Death Penalty Cases in WWII Military Courts: Lessons Learned from North Africa and Italy

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I. ABSTRACT

This paper continues our investigation surrounding World War II military justice but with a focus on the Mediterranean (MTO) and North African (NATO) Theaters of Operation. This paper will first review the history and background of military justice in America. Then, it will focus on World War II military justice and the lessons learned in the Europe (ETO), most notable in Britain. Then the paper turns to its more immediate focus - the 27 deaths associated with the North African and Italian campaigns. This paper then concludes with lessons learned that may be applied to today's military justice system.

II. HISTORY

Current capital punishment literature is overwhelmingly concerned with civilian executions. Overlooked is capital punishment by the non-civilian sector - **the military**. While the use of capital punishment is rare in military courts in recent years, capital punishment has long been used as a disciplinary tool. Capital punishment is also part of the more inglorious aspects of U.S. military history.

A. Role of the U.S. Military in American Society

Americans initially did not respect the military because of its long continental association with oppressive government. The point has been made not only by military historians (Ambrose and Barber, 1972; Janowitz, 1974; Moskos, 1970; Sherrill, 1970; Weigley, 1967; Williams, 1989), but also biographies from some of its most famous generals (Bradley, 1951; Eisenhower, 1948; Grant, 1982; Macarthur, 1964). American colonists chose to fight their revolutionary war with militia volunteers, and hated military professionals as reinforced by the formative Federalist Papers.

The use of government troops under General Washington to suppress Shay's Rebellion (1787) was a strong factor in the founding fathers creating a stronger central government in the U.S. Constitution to combat the economic chaos during the initial confederacy. However, the Framers were equally adamant that the newfound United States would be protected by a well-armed militia, not a professionalized standing army (Weigley, 1967)[1] In fact, it took an act of Congress to approve pay for its soldiers and

investors after the American Revolutionary War, and then only at pennies to the dollar. The initial U.S. government used an “occasional” armed forces administered via separate branches under a Department of War. The current configuration of a standing army, using more unified branches administered through a Department of Defense was formed shortly after World War II (Bishop, 1977: 1-18). The Framers were international isolationists favoring an occasional military force to be dormant until needed for select purposes: to repel foreign invasion, to fulfill the "manifest destiny" of the Western frontier, and to protect American economic and diplomatic interests when threatened abroad. Even today, military spokespeople accent that the American military is comprised of volunteers and that mass drafting of personnel is saved for rare occasions. In fact, the U.S. government begrudgingly gave the armed services permission to create career officers (Ambrose, 1974).

Despite the fact that some of its military heroes such as George Washington, Andrew Jackson, U. S. Grant, Theodore Roosevelt and Dwight D. Eisenhower occupied the White House, the military has never been fully accepted by United States citizenry (Eisenhower, 1948; Grant, 1982). After almost sixty years experience of a standing army, the military still struggles to maintain its image. The U.S. military services spend millions yearly in advertising and Internet technologies not only to recruit new members, but to maintain their institutional legitimacy.

Even the post 911 pro-military fervor has now waned in the face of a long term military presence in the Middle East. The reality for the military is a confident portrayal of itself to the general public, knowing all the while that the military image is fragile. A serious long-term public scandal or two can seriously damage its credibility. That credibility is critical as America’s military role in a sole superpower world is debated by its civilian leadership. There will be economic public scandals from the inevitable overspending built into the military’s iron triangle. There will also be scandals as the male-dominated academy systems become more gender sensitive. However, economic and sexual scandals, while juicy short-term press coverage, do not match the long-term credibility problem of a justice scandal such as Me

Lie in Vietnam[2]. We now review the pre-World War II military justice system problems, and the inherent problem in military justice.

B. Military Justice: The Inherence Conflict of Discipline versus Due Process

A large measure of the military problem with legitimacy stems from its questionable record of military justice. Both its legal codes (Uniform Military Code, 1950) and precedents (*Chappel v U.S.*, 1981) have facilitated the abuse of court martial as a tool of justice. The contention has been over the purpose of military justice: civilian rulers see military courts as extensions of civilian justice while career militarists view the courts as a means of discipline.

Several exposes of spectacular military cases and legal commentaries illustrate this point (Chomsky, 1990; Sykes and Putkowski, 1989). The first cause celebre was the 1883 court martial, under suspicious circumstances, of James Chestnut Whittaker (1883), a former slave.[3] During WW I, between April, 1917 and June, 1919 a total of 35 soldiers, all black, were executed (Bishop, 1974; Felder, 1987). Additional WW I black soldiers were treated very harshly. In 1917 alone, at Fort Bliss, Texas, over 60 black soldiers were court martialed for mutiny when they did not attend a drill formation in a racially charged southern environment. All were promptly found guilty, dishonorably discharged and given 10 - 20 years in Leavenworth prison for their protest (Felder, 1987). The incident went largely unreported in the south, but was used by northern politicians to discredit the Army as racist.

More horrific than the Fort Bliss incident were the Houston, Texas riots, also of 1917. Amidst a constant war between the African American 24th Infantry and the local white police, two non-commissioned officers were arrested for "disorderly conduct" and rumored to be dead. This sparked the soldiers to arms and an ugly scene. Several hours later, 15 whites were dead. A "state of war" was declared and 63 soldiers, all African Americans, were court martialed. Forty-eight were convicted and sentenced to lengthy prison terms, 14 more were sentenced to death and five were acquitted. The executions occurred the morning after the trial and before the records reached Washington for command review. A similar incident occurred in Camp Dodge, Iowa, in 1918, where three African-American soldiers were hanged for "assaulting and outraging" a seventeen-year-old white girl (New York Times, 1918:4).

The military, stinging from public criticism of these and other incidents, faced an enraged 1919 Congress who enacted General Order Number Seven. This order created Boards of Review (hereafter BR) to examine all serious sentences after verdict and prior to sentence disposition. The BRs were to insure that military justice was, in fact, just. They were empowered to review the process and content of general courts martial. However, BRs did not stop the role of command influence in capital cases for WW II and afterwards.[4]

Legal authors have also written case commentaries on military law, e.g. *Chappel* v U.S., 1981 (Conners, 1982; Gutter, 1984; Sylvester, 1983; Watson, 1990; Williams, 1989). Most of them are critical of the military justice system, and call for more control by the U. S. Supreme Court over the military. Their position recognizes that despite the United States Supreme Court's strong stand for individual rights through procedural and substantive "due process" (e.g. *Miranda v. Arizona*, 1964); it has often sided with the careerists' view of military courts as extensions of military discipline. The Supreme Court has given military courts "exclusive prerogative" and "almost unlimited control over almost every facet of military

justice" (West, 1977:16). Egregious military errors are therefore "beyond the scope of civilian review" because "only military authorities could correct errors that occurred in military courts" (West, 1977: 42). The landmark precedent is *Chappel v US* (1981) where the court stated:

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command (Gutter, 1984: 115).

As a result, there is virtually "no effort to check the illegal control of the courts-martial system by its over-zealous commanders and legal officers, but that it had, in fact, condoned the entire operation on the convenient basis that “discipline is a function of command” (West, 1977: 44). In the next section, we review what happened during World War II as the military rolled out its new and improved version of military justice and then ″exported″ its justice system to Europe.

III. Military Justice in World War II: European Theater of Operations

A “reformed” military justice system in World War II used Boards of Review to limit command influence and prevent discriminatory activity. The military justice system activity was divided into three separate theaters of activity: Mediterranean (NATO/MTO), European (ETO) and Pacific (PTO). The great majority of military records and historical data exists for the ETO, and hence is reviewed first.

A. General Europe (ETO) Data

Surprisingly, there are few studies examining military executions (Perry, 1977a&b). Mannhiem (1965) examined civilian crime during war while Bryant (1979) studied of "khaki collar crime."[5] Weiglay (1967) examined crime and military policy (e.g. Weiglay, 1967), and a few authors (Janowitz, 1974; Sherrill, 1970; Scheutler, 1980) provide broad, unsystematic works depicting the brutish and negatively arbitrary features of military justice.

One of the best works on the military justice system is West's (1977) case study of how the power of military commanders greatly influenced, if not in fact determined, the outcome of courts-martial trials, including capital cases. This is possible, according to West, because once commanders decide criminal charges are appropriate, they select the officers who serve as prosecutors, defense counsel and jurors, while retaining the power to evaluate these officers' performances and thus influence their future careers. Under these circumstances, officers serving as prosecutors were given broad discretionary power in pursuing a court martial. Vigorous defense efforts were not only discouraged, but considered egregiously hostile acts toward command. In West's case studies, defense counsel were given little time to prepare, virtually no resources except access to the defendant, and advice from their superiors not to rock the proverbial justice boat. These defense officers, mostly careerists, chose not to threaten their future status because, as it was explained to them by superior officers, military justice is not about justice, but enforcing discipline while making command look good. For commanders to bring charges and then to lose the case was a black mark on their service career record.

