfere with the administration of military justice. I found that the average court member presumed a man to be guilty until proven innocent. I also found a tendency to impose maximum sentences, leaving it to the reviewing authorities to reduce them subsequently. Proper instructions from the JAGD would correct these tendencies. The JAGD should assist and guide, but it should not interfere with local command. Local command power is necessary to handle local problems. The JAGD should be in charge of indoctrinating and instructing new officers re courts-martial. The Army's animosity against lawyers is proper, because the profession has built up improper trivialities.

FREEDMAN, Leo, 110-34 73rd Rd., Forest Hills, Long Island; officer during war with court-martial experience. (p. 381)

Command domination of courts should be terminated. Civilian lawyers should have been utilized by the Army. The average Regular Army officer has insufficient legal experience. By mixing civilian lawyers with regular officers, civilian excesses would be prevented. There is an automatic appeal in courts-martial cases which is insufficiently appreciated. In a large Army, it is impossible to give adequate military justice training to everyone. As assistant staff judge advocate, I have written letters of censure to court members, particularly one court president who went too far in his attempted domination of the trial judge advocate. We subsequently reversed the finding of guilt in that case.

11 Sept 46

FARMER, Arthur E., 551 Fifth Ave., N.Y.; attorney; EM and JA officer during war. (p. 395)

Judge advocates should be removed from local command pressure. Their recommendations should carry the weight of higher echelon JAGD authority. The JAGD should have the powers to appoint courts, to refer cases, and to pass on findings and sentences. The JAGD should appoint courts from officer panels submitted by local commanding officers in special court cases. Both special and general courts should have law members. Law members should be required to sit with their courts as well as merely to be designated as at present. I would prefer that even a general court have only a non-voting law member and three other officers. The law members should be JAG officers. The JAGD should be expanded. In addition to the above powers, it should also have the power to refer cases. The JA school need not teach all its officer candidate students all the courses now taught, i.e. contracts, international law, etc. They might well have specialized courses to train only military justice judge advocates.

Too much pressure is used today in courts-martial matters. AW 43 should be amended re voting in courts-martial to end the Hancock v. Stout interpretation thereof. If a finding of guilt is not unanimous, a death sentence in that case should be prohibited. The same rule should apply re cases in which a 3/4ths vote is required. Also, findings and sentence should indicate the number of votes each way. At present in small staff judge advocate division offices, the officers confer about a case and then one may go out and sit as law member thereon.

RESNICOFF, Samuel, 280 Broadway, N.Y.; lawyer appearing on behalf of the Jewish War Veterans (30,000 members); soldier during war. (p. 412)

There should be a separate legal corps without rank but with division into junior and senior members, dependent upon length of service. They should be known as P.O.s--professional officers (as Flight

Officers are known as F.O.s). The P.O.s should include all doctors, dentists and lawyers. The legal officers should do nothing but legal work, courts-martial and otherwise.

The Manual for Courts-Martial should be substituted by a new Manual which would clearly define everything. While stenographers are unnecessary in summary courts, they should be used to take down the complete transcripts in special courts. AW 96, the catchall, should be discarded in its entirety. It is insufficiently definite. Special and general courts should be presided over by civilian Army judges appointed by the President and approved by the Senate. A Special court should have one civilian judge reviewable by three Army judges with final decision. All should serve outside the Army, and should be without rank. These new courts would handle both military and non-military offenses. With civilian judges, more than 50% of courts-martial would be eliminated. My experience was that 90% of the cases were based on AW 96, and we should eliminate AW 96. On the general courts, there should be three civilian judges in serious cases, with their decisions reviewable by the Secretary of War. AW 121 provisions for redress should be amplified and enlarged. The I.G. to whom complaint is made should be a separate department without rank, etc. The I.G. should have absolute right in its investigations to act impartially.

BARKMAN, Francis E., Brooklyn; lawyer; EM and officer during war with court-martial experience; taught military law at Ordnance OCS school for 14 months. (p. 428)

Court members should have been familiar with military justice. They needed more training by JA members. At our OCS, we gave a 20-hour course. It should have been expanded to 40 hours. Defense counsel should be of equal or superior rank to the trial judge advocate, and also should be as well qualified. Accused's power to select independent counsel should be expanded, so long as the selected defense counsel was reasonably available. My experience was that special court digest-records were properly and carefully prepared, and properly gone over by defense counsel. I would eliminate the necessity of preparing written findings of fact by the court.

Sentence disparities between officers and enlisted men have not always favored the officers. Sometimes it worked the other way. The Manual for Courts-Martial needs some revision, i.e. re larceny and embezzlement (discuss at length). A general AW such as AW 96 is necessary, but it should not be used to expand crimes which are specifically detailed in other AWs. In such cases, it should be used only for findings of lesser-included offenses. Should the present excellent Manual for Courts-Martial be rewritten, its index should be improved.

NEW YORK

MARCUS, Marshall S., 200 Fifth Ave., N.Y.; attorney; sergeant major in AF during war with court-martial experience. (p. 438)

The use of skin letters should be abolished. Law members should be men with legal experience. Evidence rules should be enforced strictly in courts-martial—rules of the U.S. courts. An appellate system should be established. Staff judge advocates—all lawyers—were usually incompetent. This often resulted from their attempts to please their commanding generals. There should be a separate legal department responsible only to Washington. Defense appeal briefs should be used. The Army's appellate system should follow the N.Y. system of appeals. The appellate courts would consist of ranking officers of the legal department, and would sit either in the theaters or in Washington. They would be appointed by the JAG or the President. An accused should be apprised of the charges and given defense counsel as soon as he is officially accused. At present, investigations often result in unfairness to the accused. Courts should be constituted of one judge and a jury of men one rank above the accused, using enlisted men entirely. Mixed courts would be improper.

POST, Edward Tanner, 1 Madison Ave., N.Y.; lawyer; EM and officer during war with court-martial experience. (p. 455)

The services of legally-qualified enlisted men should be used. They should sit on courts, and give other legal aid. The investigating officer should not thereafter be named the trial judge advocate. As to the criticism that defense witnesses were not brought in, my experience in some 100 general court cases was that the accused would not name any witnesses he desired to have brought in. There should be a separate group of investigators. Many accused "clammed up" because of fear before the investigating officers. Defense counsel as well as trial judge advocates should have the power to subpoena witnesses. Use of depositions by the prosecution should be continued. The method of voting in courts-martial is adequate re the necessary vote for convictions.

There should be clarified AW provisions re the further confinement of a military prisoner who is given another court-martial sentence while already serving a similar sentence. AW 50 and 52 re mitigation, remission and suspension of sentences should be amended. AW 65 provisions re insubordinate conduct by soldiers should be clarified in its extension to offenses committed by military prisoners. There should be separate maximum punishments for general prisoners.

DOUGLASS, Malcolm C., East Orange, N.J.; layman; EM during war. (p. 470)

The Army's method of selecting general courts prejudices the cases against enlisted men. It seemed to me that the staff judge advocate who selected the courts influenced the members. In a trial at which I was prosecuting witness, the press was excluded. Enlisted men should

be represented on the courts. At the case in which I testified, I was excluded from hearing "what use was being made of my testimony". Special court members should not be selected by local command. Sentences were too severe. Accused should be tried away from the locality of the offense.

SEREYSKY, A.W., 52 Williams St., N.Y.; attorney; EM and JA officer. (p.475)

My extensive experience with general courts indicated that while the system is good, court personnel is inadequate, usually being the less competent officers of a command. Sentences are too severe. I would require a 3/4ths vote for sentences over five years. The JAGD should become the military justice division of the Army. Courts should not be appointed by local commanders but by area Judge Advocate Generals. Enlisted men should serve on the courts to the extent of 25% of the total membership in trials of enlisted men. They should be above the grade of the accused, and from a different command. The court personnel should have the same background as the accused, i.e. combat experience or noncombat experience. Excessive sentences seemed to be more prevalent for military offenses. It should be a jurisdictional requirement that pretrial investigations be had.

BAETICH, Emanuel, 122 E. 42nd St., N.Y.; attorney; AAF enlisted man who served with Board and Claim Section during war. (p. 481)

During my last six months in the Army as a sergeant, I defended a number of enlisted men at their request. I felt that the courts were more attentive because I was an enlisted man. In no case was a maximum sentence given. Special courts should have law members. Law members should be trained men. Although an accused's previous convictions are not stated to the court until after its finding of guilt, it too frequently happens that a court member may know of them before trial because of earlier experiences. Members who have served on a previous court-martial of an accused should not be permitted to serve on later courts-martial of that same person. Investigating officers should have been better qualified. Accused should be given defense counsel as soon as they are charged rather than subsequently.

ROSENBERG, Herbert E., 233 Broadway, N.Y.; lawyer; EM and MP officer with court-martial experience. (p. 489)

Courts-martial work should be primary duties for trial judge advocates and defense counsel. All court-martial members should appear in similar dress without insignia of rank, so that there would be no feeling of the influence of rank. Appointing authorities should have to appear personally at the commencement of trials and tell the courts that accused is to receive a fair and impartial hearing. Appointing authorities should have no power re the promotion of members of their courts. Preliminary investigations at which

accused appear without counsel do more harm to those accused than good. Such investigations should be abolished. AW 4 should require that court members have a high school education or its equivalent. Too many court-martial members had little knowledge of the law or their duties. They knew nothing of rules of federal practice, evidence or procedure. Lawyers should be placed in a separate department. Non-military offenses should be handled by the Federal judiciary as distinguished from the Army. It would be wise to have a new JAGD whose members would serve as law members, defense counsel and trial judge advocates. Enlisted men today cannot get independent counsel unless they are "reasonably available". This phrase was sometimes used to the prejudice of accused. It should be substituted with the words "if counsel be willing to serve". There should be a "soldiers-defense generals' department", completely independent of the JAGD.

SILVERMAN, Selig J., 274 Madison Ave., N.Y.; attorney; AF officer with court-martial experience. (p. 500)

The basic military justice problem is one of personnel—the necessity to get qualified men. Courts-martial were, generally speaking, administered by non-professionals. Specialists were necessary in all fields, and were so used by the Army except in matters of military justice. There should be a separate permanent court-martial system as suggested in the Committee's Questionnaire, Sec 5, Art. 5-V. There was too much command domination during this war. There were frequent sentence disparities. Pretrial investigations were often perfunctory. Too often, guilty men went free.

10 Sept 46:

COHEN, William R., 24 Branford Place, Newark, N. J.; lawyer; in reserve for 20 years; entered active duty as captain in 1940 and was discharged in January 1946 as a lieutenant colonel. Served as defense counsel and TJA at Fort Dix, N. J. (p.392)

Officer with no legal training should not be assigned to trials; assignments "in addition to other duties" makes for slipshod work and hurried consideration. There should be a lawyer on special courts; special staffs for investigation, prosecution, and defense. Investigating officer should be of high rank to eliminate possibility of influence and come from a unit or post other than that of the individuals involved. Defense counsel should be assigned on arrest of accused. Favors roving courts to eliminate influence of commanders.

PHILADELPHIA HEARING

Mr. Henderson24 Sept 46

MONCURE, William A., Girard Trust Co., Philadelphia; lawyer; EM and JAG officer during war. (P.3)

Justice was obtained in the large majority of courts-martial cases. Often, cases had to be tried on documentary evidence such as morning reports because witnesses were dead or unavailable or unwilling to testify. As in civilian life, there were men from all walks of life in the Army, including those with civilian criminal records. Policy in my headquarters was to execute dishonorable discharges only in those cases involving moral turpitude and in military offenses which were aggravated, i.e. repeaters, etc. When the dishonorable discharge was suspended, the prisoner usually served only about six or seven months in a rehabilitation center, after which he could receive an honorable discharge. Severe penalties were necessary in wartime. It was estimated that at one time there were 20,000 absentees hiding out in the Paris area alone. Thousands of those apprehended were not prosecuted because of a lack of evidence. The Army was not sufficiently disciplined, and would have to be better disciplined in another war.

A general court might well be composed only of three JA officers, with power to suspend sentences. Formal staff judge advocate reviews should be continued, but with possibly some modification. Action or sentence should be assigned by a JA independent of the commanding general.

More officers should be tried before general courts. It should be possible to give them suspended sentences or short imprisonment for drunkenness or similar offenses. Officer fines were inadequate. JAs signing sentences should be permitted to reduce death sentences. Rape punishment should be reduced to perhaps 20 years or so confinement. More lawyers should have been used as JAs. JAs were overworked. Sentences in Paris were sometimes quite severe, although usually reduced.

FRAME, T. E., Bankers Securities Bldg., Philadelphia; EM and JAG officer during war. (P.13)

The main court-martial purpose is to aid in maintaining discipline. Administration of justice cannot be separated from military command. Enlisted men should not be permitted to serve on courts, because those courts must be tied to officer command.

PHILADELPHIA

Before the War, the 121 JA officers had to be spread quite thin, with result that they did not function at trial level. Inexperienced men served at that level. The court-martial system should be handled by trained men. This responsibility should be chargeable to the JAGD. You cannot turn a court case over to a trained chemical warfare officer, and expect him to handle it properly when his background contains only the scantiest of military justice training. This criticism also applies to pretrial investigations. The Army roster should include trained investigators, with investigation work their primary duty.

There is now confusion between reduction in rank of a non-commissioned officer, this being done both by administrative action and by courts-martial. Once charges are made against a non-com, the administrative power to reduce him should be suspended until the charges are disposed of.

COHEN, Edward, 1905 North American Bldg., Philadelphia; JA officer during war. (P.27)

Courts-martial procedure was excellent during the war, but there was a lack of personnel to administer it. There were seldom more than two JA officers on the average post, so that the bulk of military justice work had to be handled through inexperienced men, preferably lawyers if they could be found. Defense counsel were usually inadequate, and were often selected because they had no other "important duties" to perform. If there was an infrequent defense counsel who did too good a job, he would probably be removed and made trial judge advocate. I believe that all together, there were only 3,000 JA officers at the peak, and they were usually stationed in higher echelons separated from actual handling of the cases.

As trial judge advocate, I was often told that I should see that maximum penalties were obtained. I have heard many courts admonished for leniency, and have seen a letter of reprimand. The court-martial system should be removed from command, and should be under the complete control of the JAGD. There is a dire need for trained law members. I seldom saw one.

AW 95 should remain. An officer so charged may always be found guilty of a lesser AW 96 offense wherein dismissal is not mandatory. There was disparity of punishment between officers and EM. The only way this could be eliminated would be to remove the court system from command.

The Army did a great injustice to lawyers. The legal professions could have been used to better advantage. Bar Associations should have done something about it.

FITZGERALD, David B., Morris Bldg., Philadelphia; lawyer; QM officer during war with troop duty, JA duty and court-martial experience. (P.41)

The basic court-martial law is an Act of Congress, supplemented by executive order of the President. It contains common-law principles, and was revised after World War I. The pretrial investigation adds a safeguard not found in most civilian communities. Investigation is a command function, and should be. Pretrial investigation should be made mandatory for special court offenses. AW 22 should be made more specific, to give the defense more opportunity to obtain defense witnesses. The present Table of Maximum Punishments provides a moderate system of penalties. There are also powers of mitigation and review. Sentences may not be increased, and men cannot be retried. Law members catch many errors, and reviewing authorities catch the balance.

The Lichfield brutalities were isolated. In my frequent wartime inspection of prisons, I never saw similar brutalities. Prisoners could write to anyone they chose and had contact with chaplains who reported directly to the Chief of Chaplains.

Officer court members are more strict with other officers than with enlisted men. The customs of the service are strong. Officers can expect severity, seldom tempered with mercy.

Attempt is made to keep men out of confinement, because keeping them there adds extra burdens to a unit. Unit commanders attempt to avoid courts-martial, because excessive numbers of courts-martial are a reflection upon their command abilities. First offenders are not tried except for very heinous or aggravated acts. Only if a man is a repeater does he get serious punishment.

I have never noted any command domination of courts. Rather the contrary is true, with junior officers exercising remarkable independence. However, commanding officers sometimes show their displeasure with a sentence after the event. Five lawyers usually participate in general courts, two for the offense, two for the defense, and one as law member. Additionally, all officers receive some courts-martial training. As to sentence uniformity, most cases go to special courts with a six-month ceiling on confinement. There was frequent rehabilitation. Severe sentences were reduced.

Special court records should be kept verbatim. Other than that, I have no recommendations for any substantial changes, but would in the future further emphasize rehabilitation of offenders.

PHILADELPHIA

HEPBURN, Earle, 1500 Walnut St., Philadelphia; lawyer and JA officer during war, Board of Review member. (P.57,90)

I have reviewed thousands of courts-martial records, and have written hundreds of Board of Review opinions. The courts-martial system is excellent, although there are a few loopholes. The personnel, rather than the system has fallen down. About 75% of the complaints against courts-martial are directed against sentences. Generally, the AWWs leave it to the courts to set such punishment as they shall direct, relying upon the President (AW 45) to draw up a table of maximum sentences. This being at the President's discretion, the first thing he did during this war was to remove maximum punishments on AWOL, which resulted in a follow-up of severe sentences for that offense. Likewise, the Table of Maximum punishments did not include all offenses. And where maximums are in effect, it is possible to redescribe an offense to permit the imposition of a greater penalty. In the European Theater, there was no maximum limit on 80% of the offenses tried. AW 45 should be written to include a fixed table of maximum punishments which are effective. And because courts invariably impose the maximum, these future maximums should be set at about the level of a fair (as distinguished from a maximum) sentence. The future table should include more types of offenses, with a specific limit of punishment for offenses not found in the table. There is particular danger in AW 96 in this regard. Present clemency boards in Washington have cut down at least 75% of the wartime sentences. Despite the 17,000 trials we had in Europe, when I left that theater only 4,000 men were still in confinement. Rather than follow the British system of imposing shorter sentences and making the prisoners serve them in full, we impose excessive sentences and cut them down. The result is that the soldiers consider our sentences to be a joke, and do not pay much attention to them. They therefore lose their disciplinary effect.

The three key men in every general court case are the trial judge advocate, the defense counsel and the law member. These should be lawyers or JAG members, particularly the latter. I have seen many records in which accused were improperly defended. While an accused has freedom to select his own counsel, he seldom knows who is a good counsel. The law member should be a JA officer without exception.

AW 70 investigations are too frequently conducted as a prosecution rather than as an impartial hearing. Defense counsel should always be present at investigations. Accused's investigation statements should be inadmissible in evidence.

AW 92 should be amended, to leave punishment for rape at the discretion of the court. It should not exceed the punishment levied in the countries where the rape was committed.

AW 50 $\frac{1}{2}$ should be patched up. This complicated AW covering appellate procedure is difficult to understand. Cases with suspended dishonorable discharges receive only a cursory appellate examination rather than a board of review examination. While 75% of those offenders have been released and sent back to duty, 25% still do remain in jail. Published order cases should be handled by boards of review if the man is actually confined for one year. Boards of review should have clemency powers. A board's reversal of a conviction should be final, and should not be subject to further action by higher authorities. Those higher authorities do not have the time to sufficiently consider such cases.

AW 96 should be amended, to strike out the words "all conduct of a nature to bring discredit upon the military service." (Reasons explained at length--pp. 76-8) AW 95 should remain as it is.

Assuming that these other suggestions are not adopted, military justice should be removed from the Army and placed in civilian hands in regard to appeal boards--a sort of Supreme Court of Military Justice of several persons. Such a change could be made by substituting the words "supreme court of military justice" or "judge advocate" in AWs 45, 48, 50 $\frac{1}{2}$, 51, 52 and 53 wherever the present words "Secretary of War" and "President" appear.

