

**Lawfare in Luzon: The American Application of the Rules of
War in the Philippines, 1898-1903**

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Term Paper for Seminar “The Laws of War: Controversy & Precedent”

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Yale Law School, Spring Semester 2012

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Introduction

The campaign fought in the towns, villages, and jungle paths of the Philippine Islands at the turn of the last century long remained outside the mainstream of U.S. historical memory, but it has returned during the current conflict with al-Qaeda and its affiliates. For military historians, the Philippine-American War—fought in a faraway land on difficult terrain against an elusive, irregular foe who often enjoyed the support of local civilians—represents a paradigmatic, successful counterinsurgency.¹ Legal scholars, for their part, have focused on the military commissions before which the United States government, then as now, tried its enemies for violating the laws of war. In recent years, legal academics, military lawyers, and even the military commissions themselves have looked to these earlier tribunals as a source of precedent.² Meanwhile, cultural historians have drawn implicit and explicit comparisons between the Philippine-American War and the U.S. engagement in Iraq since 2003, examining and comparing the role of racial assumptions in driving violence and torture.³

¹ See MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 125-28 (2002); BRIAN MCALLISTER LINN, *THE PHILIPPINE WAR 1899-1902* (2000) [hereinafter LINN, *PHILIPPINE WAR*]; BRIAN MCALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899-1902* (1989) [hereinafter LINN, *COUNTERINSURGENCY*]; JOHN MORGAN GATES, *SCHOOLBOOKS AND KRAGS: THE UNITED STATES ARMY IN THE PHILIPPINES, 1898-1902* (1973). For Boot, the relevant modern conflict is that against al-Qaeda; Linn and Gates had the Vietnam War in mind.

² See Haridimos Thravalos, *History, Hamdan, and Happenstance: "Conspiracy by Two or More To Violate the Laws of War by Destroying Life or Property in Aid of the Enemy"*, 3 HARVARD NAT'L SEC. J. 223 (2012), available at <http://harvardnsj.org/wp-content/uploads/2012/05/Vol.-3-Thravalos-final-edits2.pdf> [hereinafter Thravalos, *History*]; David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005-2006); Haridimos Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737 (2006) [hereinafter Thravalos, *Military Commission*]. For the role of Philippine-American War-era precedents in the modern-day commissions' own proceedings and opinions, see *infra* notes 39-41. An earlier use of these precedents, anticipating possible Japanese guerrilla action in World War II, is Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces under the Laws of War*, 40 AM. J. INT'L L. 563 (1946).

³ See LOUISE K. BARNETT, *ATROCITY AND AMERICAN MILITARY JUSTICE IN SOUTHEAST ASIA: TRIAL BY ARMY* (2010); PAUL KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* (2006); Frank Schumacher, "Marked Severities": *The Debate over Torture during America's Conquest of the Philippines, 1899-1902*, 51 AMERIKASTUDIEN/AMERICAN STUDIES 475 (2006); Paul A. Kramer, *The Water Cure: Debating Torture and Counterinsurgency—A Century Ago*, THE NEW YORKER (February 25, 2008), www.newyorker.com/reporting/2008/02/25/080225fa_fact_kramer.

The Philippine-American War appears in these different literatures variously as a military exemplar; as an honored source of legal precedent; or as a stark warning that racism can triumph over the rule of law when the United States fights abroad. Some scholars have implied that the laws of war were cast aside in the Philippines, and deployed only as a political fig leaf at home; others have suggested that they were consistently adhered to (a viewpoint which seems to assume that the law was static and unambiguous). However, there has been no systematic study of the role those laws themselves played in the Philippine-American War.

This paper will attempt such a study, arguing that the law *did* matter. It was, I contend, neither cast aside nor simply followed, but instead invoked, maintained, and, most importantly, frequently *reinterpreted*, because this served pragmatic and symbolic purposes. American officials consistently reiterated that the law applied even to this unusual, colonial conflict, against an enemy who fought by different rules, and whom most Americans regarded as racially and civilizationally inferior. American officials repeatedly considered arguments that these factors made the law fundamentally inapplicable to the conflict, and the McKinley and Roosevelt Administrations sometimes flirted with such arguments in the press. But whenever called upon for an official decision, military officers always rejected this view. Instead, they chose to reinterpret and apply the law as they saw necessary, using legal reasoning to understand and shape the conflict. Law was, indeed, a weapon of war, a phenomenon which Charles J. Dunlap, in this century, has called “lawfare.” But as Dunlap has noted, lawfare is a double-edged sword, “much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law—or not. It all depends on who is wielding it, how they do it, and why.”⁴ The same was true in the Philippine-American War. The law proved itself flexible and adaptable, accommodating American operational imperatives, but also racist

⁴ Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 148 (2008).

assumptions and extraordinary violence. Furthermore, official interpretations were never universally accepted; they were always contested—within the U.S. military, by American imperialists and anti-imperialists, and by Filipinos themselves.⁵

The law's sometimes salutary and sometimes frightening flexibility resonates today, as do the contested nature of the law; the tension between accommodating military necessity⁶ and limiting cruelty; and the dichotomy between holding individual combatants responsible for war crimes, or targeting or detaining people based on enemy status. It remains important to understand how the laws were interpreted—some might say misinterpreted—and why the military consistently stood by them.

The paper consists of three Parts. Part I provides the historical chronology of the conflict, and summarizes the previous legal and historical literature on the Philippine-American War, from the standpoint of the laws of war, before proceeding to explain the historical and legal framework and chronology of the conflict. Part II, the heart of the paper, traces the evolving interpretations advanced by American officers, putting these in historical context and showing how other actors contested them. Part II is organized chronologically, but also thematically, because the issues changed as the war did. Thus Part II moves from the first legal questions about the nature of the war, to the application of the laws of war, the debate over whether they should apply, their reinterpretation as the conflict evolved, and their contestation as the war drew to a close. However, the narrative occasionally pauses or discusses events out of order, so as to consider particular themes

⁵ I cannot read Spanish, so this paper will consider Filipino claims only on one occasion, when made in English in an American court. *See infra*, p. 55-56.

⁶ For a general discussion of military necessity in legal theory, see STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 60-62 (2010).

in greater depth. Finally, Part III concludes with an examination of the broader themes and their current relevance.

PART I

A. The Philippine-American War, 1899-1902: Chronology and Background

The Philippine-American War was an outgrowth of the Spanish-American War.⁷ The United States declared war on Spain in April 1898, after widespread American denunciations of the methods the Spanish used to suppress revolts on Cuba—including the policy of “reconcentration,” which confined civilians to small compounds and devastated the surrounding countryside.⁸ The final straw was the unexplained explosion of an American warship, the U.S.S. *Maine*, while visiting Havana. When war broke out, the U.S. Navy’s Asiatic Squadron sailed quickly to the Philippine Islands, a Spanish colonial possession, and defeated the Spanish fleet in the Battle of Manila Bay. Manila, the capital city, was soon besieged by anti-Spanish Filipino insurgents under the command of Emilio Aguinaldo, who enjoyed a friendly relationship with the United States. American land forces under Major General Elwin Otis arrived in August and conquered Manila. They deliberately prevented Aguinaldo’s insurgents from taking part in the conquest of the city, leaving them outside the walls while the Spanish surrendered directly to the U.S. forces.

An increasingly tense standoff ensued, as Aguinaldo hoped for American recognition of his government as an independent country. His men continued to camp outside the city walls and to set

⁷ The following paragraph, except where noted, is based on KRAMER, *supra* note 3, at 91-98.

⁸ *Id.* at 152-53.

up their own government, even as the U.S. set about administering Manila.⁹ According to Enoch Crowder, a Missouri law professor who served as Judge Advocate for the Philippine command, by August 28, 1898, American “war courts” exerted “all the criminal jurisdiction of the native tribunals in addition to their war jurisdiction[,]” generally applying Spanish law.¹⁰ Otis was anxious to extend his control outside the city, but doing so would provoke clashes with the insurgents.¹¹ As the standoff continued, President William McKinley decided to annex the Philippines, avowedly in order to “uplift them and civilize and Christianize them, and by God’s grace do the best we could for them, as our fellowmen for whom Christ also died”—in brief, the U.S. policy was to be “benevolent assimilation.”¹² The United States and Spain signed a peace treaty in Paris, ratified by the U.S. Senate on February 6, 1899, which transferred possession of the Philippines to the United States.¹³ Just two days earlier, though, the mounting tensions on the lines outside Manila had erupted as American sentries, without explicit orders, fired at Filipinos approaching their positions on the night of February 4-5.¹⁴ A confused battle in the darkness ensued, until Otis launched a full-scale offensive in the morning. The Americans pushed back Aguinaldo’s insurgents at almost every point and killed 700 Filipinos at the cost of only 44 American dead.¹⁵ This was the largest battle of the entire ensuing war, and U.S. forces advanced as much as six miles in some places on February 5.¹⁶

⁹ KRAMER, *supra* note 3, at 98. He calls this period one of “competitive state-building.”

¹⁰ United States National Archives and Records Administration [hereinafter NARA], Record Group [hereinafter RG] 153, Judge Advocate General [hereinafter J.A.G.] Doc. File, #6701, Crowder to J.A.G. Guido Norman Lieber, Aug. 28, 1898; *see also* KRAMER, *supra* note 3, at 98 (noting the role of U.S. courts in the “competitive state-building” between the U.S. and the insurgents); GATES, *supra* note 1, at 55-56, 65 (describing President McKinley’s May 1898 order that Spanish law continue in force “so far as practicable” and its enforcement, and discussing Crowder’s background)

¹¹ STUART CREIGHTON MILLER, “BENEVOLENT ASSIMILATION”: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903, AT 59, 64 (1982).

¹² BOOT, *supra* note 1, at 105-06; KRAMER, *supra* note 3, at 109-10.

¹³ KRAMER, *supra* note 3, at 109.

¹⁴ *Id.* at 111.

¹⁵ BOOT, *supra* note 1, at 109.

¹⁶ LINN, PHILIPPINE WAR, *supra* note 1, at 52, 59.

In the remainder of 1899, the Americans won a string of victories in the field, but Aguinaldo increasingly turned to guerrilla warfare.¹⁷ Frustrated by the insurgency's persistence, President William McKinley replaced Otis with Major General Arthur MacArthur in May 1900. Both were disappointed when resistance did not collapse after McKinley's victory in the November 1900 presidential election against William Jennings Bryan, but nevertheless, the insurgency was slowly and bloodily suppressed, leaving only pockets of resistance, which were the focus of targeted operations in late 1901 and early 1902.¹⁸

These mopping-up expeditions adopted increasingly harsh tactics, which came to light in the United States in early 1902. It also emerged that American troops had frequently employed the "water cure," akin to modern-day waterboarding, to torture captives during interrogations, and that they had burned Filipino villages and sometimes executed prisoners.¹⁹ At times, American attitudes arguably tended toward what Paul Kramer has called "racial exterminist war[.]"²⁰ Much of this behavior was clearly illegal, although American commanders often disciplined the perpetrators lightly or not at all. (As the purpose of this paper is to discuss the law, not to evaluate the conduct of American soldiers, I will touch on such abuses, however widespread, only as they illuminate the interpretation of the laws of war.) The U.S. Senate's Committee on the Philippines opened hearings

¹⁷ See BOOT, *supra* note 1, at 109-112; *see generally* LINN, PHILIPPINE WAR, *supra* note 1, at 185-224; 2 JAMES A. LEROY, THE AMERICANS IN THE PHILIPPINES: A HISTORY OF THE CONQUEST AND FIRST YEARS OF OCCUPATION WITH AN INTRODUCTORY ACCOUNT OF THE SPANISH RULE 196 (1914).

¹⁸ KRAMER, *supra* note 3, at 132-34; *see generally* LINN, PHILIPPINE WAR, *supra* note 1, at 277-321.

¹⁹ There is an extensive literature on the water cure, at the time debating whether its utility justified its cruelty, and more recently, critiquing that debate and comparing it to twenty-first century waterboarding. As will be discussed below, Judge Advocate General George B. Davis clearly ruled that it was not a legal technique. *See infra* p. 58. At the time, defenders of U.S. policy argued that it was necessary, mild, rare, and used only against those who deserved it; or that its use, while unfortunate, reflected the lack of a strictly enforced U.S. policy rather than a fundamental cruelty in the war itself. *See* DEAN C. WORCESTER, THE PHILIPPINES PAST AND PRESENT 215 (1921); LEROY, *supra* note 17, at 226. Historians' views have generally accorded with their overall view of the conflict; in particular, cultural historians have recently tied the water cure to twenty-first century waterboarding and to the abuses of Abu Ghraib prison, using these as concrete illustrations of the fundamental injustices they see in wars then and now. *See* Schumacher, *supra* note 3; Kramer, *supra* note 3.

²⁰ KRAMER, *supra* note 3, at 139.

on the question of atrocities in 1902, and the War Department responded to the public relations pressure with several politically motivated courts-martial of mid-level officers.

By then, however, the war was winding down. Aguinaldo was captured in March 1901, and the civilian Philippine Commission formally assumed power four months later, exerting civil jurisdiction over provinces one-by-one as they were pacified. At the same time, the military government passed to Major General Adna Chaffee.²¹ Despite new revolts by the Muslim Moro peoples of the southern Philippines, which lingered for a decade,²² President Theodore Roosevelt (who replaced McKinley after the latter's death, due to assassination, on September 14, 1901) declared on July 4, 1902 that: "insurrection against the authority and sovereignty of the United States is now at an end, and peace has been established in all parts of the archipelago except in the country inhabited by the Moro tribes, to which this proclamation does not apply."²³

B. Previous Literature

The standard historical narrative of the Philippine-American War, since the mid-twentieth century, has been shaped by Stanley Karnow²⁴ and Stuart Creighton Miller,²⁵ both of whom saw the conflict as an episode of American colonialism, comparable to but not as bad as the activities of European empires. While he scarcely discusses the laws of war, Miller's scattered references seem to suggest

²¹ MILLER, *supra* note 11, at 174.

²² See JAMES R. ARNOLD, THE MORO WAR: HOW AMERICA BATTLED A MUSLIM INSURGENCY IN THE PHILIPPINE JUNGLE, 1902-1913 (2011).

²³ JUDGE ADVOCATE GEN.'S DEP'T, U.S. ARMY, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 1912, at 1082 (1917) [hereinafter DIG. OPIN. J.A.G.].

²⁴ STANLEY KARNOW, IN OUR IMAGE (1990).

²⁵ MILLER, *supra* note 11.

that he felt most U.S. officers left behind the law in their drive to conquer and subdue the islands.²⁶ More recently, Paul Kramer has argued that the war, rather than being *driven* by pre-established American racist attitudes, in fact helped constitute racial categories, and that this turned the conflict into a brutal race war.²⁷ Kramer, too, does not directly address the laws of war, but he seems to believe that they were ignored or explained away due to American racism.²⁸ In particular, Kramer comments that the Americans had difficulty applying the laws of war, because “to share the ‘laws of war’ with Filipinos might appear to recognize them as the army of an actual state.”²⁹ All three of these authors seem to feel that the laws of war were roughly coterminous with morality, and that United States policy violated both.

Historians of counterinsurgency, on the other hand, have taken a different view. Writing in 1973 with the Vietnam War clearly in mind, John Morgan Gates argued that only “a fraction” of Americans tolerated “cruelty and uncalled for severity” or violations of the laws of war.³⁰ The law, he implies, was roughly coterminous with morality, and the Americans by and large violated neither. In a more nuanced view, Brian Linn suggests that the Americans *did* follow the law, but that the law itself did not correspond to late twentieth-century values.³¹ Linn contends that, “with the possible exception of Smith on Samar[,]” American commanders never “implemented a counterinsurgency policy based on extralegal repression,” but many tolerated “considerable stretching” of the law and

²⁶ *Id.* at 95, 207 (referring to Colonel Jacob H. Smith’s shooting of prisoners as “lawlessness,” and to Brigadier General J. Franklin Bell as going “on record as planning to violate General Orders No. 100 and the accepted tactics of civilized warfare”). However, Miller does note in passing that “[m]any of Bell’s and Smith’s orders were either direct quotations or paraphrased portions of General Orders No. 100.” *Id.* at 236. For Bell and Smith, see *infra*, Part II.F.

²⁷ See generally KRAMER, *supra* note 3.

²⁸ *Id.* at 136, 45 (describing General Arthur MacArthur’s interpretation of G.O. 100 as “highly expedient,” and arguing that racial ideas undermined the “moral and legal claims” against U.S. soldiers accused of atrocities).

