THE FIFTH FIELD: THE STORY OF THE 96 AMERICAN SOLDIERS SENTENCED TO DEATH AND EXECUTED IN EUROPE AND NORTH AFRICA IN WORLD WAR II[1]

REVIEWED BY FRED L. BORCH III[*]

Between March 1943 and October 1945, the Army hanged (or shot by firing squad) ninety-six soldiers who had been tried by courts-martial and condemned to death. *The Fifth Field* is about those trials—who, what, why, when, where and how—and will be of great interest to all judge advocates because no other book has previously analyzed, much less examined, the records of trial in death penalty courts-martial conducted during World War II.

Author French L. MacLean, who delivered the George S. Prugh Lecture in Military Legal History on this topic in April 2013, deserves special praise for researching and writing this unique study in military legal history. As a retired Infantry colonel with first-hand experience with courts-martial (MacLean served as a panel member in more than a few cases), the author also has an insider's view of the military criminal legal system that gives him additional credibility when discussing whether justice was done by these military tribunals.

The Fifth Field begins with a short statistical analysis of the Army's use of the death penalty in World War II[2] before continuing with a longer discussion of how the military judicial system operated "in the field" between 1942 and 1945. The book then examines each of the ninety-six

---

[*] Mr. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007). From 2012 to 2013, Mr. Borch was a Fulbright Scholar in the Netherlands, where he was a Visiting Professor at the University of Leiden and a Visiting Researcher at the Netherlands Institute of Military History.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (*2001*)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (*2004*)*. His latest book, *Medals for Soldiers and Airmen: Awards and Decorations of the United States Army and Air Force* was published by McFarland Press in 2013.

[1] FRENCH L. MACLEAN, THE FIFTH FIELD (2013).

[2] *Id.* 20–22.

cases in which the accused was executed; most were hanged but a few (like Private (PVT) Mansfield Spinks[3] and PVT Eddie Slovik[4]) were shot by firing squad. Each court-martial is covered in a two- or three-page synopsis, with relevant information about the accused and the circumstances surrounding the charged offenses. Colonel MacLean also includes data about the officers who served as jurors on the court-martial panels, and usually provides considerable detail about how the executions were carried out.[5] *The Fifth Field* then takes a "closer look"[6] at eight cases in order to highlight evidentiary issues (usually mistakes made by defense counsel) that might have affected the verdict. In a subsequent chapter, MacLean also explains how he would have decided each case, based on his experiences with courts-martial during his career as a professional soldier. *The Fifth Field* concludes with a folio of photographs of some accuseds and victims that apparently have never been published previously.[7] All this makes for riveting—and sobering—reading.

As *The Fifth Field* shows, the more things change, the more they stay the same. Then, as is common now, the most egregious criminal cases involved soldiers who were drunk or otherwise had used alcohol to excess; those who have served as trial and defense counsel in the Corps today can attest that today's cases are no different.[8] The court-martial of Private Amos Agee, Private John C. Smith, and Private Frank Watson, all assigned to the 644th Quartermaster Troop Transport Company, is a perfect example. The men arrived in France on 30 August 1944. Less than four days later, "in what may have been an ignominious record for new soldiers in the theater,"[9] Watson robbed two French civilians and all

---

[3] Private Mansfield Spinks was convicted of rape and murder. Sentenced "to death by musketry," Spinks was shot by firing squad on 19 October 1945, many months after the fighting in Europe had ended. *Id.* at 237–39.

[4] Private Eddie Slovik is the only soldier to be executed for desertion in World War II. He was shot by firing squad on January 31, 1945. *Id*. at 129–33. *See also* Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Private Eddie Slovak*, ARMY LAW., May 2010, at 1–3.

[5] *See, e.g.*, MACLEAN, *supra* note 1, at 32–33 (Private David Cobb), 36–37 (Private Harold A. Smith).

[6] *Id.* at 243–51.

[7] *Id.* at 353–68.

[8] *See, e.g.*, United States v. Green, No. 5: 06CR-19-R, 2009 U.S. Dist. (W.D. Ky. Sept. 4, 2009) (alcohol-fueled rape of Iraqi girl and murder of her family by soldiers from 502d Parachute Infantry Regiment, 101st Airborne Division). For more on the event, see JIM FREDERICK, BLACK HEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH (2010).

