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**DROP BY DROP:
FORGETTING THE HISTORY OF
WATER TORTURE IN U.S. COURTS**

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

Drop by Drop: Forgetting The History of Water Torture in U.S. Courts¹

By

Evan Wallach²

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, p. 55, Record of Trial, *United States v. Shigeru Sawada et al*, (1946) Record of National Archives, Suitland, Maryland.³

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."⁴

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

I

Introduction

¹This 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 MG Thomas J. Romig, who so clearly exemplifies the vision which the Corps has of itself as "...committed to justice [and] grounded in values...".

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³See text accompanying fn 23 infra.

⁴Jane Mayer, *Outsourcing Torture*, The New Yorker, February 14, 2005.

Interrogation techniques using water to induce the sensation of drowning in the person under questioning (The technique has, in recent news accounts, generally been called “water-boarding.”)⁵ have been hotly debated in the past few years.⁶

An August, 2002, memo, drafted by John Yoo of the Department Of Justice’s Office of Legal Counsel,⁷ and signed by then Assistant Attorney General (now Judge of the 9th Circuit) Jay Bybee, discussed interrogation methods and whether they might violate U.S. or international law. According to Newsweek, it:

“...learned that 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...”

Michael Hirsh, John Barry and Daniel Klaidman, *A Tortured Debate*, Newsweek, 21 June, 2004 at p.52 (emphasis added).

The Yoo Memo’s authors concluded that:

We conclude that torture 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

⁵See, e.g., David Johnston and James Risen, *Aides Say Memo Backed Coercion Already in Use*, New York Times, 27 June, 2004, page 1, (“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,”); and Douglas Jehl and David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, 29 August, 2004, page 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.”)

⁶ See, e.g. Mark Danner, *Torture and Truth*, New York Review Books, (New York, 2004).

⁷ http://www.berkeley.edu/news/media/releases/2005/01/05_johnnyoo.shtml.

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 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.

On 16 October, 2006, President Bush signed into law the Military Commissions Act of 2006⁹. That Act principally defined persons over whom military commissions have jurisdiction, and modified procedures and rules before those commissions. It also, however, modified¹⁰ the War Crimes Act of 1995.¹¹ That Act, which criminalizes breaches of the Geneva Conventions of 1949, provided in Section 3 that a "war crime" included conduct which constituted a violation of common article 3 of the Conventions (covering conflicts not of an international nature in territory of a signatory power). The Military Commissions Act modified Section 3 adding a new subsection (d) to limit violations to include, *inter alia*, torture and cruel or inhuman treatment, only if they inflicted "...severe physical or mental pain or suffering [if not incidental to lawful sanctions]."¹²

The apparent intention of the modification of Common Article Three was to affect its application to military commissions by the United States Supreme Court in *Hamdan v. Rumsfeld*,

⁸<http://www.lawofwar.org/Protected%20Persons.htm#Torture>.

⁹S 3930 (2006).

¹⁰At Section 6 of the Military Commissions Act.

¹¹ 18 U.S.C. § 2441.

¹²The 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;

126 S.Ct. 2749, 2795-96, 165 L.Ed.2d 723 (2006). In addition to stripping defendants before military commissions of any right to assert the Geneva Conventions,¹³ the Act specifically provided that:

No 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].

S. 3930 at Sec. 6(a)(2).

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 scale¹⁴, nobody seems to remember¹⁵ that, not so very long ago, the United States, acting alone before domestic courts, commissions and courts-martial, and as a participant in the

¹³See, e.g. Section 948(b)(g) of the Act.

¹⁴In 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 “Whether 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*, *The Scotsman*, 11 March, 2006.

¹⁵ 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, Karen Greenberg, Ed., *The Torture Debate in America*, Cambridge University Press (New York, 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 Decker, *Is the United States Bound by the Customary International Law of Torture? A Proposal for Its Litigation in the War on Terror*, 6 *Chi. J. Int’l L.* 803 (2006); Harold Koh, *A World Without Torture*, 43 *Colum. J. Transnat. L.* 641 (2005); Seth Kreimer, “*Torture Lite*,” “*Full Bodied*” *Torture, and the Insulation of Legal Conscience*, 1 *J. Nat’l Security L. & Policy* (2005); Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 *Colum. J. Transnat’l L.* 811 (2005) and Kim Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 *J. Nat’l Sec. L. & Policy* 285 (2005).

world community, not only condemned the use of water torture, but severely punished as criminals those who applied it.

In trials, both before U.S. military commissions, and as a participant in the International Military Tribunal for the Far East (IMTFE)¹⁶ American judges or commissioners heard American prosecutors roundly condemn the practice as it was applied to American servicemen, 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,¹⁷ and the United Kingdom's trial and execution of Japanese interrogators who used the method.¹⁸ There

¹⁶Commonly known as the Tokyo War Crimes Trial, it applied the same general rules and procedures as the better known Nuremberg Trial, See generally, Evan 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 Columbia Journal of Transnational Law 852 (1999).

