Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903

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Writing for his fellow military officers in early 1903, United States Army Major C.J. Crane reflected on the recent Philippine–American War. The bloody struggle to suppress an insurgency in the Philippines after the United States had annexed them from Spain in 1899 had officially concluded the previous July. The war had been accompanied by fierce racist sentiments among Americans, and in keeping with these, Crane described his foes as "the most treacherous people in the world."[1] But Crane's discussion drew as much on concepts of law as it did on race. The average American officer, Crane argued, had "remembered all the time that he was struggling with an enemy who was not entitled to the privileges usually granted prisoners of war," and could be summarily executed, without benefit of "court-martial or other regular tribunal." If anything, the Americans had been too generous. "Many [American] participants in the struggle," he maintained, "have failed to fully understand that we were practically fighting an Asiatic nation in arms and almost every man a

1. C.J. Crane, "Paragraphs 93, 97, and 88, of General Orders 100," *Journal of the Military Service Institution* 32 (1903): 256.

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soldier in disguise and a violator" of the laws of war.[2] But what did those laws mean to the United States during the conflict, and what does this indicate about the broader history of international law's relationship to empire?

The Philippine–American War, and the preceding Spanish–American War, arguably marked the United States' entry into the world of imperialism at its height, as Western states conquered numerous African and Asian populations. Such conflicts were inflected, and often justified, by the empires' claims to racial and civilizational superiority.[3] This was not only a matter of rhetoric or belief, but also of law: colonizing powers argued that the polities they sought to conquer were not entitled to participate in the legal system, as it took shape through custom and treaties. International lawyers, as they emerged as a recognizable group of professionals and intellectuals during the second half of the nineteenth century, perceived a fundamental division between the "civilized" states of the West, and others that were inferior.[4] This distinction, scholars have argued, was particularly salient during imperial wars. "One of the disturbing implications of being written off as uncivilized," Mark Mazower notes, "was that if Africans or Asians sought to resist European incursions they could be treated as if they lay outside the law." Law, according to this view, simply served to mask brutality.[5] Frédéric Mégret goes further, arguing that exclusion was not incidental but rather fundamental to the project: "the laws of war, from their inception, were subtly designed to exclude non-European peoples from their protection."[6]

2. Ibid., 256.

3. See Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: University of North Carolina Press, 2006); see also Louise K. Barnett, *Atrocity and American Military Justice in Southeast Asia: Trial by Army* (London: Routledge, 2010). By "Western," I mean the Atlantic imperial powers of Northern and Western Europe, and the United States.

4. See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University, 2005); Gerrit W. Gong, *The Standard of "Civilization" in International Society* (New York: Oxford University Press, 1984).

5. Mark Mazower, *Governing the World: The History of an Idea* (New York: Penguin, 2012), 77–78. See also Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca: Cornell University Press, 2011); and Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 98–178. However, Isabel Hull points to countervailing tendencies among legal scholars: Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005); and Isabel V. Hull, "Prisoners in Colonial Warfare: The Imperial German Example," in *Prisoners in War*, ed. Sibylle Scheipers (Oxford: Oxford University Press, 2010), 158.

6. Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2009), 268. Mégret describes ideas of non-

There has been little systematic study of the laws of war during the Philippine–American War, even as American historians have recently paid closer attention to the broader legal history of the Spanish–American War and the territories that the United States conquered in the conflict.[7] Those who have written about other aspects of the conflict often seem to imply that, as in European imperial conflicts, the United States denied the law of war's applicability, in whole or in part, because of the Filipinos' perceived racial and civilizational inferiority.[8] This is often tied to discussions of the extreme violence and atrocities, including against noncombatants, unleashed by the United States military. In surveying the laws of war throughout United States history, John Witt has recently suggested that most United States officers saw the laws of war as "adaptable to the irregular warfare of the Philippines," but that the law nonetheless "seemed to have lost its way," especially through torture.[9]

Western inclusion as essentially marginal and theoretical (275–78). A similar approach—suggesting that "there is no lawlessness" in "liberal counterinsurgencies" because law creates its own exceptions and exclusions—is found in Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford, CA: Stanford University Press, 2013), 100.

7. See Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford: Oxford University Press, 2009); Alfred W. McCoy, *Policing America's Empire: The United States, the Philippines, and the Rise of the Surveillance State* (Madison, WI: University of Wisconsin Press, 2009); Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Lawrence, KS: University Press of Kansas, 2006); Christina Duffy Burnett and Burke Marshall, eds., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham, NC: Duke University Press, 2001); Winfred Lee Thompson, *The Introduction of American Law in the Philippines and Puerto Rico, 1898–1905* (Fayetteville, AR: University of Arkansas Press, 1989); Sam Erman, "Citizens of Empire: Puerto Rico, Status, and Constitutional Change," *California Law Review* 102 (2014): 1181–241; Sam Erman, "Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898–1905," *Journal of American Ethnic History* 27 (2008): 5–33; Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81 (2002–2003): 1–284; and Clara Altman, "Courtroom Colonialism: Philippine Law and U.S. Rule, 1898–1935," PhD dissertation, Brandeis University, 2014.

8. See, for example, Barnett, *Atrocity*, 56, 66, 112; Stephanie Carvin, *Prisoners of America's Wars: From the Early Republic to Guantanamo* (London: Hurst, 2010), 77–82; Robert C. Doyle, *The Enemy in Our Hands: America's Treatment of Enemy Prisoners of War, from the Revolution to the War on Terror* (Lexington, KY: University Press of Kentucky, 2010), 153, 157; Paul J. Springer, *America's Captives: Treatment of POWs from the Revolutionary War to the War on Terror* (Lawrence, KS: University Press of Kansas, 2010), 132; Kramer, *Blood of Government*, 136; and Stuart Creighton Miller, *"Benevolent Assimilation": The American Conquest of the Philippines, 1899–1903* (New Haven: Yale University Press, 1982), 95, 187.

9. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 358, 361. Witt notes officers' differing opinions on the law's applicability.

A few other historians, by contrast, have seen the law, and United States forces' references to it, as a constraint on extreme violence.[10]

This article turns away from questions of whether the law applied, or was followed, to explore conflicting and changing ideas of *how* it was interpreted and deployed. I draw on United States archival sources, particularly those of the judge advocate general (JAG), to trace fraught debates among officers over what the law meant. Whereas the issues of torture and the "water cure," and to a lesser extent courts-martial, have received the most attention in scholarship, this story emphasizes instead interpretations during active combat operations, which established the United States Army's official legal theory. In doing so, this article focuses less on high-ranking United States politicians—whose arguments were primarily rhetorical and political—than on mid-ranking military officers, in the JAG's office or in operational commands, who engaged with the law. Many of these officers, even those without formally legal roles, were trained as lawyers. (This was common throughout United States history.)[11] The views of Filipino officers, insurgents, and civilians are certainly well worth examination, but they are not the focus of this article. This is not, therefore, a comprehensive examination of the role that law played in the conflict. It is an examination of the colonizers' views, not those of the colonized.

The article challenges both the view that the United States used racial or civilizational arguments to avoid the law, and the view that the United States obeyed the law or easily adapted it. Instead, as Crane's article implies, United States officers reinterpreted the law so that it could simultaneously demonstrate their moral and cultural superiority, while also authorizing widespread summary violence. But this was a contentious process. It will be seen that no United States officer believed that law was *irrelevant* to the conflict. Some argued that the law of war did not apply, either because Filipinos were inherently uncivilized and racially inferior, or because of insurgents' behavior; or because they had not signed the proper treaties. In the face of these challenges, and even of frequent violations of the law, the United States government consistently reiterated that

10. See, for example, Brian McAllister Linn, *The Philippine War, 1899–1902* (Lawrence, KS: University Press of Kansas, 2000); Brian McAllister Linn, *The U.S. Army and Counterinsurgency in the Philippine War, 1898–1902* (Chapel Hill, NC: University of North Carolina Press, 1989); John Morgan Gates, *Schoolbooks and Krags: The United States Army in the Philippines, 1898–1902* (Westport, CT: Greenwood, 1973); and Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (New York: Basic Books, 2002), 123–124, 127.

11. Bernard J. Hibbitts, "Martial Lawyers: Lawyering and War-Waging in American History," *Seattle Journal for Social Justice* 13 (2015): 406; and John Fabian Witt, "Law and War in American History," *American Historical Review* 115 (2010): 779.

the law *did* apply. But the United States Army nonetheless found room to license more extreme violence in ways that fit both perceived operational needs and racial assumptions. By doing so, officers used the law to understand guerrilla warfare, to advance their operational goals, to defend their actions, and to vindicate their claims to be "civilizing" the Philippines. Even when the army applied considerable brutality, officers produced specific legal justifications for their actions. The purpose of studying those justifications is not to claim that they were correct or plausible. The point is that those justifications did exist, and that their existence forces reconsideration of the relationship among law, war, and empire.

This study, then, provides a new understanding of the law's role in the Philippine–American War. In a global context, by refocusing attention from questions of inclusion and exclusion to the work of legal interpretation itself, it suggests how integral international legal interpretation was to imperial wars. The racism and violence that characterized the age of high imperialism could be articulated not only by avoiding the law, but by interpreting it.

The War

The Philippine–American War followed immediately after the 1898 Spanish–American War. Filipino insurgents led by Emilio Aguinaldo, who had fought for independence against the Spanish, realized by early 1899 that the Americans, who had conquered Manila during the war, did not intend to withdraw. Indeed, the United States signed a treaty with Spain to annex the entirety of the Philippines, not only for imperial advantage, but also in the name of "civilizing" the islands.[12] Fighting broke out on the night of February 4, 1899, and the better-trained and better-organized American forces soon gained the upper hand. 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."[13]

After such victories, the United States forces under Major General Elwin Otis, which had initially occupied only Manila, began to take control of the rest of the country. Recognizing that his Western-style army was at a

12. Kramer, *Blood of Government*, 109–10. This narrative draws generally on Kramer, as well as Linn, *Philippine War*; Miller, *Benevolent Assimilation*.

13. Linn, *Philippine War*, 55.

disadvantage, Aguinaldo began a campaign of guerrilla warfare by the end of 1899.[14] The Americans at first claimed an official policy of "benevolent assimilation," hoping that they could win the sympathies of most Filipinos. However, President William McKinley replaced Otis with Major General Arthur MacArthur in May 1900, and after McKinley was re-elected in November that year—crushing Filipino hopes for a negotiated solution—MacArthur adopted harsher tactics.

Even before this turn, the Americans increasingly interpreted the conflict as what Paul Kramer calls a "race war" again a civilizationally and racially inferior foe.[15] Racism, and brutality, were rampant; an American sergeant, for example, recorded his desire to "blow every nigger [here referring to Filipinos] into a nigger heaven … When we find one that is not dead, we have bayonets."[16] In Washington, too, Secretary of War Elihu Root denigrated the insurgent forces as "an army of Tagalogs, a tribe inhabiting the central part of Luzon, under the leadership of Aguinaldo, a Chinese half-breed."[17]

Even as Root attacked Aguinaldo and his followers in racist terms, his subordinates made a legal case against the insurgents, based on the United States–Spanish treaty that transferred the Philippines to American control. Charles Magoon, Legal Officer of the War Department's Division of Insular Affairs, stated the official United States theory of the war:

> 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.[18]

According to this view, the Philippines, were not an independent state, but the conflict was a real war. This followed the example of the American Civil War, when the Union had denied the Confederacy's legal

14. Ibid., 58.

15. See Kramer, *Blood of Government*.

16. Julian Codman and Moorfield Storey, *Secretary Root's Record: "Marked Severities" in Philippine Warfare* (Boston: G.H. Ellis, 1902), 10. See also Kramer, *Blood of Government*, 102.