²⁹ *Id.* at 136.

³⁰ GATES, *supra* note 1, at 216.

³¹ See generally LINN, COUNTERINSURGENCY, *supra* note 1.

often could not control “isolated commands.”³² The law constrained the Americans, he contends, by restricting the level of violence they could apply, and some units turned illicitly to torture to redress that imbalance.³³ Max Boot, while drawing on Linn’s work, has more recently taken the argument even further; he contends that the Americans should not be judged by “twenty-first century morality” and that, while the Americans “did not always observe Marquis [sic] of Queensberry rules[,]” their behavior was nonetheless “better than average for colonial wars[.]”³⁴ Both authors seem to see the laws of war as relatively static and inflexible, but generally obeyed.

Boot’s implicit assumptions, that “colonial wars” like that in the Philippines were inherently more brutal than others, and that the law was relaxed in such conflicts, seem common. In her recent book on the American experience of law in wartime, the legal historian Mary Dudziak notes in passing that “[t]he wars of empire fell outside the law; they were instead matters of imperial governance[.]” they “fell through the cracks of the law of war at the time.”³⁵

Other scholars, however, studying the history of American law and policy with regard to prisoners of war,³⁶ guerrilla warfare,³⁷ and, most notably, military commissions,³⁸ have repeatedly referenced law—in the form of the procedures, jurisdiction, and substantive law of the Philippine-American War-era tribunals. In 2011, the U.S. Court of Military Commission Review itself turned to the

³² LINN, PHILIPPINE WAR, *supra* note 1, at 224.

³³ LINN, COUNTERINSURGENCY, *supra* note 1, at 146.

³⁴ BOOT, *supra* note 1, at 123-24, 127.

³⁵ MARY DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 31-32 (2012).

³⁶ PAUL J. SPRINGER, AMERICA’S CAPTIVES: TREATMENT OF POWS FROM THE REVOLUTIONARY WAR TO THE WAR ON TERROR (2010).

³⁷ Nurick & Barrett, *supra* note 2.

³⁸ Glazier, *supra* note 2; Thravalos, *History*, *supra* note 2; Thravalos, *Military Commission*, *supra* note 2; see also Robert Chesney, *Historical Examples of Remand to Military Detention After Commission Prosecution*, LAWFARE (Oct. 25, 2011, 10:23 AM), <http://www.lawfareblog.com/2011/10/historical-examples-of-remand-to-military-detention-after-commission-prosecution/> (discussing research by Thravalos on the retention in U.S. custody, as prisoners of war, of Philippine-American War-era prisoners after their acquittal on law-of-war charges).

Philippine-American War as a source of precedent in deciding whether “the offense of aiding the enemy [is] limited to those who have betrayed an allegiance or duty to a sovereign nation[.]”³⁹ The court concluded that the offense is not so limited, although all Philippine-American War convictions were of those who owed a duty to the United States.⁴⁰ In April 2012, the same court, in the case of *United States v. Al-Nashiri*, took up a defense motion arguing that “conspiracy to commit terrorism and murder in violation of the law of war” was not an offense triable by a military commission. The government again invoked Philippine-American War era military commission precedents.⁴¹ As of May 2012, the court had not ruled on this motion, but the same issue was pending before the U.S. Court of Appeals for the District of Columbia Circuit, in *United States v. Al Bahlul*.⁴²

My purpose here is not to dispute this court’s, or any of the legal scholars’, interpretations of substantive law. Instead, I intend to discuss the unspoken assumptions underlying these

³⁹ Quoted in Robert Chesney, *Two Issues to Be Briefed and Argued to the En Banc Court of Military Commission Review in the al-Bahlul Case*, LAWFARE (Jan. 25, 2011, 3:56 PM), <http://www.lawfareblog.com/2011/01/two-issues-to-be-briefed-and-argued-to-the-en-banc-court-of-military-commission-review-in-the-al-bahlul-case/>.

⁴⁰ See *United States v. Hamdan*, 801 F.Supp.2d 1247, 1298, 1303-04 (U.S. Ct. Mil. Comm’n Rev. 2011) (per curiam) (noting that “Philippine-era military commission specifications alleged violation of a duty of allegiance to the United States, or violation of an oath of allegiance” as a separate charge at least once; and concluding based in part on numerous Philippine-American War-era examples that “[c]onduct and not residency is the focus of whether a law of war offense involving guerrilla activity has been committed”); see also *United States v. al-Bahlul*, 820 F.Supp.2d 1141, 1157 (U.S. Ct. Mil. Comm’n Rev. 2011) (noting that “[i]n *Hamdan*, we concluded that the charged conduct of providing military support for terrorism was punishable under the law of armed conflict”). The appellants in both cases argued that all those tried in the Philippines owed a duty of loyalty to the United States, which they had breached by aiding the insurgents, and that non-citizens—such as Hamdan and Al Bahlul—owe no such duty and therefore cannot be tried for providing material support to al-Qaeda. See Appellant’s Supplemental Brief on Joint Criminal Enterprise and Aiding the Enemy at 23-25, *United States v. Hamdan*, 801 F.Supp.2d 1247 (U.S. Ct. Mil. Comm’n Rev. 2011) (No. 09-002), available at <http://www.lawfareblog.com/wp-content/uploads/2011/03/Hamdan-Specified-Issues-Jan-Feb-2011.pdf>; Appellant Responses to Certified Issues at 33-36, *United States v. Al Bahlul*, 820 F.Supp.2d 1141 (U.S. Ct. Mil. Comm’n Rev. 2011) (No. 09-001), available at <http://www.lawfareblog.com/wp-content/uploads/2011/03/Al-Bahlul-Specified-Issues-25-Jan-to-24-Feb-2011.pdf>.

⁴¹ See Government Response To Defense Motion To Dismiss, *United States v. Al-Nashiri*, No. AE 048 (U.S. Ct. Mil. Comm’n Rev. Mar. 26, 2012), available at <http://www.lawfareblog.com/2012/04/motions-hearing-preview-in-united-states-v-al-nashiri-defense-challenge-to-the-conspiracy-charge/>. The government relies in part on an earlier version of Thravalos, *History*, *supra* note 2, as posted on the blog *Lanfare*. See Benjamin Wittes, *Haridimos Thravalos on Hamdan, Conspiracy, and History*, LAWFARE (Mar. 25, 2012, 11:46 PM), <http://www.lawfareblog.com/2012/03/haridimos-thravalos-on-hamdan-conspiracy-and-history/>. Thravalos’s work contends that the Supreme Court was incorrect in holding that conspiracy was not, historically, an offense against the laws of war. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 608 (2006) (plurality opinion).

⁴² See Thravalos, *History*, *supra* note 3, at 224.

authorities—that the laws of war applied, and *should* have applied, to the Philippine conflict, and that they were applied in a recognizable way. At the same time, I will challenge historians’ varying assumptions that the law was static; that it was obeyed; or that it was ignored.

PART II

A. Was This a War?

The Philippine-American War began as a recognizable, conventional conflict, fought by armies in the field. Brian Linn describes one of the first battles, on February 16, 1899: “whole companies and squads [of insurgents] appeared, drawn up in parade formation, each man with a uniform, officers on horseback, buglers blowing, and flags flying. They marched forward into oblivion: the [U.S.] Volunteers let them approach and then shredded their lines with Springfield [rifle] fire.”⁴³ Recognizing that his European-style army was at a disadvantage after a string of such defeats, Aguinaldo began laying the groundwork for guerrilla warfare before the end of February, 1899.⁴⁴ This change lay behind many of the legal developments, but first, it is necessary to understand the initial American legal approach to the conflict.

Race played a role from the start.⁴⁵ In Washington, Secretary of War Elihu Root denigrated the insurgent forces as “an army of Tagalogs, a tribe inhabiting the central part of Luzon, under the

⁴³ LINN, PHILIPPINE WAR, *supra* note 1, at 55. Linn points out that the Filipinos were well-equipped veterans of their war against the Spanish, but American tactics, organization, and leadership nevertheless proved superior. *Id.* at 61-62.

⁴⁴ *Id.* at 58.

⁴⁵ See generally KRAMER, *supra* note 3 (arguing that the Philippine-American War was progressively racialized, and that it helped construct American conceptions of race).

leadership of Aguinaldo, a Chinese half-breed.”⁴⁶ In the field, at least some American soldiers resorted to measures they might not have taken against European or white American enemies; one Missouri soldier commented that “the Tennessee boys . . . would not take any prisoners” during the initial battle on February 4, 1899, while an American sergeant recorded his desire to “blow every nigger [meaning Filipino] into a nigger heaven . . . When we find one that is not dead, we have bayonets.”⁴⁷ Such behavior has been noted even by historians with a generally positive view of the American army, such as Brian Linn.⁴⁸ American commanders did not exert themselves to investigate such allegations, and in one case, Otis even considered court-martialing a soldier who *reported* the killing of prisoners.⁴⁹ It is unclear how widespread the execution of prisoners was, but it was at least sometimes tolerated by American officers.⁵⁰

But American commanders *did* take for granted that the law of war applied—they might tolerate abuses, but the law itself was unquestioned. On the battlefield, Paul Kramer notes, “[h]owever profound the failure of recognition had been at the level of diplomacy, the U.S. Army still recognized its enemy sufficiently to fight in conventional ways.”⁵¹ This was true in the legal realm as much as the tactical; Otis issued orders in April, 1899 that “unarmed citizens” and private property were to be protected, and that “a wounded or surrendered opponent, who is incapable of doing any injury, is entitled to the most cordial treatment and kindness.”⁵² “Any departures from the well-

⁴⁶ MOORFIELD STOREY & JULIAN CODMAN, SECRETARY ROOT’S RECORD: “MARKED SEVERITIES” IN PHILIPPINE WARFARE 6 (1902). For the context of this publication, see *infra* p. 51.

⁴⁷ *Id.* at 10. For the use of the term in the Philippines, see KRAMER, *supra* note 3, at 102. African-American soldiers, who arrived in the Philippines later, were often less quick to stereotype and denigrate Filipinos, in turn prompting suspicions from some white officers. MILLER, *supra* note 11, at 193.

⁴⁸ LINN, PHILIPPINE WAR, *supra* note 1, at 64.

⁴⁹ MILLER, *supra* note 11, at 89-90; STOREY & CODMAN, *supra* note 44, at 11-20.

⁵⁰ LINN, PHILIPPINE WAR, *supra* note 1, at 222; MILLER, *supra* note 11, at 188-89; STOREY & CODMAN, *supra* note 44, at 10-23.

⁵¹ KRAMER, *supra* note 3, at 112.

⁵² STOREY & CODMAN, *supra* note 44, at 38 (emphasis removed).

established amenities of the battlefield or the laws of war,” he continued, “must and will be punished[.]”⁵³ The same applied in legal terms; the official correspondence between Otis and Washington gives no indication that the topic was even discussed.⁵⁴

The Americans, of course, remained adamant that the Philippines were *not* a separate country, and that Aguinaldo’s army did not represent an independent state.⁵⁵ The U.S. Army, in February 1899, controlled only Manila and its outskirts, but in legal terms, the United States viewed its fight to conquer the rest of the islands as a vindication of its rightful sovereignty, not as a war of conquest.⁵⁶ The U.S. government’s theory of the conflict was stated by Charles Magoon, Legal Officer of the War Department’s Division of Insular Affairs, in February 1900:

Although the United States has acquired the rights of sovereignty over those islands, it has not entered into peaceable and undisputed possession thereof. In establishing that possession it encounters an armed insurrection, against which it is conducting military operations and with the forces of which it is engaged in active hostilities. The military government of the islands has been continued and is now utilized as a means of suppressing said armed insurrection, and therefore is authorized to exercise the rights of a belligerent.⁵⁷

The *New York Times* echoed this view as early as February 1899, arguing that the insurgents’ government was no more legitimate than the Confederacy had been.⁵⁸ Likewise, General Otis, a Harvard Law School graduate, displayed his legal sensitivity on the recognition question in October

⁵³ *Id.*; see also LINN, PHILIPPINE WAR *supra* note 1, at 211 (arguing that the “humanitarian” provisions of G.O. 100 were in effect from the beginning of the American expedition to the Philippines).

⁵⁴ See generally 2 ADJUTANT GENERAL’S OFFICE, U.S. ARMY, CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, 1898-1902, at 893-1159 (1902) [hereinafter 2 CORRESPONDENCE].

⁵⁵ See, e.g., *id.* at 981.

⁵⁶ See KRAMER, *supra* note 3, at 88 (describing the treaty as “turn[ing] imperial war into civil war”); see also MILLER, *supra* note 11, at 266 (quoting a British reporter who critiqued the American position, commenting, “[o]bserve, the Filipinos are ‘insurgent,’ although they never have been subjected to the Yankee domination against which they are fighting, and, therefore, are no more insurgents than were the Spaniards.”).

⁵⁷ CHARLES E. MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 36 (Igor I. Kavass & Adolph Sprudz eds. 1972) (1903).

⁵⁸ MILLER, *supra* note 11, at 87-88.

1899, refusing to accept a commission sent in the name of the “honorable president Aguinaldo[.]” Otis insisted he would only speak to representatives of “General Aguinaldo, general in chief of insurgent forces.”⁵⁹ The Supreme Court endorsed this view in 1901, holding that the Philippines were legally American territory, regardless of the military situation, for the purposes of American import duties: even if “those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected[.]”⁶⁰

While it did not consider Aguinaldo’s government legitimate, the McKinley Administration systematically established through internal decisions in 1900 and 1901 that the conflict *was* a war for domestic legal purposes.⁶¹ The Army’s Office of the Judge Advocate General (J.A.G.) prepared legal opinions holding that it was wartime for the purposes of soldiers’ right to wear special decorations for wartime service,⁶² their entitlement to combat pay,⁶³ division and brigade commanders’ rights to convene courts-martial,⁶⁴ department commanders’ authority to dismiss officers in wartime,⁶⁵ and the applicability of harsher wartime penalties for deserters.⁶⁶ Most interestingly, the J.A.G.

⁵⁹ 2 CORRESPONDENCE, *supra* note 52, at 1088.

⁶⁰ *The Diamond Rings*, 183 U.S. 176, 181 (1901). Ironically, the government in this case contended that the Philippines were foreign, in order to legitimate the tariffs. This case followed *Dooley v. United States*, 182 U.S. 222 (1901), which allowed suits to recover duties paid to the U.S. government for imports to Puerto Rico, on the grounds that military authority extended only to foreign imports, not to imports from the United States. The government, after the *Dooley* decision, continued tariffs on the Philippines because “a state of war has continued in the Philippines[.]” so “the President’s power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court[.]” *Lincoln v. United States*, 202 U.S. 484, 497 (1906) (quoting a June 8, 1901 cable from Root to the Philippine Commission).

⁶¹ Mary Dudziak argues that even in paradigmatically “clean” wars like the Second World War, the lines between wartime and peacetime are far less clear than is commonly thought. *See generally* DUDZIAK, *supra* note 33.

⁶² NARA, RG 153, J.A.G. Doc. File, #10252, Opinion of J.A.G. Lieber, April 17, 1901.

⁶³ NARA, RG 153, J.A.G. Doc. File, #15754, Opinion of J.A.G. Davis, Dec. 26, 1903.

⁶⁴ *Id.*; NARA, RG 153, J.A.G. Doc. File, #8195, Opinion of J.A.G. Lieber, May 9, 1900; *see also* NARA, RG 153, J.A.G. Doc. File, #10881, Opinion of J.A.G. Davis, Dec. 9, 1902 (holding that after President Roosevelt’s proclamation of peace on July 4, 1902, brigade commanders in the Philippines could no longer convene courts-martial).

⁶⁵ DIG. OPIN. J.A.G., *supra* note 22, at 175.