¹⁷See, e.g. *Trial of Karl-Hans Klinge*, Eidsivating Lagmansrett and Supreme Court of Norway, 8th December, 1945 and 27th February, 1946, reported in United Nations War crimes Commission, Law Reports of Trials of War Criminals, Vol. III, p.1 (throwing victim, naked and with bound hands and feet, into a bath filled with ice-cold water, where he was repeatedly ducked under, constituted torture).

¹⁸Colin Sleeman, Ed., *Trial of Sumida Haruzo and Twenty Others, The "Double Tenth" Trial*, William Hodge and Company (London). Trial conducted at Singapore, 1946.

The prosecution was for numerous misdeeds but 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,

were also reports of use of the technique against American service personnel in other conflicts,¹⁹

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 head 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 at pp. 86-87.

¹⁹See, e.g. Air Officer Tells of Torture By Foe, New York Times, 6 August, 1953 in which USAF Lt. Col. William Harrison describes being "...tortured with the 'water treatment' by Communist North Koreans." As Harrison described it:

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 breath. This went on hour after, 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.

and of its use by American personnel against Vietnamese prisoners during the Vietnam conflict.²⁰

The “water cure,”²¹ “water torture,”²² “water boarding;” under whatever name the technique has long been prized by extreme interrogators for its unique combination of severe mental trauma and physical pain with, unlike other methods, a lack of perceivable physical trauma short of autopsy.²³

²⁰Army 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 and Nick Turse, *A Tortured Past*, Los Angeles Times, 20 August, 2006.

²¹See, e.g., In *Re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460 at 1463 (D. Hawaii, 1995), discussion, *infra*.

²²IMTFE Record p. 14,168.

²³James Risen, David Johnston and Neil Lewis, *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, New York Times, 13 May, 2004; David Johnston and James Risen, *Aides Say Memo Backed Coercion Already in Use*, New York Times, 27 June, 2004; Douglas Jehl and David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, New York Times, 29 August, 2004; and 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*, Washington Post, 3 August, 2005.

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, and that it is torture, giving rise to traumatic symptoms years later.²⁴

At least one, in-depth study, indicates that suffocation by immersion may cause severe psychological effects.²⁵ Among the cases studies presented was:

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

(Emphasis added).

Indeed, even among experienced scuba divers more than half report having panic attacks while scuba diving.²⁶ It is also clear that respiratory challenges of all sorts exacerbate symptoms in individuals already prone to panic attacks.²⁷

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,

²⁴Jane Mayer, *Outsourcing Torture*, The New Yorker, 14 February, 2005.

²⁵Colin Bouwer and Dan Stein, *Association of Panic Disorder With a History of Traumatic Suffocation*, 154 American Journal of Psychiatry, 1566 (1997).

²⁶*Divers Beware: Training Dives Present Serious Hazards to Fire Fighters*, National Institute for Occupational Health and Safety, NIOSH Publication No. 2004-152 (2004).

²⁷ Laszlo Papp et al, *Respiratory Psychophysiology of Panic Disorder: Three Respiratory Challenges in 98 Subjects*, 154 American Journal of Psychiatry 1557 (1997).

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 10-15% 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.²⁸

Despite the mental and physical trauma, water torture has been variously described as “torture lite”²⁹ or a “...very mild form of torture”³⁰. John Yoo, now a U.C. Berkeley law professor,³¹ testified in 2005 before the United States Senate that he did not know whether water-boarding constituted torture.³² 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 Tokyo³³, detailed the essence of the technique:

²⁸KD Boffard, C. Bybee, B. Sawyer, and E. Ferguson, *The Management of Near Drowning*, 2 *Journal of Trauma* 269 (2000).

²⁹Evan Thomas and Michael Hirsh, *The Debate Over Torture*, *Newsweek*, 21 November, 2005.

³⁰Stuart Miller, *Benevolent Assimilation, The American Conquest of the Philippines, 1899-1903* at p. 213, Yale University Press, (New Haven, 1982).

³¹ <http://www.law.berkeley.edu/faculty/yooj/>.

³²Sonni Efron, *Torture Becomes A Matter Of Definition*, *Washington Post*, 23 January, 2005. “It depends on the circumstances,” he said, including the details of what was done, the condition of the detainee and what other interrogation methods has been used, Yoo said. See, footnote 6 , supra.

³³On 18 April, 1942, then Lieutenant Colonel James Doolittle lead a flight of B-25 bombers in a raid on the Japanese mainland. See generally, Craig Nelson, *The First Heroes*, Penguin (New York, 2002). The Japanese captured ten of the raiders and executed three of them

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.