17. Codman and Storey, *Root's Record*, 6.

18. Charles E. Magoon, *Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States* (Buffalo, NY: Hein, 1972), 36.

independence, while still treating its forces as legitimate belligerents.[19] Drawing partly on Civil War precedents, the United States Supreme Court held that the Philippines were legally American territory.[20] Although that court never directly ruled on whether the conflict was a war, the United States Court of Claims twice held that it was.[21] The United States Army JAG's office, too, issued opinions finding that it was wartime, for the purposes of soldiers' rights to wear special decorations[22] and to collect combat pay,[23] division and brigade commanders' capacity to convene courts-martial,[24] department commanders' authority to dismiss officers,[25] the applicability of harsher penalties for deserters,[26] and commanders' ability to deport American journalists from the Philippines.[27]

Out in the field, Otis regarded the conflict as a war early on.[28] He clearly differentiated between political and military legitimacy, refusing in October 1899 to receive commissioners sent in the name of the "honorable president Aguinaldo," and insisting that he would only speak to representatives of "General Aguinaldo, general in chief of insurgent

19. See *The Amy Warwick (Prize Cases)*, 67 U.S. 635, 673 (1862) ("the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights"); Witt, *Lincoln's Code*, 150; Miller, *Benevolent Assimilation*, 87–88; Kramer, *Blood of Government*, 88.

20. See *Fourteen Diamond Rings*, 183 U.S. 176, 181 (1901). See also Sparrow, *Insular Cases*, 151–55; Magoon, *Law of Civil Government*, 10–255; Henry M. Hoyt, "The Final Phase of the Insular Tariff Controversy," *Yale Law Journal* 14 (1904–1905): 333–42.

21. See *Thomas v. U.S.*, 39 Ct.Cl. 1 (1903); and *Leigh v. U.S.,* 43 Ct.Cl. 374 (1908) (both awarding additional pay to naval officers for wartime service).

22. National Archives and Records Administration (hereafter NARA), Record Group (hereafter RG) 153, Judge Advocate General (JAG) Doc. File, #10252, Opinion of JAG Lieber, April 17, 1901.

23. NARA, RG 153, JAG Doc. File, #15754, Opinion of JAG George B. Davis, December 26, 1903. Miller contends that the government argued that there was *not* a war, inorder to avoid paying combat pay: Miller, *Benevolent Assimilation*,165–66.

24. NARA, RG 153, JAG Doc. File, #8195, Opinion of JAG Guido Norman Lieber, May 9, 1900; NARA, RG 153, JAG Doc. File, #10881, Opinion of JAG Davis, December 9, 1902.

25. United States Army JAG's Department, *A Digest of Opinions of the Judge Advocates General of the Army, 1912* (Washington, DC: Government Printing Office, 1912), 175.

26. NARA, RG 153, JAG Doc. File, #19734, Opinion of JAG Davis, May 15, 1906; NARA, RG 153, JAG Doc. File, #16859, Opinion of JAG Davis, September 7, 1904.

27. NARA, RG 153, JAG Doc. File, #12184, various opinions of JAG Davis, 1901–3; Miller, *Benevolent Assimilation*, 164–65; JAG's Department, *Digest*, 1066; and United States Army Adjutant General's Office (hereafter A.G.O.), *Correspondence Relating to the War with Spain, 1898–1902* (Washington, DC: Government Printing Office, 1902), II:152. For the historically fraught question of "when is war," see Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford: Oxford University Press, 2012).

28. See A.G.O., *Correspondence*, 893–1159; Kramer, *Blood of Government*, 112.

forces."[29] Otis (who was a graduate of Harvard Law School and closely advised by a former law professor, Lieutenant Colonel Enoch Crowder) paid careful attention to the laws of war, issuing orders as early as 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."[30] "Any departures from the well-established amenities of the battlefield or the laws of war," he continued, "must and will be punished."[31] Such departures occurred fairly frequently, but even as its brutality intensified, the United States Army also intensified its engagement with the laws of war.

The Law

The "laws of war," for the United States Army, referred to customary international law on conduct within war (*jus in bello*) rather than to rules for going to war (or *jus ad bellum*). In particular, officers looked to General Order (G.O.) 100, 1863 Series, a codification written by the German-American professor Francis Lieber for the Union Army during the Civil War.[32] It summarized Lieber's view of the rules that had evolved between Western states in the preceding centuries, including regulations for sieges, truces, and the treatment of enemy prisoners and property. By the time of the Philippine–American War, the code was taught at West Point, and was familiar to most officers.[33] In the Philippines, G.O. 100 proved useful as a rhetorical weapon against the insurgents, and a guide to more tangible measures against both Filipino property and captured Filipinos.

