

Essays

Drop by Drop: Forgetting the History of Water Torture in U.S. Courts

EVAN WALLACH*

Historical analysis demonstrates that U.S. courts have consistently held that artificial drowning interrogation is torture, which, by its nature, violates U.S. statutory prohibitions.

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* Judge, United States Court of International Trade. Adjunct Professor, Law of War, Brooklyn Law School, George Mason Law School, New York Law School. Visiting Professor, Law of War, University of Muenster. Web master and author, www.lawofwar.org. Any views expressed in this article are only those of the author. The author wishes to express gratitude for the research assistance of Daniel Molina of Stanford University Law School.

This article is respectfully dedicated in general to the Judge Advocate General Corps of the United States Army, of which the author was a proud member, and specifically, to M.G. Thomas J. Romig, who so clearly exemplifies the vision which the Corps has of itself as “committed to justice [and] grounded in values.” Judge Advocate General Corps Strategic Plan FY 2004–2010: Judge Advocate General’s Corps Transformation 3 (2004), available at [https://www.jagcnet.army.mil/JAGCNETIntranet/JAGCStra.nsf/\(JAGCNetDocID\)/1C0BA360376A958485257050006754B8/\\$FILE/JAGCStratPlan04.pdf](https://www.jagcnet.army.mil/JAGCNETIntranet/JAGCStra.nsf/(JAGCNetDocID)/1C0BA360376A958485257050006754B8/$FILE/JAGCStratPlan04.pdf).

Q: Did the questioners threaten you with any other treatment while you were being questioned?

A: Yes, I was given several types of torture. . . . I was given what they call the water cure. . . .

Q: What was your sensation when they were pouring water . . . , what did you physically feel?

A: Well, I felt more or less like I was drowning, just gasping between life and death.

Excerpts from testimony of Cpt. Chase Jay Nielsen, Record of *Sawada* Trial, at 55.¹

Congress doesn't have the power to tie the President's hands in regard to torture as an interrogation technique. . . . It's the core of the Commander-in-Chief function. They can't prevent the President from ordering torture.

John Yoo, Professor of Law, University of California at Berkeley.²

I. INTRODUCTION

Interrogation techniques using water to induce the sensation of drowning in the person under questioning (generally called "water-boarding" in recent news accounts)³ have been hotly debated in the past few years.⁴

An August 2002 memo, drafted by John Yoo of the Office of

1. *United States v. Sawada*, 5 L. Rep. Trials of War Criminals 1 (1948). The corresponding record is kept at the National Archives in Suitland Maryland [hereinafter "National Archives"]. On April 18, 1942, then-Lieutenant Colonel James Doolittle led a flight of B-25 bombers in a raid on the Japanese mainland. The Japanese captured ten of the raiders, including Cpt. Nielsen, and executed three of them following a trial before a Japanese Army tribunal. Following the conclusion of hostilities, the U.S. Army prosecuted the Japanese who convened and participated in the trial. *See generally* CRAIG NELSON, *THE FIRST HEROES* (2002).

2. Jane Mayer, *Outsourcing Torture*, *NEW YORKER*, Feb. 14, 2005, at 106 (citing to Prof. Yoo's statement).

3. *See, e.g.*, David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, *N.Y. TIMES*, June 27, 2004, at A1 ("Mr. Mohammed was "waterboarded"—strapped to a board and immersed in water—a technique used to make the subject believe that he might be drowned, officials said."); Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, *N.Y. TIMES*, Aug. 29, 2004, at 10 ("Former intelligence officials say that lawyers from the C.I.A. and the Justice Department have been involved in extensive discussions in recent months to review the legal basis for some extreme tactics used at those secret centers, including 'waterboarding,' in which a detainee is strapped down, dunked under water and made to believe that he might be drowned.").

4. *See, e.g.*, Mark Danner, *Torture and Truth*, *N.Y. REV. BOOKS*, June 10, 2004, at 46.

Legal Counsel of the Department of Justice,⁵ and signed by then Assistant Attorney General (now 9th Circuit Judge) Jay Bybee, discussed interrogation methods and whether they might violate U.S. or international law.⁶ According to *Newsweek*:

Yoo's . . . memo was prompted by CIA questions about what to do with a top Qaeda captive, Abu Zubaydah, who had turned uncooperative. And it was drafted after White House meetings convened by George W. Bush's chief counsel, Alberto Gonzales, along with Defense Department general counsel William Haynes and David Addington, Vice-President Cheney's counsel, who discussed specific interrogation techniques, says a source familiar with the discussions. *Among the methods they found acceptable: "water-boarding," or dripping water into a suspect's face, which can feel like drowning . . .*⁷

The authors of the Yoo Memo concluded that:

[T]orture as defined in and proscribed by Sections 2340-2340A covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. . . . Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.⁸

None of the Memo's analysis explains why water-boarding does not cause physical or psychological pain sufficient to meet the criminalization standards it enunciates.

5. John Yoo, Commentary, *Behind the 'Torture Memos'*, U.C. BERKELEY NEWS, Jan. 4, 2005, http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml.

6. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–40A (Aug. 1, 2002), available at <http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf>.

7. Michael Hirsh et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 52 (emphasis added).

8. See YOO, *supra* note 5, at 46.

On October 16, 2006, President Bush signed into law the Military Commissions Act of 2006.⁹ That Act principally defines persons over whom military commissions have jurisdiction, and modifies procedures and rules before those commissions. It also, however, modifies¹⁰ the War Crimes Act of 1995.¹¹ Section 3 of that Act, which criminalizes breaches of the Geneva Conventions of 1949, provides that a “war crime” includes conduct which constitutes a violation of Common Article 3 of the Geneva Conventions¹² (covering conflicts not of an international nature in the territory of a signatory power). The Military Commissions Act modifies Section 3, adding a new subsection (d) to limit violations to include, *inter alia*, torture and cruel or inhuman treatment, only if they inflict “severe physical or mental pain or suffering [if not incidental to lawful sanctions].”¹³

The apparent intention of the modification of Section 3 was to affect its application to military commissions by the United States Supreme Court in *Hamdan v. Rumsfeld*.¹⁴ In addition to stripping defendants before military commissions of any right to assert the Geneva Conventions,¹⁵ the Act specifically provided that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the Courts of the United States in interpreting the prohibitions enumerated in subsection (d) of [the War Crimes Act].”¹⁶

The drafters of the Act, however, were apparently unaware of or ignored past U.S. legal history. Indeed, despite increasing discussion of variations of the technique and their application on a global

9. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), available at <http://thomas.loc.gov/> [hereinafter Military Commissions Act].

10. *Id.* § 6(b).

11. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000).

12. Military Commissions Act, *supra* note 9, § 3. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

13. The Military Commissions Act incorporates by reference the definitions of 18 U.S.C. § 2340(2) which provides, *inter alia*:

severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering; . . .

(C) the threat of imminent death; . . .

Military Commissions Act, *supra* note 9, § 6(d)(2)(D)(A).

14. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795–96 (2006).

15. See, e.g., Military Commissions Act, *supra* note 9, § 3(a)(1); 10 U.S.C. § 948b(g).

16. Military Commissions Act, *supra* note 9, § 6(a)(2).

scale,¹⁷ nobody seems to remember that, not so very long ago, the United States, acting alone before domestic courts, commissions, and courts-martial, and as a participant in the world community, not only condemned the use of water torture, but severely punished as criminals those who applied it.¹⁸

American judges or commissioners heard American prosecutors roundly condemn the practice as applied to American servicemen, in trials both before U.S. military commissions and as participants in the International Military Tribunal for the Far East (IMTFE),¹⁹ and voted to convict the perpetrators. The United States was not alone in prosecuting water torture before national tribunals, nor were the Japanese its sole practitioner. It is worth comparing those trials with Norway's prosecution of German defendants for the same form of misconduct,²⁰ and the United Kingdom's trial and execution of Japanese interrogators who used the method.²¹ There were

17. In a 2006 written parliamentary exchange, the U.K. Foreign Office was asked whether "the infliction of simulated drowning falls within the definition of torture or cruel and inhumane treatment used by the government for the purposes of international law." The government's reply from Ian Pearson, a junior Foreign Office minister was that "[w]hether the conduct constitutes torture or cruel, inhumane or degrading treatment or punishment for the purposes of the UN Convention Against Torture would depend on all the circumstances of the case." James Kirkup, *Taking Prisoners to the Edge of Drowning 'Not Torture' Says FO*, SCOTSMAN, Mar. 11, 2006, available at <http://news.scotsman.com/politics.cfm?id=367282006>.

18. Within the legal and academic community there has been a good deal of discussion of water torture in various forms under the general rubric of "water boarding." See generally THE TORTURE DEBATE IN AMERICA (Karen Greenberg ed., 2005). There has been no mention, however, of past American government pursuit and prosecution of individuals who inflicted such treatment on U.S. military personnel (the trials of Japanese war criminals after World War II) or of American service members who indulged in the technique (the Philippine insurgency hearings). See, e.g., Charles Brower, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353 (2005); Joshua A. Decker, *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 CHI. J. INT'L L. 803 (2006); Harold H. Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005); Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SEC. L. & POL'Y 187 (2005); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005); Kim L. Scheppele, *Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SEC. L. & POL'Y 285 (2005).

19. Commonly known as the Tokyo War Crimes Tribunal, it applied the same general rules and procedures as the better-known Nuremberg Tribunal. See generally Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851 (1999).

20. See, e.g., Trial of Karl-Hans Klinge, Eidsivating Lagmansrett and Supreme Court of Norway (Dec. 8, 1945 and Feb. 27, 1946), reported in 3 L. REP. TRIALS OF WAR CRIMINALS 1 (1947) (holding that throwing a victim, naked and with bound hands and feet, into a bath tub filled with ice-cold water, where he was repeatedly ducked under, constituted torture).

21. TRIAL OF SUMIDA HARUZO AND TWENTY OTHERS, THE DOUBLE TENTH TRIAL (Colin

also reports of use of the technique against American service personnel in other conflicts,²² and by American personnel against Vietnam-

Sleeman & S.C. Silkin ed., 1950). In the trial, conducted in Singapore in 1946, the prosecution alleged numerous misdeeds and certainly included water torture. As described by a trial witness:

Witness: [One interrogator] ordered a ladder to be brought, and they tied my chest and legs to it, my hands already having been tied before. I was then pressed under three running taps in a bathroom. [Another interrogator] pressed a gunny bag on my face and they tried to force water into me. They did not succeed because I struggled and they left me under one tap which was running directly on my nose and face, a second flowing towards my body, and the third towards my legs.

Prosecutor: How long were you left lying there?

Witness: Approximately two hours.

Prosecutor: Did you drink any water?

Witness: Some, but not very much.

Prosecutor: What happened after the two hours?

Witness: The same people came back, including another [military policeman], who ordered two [assistants] to lay me aside. After half an hour [the second interrogator] came back and spoke to me in Chinese. He said I was still healthy, and that I was a young British agent and would be treated the way all British agents deserved.

Prosecutor: What happened after he made that remark?

Witness: He lifted one side of the ladder and another [assistant] lifted the other and I was dipped into a pool of water.

Prosecutor: Was this pool in the garage?

Witness: It was a big bathroom inside. The pool is very large and approximately three feet deep.

