

Water Cure
US Policy and Practice in the Philippine Insurrection

Richard Prevost, ESQ
Member of the Virginia Bar and Military Law Section

Introduction

The day was hot and humid. They had been chasing shadows for weeks. CPT Edwin Glenn wiped his brow. One could not tell who the enemy was. None of them wore uniforms. Everyone they met emphatically stated they were friends. Now some of his troops were missing and others had been fired upon even though the area had been declared safe. Where were they getting their weapons? Where were his missing men? CPT Edwin Glenn looked down at *Presidente*¹ Tobeniano Ealdama. Was he really an *insurrecto*? “Yo soy amigo.” Ealdama repeated even though he knew that none of the American soldiers were inclined to believe him. Two troopers held his arms, two more held his legs, a fifth positioned Enrique’s head so that that the water would run into his mouth and a sixth soldier stood ready with the water. “Go ahead.” Glenn said. The water poured and poured. Five, ten, maybe fifteen minutes passed and the water continued to pour. *Presidente* Ealdama felt as though he would drown.²

Captain, soon to be promoted to Major, Glenn had a distinguished career to this point. He graduated from the US Military Academy at West Point and was a Judge Advocate with several noteworthy accomplishments. His handbook on International Law was published in 1895.³ Prior to his Philippine assignment, he had successfully completed challenging duty exploring parts of Alaska. Unfortunately for him, his actions in the Philippines would lead to his becoming one of the few American soldiers prosecuted in

¹ In the Philippines a *presidente* was the leader of a geographical district or town.

² The above paragraph is an interpretation compiled from several historical sources subsequently identified in this article. The personal names and titles are as reported. However, the quoted material is merely conjecture on my part as to what might have been said.

³ {{162 Glenn, Edwin F. 1895}}

1902 for administering the water cure to Filipinos.⁴ Most likely he and other Americans learned of the water cure as an interrogation technique from the Spanish or from Filipinos.⁵ MAJ Glenn was unapologetic. He was assigned the responsibility for obtaining information from captured Filipinos and he felt the water cure was an effective interrogation technique. So he used the technique until his actions became publicized.⁶ Members of Congress then invited some former soldiers to testify regarding his actions. This testimony was publicly transmitted to Secretary of War Elihu Root who directed action. MAJ Glenn, was arrested, brought before a court martial and convicted.⁷

Ninety-nine years later Americans were aghast when, on September 11, 2001, Al-Qaeda terrorists conspired and struck the World Trade Center and the Pentagon causing a little less than three thousand deaths. But for the brave acts of the passengers on United Airline Flight 93 at least one other US target would have been struck. The scope of the coordinated attack killing American civilians was unprecedented. The property loss was huge. And, the effect on American psyche is still being evaluated. The United States Government responded to these terrorist attacks in a variety of ways. An incomplete list of US actions would include tightening of security for travelers at airports and at border crossings, the establishment of a new government department called the Department of

⁴ The water cure is the similar interrogation technique as water boarding. There are variations of this technique and the motivations for using the practice differ. But all involve placing the “victim” in a position so that water runs into the abdomen and lungs creating a sense of drowning.

⁵ {{149 Le Roy, James A. 1914}} {{140 Wolff, Leon 1961}}

⁶ In fact, Glenn twice used the water cure on Ealdama as part of interrogation; once in a building and again, outside, a short time later. {{150 Storey, Moorfield 1926}} Miller implies that Glenn and 1LT Day used the water cure on numerous occasions. {{143 Miller, Stuart C. 1982}} 225-226

⁷ MAJ Glenn was neither the only nor the highest ranking officer to be tried and convicted for alleged atrocities in the Philippines. In fact, MAJ Glenn participated in the legal defense of Marine Maj Littleton Waller’s actions leading to the deaths of several Filipinos on the island of Samar. Miller 227 – 232. BG Smith, US Army, was tried for, among other things, issuing orders to kill Filipinos. He was convicted and, for his sentence, admonished. Storey, 138-144. See generally {{156 Fritz, David L. 1979}}

Homeland Security, the announcement of color-coded threat conditions and, the announcement of rewards for information leading to the capture or death of those implicated in the attack. Through the Patriot Act,⁸ the US Government was allowed to monitor certain communications by its citizens without the necessity of first demonstrating probable cause and obtaining a warrant.