Nielsen testimony, *id.*

Descriptions of water boarding as it is apparently currently applied³⁴ differ very little from the techniques applied by the Japanese. One investigator describes water-boarding as a technique "...in which a prisoner is stripped, shackled and submerged in water until he begins to lose consciousness..."³⁵ Another source says "...a prisoner is strapped down, forcibly pushed under water and made to believe he might drown."³⁶ The similarity is startling, given the opprobrium occasioned by its application to American military personnel. But it is striking for another reason; 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 questioning below. In *United States v. Parker et al*, CR-H-83-66 (S.D. Tex., 1983) affirmed *sub nom*, *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), 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 cure was applied by Americans, 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

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, supra*.

³⁴See footnote 5, *supra*.

³⁵Mark Danner, *We Are All Torturers Now*, New York Times, 6 January, 2005.

³⁶James Risen, David Johnston and Neil Lewis, *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, New York Times, 13 May, 2004.

The clearest exposition of the U.S. position on the use of the water treatment as torture is found in cases in which the Japanese armed forces applied it to Allied prisoners of war during World War Two³⁷. Japan's use of the technique was extremely common,³⁸ and was part of the widespread use of torture as a tool of interrogation.³⁹ An extensive 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

³⁷There are numerous instances, both anecdotal and in trial records as well, of use by the Japanese of water based interrogation techniques on civilians. An American missionary, for example, 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." Belman Morin, *American Defied Torture in Korea*, New York Times, 23 July, 1942.

³⁸See discussion of ITFE Judgement *infra* at Section II C.

³⁹A 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 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.

Cited in IMFTE Final Judgement, Torture Section, at p 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. ...the 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 <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark..>

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 Allied Powers⁴⁰ with representative judges from each of the nations engaged in the war against Japan.⁴¹ The IMTFE followed the rules and procedures used at the Nuremburg tribunal.⁴²

The United States,⁴³ however, as did other Allied powers, principally including the United

⁴⁰The Charter of the International Military Tribunal for the Far East, provide “[b]y command of General MacArthur...” that, inter alia, “The 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.” Article 1, and “The 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.” Article 2. See, Avalon Project web site, <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

⁴¹ *Tokyo War Crimes Trials: Background Information*, Truman Library, <http://www.trumanlibrary.org/educ/tokyo.htm>.

⁴²See, Wallach, *supra* at fn 16.

⁴³The best known is *United States v. Yamashita*, United States Military Commission, Manila, 8 October- 7 December, 1945.4 LRTWC 1, (Case No. 21), appeal decided as *Yamashita v. Styer*, 327 U.S. 1 (1946).

Kingdom⁴⁴3 , Australia⁴⁵, China,⁴⁶ the Soviet Union,⁴⁷ the Philippines⁴⁸, and the Netherlands⁴⁹, also tried lesser war criminals⁵⁰ 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 results of that torture (although not its actual application)

⁴⁴See, e.g. *Trial of Yamamoto Chusaburo*, 3 LRTWC 76, (Case No. 20), British Military Court, Kuala Lumpur, 30 January - 1 February, 1946.

⁴⁵See, e.g. *Trial of Sergeant Major Shigeru Ohashi*, 5 LRTWC 25, (Case No. 26) Australian Military Court, Rabaul 20-23 March, 1946.

⁴⁶ The Nationalist Chinese prosecuted Japanese Class B and C war criminals in Nanking between 1946 and 1947. C.f. Xiaoyu Pu, *The Nanking Massacre, Justice and Reconciliation: A Chinese Perspective*, Overseas Young Chinese Forum Perspectives, Vol 6, No. 3 at p. 26 (September, 2005).

⁴⁷The U.S.S.R. conducted a series of trials at Khabarovsk between 25 and 31 December, 1949, the subject of which was principally allegations of biological and chemical warfare.

⁴⁸215 Japanese defendants faced military commissions in the Philippines.
http://www.historynet.com/wars_conflicts/world_war_2/3035796.html?showAll=y&c=y.

⁴⁹See, e.g. *Trial of Washio Awochi*, 13 LRTWC 122, Netherlands Temporary Court Martial at Batavia, 25 October, 1946.

⁵⁰The 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 US departments of State, War, and Navy (SWNCC) published its classification of war criminals: A, B, and C. In brief, Class A were 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 were 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. Class C were 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, October, 2004.

was included in the charges and specifications against the defendants.

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 Military Tribunal in violation of the Laws and Customs of War."⁵¹ 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 criminals⁵².

CPT 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.⁵³ 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...

⁵¹Charge against Shigeru Sawada, 1 February, 1946, Vols I and II, File No. 119-19-5 (File containing Charges and Specifications), NARA, Suitland, MD.

⁵²Specifications against Shigeru Sawada, 1 February, 1946. Id.

⁵³The United States 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.

Sec. Of State Cordell Hull, Note to Japanese Government, 5 April, 1943, in Evidence File, *United States v. Sawada*.

