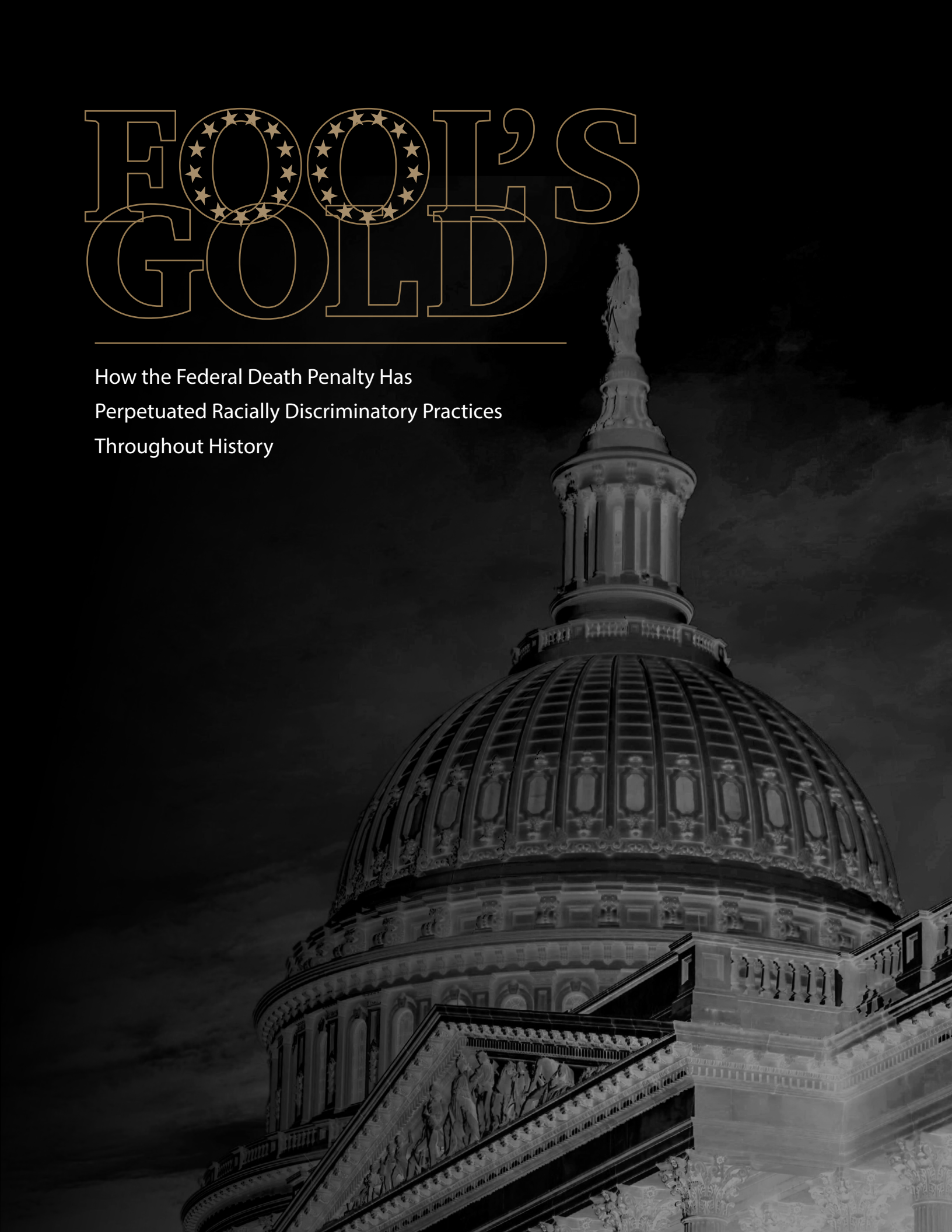
FOOL'S GOLD

How the Federal Death Penalty Has Perpetuated Racially Discriminatory Practices Throughout History



“Federal Defendants also share many of the same characteristics as state court defendants: they are poor, frequently traumatized and mentally impaired, and disproportionately people of color.”

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Gold

Introduction

The federal death penalty has been called the “gold standard” of capital punishment systems. Its supporters claim it provides the highest quality legal representation for those accused of a narrow set of exceptional crimes.

In reality, an examination of the data and an understanding of historical use reveals that the federal death penalty has the same longstanding, systemic problems as do state death penalty systems, including arbitrariness, ineffective legal representation, and especially, racial bias.

Standard

OF AMERICAN DEATH AND JUSTICE

It is a common assumption that the federal death penalty is reserved only for the most serious crimes against the country, like terrorism, that have a unique federal interest. But an expansion of the federal death penalty in the 1990s added more than 60 crimes that carried a potential death sentence. The cases the federal government decides to pursue are rarely "exceptional" compared to the cases tried at the state level. Federal defendants also share many of the same characteristics as state court defendants: they are often poor, traumatized and mentally impaired, and disproportionately people of color.

This report documents use of the federal death penalty from its earliest beginnings through modern day. Like many state-level capital punishment systems, the federal death penalty has been used in a racially biased manner, a conclusion that the many historical examples and data in this report confirm. The federal death penalty was a tool historically used by the government to intimidate and subjugate people of color, particularly Black and Native American communities. Today, the most active death-sentencing federal jurisdictions were once the nation's leaders of extra-judicial lynchings, a through line of connection that links the past to the present and raises serious questions about the future use of the federal death penalty.

Historical Use of the Federal Death Penalty

1790–1861

Before the Civil War, the Federal Death Penalty Was Reserved Only for Crimes That Pertained to a Narrow Federal Interest.

Historically, the federal death penalty was only a possible sentence for a small number of crimes that threatened the stability and security of the nation.[1] The Crimes Act of 1790, the first federal legislation authorizing the death penalty, allowed the practice for a handful of offenses, including treason, intentional murder on federal property, piracy, and counterfeiting or forgery.[2]

There were at least 63 federal executions during this time period. The majority of those executed (38, or 60%) were white men.[3] Later, the U.S. Civil War and continued westward expansion into Native American land contributed to a stark demographic shift among those executed by the federal government.[4]

An ACT for the PUNISHMENT of certain CRIMES againſt the UNITED STATES.

Sec. 1. BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That if any perſon or perſons, ſhall levy war againſt them or any of them within the United States of America, or ſhall adhere to their enemies, giving them aid and comfort within the United States or elſewhere, and ſhall be thereof convicted on confeſſion in open court, or on the teſtimony of two witneſſes to the ſame overt act of the treaſon, whereof he or they ſhall ſtand indicted, ſuch perſon or perſons ſhall be adjudged guilty of treaſon againſt the United States, and ſhall ſuffer death by being hanged as a felon, and ſhall forfeit to the uſe of the United States all the eſtate real and perſonal, which he or they had at the time of committing the treaſon aforeſaid.

Sec. 2. AND BE IT ENACTED, That if any perſon or perſons having knowledge of the actual commiſſion of any of the treaſons aforeſaid, ſhall conceal and not diſcloſe and make known the ſame to the Preſident of the United States or ſome one of the Judges thereof, or to the Preſident or Governor of a particular State or ſome one of the Judges or Juſtices thereof, ſuch perſon or perſons on conviction ſhall be adjudged guilty of miſpriſion of treaſon, and ſhall be impriſoned not exceeding ſeven years at the diſcretion of the court, and fined not exceeding the clear yearly value of his real and perſonal eſtate during the term of his imprisonment.

Sec. 3. AND BE IT ENACTED, That if any perſon or perſons ſhall, within any fort, arſenal, dock-yard, magazine, or in any other place or diſtrict of country, under the ſole and excluſive juriſdiction of the United States, commit the crime of wilful murder, ſuch perſon or perſons on being thereof attainted, ſhall be adjudged to ſuffer death by being hanged as a felon, and forfeit all the eſtate both real and perſonal, which he or they had at the time of committing the crime, to the uſe of the United States.

