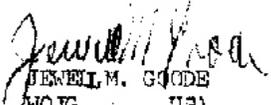


Military Justice

When I joined the army in 1950, I was a 20-year-old kid from a small farming community in Iowa. Although I never considered myself a "hayseed," I had a lot to learn about a world from which I had been relatively isolated as I was growing up. One of the things I learned was that military justice was something that every GI had to know something about and that it was fundamentally different in many ways from justice as it was carried out in civilian life. I had attended classes on the subject during my training—particularly leadership training—and I considered myself pretty well acquainted with it as I began my tour of duty as a young officer in Korea. Then, a few months into that tour, the following special order appeared in my mailbox:

HEADQUARTERS 31st INFANTRY APO 7		
SPECIAL ORDERS NUMBER 316		16 December 1952
1. A special court-martial is hereby ordered to convene at this Headquarters, APO 7, at the call of the President thereof for the trial of such persons as may properly be brought before it. The court will be constituted as follows:		
<u>MEMBERS</u>		
CAPTAIN MELVIN GARTEN	048 990	Inf, Headquarters, 1st Bn, 31st Inf
CAPTAIN WILLIAM B. YOUNG	01 289 186	Inf, Hq Co, 3rd Bn, 31st Inf
CAPTAIN JAMES F. YOST	01 648 399	Inf, Company H, 31st Infantry
1ST LT LAUNCELOT E. SOHLT JR.	02 202 773	Inf, Company B, 31st Infantry
1ST LT DONALD L MEYER	02 028 611	Inf, Hq Co, 2nd Bn, 31st Inf
1ST LT GLEN E. SMITH	01 873 209	Inf, Company I, 31st Infantry
<u>TRIAL COUNSEL</u>		
1ST LT ROBERT K. SIEBENTHALER	02 104 128	Inf, Heavy Mortar Co, 31st Inf TRIAL COUNSEL, not a lawyer in the sense of Article 27b
<u>DEFENSE COUNSEL</u>		
✓ 2ND LT RICHARD E. ECKER	02 028 566	Inf, Hq & Hq Co, 31st Inf DEFENSE COUNSEL, not a lawyer in the sense of Article 27b
BY ORDER OF COLONEL KERN:		
OFFICIAL:		JOHN W. LITTLE Capt Infantry Adjutant
 JEWEL M. GOODE WOJG USA Asst Adjutant		
<u>DISTRIBUTION:</u> "A" PLUS "X"		

In the army at that time, there were four levels of justice available to deal with infractions of the rules by military personnel. The first was called “company punishment.” The company (about 200 men) was the basic unit of organization in the army and the company commander was authorized to mete out justice for minor infractions. Mostly the punishment involved withdrawal of privileges and/or assignment of extra duties. The second level was a “summary court-martial.” This was a hearing before a single officer, typically more senior than a company commander, in which no accusing authority was present and the accused had no advocate in his defense. The presiding officer worked from written charges and interviewed the accused and any possible witnesses before making judgement. I don’t recall now what charges were appropriate for summary court martial or the limits of punishment the presiding officer could administer. I was never involved with a proceeding at that level.

The next level was the “special court-martial.” As the special order above indicates, a special court-martial was convened at the order of the regimental commander and consisted of a board of officers, a trial counsel and a defense counsel. The board of officers served as the jury in the proceeding and the President of the board served as the presiding judge. Neither of the counsels identified in the order was qualified to practice law. In fact, the only qualifications for the position were a commission as an officer, your availability for the duty and your name on the order. Typical offenses tried by a special court were things like AWOL (absent without official leave), assault or theft, where the convening commander determined that the severity of the offense could meet the requirements for the maximum punishment allowed for this court. That maximum punishment was six months’ confinement in the stockade and forfeiture of two-thirds pay for six months—what the GIs typically referred to as “six and two-thirds” or “six and six.” As I recall, this court could also order a reduction in rank.

The highest level was the “general court-martial.” This court was typically convened by a general officer, tried the most serious offenses and could administer any sentence up to and including death. Any officer was qualified to serve on the board, but the two counsels each had to be licensed to practice law. As I recall, every general court-martial board had to include a “law officer” who was a licensed lawyer and made judgements for the board in matters of law. This was also a level in which I had no personal experience.

So, now imagine yourself in the position of a 22-year-old second lieutenant having just received the special order listed above. They didn’t empanel courts-martial without having somebody in the pipeline to try, so I could expect being assigned a client in short order. I was—and I would have only a short time to prepare myself to become a competent defense counsel. To do that, I was supplied a copy of a book called “The Uniform Code of Military Justice (UCMJ),” a maroon-colored, hard-bound volume of more than 500 pages. This volume contained everything you needed to know about military justice—at any level.

