

Fall 9-1-1941

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Charles P. Light, Jr.

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Recommended Citation

Charles P. Light, Jr., *Some Duties Of The Judge Advocate Of A Base Command In British Empire Territory*, 3 Wash. & Lee L. Rev. 34 (1941), <https://scholarlycommons.law.wlu.edu/wlulr/vol3/iss1/3>

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SOME DUTIES OF THE JUDGE ADVOCATE OF A BASE COMMAND IN BRITISH EMPIRE TERRITORY

CHARLES P. LIGHT, JR.*

"The judge advocate of a command is the legal adviser of the commanding officer thereof," is the brief statement found in a paragraph of Army Regulations.¹ Continuing, the same paragraph states that "The scope of the duties of a judge advocate of a command includes * * * the legal phases of military disciplinary action therein." This article is concerned with some of the duties of the staff judge advocate of a Base Command in relation to the exercise of court-martial jurisdiction over United States military personnel in a Territory wherein is situated one of the bases leased or to be leased from Great Britain for a period of ninety-nine years.²

I. *Jurisdiction*

By the explicit language of a prefatory paragraph,³ Congress has provided that "the Articles of War * * * shall at all times and in all places govern the Armies of the United States;" and in the 2nd Article of War⁴ has listed the persons subject to the Articles and to military law. Inasmuch as the commanding general of a Base Command will be empowered to appoint general courts-martial,⁵ the personnel of his command are, therefore, subject to his general, as well as his special⁶ and summary,⁷ court-martial jurisdiction. Nevertheless, it is appropri-

*Major, Judge Advocate General's Department, Reserve; Judge Advocate, Bermuda Base Command, U. S. Army; Professor of Law, Washington and Lee University School of Law, on leave of absence in military service. The opinions expressed herein are those of the writer, and do not necessarily represent those of The Judge Advocate General or of the War Department.

¹Par. 3b, AR 25-5, Aug. 30, 1926.

²The Army court-martial system in all of its aspects is ably and clearly discussed by Colonel Archibald King, Judge Advocate General's Department, in the May, 1941, issue of the Wisconsin Law Review.

³10 U. S. C. § 1471.

⁴10 U. S. C. § 1473.

⁵A. W. 5, 10 U. S. C. § 1476: "General courts-martial may consist of any number of officers not less than five."

⁶A. W. 6, 10 U. S. C. § 1477: "Special courts-martial may consist of any number of officers not less than three."

⁷A. W. 7, 10 U. S. C. § 1478: "A summary court-martial shall consist of one officer."

ate to mention briefly the situation of the United States military forces which are operating with consent in the Territories of a friendly power.

It will be remembered that the President in a message to Congress dated March 27, 1941,⁸ stated that on September 3, 1940, he had transmitted "for the information of the Congress notes exchanged between the British Ambassador at Washington and the Secretary of State on the preceding day, under which this Government acquired the right to lease naval and air bases in Newfoundland and in the islands of Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and Antigua, and in British Guiana;" and that he now transmitted "for the information of the Congress a copy of an agreement for the use and operation of these bases, which was signed in London on March 27, 1941, together with the notes exchanged in connection therewith." The message closed with the following sentences:

"These bases are for American defense against attack, and their construction is consistent with such defense. International developments since my message to Congress of September 3 last, have emphasized the value to the Western Hemisphere of these outposts of security."

The mentioned Agreement for the Use and Operation of the United States Bases,⁹ which for brevity may be called the Lease Agreement,¹⁰ contains in Article I (1) the following "General Description of Rights:"

"The United States shall have all the rights, power and authority within the leased areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the leased areas, which are necessary to provide access to and defence of the leased areas, or appropriate for control thereof."

The broad powers thereby conferred will in general also exist over additional necessary areas which may be acquired, inasmuch as Article XXVII of the Lease Agreement provides that the supplementary leases therefor "shall unless there are special reasons to the contrary

⁸House Doc. No. 158, 77th Cong., 1st Sess., p. 1.

⁹House Doc. No. 158, 77th Cong., 1st Sess., pp. 2-11.