Table One presents the military justice system data and the use of the death penalty in the European Theater of Operations (ETO) during World War II (1942 – 1945). The European Theater of Operations included military activity in England, France, Belgium and Germany. The data indicates that a general court martial (GCM) occurred for less than 1% of the 4.1 million soldiers serving in the ETO. Just less than five percent of all 36,000 GCM cases were capital cases (N = 1,608) in which about two-thirds of capital defendants (N = 1,056) received a guilty verdict to their capital offense. Of the capital verdict defendants, less than half (42%, N = 443) received a death penalty as their sentence. Each of the death sentences was carefully reviewed by the Board of Review (BR). The BRs did fulfill their sifting role as only 70 (15%) of the 443 sentences resulted in executions.

Our previous research on these cases documented that despite the BR reform, **command influence** was still a major contributing factor to the selection of capital cases as well as death verdicts (Lilly and Thomson, 1996). Also, the BR process did little to stop **discrimination**. The final result of the entire sifting process is that while African Americans represented only 9.5% of the soldiers serving in this theater of operations, they accounted for almost 80% (N=55) of the executed defendants. The combination of the two factors resulted in a practice we call **sexual racism**.

TABLE ONE
The Military Justice Funnel in the ETO WWII (1942-1945)

	Soldiers	Pct Previous Stage	African American
Soldiers	4,182,226		9.5%
General Courts Martial	36000	0.86%	
Capital Cases	1608	4.47%	
Guilty Verdicts	1056	65.67%	
Death Sentences	443	41.95%	
Executions	70	15.80%	79%

B. The Context of Punishment: Lessons Learned from England

The records of trial by general courts-martial in the ETO, summarized in the U.S. Army's History of the Branch Office of the Judge Advocate General with the United States Forces European Theater, Vol. and II (1945), hereafter USFET, provide an authoritative measure of the major breaches of military discipline and serious criminal offenses.[6] The USFET report contains data for 70 executions between 1942 and November 1945, plus another 38 executions scheduled, for a total of 108. Of the 70 executions, 18 occurred in England.

In earlier work, we demonstrated that while racism is evident when examining the aggregate process data, it can only be understood through the **context** of its use (Lilly and Thomson, 1997). To place this aggregate data in its context, we examined the 18 capital execution cases in England. Despite American troops being stationed in a country that banned capital punishment, the Visiting Forces Act of 1942 between England and the United States, permitted the American military to export its entire justice mechanisms including capital punishment. Table Two provides the basic data for these cases.

TABLE TWO
MILITARY EXECUTIONS IN BRITIAN (NATO) WWII

Ethnicity	Percent	Crime	Percent	Rank	Percent
White	28%	Sex Rel	66.67%	Priv/PFC	94.44%
Afr-American	56%	Not-Sex	33.33%	Corporel	5.56%
Mex-American	17%				
Totals:	100%		100%		100%

The data suggest that military justice in England was used disproportionately on African American soldiers of lower rank who were involved in sexual crimes. Through a review of military records and related writings, we were able to document the context of this data – **sexual racism**.

No clearer example of the military justice system's preference to protect its life and death power over its ranks exists than in the records of the 18 executions in England.[7] In the U.S. Army's initial execution Private David Cobb (Case 1), a 21 year old African American soldier, shot and killed a military personnel – specifically his caucasian superior called "officer of the day." After conviction and subsequent death sentence, ETO Judge Advocate Hendrick appointed a BR from his junior officers to examine Cobb's case, and to give him a recommendation. They upheld the conviction, and Hendrick agreed. Cobb was hanged 66 days after his trial.

The most powerful aspects of the data are the swiftness of the military justice process, and the inadequacy of legal defense. The average capital case took only one week to gather evidence and formally

charge a defendant (median 8 days). Usually, defense counsel was of the same rank as prosecution, mostly captains. All but two trials lasted a single day, and most were over by early afternoon. The defense took only 11% of trial time.[8] Usually, the defense called one witness (the defendant), presented no exhibits, and made few if any motions to the court (61% of the case had no motions, 17% only one motion). Most of the time defense work entailed no more than a cross examination of prosecution witnesses. In a few cases defense attorneys read a one page statement by the defendant. In two cases there was no presentation of any defense. Given the severe sanctions waiting these defendants, the defensive work was extremely inadequate. While perhaps such a defense might be expected under the exigencies of war, these 18 cases were conducted on friendly soil without moving battle lines. Clearly, the unspoken message was not to mount vigorous defenses.

In only one case (Harrison) was the defense thoroughly prepared and well argued, and we have confirmed its defense team was comprised of non-career attorneys. They were more prone to mount a vigorous defense than career attorneys. The defense, if appointed at the time of charging the accused, had about two weeks to build its arguments (median time 17 days). In six cases, the team had under ten days to prepare, and the Court was intolerant of granting motions to delay prosecution (only two were granted). The speed of the system and inadequacy of the defense bolster West's (1977) arguments concerning military justice's bent towards discipline over process. Even the vaunted reform of using BRs did not stop command influence in England.

In a surprising collection of surviving secondary historical data surrounding the Cobb case, US Judge Advocate Major General Myron Cramer decided that Hendrick's actions did not comply with Army policy, specifically Congress' post World War I reform, General Order Number Seven. Cramer noted that Hendrick was merely "Acting Judge Advocate" in the ETO and that he, General Cramer, in Washington D.C. possessed ultimate procedural authority. Cramer then instructed Hendrick that in future ETO cases, a

BR would not be called until Hendrick had upheld the sentence, altered the penalty or dismissed the case. Because BRs were created by Congress as a check on swift, untempered and unchecked justice, Cramer's actions allowed the military to carry out the letter, as opposed to the spirit of General Order Number Seven. By placing the BR process *after* a superior officer's official recommendation or (dis)confirmation, the Judge Advocate General permitted command influence to supersede the new "due process."

Despite Hendrick's well reasoned and passionate protests, ETO BRs were appointed only after he made a determination of a case's validity. In the 18 England cases, as well as the remaining ETO cases, BR action by Hendrick's junior staff became no more than pro forma check sheets by officers who dared not contradict their superior. Some of the reviews were quite thorough (10 - 18 single spaced pages), but most of these focused on mitigatory issues such as insanity. They also provided good cover in case an occasional U.S. Senator or Representative inquired about a case (Cases 8, 10, 11: Pygate, Brinson and Smith). The Judge Advocate's office also did not take kindly to convictions tempered by pleas for clemency. In the case of Harold Smith (Case 9), a 19-page BR report argued that the court's conviction followed by a plea of clemency was "not easily understood" and "smacks of a lack of courage of their convictions." Ultimately, the Board decided "such a recommendation must fail to impress" the panel of senior officers.

The 18 England cases, when combined with the historical secondary material, indicate one incontrovertible conclusion: the military justice system condoned command influence in capital cases. While not unchecked by civilian rule, military justice was certainly shielded from politicians, and it was carried out swiftly. Command influence on career-oriented junior officers dictated that due process was not a major consideration in military justice; it took a back seat to the disciplinary needs of the institution. Command influence was most evident at the time capital cases were reviewed prior to the imposition of death. As experienced in England during World War II, it permitted the selection and execution of

African American troops as a disciplinary tool. Its purpose was to enforce the segregation of troops, to keep the peace when violence occurred between segregated units, and to punish improper mixing of color lines in social situations, a practice we call sexual racism.[9]

While the troops in England were segregated, the U.S. military's massive build-up stationed whites and African Americans in close quarters. Adding fuel to this potential racial fire, English women, unused to racial segregation, freely socialized with African American U.S. troops. While Eisenhower wanted "discrimination against the Negro troops to be sedulously avoided" (Smith, 1987: 102), he knew this initial policy was problematic. Troops of color were welcome in British pubs and homes. Eisenhower learned that:

> Censorship had been established by American headquarters on stories involving minor difficulties between Negro troops and other soldiers and civilians. These incidents frequently involved social contact between our Negro soldiers and British girls... The small town British girl would go to a movie or dance with a Negro quite as readily as she would with anyone else, a practice that our white soldiers could not understand. Brawls often resulted and our white soldiers were further bewildered when they found the British press took a firm stand on the side of the Negro...Several reporters spoke up to ask me to retain the ban... They said that trouble-makers would exaggerate the importance of incidents and that the reports, taken up at home, would cause domestic dissension. (by Eisenhower, in Longmate, 1975: 118).

General Eisenhower did not like segregation, but understood that the problems of racial violence between white and African American soldiers. "There were some shootings, most by whites against blacks and a few killings -- all covered up by the army" (Ambrose, 1994: 148). Eisenhower knew that it was impossible to segregate troops, especially on leave. Ultimately he decided on a rotating pass system:

> This Headquarters will not attempt to issue any detailed instructions. Local Commanding Officers will be expected to use their own best judgment in avoiding discrimination due to race, but at the same time, minimizing causes of friction between White and Colored troops. Rotation of pass privileges and similar methods suggest themselves for use; always the guiding principle that any restriction imposed by the Commanding Officers applies equally with force to both races. (by Eisenhower, ETO USA, 16 July 1942 Add. Hist. 218, RG 332, NA).