⁶⁶ NARA, RG 153, J.A.G. Doc. File, #19734, Opinion of J.A.G. Davis, May 15, 1906; NARA, RG 153, J.A.G. Doc. File, #16859, Opinion of J.A.G. Davis, Sept. 7, 1904. *See also* NARA, RG 153, J.A.G. Doc. File, #15754, Opinion of J.A.G. Davis, Dec. 26, 1903 (noting that an unspecified previous opinion held that it was wartime for pay purposes). *But see* MILLER, *supra* note 11, at 165-66 (contending that the War Department and President McKinley’s ally Senator Mark

responded to a public outcry in early 1901, after MacArthur deported to San Francisco George T. Rice, an American journalist who, as editor of the Manila *Daily Bulletin*, had accused the U.S. military port commander of corruption.⁶⁷ The Office of the J.A.G. upheld this deportation, because “we are in most respects proceeding on the theory that a state of war exists[,]” giving MacArthur the power to act against those who were, in his judgment, “a menace to the military situation.”⁶⁸

The government’s position was finally tested in court in 1903, when a naval officer sued the United States government to claim pay owed to him for his temporary, wartime promotion. The case turned on whether his service during the summer of 1899 occurred during wartime, and the U.S. Court of Claims—relying on Magoon’s opinion on presidential war powers to impose tariffs, as well as on a 1900 J.A.G opinion about convening courts-martial in wartime—held that the conflict amounted to a “time of war.”⁶⁹ A year later, the same court, again relying in part on the government’s internal opinions, as well as the fact that captured Filipinos were treated as prisoners of war rather than traitors (see below), held that war continued after the treaty’s ratification. This came in a ruling on the claims of merchants to recover duties they had paid to import goods into the Philippines, based on tariffs imposed by the McKinley administration during the war with Spain, and continued during the insurgency on the basis of military necessity.⁷⁰ The merchants argued that the duties were

Hanna both claimed there was no war in the Philippines, in order to avoid owing combat pay to soldiers). The reason for the different positions in these two sources is unclear.

⁶⁷ See MILLER, *supra* note 11, at 164-65; 2 CORRESPONDENCE, *supra* note 52, at 1252.

⁶⁸ NARA, RG 153, J.A.G. Doc. File, #12184, various opinions of J.A.G. Davis, 1901-1903 (quoting a March 18, 1901 opinion approving Rice’s deportation); see also DIG. OPIN. J.A.G., *supra* note 22, at 1066 (summarizing the 1901 opinion).

⁶⁹ See *Thomas v. U.S.*, 39 Ct.Cl. 1 (1903); see also *Leigh v. U.S.*, 43 Ct.Cl. 374 (1908) (awarding additional pay to a naval officer who served off the Philippines in 1899, based on the precedent set in *Thomas*, which the court found had not been affected by the Supreme Court’s decision in *Lincoln v. United States*, 197 U.S. 419 (1905), *aff’d on reh’g*, 202 U.S. 484 (1906)).

⁷⁰ See *Warner Barnes & Co. v. United States*, 40 Ct.Cl. 1 (1904), *rev’d sub nom Lincoln v. United States*, 197 U.S. 419 (1905) and *aff’d on reh’g sub nom Lincoln v. United States*, 202 U.S. 484 (1906); see also MAGOON, *supra* note 55, at 10-255 (stating the government’s legal position on the tariff’s validity under war powers); Henry M. Hoyt, *The Final Phase of the Insular Tariff Controversy*, 14 YALE L. J. 333 (1904-05) (arguing that the insurrection justified the executive imposition of tariffs); NARA, RG 153, J.A.G. Doc. File, #12184, various opinions of J.A.G. Davis, 1901-1903 (containing a collection

unconstitutional as they had not been imposed by Congress, but only by executive order. The Supreme Court overturned this decision in 1905, without directly denying that a war existed.⁷¹ Instead, the Court simply referred to its earlier holding that the insurrection was not “of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act.”⁷²

Lincoln came late in the day, however, after President Roosevelt’s peace proclamation on July 4, 1902.⁷³ Until then, the McKinley and Roosevelt Administrations proceeded on the theory that war did exist—expanding the power of the executive branch and of the military.

B. The Laws of War

While the *existence* of war strengthened the executive branch and especially the military, the specific *laws of war*, while simply assumed to apply at first, soon became positively useful to the United States in their own right. The laws of war, for the U.S. Army, meant General Order 100, 1863 Series, a code of behavior prepared for the Union Army during the Civil War by the German-American

of internal memoranda and reports prepared to support the government’s case in *Warner Barnes*). The plaintiff firm was British, and Taft suggested that the need for revenue was not the only “military necessity” driving the tariff—because “a lot of Englishmen who had been at the bottom of the [Filipino] insurrection” stood to benefit from free trade with the islands. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 152 (2006). See also WINFRED LEE THOMPSON, *THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898-1905*, at 144-46, 154-55 (discussing the history of *Warner, Barnes*).

⁷¹ See *Lincoln v. United States*, 197 U.S. 419 (1905), *aff’d on reh’g*, 202 U.S. 484 (1906); see also Leigh, 43 Ct.Cl. 374 (noting that the Supreme Court had not denied the existence of a war in *Lincoln*); SPARROW, *supra* note 68, at 151-53. Congress eventually approved the duties retroactively, and this action survived a court challenge on Fifth Amendment due process grounds, *id.* at 154-55.

⁷² *Id.* at 428. The Court further held that the president’s executive order for the imposition of tariffs, even if valid, had applied only for the duration of the war with Spain, and it found both originally and on rehearing that Congress had not approved the tariffs. See *id.* at 429; *Lincoln*, 202 U.S. at 498-99

⁷³ KRAMER, *supra* note 3, at 154. The Office of the J.A.G., in numerous subsequent opinions, took this proclamation as the legal end of the Philippine War, outside of the Moro provinces. See, e.g., DIG. OPIN. J.A.G., *supra* note 22, at 1082; NARA, RG 153, J.A.G. Doc. File, #10881, Opinion of J.A.G. Davis, Dec. 9, 1902; NARA, RG 153, J.A.G. Doc. File, #13653, Opinion of J.A.G. Davis, Nov. 18, 1903; NARA, RG 153, J.A.G. Doc. File, #13770, Opinion of J.A.G. Davis, Feb. 18, 1903.

professor Francis Lieber as a codification of customary international law.⁷⁴ By the time of the Philippine-American War, the code was taught at West Point, and was familiar to most officers. It was a major source for the 1899 Hague Convention, which codified the laws of war.⁷⁵

At the broadest level, the laws of war could be invoked as a diplomatic weapon against the Filipino forces. In November 1899, for example, Adjutant General Henry Corbin instructed Otis to “notify Aguinaldo that he and his advisers will be held personally responsible for any injury done to Spanish or American prisoners in violation of the laws and usages of war among civilized nations.”⁷⁶ The Filipinos might not have played any role in the evolution of the customary law of war, in the drafting of G.O. 100, or in the ongoing Hague negotiations, but by engaging in warfare, they had accepted a set of off-the-shelf rules. These rules, in theory, both constrained and liberated both sides, but unsurprisingly, the Americans emphasized license for their own behavior, and constraints on the insurgents’.

American commanders deployed the laws of war not only to affect Filipino behavior, but even in attempts to convince them to capitulate. In negotiations in July 1900, MacArthur pointed out to the insurgent General José Alejandrino that the latter’s forces were scattered and nearly defeated, and that “the rules of modern warfare forbid a continuance of hostilities after the hope of success has vanished, and that to infringe this rule by adopting tactics of guerrilla warfare is simply to become

⁷⁴ See generally JOHN F. WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (forthcoming 2012); NEFF, *supra* note 6, at 56-57 (2010); RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (1983). The text of the code is reprinted in *id.*, at 45-71; 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 158-86 (Leon Friedman ed., 1972) [hereinafter *DOCUMENTARY HISTORY*].

⁷⁵ MILLER, *supra* note 11, at 230; GATES, *supra* note 11, at 191.

⁷⁶ 2 *CORRESPONDENCE*, *supra* note 52, at 1098. Otis was referring in part to Spanish prisoners, captured by the insurgents in earlier fighting, whom they still held.

[sic] guilty of murder for the death of every man who falls.”⁷⁷ MacArthur does not seem to have been threatening actual prosecution of the insurgent leaders, but he would soon contemplate that (see below). The rules of regular warfare provided a symbolic weapon, allowing MacArthur to delegitimize his enemies’ resistance once he had begun to gain the upper hand. Nearly a year later, Brigadier General R.P. Hughes used similar reasoning to justify recommending that the captured insurgent leader Annanias Diocno be exiled to Guam.⁷⁸ Hughes accused Diocno of carrying on equally deceptive correspondence both with the Americans and with subordinate insurgent leaders. “This of course would have been entirely admissible in a state of war where results were still possible,” Hughes argued, “but at the time Diocno was applying these methods we were simply treating with him in order to spare useless sacrifices of life.” Thus, he had violated the laws of war. Diocno was not apparently tried, but this argument justified Hughes’ recommendation that he be deported. Later still, William Howard Taft, Governor General of the Philippines, argued before Congress that it was “a crime against the Filipino people” for the insurgents to continue fighting.⁷⁹ The laws of war conveniently meant that American victories transformed legitimate resistance into illegal behavior.

American officers did recognize that the laws of war constrained their *own* behavior, too—though this was rarely invoked, and then usually only against enlisted men or junior officers. At least 67 American soldiers were court-martialed for “crimes against Filipinos” in 1899,⁸⁰ but as Louise

⁷⁷ NARA, RG 94, Adjutant General’s Office [hereinafter A.G.O.] Doc. File, #344307, MacArthur to Adjutant General Henry Corbin, Aug. 25, 1900. For Alejandrino’s first name and background, see *Jose Alejandrino*, SENATE OF THE PHILIPPINES, http://www.senate.gov.ph/senators/former_senators/jose_alejandrino.htm (last visited April 29, 2012).

⁷⁸ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events, Headquarters, Division of the Philippines, for April 18-May 13, 1901, Hughes to Brigadier General T.H. Barry, April 26, 1901. Hughes was also, curiously, offended by Diocno’s “succe[ss] in convincing his fellow countrymen of the entire appropriateness of his baptismal name[.]”

⁷⁹ MILLER, *supra* note 11, at 213-14. Senator Thomas Patterson countered that it was American policies which caused Filipino suffering.

⁸⁰ GATES, *supra* note 1, at 83.

Barnett points out, most of the offenses tried in courts-martial from 1899 to 1902 resemble the “criminal acts of individuals who happen to be military personnel”—such as rape and assault—more than “military atrocities” which might be “entwined with military policy.”⁸¹

One exception is the case of an American lieutenant, Arthur G. Duncan, who executed a suspected spy without trial in December 1900. Duncan was brought before a board of officers, and defended his actions based on an unspecified provision of G.O. 100. The board did not accept this defense, but it nonetheless decided not to proceed to a court-martial because Duncan’s action, due to ignorance and misunderstanding, was “not inexcusable.”⁸² As noted above, American commanders seem to have been less than energetic in pursuing soldiers accused of unjustifiably killing Filipino prisoners—but such killings *were* clearly recognized as illegal.

Much more important to the Americans than the ways in which the laws of war constrained American behavior, were the ways in which they *licensed* American behavior. American forces burned entire villages in February 1899 after an ambush happened near there,⁸³ and at times the burning of villages became part of the American plan of campaign. This does not seem to have been expressly legal, but authorities as high as generals tolerated it.⁸⁴ Burning on a slightly more restricted scale was explicitly justified. J.A.G. opinions issued in 1903 and 1904 with reference to the Philippines confirmed the legality of burning houses belonging to those who were “holding communications with and forwarding supplies to the insurgents[.]”⁸⁵ and later authors justified this as a “legitimate

⁸¹ BARNETT, *supra* note 3, at 41, 58.

⁸² LINN, COUNTERINSURGENCY, *supra* note 1, at 57-58.

⁸³ MILLER, *supra* note 11, at 69.

⁸⁴ LEROY, *supra* note 17, at 223-24.

⁸⁵ DIG. OPIN. J.A.G., *supra* note 22, at 1063.

method[] of reprisal[.]”⁸⁶ Likewise, the J.A.G. held that Section 15 of G.O. 100 authorized the burning of a market house, in which an American sympathizer had been murdered, as “a necessary military measure to prevent such future lawless acts.”⁸⁷ Even the subsequent spread of that fire to other houses did not make the government liable, because this was “without negligence on the part of anyone.”⁸⁸ Another opinion, on the killing of livestock, made clear that even if there *were* negligence, sovereign immunity would still protect the U.S. from liability, “as the United States is not liable for the torts of its officers or agents.”⁸⁹ The same reasoning applied to property of all types, whether destroyed or seized.⁹⁰ Magoon, too, issued an opinion in October 1899 legitimating the confiscation, from a Manila bank, of money belonging to insurgents “[u]nder the laws and usages of war[.]”⁹¹ Even when U.S. forces used property under conditions which created an implied contract with the owners—a situation in which the government could be sued for breach of contract under the 1887 Tucker Act—the army needed not pay if the owner were arrested for aiding the insurgents.⁹²

The laws of war, of course, governed the treatment not only of property but also of people. From the beginning of the conflict, American commanders had assumed that the insurgents they captured in battle were not criminals, but prisoners of war; on March 3, 1899, Otis reported that of more than 1,500 “insurgent soldiers” captured since February 4, he held the “majority as prisoners of war.”⁹³

⁸⁶ LEROY, *supra* note 17, at 224. He argued that thatched huts were inexpensive and easy to rebuild.

⁸⁷ DIG. OPIN. J.A.G., *supra* note 22, at 251, 1063.

⁸⁸ *Id.* at 1063.

⁸⁹ *Id.* at 250. For the relevant provision of the Tucker Act, see 28 U.S.C. § 1346(a)(2).

⁹⁰ DIG. OPIN. J.A.G., *supra* note 22, at 250-251; *see also* MAGOON, *supra* note 55, at 264-70 (approving the confiscation of insurgents’ property for necessary military purposes or for punishment for “resisting the lawful authority of the military government of the Philippines[.]” even without congressional approval).

⁹¹ MAGOON, *supra* note 55, at 262-63.

⁹² DIG. OPIN. J.A.G., *supra* note 22, at 252-253. Similar conduct was considered legal in the Civil War; *see* NEFF, *supra* note 6, at 94-98.

⁹³ 2 CORRESPONDENCE, *supra* note 52, at 921. It is unclear what became of the minority; they may have been released.

By March 10, 1900, the Americans held 4,149 prisoners.⁹⁴ Insurgents who surrendered, rather than being captured in battle, were often released after signing a parole agreement or taking an oath of allegiance to the United States.⁹⁵ Even many of those taken in battle were “disarmed and immediately released,” as part of the overall policy of “conciliatory action.”⁹⁶ The U.S. authorities repeatedly offered amnesty against any criminal (but not law-of-war) violations to prisoners who swore an oath of allegiance, and to insurgents who turned themselves in.⁹⁷ This implied that the Americans reserved the right to try Filipinos for treason, or for violence committed in the ordinary course of the war.⁹⁸ But, as will be discussed below,⁹⁹ the United States recognized that most insurgents were by default entitled to combatant privilege—immunity from prosecution for their violent acts, generally applied to regular soldiers in conventional wars.¹⁰⁰

C. The Law’s Contested Applicability to Guerrilla Warfare

This policy was probably in part a natural outgrowth of the conventional nature of the early conflict, but combatant privilege, amnesty, and releases also all fit in well with the official American policy that “benevolent action could overcome the resistance of the Filipinos.”¹⁰¹ As the insurgents turned increasingly to guerrilla warfare, the military situation became more complicated, and American officers began to question whether the laws of war should be applied. They justified this position

⁹⁴ SPRINGER, *supra* note 34, at 129. It is unclear whether this number includes civilians arrested for crimes or law-of-war violations.

⁹⁵ See, e.g., NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events, Division of the Philippines for May 6-June 14, 1900, Wheaton to Adjutant General, Division of the Philippines, May 22, 1900 (instructing the release after parole or oath of “such as it is not considered necessary to hold” among a group of insurgents who surrendered at Tarlac).

⁹⁶ 1 ANNUAL REPORT OF MAJOR GENERAL ARTHUR MACARTHUR, U.S. ARMY, COMMANDING, DIVISION OF THE PHILIPPINES 90 (1901) [hereinafter 1 ANNUAL REPORT].

⁹⁷ MILLER, *supra* note 11, at 161-62; SPRINGER, *supra* note 34, at 129-30; 2 CORRESPONDENCE, *supra* note 52, at 979, 1079, 1175-77, 1181, 1203-04.

⁹⁸ See *supra* p. 14.

⁹⁹ See *infra* p. 39-41.

¹⁰⁰ See NEFF, *supra* note 6, at 59-60, 71, 82-83.

¹⁰¹ GATES, *supra* note 1, at 80.

based either on the insurgents' military conduct, or on racist assumptions about Filipinos—but both arguments, it will be seen, were ultimately rejected.