Additionally the United States with allies joined the Afghan Northern Alliance and attacked the Taliban Government of Afghanistan. The Taliban was harboring and refusing to turn over to the US some of the terrorists who had been involved in the attack. As US and Northern Alliance forces gained the military advantage several questions remained. Who were these terrorists? What were their motivations? Where would they next strike? Suspected terrorists captured in Afghanistan and elsewhere were incarcerated, interrogated and, some were subject to the water cure.⁹

Only certain US agencies used the water cure as part of interrogation. Among those agencies using this technique not every person incarcerated was subject to the water cure. As the public became aware of the practice, and of the existence of Government memos concluding that the water cure and other techniques might not be considered torture,

⁸ P.L. 107-56.

⁹ Some of those captured were transferred to other nations and there interrogated. The extent of this practice, called “rendition”, is difficult to determine. To the extent it was done it was completed in a non-transparent manner, without due process and apparently not through any extradition process. See {{154 Hakimi,Monica 2007}}See also http://www.pbs.org/frontlineworld/stories/rendition701/video/video_index.html last accessed 10 December 2009

vigorous public debate ensued.¹⁰ The debate was not limited to the water cure. However, this interrogation method was probably the most controversial.

Americans have been both victims and wielders of this technique since at least the US involvement in the Philippines during and after the Spanish American War. Then, as now, there was great concern about its use and legality.

Background - the US Arrival in the Philippines

The US acquired control of the Philippines as a result of the Treaty of Paris, signed December 10, 1898, ending the Spanish American War. The Treaty was ratified on February 6, 1899 merely two days after the start of hostilities between US forces and the *insurrecto* forces of Emilio Aguinaldo.¹¹ Aguinaldo had led Filipino forces against the Spanish prior to the War and, during the War, formed an uneasy alliance with the Americans. Aguinaldo fought against the new occupiers when it became clear to him that the US was not going to immediately grant independence to the Philippines.

The Americans were divided about what to do with these islands located thousands of miles from the US mainland. The US itself had gained independence from England at the turn of the previous century and there was some American sympathy for a Filipino independence movement. Many wanted to give the Filipinos their independence; either

¹⁰ Many of the memos were authored by the Justice Department in 2002 and 2003. See footnotes 38-41 *supra*.

¹¹ {{146 Worcester, Dean C. 1930}} 209. Worcester, writing in 1930, still felt the Filipinos had not made sufficient progress to be granted independence at that time.

immediately or after a “seasoning” period.¹² Others wanted to keep the Philippines as a protectorate and saw these possessions as an opportunity for economic and world prestige. The Filipinos themselves tended to fall on the side of independence although some contended that a more gradual road to independence would be a preferable course.¹³ And, if granted independence, how the Philippines would be organized was unclear in 1899.¹⁴ Whatever idealistic goals the US may have had for the Philippines it first had to address the insurgency. American troops had not left the Philippines after the Treaty of Paris and soon the widespread independence movement loosely led by Aguinaldo took up most of their time. Aguinaldo could not match the Americans in a conventional war. Ultimately he was captured. Aguinaldo’s capture may have been aided by information obtained from a courier who was made to reveal the location of Aguinaldo’s headquarters with the help of the “water cure.”¹⁵ Despite Aguinaldo’s capture the conflict persisted in the form of a guerilla war.