The policy eventually was dubbed **"Blacks Tuesday, Whites Wednesday."** Despite being attacked both in the United States and in Britain, Jim Crow was operational in Britain.[10] The risks of increased interracial troop violence outweighed Eisenhower's official high road policy. The result was almost a paranoid and compulsive enforcement of military discipline on African American soldiers found guilty of sex-related crimes. The censorship on US publicity of racial sex crimes or attendant violence often meant that few people in the U.S. ever learned of these incidents or about the executions until well after the fact, if at all. This included, at times, the families of the executed.

The lessons learned from England are clear. Reforming a permanent bureaucracy via structural reform (BRs) will be weakened through the discretion of its implementation. The 18 capital cases from England demonstrate the continued power of command influence and the reason for it's use – to limit interracial violence between troops who were segregated in a military sense, but commingling through social interaction with the same British women.

C. The Context of Punishment: Lessons Learned from France, Belgium and Germany

Did the path of military justice change when American troops entered and moved through France, Belgium and ultimately to victory in Germany? With troops on the move in larger geography, the problems of close quarter interracial conflict is practically moot. However, the military tried and executed 52 soldiers in roughly two years time. The punishment is even more disproportionately applied to troops of color (89%). The purpose of the capital punishment is very much directed to civilian victims (75%) and sex-related crimes take up a majority of capital executions (60%). The key context for the selection and application of punishment is protecting civilians with a secondary purpose of Old Testament justice for intra-unit murder (23%). What is most interesting is the disproportionate use of capital punishment in France (92%) as opposed to "enemy soil" in Germany (N=1). We believe that the deliberate non-selection of capital verdicts and sentences for Germany general court martial cases is directly related to the non-

value of the victim. The need for protecting an enemy civilian population is far less than the same for crimes against friendly countries. We next turn to the cases under focus in this paper, the MTO.

III. Military Justice in World War II: MTO and NATO

A. Overview of the Theaters

The MTO (Italy, and France) and NATO (North Africa) campaigns actually preceded the ETO in history. These cases represent the pre-England rollout of the BR reforms. Note that there was no need for a Visiting Forces Act, as the United States saw no need for local justification of its military activities, especially in an enemy land such as Italy. Additionally, there was less racial tension because the segregated units were rarely engaged in social activities together. So, we suspect that the context of MTO / NATO capital punishment was more to keep general order in the ranks, as would happen later in non-England ETO cases.

The great bulk of America's attention and historical analysis during the European front was focused on the Normandy invasion and subsequent German conquest. The Northern Africa and Italian campaigns, while not forgotten, received less scholarly and public attention. Operations Torch (North Africa: Aug-1942, 100,000 troops), Husky (Sicily: January – 1943, 120,000 troops), and Shingle (Anzio: January - 1944, 250,000 troops) were successful, but bloody. The North Africa campaign was almost a disaster, and Commander Eisenhower learned several valuable lessons from troops with high morale but poor preparation.[11] The Sicily, Anzio, Rome-Arno campaigns were particularly hard fought, but provided valuable lessons for the ultimate 1,000,000 troop assault on Normandy - Operation Overlord.

The USFET records of trial by general courts-martial in the MTO and NATO do not have the same level of data as with the ETO. Also, there is a serious dearth of secondary materials from this theater of operations. For NATO / MTO, the data source is the Digest of Opinions of the Brach Office of the Judge Advocate General with the MTO (1945) which provides a short summary of all cases. Unlike the

ETO (Table One), this data does not provide GCM statistical summaries to build the criminal justice funnel table. However, there is a seven volume set Holdings, Opinions and Reviews Board of Review North African Theater of Operations and Mediterranean Theater of Operations (1943 – 1945) to analyze the BR results. There is also a Digest of key BR opinions. Lastly, we do have the actual case records of the 27 capital cases.

FIGURE ONE
MILITARY EXECUTIONS IN
NATO AND MTO BY YEAR

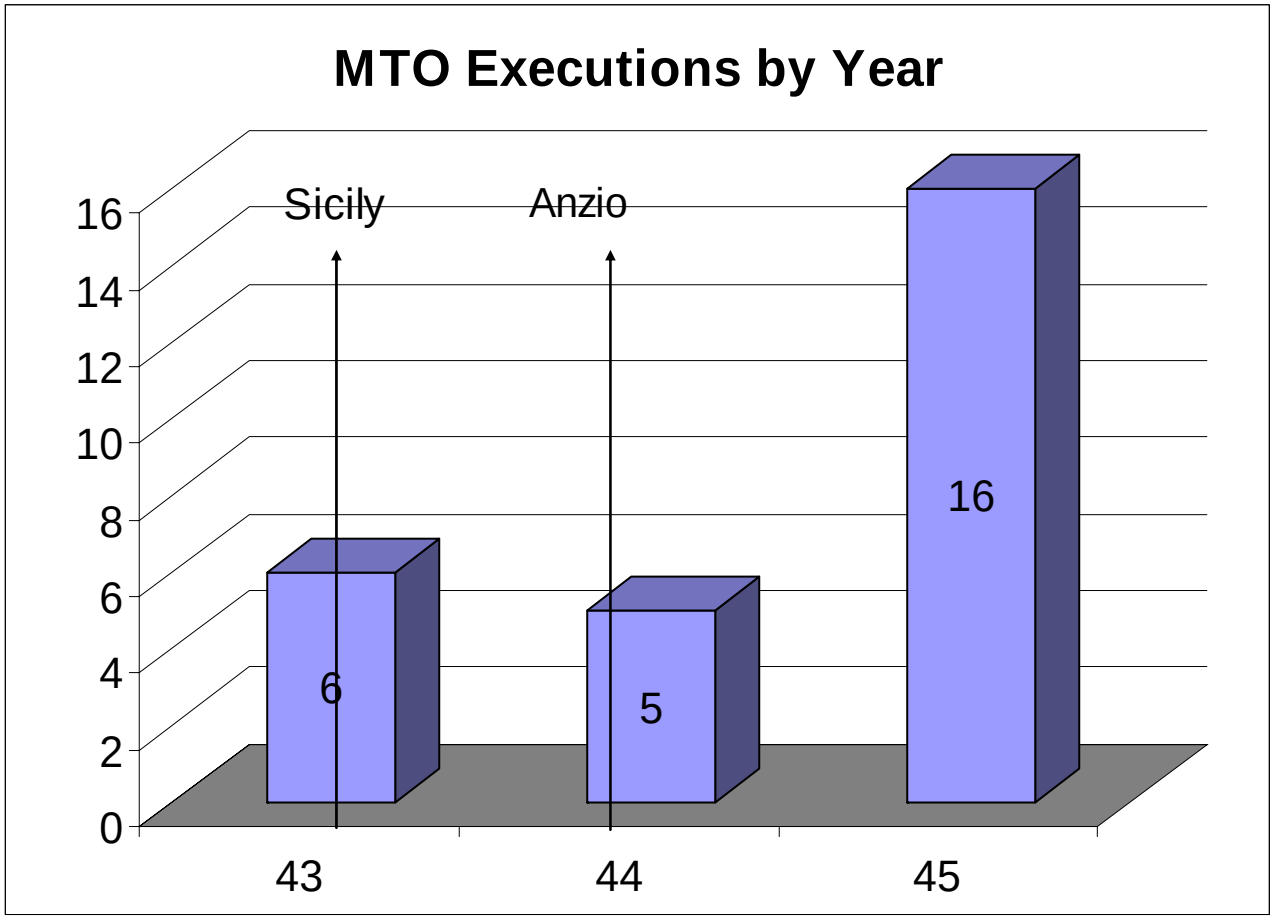

TABLE THREE
MILITARY EXECUTIONS IN FRANCE, BELGIUM AND GERMANY[12]

Year	Execute	Per
43	0	0%
44	13	25%
45	38	73%
46	1	2%
	52	**100%**

Race	Execute	Per
Caucasian	6	12%
Afr Amer	45	87%
Mex Amer	1	2%
	52	

Country	Execute	Per
France	48	92%
Germany	1	2%
Belgium	3	6%
	52	100%

Victim	Execute	Per
Civilian	39	75%
Military	12	23%
None	1	2%
	52	**100%**

Crime	Execute	Per
Murder	20	38%
Rape	23	44%
Mur / Rape	8	15%
Desertion	1	2%
	52	**100%**

Crime	Execute	Per
Sex Related	31	60%
Non Sex	21	40%
	52	**100%**

The context of administering military justice was a moving theater, with campaigns fought on neutral (Algeria), "semi-friendly" (Italy) and friendly (France) soil. In the ETO, approximately two thirds (65%) of the capital execution cases occurred after D-Day. In the MTO / NATO, the great bulk of the capital court martial cases occurred near the end of the military activities (see Figure One). Figure One notes the key invasion dates for Sicily and Anzio with over 20 of these cases happening after Anzio.