First, American commanders insisted that the laws of war imposed constraints on the Filipinos' means of fighting, and even their authority to fight at all. In November 1899, for example, Adjutant General Henry Corbin in Washington 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."[34] Corbin implied that the Filipinos were bound by the customary international law of war, as codified in G.O. 100, even though the

29. A.G.O., *Correspondence*, 1088.

30. Codman and Storey, *Root's Record*, 38; and Gates, *Schoolbooks and Krags*, 65.

31. Codman and Storey, *Root's Record*, 38; see also Linn, *Philippine War*, 211.

32. See Witt, *Lincoln's Code*. The code itself can be found at 375–94, or at "General Orders No. 100: The Lieber Code," *The Avalon Project*, http://avalon.law.yale.edu/19th_century/lieber.asp (accessed April 17, 2018).

33. Witt, *Lincoln's Code,* 2–3, 347–53.

34. A.G.O., *Correspondence*, 1098.

Americans did not recognize Philippine sovereignty. The laws of war, according to this view, amounted to an off-the-shelf set of rules that the insurgents, by engaging in warfare, had tacitly accepted.

American commanders also deployed the laws of war in demanding that the insurgents capitulate. Once victory was impossible, the Americans reasoned, the law made it criminal to continue fighting. This theory was useful in domestic public relations, as evidenced when 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.[35] But it was useful in the field, as well. 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 contended that "the rules of modern warfare forbid a continuance of hostilities after the hope of success has vanished, and . . . to infringe this rule by adopting tactics of guerrilla warfare is simply to begome [sic] guilty of murder for the death of every man who falls."[36]

Nearly a year later, Brigadier General Robert P. Hughes used similar reasoning to justify recommending that a captured insurgent leader, Annanias Diocno, be exiled to Guam. Hughes accused Diocno of carrying on deceptive correspondence with the Americans (and also 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."[37] Thus, he had violated the laws of war. Here, again, the Americans conveniently interpreted the laws of war to mean that their victories transformed legitimate resistance into illegal behavior.[38]

The law regulating the destruction of enemy property also provided a framework within which the United States Army could license and justify its expanding campaign. As the insurgents adopted guerrilla warfare, the army sought to punish villagers who harbored or supported them. JAG opinions issued in 1903 and 1904 with reference to the Philippines

35. Miller, *Benevolent Assimilation*, 213–14.

36. NARA, RG 94, A.G.O. Doc. File, #344307, MacArthur to Adjutant General Henry Corbin, August 25, 1900. For Alejandrino, see "Jose Alejandrino," *Senate of the Philippines*, https://www.senate.gov.ph/senators/former_senators/jose_alejandrino.htm (accessed April 26, 2017).

37. 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.

38. Apolinario Mabini, an adviser to Aguinaldo, protested this: Witt, *Lincoln's Code*, 354–55.

confirmed the legality of burning houses belonging to those who were "holding communications with and forwarding supplies to the insurgents,"[39] and later authors justified this as a "legitimate method. . .of reprisal."[40] Likewise, the JAG held that Section 15 of G.O. 100[41] 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."[42] The United States could also seize insurgent property; Magoon 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."[43]

These legal opinions held that the law not only allowed these actions, but shielded the government from any potential lawsuits. If the market house fire spread to other houses, there could be no liability "without negligence on the part of anyone."[44] Another opinion, on the mistaken killing of livestock, made clear that even if Americans *were* negligent, the United States would still be immune, because the doctrine of sovereign immunity meant that "the United States is not liable for the torts of its officers or agents."[45] The same reasoning applied to property of all types, whether destroyed or seized.[46] Even when United States forces appropriated property for their own use—a situation that could ordinarily create an implied contract to pay, enforceable under the 1887 Tucker Act[47]—the JAG held that the owner could not sue if he or she were arrested for aiding the insurgents.[48] Years after the war ended, Judge Fenton Booth of the United States Court of Claims used this same reasoning to dismiss José López y Castelo's claim for compensation after American forces had used his boat in 1901.[49] Such legal impunity may have emboldened junior officers, who

39. JAG's Department, *Digest*, 1063.

40. James A. LeRoy, *The Americans in the Philippines* (New York: Houghton Mifflin, 1914), 224.

41. "Military necessity . . . allows of all destruction of property," G.O. 100, Article 15.

42. JAG's Department, *Digest*, 251, 1063.

43. Magoon, *Law of Civil Government*, 262–63.

44. JAG's Department, *Digest*, 1063.

45. Ibid., 250. After the United States entered the First World War, the 1918 Indemnity Act (later updated as the Foreign Claims Act) established a procedure for paying for damages caused by American forces overseas. See John Fabian Witt, "Form and Substance in the Law of Counterinsurgency Damages," *Loyola of Los Angeles Law Review* 41 (2007–2008): 1455–81.

46. JAG's Department, *Digest*; and Magoon, *Law of Civil Government*, 264–70.

47. Tucker Act, 24 Stat. 505 (1887).

48. JAG's Department, *Digest*, 252–53.

49. *Castelo v. U.S.,* 51 Ct.Cl. 221 (1916). Brigadier General J. Franklin Bell had seized the boat during his December 1901 campaign in Batangas (see the section "Communal Responsibility" in this article), in order to put pressure on the Filipino leader

sometimes resorted to the burning of entire villages, without legal authority, but with a blind eye from their commanders.[50]

The laws of war governed the treatment not only of property but also of people. In customary international law, soldiers were (and are) entitled to "belligerent privilege": immunity to punishment by the enemy for the violent actions they took as part of their wartime duties. Were this not the case, soldiers in combat would constantly worry that, if captured, they could be tried for murder or assault.[51] Instead, international custom (and G.O. 100) provided captured soldiers with immunity to prosecution, requiring them to be held as prisoners of war. In keeping with Otis's immediate application of the laws of war, American commanders, almost by default, assumed that captured insurgents were entitled to belligerent privilege: that the proper legal category for them was "prisoners of war," not "criminals." Therefore, 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."[52] By March 10, 1900, the Americans held 4,149 prisoners.[53]

As a legal matter, then, most captured insurgents were prisoners of war by default.[54] From a policy perspective, however, the Americans' initial goal of "conciliatory action" meant that many of those captured were "disarmed and immediately released," often after signing a parole agreement or taking an oath of allegiance to the United States.[55]

Those who turned themselves in, or swore an oath, were often promised immunity to criminal charges.[56] Since at least the Civil War, the United States government had maintained that in cases of rebellion it could simultaneously exercise the rights of a belligerent engaged in a war, and those of

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Sixto López—possibly a relative of owner José López y Castelo—whom Bell believed to be the boat's beneficial owner. See NARA, RG 94, A.G.O. Doc. File, #338335, Bell, Telegram Regarding Movement Contemplated in Batangas, December 26, 1901.