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?

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

Trial Transcript, Record at pp. 439-440.

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

...our 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.

Id at 490.

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.

Id at 491.

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." Judgement of the Commission, Record at p. 549.

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 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 of that, 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 which elicited compelling descriptions of water torture from its victims, and which resulted in severe punishment for its perpetrators.

One compelling example is found in the Manilla trial⁵⁴ of Sergeant-Major Chinsaku Yuki of the Kempentai for torture and murder⁵⁵ of Philippine civilians. There, the Commission heard testimony from Ramon Lavarro, 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 SGM 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 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

⁵⁴*United States of America v. Chinsaku Yuki*, Manilla (1946) before a military commission convened by the Commanding General Philippines-Ryukyus Command. NARA NND 775011 Record Group 331 Box 1586.

⁵⁵The Charge was a standard one: "That Chinsaku YUKI, ISN 51J-119862, the 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." 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.*

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...

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

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.

Trial Transcript pp. 84-88

In his summation, the Prosecutor discussed Lavarro'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.

Id at 241.

A U.S. Military Commission at Yokohama, Japan, tried four Japanese defendants for torture and mistreatment of American and Allied prisoners at Fukoka Prisoner of War Branch Camp Number 3, in Kyushu. Water torture was among the acts alleged in the specifications

against the various defendants, and it loomed large in the evidence presented against them.⁵⁶

The four defendants, Hata,⁵⁷ Asano,⁵⁸ Kita⁵⁹, and Nakamura⁶⁰ were respectively, the camp

⁵⁶*United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita*, U.S. Military Commission, Yokohama, 1-28 May, 1947. NARA Records, NND 735027 RG 153, Entry 143 Box 1025

⁵⁷The 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.

⁵⁸The 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 Asana, 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.

doctor, interpreter, senior non-commissioned officer, and mess sergeant. The charges against them arose from two separate water torture incidents in which they participated; one against a single victim, John Burton, and one against several prisoners arising from the jailers' believe the prisoners, Armitage, Cash and Woodall, had stolen food.⁶¹

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.

⁵⁹The 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.

⁶⁰The 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.

None of the specifications were on water torture per se, but specifications 2 and 9 refer to forcing prisoners into a tank of water, 2 is 5 unknown pows, 9 is throwing American POW James E Martin into a tank of water. The testimony discussed infra ties those specifications into water torture.

⁶¹A separate trial arising out of the same incidents of torture was instituted against Genji Mineno. See discussion, infra at fn 69.

The witnesses' 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 and water poured up his nose and beaten into unconsciousness.⁶²
- ...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...⁶³
- ...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.... They then began pouring water over my face and at times it was almost impossible for me to breath without sucking in water.⁶⁴

⁶² "...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 Officer.

Affidavit of Captain Vetalis Vernon Anderson, 20 Oct. 1945, San Francisco, CA., and Captain William Arno Blueher (both Med Corps)

⁶³ "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): 1 Oct. 1945 at 29th Repl Depot

⁶⁴ "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 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

- [We] were strapped to stretchers and warm water poured down our nostrils until we were about ready to pass out⁶⁵
- [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.⁶⁶
- [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...⁶⁷

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 breath 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, Los Angeles, CA, 26 April, 1946, (civilian captured on Wake Island).

⁶⁵ “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 22 Oct 1945, Alameda CA (victim).

⁶⁶ “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, taken 28 Sept, 1945 at 29 Replacement Depot.

⁶⁷

“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 95 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.

- ...they stood them on their heads and poured water down their noses and into their mouths until they almost choked.⁶⁸

Genji Mineno was tried separately at Yokohama⁶⁹ for participating in the same series of events.⁷⁰ The evidence introduced against him included the same affidavits and witness statements introduced against the other four defendants. On the basis of that evidence⁷¹, all five were convicted of all the torture specifications.⁷² It is worth noting that, in Minano's case, the

Affidavit of James William Pettit, 12 October, 1945, Alameda, CA.

⁶⁸ "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..."

Deposition of Claude A Thomas, 18 Sept 12945 at 29th Replacement Depot, Luzon. P.I.

⁶⁹Military Commission Case Docket No 47 Tried at Yokohama 25-28 June, 1946. NARA NND 735027 Record Group 153, Entry `145, Box 151. Mineno was a civilian employee of the Imperial Japanese Army.

⁷⁰The 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.

⁷¹See, footnotes 50 et seq, supra.

⁷²Surgeon First Lieutenant Hata was sentenced to 25 year confinement at hard labor; Mr. Mineno, the civilian guard and Mess Sergeant Nakamura both received 20 years confinement at hard labor; and Sergeant Major Kita and Mr Asano, the interpreter were given confinement for

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.”⁷³

In an entirely separate water torture case, the United States tried Yagoheiji Iwata.⁷⁴ The torture charges against Iwata involved his mistreatment of a Dutch Prisoner of War, A. A. Peters.⁷⁵ 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.