In the MTO / NATO there was no need for a VFA with a host country to justify executions, so the exercise of capital verdicts permitted more direct command influence decision – to keep order in the ranks and to reattribute heinous acts in the local community. In terms of selecting cases for the death penalty, the ETO featured 70 executions to the NATO/MTO 27 executions. The two theaters operated for similar lengths of time (three years) but ETO featured more than double the troops.[13] So, the use of the death penalty in NATO/MTO is similar to the proportion of use in the accompanying theater. Our conclusion is that the death penalty was used by NTO/MTO command in less, but not significantly less, proportion to capital punishment in the ETO.

B. Review of 27 Capital Execution Cases in MTO and NATO

Table Four reviews the specific defendant characteristics for the NATO / MTO capital executed defendants. Table Four reveals that the sexual tension of "Black Tuesdays – White Wednesdays" was not present, and neither was the high percentage of minority executions, especially for rape. Only 14 of the 27 defendants (52%) were African American. However, this does represent more than five times their presence in the Armed Forces. An initial review of the entire seven volume NATO/MTO Boards of Review indicate that African Americans comprised only 20% of the 517 Board Reviews. **As with the ETO data, the prejudicial impact of capital cases increases for troops of color as the capital process moves forward**. For a comparison, the ETO featured 1,600 board reviews with 40% African American. While African Americans are overly represented in the NATO / MTO justice process, their "share" of the

Board Reviews and Executions was approximately half of what it was in the European Theatre. So, in the NATO / MTO, the racial aspects of the death penalty cases are not as evident as in England or Europe. However, selection of troops of color for capital execution (52%) still occurred far more than their share of the armed forces population (9.5%).

In England especially, there were several racial references, especially in sex related cases, which comprised two-thirds of the capital execution cases. In the NATO/MTO actions, sex related cases were less than half (48%) of all executions. In case 12, (#12, Crews, Board Reviews Volume 6, pp. 73), Private Crews killed a white Military Police when the MP demanded that he leave a local house in Naples, Italy. The defense tried to present a "self-defense" theory with testimony of alleged statements by the MP that "you do not go into white people's houses in the states" (Vol. 6:66) and "don't argue with those god dam niggers, let's kill them." (Vol. 6:77). However, local Italian witnesses indicated that the MPs were actually cordial, and the Review Board concurred with the local judicial panel and confirmed the execution. Aside from this case, there are few references in the records of general racism or specifically sexism racism concerning African American interactions with local population.

An exemplary case proving this point of not using the death penalty is NATO 2221 (MTO Board Reviews Volume 4, pp. 1). Three African American Privates (Harris, Ray, Patterson) were in a Naples dance hall in December 1943, when a white soldier demanded that they leave because mixing races was not permitted. The three soldiers left the premises to avoid the trouble, but the white Private Bert Ray followed them into the streets. In the ensuing verbal and physical exchange, guns were drawn and Private Ray was killed. The local court and the Review Board did not see a need to exert the ultimate penalty, because the three soldiers initially tried to avoid trouble. The BR chose to dishonorably discharge them and sentence each to life without parole in Lewisburg, Pennsylvania.

TABLE FOUR
DEFENDANT AND CRIME CHARACTERISTICS
FOR NATO AND MTO CAPITAL EXECUTION CASES

Case Num	Defendant Name	Area Service	Theater Oper	Def Rank	Def Plea	Country of Crime	Racial Status	Type of Crime	Victim Race	Victim Gender	Victim Status
1	Kendrick	Artillery	NATO	Pvt	Not Guilty	Algeria	White	Murder / Rape	White	Female	Civilian
2	Smith, C	Engin	NATO	Pvt	Not Guilty	Algeria	White	Murder	White	Male	Military
3	White, D	Quart	NATO	Pvt	Not Guilty	Sicily	AA	Rape	White	Female	Civilian
4	Pittman	Quart	NATO	Pvt	Not Guilty	Sicily	AA	Rape	White	Female	Civilian
5	White, A	Quart	NATO	Pvt	Not Guilty	Sicily	AA	Rape	White	Female	Civilian
6	Stroud	Quart	NATO	Pvt	Not Guilty	Sicily	AA	Rape	White	Female	Civilian
7	Jones	Artillery	NATO	Pvt	Not Guilty	Algeria	White	Murder	White	Male	Military
8	Spears	Engin	NATO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Military
9	Donnelly	Artillery	NATO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Military
10	Watson	Engin	NATO	Pvt	Not Guilty	Italy	AA	Murder	White	Male	Military
11	Maxey	Quart	NATO	Pvt	Not Guilty	France	White	Rape	White	Female	Civilian
12	Crews	Quart	MTO	Pvt	Not Guilty	Italy	AA	Murder	White	Male	Military
13	Jones	Infantry	MTO	Pvt 1st C	Not Guilty	Italy	White	Murder	White	Male	Military
14	Mack	Artillery	MTO	Pvt 1st C	Not Guilty	Italy	AA	Murder	White	Female	Civilian
15	Burns	Ordin	MTO	Pvt	Not Guilty	Italy	White	Rape	White	Female	Civilian
16	Taylor	Infantry	MTO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Military
17	Grant	Infantry	MTO	Pvt 1st C	Not Guilty	Italy	AA	Murder	White	Male	Civilian
18	Smalls	Infantry	MTO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Military
19	McGhee	Quart	MTO	Cpl	Not Guilty	Italy	White	Murder	White	Male	Military
20	Schmiedel	Replace	MTO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Civilian
21	Jeffries	Infantry	MTO	Pvt	Not Guilty	Italy	White	Murder	White	Male	Civilian
22	Jones	Artillery	MTO	Pvt	Not Guilty	Italy	AA	Rape	White	Female	Civilian
23	Nelson	Infantry	MTO	Pvt	Not Guilty	Italy	AA	Rape	White	Female	Civilian
24	Murray	Transport	MTO	Pvt	Not Guilty	Italy	AA	Murder / Rape	White	Female	Civilian
25	Till	Transport	MTO	Pvt	Not Guilty	Italy	AA	Murder / Rape	White	Female	Civilian
26	Ervin	Infantry	MTO	Pvt	Not Guilty	Italy	AA	Murder / Rape	White	Female /	Civilian
	Spinks	Infantry	MTO		Not Guilty		AA	Murder / Rape	White	Female / Male	
27				Pvt		Italy					Civilian
	Category	**Back Line**	**NATO**	**PVT**	**Not Guilty**	**Italy**	**Afr Amer**	**Sexual**	**White**	**Female**	**Civilian**
	Percent	**74%**	**41%**	**96%**	**100%**	**70%**	**52%**	**48%**	**100%**	**52%**	**63%**

TABLE FIVE
AGGRAVATING CIRCUMSTNACES

Case Num	Defendant Name	Aggravating Circimstances
1	Kendrick	raped and killed a fragile 10 yr old Spanish clild with club feet
2	Smith, C	killed an MP with a knife while drinking (.375 BAL) "I will cut your damn throat"
3 4 5 6	White, D / White, A Pittman / Stroud	forcibly raped wife while holding house members hostage including 18 yr old nephew and husband.
7	Jones	Jones killed an MP and shot another while drinking wine: "We'll come back tomorrow and show you a thing or two."
8	Spears	Killed soldier drinking buddy over $5 loan "accused decided it was time for him to look for deceased to get thiongs straightened out."
9	Donnelly	AWOL for 41 days; shot an MP while under arrest.
10	Watson	killed two MPs in showdown at a house.
11	Maxey	raped married woman used rifle to threaten family members.
12	Crews	killed MP when at a house trying to get wine
13	Jones	shot his commander with a rifle when told to "relive the man on the bridge."
14	Mack	Killed three civilians including a young girl.
15	Burns	forcibly raped 14 year-old girl in front of the family.
16	Taylor	killed soldier (drinking buddy) with a rifle after a namecalling ("cocksucker") incident.
17	Grant	killed a young boy when arguing with father over a bottle of wine.
18	Smalls	past.
19	McGhee	Fired on superior once and then five more times when down, angry saying "nobody takes nothing from me."
20	Schmiedel	AWOL; killed multiple civilians, crime spree, faked MP bands.
21	Jeffries	shot six people killing one and wounding five others.
22 23	Jones / Nelson	raped woman, assualted and stole from husband; 2 young boys in house at time; claimed to be MPs
24 25	McMurray / Till	raped two women and then killed one taking advantage of air raid; gang rape; both women were pregnant.
26 27	Ervin / Spinks	murdured husband and raped wife; children present in house; threatened wife after shoting husband

The most striking feature from reading the 27 capital cases is the **importance of aggravating circumstances.** Table Five presents the basic aggravating circumstance mentioned by a Board of Review when upholding a GCM verdict. While similar crimes (murder, rape) were given life sentences, these cases were selected because of some horrific aspect of the case. In the murder cases, many were against an MP apprehending them, which required, in the Board's eyes, harsh discipline. Also, several murders occurred against fellow military personnel in their unit. However, those chosen for execution were often more cold blooded such as Private Taylor (#16, Vol. 6:207) who walked into a barracks and immediately shot his PFC for assigning him guard duty. The same is true for civilian murders. Private John Mack (#14, Vol. 6: 169) entered a house in Piestrasanta, Italy in March, 1945. Mack demanded vino from the spouse and grabbed her arm. She screamed and he immediately started firing his weapon. Private Mack killed the wife and husband at their back door as they tried to flee. Their 14 year-old daughter ran from the house and Mack tracked her for 500 yards, fired several shots at her, and left her dead by the road. The worst case was Private Schmeidel (#20, Vol. 7:59) who was part of a five-member gang who went on a two month AWOL crime spree of assault, robbery and eventually murder in the Rome area during 1945.