[9] MACLEAN, *supra* note 1, at 147.

three soldiers raped a French woman. At the time, all three men were highly intoxicated. But alcohol was freely available for sale in liberated France—in bars, cafes, hotels—and there was no prohibition on consuming French wine and spirits.

When Private Agee took the stand, he claimed to have been "so drunk" that he could not remember anything.[10] Private Smith "told the same story," but denied having raped the victim.[11] As for Private Watson, he stated he was "pretty high" but "did not recall visiting the victim's home."[12] The problem for all three soldiers was that the victim testified that the Americans, "armed with a rifle, took turns holding her down and raping her."[13] After her husband corroborated her testimony, the result was a foregone conclusion. All three accuseds were found guilty of rape; Watson also was found guilty of robbery. They were sentenced to be hanged. After their records were reviewed by the Office of The Judge Advocate General, European Theater of Operations, General Dwight D. Eisenhower signed the order directing that the execution be carried out and the convicted men were hanged on 3 March 1945.[14]

The facts in *United States v. Agee, Smith and Watson* (the men were tried jointly) were not unique, in that other soldiers who committed rape (usually under the influence of alcohol)[15] also were sentenced to death. But this was a different time, a different place, and a very different Army. Few questioned the appropriateness of the death sentence for rape; it was still a permissible punishment in many, if not most, civilian jurisdictions.[16] Additionally, no one thought that an alcohol-free Army could be a solution to soldier misconduct; it was not until *Operation*

---

[10] *Id.*
[11] *Id.* at 148.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See, e.g.*, Corporal Ernest Lee Clark & Private Augustine M. Guerra, at 111–13 (accuseds intoxicated when they raped and murdered fifteen-year old girl); Private Mervin Holden and Private Elwood J. Spencer, at 126–28 (accuseds "had been drinking and were looking for a whorehouse" when they assaulted, sodomized and raped 51-year old Belgian female).
[16] For a historical examination of the death penalty in the United States, see Furman v. Georgia, 408 U.S. 238 (1972).

Desert Shield in 1990 that the Army first adopted a blanket prohibition on the consumption of alcohol during military operations.[17]

While the story of each individual court-martial is valuable by itself, what makes *The Fifth Field* an important addition to military history is that the author articulates the purpose of military criminal law in a combat environment and explains how commanders believed it played an important role in winning the war in North Africa and Europe.

Having full and fair proceedings, reaching a just verdict and determining appropriate sentences were certainly key components in courts-martial in North Africa and Europe in World War II. However, other factors were important in the military justice system too. For example, only the most serious crimes were prosecuted, since the Army desired to keep as many soldiers as possible in the war effort and Army leaders did not want incarceration to become an attractive alternative to combat.[18] No one knew for certain if a soldier would commit a minor offense if the result would be a few months in jail away from the horrors of close combat with the Wehrmacht, but the Army did not want to take any chances and so courts-martial were reserved for only the most egregious offenses.[19]

Another factor in play in Europe and North Africa—and one that set the military criminal legal system apart from its civilian counterparts in World War II—was that punishment had to be swift and certain. Units were constantly on the move, and it was highly likely that a delayed trial might mean that witnesses to a crime would be killed or wounded in combat or otherwise become unavailable.[20]

Finally, in courts-martial involving civilian victims in newly liberated areas, Army leaders were only too aware that crimes committed by soldiers might seriously harm mission success, if not adversely affect victory itself. In *United States v. Whitfield*, for example, the accused was convicted of raping a young woman in France—only days after the landings in Normandy.[21] He was sentenced to hang for his crime. Private Clarence Whitfield had been tried by a First Army court-martial, and this

---

[17] Headquarters, U.S. Cent. Command, Gen. Orders No. 1, (30 Aug. 1990) (Prohibited Activities for U.S. Personnel Serving in the USCENTCOM A[rea] O[f] R[esponsibility]).
[18] MACLEAN, *supra* note 1, at 23.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 67–69.