Prosecutor: What happened after they carried you to this pool?

Witness: I saw [the first interrogator] adjusting his watch, and then they placed me into the pool with my head downwards.

Prosecutor: Did your face go under water?

Witness: Yes.

Prosecutor: How long did you stay there?

Witness: I cannot tell you.

Prosecutor: Could you hold your breath for the length of time?

Witness: I just managed.

Prosecutor: Did they then bring your head out of the water?

Witness: Yes, but it was too late to take any breath because they dipped me again.

Prosecutor: Did this continue?

Witness: Yes.

Prosecutor: For how long?

Witness: I cannot say because I felt like a drowning man. I drank a lot of water.

Testimony of Khoo Hock Choo, *id.* at 86–87.

22. For example, USAF Lt. Col. William Harrison described being “tortured with the ‘water treatment’ by Communist North Koreans”:

They used the water treatment. They would bend my head back, put a towel over my face and pour water over the towel. I could not breathe. This went on hour after hour, day after day. It was freezing cold. When I would pass out, they would shake me and begin again. They would leave me tied to the chair with the water freezing on and around me.

Air Officer Tells of Torture by Foe, N.Y. TIMES, Aug. 6, 1953, at 3.

ese prisoners during the Vietnam conflict.²³

“Water cure,”²⁴ “water torture,”²⁵ “water boarding.”²⁶ Under whatever name, extreme interrogators have long prized the technique, which, unlike other interrogation methods, imposes severe mental trauma and physical pain but no traces of physical trauma that would be discoverable without an autopsy.²⁷

Concerning the mental trauma, Dr. Allen Keller, the director of the Bellevue/N.Y.U. Program for Survivors of Torture, says he has treated individuals who have been subjected to forms of near-asphyxiation similar to water-boarding. He affirms that it is torture, giving rise to traumatic symptoms years later.²⁸

At least one in-depth study indicates that suffocation by immersion may cause severe psychological effects.²⁹ Among the cases studies presented was that of:

[a] 31-year-old man . . . with panic disorder. Typically, his panic attacks were characterized by predominantly respiratory symptoms, and there were also

23. Army investigations showed water torture techniques were used by American troops:

[A witness] identified former Staff Sgt. David Carmon as one of the interrogators who had tortured detainees.

[Lieutenant Colonel Anthony] Herbert also accused Carmon of subjecting a detainee to water torture. Herbert said he found Carmon involved in the torture of a Vietnamese man, pouring water onto a rag placed over the captive's nose and mouth.

This technique, called the “water rag,” causes a drowning sensation . . .

When investigators questioned Carmon in December, 1970, he admitted using the water rag on a detainee, records show.

“I held the suspect down, placed a cloth over his face and then poured water over the cloth, thus forcing water into his mouth. The suspect after becoming choked on the water, confessed that he was a VC and stated that he was a propaganda man,” Carmon said, according to his sworn statement.

Deborah Nelson & Nick Turse, *A Tortured Past*, L.A. TIMES, Aug. 20, 2006, at A1.

24. See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). See also *infra* note 117.

25. International Military Tribunal for the Far East (IMTFE) Record, at 14,168, available at National Archives and Diamond Library, Columbia Law School, Treasure, reproduced in facsimile in THE TOKYO WAR CRIMES TRIAL (R. John Pritchard & Sonia Magbanna Zaide eds., Garland Publishing Inc., 1981).

26. Mark Danner, Op-Ed., *We Are All Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27 (using term “water boarding” to describe American treatment of al Qaeda prisoners).

27. James Risen et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1; Johnston & Risen, *supra* note 3; Jehl & Johnston, *supra* note 3; Josh White, *Documents Tell of Brutal Improvisation by GIs; Interrogated General's Sleeping-Bag Death, CIA's Use of a Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, at A1.

28. Mayer, *supra* note 2, at 106.

29. Colin Bouwer & Dan Stein, *Association of Panic Disorder with a History of Traumatic Suffocation*, 154 AMER. J. PSYCHIATRY 1566 (1997).

frequent nocturnal panic attacks. On questioning about traumatic suffocation experiences, the patient recalled having been tortured as a political prisoner at age 18. A wet bag had been placed over his head repeatedly, leading to choking feelings, hyperventilation, and panic. At about age 20 the patient began to experience spontaneous panic attacks. The characteristic reexperiencing, avoidant, and numbing symptoms of PTSD were less prominent. [The authors'] . . . main findings were that 1) *there was a significantly higher incidence of traumatic suffocation experiences*, both accidental (near-drowning) and *deliberate (torture by suffocation)*, in the patients with panic disorder than in the psychiatric comparison subjects, and 2) within the group of panic disorder patients, those with a history of traumatic suffocation were significantly more likely to exhibit predominantly respiratory symptoms and nocturnal panic attacks.³⁰

Even among experienced scuba divers, more than half report having panic attacks while scuba diving.³¹ It is also clear that respiratory challenges of all sorts exacerbate symptoms in individuals already prone to panic attacks.³²

The physical effects of immersion are generally described in studies of drowning victims:

The natural progression of events is fairly typical. The victim, if conscious, may begin struggling on the surface. Owing to exhaustion, panic or inability to . . . swim, this is followed by intermittent submersion, usually associated with initial breath holding. Large amounts of fluid are swallowed, usually associated with vomiting.

The victim then aspirates small amounts of fluid, which causes laryngospasm, and this in turn may result in complete airway obstruction lasting up to 2 min. During this period of increasing hypoxia [oxygen deprivation] and panic, the victim may continue to swallow fluid into the stomach. Approximately 10–

30. *Id.* at 1568 (emphasis added).

31. *Divers Beware: Training Dives Present Serious Hazards to Fire Fighters*, Nat'l Inst. for Occupational Safety and Health, NIOSH Publication No. 2004-152 (2004).

32. Laszlo A. Papp et al., *Respiratory Psychophysiology of Panic Disorder: Three Respiratory Challenges in 98 Subjects*, 154 AMER. J. PSYCHIATRY 1557 (1997).

15% of victims proceed to aspirating another aliquot of fluid, which then causes severe laryngospasm, followed by increasing hypoxia, possible convulsions, bradycardia, and cessation of cardiac activity. In the remainder . . . laryngospasm relaxes secondary to hypoxia and unconsciousness, when large amounts of fluid are aspirated.³³

Despite the mental and physical trauma, water torture has been variously described as “torture lite”³⁴ or a “very mild form of torture.”³⁵ John Yoo, now a U.C. Berkeley law professor,³⁶ testified in 2005 before the United States Senate that he did not know whether water-boarding constituted torture.³⁷ It is difficult to believe that those who describe it that way have ever experienced it.

Captain Nielsen, the U.S. aviator captured by the Japanese in China following the Doolittle Raid on Tokyo,³⁸ detailed the essence of the technique:

Well, I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I’d get my breath, then they’d start over again.³⁹

Descriptions of water boarding as it is apparently currently applied⁴⁰ differ very little from the techniques applied by the Japanese. One investigator describes water-boarding as a technique “in which a

33. Kenneth D. Boffard et al., *The Management of Near Drowning*, 2 *TAUMA* 269, 269 (2000).

34. Evan Thomas & Michael Hirsh, *The Debate over Torture*, *NEWSWEEK*, Nov. 21, 2005, at 26.

35. STUART MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903*, at 213 (1982).

36. See <http://www.law.berkeley.edu/faculty/yooj/>.

37. Sonni Efron, *Torture Becomes a Matter of Definition*, *L.A. TIMES*, Jan. 23, 2005, at A1. “‘It depends on the circumstances,’ he said, including the details of what was done, the condition of the detainee and what other interrogation methods had been used, Yoo said.” *Id.* See also *supra* note 5.

38. On April 18, 1942, then Lt. Col. James Doolittle led a flight of B-25 bombers in a raid on the Japanese mainland. See generally CRAIG NELSON, *THE FIRST HEROES* (2002). The Japanese captured ten of the raiders and executed three of them following a trial before a Japanese Army tribunal. Following the conclusion of hostilities, the U.S. Army prosecuted the Japanese who convened and participated in the trial. See *United States v. Sawada*, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948).

39. Testimony of CPT Chase Jay Nielsen, *supra* note 1, at 55.

40. See Danner, *supra* note 4.

prisoner is stripped, shackled and submerged in water until he begins to lose consciousness.”⁴¹ Another current source says that in waterboarding “a prisoner is strapped down, forcibly pushed under water and made to believe he might drown.”⁴² The similarity is startling, given the opprobrium occasioned by its application to American military personnel. Furthermore, it is striking because, as discussed at length below, it bears a stark resemblance to conduct by American troops in the Philippine insurgency following the Spanish-American War, just over a hundred years ago.

Water torture has also been described in the U.S. judicial system in another context. Its use has been punished where it was applied by government authorities as a means of domestic questioning. In *United States v. Parker*,⁴³ a jury convicted a county sheriff and several of his deputies for interrogating prisoners using one of the methods described above.

In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators.

II. JAPAN’S USE OF WATER TORTURE AGAINST ALLIED POWS AND THE SUBSEQUENT TRIALS OF THE JAPANESE

The clearest exposition of the U.S. position on the use of water treatment as torture is found in cases in which the Japanese armed forces applied it to Allied prisoners of war during World War Two.⁴⁴ Japan’s use of the technique was extremely common,⁴⁵ and was part of the widespread use of torture as a tool of interrogation.⁴⁶ An ex-

41. Danner, *supra* note 26.

42. Risen et al., *supra* note 27.

43. CR-H-83-66 (S.D. Tex. 1983), *aff’d sub nom.* *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

44. There are numerous instances, both anecdotal and in trial records, of use by the Japanese of water-based interrogation techniques on civilians. For example, an American missionary held by the Japanese in Korea reported that he “had received the water cure when other less elaborate methods of punishment failed to make him agree he had been engaged in espionage.” According to the reporter, the water cure was “a method of forcing quantities of water down the throat of the victim until he is unconscious and in a semi-drowning condition.” Relman Morin, *American Defied Torture in Korea*, N.Y. TIMES, July 26, 1942, at 10.

45. See discussion of IMTFE Final Judgment *infra* at Part II(C).

46. A 1943 Japanese manual entitled “Notes for the Interrogation of Prisoners of War” included the following:

Care must be taken when making use of rebukes, invective or torture as it will result in his telling falsehoods and make a fool of you. The following are the

tensive discussion of the effectiveness of water questioning, and one with which some Americans might be expected to be familiar because of the fame of the victims, was found in the trial of Japanese officers responsible for the torture, trial, and in some cases execution, of crew members of the April, 1942 Doolittle raid on Tokyo.

A. United States v. Sawada: *Water Torture of the Doolittle Raiders*

Following the end of World War Two the United States participated in two forms of military tribunals. Most widely known is the International Military Tribunal for the Far East, which was convened by General MacArthur as Supreme Commander of the Allied Powers⁴⁷ with representative judges from each of the nations engaged in the war against Japan.⁴⁸ The IMTFE followed many rules and procedures similar to those used at the Nuremburg tribunal.⁴⁹

The United States,⁵⁰ however, as did other Allied powers,

methods normally to be adopted: (1) Torture which includes kicking, beating and anything connected with physical suffering. This method is to be used only when everything else fails as it is the most clumsy one. Change the interrogating officer when using violent torture, and good results can be had if the new officer questions in a sympathetic manner.