Also, in the rape cases, the victims were most often sexually assaulted by strangers in their own homes and were young girls, pregnant, virgins, or mothers who were raped while their husbands or family were detained outside. Private Curtis Maxey (#11, Vol. 5, 111) was part of the quartermaster corps who just landed in St. Tropez France and they were visiting local homes near their post. Maxey and a friend left their post late that evening and returned to a house of a 22 year old Madame Lucy Collomp. After assaulting the husband and family, Curtis dragged Lucy about 50 yards from the house and raped her while she was shouting for her helpless husband who was restrained, and her cries were also within ear shot of her other relatives and her very young child. In another case, two Privates Murray (#24, Vol. 7: 171) and Till (#25, Vol. 7: 171), noticed two women who lived in a small shack just outside their military

post near Cisterna, Italy. In a pre-planned action, they awaited an air-raid in June, 1944. While the blasts were going off, highlighting the total dark evening, the two men entered the shack, subdued other family members and then raped two women, killing one of them. It took months to identify the men, but eventually they were caught, tried and executed. **From the reading of the Board Reviews, it appears that executions were selected for cases of rape and murder with serious aggravating circumstances.** The conclusion is that the command staff did not see a need to use executions to maintain racial harmony. Circumstances and the value of the victim were more important. Comparison of ETO to NATO/MTO data shows that Italian women were valued more than German women in the eyes of the American military judicial system.

The other interesting aspect of NATO / MTO cases was the **speed of the system.** Tables Six provides processing details for all 27 cases. In the NATO / MTO cases, it took 31 days to trial; trials lasted one day or less. Death penalty cases were tried, sentenced, reviewed by the local JAG staff. Then the sentenced was affirmed / remanded by the area commander. After these steps, the case was sent up the JAG chair for a three member board of review. This procedure was mirrored in England as cited earlier in this work. The BR team was very consistent over these cases. It typically took 55 days from sending to get to a board of review decision. This was at a time when we were in four different mobile theaters (North Africa, Sicily, France and Italy). Given an affirming vote, the top JAG NATO / MTO officer Col. Hubert Hoover signed off to permit an execution which usually occurred 17 days later. The executions were all hangings save two who were shot (#26 Ervin, #27 Spinks) and eventually all save one (#27 Spinks) were buried in Oise-Aisne Cemetery, Plot E in France (Lilly, 1996).

In the ETO, the total process time from act to execution was a median 136 days. Compared to today's cases this is incredibly swift justice. **However, the NATO/MTO actions were even faster, with a mere 119 median days from act to execution.** Table seven reviews case processing times for five

cases selected to represent the NATO / ETO versions of fast (77 or 79 days) and slower (93 - 130 days) processing times. Removing a desertion case and two other cases where a suspect identification was delayed three months, the processing time drops to a frighteningly speedy 107 median days from alleged act to hangman's noose. Since the theaters were more mobile, the military justice system certainly responded more quickly.

Strength of defense is another important issue and is presented in Table Eight. As discussed earlier, the defendants in England received little in the way of a capital defense. In NATO / MTO, the defense was similar. Approximately 70% of all cases were "passive" with light cross examination, a defendant's unsworn statement and usually a plea for mercy. In several cases, the defense was one or two lines. As with England, one defense was very active (#2 Charles Smith) which tried to mitigate his crime by focusing on the high blood alcohol level of the defendant (.375). Despite the overt drunkenness, the trail judges, JAG staff and area JAG commander affirmed a death penalty. In the Smith BR (pp 7), the review board had a chance to take a stand on alcohol as a mitigating factor. They stated that:

> "The only defense interposed was that accused was drunk and did not remember what he did. A laboratory test showed that immediately after the fatal attack, accused had three and seventy five hundreds milligrams of alcohol to each cubic centimeter of blood. By some standards accepted by the medical profession, this alcoholic content indicates a state of advanced drunkenness. Those standards, however, allow no tolerance for the individual and there is only a rough connection between the alcoholic content of the blood and the degree of intoxication; that more reliance is to be placed on the physical aspects of the individual."

The BR sent a clear message that using alcohol levels to mitigate a death sentence is not appreciated. Given many state's drunken driving standards (.08 - .10), Charles Smith was over three times the minimum level for legal drunkenness. Note that Charles Smith was the largest case file, and occurred early in the NATO campaign (Algiers). This command influence is how JAG line officers and staff take cues for future cases. Defense attorneys would not present a mitigatory defense, especially one for high

blood alcohol content. Several of the death penalty cases involved the presence (or absence) of alcohol. The command influence also works in reverse. The command discretion of an area JAG commander to influence key staff, to select the trial judges and to have the staff review and the area commander opinions occur BEFORE a BR can look at a case, limited the BR's effectiveness as a judicial reform. Typically, the BR focused on procedural as opposed to substantive due process issues. For example, the Review Boards never took standards for an effective defense counsel, or the use of an insanity defense (which was discussed in some ETO cases) or what specific types of crime are appropriate for the death penalty.

Command influence, especially in the first 10 capital case reviews, discouraged other mitigatory defenses was also present in other early cases. In case #7 Edwin Jones, Brigadier General Adam Richmond wrote a six page confirmation of the BR decision upholding the death verdict and enabling execution. General Richmond (pp 6) states that:

> "I have not overlooked the fact that the accused is 23 years old and under some circumstances this fact is sufficient to weigh the balance in favor of commuting a death sentence. However, the entire command is composed of young men and every case coming to your attention will be that of a young man and hence the situation is wholly different than in civil life where the case of a youth coming before the high court under a sentence of death is the exception."

TABLE SIX
CASE PROCESSSING CHARACTERISTICS FOR NATO / MTO CASES

Case Num	Defendant Name	Def Age	Days To Trial	Trial Length	Days To BR	Time To Exec	Total Time	Number Priors	Method of Execution	Place of Burial
1	Kendrick	21	14	1	23	12	49	0	Hung	Oise-Ainse Plot E
2	Smith, C	39	14	1	71	34	119	0	Hung	Oise-Ainse Plot E
3	White, D	24	4	1	18	21	43	0	Hung	Oise-Ainse Plot E
4	Pittman	24	4	1	18	21	43	0	Hung	Oise-Ainse Plot E
5	White, A	26	4	1	18	23	45	0	Hung	Oise-Ainse Plot E
6	Stroud	22	4	1	18	21	43	0	Hung	Oise-Ainse Plot E
7	Jones	23	24	1	93	13	130	0	Hung	Oise-Ainse Plot E
8	Spears	34	40	1	64	17	121	0	Hung	Oise-Ainse Plot E
9	Donnelly	20	30	1	55	22	107	0	Hung	Oise-Ainse Plot E
10	Watson	20	45	1	81	8	134	0	Hung	Oise-Ainse Plot E
11	Maxey	22	57	1	130	17	204	0	Hung	Oise-Ainse Plot E
12	Crews	27	27	1	22	16	65	0	Hung	Oise-Ainse Plot E
13	Jones	30	15	1	34	17	66	0	Hung	Oise-Ainse Plot E
14	Mack	34	53	1	57	25	135	0	Hung	Oise-Ainse Plot E
15	Burns	31	52	1	56	10	118	2	Hung	Oise-Ainse Plot E
16	Taylor	24	7	1	36	12	55	0	Hung	Oise-Ainse Plot E
17	Grant	23	31	1	30	32	93	0	Hung	Oise-Ainse Plot E
18	Smalls	34	13	1	30	8	51	0	Hung	Oise-Ainse Plot E
19	McGhee	28	48	1	78	13	139	0	Hung	Oise-Ainse Plot E
20	Schmiedel	22	104	1	60	15	179	2	Hung	Oise-Ainse Plot E
21	Jeffries	21	66	1	64	63	193	0	Hung	Oise-Ainse Plot E
22	Jones	32	16	1	43	18	77	1	Hung	Oise-Ainse Plot E
23	Nelson	21	46	1	54	54	154	0	Hung	Oise-Ainse Plot E
24	Murray	24	60	1	116	17	193	4	Hung	Oise-Ainse Plot E
25	Till	25	120	1	116	17	253	2	Hung	Oise-Ainse Plot E
26	Ervin	25	120	1	40	17	177	0	Shot	Oise-Ainse Plot E
27	Spinks	20	102	1	80	90	272	0	Shot	Unknown
	Median	24	31	1	55	17	119	0		
	Average	26	41	1	56	23	121	0		