¹⁰Each Lease provides that the Agreement is to be regarded as incorporated therein and made a part thereof. Annex II, House Doc. No. 158, 77th Cong., 1st Sess., pp. 14-28, contains the Forms of Leases.

be on the basis of those [terms and conditions] contained in this agreement." Furthermore, paragraph (1) of article XIX provides that:

"United States forces stationed or operating outside the leased areas under separate agreement with the Government of the United Kingdom or the Government of the territory shall be entitled to the same rights and enjoy the same status as United States forces stationed within the leased areas."

More particularly, the Lease Agreement in Article IV (1) contains the following material provisions relating to the distribution of jurisdiction:

"In any case in which

(A) A member of the United States forces * * * shall be charged with having committed, either within or without the leased areas, an offence of a military nature, punishable under the law of the United States, including, but not restricted to, treason, an offence relating to sabotage or espionage, or any other offence relating to the security and protection of United States naval and air bases, establishments, equipment or other property or to operations of the Government of the United States in the territory; or * * *

(C) A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area, the United States shall have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence."

And the same Article concludes in paragraph (5) with these significant words:

"Nothing in this agreement shall be construed to affect, prejudice or restrict the full exercise at all times of jurisdiction and control by the United States in matters of discipline and internal administration over members of the United States forces, as conferred by the law of the United States and any regulations made thereunder."

In the practical application of the above-quoted provisions of the Articles of War and of the Lease Agreement with regard for persuasive principles of international law,¹¹ it is entirely reasonable to

¹¹ Oppenheim, *International Law*, 5th ed., § 445: "Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some

suppose that the commanding general of a Base Command will, and agreeably to the Territorial and United Kingdom authorities, exercise immediate court-martial jurisdiction over a soldier of the Command who has committed an offense of any nature, either (a) inside the principal or (b) an additional leased area; or (c) outside a leased area, while acting as a part of the forces stationed or operating outside such area under separate agreement, whether express or tacit. Moreover, it is not unreasonable to suppose that in cases involving offenses committed by a soldier under conditions other than those mentioned, principally while he is on pass or leave in the towns of the Territory, immediate court-martial jurisdiction may likewise be exercised by mutual agreement between the United States and the Territorial authorities. The practical advantages to this course have been ably stated by a learned writer on the subject:¹²

“Such an arrangement is to the advantage of the city authorities, since it relieves their police courts and jails of a burden, and is desired by the military authorities because they prefer to deal with the misdeeds of their soldiers in their own courts rather than air them in a city police court. Though his preference is not asked, it may also be assumed that the erring soldier will rather serve his time in the post guardhouse than in the city jail.”¹³

II. *General Court-Martial Cases*

Let us assume that a soldier is alleged to have committed an offense made punishable by the Articles of War, for example, assault with intent to do bodily harm with a dangerous weapon,¹⁴ and that he is in custody of the military authorities of the Base Command. Before the soldier may be tried by a court-martial, the special orders appointing the court and specifying its personnel will have been issued by the commanding general. The selection of the personnel of the several courts and the preparation of the necessary special orders are the particular concern of the adjutant and the staff judge advocate. Prior to trial there will be drawn up and entered upon a form known

place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them.”

¹²King, *The Army Court-Martial System* [1941] Wis. L. Rev. 311, at 321.

¹³In the Territories under consideration, although the word has become “gaol” the assumption nevertheless is believed to be sound.

¹⁴A. W. 93, 10 U. S. C. § 1565.

as the charge sheet¹⁵ a written accusation,¹⁶ consisting of the technical charge, which indicates the Article of War accused is alleged to have violated, and the specification, which sets forth the specific facts and circumstances relied upon as constituting the violation. The applicable 70th Article of War¹⁷ provides that "Charges and specifications must be signed by a person subject to military law" (usually, the soldier's immediate commanding officer), "and under oath either that he has personal knowledge of, or has investigated the matters set forth therein and that the same are true in fact to the best of his knowledge and belief." Customarily, the charges will be accompanied by the statements of witnesses to the occurrence.