IMTFE Judgment, Torture Section, Record, *supra* note 25, at 49,664.

The Japanese Notes make an interesting comparison with the "KUBARK Manual," a 1963 CIA interrogation manual obtained by the Baltimore Sun under a FOIA request in 1997. See CIA, KUBARK Counterintelligence Interrogation, July 1963, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark> ("[T]he threat to inflict pain . . . can trigger fears more damaging than the immediate sensation of pain In general, direct physical brutality creates only resentment, hostility and further defiance.").

47. The IMTFE Charter provides "[b]y command of General MacArthur" that, *inter alia*, "[t]he International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo." Charter of the International Military Tribunal for the Far East art. 1, in SENATE COMMITTEE ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941-1949 (1950), also available at <http://www.yale.edu/lawweb/avalon/imtfec.htm>. The Charter further provides that "[t]he Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines." *Id.* art. 2.

48. For a description of the working of the IMTFE, see B.V.A. Röling, *Introduction to THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.F.T.E.) 29 APRIL 1946-12 NOVEMBER 1948*, at XI (B.V.A. Röling & C.F. Rüter eds., 1977).

49. See *id.* at xii; Wallach, *supra* note 19, at 863-68.

50. The best-known example is *United States v. Yamashita*, United States Military Commission, Manila, Oct. 8-Dec. 7, 1945, 4 L. REP. TRIALS OF WAR CRIMINALS 1 (1948), appeal denied *sub nom.* *Yamashita v. Styer*, 327 U.S. 1 (1946).

principally including the United Kingdom,⁵¹ Australia,⁵² China,⁵³ the Soviet Union,⁵⁴ the Philippines,⁵⁵ and the Netherlands,⁵⁶ also tried lesser war criminals⁵⁷ before sole state military commissions or tribunals. Among those tribunals was the *Sawada* case, of interest here because some of the Doolittle raiders were questioned using water torture, and the result of that torture (although not its actual application) was included in the charges and specifications against the defendants.⁵⁸

Sawada and his co-defendants were not specifically charged with torture in the trial charges and specifications. Rather, Sawada was charged with causing "Prisoners of War to be denied the status of Prisoners of War and to be tried and sentenced by a Japanese Mili-

51. See, e.g., Trial of Yamamoto Chusaburo, British Military Court, Kuala Lumpur, Jan. 30–Feb. 1, 1946, 3 L. REP. TRIALS OF WAR CRIMINALS 76 (1947).

52. See, e.g., Trial of Sergeant-Major Shiger Ohashi and Six Others, Australian Military Court, Rabaul, Mar. 20–23, 1946, 5 L. REP. TRIALS OF WAR CRIMINALS 25 (1948).

53. The Nationalist Chinese prosecuted Japanese Class B and C war criminals in Nanking between 1946 and 1947. Xiaoyu Pu, *The Nanking Massacre, Justice and Reconciliation: A Chinese Perspective*, 6 PERSPECTIVES 26 (2005), available at http://www.oycf.org/Perspectives/30_09302005/2c_Pu_NankingMassacre.pdf.

54. The U.S.S.R. conducted a series of trials at Khabarovsk from December 25, 1949, through the 30th, the subject of which was principally allegations of biological and chemical warfare. Jing-Bao Nie, *The United States Cover-Up of Japanese Wartime Medical Atrocities: Complicity Committed in the National Interest and Two Proposals for Contemporary Action*, 6 AM. J. BIOETHICS 3, 3 (2006).

55. Two hundred and fifteen Japanese defendants faced military commissions in the Philippines. See Robert Barr Smith, *Japanese War Crimes Trials*, available at http://www.historynet.com/wars_conflicts/world_war_2/3035796.html (last visited Jan. 18, 2007).

56. See, e.g., Trial of Washio Awochi, Netherlands Temporary Court Martial at Batavia, Oct. 25 1946, 13 L. REP. TRIALS OF WAR CRIMINALS 122 (1949).

57. The term refers not to the gravity of crimes committed but to their type, and the decision not to include that individual as a representative "Class A" defendant before the IMTFE. In August 1945, the Coordinating Committee of the U.S. Departments of State, War, and Navy [hereinafter SWNCC] published its classification of war criminals: A, B, and C. In brief, Class A consisted of those accused of "crimes against peace"—first of all, planning, preparing, initiating, or waging a declared or undeclared war of aggression, or a war in violation of international law and treaties; or, participating in a conspiracy for the accomplishment for any of the foregoing. Class B consisted of those people charged with conventional war crimes—namely violations of the laws and customs of war, including the maltreatment of civilians and prisoners of war. Finally, Class C comprised all those accused of crimes against humanity—those who had carried out torture, murder, extermination, enslavement, deportation, and other inhumane acts before or during the war, or persecution on political, religious, or racial grounds ordered by superiors. As Takemae Eiji notes, "In Germany, four Allied powers had tried Nazi leaders for the Holocaust and related horrors under Class-C crimes against humanity, but in Japan this category became blurred with Class B offenses, and most of the so-called B/C war crimes covering conventional brutalities and murder were tried in local military tribunals throughout Asia." Bill Barette, *Art and Exchange at Sugumo Prison, 1945–52: Visual Communication in American-Occupied Japan* (Japan Policy Research Institute, JPRI Occasional Paper No. 33, 2004).

58. See *infra* notes 59 and 60.

tary Tribunal in violation of the Laws and Customs of War.”⁵⁹ The specifications alleged that he had directed the prisoners’ trial “on false and fraudulent charges,” that he failed to commute or remit the sentences causing unlawful deaths and other criminal sentences, and that he unlawfully caused the prisoners to be treated as war criminals.⁶⁰

Captain Nielsen’s testimony was part of the prosecution’s proof that the Doolittle raiders were not guilty of war crimes, and that, in fact, their confessions were obtained by torture.⁶¹ Sawada was present during that testimony and was asked about it on cross-examination:

Q: Did you listen to Captain Nielsen testify on the witness stand in this case?

A: I heard it.

Q: Did you hear him tell how he was treated . . . ?

A: I heard.

Q: Well who was responsible for his treatment at the Airfield that night?

A: The Gendarmerie took them over already

Q: The fact of the matter is, General, you didn’t care how they were treated did you?

A: I thought they were treated fairly.

Q: You heard Captain Nielsen testify about being given the water treatment out there, didn’t you?

59. Charge, Record of Trial, United States v. Sawada, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948), Judge Advocate General’s Office File No. 119-19-5 (1946), at 1, *available at* National Archives.

60. Specifications, Record of Trial, *supra* note 59, at 2–3.

61. The U.S. Government’s official position about Japanese interrogation techniques applied to the Doolittle raiders was clearly stated in a diplomatic note delivered to the Japanese government through Switzerland in 1943:

With regard to the allegation of the Japanese Government that the American aviators admitted [intentionally bombing and strafing non-military targets] there are numerous known instances in which Japanese agencies have employed brutal and bestial methods in extorting alleged confessions from persons in their power. It is customary for those agencies to use statements obtained under torture, or alleged statements, in proceedings against the victims.

Telegram from Sec. of State Cordell Hull to Japanese Government via Bern Legation, Apr. 5, 1943, Investigative File, United States v. Sawada, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948), Judge Advocate General’s Office File No. 35-6, at 53 (1945), *available at* National Archives.

A: I heard him say he received it from the Gendarmes.⁶²

In his closing argument the Prosecutor explained the government's position on the application of the facts about prisoner mistreatment to General Sawada:

[O]ur contention is that we cannot see how Sawada can escape responsibility when these men were his prisoners and he turned them over and allowed these Gendarmerie members to treat them as they did, when he should have seen to it that they had proper treatment.⁶³

He continued his argument against Sawada discussing the General's claim that he was not familiarized by the Japanese government with the specifics of the 1929 Geneva Convention:

They cannot say that something their government failed to do authorized them to fail to treat these men as human beings. When their government agreed to [abide by the 1929 Convention] they should have taken these men and treated them as prisoners of war and not as war criminals.⁶⁴

The Commission rejected the Prosecutor's argument about the General's criminal liability for the water torture (and other mistreatment) inflicted by the Japanese military police. Although it found that Sawada "was negligent in not personally investigating the treatment being given the American prisoners, he was informed by his responsible staff that they were being given the treatment accorded Japanese officer prisoners."⁶⁵

What the Commission did not question, however, was the Prosecution's contention that Captain Nielsen was tortured with the water cure, and that the torture resulted in a wrongful conviction. It rejected the portion of the First Specification alleging Sawada "knowingly and willfully" constituted a military tribunal to try Americans who were entitled to POW status, although it found the

62. Record of Trial, *United States v. Sawada*, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948), Judge Advocate General's Office File No. 119-19-5 (1946), at 439-40, *available at* National Archives.

63. *Id.* at 490.

64. *Id.* at 491.

65. Commission's Conclusions, Record of Trial, *United States v. Sawada*, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948), Judge Advocate General's Office File No. 119-19-5 (1946), at 549, *available at* National Archives.

General guilty on the remainder of that Specification. On the Second Specification, however, that Sawada had the American prisoners tried “on false and fraudulent charges,” the Commission found him guilty with no exception. It accepted that they were false and fraudulent, based on evidence which in very large part showed the prisoners’ confession had been obtained through torture. A key aspect was the water torture applied to Captain Nielsen.

That the water cure was torture was also a legal conclusion accepted in other U.S. military commissions in the Pacific Theater.

B. Water Torture Prosecutions Before Other U.S. Tribunals

The United States tried a significant number of Class B and C war criminals before national tribunals. Among them were several conducted at Yokohama, Japan and one in the Philippines. All of these trials elicited compelling descriptions of water torture from its victims, and resulted in severe punishment for its perpetrators.

One compelling example is found in the Manila trial of Sergeant-Major Chinsaku Yuki of the Kempentai⁶⁶ for torture and murder⁶⁷ of Philippine civilians. There, the Commission heard testimony from Ramon Navarro, a Filipino lawyer who had been arrested by the Kempentai and questioned by the Defendant on suspicion that he knew of and supported guerilla activities. His testimony was the only direct evidence received by the tribunal about Sgt. Maj. Yuki’s interrogation techniques:

Q: And then did he take you back to your room?

A: When Yuki could not get anything out of me he wanted the interpreter to place me down below

66. Yuki was tried before a military commission convened by the Commanding General Philippines-Ryukyus Command. Record of Trial, United States v. Yuki, Philippines Trials, March 21, 1947, SCAP Prosecution Section File 142, *available at* National Archives, NND 775011, Record Group 331: Allied Operational and Occupation Headquarters, World War II, Entry 1321: SCAP; Legal Section; Prosecution Division, United States v. Japanese War Criminals Case File, 1945-49, Box 1586, File Chinsaku Yuki-Vol. I.

67. The Charge was a standard one:

That Chinsaku YUKI, ISN 51J-119862, a Sergeant-Major in the Imperial Japanese Army, on the dates and at the places hereinafter specified, and while a state of war existed between the United States of America, its allies and dependencies, and Japan, did violate the laws and customs of war.