DUNLAP, Foster A., Land Title Bldg., Philadelphia; lawyer; infantry and IG officer during war; court-martial experience. (P.82)

Substantive court-martial law follows the common law, and is satisfactory. Procedural court-martial law is defective, chiefly because of the appointing authority's excessive powers. The courts which I have observed sought to carry out the commanding officer's will, particularly re maximum punishments I have received "skin" letters. I have also seen courts relieved when their findings did not correspond to his views. Courts have been tools of the commanding officer, and very dull ones at that. Defense counsel and trial judge advocates are seldom lawyers. While it may not be essential that they be lawyers, these men should not have other primary duties which would interfere with their court-martial activities. Staff Judge Advocates were too often amenable to their Generals in disciplinary matters. Courts-martial jurisdiction should be removed from lower echelon commanders, excepting in AW 104 matters. Courts might travel circuit under field commanders. I agree with Col. Hepburn's views re appellate review. Court officers should be free from other duties. Circuit courts are practicable, in view of modern transportation. A number of courts, with several sets of prosecution and defense counsel could be established.

AW 95's provision for compulsory dismissal is unfortunate, and has sometimes led to acquittal of guilty officers because of this

PHILADELPHIA

severity. Officer punishment should be identical with enlisted men punishment. Mandatory dismissal should be eliminated from AW 95.

A new Table of Maximum Punishments should cover officers and civilian employees, as well as enlisted men.

McDOWELL, Sherwin T., Land Title Bldg., Philadelphia; lawyer; EM and Med. Adm. officer detailed to JAGD during war. (P.39)

The weakness in the court-martial system results from the association of command and judicial functions. General courts should be appointed by the JAG, should be under his command, and should be responsible to him. He should do the promoting. At present, there is command domination of courts. Defense counsel in general courts should always be JA officers. Likewise, the law member should be a JA. It would contribute to uniformity if the trial judge advocate was also a JA, although I am not so sure that this is necessary.

Presently, there is too great a tendency for defense counsel to plead a man guilty.

General court trials should be reviewed by a JAG with respect to both law and facts, and with power to reduce sentences to secure uniformity. In the alternative, devise a code which specifically states punishments for every offense, thus eliminating both AWs 95 and 96.

In special courts, defense counsel should be lawyers or JA officers. There has been too great a tendency to overlook the importance of the special courts. Six months confinement is important to the man who serves it.

Defense counsel should be present during pretrial investigations. These investigations should be conducted by JA officers serving in the area. My experience was that investigations were complete and comprehensive, but were also slanted against the accused. There was a tendency upon the part of court members to feel that an accused must be guilty else he would never be before the court. I have seen letters of reprimand to court members, which were made part of their 201 files. Likewise, there are other means of influence.

SHELL, Irving R., 6926 Cresheim Rd., Philadelphia; lawyer; EM during war with court-martial experience. (P.99)

Courts should not be appointed from the command by the commanding officer. The members naturally try to please him. There is no ballast on present courts to keep them on an even judicial key. Such ballast could be supplied by legally trained law members, with court members entirely separated from command. I know of a staff judge advocate who instructed courts that there is ample justification to consider that a man sent to trial before a general court is guilty.

The courts should be presided over by a judge. Some other countries are already doing this. The German court-martial system seems to be most equitable. In that system, trials of serious offenses have two judges, "civilian judges, one of whom presides, each one assigned to the military, two officers of field grade or higher, and two men of rank no higher than the accused."

The present system results in sentence inequities.

McNALLY, John M., Jr., 606 Vernon Rd., Philadelphia; Air Corps officer with court-martial experience. (P.108)

More attention should be given the appointment of defense counsel. He should have more time to perform his duties. It might even be wise to use full-time defense counsel. As defense counsel with other duties, I was always hurried in preparing my cases, although I was able to get postponements when necessary.

There should be an in-between punishment for officers, less than dismissal and more than a fine. I also found some command domination. Courts should have full power over punishment, and not be obligated to impose maximums. Reviewing authorities have not the immediate knowledge of a case which would permit them to exercise the soundest judgment in regard to clemency.

There should be more pretrial investigation safeguards. Accused who make statements at those investigations usually feel under some compulsion to talk. As soon as a man is charged with an AW offense, he should have defense counsel.

While I do not think innocent persons were convicted, I feel that there were sentence excesses.

BELL, Clarence D., Grozer Bldg., Chester, Pa.; attorney with FA and IG officer experience during war. (P.115)

There is command domination, particularly of the inferior courts. Courts and counsel are untrained, with other primary duties and insufficient time to devote to courts-martial. Likewise, there is bias. There should be a professional court staff traveling circuit from Army or Corps headquarters. This court should be independent of command, and should be permanent. It is doubtful whether enlisted men on courts would be an aid, because the better enlisted men became officers during wartime. Defense should be by trained men, and should be a primary job. Only lawyers would be qualified to handle the key courts-martial positions.

PHILADELPHIA

FERRER, Robert N., 310 S. Smedley St., Philadelphia; attorney; officer during war with courts-martial experience. (P.122)

The present system, as a whole, is good when administered by trained personnel. Inadequacies result from inadequate training. Few officers know how to draw up proper charges and investigations. There is a general ignorance of duties, with resulting delay and loss of confidence in the courts. There should be more instruction, both during initial training and also after assignment to a unit. This latter type of training was had in one unit in which I served, with excellent results. I have never seen a case which resulted in either unjust conviction or excessive punishment. I believe that lay officers can be sufficiently trained to run the court-martial system, without requiring them to be lawyers.

JASON, Mrs. Mamie J., 509 So. Broad St., Philadelphia; N.A.A.C.P. officer and ngress mother of three soldiers. (P.129)

Courts-martial members should have thorough military legal knowledge, and should include some properly trained enlisted men. There is a fraternity among officers which hinders justice. At a Florida case in which my son was one of the accused, defense counsel failed to confer with the accused and failed to develop their case.

There should be proper pretrial investigation by unprejudiced persons who would have to establish their disinterest before they could so serve.

Courts-martial records should be reviewed away from the local area base by persons of a judicial mind without affiliations or outside influence.

The Army discriminated against negroes re the type of assignments they would give them—usually restricting their status to that of servants. My son was sentenced to one year for over-staying a weekend pass. That was excessive punishment. Officers who got convictions got promotions. So also with the judge advocates. There are too many dishonorable discharges for relatively minor offenses. Injustice is meted out to negroes in particular. This affects morale and creates social problems. (Cite injustices.) In one particular case, prospective defense witnesses were transferred.

SHORTER, Charles A., 260 So. 15th St., Philadelphia; officer of N.A.A.C.P.; colored. (P.142)

I am more anxious to see a fair man on a court, regardless of whether he is white or colored. "So many of our colored men who are successful in the Army have been Uncle Toms" who cater to their own success.

NITZBERG, William N., 1709 Market St., Natl. Bank Bldg., Philadelphia; lawyer who handled a number of courts-martial cases (mainly Navy). (P.143, 156)

There should be a uniform system of courts-martial for all the Armed Forces, rather than merely for the Army or the Navy. Today, there is no uniformity re sentences and offenses between the two services. I defended several hundred accused in the Navy.

A problem of "brass" results from the use of officers on courts-martial. Defense counsel should be better selected, and should outrank the trial judge advocate by several grades. More care should be exercised in preparing courts-martial records. (Shows copy of a record he has brought to the hearing.) Army records should be like the Navy's--typed on one side of the paper only and in a legible manner. A demurrer to the evidence should be permitted upon completion of the prosecution's case. I do not know whether any innocent men were convicted.

[Local chairman intercepts, to definitely state that Army courts-martial procedure has provision for directed verdicts--Manual for Courts-Martial Par. 56b.]

A man should be immediately advised what disposition has been made of his case. Use of depositions in courts-martial should not be permitted. Army sentences are too severe, and should not exceed civilian limitations on punishments. Law members should not have a vote on the facts, but his rulings of law should not be subject to challenge. There should be no sentence disparity between officers and enlisted men.

SCHWEITZER, Henry, 1932 E. Birch St.; father of a soldier who cracked up after extensive combat, left the lines, and got a 20-year sentence (reduced to eight years).

No recommendations, other than to discuss his 23-year old son's case.

LINDSAY, Robert J., Liberty Trust Bldg., Philadelphia; lawyer; EM with courts-martial experience during war. (P.158)

Working as an enlisted man in a judge advocate office, I found that the most difficult task was to find competent personnel, both defense counsel and trial judge advocates. Had trained lawyers been given direct commissions, this difficulty would not have existed. JAs could have traveled in teams, assigned out of the Theater Headquarters. In our headquarters, effort was made to get competent defense counsel and trial judge advocates. We were not very successful, but we always made it a practice to have the defense counsel outrank the trial judge advocate. Competent legal law members should charge the court, and their remarks should be recorded. Staff Judge

PHILADELPHIA

Advocates should be removed from command control, and not given an efficiency rating by the command. More use of reserve than of Regular Army officers for trial judge advocate work would be advisable. Defense counsel should be assigned at the time of the pretrial investigation. The majority of cases today may be sustained on confessions obtained at the investigation. Confessions were too readily obtained at that time. At our headquarters, however, no case was sustained if it was solely based on a confession.

HEFFNER, R. Merle, 1201 Mifflin St., Huntington, Pa.; attorney and JA for Pa. VFW.; JA officer during war. (P.167)

ADDLESTON, Albert A., 1545 Archer Rd., Bronx, N.Y.; JA officer during war. (P.167,172)

The Army should include a staff section of trial personnel, composed of attorneys who do trial work solely. Defense counsel should also be included in this type of group. They should be responsible to a headquarters separate from command. Officers assigned to this section should have had at least six months previous active duty with troops. Lawyers without this practical troop experience were found to be inadequate during this last war. The trial staff should include both colored and white officers. Personnel thereon should be rotated between defense and prosecution work. Trial judge advocates should be permitted to write travel orders, in order to facilitate the obtaining of witnesses. Trained stenographers were desperately needed. Investigating officers were inadequate, with little knowledge of legal evidence. These men should be trained, with investigations their primary duty.

Courts should include enlisted men, warrant officers, and officers of all grades in generally equal proportions. Enlisted men might also serve on officer cases. At Marseilles, I conducted a practical experiment in teaching officers and enlisted men military justice. I took them to actual trials. I had them independently reach their own conclusions as to guilt and proper sentence of the various accused. In 92% of the cases, the officers and enlisted men in the classes did not vary more than $\frac{1}{2}$ of 1% from each other in their conclusions. In the other 8%, enlisted men would have returned the more severe sentences. In no case did these students return a sentence more severe than the court. Enlisted men serving on courts would not injure or affect their status as enlisted men.

All court members should have special military justice training. Every court should include at least one member, either enlisted or officer, with some social service training. Likewise, all courts should have at least one colored member, particularly where there are large numbers of colored soldiers in the vicinity. No staff heads of a command should sit on any courts. Nor should there be any command influence.

As to challenges, officers from southern states cannot act without prejudice in trials of colored soldiers. Challenges should be handled by pretrial motion addressed to the appointing authority.

Courts-martial have a tendency to give excessive sentences. Sentences should be more reasonable, and rendered with the expectation that they are going to be served in full. Excessive sentences which are not served lead to disrespect.

Reviewing authorities have too much concentration of power--pretrial, trial and post-trial. Reviews should be speeded up. While the JA school did a wonderful job, too many of its graduates came out with a prosecution complex.

There is an unfortunate disparity at times between officer and enlisted sentences, and a general feeling that this is customary. While ^{men} punishments should be equal, yet different circumstances surround the two classes. A convicted officer has no chance to rehabilitate himself as enlisted men do.

All persons convicted of AWOL for more than 48 hours should have their dishonorable discharges executed. AW 94 should be modified, so that larceny or illegal use of government property would carry a minimum five-year sentence, regardless of value. AW 96 is too much of a catch-all, and should be broken down into a number of specific AWs covering individual offenses.

Courts too often chose to ignore rules of evidence observed by Federal courts, and abided by the word rather than the spirit of the Manual for Courts-Martial. It should be provided that the courts shall observe the Federal practices. Confessions should not be admissible unless made in the presence of an officer or other person of accused's own selection. This would protect accused. It would also protect the prosecution from an accused's false claim before court that he was beaten up or otherwise mistreated when he made his confession. An accused should have access to counsel earlier than at present.

The above recommendations are personal beliefs, and also have been endorsed by the Pennsylvania Veterans of Foreign Wars.

FRIEDMAN, Daniel M., 1632 Pine St., Philadelphia; SEC attorney; EM during war with court-martial experience in inferior courts; served in same command overseas as the two previous witnesses. (P.193)

Defense counsel were particularly inadequate in special courts where they were usually laymen, and were pitted against trial judge advocates who were lawyers. While an accused is entitled to his choice of counsel, this did not work out too well in practice. In one case which I, an enlisted man, defended, the court president "pulled his rank" on me. There was no possibility of doing a satisfactory defense

job. If enlisted men had been serving on the court, this would not have happened. A man was too often presumed to be guilty. Reviewing authorities should be permitted to weigh evidence, and to make sure that there is more than a slight amount of evidence of guilt. Reviews should be placed in the hands of the JAGD and removed from the line officers. Cases should by-pass the local reviewing authorities and go directly to the JAGD. The latter would be empowered to reduce sentences. Defense should also have more opportunity to participate in the appeal. While he may now have such right in theory, he does not exercise it in practice.

Officer offenders should be punished more severely than enlisted men. Today there is too much officer leniency. Enlisted men should serve in the trial of officers, and this would help to eliminate the disparity. The difficulty of officer punishment is that there is too great a gap between AW 104 and general courts, with no in-between punishment. An officer might be subjected to special court trial with some power to confine him. After the confinement, the officer might be sent to a new command.

Enlisted men should be given more authority in administrative JA work. When I served as an enlisted man in a JA office, I was doing just about the same work as the officers, yet could not sign any of the recommendations and could not occupy a higher position than clerk.

Courts-martial might be removed entirely from command and vested in the JAGD. They could then act as circuit courts, traveling to the different commands. Command domination, particularly of inferior courts, should be terminated. Undue pretrial confinement should be ended. A man in the stockade is not in a position to obtain a habeas corpus writ.

In simple AWOL cases, summary courts should have the power to sentence up to six months. They are routine and are proved by documentary evidence, so why go to the bother of assembling a special court. Pretrial investigation will have determined whether or not the AWOL was aggravated.

RALEIGH HEARING3, 4, 5, September 46Mr. Joyner

MANNING, John M., Raleigh lawyer and U. S. District Attorney; officer during both wars; court-martial experience. (p.2)

In the Mediterranean Base section, we tried about 150 accused before general courts; about one-third being drunken and disorderly officers. Sentences for officers varied from dismissal to reprimands and substantial fines which varied from \$250 to \$1,000 dependent in part upon the rank of the officer. At that command, the innocent were not convicted, and only in one case did I consider the sentence to be excessive. At another command, I thought it improper for members of the staff judge advocate office to be serving as defense counsel. They were too closely connected with the prosecution. Our replacement depot presented disciplinary problems, in part due to the fact that men needing disciplinary punishment were frequently to be found there.

There was a general lack of familiarity with the Manual for Courts-Martial, and the principles of military justice. This extended through to officers of high grades. The Regular Army failed to sufficiently emphasize the importance of this subject.

I do not favor enlisted men sitting on courts trying officers, but would use the top three grades of noncommissioned officers to constitute a minority of three on general court trials of nonofficer personnel. Where enlisted men are being tried, it might be well to have an enlisted man act as assistant defense counsel. I have no objection to a court member being junior in rank to an accused. General courts should have lawyer trial judge advocates and defense counsel, with the latter of superior rank. The law member should be a well trained, qualified lawyer. Special court members should not be required to be lawyers. When practicable, the law member, trial judge advocate and defense counsel should be full-time JA officers. However, this would not always be practicable in the field.

AW 104 power should include discipline over Lt. Colonels, with power to fine officers up to one month's pay. Such disciplined officers should have the right to demand court-martial in lieu of AW 104, although I doubt if many would make such a demand. Company punishment should be permitted to go to 30 days if approved by a field grade officer.

RALEIGH

Accused soldiers have just as adequate safeguards as civilian criminals. I had no personal experience with command domination of courts, although I have heard of the practice. The AWs should forbid it. Reprimands should be prohibited. They serve no good purpose.

Education and training will improve the quality of courts-martial. But even so, the human equation will be always present.

DANIELS, Josephus, former Navy Secretary and Ambassador to Mexico; now editor. (p.32)

By and large, military justice administration has been good. But there have been instances of gross favoritism to officers. Trial by jury is desired.

Enlisted men should serve on military courts. Except for wartime military offenses, soldiers should retain their civilian rights. With enlisted men on courts, the suspicion of rank favoritism would be avoided.

CHESHIRE, Godfrey, layman of Raleigh; Army officer during war. (p.42)

Court-martial duty in the Army is considered to be a nuisance and a burden, and is discharged as quickly as possible. Military justice, however, is of at least the equal of civilian justice.

Summary court officers should come from an outside command. Review should be by a disinterested person other than the officer ordering the trial. AW 104 power should be expanded, subject to review, and should be coordinated with summary courts. General court trial review should be by other than the appointing authority, i.e. the record should go up to the next higher echelon in the chain of command.

Enlisted men should not serve on courts. They would be more severe than officers. Command relationships would be seriously disturbed. Should they be used, they should come from an outside command. Reprimands should be prohibited. Innocent men are not convicted by courts-martial. Command influence sometimes dictates maximum sentences, with mitigation later. This is a bad practice.

PURRINGTON, A. L. Jr., Raleigh lawyer; officer during war, with court-martial experience. (p.56)

The main weakness was inadequate defense counsel. Trained JA officer prosecutors were frequently pitted against line officer defense counsel with inadequate experience and preparation. Defense counsel should be trained lawyers, and should have time to

prepare their defenses. If possible, JAG officers should be assigned as defense counsel. However, I never saw an innocent man convicted.

Sentences were frequently excessive, and injured morale.

AW 104 disciplinary powers should be increased, and officers further instructed in its use. Appointing authorities should retain powers of review. They are closest to the offender and the offense. Mitigation is more often exercised by one close to the accused. It would not be practicable to place review under a separate command. He would be primarily interested in sentence uniformity, as distinguished from mitigation.

Enlisted men should not serve on courts. The main difficulty now is inexperienced court personnel, and enlisted men thereon would accentuate the problem. I did not see officer favoritism, but rather saw many instances of severe handling of officers because of alleged inadequate command. The greatest miscarriages of justice I observed were in officer cases.

BAILEY, James H. Pou, Raleigh lawyer; EM and FA officer during war; combat and court-martial experience. (p.78)

Generally, the court-martial system is just. I know of no instance in which an innocent man was even sent to trial. Appointing authorities should not subsequently act as reviewers. Rather the next higher echelon in the chain of command should so serve. The law member, trial judge advocate and defense counsel should be lawyers. AW 104 powers should be extended to include hard labor for 30 days and one-half month pay forfeiture. But any punishment over seven days should be reviewed. They should also be extended over officers.

Courts-martial duty, particularly the prosecution and the defense, should be primary rather than in addition to other work. But I would not require that defense counsel in special courts be attorneys. As to higher-echelon review, this should be done by a three-officer board.

Appointing authority influence over courts re excessive sentences is bad, even though such sentences might be subsequently reduced. No man connected with the staff judge advocate should be connected with the prosecution of a case. A court should try to give a fair sentence in the first place. Better morale would result. If a higher command would do the reviewing, a court would be more prone to seek a fair sentence in the first instance.

POLLOCK, Robert F. Hoke, Southern Pines, N. C., lawyer; FA and JA officer during war. (p.99)

JAGD personnel should be increased, with JAs at regimental and special troop (division) level forming a pool from which to draw qualified trial judge advocates and defense counsel. JAG personnel should be removed from the line of command, and placed directly under the Army JAG.

Review by the appointing authority is proper, but if there is a conflict of opinion between the staff judge advocate and the appointing authority, the case should go to the staff judge advocate of the next higher command. The latter should have the final say.

AW 104 should be expanded to include two-thirds pay forfeiture against enlisted men up to two weeks, and confinement at hard labor for two weeks. Likewise, the AWs should include punishment limitations. I did not observe undue hardship resulting from delay in trial, but did observe errors resulting because cases were speeded up too much. AW 70 investigation requirements should be made jurisdictional. I never saw a case of an innocent man being convicted.