As the U.S. military gained the upper hand, the Philippine Commission reported to Secretary of War Root on June 25, 1900 that “No organized army of insurgents exists anywhere. Small bands under partisans [are] invading territory not now occupied by our forces, compelled contribution and secret support [from civilians] by violence.”¹⁰² In November 1900, the insurgents disbanded their field army, and embraced guerrilla warfare wholeheartedly, engaging in hit-and-run raids against American forces and using covert pressure and threats of assassination to ensure support from local villages.¹⁰³ Guerrillas blended into the civilian population; one American officer observed that the average Filipino soldier “wears the dress of the country; with his gun he is a soldier; by hiding it and walking quietly down the road, sitting down by the nearest house, or going to work in the nearest field, he becomes an ‘amigo,’ full of good will and false information.”¹⁰⁴ American soldiers, with or without authorization, responded with harsher measures—and the question soon arose of whether and how the law would catch up.¹⁰⁵

At the same time, as American forces occupied new areas, they found themselves contending with bands of “robbers,” or “mere *ladrones* (bandits),” as Taft described them.¹⁰⁶ The lines between guerrilla insurgents and simple criminals were quite blurry, and the same men could be called by

¹⁰² 2 CORRESPONDENCE, *supra* note 52, at 1184.

¹⁰³ 1 ANNUAL REPORT, *supra* note 96, at 88. Aguinaldo had previously been concerned that a guerrilla strategy would undermine his international legitimacy, by making the Filipinos appear uncivilized. *See id.*; KRAMER, *supra* note 3, at 90, 94. For a detailed, though polemical, discussion of insurgent assassination and intimidation, see WORCESTER, *supra* note 19, at 226-42.

¹⁰⁴ *Quoted in* BOOT, *supra* note 1, at 113.

¹⁰⁵ BOOT, *supra* note 1, at 115-16.

¹⁰⁶ *Quoted in* BOOT, *supra* note 1, at 114. *See generally* 2 CORRESPONDENCE, *supra* note 52, at 999, 1001, 1035-1060; 1 ANNUAL REPORT, *supra* note 96, at 103.

both terms at different times.¹⁰⁷ For some Americans this suggested that the war was over, and that the remaining problems were criminal, not military. In the area around Subic Bay, Otis reported in December 1900, “organized rebellion no longer exists, and troops [are] active pursuing robber bands.”¹⁰⁸ Otis allegedly censored reporters who tried to report the existence of more politically oriented guerrilla bands,¹⁰⁹ and he later testified before the Senate that after the disbandment of Aguinaldo’s army, there was no real “war,” only law-enforcement.¹¹⁰ In short, on this view, what remained “was mere outlawry . . . which the army, acting as a constabulary force, would soon end, with the coöperation of the peaceful inhabitants when they saw how their interests lay.”¹¹¹

Others, however, saw that the classification of insurgents as offenders—against the laws of war, rather than the criminal law—offered a new weapon. This was a strategy previously employed in the Mexican War, and in the Civil War.¹¹² Many officers were aware that G.O. 100 allowed the summary punishment and even execution of “highway robbers,” “war rebels,” and guerrillas.¹¹³ Unlike ordinary soldiers, “war rebels” were, in modern terms, “unprivileged belligerents.”¹¹⁴ Some officers saw these provisions as applicable to the intermittent participation of Filipino civilians in hostilities on behalf of the insurgents.¹¹⁵ Thus in June 1900, the Adjutant General of the Department of Southern Luzon reminded its constituent commands that G.O. 100 provided “ample and lawful methods for the treatment of prisoners, spies, and other persons not entitled to the rights of

¹⁰⁷ LINN, PHILIPPINE WAR, *supra* note 1, at 193-94; WORCESTER, *supra* note 19, at 210.

¹⁰⁸ 2 CORRESPONDENCE, *supra* note 52, at 1120.

¹⁰⁹ LEROY, *supra* note 17, at 196-97 n.1.

¹¹⁰ See MILLER, *supra* note 11, at 216. Otis expressed this view during the Lodge commission hearings in 1902.

¹¹¹ LEROY, *supra* note 17, at 195.

¹¹² See Erika Myers, Note, *Conquering Peace: Military Commissions as a Lanfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 203 (2007-2008); WITT, *supra* note 72.

¹¹³ See DOCUMENTARY HISTORY, *supra* note 72, at 173 (reprinting Article 82 of Lieber’s Code).

¹¹⁴ See NEFF, *supra* note 6, at 59-60, 71, 82-83.

¹¹⁵ See GATES, *supra* note 1, at 191-192..

recognized belligerents.¹¹⁶ Brigadier General Loyd Wheaton went further in his Department of Northern Luzon, ordering the relevant portions of G.O. 100, “concerning the treatment and classification of spies, war rebels, war traitors, and prisoners of war” to be “published as a proclamation to the inhabitants.”¹¹⁷ By the end of the summer, Brigadier General S.B.M. Young in the First District, part of Wheaton’s command, had established a regular routine of trying “war rebels” by a Provost Judge, whose actions, “as he is not bound by any special law of procedure or evidence . . . may be as summary as the Laws of War and circumstances justify.”¹¹⁸ Young depicted the Provost Judge almost as a rapidly-deployable combat unit, which he could send wherever needed—and indeed, the law of war itself had become a weapon. Young reported that he had given orders to protect a critical telegraph line by using “the most stringent action known to the Laws of War . . . holding as far as practicable the inhabitants nearest the line accountable, unless they assist in preventing the cutting and aid in the apprehension of those interfering with the line.”¹¹⁹

There were still no general orders from Manila, however, for the implementation of G.O. 100’s provisions on unprivileged belligerency.¹²⁰ This may have been, in part, a result of Otis’s view that the guerrillas were a criminal, rather than law-of-war, problem. Even after he relieved Otis as Military Governor in May 1900,¹²¹ MacArthur continued to discourage the execution of “war rebels” and similar offenders against G.O. 100. In November 1900, when Wheaton sentenced a guerrilla to death for “three murders” (whether of civilians or American soldiers is unclear), MacArthur

¹¹⁶ *Charges of Cruelty, etc., to the Natives of the Philippines: Letter from the Secretary of War Relative to the Reports and Charges in the Public Press of Cruelty and Oppression Exercised by Our Soldiers toward Natives of the Philippines*, 57th Cong., 1st Sess., Sen. Doc. No. 205, Part 1, at 40 (1902) [hereinafter *Charges of Cruelty*].

¹¹⁷ LINN, COUNTERINSURGENCY, *supra* note 1, at 24, 49.

¹¹⁸ The remainder of the paragraph is based on NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events, Headquarters, Division of the Philippines, for Sept. 22-30, 1900, Wheaton to Adjutant General, Division of the Philippines, Sept. 25, 1900 (quoting a report from Young to Wheaton).

¹¹⁹ *Id.*

¹²⁰ LINN, COUNTERINSURGENCY, *supra* note 1, at 22.

¹²¹ MILLER, *supra* note 11, at 99.

commuted the sentence to imprisonment.¹²² Provost Courts were generally limited to imposing sentences of less than six months' duration.¹²³ Military commissions could hand out more severe sentences, but no Filipinos were executed before March 30, 1900. By September 1, 1900, there had been only seventy-two trials in military commissions, with only seven defendants executed.¹²⁴ Senior American argued that this "humane policy[.]"¹²⁵ was in keeping with the broader goal of "benevolent assimilation."

Many of MacArthur's subordinates, however, protested; they felt that the law could be a more potent weapon if fully unsheathed. One officer complained that G.O. 100 was "plain to me, but I do not believe that my action would be approved were all guilty who may be captured immediately put to death."¹²⁶ Brigadier General Jacob H. Smith—who, it will be seen below, repeatedly endorsed harsh measures—was more blunt, saying "it is difficult to get Officers to take prompt measures[.]" which was regrettable because "[a] few killings under G.O. 100 will aid very much in making the enemy stop these assassinations."¹²⁷ Foreshadowing later developments, Captain John H. Parker gestured toward cultural stereotypes rather than to the insurgents' behavior itself. Writing directly to then-Vice President Roosevelt in October 1900, he argued that it was futile to "attempt to meet a half civilized foe . . . with the same methods devised for civilized warfare against people of our own race, country and blood."¹²⁸ Therefore, he recommended that Sections 82-85 of G.O. 100 be invoked, and "murderers, highway robbers, persons destroying property, spies, conspirators, and . . .

¹²² LINN, PHILIPPINE WAR, *supra* note 1, at 211-212. Wheaton promptly re-tried the man for three more killings and hanged him before MacArthur could intervene.

¹²³ Glazier, *supra* note 2, at 48. This was later raised to two years.

¹²⁴ 1 ANNUAL REPORT, App'x C, at 1; LEROY, *supra* note 17, at 211 n.1. Twenty more records were still awaiting review by MacArthur on September 1, 1900. A list of those tried in 1900, and their offenses, is found in NARA, RG 153, J.A.G. Doc. File, #12291.

¹²⁵ 1 ANNUAL REPORT, App'x C, at 2.

¹²⁶ LINN, PHILIPPINE WAR, *supra* note 1, at 212.

¹²⁷ *Id.*

¹²⁸ GATES, *supra* note 1, at 190-91.

part-time guerrilla[s]” be executed.¹²⁹ This attitude began in the field, but officers in Washington were sympathetic; Corbin ordered MacArthur that Filipinos who used false claims of allegiance to kill Americans should be tried, “convicted and punished.”¹³⁰

Corbin, Smith, Parker, and others saw the laws of war as a license, but others—especially junior officers—simultaneously suggested that the U.S. had both justifications and pragmatic reasons to abandon the law altogether. On August 23, 1900, Captain R.K. Evans, commander of the 2nd Battalion, 12th Infantry Regiment in San Miguel y Norte, Luzon recommended a new policy, combining both alternatives.¹³¹ The insurgents, Evans explained, killed those Filipinos who opposed them, so “anything in the nature of an investigation or trial, based on testimony, is a failure and a farce.” This was not a “military” situation, he argued, but “an organized secret conspiracy, comprising a large number of War Rebels, Robbers, and Murderers,” and “to grant these creatures the humane protection of the Laws of War, is simply assisting and encouraging them in crime.” For Evans, it seems, the laws of war were a contract, which the Filipinos’ behavior had breached—relieving the U.S. of its own responsibilities. Evans, then, suggested that G.O. 100 should not apply. He may have recognized that this suggestion was unlikely to be approved, because he followed it with another recommendation: working within the law, “all the male inhabitants of the barrios of Batac, Paoay, and Badoc, be declared War Rebels.” Their residence in these areas, he contended, “is conclusive evidence” that they supplied the insurgent combatants and refused to give information about them. Evans’ commanding officer, Lieutenant Colonel Robert L. Howze, passed the recommendations along to Young.

¹²⁹ GATES, *supra* note 1, at 191.

¹³⁰ 2 CORRESPONDENCE, *supra* note 52, at 1206.

¹³¹ The following paragraph is based on NARA, RG 94, #338335, Diary of Events for Sept. 22-30, 1900, Evans to Adjutant of U.S. Forces at Laoag, Aug. 23, 1900.

Young disapproved of Evans' first suggestion, because "[s]o long as these people are recognized merely as Insurgents, they are entitled to treatment according to the Laws of War. If we attempt to treat them otherwise than according to the rules of war, we shall simply be taking a backward step in civilization"—contradicting the declared American mission in the Philippines.¹³² Thus Young implicitly denied Evans' contractual view of the laws of war; in Young's view, the laws were incumbent upon the Americans as civilized people, regardless of their opponents' behavior. And those laws, he seems to have felt, protected the opponents even if the latter engaged in irregular guerrilla tactics.

Moreover, when it came to civilians, not part of the main insurgent army, Young argued that it was legally impossible, and irrelevant, to "declare a whole community war rebels[.]" The status of war rebel, according to Young, was based on "an act," not a declaration; if individuals had acted as war rebels, he continued, then they *were* war rebels; if they had not, then a declaration could not make them so. Young, thus, stood by an individualized approach to the insurgency. This seems to have been the general American attitude in the summer of 1900; orders issued by the 43d infantry on Leyte in June had insisted on "the utmost kindness and consideration unless it is positively known that they are insurgents, or engaged in giving aid to insurgents."¹³³ Kindness may not have always been practiced in the field, but individualized judgments remained official policy.

¹³² NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Sept. 22-30, 1900, Wheaton to Adjutant, Division of the Philippines, Sept. 25, 1900 (quoting a report from Young to Wheaton).

¹³³ *Charges of Cruelty*, *supra* note 116, at 41.

A few months later, however, Young changed his view. This may have been due to his personal and operational differences with Otis,¹³⁴ but probably also owed much to growing frustration with the stubborn insurgency—and, increasingly, to racial reasoning.¹³⁵ Where Evans had reasoned based on the insurgents' behavior, Young's new argument relied on the idea that Filipinos were homogenous, and uncivilized. He reported to Manila that it was more difficult to capture insurgents than American Indians, as it was impossible to differentiate “the actively bad [Filipinos] from those only passively so. If it was deemed advisable to pursue the methods of European nations and armies in suppressing Asiatics,” the insurrection could have been put down more quickly.¹³⁶ Young's superior, Wheaton, passed along the report, and endorsed “the swift methods of destruction followed by other powers in dealing with Asiatics.”¹³⁷

When MacArthur's chief of staff, Brigadier General Thomas H. Barry, asked precisely what Young had in mind,¹³⁸ the latter replied with a list of harsh measures, of which he recommended at least some be adopted in the Philippines.¹³⁹ Most notably, he contended, Europeans had “[r]ecognized the fact that they were fighting a people, the mass of whom were worse than ordinary savages, and were not entitled to the benefits of G.O. 100, A.G.O. 1863.” Young had, it seems, come around to the contractual view of the laws of war which he had earlier rejected, when proposed by Evans. Young further mentioned retaliation “in kind on their rebellious subjects for every murder or

¹³⁴ LINN, COUNTERINSURGENCY, *supra* note 1, at 34 (arguing that Young, earlier in the war, felt “Otis and others” were trying to destroy his career); LEROY, *supra* note 17, at 204 (“General Young, almost without interruption from January 1, had been calling for more troops.”).

¹³⁵ This reflects Paul Kramer's view that the war became increasingly racialized as it dragged on. *See generally* KRAMER, *supra* note 3.

¹³⁶ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Dec. 19, 1900-Jan. 12, 1901, Young to Wheaton, Dec. 28, 1900; *see also* GATES, *supra* note 1, at 190 (summarizing Young's argument).

¹³⁷ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Jan. 12-30, 1901, Wheaton to Adjutant General, Division of the Philippines, Jan. 11, 1901.

¹³⁸ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Jan. 12-30, 1901, Barry to Young, Jan. 4, 1901.

¹³⁹ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Jan. 12-30, 1901, Young to Adjutant, Department of Northern Luzon, Jan. 17, 1901.

assassination[.]” and the punishment “by death summarily or by means of drum head court-martials, provost or summary courts, all spies, murderers, assassins and persons caught with arms after having taken the oath of allegiance.” Echoing a principle found in G.O. 100, Young argued that, overall, a harsh war would be short, and thus “in the end the most humane course.”¹⁴⁰ While Evans had seen the laws of war as a contract, abrogated by the insurgents, Young implied that the Filipinos, due to their racial and civilizational character, either had never been, or perhaps could not ever be, parties to the contract in the first place.

Wheaton again endorsed Young’s views, agreeing that Europeans knew how to deal with “races that have no idea of gratitude, honor, or the sanctity of an oath and have a contempt for government which they do not fear.”¹⁴¹ Wheaton, nevertheless, stuck by the law, urging the “annihilation by every method known to civilized war[.]” including “the execution after due trial and conviction of murderers, assassins and their accomplices[.]”

MacArthur himself seems to have considered the idea of revoking the insurgents’ combatant privilege, whether on racial or behavioral grounds. As early as late 1899, he proposed a general amnesty, with the promise that those who did not accept it “would be treated when caught as outlaws and murderers.”¹⁴² Otis vetoed this, fearing that it would cause “legal difficulties of an ‘international character[.]’” and that it might lead the insurgents to retaliate against American and Spanish prisoners.¹⁴³ Thus the Harvard Law School-educated Otis, at least, felt constrained by the laws of war and the traditional mechanism of reprisals. However, MacArthur—with Taft’s

¹⁴⁰ GATES, *supra* note 1, at 283, notes that this Civil War-era axiom was widely accepted among officers in the Philippines. It was codified in Article 29 of G.O. 100; see DOCUMENTARY HISTORY, *supra* note 72, at 163-64.

¹⁴¹ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events of Headquarters, Division of the Philippines for Jan. 12-30, 1901, Wheaton to Adjutant, Division of the Philippines, Jan. 22, 1901.

¹⁴² LEROY, *supra* note 17, at 200.