50. Miller, *Benevolent Assimilation*, 69; and LeRoy, *Americans in the Philippines*, 223–24.

51. See Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Cambridge, MA: Harvard University Press, 2010), 59–60, 71, 82–83; and Witt, *Lincoln's Code*, 128.

52. A.G.O, *Correspondence*, 921. The remainder were likely released.

53. Springer, *America's Captives*, 129.

54. As with the broader United States theory of the war, this mirrored the approach taken in the Civil War; see Witt, *Lincoln's Code*, 142–63.

55. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events, Division of the Philippines for May 6–June 14, 1900, Brigadier General Loyd Wheaton to Adjutant General, Division of the Philippines, May 22, 1900; *Annual Report of Major General Arthur MacArthur, U.S. Army, Commanding, Division of the Philippines* (Washington, DC: Government Printing Office, 1901), I:90.

56. Springer, *America's Captives*, 129–30; Miller, *Benevolent Assimilation*, 161–62; and A.G.O., *Correspondence*, 979, 1079, 1175–77, 1181, 1203–4.

a sovereign faced with treason. Combatants were therefore, in theory, vulnerable not only to being killed or captured as prisoners of war, but also to trial for treason, although in practice, the United States government rarely conducted such trials in either the Philippines or the Confederacy.[57] The immunity offered those who cooperated with the Americans thus would likely have covered treason. However, it explicitly did not extend to crimes against the law of *war*, as opposed to crimes against ordinary criminal law. This became critical to the Americans' evolving, and contested, legal strategy.

Did the Law Apply?

The roots of this evolution lay in Aguinaldo's shift to guerrilla warfare in the second year of the war. The insurgents initially hoped that if they fought "in conventional formations, demonstrated discipline, and treated prisoners humanely," they might gain international recognition as a sovereign state with rights under international law, but United States victories doomed this strategy.[58] By June 25, 1900, the civilian Philippine Commission could report to Secretary of War Root that "[n]o organized army of insurgents exists anywhere."[59] Indeed, by November 1900, the insurgents disbanded their field army entirely, instead engaging in hit-and-run raids against American forces while using covert pressure and threats of assassination to ensure support from local villages.[60] As noted, the Americans adopted increasingly harsh military tactics, and many officers felt that these should go hand in hand with a legal reinterpretation: they believed that Filipino insurgents were not entitled to belligerent privilege.

There were two versions of this argument: first, there was a racist argument, holding that the Filipinos were inherently inferior (because of either race or level of civilization) and therefore fell outside the scope of international law entirely. This was joined by a contractual argument, claiming that the law *was* presumptively applicable, but that the insurgents had violated it themselves. Therefore Filipinos, as a group, had forfeited the law's protections. As will be discussed, the United States Army repeatedly rejected both views, preferring a third option: articulating its new, harsher tactics *through* the laws of war.

Even to enter into this debate, however, required answering a previous question: was the guerrilla conflict a military matter in the first place?

57. See Witt, *Lincoln's Code*.
58. Kramer, *Blood of Government*, 90, 94, 100.
59. A.G.O., *Correspondence*, 1184.
60. *Annual Report*, 88.

Otis, who initially believed it was, had changed his mind by late 1899. As the American forces extended their control over the Philippines, they increasingly contended with "bandits" whom they believed had few if any political motivations.[61] At the same time, more and more insurgents shed their uniforms and became guerrillas. American commanders had difficulty differentiating bandits from guerrillas, and indeed the same people could be called by both terms at different times.[62]

For Otis, this was a sign of victory. In the area around Subic Bay, he reported in December 1899, "organized rebellion no longer exists, and troops [are] active pursuing robber bands."[63] Otis allegedly censored reporters who tried to report the existence of more politically oriented guerrilla groups,[64] and he later testified before the Senate that after Aguinaldo's army disbanded, there was no real "war," only law-enforcement.[65] In short, in Otis's view, what remained "was mere outlawry … which the army, acting as a constabulary force, would soon end, with the coöperatıon of the peaceful inhabitants when they saw how their interests lay."[66] This would have suggested that criminal law, rather than the laws of war, was the proper legal framework for the remainder of the conflict.

The rest of the United States government, however, disagreed. Otis was dismissed in May 1900, partly because he did not take the opposition seriously enough.[67] Warfare, therefore, remained the legal framework, but many officers believed that even if the insurgents were belligerents, they should not be entitled to the protections of the laws of war. It was here that the army entered an internal debate, which began with junior officers but soon reached all the way to MacArthur.

"War Rebels"

The debate proceeded from the wording of G.O. 100, which allowed the summary punishment and even execution of "highway robbers," "war

61. See A.G.O., *Correspondence*, 999, 1001, 1035–60; *Annual Report*, 103; and Kramer, *Blood of Government*, 130; see also Boot, *Savage Wars*, 114.

62. Linn, *Philippine War*, 193–94; and Dean C. Worcester, *The Philippines Past and Present* (New York: MacMillan, 1921), 210.

