

Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 5 • 2020



Ben Spencer:
Captain & Dean
48

Advice to POTUS
32

Space Law
66

Modernization Opportunities
82

Army Lawyer

Editorial Board

Issue 5 • 2020

Captain Emma K. Fowler
Editor-in-Chief, The Army Lawyer

Captain Bradan T. Thomas
Editor-in-Chief, Military Law Review

Major Courtney M. Cohen
Director, Professional Communications Program

Mr. Fred L. Borch III
Regimental Historian and Archivist

Major Scott L. Goble
Chief, Strategic Communications

Chief Warrant Officer Two Jessica P. Marrissette
Strategic Communications Officer

Mr. Marco Marchegiani
Art Director, Government Publishing Office

Ms. Jaleesa L. Mitchell-Smith
Technical Editor

Mr. Sean P. Lyons
Managing Editor, The Army Lawyer

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published six times a year by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia for the purpose of education and performance in legal responsibilities.

The opinions expressed by the authors in the articles do not necessarily reflect the view of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps (JAGC), The Judge Advocate General's Legal Center and School, or any other governmental or non-governmental agency. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army.

Unless expressly noted in an article, all articles are works of the U.S. Government in which no copyright subsists. Where copyright is indicated in an article, all further rights are reserved to the article's author. No compensation can be paid for articles.

The Army Lawyer may make necessary revisions or deletions without prior permission of the author. An author is responsible for the accuracy of the author's work, including citations and footnotes.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed at <https://ttaglcsppublic.army.mil/tal>.

Articles may be cited as: [author's name], [article title in italics], ARMY LAW., [issue number], at [first page of article], [pincite].

On the cover: Benjamin Spencer, Dean of William & Mary Law School, and captain in the U.S. Army Reserve. (Credit: Stephen Salpukas/William & Mary)

Table of Contents

Departments

39 Administrative Actions with a Counterintelligence Twist
By Major Timothy M. McCullough

42 On Becoming a Versatile Paralegal
By Sergeant Major Anthony D. Rausch

45 Demystifying the Promotion Review Board
By Major Elizabeth N. Strickland

Court Is Assembled

2 The Opportunities of Modernization
By Brigadier General Joseph B. Berger

News & Notes

Book Review

7 Disciplined Entrepreneurship
Reviewed by Major John T. Castlen

Azimuth Check

11 Reporting Misconduct
By Colonel William R. Martin

Lore of the Corps

13 War Crimes in Sicily
Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943
By Fred L. Borch III

Special Contribution

19 War Criminal Paroled
Horace T. West and the Final Chapter of the Biscari Massacre
By Thomas Harper Kelly

Practice Notes

23 Notable Revisions of Army Regulation 600-20
By Major Michael J. Wood & Major Joshua S. Mikkelsen

26 COVID-19
Response in the Indo-Pacific Theater
By Lieutenant Colonel Laura A. Grace & Major Sean P. Mahoney

32 Effective Advice to POTUS
By Lieutenant Colonel Yevgeny S. Vindman

35 HIV and Converging Policies
By Major Nicholas D. Morjal

Features

No. 1

48 An Officer and a Dean
William & Mary's New Law Dean a JAGC Captain
Interview with Sean Lyons

No. 2

52 Revising the Exclusionary Rule
By Major William "Joey" Mossor

No. 3

66 Space Law
What It Is and Why It Matters
By Major Joshua J. Wolff

No. 4

72 The Plea of Necessity and Cyber Warfare
By Captain Katharina J. Rienks

No. 5

82 Modernizing Through Innovative Acquisition
By Major Clayton J. Cox & Major Annemarie P.E. Vazquez

Closing Argument

92 Cross-Functional Teams for the Future
By Major Douglas A. Reisinger



Special Contribution

War Criminal Paroled

Horace T. West and the Final Chapter of the Biscari Massacre

By Thomas Harper Kelly

In February 1945, United Press International (UPI) war correspondent Robert Vermillion visited the positions of the 100th Infantry Division in Alsace—near Bitché, France. His intent was to interview a sniper—from Wagoner, Oklahoma, in L Company, 399th Infantry Regiment—who was credited with killing more than 130 German troops. That Soldier, Sergeant Horace Theodore West, was a thirty-five-year-old Oklahoma native with thinning gray hair and skin “tanned the color of

smoked ham.” During the interview, West told Vermillion (the UPI reporter) that his beloved Springfield rifle, equipped with a telescopic sight, was named after his wife Mabel.¹ In his story, West described the prayer he shared with Mabel and his two children before he shipped out: he asked God to “take care of all the boys on the battlefields.”² On the subject of killing, West meekly posited, “[a] man shouldn’t be too proud of killing another man.”³ But, he added, “the Germans started it.”⁴

What Vermillion did not know, and could not have known, was that the seemingly pious West had only recently returned to combat after being imprisoned for over a year. His crime? He murdered thirty-seven Italian and German prisoners of war (POWs) in an incident now known as The Biscari Massacre.