Trial judge advocates, defense counsel, and law members should be JAG officers. This should be jurisdictional. Reprimands to a court should be forbidden. The advisability of traveling courts should be studied. I am inclined to think they would be a wise innovation. Law members should not have a vote on the guilt or sentence of an accused except in the case of a tie.

PICKENS, Wiley M., Director of N.C. Veterans Com.; Army service as officer; both wars. (p.129)

Military justice is an important element in Army discipline. I have seen commanding officer domination in special courts. Reprimands are sometimes necessary. The most serious weakness is that of inadequate defense counsel. Trial judge advocates have too much to do in the operation of the court. Generally, they have time to prepare their cases, in contrast to defense counsel who usually must continue their normal duties. Moreover, they are usually better trained. It will not help to put enlisted men on courts. Rather, this would embarrass the enlisted men so selected.

BEDDINGFIELD, Charles A., law student before war; noncommissioned officer in U. S. during war. (p.141)

Trained prosecutors were pitted against inexperienced defense counsel. Although I know of no innocent man being convicted, penalties were too severe. This was bad for morale. Enlisted men should serve on courts.

CHANEY, J. A., newspaper man; noncommissioned officer in Army and writer on Stars and Stripes. (p.147)

To remedy Army justice would require a change in the Army system at its foundation. Nothing short of this would be effective. Enlisted men on courts would aid, but only favored enlisted men would be selected and they would react about the same as officers. The courts-martial should be removed from appointing authorities. And appointing authorities should not have the last word.

HILLIARD, William (p.157)

More legally trained men should serve on courts.

WHEELER, C. C. (p.158)

Defense counsel should be strengthened.

McDADE, Thomas, Chappel Hill; Master Sergeant during war. (p.159)

Defense counsel should be strengthened. I know of one singularly successful defense counsel who was suddenly transferred to a rifle company. The trial judge advocate and defense counsel should be directly responsible to the JAGD. Enlisted men should serve on courts.

CLARIDGE, Frederick H., Raleigh; M.P. officer during war. (p.166)

Sentence disparity was prevalent. A circuit court consisting of officers and enlisted men from a different command would be preferable. There was also disparity of treatment between officers and enlisted men, with officers getting better defense counsel and defense. Although I would have enlisted men on courts, I think they would be tougher than officers.

DAVIS, Robert L., with UP at Raleigh; EM and officer in war. (p.177)

Enlisted men should not sit on courts because they lack proper feeling of responsibility. They would be erratic and unstable. Moreover, it is doubtful if properly qualified enlisted men other than the higher noncommissioned officers could be found. If you select only "blue ribbon" enlisted men, they would react the same as officers do now. Putting enlisted men on courts would create an additional training problem.

ELLISBERG, Bernard, Raleigh lawyer and businessman; Air Corps officer during war. (p.180)

There was command domination re sentence severity. Courts undoubtedly were intimidated. One cause was leadership defectiveness, as well as

RALEIGH

a lack of responsibility. The Army should train more competent leaders. Morale in my command in England was impaired by the lenient treatment of the General who revealed the date of D-Day. He was merely sent back to the United States. An enlisted man violating a security regulation would get from 6 to 10 years. Investigations also should be strengthened.

FITTS, W. T., Jr., Raleigh; longtime Army service; troop commander; Colonel. (p. 190)

The AWs should be reworded with a view toward simplification, in order that they may be better understood by laymen. Officers need more court-martial training, particularly defense counsel. Defense counsel receive corresponding relief from other duties in any well-run organization.

Enlisted men should not serve on courts. An Army cannot be democratic. To win wars, you must discard many of our democratic civil life practices. Enlisted men on courts would lower court standards. We already have enough protection for the accused before a court-martial.

Wartime penalties for offenses such as running away in the face of the enemy were not too severe. Present review practices are adequate and should be retained. Generally, officers receive more severe sentences than enlisted men. AW 104 powers re enlisted men should not be increased. Summary courts should cover only their present field. I observed no appointing authority domination. Such authorities should not reprimand their courts. It might be put in writing that reviewing authorities do not have the right to expect their courts to impose maximum sentences so that they will have the opportunity to reduce them subsequently.

LYON, Terry A., Fayetteville, N.C., lawyer; JAG officer in Washington as Chairman of a Board of Review and later Assistant JAG in charge of military justice matters. (p.206)

Despite the wartime difficulties occasioned by the tremendous expansion of the Army, an unusually good job of administering military justice was done. Generally, it functioned well; although there were times when it bogged down.

AW 50 $\frac{1}{2}$ should be amended, to give the JAGD the same authority in published order cases as in dishonorable discharge cases. The JAGD should also have final say re sentences, to aid in the correction of sentence disparities. However, general cases should continue to be routed through the local reviewing authorities in order to get their indorsements. The JAGD should be strengthened and enlarged. Law members, trial judge advocates and defense

counsel should be lawyers, with this being a jurisdictional requirement in regard to the law members. If possible, the latter should be JA officers. They should retain their vote, but I doubt the advisability of giving them the sole sentencing power.

There have been unfortunate instances where reviewing authorities have considered that the imposition of less than maximum penalties was an invasion of their authority. Reprimands to courts should be prohibited.

Enlisted men on courts would be a good experiment, although the effect thereof on military justice is doubtful. Rather, there might be improved morale and increased confidence in the courts.

Defense counsel should be strengthened. Trained lawyers should be available for this duty before general courts. The AJs or the Manual for Courts-Martial might provide that competent attorneys be so assigned. It is not necessary to have a staff judge advocate in a division. No staff judge advocate should be assigned as defense counsel. Staff judge advocates should be removed from the command of the appointing authorities; should be more independent, and should serve under the JAG. AW 39 should be mandatory in its provision for the court to advise accused of statute of limitation rights.

HATCHER, H. J., lawyer and head of Highway Safety Division; Provost Marshal officer experience during war; court-martial experience. (p.237)

The principal weakness of the system resulted from the inequality between trial judge advocate and defense counsel. The former were competent and experienced, but the latter were inexperienced and usually laymen who were changed at least once a month. A new divisional staff section for court-martial defense should be set up to investigate cases from the defense standpoint and to handle defense. It should have the same rank as the prosecution's staff section, and should be under the JAG.

The Manual for Courts-Martial should be simplified. Staff judge advocate duties should be lessened. More work should be given the Provost Marshal re getting witnesses and serving papers.

Reprimands should be prohibited. It should be jurisdictional that law members be competent attorneys. They should have a vote. Courts should impose sentences. The JAGD should have final review powers both as to procedure and sentence.

Enlisted men should be permitted to serve on courts. This would improve morale and the administration of military justice. I have seen examples of disparity in treatment between officers and enlisted men.

RALEIGH

AW 104 punishment powers should be increased, both as to the rank of officers who may be punished, and the extent of punishment for enlisted men.

I know of no instances wherein innocent men have been convicted.

Pretrial investigation requirements should be jurisdictional.

SAN FRANCISCO HEARING

Judge Holtzoff
13, 16 Sept 46

13 Sept 46:

ALEXANDER, Don, 145 Montgomery St., San Francisco; President, Enlisted Men of America. (p.5)

I was a guard at Lichfield, and the atrocities practiced there were not exaggerated by the press. I reported in this regard to The Inspector General in November 1944.

AW 4 should be amended, to permit enlisted men to sit on courts-martial if they have the necessary legal background and training. This would end the current court-martial approach that a man is guilty until proven innocent. Enlisted men understand their own problems better, and would not mete out too severe sentences. The law member should always be a lawyer. Too severe sentences make men bitter, and adverse to Army regulations. There is frequent undue delay in bringing men to trial. There is unequal treatment between officers and enlisted men.

BACICALUPI, Tadini, 300 Montgomery St., San Francisco; two years as an EM working in JA offices in U.S. and Manila. (p.10)

In the domestic JA office in which I worked, true justice resulted because the judge advocate was free. Overseas, the judge advocate was dominated and true justice did not result. The JAG should be free of local unit command. This freedom should apply to both court and counsel as well. Many defense counsel today are afraid to exert real efforts. In my overseas office, there also was disparity in sentences. Many defense counsel fail to take advantage of technical steps to protect the accused; fail to conduct independent, detailed investigations; and are discouraged from making vigorous defense. There also was a tendency to delay trials, then suddenly spring it upon an accused without adequate notice. In special courts, the digest-record of trial is sketchy.

Recommend: Independent JAGD, including counsel; more opportunity to prepare for trial; and a justment of sentences, with equality between officers and enlisted men.

HOWLAND, Wallace, U. S. Dept. of Justice, 55 New Montgomery St., San Francisco; battery commander overseas; court-martial experience; civilian lawyer. (p.14)

Except in combat zones, courts-martial resulted in a high degree of essential justice. The problem is not so much a matter of trial procedure mechanics, but of establishing a fair policy which can be carried into effect. Confinement is not the answer. Overseas, there was no punishment for what would otherwise result in six months' or

less confinement. In lieu thereof, my battery substituted very hard labor.

An important procedural reform would be to appoint permanent defense counsel for general courts, using men with trial lawyer experience and with rank commensurate with that of the trial judge advocate when possible. In all courts where I appeared, the law member had legal background. Judge advocates should be given freedom to recast charges and specifications. Now, they are too often inadequately drafted by complainants with no legal experience. Injustice sometimes resulted from this source. Trial judge advocates should have greater freedom from command influence. AW 70 investigations may have been good, but they were not good enough. Most cases had to be reinvestigated by the trial judge advocates. An enlarged JA office would provide adequate investigators, although they need not necessarily be trained lawyers. On the other hand, the task should not be assigned to line officers.

Unit commanders should not be required to act as summary court officers. Their AW 104 powers are sufficient to maintain immediate discipline of a military nature, as distinguished from any judicial relationship. It hurts his relations with his men, when he must also act as a judge. Summary court officers should be of field grade, with the courts moved from company to battalion level. Such new summary courts should be able to give up to three months' confinement. Special courts should be abolished, with general courts assuming jurisdiction re confinement over three months. Special court jurisdictions seldom have enough trained personnel, are too close to the parties involved, and are seldom disinterested.

The Manual for Courts-Martial should be revised, to improve definitions of crimes (i.e. degrees of homicide and assault and battery), to clarify parts of the Table of Maximum Punishments (decrease rape punishment, increase punishment for misrepresentations during combat).

Combat unit commanders need a better procedure to administratively reclassify inefficient subordinates. Lacking that procedure, they fall back on courts-martial.

BURNS, Lester, 428 13th St., Oakland, Calif; EM in JA offices in U.S. and Europe. (p.23)

The method of filing charges is satisfactory. Investigating officers are frequently inadequate in the performance of their duties, often having been selected because they were incapable of doing anything else. Investigations are often conducted more as a prosecution rather than impartially. The defense is not represented. Counsel should be assigned at the time charges are preferred.

Military justice should be conducted by an independent group, such as The Inspector General. This would obviate command influence. Defense counsel are inadequate, frequently not being interested, frequently being lazy, and frequently lacking time. Military justice should be conducted by lawyers. I believe that lawyers were usually used as law members, but this was not so often true of defense counsel. There is too much command influence. Officers are dependent upon their commanding officer for efficiency ratings and promotions.

Officers should be triable by special courts. Officers frequently go unpunished.

KELLER, Julius M., 60 Post St., San Francisco; Vice President, California Council of the AVC; EM and Air Corps officer; Acting Staff Judge Advocate in a Hawaii air command; tried about 100 cases. (p.27)

Air Corps administration of military justice was better than in the infantry and other line and service organization. Reason: more time at Air Base to devote to administrative duties. Even so, abuses did occur in Air Corps units. The greater weakness is the control exercised by commanding officers, and their frequent expectation of convictions. Investigations are often inadequate, to require further investigations by trial judge advocates. Defense has no time to investigate, because he is not appointed until 2, 3 or 5 days before trial. Continuances are seldom granted to defense counsel. A number of enlisted men could conduct better defenses than many officers.

Better justice would result if there was a separate court-martial system within the Army, operating under the JAGD and not answerable to the immediate command. Control by command is exercised by letters of reprimand, by sometimes sending the reprimanded officers to forward areas, and by making a notation in the officer's 201 file.

Accused do not receive equal treatment in courts-martial. Generally, officers receive less punishment than enlisted men, and are not so frequently brought to trial.

Recommendations: Trained court personnel, prosecuting and defense counsel; defense counsel who travel with the command; trained investigating officers independent of command; a JA section officer who does nothing but investigating, and is not answerable to the commanding officer.

GENSER, Joseph, 413 10th St., Richmond, Calif.; EM in JA office in U.S. during war. (p.33)

Trial judge advocates recommend court membership to the commanding officer, thereby usually picking their own courts. Recommend: Establish independent system of JAGD judges responsible only to Washington; have list of qualified defense counsel, permitting accused to choose there-

SAN FRANCISCO

from; permit accused contact with his counsel upon being brought to the stockade, rather than when his case is referred to trial. Investigations are too often a means of getting confessions, upon which cases are subsequently prosecuted. Rules against self-incrimination should be applied more adequately. EM give confessions to officer investigators so readily because of the inherent officer-EM relationship in the Army.

ROGERS, Thomas Pierce, 300 Montgomery St., San Francisco; Infantry colonel during war, with personnel duties in ETO replacement center; had court-martial experience. (p.35)

Rather than making the JAGD independent, I would have a court-martial section in all organizations, with adequate officers for trial judge advocates, defense counsel and law members. Often, reviewing authorities void a court's finding of guilt to conserve manpower. This is a more important consideration to them than rehabilitation. Many appointing authorities ask for the maximum punishment, and then exercise clemency.

MOORE, Douglas M., 625 Market St., San Francisco; Army legal officer with rank of major. (p.36)

The principal weakness is inadequate representation of accused in court. This results in untrained defense counsel being frequently pitted against trained prosecutors. While innocent men are probably not convicted, excessive punishment does result. Frequently, law members are not lawyers. There is a disparity between courts-martial treatment of officers and enlisted men, with officers often getting off with light sentences. One difficulty in trying officers is the necessity of sending them to general courts. AW 104 discipline avoided a lot of red tape. Officers should be triably by special courts, and should be dealt with more severely than enlisted men because of their greater responsibility.

DE MARTINI, James S., 300 Montgomery St., San Francisco; former Alaska JA officer. (p.41)

Many capable lawyers found that their services were not utilized in the courts-martial system. Investigating officers should be lawyers, and their functions should be exhaustive. Law members should be lawyers, but very frequently were not. Many enlisted men were lawyers who could have been more effectively used as legal officers.

Special court punishment might be used against officers for those offenses more serious than to warrant AW 104 discipline but not serious enough to warrant general court punishment. There is a twilight zone between those two extremes. Such special courts might punish by fine, but should not be permitted to reduce an officer in grade. Reduction to the ranks would be preferable to reduction in grade.

Enlisted men should not be permitted to serve on courts, because of operational objections. How would you select them? A roster basis would be inadequate because capabilities would not be recognized thereby. A basis of grade would also be unsatisfactory. An enlisted man would not want a higher enlisted man looking down upon him. Nor would a top sergeant want to be tried by a private.

KARMEI, H. Burriss, Burlingame, Calif.; ETO duty as EM and as officer in JA office of ETO headquarters. (p.45)

Generally, the criticisms made against Army justice can also be made against civilian justice. However, improper command influence frequently exists (gives example). This could be avoided by creating courts separate of command. JA personnel in Europe were inadequate in number to meet demand. This in turn resulted in using others as law members, defense counsel, and trial judge advocates, although usually they were lawyers. I do not know of any case in which the law member was not a lawyer.

AW 70 investigations frequently are not adequate, and must be sent back for supplemental investigations. Distances intervene, and cause delay. An EM would probably be confined within that period, although this was not so true after redeployment had commenced and his administrative use was necessary. AW 70 investigations should be handled by competent investigators, although these men need not necessarily be lawyers. Investigators should so perform on a full-time basis.

It was not until early 1944 that the War Department sent out a directive to obtain EM to be commissioned as JA officers. If an enlisted lawyer had JA experience, he could get an immediate JA commission, but if without that JA experience he was sent to the JA OCS in the U.S. if otherwise qualified. I know of a case where a man was turned down as a prospective JA because he was too stout and not prepossessing enough.

SPIEGL, Ernest I., Mills Bldg., San Francisco; five years war experience. (p.52)

The administration of military justice is too perfect to be cast aside, or even to be altered to any great extent. Difficulties arose from faulty administration, which in turn resulted from personnel trouble. Many difficulties were fancied rather than real. However, these imaginary troubles were important because they were believed by enlisted men lacking insight as to the system's real purposes. Personnel difficulties resulted, not so much from the lack of legally-trained personnel, but because many officers did not have a true insight into their purposes.

SAN FRANCISCO

RINGOLE, Gus C., 707 Central Tower, San Francisco; JA officer during war.
(p.54)

A 1943 War Department conference of judge advocates emphasized the importance in getting men tried without undue delay. The AJs provide for immediate trial. We finally operated so that summary courts were held within 24 hours, three days for special courts, and general courts as expeditiously as possible. It was the general practice to keep these accused in confinement awaiting trial, although in many cases they might have been permitted to continue to perform their regular duties. Speedy trials were accomplished by immediate notification of the judge advocate office when men were placed in jail. Eventually, we ran three days for general courts, excluding continuance time requested by the defense. Our defense always had ample time.

Appointing authorities should be shorn of their right to criticize courts. They already have the right to change court membership if they do not like its performance. The JAG should have continuing authority over courts-martial cases, so that he can grant subsequent relief. New facts sometimes come to light after trial.

Generally speaking, I have profound respect for the Army's system of military justice.

LOBREE, Donald, 1046 Lake St., San Francisco; Air Inspector officer during war. (p.59)

During inspections, I found, first, that violations were caused by a lack of attention by responsible officers, and, second, that violations resulted from ignorance of rules, i.e. the Army's bad habit of attaching disciplinary consequences to things which in civil life would not carry that type of penalty. (Note AW 96, and requirements re keeping of reports). There was also a tendency not to listen to complaints. Complaints forwarded by inspectors were often neglected by higher command, so that defects were covered up.

Persons in confinement do not have opportunity to make complaints about undue confinement. Confined persons should be afforded direct access to The Inspector General rather than having to proceed through channels.

STOUTENBURGH, Eliot, 762 Fulton St., San Francisco. (p.63)

Officers should be subjected to special court trials, but not to summary court trials.

While I would not extend AW 104 powers, there should be a revision so as to distinguish violations of a disciplinary nature from the more serious offenses.

As to personnel, there were many inadequate Regular Army officers as well as inadequate temporary officers. The court-martial system was frequently operated by men without legal experience. The Regular Army was at fault, because it was unprepared for wartime expansion. It neglected the lawyers, and was completely fogged up in that regard. Key court-martial posts should be occupied by men with legal experience. Courts should be permanently established, with full-time duty personnel selected from members of the bar. This would leave the other officers free to perform their own specialized duties on a full-time basis.

There were many sentence disparities, with emphasis on severity. This can be cured only by JAGD supervision from the very top level. Powers of arrest and confinement were not seriously abused. Trials were usually expedited as much as possible. Even during confinement, an attempt was made to have prisoners perform constructive labor. They were restored to duty as soon as possible. Establishment of disciplinary centers was a great step forward.

A policy of officer fines and short confinements would solve many officer disciplinary problems.

FLANCKENBURG, William L., Migliavacca Bldg., Nappa, Calif.; EM in Europe, and subsequently student at JA OCS. (p.69)

The required reading of certain AOs to enlisted men is always prefaced with a veiled "threat" that they will be applied to out-of-line soldiers. The reading is usually done by a legally-ignorant low-ranking officer. They should be read by a trained JAC officer, who would also show how they work to protect the innocent as well as to punish the guilty. Now, the reading is the wielding of a club, and this does not lead to respect.

There should be a difference in the handling of offenses, dependent upon whether they were committed at the front or in rear areas. Sometimes in combat outfits, trials are had with alarming speed, with general court trials being run through at the rate of one an hour. One court-martial record which resulted in a 25-year sentence for a man who deserted in the face of the enemy was only 18 lines long. While higher authorities reduced the finding of guilt to one of AWOL, the news of that trial spread through the entire division. The fact that such a thing could have happened is a weakness. The only cure would be independent staff judge advocates responsible to Washington, and sufficient judge advocates to give full-time to their type of work.