In the case supposed, the charges appear to be serious enough to indicate trial by a general court-martial which, as the highest military court, is competent to award any form of appropriate punishment including dishonorable discharge.¹⁸ The commanding general of the Base Command, who has general court-martial jurisdiction over the accused soldier and, therefore, is "the appointing authority," is now subject in his action to the provisions of the 70th Article that "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made."¹⁹ This Article further provides that the investigation "will include injuries as to the truth of the matters set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline." At the investigation, moreover, full opportunity must be given the accused to cross examine witnesses if they are available and to present anything in his own behalf either in defense or mitigation. Further, the investigating officer is required to examine available witnesses requested by the accused. Upon the completion of the investigation, it is the established practice for the investigating officer to submit a formal report containing his recommendation as to what disposition should be made of the case, a statement of any reasonable ground for belief that the accused is, or was at the time of the alleged offense, mentally defective, deranged or abnormal;²⁰ a statement of the substance of the testimony taken on

¹⁵W. D., A. G. O. Form No. 115, April 2, 1948.

¹⁶Par. 24, Manual for Courts-Martial U. S. Army, 1928, hereinafter cited M. C. M.

¹⁷10 U. S. C. § 1542.

¹⁸M. C. M., pars. 13, 102, 103a.

¹⁹M. C. M., par. 35a.

²⁰The Procedure in cases of suspected insanity is outlined in M. C. M., par. 35c.

both sides; and copies of the statements, documents or other matters considered by him in reaching his conclusions.

The commanding general is further subject to the requirement of the 70th Article that "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice."²¹ The charge sheet and accompanying papers, including the investigating officer's report, will, therefore, be forwarded to the staff judge advocate of the Base Command, who is an officer of the Judge Advocate General's Department. He will carefully examine the specification of the charge to determine whether it alleges an offense under the Article of War stated to have been violated. He will give especially careful consideration to the summaries of expected testimony accompanying the report of the investigating officer, to determine whether competent evidence of the details of the offense alleged is contained therein. On the basis of his consideration the staff judge advocate will then make his recommendation as to trial of the case by a general or lesser court-martial. If he recommends trial by general court-martial and if this recommendation is followed by the commanding general, the case will then be referred for trial to the trial judge advocate²² of the general court.

Prior to trial, the staff judge advocate will discuss with the trial judge advocate the proof of necessary elements of the offense which is charged, and will point out to him hearsay or other incompetent evidence contained in the summaries of testimony accompanying the report of investigation. Moreover, it is appropriate for the staff judge advocate to discuss with the regularly appointed defense counsel²³ the rights of the accused and any matters which concern the presentation of the defense, as outlined in the Manual for Courts-Martial.²⁴ If the accused exercises his right under Article of War 17 "to be represented in his defense before the court by * * * civil counsel if he so provides, or military if such counsel be reasonably available," the regularly appointed defense counsel, if accused so desires, will act as his associate counsel.

In the case supposed, let us assume that the general court-martial found the accused guilty of the offense of assault with intent to do

²¹M. C. M., par. 35b.

²²The trial judge advocate is chosen from among the commissioned officers of the Command. He may or may not have had legal training.

²³He may or may not have had legal training.

²⁴Pars. 43-45.

bodily harm with a dangerous weapon, in violation of the 93rd Article of War; and sentenced accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of one year and six months. Upon the completion of the stenographic record proper of the trial, all of the papers relating to the case are forwarded by the trial judge advocate to the commanding general. As the reviewing authority, the commanding general is then required by Article of War 46²⁵ to refer the entire record "before he acts thereon to his staff judge advocate," for review.

One of the most important functions of the staff judge advocate is the preparation for the commanding general of a review of the case. The Manual for Courts-Martial²⁶ provides that the staff judge advocate's review be written and that it include "his opinion, both as to the weight of evidence and any error or irregularity, and a specific recommendation of the action to be taken together with his reasons for such opinion and recommendation." Although there is no prescribed form for this review, it will customarily contain, after a formal introductory first paragraph, a second paragraph which sets forth pertinent data as to the accused, his age, date of enlistment or induction, prior service, any previous convictions within the year and within the current enlistment, the date of confinement, and the date of trial. This second paragraph also will include a synopsis of the staff judge advocate's opinion, the terms of the sentence adjudged by the court, and the maximum punishment authorized to be awarded.