Testimony of Johannas J. Budding, Captain, Royal Netherlands Indies Army, Special Troops.

15 years at hard labor.

⁷³See, Reviews of the Yokohama Class B and C War Crimes Trials by the U.S. Eighth Army Judge Advocate, 1946-1949, National Archives Microfilm Publications (1981).

⁷⁴. United States v. Yagoheiji Iwata Case Docket No 135 31 March 1947 to 3 April, 1947, Yokohama. NND735027 RG 153 Entry 143 Box 1036.

⁷⁵The 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.

Upon that evidence, Iwata was convicted of the torture charge.⁷⁶

In addition to those single nation military commissions conducted 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 Allied Powers, (“SCAP”),⁷⁷ an American Judge⁷⁸ sat on it and voted for convictions⁷⁹, and the chief prosecutor was an American.⁸⁰ Accordingly, if for no other reason,⁸¹ 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 peace⁸² but it also considered charges of misconduct against military personnel and civilians including murder, rape and torture.⁸³

⁷⁶Iwata was found guilty except for the words “a bucketful of” and “by placing him in solitary confinement” and of the excepted words not guilty. He was sentenced to 12 years confinement at hard labor.

⁷⁷Charter of the International Military Tribunal for the Far East, The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

⁷⁸Justice John P. Higgins of the Massachusetts Supreme Court, and, as a replacement in July, 1946, MG Myron Cramer, former Judge Advocate of the Army. Richard Minear, *Victor’s Justice: the Tokyo War Crimes Trial*, Princeton University Press (1971). Interestingly, Cramer was a former Judge Advocate General of the United States Army who had participated extensively in the drafting and application of the procedural and evidentiary rules which governed both the Nuremburg Tribunal and the IMTFE. See, Wallach, *supra* at fn. 16.

⁷⁹See **IMTFE Judgment at** _____

⁸⁰Joseph Keenan. See, Joseph Keenan, *Observations and Lessons from International Criminal Trials*, 17 U. KAN. CITY L. REV. 117, 123 (1949).

⁸¹Some authors argue that international law decisions should have no precedential value in U.S. courts.

⁸²See IMTFE Indictment Paragraphs 1-53.

⁸³The IMTFE Indictment charged the defendants, inter alia, with torture under conventional War Crimes and Crimes against Humanity by ordering, authorizing and permitting

The Judgement of the International Military Tribunal for the 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...

Judgement of the International Military Tribunal for the Far East at 49,663.

As noted above, the Judgement described the water treatment as “commonly applied.” It was called by a number of names; water treatment, the water test,⁸⁴ water torture,⁸⁵ suffocation by immersions⁸⁶, 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 breath 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

“...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 labour 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,” including “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.” Appendix D, Section One; “Excessive 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...” Appendix D, Section Four; and “Large numbers of the inhabitants of [occupied] territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated, Appendix D, Section Twelve. See, IMTFE Judgement, Indictment, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html>.

⁸⁴IMTFE Record pp. 13,811 and 13, 812.

⁸⁵IMTFE Record p. 12,940.

⁸⁶IMTFE Record p. 13,691.

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.

Affidavit of J.L. Wilson, The Right Reverend Lord Bishop of Singapore, admitted as Prosecution Exhibit 1519A, 16 December, 1946, IMTFE Record at 12, 935.⁸⁷

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 immersions.” A towel was fixed under the chin and down 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.

Report of Dr. R. Flachs on treatment by Japanese Kenpeitai [military police] at Bandung, Dutch East Indies, Admitted as Prosecution Exhibit 1752A, 27 December, 1946, IMTFE Record at 13,691.

The technique was similar in Shanghai:

Various tortures were administered during interrogation, the main one 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.

Affidavit of CPT Edward E. Williamson, sworn to on 6 June, 1946, Admitted as Prosecution Exhibit 1892-A, 3 January, 1947, IMTFE Record at p. 14,168.

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

⁸⁷This testimony refers to the same events discussed in the U.K. “Double Tenth Trial” at footnote 11, *supra*.

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 litres of water forced down me.

Affidavit of Marcel Robert, Admitted as Prosecution Exhibit 2134-A, 16 January, 1947, IMTFE Record at p. 15,339.

There was a significant reason the IMTFE’s Judgement⁸⁸ listed water torture first in its determination that the Japanese uniformly engaged in torture throughout occupied areas. The practice, in its various iterations, was widespread and uniform.⁸⁹ Its condemnation, and the

⁸⁸IMTFE Judgement at p. 49,664.