Laymen sometimes acted as law members in special courts, despite their lack of qualifications. Usually, the law members of general courts were lawyers. The law member should have final authority to rule

SAN FRANCISCO

on all questions of law, and should orally instruct the court as a judge would a jury. He should not vote, but should accompany a court into closed session and give advice and help there. Officers other than junior members will not be misled by him.

Court members should be familiar with local problems, rather than so wrapped up in legal technicalities as to be unable to appreciate those local problems which are inherent in the fighting of a war and where technicalities cannot always be observed. Judge advocates should live part of the time in the field. Hard labor will sometimes solve a disciplinary problem without resort to courts. Too much strictness was sometimes apparent. Brother officers, on the other hand, were too lenient to some officer offenders. Officers should be held to a higher degree of responsibility than enlisted men. Instead, they were given lighter sentences.

SCHOFIELD, Allison E., Central Tower Bldg., San Francisco; officer in U.S. and abroad during war; some court-martial experience. (p.76)

Military courts should be divorced from command and its dictation. Sometimes, command domination is expressed, both to obtain convictions and to impose severe sentences. Laymen should not be appointed as defense counsel. It should not be presumed that a man is guilty until proven innocent. "I never lost a case as trial judge advocate and never won one as defense counsel." Trial judge advocates should also be lawyers. On the face, pretrial investigation procedural requirements were good. Law members should also be lawyers.

16 Sept 1946:

EATON, Richard B., Redding, Calif.; major during war; court-martial experience; now practicing attorney. (p.79)

Courts-martial required sufficient proof of an accused's identity as the perpetrator of the charged offense. They were less careful in their determination re whether the thing done was a criminal act. Their sentences were too severe, were they permitted to stand as rendered. However, they were usually reduced extensively. Men were also sent to disciplinary training centers where a man with a sentence of five years or less usually served about nine months; if over five years, about a year--if their conduct was good. The last report showed that 85% of those thus released were not recidivists. Reviewing authorities preferred excessive sentences, to leave them with the power to reduce them. This worked all right when the reviewing authorities were conscientious, and was satisfactory then.

I never found commanding officer intervention in my own courts, although I have heard rumors to that effect. The two greatest weaknesses of the court-martial system: a. Some members were temperamentally unsuited for such posts, some had prejudices, some were too anxious to get back to their other duties, some were prejudiced against negroes (cure: careful appointment of members by staff judge advocate). b. The law member, the trial judge advocate and the defense counsel should be lawyers. Defense counsel were often inferior to the prosecution. Some enlisted lawyers might have been used in court-martial posts had they been commissioned.

JACKSON, George J., 1164 O'Farrell St., San Francisco; EM with court-martial investigating experience during war. (p.83)

While AW 70 investigation procedure requirements are satisfactory, the system did not work so well in practice. Defense witnesses were not always called. Accused should have counsel at the pretrial investigation, with protected rights of cross-examination.

At trial, a unanimous vote should be required for conviction, particularly because of the frequent inadequate defense.

Colored troops in Europe were responsible for too large a proportion of crime (in my outfit, the 4% of colored troops were responsible for 67% of the crimes).

It would be desirable to have enlisted men on courts, but up at the front an officer might exercise influence by reassignment of a disagreeing enlisted man. I do not know how enlisted men on courts would work in practice. If enlisted men were used, they should be attorneys. I do not know about whether they should be noncommissioned officers.

A successful defense counsel is soon made trial judge advocate. The policy of imposing maximum sentences, to permit them to be reduced by the reviewing authority, is a poor one. Court members should be instructed that maximum penalties are not necessary.

CRITTENDEN, Howard B. Jr., Palo Alto, Calif.; reserve officer and wartime officer experience, part with troops and part with Military Government. (p.86)

Present court-martial law and procedure are near perfect. But in practice it does not work out that way. Commanding officer influence is present, with dissolution of a court and reassignment of its members when it does not react the way he desires. Cure: Require courts to act independently and impartially. But if you make them responsible only to the Army commander, then they would not be too familiar with the problems of field duty. Such officers could become careless, and impose heavy sentences. As to using only judge advocate officers,

SAN FRANCISCO

many of them were not too good and many were also influenced by command. Courts-martial should be composed both of men with civilian legal experience and no other military duties, and also officers who have had some experience with troops. Men with legal training should do all questioning, and should preside over the courts. Military courts should have preference during wartime on the services of civilian judges.

The fear of punishment (except in some insubordinations) has little effect on discipline or obedience. Near the front, fear of punishment has no meaning. There, all perspective is lost. Men will do many things to keep from going to the front, because of the feeling that front-line duty means death within two to four weeks.

Unanimous decision should be required in courts-martial cases. This would be important, should enlisted men be put on courts.

FOLEY, Thomas Lester, 967 B St., Hayward, Calif.; wartime service as defense counsel in European Theater. (p.91)

Courts in my base air depot command were chosen by the commanding general requesting various commanders to make so many men available for court-martial duty. Men so selected were those who could best be spared, and were invariably the incompetent officers. In one case, our judge advocate refused to thereafter use certain officers who had returned too lenient sentences in a certain case. Written reprimands were sometimes sent out, and placed in the officer's 201 file.

Maximum punishments were always given, so that reviewing authorities could cut them down. This was improper.

There was inadequate court-martial training for officers. Decisions of The JAG were not available in subordinate commands. While we always had lawyers as law members, many of these lawyers were incompetent.

Investigations are inadequate. The investigating officer is usually untrained, so he goes to the staff judge advocate for instructions. The latter officer is the one who has aided in the determination to send the case to trial, so the two of them work up a one-sided case. As administered, the system is just about 100% wrong.

Courts independent of command are not the answer. Rather, a system of Federal judges with officers and enlisted men sitting as jurors, and the judge administering the law and fixing the sentence, seems to be the only answer. Even old-time Army officers do not necessarily know how to pass on legal questions.

KAHN, Robert, Oakland, Calif.; layman; Air Force major during war with some court-martial experience. (p.95)

Bad situations are sometimes caused by lack of leadership capacity in the commanding officer. Sentence disparity exists between the Table of Maximum Punishments and civilian practice (i.e. speeding--Army 6 months; civilian (10). There should be a table of more reasonable punishments comparable to Federal civilian codes. Also, new offenses such as joyriding should be written in.

Enlisted men were tried for offenses which, had they been committed by officers, there would have been no trial. That is injustice. There should be intermediate punishment for officers, between AW 104 and the general courts.

More adequate Inspector General inspection should be had, either through him or an independent inspection staff. This would be better than having an independent JAGD.

One way to avoid commanding officer control would be to have cases tried by adjacent units, where the court would be appointed by a different appointing power and reviewed by a different reviewing board. Men with legal training should be better used in the Army.

STUMPF, Felix F., San Francisco; EM and officer during war; served on about 250 courts-martial. (p.99)

AW 70 investigations were inadequate, because investigating officers were generally uninterested and inexperienced. As trial judge advocate, I found myself also investigating and making recommendations. Commanding officer influence was quite general. There is a great leeway for doctoring of inferior-court records, and higher-up authorities cannot tell whether or not this has been done. General court records were verbatim accounts. Court reporters should be available to inferior courts. Rather than imposing maximum punishments, courts should impose fair punishments.

TWOHY, Daniel, 3586 Pierce St., San Francisco; layman, with some war experience with courts-martial. (p.102)

The AWs are designed to expedite the efficiency of a fighting Army seeking to win the war, rather than to deal in abstract points of justice.

Summary courts would bog down if transcripts had to be taken in them.

The only serious court-martial weakness is pressure from the appointing authority. The commanding officer exercises too much influence, particularly in the imposition of maximum sentences. This is a typical Regular Army practice. Court members are sadly lacking in necessary judicial experience. This is as true for Regular Army as for AUS officers. Invariably, courts in which the law members had

SAN FRANCISCO

no civilian legal training were unsound in operation. While I do not recall a general court without a trained law member, frequent special courts sat without lawyers. And such latter types of courts were more boards of inquiry rather than courts of justice, considering objectionable testimony as well as good.

HOLMES, Paul W., San Francisco; retired Lt. Col. with 30 years' Army experience. (p.105)

The Manual for Courts-Martial is good even though not perfect. Officers can be trained in the field to be good investigating officers, whether or not JAs. No advantage would result from having enlisted men on courts. Noncommissioned officers would have an equal amount or more prejudice than officers. While command influence may be exercised, the larger the command the farther away the commanding officer is from the men. He therefore must leave more discretion to his staff judge advocate.

SYMONDS, Myer C., 3868 California St., San Francisco; draftsman; clerk in division JA office and subsequently in Branch Office, JAG, in Paris, reviewing general court records for procedural error; attended JA school; not commissioned. (p.108)

The Army failed to utilize lawyer services in full, so should not now argue that there were inadequate trained men available to act in key court-martial posts. During my basic training, my application for JA OCS was not even considered, because I was physically fit for combat. The JA at the post stated that he did not need enlisted lawyers. Another JA did not want me because I was almost 35 years of age.

Command influence was exercised over general courts-martial. There should be a separate military justice unit. There was great disparity in sentences. Likewise, officers were not tried as often as they should have been, nor punished as severely as enlisted men. A separate military justice administration would eradicate this fault. Each case should be handled to establish justice rather than to maintain discipline. Too severe sentences did not accomplish their purpose, because it was common knowledge that they would never be fully served. Defense counsel should be lawyers, and no pretrial statement taken from an accused without his counsel being consulted. The average enlisted man has the intelligence only of a 12-14 year old person. Too little attention is paid by courts to psychiatric reports. There should not be an automatic waiver of special defenses merely because they are not pleaded. The average defense does not know about these technicalities. Psychiatrists should sit on courts.

Enlisted men, particularly lawyers, should sit on courts. There should be a limitation on the length of time an accused can be held in custody while awaiting trial.

BLAINE, Jack L., Mills Bldg., San Francisco; EM in JA office, and thereafter a JA officer, reviewing many records of courts-martial. (p.116)

Investigating officers were prone to examine evidence pointing to an accused's guilt, while overlooking defense evidence. Likewise, pre-trial statements are not taken down in accused's own language. There is disparity between officer and enlisted men's sentences. An officer should be triable before inferior courts.

Those who attended the JA school were advised that it was fundamental JAG policy that maximum sentences should be given, and clemency settled by the reviewing authorities. An ideal solution would be court autonomy. There are a variety of views re what constitutes a proper sentence. There is court domination. Adequate defense is discouraged, and defense counsel is usually an inferior officer. Defense counsel is seldom a lawyer. Instead of using good enlisted lawyers, inferior officers are used.

I am opposed to the death sentence except for first degree murder.

Inferior court review is usually inadequate. As to the general courts, a portion of the sentence will have been served before trial inadequacies have been brought to light by appellate review.

On some general courts where I have acted as law member, Regular Army officers would attempt to influence my vote both as to guilt and sentence severity.

KENNEDY, Thomas Hart, Standard Oil Bldg., San Francisco; reserve officer with Air Force service during war. (p.122)

While courts-martial procedures are good, trouble sometimes arises in actual operation. As an investigating officer, I once involved high-ranking officers in the trouble under consideration. I got nowhere. Officers are so promotion-conscious that they can be guided by commanding officers in their court-martial duties. Having a JA law member would not clear the situation. JA officers also want promotions. Defense counsel who make too good a defense are removed. As defense counsel, I once objected to an incomplete transcript of trial. While the transcript was properly corrected, I no longer served as a defense counsel. The Army should have a separate court-martial system, in which the judge is not tied up to anyone.

SCOTT, John Merrill, 200 Bush St., San Francisco; five years in Army during war; courts-martial experience. (p.127)

The court-martial system is not as bad as has been painted by some of the preceding witnesses. I always received full cooperation in my court-martial work in the Army, although some of the investigations

may have been flimsy, and cases were sometimes tried before I had enough time to prepare a defense. There is a tendency to assign less capable officers to court-martial duty. A permanent, full-time court of JA officers would be ideal. From work with The Inspector General, I feel that most of the men in the guardhouse deserved to be there.

JOSEPH, Leonard, 5000 California St., San Francisco; Field Artillery officer; court-martial experience. (p.131)

The predominant end of courts-martial is discipline. This is proper. There is a tendency to assign less capable officers to court-martial duty. Available lawyers are not always used. Enlisted men should serve on courts-martial if they are trained. AW 104 punishment powers should be increased. This would decrease resort to courts-martial and keep the latter type of punishment off a man's service record. Special courts should have jurisdiction over officers to take care of minor offenses not important enough to warrant a general court. Defense counsel should be trained, as well as the trial judge advocate, law member and president. The first three of these officers should be JAGD members if practicable, or at least legally trained. This would not deprive commanders of a portion of their command function. Other members of his command could sit as a jury. The law member should have final authority of questions of law, without vote--provided he is a JA or legally-trained. There were cases when the law member was not a lawyer on general courts. Court members were often inferior. There was a practice in many commands of imposing maximum sentences. This should be eliminated. Elimination might result by proper instructions circulated throughout the Army. Whether a dishonorable discharge should accompany a sentence of over six months should be discretionary. General courts should have the power to suspend sentences, and to place an accused on probation. The Manual for Courts-Martial might be revised, to provide better definitions of offenses and sentences, as well as a clearer explanation of evidence rules. Substantive U.S. law should govern trials in foreign countries.

CURTRIGHT, C. K., Ochsner Bldg., Sacramento, Calif; line officer during war; court-martial experience. (p.137)

The present system is good, despite defects which result from personnel administering it. The flaws show up particularly when the administering authorities are indifferent to military justice. In such times, grave miscarriages can result. 90% of the courts-martial could have been avoided had company commanders known how to handle men properly. This knowledge comes only from experience and personality, not training.

The JAGD should not be an independent agency. A single person must be solely responsible for the entire command on the battlefield. The

trial of offenses is a command function. In time of war, even for civilian-type offenses. Impartiality depends on the commander's personality.

Enlisted men should serve as court members, but the achievement thereof would be difficult. An enlisted man so used should know that his judgment was to be independent, that there would be no official recrimination, etc. Neither the trial judge advocate nor the defense counsel should be full-time staff members. Contact with enlisted men is necessary experience for proper military justice administration. Most staff officers lose this common touch.

The law member should have final authority on law questions, leaving the other members to determine the facts. Where lawyers are available, they should be assigned as law members. This is not necessary re trial judge advocates and defense counsel. Nor should these be full-time jobs, because this would take them away from contact with the rank and file.

Present pretrial investigations are botched up, and the failure does more harm than good. Investigators are selected without regard to ability, and their reports are frequently based on illegal testimony, are garbled, and merely consist of opinions. Those investigating reports are seldom of any value. Pretrial investigations should be made by JAGD officers, by the Military Police, or by legally-trained officers.

BAUMGARTEN, Frank J., Central Tower, San Francisco. (p.145)

While the system is adequate, its administration causes difficulties. This administration of military justice should be placed in the hands of a separate department such as the JAGD, and possibly be set up in judicial districts. Summary court jurisdiction should be enlarged, and should have power over officers. AW 95 severity frequently results in nontrial of officers. Trial judge advocates and defense counsel should be removed from a commanding officer's jurisdiction. Courts are too often hand-picked, and subject to command domination. While the commanding officer was supposed to cut down excessive sentences, this was not too often done.

Pretrial investigations are absurd. Accused should have benefit of counsel as soon as he is charged with an offense. Many accused could be continued on a duty status while awaiting trial.

At present, rules for the protection of the accused are abandoned because court members have no concept of evidence rules. There is no presumption of innocence for enlisted men. Minor-offense punishment should be separated from serious-offense punishment. AW 104 powers might be enlarged. Dishonorable discharges should not always have to accompany sentences over six months.

SCOTT, Robert M., 200 Bush St., San Francisco; E4 and officer during war; battery commander. (p.153)

My court-martial experience convinced me that there is a misconception of the meaning of the words discipline and justice. They go together in the Army, yet the Army cannot get too legalistic. They should be separated. The Manual for Courts-Martial, while a good work, is too often applied by men who cannot carry out its spirit because they are untrained. AW 104 power might be increased somewhat, to include the power to fine on a graduated scale. There is too much "throwing the book" at accused in the matter of punishments. Courts should be independent of command domination. The Inspector General should be responsible to the Commander in Chief alone rather than to the Chief of Staff. Then he would have the courage to turn in adverse reports against officers and make them stick.

Discipline must not be confused with justice. During war, the former is more important to success than the latter. Yet justice must be had to create good discipline. The two are inseparable. Frequently, poorer officers are used on courts. As to discharges short of dishonorable, the Army already has "blue" discharges. This is a disciplinary discharge, rather than one by court-martial. Noncommissioned officers should be used more often as character witnesses. Sometimes, there should be a cooling-off period for both officers and enlisted men. Separate treatment re offenses outside of combat zones would be desirable. There is a practical lack of guards to guard men in trouble during combat.

SEATTLE HEARING

Judge Holtzoff
19 Sept 46

WILKINS, William J., Superior Court Judge, County-City Bldg., Seattle;
 JA colonel during war, and EM during most of last war. (p.6)

The consensus of a recent meeting of local JA officers was that as a whole the military justice system was good despite criticism levied at a few individual cases. Nonetheless, there was a lack of sentence uniformity. A good feature was the pretrial investigation, when this was thoroughly conducted. A second good feature was the rehabilitation center program.

AW 104 punishment of officers should be extended to cover all officers, both field and company grade, and also warrant officers. Enlisted men should be put on special and general courts, although I do not think that the ultimate outcome of a case will be changed by adding the enlisted men. Some enlisted men lawyers are more capable than some officers. Older rather than younger men should be used on courts, as the latter sometimes permit their enthusiasms to get out of bounds. Noncommissioned officers could well serve on courts.

The JA should be answerable to the command in which he serves, rather than apart therefrom. Access to the commanding officer should always be had by the JA. If you deprive the commanding officer of court-martial jurisdiction, he would not have discipline. During wartime, there was too much speed in handling cases because of a competitive race. This was sometimes injurious to justice. Where men were held too long before trial, this was the fault of the judge advocate. Both a minimum and maximum time limit should be set, i.e. ten days before a man could be tried by a general court, and 5 days before a special court.

WRIGHT, Eugene A., Seattle; Division officer during war with court-martial experience. (p.13)

To me, not a JA officer, it was a burden to be given court-martial work in addition to my other duties. Trial judge advocates are supposed to both prosecute and also see that justice is done. He cannot represent both sides well. I would have inadequate time for preparation. Ordinary officers were not qualified for court-martial work. Very frequently, trial judge advocates were not lawyers. Occasionally law members were not lawyers. It was also embarrassing to me to have to prosecute men from outfits I might later have to command. Trial judge advocates and defense counsel should be appointed from outside command, with court-martial work their primary function. It also should be impossible for a commanding

SEATTLE

officer, the appointing authority or the President to control these men as they frequently do now. In one trial which I was handling, the Chief of Staff took me aside during a recess and told me how he thought I might best secure a conviction.

REVELLE, George, Seattle; formerly Colonel, without court-martial work.
(p.17)

One weakness is that many guilty escape trial in combat zones entirely. This is destructive to courts-martial prestige. On the other hand, once charged a man is usually found guilty. I do not know of any innocent persons who were convicted. Because of lack of time, cases were often poorly presented. In about 95% of the cases, defense counsel were laymen. Some of these, having taken military courses on military law, had inflated ideas of their own abilities, whereas in reality they knew very little. It would have been better had they not studied law at all.

Command influence was present, even though perhaps not directly from the General himself. It was too often presumed that an accused was guilty before he was tried. A separately administered system of military justice, with review by higher command authority, would gain more respect from military personnel. It should be separated from the immediate chain of command. Personnel of this separate branch should be legally trained. Psychiatrists should be resorted to, particularly in combat areas, and medical cure rather than courts-martial used in battle fatigue and insanity cases. However, in various instances battle fatigue was merely a matter of improper training rather than a real mental sickness.

