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

INDEX (Continued)

INDEX (Continued)

INDEX (Continued)

- - - - -oOo- - - - -

I. GENERAL

1. 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:

	both	discipline	justice
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
Totals	35	10	6

I-1
I-2

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.

- - - - - - - - - -

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 penalities, 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 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 50½ 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.

I-2
I-3

bb. Definite qualifications for membership on Boards of Review created under AW 50½ 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 criticise 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. Additional, there was lack of proper court facilities, such as dignified courtrooms, 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.

- - - - - - - - - -

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 criticised 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

I-5
I-6

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.

- - - - - - - - - - -

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:

	Yes	No
Combat Judge Advocates	8	2
Regular Army Judge Advocates	12	8
Board of Review Judge Advocates	2	4
Staff Judge Advocates	7	5
Totals	29	19

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:

	Yes	No
Combat Judge Advocates	4	8
Regular Army Judge Advocates	6	13
Board of Review Judge Advocates	1	4
Staff Judge Advocates	4	8
Totals	15	33

I-7
I-8

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 criticise 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.

- - - - - - - - - - -

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
Totals	30	23

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	4	8
Regular Army Judge Advocates	6	14
Board of Review Judge Advocates	4	2
Staff Judge Advocates	9	1
Totals	23	25

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	8	3
Regular Army Judge Advocates	9	10
Board of Review Judge Advocates	7	2
Staff Judge Advocates	9	5
Totals	33	20

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.

I-9
I-10

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.

- - - - - - - - - - -

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?

GENERALS:

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:

	Yes	No
Combat Judge Advocates	9	3
Regular Army Judge Advocates	13	5
Board of Review Judge Advocates	6	2
Staff Judge Advocates	8	4
Totals	36	14

ENLISTED MEN:

Yes 23. No 17.

- - - - - - - - - - -

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

GENERALS:

	Yes	No
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
Totals	44	5	18	12	22	15

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 and 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.

I-12
I-13

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 AW 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
Totals	36	18

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 id 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 court 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.

I-14
I-15

JUDGE ADVOCATES:

	Yes	No
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 AGCT 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; then 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:

	Yes	No
Combat Judge Advocates	6	4
Regular Army Judge Advocates	16	0
Board of Review Judge Advocates	9	0
Staff Judge Advocates	12	1
Totals	43	5

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:

	None	Seldom	Often
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
Totals	8	37	4

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 AW 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:

	Yes	No
Combat Judge Advocates	6	6
Regular Army Judge Advocates	14	5
Board of Review Judge Advocates	5	4
Staff Judge Advocates	10	2
Totals	35	17

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
Totals	29	21

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:

	Yes	No
Combat Judge Advocates	7	5
Regular Army Judge Advocates	8	11
Board of Review Judge Advocates	1	8
Staff Judge Advocates	5	8
Totals	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 CHARGES

1. 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	1	11
Regular Army Judge Advocates	2	18
Board of Review Judge Advocates	0	8
Staff Judge Advocates	1	8
Totals	4	45

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 AW 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
Totals	44	8

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:

	Yes	No
Combat Judge Advocates	9	4
Regular Army Judge Advocates	12	7
Board of Review Judge Advocates	4	3
Staff Judge Advocates	8	4
Totals	33	18

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 CHARGES

1. 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:

	Yes	No
Combat Judge Advocates	10	3
Regular Army Judge Advocates	18	1
Board of Review Judge Advocates	6	1
Staff Judge Advocates	11	2
Totals	45	7

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.

- - - - - - - - - -

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:

	Yes	No
Combat Judge Advocates	0	13
Regular Army Judge Advocates	9	11
Board of Review Judge Advocates	2	5
Staff Judge Advocates	1	10
Totals	12	39

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:

	Yes	No
Combat Judge Advocates	3	9
Regular Army Judge Advocates	9	11
Board of Review Judge Advocates	3	4
Staff Judge Advocates	5	9
Totals	20	33

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.

IV-3

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.

- - - - - - - - - - -

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:

	Yes	No
Combat Judge Advocates	10	2
Regular Army Judge Advocates	17	2
Board of Review Judge Advocates	6	1
Staff Judge Advocates	7	4
Totals	40	9

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:

	Yes	No
Combat Judge Advocates	10	2
Regular Army Judge Advocates	16	1
Board of Review Judge Advocates	6	1
Staff Judge Advocates	8	4
Totals	40	8

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 increasedin 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:

	Yes	No
Combat Judge Advocates	4	9
Regular Army Judge Advocates	10	6
Board of Review Judge Advocates	2	6
Staff Judge Advocates	4	8
Totals	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.