Sec. 4. And further to deter perſons from committing the ſaid heinous crime of murder—BE IT alſo ENACTED, That the body of the murderer ſo convicted, ſhall after execution be immediately delivered by the Marſhall or his Deputy and his Officers, to ſuch ſurgeon as the court before whom the ſaid conviction is had ſhall direct, who ſhall give to the ſaid Marſhall or his Deputy a receipt for the ſame, and the body ſo delivered ſhall be diſſected and anatomiſed by the ſaid ſurgeon, or ſuch perſon or perſons as he ſhall appoint for that purpoſe, and the ſaid court ſhall, in the ſentence pronounced againſt the ſaid murderer, expreſs the award of delivery of his body as aforeſaid.

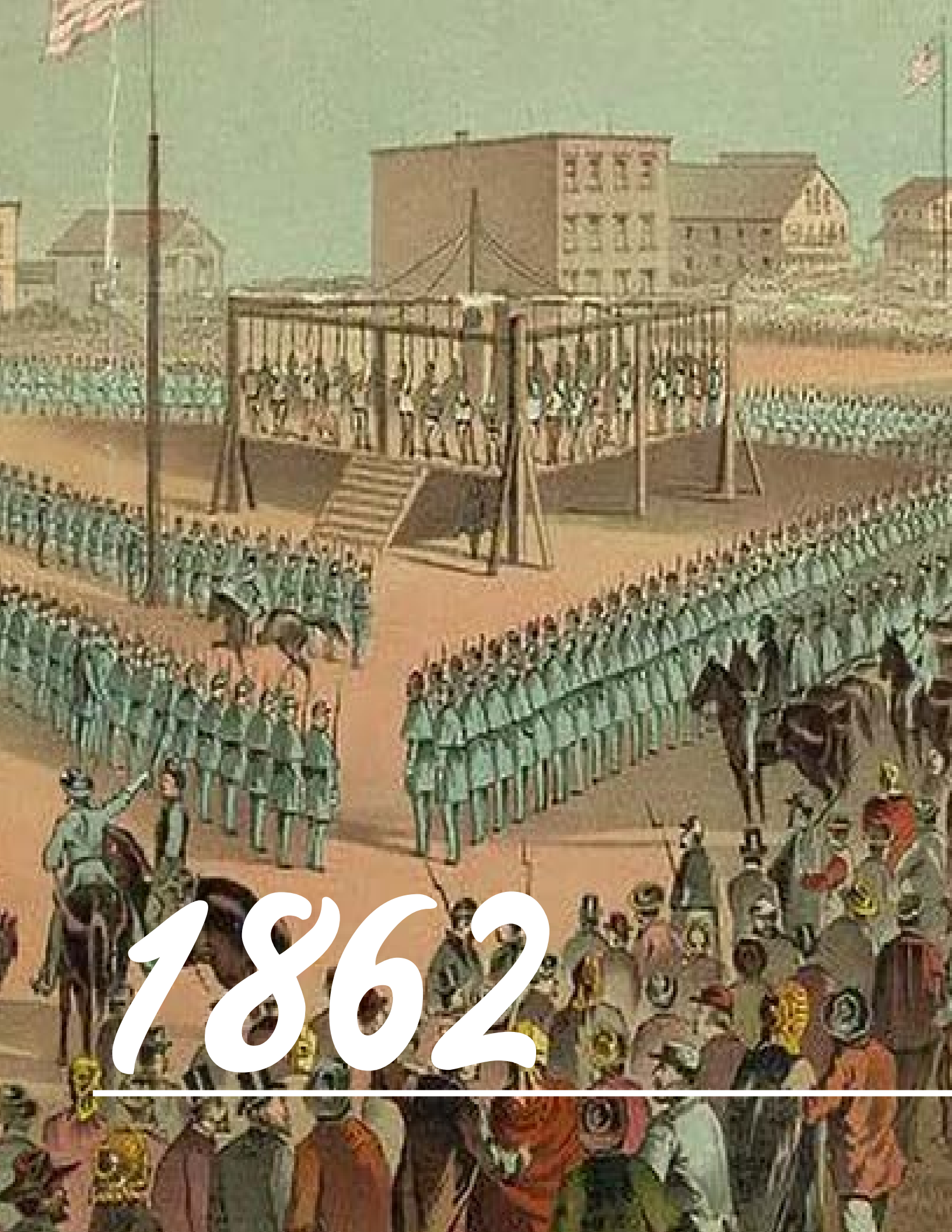
Sec. 5. AND BE IT FURTHER ENACTED, That if any perſon or perſons whatſoever ſhall after ſuch execution had, by force reſcue, or attempt to reſcue, the body of ſuch offender out of the cuſtody of the Marſhall or his Officers during the conveyance of ſuch body to any place for diſſection as aforeſaid, or ſhall by force reſcue, or attempt to reſcue ſuch body from the houſe of any ſurgeon where the ſame ſhall have been depoſited in purſuance of this act—every perſon ſo offending ſhall be liable to a fine, not exceeding one hundred dollars, and an impriſonment not exceeding twelve months.

Sec. 6. AND BE IT ENACTED, That if any perſon or perſons, having knowledge of the actual commiſſion of the crime of wilful murder, upon the high ſeas, or within any fort, arſenal, dock-yard, magazine, or other place or diſtrict of country, under the ſole and excluſive juriſdiction of the United States, ſhall conceal and not diſcloſe and make known the ſame to ſome one of the Judges or other perſons in civil or mil[illegible] under the United States, on conviction thereof, ſuch perſon or perſons ſ[illegible] be [illegible] of mi[illegible] of murder, and ſhall be impriſoned not exceeding th[illegible]s, at the [illegible] of th[illegible] fined in a ſum not exceeding two hundred of the [illegible]rly value of h[illegible]tate [illegible] real perſonal, during the term of his impriſonment.

Sec. 7. AND BE IT ENACTED, That if any pe[illegible] or perſons ſ[illegible] within a[illegible], dock-yard, magazine, or other place or diſtri[illegible] of country, [illegible] the ſole [illegible]e juriſdiction of the United States, commit the c[illegible] of manſlau[illegible], and ſhall be the[illegible]n-victed, ſuch perſon or perſons ſhall be impriſ[illegible] not exceed[illegible] three years, and f[illegible]n a ſum not exceeding the clear yearly value of [illegible]eal and pe[illegible] eſtate, during t[illegible]m of his impriſonment.

Sec. 8. AND BE IT ENACTED, That if any perſon or perſons ſhall commit treaſon, murder, felony or robbery, upon the high ſeas, or in any river, haven, baſon or bay, out of the juriſdiction of any particular State, or any captain or mariner of any ſhip or other veſſel, ſhall piratically and feloniouſly run away with the ſhip or veſſel, or any goods or merchandize to the value of 50 Dol. or yield up ſuch ſhip or veſſel voluntarily to any pirate, or any ſeaman ſhall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ſhip or goods committed to his truſt, or ſhall make a revolt in

1790



1862

1862–1899

Native Americans Were Executed in Groups After Brief Trials with Insubstantial Evidence and Limited Legal Representation.

In the second half of the 19th century, the federal death penalty was used to largely to punish Native Americans resisting colonization. At least 58 Native Americans were executed by the federal government during this period. This number is likely an undercount for a myriad of reasons,[5] including that many executions of Native Americans are classified as military as opposed to federal executions. For example, this number does not account for the largest mass execution in U.S. history, when the federal government ordered the execution of 38 members of the Dakota Tribe.