63. A.G.O., *Correspondence Relating to the War with Spain, 1898–1902* (Washington, DC: Government Printing Office, 1902), 1120.

64. LeRoy, *Americans in the Philippines*, 196–97 n. 1.

65. Miller, *Benevolent Assimilation*, 216.

66. LeRoy, *Americans in the Philippines*, 195.

67. Linn, *Counterinsurgency*, 21–22.

rebels," and guerrillas.[68] Such combatants, although belligerents, were not *privileged* belligerents. They had committed offenses not just against the criminal law, but also against the law of war. In the Mexican–American and Civil Wars, offenders of this type had been tried and punished by military commissions, constituted in the field.[69] Many officers felt that these provisions were applicable to the average guerrilla, who, one officer claimed, "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."[70]

In May 1900, the adjutant general of the Department of Southern Luzon reminded its constituent units that G.O. 100 provided "ample and lawful methods for the treatment of prisoners, spies, and other persons not entitled to the rights of recognized belligerents."[71] 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."[72] By the end of the summer, Brigadier General Samuel B.M. Young, one of Wheaton's subordinates, 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."[73]

It remained unclear, however, precisely *who* could be considered a war rebel, and the policy of "benevolent assimilation" meant that the category was initially interpreted very narrowly.[74] This may have been, in part, a

68. G.O. 100, Article 82.

69. These commissions had roots in the Mexican–American War and Civil War. See Erika Myers, "Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War," *American Journal of Criminal Law* 35 (2008): 201–40; and Witt, *Lincoln's Code*, 122–32.

70. Quoted in Boot, *Savage Wars*, 113; see also Kramer, *Blood of Government*, 134; and Gates, *Schoolbooks and Krags*, 191–92.

71. *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* (Washington, DC: Government Printing Office, 1902), 40.

72. Linn, *Counterinsurgency*, 24, 49.

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

74. Linn, *Counterinsurgency*, 22, sees a lack of orders to implement G.O. 100 rather than the lack of a clear legal standard.

result of Otis's view that the guerrillas were a criminal, rather than law-of-war, problem. Even after he relieved Otis in May 1900, MacArthur discouraged 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," MacArthur commuted the sentence to imprisonment. (Wheaton promptly re-tried the man for three more killings, and convicted and hanged him before MacArthur could intervene.)[75]

Military commissions were established, but they heard only seventy-two cases between August 1898 and September 1, 1900, executing seven defendants.[76] (Another set of tribunals, the Provost Courts, could only impose sentences of less than 6 months' imprisonment, later increased to 2 years.)[77] Senior Americans saw this as a "humane policy."[78]

Many of MacArthur's subordinates, however, protested. They felt that G.O. 100's provisions against war rebels could and should be much more widely applied. One officer, for example, 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." Colonel Jacob H. Smith 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."[79]

Captain John H. Parker made a broader argument: writing directly to then-Vice President Theodore 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."[80] This gestured toward a racist argument for the law's inapplicability, but Parker's suggested policy was more individualized: he recommended that Articles 82–85 of G.O. 100 be more strictly applied, and that therefore "murderers, highway robbers, persons destroying property, spies, conspirators, and . . . part-time guerrilla[s]" should be executed.[81]

On August 23, 1900, Captain Robert K. Evans, commander of the 2nd Battalion, 12th Infantry Regiment in San Miguel y Norte, Luzon, made the

75. Linn, *Philippine War*, 211–12.

76. LeRoy, *Americans in the Philippines*, 211 n. 1; *Annual Report*, App. C:1. Twenty more records were still awaiting MacArthur's review on September 1, 1900. For a list of those tried in 1900, and their offenses, see NARA, RG 153, JAG Doc. File, #12291.

77. David Glazier, "Precedents Lost: The Neglected History of the Military Commission," *Virginia Journal of International Law* 46 (2006): 48.

78. *Annual Report*, App. C:2.

79. Linn, *Philippine War*, 212.

80. Gates, *Schoolbooks and Krags*, 190–91.

81. Ibid., 191.

most comprehensive case for a new approach.[82] On August 23, 1900, he explained his views to his commanding officer, Lieutenant Colonel Robert L. Howze. Judicial process, Evans argued, was useless: the insurgents 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." Evans, therefore, embraced the contractual argument for the law's inapplicability: the Filipinos, as a group, had broken the law-of-war contract, relieving the United States of its own responsibilities. Therefore, he suggested that "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.

Howze passed Evans's arguments along to his own commanding officer, S.B.M. Young, who in turn sent his views to Wheaton, the department commander.[83] Young disagreed with Evans, largely on legal grounds. He began by reiterating the United States legal theory of the war, that Aguinaldo's forces were legitimate belligerents. "So long as these people are recognized merely as Insurgents," he reminded Wheaton, "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." He left unspoken the obvious: this would contradict the Americans' declared mission of bringing civilization to the islands.

Thus Young denied Evans' implicitly contractual view of the laws of war; to Young, the laws were incumbent upon the Americans as civilized people, regardless of their opponents' behavior. And working within those laws, it was impossible to "declare a whole community war rebels," as Evans suggested. The status of war rebel, according to Young, was based on "an act." 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. Evans's suggestions were implemented.

82. The following paragraph is based on NARA, RG 94, #338335, Diary of Events for September 22–30, 1900, Evans to Adjutant of United States Forces at Laoag, August 23, 1900. Decades earlier, Evans had penned a similarly "stern vision" of G.O. 100, arguing that it allowed "retaliation against savages" in the Indian wars: Witt, *Lincoln's Code*, 337.

