

10 AUGUST 1945.

*Top Secret**Second Endorsement.*

From: The Judge Advocate General.

To: Commander-in-Chief, United States Fleet and Chief of Naval Operations.

Subject: Report of further Pearl Harbor investigation by Admiral H. K. Hewitt, U. S. Navy.

1. Subject report clarifies obscure points and supplies omissions in the earlier investigations. It is considered that this and former investigations, taken together, present as clear a picture of the pertinent facts as will ever be adduced. With this report, therefore, I believe the investigation of the Pearl Harbor attack should be considered completed.

2. Admiral Hewitt's report brings out and confirms a distinction which impressed me at the time of studying the earlier investigations, a distinction which does much to clarify thinking on the question of placing responsibility for the Pearl Harbor disaster. It appears that there was no lack of appreciation on the part of any of the responsible officers that war was coming, and coming quickly, during the critical period immediately preceeding 7 December 1941. The point on which those officers failed to exercise the discernment and judgment to be expected from officers occupying their positions, was their failure to appreciate, from the information available to them, that Pearl Harbor was a likely target for aerial attack and their failure to take the necessary steps to prevent or minimize such a surprise attack. Each of these officers, in estimating the critical situation, demonstrated a poor quality of strategical planning, in that he largely ruled out all possible courses of action by which the Japanese might begin the war except through an attack in the Western Pacific.

3. I do not believe that the lack of more complete understanding and co-operation between Admiral Kimmel and Lieutenant General Short had any great effect on the ultimate result; for it is abundantly shown that they each entertained the same fallacious views, and closer understanding would most likely merely have strengthened those views. Likewise, I submit that the importance of information from Japanese sources has been overemphasized; for had more basically sound principles been observed, the Pearl Harbor disaster would not have occurred. The security of Pearl Harbor was the very core of our Pacific strategy, a fact which did not receive sufficient consideration in the strategic concept of responsible officers.

4. In answer to the specific questions asked in the first endorsement, the following opinions are submitted:

(a) As is more fully developed in the answer to question (b), it is not believed that there is sufficient evidence to warrant conviction of any of the officers concerned of any offense known to naval law.

(b) Under the facts of this case, there are only two offenses which are worthy of consideration: (1) Neglect of Duty and (2) Culpable Inefficiency in the Performance of Duty. Under either charge it would be necessary to define the duty of the officer concerned, and to show that it was his duty to follow a course of action other than the one he did. In my opinion this would be impossible, as the acts of omission of these officers do not rise above the status of errors of judgment. No clearly defined duty can be established which was neglected or improperly performed. As stated by Fleet Admiral King, in his endorsement on the findings of the Court of Inquiry, the evidence in the case boils down to the fact that the acts of the officers in question "indicate lack of superior judgment necessary for exercising command commensurate with their rank and their assigned duties, rather than culpable inefficiency". "Lack of Superior Judgment" is not an offense triable by general court-martial.

(c) The charges and specifications for any court-martial proceedings must be filed not later than a date "six months after the termination of hostilities in the present war with Japan as proclaimed by the President or as specified in a con-

current resolution of the two Houses of Congress, whichever is the earlier". Public Law 77—79th Congress, approved June 7, 1945. There are serious doubts as to the constitutionality of this and the earlier extensions of the Statute of Limitations enacted by the Congress since 7 December 1941 and applicable to trials arising out of the Pearl Harbor disaster as a violation of the Constitutional prohibition against *ex post facto* laws. Admiral Kimmel has executed a waiver of the Statute of Limitations for a period of six months past the end of the present war, and therefore the question of the validity of the Congressional extensions is not controlling in his case. However, as it has become apparent since the time that Admiral Kimmel was requested to execute this waiver that other officers are also blameworthy, it is my opinion that the Navy Department would be acting in an inequitable manner in instituting any proceedings against Admiral Kimmel on his waiver, unless Admiral Kimmel himself so requests.

(d) The requirements of 39th Article for the Government of the Navy and Section 346 of Naval Courts and Boards pertaining to the rank of members of a general court-martial will make it most difficult to constitute a court for the trial of the officers here concerned during war time or during a period of six months after the cessation of hostilities. Many of the officers of appropriate rank, both on the active and the retired lists, would be disqualified because of interest in the subject matter, the probability of being called as a witness, or by virtue of having been connected with one of the investigations into the matter. If more than one of the officers in question are brought to trial, an entirely new court would be necessary in each case, as members who had tried a former case arising out of the Pearl Harbor attack would be subject to challenge. The Summoning of the necessary witnesses would result in temporarily removing from their duty stations many of the key officers in the naval organization. For the foregoing reasons, I am of the opinion that any such court martial proceedings prior to the end of hostilities with Japan is highly impractical and would be detrimental to the war effort, and further, that any such proceedings during the six months immediately following the end of hostilities would seriously impair the efficiency of the naval service.

5. Notwithstanding the difficulties pointed out above, I am of the opinion that the Navy Department is morally obligated to order Admiral Kimmel tried by general court-martial should Admiral Kimmel so insist. In August 1943, Secretary Knox sent Admiral Kimmel a memorandum from which the following is quoted, "I feel that it would be to the best interests of all concerned if you should now agree not to plead the statute of limitations in bar of trial upon my assurance that the trial will be had at the earliest practicable date." And in Admiral Kimmel's waiver he agreed, "I will not plead, nor permit any attorney or other person on my behalf to plead, the statute of limitations in bar of my trial by General Court-Martial in open court for any alleged offenses with which I may be charged relating to the period on or before December (sic) 7th, 1941, should my trial be held during the present war or within six (6) months thereafter."

6. I suggest that this record be made available to Admiral Kimmel and his counsel; that Admiral Kimmel be informed that he is free to make public anything contained in this record and prior records as soon as that may be done without prejudice to the public interests; that if he insists a general court-martial will be convened to try him for alleged offenses he may have committed on or before December 7, 1941; and that his decision be abided.

T. L. GATCH.