Mass executions were also a defining feature of the latter half of the 19th century. During this period, there were at least 16 federal mass executions—defined as at least three people executed at the same time.[6] Thirteen of the 16 mass executions involved at least one Native American person. Of the 61 total people executed in mass hangings, 37 were Native Americans.[7]

Resisting colonization was one of the reasons for which Native Americans were often executed. In 1873, six members of the Modoc Tribe were sentenced to death in Oregon for defending their land in the Modoc War. The joint trial lasted nine days.[8] Documentation of the Modoc War asserted that because of their resistance,[9] "*All negotiations were called off. The old policy of extermination of all renegade Indians was restored.*" After the executions of four Modoc men,[10] the federal government allowed the Modoc chief's body to be embalmed and taken on tour for the public to view for 10 cents per visitor. [11]

LARGEST MASS EXECUTION IN U.S. HISTORY

1862: THE FEDERAL GOVERNMENT AUTHORIZED THE EXECUTION OF 38 MEMBERS OF THE DAKOTA TRIBE IN THE LARGEST MASS EXECUTION IN U.S. HISTORY

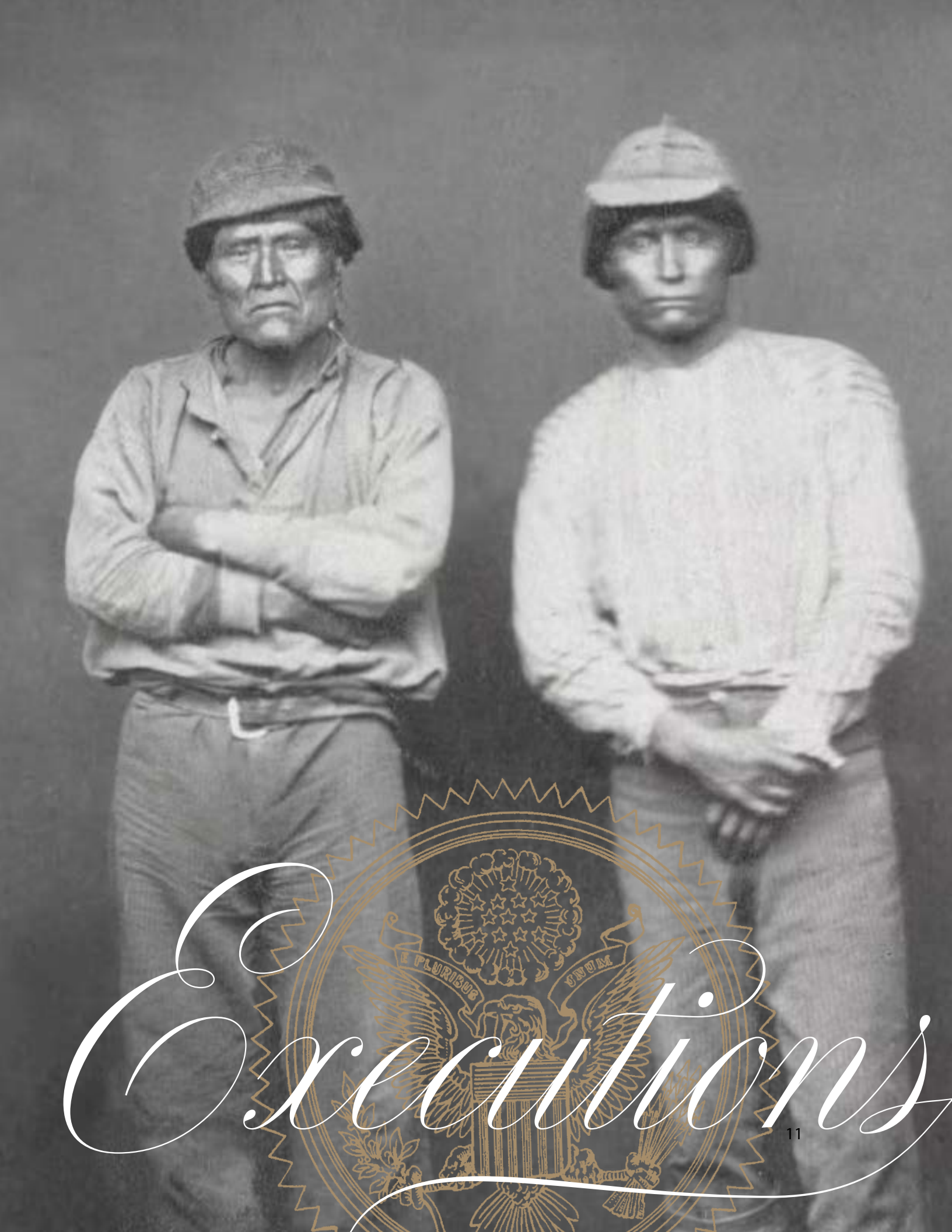
The Dakota people's resistance to colonization in Minnesota resulted in the largest mass execution in U.S. history. In 1862, 303 Dakota men accused of participating in the U.S.-Dakota War were sentenced to death in a series of rapid trials, some lasting less than five minutes. President Abraham Lincoln approved the execution of 39 men. Ultimately, after one man received a last-minute reprieve, 38 Dakota people were hanged in front of 4,000 spectators.[12] It was later discovered that two Dakota men were mistakenly executed.

Lincoln later justified the mass execution, saying that he was "[a]nxious to not act with so much clemency as to encourage another outbreak," confirming the intent of the federal government to use executions to warn other Native American nations against resisting colonization.[13] In addition to the men who were executed, another 265 Dakota men were sent to a prison camp where they were leased out to farmers as forced laborers in Iowa.[14]

Regardless of whether these executions are considered "military" or "federal", it is clear that the federal government was the responsible actor. The executions were also emblematic of this era, when lethal punishment was used aggressively to subjugate Native Americans and seize their land

FEDERAL GOVERNMENT

Authorized



Executions

The Number of Black People Executed by the Federal Government Increased 488% After the Civil War.

The number of Black people executed by the federal government grew from 8 to 47 after the Civil War.[15] Compared to the number of whites executed during this timeframe (53), the number of Black people sentenced to a federal death sentence was wholly disproportionate. For context, the average Black population from 1860-1900 was 12.7%, while white people comprised 86.4% of the population.[16]

The majority of these executions (39 of 47)[17] occurred during and after the Reconstruction era when Southern states reacted to federal laws passed by Congress to increase racial equality. These former states of the Confederacy implemented "Jim Crow" laws to enforce racial discrimination and segregation. Importantly, this was also an era characterized by a dramatic rise in the extralegal lynchings of Black people in these same states.[18]

Black people were also killed in mass federal executions. There were at least seven mass executions that included Black people, with many taking place in front of large crowds.[19] In 1894, a triple execution by the federal government in Lamar County, Texas drew hundreds of viewers despite "every effort" to limit attendance to those who had secured tickets. Hundreds of people also watched the federal executions of Silas Lee, Hickman Freeman, and George Wheeler in 1896. Silas Lee and Hickman Freeman, both Black men, are said to have been convicted on circumstantial evidence. Five other men were set to be executed at the same time but received last minute commutations.[20] While the races of the five men who received commutations are unknown, researchers note that commutations and pardons at this time were almost always reserved for white men.[21]

The dramatic rise in the federal government's executions of Black men raises questions about the federal death penalty's purpose before the 1900s, and whether it was actually being used to punish the worst crimes. Professor Rory K. Little explains that "[p]ostbellum race prejudice likely also played a role [in death penalty statutes], as discretionary capital sentencing enabled all-white juries to dispense death penalties 'in the desired manner,' along racial lines."[22]

The Number of Black People Executed by the Federal Government Increased 487% After the Civil War.