Record of Trial, United States v. Yuki, *supra* note 66, Vol. I (Charge and Specifications Against Chinsaku Yuki), at 7. The specifications included torture and murder of unarmed non-combatants. *Id.* Interestingly, the Commission declined to convict Yuki regarding his treatment of guerillas, apparently taking the position that the charge and specifications were limited to noncombatants. *Id.*, Vol. VI (Judgment), at 249-50.

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and I was told by Yuki to take off all my clothes so what I did was to take off my clothes as ordered. I was ordered to lay on a bench and Yuki tied my feet, hands and neck to that bench lying with my face upward. After I was tied to the bench Yuki placed some cloth on my face and then with water from the faucet they poured on me until I became unconscious. He repeated that four or five times.

Col. Keeley: You mean he brought water and poured water down your throat?

A: No sir, on my face, until I became unconscious. We were lying that way with some cloth on my face and then Yuki poured water on my face continuously.

Col. Keeley: And you couldn't breathe?

A: No, I could not and so I for a time lost consciousness. I found my consciousness came back again and found Yuki was sitting on my stomach and then I vomited the water from my stomach and the consciousness came back again for me.

Q: Where did the water come out when he sat on your stomach?

A: From my mouth and all openings of my face . . . and then Yuki would repeat the same treatment and the same procedure to me until I became unconscious again.

Q: How many times did that happen?

A: Around four or five times from two o'clock up to four o'clock in the afternoon. When I was not able to endure his punishment which I received I told a lie to Yuki . . . I could not really show anything to Yuki because I was really lying just to stop the torture.⁶⁸

When Yuki learned that Navarro was lying, he was brought back to the Kempentai facility and again subjected to the water cure:

68. *Id.*, Vol. III (Public Trial), at 85–86.

Col. Keeley: Was it painful?

A: Not so painful, but one becomes unconscious.
Like drowning in the water.

Q: Like you were drowning?

A: Drowning: you could hardly breathe.

Q: How many times did he do that?

A: Two or three times.⁶⁹

In his summation, the Prosecutor discussed Navarro's testimony noting that "it's on his testimony that we have to determine whether there was any torture or not." Apparently, that testimony was sufficient for the Commissioners. They convicted Yuki of the charges that he tortured and murdered a civilian non-combatant, and sentenced him to life imprisonment.⁷⁰

Another compelling description of water torture is found in a case heard before a U.S. Military Commission at Yokohama, Japan. There, four Japanese defendants were tried for torture and mistreatment of American and Allied prisoners at Fukoka Prisoner of War Branch Camp Number 3 in Kyushu.⁷¹ Water torture was among the acts alleged in the specifications against the various defendants, and it loomed large in the evidence presented against them.⁷²

The four defendants, Hata,⁷³ Asano,⁷⁴ Kita⁷⁵, and Naka-

69. *Id.*, at 87-88.

70. *Id.* at 241.

71. *United States v. Hideji Nakamura*, U.S. Military Commission, Yokohama, 1947, available at National Archives, NND 735027, Record Group 153: Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944-49, Box 1025, File No. 36-219-Vol. I.

72. *Id.*

73. The charge and specifications against Hata were:

Charge: That the following member of the Imperial Japanese Army with his then known title: Seitaro Hata, Surgeon First Lieutenant, at the times and places set forth in the specifications hereto attached, and during a time of war between the United States of America and its Allies and Dependencies, and Japan, did violate the Laws and Customs of War.

Specification 3. That in or about July or August, 1943, at Fukoka Prisoner of War Branch Camp Number Three, Fukuoka ken, Kyushu, Japan, the accused Seitaro Hata, did willfully and unlawfully, brutally mistreat and torture Morris O. Killough, an American Prisoner of War, by beating and kicking him, by fastening him on a stretcher and pouring water up his nostrils.

Specification 5. That on or about 15 May, 1944, at Fukoka Prisoner of War Branch Camp Number Three, Fukuoka ken, Kyushu, Japan, the accused Seitaro Hata, did, willfully and unlawfully, brutally mistreat and torture Thomas B. Armitage, William O Cash and Munroe Dave Woodall, American Prisoners of War, by beating and kicking them, by forcing water into their mouths and noses, and by pressing lighted cigarettes against their bodies.

mura⁷⁶ were respectively the camp doctor, interpreter, senior non-commissioned officer, and mess sergeant. The charges against them arose from two separate water torture incidents in which they partici-

Charge and Specifications Against Seitara Hata, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947 (emphasis added).

74. The charge and specifications against Asano were:

Charge: That between 1 April, 1943 and 31 August, 1944, at Fukoka Prisoner of War Branch Camp Number 3, Kyushu, Japan, the accused Yukio Asano, then a civilian serving as an interpreter with the Armed Forces of Japan, a nation then at war with the United States of America and its Allies, did violate the Laws and Customs of War.

Specification 1: That in or about July or August, 1943, the accused Yukio Asano, did willfully and unlawfully, brutally mistreat and torture Morris O. Killough, an American Prisoner of War, by beating and kicking him, by fastening him on a stretcher and pouring water up his nostrils.

Specification 2: That on or about 15 May, 1944, at Fukoka Prisoner of War Branch Camp Number 3, Kyushu, Japan, the accused Yukio Asano, did, willfully and unlawfully, brutally mistreat and torture Thomas B. Armitage, William O. Cash and Munroe Dave Woodall, American Prisoners of War, by beating and kicking them, by forcing water into their mouths and noses, and by pressing lighted cigarettes against their bodies.

Specification 5: That between 1 April, 1943 and 31 December, 1943, the accused Yukio Asano, did, willfully and unlawfully, brutally mistreat and torture John Henry Burton, an American Prisoner of War, by beating him, and by fastening him head downward on a stretcher and forcing water into his nose.

Charge and Specifications Against Yukio Asano, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947 (emphasis added).

75. The charge and specifications against Kita were:

Charge: That the following member of the Imperial Japanese Army with his the known title: Takeo Kita, Sergeant Major, at the times and places set forth in the specifications hereto attached, and during a time of war between the United States . . . and Japan, did violate the Laws and Customs of War.

Specification 2: That between 1 April, 1943 and 31 August, 1944, at Fukoka Prisoner of War Branch Camp Number 3, Kyushu, Japan, the accused Takeo Kita, did, willfully and unlawfully, brutally mistreat and torture John Henry Burton, an American Prisoner of War, by beating him and by forcing water into his nose.

Specification 4: That on or about 15 May, 1944, at Fukoka Prisoner of War Branch Camp Number 3, Kyushu, Japan, the accused Takeo Kita, did, willfully and unlawfully, brutally mistreat and torture Thomas B. Armitage, William O. Cash and Munroe Dave Woodall, American Prisoners of War by beating them, forcing water into their mouths and noses, and by pressing lighted cigarettes against their bodies.

Charge and Specifications Against Takeo Kita, United States v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita, U.S. Military Commission, Yokohama, May 1-28, 1947 (emphasis added).

76. The charge and specifications against Nakamura were less specifically related to water torture per se, but still dealt with forced dunking:

Charge: That the following member of the Imperial Japanese Army, with his then known title, Hideji Nakamura, at the times and places set forth in the specifications hereto attached, and during a time of war between the United States of America, its Allies and Dependencies, and Japan, did violate the Laws and Customs of War.

Charge and Specifications Against Hideji Nakamura, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947. None of the specifications were on water torture per se, but specifications two and nine refer to forcing prisoners into a tank of water. *Id.* The testimony discussed *infra* links those specifications to water torture (emphasis added).

pated: one involved a single victim, John Burton, and the other involved several prisoners and arose from the jailers' belief that prisoners Armitage, Cash and Woodall had stolen food.⁷⁷

The witness's descriptions painted a grim portrait of the treatment meted out to POWs, and of the use of water torture as a primary means of interrogation. He was turned upside down, water poured up his nose, and he was beaten into unconsciousness.⁷⁸

[T]hey would lash me to a stretcher then prop me up against a table with my head down. They would then pour about two gallons of water from a pitcher into my nose and mouth until I lost consciousness.⁷⁹

[T]hey laid me out on a stretcher and strapped me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. . . . They then began pouring water over my face and at times it was almost impossible for me to breath [sic] without sucking in water.⁸⁰

77. A separate trial arising out of the same incidents of torture was instituted against Genji Mineno. See *infra* text accompanying note 85.

78. The full testimony reads:

American prisoner Woodall . . . had stolen a shirt from the Japanese . . . was stretched and tied on a hospital stretcher and severely beaten. He was turned upside down and water poured up his nose and beaten into unconsciousness. The treatment lasted for about four hours. . . . William Cash . . . WAS given the identical treatment for the same offense. The Japanese immediately involved in this punishment were FIRST LIEUTENANT HATA, medical officer at the camp, MR ASANO, civilian interpreter, MASTER SERGEANT KITA, and the unidentified Japanese Warant [sic] Officer.

Affidavit of Cpt. Vetalis Vernon Anderson, Oct. 20, 1945, San Francisco, CA, Record of Trial, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947, at Exhibit 6. See also Affidavit of Cpt. William Arno Blueher, Record of Trial, United States v. Nakamura, at Exhibit 6.

79. The full testimony reads:

In addition to the two [Japanese] who brought us over there, the following [Japanese] were also present and participated in the beatings and tortures; Doctor Lieutenant HATA, Sergeant KALISAKI, a discharged ex-soldier named MANEO, a civilian interpreter named OSANA. After beating me for a while they would lash me to a stretcher then prop me up against a table with my head down. They would then pour about two gallons of water from a pitcher into my nose and mouth until I lost consciousness. When I revived they would repeat the beatings and 'water cure' The tortures and beatings continued for about six hours.

Statement of Thomas B Armitage (one of the victims), Oct. 1, 1945, 29th Replacement Depot, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

80. The full testimony reads:

Two of the Japanese guards, Kita and Osano (Kita was the Sergeant Major and Osano was the interpreter) These two Japanese then started beating me with a club, using a bamboo stick about two feet long and two inches thick. . . . the beating . . . continued from 9:00 that morning until 1:00 o'clock in the

[We] were strapped to stretchers and warm water poured down our nostrils until we were about ready to pass out.⁸¹

[They] strapped him to a stretcher and elevated his feet and then poured on his face so that it was almost impossible for him to get his breath.⁸²

[The victim] was then taken into the corridor, strapped to a stretcher, which was tilted so that his head was toward the floor and feet resting on a nearby sink. Water was then poured down his nose and mouth for about twenty minutes. . . .⁸³

afternoon. Then I was taken into the hallway of the barracks. Both of the Japanese still insisting I was guilty and urging me to confess After taking me down into the hallway, they laid me out on a stretcher and strapped me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. By this time, practically the entire Japanese personnel of the camp were present. I saw the Japanese Major who was the Commanding Officer and also the 1st Lt. who was his assistant. This 1st Lt. told me while I was strapped to the stretcher that he didn't think I did it, but it was his duty to punish me anyway. They then began pouring water over my face and at times it was almost impossible for me to breathe without sucking in water. This torture continued for what must have been a half hour or an hour. Finally I was placed in a horizontal position and unstrapped. It was impossible for me to arise so one of the prisoners . . . helped me.