WESEFIELD, Richard S., 2261 W. Montrey St., Seattle; Division officer with court-martial experience during war. (p.22)

The system is not radically wrong. Criticisms result from the improper administration thereof. But too often, officers are inexperienced, and many would not take time to learn. It would be advantageous for the trial judge advocate, the defense counsel and the law member to be lawyers, but this would not be necessary if those persons would apply themselves. Only the rare defense counsel would have read the Manual for Courts-Martial. However, some commands did conduct military justice classes. These were an aid. In my outfit, the law member was not often a lawyer. Usually he was an infantry officer.

It was drilled into the officers that clemency was a prerogative of the reviewing authority. This was bad. It made the court feel like a rubber stamp, and created an unfortunate impression re military justice on the enlisted men. Command influence was exercised.

BURNS, John A., Dept. of Justice, Courthouse, Seattle; former EM and JA officer with Divisions and Boards of Review. (p.26)

Military justice is not effective. There was too much command domination. General Court records from one division were so bad that appellate authorities had to reverse eight cases within a single month because the commanding general had sent written instructions to his court re what should be done. The court-martial system should be divorced from command, and should be operated independently under a new Judge Advocate set-up. Likewise, the power of review should be separated from command. Every law member should be a trained lawyer, although not necessarily from the JAGD. The office of president of a court should be abolished. The trial judge advocate and defense counsel should also be trained lawyers. It might be wise to have the law member orally instruct the court in open court, give legal advice, but not vote.

Sentence disparity has been great, particularly in combat zones. Many psychiatrists have apparently reported in accord with the desires of their commanding generals. Their reports frequently are not too satisfactory.

Defense counsel are sometimes so inadequate that they will say nothing to a court, make no objections, and sometimes not even make a closing argument.

VANCE, J. Duane, Antitrust Division, Department of Justice, Seattle; infantry lt. during war; some court-martial experience. (p.31)

Every general court case I tried had a law member who was a Regular Army officer and not a qualified attorney. Maximum sentences should not be demanded by command, and defense counsel should have the right to make a plea for clemency. The Manual for Courts-Martial does not seem to adequately provide for presentation of evidence re mitigation. Courts should be forced to consider such evidence.

Rehabilitation centers have done a good job. Accused should have the right to be heard in the review of his case, or at least to file a bill of exceptions or an argument which could be forwarded with the record. Difficulties present re general courts also exist re the inferior courts. A simplified lower court procedure would be desirable.

There should be qualified legal counsel at regimental level to serve as a police court. The manner of preferring charges might be simplified. As to the more important general court cases, professional personnel should be utilized. This particularly applies re the correct handling of technical motions.

SEATTLE

SHORTS, Bruce, 140 Hillside Dr., Seattle; JA officer during war. (p.36)

Lawyers were not used by the Army to the best of their technical capacities. Yet laymen officers were at the same time used to do court-martial work. Enlisted men should be permitted to serve on courts, and do other types of work in judge advocate offices. It would not be harmful to commission enlisted lawyers. There are insufficient lawyers at division level--i.e. the JA office there has a total of five persons only (two JAs, a Warrant Officer and two enlisted men). The main difficulty in administering military justice was the lack of trained and qualified personnel. Even at battalion level, one officer should have a full-time job administering military justice. A one-man court might be set up at that level, with a legal officer in charge. A single qualified man might well handle both summary and special court work as a judge. If this were done, no transcript of special court trials would be necessary.

AW 104 discipline should be extended. This does not go into a man's service record. I also feel that summary court convictions should not be included in service records, because it starts a man out with a bad reputation in his new outfit after his release from confinement. But if AW 104 power is increased, it should be taken away from the company commander and lodged with the battery or regimental commander. A company commander would still have sufficient disciplinary power remaining.

The administration of justice should be separated from command. Yet the reviewing authority should still have the right to approve or disapprove a sentence. The only way to obtain sentence uniformity would be to establish a system of indeterminate sentences.

PALMER, James H., Insurance Bldg., Seattle; EM and JA officer during war. (p.44)

Personnel and training inaequacies caused military justice difficulties. There was a lack of trained officers. We needed investigating officers most. Investigating officers should be of at least field grade. Trial judge advocates and defense counsel should be practicing lawyers of at least five years' experience, of at least the grade of captain. Likewise, law members should be experienced lawyers and more mature. No benefit will result from having enlisted men sit on courts. The JAG should be independent from command, as is the Medical Corps. Unless there be good contrary reasons, commanding officers should be bound by the recommendations of their judge advocates. Courts-martial duties should be full-time. The law member should also be court president. Psychiatrists are important in time of war, but their reports were often too technical.

O'BRIEN, John J., Seattle; former JA officer and company commander (p.49)

There was too much command influence. Likewise, we were not sufficiently prepared at the commencement of the war. Many of the commanding officers were likewise new to their jobs. The War Department should state that they should not try to influence their courts. The staff judge advocate should be the legal adviser to the appointing authority. Each court should have a competent law member who could rule with authority, preferably JA officers. These should be full-time jobs.

AW 104 should be extended to include power over all officers including colonels, to fine up to one-half of three months' pay and restriction for 30 days. Only a general court should be permitted to reduce an officer in rank. AW 104 should also be extended re enlisted men, to include fines up to 2/3rds of one month's pay and restriction up to 30 days. But such extended AW 104 restriction should be imposed only by officers exercising special court jurisdiction, i.e. regimental commanders. I believe in the above system of fines because in this war restriction during combat was no punishment. Everyone was restricted in a sense. AW 104 fines would be particularly useful re speeding and traffic violations, and would do away with the need of summary court trials for this type of offenses. Staff judge advocates might exercise some supervision. For a drunken officer, I would either dismiss him or give him an AW 104 forfeiture—putting it on his record.

There was a difference in punishment between enlisted men and officers. The blame lay in Washington, where in 1942 and 1943 officer sentences were too frequently reduced by the President. Incidentally, the President should not have to pass on officer dismissal cases.

Inferior courts need more supervision. More JAs are needed. Legally trained officers should act as law members, defense counsel and trial judge advocates.

THORCRINSON, Richard, Northern Life Tower, Seattle; war experience. (p.57)

Weakness: Lack of trained personnel, particularly in the early days. Although investigation and preparation of a case is most important, average investigating officers were incompetent, were busy with other work, had little knowledge of the elements of an offense, and did not know how to make proper investigations. About 2/3rds of the cases had to be returned for further investigation in my command. Mobility of units caused difficulties in keeping track of witnesses. We need more trained men for investigators, trial judge advocates, defense counsel and law members—using lawyers for the latter three classifications. We had lay law members at various times, although some of these were excellent. I know of only one case in which the commanding officer attempted to influence a court.

SEATTLE

Enlisted men would make good court members. This change would stop a lot of complaint, and aid in raising morale. There was a lack of sentence uniformity. AW 104 disciplinary powers should be increased, both over officers and enlisted men. If this were done, there would be no reason to give special courts jurisdiction over officers. I believe that commanding officers should be permitted to censure their courts.

MATHIEU, George E., Marion Bldg., Seattle. (p.64)

Highly specialized training is necessary for the proper administration of military justice. The law member, trial judge advocate and defense counsel should be experienced lawyers and JAG officers. The law member should also be court president. The court members should have adequate training, as should the investigating officer. Court members are different from ordinary civilian jurors, in that they are also functioning in aid of military discipline. Today, rights of challenge are so limited that they are ineffective. If enlisted men are to be put on courts, they should be highly trained. In practice during this war, most officers were originally enlisted men. All court members should be lawyers.

GAINES, Donald L., Seattle; reserve JAG colonel with wartime experience in U.S. (p.68)

Faults in the system result largely from untrained personnel. Innocent men are seldom convicted, because of the lengthy review procedures required after trial. A number of cases reach courts-martial because of poor officer judgment in lower echelons. There are too many sentence disparities. An indeterminate sentence would be more appropriate.

It is not possible to divorce courts-martial from command. Disciplinary enforcement is inherent in command. There should be more extensive supervision and inspection at lower echelons. Appointing authorities should retain the power to suspend sentences.

AW 104 should remain as it is. As to field officers, they do not need this type of punishment. If a man needs more than a reprimand, he should be separated from the service. Under stress, some commanding officers might vent their emotions on their staffs. The average enlisted man probably prefers to receive AW 104 discipline rather than court-martial punishment. AW 104 discipline is abused, and is handled clumsily. However, it might be extended to include extra duty up to 30 days, particularly if administered independently of the immediate commanding officer.

HALL, Frank, U.S. Atty. office, Federal Bldg., Seattle, EM and officer in war; had court-martial experience. (p.73)

The court-martial system as outlined is satisfactory, but defects result in its operation by untrained personnel and the close tie-up between trial judge advocate, defense counsel and law member within a single unit. There are sentence discrepancies. Justice administration should be handled by professionally trained lawyers divorced from the immediate command of the appointing authority.

Enlisted men should not sit on courts-martial. This would impair Army discipline. Defects would be cured by having trained personnel act as trial judge advocates, defense counsel and law members. These should be free from the immediate appointing authority's command. They should not have other duties which would interfere. Establishment of JA personnel riding circuit would be advantageous.

RECOMMENDATIONS OF COMMITTEE OF EIGHTEEN LAWYERS:

DAVIS, Herbert H., Deputy Prosecuting Atty., Seattle; EM and JA officer during war. (p.77)

Personal remarks: A JA officer should properly explain the AWs to enlisted men.

Committee Recommendations: War conditions must be considered when it comes to changing the court-martial system. Peacetime rules are not always effective in wartime. Right now, more zealous observation of Manual for Courts-Martial rules would remedy many of the weaknesses complained of.

There was sentence disparity between enlisted men and officers, which might be remedied; likewise difference of treatment while awaiting trial, conviction and sentence. Officers should at least be given the same sentences as enlisted men. This is particularly true as to serious offenses of a civilian nature. Officers should be triable before special courts. AW 104 should be extended to permit forfeiture against field grade officers.

The JAGD should assign judge advocate officers to smaller units. Thorough pretrial investigations should be had, using attorneys somewhat like police officers. The JAGD should frequently inspect all commands, to determine their military justice adequacy. Policy letters sent out during this war were not always correctly interpreted (i.e. the five-year policy for deserters). The staff judge advocate should be permitted direct access to his commanding officer, and that staff judge advocate should be responsible for his determinations on legal matters. Staff judge advocates should be of at least the grade of captain.

The committee majority is believed to have been against enlisted men serving on courts, but made no recommendation in this regard.

LETTERS ATTACHED TO TRANSCRIPT. (p.85)

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ST. LOUIS HEARINGMr. Lashly; Mr. Armstrong3, 4 Oct 463 Oct 46:

WIESE, Edward L., 4536 Holly Ave., St. Louis; lawyer; EM and JA officer during war. (p.6)

The courts-martial system is fundamentally sound. Innocent men are not convicted, and few guilty go free. Difficulties, however, were presented by inadequate administration by inexperienced or unqualified personnel. An example was occasional excessive pretrial confinement. It was hard to get qualified courts, despite AW C provisions. Courts should not consist solely of lawyers. They must not be completely divorced from command. Law members should be trained JA officers separate from local command, with final say on legal rulings, but the other court members should be from the local command. Some commanding officers attempted to influence their courts, but usually did so in an attempt to obtain some uniformity of sentences. Courts-martial must be used to some extent for disciplinary purposes. I do not think that having enlisted men on courts-martial would work. This might result in clashes on courts. I doubt that enlisted men would want to sit on courts. However, there is no reason why an enlisted man could not serve. There was frequent disparity between trial judge advocates and defense counsel, with the latter having the lesser abilities. Sometimes good defense counsel were subsequently switched to the prosecution side. Trial judge advocates and defense counsel, like law members, should be required to be JA lawyers separate from command. Good lawyers in the Army were seldom available for court-martial duty because, being equally well qualified in other military jobs, they were retained at them. Courts-martial duty was too often just an extra duty.

Unquestionably, there was sentence disparity, including disparity between officers and enlisted men. One of the criterions in determining whether an officer should be tried was whether his offense justified dismissal.

I would increase the strength of the JAGD. This idea should be sold to the Army through the Bar Association. Lawyers were neglected during the war. I would also insist on more education. Courts-martial duty should not be considered as an extra burden.

McNALLY, Raymond F., Jr., 4944 Lindell Blvd., St. Louis; lawyer; QM officer during war, with limited court-martial experience. (p.25)

ST. LOUIS

The courts-martial system has no provision for appeal, despite the automatic appeal review of general court records. Staff judge advocate reviews are one-sided and in favor of the prosecution. These are followed by the commands. I would suggest that defense counsel prepare an independent abstract, to be presented to the high command with the staff judge advocate review. In special court cases, trial judge advocates and defense counsel should be permitted to file their comments or argument with the digest-record. A man charged before a summary court should have the right to demand a special court trial. Summary courts should not be abolished unless AW 104 powers were to be expanded.

When courts have no experienced law member, court-martial requirements that evidence rules be followed have no meaning. It should be required that every special court have a law member as well as general courts. Requirement that legal rules of evidence be followed in summary courts might as well be abolished.

There was a shortage of JA officers during the war (gives figures, p. 38). Law members should not be outside the chain of command. The right to plead guilty should be abolished. Accused should always have the right to testify in his own behalf if he desires. Ample AW protection in this regard now exists. There was an absence of uniform punishments. There should be specific promulgation of uniform maximum punishments.

In general, military justice is sound.

RUZICKA, Edward, 3533-A Lawn Ave., St. Louis; Army; EM and court-martial court reporter during war. (p. 47)

All court-martial members should be JAGD officers independent of command. Enlisted men should not serve on courts. My experience was that court members were prone to follow advice from above, and often were not too interested in the trials immediately before them. There was likewise interference from above, i.e. sending members of one court who returned an acquittal to a court-martial school. Court members should come from an outside command. Also, the JAGD should be independent of command. I believe enlisted men on courts would favor enlisted accused. Trial judge advocates and defense counsel should come from outside of command.

HERALD, Charles W., Jr. 6 Hortense St., St. Louis; realty appraiser; EM in first war, and officer in second war in training camp. (p. 53)

Special courts should be appointed from outside the command, and should not be influenced. So also should trial judge advocates. Summary court officers should be appointed from an outside station also. Accused before summary courts should have defense counsel always. I would agree to the abolition of summary courts, sub-

stituting therefor AW 104 discipline which would not go on his record.

FARIS, James W., St. Louis attorney; cavalry officer during war, with court-martial experience. (p. 58)

I have received reprimands because of my actions on courts-martial, but they were not made part of my 201 file. Military justice problems arose from inadequate administration. The system itself was sound. Generally, severe sentences were imposed in the expectation that they would be subsequently modified.

Law members should not be separated from command and taken from the JAGD. A unified command is necessary in the maintenance of discipline. Necessary improvements would result if the Inspector General was more active. The JAGD should not be independent. There were never enough JA officers during the war, i.e. never enough to have one on each general court. I was burdened with so many other duties that courts-martial details were onerous to me.

BERGMANN, Roy W., St. Louis lawyer; EM and JA officer with domestic war service. (p. 69)

In a mobile Army, it was hard to keep track of witnesses. JA officers frequently were burdened with a variety of extraneous tasks which interfered with their military justice efforts. Likewise, they should be permitted to use their own independent judgment more often. There was command influence, which resulted in maximum rubber-stamp sentences. The court president should be drawn from outside of command. No difficulty in this plan would arise in combat areas. The JAGD should not be divorced from command. JA officers should remain their commanding officers' legal adviser, but should not be burdened with outside duties.

Guilty pleas should remain and should be given more weight, i.e. it should not thereafter be necessary to present a prima facie case. This would save time. While I hate to recommend relaxation in the rules of evidence, I believe that there should be some relaxation re introduction of morning reports in AWOL proof. Morning reports should be prima facie evidence, regardless of the personal knowledge of the AWOL by the entrant. Likewise, there should be some relaxation in the use of depositions, and depositions should be used more frequently. While it would be worthwhile to have defense counsel abstracts, most of these officers would not devote much attention to them.

Enlisted men should not sit on courts, but warrant officers should. They would have the enlisted man viewpoint. Charges should be signed by the immediate commanding officers, but the charge sheets should be prepared by the JAGD in order that they would be correct statements of the charged offenses.

ST. LOUIS

FRAMPTON, Sydney D., St. Louis lawyer; officer during war with court-martial experience; domestic service. (p. 85)

Services of lawyers should have been more thoroughly utilized on courts-martial, and as trial judge advocates and defense counsel. They would be less likely to be influenced by command. Nothing is basically wrong with the court-martial system. Its primary purpose is to secure discipline. It has a number of safeguards to protect accused. Crimes against civilians should be tried in civil courts, particularly in peacetime.

All court members should not be lawyers, but only the key legal positions, i.e. law member. The JAGD would have to be expanded to provide them.

Summary courts could be abolished, but AW 104 powers should be expanded. The commanding officers should be trained to rely on their JA officers more heavily. JA work has been chiefly post-trial in the past. The Inspector General's Department should pay more attention to the shortcomings of court members. Commanding officers often failed to appoint satisfactory court members. Many punishments were excessive.

OLIVER, Jack L., company commander with extensive combat experience, and JA officer. (p. 96)

The fundamental purpose of courts-martial is to administer individual justice. The chief merits of the present system are stability, appellate review, adaptability for expansion, brief trial procedure, a good (though out-dated) Manual for Courts-Martial, good control of troops yet with decentralized authority and a conservation of manpower.

Weaknesses resulted from the system, its administration and personnel. Weaknesses included use of the system for disciplinary ends, inequality of punishments, commanding officer dominance, delays, absence of enlisted men on courts, existence of outdated AWs and punishment tables, inadequacy of court records, lack of competent pretrial and post-trial personnel, lack of ~~in~~adequately trained enlisted personnel, and use of JAG officers lacking practical experience with troops.

An independent JAGD should be established. The JAG should be responsible only to the Secretary of War, and the members responsible only to the JAG or his assistants in charge of Branch Offices. The members should engage principally in administration of military justice with corps, divisions and other lower units, attached to those units for rations and quarters only. Branch Offices should be established in Armies, and independent area courts should be maintained, each with trial judge advocates, defense counsel, law members, investigators, and enlisted complements.

Special courts should have expanded jurisdiction, and should be appoint-

ed at division level. Division staff judge advocates should have three officer assistants, one to act as investigating officer, another to be trial judge advocate, and the third to be defense counsel on division special courts. Summary courts should have slightly expanded jurisdiction, should be appointed at regimental level, and should have a permanent officer and a recorder.

Enlisted men should be represented on general and special courts. Accused should have a right to be represented by regularly appointed defense counsel, other officers or enlisted men.

Reviewing authorities should be: for general courts, Army commanders; for special courts, Division commanders; for Summary courts, regimental commanders; for company punishment, battalion commanders.

During the recent war, the Army seriously erred by not using sufficient numbers of lawyers to act in legal capacities. There should have been more lawyers in the lower commands.

While peacetime courts-martial may work, they were not satisfactory in wartime when there was haste, mobility, and civilian soldiers who were essentially individualists. Generally, civilian lawyers in uniform were better qualified to act in legal positions than Regular Army JA officers. Temporary line officers may have had difficulties of command, but this resulted from lack of time rather than experience. Generally, JAG officers were given ample training during this war, but the JAG school might have stressed practice rather than theory a little more. Practical courses should have been expanded.

In combat, trials were inevitably delayed. They were handled by rear echelon men with little knowledge of combat psychology or conditions. Witnesses were difficult to obtain. Investigations were not complete. There was too much confinement, with resulting use of other men to guard the prisoners. Surgeons and psychologists were inevitably taken from their own duties when they were most needed. Combat changes recommended: Prompt investigation; minimum paper work, transportation of serious offenders to rear areas; independent general court trials immediately upon cessation of the units' combat phase; strengthening of unit commander's AW 104 powers.

There should be a difference in dealing with combat and noncombat offenses as to type of punishment and employment of prisoners. In the U.S., soldiers committing serious non-military offenses should be turned over to civilian authorities.

