

## Lore of the Corps

### The “Malmedy Massacre” Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath

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On 17 December 1944, at a road intersection near Malmedy, Belgium, German Waffen-SS troops shot and killed more than seventy American prisoners of war (POWs) who laid down their arms. Several weeks after the “Malmedy Massacre,” even more American POWs and a smaller number of unarmed Belgian civilians were also shot and killed by German troops during the Ardennes Offensive, commonly known as the “Battle of the Bulge.”

Seventy-four Germans were later tried by a U.S. military government court for the murders committed at Malmedy and other locations between 16 December 1944 and 13 January 1945. Seventy-three were eventually found guilty following the trial, which began on 16 May 1946, at Dachau, Germany. Forty-three were sentenced to be hanged; twenty-two received life imprisonment; and the remainder were sentenced to jail terms between ten and twenty years. However, no one was actually put to death, and by Christmas 1956, all the convicted men had been released from prison.

Lieutenant Colonel (LTC) Burton F. Ellis, a member of the Judge Advocate General’s Department (JAGD), served as the chief prosecutor at the Malmedy Massacre trial, but despite his success in court, controversy dogged the proceedings for years after the trial. Today, the truth about the Malmedy massacre, and whether justice was served by the military government court that heard the evidence, still provokes disagreement among those who study the episode.

There is no doubt that U.S. POWs and Belgian civilians were shot, machine-gunned, or mistreated at Malmedy and other nearby locations by SS troops in a *Kampfgruppe* (a regimental-sized “battle group”) under the command of SS-Colonel (COL) Joachim Peiper. Survivors of the events bore witness to these facts. At Malmedy, for example, then-First Lieutenant (1LT) Virgil P. Lary witnessed American POWs being killed by machine gun fire; Lary survived by falling down face first in the muddy meadow and playing dead until he could escape. Lary later testified that he saw German troops kicking the bodies of the fallen Americans and then “double-tapping” those who flinched.<sup>1</sup>

The exact number of American and allied civilian victims will never be known and the prosecution avoided the issue by charging the seventy-four German SS accused as follows:

In that \_\_\_\_\_ did, at or in the vicinity of Malmedy, Honsfeld, Bullingen, Ligneauville, Stoumont, La Gelize, Cheneus, Petit Their, Trois Ponts, Stavelot, Wanne, and Lutre-Bois, all in Belgium, at sundry times between 16 December 1944 and 13 January 1945, willfully, deliberately, and wrongfully permit, encourage, aid, abet and participate in the killings, shooting, ill treatment, abuse, and torture of members of the Armed Forces of the United States of America, then at war with the then German Reich, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, the exact names and numbers of such persons being unknown but aggregating several hundred, and of unarmed allied civilian nationals, the exact names and numbers of such persons being unknown.<sup>2</sup>

In any case, the killings and mistreatment of the POWs violated article 4 of the 1907 Hague Convention<sup>3</sup> (requiring humane treatment of POWs) and article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War<sup>4</sup> (mandating both humane treatment and requiring that POWs be protected “against violence, insults and public curiosity”), both of which governed the conduct of German troops in general and Peiper’s *Kampfgruppe* in particular at Malmedy.

On 16 May 1946, some seventeen months after the killings at Malmedy, a “military government court” consisting of eight officers and convened by Headquarters, U.S. Third Army, began hearing evidence against the German accused. While styled as a military government

<sup>1</sup> CHARLES WHITING, MASSACRE AT MALMEDY 52–53 (1971). “Double-tapping” is the practice of shooting wounded or apparently dead soldiers to insure that they are dead. Some also call it a “dead check.” Under customary international law and the Geneva Conventions of 1929, however, double tapping was—and remains—a war crime because it is unlawful to kill the wounded. See GARY D. SOLIS, LAW OF ARMED CONFLICT 327–32 (2010).

<sup>2</sup> JAMES J. WEINGARTNER, A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY MASSACRE 53 (2000).