¹⁴³ *Id.* at 200 n.1.

concurrence—again suggested such a policy to his new superiors in Washington after he took command.¹⁴⁴ Adjutant-General Corbin, however, advised MacArthur not to mention this step in his June 1900 amnesty proposal, and by the end of August, MacArthur himself felt that with the U.S. presidential election approaching, it was best simply to let the amnesty expire, with no further threats.¹⁴⁵ After the capture of Aguinaldo, MacArthur again, on April 1, 1901, suggested another amnesty, to expire June 1, “after which all in arms considered outlaws, criminals, treated accordingly.”¹⁴⁶ But Corbin, for unknown reasons, twice vetoed this suggestion.¹⁴⁷

D. Liberties within the Law: MacArthur’s Dec. 20, 1900 Proclamation

Ultimately, MacArthur found greater license inside, rather than outside, the laws of war. There was no need to reject privileged belligerency entirely, or to invoke the Filipinos’ alleged lack of civilization—but race *did* play a role in his view of the military situation. By late 1900, MacArthur had come to believe that the Philippine population was generally united in support of the insurgency, and that “the adhesive principle comes from ethnological homogeneity, which induces men to respond for a time to the appeals of consanguineous leadership”—a principle that another American observer referred to as “race-feeling[.]”¹⁴⁸ In the face of racial unity, MacArthur believed, G.O. 100 provided precisely the tools needed to intimidate Filipinos who themselves violated the

¹⁴⁴ 2 CORRESPONDENCE, *supra* note 52, at 1175.

¹⁴⁵ *Id.* at 1175, 1203-04; LEROY, *supra* note 17, at 201.

¹⁴⁶ 2 CORRESPONDENCE, *supra* note 52, at 1265.

¹⁴⁷ *Id.* at 1266-68. Corbin may have approved a similar proposal targeted only at the island of Samar in the spring of 1901 (*id.* at 1278-1279).

¹⁴⁸ MILLER, ASSIMILATION, *supra* note 11 at 150; LEROY, *supra* note 17, at 202. MacArthur also claimed that “[t]he cohesion of Filipino society in behalf of insurgent interests” was proven by the fact that the assassination of those loyal to the United States “was generally accepted” and “[t]he individuals marked for death would not appeal to American protection,” WORCESTER, *supra* note 19, at 245 (emphasis omitted). The claim that the entire insurgency was “consanguineous” seems hard to reconcile with Root’s equally racialized 1899 claim that Aguinaldo was half-Chinese, while his men were Tagalogs. *See supra* pp. 12-13.

laws of war, and to separate insurgent combatants from the civilian population.¹⁴⁹ The necessary measures, MacArthur reported to Washington, “[f]ortunately...fell directly within the operation of the well-known prescriptions of the laws of war which touch the government of occupied places.”¹⁵⁰ MacArthur hoped that if President McKinley was re-elected in 1900, the insurgents would see their cause as futile.¹⁵¹ But by December, McKinley had won, yet the insurgency showed no signs of stopping, and MacArthur seems to have felt no need to hesitate any longer.¹⁵² So on December 20, 1900, he issued a proclamation for the “precise observance of laws of war.”¹⁵³

In the proclamation, MacArthur began by denying that the insurgent army represented a belligerent state. But contrary to Paul Kramer’s view,¹⁵⁴ MacArthur did not see this as a logical contradiction. He stood by the official American theory of the war: that, like in the Civil War, the enemy army was a real army, even though it did not represent a real state. MacArthur, therefore, accepted that the laws of war applied, and that various Filipino actions violated them—so he sought to “remind all concerned of the existence of these laws.”¹⁵⁵ In logical reasoning “[c]ouched much like a legal brief,”¹⁵⁶ he laid out those laws, and their consequences. First, he argued that martial law created a reciprocal relationship of rights and duties between the occupiers and the occupied; this contract was violated by “insurgent commanders” when they threatened Filipinos with execution as the penalty for aiding the United States. The guilty parties “must eventually answer for murder or other

¹⁴⁹ LEROY, *supra* note 17, at 202. LINN, PHILIPPINE WAR, *supra* note 1, at 24, contends that the former motivation was stronger than the latter.

¹⁵⁰ 1 ANNUAL REPORT, *supra* note 96, at 91. *But see* KRAMER, *supra* note 3, at 136 (calling MacArthur’s interpretation “highly expedient”). The preceding discussion suggests that Kramer’s attitude is overly cynical; MacArthur, like others, saw tools in the plain language of G.O. 100.

¹⁵¹ 2 CORRESPONDENCE, *supra* note 52, at 1203-04.

¹⁵² KRAMER, *supra* note 3, at 136; LINN, PHILIPPINE WAR, *supra* note 1, at 213.

¹⁵³ 2 CORRESPONDENCE, *supra* note 52, at 1237-1238. He simultaneously deported 38 Filipino leaders to exile in Guam, BOOT, *supra* note 1, at 116.

¹⁵⁴ *See* KRAMER, *supra* note 3, at 136.

¹⁵⁵ 1 ANNUAL REPORT, *supra* note 96, at 6.

¹⁵⁶ LINN, PHILIPPINE WAR, *supra* note 1, at 213.

such crime” and would be unable to escape, except by fleeing U.S. jurisdiction and never returning to the Philippines.¹⁵⁷ Next, MacArthur turned to G.O. 100’s language about “war traitors,” defining them as “[p]ersons residing within an occupied place who do things inimical to the interests of the occupying power” “according to the nature of their overt acts.” Moreover, the implicit contract between occupier and occupied forbade the latter from “comply[ing] with the demands of an expelled public enemy[,]” or failing to report such demands.¹⁵⁸ Those who protected the insurgents’ supporters “from a sense of timidity or misplaced sympathy for neighbors” might also be “classified and tried” as war traitors.¹⁵⁹ Third, MacArthur threatened publishers in Manila with punishment for sedition, as they were subject martial law.¹⁶⁰ Finally and most critically, MacArthur turned to the question of unprivileged belligerency. He declared that,

Men who participate in hostilities without being part of a regularly-organized force and without sharing continuously in its operations, but who do so with intermittent returns to their homes and avocations, divest themselves of the character of soldiers, and if captured are not entitled to the privileges of prisoners of war.¹⁶¹

The United States, according to MacArthur, had previously refrained from fully implementing this law out of “solicitude.”¹⁶² MacArthur closed by situating his order as part of the American mission of “civilizing” the Philippines; he argued that the laws of war represented an international effort, “adopted by all civilized nations[,]” which had evolved through conferences and discussions “to mitigate, and to escape, as far as possible, from the consequences” of war’s barbarism.¹⁶³ The “careful perusal” of the laws of war “by the people, it is hoped, will induce all who are eager for the

¹⁵⁷ 1 ANNUAL REPORT, *supra* note 96, at 6-7.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ *Id.* at 7-8.

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Id.*

¹⁶² *Id.* at 9.

¹⁶³ *Id.*

tranquilization of the Archipelago to combine for mutual protection and united action in behalf of their own interests and the welfare of the country.”¹⁶⁴

MacArthur’s reasoning seems to have flowed from several premises. First, he reiterated the standard American legal theory of the war: that Aguinaldo’s government was not an independent state, but that its army was a legitimate combatant, engaged in a conflict governed, by default, by the laws of war. The United States Army had conquered large parts of the Philippines, and administered a military occupation in those areas. The continued existence of a *de facto* state of war with the Philippine army, “an expelled public enemy,” justified MacArthur in applying the laws of war to govern the conduct of civilians in those areas, and in particular, justified the punishment of such civilians who aided the Philippine army. That regular army, as the Americans themselves admitted, was largely fictional by the end of 1900, but it was a useful legal fiction. The alleged existence of a regular Philippine Army justified MacArthur in treating “the entire Archipelago” as if it were a conquered part of a southern U.S. state in the Civil War, with a Confederate army lurking just down the railway line. This was useful because G.O. 100 itself had been “thoroughly dedicated to providing the ethical justification for a war aimed at the destruction of the Confederacy[.]” written as the Union shifted to a policy of “hard war” to intimidate Southern civilians against supporting the secessionist cause.¹⁶⁵

¹⁶⁴ *Id.* MacArthur had tried to include such uplifting language in his amnesty proposal six months earlier, but Corbin had vetoed this. See 2 CORRESPONDENCE, *supra* note 52, at 1177-79.

¹⁶⁵ MARK GRIMSLEY, THE HARD HAND OF WAR: UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS, 1861-1865, at 151 (1995).

As noted above, G.O. 100 reflected this policy by noting that, “[t]he more vigorously wars are pursued the better it is for humanity[.]” and MacArthur, like Young, embraced this principle.¹⁶⁶ This principle fit well with MacArthur’s objective, which was to make average Filipinos fear the U.S. as much as they feared the insurgents. MacArthur’s Provost Marshal General, J. Franklin Bell, who had jurisdiction over Manila, expressed this as a need “to create a reign of fear and anxiety among the disaffected which will become unbearable,”¹⁶⁷ while another commander explained that “[t]he natives must be made to feel that a compliance with insurgent demands will be as dangerous as a refusal.”¹⁶⁸

Even as he endorsed G.O. 100’s applicability, MacArthur also continued to focus on the question of who was a combatant, and which individual combatants violated the laws of war; he did not embrace communal responsibility or any idea of targeting whole enemies based solely on their status.¹⁶⁹ Rejecting Evans’ suggestion that whole communities be declared war rebels, MacArthur’s proclamation applied the status only to those who “according to the nature of their overt acts” did “things inimical to the interests of the occupying power.”¹⁷⁰ Likewise, the order’s provisions applying to intermittent participants in hostilities, and to assassins, were based on individual, not communal, responsibility.

¹⁶⁶ *Id.*; DOCUMENTARY HISTORY, *supra* note 72, at 163-64.

¹⁶⁷ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Headquarters, Division of the Philippines for Dec. 19, 1900-Jan. 12, 1901, Bell to Adjutant General, Division of the Philippines, Dec. 31, 1900.

¹⁶⁸ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Headquarters, Division of the Philippines for Dec. 14-Dec. 29, 1900, Ass’t Adjutant Gen. Arthur L. Wagner to Commanding Gen., 4th District, Dec. 26, 1900.

¹⁶⁹ Paul Kramer has, to the contrary, has claimed that “MacArthur’s proclamation defined these terms in ways that embraced the entire population in areas of combat as potential targets of punishment[.]” KRAMER, *supra* note 3, at 137. In fact, as the following review of the proclamation and its interpretation will show, the focus was still guilt, not status, and guilt could only be extended through at least nominally individualized determinations in most cases.

¹⁷⁰ 1 ANNUAL REPORT, *supra* note 96, at 7.

MacArthur's subordinates, again, largely confirmed this principle, though with exceptions. Barry instructed the Department of Northern Luzon that "it is safe to assume that all prominent families" were in league with the insurgents, unless proven otherwise,¹⁷¹ while Bell told the officers of the Provost Guard that "[w]hen a prominent insurgent is caught living in a house in Manila it is morally certain that all persons living in the same house are cognizant of his character. They have thus rendered aid and assistance to the insurrection by harboring him, and resting upon them is the burden of proof that they have not done worse."¹⁷² But this followed a series of warnings from Bell—himself a lawyer¹⁷³—that his subordinates were to avoid arresting the innocent, and that "there should be foundation for reasonable suspicion"—even though this was not strictly a criminal situation; "you are not being called upon to administer justice, but to wage war."¹⁷⁴ Assistant Adjutant General Arthur L. Wagner, too, authorized the arrest only of those who were proven guilty or suspected "to a moral certainty."¹⁷⁵

Thus, individual, not communal, responsibility remained the rule, and MacArthur did not consider *all* insurgents as violators of the laws of war. Those in the (increasingly mythical) insurgent field army remained subject to captivity only as prisoners of war, not as war criminals, as did insurgent guerrilla fighters, so long as they did not engage in assassination or intermittently masquerade as civilians. Of course, remaining continuously in the field made guerrillas more vulnerable to the Americans—so MacArthur used law as a weapon not only to separate the insurgents from their

¹⁷¹ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Dec. 14-Dec. 29, 1900, Barry to Department of Northern Luzon, Dec. 19, 1900.

¹⁷² NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Dec. 19, 1900-Jan. 12, 1901, Bell to Adjutant General, Division of the Philippines, Dec. 31, 1900.

¹⁷³ WILLIAM GARDNER BELL, *COMMANDING GENERALS AND CHIEFS OF STAFF, 1775-1983*, at 98 (1983).

¹⁷⁴ *Id.*

¹⁷⁵ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Dec. 14-Dec. 29, 1900, Wagner to Commanding General, 4th District, Dec. 26, 1900.

civilian supporters, but also in an attempt to force them into open confrontations they were unlikely to win.

E. Applying the Law to Individuals: Military Commissions and Provost Courts

The lines between guilt and innocence, and between war criminals and legitimate enemy combatants, were drawn in detail by American military commissions and provost courts. These military tribunals had been invented by the American General Winfield Scott during the Mexican-American War (1846-48), as a way of punishing both American war criminals and Mexican guerrillas and irregulars.¹⁷⁶ As discussed above, several scholars have written about the functioning of military tribunals in the Philippine-American War, and my intention here is not to discuss the institution thoroughly—due to the amount of surviving documentation, that is a task which would require an entire article to approach properly. Instead, I seek to show through the following discussion that military tribunals functioned as a major weapon in the American lawfare arsenal; that they sought to assign individualized rather than communal guilt; and that they continued to distinguish between privileged and unprivileged Filipino combatants.

While military commissions and provost courts had, as discussed above, tried Filipinos before the summer of 1900, their use increased tremendously under MacArthur, and this aided in suppressing the insurrection.¹⁷⁷ There had been only 72 military commission trials between August 1898 and September 1, 1900, but in 1901 and 1902, U.S. tribunals tried thousands of prisoners.¹⁷⁸ Seventy-nine people were executed between September 1900 and June 1901, with 164 sentenced to ten years'

¹⁷⁶ See Myers, *supra* note 112.

¹⁷⁷ GATES, *supra* note 1, at 208, 278.

¹⁷⁸ SPRINGER, *supra* note 34, at 129; 1 ANNUAL REPORT, *supra* note 96, App'x C, at 1.

imprisonment or more.¹⁷⁹ Many more were released, however, either in exchange for oaths of allegiance or for weapons turned in by friends and relatives—for each gun surrendered, a Filipino could request the release of one prisoner of his or her choice.¹⁸⁰

To some extent, then, the military tribunals aimed to pacify the population by providing a legally-regulated way to lock up insurgents, especially leaders, to kill them, or to hold them hostage in return for voluntary disarmament by the Philippine population.¹⁸¹ Indefinite confinement as prisoners of war, the Americans believed, did not have a sufficient deterrent effect on the Filipinos, because “[t]his humane policy was at once confronted with the cunning announcement of the insurgent chiefs that with their fast-approaching ability to drive the Americans from the Islands all native prisoners would be set free.”¹⁸² The Americans hoped that more permanent penalties would be more effective, and Philippine Division Judge Advocate S.W. Groesbeck claimed in 1901 to have seen a “sudden and most gratifying decrease, almost to cessation of all high crimes in some sections where the gallows has been set up.”¹⁸³

But military tribunals also served a broader symbolic role, reflected in Groesbeck’s 1901 Annual Report. Just as MacArthur hoped that his proclamation would help “civilize” the Filipinos by acquainting them with the laws of war, so Groesbeck believed that the military tribunals could do the same. While he admitted the commissions had fewer procedural safeguards than American courts (these were “often carried too far at home”), they could help instill “a wholesome fear and

¹⁷⁹ 1 ANNUAL REPORT, *supra* note 96, App’x C, at 2.

¹⁸⁰ SPRINGER, *supra* note 34, at 130.

¹⁸¹ *See id.*

¹⁸² 1 ANNUAL REPORT, *supra* note 96, App’x C, at 2.

¹⁸³ *Id.*, App’x C, at 3.

respect for law[.]” supplanting “the time honored and despotic rule of the headman[.]”¹⁸⁴ Thus, he hoped, “slowly the people will come to perceive the benefits flowing from the administration of laws designed to protect the right-doing” while severely punishing that “class of men in these islands similar to like classes found in all nations and especially among half-enlightened and badly-governed peoples[.]”¹⁸⁵

While their objectives were related to the overall American war aims, the military tribunals still tried individuals for particular acts, including manslaughter, abduction, rape, robbery, assault, arson, larceny, neglect of duty, false imprisonment, destruction of property, being a war traitor, aiding and abetting the enemy, supplying the enemy, collecting money illegally, and occasionally, for treason.¹⁸⁶ Haridimos Thravalos has recently argued that the commissions accepted conspiracy as a crime,¹⁸⁷ extending their reach, but even conspiracy served only to impute guilt from one individual onto other individuals.