The third paragraph of the review will contain a summary of the evidence for the prosecution, and the fourth, of the evidence for the defense, including any testimony or statement given by the accused in his own behalf. In the fifth paragraph, the staff judge advocate will point out any material errors which may have occurred, and will express his opinion as to whether they were so grave as to impair any substantial right of the accused within the meaning of Article of War 37²⁷ which provides in pertinent part:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing * * * authority, after an exam-

²⁵10 U. S. C. § 1517.

²⁶Par. 87b, p. 75.

²⁷10 U. S. C. § 1508.

ination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused * * *."

It is appropriate to mention here that the form known as the general court-martial data sheet²⁸ is of great assistance, first to the trial judge advocate in the preparation of the record, and next to the staff judge advocate in examining the record to determine whether the required procedure was observed in material respects.

In the course of his examination of the evidence of record and of the findings and sentence of the court, the staff judge advocate necessarily will bear in mind the broad powers of the commanding general as the reviewing authority. Thus, under Article of War 47²⁹ the power of the commanding general to approve the sentence of the court includes the power to approve or disapprove a finding and to approve only so much of a finding of guilt of a particular offense as involves a finding of guilty of a lesser included offense, when, in his opinion the evidence of record requires a finding of only the lesser degree of guilt; the power to approve or disapprove the whole or any part of the sentence; and the power to remand the case for rehearing in certain cases under Article of War 50½.³⁰ If, therefore, during his examination of the evidence in the assumed case, the staff judge advocate is of the opinion that it establishes that accused was guilty of assault with intent to do bodily harm,³¹ but not of such assault with a dangerous weapon,³² as found, he will recommend approval by the commanding general of only so much of the findings of guilty of the specification of the charge and the charge as involves a finding that accused was guilty of such lesser included offense.

Again, in the case supposed the court sentenced the accused to confinement for a period of one year and six months, whereas the maximum which is authorized by the table of maximum punishments³³ for such lesser included offense is confinement for one year. The staff judge advocate in this case will recommend approval by the commanding general of only so much of the sentence as adjudges confinement for an appropriate time not exceeding one year.³⁴

²⁸W. D., A. G. O. Form No. 116, April 2, 1928.

²⁹10 U. S. C. § 1518.

³⁰10 U. S. C. § 1522.

³¹M. C. M., par. 149n.

³²M. C. M., par. 149m.

³³M. C. M., p. 99.

³⁴M. C. M., par. 87b.

It will further be borne in mind that under Article of War 50,³⁵ the power of the commanding general to order the execution of the sentence adjudged by a court-martial "shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence."³⁶ In the case supposed, it may be that the evidence of record discloses that there were extenuating circumstances in connection with the offense committed by the accused, or it may be that through unavoidable delays the accused has been confined for a substantial period before trial and sentence. In such cases the staff judge advocate may recommend that an appropriate part of the confinement adjudged be remitted.

Another Article of significance is the 52nd³⁷ which provides that the authority competent to order the execution of the sentence of a court-martial, here the commanding general of the Base Command, may, "at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension."³⁸ In the assumed case, the sentence of the court included dishonorable discharge from the service. If from the evidence the staff judge advocate is of the opinion that the conduct of the accused was not of such nature as to require that he be denied the opportunity of rehabilitation and restoration to duty, the staff judge advocate will recommend to the commanding general that the execution of that portion of the sentence adjudging dishonorable discharge be suspended until the soldier's release from confinement.

The opinion of the staff judge advocate upon the findings and the sentence as above indicated will comprise the sixth and seventh paragraphs of his review; and his recommendations in respect thereof, including a recommendation as to the place of confinement,³⁹ the eighth. Moreover, in the ninth and final paragraph his recommendations will be put into a form of action for the signature of the commanding general, who if he agrees will sign the action taken by him in his own hand, whereby the sentence as approved is ordered to be executed⁴⁰ and the general court-martial order will then issue.⁴¹ This order is normally prepared by the staff judge advocate along with the form of

³⁵10 U. S. C. § 1521.