⁸⁹The 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, 12 December, 1946, IMTFE Record at 12,607; Affidavit of Amhad Bin Cheteh regarding death of prisoners following water torture at Penang [Malaysia], admitted as Prosecution Exhibit 1531A, 16 December, 1946, IMTFE Record at 12,959; Solemn Declaration of Harry Joseph regarding tortures by Kempeitai at Kyaikto [Myanmar] (“...a large quantity of water slowly poured into [prisoner’s] mouth and nostrils, so that the prisoner suffocated”), admitted as Prosecution Exhibit 1552A, 16 December, 1946, IMTFE Record at 12,982; Affirmation of Pyaray Mohan (victim of water torture in Andaman Islands), admitted as Prosecution Exhibit 1611A, 18 December, 1946, IMTFE Record at 13,186; Affirmation of Murad Ali (Indians tried as spies in Adaman Islands, water torture carried, including by one of the judges), admitted as Prosecution Exhibit 1616A, 18 December, 1946, IMTFE Record at 13,193; Affidavit of MAJ A. Zimmerman, (“water test” at Buitenzorg [now Bodor], Indonesia) admitted as Prosecution Exhibit 1750, 26 December, 1946, IMTFE Record at 13,684; Affidavit of Prof. E. DeVries, (underwent “water test” 22 times during a period of two months at Buitenzorg [now Bodor], Indonesia), admitted as Prosecution Exhibit 1751, 26 December, 1946, IMTFE Record at 13,686; Affidavit of CDR C.D. Smith regarding water torture at Shanghai (“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

ensuing severe sentences of those who ordered and permitted it,⁹⁰ was approved in its entirety by Myron Cramer,⁹¹ the United States Judge on the Tribunal.⁹²

The water cure, however, has had a longer association with the US. 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 United States Courts as a result of the Spanish-American War, and the resulting 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

the treatment is resumed.”), admitted as Prosecution Exhibit 1901A, 3 January, 1947, IMTFE Record at 14,181; Affidavit of Dominique Poli (given “water punishment” several times at Hanoi, Vietnam by Japanese police) admitted as Prosecution Exhibit 1901A, 16 January, 1947, IMTFE Record at 15,341; and Declaration of Leon Artouard, interrogated by Kempetai at Saigon, Vietnam (“...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 by a whip or a staff slipped between the teeth, or a rag held firmly over these two orifices.” admitted as Prosecution Exhibit 1901A, 16 January, 1947, IMTFE Record at 15,366.

⁹⁰Those IMTFE defendants, Kenji Dohihara, Koki Hirota, Seishiro Itagaki, Heitaro Kamura, Akira Muto and Hideki Tojo, who were convicted of Count 54 (ordering, authorizing, and permitting commission of war crimes including, *inter alia*, torture) were all sentenced to death by hanging. Those convicted of Count 55, Shunroko Hata, Kuniaki Kosio, (failure to take adequate steps to prevent war crimes) were generally sentenced to life imprisonment except for defendant Iwane Matsui who was sentenced to death after he was convicted of failing to prevent the Nanjing massacre, and Mamoru Shigemitsu who was sentenced to seven years imprisonment based on mitigating circumstances. Many of the defendants were, of course, convicted of other crimes of conspiracy, aggression and against peace.

⁹¹Signature page following IMTFE Record at 49,858.

⁹²A number of the Members separately concurred, Delfin Jarnilla, Philippines, dissented in part, Bernard Roling, Netherlands, or entirely dissented Henri Bernard, France and Rabhabinod Pal, India..

by American troops. Eventually, courts-martial reached as high as a general officer⁹³, left the administration facing congressional inquiries, and the public with a sour after taste from its “splendid little war.”⁹⁴ 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.⁹⁵ The testimony coincided with publication of a soldier’s letter home boasting of use of the water cure on Filipino insurgents.⁹⁶

The technique lasted in the Philippines. In the compensatory damages phases of an action against the estate of former Philippine President Ferdinand Marcos, a United States District Court articulated what it described as both “...a human rights violation...” and “...a form of torture.”

The “water cure”, where a cloth was placed over a detainee’s mouth and nose and water poured over it producing a drowning sensation;

In Re Estate of Ferdinand E. Marcos, Human Rights Litigation, 910 F. Supp. 1460 at 1463 (D. Hawaii, 1995).

The Philippine Islands came into U.S. possession as a result of the Spanish-American War in 1898.⁹⁷ During the conflict the United States entered into tentative negotiation with Philippine nationalist guerillas who had been engaged in a revolution against Spanish rule.

⁹³Court martial of General Jacob Smith, See, Guenael Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contributions to National Case Law of War Crimes*, 1 Oxford Journal of International Criminal Justice 135 (2003). Smith was charged with “...conduct to the prejudice of good order and military discipline” before a court martial in Manilla from 24 April to 3 May, 1902. The Specifications included giving orders that “I want no prisoners,” and “...the more you kill and burn, the better you will please me.” General Smith was convicted of the charge (although not all the specifications), and sentenced to be admonished. *Id.* at 140.