Of course, I was only interested in the code as it applied to special courts-martial but, as I recall, that involved several hundred pages of detail in the book. Although I didn’t have to commit those pages to memory, I still had to have them well enough in mind that I could respond knowledgeably to what was happening in the courtroom. At that time, the regiment was off the line, back in reserve, so I could adjust my schedule to give me time for study. That maroon book became my constant companion for the few days available before the trial was to take place. In it, I learned how a special court-martial proceeding was carried out. I learned about the rules of evidence. I learned about challenges, objections and the rights of the accused. It was an accelerated, self-taught course, but everything I had to know was in the book—and nothing was

allowed in the trial that was not in the book—so I felt reasonably confident as trial day approached.

Meanwhile, I had to meet with the accused and plot out a strategy for his defense. The defendant was a member of one of the rifle companies in the regiment and the offense had taken place a few days after the regiment had moved into reserve. He was accused of assaulting his platoon sergeant—a very serious offense, “striking a superior officer,” and the UCMJ specified the maximum allowable sentence (six and six) as an appropriate punishment for the offense. The facts of the case were very clear. My client’s assault was not a private affair. He had committed the act in front of the whole platoon. The trial counsel had available some three dozen witnesses to the act. Clearly, my defense was not going to be that he didn’t do it, although I advised him to plead “not guilty,” simply because he would not have gained anything by admitting his guilt. In addition, I thought I had a strategy that might temper the decision of the court in his case. To understand that strategy, I need to tell you some things about the way courts martial are conducted and how they differ fundamentally from the way justice is administered in civilian courts.

Special courts martial are carried out in two specific stages. In the first stage, the matter of guilt or innocence is determined. Did the accused do what the charges specified? Yes or no. Nothing more. In the case of my client, that was essentially an established fact. We had no case, and I would not try to waste the court’s time trying to present one. So, after the trial counsel had rested his case and I had declined to present one, the court would retire to consider the matter of guilt or innocence (nothing more) and return with the verdict—in this case, guilty. It would only be then that I would have an opportunity to make my study of the maroon book useful to my client. After announcing the verdict, the President will turn to me and ask, “Lieutenant, do you have any matters to present in extenuation and mitigation?” Thus begins the second stage of the proceeding—the determination of the sentence. Extenuation and mitigation are important, because the board can take them into consideration when the sentence is determined.

Matters in extenuation are any circumstances I might be able to present that offer justifiable reasons for the offense. With the current offense, however, it is virtually never justifiable to strike a superior officer, irrespective of how much he might have had it coming. I did not place any hope on extenuation because the platoon sergeant was well liked by most of his men while my client was considered by them to be a certifiable hothead.

My only hope was mitigation. Although in most allowable aspects of mitigation (such as a clean record or endorsements of good character) my client would not earn any sympathy from the board, he did qualify for consideration in one other aspect. He was a genuine war hero. He had been awarded medals for valor on two separate occasions. So, I obtained certified copies of those awards and presented them to the board with a plea to have his sentence mitigated in consideration of his exemplary conduct in battle. I knew it was slim, but it was my only hope.

The reason I was not totally confident, was that I had learned as I undertook the case that, in Korea during the war, they never put a man up for special court-martial unless they had the strongest possible case against him. Anything less than that was considered not worth the time and the bother and they would just use a lower and less complex level of discipline. I knew that; the trial counsel knew that; the board members knew that. In fact, my role in the case was considered—particularly by this board President—to be an irritating necessity that needed to be neutralized as quickly as possible. I can recall that, on a couple of occasions during this trial, I attempted a couple of objections on procedural grounds and was quickly and impatiently overruled by the President.

Given that, I wasn't at all surprised when the board quickly returned from its second recess and announced the sentence—six and six. Then they suspended the confinement portion of the sentence. This also was not all that surprising. For a member of a rifle company, who was committed regularly to mortal combat with an enemy bent on killing you, confinement in a safe lockup in the rear area would not necessarily be considered punishment. So, in Korea, suspension of the confinement was common practice by court-martial boards. For me, as an unsuccessful defense counsel, it was consoling to know that my client was only going to suffer in the pocketbook.