Many of the officers who served in the military commissions and provost courts were not trained lawyers,¹⁸⁸ and it seems that often they were imprecise about the law they applied.¹⁸⁹ This may in part explain why their language did not always match their practice, as when one military commission

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 3-4. Worcester, perhaps intending to make a similar point about civilization, compares the individualized procedure of the American military commissions to Aguinaldo’s more arbitrary justice, WORCESTER, *supra* note 19, at 244-47.

¹⁸⁶ Appellant’s Supplemental Brief, *supra* note 38, at 23-24; NURICK & BARRETT, *supra* note 2, at 577-78; NARA, RG 153, J.A.G. Doc. File, #12291, list of Filipinos sentenced by military commissions; NARA, RG 153, J.A.G. Doc. File, #17546, Complete List of Prisoners Under the Control of the Civil Government of the Philippine Islands, Feb. 2, 1905.

¹⁸⁷ See Thravalos, *History*, *supra* note 2.

¹⁸⁸ STOREY & CODMAN, *supra* note 44, at 77.

¹⁸⁹ See NARA, RG 153, J.A.G. Doc. File, #15057, documents related to the case of *United States v. Abdon Dumpay*, 1903 (relating the confused legal questions surrounding the United States request for a Philippine court to implement a death sentence previously imposed against Dumpay by a military commission, for an offense whose elements the government and the prisoner disputed, because the commission had not fully specified them).

denied the existence of privileged belligerency. Writing before MacArthur issued his December 20, 1900 proclamation, the tribunal stated that,

[p]ersons who rise in arms against an occupying . . . army . . . are regarded by the laws of war as war-rebels, and if captured, may suffer death, ‘whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not.’¹⁹⁰

This was a far broader definition than MacArthur eventually used; he cast “war rebels” as an exceptional category, outside the mainstream of the insurgents. This commission’s definition could conceivably have condemned *all* insurgents to death, but this did not occur. This is illustrated by the case of Eroberto Gumban, tried and sentenced to death by a military commission on the island of Panay in 1901 for “murder, and violation of the laws of war” in commanding an irregular company “not being part or parcel of the organized hostile army, and not sharing continuously in regular warfare, but who did intermittently return to their homes and avocations” and not wearing “a distinctive uniform[.]”¹⁹¹ But this sentence was disapproved by MacArthur, on the grounds that Gumban was “a lawful belligerent” because “[h]is identity was known, he shared continuously in the war, and he did not return to his home intermittently and assume peaceful avocations.”¹⁹² Gumban was set free, and other Filipinos, accused of being spies, were acquitted but kept in custody as prisoners of war.¹⁹³ Similarly, when insurgents surrendered, they were set free after swearing allegiance to the U.S., but “[t]his does not protect from trial and punishment those who have committed crimes which would properly bring them before a military commission or court of law”—implying that, by default, insurgents were entitled to combatant privilege as long as they did

¹⁹⁰ Quoted in Appellant’s Supplemental Brief, *supra* note 38, at 24 n.14.

¹⁹¹ This example is used by Nurick & Barrett, *supra* note 2, at 576-77, to make the same point about privileged belligerency.

¹⁹² *Id.* at 577.

¹⁹³ See Chesney, *supra* note 36.

not commit *other* law-of-war or criminal violations.¹⁹⁴ As MacArthur's Dec. 20, 1900 proclamation had suggested, it seems only insurgents who masqueraded as civilians or engaged in assassination were liable to prosecution for murder.

In general, then, the United States seems to have accorded combatant privilege to those who met the four criteria which were later codified in the 1907 Hague Rules: they were commanded by a responsible authority, wore distinctive emblems, carried arms openly, and fought according to the laws of war.¹⁹⁵ However, this test was not explicitly spelled out, and without further research, it is far from clear whether these were in fact the precise criteria which U.S. authorities used. In any case, it is clear that for much of the conflict, the military tribunals aimed to assign individual guilt to those who, by their own acts, were belligerents. By late 1901, this understanding was about to change.

F. Mopping Up: Racism and Communal Responsibility in Batangas and Samar, 1901-1902

As the military tribunals did their work, the insurgency calmed in many areas, but it persisted on the island of Samar, and in Batangas on the island of Luzon. In September 1901, an American infantry company was attacked by villagers and nearly annihilated while eating breakfast in a village on Samar. As the press spread horrifying reports of what became known as the Balangiga Massacre, American public opinion demanded strong action to pacify these pockets of resistance.¹⁹⁶ Major General Adna Chaffee, who had replaced MacArthur, wanted a harsher approach, and he turned to Brigadier Generals J. Franklin Bell and Jacob Smith, former cavalymen whom "he could count on

¹⁹⁴ NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for April 18-May 13, 1901, Division of the Philippines, Major Fred A. Smith to Adjutant General, Division of Southern Luzon, April 15, 1901.

¹⁹⁵ Nurick & Barrett, *supra* note 2, at 576; *see also* NEFF, *supra* note 6, at 85 (explaining the four criteria).

¹⁹⁶ MILLER, *supra* note 11, at 200-07.

for an Indian-style campaign.”¹⁹⁷ At first, Bell assumed command in Batangas with Smith as his subordinate, but soon the latter took charge on Samar.¹⁹⁸ Both officers sought the legal authority for a broader counterinsurgency policy, to “place the burden” of the war on civilians who aided the insurrection.¹⁹⁹ This was a principle drawn directly from G.O. 100.²⁰⁰ Smith, like Young and MacArthur, also echoed Lieber’s Code in his view that “short severe wars are the most humane in the end.” Therefore, his goal was to “create in the minds of all the people a burning desire for the war to cease.”²⁰¹ Bell, likewise, declared as his policy to “make the people want peace, and want it badly[,]” because “[a] short and severe war creates in the aggregate less loss and suffering than benevolent war indefinitely prolonged.”²⁰² In order to make the disloyal, or even neutral, population suffer, Bell and Smith sought to broaden their powers of detention and property seizure.

Those who defend American behavior in the Philippines have emphasized that the harsh measures applied on Samar were different from the past, and legally, it will be seen that they were. But extreme violence and communal responsibility were not entirely new, especially for Smith—who claimed as early as 1899, according to American newspapers, that he had shot insurgent prisoners.²⁰³ Furthermore, in December of that year, Smith imposed a collective fine on several towns on Negros which he suspected were aiding “robbers.”²⁰⁴ As early as August 1900, some officers feared that the United States would be forced to adopt “the Spanish method of dreadful general punishments on a whole community for the acts of its outlaws,”²⁰⁵ and as noted above, Young may have used such

¹⁹⁷ *Id.* at 196.

¹⁹⁸ *Id.* at 219.

¹⁹⁹ STOREY & CODMAN, *supra* note 44, at 112 (reproducing Bell’s orders of Dec. 24, 1901).

²⁰⁰ See DOCUMENTARY HISTORY, *supra* note 72, at 185 (reprinting Article 156 of Lieber’s Code).

²⁰¹ STOREY & CODMAN, *supra* note 44, at 101 (reproducing Smith’s orders of Dec. 24, 1901).

²⁰² *Id.* at 105 (reproducing Bell’s orders of Dec. 9, 1901).

²⁰³ MILLER, *supra* note 11, at 95.

²⁰⁴ 2 CORRESPONDENCE, *supra* note 52, at 1124.

²⁰⁵ GATES, *supra* note 1, at 174.

methods to protect a vital telegraph line a month later.²⁰⁶ The Batangas and Samar campaigns were, however, seemingly the first time that such policies were systematically issued and legally justified. Miller suggests that, due to the public outrage which followed the Balangiga massacre, Chaffee and Bell felt comfortable with orders “that should never have appeared in writing” because they “went on record as planning to violate General Orders No. 100 and the accepted tactics of civilized warfare.”²⁰⁷ But in fact, a close reading of the orders, in their proper legal context, suggests that Bell felt his actions were entirely within the law—as he interpreted it.

Miller has himself observed that Bell’s orders were written “much like a lawyer’s brief,”²⁰⁸ and Bell had indeed passed the Illinois bar.²⁰⁹ Smith seems to have had no legal training, but he had served as a temporary judge advocate in the late 1860s.²¹⁰ Both officers were careful to provide legal justifications for their orders, often referencing G.O. 100. Bell attempted to provide legal justification for even those provisions which shock modern readers, especially regarding retaliation. It seems that Bell and Smith believed, like MacArthur, that the law gave them precisely the tools they needed to suppress the insurgency legitimately.

The key shift, for both Bell and Smith, was to ask which Filipinos were *enemies*—not merely which were active combatants, let alone which had committed acts punishable by a military tribunal. Karl S. Chang has recently urged such a move in the modern conflict with al-Qaeda and its affiliates, in part

²⁰⁶ See *supra* p. 25.

²⁰⁷ MILLER, *supra* note 11, at 207.

²⁰⁸ *Id.* at 207.

²⁰⁹ BELL, *supra* note 73, at 98.

²¹⁰ David L. Fritz, *Before the “Howling Wilderness”: The Military Career of Jacob Hurd Smith, 1862-1902*, 43 MILITARY AFFAIRS 186, 187 (1979). There was no requirement that a judge advocate have legal training; he had merely to be “a fit person,” 1 WILLIAM WINTHROP, MILITARY LAW 247 (1886).

as a way to lower the burden of proof necessary to allow detention.²¹¹ In the Philippine context, the effect of this move was broadly similar, effectively shifting the burden of proof from the United States to Filipino individuals—and soon, to whole communities. While classification as a war rebel required “overt acts,”²¹² Smith inverted this in his December 24, 1901 orders defining “enemies”:

Every native, whether in arms or living in the pueblos or barrios, will be regarded and treated as an enemy until he has conclusively shown that he is a friend . . . [by] some positive act or acts that actually and positively commit him to us, thereby severing his relations with the insurrectos and producing or tending to produce distinctively unfriendly relations with the insurgents.²¹³

Bell, too, instructed his men to regard all Filipinos as hostile unless they undertook “such acts publicly performed as must inevitably commit them irrevocably to the side of Americans by arousing the animosity and opposition of the insurgent element.”²¹⁴ Bell summed up the new default position on December 24, 1901, writing that he assumed “with very few exceptions, practically the entire population has been hostile to us at heart.”²¹⁵

It was not merely internal hostility which, according to Bell, justified a general categorization of all Filipinos in certain areas as enemies. Recalling modern debates over whether civilians who repeatedly and directly participate in hostilities are considered to be serving a “continuous combat function,” and thus liable to be targeted,²¹⁶ Bell argued that, “[i]nasmuch as it can be safely assumed that at one time or another since this war began every native in the provinces of Batangas and

²¹¹ See Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEXAS INT’L L. J. (forthcoming 2011-12). He does not, of course, endorse *group* liability as Bell and Smith did.

²¹² See *supra* p. 33.

²¹³ STOREY & CODMAN, *supra* note 44, at 102 (reproducing Smith’s orders of Dec. 24, 1901). The J.A.G. recognized the legality of such a burden shift in a 1906 opinion. DIG. OPIN. J.A.G., *supra* note 22, at 249-50.

²¹⁴ STOREY & CODMAN, *supra* note 44, at 107 (reproducing Bell’s orders of Dec. 9, 1901).

²¹⁵ *Id.*, 112 (reproducing orders from Bell, Dec. 24, 1901).

²¹⁶ See HCJ 769/02 Pub. Comm. Against Torture In Isr. v. Gov’t of Isr. [Dec. 11, 2005]; Assembly of the International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT’L REV. OF THE RED CROSS 991 (2008).

Laguna . . . has, with exceedingly rare exceptions, taken some part in aiding and assisting the insurrection against the United States, they have all rendered themselves liable.”²¹⁷ Smith’s orders were understood by one of his subordinates to mean that “everybody in Samar was an insurrecto, except those who had come in and taken the oath of allegiance.”²¹⁸ This was essentially the same communal definition of “war treason” which Captain Evans had urged, and Young had rejected, a year and a half earlier.²¹⁹

This two-step process—asking who was an enemy, and treating Filipinos interchangeably—allowed widespread preventative detention even of those against whom Bell and Smith had no proof of wrongdoing. Bell forced the inhabitants of Batangas into “concentration camps”—intended, in their nineteenth-century incarnation, not to exterminate but to separate civilians from the guerrillas.²²⁰ Both generals were particularly worried about the pro-insurgent sentiments of Filipino elites, especially the clergy, and Smith ordered priests arrested within his area of responsibility. “If the evidence is sufficient,” he commanded, “they will be tried in the proper court. If there is not sufficient evidence to convict, they will be arrested and confined as a military necessity, and held as prisoners of war until released by orders from these headquarters.”²²¹ In Batangas, Bell also ordered that “well-founded suspicion” was a sufficient ground to arrest elites and priests and to hold them “indefinitely as prisoners of war[.]”²²² Gone was the language of MacArthur’s subordinates a year earlier, about “reasonable suspicions” and “moral certainties” being necessary before arrests.

²¹⁷ STOREY & CODMAN, *supra* note 44, at 84 (quoting Bell’s orders of Jan. 23, 1902).

²¹⁸ BARNETT, *supra* note 3, at 82.

²¹⁹ See *supra* pp. 27-28.

²²⁰ BOOT, *supra* note 1, at 123-24. This soon set off a debate in the United States about whether Bell’s camps were as bad as those set up by the Spanish in Cuba—the horrors of which had helped arouse American public opinion against Spain just a few years before. See KRAMER, *supra* note 3, at 152-53.

²²¹ STOREY & CODMAN, *supra* note 44, at 103 (reproducing Smith’s orders of Dec. 24, 1901).

²²² *Id.*, 107 (reproducing Bell’s orders of Dec. 9, 1901).

The conception of all Filipinos in certain areas as enemies also legitimated other new policies. Bell announced on December 13 that he would apply communal responsibility for assassinations: for every “defenseless American[] or native[] friendly to the United States Government” killed by insurgents, he would execute one of “the officers or prominent citizens held as prisoners of war,” preferably from the same town as the original assassination.²²³ Moreover, Bell authorized the confiscation of all food within his jurisdiction, to be distributed only to those in the towns which he controlled, because Article 17 of G.O. 100, he contended, allowed the starvation of “unarmed hostile belligerents as well as armed ones[.]”²²⁴ No able-bodied men were to be allowed to travel outside the towns; those who violated the curfew “will be arrested and confined, or shot if he runs away.” However, “[n]o old and feeble man nor any woman or child will be shot at pursuant to this rule.”²²⁵ Local officials who allowed insurgents to be sheltered within their towns were also to be punished.²²⁶ In short, all of the measures which, as discussed above, the laws of war authorized against *individuals* who were considered disloyal, could now be more broadly applied against nearly any Filipino *community*, once Bell and Smith defined them all as enemies.

Smith took this principle to its furthest extreme in verbal orders to one of his subordinates, Major Littleton Waller. “I want no prisoners[.]” he said. “I wish you to kill and burn, the more you kill and the more you burn the better you will please me . . . I want all persons killed who are capable of bearing arms.” Smith went on to clarify that he meant all those over ten years of age were to be killed.²²⁷ This suggested that, again, Smith saw the laws of war in terms of status rather than

²²³ NARA, RG 153, J.A.G. Doc. File, #4275, memorandum regarding Bell’s orders, July 8, 1904.

²²⁴ STOREY & CODMAN, *supra* note 44, at 109 (reproducing Bell’s orders of Dec. 15, 1901).

²²⁵ *Id.*, 111 (reproducing Bell’s orders of 21 Dec. 1901).

²²⁶ NARA, RG 153, J.A.G. Doc. File, #4275, memorandum regarding Bell’s orders, July 8, 1904. *See also* WORCESTER, *supra* note 19, at 222-24 (summarizing Bell’s policies approvingly).