³⁶M. C. M., par. 87b.

³⁷10 U. S. C. § 1524.

³⁸M. C. M., par. 87b.

³⁹M. C. M., par. 90.

⁴⁰M. C. M., par. 87b.

⁴¹M. C. M., par. 87b.

action and is ready to be published as soon as the form of action is signed.

The staff judge advocate now prepares for forwarding to The Judge Advocate General⁴² the entire record in the case, including a chronology sheet, which will show and explain delays in the proceedings, the general court-martial data sheet properly checked, copies of the general court-martial order, copies of the staff judge advocate's review, the original of the charge sheet and all papers which accompanied the charges, the report of the investigating officer together with the staff judge advocate's report, and the stenographic record proper of the trial followed by the signed action of the commanding general. After forwarding, the record is examined as provided in the fifth paragraph of Article of War 50½.⁴³ If upon such examination it shall be found legally insufficient to support the findings and sentence, further proceedings as there outlined will be taken to achieve justice in the case.

If in the case supposed the commanding general had determined that the execution of the dishonorable discharge should not be suspended under Article of War 50½, he would not have been authorized to order the execution of the sentence, "unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence."⁴⁴ In such case the entire record prepared as above stated would have been sent forward for that purpose.⁴⁵ Upon being advised by The Judge Advocate General that the record was legally sufficient, the commanding general would thereupon order the execution of the sentence, or, if advised that the record was legally insufficient, he would take such action as was directed.

In the assumed case, if the general court-martial had acquitted the accused upon the specification and the charge, Article of War 29⁴⁶ requires that "the court shall at once announce such result in open court." An acquittal automatically results from findings of not guilty of all charges and specifications⁴⁷ and, manifestly, does not require

⁴²M. C. M., par. 87c.

⁴³10 U. S. C. § 1522.

⁴⁴10 U. S. C. § 1522. This same requirement is applicable also to a sentence involving the penalty of death, dismissal not suspended, or confinement in a penitentiary.

⁴⁵The Board of Review which acts upon the record is composed of three officers in the Office of The Judge Advocate General.

⁴⁶10 U. S. C. § 1500.

⁴⁷M. C. M., par. 78a.

approval by the the reviewing authority nor should it be disapproved. If, erroneously, the latter is attempted it can not in any event "affect the finality of a legal acquittal or of a legal finding of not guilty."⁴⁸ After an acquittal, the entire record is transmitted to the office of The Judge Advocate General as in the situations previously discussed.

It will be observed from the preceding discussion that with respect to court-martial cases the staff judge advocate acts exclusively in his capacity as the legal adviser to the commanding general in the exercise by the latter of his broad powers as the intermediate appellate⁴⁹ reviewing authority. Inasmuch as Article of War 11⁵⁰ prohibits any officer who has acted as a member of court-martial from thereafter acting as staff judge advocate to the reviewing authority upon the same case, the unlikelihood of complying in a Base Command with the suggestion of Article of War 8⁵¹ that a member of the Judge Advocate General's Department be appointed as law member of a general court-martial is apparent.

III. *Special Court-Martial Cases*

Returning to the case of the soldier, it may be that during the initial investigation by his company, battery or detachment commander the facts disclosed a case of assault and battery.⁵² The commanding general may decide to refer the case for trial to a special court-martial which is not empowered to adjudge confinement in excess of six months, nor forfeiture of more than two-thirds pay per month for a period of six months.⁵³ In such case it is not required that there be an investigation under the 70th Article of War, nor is reference to the staff judge advocate prior to directing trial by such court necessary, although the commanding general may refer the case for either of these purposes in his discretion. After the case has been referred for trial to the trial judge advocate of the special court-martial, the staff judge advocate will confer with him, and may confer as well with the regular-

⁴⁸M. C. M., par. 87b.

⁴⁹This is not to lose sight of the fact that the action of the commanding general is required to give effect to the sentence of the court in the first instance.