Under the present system, miscarriages of justice result. While the innocent may not be convicted often, many would not have committed their offenses had they had proper leadership. There were inequalities of punishment, which may be remedied by including both

ST. LOUIS

a maximum and minimum table of punishments for all offenses, and by an independent court system which would tend to equalize punishments. There often were punishment inequalities between enlisted men and officers, chiefly resulting from failure to prosecute officers rather than from equality once the officers had been sent to trial. Sentences were grossly unequal.

Over 70% of courts-martial for minor offenses were caused by company commander inadequacies. Regular Army officers were seldom company commanders during wartime, so their capacities in this regard cannot be measured as against the temporary officers.

Officers receiving civilian commissions were inferior to the other varieties of officers.

There was no tendency to assign less capable men to courts-martial duty, although less capable ones were assigned as investigation officers, claims officers, etc. It would be advisable to expand the JAGD, to increase its authority, and to make it independent. It would be inadvisable to use retired officers on courts, although partially disabled officers might be used for this purpose. Enlisted men should serve on courts. Great disparity in sentences was between courts, not commands.

Company commander authority should not be increased in more than a limited extent, but the inferior court powers might be expanded. AW 104 powers over officers should be increased, but they should not be subject to inferior court trial.

There should be a change in the procedure of filing charges. Combat commanders neither have the time nor the materials. The filing of charges might be handled by a JA officer after receiving oral, informal reports, or in the alternative a simplified system of charges might be adopted. Preliminary investigations are inadequate today, because investigators are not trained, witness attendance is not compulsory, procedure is too informal, and the investigators are both prosecution and jury. Investigations of serious offenses should be handled by JA officers.

The present system of directing trial would be adequate only if investigations were satisfactory. Some mandatory references to trial (i.e. in manslaughter cases, to clear innocent persons) might be wise. While there is little delay of trial in garrison, there is delay in combat. The latter delay is inevitable. Speed of trial was emphasized during the recent war.

Summary courts should have recorders, with the duty to explain an accused's rights to him. With the addition of enlisted members, special courts are satisfactory. Defense counsel in special and general courts should be JA officers. All courts are somewhat dominated

by commanding officers, although the degree varies. But the inferior courts which handled most courts-martial work are 95% dominated. (See earlier suggestion re these inferior courts.)

The trial judge advocate, law member and defense counsel of the proposed general and special courts should be JA officers. It would be wise to make the law member more of a judge, divesting him of his vote as a member.

Recommended procedural changes: Obviate the necessity of reswearing a court for successive trials held the same day. Permit a wider use of depositions and official Army documents. Allow more evidence latitude in lower courts. While defense counsel are today encouraged to make good defenses, better trained defense counsel would improve the system. Defense has adequate opportunity to obtain witnesses today. The Federal Rules should be used when practical. A unanimous vote should be required for non-military offenses, but not for military offenses. The present practice of imposing maximum sentences should be eliminated, perhaps by commanding officers so instructing their courts, perhaps by telling courts to return fair sentences without regard to other influences. Special and general court records are seldom accurate verbatim transcripts unless civilian reporters are available. Delay is inherent in a mobile Army, but not overly-prevalent. General courts should have the discretion to impose dishonorable discharges with sentences of six months or more. Courts should not be given probationary powers. Dishonorable discharges are now imposed too frequently. Use of a bad conduct discharge could be beneficial. Clemency recommendations should be included in reports when independent JAG investigators are used.

Review: There is inadequate summary court review. If special court jurisdiction should be expanded, a verbatim record might be included, to permit better review thereof. Both prosecution and defense should be permitted to submit briefs and memorandum to the law members of general courts and to reviewing authorities, both on questions of law and clemency. Libraries should be furnished down to regiments and special battalions.

The AWs and Manual for Courts-Martial should be revised re their outdated definitions of offenses and provisions for punishments. AW 95 should be amended, to make dismissal permissive. AW 96 should be revised, to specifically set out all known offenses tried thereunder at the present time. For other offenses, reference should be made to the District of Columbia Code. Non-military offenses committed abroad should be governed by the District of Columbia Code.

The JAG should be responsible only to the Secretary of War.

LIMBAUGH, Rush H., Cape Girardeau, Mo.; lawyer; infantry EM and Air Corp officer with court-martial experience. (p. 131)

ST. LOUIS

As defense counsel for six months, it seemed to me that the boys were being railroaded through command influence on the courts. The courts were uninformed and inexperienced. The influence came down from Third Air Force through local authorities to the courts, and applied to all three types of courts. I was told not to indulge in technicalities. There was discrepancy between treatment of enlisted men and officers. Civil offenses should be separated from the Army. Summary courts need not necessarily have lawyers. Special courts should be eliminated. General courts might operate separate and on circuit. The mere separation of law members, prosecution and defense from command would be insufficient, because the court president, outranking all of them, would still be in control. Every general court member except the president should be of the same rank. Court transcripts in my command were incomplete.

LOWRY, Frank, Cape Girardeau, Mo; lawyer; JA officer during war. (p. 143)

The court-martial system is about as good as can be devised and has done a good job, although it can be improved. But civilian justice can also be improved.

There should be no concurrent jurisdiction between civil and military courts over certain offenses. AW 74 should be modified in this regard. Civil-type offenders might be left behind, to be tried by civilian courts. This should apply to foreign jurisdictions which have law compatible to ours.

I would not divorce courts-martial from command re military-type offenses. Too-severe sentences were usually reduced. But there should be more leniency.

ABRAMS, Harold J., St. Louis attorney; EM in Transportation Corps during the war, who observed courts-martial. (p. 158)

Courts-martial provided an unfair procedure on the whole, and resulted in great injustice. Untrained men were used to defend accused, despite the availability of lawyers. Often, selected defense counsel had no zeal for the job, nor appreciation for its responsibility. There was discrimination between officers and enlisted men. Ranking presiding officers exercised undue influence. There should be a legal department within the Army which would be separate from command. Its personnel should consist of lawyers and clerks. All court members would be lawyers from this department as well as prosecution, defense and investigators.

LEWIS, Joseph B., St. Louis lawyer; Artillery officer during war with court-martial experience. (p. 155)

The administration of military justice must be separated from command.

Too many commanding generals insisted upon maximum sentences. There was a standing feud between Regular Army and civilian officers, the former believing like the generals. There was too much influence of "high brass". Appointing authorities should not also be the reviewing authorities. Rather, reviewers should be from an independent staff organization. I would hesitate to suggest that the entire court personnel come from such a separate organization. Rather, I would use lawyers for law members, and would have an adequate defense attorney. Line officers know combat conditions better than rear echelon men.

EVANS, Robert D., St. Louis attorney; Naval officer service during war.
(p. 174)

Enlisted men did not get a fair break from courts-martial. Emphasis was always on discipline rather than justice. Officers were favored. I would prefer an independent judicial system for approved punishment. Enlisted men should sit on courts. The Army's blue discharge takes the place of the Navy's bad conduct discharge. Special courts should have jurisdiction over officers as well as enlisted men for disciplinary offenses. Appellate briefs should be used.

SCHMANDT, Henry, St. Louis attorney; EM and JA officer. (p. 180)

My service overseas was as an enlisted man, from which I was returned to go to the JAG school. Upon graduation, I was placed in a surplus JA pool, with eventual domestic assignment. It is not possible to separate military discipline from justice either in war or peacetime. Weak judge advocates got poor results.

The JAGD should be separated from command, with direct responsibility to the War Department. If commanding officers know that their JA officers are responsible only to this separate department, they are going to take heed of what they say and are going to get along with them. Such a JA officer should be in each command, as well as a separate JA to sit as law member and president of each general court, occupying the middle seat at court sessions. Both the trial judge advocate and defense counsel should be qualified lawyers.

There should be revision and simplification of the Manual for Courts-Martial, because at present even lawyers have a difficult time in understanding it.

Summary court convictions should not be admissible as prior offenses in subsequent trials. I would eliminate summary courts, but would increase AW 104 powers, with report to the staff judge advocate so that a record might be had of abuses by company commanders.

There should be sentence uniformity, with emphasis on reasonable rather than maximum sentences. Too-severe sentences are injurious to morale, because the convicted men know they will not have to serve

ST. LOUIS

them in their entirety.

Pretrial investigations are not impartial at the present time. Investigators should be independent of command.

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COSPER, Roy B., lawyer; Air Corps officer during war with court-martial experience.

Fundamentally, the courts-martial system is good, operating with a minimum of confusion and red tape. I know of only a few excessive sentences. Rehabilitation was excellent. Substantial justice was done, irrespective of rank. But there is need of an in-between punishment for officers—between AW 104 and general court trial. Company grade officers should be subject to special court trial. AW 104 powers should also be increased over officers. On the whole, officers should be punished more severely than has been done in the past.

ROTH, Benjamin, St. Louis attorney; EM and Air Corps officer during war. (p. 208)

The court-martial system is fair in its findings of guilt and innocence. However, court-martial duty was considered as a burden by most officers. There were no set standards of punishment, with resultant sentence discrepancies. Officer punishments were inadequate. Often overseas, restriction or fine was very little punishment for an officer. I believe that it should be possible to reduce them in grade. This would be effective. It should also be permissible to reduce a noncommissioned officer one grade at a time.

Defense counsel and the law member should come from an independent JA branch, although my experience was that law members were usually capable. Independent law members could also advise on uniformity of sentences. But persons who actually confront the accused should be the ones to sentence him. I have never found command influence in my commands, although it can exist. Even after appellate review, sentence disparity would often still exist.

GASTRICH, Arthur, 3925 Castleman, St. Louis; student; EM court reporter on 125 or more court-martial cases. (p. 219)

There were five reporters assigned to our staff judge advocate's office, held available to report general court trials at 35 or 36 airfields within the training command. Later, the command evolved the policy of also having travelling law members from the staff judge advocate office. This seemed to be giving the staff judge advocate a seat on the court, and the different judge advocate officers would review each other's trials when back at the office.

The staff judge advocate would have a say in appointing the court memberships, and would have an insight re available men through his traveling law members. It did not seem fair to have such a close relationship between the actual trials and the reviewing authority.

Defense counsel were caught in an in-between position--between loyalty to the accused and to their commanding officers. It would be better if perhaps the defense counsel was from the JAGD, with the JA freed from direct command authority. It might be wise to free the law members from the local staff judge advocate. General court transcripts in my command were fair to the accused. I never heard of abuses of the special court digest-records, although I have no personal knowledge re their completeness.

I believe there was an inherent command influence upon courts. I would have courts and defense counsel sent in by an impartial man away from the scene of the offender's command.

WALTERS, Arthur J., lawyer; EM and cryptographic security officer during war with court-martial experience. (p. 230)

The main difficulty with courts-martial was that its participants regarded it as an additional duty rather than as a full time occupation. Investigating officers seldom had qualifications or time to properly do their work. This should have been a full-time job for a trained individual. There should be correlation between the military policy and the processing of disciplinary actions. There should also be an equal application of courts-martial to all persons for all offenses. Too many guilty were not even tried.

On cases where I appeared as defense counsel, the law member was out-ranked by the president. He merely made recommendations re legal rulings to the president, and the latter made the final decisions even though he was not qualified in the law. However, he usually followed the law member's advice. Law member qualifications should be set higher than at present. It might be wise to select JA law members and defense counsel. Trial judge advocates should also be qualified, as this makes it easier for defense counsel. They hold to legal evidence.

Courts-martial boards should be separated from the law members, and the law members should be the presiding officers. Opening and closing statements and the arguments should be made a verbatim part of the record. They can be prejudicial at times. Defense counsel should be permitted to file appellate briefs and arguments.

GOODLOE, Allan McDowell, 330 W. Lockwood Ave., Webster Groves, Mo; EM and officer instructor in law and administration, with overseas experience. (p. 244)

ST. LOUIS

Court personnel were often inexperienced. The law member, trial judge advocate and defense counsel should come from the JAGD, separate from local command. The investigating officer should come from a different group, i.e. the military police. The law member should have the final decision on law questions. He should be an expert judge. Other court members could come out of command. If the law member is a trained man, he should also be president. It would not hurt if other members of the court outranked him, if he was independent from them. Whether or not he wore insignia would be immaterial.

Summary and special courts should be abolished, but AW 104 powers should be increased.

GRANT, David M., lawyer without war experience, counsel for accused in a habeas corpus proceeding (Ferd Hurse v. Cavvy, 59 Fed. Supp 363). (p. 261)

As habeas corpus counsel for a convicted soldier, I found that the transcript showed the law member's ruling was erroneously overruled by the president on the one vital issue of the defense. Law members should have finality and independence in their decisions. Additionally, the U. S. should financially aid an accused soldier in death cases in the protection of his rights.

McDONALD, George William, St. Louis lawyer; EM and officer during war, with court-martial experience. (p. 275)

Court members should be half enlisted men and half officers. At present there are two standards of justice, one for officers and the other for enlisted men. Prosecution, defense counsel and law members should have independence. Good investigators are essential. It would not be practical to require unanimous verdicts. A different procedure would be required in combat than in non-combat work. Rear area trials should be had for combat unit offenders. The only difficulty would be in obtaining and keeping witnesses.

ACKERMAN, Paxton H., St. Louis lawyer; EM officer and JA officer during war. (p. 282)

The Army put too many round pegs in square holes. As a whole, the military justice system is excellent. Nonetheless, it is dependent upon the human equation. Leadership inadequacies resulted in courts-martial. There sometimes was commanding officer domination of courts. There is a definite conflict between the necessities for discipline and for justice when it comes to control. During combat, the main objective is to win the battle. Divorcement of command influence from the professional work of the JAGD would be proper. Too frequently, investigating officers are guided by staff judge advocate suggestions. Competent men are needed for investigations.

ARMBRUSTER, Norman M., St. Louis attorney; EM and officer during war. (p. 296)

There was disparity of treatment between officers and enlisted men. It was difficult to give officers AW 104 fines when no generals were immediately available. In my commands, most of the personnel knew all of the facts of a case before it was even tried. It was grossly unfair to be able to try enlisted men for minor violations such as traffic infractions before local summary courts, yet permit the officers to go free. An officer should be punished as easily and as readily as an enlisted man.

ROTHSCHILD, Paul W., St. Louis lawyer; EM and FA officer during war, with court-martial experience. (p. 310)

As a lawyer in my command, I was never named the regularly appointed defense counsel. However I did so act on a number of occasions at the special requests of the accused. In cases which I handled in Japan as trial judge advocate, the court personnel had no interest one way or the other, did not know the facts and did not know the accused. The accused were not part of our actual command. I found no difference in treatment of accused from within the command or from outside the command.

Speaking from the experience of more than 200 days in combat, I never felt that any real injustice resulted from courts-martial in a real combat zone. I have seen more injustice in non-combat zones.

An entirely different procedure should be used in combat areas, as distinguished from noncombat areas.

As defense counsel, I always defended freely. However, I had some unpleasant experiences, including having my promotion torn up because of my defense activities. Too-strenuous defenses were frowned upon.

Summary courts should be eliminated and AW 104 expanded. There are now too many grades of courts-martial.

FISHER, Harvey, St. Louis attorney; CID EM in war. (p. 320)

In the Criminal Investigation Division, we chiefly investigated major felonies and made reports subsequently used by JAs. A case was usually signed, sealed and delivered by the time it went to the JAs. From field officers up, there was a group of "untouchables" that we could not reach by investigation. Nine-tenths of our personnel were enlisted men and it was almost impossible for us to make a proper investigation of high-ranking officers. We might be transferred, denied promotions, etc. Investigation should be divorced from the commanding officers. Rather than answer direct to our Paris office, we were merely an advisory body.

ST. LOUIS

Even though we worked in civilian clothes most of the time, the high-ranking officers considered us enlisted men in their treatment of us. They needed an F.B.I. in Europe. On one case, a colonel who was being investigated asked the agents for a day to think the matter over. That very night, the agents were suddenly taken off the case. We were subject to all kinds of pressure. We also should have worked the way the O.S.S. did. Officers were almost always protected.

Investigations should be conducted independently by men having the status of civilian technicians.

Defense counsel should be assigned to accused immediately. In about 86% of the cases I worked on, we had confessions. Those accused did not know enough not to talk, even though they were warned of their rights. We were not allowed to include extenuating circumstances in our reports, but could only state the basic facts. Nor were we allowed to make recommendations.

There should be a public defender system.

UNGER, Edmond F., layman; accountant, 2734 Osceola, St. Louis; EM and overseas officer, with defense counsel experience.

There was racial prejudice in courts-martial. Trial judge advocates prosecuted from work sheets. Usually, law members were not present at trials. There was undue commanding officer influence, which should be abolished. In one case where I was defense counsel, the commanding officer told me he wanted the accused convicted. I was reprimanded for trying too hard to get him acquitted. Clemency pleas should be permitted after trial. West Pointers can get away without about everything ("West Point Protective Association"—a system, not an organization). Our AWs normally apply to a combat Army. They should be modified to apply to peacetime and occupation Armies as well. Officers are too prone to "throw the book" at enlisted men.

FEICKERT, Carl W., 44 N. Pennsylvania Ave., Belleville, Ill.; lawyer; JA officer. (p. 344)

I am in accord with the statements already made that courts-martial should be separated from command. It should be mandatory that law members be lawyers. Enlisted men should be permitted to serve as court members for all trials of enlisted men. Courts-martial should have power in the first instance to place a convicted man on probation. The Federal Court system of probation should be followed. Insufficient attention is now given to the salvage value of a man, despite present rehabilitation work. While reviewing authorities now have probationary powers, the court members themselves are the ones who see and hear the accused and have the best picture of the surrounding circumstances.

Generally the court-martial system is excellent, with its faults resulting from the human equation. Injustices are bound to occur in the most perfect of judicial systems.

CASE, T. Jackson, Boatmen's Bank Bldg., St. Louis; lawyer; EM and JA officer with domestic war service. (p. 348)

As a whole, the court-martial system is excellent. The civilian judicial system would not have worked as well in the Army. The JAGD should be expanded, and only commanding officers who have JAs should have the right to send a man to court-martial trial. If you have officers who are innately just, you have justice. If you do not, you have injustices. Lawyers are better able to discern the merits of a case than laymen. Men should be sent to the guardhouse only as a last resort, because there they mix with the lower elements of society. Summary courts should have jurisdiction to confine a man, but should retain their other powers. AW 104 powers should not be increased.

Law members should be specially trained men, as should be defense counsel and trial judge advocates. Depositions should be permitted as they are at present. They save time and expense. Unanimous verdicts should not be required, although this might be all right. Of course, unanimous verdicts are sometimes required now. Courts should not impose maximums, with the thought that this will give reviewing authorities leeway to reduce such sentences. Courts should have probation powers. AW 95 dismissal should not be mandatory.

KIRKWOOD, Joseph, 705 Olive St., St. Louis; attorney; EM and JA officer during the war. (p. 358)

As a noncommissioned officer in the jungle, I found that men were not sent before a court-martial unless they had several previous missteps. However, other commanding officers may have been more severe. I believe the present court-martial system is sound, although not without flaws. One flaw is that the commanding officer who appoints courts has too much power over those courts and in reviewing their work. The basic purpose of an Army is to win wars. Discipline is necessary. All problems would not automatically disappear if law members, prosecution and defense were separated from command. Generally speaking, substantial justice has been done. I defend the system.

There was a hesitancy on the part of Board of Review members to bust cases which may have had errors in them but in which substantial justice had been accomplished.

There should have been more JA officers.

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WAR DEPARTMENT
PUBLIC RELATIONS DIVISION
PRESS SECTION
TEL. RE 6700
BRS. 2528 AND 4860

FOR RELEASE TO PRESS AND RADIO
AT 6:00 P.M., EST, THURSDAY, FEBRUARY 20, 1947

SECRETARY PATTERSON ANNOUNCES ACTION
ON MILITARY JUSTICE REPORT

Secretary of War Patterson announced today that he had approved the principal recommendations of the Advisory Committee on Military Justice. The Committee, composed of eminent members of the American Bar Association designated by the President of the Association, was appointed by Secretary Patterson on the 25th of March of last year.