²²⁷ BOOT, *supra* note 1, at 120. A court-martial later found that he had meant only those engaged in *actual* hostilities, but this seems doubtful. *See infra* p. 57-58.

culpability; all Filipinos were enemies, and in a further leap, all those who *might* be combatants could be targeted. But there were no grounds in G.O. 100 for deliberately targeting noncombatants; these *were* clearly illegal orders, and they went too far even for Waller. Despite his willingness to execute prisoners—for which he was later court-martialed²²⁸—Waller “knew the laws of war as well as any officer, [and] told his subordinates that ‘we are not making war on women and children.’”²²⁹

It may be that more than military pragmatism, and Bell’s and Smith’s desire for harsher measures against the populace, lay behind these orders. As noted above, racial attitudes had inflected American attitudes toward the Filipinos from the beginning of the conflict, encouraging some to suggest ignoring the laws of war, and providing MacArthur with an explanation for why the insurgency was so hard to defeat. Young had gone further, arguing that “[t]he keynote of insurrection among the Filipinos past, present and future is not tyranny, for we are not tyrants. It is race.”²³⁰ Now, race justified the move from a belligerency calculus to a system of communal responsibility. Paul Kramer has seen “the Philippine-American War as race war,” arguing that the Americans relied on some combination of racism, feelings of civilizational superiority, and anger at insurgent tactics to throw out the laws of war.²³¹ In fact, it seems that racial thinking filtered *into* legal interpretation. Bell and Smith—like MacArthur before them—did not discard the law, but they interpreted it in ways increasingly informed by racism.

Bell, for example, argued that it was difficult to assign individual culpability to Filipinos: “I have been in Indian campaigns where it took over 100 soldiers to capture each Indian,” he reported, “but

²²⁸ See *supra* pp. 55-56.

²²⁹ BOOT, *supra* note 1, at 120, 123.

²³⁰ MILLER, *supra* note 11 at 162.

²³¹ KRAMER, *supra* note 3, at 89, 138. Kramer conflates MacArthur’s attitudes and legal opinions with those of Bell and Smith, and he is extremely unclear about the lines between discourses about insurgent tactics, Filipino civilization, and more outright racism, or about the distinction between sentiments, actions, and legal interpretation.

the problem here is more difficult on account of the inbred treachery of these people, their great number, and the impossibility of recognizing the actively bad from the only passively so.”²³² Similarly, Waller claimed that he did not know the identity of a Filipino he had ordered executed, because there were “[s]o many of them, sir. I couldn’t tell one from the other.”²³³ The idea that Filipinos were fundamentally homogenous, coupled with perceived difficulties in differentiating one from another, likely seemed to justify imputing the guilt of individuals to whole communities.²³⁴

The historian Max Boot seems to be correct that such harsh measures of communal responsibility were not, as Paul Kramer implies, representative of the overall war effort.²³⁵ These were, officially, new policies, justified with new legal reasoning, but they did extend principles already deployed, in law and in practice, in earlier campaigns. It is also important to note that these were not the products of rogue field commanders. Bell’s orders, in fact, were passed up the chain of command, and in the summer of 1904, officers at the Office of the Judge Advocate General systematically analyzed Bell’s orders from December 1901, and held that all of them were justified by the provisions of G.O. 100 and, in many cases, by the recently-signed 1899 Hague Convention.²³⁶ A 1906 J.A.G. opinion simply took for granted that there had been “certain limited areas where the conduct of the inhabitants led to the conclusion that the entire community was disloyal.”²³⁷ Even the most extreme violence

²³² *Charges of Cruelty*, *supra* note 116, at 50 (reproducing Bell’s report, 1901). In a similar vein, Louise Barnett argues that “The paradigm of the treacherous native, treacherous by definition rather than by action, could, in fact, be extended to include Iraq or any situation where Americans occupied by force the land of a nonwhite, non-English-speaking other.” BARNETT, *supra* note 3, at 82.

²³³ BARNETT, *supra* note 3, at 15.

²³⁴ Arguably, the ultimate solution to this “problem” in the Philippines was the postwar implementation of large scale plans to document and identify the population. *See generally* ALFRED W. MCCOY, *POLICING AMERICA’S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE* (2009).

²³⁵ Compare BOOT, *supra* note 1, at 123 *with* KRAMER, *supra* note 3, at 137-45. Kramer asserts that MacArthur’s 1900 proclamation “embraced the entire population in areas of combat as potential targets of punishment[.]” and proceeds directly to discuss Smith’s “no prisoners” order to Waller on Samar. Thus he seems to collapse the events of 1900 and 1902, erasing the intervening legal and operational changes.

²³⁶ *See* NARA, RG 153, J.A.G. Doc. File, #4275, memorandum regarding Bell’s orders, July 8, 1904.

²³⁷ DIG. OPIN. J.A.G., *supra* note 22, at 249-50.

deployed by the United States during the conflict, then, was articulated through legal reasoning within the framework of G.O. 100.

G. The Domestic Debate Over the Laws of War

The J.A.G. office's close examination of Bell's orders may have been prompted by the public outcry which arose in the United States in the spring of 1902 over the behavior of American forces, especially the death and destruction meted out on Batangas and Samar.²³⁸ Smith's comment to a newspaper reporter at the end of 1901 that he intended to set Samar ablaze and wipe out its population attracted attention, setting off a series of debates which often touched on legal themes and used legal language. Most notably, Senator Henry Cabot Lodge led his Senate Committee on the Philippines in a series of intensely antagonistic hearings, featuring testimony from MacArthur, Taft, and many other key players.²³⁹ At Lodge's request, Secretary of War Root issued a report entitled *Charges of Cruelty, Etc. to the Natives of the Philippines*, attempting to demonstrate that the U.S. Army had taken stern measures against its own members who abused Filipinos, and that the insurgents' crimes were much worse.²⁴⁰

The administration and its defenders argued in the press that these crimes by Filipinos cast them outside the protections of civilized warfare; by breaking the laws of war, the insurgents had forfeit any right to invoke those laws. The *Philadelphia Ledger* contended that "we are not dealing with a civilized people. The only thing they know and fear is force, violence, and brutality, and we give it to

²³⁸ For the press reaction, see MILLER, *supra* note 11, at 231-52; for the water cure, see Kramer, *supra* note 3.

²³⁹ See generally MILLER, *supra* note 11, at 212-18; BARNETT, *supra* note 3, at 23-31.

²⁴⁰ See *Charges of Cruelty*, *supra* note 116, at 1.

them.”²⁴¹ In one exchange between Brigadier General Hughes and Senator Joseph Rawlins during the Lodge Committee hearings, Rawlins asked whether it was “within the ordinary rules of civilized warfare” to burn shacks—to which Hughes replied, “These people are not civilized.”²⁴² Senator Dietrich then interrupted, asserting that “[i]n order to carry on civilized warfare both sides have to engage in such warfare.”²⁴³

This view was expressed most forcefully and clearly by Theodore Woolsey, professor of international law at Yale, in a debate which followed Aguinaldo’s capture by a commando force under General Frederick Funston.²⁴⁴ Critics claimed that Funston, whose men disguised themselves as insurgents and used other ruses, had violated the laws of war.²⁴⁵ Woolsey responded that, under the 1899 Hague Convention, every tactic Funston used had been legal, except for the use of enemy uniforms—and this would only be illegal if fighting a signatory to the Convention, “a civilized power which was itself governed by similar rules.”²⁴⁶ The Americans, he argued, had followed Civil War precedent in applying most of the laws of war out of humanity, not out of obligation.²⁴⁷ Woolsey’s academic opinion thus agreed with Young’s layman’s approach:²⁴⁸ the Filipinos were not, and perhaps never could be, parties to the law-of-war contract, due to their lack of formal state standing and their civilizational level. This has become the conventional narrative for

²⁴¹ MILLER, *supra* note 11, at 211.

²⁴² *Id.* at 215; STOREY & CODMAN, *supra* note 44, at 98.

²⁴³ MILLER, *supra* note 1, at 215.

²⁴⁴ For an account of the capture, see BOOT, *supra* note 1, at 118-19. For Woolsey’s biography, see *Theodore Salisbury Woolsey 1852-1929*, ANCESTRY.COM, http://freepages.genealogy.rootsweb.ancestry.com/~woolsey/resources/descends/woolgen/wltheodoresalisbury1852_1929.html (last visited May 13, 2012).

²⁴⁵ MILLER, *supra* note 11, at 169. Ironically, even as Boot celebrates Funston’s heroism—suggesting that the action had almost no domestic critics—he heightens the drama by noting breezily that Funston and his men “were on their own. Under the laws of war, capture in enemy uniforms meant certain death.” BOOT, *supra* note 1, at 118.

²⁴⁶ Theodore S. Woolsey, *The Legal Aspects of Aguinaldo’s Capture*, 1901 THE OUTLOOK 855, at 855-56, *available at* <http://www.unz.org/Pub/Outlook-1901apr13-00855>.

²⁴⁷ *Id.* at 856.

²⁴⁸ *See supra* pp. 28-29.

historians; in Paul Kramer's words, the Americans felt the Filipinos were not "owed the restraints that defined civilized war."²⁴⁹

However powerful this argument may have been in domestic debate, though, and however much it may have motivated individual soldiers, it has been seen that it was *not* officially accepted by the U.S. Army. In fact, American generals continued to legitimate their actions *through* the laws of war, and in particular G.O. 100; not even Bell thought that Filipino behavior, racial characteristics, or civilizational level negated the applicability of the law itself. MacArthur, indeed, had repeatedly rejected suggestions that the laws of war were a contract, which once violated by the Filipinos, no longer bound the Americans. The U.S. Army held to the law, even as it repeatedly reinterpreted it.

American anti-imperialists, in their own way, agreed with the army, and they invoked the laws of war in their campaign against the occupation of the Philippines. The anti-imperialist Philippine Investigating Committee, led by Charles Francis Adams, Carl Schurz, Edward Burritt Smith, and Herbert Welsh, commissioned the prominent Boston lawyers Moorfield Storey and Julian Codman²⁵⁰ to rebut Root's claims. Their report appeared in 1902, under the title *Secretary Root's Record*. Their principal target was Root, and they argued that the secretary and his military subordinates had been overly willing to tolerate abuses of the laws of war.²⁵¹ But Codman and Storey did not just argue that the law was not being *enforced*; they contested what the law *was*. They took specific aim at Bell's orders issued on Batangas, challenging precisely the legal moves which Bell had used to justify his sweeping counterinsurgency policy.

²⁴⁹ KRAMER, *supra* note 3, at 90.

²⁵⁰ For Storey's biography, see generally WILLIAM B. HIXSON, JR., *MOORFIELD STOREY AND THE ABOLITIONIST TRADITION* (1972).

²⁵¹ STOREY & CODMAN, *supra* note 44, at 3-62 *passim*.

First, Storey and Codman questioned Bell’s argument that he could designate the entire population of Batangas as enemy. They contended that Bell’s “assumption that, with very few exceptions, practically the entire population has been hostile to us at heart[.]” expressed in his Dec. 24, 1901 orders, was unjustified by G.O. 100.²⁵² Even if all Filipinos were, as Bell argued, enemies, Storey and Codman noted that Article 28 of G.O. 100—a section invoked by Bell himself—provided that “retaliation shall only be resorted to after careful inquiry into the real occurrence and character of the misdeeds that may demand retribution.”²⁵³ This required proof of particular misdeeds, not simply an assumption of hostile intent; it “surely does not justify an officer in assuming that a whole people are ‘hostile in heart’. . . It is the overt act, not the inevitable feeling of the conquered, at which this article is aimed.”²⁵⁴

Moreover, Bell had not only defined the offense wrongly, but had also defined the offenders too broadly. In orders issued December 13, 1901, Bell accused the Filipinos, generally, of various violations of the laws of war, but Storey and Codman argued that such accusations could not be leveled against *groups*, only against *individuals*: “Not one of the rules permits a military commander to assume that a given person has been guilty of such offenses, far less to give all his subordinates power to make such assumption, and still less to assume that whole communities are guilty, and to burn, kill, and devastate accordingly.”²⁵⁵ Thus, the two Boston lawyers opposed Bell’s shift from a framework focused on punishing wrongdoing to one based on communal liability and status.

²⁵² *Id.* at 112 (quoting Bell’s Dec. 24, 1901 orders).

²⁵³ *Id.* at 80.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

On this basis, Codman and Storey challenged the measures Bell had taken against civilians. Article 59 of G.O. 100, Storey and Codman admitted, authorized retaliation against prisoners of war, but “[p]eaceful citizens are not prisoners of war, nor were Bell’s orders retaliation.”²⁵⁶ They likewise attacked his orders to deprive disloyal Filipino villages of food, pointing out that Article 17 of G.O. 100 allowed the starving of *belligerents*, not only of those with enemy sympathies. Again, for these authors, the critical question was one of individual belligerency, not simply of enemy status.²⁵⁷

Codman and Storey simultaneously advanced an even broader critique of American military interpretations of G.O. 100: they contested the broad license which the military had claimed on the basis of “necessity.” As noted above, necessity justified the widespread confiscation and destruction of property, and Bell had likewise justified his retaliatory execution policy based on G.O. 100’s axiom that “[t]he more vigorously wars are pursued, the better for humanity. Sharp wars are brief.”²⁵⁸ This principle, it has been seen, defined many officers’ understanding of G.O. 100; it was necessary, they felt, to “throw the burden of the war” on the disloyal.²⁵⁹ But Storey and Codman directly challenged that interpretation; they pointed to Articles 37 and 38 of G.O. 100, which protected private property: “In other words,” they wrote, “the rule is to respect private property. The exceptions are the right to tax, and to take property for temporary purposes for the use of the army upon giving receipts. Wherein, then, is found the right to burn houses, to confiscate the property of noncombatants, to hunt and kill people, to lay waste a province?”²⁶⁰ Such invocations of necessity, Storey and Codman argued, “is the usual ‘*tyrant’s plea*,’ and would justify anything, if the

²⁵⁶ *Id.* at 81-82.

²⁵⁷ Although it remains unclear if Codman and Storey would have disagreed with Bell’s policies as applied to an international armed conflict in which the civilians in question were *citizens* of a real enemy state, owing an allegiance to that state.

²⁵⁸ *Id.*, 82.

²⁵⁹ The quotation is from DOCUMENTARY HISTORY, *supra* note 72, at 185 (reprinting Article 156 of Lieber’s Code).

²⁶⁰ STOREY & CODMAN, *supra* note 44, at 84.

discretion of the commander is unfettered.”²⁶¹ Thus it was precisely the license which the laws afforded with the two anti-imperialist lawyers contested; the laws of war, they felt, should bind rather than loose the U.S. forces.

Here, as in their other attacks on the legality and morality of American military policy, Codman and Storey used Civil War analogies. Unlike MacArthur and other American officers, they intended these to constrain, not to license, U.S. behavior. In condemning generalized retaliation, they asked their readers to “[i]magine the whole population of a Virginia district put to the sword because Mosby had surprised a detachment, or Winchester burned because a soldier was found dead in the street.”²⁶² Such comparisons made Filipino civilians’ suffering resonate with American audiences, and, perhaps, they implicitly refuted the racial stereotypes which underlay Bell’s theories of communal guilt. Codman and Storey seem to have felt that American analogies might illuminate the fallacy they saw in Bell’s reasoning.

H. Lawfare Goes to Court

Codman and Storey made a legal argument, but their intended audience was the public, not the courts. However, questions about the legality of American tactics did find their way into both civilian and military courts, and once again, the laws of war were upheld, even as they were reinterpreted to license many—but not all—American actions.

²⁶¹ *Id.* at 87.

²⁶² *Id.* at 25. In fact Union generals did destroy crops and buildings and arrest Southern civilians *en masse* to combat guerrillas, NEFF, *supra* note 6, at 90-93.

The first story, and the only one discussed here which features a Filipino protagonist, began with a boat. While campaigning in Batangas, General Bell used every legal means at his disposal to bring the prominent Filipino leader Sixto López to the bargaining table, including the powers of detention and property seizure which war powers and communal responsibility authorized.²⁶³ Bell reported on December 26, 1901 that López was “now interested in peace because I have in jail all the male members of his family found in my jurisdiction and have seized his houses and palay [unhusked rice stocks] and his steamer the ‘Purísima Concepcion’ for the use of the government.”²⁶⁴ This is almost certainly the same steamer whose seizure found its way into the U.S. Court of Claims fifteen years later. Jose López y Castelo claimed that on December 12, 1901, Bell had seized his ship, the *Purísima Concepcion*. López y Castelo claimed compensation, arguing that he was loyal, and that his property was protected by Articles 37 and 38 of G.O. 100.²⁶⁵

The government justified Bell’s seizure as having been based on a suspicion that the ship was engaged in smuggling, to the benefit of the insurgents. Judge Fenton Booth was sympathetic, writing that the seizure was an “exercise of what he [Bell] at least supposed to be a military right—an act performed in defiance of the protest of the possessor of the vessel, in disregard of his claimed immunities, and without the thought or suggestion of promising compensation[.]”²⁶⁶ Even if Bell were mistaken, this mistake would give rise only to a tort, not to an implied contract—and as noted

²⁶³ López maintained an ambiguous position, publishing in the American press advocating Philippine independence without overtly supporting the insurgency. See Sixto Lopez, *The Philippine Problem: A Proposition for a Solution*, 1901 THE OUTLOOK 857, available at <http://www.unz.org/Pub/Outlook-1901apr13-00857>.