V-3
V-4

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:

	Dominated	Seldom Dominated
Combat Judge Advocates	2	9
Regular Army Judge Advocates	4	11
Board of Review Judge Advocates	6	1
Staff Judge Advocates	5	7
Totals	17	28

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	4	7
Regular Army Judge Advocates	9	9
Board of Review Judge Advocates	5	3
Staff Judge Advocates	6	3
Totals	24	22

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

V-5
V-6

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:

	Yes	No
Combat Judge Advocates	13	0
Regular Army Judge Advocates	19	0
Board of Review Judge Advocates	8	0
Staff Judge Advocates	12	1
Totals	52	1

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 Tr[illegible] 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
Totals	45	9

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.

V-7

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
Totals	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.

VI-1
VI-2

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:

	Yes	No
Combat Judge Advocates	11	2
Regular Army Judge Advocates	19	1
Board of Review Judge Advocates	7	0
Staff Judge Advocates	10	3
Totals	47	6

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 inabilities 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:

	Yes	No
Combat Judge Advocates	11	0
Regular Army Judge Advocates	18	2
Board of Review Judge Advocates	7	0
Staff Judge Advocates	10	2
Totals	46	4

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.

- - - - - - - - - - -

VI-4
VI-5

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:

	Yes	No
Combat Judge Advocates	11	1
Regular Army Judge Advocates	19	1
Board of Review Judge Advocates	6	2
Staff Judge Advocates	10	1
Totals	46	5

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 38.

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

	Yes	No	Not familiar with Rules
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
Totals	10	19	16

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.

VI-5
VI-6

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:

	Yes	No
Combat Judge Advocates	0	9
Regular Army Judge Advocates	2	18
Board of Review Judge Advocates	3	6
Staff Judge Advocates	1	13
Totals	6	48

Comments: One Judge Advocate noted: There is no time for "hung juries" during war. A number of Judge Advocates commented on AW 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 determinated 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
Totals	48	5

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:

	Yes	No
Combat Judge Advocates	11	1
Regular Army Judge Advocates	18	2
Board of Review Judge Advocates	7	1
Staff Judge Advocates	10	1
Totals	46	5

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

ENLISTED MEN:

Yes 33. No 6.

- - - - - - - - - - -

VI-9
VI-10

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:

	Yes	No
Combat Judge Advocates	3	9
Regular Army Judge Advocates	6	14
Board of Review Judge Advocates	2	5
Staff Judge Advocates	3	7
Totals	14	35

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:

	Yes	No
Combat Judge Advocates	5	7
Regular Army Judge Advocates	6	14
Board of Review Judge Advocates	8	1
Staff Judge Advocates	4	7
Totals	23	29

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:

	Yes	No
Combat Judge Advocates	1	11
Regular Army Judge Advocates	4	15
Board of Review Judge Advocates	6	3
Staff Judge Advocates	1	10
Totals	12	39

VI-11
VI-12

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 (sec 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
Totals	22	19

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 Judge Advocates	4	5
Regular Army Judge Advocates	6	3
Board of Review Judge Advocates	3	0
Staff Judge Advocates	4	2
Totals	17	10

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:

	Yes	No
Combat Judge Advocates	9	2
Regular Army Judge Advocates	14	2
Board of Review Judge Advocates	5	2
Staff Judge Advocates	8	1
Totals	36	7

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 adviser. 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 50½ 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, 50½, 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 50½, 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 50½, 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.

- - - - - - - - -

VII-2
VII-3

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?

GENERALS:

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:

	Yes	No
Combat Judge Advocates	6	3
Regular Army Judge Advocates	13	7
Board of Review Judge Advocates	7	1
Staff Judge Advocates	10	3
Totals	36	14

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?

GENERALS:

Yes 2. No 52.

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

JUDGE ADVOCATES:

	Yes	No
Combat Judge Advocates	2	10
Regular Army Judge Advocates	3	14
Board of Review Judge Advocates	3	4
Staff Judge Advocates	5	6
Totals	13	34

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, 50½, 51).

- - - - - - - - -

VIII. SUBSTANTIVE LAW

1. Advisability of amending Articles of War and Courts-Martial Manual in respect to definitions of offenses and provisions for penalties.

GENERALS:

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 lattitude 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:

	Yes	No
Combat Judge Advocates	4	6
Regular Army Judge Advocates	12	7
Board of Review Judge Advocates	4	4
Staff Judge Advocates	9	2
Totals	29	19

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 onlisted 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. TM 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:

	Yes	No
Combat Judge Advocates	3	10
Regular Army Judge Advocates	4	15
Board of Review Judge Advocates	6	3
Staff Judge Advocates	7	6
Totals	20	34

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 Winthdrop'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.)

VIII-3
VIII-4

JUDGE ADVOCATES:

	Yes	No
Combat Judge Advocates	1	10
Regular Army Judge Advocates	5	15
Board of Review Judge Advocates	0	7
Staff Judge Advocates	2	9
Totals	8	41

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.S.	Foreign
Combat Judge Advocates	9	2
Regular Army Judge Advocates	14	1
Board of Review Judge Advocates	9	0
Staff Judge Advocates	12	1
Totals	44	4

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.

- - - - -oOo- - - - -