I don't recall that I had any other clients in that special court-martial. I don't think I had time, as our regiment went back up onto the front lines ten days after it was convened, and my platoon was responsible for guiding the regiment into its new positions. However, this did not keep me forever out of the courtroom, because about a month later, the following special order appeared in my mailbox:

HEADQUARTERS 31ST INFANTRY	
APO 7	
SPECIAL ORDERS NUMBER 28	30 January 1953
EXTRACT	
6. So much of special court-martial appointed by par 1 SO 23 dtd 25 Jan 53, is amended to add:	
<u>DEFENSE COUNSEL</u>	
2D LT RICHARD E HOKER 02 028 566	Inf, Hq & Hq Co, 31st Infantry DEFENSE COUNSEL, in the case of Sgt Alfred L Patt, RA 20305771, Sv Co, 31st Inf Regt, only; not a lawyer in the sense of Article 27b.
2D LT JAMES E HOCTOR 064 858	Inf, Hq Co, 31st Infantry DEFENSE COUNSEL, in the case of Sgt Robert E Andrews, RA 11 202 395, Service Co, 31st Inf Regt, only; not a lawyer in the sense of Article 27b.
BY ORDER OF COLONEL KERN:	
OFFICIAL:	ALTON T PHIPPS Captain Inf Adjutant
 EDWARD DAVIS 2d Lt Inf Asst Adj	

I don't recall much about the board convened under the amended special order, except that the President of this board was the same guy that had presided over my first case. So, I need to begin my narrative about this new case with some explanation concerning challenges. In special courts-martial, the UCMJ permitted either counsel to challenge any member of the board for cause. That is, if counsel considered a board member to have a possible bias in the case—and this bias could be established to the satisfaction of the President of the board—then that member would be removed. An example of such a claim of possible bias might be that the member and the defendant had once served in the same company.

Counsel could also enter one preemptory challenge for which he did not have to state a cause. He merely named the member and that member was gone—no questions asked. So, given that I had had some experience with the President of the board—who was just as subject to challenge as any of the other members—and that I considered him to be especially severe, it would make sense to use my preemptory challenge to get him off the board. This could be particularly useful as the boards usually convened with five members. With five members, two votes for acquittal would be insufficient for my client. However, with four members, two votes would create a tie and the UCMJ gave a tie to the defendant. Yet, as sound as this strategy would seem, I did not use it. One reason was self-interest. Another was self-confidence.

In the matter of self-interest, the President of the board was a staff officer in one of the battalions in the regiment. As such, I had to view him as a potential replacement for one of the regimental staff officers. After five months in regimental Headquarters Company, I was becoming an “old timer” in the headquarters...and there was every reason to believe that I would remain there for the rest of my tour. I didn't relish the possibility of having this senior officer suddenly showing up at regimental headquarters after I had suggested that he could not be impartial by challenging him off his court.

In the matter of self-confidence, I really thought that I could win this case even with the “hanging judge” on the court. Sgt. Putt was charged with being absent from his duties for several hours one day. He was not a combat soldier. Service Company—his assigned outfit—was involved with repair and maintenance of vehicles and equipment in the regiment. However, when your regiment was committed to combat, an unauthorized absence—even for a short time—was still considered a very serious offense. Yet, when I interviewed him, the sergeant insisted that he could account for every minute of the day in question, that he was on duty at all times and had witnesses that could attest to his claim. After interviewing those witnesses, I was sure I could introduce sufficient doubt into the prosecutor's case that the board would have to find him innocent of the charge. It was a complicated case, but it appealed to my sense of the dramatic. I had to account to every minute of Sgt. Putt' day in about five or six segments, each segment being attested to by one of his witnesses.

The trial counsel in this case was a friend of mine. First Lt. James Speer was the executive officer of Headquarters Company, my company, and we shared quarters in the company officers' tent. I never knew much about his background, but he was some years older than I and obviously had seen quite a lot of service. He presented his case to the court quickly and simply. The records showed that the defendant was absent without leave and that's all he was required to submit. In a few short minutes, I faced the responsibility to prove that those records were wrong.

As I presented my witnesses, Lt. Speer sat at his table taking notes. He declined to cross examine any of the witnesses after they testified. When I had presented the last of the witnesses, he requested to recall each of them, one at a time. (I should point out that the UCMJ does not

permit witnesses to be in a proceeding except during their testimony.) During the presentation of my case, Lt. Speer had been carefully preparing a time chart from the testimony of my witnesses. He was relentless in his cross examinations. Before long, he discovered a discrepancy between his chart and the answers he received from the cross of one witness. Then he became like a dog with a bone. In a short time, that witness was not sure where he himself was on the day and hour in question. My case disintegrated in an instant. Clearly I had been bamboozled by my client, who had carefully set up a bogus defense scenario with a bunch of his friends, all willing to lie for him to get him cleared of the charge.

Mercifully, Speer did not recall any more of my witnesses. He had proved his point and declined to spend any more of the court's time rubbing my nose in it. When the court asked if I had anything further to present to the court, I declined and rested my case. They adjourned and quickly returned a verdict of guilty. Obviously, I offered no matters in extenuation or mitigation and, shortly later, they returned with his sentence—six and six...with the confinement suspended.

This ended my personal experience in military justice. It was a great learning experience and, from it, I gained an appreciation of the way the military deals with the issue. To this day, I remain convinced that it is superior to the way our civilian courts handle criminal justice.