explains why Lieutenant General Omar Bradley, then commanding First Army, approved the trial results and forwarded the record for final review to General Dwight D. Eisenhower.[22]

Only Eisenhower had the authority to order Whitfield's hanging to be carried out and, when Eisenhower suggested that perhaps "the ends of justice" would be served if Whitfield's death sentence were changed to life imprisonment, Bradley was furious.[23] As the correspondence contained in *United States v. Whitfield* shows, Bradley insisted that the accused must be put to death.[24] As he put it in a "scorching reply" to Eisenhower, the number of rape cases in the First Army area of operations was causing "considerable difficulty" in its relations with local civilians.[25] Said Bradley: "One way to discourage future cases is to make those convicted of this crime [rape] pay the extreme penalty."[26] As he saw it from his position as First Army commander, the invading American forces must show that they were willing to carry out a death sentence to deter other soldiers from committing similar offenses.[27] Only imposing the 'extreme penalty' would convince the French that they had nothing to fear from their liberators—and that they had not traded one set of evil occupiers for another.[28]

Bradley got his way; Whitfield was hanged. Over time, Eisenhower also seems to have come around to Bradley's viewpoint. Some months later, when Major General Bedell Smith told his boss that French and Dutch civilians were complaining about murders and rapes committed by U.S. soldiers against them, Eisenhower suggested that "there should be a public hanging, particularly in the case of rape."[29]

The Fifth Field is not a perfect book. But a "perfect" book on the military death penalty in World War II would be at least four volumes—one per major war theater and one overall—and most likely require a team of historians and investigators to complete. The theater-specific volumes would go into much greater detail on the evidence used in each case, while the overall volume would provide a more comprehensive

---

[22] *Id.* at 67.
[23] *Id.* at 68.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 68.
[27] *Id.*
[28] *Id.*
[29] *Id.* 23.

analysis of the death penalty, including: why some soldiers were sentenced to death for committing homicide or rape while others convicted of the same offenses were not; whether African-American soldiers sentenced to death received fair trials; and whether the use of the death penalty in the Asiatic-Pacific Theater differed from its imposition in North Africa and Europe.

The Fifth Field is not, however, intended to be a perfect book, much less a comprehensive study of military capital punishment in World War II. On the contrary, the value of MacLean's research—which took over ten years to complete[30]—is that it provides a "Rosetta Stone" for every individual interested in Army courts-martial in World War II. All future research on this topic will lean heavily on this work, and the book's 62 pages of detailed footnotes will help judge advocates for years to come to plough their own ground, be that the study of an individual court-martial or the military death penalty writ large.

While no soldier has been executed by the Army since 1961 (when President John F. Kennedy ordered a death sentence carried out for a soldier who had been convicted of raping and attempting to murder an Austrian girl), the death penalty cases discussed in *The Fifth Field* contain lessons for today's judge advocate. Probably the most important teaching point is that Army leaders in World War II—as in Afghanistan and Iraq—understood that serious misconduct committed by soldiers had a pernicious impact on mission success where the victims of that misconduct were civilians. A second lesson is that over consumption of alcohol—then and now—inexorably led to trouble. Many of the rapes and murders of English and French civilians were committed by drunken soldiers who likely would not have committed these crimes had they been sober. Judge advocates prosecuting and defending those soldiers accused of sexual assault likewise usually find that it is excess alcohol that fueled (or at least exacerbated) the accused's misconduct. A final lesson is that, despite the absence of the procedural safeguards provided by today's Uniform Code of Military Justice (UCMJ), the courts-martial examined in Colonel MacLean's book—conducted under the Articles of War—seem to have been full and fair trials. This is an important point, because some judge advocates might be inclined to criticize—or dismiss—courts-martial of the World War II era as deficient because they were *different* from trials conducted today. *The Fifth Field* shows, however, that despite the severity of the sentences imposed, justice

[30] *Id.* at 14.

seems to have been done in the vast majority of the 96 trials. This suggests that the military criminal legal system of the World War II era, while arguably more focused on discipline than today's UCMJ, nonetheless was also about doing justice.

The Fifth Field deserves to reach the widest audience among judge advocates and those with an interest in World War II and military legal history.