TABLE SEVEN
PROCESSING TIME OF SELECTED CAPTIAL EXECUTION CASES

Case	Jones #7		Grant #17		Jones #22		Mack #14		Burns #15	
Activity	**Date**	**Days**	**Date**	**Days**	**Date**	**Days**	**Date**	**Days**	**Date**	**Days**
Offense	8/28/1943	0	1/8/1945	0	1/2/1945	0	12/31/1944	0	11/27/1944	0
Charges	9/6/1943	9	1/23/1945	15	1/6/1945	4	1/4/1945	4	12/16/1944	19
To Trial	9/12/1943	6	2/1/1945	9	1/14/1945	8	1/11/1945	7	1/14/1945	29
Trial	9/21/1943	9	2/8/1945	7	1/17/1945	3	1/18/1945	7	1/19/1945	5
Staff review	10/27/1943	36	2/12/1945	4	1/18/1945	1	1/21/1945	3	1/23/1945	4
Reviewing Authority	10/31/1943	4	2/15/1945	3	1/21/1945	3	1/23/1945	2	1/25/1945	2
Mailed to JAG	11/7/1943	7	2/16/1945	1	1/23/1945	2	1/24/1945	1	1/25/1945	0
Theater Jug Advocate	11/28/1943	21	2/28/1945	12	2/12/1945	20	2/14/1945	21	2/12/1945	18
BR	12/23/1943	25	3/10/1945	10	3/3/1945	19	3/6/1945	20	3/17/1945	33
Hanged	1/5/1944	13	4/11/1945	32	3/20/1945	17	3/20/1945	14	4/11/1945	25
	Total	**130**		**93**		**77**		**79**		**135**

TABLE EIGHT
DEFENSE CHARACTERISTISCS OF CAPTIAL EXECUTION CASES

Case Num	Defendant Name	BR Citation	BR pp	GCM Num	Place of Trial	Type of Defense	Defense Called	Defense Acts	Pros pp	Def pp	Tot pp	Pct Def
1	Kendrick	1 - 151	14	218	2nd armored HQ, NA	passive	none	light crosss	105	3	112	3%
2	Smith, C	1 - 137	10	213	Oran, Algeria	very active	8 plus defendant!	mitigatory defense:	28	27	56	48%
3	White, D	1 - 341	4	420	Caltanisseta, Italy	passive	none	light crosss	14	1	16	6%
4	Pittman	1 - 345	6	421	Caltanisseta, Italy	passive	accussed unsworn statement	light crosss	10	2	14	14%
5	White, A	1 - 351	6	422	Caltanisseta, Italy	passive	none	very light cross	10	1	13	8%
6	Stroud	1 - 357	7	423	Caltanisseta, Italy	active	accussed unsworn statement	light crosss	15	8	31	26%
7	Jones	2 - 331	7	1070	Oran, Algeria	passive	none	very light cross	37	2	45	4%
8	Spears	3 - 229	6	1672	Naples, Italy	active	3 char witnesses; drunk	light crosss	15	5	24	21%
9	Donnelly	3 - 343	3	2022	Naples, Italy	passive	none	very light cross	18	1	24	4%
10	Watson	4 - 247	8	2880	Naples, Italy	passive	none	None	49	1	58	2%
11	Maxey	5 - 111	8	3940	St. Tropez France	passive	none	light crosss	48	7	60	12%
12	Crews	6 - 073	6	5121	Naples, Italy	passive	none	very light cross	31	2	38	5%
13	Jones	7 - 083	4	5917	rear echelon: 92nd inft	passive	none	light crosss	13	1	17	6%
14	Mack	6 - 169	9	5918	rear echelon: 92nd inft	passive	none	light crosss	22	1	30	3%
15	Burns	6 - 181	5	5915	rear echelon: 92nd inft	active	1 witness - time of event	some cross	44	7	59	12%
16	Taylor	6 - 207	5	6026	rear echelon: 92nd inft	active	2 witnesses	some cross	26	5	40	13%
17	Grant	6 - 223	5	6040	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	15	1	24	4%
18	Smalls	6 - 267	5	6195	rear echelon: 92nd inft	active	unsworn statement + 1 witness	lt cross & object	11	7	19	37%
19	McGhee	7 - 039	6	6525	Leghorn, IT	active	3 witnesses	cross & object	30	6	48	13%
20	Schmiedel	7 - 059	4	6637	Naples, IT	active	acc statement unsworn + wit	cross & object	114	18	132	14%
21	Jeffries	7 - 0-75	6	6638	rear echelon: 92nd inft	passive	none	light crosss	37	1	43	2%
22	Jones	6 - 163	11	6640	Lucca Italy	passive	accussed unsworn statement	lt cross & object	41	2	47	4%
23	Nelson	7 - 083	11	6640	Lucca Italy	passive	accussed unsworn statement	lt cross & object	41	2	47	4%
24	McMurray	7-171	15	6866	Leghorn, Italy	passive	none	cross & object	72	3	83	4%
25	Till	7-171	15	6866	Leghorn, Italy	passive	none	cross & object	72	3	83	4%
26	Ervin	7 - 367	9	7577	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	25	2	30	7%
27	Spinks	missing	9	7187	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	21	1	28	4%
			6		**Italy**	**passive**		**Median**	**28**	**2**	**40**	**6%**
					81%	**70%**						

FIGURE TWO: Letter to NATO / MTO JAG Commander Lt. Col Hoover

Colonel Hubert D. Hoover, JAGD,
Office of the Branch Judge Advocate,
North African Theater of Operations,
APO 534, U. S. Army.

Dear Colonel Hoover:

About the middle of February we sent to your office the cases of Private Charles E. Spears, 32337619, and Private Sidney C. Cimental, 39841882, and on March 27 we sent you the case of Private Robert L. Donnelly, 13131982. Of these cases, Spears and Donnelly were convicted of murder and Cimental was convicted of rape. The sentence in each case was death by hanging.

I note that the General's action in each case was to approve the sentence and forward the record under Article of War 50½, but as I read the law the record should have been forwarded under Article of War 48 since confirmation by the Theater Commander is necessary. We are therefore inclosing an original and one copy of a new action sheet in each case, forwarding the record under Article of War 48. Will you please see that this action is inserted in the record instead of the former action?

We have another murder case the record of which we will be ready to forward in a few days and in which the sentence is also death by hanging. The Donnelly case and the one which we will send you in a few days are particularly outrageous as you will note by the record when you see it.

Our volume of work over here has been particularly heavy. This comes about not only through the number of troops assigned to this headquarters of which approximately one-third are colored, but also from the close proximity of the other forces. The result of our location is that most any soldier who goes AWOL from his organization winds up in our territory. As soon as he runs out of money he engages in theft, robbery, counterfeiting or some other illegal activity which sooner or later leads to his apprehension. In view of the fact that most of his criminal activity

belong to us. During the month of March we have tried 56 general court-martial cases and we tried [illegible] in February. There seems no likelihood of a decrees in this volume in the near future. In addition to the foregoing, we are handling about 1500 special and summary court cases per month and have to maintain close liaison with the A.M.G. courts which try civilian cases closely related to and frequently involved with the case of our military personnel. Our crying need at the present time is court reporters, so that we can try more cases and get our records quicker.

We hope you will pay us a visit. We should like very much to see you and have an opportunity to discuss a number of our problems with you. We hope that your office will be moved to this neighborhood soon, and we understand that this is a distinct possibility.

Please extend my regards to the members of your force, a number of whom I know, and also please accept my sincere regards and best wishes for yourself.

Yours very truly,

Probably the best example of this command interaction is NATO JAG staffer Col. Harold LaMar informing his theater JAG commander Col. Hoover about his current problems. Figure Two provides the actual letter taken from the # 8 Spear's case and is excerpted here:

> "Our volume of work over here has been particularly heavy. This comes about not only because of the number of troops assigned to this headquarters, of which approximately one-third are coloured, but also from the close proximity of other forces. The result of our location is that most any soldier who goes AWOL from his organization winds up in our territory." Col Harold LaMar, JAGD letter to Col. Hoover JAGD, dated Mar 31 1944.

LaMar did not make a plea for quality justice but for more court reporters so that his system would operate more efficiently. Col. Hoover replied in the affirmative and said that he would visit to discuss this and other problems.