<sup>3</sup> Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>4</sup> Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

court in the convening orders, the tribunal was more akin to a military commission in that it operated with relaxed rules of evidence and procedure (e.g., hearsay was admissible and there was no presumption of innocence) and required only a two-thirds majority for a death sentence. While the senior member of the panel, Brigadier General (BG) Josiah T. Dalbey, wielded considerable power as court president, a law officer, COL Abraham H. Rosenfeld, was responsible for interpreting the law and ruling on procedural and evidentiary matters. Meanwhile, although Rosenfeld was a Yale-educated attorney, he was not a judge advocate. Similarly, the chief defense counsel, COL Willis M. Everett, Jr., was a lawyer<sup>5</sup> but not a judge advocate, and only one of his five assistant defense counsel, 1LT Wilbert J. Wahler, was a member of the JAGD.<sup>6</sup> However, the other four members of the defense team were attorneys. The Trial Judge Advocate who prosecuted the case, LTC Ellis, was apparently the only other attorney who wore the crossed pen and sword insignia of the JAGD on his uniform.<sup>7</sup>

The court proceedings, held in Dachau within sight of the infamous concentration camp of the same name, began with Ellis's opening statement and his assertion that the Government would prove that "538 to 749" American POWs and "over 90" Belgian civilians had been murdered.<sup>8</sup> Over the next three weeks, the prosecution called members of Peiper's *Kampfgruppe*, who had not been charged with crimes, to testify that Peiper and other SS officers and noncommissioned officers had instructed their men to ignore the rules of war governing prisoners. For example, SS-Private First Class Fritz Geiberger stated under oath that his platoon leader had given "a blanket order requiring the shooting of prisoners of war."<sup>9</sup> SS-Corporal Ernst Kohler testified that his platoon was ordered to "show no mercy to Belgian civilians" and to "take no prisoners," as this would avenge German women and children killed in Allied air raids.<sup>10</sup>

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<sup>5</sup> While he had been an attorney since graduating from Atlanta Law School in 1924, Everett had very little, if any, trial experience. His official military records show that his law practice focused on "titles, estates, investments, corporation and civil law." TJAGLCS Historian's Files, WD AGO Form 66-4, Main Civilian Occupation (1 Dec. 1944). Given the relaxed rules of evidence and procedure in the Malmedy trial, however, Everett's lack of litigation experience did not hurt his effectiveness as a defense counsel.

<sup>6</sup> Wahler graduated from the 13th Officer Candidate Class at The Judge Advocate General's School in late 1945. JUDGE ADVOCATE GENERAL'S SCHOOL, STUDENT AND FACULTY DIRECTORY 79 (1946) [hereinafter DIRECTORY].

<sup>7</sup> Ellis graduated from the 21st Officer Class at the Judge Advocate General's School in 1944. DIRECTORY, *supra* note 6, at 14. Like Everett, he too had little criminal litigation experience: Ellis had been a corporate tax attorney in civilian life. See WEINGARTNER, *supra* note 2, at 40.

<sup>8</sup> WEINGARTNER, *supra* note 2, at 54.

<sup>9</sup> *Id.* at 58.

<sup>10</sup> See WHITING, *supra* note 1, at 191.

Additional testimony came from Malmedy survivors 1LT Lary and an ex-military policeman named Homer Ford, who had heard the American wounded "moaning and crying" and watched the Germans "either shoot them or hit them with the butts of their guns."<sup>11</sup> A number of Belgian civilians also declared under oath that they had witnessed the brutal and unjustified killing of unarmed civilians by SS troops. The testimony, especially of the German witnesses, was designed to prove that the killing of the American POWs and Belgian civilians was premeditated because it had been part of a conspiracy or common design.

The bulk of the prosecution's evidence, however, was not live testimony. Nearly one hundred written sworn statements linked each of the SS accused "with crimes that were described in exhaustive detail."<sup>12</sup> If BG Dalbey and the seven other panel members took these statements at face value, the accused would almost certainly be convicted.