The members of the Committee were: Dean Arthur T. Vanderbilt, Chairman, Judge Alexander Holtzoff, Walter P. Armstrong, Joseph W. Henderson, William T. Joyner, Honorable Frederick E. Crane, Jacob M. Lashly, Judge Morris A. Soper and Floyd E. Thompson. The Committee was requested to study the administration of military justice within the Army and the Army's court-martial system and to recommend such changes in existing laws, regulations, and practices as the Committee deemed necessary or appropriate.

The Secretary of War expressed to the Honorable Willis Smith, retiring President of the American Bar Association and to Dean Vanderbilt, Chairman of the Committee, his appreciation for the extended and careful study of the problems involved by all members of the Committee.

The report of the Advisory Committee was filed on December 13, 1946. The Committee found that "the Army system of justice in general and as written in the books is a good one; that it is excellent in theory and designed to secure swift and sure justice; and that the innocent are almost never convicted and the guilty seldom acquitted." However, the Committee found defects in the operation of the system and made a series of recommendations for changes. The report of the Committee has been under careful consideration of the War Department for the past two months.

In the consideration by the Department of the Advisory Committee report, close study was also given to the report on the judicial system of the Army by the Committee on Military Affairs of the House of Representatives of the 79th Congress in August 1946. Many of the recommendations contained in the report of the Committee on Military Affairs corresponded with recommendations of the Advisory

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Committee. The recommendations of the Military Affairs Committee exhibited an appreciation of the problems involved.

The Secretary of War stated that the War Department will propose a program of changes in the administration of military justice based upon the recommendations of the two committees. The most important changes can be effectuated only through amendments by the Congress of the Articles of War. The Under Secretary of War is having appropriate drafts of bills prepared for submission to the Congress. Other changes may be effected through administrative action, and such action will be taken immediately.

The Secretary of War stated that he is advised that the Navy Department is also considering a report prepared at its instance on the administration of military justice within the Navy, and that the Secretary of the Navy will communicate his views to the Armed Forces Committees of the Senate and House of Representatives. The Secretary of War stated that the armed services committees would thus have an opportunity to consider military justice in both Services and to coordinate any action they might take with respect to the two Services.

Specific changes will be as follows:

The Judge Advocate General's Department will be substantially enlarged through the appointment or detail of officers with legal education and training. Additional technical personnel, such as reporters and clerks, will be provided for the efficient operation of the system of military justice. The extent of the expansion in the Judge Advocate General's Department will be determined after further detailed study of availability of military personnel in the active Army and of the additional functions to be prescribed for the Judge Advocate General and his department.

The Manual for Courts-Martial will be amended and an amendment of the Articles of War will be proposed to declare it improper and unlawful for any person to attempt to influence the action of a court-martial in reaching its findings or sentence in a particular case or the action of an appointing or reviewing authority with respect to his acts. Adequate provision, however, will be made for the instruction of officers and enlisted personnel concerning the exercise of their duties in connection with courts-martial. Provision will also be made for providing information to courts-martial by appointing authorities as to general or special conditions in the particular command, including the prevalence of particular offenses, but with no communication about a particular pending case.

The Manual for Courts-Martial will be amended expressly to prohibit the reprimand of a court-martial or any of its members with respect to court-martial action and to delete the present authorization for reviewing authorities to advise the members of courts-martial by letters of non-concurrence in acquittals or findings of not guilty and the reasons for such non-concurrences. This change in

the Manual will be so framed as to permit instruction of personnel in their duties and to permit the punishment by court-martial action or otherwise of personnel of courts-martial who may in the exercise of their duties be guilty of any individual misconduct amounting to a violation of the Articles of War.

The Manual for Courts-Martial will be amended to clarify the obligation of courts-martial to exercise their own judgment in imposing sentences and to forbid the courts, in reliance on the mitigating action of reviewing authorities, to impose sentences known to be excessive.

Amendments to the Articles of War will be proposed to make it a jurisdictional requirement that the law members of general courts-martial be members of the Judge Advocate General's Department or trained lawyers designated by the Judge Advocate General and that the law members be present at the trials. Necessary changes in the Manual for Courts-Martial will be made to clarify the duties and powers of law members. Rulings of law members will be final on all interlocutory legal matters other than those involving the issue of guilt or innocence and those in their nature requiring action by the full court such as challenges. The proposed amendments will include a requirement that when the trial judge advocate of a general court-martial is a lawyer the defense counsel must also be a lawyer.

Amendments to the Articles of War will be proposed to place final judicial review of all general court-martial cases in the Judge Advocate General's Department, with authority in the Judge Advocate General to establish within his office or as adjuncts thereto appellate agencies to assist him in exercising his powers. The Judge Advocate General and appellate agencies will be given authority to weigh evidence, confirm, approve, disapprove, or vacate findings and sentences, to commute, suspend, reduce or remit sentences, and to order new trials, but the appellate agencies' power of mitigation and remission will be exercised by the Judge Advocate General under the direction of the Secretary or Under Secretary of War. These appellate judicial powers will be exercised in death cases, except that no death sentence will be ordered into execution, in peace or wartime, without confirming action by the President. All sentences to dismissal, dishonorable discharge, or bad conduct discharge will be passed on by a Board of Review or similar appellate agency, and will be confirmed by the Judge Advocate General or his appellate agency prior to execution of the sentences. Action by the Judge Advocate General and his appellate agencies will follow approving action by the normal reviewing authorities, which authorities will have the power to approve or disapprove, mitigate or suspend, the sentences.

Amendment of the Articles of War will be proposed to give discretionary power to the Judge Advocate General upon application by accused persons to grant new trials and set aside sentences, the application to be submitted within one year after final disposition on initial appellate review, or with respect to World War II cases within one year after final disposition or after the termination of the war,

whichever is the latest; only one application for thus reopening a case to be afforded.

Amendment of the Articles of War will be proposed to require that appointing and reviewing authorities provide direct communication with their staff judge advocates in all matters relating to the administration of military justice.

Amendment of the Articles of War will be proposed to vest the Judge Advocate General with the authority to prescribe the assignments of officers of his Department, after appropriate consultations with commanders on whose staffs they may serve, and to require the Judge Advocate General or senior members of his staff to make frequent inspections in the field with respect to the administration of military justice.

Amendments of the pertinent statutes will be proposed to give the officers of the Judge Advocate General's Department advantages in promotion commensurate with those given other officer personnel on account of their specialized professional education and training.

Amendments to the Articles of War will be proposed authorizing special courts-martial, as well as general courts-martial, to adjudge as punishment discharges for bad conduct as distinguished from dishonorable discharges; to require appellate review by a Board of Review in the Office of the Judge Advocate General of the records of trial by special courts-martial involving such bad conduct discharges; and to require that when a trial judge advocate of a special court-martial is a lawyer the defense counsel also be a lawyer.

An amendment to an existing executive order will be requested removing present limitations upon the trial of officers by special courts-martial. This will permit imposition of appropriate punishments upon officers by special courts-martial for offenses of lesser gravity not requiring trial by general court-martial.

Amendment of Article of War 104 will be proposed to authorize disciplinary punishment by commanding officers to a maximum of forfeiture of one-half month's pay for three months in the cases of warrant officers, flight officers, and all officers below the grade of brigadier general, the power to be exercised in peace as well as in wartime. The Manual for Courts-Martial will contain a provision that information as to punishment of officers under Article of War 104 will be made available to other Army personnel.

Amendment of the Articles of War will be proposed to authorize general courts-martial to impose upon officers punishment involving loss of commission and concurrent reduction to the ranks.

Amendment of Article of War 85 will be proposed to make discretionary in war and in peace the punishment of an officer for being drunk on duty, and to

delete the present mandatory requirement for dismissal for the offense in time of war. The punishment will thus be made to depend upon the gravity of the offense as determined by the duty involved and the other circumstances.

The Manual for Courts-Martial will be amended to require that the sessions of general, special and summary courts-martial be open, except for security or other special reasons, and that sessions of the courts be bulletined to encourage the attendance of spectators who may wish to attend. The necessity of attaining impressive decorum in the conduct of trials will be stressed.

Amendments of the Articles of War will be proposed to make qualified enlisted personnel eligible to serve as members of general and special courts-martial, the detail of such enlisted persons to be discretionary with the appointing authority; all members of courts-martial to be senior to accused and enlisted members to be from units other than those to which accused are assigned. Special emphasis will be placed by appropriate War Department orders on instructions of enlisted persons with respect to the administration of military justice generally and on instruction required to qualify enlisted persons for the responsibilities incident to membership on courts-martial.

Appropriate War Department orders will be issued requiring the selection of summary courts-martial from captains or officers of field grade when available and requiring that selection of inexperienced officers be avoided. Instructions will be given also requiring that accused persons before summary courts-martial be provided counsel when requested, and, where available, counsel of their own choice.

The Manual for Courts-Martial will be amended to enjoin strict enforcement of the requirement of Article of War 70 that charges be referred for trial by general court-martial only after thorough and impartial investigation. The employment of trained and mature officers in the conduct of investigations will be emphasized.

The Manual for Courts-Martial will be amended to clarify and liberalize the present rules as to the admissibility of documentary record evidence and to insure the admissibility of book and similar entries made in the regular course of business or administration.

Amendment of Article of War 22 will be proposed to clarify insurance to the defense of equal opportunity with the prosecution to obtain the attendance of witnesses before courts-martial.

Amendment of Article of War 25 will be proposed to permit the use by the prosecution as well as by the defense of depositions in nominal death cases - in cases in which the death penalty is authorized by law but is not to be adjudged. Prompt taking of depositions will also be authorized.

Amendment of Article of War 39 will be proposed to exclude from the operation of the statute of limitations the offense of absence without leave committed in time of war.

Amendment of Article of War 43 will be proposed to remove any possible ambiguity in the requirements as to the number of votes necessary to convict accused persons. The Article will require a unanimous vote in mandatory death cases and a two-thirds vote in other cases.

Repeal of Articles of War 44 and 88, which are obsolete for present day application, will be proposed. Article of War 44 requires publication in his home State of the fact of dismissal of an officer for cowardice or fraud and makes it scandalous for other officers thereafter to associate with him. Article of War 88 denounces as an offense abuse, intimidation, violence to or wrongful interference with any person bringing subsistence or other necessaries into camps or quarters.

Amendment of Article of War 45 will be proposed to require maximum limitations by the Executive on the punishment of officers as well as enlisted men in all cases; and to provide for limitations upon punishments of all persons in time of war and in theaters of operations, as well as under peacetime conditions.

Amendment of Article of War 92 will be proposed to delete the present mandatory punishment of death or life imprisonment for the offense of rape and to substitute death or any lesser punishment for this offense; and to make discretionary the quantum of punishment for murder without premeditation.

The Manual for Courts-Martial will be amended to permit general courts-martial, in their discretion, to adjudge sentences to confinement in excess of six months but not exceeding one year without imposing the punishment of dishonorable discharge.

Amendment of the Articles of War will be proposed expressly to forbid coercion in any form in the procurement of admissions and confessions of accused persons, and to provide punishments for such coercion or attempts at coercion.

The Secretary of War stated that certain recommendations by the Advisory Committee on Military Justice had not received War Department approval or had received qualified approval. The principal recommendations not completely followed and the reasons for nonconcurrence are as follows:

The Committee recommended that general and special courts-martial be appointed by the Judge Advocate General or by his delegates who would act as reviewing authorities independently of the normal command authority. This recommendation was disapproved for the reason that it was believed that the ends of military justice would be more effectively accomplished if appointment of courts and initial review of cases were left in the officers exercising command. The pro-

posed requirements that legally trained officers be utilized as law members, the provision that the Judge Advocate General should in general control the assignment of judge advocates to a theater, the requirement that trial judge advocates and defense counsel be equally qualified, the powers of appellate review placed in the Judge Advocate General and agencies under his direction, and the prohibitions against criticisms of courts, appear to furnish a sufficient check upon possible abuses in the appointment and control of courts by the command power to guarantee adequate, independent judicial control, and to insure efficiency and fairness. In the opinion of the Secretary any tendency to centralize in Washington detailed control of field activities is destructive of the responsibility and efficiency of field commanders and must be avoided.

The Committee recommended that officers of the Judge Advocate General's Department be governed as to promotions, efficiency reports, and specific duty assignments by the Judge Advocate General and not by local commanders. Except that the Judge Advocate General should have authority to prescribe the assignments of officers of his department, this recommendation was not approved for the reason that control of promotions and efficiency reports of all officers was believed properly to rest in the normal chain of command of the Army.

The Committee recommended that members of the Judge Advocate General's Department be given the same privileges regarding promotion as are given to certain other professional personnel on separate promotion lists. This recommendation was approved to the extent that special privileges are afforded by pending personnel procurement legislation which will include a three-year service credit for lawyers entering from civil life. In other respects it was not approved for the reason that except in the cases of professional groups which are necessarily not interchangeable within the Army, it is thought advisable from an Army-wide viewpoint to have all officers on a single promotion list.

The Committee recommended that all defense counsel before courts-martial be trained lawyers. This was not approved because of the impracticality of providing trained lawyers in all cases, and because in many simple military cases line officers are equally effective as counsel as are lawyers. It is proposed that where the trial judge advocate is a lawyer the defense counsel must also be a lawyer. This proposal insures equal advantages to both sides.

The Committee recommended that special courts-martial be administered as far as possible by rules governing general courts-martial. This is approved in part. The Manual for Courts-Martial now provides that the procedure of and before special and summary courts-martial will, as far as practicable, be that prescribed for general courts-martial unless otherwise stated. The new proposals' forbidding reprimand, censure, or attempt to influence decisions will apply to special courts-martial. If the trial judge advocate is a lawyer, the defense counsel must also be. Because of the limited punishing power of the court, a mandatory law member is not deemed necessary. Cases involving bad conduct discharge are

to receive the same appellate review afforded records of trial by general courts-martial.

The Committee recommended repeal of Articles of War 87 and 91, relating to personal interest in sale of provisions (AW 87) and dueling (AW 91). This was not approved for the reason that these Articles, although in some respects obsolete, fix certain standards of conduct for officers which are of value to the Army.

END

- 8 -

DISTRIBUTION: Aa, Af, B, Da, Dd, Dm, N.

2-20-47

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COMPARATIVE ANALYSIS OF ARMY AND NAVY SYSTEMS OF JUSTICE

| | | U. S. NAVY | U. S. ARMY | Recommendations of the VANDERBILT COMMITTEE | REMARKS |
|-------------------------------------|---|--|---|--|--|
| <u>SOURCES</u> | BASIC LAW | Articles for the Government of the Navy, 1874, as amended. | Articles of War, 1920, as amended. | Explanation of A.W. to enlisted men should be emphasized. | |
| | MANUAL | Naval Courts and Boards, 1937, as amended. | Manual for Courts-martial, U.S. Army, 1928 (reprinted and corrected to 20 April, 1943), as amended. | SecWar, GenStaff, and Army should place greater emphasis on operation of system of justice, and enlarge substantially legal staff. | |
| <u>PRELIMINARY PROCEDURE</u> | Report of offender | Offender is reported to his commanding officer (e.g., by entry in report book). | "Accuser" prefers Charges and Specifications on "Charge sheet"--swearing that personal knowledge or investigated--if possible within 48 hours. (Accuser may be any person in military service, regularly the immediate commanding officer of accused). Charge sheet to be accompanied by summary of evidence (signed by witnesses if possible) and letter of transmittal recommending mode of disposal. | | The 48 hour period is often exceeded in Army practice. This is not a mandatory Army rule; Summary of evidence is often omitted. |
| | Forwarding of report | If commanding officer has no power of punishment under Art's. 24 or 25, A.G.N., report is forwarded to next higher commander having such power. | If accuser is not immediate commanding officer, submitted to latter. | | |
| <u>POWERS OF COMMANDING OFFICER</u> | Hearing by officer having power to punish | After 24 hours, mast investigation resulting in further investigation or dismissal or mast punishment or order for deck court or summary court martial trial or recommendation for general court martial. | Immediate commanding officer may dispose of case according to Art. 104 A.W. Accused has a legal right to trial by court martial in lieu of commanding officer's punishment. | The right of an officer to demand a court martial should be preserved. | At this stage in Army or Navy, other measures, such as termination of probation, transfer, recommendation for administrative discharge, hospitalization, or mental or physical medical examination, might be initiated. |
| | Punishments by commanding officer | Upon officers: Private reprimand; Suspension from duty, arrest, or confinement (none over 10 days.) Upon enlisted men; one of following: Reduction to next inferior rating, if rating established by same command. Confinement: Simple, 10 days; Solitary, 7 days; Solitary on bread and water, 5 days. Extra duties. Loss of liberty. | Upon commissioned officers below major, in war or emergency, by a Brigadier General or above: Loss of one-half of one month's pay. Upon enlisted men and officers; one of following or apportioned combination: ----- ----- Extra fatigue (not upon noncommissioned officers and officers), 1 week. Hard labor (upon no person above rank of private first class), 1 week. Restriction to limits, 1 week. Admonition Reprimand Withholding of privileges, 1 week. Accused has a right of appeal to next superior authority on ground of unjust or disproportionate punishment. | Warrant, flight, and field officers should be punishable. Maximum fine should be increased to one-half pay per month for a period not over 3 months. Information should be given out as to use of AW 104 on officers to avoid impression that they go unpunished. Authority of commanding officer to punish enlisted men should be enlarged. | In the Army, loss of pay is regularly combined with reprimand (and/or restriction). The naval officer authorized to impose punishment commands, as a rule, a larger unit than the Army officer. His powers are therefore greater. Hard labor does not as company punishment in the Army, involve confinement. An appeal in naval cases might be very difficult to allow at sea. |
| | Assessment of damages | | Assessment of private damages by board, subject to approval by commanding officer and to be stopped against pay of offender. | The right of an officer to appeal to the next higher commander should be preserved. | Navy has no provision for assessing private damages or stopping pay. Use of assessment device is discouraged in the Army. |

PRE-TRIAL
PROCEDUREForwarding
charge sheetSelection
of court

Investigation

Charges
preferred
and served
on accused

Convening authority may order board of investigation or court of inquiry if further development of facts is needed.

Convening authority (assisted by his legal officer) writes charges and specifications, signs, and serves on accused; forwards file to JA.

JA informs accused of prosecution witnesses; ascertains names of defense witnesses; conducts investigation; summons witnesses for trial; informs accused of his rights (defense counsel to be secured, etc.).

Copy of charges and list of prosecution witnesses are given to accused, but he is not allowed to see letter containing narrative of facts or statements of witnesses. The letter and statements of witnesses are not read to or by the court.

General Court-martial.

President, SecNav, C-in-C of a fleet, CO of naval station or larger shore activity outside U.S., and, when empowered by SecNav, commanders of naval districts and CO's of certain larger forces afloat and ashore.

Number of
members
Qualifica-
tions

CONSTITUTION

Restrictions

Not less than 5 nor more than 13.
Lt. or above, if available. One-half, senior to officer accused, if possible. President should be line officer. One-third, of same corps or branch as and senior to officer accused. Legal quorum: 5.
Material witness should not be a member.

Immediate commanding officer (sometimes identical with accuser) forwards charge sheet to officer with summary court martial jurisdiction (regularly, regimental or post commander).

Latter selects course of action: if summary or special court martial, his adjutant signs 1st indorsement. If general court martial, referred to Pre-trial investigating officer.

Pre-trial investigating officer hears prosecution and defense witnesses under oath; accused may cross-examine.

Pre-trial investigation should be completed within 48 hours.

Commanding officer should forward file within 24 hours to general court martial authority with 1st indorsement signed personally by him.

General court martial authority should hear advice of his staff judge advocate and refer file for trial to TJA within 48 hours.

TJA checks all papers as soon as received. May correct clerical and slight technical errors; but reports serious irregularities, if discovered by him, to the appointing authority.

Copy of charges is given to accused. Accused may examine letter of transmittal, summaries of testimony of witnesses, record of investigation, and other related papers. Contents of these papers are not evidence and are not seen by the court.

Interval between serving and trial, 5 days or more (if less, consent of accused necessary).