The Water Cure in the Philippines

¹² Worcester argues that, contrary to Storey and Kramer, there was no functioning or inhabitant-accepted Filipino Government prior to US occupation. Where one stands on this debate and, more broadly, stands on whether the US should grant immediate independence to the Philippines after the Spanish-American war seems to bias the views of US government action. For example, Storey finds little on which to commend Presidents McKinley and Roosevelt whereas Worcester is much more positive of these administrations. Commissioner Taft supported independence after a period of adjustment:

A government ought to be established under American guidance which shall form a stable government, by which and under which the Filipinos shall gradually improve their knowledge of what is individual liberty and what is a constitutional government, and subsequently the time will come when the United States and the Filipino people together can agree upon what their relations shall be.

Graff 35-36

¹³ {{140 Wolff, Leon 1961}} 145-146. Kramer finds that pro-American newspapers in the Philippines such as *La Democracia*, combined with the US Government’s use of the Sedition Act to stifle dissent, created an illusion of a broad-based Filipino consensus in support of American policy when, in fact, Filipinos openly challenged the creation of a colonial state. Kramer 176-177.

¹⁴ Worcester 200 – 208. Graff, 41-42

¹⁵ Miller, 167

Officially, physical mistreatment and torture were never sanctioned by any formal US authority to include the Secretary of War, Divisional Headquarters in Manila or district headquarters.¹⁶ There were warnings issued by the military against it; but mistreatment and torture 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.”¹⁷ By 1902, American newspapers raised the issue to the public.

¹⁶ The Lieber Code established in 1863 was still in effect in 1902 and promulgated under General Order 100. In fact, the Lieber Code had been observed with approval by several nations and ultimately adopted as the basic code for warfare by the Hague Convention of 1899. Miller 230.

Art. 16 of General Order 100 states:

Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, *nor of torture to extort confessions*. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. (emphasis added.)

General Order 100 does not state that the water cure is or is an example of “torture.” However, the water cure was considered “torture” as that term was used during the period. For example, soldiers described the water cure as torture and William Taft in testimony before Congress described the water cure as “torture”

Art. 75 states:

Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

Art. 44 states:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

¹⁷ {{ 141 Linn, Brian M. 1989 }}, 145

But the water cure! If tortures I've mentioned are hellish, the water cure is plain hell. The native is thrown upon the ground, and, while his legs and arms are pinned, his head is raised partially so as to make pouring in the water an easier matter. An attempt to keep the mouth closed is of no avail; a bamboo stick or a pinching of the nose will produce the same effect. And now the water is poured in, and swallow the poor wretch must or strangle. A gallon of water is much but it is followed by a second and a third. By this time the victim is certain his body is about to burst. But he is mistaken, for a fourth and even a fifth gallon are poured in. ... While in this condition speech is impossible, and so the water must be squeezed out of him. This is sometimes allowed to occur naturally....¹⁸

There were racial overtones to the actions of many US troops which may have allowed them to treat Filipinos with less or little regard to their humanity.¹⁹ Race was a consideration addressed in hearings in the US Congress as well.

Senator Patterson. When a war is conducted by a superior race against those whom they consider inferior in the scale of civilization, is it not the experience of the world that the superior race will almost involuntarily practice inhuman conduct?

Governor Taft. There is much greater danger in such a case than in dealing with whites. There is no doubt about that.²⁰

The Army had previously investigated some allegations of water cure use by US service men in the Philippines and, in 1902, concluded that some soldiers had used the water cure. However the investigation reported that evidence of the presence of an officer when the water cure was used occurred in “comparatively few instances.”²¹ The issue would not go away and ultimately questioning regarding the use of water cure came up during Senate hearings of no less a witness than William Howard Taft, then Governor of the Philippines. Governor Taft conceded that the water cure had been used:

¹⁸ {{150 Storey, Moorfield 1926}}, 147 quoting an extract in the New York Evening Post of April 8, 1902.