Beyond Black and White: Federal Executions Affected People of All Races.

The Lamar County execution in 1894 involved three men: one white, one Mexican national, and one Black. At least one man, Eduardo Ray Gonzalez, continuously proclaimed his innocence up to the moment he died. News coverage of his execution notes that Mr. Gonzalez was convicted based on shaky circumstantial evidence. For example, one piece of evidence was that his big toe "matched" that of a big toe print found in the mud near his boarding house. His jury, which like other juries of this era was likely all white people,[23] is reported to have deliberated briefly before finding him guilty and sentencing him to death. The newspaper noted that he "met death with the stoicism of the typical Mexican." While the white man's body was turned over to his family, the bodies of Mr. Gonzalez and Joe Upkins, the Black man executed, were not given to their families. Mr. Upkins was buried in a Black cemetery, and Mr. Gonzalez in a potter's field, typically reserved for unknown or unclaimed bodies.[24]

His jury, which like most of its time was likely made up of all-white people, is reported to have deliberated only for a short time before finding him guilty and sentencing him to death.

circumstantial

More Than Half of All Federal Executions Were Concentrated in Washington, D.C., Where Black Americans Had Sought Refuge from Southern Racial Violence

After the turn of the century, Washington, D.C. became the epicenter of the federal death penalty. The 78 executions in the District of Columbia accounted for 53% of all federal executions in the country. The racial disparities are striking: an astonishing 76% of those executed were Black men. This era saw a 181% increase in the number of Black men executed in the District of Columbia compared to 1862 to 1899.[25] For context, Black people consistently comprised less than one-third of the District of Columbia's total population until the 1950s.[26]

Racial tensions in the District of Columbia were amplified by the mass exodus of Black Southerners to Northern cities during the Great Migration. Starting in 1915 and continuing for decades thereafter, the Great Migration saw as many as 5,000,000 Black people escape the South[27] where whites both terrorized Black people and actively tried to prevent their main labor source from fleeing to the North.[28] The District of Columbia was a destination for many of those seeking safety from Southern violence in the Carolinas, Florida, Georgia, and Virginia.[29] Instead of working as sharecroppers for white landlords, Black people came to the District of Columbia for "GGJs"—Good Government Jobs.[30] It was this migration—combined with the voluntary relocation of white people ("white flight") to the suburbs—that resulted in the District of Columbia becoming the first majority Black major city in the U.S. in the late 1950s.[31]

As the Black population increased, so, too, did the frequency of executions. The number of Black people executed in the District of Columbia nearly tripled after the Red Summer of 1919 when white mobs across the U.S. repeatedly carried out attacks on Black communities. From 1900-1919, there were 11 federal executions of Black men in the District of Columbia. Over the following 20 years, from 1920 to 1940, the number of federal executions jumped to 31.[32]

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THE AFRO-AMERICAN

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WHITE CRIMINALS IMPERSONATE NEGROES

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HIS LETTER BEGINS WITH "DEAREST W"

Northwestern Crowded with Spectators at Custis-Green Trial Ministers Letters To Mrs. Hilliard Read.

SOLDIERS TRY TO TERRORIZE COLORED FOLK

AFRO AGENT HELD UP IN WASHINGTON

White Soldiers Demanded Papers or His Life.—Organized Colored Citizens Armed Themselves to Protect Their Homes

BETTER MAN SAY EXPERTS

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COLORED MAYOR FORCED TO FLEE

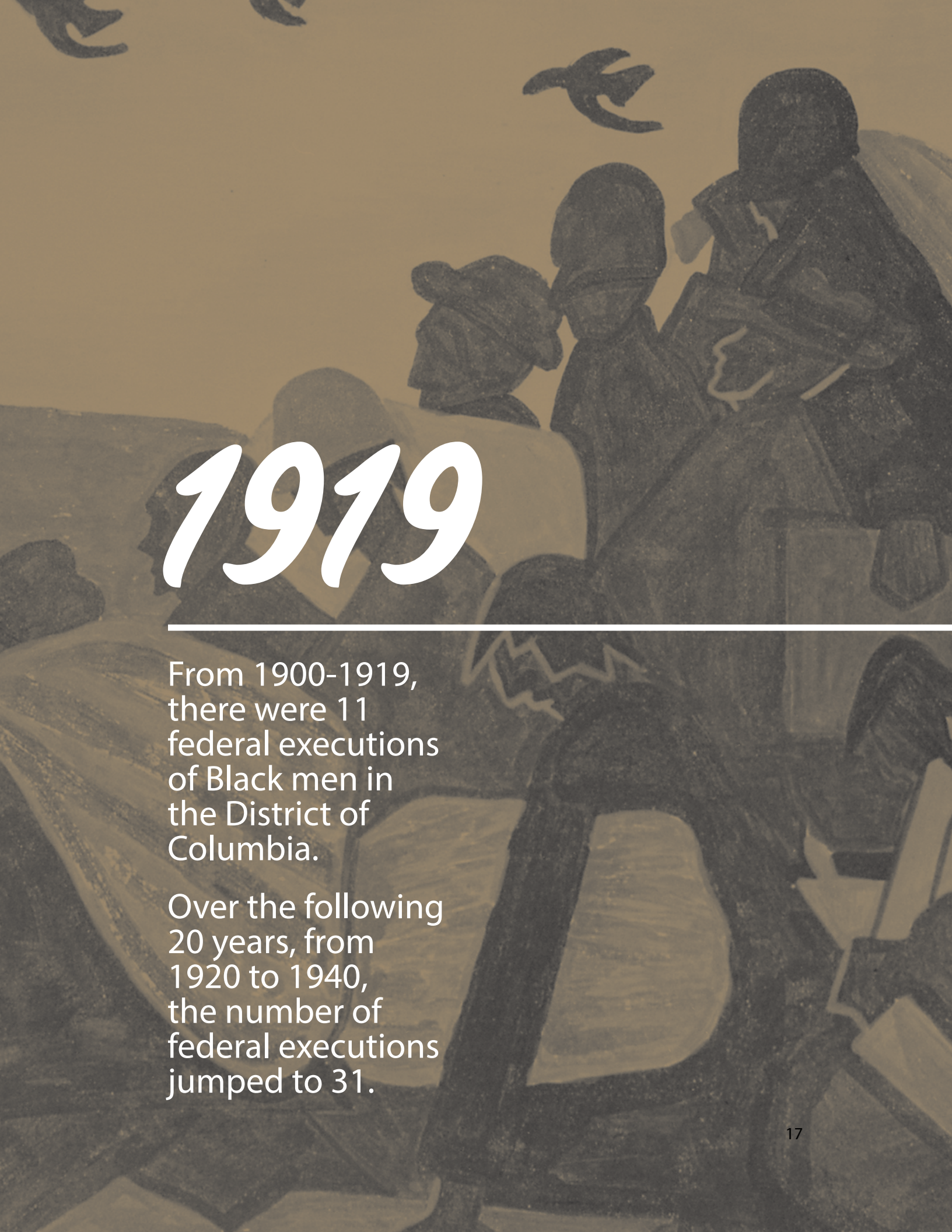
Head of Colored Town Compelled to Leave Town By Violent Threats

SAW MOB ANTICS

BRITISH VISIT TUSKEGEE

Red Summer

The District of Columbia was just one of 20 major cities in the summer of 1919 where white mobs planned and carried out extended violent attacks against Black residents.[33] Rumors that a Black man had assaulted a white woman sparked a four-day riot against the Black community starting on Pennsylvania Avenue NW. White mobs indiscriminately killed Black people on the streets. Newspapers contributed to the growing tensions during the conflict, reporting erroneously that Black men were attacking white women. The Washington Post even ran a front-page story coordinating a meeting place for white people to gather before an attack on Black people. Finding themselves without assistance from the police, the Black community ultimately banded together to defend themselves.[34] Heavy rainfall is said to have quelled the violence, not the 2,000 federal troops ordered to restore peace.[35] By the end, nine people had died, 30 were severely wounded, and 150 had been beaten.[36]



1919

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racial disparities from 1988 to 1994, 73% of people convicted of participating in a drug enterprise under the Act were white. However, just 11% of white defendants were chosen for death penalty prosecutions; 89% were either Black or Hispanic.