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

A few months later, however, Young, who had grown bitter toward his superiors, changed his view.[84] Now he went even further than Evans, arguing that the law was inapplicable to the conflict, not because of the insurgents' behavior, but because of their putative racial and civilizational inferiority.[85] He reported to Manila on December 28, 1900 that it was more difficult to capture insurgents than American Indians, because 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. Young's superior, Wheaton, passed along the report, and endorsed "the swift methods of destruction followed by other powers in dealing with Asiatics."[86] These comparisons revealed the weight he placed on ideas of Filipino racial inferiority and difference.

When MacArthur's chief of staff, Brigadier General Thomas H. Barry, asked precisely what Young had in mind, the latter replied with a list of recommended measures.[87] 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 noted that European states had retaliated "in kind on their rebellious subjects for every murder or assassination," and punished "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, therefore, "in the end the most humane course."[88] Whereas Evans had seen the laws of war as a contract, abrogated by the insurgents' own behavior, Young implied that the Filipinos, because of their racial and civilizational character, either had never been, or could not ever be, parties to the contract in the first place.

84. Linn, *Counterinsurgency*, 34.

85. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for December 19, 1900–January 12, 1901, Young to Wheaton, December 28, 1900; see also Gates, *Schoolbooks and Krags*, 190.

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

87. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for January 12–30, 1901, Barry to Young, January 4, 1901; Young to Adjutant, Department of Northern Luzon, January 17, 1901.

88. See G.O. 100, Article 29; Gates, *Schoolbooks and Krags*, 283. This view was critical to Lieber's approach: Witt, *Lincoln's Code*.

Wheaton 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."[89] Wheaton, however, seemed to distance himself from Young's suggestion of summary execution and drum-head trials, instead urging the insurgents' "annihilation by every method known to civilized war," including "the execution after due trial and conviction of murderers, assassins and their accomplices." For Wheaton, the law made severe violence not only legally permissible, but symbolically beneficial. It vindicated American claims of superior civilization.

Reinterpreting the Law

MacArthur, who had authority over the matter as overall United States commander, had once sympathized with Young and Evans. In late 1899, when still serving under Otis, MacArthur had proposed a general amnesty, with the promise that those who did not accept it "would be treated when caught as outlaws and murderers." Otis—perhaps drawing on his legal training—vetoed this, fearing "legal difficulties of an 'international character'" and the risk of retaliation.[90] MacArthur, with Taft's concurrence, again suggested such a policy to his new superiors in Washington after he took command.[91] Adjutant-General Corbin, however, advised MacArthur not to mention this step when he did issue an amnesty in June 1900. By the end of August, MacArthur himself felt that with the United States presidential election approaching, it was best simply to let the amnesty expire, with no further threats.[92] He hoped that if McKinley won that election, the insurgents would give up on inducing the United States to withdraw from the Philippines.[93] When the insurgents nonetheless continued to resist after McKinleys' victory in November 1900, MacArthur sought harsher measures

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

90. LeRoy, *Americans in the Philippines*, 200.

91. A.G.O., *Correspondence*, 1175.

92. LeRoy, *Americans in the Philippines*, 201; A.G.O., *Correspondence*, 1175, 1203–4. After capturing Aguinaldo (discussed later in this article) MacArthur, suggested another amnesty on April 1, 1901, to expire June 1, "after which all in arms considered outlaws, criminals, treated accordingly." However, Corbin twice vetoed this suggestion. A.G.O., 1265–68. He may have approved a similar proposal targeted only at the island of Samar in the spring of 1901: A.G.O., 1278–79.

93. Kramer, *Blood of Government*, 136; Linn, *Philippine War*, 213; and A.G.O. *Correspondence*, 1203–4.

to suppress them. Earlier that same autumn, Corbin himself had urged MacArthur that Filipinos who used false claims of allegiance to kill Americans should be tried, "convicted and punished."[94]

MacArthur, however, chose not to reject the laws of war, but to interpret them.[95] The necessary military 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."[96] Therefore, on December 20, 1900, he issued a proclamation for the "precise observance of laws of war."[97] He began by reiterating that the United States recognized the Filipinos as legitimate belligerents, but not as representatives of a sovereign state. Filipino actions had violated the laws of war; therefore, MacArthur intended to "remind all concerned of the existence of these laws."[98] Therefore, in an order that read (in Brian Linn's words) "much like a legal brief,"[99] MacArthur laid out his view of the rules, and their implications.

First, he argued that American occupation invoked martial law, which in turn 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 such crime" and would be unable to escape, except by fleeing United States jurisdiction and never returning to the Philippines.[100]

Next, MacArthur turned to "war traitors" (a term used in G.O. 100), 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."[101] 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.[102] Those who protected the insurgents' supporters "from a sense of timidity or misplaced sympathy for neighbors" might also be

94. A.G.O., *Correspondence*, 1206.

95. LeRoy, *Americans in the Philippines*, 202.

96. *Annual Report*, 91.

97. A.G.O., *Correspondence*, 1237–38. He simultaneously deported thirty-eight Filipino leaders to exile in Guam: Boot, *Savage Wars*, 116.

98. *Annual Report*, 6.

99. Linn, *Philippine War*, 213. The orders are also discussed in Kramer, *Blood of Government*, 136–37; and Gates, *Schoolbooks and Krags*, 191–92.

100. *Annual Report*, 6–7.

101. See G.O. 100, Articles 90–92, 95, 102–4.

102. *Annual Report*, 7.