¹⁹ Kramer at 137-145

²⁰ Testimony of William H. Taft Before the Senate Committee on the Philippines, p. 77

²¹ Linn at 145 (citations omitted.) Linn notes: “Given the prevalence of testimony in private papers, courts-martial, and other Army investigations, it is impossible to concur with this judgment.” Ibid.

What I am trying to do is state what seemed to be to us the explanation of these cruelties – that cruelties have been inflicted; that people have been shot when they ought not to have been; that there have been in individual instances of water cure, that torture of which I believe involves pouring water down the throat so that the man swells and gets the impression that he is going to be suffocated and then tells what he knows, which was a frequent treatment under the Spaniards, I am told – all these things are true.²²

The Recognition at Home of the Use of the “Water Cure” by US Forces.

Why MAJ Glenn and others resorted to the water cure as a particular interrogation technique is unclear. A variety of punishments were employed by Americans on Filipinos. Yet this particular technique, perhaps because it could be interpreted not as punishment but as an interrogation technique, garnered great interest in the press and in the Congress. The letters home by soldiers reported the use of the water cure as a practice to extract information from Filipino civilian and/or military prisoners.²³ Soldiers writing home describe it great detail; perhaps because the technique was novel to the Americans. The author Leon Wolff, writing in 1961, describes the technique as “a blend of Castilian cruelty and American ingenuity.”²⁴ Some soldiers recalled first hand numerous uses of the water cure. “Many times I have witnessed the torturing of prisoners by the water cure, which was done usually by placing the barrel of a rifle in the prisoner’s mouth and forcing him to swallow water until he could hold no more, and was repeated until he was willing to give information.”²⁵ Another account published in the New York Evening Post of April 8, 1902 suggests that several hundred water cures were

²² Testimony of William H. Taft Before the Senate Committee on the Philippines, p. 75, Miller at 213

²³ {{145 Bain, David H. 1984}}, 84

²⁴ {{140 Wolff, Leon 1961}}, 253. The cure “consisted of forcing four or five gallons of water down the throat of the captive, whose ‘body becomes an object frightful to contemplate,’ and then squeezing it out by kneeling on his stomach. The process was repeated until the *amigo* talked or died. Almost invariably he talked” Ibid.

²⁵ {{139 Pohlman, Andrew 1906}}, 104

conducted.²⁶ Some testimony was presented in Congress concerning the use of the water cure and of MAJ Glenn's participation and oversight.²⁷

The type of unrestricted warfare conducted by the Filipinos, while not an excuse, probably contributed to American troops losing their discipline. Filipinos fighting the US did not have uniforms and, if come upon and questioned would often announce that they were "amigos." Many, when released, would return to shooting and "boloing"²⁸ Americans. There was likely a frustration among the soldiers that was not controlled and, in fact, may have been encouraged by some of the military leadership. LeRoy, who wrote one of the first histories of the Americans in the Philippines, proffered that "the Americans borrowed from the guerrillas and from Spanish-Philippine history in resorting to the use of the 'water cure' and similar tortures to gain information or rifles."²⁹

Command Reaction

Some government officials, while admitting the use, reported that the occurrence was infrequent. In his 1930 book Worcester reports:

There were some rare individual instances in which uninjured Filipinos were treated with severity, and even with cruelty, by American soldiers. They occurred for the most part late in the war when the 'water cure' in mild form was sometimes employed in order to compel persons who had guilty knowledge of the whereabouts of firearms to tell what they knew.... Usually the sufferers were themselves bloody murderers... I mention these facts to explain, not to excuse, their conduct.³⁰

²⁶ Storey, 147-48

²⁷ Graff at, 75-80, 81-82, 84-86, 97-100, 105-106, 107-110, 133

²⁸ A bolo is a curved knife used by Filipinos.