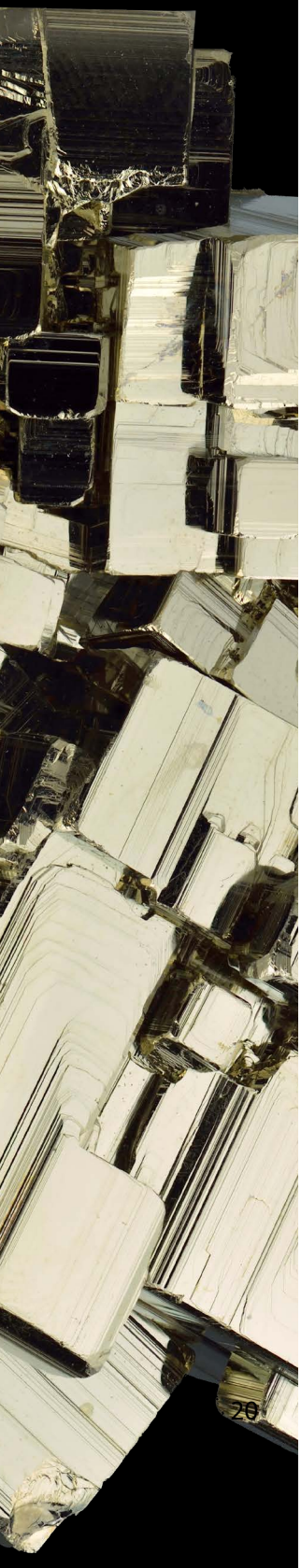
The Federal Death Penalty in the Modern Era

Policies and Laws Adopted in the Modern Era of the Federal Death Penalty Perpetuated Racial Disparities.

The 1988 Anti-Drug Abuse Act was the first major expansion of the federal death penalty in the modern era. The "drug kingpin" provision in the Anti-Drug Abuse Act created an enforceable federal death penalty for murders committed by those involved in certain drug trafficking activities. This was a notable shift from the early iterations of the federal death penalty that reserved the practice for a narrow set of crimes that exclusively concerned issues of national security.

In 1994, the Federal Judiciary's Subcommittee on Civil and Constitutional Rights, with the help of the Death Penalty Information Center (DPI), conducted a statistical review of federal prosecutions brought by the United States Department of Justice (DOJ) under the new statute. The analysis found glaring racial disparities. From 1988 to 1994, 75% of people convicted of participating in a drug enterprise under the Act were white. However, just 11% of white defendants were chosen for death penalty prosecutions; 89% were either Black or Hispanic. At the time of the study, then-Attorney General Janet Reno had approved prosecutions for 10 people under the "kingpin" statute, all of whom were Black. DPI's 1994 review of these statistics noted that "[j]udging by the death row populations of the states, no other jurisdiction comes close to this nearly 90% minority prosecution rate."[37]

In response to these findings and rising criticism about the racist application of the death penalty, in 1995 Attorney General Reno implemented a "race blind" approach to the DOJ's review and approval of death prosecutions. Researchers have noted that the "race blind" rhetoric "seems perhaps more political cover than practical reality."[38] While the race of a defendant chosen for a death penalty prosecution was no longer provided to the Attorney General's Office, it would not be difficult for officials to learn the race of a defendant from other details in the case, for example, when they were members of the Latin Kings or the Black Gangster Disciples, or where the crime occurred. Additionally, the policy did not address the conscious and unconscious racial biases that permeate the early stages of the criminal legal process, when local law enforcement and prosecutors make critical charging decisions.[39]



A 2001 supplementary study by the DOJ demonstrated persistent racial biases in the selection of defendants for whom a death sentence would be sought. A review of death-eligible cases revealed that, in a sample of nearly 1,000 cases, 17% involved a white defendant while 78% involved non-white defendants (42% Black and 36% Hispanic).

The DOJ stated that "[t]he Attorney General will, of course, retain legal authority as head of the Justice Department to determine in an exceptional case that the death penalty is an appropriate punishment..." Researchers note, however, that the cases pursued by the Attorney General were not exceptional. In one example, Attorney General Ashcroft ordered the DOJ to seek death sentences for three Black men accused of murdering a single victim; there were no exceptional circumstances that "distinguish[ed] this case from dozens of other single-victim drug gang homicides that fell (or could have fallen) under federal jurisdiction."[40]

The Federal Death Penalty Act Expanded the Number of Capital Crimes in the Era of the "Superpredator" Myth.

The 1994 Crime Bill further expanded the federal death penalty by permitting capital prosecutions for 60 additional crimes, including many, such as carjacking resulting in death, that did not have particularly unique federal interest.[41] The Federal Death Penalty Act also allowed death sentences for some drug crimes that did not result in a homicide, though these statutes have not been used.[42] Notably, the number of death-eligible crimes at the federal level is out of step with the rest of the nation as no state has nearly as many crimes punishable by death.[43] This seems inconsistent with data that show decreasing overall public support for the death penalty and rising concerns about fairness and accuracy.[44]

An investigation published in *Newsday* in June 2001 demonstrates the different ways in which the DOJ addressed crimes committed by white gang members compared to non-white gang members. A white hitman involved with the Mafia was accused of murdering four people. The same year, a Hispanic member of the Latin Kings was charged with a single victim murder. While both crimes qualified as death-eligible, only the Hispanic man faced the death penalty.[45] From 1988 to 2000, only a single person involved with the Mafia faced the death penalty (and he was not ultimately sentenced to death), even though roughly 80 members could have been tried capitally.[46]

The racially discriminatory application of the death penalty may be, in part, attributable to the fact that the crime bill expansion happened amidst public fears over rising crime rates. The national murder rate peaked in the 1980s and remained relatively high in the early 1990s.[47] Sensational media coverage portrayed young Black men as violent animals, using racialized and animalistic terms like "wilding" and describing them as traveling in "wolf packs."[48]