⁵⁰10 U. S. C. § 1482.

⁵¹10 U. S. C. § 1479.

⁵²Punishable under A. W. 96, 10 U. S. C. § 1568. The Table of Maximum Punishments provides as the maximum for assault and battery, confinement for six months and forfeiture of two-thirds pay per month for a period of six months. (M. C. M., p. 100).

⁵³M. C. M., par. 103b.

ly appointed defense counsel, in the manner outlined above for general court-martial cases. Normally no stenographic reporter is authorized for a trial by special court-martial, the obligation in this respect being upon the trial judge advocate to prepare a record which will give the substance of the testimony of the witnesses.⁵⁴ The record, although it sets forth all elements necessary to a clear conception of the proceedings, including the findings and sentence, of course is briefer than the record of a general court.

Inasmuch as a special court-martial of the Base Command is appointed directly by the commanding general, he will refer a record of trial by special court to the staff judge advocate prior to taking action thereon.⁵⁵ In such case the staff judge advocate will prepare his review and therewith will submit his recommendations, a form of action and a draft of special court-martial order. Although the written review may be less elaborate in form than that for a general court-martial case, the care which the staff judge advocate will exercise in reviewing the record of trial by special court-martial will, perhaps, be greater than that employed in connection with a general court-martial record. This is understandable, inasmuch as the records of trial by special courts-martial are not forwarded to the office of The Judge Advocate General for further review, but are permanently filed in the office of the staff judge advocate of the Command.⁵⁶

IV. *Summary Court-Martial Cases*

Returning for the last time to the case of the delinquent soldier, it may be that the offense charged was simple assault⁵⁷ and that, in the opinion of the commanding general, it was adequate to refer it for trial by summary court martial of the Base Command. A summary court consists of one officer, and the severest sentence which it may adjudge is confinement for one month⁵⁸ and forfeiture of two-thirds

⁵⁴See *M. C. M.*, p. 271, App. 7.

⁵⁵Compare *M. C. M.*, par. 91.

⁵⁶*M. C. M.*, par. 91.

⁵⁷Punishable under A. W. 96, 10 U. S. C. § 1568. The Table of Maximum Punishments provides as the maximum for assault, confinement for three months and forfeiture of two-thirds pay per month for a period of three months.

⁵⁸*M. C. M.*, par. 103b. In the alternative, the summary court is authorized to impose restriction to limits for not more than three months. It may impose both confinement and restriction, but in such case an apportionment must be made, for example, "assuming the punishment to be in conformity with other limitations, a summary court might impose confinement at hard labor for 15 days; restriction to limits for 45 days; and forfeiture of two-thirds of one month's pay." (*M. C. M.*, par. 17).

of one month's pay. Although the summary court-martial is not required to keep a full record of its trial proceedings, a report is made on the last page of the charge sheet showing, in respect of each specification and charge, the plea and the findings together with the sentence adjudged or the fact of acquittal.⁵⁹ When the report of trial is referred to him for recommendation prior to action thereon by the commanding general, the staff judge advocate will examine the specifications to determine whether each states an offense under the Articles of War; whether the proper Article has been mentioned in relation to a particular specification; and whether the sentence adjudged is within legal limits. Thereafter, the action of the commanding general is signed upon the final page of the charge sheet and the original is filed in the office of the staff judge advocate.⁶⁰

V. Conclusion

The foregoing discussion has emphasized the obligations of the staff judge advocate of a Base Command as the legal adviser of the commanding officer thereof in matters pertaining to the exercise of his court-martial jurisdiction over personnel of the Command. The emphasis of the discussion, it is hoped, has not obscured the fact that a proper functioning of the courts-martial of a Command depends fundamentally upon the experience of the senior officers who serve as members; upon the abilities of the junior officers who serve as members, as trial judge advocates and as defense counsel; and upon the sense of fairness possessed by both. Composed of personnel possessed of these attributes, the courts-martial of a Command become in every substantial sense courts of justice under law.

⁵⁹M. C. M., par. 86, and App. 8, p. 273.

⁶⁰M. C. M., par. 91.