Overall, the NATO / MTO cases followed the procedures and practices demonstrated in England. The defense took only 6% of case time and the median case lasted one-half day with a scant 40 typed pages of trial transcript. The most common "active" defense (33% of a case) was mostly an unsworn statement by the defendant to let the Court listen to the defendant's side of the story before sentencing. The defense activity provided in these cases certainly would not pass the Supreme Court's *U.S. v. Strickland* (1984) test for effective counsel, are the direct product of command influence.

IV. Lessons Learned for Today's Military Justice System

A. WW II Bolsters the Case for Death Penalty Discrimination

Capital punishment literature suggests important variables favoring its use: people of color, the socially disadvantaged, and offenders committing acts of violence. All three are powerful predictors of who is selected for execution. In both theaters, U.S. execution files are disproportionately represented by soldiers of color (African American and Mexican American). They are younger men (22 – 24 years old) from the lowest ranks (Private / PFC) with no prior record who committed an act of wartime violence against their fellow soldiers, Military Police, or local citizenry.

TABLE EIGHT
DEFENSE CHARACTERISTICS OF CAPTIAL EXECUTION CASES

Case Num	Defendant Name	BR Citation	BR pp	GCM Num	Place of Trial	Type of Defense	Defense Called	Defense Acts	Pros pp	Def pp	Tot pp	Pct Def
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3	White, D	1 - 341	4	420	Caltanisseta, Italy	passive	none	light crosss	14	1	16	6%
4	Pittman	1 - 345	6	421	Caltanisseta, Italy	passive	accussed unsworn statement	light crosss	10	2	14	14%
5	White, A	1 - 351	6	422	Caltanisseta, Italy	passive	none	very light cross	10	1	13	8%
6	Stroud	1 - 357	7	423	Caltanisseta, Italy	active	accussed unsworn statement	light crosss	15	8	31	26%
7	Jones	2 - 331	7	1070	Oran, Algeria	passive	none	very light cross	37	2	45	4%
8	Spears	3 - 229	6	1672	Naples, Italy	active	3 char witnesses; drunk	light crosss	15	5	24	21%
9	Donnelly	3 - 343	3	2022	Naples, Italy	passive	none	very light cross	18	1	24	4%
10	Watson	4 - 247	8	2880	Naples, Italy	passive	none	None	49	1	58	2%
11	Maxey	5 - 111	8	3940	St. Tropez France	passive	none	light crosss	48	7	60	12%
12	Crews	6 - 073	6	5121	Naples, Italy	passive	none	very light cross	31	2	38	5%
13	Jones	7 - 083	4	5917	rear echelon: 92nd inft	passive	none	light crosss	13	1	17	6%
14	Mack	6 - 169	9	5918	rear echelon: 92nd inft	passive	none	light crosss	22	1	30	3%
15	Burns	6 - 181	5	5915	rear echelon: 92nd inft	active	1 witness - time of event	some cross	44	7	59	12%
16	Taylor	6 - 207	5	6026	rear echelon: 92nd inft	active	2 witnesses	some cross	26	5	40	13%
17	Grant	6 - 223	5	6040	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	15	1	24	4%
18	Smalls	6 - 267	5	6195	rear echelon: 92nd inft	active	unsworn statement + 1 witness	lt cross & object	11	7	19	37%
19	McGhee	7 - 039	6	6525	Leghorn, IT	active	3 witnesses	cross & object	30	6	48	13%
20	Schmiedel	7 - 059	4	6637	Naples, IT	active	acc statement unsworn + wit	cross & object	114	18	132	14%
21	Jeffries	7 - 0-75	6	6638	rear echelon: 92nd inft	passive	none	light crosss	37	1	43	2%
22	Jones	6 - 163	11	6640	Lucca Italy	passive	accussed unsworn statement	lt cross & object	41	2	47	4%
23	Nelson	7 - 083	11	6640	Lucca Italy	passive	accussed unsworn statement	lt cross & object	41	2	47	4%
24	McMurray	7-171	15	6866	Leghorn, Italy	passive	none	cross & object	72	3	83	4%
25	Till	7-171	15	6866	Leghorn, Italy	passive	none	cross & object	72	3	83	4%
26	Ervin	7 - 367	9	7577	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	25	2	30	7%
27	Spinks	missing	9	7187	rear echelon: 92nd inft	passive	accussed unsworn statement	light crosss	21	1	28	4%
			6		**Italy**	**passive**		**Median**	**28**	**2**	**40**	**6%**
					81%	**70%**						

TABLE NINE
STATISTICAL DATA FROM THE U.S. COURT OF MILITARY APPEALS

	Filed Petitions	Pending Petitions	Petitions Processed	Oral Arguments	Total Opinions	Total Process Time	Death Process Time
1985	2706	563		102	76	93	352
1986	2721	702	2582	82	105	100	501
1987	2719	442	2979	112	134	127	549
1988	2195	273	2364	86	130	108	537
1989	2383	260	2396	89	120	76	387
1990	2160	199	2221	100	105	75	269
1991	1813	212	1800	112	125	82	324
1992	1291	326	1177	124	129	108	347
1993	1610	353	1583	122	129	145	258
1994	1514	291	1576	144	144	178	312
1995	1251	295	1247	112	111	138	473
1996	1435	379	1351	116	118	120	486
1997	1234	235	1378	115	113	139	380
1998	1104	290	1049	131	129	166	371
1999	1051	226	1115	116	123	139	429
2000	753	152	827	113	110	129	380
2001	926	190	888	81	73	110	330
2002	974	301	863	68	75	105	353
Median	**1474.5**	**290.5**	**1378**	**112**	**119**	**115**	**375.5**

Clearly officers and career soldiers, and people of privilege in our society are exempt from the ultimate sanctions. In this aspect, this paper reinforces current capital punishment literature.

This paper uses an analysis of primary and secondary sources to examine another powerful explanatory tool: context. In the ETO, this is demonstrated by the paucity of defense, and the predominance of sex-related crimes, especially in a country where rape is not a capital offense. The 18 England cases represent how the military context influenced the selection and outcome of capital cases. However, as the context shifts, the pattern of military justice adapts to the new circumstances. Comparing cases across the theaters, it is clear that victims are valued differently, especially rape victims. Allied women (England) are to be defended more strenuously. In the case of neutral (Algiers) or "semi-friendly" soil (France, Italy), rapes do deserve the ultimate penalty, but must be accompanied by aggravating circumstances. In purely hostile land (Germany), the value of the woman precludes both prosecution and severe sanctions. Only one soldier was executed for acts in Germany, and that was not for rape.

Another interesting comparison is flavor of justice across theaters. In both theaters, the death penalty process was very similar and used in the similar proportion to the level of criminal activity. Capital cases, like most others, were tried in one day. Also, the judges and judge advocates used similar standards. For example, at no time in either theater was inebriation considered a mitigating circumstance, regardless of the amount of drinking. Also, in any rape or murder case, the Articles of War were carefully reviewed and applied in similar fashion as to the ingredients comprising a successful prosecution. In both theaters, the types of crime given the death penalty were similar, except for the increased use of the death penalty in England to deter the racial tension / violence. There are some subtle differences that are probably attributed to the personal command style of the top JAG officer, Col. Hubert D. Hoover. In the NATO/MTO, Hoover ran a tighter system that was quicker to trial, review and execution. Also, Hoover

encouraged following procedure but the use a “passive” defense via some cross examination and occasional objections.

B. Military Justice Today

The problems of earlier wars prompted Congress for a reform called Board of Review (three military judges) to oversee the key cases from a neutral eye and away from the heat of the battle field. However, the reform was not implemented until after the JAG staff and military commander reviewed the case, making them more of a procedural than substantive due process body. For example, the BR did negate a death verdict when the trial judges did not have the prerequisite three-quarters verdict. However, the BR did not provide the substantive due process that Congress hoped for. Instead command influence, exercised in the context of the operational theater, provided a stronger influence on the substance of WW II military justice.

After WWII, we went through another round of reforms. Ultimately, Congress created a uniform code of military justice (1950) with a three member civilian Board of Appeals.[14] Eventually, this body became the U.S. Court of Military Appeals (USCOMA) with five members and Presidential appointment for 15 years. Reformers wanted to limit justice abuse, especially the use of the death penalty. The U.S. Court of Appeals provides statistical data seen in Table Nine.[15]

The current military, according to DOD statistics from September 2003 have 1,434,377 soldiers serving including approximately 183,200 in Iraqi Freedom. The IF force is not all that unlike that of the combined operations Torch (North Africa) and Husky (Sicily). Today’s USCOMA sees almost 1,500 petitions per year. The court processes 93% of its cases annually, and delivers 119 opinions. While the average time from filing to decision is 115 days (similar to the ETO / NATO / MTO), the serious cases, including all death cases, take about a year to process.