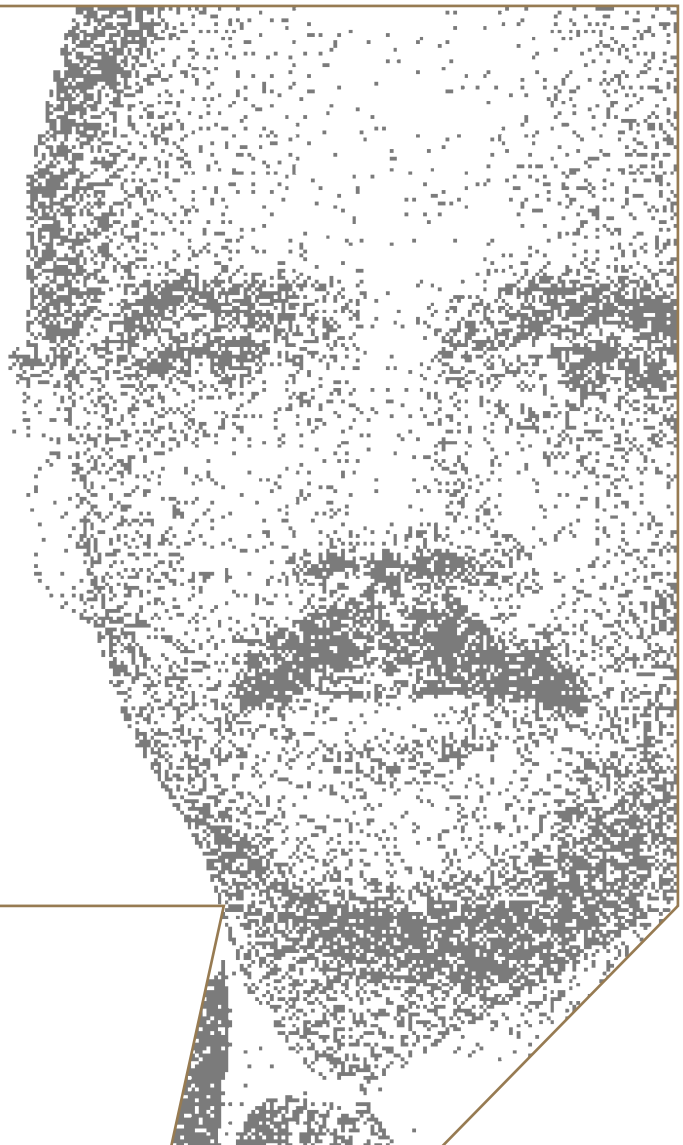
National and local politicians undeniably stoked the fears about violent crime to justify the stricter provisions in the law.[49] Hillary Clinton described young kids as "superpredators"—with "[n]o conscience, no empathy." She further stated, "[w]e can talk about why they ended up that way, but first we have to bring them to heel."[50]

1994

Misinformation and confusion about violent crime continues into the present day. While crime rates have been steadily dropping over the last two decades, many Americans continue to overestimate their risk of being victims of violent crime.[51] Importantly, research continues to demonstrate that the death penalty does not deter crime.[52] Some candidates and officials still lean into "tough on crime" narratives[53] when running for election, though lower support for use of the death penalty is now changing the language and results in some of those contests.[54]

No one reading this report can help but be disturbed, troubled [by the disparities].

Eric Holder
Former U.S. Attorney General[55]



The Modern Use of the Federal Death Penalty Is Concentrated in Jurisdictions That Were Historic Outliers for Lynchings.

A small number of federal jurisdictions, in Texas, Missouri, and Virginia, account for 43% of all active federal death sentences. These districts are located in former slave-holding states that historically used the death penalty in a racially disparate manner and have legacies of horrifying racial violence. Texas and Virginia are among ten states with the most lynchings. Missouri has the second highest number of racial terror lynchings outside of the South. Historical execution statistics also reveal that these states executed Black people at a disproportionate rate compared to their white counterparts. Including these historical executions, Virginia has executed more people than any other state—1,390 from 1608 to 2021.[56] (Virginia abolished the death penalty in 2021, but the federal government retains the jurisdiction to seek a federal death sentence in Virginia and every other U.S. state and territory, regardless of any decision to abolish the death penalty at the state level.)

Modern federal death sentencing statistics from these districts reveal stark racial differences among defendants who receive death sentences. In Texas, 75% of all federal death sentences have been imposed on people of color. In the Eastern District of Virginia, the Western District of Virginia, and the Eastern District of Missouri, every single federal death sentence has been imposed on a person of color.[57]

A 2010 study in the Eastern District of Missouri found that all authorized federal capital prosecutions were against Black men; all but one of the victims in these cases was white.[58] This district is not unique: all ten of the defendants authorized for federal capital prosecution within Orleans Parish, Louisiana were either Black or Hispanic.[59]

REJON TAYLOR

Rejon Taylor was sentenced to death by a nearly all-white jury in the U.S. District Court for the Eastern District of Tennessee in 2008. Mr. Taylor and his two co-defendants are Black men from a majority Black community. The victim was a white man in a predominantly white jurisdiction.

During jury selection—an important phase for identifying and removing potentially biased jurors—Mr. Taylor's inexperienced attorneys asked just two questions about potential racial bias. Jurors were asked (1) if they had any Black friends and (2) if they had worked with a Black person before. Mr. Taylor's appellate attorneys argue that these questions are not sufficient for determining whether jurors harbored racial biases.

Because this case was charged as a federal crime, the jury pool was whiter than if the case had been tried in state court. (The Black population at the county level was 20% at the time, compared to 12.6% Black in the federal jurisdiction.) The majority of the jurors in this case came from predominantly white communities, which had histories of racial violence, including lynchings.

The media stoked racial tensions between Mr. Taylor and the 11 white jurors who determined his fate. Misleading news stories alleged that Mr. Taylor had called the jurors "racist rednecks." All jurors admitted to having heard reports of these remarks before the sentencing phase, which Mr. Taylor's appellate attorneys suggest negatively affected their judgement of Mr. Taylor. Afterward, an alternate juror reported that some jurors talked about how they "needed to make an example" out of Mr. Taylor. Before the sentencing phase of his trial, one juror allegedly said, "Yeah, we need to kill him off." Another stated that they had considered buying a weapon to protect themselves from Mr. Taylor, indicating fear and bias against Mr. Taylor.

Throughout the trial, the prosecutor used racially coded and dehumanizing language to refer to Mr. Taylor. Mr. Taylor was referred to as a "wolf," "chameleon," "hunter," "Dr. Jekyll," "Mr. Hyde," and an "ugly looking monster guy." There were also repeated mentions of Mr. Taylor "stalking" the victim, like an animal would stalk its prey. In closing arguments, the prosecutor brought up race directly by reminding the jury that this was a case of "two Black men circling around the victim."

Mr. Taylor remains on federal death row.

Jury Pools in Federal Capital Cases Are Racially "Diluted," Resulting in All-White and Nearly-All White Juries.

When cases are tried at the state level, jury pools are comprised of people who live in the county where the crime occurred. At the federal level, jurors are chosen from the population of the much larger federal district. The shift from the county level to the district level is significant because in many parts of the country, a larger pool "dilutes" the racial composition of the jury, with far fewer people of color than if a case was tried by a jury of people who live in the county where the crime occurred. One study of four districts in Missouri, Louisiana, Maryland, and Virginia consistently found that had defendants been tried in local state courts, the juries would have been pulled from populations that were significantly more racially diverse and representative of the defendant and the community where the crime occurred.[60]

St. Louis, Missouri provides a striking example of the effect of jury dilution. Five federal capital prosecutions approved in the Eastern District of Missouri were the result of crimes committed in the city of St. Louis. If those defendants had been tried in state court, the juries would have been pulled from a jurisdiction that was 49% Black and 47% white. When the same case is tried federally, the racial composition of the district creates a jury pool that is 81.8% white and 15.5% Black. At least one Black man was sentenced to death in the Eastern District of Missouri by an all-white jury.[61]

Jury diversity has consistently been proven to affect case outcomes. Researchers who studied mock juries found that all-white juries are more likely to convict than racially diverse juries; when compared to actual jurors' sentencing patterns in capital cases, this pattern holds true. More specifically, studies have determined all-white juries are more likely to sentence Black defendants to death. Diverse juries also have been found to more thoroughly consider the evidence and be more willing to address issues of race instead of ignoring them.[62]

Recent Statistics Confirm Continued Racial Disparities: 73% of Capital Defendants Authorized for Death Penalty Prosecution Since 1989 Were Non-White.

While there are thousands of defendants whose cases are death-eligible, U.S. Attorneys and the DOJ only authorize a handful of cases for federal capital prosecution. Between 1989 and June 2024, 541 defendants have been authorized for capital prosecutions at the federal level. 73% of these defendants (393/541) were people of color. The vast majority of people of color authorized for federal capital prosecution were Black (265 out of 393).