Affidavit of John Henry Burton, Apr. 26, 1946, Los Angeles, CA, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

81. The full testimony reads:

One of the Japanese Guards who was particularly bad was a two star sergeant named MENINO (phonetic) In August, 1943, I and a civilian from Wake Island named BILL CASH, were strapped to stretchers and warm water poured down our nostrils until we were about ready to pass out. MENINO did this with the help of two other Japanese guards.

Affidavit of George Dee Stoddard, Oct. 22, 1945, Alameda, CA, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

82. The full testimony reads:

At about 12:00 noon Kita and Osano took Burton and strapped him to a stretcher and elevated his feet and then poured on his face so that it was almost impossible for him to get his breath. I was standing within three feet of Burton when this happened. While the Japs were giving Burton the 'Water Cure' I was forced to hold my right arm which was infected out at right angles to my body and the Japs were hitting it with clubs. Gibson also identified Mineno as having commonly been nicknamed by the POWs as 'the water snake.'

Sworn Statement of George E. Gibson (civilian contractor captured at Wake Island), Sept. 28, 1945, 29th Replacement Depot, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

83. The full testimony reads:

BURTON . . . was then taken into the corridor, strapped to a stretcher, which was tilted so that his head was toward the floor and feet resting on a nearby sink. Water was then poured down his nose and mouth for about twenty minutes ASANO (5 star), the civilian interpreter of the camp . . . was responsible for this water treatment, and had done the beating and poured the water down BURTON's nose and mouth.

[T]hey stood them on their heads and poured water down their noses and into their mouths until they almost choked.⁸⁴

Genji Mineno was tried separately at Yokohama⁸⁵ for participating in the same series of events.⁸⁶ The evidence introduced against him included the same affidavits and witness statements introduced against the other four defendants. On the basis of that evidence,⁸⁷ all five were convicted of all torture specifications.⁸⁸ It is worth noting that, in Mineno's case, the reviewing officer "in view of the proof of the guilt of the accused of the many beatings and other vicious tortures" thought his sentence of twenty years confinement at hard labor was "inadequate."⁸⁹

Affidavit of James William Pettit, Oct. 12, 1945, Alameda, CA, United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

84. The full testimony reads:

In about May of 1944, 3 Americans, one whose name was William Cash took some clothing from the store house . . . [Among other tortures] they stood them on their heads and poured water down their noses and into their mouths until they almost choked.

Claude A Thomas Dep., Sept. 18, 1945, 29th Replacement Depot, Luzon. P.I., United States v. Hideji Nakamura, U.S. Military Commission, Yokohama, 1947.

85. Military Commission Case Docket No 47 Tried at Yokohama June 25–28, 1946. NARA NND 735027 Record Group 153, Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944–49, Box 1025, File No. 36-449-Vol. I. Mineno was a civilian employee of the Imperial Japanese Army.

86. The charges and specifications were:

Charge: That between 1 Feb 1943 and 1 Sept 1945 at POW Camp No. 3, Kokura, Fukuoka, Japan, Genji Mineno . . . did willfully and unlawfully commit cruel, inhuman and brutal acts, atrocities and other offenses against certain American and Allied Prisoners of War, in violation of the Laws and Customs of War.

Specification 5. That in or about August, 1943, the accused, Genji Mineno, together with other persons did, willfully and unlawfully, brutally mistreat and torture George De Witt Stoddard and William O. Cash, American Prisoners of War, by strapping them to a stretcher and pouring water down their nostrils.

Specification 9. That in or about 15 May, 1944, the accused, Genji Mineno, did, willfully and unlawfully, brutally mistreat and torture Thomas B. Armitage, William O. Cash, and Munroe Dave Woodall, American Prisoners of War, by beating and kicking them, by forcing water into their mouths and noses, and by pressing lighted cigarettes against their bodies.

Reproduced in Synopsis of Charges, Pleas, Findings, Legal Sufficiency, and Sentence, Review of Staff Judge Advocate, Headquarters Eighth Army, United States Army, Yokohama, Japan, Document No. 46, Aug. 17, 1946, at 1–2.

87. See *supra* notes 69–81.

88. Surgeon First Lieutenant Hata was sentenced to twenty-five year confinement at hard labor. Mr. Mineno, the civilian guard, and Mess Sergeant Nakamura both received twenty years confinement at hard labor. Sergeant Major Kita and Mr. Asano, the interpreter, were given confinement for fifteen years at hard labor. Review of Staff Judge Advocate, Headquarters Eighth Army, United States Army, Yokohama, Japan, Case No. 53, Oct. 15, 1948, at 1.

89. See Reviews of the Yokohama Class B and Class C War Crimes Trials by the 8th Army Judge Advocate, 1946–1949. National Archives Publication M1112.

In an entirely separate water torture case, the United States tried Yagoheiji Iwata.⁹⁰ The torture charges against Iwata involved his mistreatment of a Dutch Prisoner of War, A. A. Peters.⁹¹ One of Peters' superior officers was a witness to the torture:

After [beating Peters] they let him down again . . . and Iwata told a few soldiers to hold Peters head backwards. Then he told another soldier to put a piece of cloth over his mouth and ordered another soldier again, to fetch a bucket of sea water. There were five buckets which were standing on a special tank in case of fire. At that point the Japanese sick bay attendant, who was present at the moment, and who expected what was going on, intervened. He told him, to Sergeant Iwata, that it is dangerous because it is sea water and the man will get sick. At that moment Sergeant Iwata said 'Let him die.' Further, the soldiers lifted the buckets and Iwata assisted in pouring the sea water over Peters face. On account of the piece of cloth over his mouth, his nose was closed so he was forced to swallow the sea water causing a swollen belly.⁹²

Upon that evidence, Iwata was convicted of the torture charge.⁹³

In addition to those single-nation military commissions con-

90. United States v. Iwata, Case Docket No 135, Mar. 31, 1947 to Apr. 3, 1947, Yokohama. NND735027, Record Group 153: Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944-49, Box 1036, File No. 36-449-Vol. I.

91. The charges and specifications against Iwata included:

Charge: That the following member of the Imperial Japanese Army, with his then known title: Yagoheiji IWATA, Sergeant, at the time and place set forth in the specifications hereto attached, and during a time of war between the United States of America, its Allies and Dependencies, did violate the Laws and Customs of War.

Specification 1. That on or about 24, September, 1943, at Fukuoka Prisoner of War Camp Number Two, Koyagimura, Nagasaki, Kyushu, Japan, the accused, Yagoheiji Iwata, singly and with others, did willfully and unlawfully mistreat and torture Marine Third Class A. A. Peters, a Dutch Prisoner of War, by beating him, by throwing him on the ground, by hanging him by his hands from a post, by holding his head back and forcing him to swallow a bucketful of sea water, by placing him in solitary confinement and by otherwise abusing him.

Record of Trial, United States v. Iwata, *supra* note 90, Vol. 1 (Charges and Specifications Against Yagoheiji Iwata), at 1-2.

92. Testimony of Johannes J. Budding, Captain, Royal Netherlands Indies Army, Special Troops. *Reproduced in* Synopsis of Charges, Pleas, Findings, Legal Sufficiency, and Sentence, Review of Staff Judge Advocate, Headquarters Eighth Army, United States Army, Yokohama, Japan, Sept. 17, 1948, at 1.

93. Iwata was found guilty (but the words "a bucketful of" and "by placing him in solitary confinement" were struck from the charge). Iwata was sentenced to twelve years of hard labor.

ducted by the United States, water torture was a major issue in proceedings before the IMTFE. That tribunal was created by General MacArthur in his position as Supreme Commander of Allied Powers, (SCAP).⁹⁴ An American Judge⁹⁵ sat on the tribunal and voted for convictions⁹⁶, and the chief prosecutor was an American.⁹⁷ Accordingly, its record should have some precedential weight, in history if not in law.

C. *The International Tribunal*

The IMTFE was principally concerned with Japanese crimes against states, including acts of aggression and crimes against peace,⁹⁸ but it also considered charges of misconduct against military personnel and civilians, including murder, rape, and torture.⁹⁹

The Judgment of the International Military Tribunal for the

94. IMTFE Charter, *supra* note 47.

95. Justice John P. Higgins of the Massachusetts Supreme Court, and, as a replacement in July, 1946, M.G. Myron Cramer, former Judge Advocate of the Army. RICHARD MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971). Interestingly, Cramer, a former Judge Advocate General of the United States Army, had participated extensively in the drafting and application of the procedural and evidentiary rules which governed both the Nuremberg Tribunal and the IMTFE. Wallach, *supra* note 19, at 858.

96. See IMTFE Judgment, Record, *supra* note 25, at 48,413.

97. See Joseph Keenan, *Observations and Lessons from International Criminal Trials*, 17 U. KAN. CITY L. REV. 117, 123 (1949).

98. See IMTFE Indictment, 1 THE TOKYO WAR CRIMES TRIAL, *supra* note 25, at ¶¶ 1–53.

99. The IMTFE Indictment charged the defendants, *inter alia*, with torture under conventional war crimes and crimes against humanity. Specifically, the defendants allegedly had ordered, authorized, and permitted:

the Commanders-in-Chief of the several Japanese naval and military forces in each of the several theatres of war in which Japan was then engaged, and the officials of the Japanese War Ministry, and the persons in charge of each of the camps and labor units for prisoners of war and civilian internees in territories of or occupied by Japan and the military and civil police of Japan, and their respective subordinates frequently and habitually to commit . . . breaches of the Laws and Customs of War. . . .

IMTFE Judgment, *supra* note 96, at Appendix D, Section One. Allegedly “prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces.” *Id.* Defendants allegedly inflicted

[e]xcessive and illegal punishment of prisoners of war, contrary to Article 8 of the said Annex to the said Hague Convention and to Part III, Section V, Chapter 3 of the said Geneva Convention, and to the said assurances: 1. Prisoners of war were killed, beaten and tortured without trial or investigation of any kind, for alleged offences.

Id. at Section Four. Finally, allegedly “[l]arge numbers of the inhabitants of [occupied] territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labor, and their property destroyed or confiscated.” *Id.* at Section Twelve. IMTFE Indictment, *supra* note 98.

Far East held that:

The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan. The Japanese indulged in this practice during the entire period of the Pacific War. Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment . . .¹⁰⁰

As noted above, the Judgment described the water treatment as “commonly applied.” It was called by a number of names (water treatment, the water test,¹⁰¹ water torture,¹⁰² suffocation by immersions¹⁰³), but the descriptions in the IMTFE trial record are generally of two types:

There were two forms of water torture. In the first, the victim was tied or held down on his back and cloth placed over his nose and mouth. Water was then poured on the cloth. Interrogation proceeded and the victim was beaten if he did not reply. As he opened his mouth to breathe or answer questions, water went down his throat until he could hold no more. Sometimes, he was then beaten over his distended stomach, sometimes a Japanese jumped on his stomach, or sometimes pressed on it with his foot.

In the second, the victim was tied lengthways on a ladder, face upwards, with a rung of the ladder across his throat and head below the latter. In this position he was slid first into a tub of water and kept there until almost drowned. After being revived, interrogation proceeded and he would be reimmersed.¹⁰⁴

Another detailed description before the IMTFE was provided by a Swiss engineer held by the Japanese in the Dutch East Indies:

The third degree of punishment was suffocation by

100. IMTFE Judgment, *supra* note 96, at 49,663.

101. IMTFE Record, *supra* note 25, at 13,811, 13,812.

102. *Id.* at 12,940.