Everett and the defense counsel soon learned, however, that there were problems with some of the sworn statements. Their German clients insisted that many of their statements were the result of trickery, deceit, and in some cases, coercion. Peiper claimed that one of his fellow accused had been beaten for nearly an hour by American investigators seeking a confession—although apparently no incriminating statement was obtained. Two other German accused claimed that ropes had been placed around their necks during questioning. This act, they believed, was preparatory to hanging. However, the most prevalent interrogation technique had been the use of a "mock trial," where the accused was brought before a one-person tribunal. While he sat with his "defense counsel," the "court" rushed through the proceedings before informing the surprised accused that, as he was to be hanged the next day, he "might as well write up a confession and clear some of the other fellows [co-accused] seeing as he would be hanged."<sup>13</sup> Just how many sworn statements were obtained through the use of these fake tribunals, which Army investigators admitted they had used at times, and which they called a "*schnell* (or fast) procedure," will never be known, but no doubt some of the statements introduced at trial resulted from their use. On the other hand, as some statements from the SS accused had been obtained after "one or two brief and straightforward interrogation sessions," it is equally true that subsequent claims of widespread coercive interrogation are false.<sup>14</sup>

Everett was sufficiently alarmed by his clients' claims of abuse to report the alleged prosecutorial misconduct to COL Claude B. Mickelwaite, the Deputy Theater Judge Advocate in Wiesbaden, Germany. Mickelwaite, who had

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<sup>11</sup> *Id.* at 194.

<sup>12</sup> See WEINGARTNER, *supra* note 2, at 71.

<sup>13</sup> *Id.* at 42.

<sup>14</sup> *Id.* at 74.

overall responsibility for the prosecution of war crimes in Germany, sent a subordinate, LTC Edwin Carpenter, to Dachau to investigate. Carpenter concluded that mock courts and other psychological stratagems had, in fact, been used by Army investigators, but Carpenter also concluded that none of the sworn statements obtained from the accused were the product of physical violence.<sup>15</sup>

After the prosecution rested, the defense presented its evidence. Everett argued that the Malmedy massacre was an unfortunate event that had occurred in the midst of fast-moving and very fluid combat operations during the Battle of the Bulge. To support his argument, Everett called a number of German officers to testify that there had been no formal orders to murder POWs. Everett also managed to locate a West Point graduate and regular Army officer, LTC Harold D. McCown, who testified under oath that he had been captured by Peiper's *Kampfgruppe* and had been well-treated while a POW.<sup>16</sup> Everett and his defense team also argued that the nearly one hundred sworn statements introduced into evidence by the prosecution were unreliable products of coercion.

But it was a tough road for the defense, especially when Peiper testified on his own behalf. While denying that he had pre-existing orders from his superiors to kill POWs, or that he had directed troops under his command to kill combat captives, the forty-two-year-old Peiper did admit that it was "obvious" to experienced commanders that POWs sometimes must be shot "when local conditions of combat require it."<sup>17</sup> Under cross-examination by LTC Ellis, Peiper also admitted to misconduct that, while uncharged, was devastating. Peiper, who had served as Reichsfuhrer-SS Heinrich Himmler's adjutant from 1938 to 1941, admitted that he had been with Himmler at a demonstration where human beings had been gassed.<sup>18</sup>

On 11 July 1946, after a two month trial, BG Dalbey and the panel retired to consider the evidence. Two hours

and twenty minutes later, they were back with a verdict: All seventy-three accused<sup>19</sup> were found guilty of the "killing, shooting, ill-treatment, abuse and torture of members of the armed forces of the United States of America and of unarmed Allied civilians."

During sentencing, BG Dalbey and his fellow panel members heard oral statements from more than half the convicted men. While one third of those who addressed the court denied the charges against them, a small number admitted their guilt. For example, a nineteen-year-old SS man confessed to killing two civilians but claimed the defense of superior orders. Another accused admitted he had shot and killed an American POW while acting under orders. A sergeant also admitted he had killed a POW but insisted that "the heat of combat, superior orders, and incitement by his comrades" was to blame.<sup>20</sup>

On July 16, 1946, the panel announced that forty-three convicted SS troops, including Peiper, were sentenced to death. Twenty-two received life sentences, and the rest were sentenced to jail terms of ten to twenty years in duration.