One of the most consistent indicators of racial bias in death penalty cases is the frequency with which defendants are sentenced to death for cases involving white victims. When factoring gender into these analyses, state-level studies consistently find the white female victims are overrepresented among cases chosen for capital prosecution.

A statistical analysis of federal death penalty prosecutions from 1989 to April 2016 found similar results at the federal level. Defendants who kill white female victims receive the death penalty at substantially higher rates than defendants whose victims are not white women. When a case involved a white female victim, 31% of defendants were sentenced to death, compared to 11.5% for defendants whose cases did not involve a white victim.

A look at all cases which proceeded to a capital trial found similar gender and racial disparities. Defendants with cases involving white female victims received a death sentence 55% of the time. Meanwhile, defendants whose cases did not include a white female victim received death sentences 25% of the time. The study concluded that a federal capital trial was more than twice as likely to result in a death sentence when a case involved a white female victim.[63]

Seven of the Last 13 People Executed Were Black or Native American.

In the waning months of his first presidency, and despite a worldwide pandemic, President Donald Trump restarted federal executions for the first time in nearly two decades. In just six months, Trump's DOJ executed 13 people in a historically unprecedented "killing spree." Seven of the 13 people executed (54%) were either Black or Native American and shared many common features. All of those executed had at least one of three vulnerabilities: intellectual disability or brain damage, childhood trauma, and/or serious mental illnesses. Many also had unresolved legal issues, including concerns that some of their trials were infected by racial discrimination.

Death penalty experts have noted some of these executions were marred by racial issues. Associate Professor of Law Ngozi Ndulue suggested that it was an unlikely coincidence that the first three people executed were white, as the nation reckoned with race issues in 2020. Ruth Friedman, Director of the Federal Capital Habeas Project, noted that some of the executions moved forward despite unresolved claims of racial bias affecting death sentences.

> We come from a history, which I think is getting more attention than it has in the past. Our criminal justice system treats Black and white people differently. You can't look at the death penalty outside of that context.

Ruth Friedman

Director, Federal Capital Habeas Project
Federal Capital Habeas Project

Federal executions are currently on hold under President Joe Biden's Administration. After taking office, Attorney General Merrick Garland instituted a moratorium on the federal death penalty and initiated an internal review of the Justice Department's death penalty policies and practices. The review included the procedures and regulations added by the Trump administration that pertained to executions. Importantly, this was not a review of all of the Department's death penalty policies and practices.[64]

Calls are increasing for President Biden to make good on his campaign promise to end the federal death penalty or take some other meaningful action before leaving office in 2025.[65] President-elect Donald Trump is expected to resume executions for those on federal death row. Created by the Heritage Foundation, Project 2025 outlines a conservative presidential transition plan. This project includes the April 2023 publication, A Mandate for Leadership: A Conservative Promise, which recommends the resumption of federal executions: "The next conservative Administration should therefore do everything possible to obtain finality for the 44 [sic] prisoners currently on federal death row."[66]

ORLANDO HALL

Orlando Hall was sentenced to death by an all-white jury in the U.S. District Court for the Northern District of Texas in 1996. Mr. Hall's appellate attorneys raised concerns regarding discrimination in jury selection during his trial. The prosecution team in Mr. Hall's case brought a federal prosecutor named Paul Macaluso onto the team specifically for jury selection. Mr. Macaluso has since been found by courts to have illegally engaged in racially biased jury selection twice, including once by the United States Supreme Court. The defense team learned after Mr. Hall's trial that Mr. Macaluso had trained in an office that historically used an explicitly racist training manual, advising prosecutors to strike potential jurors who were Black, Jewish, or female, and stating, "You are not looking [to seat] any member of a minority group…they almost always empathize with the accused." The same office previously published materials that said, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[67]

Mr. Hall's lawyers further argued that "the authorization process by which the Department of Justice (DOJ) selects which defendants will face the death penalty…are impermissibly influenced by race." Data show that racial disparities in federal cases are even greater for defendants in Texas. Between 1988 and 2020, the DOJ approved capital charges for 537 Texas defendants, 73% of whom were people of color; just under half of all capitally charged defendants were Black. Overall, the data show that the DOJ was nearly twice as likely to approve capital prosecutions against Black defendants than white defendants.[68]

Mr. Hall was executed on November 19, 2020.

Conclusion

The federal death penalty has evolved substantially since the first capital statute was enacted in 1790. A punishment that was once reserved for exceptional cases pertaining to narrow federal interests has since been used to perpetuate racially biased and discriminatory practices throughout history. The use of the federal death penalty to punish Native Americans resisting colonization underscores the racist roots from which the modern federal death penalty has grown.

This report traces the history of the federal death penalty from its origins to the modern use of the practice, contextualizing the many ways the federal death penalty has been used to achieve evolving governmental goals. Regardless of the stated—and, more often, unofficial—purpose of the federal death penalty, one finding has remained consistent throughout history: people of color have been disproportionately targeted.

Standard

Endnotes

1 Hannah Freedman, The Modern Federal Death Penalty: A Cruel and Unusual Punishment, 107 Cornell L. Rev. 1689, 1706 (2022).

2 An Act for the Punishment of Certain crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

3 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016). Before 1930, there was no national tracking of executions. The number of early executions included in this report reflects estimates from researchers.

4 Hannah Freedman, The Modern Federal Death Penalty: A Cruel and Unusual Punishment, 107 Cornell L. Rev. 1689, 1719 (2022).

5 Historical executions were not routinely tracked until the 1930s. Additionally, some Native Americans have been erroneously reported as other races throughout history.

6 There is not a standard definition for mass executions. DPI decided to qualify mass executions as any execution where three or more people were killed at the same time. This is similar to the definition for mass shootings, which is also the murder of three or more people in a single event.

7 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

8 Stephen R. Mark, Modoc War, Ore. Encyclopedia (Oct. 4, 2023)

9 Though six people were sentenced to death, President Ulysses S. Grant approved four death sentences. The remaining two were sentenced to life in prison at Alcatraz. Kami Horton, 150 years ago, the US military executed Modoc war leaders in Fort Klamath, Oregon, Ore. Pub. Broad. (Oct. 3, 2023).

10 Documentation for the execution of Jim Black, John Schonchin, Kintpuash, Charley Boston, M. Watt Espy Papers, 1730-2008 (last visited November 12, 2024).

11 Documentation for the execution of Jim Black, John Schonchin, Kintpuash, Charley Boston, M. Watt Espy Papers, 1730-2008 (last visited November 12, 2024).

12 The U.S.-Dakota War of 1862: The Trials and Hanging, Minn. Hist. Soc'y (last visited November 12, 2024).

13 The U.S.-Dakota War of 1862: The Trials and Hanging, Minn. Hist. Soc'y (last visited November 12, 2024) ("Anxious to not act with so much clemency as to encourage another outbreak on one hand, nor with so much severity as to be real cruelty on the other, I ordered a careful examination of the records of the trials to be made, in view of first ordering the execution of such as had been proved guilty of violating females.").

14 Douglas K. Miller, The Spider's Web: Mass Incarceration and Settler Custodialism in Indian Country, in Caging Borders and Carceral States: Incarcerations, Immigration Detentions, and Resistance 385, 389 (Robert T. Chase ed., 2019).

15 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

16 Twelfth Census of the United States Taken in the Year 1900, Population, Part 1, U.S. Census Bureau, cxii (1901); 1870 Census: Vol. I. The statistics of the population of the United States, U.S. Census Bureau, 3 (1871).