⁹⁴Ambassador John Hay, writing from London to Theodore Roosevelt, declared that from start to finish [the Spanish-American War] had been “a splendid little war.”
<http://www.harvardmag.com/issues/nd98/war.html>

⁹⁵Stuart Miller, *Benevolent Assimilation, The American Conquest of the Philippines, 1899-1903* at p. 213, Yale University Press, (New Haven, 1982).

⁹⁶*Id.*

⁹⁷See generally, Stuart Miller, *Benevolent Assimilation*, *supra* at footnote 20.

American occupation of the islands, and their subsequent transfer from Spanish to U.S. sovereignty, eventually resulted in an open break.⁹⁸ A bloody conflict followed.⁹⁹

The fight against the Philippine insurrectionists was, to say the least, controversial at home.¹⁰⁰ 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,¹⁰¹ including allegations of various forms of torture. Thus, for example, a committee was formed in 1902 to “...vindicate the National Character”. 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 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 Philippines: 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; but that it typifies the conduct of the army in the islands I do not believe...It is not strange that young officers ...should resort to every legitimate means 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...

Full Disclosure of the Facts, New York Times, 1 May, 1902.

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

A

⁹⁸Id at 31 *et seq.*

⁹⁹Id at 57 *et seq.*

¹⁰⁰Id at 104 *et seq.*

¹⁰¹“Inquiries were conducted in Congress and the Press on a continuing basis during the period between 1899 and 1903. See, generally, Miller *supra*.

The Water Cure During U.S. Occupation of The Philippines

The American Commander in the Philippines In 1900, was moved to complain when the enemy was "...pursued too closely they 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."¹⁰² 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.¹⁰³

Descriptions of the "water cure" vary, but their similarity to its application by the Japanese is startling.

In testimony before the Senate Committee on the Philippines, former Sergeant Mark Evans described 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

¹⁰²Boston Evening Transcript, 20 September, 1900. **Need this story in full**

¹⁰³An 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 judgement. 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...in 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.

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.

Tell of "Water Cure" Cases, New York Times, 13 June, 1902.

Another witness, former Private Edward Norton "...described in one instance where 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 after receiving the cure delivered up a number of rifles and pistols."¹⁰⁴

Another former soldier, First Lieutenant Grover Flint testified he has been a witness to at least twenty applications of the water cure. Flint stated he had never seen anyone die as a result although he had seen a prisoner rendered unconscious, and that "...in some cases where it was given to old men he had seen their teeth fall out."¹⁰⁵

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 "The stomach would swell up, and in some cases I witnessed blood come from the mouth."¹⁰⁶

The response to that sort of testimony, and the ensuing commentary was often startling. The attitude of at least some company 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." 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. To destroy these bands, he said, it was necessary to force individuals to divulge information. There was another group, as well, he added which required resort to "vigorous measures." These were local representatives of well-known guerilla leaders who pretended to be peace-loving but actually collected money and information for the insurgents. The explication which followed is worth quoting at length:

¹⁰⁴*Tell of "Water Cure" Cases*, Id.

¹⁰⁵*Testified on "Water Cure,"* New York Times, 22 April, 1902.

¹⁰⁶*The Water Cure Described*, New York Times, 4 May, 1902.

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 used against outlaws only.

Letter to the Editor, New York Times, 13 July, 1902. (Emphasis added).

As one counterinsurgency study noted:

Officially, the Army condemned the water cure, which fell under [General Order] 100's prohibition 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.”

Andrew Birtle, *U.S. Army Counterinsurgency and Contingency Operations Doctrine, 1860-1941*, U.S. Army Center of Military History (1998).

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, Sec. Root claimed that “...in substantially every case [alleging torture] the report has proved to be unfounded or grossly exaggerated. He added that an allegation “...the ‘water cure’ is the favorite torture ...to force natives to give information...already is under investigation.” Root

than quoted an enclosed letter from Gen. Funston who called the water torture claims an “...atrocious lie without the slightest foundation in fact.”¹⁰⁷

Less than two months later, Secretary Root had substantially changed his position. In light of additional testimony before Sen. Lodge’s Committee,¹⁰⁸ he announced that “directions [had] been 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...,” and 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.”¹⁰⁹

¹⁰⁷*Cruelty Charge Denied*, New York Times, 20 February, 1902.

¹⁰⁸Root 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 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, 14 April, 1902.

¹⁰⁹*More Courts Martial in the Philippines*, New York Times, 16 April, 1902. Root enclosed directions to the Adjutant General of the Army to cable Gen. Chafee, the new

Courts martial were eventually held, one defendant convicted¹¹⁰ and the water cure drifted off the front pages and out of the 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 lingered in the Philippines after the Japanese occupation ended. During the regime of Ferdinand Marcos (1965-1986) there were press reports of continuing use of water torture against government opponents.¹¹¹ Eventually, that conduct

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 officer named as having administered the water cure be tried by 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).