New scholarship⁵ shows that a convicted war criminal sentenced to life, paroled, and returned to combat, continued to kill; and, in the process, he became a minor celebrity in his new unit.⁶ This new chapter of the Biscari Massacre reveals innominate dimensions of the case and unknown applications of military justice during World War II.

The Biscari Massacre

Sergeant West was a cook in A Company, 180th Infantry Regiment, 45th Infantry Division when it landed near Gela, Sicily, as part of Operation Husky.⁷ On 14 July 1943, several days after the initial landings, West’s company was engaged near the airport at Biscari. The battalion’s executive officer, Major Roger Denman, ordered West and several other American Soldiers to escort forty-eight German and Italian POWs to the rear for questioning. After marching the POWs a mile, West halted the group and selected eight or nine to report to the regimental intelligence officer. He then borrowed a Thompson sub-machine gun from his company’s first sergeant, and told him he was going to kill the “sons of bitches.”⁸ He instructed his comrades to “turn around if you don’t want to see it.”⁹ West murdered the disarmed POWs at close range, then reloaded and began firing single shots into the hearts of the POWs still moving.¹⁰

The bodies of the executed POWs were quickly discovered and brought to the attention of II Corps Commander, Lieutenant General Omar Bradley.¹¹ The same day, West’s company commander, Captain John T. Compton, had also been involved in the killing of thirty-six POWs near Biscari. Both incidents deeply troubled Bradley, who reported them to Seventh Army Commander Lieutenant General George S. Patton.¹² Patton initially

dismissed the accounts and told Bradley that the incidents would "make a stink in the press."¹³ Patton told Bradley to advise the officer responsible for the shooting to say either that the dead men were snipers, or they were shot during an escape attempt; regardless, nothing could be done about it. However, Bradley ignored Patton

was paroled and restored to active duty at the rank of Private.²² West's court-martial records were kept under lock and key at the Pentagon until the 1950s.²³

Previous scholarship traced West's service to his parole and subsequent honorable discharge, but it skipped an entire chapter of his story. Following his release,

immediately.²⁹ When West arrived at the front and learned The Kid had been picked off by a sniper, he lamented it "went plumb against my liver."³⁰ West said that "the guys in the outfit were burned up...I went to the [commanding officer] and told him I could get that sniper if he'd give me a chance. [He] said 'Fine, go git him!'"³¹ West said he went "lookin' for the bugger," and his vengeance was swift:

First thing I did was to find the hole where the kid was. I asked a lot of questions, naturally, like: "where he was sitting when he got it?"... There was no wind that day, so after figurin' the trajectory of the bullet, I picked a spot where the lousy sniper had to be when he fired at the kid. There was a fork in the tree about five feet above the ground which made a swell spot for his gun. I thought I saw movement there and put my telescopic sight on it. Sure enough, there was his head and part of his shoulder. I drew a bead with old "Mabel" and let go. The Kraut's head snapped up and I saw him tumble over backward.³²

In the following days, West claimed to have killed two more German soldiers as they attempted to sneak up a trail opposite his company's positions.³³

On 15 February 1945, West's company moved to new positions near an observation post overlooking Reyersviller, France—dubbed "The Panama Canal."³⁴ Assigned to screen the work of Soldiers expanding the Canal, West allegedly spotted six Germans and directed 60mm mortar fire that killed them all.³⁵ He then claimed to have eliminated an additional five Germans with his sniper rifle.³⁶ On another day, West was credited with the dispatch of fourteen German soldiers and a possible wounding or killing of six more while sniping and acting as a forward observer for his company's mortars.³⁷

West's reputation grew apace with his body count. He received a promotion directly from private to sergeant within three weeks of joining L Company, and was featured on the front page of the 100th Infantry Division newspaper, the

When West arrived at the front and learned The Kid had been picked off by a sniper, he lamented it "went plumb against my liver"

and pressed for charges to be brought against both Compton and West. Patton belatedly agreed.¹⁴

West was tried first.¹⁵ He was found guilty of the murder of thirty-seven POWs and sentenced to life.¹⁶ Captain Compton, whose trial took place after West, was acquitted of the charges against him.¹⁷ Compton was then reassigned and, on 8 November 1943—roughly four months after the incidents around Biscari, was killed in action.¹⁸