103. *Id.* at 13,691.

104. Affidavit of J.L. Wilson, The Right Reverend Lord Bishop of Singapore, admitted as Prosecution Exhibit 1519A, Dec. 16, 1946, IMTFE Record, *supra* note 25, at 12,935. This testimony refers to the same events discussed in the U.K. “Double Tenth Trial,” *supra* note 21.

immersions. A towel was fixed under the chin and drawn over the face. Then many buckets of water were poured into the towel so that the water gradually reached the mouth and rising further eventually also the nostrils . . . which resulted in his becoming unconscious and collapsing like a person drowned. This procedure was sometimes repeated 5–6 times in succession. Did the prisoner not confess, he was mostly led back to the cell to pass the night in his wet clothes.¹⁰⁵

The technique was similar in Shanghai:

Various tortures were administered during interrogation, the main ones being “Water Torture,” which is done by laying a person flat on a bench with his head overhanging one end. A funnel is then placed in the mouth and water forced into the abdomen and lungs. The torturer then jumps on the stomach of his victim producing a drowning sensation.¹⁰⁶

A French prisoner of the Japanese at Cao-Bang in Vietnam described “water punishment” applied to him:

I was submitted to another group of torturers: a soldier held my head with one hand and with the other stopped my mouth during this time a second soldier poured cold water from a teapot into my nostrils, my head thrown backwards to a position lower than the bench on which I was lying. This operation was repeated about fifteen times and the teapot was filled as many times. This produced in me the early stages of asphyxia and I estimate that I must have had 3 or 4 liters of water forced down me.¹⁰⁷

There was a significant reason the IMTFE’s Judgment listed water torture first in its determination that the Japanese uniformly engaged in torture throughout occupied areas.¹⁰⁸ The practice, in its

105. Report of Dr. R. Flachs on treatment by Japanese Kenpeitai [military police] at Bandung, Dutch East Indies, admitted as Prosecution Exhibit 1752A, Dec. 27, 1946, IMTFE Record, *supra* note 25, at 13,691.

106. Affidavit of Cpt. Edward E. Williamson, sworn to on June 6, 1946, admitted as Prosecution Exhibit 1892-A, Jan. 3, 1947, IMTFE Record, *supra* note 25, at 14,168.

107. Affidavit of Marcel Robert, admitted as Prosecution Exhibit 2134-A, Jan. 16, 1947, IMTFE Record, *supra* note 25, at 15,339.

108. IMTFE Judgment, *supra* note 96, at 49,664.

various iterations, was widespread and uniform.¹⁰⁹ Its condemnation, and the ensuing severe sentences of those who ordered and permitted it,¹¹⁰ was approved in its entirety by Myron Cramer,¹¹¹ the U.S. Judge on the Tribunal.¹¹²

109. The trial record of the IMTFE contains numerous references to forms of water torture inflicted by Japanese troops. These include, *inter alia*: Affidavit of James Strawhorn regarding torture at a POW camp at Nichols Field in the Philippines (tying victim to a board with head lower than feet and pouring salt water into his mouth), admitted as Prosecution Exhibit 1453, Dec. 12, 1946, IMTFE Record, *supra* note 25, at 12,605–07; Affidavit of Amhad Bin Cheteh regarding death of prisoners following water torture at Penang [Malaysia], admitted as Prosecution Exhibit 1531A, Dec. 16, 1946, *id.* at 12,958–59; Solemn Declaration of Harry Joseph regarding tortures by Kempeitai at Kyaikto [Myanmar], admitted as Prosecution Exhibit 1552A, Dec. 16, 1946, *id.* at 12,981–82 (“a large quantity of water slowly poured into [prisoner’s] mouth and nostrils, so that the prisoner suffocated”); Affirmation of Pyaray Mohan, admitted as Prosecution Exhibit 1611A, Dec. 18, 1946, *id.* at 13,186 (victim of water torture in Andaman Islands); Affirmation of Murad Ali, admitted as Prosecution Exhibit 1616A, Dec. 18, 1946, *id.* at 13,192–93 (Indians tried as spies in Adaman Islands, water torture carried, including by one of the judges); Affidavit of Maj. A. Zimmerman, admitted as Prosecution Exhibit 1750, Dec. 26, 1946, *id.* at 13,682–84 (“water test” at Buitenzorg [now Bodor], Indonesia); Affidavit of Prof. E. DeVries, admitted as Prosecution Exhibit 1751, Dec. 26, 1946, *id.* at 13,685–86 (underwent “water test” twenty-two times during a period of two months at Buitenzorg [now Bodor], Indonesia); Affidavit of Cdr. C.D. Smith regarding water torture at Shanghai, admitted as Prosecution Exhibit 1901A, Jan. 3, 1947, *id.* at 14,179, 14,181–82:

The water treatment consists of lashing a man face up across the desk top. A bath towel is then so rolled as to form a circle around his nose and mouth, and a five-gallon can of water, which was generally mixed with the vilest of human refuse and other filth, such as kerosene, was then put handy . . . if he did not respond, the water was poured into the space made by the bath towel, forcing the prisoner to either swallow and inhale the vile concoction or strangle himself. This is kept up, questioning between doses, until the man is at the point of unconsciousness . . . the water is allowed to drain out of him. When he has sufficiently recuperated the treatment is resumed.

Affidavit of Dominique Poli, admitted as Prosecution Exhibit 2135, Jan. 16, 1947, *id.* at 15,340–41 (given “water punishment” several times at Hanoi, Vietnam by Japanese police); and Declaration of Leon Artouard, interrogated by Kempetai at Saigon, Vietnam, admitted as Prosecution Exhibit 2143A, Jan. 16, 1947, *id.* 15364, 15,366:

I was placed on my back on a bench and firmly tied down so as to undergo ‘torture by water’ which consisted in causing the first stages of asphyxiation by the absorption of water into the respiratory tract. Water was poured at the same time into the nose and mouth, which is kept open with a whip or a staff slipped between the teeth, or on a rag held firmly over these two orifices.

Id.

110. Kenji Dohihara, Seishiro Itagaki, Heitaro Kimura, Akira Muto, and Hideki Tojo, the IMTFE defendants who were convicted on Count 54 (ordering, authorizing, and permitting commission of war crimes including, *inter alia*, torture), were all sentenced to death by hanging. IMTFE Judgment, *supra* note 96. Shunroko Hata, Kuniaki Koiso, Koki Hirota, who were convicted on Count 55 (failure to take adequate steps to prevent war crimes), were sentenced to life imprisonment, but defendant Iwane Matsui was sentenced to death after he was convicted of failing to prevent the Nanjing massacre, and Mamoru Shigemitsu was sentenced to seven years imprisonment based on mitigating circumstances. *Id.* Many of the defendants were, of course, convicted of other crimes of conspiracy, of aggression and against the peace. *Id.*

111. Signature page, IMTFE Record, *supra* note 25, at 49,858.

112. A number of the Members separately concurred, Delfin Jarnilla (Philippines),

The water cure, however, has had a longer association with the U.S. Government than its application to American and Allied prisoners of the Japanese. In fact, in the international context, it came to the attention of the courts of the United States as a result of the Spanish-American War, and the ensuing U.S. occupation of the Philippine Islands.

III. THE PHILIPPINES

The United States has largely forgotten its adventure in the Philippines, but at the time the U.S. occupation was highly controversial at home, not least because of allegations of misconduct by American troops. Eventually, courts-martial reached as high as a general officer,¹¹³ leaving the administration to face congressional inquiries, and the public with a sour aftertaste from its “splendid little war.”¹¹⁴ One highly publicized aspect of that misconduct was the “water cure.”

Testifying before Congress, the U.S. Administrator in the Philippines, William Howard Taft (later President and Supreme Court Justice) conceded that the “water cure” had been used as a questioning technique.¹¹⁵ The testimony coincided with publication of a soldier’s letter home boasting of use of the water cure on Filipino insurgents.¹¹⁶

The technique persisted in the Philippines. In the compensatory damages phases of an action against the estate of former Philippine President Ferdinand Marcos, a U.S. District Court articulated what it described as both “a human rights violation” and “a form of torture:” “[t]he ‘water cure,’ where a cloth was placed over a de-

dissented in part, Bernard Roling (Netherlands), or entirely dissented Henri Bernard (France), and Rabhabinod Pal (India). 21 THE TOKYO WAR CRIMES TRIAL, *supra* note 25.

113. See Guénaél Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contributions to National Case Law on War Crimes*, 1 J. INT’L CRIM. JUST. 135 (2003) (Court martial of General Jacob Smith). General Smith was charged with “conduct to the prejudice of good order and military discipline” before a court martial in Manila from April 24 to May 3, 1902. *Id.* at 139. The specifications included giving orders that “I want no prisoners,” and “the more you kill and burn, the better you will please me.” *Id.* General Smith was convicted on the charge (although not all the specifications), and sentenced to be admonished. *Id.* at 140.

114. See John T. Bethel, *A Splendid Little War*, HARV. MAG., Nov./Dec. 1998, at 44, available at <http://www.harvardmag.com/nd98/war.html> (“Ambassador John Hay, writing from London to Theodore Roosevelt, declared that from start to finish [the Spanish-American War] had been ‘a splendid little war.’”).

115. MILLER, *supra* note 35, at 213.

116. *Id.*

tainee's mouth and nose and water poured over it producing a drowning sensation."¹¹⁷

The Philippines came into U.S. possession as a result of the Spanish-American War in 1898.¹¹⁸ During the conflict, the United States entered into tentative negotiations with Philippine nationalist guerillas who had been engaged in a revolution against Spanish rule. American occupation of the islands, and their subsequent transfer from Spanish to U.S. sovereignty, eventually resulted in a split between Spain and the United States.¹¹⁹ A bloody conflict followed.¹²⁰

The fight against the Philippine insurrectionists was, to say the least, controversial at home.¹²¹ The American homeland was divided between self-described "imperialists" and "anti-imperialists," and the conduct of the war resulted in numerous political conflicts. Not the least of those was the argument over alleged mistreatment of rebel prisoners by the American counter-insurgency forces,¹²² including allegations of various forms of torture. Thus, for example, a committee was formed in 1902 to "vindicate the National Character."¹²³ The *New York Times*, then a staunchly pro-imperialist newspaper, opined that:

Reports of cruelty, torture and inhuman procedures in the Philippines have come to their ears. They have been shocked by Gen. Jacob H. Smith's admission that he issued the order to burn and kill We beg to remind the committee that it will be disobedient to its instructions if it investigates and reports upon nothing but the water cure torture and wanton killing. The American people denounce as cruel and monstrous Gen. Smith's orders to kill male natives of Samar above the age of ten. But all candid and fair-minded American not only want to know but insist upon knowing the truth about the conditions of the war in the Philippines. The committee will be unwise . . . if it excludes from considerations such testimony as this from William H. Taft, Civil Governor of the Philip-

117. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995).