General court-martial.

President, CO of a territorial division or department, Supt. of Military Academy, CO of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, any other CO.

An accuser or prosecutor cannot convene the court.

Any number not less than 5.
Must not be inferior to an officer accused where avoidable. Majority should have 2 or more years' service if possible. Senior in rank is president. Legal quorum: 5.

An accuser, witness for prosecution, and an officer suspended in rank cannot sit as members.

AW 70 (impartial investigation) should be enforced.

The authority of a division or post commander to refer a charge for prompt trial to a court appointed by a (staff) judge advocate should be final.

Doctrine of condonation should be extended to case of soldier committed to actual combat with knowledge of pending charges.

Permanent GCM for territorial units, to be used as rotating courts, should be created.

The JAGD should become the appointing authority independent of the command, and AW 8 so amended.

Attempt to influence court or reviewing authority should be made violation of AW 96.

Qualified enlisted men should be eligible for membership on GCM's, to be so appointed at discretion of appointing authority.

AGN does not require a pre-trial investigation, but N.C. & B. and Navy Regulations require careful inquiry by officer recommending GCM.

Convening authority of Navy or Army SCM may return file to subordinate command for trial by lower court.

The investigation made by Navy JA in preparation of his case is, in effect, a pre-trial investigation. If he finds no adequate basis for trial, or for certain charges, he recommends to convening authority that charges be dropped.

Naval policy requires that all members be superior to accused.

U. S. NAVY

U. S. ARMY

Recommendations of the
VANDEBILT COMMITTEE

REMARKS

COURTS OF
WIDE JURIS-
DICTION
(Cont'd)

TRIAL
PROCEDURE
(Cont'd)

Court sworn

President swears in JA.
JA swears in members.
JA swears in reporter.

TJA swears in members.
President swears in TJA.

Order reversed.

Objections
to charges
and specifi-
cations

Accused states when copy
of charges and specifica-
tions received.
JA announces nolle prose-
qui.
Objections to charges and
specifications by accused.
Court examines charges
and specifications; pro-
nounces them in due form and
technically correct.
Accused states that he is
ready for trial.

TJA announces nolle prose-
qui now or after arraignment.
TJA declares affidavit
and 1st indorsement of
charges and specifications
in proper form; reads, un-
less waived, charges and
specifications; and states
when served on accused. (If
less than 5 days interval,
accused must consent to
trial at that time.)

In Army trial, subject
to discretion of court, wit-
nesses excluded from court
room until called to testify.

Special pleas

Special pleas.

Special pleas and motions
(e.g., to sever). Court has
power to strike charges and
specifications on plea made
on certain grounds.

No motion to sever or
strike in Navy trial.

General pleas

JA reads charges and spec-
ifications.
Pleas to the issues (by
accused himself).
Warning on guilty pleas.

General pleas by defense
counsel (who states that ef-
fect of pleas of guilty was
explained to client; in nec-
essary, additional warning
by president or law member.)
TJA reads sections of
Manual or precedents if de-
sired by defense counsel or
court.
TJA may make opening
statement what he expects to
prove.

Navy does not accept plea
of guilty in cases of deser-
tion. Army suggests "some"
evidence in all guilty plea
cases.

Evidence

Prosecution witnesses
(sworn by president).
Direct examination.
Cross examination.
Redirect examination.
Recross examination.
Examination by court.
(Examination by court has
character of cross-examin-
ation.)

Prosecution witnesses
(sworn by TJA).
Direct examination.
Cross examination.
Redirect examination.
Recross examination.
Examination by court.
(Court may ask questions
that either side might ask
(but limited to cross-exam-
ination of accused if he
takes witness stand).)
When prosecution rests,
defense counsel may move for
finding of not guilty; court
may require specific indica-
tion of insufficiency.

In Army trial, all wit-
nesses (prosecution and de-
fense) sworn by TJA.

In Navy court, accused
has no right to move for
acquittal.

Defense witnesses.
Rebuttal.
Surrebuttal.
Witnesses for court.
Proper safeguards that ac-
cused understands his rights,
especially to be witness in
his own behalf.

Opening statement by de-
fense counsel.
Defense witnesses.
Rebuttal.
Surrebuttal.
Witnesses for court.
Proper safeguards that ac-
cused understands his rights,
especially to be witness in
his own behalf.

In Army trial, no intro-
ductory questions to defense
witnesses by TJA (except
where accused a witness).
In Navy trial, accused
may testify and make unsworn
statement; in Army trial,
only one or the other.

Rules of
evidence

Prescribed by executive
regulation.

Prescribed by President
under authority delegated in
AW 38, which provides that
they shall, as far as prac-
ticable, be those recognized
in criminal cases in U.S.
district courts.

Rules for admissibility of
documentary evidence should
be liberalized, especially
those relating to entries in
due course of business. The
confusing reference to per-
sonal knowledge should be el-
minated, and the federal
court rule adopted.

The Army manual allows
use of service record in two
specific instances only (MCM,
sec. 117a).

Personal knowledge is no
longer a requisite to admis-
sibility of a service record
entry. (NC&B, Sec. 202; 5
CMO 1946, 179)

Manual states that ser-
vice record entries admis-
sible only if based on per-
sonal knowledge. (MCM, sec.
117, amended by Pres. Exec.
Order No. 9216 of 7 Aug. 42
to prevent disclosures con-
trary to public policy. The
federal rule was once re-
jected (I Bull. JAG, Army,
158), but is now accepted as
to entries in due course
(III Id. at 468-69) except
official writings, which can
be impeached by a showing of
lack of personal knowledge.
(IV Id. at 87-88)

Depositions should be al-
lowed to prosecution in capi-
tal cases, subject to limita-
tion that case be treated as
not capital and that death
sentence may not be imposed,
and AW 25 so amended.

Depositions allowed in
capital cases, but sentence
on charges to which deposi-
tions relate restricted to
one year's imprisonment.

Depositions allowed to
defense, but not to prose-
cution, in capital cases,
unless accused consents.

Provision should be made
for the taking of depositions
at the earliest possible mo-
ment in time of war, subject
to limitation that defendant
must have counsel and both
sides have notice and oppor-
tunity to participate.

| | | U. S. NAVY | U. S. ARMY | Recommendations of the VANDERBILT COMMITTEE | REMARKS |
|--------------------------------------|----------------------------------|------------------------------|---|---|---|
| COURTS OF WIDE JURISDICTION (Cont'd) | TRIAL PROCEDURE (Cont'd) | Continuance | Must meet day to day except Sundays and holidays unless special permission obtained. | Court has power to grant continuance for reasonable cause. | |
| | | Arguments | Opening by JA. Argument by counsel for defense. Closing by JA. | Opening by TJA. Argument by defense counsel. Closing by TJA. | |
| | | Findings | Deliberation of court on findings; simple majority vote sufficient. | Deliberation of court on findings; 2/3 majority required, but unanimous vote in case of spying. | AW 43 should be amended to state clearly the number of votes necessary to convict. Findings should be announced as soon as determined, and, in case of conviction, near arguments on questions of sentence. |
| | | (Acquittal) | (JA announces total acquittal; president announces acquittal in part.) | (President announces total acquittal.) | Findings and sentence: The ballots are signed in the Navy, secret in the Army. |
| | | Sentence | Matter in aggravation, extenuation, or mitigation. | | In Army trial, such "evidence" is not delayed until after findings and court may consider it in sentence; it may cause Navy court merely to recommend clemency (or reject plea of guilty where inconsistent therewith). |
| | | | Record of previous convictions and personal data. Deliberation on sentence; simple majority sufficient, but 2/3 for death sentence. | Record of previous convictions and personal data. Deliberation on sentence; unanimous vote for death, 3/4 for life or more than 10 years, 2/3 for all other sentences. | Manual should provide that a court martial should exercise its own judgment, and not give maximum sentence where excessive, relying upon the reviewing authority to reduce it. |
| | | | | President announces findings and sentence (but announcement may be withheld). Defense counsel may submit matter in writing for clemency consideration. Recommendation to clemency by members of court. | Sentence should be announced as soon as determined. |
| | | recording and authentication | Testimony, accused's statement, and arguments on the general issue, are recorded in full. Oral arguments upon admissibility of evidence and interlocutory questions are recorded fully only for special reason, e.g., JA and court differ. Record approved from day to day by parties and court if trial extends over more than 1 day. Entire record incl. findings and sentence authenticated by all members and JA; in addition, final adjournment clause by president and JA. In case of total acquittal separate copy of findings signed by all members and JA. Before proceedings, findings and sentence approved and published, counsel for defense may examine record exclusive of finding and sentence. | Testimony and accused's statement are recorded in full but opening statements and arguments on any matter, interlocutory or other, need not be recorded except to extent necessary for understanding or permitted by court. Entire record examined by defense counsel, then authenticated by president and TJA. If findings and sentence were not announced at the trial, TJA signs and appends certificate that he personally recorded findings and sentence. | Upon direction of law member, opening statement and/or closing arguments should be included in transcript of record. Provision should be made to define what portions of a JCM record and action of reviewing authority shall be available to inspection of defense counsel. |
| | REVIEW AND EXECUTION OF SENTENCE | Principles | Execution of sentence requires a. regularly: approval of proceedings, findings, and sentence by convening authority (and designation of place of confinement); b. dismissal of an officer or death sentence: approval by convening authority and confirmation by President (or, except in death cases, SecNav until termination of Title I, 1st War Powers Act). Approved sentences involving immediate DD or BCD (where no confinement is to be served and/or no probation was granted) are effected only on instructions from the Bureau of Naval Personnel. | Execution of sentence requires a. regularly: approval of sentence and order of execution by convening authority; b. approval by convening authority and review by board of review in certain cases under AW 50g; c. confirmation by President or certain other authorities in cases under AW.48 and 50g, in addition to approval by convening authority; (except in death cases, authority of President has been delegated to SecWar until termination of Title I, 1st War Powers Act.) | Reviewing authority should have power to review every case as to weight of the evidence, legal sufficiency of the record, and to mitigate or set aside sentences, and to order a new trial. The general or officer who referred case for trial should have power to mitigate, suspend, or set aside the sentence, but this power to act should be limited to clemency. JAGD should become the reviewing authority independent of the command. Provision for advising members of court of nonconcurrency in an acquittal should be expunged. Reprimand of court or members should be expressly prohibited. |

| | | U. S. NAVY | U. S. ARMY | Recommendations of the VANDERBILT COMMITTEE | REMARKS |
|--------------------------------------|---|---|--|---|---|
| COURTS OF WIDE JURISDICTION (Cont'd) | REVIEW AND EXECUTION OF SENTENCE (Cont'd) | Types of action by convening authority | <p>1. Acquittal is final (neither approval nor disapproval) except where set aside by SecNav.</p> <p>2. Revision of record, findings, and sentence before same court; no new evidence; no increase of punishment except where such purpose authorized by SecNav.</p> <p>3. Disapproval (or setting aside) proceedings, findings, sentence.</p> <p>4. Approval of proceedings, findings, sentence; may be combined with remission or mitigation of sentence (mitigation of finding rare); commutation only by SecNav.</p> <p>5. Ordering probation for certain period (termination for cause within that period).</p> | <p>1. Acquittal is final; neither approval nor disapproval.</p> <p>2. Rehearing before court with new members; is trial anew; no more severe findings or sentence.</p> <p>3. Return of record for certificate of correction.</p> <p>4. Revision of findings and sentence without increase before same court.</p> <p>5. Disapproval of sentence (without ordering rehearing).</p> <p>6. Approval of sentence; may be combined with remission or mitigation in quality and quantity of finding (s) and sentence; commutation limited by AW 50.</p> <p>7. Ordering execution or suspension (probation); the latter may be "vacated" later.</p> | <p>Present Navy policy is not to allow revision of acquittal or increase of punishment.</p> |
| | Publication | Notification of party and publication by convening authority. | Notification of party, Court-Martial Order, and newspaper in case of officer dismissal for fraud &c. | The requirement for newspaper publication of dismissal of officer for cowardice or fraud (AW 44) should be repealed. | |
| COURTS OF INTERMEDIATE JURISDICTION | Further review and action | <p>Additional review for legality in JAG's office, and for disciplinary features in BuPers or MarCorp. Only cases in which SecNav action is recommended are reviewed in SecNav's office.</p> <p>SecNav has power to set aside the proceedings or to remit, mitigate, or commute the sentence.</p> | <p>Additional review for errors of law by JAGD (Cases involving death, unsuspended dismissal, DD, or penitentiary confinement are reviewed by Board of review before being reviewed by JAG. Cases which JAG finds legally insufficient then go to Board of Review.) Where Board of Review and JAG agree on cases of legal insufficiency, or disagree on cases reviewed by the Board of Review, each submits an opinion to SecWar for action. JAG may refer back to the confirming authority for appropriate modification of sentence cases which have been set aside in part.</p> | <p>Final review of all GCM's should be made by JAGD, incl. review as to weight of the evidence.</p> <p>AW 50 is unintelligible and should be amended; there is no good reason why cases in which DD is suspended should not be reviewed in the same way as cases where it is ordered to be executed.</p> | <p>Incident to power of confirmation of sentence in Army confirmation of only so much of a finding as involves a lesser included offense.</p> |
| | CONSTITUTION | Unexecuted portion can be remitted, mitigated, or suspended at any time by SecNav. | Unexecuted portion can be remitted, mitigated, or suspended at any time by convening authority, officer of equal authority, SecWar, or President. | | |
| COURTS OF INTERMEDIATE JURISDICTION | NAME OF COURT | Summary court martial | Special court martial | Should be governed by same requirements as GCM's. | |
| | CONVENING AUTHORITY | CO of vessel, Comdt. of navy yard or station, CO of brigade, regiment, or smaller detached command, CO of marine barracks and hospitals, and, when empowered by SecNav, CO of any other command. | CO of a district, garrison, fort, camp, or other place where troops are on duty, or by CO of a brigade, regiment, or detached smaller command. An accuser or prosecutor cannot convene the court. | | |
| COURTS OF INTERMEDIATE JURISDICTION | Number of members | Three. | Any number not less than 3. | | |
| | Qualifications | Ensigns or above. Senior member should be lieutenant or above. | Majority should have 2 or more years' service, if possible. Senior in rank is president. Legal quorum: 3. | | A commissioned warrant officer is regarded as of equal rank to ensign. |
| COURTS OF INTERMEDIATE JURISDICTION | Restrictions | Convening authority, material witness, and an officer reasonably subject to challenge should not be appointed members. No member may later act as reviewing authority of a court of which he was a member. | An accuser, witness for prosecution, and an officer suspended in rank cannot sit as members. | | |
| | JURISDICTION | Persons | All enlisted persons under command of convening authority. | All persons, except commissioned officers, subject to military law. | Trial of officers by special court martial should be authorized to bridge between commanding officer's punishments (AW 104) and GCM. |
| COURTS OF INTERMEDIATE JURISDICTION | Offenses | Minor offenses warranting punishments of medium severity. | Any offenses except capital offenses and those carrying a mandatory punishment which is beyond the power of the court to impose. | | but an Army officer having GCM authority may authorize trial of capital offense by Special court martial and this is often done. |
| | Punishments | Limited to bad-conduct discharge, reduction of one rating, 2 months confinement, 3 months' loss of pay, or minor punishments. | Cannot impose death, dishonorable discharge, dismissal, confinement in excess of 6 months, or loss of pay of more than 2/3 pay per month for a period of 6 months. | | |

U. S. NAVY

U. S. ARMY

Recommendations of the
VANDERBILT COMMITTEE

REMARKS

COURTS OF
INFERIOR
JURISDICTION
NAME OF
COURT
CONVENING
AUTHORITY

Deck court.
Any GCM or SCM convening authority.

Summary court-martial.
CO of a garrison, fort, camp, etc., or CO of a regiment or detached smaller command. CO, if only officer present, is the summary court-martial.

Different from other Army courts: accuser or prosecutor may be convening authority.

CONSTITUTION

One officer. Should be Lt. or above. CO, if commissioned officer, may act as DC officer.

One officer. Should have 2 or more years' service, if possible.

Should be selected from captains or officers of field grade. Junior and unexperienced officers should not be selected.
The accused should be allowed to have counsel of his own selection before a summary court; but appointment should not be mandatory.

The accused before a naval deck court is represented by counsel if he so desires.

JURISDICTION

All enlisted persons under command of convening authority who consent to trial by DC. Tries very minor offenses. Punishment limited to reduction by one rating, 20 days' confinement, 20 days' loss of pay or minor punishments.

Privates, first class, and below. Also non-commissioned officers below technical sergeant, if they do not object or unless their trial is ordered by an officer competent to convene a GCM. It may not try capital offenses. It cannot impose dishonorable discharge, confinement in excess of one month, restriction to limits for more than 3 months, or loss of pay of more than 2/3 of one month's pay.

The power, authority, and dignity of summary courts should be increased.

PROSECUTOR

Name

Judge advocate (in GCM). recorder (in SCM).

Trial judge advocate (in GCM and Special Court Martial).

No separate prosecutor in Navy Deck Court and Army Summary Court Martial.

Appointed by

Convening authority.

Convening authority.

Right of the command to control the prosecution and name a TJA should be retained.

Responsible to
Qualifications

Convening authority.
Judge advocate should be an officer skilled in the law. Where none such is available, any officer may be designated, recorder needs no special qualifications.

Convening authority.
Should be member of Judge Advocate General's Dept. May be disqualified for bias, prejudice or hostility.

TJA should be a trained lawyer and member of JAGD, and his fitness report, duty assignments, and promotions should be made by JAG.

Duties

Prosecutes case.
Summons and examines witnesses.
Gives court opinion of form and law.
Sums up case for prosecution.
Withdraws when court is cleared.
Keeps record.

Prosecutes case.
Summons and examines witnesses.
Does not give court opinion on law unless so requested by court.
Sums up case for prosecution.
Withdraws when court is cleared.
Keeps record; signs each day's proceedings.

Naval JA and Army TJA have a duty to call attention to irregularities without request of court.

Relation to
accused

Behaves impartially. Gives to accused and counsel opinion on law, in or out of court, on request. Protects interests of accused when he is without counsel. Makes no comment on failure of accused to testify.

Does not assist or advise the defense. Must not suppress evidence favorable to defense. Makes no comment of failure to testify on part of accused.

DEFENSE
COUNSEL

Name

Counsel for accused.

Defense counsel.

An accused does not have a right to be represented by counsel before an Army Summary Court Martial.

How selected

Selected by accused or, if accused so requests, convening authority details an officer. When accused has no counsel, judge advocate (in GCM) or recorder (in SCM) protects accused's interests.

Convening authority appoints one for each general and special court martial. Accused may select own counsel; civil, at own expense; military, if reasonably available; or may rely on defense counsel of court, either alone or together with selected counsel.

Defense counsel should be trained lawyer and commissioned officer of JAGD; the requirement to be jurisdictional. His fitness reports, duty assignments, and promotions should be made by JAG.

Qualifications

Suitable officer should be detailed. Lt. or above, if available.

Carefully selected. May be disqualified for bias, prejudice, or hostility.

Rights

Same rights as defence counsel before civil courts in criminal cases.

In general, same rights as defense counsel before civil courts in criminal cases.

LEGAL
SPECIALIST

Name

None provided for. Court depends upon JA (in GCM) or recorder (in SCM) for legal advice.

GCM only: Law member of the court.

Appointed by

Convening authority.

Responsible to

Convening authority and also, if law member is of JAG Dept., to Judge Advocate Gen.

Qualifications

Should be officer of JAG Dept. if available. Otherwise, a specially qualified officer.

Law member should be trained lawyer and commissioned officer of JAGD, and his fitness reports, should be made by JAG.

Duties

Rules on interlocutory questions, except challenges. Acts as legal adviser to the court. Remains with other members in closed court. Has equal voice and vote with other members.

Law member must be present during entire trial and his rulings on legal questions other than sufficiency of evidence should be binding on the court.

The ruling of Army law member on admissibility of evidence is final and not subject to being overruled by court.

Relation to
accused

Has no different relation to accused than other members of the court.