James J. Weingartner, the historian who first examined the incidents, argued that the Biscari Massacre "made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility of reprisals should the details of the incidents become common knowledge."¹⁹ With Compton dead, the chance that his involvement would be revealed was removed. West, however, sat in an Army prison in North Africa. His brother sought information from the War Department on details of his brother's confinement. Eventually the matter was brought to the attention of General Dwight D. Eisenhower, and he recommended that West be given another chance.²⁰

In February 1944, the War Department recommended that West be granted clemency, but that no publicity be given to his case because "to do so would give aid and comfort to the enemy, and would arouse a segment of our own citizens who are so distant from combat that they would not understand the savagery that is war."²¹ On 23 November 1944, after serving fourteen months of his life sentence, West

West was far from inconspicuous. After his parole, the Army did not assign West to a rear echelon unit.²⁴ Instead, he progressed through the Army Ground Forces replacement system, joined an infantry division fighting in France, and unexpectedly found himself appearing in his unit's newspaper, the Army's newspaper—titled *The Stars and Stripes*—and newspapers across America.²⁵

Squaring Things for "The Kid"

On 24 January 1945, Private West—along with twenty-nine other replacement Soldiers—was assigned to the depleted L Company, 399th Infantry Regiment, 100th Infantry Division.²⁶ Official records, post-war memoirs, and histories of the company give no indication that anyone there knew about his involvement with the Biscari Massacre, or his imprisonment; this is hardly surprising given the secrecy surrounding both events. Nonetheless, West quickly made a name for himself in his new unit as a sniper.

According to West, his sniping exploits were motivated by a desire to avenge the death of "The Kid"—a young Soldier he had met in a replacement depot on the way to the front and who was assigned to L Company the day before West arrived.²⁷ As the story goes, West took The Kid under his wing, shared what he learned from his earlier combat experiences, and "warned him not to move aroun' too much" on the frontlines, "particularly when you figure there might be a sniper around"²⁸ Unfortunately, The Kid became the victim of a German sniper almost

Century Sentinel.³⁸ In an article titled “Sniper Picks Off 17 Krauts to Square Things for ‘Kid,’ his battalion commander—Lieutenant Colonel Bernard V. Lentz—praised West as “a better shot than any Nazi sniper we’ve ever encountered....I’d say he personally has pushed their line back at least 150 yards.”³⁹ It was shortly after that article’s publication that Vermillion, the UPI reporter, interviewed West. The resulting story, “They Started it, Says Oklahoma Sniper with 130 Nazis to Credit,” began appearing in newspapers across the country.⁴⁰ A report of West’s exploits also appeared in the London edition of *The Stars and Stripes*.⁴¹

“150 Germans and a Legend”

A fascinating element of West’s story is how many of the sources refer to his earlier service with the 45th Infantry Division and his combat experiences in Sicily, but fail to adequately explain why West left the 45th Infantry Division and why he was assigned to the 100th Infantry Division almost eighteen months later.

The first mention of West’s earlier service appears in the *Century Sentinel*, which merely states that West had “been through the mill” with A Company, 180th Infantry Regiment, 45th Infantry Division.⁴² The 399th Infantry’s regimental history offers what is, at best, an oversimplification: “West had fought in Sicily with the 45th. He wanted to fight in Germany, so African authorities gave him a Springfield sniper rifle and shipped him off to the [European Theater of Operations].”⁴³

The UPI story describes how West had “been shooting Germans, running, sitting, and standing since his old division, the 45th, landed in Sicily [on] July 10, 1943,” but missed combat in Italy because “he was assigned to the 100th division as a rifle company headquarters handyman.”⁴⁴ But, the 100th Infantry Division had not even arrived in the European Theater of Operations until 20 October 1944; and, West’s assignment to the division did not occur until late January 1945.⁴⁵

The UPI story is also the origin of West’s unsubstantiated claims that he killed over one hundred German soldiers.⁴⁶ West was quoted as saying “I reckon I must have killed around 120 [Germans] in Sicily....