118. See generally MILLER, *supra* note 35

119. See *id.* at 31–56.

120. See *id.* at 57–66.

121. See *id.* at 104–28.

122. Inquiries were conducted in Congress and the Press on a continuing basis during the period between 1899 and 1903. See generally *id.*

123. *Full Disclosure of the Facts*, N.Y. TIMES, May 1, 1902, at 8.

pinos: That there has been cruelty in the Philippines and that the “water cure” has in some cases been administered to natives is no doubt true; that it typifies the conduct of the army in the islands I do not believe. [I]t is not strange that young officers . . . should resort to every legitimate means to endeavor to find where guns were hid by the treacherous foe, and if they found in vogue a system of torture among the Filipinos, which the Spaniards, too, had used, is it strange that human nature weakened.¹²⁴

As the *New York Times* indicated, not the least uncommon of the forms of torture encountered in the Philippines was the water cure.

A. *The Water Cure During the U.S. Occupation of the Philippines*

The American Commander in the Philippines in 1900 was moved to complain that when enemy soldiers were “pursued too closely they [would] hide their rifles and scatter to their homes, and no longer wear uniforms or any distinctive insignia but use the dress of noncombatants of the country.”¹²⁵ As the American people learned in some detail, one common means for countering these “illegal enemy combatants” was questioning using a form of water torture.¹²⁶

124. *Id.*

125. SAN FRANCISCO CALL, Sept. 20, 1900.

126. An extensive study of counterinsurgency in the Philippine War concluded, with considerable support, that:

Physical mistreatment and torture were never sanctioned by either Division headquarters in Manila or district headquarters, and there were constant warnings against it; but it clearly occurred. The most infamous torture was the “water cure,” which consisted of forcing water down the victim’s throat until he agreed to divulge the required information. An Army investigation in 1902 concluded that some soldiers had given Filipinos the water cure, but smugly concluded that in “comparatively few instances is there evidence that a commissioned officer was present.” Given the prevalence of testimony in private papers, courts-martial, and other Army investigations, it is impossible to concur with this judgment. An Army board called to investigate . . . allegations that torture was widespread heard testimony from both Americans and Filipinos which suggested that in Tayabas alone, between October and December 1901, there were seventeen cases of physical abuse involving eight U.S. officers . . . [I]n southwestern Luzon the use of the “water cure” was not the result of random individual sadism. Rather it appears to have been both a means of retaliation and a distressingly common manner of interrogation among officers assigned to intelligence work.

BRIAN LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899–1902*, at 145–46 (1989).

Descriptions of the “water cure” vary, but their similarity to reports of its application by the Japanese is startling. In testimony before the Senate Committee on the Philippines, former Sgt. Mark Evans described the administration of the water cure to Filipinos on four different occasions on the island of Luzon. According to Evans:

In one case the “cure” was administered by native scouts and in the others by an American soldier. During an expedition to neighboring islands the witness said that he had seen an American soldier take two suspected natives into the water and duck them. He secured a confession as to the hiding of guns in one case, but none in the other.

After the first case of ducking the victim seemed, [Evans] said, to have been quite disabled, being apparently so weak that he was unable to rise.¹²⁷

Another witness, former Private Edward Norton, described one instance in which he had assisted in water-curing a native. The man’s mouth, he said, was forced open with a stick and the water poured down his throat. The effect of the treatment was temporary strangulation. In this particular case, he said, the native delivered up a number of rifles and pistols after receiving the cure.¹²⁸

Another former soldier, First Lt. Grover Flint, testified that he has been a witness to at least twenty applications of the water cure. Flint stated that he had never seen anyone die as a result of its application, although he had seen a prisoner rendered unconscious. He added that “in some cases where it was given to old men he had seen their teeth fall out.”¹²⁹

Still another ex-enlisted man, L.E. Hallock, “told of the infliction of the cure upon a dozen natives He said they were captured and tortured in order to secure information of the murder of [an American soldier who was tortured before his death].” When asked the effect of the treatment, he testified that “[t]he stomach would swell up, and in some cases I witnessed blood come from the mouth.”¹³⁰

The response to that sort of testimony, along with the ensuing commentary, was often startling. The attitude of at least some com-

127. *Tell of “Water Cure” Cases*, N.Y. TIMES, June 13, 1902, at 3.

128. *Id.*

129. *Testified on “Water Cure,”* N.Y. TIMES, Apr. 22, 1902, at 2.

130. *The Water Cure Described*, N.Y. TIMES, May 4, 1902, at 13.

pany grade officers was stated by an anonymous "Army Captain" who wrote to the *New York Times* to take exception to the inference in an editorial that "the methods of torture used in the Philippine Islands have been used against insurgents."¹³¹ He explained that while some larger bands of insurgents could be considered legitimate, there were hundreds of smaller ones which "showed by their actions" that they were actually robbers.¹³² To destroy these bands, he said, it was necessary to force individuals to divulge information.¹³³ There was another group, as well, he added, which required resort to "vigorous measures."¹³⁴ These were local representatives of well-known guerilla leaders who pretended to be peace-loving but actually collected money and information for the insurgents.¹³⁵ The explication which followed is worth quoting at length:

It was against such men as described above that unauthorized methods were used to obtain information, and against such men only. From the results obtained it became simply a case where the end justifies the means. A legitimate combatant was never ill-treated.

The water cure is very uncomfortable, but not serious. A surgeon attached to one of the regiments and called on for a report as to the water cure, reported to the regimental commander that it was "a crude sort of stomach pump." That describes it perfectly. We all know that when the stomach becomes over full it needs no assistance in expelling the excess of contents, so it is easy to appreciate the falsity of the reports . . . of Filipinos who have been subjected to the water cure and then have had people jump on the full stomach in order to expel the water. At the best the water cure is brutal enough. I do not think that any one would add deliberately to the brutality. Salt, kerosene, and sand mixed with the water used are fancies of the irresponsible in my opinion. I never heard of anything but plain water being used. I am not writing to defend torture, but to let you know what I have not seen published this Winter; that is, that these vigorous measures were not used against combatants, but

131. Letter to the Editor, N.Y. TIMES, July 13, 1902, at 8.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

used against outlaws only.¹³⁶

As one counterinsurgency study noted:

Officially, the Army condemned the water cure, which fell under [General Order] 100's proscription of torture. Unofficially, many officers winked at the practice, and military courts proved exceedingly reluctant to punish officers charged with applying coercive methods. As the war progressed the number of incidents of abuse grew as officers . . . came to believe that the "cure" was the only way to uproot the guerilla infrastructure. Even well-known champions of the policy of attraction . . . conceded that the water cure "might be a good thing if judiciously administered in occasional doses, provided that the antis [anti-imperialists] at home did not find it out."¹³⁷

Secretary of War Elihu Root initially responded to charges before the Senate with a flat denial. In February 1902, he answered an inquiry from Sen. Henry Cabot Lodge (R-MA), the Committee Chair, and transmitted reports from officers in the Philippines. Referring to those reports, Secretary Root claimed that "in substantially every case [alleging torture] the report has proved to be unfounded or grossly exaggerated."¹³⁸ He added that an allegation that "the 'water cure' is the favorite torture . . . to force natives to give information . . . [and] already is under investigation."¹³⁹ Root then quoted an enclosed letter from Gen. Funston who called the allegations concerning the use of water torture an "atrocious lie without the slightest foundation in fact."¹⁴⁰

Less than two months later, Secretary Root had substantially changed his position. In light of additional testimony before Sen. Lodge's Committee,¹⁴¹ he announced that "directions [had] been

136. *Id.* (emphasis added).

137. ANDREW BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE, 1860-1941, at 132 (1998).

138. *Cruelty Charge Denied*, N.Y. TIMES, Feb. 20, 1902, at 3.

139. *Id.*

140. *Id.*

141. Root specifically mentioned the testimony of Sgt. Charles S. Riley. Riley had testified to Lodge's Committee that:

The presidente [village chief] was tied and placed on his back under a water tank holding probably one hundred gallons.

The faucet was opened and a stream of water was forced or allowed to run down his throat. His throat was held so he could not prevent swallowing the water, so that he had to allow the water to run into his stomach. He was directly under the faucet with his mouth held wide open. When he was filled

given to the Judge Advocate General of the Army to take proper steps,” and that the “War Department will be glad to receive the earliest possible information of any further evidence which may be elicited by the committee, tending to fix responsibility upon any one in the military service of the United States for any violation of the laws of war.”¹⁴² He directed the Army Commander in the Philippines that “nothing can justify or will be held to justify the use of torture or inhuman conduct of any kind on the part of the American Army.”¹⁴³

Courts martial were eventually held, one defendant was convicted,¹⁴⁴ and the water cure drifted off the front pages and out of the

with water it was forced out of him by pressing a foot on his stomach or else with the hands, and this continued from five to fifteen minutes. A native interpreter stood immediately over this man as he lay on the floor and kept saying some word which I should judge meant “confess” or “answer.”

One of the men . . . took a syringe from his saddlebag, and another man was sent for a can of water . . . holding about five gallons.

The syringe did not have the desired effect and the doctor ordered a second one. The man got a second syringe that was inserted in his nose. Then the doctor ordered some salt and a handful of salt was procured and thrown into the water. Two syringes were then in operation. The interpreter stood over him in the meantime asking for this second information that was desired. Finally he gave in and gave the information they sought and then he was allowed to rise.

Testimony Before U.S. Standing Committee on the Philippines, Apr. 14, 1902. *Reprinted in* GEORGE J.A. O'TOOLE, *THE SPANISH WAR: AN AMERICAN EPIC*, 1898, at 389 (1986).

142. *More Courts Martial in the Philippines*, N.Y. TIMES, Apr. 16, 1902, at 1.

143. *Id.* Root enclosed directions to the Adjutant General of the Army to cable General Chafee, the new commander in the Philippines, and directing that General Jacob Smith be court-martialed if he had given an order to kill all males over the age of ten in a Philippine province. He also directed that officers named as having administered the water cure be tried by a court martial. He concluded:

The President desires to know in the fullest and most circumstantial manner, all the facts, nothing being concealed and no man being for any reason favored or shielded. For the very reason that the President intends to back up the army in the heartiest fashion in every lawful and legitimate method of doing its work he also intends to see that the most rigorous care is exercised to detect and prevent any cruelty or brutality, and that the men who are guilty thereof are punished. *Great as the provocation has been in dealing with foes who habitually resort to treachery, murder and torture against our men, nothing can justify or will be held to justify the use of torture or inhuman conduct of any kind on the part of the American Army.*

Id. (emphasis added).

144. National Archives records related to proceedings of U.S. Army courts-martial or courts of inquiry can be found in Record Group 153, Records of the Judge Advocate General (Army). See Mettraux, *supra* note 113. Major Edwin Glenn and Lieutenant Edwin Hickman were tried for conduct to the prejudice of good order and military discipline by a court martial in Catlalogan, Samar in May 1902 for their alleged use of the water cure. The defense was military necessity, justified by the illegal conduct of the insurgents. Hickman was acquitted and Glenn suspended from command for one month and fined \$50. In his review, the Army Judge Advocate recognized that the charges constituted “resort to torture with a view to extort a confession.” *Id.* at 145. He recommended disapproval because “[t]he United States cannot afford to sanction the addition of torture to the several forms of force which may be legitimately employed in war” *Id.* (emphasis added). President Roosevelt affirmed the conviction of Major Glenn and disapproved the acquittal of Lieutenant Hickman. *Id.*

American consciousness until it was brought back to the headlines as the cruel brutality of a fierce and heartless foe.