While the Army no doubt hoped that the verdict and sentences meant the end of the Malmedy proceedings, that was not to be. On the contrary, after leaving active duty in June 1947 and returning home to Atlanta, Georgia, Willis Everett continued to work tirelessly as a defense counsel for Peiper and his seventy-two co-accused.

Recognizing that there was no formal avenue of appeal from the Malmedy verdict, Everett instead began a vocal and public letter writing campaign. Everett argued that "80 to 90 percent of the confessions had been obtained illegally"<sup>21</sup> and that this prosecutorial misconduct had deprived Peiper and his seventy-two fellow SS-troops of justice. Everett also insisted that it had been impossible for him and his team to mount an effective defense because the court's desire for vengeance made the Malmedy verdict a foregone conclusion.

In the meantime, COL James L. Harbaugh, the European Command (EUCOM) Staff Judge Advocate, was reviewing the Malmedy record of trial and preparing a recommendation for General (GEN) Lucius Clay, then serving as Military Governor of the American Zone of Occupation (Germany). Harbaugh's legal review concluded that the evidence was insufficient to sustain some convictions and that many of the death sentences were inappropriate. As a result, on March 20, 1948, GEN Clay

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<sup>15</sup> *Id.* at 44.

<sup>16</sup> See WHITING, *supra* note 1, at 195; WEINGARTNER, *supra* note 2, at 84–85.

<sup>17</sup> See WEINGARTNER, *supra* note 2, at 91. Joachim Peiper had extensive combat experience and was highly decorated. Born in Berlin in January 1915, he joined the SS in 1934 and was commissioned after completing officer candidate school. After the outbreak of World War II, Peiper fought in Poland and France. He then moved east with Waffen-SS forces as part of Operation Barbarossa. In March 1943, Peiper was awarded the Knight's Cross for heroism near Charkov, Russia, and he was decorated a second time—with the Knight's Cross with Oakleaves—in January 1944 for his bravery on the Eastern Front. On 11 January 1945, shortly after the Malmedy killings, Peiper was decorated a third time—with the Knights Cross with Oakleaves and Swords—for his actions during the defensive withdrawal of German forces in France after the D-Day landings. (While the Knight's Cross was Germany's highest decoration for combat valor in World War II, it is more akin to the Army Distinguished Service Cross than the Medal of Honor.) See JOHN R. ANGOLIA, *ON THE FIELD OF HONOR* 228 (1979).

<sup>18</sup> *Id.* at 92.

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<sup>19</sup> The seventy-fourth accused originally arraigned was released to French authorities before the panel retired to reach a verdict. He was a French citizen, and the French exercised jurisdiction in his case. See WEINGARTNER, *supra* note 2, at 103.

<sup>20</sup> *Id.* at 105.

<sup>21</sup> FRANK M. BUSCHER, *U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955*, at 38 (1989).

reduced thirty-one of the forty-three death sentences to life imprisonment, but confirmed the remaining twelve death sentences, including Peiper's. General Clay also disapproved the findings in several cases, which freed thirteen other men.

Everett remained convinced that the remaining accused required a new trial, and on May 14, 1948, he filed a 228-page motion and petition with the U.S. Supreme Court. In that motion, he requested leave to file a petition for a writ of habeas corpus for relief from the sentences of the Malmedy trial. The Supreme Court denied the motion, but it was a close decision: The Court split four to four (with Justice Robert Jackson disqualifying himself because of his work as Chief Prosecutor at Nuremberg).<sup>22</sup>