A review of these cases shows a **distinct bias against the use of the death penalty**. In fact the last military execution was April 13, 1961 of U.S. Army Private John A. Bennett who was hanged after being convicted of rape and attempted murder. In 1983, the civilian USCOMA outlawed the death penalty in *U.S. v. Matthews* (16 M.J. 354, 1983) declaring that that military capital sentencing procedures were unconstitutional for failing to require a finding of individualized aggravating circumstances. However, President Reagan's 1985 Executive Order reinstated the death penalty.

Despite having the death penalty, few inmates sit on military death row. There are seven men currently on military death row, and one of those, James T. Murphy is awaiting retrial / resentencing. Not surprisingly six of the seven are troops of color. Recent cases reinforce the courts dim view of the death sentence. In *United States v. Curtis* (44 MJ 106, 1996), the USCOMA Court granted a defense petition for reconsideration holding that the accused had been denied effective assistance of counsel. The Court reversed the trial decision remanded the case for a resentencing hearing. The new hearing board affirmed a life sentence. Similarly, the Court in *United States v. Thomas* (46 MJ 311, 1997), the Court held that the military judge had erred by instructing the members to vote on a sentence to death before voting on a less severe sentence. They remanded the record with direction for a sentence rehearing. The rehearing resulted in Mr. Thomas current position as one of seven on military death row.

Future capital punishment research should give more attention to capital punishment use by the military. There have been 135 people executed by the Armed Forces since 1916, and 169 executions from 1942 – 1961. This paper reviewed almost 100 of these instances. There were executions in the pacific Theater of Operations (PTO) as well as the Korean Conflict. We conclude that the death penalty is always applied in a context, despite attempts to reform the system. More importantly, that context often reflects our social prejudices such as the value of the victim or predilection to select the penalty on people of color. With America's strong public opinion favoring the death penalty and the military preparing to

try accused terrorists currently held at the detention center in Guantanamo Bay, Cuba, it is important to watch for new possible death penalty cases involving anti-terrorism.

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ENDNOTES

1. The Federalist Papers were a series of political pamphlets written by Alexander Hamilton, John Jay and James Madison. They were used to persuade votes in individual state ratification campaigns of the usefulness of the U.S. Constitution. Given the brevity of the U.S. Constitution, scholars cite these papers to demonstrate the "framer intent" of the document.
2. See http://en.wikipedia.org/wiki/My_Lai_massacre for some specifics on this event.
3. Commissioned to West Point, Whittaker was the subject of threatening notes, routinely "hazed" by cadets and finally was beaten severely and tied to his bed. His commander concluded that he was "faking it." However, Whittaker's demand for justice and request for a court of inquiry drew national newspaper coverage. The army, quick to defend itself from critics about the brutal life of a black cadet at West Point, ultimately court martialed Whittaker rather than face the stark reality of changing two of its most cherished institutions: West Point and the military justice system (Marszalek, 1972). In 1995 President Clinton posthumously granted Whittaker's commission
4. By 1950, the public was again critical of the military justice system especially since the military was still racially segregated. The system was again overhauled by creating the Military Appeals Courts and Uniform Military Code (1950). From 1950 until the death penalty was halted by the Supreme Court (*Gregg v Furman*, 1972), only ten more soldiers were executed, the last in 1961. During time it took an average of six years between the trial date and execution. Since 1972 there have been five military death penalty decisions, four of them against African American soldiers. However, their sentences were commuted to life (Felder, 1987:9). Currently, at least five soldiers sit on death row at Leavenworth, awaiting death by lethal injection (*The Los Angeles Daily Journal*, 1994). Even without the death penalty, the military has used its justice system harshly on many occasions, including the 1986 espionage court martial of Clayton Longtree. (Headley, 1989).
5. Perry has examined race and sentencing in the military but he neglects a discussion of race and the imposition of the death penalty in the military (Perry, 1977a&b).
6. However, it must be appreciated that many offenses were handled through other disciplinary action including summary and special courts-martial and in some instances of officers, by reclassification proceedings (**USFET,** 1945:3). The statistics reported here, except where otherwise noted, are based on the dates when the general courts-martial records were received by the Branch Office of The Judge Advocate General with the European Theater of Operations. The Office was open between 18 July 1942 and 15 February 1946 (**USFET,** 1945:3).
7. The records of trial by general courts-martial in the ETO are summarized in the U.S. Army's History of the Branch Office of the Judge Advocate General with the United States Forces European Theater, Vol. and II (1945), provide an authoritative measure of the major breaches of military discipline and serious criminal offenses. The case references are from 1 to 70, based upon the individual and collective reporting of the USFET.

8. While there are no time parameters except at beginning and end of trial, we use a surrogate measure: percent of pages from the trial transcript. The actual trial "record" is often triple this size, and includes boards of review, all related correspondence, and execution records.

9. Between 1798-1989, the United States has used its armed forces in approximately 215 excursions abroad, involving millions of conscripted and voluntary citizens. The neglect of social control in the military generally, and the imposition of the death penalty by the military in particular, suggests that it is time to study this topic (Congressional Research Service, 1989). Other sources have indicated that capital punishment in the military is fertile ground for research. Albert Pierrepoint, England's official hangman until 1956, stated in his 1974 autobiography:

> As the war went on, and invasion forces built up inside Britain, the Americans became an increasing part of our population, and when a death sentence was imposed by an American court martial we were called upon to execute it. The American military prison was Shepton Mallet, and they were allowed most of the American customs except the method of execution: no standard drop, no hangman's knot, but a variable drop on a modern noose suspended from a British gallows and designed to impart instantaneous death (Pierrepoint, 1974:140).

Writing later in a privately published history of Shepton Mallet prison, Somerset, England, Disney (1986:73-74) states:

> It is related that a very severe and strict regime reigned for soldiers found guilty of any military or civil offense. One of the first projects for the Army Staff was to build a new and substantial execution "House." It was attached to the side of the main accommodation blocks and built with red bricks. Every other part of the prison is built of the local grey stone, making this brick extension to be grossly out of character with its surroundings. It was a stark reminder of what was to come...This was later confirmed, in that a total of twenty-one people were to be hanged during the American occupation and that two others were put before a firing squad.

Another popular account of executions by English assistant hangman Syd Dernley (1949-1954), provides yet another indication that U.S. soldiers were executed in England during WW II. In recounting the evening before he and another English hangman, Harry "Kirky" Kirk, executed Norman Goldthorpe for the 1950 murder of an old prostitute name Emma Howe, Dernly states that Kirk claimed he and Pierrepoint, hanged twenty-two U.S. soldiers in one morning (Dernley, 1990:133). According to Dernly, Kirk stated:

> 'We hanged twenty-two yanks in one morning,' he told us. 'They'd got people all over the place who been sentenced to death in this country and in Europe. They brought them all to Shepton Mallet in Somerset where they had a big military prison and they brought us in. We did the lot in the one morning' (Dernley, 1990: 133).

Perhaps the best well known attention directed to the execution of WW II soldiers is in the opening scene of Natanson's (1965) novel The Dirty Dozen, and the movie by the same name. The most infamous U.S. military execution of WW II took the life of a deserter, Pvt. Eddie Slovik (Huie, 1954).

10. The British public and Parliament were offended by this policy but had few options. There was little debate of the 1942 VFA, and several news reports in the *Times of London*, backed by similar official documents, described the official British position as "hands off" the American treatment of its own soldiers and cooperation. The policy was attacked in U.S. newspapers (see *Pittsburgh Courier*, 1942, 1944a thru I), and by important U.S. African Americans:

> A rigid pattern of racial segregation in Great Britain, community patterns in the country not withstanding ... it is increasingly interesting to note that the practices of Great Britain conform to those that exist in many parts of this country. Here, segregation goes much beyond their separation in military units...[T]he Army has taken to England practices that exist widely in this country and that are regarded by many persons as constituting *the* solution to the racial problem (by Truman K. Gibson, aide to Secretary Grigg, January-1943, in Graham, 1987: pp 108-109).

11. Exact troop counts for NATO/MTO are not currently available, but the US Army Web Site (2001) provided estimates for major operations in the NATO / MTO activities. At the height of MTO action, the US military featured over 500,000 active troops in the theater. However, this is less than half of Operation Overlord. While 4,000,000 men / women served in ETO, the total NATO / ETO would be between one and two million.

12 .One case, Private Eddie Slovik (#33), was victimless. In this most famous of the WWII executions, Slovik was found guilty of desertion. Note that one case, Private Charles Robinson (#64), is a murder that involved a sex-related crime, as the soldier killed a prostitute in a brothel over a dispute of payment and services.

13. By the time Japan surrendered, almost 700,000 African-Americans were serving in the U.S. Army throughout the world (Nalty and MacGregor, 1981:103).

14. See http://www.armfor.uscourts.gov/index.html for a history as well as statistics of the U.S. Board of Military Appeals.

15. See http://www.armfor.uscourts.gov/Annual.htm.