The water cure, however, apparently persisted in the Philippines after the Japanese occupation ended. During the regime of Ferdinand Marcos (1965–1986), press reports alleged continuing use of water torture against government opponents.¹⁴⁵ Eventually, that conduct resulted in a civil action in U.S. federal court.

B. The Marcos Regime's Conduct on Trial

In March 1986, a number of law suits were filed, eventually resulting in a class action involving over ten thousand plaintiffs.¹⁴⁶ The court's findings demonstrated, *inter alia*, that water torture as a form of interrogation and intimidation had survived intact in the Philippines:

Immediately after the declaration of martial law [Orders] caused the arrests of persons accused of subversions, apparently because of their real or apparent opposition to the . . . government. . . . The arrest orders were means for detention of . . . plaintiffs. During those detentions the plaintiffs experienced human rights violations including, but not limited to . . . [t]he "water cure," where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation.¹⁴⁷

The court affirmed a \$766 million jury verdict in favor of the Plaintiffs and against former Philippine President Marcos. That civil verdict has been mirrored in at least one criminal proceeding before the courts of the United States.

145. Post-war use of the water cure was not limited to the Philippines. There were also reports of its use in the Republic of Korea. *Seoul Opposition Asks Free Elections Next August*, N.Y. TIMES, Dec. 7, 1979, at A11 ("Dissident sources said army investigators used water torture on Christian students [T]he investigators pumped water into the stomachs of detained students through their mouths and noses and then jumped on them"). See also Henry Stokes, *Korea's Church Militant*, N.Y. TIMES MAG., Nov. 28, 1982, at SM67 ("Moon testified that he had been subjected to 'water torture': pumping the stomach full of water and then kicking it, a technique that can cause severe internal injuries while leaving no outward trace."). Similar reports also surfaced in Brazil. *Issue of Torture Growing in Brazil*, N.Y. TIMES, Nov. 16, 1975, at 18 ("At one point 'laughter and wisecracks' were said to have accompanied water torture.").

146. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995).

147. *Id.*

IV. THE TEXAS WATER TORTURE CASE

In 1983, the Department of Justice affirmed that the use of water torture techniques was indeed criminal conduct under U.S. law. Sheriff James Parker of San Jacinto County, Texas, was charged, along with three of his deputies, for handcuffing prisoners to chairs, placing towels over their faces, and pouring water on the cloth until they gave what the officers considered to be confessions.¹⁴⁸ The officers were charged with violating the prisoners' civil rights. Count One of the Indictment asserted that the defendants conspired to:

subject prisoners to a suffocating 'water torture' ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning.¹⁴⁹

The Sheriff and his deputies were all convicted by a jury under Count One,¹⁵⁰ (as well as under other counts alleging constitutional violations for the same conduct),¹⁵¹ resulting in at least a four year sentence on that Count.¹⁵² The trial included testimony of another former deputy that the Sheriff and the other Defendants "gave [a prisoner] the water treatment:"

A towel was draped over his head . . . He was pulled back in the chair and water was poured over the towel.¹⁵³

The victims' testimony was strikingly similar to other instances of water torture at other times and places

Q: Were you frightened?

A: Yes.

Q: What were you afraid of?

A: Afraid of drowning; it was hard to breathe.

148. Brief of Petitioner-Appellee, *United States v. Lee*, No. 83-2675 (5th Cir. Nov. 9, 1984).

149. *Id.*

150. *Id.* at 7.

151. *Id.* at 4, 7.

152. *Id.* at 7.

153. United Press International, *Ex-Deputy Tells Jury of Jail Water Torture*, N.Y. TIMES, Sept. 1, 1983, at A22.

Testimony of former inmate Kevin Coffman.¹⁵⁴

My hands was handcuffed up under the table and water was poured into the face of the towel until I started suffering a state of suffocation and I felt that my life was in danger.

Testimony of former inmate Craig Punch.¹⁵⁵

I thought I was going to drown.

Testimony of former inmate James Hicks.¹⁵⁶

On an appeal¹⁵⁷ by one of the deputies, the Fifth Circuit described the trial below:

Lee was indicted along with two other deputies, Floyd Baker and James Glover, and the County Sheriff, James Parker, based on a number of incidents in which prisoners were subjected to a “water torture” in order to prompt confessions to various crimes. On the morning trial was to begin, Floyd Baker’s counsel informed the court and his co-defendants that Baker intended to admit the government’s allegations were true but would argue that he did not have the “state of mind” required for criminal liability. Lee, Glover and Parker each intended to defend on the ground that they did not participate in any torture incidents and were unaware that any such incidents were taking place. Counsel for the other defendants immediately moved for severance. The district court deferred a ruling on these motions pending some clarification of exactly what Baker’s defense and testimony would be.

At trial, Baker’s defense as developed by his counsel and his testimony rested on two points. The first was that he actively participated in only a single torture episode, and then only because ordered to do so by his superiors—a “Nuremberg defense.” The second was that while he believed the torture of prisoners immoral, he did not at the time think it was illegal. In

154. Brief of Petitioner-Appellee at 8, *United States v. Lee*, No. 83-2675 (5th Cir. Nov. 9, 1984).

155. *Id.* at 10.

156. *Id.* at 12.

157. The sole issue was whether the trial judge abused his discretion in denying a severance. *Lee*, 744 F.2d at 1124.

the course of Baker's testimony, he identified Lee as a participant in the torture of several prisoners. Seven other witnesses also connected Lee with various torture incidents. At the close of the evidence, the district judge severed Baker, and put the case of the remaining defendants to the jury. Lee was convicted on three counts.¹⁵⁸

Lee's conviction was affirmed on appeal, and all the defendants received substantial prison sentences.¹⁵⁹ United States District Judge James DeAnda's comments at sentencing were telling. He told the former Sheriff that he had allowed law enforcement to fall into "the hands of a bunch of thugs. *The operation down there would embarrass the dictator of a country.*"¹⁶⁰

V. CONCLUSION

One can only hope Judge DeAnda was right, and that even a dictator would find water torture an embarrassment. Certainly, the United States has made it clear, in its courts, both civil and military, and before the national legislature, that water torture, by whatever name it is known, is indeed torture, that its infliction does indeed justify severe punishment, and that it is unacceptable conduct by a government or its representatives.

The conclusion of Jay Bybee and John Yoo was that the legal definition of torture:

covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that

158. *Id.* at 1125. See also *Morris v. State*, 697 S.W.2d 687, 689 (Tex. Ct. App. 1985) (discussing another allegation of water torture by Sheriff Parker).

159. Former Sheriff Parker, the ringleader, was sentenced to the maximum of ten years plus a \$12,000 fine. *Ex-Sheriff Given Ten Year Sentence*, N.Y. TIMES, Oct. 27, 1983, at A11.

160. *Id.* (emphasis added). Water torture is mentioned in an American Court in another context. In his concurring opinion in *Robinson v. California*, 370 U.S. 660 (1962), Justice Douglas discusses why he believes it is cruel and unusual punishment to treat a drug addict as a criminal. *Id.* at 668. He states that "terror and punishment linger on as a means of dealing with some diseases" and then quotes a statement that "an entire chamber of horrors constitut[ed] the early treatment of mental illness. The latter includes a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking and near drowning)." *Id.* at 669. His proposition is particularly interesting in light of the Bybee Memo's internal proposition that the United States limited by reservation its accession to the Convention Against Torture to acts which constituted cruel and unusual punishment under the U.S. Constitution. See *supra* note 6.

which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder.¹⁶¹

Their definition¹⁶² may be subject to challenge as a matter of law.

161. See Bybee, *supra* note 6, at 46.

162. Prof. Yoo later explained that:

While the definition of torture in the August 2002 memo is narrow, that was Congress' choice. When the Senate approved the U.N. Convention Against Torture in 1994, it stated its understanding of torture as an act "specifically intended to inflict severe physical or mental pain or suffering." The Senate defined mental pain and suffering as "prolonged mental harm" caused by threats of severe physical harm or death to a detainee or third person, the administration of mind-altering drugs or other procedures "calculated to disrupt profoundly the senses or the personality." Congress adopted this definition in a 1994 law criminalizing torture committed abroad.

The Senate also made clear that it believed the treaty's requirement that nations undertake to prevent "cruel, inhuman or degrading treatment or punishment" was too vague. The Senate declared its understanding that the United States would follow only the Constitution's prohibition of cruel and unusual punishment.

The Senate and Congress's decisions provided the basis for the Justice Department's definition of torture:

"Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture (under U.S. law), it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. . . . We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts."

Under this definition, interrogation methods that go beyond polite questioning but fall short of torture could include shouted questions, reduced sleep, stress positions (like standing for long periods of time), and isolation from other prisoners. The purpose of these techniques is not to inflict pain or harm, but simply to disorient.

Yoo, *supra* note 5. He goes on to explain that:

The department issued a new memo that superseded the August 2002 memo. Among other things, the new memo withdrew the statement that only pain equivalent to such harm as serious physical injury or organ failure constitutes torture and said, instead, that torture may consist of acts that fall short of provoking excruciating and agonizing pain.

Although some have called this a repudiation, the Justice Department's new opinion still generally relies on Congress' restrictive reasoning on what constitutes torture. Among other things, it reiterates that there is a difference between "cruel, inhuman and degrading treatment" and torture – a distinction that many critics of the administration have ignored or misunderstood.

Id. Finally, Prof. Yoo, attempts to separate the Memo from abuses at Abu Ghraib prison in Iraq. In doing so, he says that:

those abuses had nothing to do with the memos defining torture – which did not discuss the pros and cons of any interrogation tactic – nor the decision to deny POW protections to Al-Qaida and the Taliban. Gonzales, among others, has made clear that the administration never ordered the torture of any prisoner.

Id. What he does not say, is that *Newsweek* was in any fashion incorrect when it said that his

But whether it is technically valid or not, can there be any question if we listen to the victims who speak above, and to the judges who convicted their torturers, that water torture, the repetitive artificial drowning and revival of another human being, falls within their Memo's parameters? Can there be any doubt that it is an extreme act? Can there be any doubt that it causes severe physical and lasting psychological harm? Can there be any doubt that it is torture?

If we remember what we said and did when our military personnel were victims, if we remember our response when they were perpetrators, how can our government possibly opine that the use of water torture is within the bounds of law? To do so is beneath contempt; it is beyond redemption; and it is a repudiation of the rule of law that in our origins was the core principle of governance which distinguished our nation from the crowned dictatorships of the European continent.

Let us remember the past to avoid its endless repetition.¹⁶³

memo "was prompted by CIA questions about what to do with a top Qaeda captive . . . who had turned uncooperative," that "it was drafted after White House meetings" which "discussed specific interrogation techniques," and that, "[a]mong the methods they found acceptable: 'water-boarding,' or dripping water into a wet cloth over a suspect's face, which can feel like drowning." Hirsh et al., *supra* note 7. It would be interesting if he would do so.

163. See GEORGE SANTAYA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 284 (2d ed. 1932) ("Progress, far from consisting in change, depends on retentiveness. . . . Those who cannot remember the past are condemned to repeat it."); GEORGE ORWELL, 1984, at 35 (2d ed. 1977) ("Who controls the past controls the future: who controls the present controls the past.").