¹¹⁰ NARA 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* at fn 27 . Major Edwin Glenn and Lieutenant Edwin Hickman were tried for conduct to the prejudice of good order and military discipline by courts martial in Catlalogan, Samar in May, 1902 based upon infliction of the water cure. The defense was military necessity, and that it was justified by 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.” He recommended disapproval because “...The United States can not afford to sanction the addition of torture to the several forms of force which may be legitimately employed in war...” cited in Mettraux, *id* at p.145 (Emphasis added). President Roosevelt affirmed the conviction of MAJ Glenn and disapproved the acquittal of LT Hickman. *Id*.

¹¹¹ Post war use of the water cure was not limited to the Philippines. There were reports of its use in the Republic of Korea, *Seoul Opposition Asks Free Elections Next August*, New York Times, 7 December, 1979 (“Dissident sources said army investigators used water torture on Christian students...the 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*

resulted in a civil action in the federal court system of the United States.

B

The Marcos Regime's Conduct On Trial

In March, 1986, a number of law suits were filed, which eventually resulted in a class action involving over ten thousand plaintiffs.¹¹² 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 producing a drowning sensation.

Id.

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.

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

Church Militant, New York Times Magazine, 28 November, 1982 ("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."); and Brazil, *Issue of Torture Growing in Brazil*, New York Times, 16 November, 1975, ("At one point 'laughter and wisecracks' were said to have accompanied water torture.").

¹¹²In *Re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460 at 1463 (D. Hawaii, 1995).

confessions. The officers were charged with violations of 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.¹¹³

The Sheriff and his deputies were all convicted by a jury under Count One,¹¹⁴ (as well as under other counts alleging constitutional violations for the same conduct),¹¹⁵ resulting in at least a four year sentence on that Count.¹¹⁶ 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.

Ex-Deputy Tells Jury of Jail Water Torture, New York Times, 1 September, 1983.

The victims' testimony was strikingly familiar 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 breath.

Testimony of former inmate Kevin Coffman.¹¹⁷

...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.

¹¹³*United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), Record on Appeal, Brief for the United States, 31 May, 1984 at p.3.

¹¹⁴*Id.* at 7.

¹¹⁵*Id.* at 4 and 7.

¹¹⁶*Id.* at 7,

¹¹⁷*United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), Record on Appeal, Brief for the United States, 31 May, 1984 at p.8.

Testimony of former inmate Craig Punch.¹¹⁸

“I thought I was going to drown”

Testimony of former inmate James Hicks.¹¹⁹

On an appeal¹²⁰ 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 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.

United States v. Lee, 744 F. 2d at 1125.¹²¹

¹¹⁸*Id.* at 10.

¹¹⁹*Id.* at 12.

¹²⁰ The sole issue was whether the trial judge abused his discretion in denying a severance. *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

¹²¹See also, *Morris v. State*, 697 S.W. 2d 687 (C.A. Texas, 1985) (discussing another allegation of water torture by Sheriff Parker).

Lee's conviction was affirmed on appeal, and all the defendants received substantial prison sentences.¹²² 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." *Ex-Sheriff Given Ten Year Sentence*, New York Times, 27 October, 1983 (emphasis added).¹²³

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 Yoo¹²⁴ 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 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

¹²²Former Sheriff Parker, as the ringleader, was sentenced to the maximum of ten years plus a twelve thousand dollar fine. *Ex-Sheriff Given Ten Year Sentence*, New York Times, 27 October, 1983.

¹²³ Water torture is mentioned in an American Court in another context. In his concurring opinion in *Robinson v. State of 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. He quotes a statement that "...terror and punishment linger on as a means of dealing with some diseases..." and then one that "...an entire chamber of horrors constituting 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)..." 370 U.S. at 668. His proposition is particularly interesting in light of the Yoo/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.

¹²⁴See footnote 6, supra.

Their definition¹²⁵ may be subject to challenge as a matter of law, but whether it is

¹²⁵Prof. 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' 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.

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.

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 beyond all question, 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 which 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.¹²⁶

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.

John Yoo, *Commentary: Behind the 'torture memos'*, UC Berkeley News, 4 January, 2005, http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml.

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." What he does not say, is that Newsweek was in any fashion incorrect when it said that his 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 suspect's face, which can feel like drowning..."*Tortured Debate*, supra at fn. 4. It would be interesting if he would do so.

¹²⁶"Progress, far from consisting in change, depends on retentiveness...Those who cannot remember the past are condemned to repeat it."

George Santyana, *Life of Reason* (1905-6) Vol. 1, ch. Xii *Flux and Constancy in Human Nature*. See also, George Orwell, 1984 (1949) ("Who controls the past controls the future: who controls the present controls the past.").