Undeterred, Everett now looked for other ways to help the German accused. Unfortunately, he began to lie about how the Malmedy accused had been treated prior to trial, insisting that Peiper and the troops of the *Kampfgruppe* had been routinely beaten, starved, and tortured to compel them to confess to crimes. Everett also suggested that mock trials had been "the rule rather than the exception."<sup>23</sup> Everett convinced two Democratic members of Congress from Georgia, Congressman James "Jim" Davis and Senator Walter F. George, to meet with Secretary of Defense James V. Forrestal and Secretary of the Army Kenneth C. Royall on the issue. Secretary Royall was so upset by Everett's allegations of prosecutorial misconduct that he ordered a stay of all executions pending further review.<sup>24</sup> In July 1948, Royall named his own three-person commission, chaired by Texas Supreme Court justice Gordon Simpson, to review not only the Malmedy trial death sentences but also the one hundred and twenty-seven capital sentences imposed in other war crimes trials conducted at Dachau. Everett's allegations of unfairness and foul play at the Malmedy trial "had clearly put the Army on the defense,"<sup>25</sup> and his claims threatened to undermine the validity of the Army's entire

war crimes trial program in Germany. After all, if coercive interrogation techniques had been used to obtain convictions in other trials at Dachau, the fairness of all German war crimes trials in U.S. Army military courts would be called into question.

With the press in the United States trumpeting Everett's claims of malfeasance, a number of Catholic and Protestant bishops in Germany now joined the dialogue. Cardinal Josef Frings of Cologne and Bishop Johannes Neuhausler both launched vociferous campaigns against the Dachau war crimes trials. Frings "strongly opposed the entire concept of bringing the perpetrators to justice," and insisted that the Allies had followed a "pagan and naive" optimism for taking it upon themselves to make judgments about Nazi guilt.<sup>26</sup> Neuhausler, encouraged by criticism of the Malmedy trial, "intensively lobbied American authorities on behalf of convicted war criminals."<sup>27</sup> In March 1948, he also wrote to five members of Congress demanding that they investigate the "torture, mistreatment and calculated injustice" committed by Army personnel investigating the Malmedy war crimes.<sup>28</sup>

Fortunately for the Army—and the JAGD—the Simpson commission concluded in September 1948 that the war crimes trials being conducted in Germany were "essentially fair" and that there was no "systematic use of improper methods to secure prosecution evidence."<sup>29</sup> However, the Malmedy trial was different; the use of mock trials had cast "sufficient doubt" on the proceedings to make it "unwise" to carry out the remaining death sentences.<sup>30</sup> Although GEN Clay still had the authority to affirm the death sentences, there was little doubt that the Simpson commission findings meant Peiper and the others would escape the gallows.

Shortly after the Simpson commission delivered its report to Secretary Royall, a Senate Armed Services Committee subcommittee chaired by Senator Raymond Baldwin began hearings on the Malmedy case. Beginning in March 1949, the subcommittee heard from 108 witnesses and examined thousands of pages of documents. Baldwin also invited Senator Joseph McCarthy to participate as a visiting member of the subcommittee. McCarthy's participation was intended to "gain additional credibility and quiet the more radical Army critics,"<sup>31</sup> but inviting McCarthy turned out to be a disaster. He dominated the subcommittee hearings for almost a month and "sharply

<sup>22</sup> Everett v. Truman, 334 U.S. 824 (1948); see BUSCHER, *supra* note 21, at 38.

<sup>23</sup> See WEINGARTNER, *supra* note 2, at 151.

<sup>24</sup> See BUSCHER, *supra* note 21, at 38–39. Royall's actions almost certainly were influenced by his own experience with military commissions. In 1942, then-COL Royall had served as one of three defense counsel for the eight U-boat saboteurs being prosecuted before a military tribunal convened by Franklin D. Roosevelt. (Royall was not a member of the JAGD, but he had received a direct commission as a colonel, Army General Staff, in 1942.) Believing that Roosevelt lacked the constitutional authority to convene a secret military commission to try his clients, Royall aggressively challenged the lawfulness of the tribunal before the U.S. Supreme Court. Although he ultimately did not prevail, Royall insisted that "to preserve our own system of government," it was important that the military commission not trample on the rights of the German defendants. As Royall put it: the United States would have "an empty victory" if it failed to adopt procedures at the military commission that reflected "fair administration of law." The real test of a system of justice "is not when the sun is shining but when the weather is stormy." LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 113–14 (2005).