17 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

18 Lynching in America: Confronting the Legacy of Racial Terror, Equal Just. Initiative (2017).

19 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

20 Hangings at Paris, Bryan-College Station Eagle, Sept. 6, 1896.

21 Hannah Freedman, The Modern Federal Death Penalty: A Cruel and Unusual Punishment, 107 Cornell L. Rev. 1689, 1721 (2022).

22 Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Fordham Urb. L.J. 347, 366 (1999).

23 Racial discrimination in jury selection was outlawed with the Civil Rights Act of 1875. In practice, however, people of color were routinely denied their right to serve on juries, especially in the South. Equal Justice Initiative, Race and the Jury: Illegal Racial Discrimination in Jury Selection (2021).

24 Lamar County Texas Genealogy Research, Galveston Daily News, Saturday, March 31: 1894 (last visited November 12, 2024).

25 From 1862 to 1899, there were 21 federal executions of Black men in the District of Columbia. After the turn of the century, 59 Black men were executed in the District of Columbia. M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

26 General Characteristics, District of Columbia, U.S. Census Bureau, 9-9, 9-11 tbl. 14 (1950).

27 The Second Great Migration: The Migration Numbers, African American Migration Experience (last visited November 12, 2024).

28 The Great Migration: Migration Fever, African American Migration Experience (last visited X); See also Isabel Wilkerson, The Warmth of other Suns: The Epic Story of America's Great Migration (Oct. 4, 2011).

29 Isabel Wilkerson, The Long-Lasting Legacy of the Great Migration, Smithsonian Mag, Sept. 2016; Martin Austermuhle, When Blacks Fled The South, D.C. Became Home For Many From North Carolina, WAMU 88.5, Sept. 23, 2016.

30 Martin Austermuhle, When Blacks Fled The South, D.C. Became Home For Many From North Carolina, WAMU 88.5, Sept. 23, 2016.

31 Steven Overly, Delece Smith-Barrow, Katy O'Donnell and Ming Li, Washington Was an Icon of Black Political Power. Then Came Gentrification, Politico, Apr. 15, 2022.

32 M. Watt Espy & John Ortiz Smykla, Executions in the United States, 1608- 2002: The Espy File, Inter-university Consortium for Political and Social Research (4th ICPSR ed. 2016).

33 On This Day — July 19, 1919: White Mob Terrorizes Black D.C. Residents in Red Summer, Equal Just. Initiative (last visited November 12, 2024).

34 Red Summer, The National WWI Museum and Memorial (last visited November 12, 2024).

35 Darhian Mills, Washington, D.C. Race Riot (1919), BlackPast.org, Apr. 2, 2016; One Dead and Another Dying, New Victims of Negro Bullets; 2,000 Regular Troops Take Control of Capital Streets; Rains Help Authorities Disperse Throngs as Night Comes, The Wash. Post, July 23, 1919.

36 On This Day — July 19, 1919: White Mob Terrorizes Black D.C. Residents in Red Summer, Equal Just. Initiative (last visited November 12, 2024).

37 Racial Disparities in Federal Death Penalty Prosecutions 1988 – 1994, Death Penalty Info. Ctr. (Mar. 1, 1994).

38 Kevin McNally, Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse, 53 DePaul L. Rev. 1615, 1619 (2004).

39 Kevin McNally, Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse, 53 DePaul L. Rev. 1615, 1619 (2004).

40 Kevin McNally, Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse, 53 DePaul L. Rev. 1615, 1634 (2004).

41 Criminal Resource Manual 1-499: 69. The Federal Death Penalty Act Of 1994, DOJ (last visited November 12, 2024).

42 18 U.S.C. 3591(b)(1) Non-Homicide Mega Narcotics Offense, DOJ (last visited November 12, 2024).

43 Crimes Punishable by Death: Aggravating Factors by State, Death Penalty Info. Ctr. (last visited November 12, 2024).

44 Criminal Resource Manual 1-499: 69. The Federal Death Penalty Act Of 1994, DOJ (last visited November 12, 2024).

45 Tom Brune, The Two Faces of Death, Newsday, June 13, 2001, at 6.

46 Kevin McNally, Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse, 53 DePaul L. Rev. 1615, 1637 (2004).

47 Alexia Cooper and Erica L. Smith, Homicide Trends in the United States, 1980-2008, Bureau of Just. Stat. (Nov. 2011).

48 Michael Welch, Eric A. Price, and Nana Yankey, Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media, 34 Youth & Soc. 3, 13-15 (Sept. 2002).

49 Andrew Kaczynski, Biden in 1993 speech pushing crime bill warned of 'predators on our streets' who were 'beyond the pale', CNN, Mar. 7, 2019.

50 Andrew Kaczynski, Biden in 1993 speech pushing crime bill warned of 'predators on our streets' who were 'beyond the pale', CNN, Mar. 7, 2019.

51 Jamiles Lartey, Weihua Li and Liset Cruz, Ahead of Midterms, Most Americans Say Crime is Up. What Does the Data Say?, The Marshall Project, Nov. 5, 2022; Maggie Koerth and Amelia Thomson-DeVeaux, Many Americans Are Convinced Crime Is Rising In The U.S. They're Wrong, FiveThirtyEight, Aug. 3, 2020.

52 Jamiles Lartey, Weihua Li and Liset Cruz, Ahead of Midterms, Most Americans Say Crime is Up. What Does the Data Say?, The Marshall Project, Nov. 5, 2022; Maggie Koerth and Amelia Thomson-DeVeaux, Many Americans Are Convinced Crime Is Rising In The U.S. They're Wrong, FiveThirtyEight, Aug. 3, 2020.

53 Amanda Hernández, 'Tough-on-crime' policies are back in some places that had reimagined criminal justice, Stateline, Mar. 18, 2024; Ethan Corey, Ask The Appeal: Why Do Americans Think the U.S. is Too 'Soft' on Crime?, The Appeal, Feb. 13, 2024.

54 Survey of the Federal Death Penalty System, Table Set I: Statistical Overview, Dept. of Just., T-1, T-7 tbl. 3B (Sept. 12, 2000).

55 Kevin McNally, Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse, 53 DePaul L. Rev. 1615, 1634 (2004).

56 Executions Overview: Executions in the U.S. 1608-2002: The Espy File, Death Penalty Info. Ctr., tbl. Historical Leaders in Executions Since 1608 (last visited November 12, 2024).

57 Death Penalty Census: U.S.D.C. Eastern District of Virginia, Federal; U.S.D.C. Eastern District of Missouri, Federal; Western District of Virginia, Federal, Death Penalty Info. Ctr. (Jan. 1, 2024).

58 G. Ben Cohen & Robert J.Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425, 451 (2010).

59 G. Ben Cohen & Robert J.Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425, 446 (2010).

60 G. Ben Cohen & Robert J.Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425, 445-462 (2010).

61 G. Ben Cohen & Robert J.Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425, 450-454 (2010).

62 John H. Blume, An Overview of Significant Findings from the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases, (2008)

63 Information on file with Death Penalty Information Center.

64 Memorandum from the Attorney General to the Deputy Attorney General, the Associate Attorney General, and Heads of Department Components

65 Articles of Interest: The New York Times Editorial Board Argues United States "Does Not Need the Death Penalty", Death Penalty Info. Ctr. (Sept. 3, 2024).

66 Mandate for Leadership: The Conservative Promise, Project 2025, 554 April 2023.

67 Lawyers for Orlando Hall Seek to Stay His Execution Based Upon Systemic and Case-Specific Evidence of Racial Discrimination, Death Penalty Info. Ctr. (Nov. 17, 2020).

68 Lawyers for Orlando Hall Seek to Stay His Execution Based Upon Systemic and Case-Specific Evidence of Racial Discrimination, Death Penalty Info. Ctr. (Nov. 17, 2020).