But that was close fighting. The killing in Sicily didn’t take skill as much as fire power and, most of the time, I was using a tommy gun.”⁴⁷ This was a particularly shocking statement from a Soldier previously convicted by general court-martial of murdering thirty-seven unarmed POWs with a submachine gun.⁴⁸

West’s claims are disturbing and dubious. His boast of killing 120 Germans in Sicily is particularly suspicious given his assignment as a cook in the company headquarters, and not as a member of a rifle squad.⁴⁹ The 399th Infantry Regiment

“All the Good Men I Served With”⁵⁰

On 1 April 1945, West was evacuated to a rear hospital due to an illness—possibly hepatitis—which prevented his return to his company before the end of the war in Europe.⁵¹ Despite the 448 days he spent in confinement, he had enough “points” under the Army’s discharge system to be returned to the United States in October 1945, and was honorably discharged in January of the following year.⁵² There is no indication that he received any official reprimand, or otherwise ran afoul of the military justice system, after his parole in November 1944.⁵³

West’s story after his parole is not one of redemption

history contains a photograph of West with the caption, “Legend says West killed 150 Germans. The legend is fact,” repeating West’s likely embellishment and giving it additional authority.⁵⁴ Furthermore, according to Roy Sees—who served with West in L Company, 399th Infantry—there were no witnesses to many of his “kills”:

He was kind of a loner, as far as the company concerned....He would get up in the morning early and start out with that rifle he had and we would probably see him then later again in the evening. He would stay overnight and then get up in the morning and go sniper [sic] some more....He’d come out in the morning and he’d get ready to go with his rifle on his shoulder ...and say, “Well, I’m going to go out and kill some more Krauts” and that’s the last you’d see of him during the day.⁵⁵

With regard to the claim that West was responsible for the deaths of 150 German soldiers, Sees was not convinced. “It don’t sound right to me, but he was a braggart,” Sees said.⁵⁶ “He was always bragging about killing Germans, whether he killed any or not was kind of a joke around the company because there was no way of proving whether he shot anybody, because there was nobody there but him....He was by himself, alone.”⁵⁷

While it is unclear whether West—a pre-war member of the 45th Infantry Division—maintained any connection to that unit, he was a paying member of the 100th Infantry Division veterans’ association as late as 1985; he wrote in its newsletter that he would not be able to make the division’s annual reunion, but that he “would like to be there and meet all the good men [he] served with.”⁵⁸ Horace Theodore West died in Mayer, Arizona on 24 September 1994.⁵⁹

The Legacy of the Biscari Massacre

This new research⁶⁰ adds a new dimension to the narrative of the Biscari Massacre and how its legacy must be interpreted. It may be argued that one of its perpetrators, Captain Compton, received his due when he was killed in action shortly after his trial. Despite its verdict, West’s case is not simple. He survived the war, escaped serious punishment, and wrought havoc upon the enemy after his early release. It appears that West’s desire to kill never waned, but was reformed and made acceptable in the mores of conventional warfare. And, in the process, West was elevated from murderer to cause célèbre.

West’s story after his parole is not one of redemption. It is a continuation of the same narrative of violence that began in Biscari. It may only serve as an example of the imperfect application of military justice in the American Army during World War II; however, it also illustrates, in the words

of War Department officials, the “savagery that is war.”⁶¹ **TAL**

Mr. Kelly is an intellectual property attorney in Philadelphia, Pennsylvania.

Notes

1. United Press Int'l, *Wagoner Fighter Has 130 Notches On Garand Rifle*, RECORD-DEMOCRAT (Mar. 1, 1945), <https://www.newspapers.com/clip/39339365/the-record-democrat/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. In this case, the new scholarship is based on the author's personal research.

6. *Sniper Picks off 17 Krauts to Square Things for Kid*, CENTURY SENTINEL, Feb. 24, 1945, at 1 [hereinafter CENTURY SENTINEL]. Robert Vermillion, *Missus Never Misses, Mabel Takes Care of the Sergeant*, STARS & STRIPES (London), Mar. 1, 1945.

7. Fred L. Borch, *War Crimes in Sicily: Sergeant West, Captain Compton and the Murder of Prisoners of War in 1943*, ARMY LAW., Mar. 2013, at 1.

8. *Id.*

9. *Id.*

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 3–5.

19. James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, HISTORIAN, Nov. 1989, at 38.

20. *Id.*

21. Borch, *supra* note 7, at 5.

22. *Id.*

23. *Id.*

24. A rear echelon unit would have allowed West to avoid publicity. He also would have been safe from capture and the opportunity to divulge the events of the Biscari Massacre. RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944* at 120 (2007); Weingartner, *supra* note 19, at 39; Borch, *supra* note 7, at 5.