<sup>25</sup> See BUSCHER, *supra* note 21, at 38.

<sup>26</sup> *Id.* at 93.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See BUSCHER, *supra* note 21, at 39; WEINGARTNER, *supra* note 2, at 177.

<sup>30</sup> See BUSCHER, *supra* note 21, at 39.

<sup>31</sup> *Id.*

attacked the Army.”<sup>32</sup> McCarthy had a particularly “heated confrontation” with now-COL Ellis, whom McCarthy accused of grave misconduct at the Malmedy trial.<sup>33</sup>

In October 1949, the subcommittee published a 1700-page report. It unanimously concluded that the allegations of physical mistreatment and torture were false and that the claims that violence had been used to obtain confessions were without merit.<sup>34</sup> However, the report did find that Army investigators had employed mock trials “in not more than 12 cases of the several hundred suspects interrogated by the war crimes investigative teams.”<sup>35</sup> The subcommittee criticized these mock trials as a “grave mistake” because the use of psychological trickery was unnecessary and had ultimately been exploited by critics of the war crimes trial program. Significantly, the subcommittee found that “American authorities have unquestionably leaned over backward in reviewing any cases affected by the mock trials . . . [I]t appears many sentences have been commuted that otherwise might not have been changed.”<sup>36</sup>

In the end, it was all too much for American military decision-makers in Germany, and on 31 January 1951, GEN Thomas T. Handy, who succeeded Clay, commuted the death sentences of Peiper and the remaining Malmedy accused. Handy followed the advice of COL Damon Gunn, the new Theater Judge Advocate, who had counseled that a major reason to commute the death sentences was “the probable negative congressional reaction to additional executions.”<sup>37</sup> By Christmas 1956, all the Malmedy accused had been released from prison.

Measured by today’s standards, and with the benefit of hindsight, the Malmedy court proceedings were certainly flawed. First, the prosecution’s use of fake judicial proceedings and coercive interrogation techniques to obtain statements from the accused compromised their reliability

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<sup>32</sup> See BUSCHER, *supra* note 21, at 40.

<sup>33</sup> *Id.* at 41. Joseph Raymond McCarthy (1909–1957) served as U.S. Senator from Wisconsin from 1946 to 1957. While McCarthy was relatively unknown at the time of the Malmedy hearings, he soon became a high-profile national figure after claiming in February 1950 that he had a list of Communist Party members who were employed by the U.S. State Department. McCarthy subsequently charged that Communists (and Soviet spies) had infiltrated other parts of the U.S. Government, including the U.S. Army. By December 1954, however, McCarthy’s tactics and his inability to prove claims of subversion resulted not only in a loss of popularity but also a vote of censure by his fellow senators. McCarthy died at Bethesda Naval Hospital in May 1957. He was forty-eight years old. However, his impact on America has not been forgotten. The term “McCarthyism” (coined by his opponents) continues to mean the “political practice of publicizing accusations of disloyalty or subversion with insufficient regard to evidence.” AMERICAN HERITAGE DICTIONARY 809 (1979).

<sup>34</sup> MALMEDY MASSACRE REPORT, SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, U.S. SENATE, 81ST CONG., 1ST SESS. 6–7 (1949).

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 40.

and consequently tainted the entire prosecution effort. As evidenced by Secretary Royall’s decision to have a commission look at *all* the death penalty cases tried at Dachau, flaws in the Malmedy prosecution subsequently spilled over to other war crimes trials, which became subject to Congressional scrutiny.

On the other hand, there is no doubt that American POWs were murdered at Malmedy and that few of the Malmedy survivors could identify the SS troops who had opened fire on them. It is likely that government investigators felt justified in using trickery and deceit to obtain evidence from the German accused because there was no other way to obtain proof; confessions were required if justice was to be obtained for the dead.