²⁶⁴ NARA, RG 94, A.G.O. Doc. File, #338335, Bell, Telegram Regarding Movement Contemplated in Batangas, Dec. 26, 1901. For the word “palay,” see *Palay*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/palay> (last visited April 29, 2012).

²⁶⁵ *Castelo v. U.S.*, 51 Ct.Cl. 221, 224-27 (1916). López y Castelo was a child in 1901, suggesting that perhaps his ownership of the boat was a legal fiction designed to protect someone else, perhaps Sixto López.

²⁶⁶ *Id.* at 227.

above, the Tucker Act had preserved sovereign immunity for the U.S. against tort claims.²⁶⁷ Thus, “[w]hatever may be the equities of the transaction,” the court passed over them, upholding Bell’s counterinsurgency strategy based on the intersection of sovereign immunity and military authority.²⁶⁸

One major method of imposing retroactive, courtroom constraints on any military is the institution of the court-martial. In early 1902, Root’s *Charges of Cruelty* report included the results of 348 courts-martial, attempting to demonstrate that he and his subordinates *were* enforcing the law. Yet most of those convened during the Philippine-American War do little to help understand how the laws of war were interpreted, applied, used, and contested. As noted above, most of these early courts-martial involved low-ranking Americans guilty of criminal activity, rather than anything “entwined with military policy.”²⁶⁹

Later in 1902, public outrage pushed Secretary Root to court martial more prominent officers, and these cases again echo the themes of individual and communal guilt, and of necessity, which characterized the interpretation of the laws of war throughout the conflict. The first officer court-martialed was Major Littleton Waller, a Marine officer under Smith’s command on Samar. Despite ignoring Smith’s orders to kill all Filipinos over ten, Waller eventually executed eleven Filipino porters whom he suspected of disloyalty.²⁷⁰ The prosecution accepted that the porters could legally have been shot in the field, due to “military necessity,” but Waller had executed them later, without a trial.²⁷¹ Waller pled both necessity and treachery, and was acquitted, in part because he invoked the Filipino massacre of Americans at Balangiga, perhaps implying that the perpetrators and his own

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ BARNETT, *supra* note 3, at 41, 58.

²⁷⁰ *See* BARNETT, *supra* note 3, at 69-87.

²⁷¹ *Id.* at 76, 83.

victims “were the same people in the sense that the fact that they were all Filipinos, or all natives of Samar[.]”²⁷²

It also helped that Smith’s verbal orders to kill everyone over ten on Samar had emerged during Waller’s trial, sparking a media firestorm.²⁷³ Smith himself was put on trial, and, echoing Evans and Young, he now defended himself by arguing that G.O. 100 “was never intended to apply to an inferior and savage race.”²⁷⁴ As it had been when suggested by Young, Evans, and others, this argument was officially rejected. The court was careful to maintain that the laws of war *did* apply—and that Waller, despite Smith’s orders, had followed them. “[T]he laws of war,” the court held, “rather than the instructions of General Smith, controlled the forces under Major Waller’s command in the taking of human life.”²⁷⁵ They convicted Smith, therefore, not of violating the laws of war, but of “[c]onduct to the prejudice of good order and military discipline” because he had issued orders which were “misleading and calculated to embarrass the prosecution of the very operations which they had purported to regulate.”²⁷⁶ Faced with the implication that all Filipinos were liable for the insurgents’ violations of the laws of war, the court was careful to uphold the principle of individual, not communal, responsibility.

Even as it convicted Smith, the court modified the specification (the particular allegations laying behind the more general charge) by qualifying the claim that Smith “wanted all persons killed who were capable of bearing arms”—inserting the words “and in actual hostilities against the United

²⁷² *Id.* at 84.

²⁷³ BOOT, *supra* note 1, at 122-23; MILLER, *supra* note 11, at 230.

²⁷⁴ BARNETT, *supra* note 3, at 86.

²⁷⁵ DOCUMENTARY HISTORY, *supra* note 72, at 810.

²⁷⁶ *Id.* at 800, 812.

States[.]”²⁷⁷ In essence, the court denied the assumption of communal responsibility upon which Bell’s and Smith’s written orders had relied, returning to the earlier emphasis on individual culpability. Judge Advocate General George B. Davis supported the court’s sentence of a reprimand,²⁷⁸ and President Roosevelt strengthened this sentence to a dismissal from active duty.²⁷⁹ By deciding the case this way, Davis and the court cleverly achieved three goals simultaneously: they upheld the applicability of the laws of war; they made an example of Smith, proving that the United States did not tolerate violations of those laws; and they supported the administration’s claim that the laws in fact were *not* violated during the conflict.

Several other officers were court-martialed for their role in using the “water cure,” an early version of waterboarding, to torture Filipinos.²⁸⁰ Major Edwin F. Glenn—a University of Minnesota law school graduate who had served as Waller’s defense counsel, and who had been a prominent intelligence officer throughout the war—was convicted in May 1902.²⁸¹ Davis reviewed the sentence, finding that military necessity did not justify the use of the water cure. Davis also seized on the fact that Glenn had attempted to defend the routine use of the water cure “as a method of conducting operations.”²⁸² As Glenn argued in a later proceeding, “practically all definitions agree that International Law is made up of certain rules that certain civilized states agree to regard as binding upon them in their relations with one another. Those who do not belong to this international community cannot claim any of its benefits.”²⁸³ Such an argument, Davis insisted, “fails completely,

²⁷⁷ *Id.* at 801, 812.

²⁷⁸ *Id.* at 813; BARNETT, *supra* note 3, at 87.

²⁷⁹ DOCUMENTARY HISTORY, *supra* note 72, at 800.

²⁸⁰ *Id.* at 90-99.

²⁸¹ *Id.* at 96; MILLER, *supra* note 11, at 228.

²⁸² DOCUMENTARY HISTORY, *supra* note 72, at 818.

²⁸³ *Id.* at 112. The quotation comes from Glenn’s second court-martial, held in February 1903 on charges of killing prisoners. He gained an acquittal this time, winning the court’s sympathy by reciting a parade of horrors committed by the insurgents. *See id.* at 112-13.

inasmuch as it . . . attempt[s] to establish the principle that a belligerent who is at war with a savage or semicivilized enemy may conduct his operations in violation of the rules of civilized war. This no modern State will admit for an instant; nor was it the rule in the Philippine Islands.”²⁸⁴ Davis thus forcefully reasserted the official army line about the law's binding nature, despite the contrary views of imperialist publicists, and even of Yale Law School's Professor Woolsey. Yet, Glenn hardly received a harsh punishment; he was sentenced only to one month's suspension and a \$50 fine.²⁸⁵ As in Smith's case, the army vindicated the applicability of the laws of war even as it avoided widespread or severe punishment.²⁸⁶

In summary, the 1902 courts-martial revealed yet again that, while the U.S. Army was almost certainly lax in its enforcement of the laws of war against its own men, it officially stood by the theory that the laws of war were binding regardless of the enemy's identity or behavior. When pressed, the army would even abandon the communal responsibility principles embraced by Bell and

²⁸⁴ *Id.*, at 819; BARNETT, *supra* note 3, at 96. Another officer, First Lieutenant Julian E. Gaujot, was also convicted and received a similar punishment to Glenn's, while Captain James A. Ryan was acquitted. *Id.* at 97-99. Glenn and Ryan were repeat offenders of a sort. The Philippine civil government complained that they had arrested Filipinos, “assumed to exercise governmental authority[,]” and interfered with religious affairs within areas under civilian rule. Glenn had allegedly acted on Smith's orders. NARA, RG 153, J.A.G. Doc. File, #12170, War Department to Commander, Department of the Philippines, no date (from context, probably March 1902). It may not be a coincidence that these three thorns in the War Department's side were among the few officers charged with war crimes.

²⁸⁵ DOCUMENTARY HISTORY, *supra* note 72, at 819.

²⁸⁶ This impression is confirmed by the case of Captain Cornelius M. Brownell, accused of causing the death of Father Augustine de la Pena during an interrogation in late 1900. After an inquiry in November 1902, Davis concluded that it was impossible to try Brownell: military commissions had lost their jurisdiction after Roosevelt's July 4, 1902 declaration that the insurrection was over; the 58th Article of War, governing homicide in wartime, had also ceased to be operative on that date; the 62nd Article, while not confined to wartime, could not be used against a civilian, which Brownell had become as he had left the army; U.S. federal courts had no jurisdiction over crimes committed in the Philippines; and Philippine courts, at the time of the offense, had no jurisdiction over U.S. military servicemen. Davis suggested that the matter be referred to the Attorney General for a second opinion, but he saw no way to prosecute Brownell. *See* DOCUMENTARY HISTORY, *supra* note 72, at 838-39; *see also* NARA, RG 153, J.A.G. Doc. File, #12291, Report on the Death of Father Augustine de la Pena, Nov. 17, 1902 (containing an original copy of Davis' opinion in this case). Davis seems to have been more diligent in finding ways to prosecute Private John B. Colley, who was in a similar situation—but Colley's victim was a fellow American soldier, rather than a Filipino. (Colley had also already been sentenced by a court-martial, but his sentence had not been approved before peace was declared.) Davis considered the same objections as in Brownell's case, but concluded that the Philippine courts should move forward, and the U.S. Supreme Court could resolve the legal issues. The Philippine courts eventually held that retrying Colley would constitute double jeopardy. *See* NARA, RG 153, J.A.G. Doc. File, #13653, memoranda and copies of court documents relating to the case of John B. Colley, Dec. 16, 1902-Dec. 12, 1903.

Smith, returning to a calculus of individual culpability. As MacArthur, Bell, and even Smith himself had shown through their orders, the approved procedure was to reinterpret the laws of war and find license within them, not to throw them overboard.

PART III

A. Conclusions

After Roosevelt's July 4, 1902 proclamation that the insurgency had been defeated, the laws of war generally ceased to operate in the Philippine Islands. Roosevelt pardoned violators of both the criminal law and the laws of war, with the exception of those who had committed murder, rape, and other severe crimes.²⁸⁷ The writ of habeas corpus—which the military had previously insisted should not apply, for fear it would be impossible to afford hearings to everyone they detained²⁸⁸—was reinstated, although it could be suspended in particular areas when resistance appeared again.²⁸⁹ In such instances, the military again applied the laws of war—and, perhaps having learned from the events of 1901-1902, Major General George Davis (not the same officer as the Judge Advocate General) ordered that in these operations, there would be “no water-curing or severity that is not plainly authorized without strained interpretation [of the] laws of war.”²⁹⁰

Thus, the laws of war were important to American commanders from the beginning of the Philippine-American War through to the end, serving to license and, on rarer occasions, to constrain

²⁸⁷ See Charles E. Magoon, *The Exercise of the Pardoning Power in the Philippines*, 12 YALE L. J. 405 (1903).

²⁸⁸ See NARA, RG 153, J.A.G. Doc. File, #12170, J.A.G. Davis to the Secretary of War, March 6, 1902.

²⁸⁹ See 2 CORRESPONDENCE, *supra* note 52, at 1295-96; NARA, RG 94, A.G.O. Doc. File, #338335, Major General George Davis to Brigadier General Lee, March 27, 1903.

²⁹⁰ NARA, RG 94, A.G.O. Doc. File, #338335, Davis to Lee, March 27, 1903.

American behavior. But this account of the law's adaptation and contestation raises a fundamental question: why did the Americans choose to apply the laws of war in the first place? The answer seems a matter of path dependency: the conflict began, on February 4, 1899, as a conventional war between uniformed, organized units fighting with rifles and artillery on the open field, so American commanders do not seem to have questioned that the law *should* apply in theory, even though abuses were tolerated in fact. If the war had begun with guerrilla action, the Americans might have seen the legal situation differently.

As the war continued and the tactics changed, a number of officers argued that the law was a contract, which the insurgents had abrogated through their conduct, or to which Filipinos by their very nature could not be a party, and that therefore the United States need not obey the contract either, but these were repeatedly and firmly rejected. Instead, the Americans reinterpreted the law. Race did, as Paul Kramer has argued, “play[] a key role in bounding and unbounding the means of colonial violence,”²⁹¹ but it did so by *informing* legal interpretation, not by negating it. The “fact” that Filipinos were indistinguishable and uniformly treacherous did not officially justify disregarding the law, but it did mean that culpability could be imputed from individual Filipinos onto their entire community.

But why did the Americans work so hard to retain a system which, on paper at least, constrained the military? The answer seems to be that the law was useful, in three ways. First, as MacArthur's, Bell's, and Smith's reinterpretations show, G.O. 100 contained provisions which could be read to authorize precisely the tactics they wished to use. When combined with the institution of the military commission, the law gave the army a weapon against those whose tactics it opposed, and later,

²⁹¹ KRAMER, *supra* note 3, at 89.

against whole communities which harbored hostile sentiments. The law provided those liberties which the army felt it needed.

Secondly, and more broadly, the army was seemingly willing to give up a small degree of liberty for the sake of *having* rules—in other words, the laws of war may have been useful simply *because* they were rules. Even those officers who wanted to discard G.O. 100 sought other guiding principles, as when Young and Wheaton suggested an adoption of the rules which, they believed, European states used against “Asiatic” enemies. As Richard Schragger has recently argued in defending military lawyers, “[l]aw makes just wars possible by creating a well-defined legal space,” allowing the military “to engage in forceful, violent acts with relatively little hesitation or moral qualms.”²⁹² Though never directly stated during the Philippine-American War, this principle seems to have been one motivation for the army to uphold the law’s applicability.

Finally, the law was useful to the army not only because it provided them with *a* set of rules, but because these *particular* rules was symbolically important. Adherence to the laws of war legitimated and justified American conduct and perhaps even the war itself, because those laws were a product of international law and, American officers believed, of the civilized states of Europe and North America.²⁹³ Thus MacArthur saw his proclamation as proving American civilization even as it educated the Filipinos, and Groesbeck took the same view of military commissions. The symbolic importance of the laws of war allowed the Americans to employ extreme violence not despite of but *because* of their civilizational superiority. So Bell saw no contradiction in asserting that “[n]o civilized

²⁹² Richard Schragger, *Cooler Heads: The Difference Between the President’s Lawyers and the Military’s*, SLATE.COM (Sept. 20, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/09/cooler_heads.2.html; *see also* Dunlap, *supra* note 4, at 150 (quoting Schragger).

²⁹³ Kramer has argued that, in the early stage of the conflict, “each side attempted, in its combat, to persuade the other side of its ‘civilization.’” KRAMER, *supra* note 3, at 112. In his narrative, however, this attempt broke down as the Americans embraced the idea of a race war.

war, however civilized, can be carried on on a humanitarian basis[.]”²⁹⁴ and Dean Worcester, a member of the Philippine Commission, could note on one occasion that “[s]trict enforcement of the rules of civilized warfare against [the insurgents] was threatened, but not actually resorted to.”²⁹⁵ Because anything done within the law was civilized, reinterpretations of the law allowed the Americans to assert their superiority even as they widened the boundaries of violence and responsibility.

In conclusion, then, the U.S. Army embraced the law because it seemed naturally applicable to conventional warfare, and continued to insist on the law’s applicability because it provided a set of rules which served operational necessities and fit racial assumptions while also legitimating the U.S. war effort and its methods. The ensuing questions about necessity and cruelty, over the dichotomy between individual guilt and enemy status, and the contested nature of law itself, all resonate today. It is difficult for history to inform these debates if law is seen as a static set of constraints, cast off when they became inconvenient, or as a straightforward code which could be unproblematically followed or ignored.²⁹⁶ Attempts to draw lessons from the Philippine-American War must begin with an understanding that the law remained relevant, even as it was interpreted and contested by all parties. The flexibility of the laws of war, then as now, was militarily useful, but could also, at times, be frightening.

²⁹⁴ STOREY & CODMAN, *supra* note 44, at 101 (quoting Bell’s Dec. 24, 1901 orders).

²⁹⁵ WORCESTER, *supra* note 19, at 222.

²⁹⁶ If law itself did not matter in the Philippine-American War, as many historians imply, then it was simply a screen for politics. This, perhaps ironically (given the probable political views of those now most critical of the U.S. involvement in the Philippines), parallels Glenn Sulmasy’s and John Yoo’s recent argument that international humanitarian law is simply a political program which, when enforced by military lawyers, unconstitutionally inhibits executive authority. See Glenn Sulmasy and John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2006-2007).