25. ATKINSON, *supra* note 24.

26. L COMPANY, 399TH INFANTRY REGIMENT, MORNING REPORT (Jan. 24, 1945) (on file with author).

27. West was the one who nicknamed the young Soldier “The Kid.” CENTURY SENTINEL, *supra* note 6.

28. *Id.*

29. *Id.*

30. Vermillion, *supra* note 6, at 2.

31. *Id.*

32. CENTURY SENTINEL, *supra* note 6, at 1, 4. It is important to note that West's version of events differs from the memories of other L Company Soldiers. For example, John Khoury in his book, *Love Company*, approximates the death of the replacement as late February—not January. JOHN M. KHOURY, *LOVE COMPANY* (2003). Another L Company veteran, George Tyson, who wrote the definitive history of the Company, *Company L Goes to War*, recalls the death of a replacement that shares some similarities with West's description of “The Kid.” GEORGE TYSON, *COMPANY L GOES TO WAR* 103–04 (2004). However, Tyson believes the replacement's death was because of West's sniping, and not the reason for it. *Id.* According to Tyson, West was already with L Company and actively engaged in sniping when the replacement arrived in late January 1945, and in Tyson's opinion, the replacement's death was likely attributable to it. *Id.* Also, it is possible that West referred to the replacement only as “The Kid” because neither he, nor anyone else in the company, knew the Soldier's name. According to Tyson, when the replacement's body was searched he was found not to be wearing any dog tags and ultimately was identified through a process of elimination by regimental staff. *Id.* To the Soldiers in L Company who never had the chance to meet or even see him, he “was like a ghost. An enigma. A rumor.” *Id.*

33. CENTURY SENTINEL, *supra* note 6 at 4.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. KHOURY, *supra* note 32, app. D; CENTURY SENTINEL, *supra* note 6, at 1.

39. CENTURY SENTINEL, *supra* note 6, at 4.

40. Robert Vermillion, *They Started it, Says Oklahoma Sniper With 130 Nazis to Credit*, LINCOLN J. STAR, Feb. 27, 1945, at 1.

41. *Id.*; Vermillion, *supra* note 6, at 2.

42. CENTURY SENTINEL, *supra* note 6.

43. FRANKLIN GURLEY, *399TH IN ACTION: WITH THE 100TH INFANTRY DIVISION 100* (1945).

44. Vermillion, *supra* note 40.

45. *Id.*

46. United Press Int'l, *supra* note 1.

47. Vermillion, *supra* note 40.

48. *Id.*

49. While West was assigned to the company headquarters as a cook, for most of the previous year he had been detached from the company on special duty—including as the acting Provost Sergeant in charge of the division stockade at Fort Devens. Second Lieutenant David T. Duncan—an officer in A Company—testified that, on the day of the massacre, “Sergeant West was in Company ‘A’, but had been more or less in an individual capacity you might say. He was on special duty for a number of months in the [United States] before coming across, and consequently had been replaced in his squad with another Sergeant...for that reason, West was attached to Company Headquarters and was not controlling a squad.” *United States v. West*, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 90; Off. of the Staff Judge Advoc., Headquarters, 45th Infantry

Div., Proceedings of Board of Med. Officers 5 (26 Aug. 1943).

50. GURLEY, *supra* note 43.

51. *Id.*

52. *Id.*

53. Interview with Roy Sees (May 8, 2015).

54. 100TH DIVISION ASSOCIATION NEWSLETTER, HOLIDAY ISSUE 1985, at 9.

55. Viral hepatitis was a problem in the European Theater of Operations during the winter of 1945. The 325th Medical Battalion's March unit journal (the 325th was the 100th Infantry Division's organic medical unit) states that it was a major problem in the division, and the report of the following month notes that while the number of hepatitis cases had decreased considerably, it still warranted mention. 4 PREVENTIVE MEDICINE IN WORLD WAR II: COMMUNICABLE DISEASES TRANSMITTED CHIEFLY THROUGH RESPIRATORY AND ALIMENTARY TRACTS 35 (John Boyd Coates & Ebbe Curtis Hoff, eds., 1958); U.S. DEPT' OF ARMY, MONTHLY SANITARY REPORT FOR THE 325TH MEDICAL BATTALION 4 (24 Jan. 1945) (NARA RG 407, Entry 427); U.S. DEP'T OF ARMY, MONTHLY SANITARY REPORT FOR THE 325TH MEDICAL BATTALION 4 (1 Apr. 1945) (NARA RG 407, Entry 427); KHOURY, *supra* note 32, app. D.

56. Certificate of Discharge, Sergeant Horace T. West (U.S. Army, Jan. 1946).

57. *Id.*

58. 100TH DIVISION ASSOCIATION NEWSLETTER, *supra* note 54.

59. HORACE T. WEST IN THE U.S., SOCIAL SECURITY DEATH INDEX, 1935–2014, ANCESTRY.COM, <https://search.ancestry.com/cgi-bin/sse.dll?indiv=try&db=ssdi&h=66536236> (search results available after signing in).

60. The “new research” listed here was conducted by the author.

61. Borch, *supra* note 7, at 5.