²⁹ {{149 Le Roy, James A. 1914}}, 225

³⁰ Worcester, 215

BG Funston, who gained fame for capturing Aguinaldo, denied that his US troops ever utilized the water cure but instead pointed out that it was common knowledge that Macabebes (one of the several indigenous peoples of the Philippines) used the water cure when not under the direct control of an officer.³¹

Even President Roosevelt was not privately shocked by the interrogation method. In a 1902 private letter to Speck von Sternberg, Roosevelt noted that the water cure was “an old Filipino method of mild torture. Nobody was seriously damaged whereas the Filipinos had inflicted incredible tortures on our people.”³² Others, within the government and without, who did not want to see the US take possession of the Philippines were much more outspoken in their criticisms of the practice.

Results of Court Marital for Major Glenn

At his court martial Major Edwin Glenn was found to have used the water cure to extract information, apparently successfully³³, in Igbarras, Panay. He was fined and admonished as a result.³⁴ The Judge Advocate General, Major General George B. Davis reviewed the court martial. He was dissatisfied with the results and wrote an opinion that MAJ Glenn’s punishment was too light.³⁵ MAJ Glenn remained in the service and recovered from his court martial; although it appears he left the JAG Corps. Records have him as a

³¹ Kramer, 149

³² Miller, 235.

³³ Graff 75-76

³⁴ Miller 258

³⁵ {{170 Kramer, Paul A. 2008}}

Major General commanding the 83rd Infantry Division in 1917 prior to its deployment to in World War I and in 1918 after the Division's return.³⁶

Parallels to and Divergences from the Bush Administration's View of the Water Cure

The nature of warfare has changed in 100 years. The US has much greater technological capability with the advent of communication equipment, drones, satellites and various combat systems. Weapon accuracy, distance and lethality have improved. The American military service member is better trained than his or her counterpart of a century ago.

Intelligence gathering was primarily conducted by the military during the Philippine Insurrection and it was primarily done by conducting human intelligence. The McKinley and Roosevelt Governments did not condone use of the water cure as an interrogation technique. Ultimately at least some of the military personnel who engaged in the practice were prosecuted.

Intelligence gathering by the Bush Administration as part of its War on Terror was the effort of several agencies each with its own culture and practices. In addition to human intelligence, intelligence was gathered using satellites, drones, wiretaps, monitoring internet sites and by a variety of other methods. For a time, human intelligence interrogations were conducted by contractors working for the government as opposed to

³⁶ http://en.allexperts.com/e/u/u/u.s.83rd_infantry_division.htm#hd1 last accessed 10 December 2009. {{ 161 Thomas, Shipley 1920 }} at 488

government employees.³⁷ Several legal offices in the Department of Defense and the FBI during the Bush Administration did not support the use the water cure as part of their interrogation techniques.³⁸ Whenever investigations revealed that soldiers were involved in the abuse of prisoners, such as the abuses at Abu Ghraib, the offending soldiers were prosecuted or administratively separated. Additional training was provided to address military shortcomings.³⁹ It has been more difficult to prosecute contractor employees for misconduct although jurisdiction of the Uniform Code of Military Justice had been expanded⁴⁰ and some legislation, such as the Patriot Act⁴¹, has expanded federal jurisdiction.

An additional area in which the McKinley and Roosevelt Administrations differed from the Bush Administration is that several memoranda were prepared by the Justice Department under the Bush Administration that could be relied upon by the Executive Branch to take certain actions. For example, a Justice Department memo allowed the transfer of captured terrorists to the control and custody of foreign nations,⁴² a Justice memo declaring certain US signed treaties and laws are inapplicable to Al-Qaeda and Taliban Detainees⁴³ and, more relevant to use of the water cure, a memo that allowed

³⁷ {{ 227 Anonymous 2009; 226 Gorman, Siobhan 2009;

³⁸ {{ 225 Luban, David 2009 } }

³⁹ See generally { 228 Church, A.T. Vice Admiral 2005 } }

⁴⁰ 10 U.S.C. Sec 802(a)(10)(2007)

⁴¹ P. L. 107-56, 115 Stat. 272 (2001)

⁴² See <http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf> Last accessed 10 December 2009.

