TO THE HONORABLE

THE SECRETARY OF WAR

REPORT OF

U.S. WAR DEPARTMENT

ADVISORY COMMITTEE ON MILITARY JUSTICE

13 December 1946

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TO THE HONORABLE
THE SECRETARY OF WAR:

REPORT OF ADVISORY COMMITTEE ON MILITARY JUSTICE

I. INTRODUCTION

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

Memo 25-46

MEMORANDUM)
No. 25-46)

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

WAR DEPARTMENT ADVISORY COMMITTEE
ON MILITARY JUSTICE

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

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

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

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

(AG 334 (22 Mar 46))

BY ORDER OF THE SECRETARY OF WAR:

OFFICIAL:
EDWARD F. WITSELL
Major General
The Adjutant General

DWIGHT D. EISENHOWER
Chief of Staff

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

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

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

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

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

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

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

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

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

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

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

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

1. There was an absence of sufficient attention to and emphasis upon the military justice system, and lack of preliminary planning for it.

2. There was a serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court.

3. The command frequently dominated the courts in the rendition of their judgment.

4. Defense counsel were often ineffective because of (a) lack of experience and knowledge, or (b) lack of a vigorous defense attitude.

5. The sentences originally imposed were frequently excessively severe and sometimes fantastically so.

6. There was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences.

7. Investigations, before referring cases to trial, were frequently inefficient or inadequate.

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

II. GENERAL RECOMMENDATIONS

Our first recommendations are general:

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

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

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

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

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

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

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

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

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

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

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

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

III. SPECIFIC RECOMMENDATIONS

A. The checking of command control

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Discrimination in officer punishment

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

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

In particular, we make the following recommendations:

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

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

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

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

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

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

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

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

C. Enlisted men and courts-martial

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

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

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

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

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

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

D. Summary courts.

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

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

E. Preliminary Investigations.

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

F. Additional Recommendations.

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

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

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

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

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

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

IV. RECOMMENDATION FOR FUTURE STUDY IN WAR DEPARTMENT

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

Arthur T. Vanderbilt

Alexander Holtzoff

Walter P. Armstrong

Frederick E. Crane

Joseph W. Henderson

W. T. Joyner

Jacob M. Lashly

Morris A. Soper

13 December 1946

Floyd E. Thompson