Second, the single trial of more than seventy accused, represented by six American defense counsel, smacks of unfairness, especially as each accused faced a death sentence. As there was no presumption of innocence at the trial and the panel members spent less than three hours deliberating before returning with a finding of guilty, it is difficult to conclude that there was a deliberative process instead of a rush to judgment. On the other hand, when the panel members heard about Peiper’s activities as Heinrich Himmler’s adjutant and heard him admit that “local conditions” sometimes demanded that POWs be executed, it was reasonable for these same panel members to find that Peiper had either ordered the execution of Americans or had condoned the killings. Alternatively, the panel members could have concluded that Peiper was guilty as charged because he had failed to control the members of his *Kampfgruppe*, failed to take action to prevent future killings, and failed to discipline the culpable parties whom he should have known had killed POWs and unarmed civilians. Additionally, as the panel members had access to nearly one hundred sworn statements linking each accused to the charged offenses, there arguably was sufficient evidence to support the court’s verdict.

While the killings at Malmedy were homicides, there was no credible evidence that the killings were ordered, deliberate, or pre-planned. Some historians believe that the impetus for the killings occurred when Georg Fleps, a twenty-one-year old SS-trooper, opened fire of his own volition. Once he began shooting, others armed with machine guns joined in.<sup>38</sup> Consequently, although these murders qualify as war crimes, the event preceding the murders could very well have been spontaneous. But the Malmedy court failed to adequately address the *mens rea* of the seventy-three SS troops it convicted; a fairer determination of that criminal intent could have resulted in fewer death sentences, and perhaps some acquittals.

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<sup>38</sup> See WHITING, *supra* note 1, at 51–52; WEINGARTNER, *supra* note 2, at 62; see also Michael Reynolds, *Massacre at Malmedy During the Battle of the Bulge*, WORLD WAR II, Feb. 2003, at 16, 16–21.

As for Everett, he had never spent even a day in combat and had arrived in Europe only after the fighting was over. Despite the lack of first-hand knowledge about military operations, especially against Waffen-SS units, Everett consistently made pro-German statements that showed a marked insensitivity to the suffering that many had experienced under the German Reich. For example, Everett insisted that it was wrong for the United States to prosecute Germans for war crimes when American military personnel had committed similar offenses in the heat of battle.<sup>39</sup> Given the extent of the Holocaust—and the participation of Waffen-SS officers like Peiper in it—such a claim made Everett appear to be either disingenuous, foolish, or both. Additionally, Everett’s own prejudices hurt his case. He repeatedly railed against COL Rosenfeld, the “Jew Law Member” at Malmedy and “Jewish pressure . . . demanding blood and death penalties.”<sup>40</sup> While studying in New York City in 1945, Everett was upset to see “two black negroes” in the choir at an all white church, as this “spoiled the service.” He also wrote to his wife that he could not “stomach” sharing a bathroom with a male African-American student at Columbia University.<sup>41</sup>

But there can be no dispute about one fact: Everett was an effective defense counsel, and his unwavering support of the Malmedy accused and unending agitation on their behalf is the chief reason all were spared the hangman’s noose. At least one of the accused, however, could not escape a final reckoning. On 14 July 1976, then sixty-one-year-old Peiper was living in Traves, France, when his home was fire-bombed. He died in the resulting blaze. Because the attack occurred on Bastille Day, historians think it likely that Peiper was assassinated by former members of the French Resistance.

Today, the Malmedy Massacre remains an example of the difficulties involved in prosecuting war crimes. Although American POWs had been murdered by SS troops, the use of trickery and deceit to obtain evidence against the German accused called into question the validity of the trial, allowed critics to paint the accused as victims of American injustice, and cast a shadow on the proceedings that exists to this day.

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website

*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

<https://www.jagcnet.army.mil/8525736A005BE1BE>

<sup>39</sup> See WEINGARTNER, *supra* note 2, at 151.

<sup>40</sup> *Id.* at 68, 206.

<sup>41</sup> *Id.* at 30–31.