⁴³ See <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> Last accessed 10 December 2009.

“enhanced interrogation techniques” under certain circumstances.⁴⁴ This last memorandum considered the standards of conduct for interrogation and the legal definitions of torture and concluded that certain interrogation techniques, such as the water cure, might not rise to a definition of torture. Dated August 1, 2002, it concludes in part:

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.

This memo suggests that statutory limits on interrogation techniques of 18 U.S.C. 2340A might be unconstitutional. The Office of Legal Counsel, DOJ, issued a memo on 14 March 2003 that addressed, among other things, interrogations of Al-Qaeda and Taliban detainees held outside the United States and concluded that the Fifth and Eighth Amendments do not apply to alien enemy combatants held abroad.⁴⁵ The memo also opined that US reservations to the UN Convention Against Torture so limited its scope that it mirrored 18 U.S.C. 2441 (2000) and that this statute would be inapplicable to military interrogations.⁴⁶ Key members within the Department of Defense were concerned about this memo, its reliance by a DOD Working Group organized to address interrogations and the use of enhanced interrogation techniques.⁴⁷ The Defense Department ultimately issued a memo that directed all Defense Department personnel adhere to the standards of Common Article 3 of the Geneva Conventions of 1949.⁴⁸ It is

⁴⁴ Mr. Bybee was an Assistant Attorney General writing for Attorney General Gonzales. The memo can be accessed at <http://f11.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> Last accessed 10 December 2009.

⁴⁵ See http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf Last accessed 10 December 2009.

⁴⁶ Ibid. U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, 1465 U.N.T.S. 113

⁴⁷ See, e.g. <http://www.newyorker.com/images/pdfs/moramemo.pdf> Last accessed 10 December 2009

⁴⁸ See <http://www.defense.gov/news/Aug2006/d20060814comm3.pdf> Last accessed 10 December 2009. Secretary Gordon England’s memo was written after the Supreme Court had issued its opinion in that

not publicly known whether civilian intelligence gathering agencies may have chosen to rely on this interpretation when conducting interrogations. On 27 January 2009 President Obama issued an Executive Order which had the effect of prohibiting the water cure as an interrogation technique.⁴⁹

The McKinley and Roosevelt Administrations would not have had to address General Article 3 of the 1949 Geneva Convention. Thus, it would not have been necessary in the early 1900s to distinguish US treatment of Article 3 as the US did in 2003. Nevertheless, the use of the water cure in the early 1900s was sufficiently contrary to US Law, even in the absence of General Article 3, that successful prosecutions were conducted against service members who engaged in its use.

Conclusion:

The United States policy objecting to the use of the water cure had been clear commencing at least from 1902. Applying General Order 100, an order that originated 1863, the US clearly determined in 1902 that the use of the water cure was unlawful. As a policy matter US government officials of the McKinley and Roosevelt Administrations generally and publicly associated the use of the water cure as a type of torture. Formally its use was not condoned and those who used the technique were sometimes prosecuted and convicted. However at some point in time, perhaps due to the attacks of September 11, 2001, a change in US attitudes or cultural values, a change in the nature of warfare or perhaps due to some other combination of circumstances, the US reconsidered the water

General Article 3 of the Geneva Conventions of 1949 applied as a matter of law to the conflict with al Qaeda in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴⁹ See <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf> Last accessed 10 December 2009.

cure as an interrogation technique and determined that it was not torture when used in certain circumstances. The post 9/11 Department of Justice memos that caused the change in the US position do not address why the water cure was originally considered torture by the US and what were the changes that would cause the US to next consider the use of the water cure not to be torture.

Since January of 2009 the US has operated under an Executive Order that removed the water cure as an interrogation technique. Does the Executive Order finally decide the matter or will this technique again find favor?