"classified and tried" as war traitors.[103] MacArthur also threatened publishers in Manila with punishment for sedition, based on martial law.[104]

Finally, and most critically, MacArthur turned to the rules for unprivileged belligerents, referred to in G.O. 100 as war rebels, "partisans," or "armed prowlers."[105] He claimed the United States had previously refrained from fully implementing these rules out of "solicitude,"but no more.[106] "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," he declared (paraphrasing G.O. 100) "divest themselves of the character of soldiers, and if captured are not entitled to the privileges of prisoners of war."[107]

MacArthur closed by situating his order as part of the American mission of "civilizing" the Philippines. The "careful perusal" of the laws of war "by the people, it is hoped, will induce all who are eager for the tranquilization of the Archipelago to combine for mutual protection and united action in behalf of their own interests and the welfare of the country."[108] The law itself, he said, 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.[109] Indeed, just the previous year, the Hague Convention of 1899 had codified a set of rules that largely drew on G.O. 100.[110]

MacArthur's reasoning was consistent with previous United States interpretations, but was clever in its indirect effects. As the United States had long argued, it was engaged in a war to assert its sovereign rights throughout the islands. Until that conflict had concluded, it retained the rights of a military occupier in those areas it had actually conquered. 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

103. Ibid., 7–8.
104. Ibid., 8.
105. See G.O. 100, Articles 81–85.
106. *Annual Report*, 9.
107. Ibid. See G.O. 100, Article 82.
108. *Annual Report*, 9. Six months earlier, Corbin had vetoed MacArthur's suggestion of including such language in his amnesty proposal: A.G.O., *Correspondence*, 1177–79.
109. *Annual Report*, 9.
110. "Convention with Respect to the Laws and Customs of War on Land (Hague, II) (29 July 1899)," *The Avalon Project*, http://avalon.law.yale.edu/19th_century/hague02.asp (accessed April 17, 2018); and Witt, *Lincoln's Code*, 342–52.

the conduct of civilians in those occupied areas. In particular, it justified the punishment of civilians who aided the Philippine army.[111]

As the Americans themselves admitted, there was no regular Philippine army remaining in the field by the end of 1900, but by referring to it, MacArthur perpetuated a useful legal analogy: the image of the Philippines as a captured part of a Southern American state in the Civil War, with a Confederate army still lurking down the rail line. Indeed, G. O. 100 itself had originated during the Civil War, as the Union had shifted to a policy of intimidating Southern civilians into removing their support for the Confederacy. In the words of G.O. 100, the commander should "throw the burden of the war" on disloyal citizens, because "[t]he more vigorously wars are pursued," the code declared, "the better it is for humanity."[112]

MacArthur now pursued the same strategy, seeking to make Filipino civilians fear the United States as much as they feared the insurgents. His Provost Marshal General, J. Franklin Bell, who had jurisdiction over Manila, thus sought "to create a reign of fear and anxiety among the disaffected which will become unbearable."[113] 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."[114]

MacArthur thus hoped to *influence* civilians, but the punishment measures he laid out in his proclamation were still *targeted* only at those (classified as) fighting or directly helping combatants.[115] Ignoring Evans's suggestion that all of the male residents of certain areas be declared war rebels, MacArthur's proclamation applied that status only to those who actually undertook the actions defined in G.O. 100. Likewise, only

111. As Helen Kinsella has argued, the term "civilian" has had shifting and "indeterminate" meanings throughout history. I use it here and later with the meaning of "noncombatant," but as will be discussed, the boundaries of who was recognized as a civilian, and what that meant, changed with time and circumstance. See Kinsella, *Image before the Weapon*.

112. G.O. 100, Article 29, 156. See also Witt, *Lincoln's Code*, 3–4; and Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861–1865* (Cambridge: Cambridge University Press, 1995), 151.

113. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Headquarters, Division of the Philippines for December 19, 1900–January 12, 1901, Bell to Adjutant General, Division of the Philippines, December 31, 1900.

114. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for Headquarters, Division of the Philippines for December 14–December 29, 1900, Assistant Adjutant General Arthur L. Wagner to Commanding General, 4th District, December 26, 1900.

115. Paul Kramer suggests that "MacArthur's proclamation defined these terms in ways that embraced the entire population in areas of combat as potential targets of punishment." In understanding changing United States legal interpretations, the word "potential" is key. Kramer, *Blood of Government*, 137.

"overt acts" could make one a war traitor.[116] Therefore, MacArthur's Provost Marshal General Bell (himself a lawyer)[117] ordered 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."[118] Assistant Adjutant General Arthur L. Wagner, too, authorized the arrest only of those who were proven guilty or suspected "to a moral certainty."[119] This could, however, include useful legal fictions to extend the available evidence: MacArthur's Chief of Staff 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.[120] It is also likely that many lower-ranking officers went beyond their legal authority, and were allowed to do so.

Overall, civilians remained officially off-limits to attack and detain, unless they themselves, by their "overt acts," became war rebels or war traitors. Those in the (increasingly mythical) insurgent field army were subject to captivity only as prisoners of war, not as war criminals. So were insurgent guerrilla fighters, as long as they did not engage in assassination or intermittently return to civilian roles. Fighters who were found guilty of those activities could be executed.

This distinction is illustrated by the case of Eroberto Gumban, an insurgent who was tried by a military commission on the island of Panay in 1901 for "murder, and violation of the laws of war."[121] Gumban was one of thousands of prisoners tried in 1901 and 1902 for a variety of criminal and law-of-war crimes, of whom dozens were executed.[122] He was

116. *Annual Report*, 7.

117. William Gardner Bell, *Commanding Generals and Chiefs of Staff, 1775–1983* (Washington, DC: Center of Military History, 1983), 98.

118. NARA, RG 94, A.G.O. Doc. File, #338335, Diary of Events for December 19, 1900–January 12, 1901, Bell to Adjutant General, Division of the Philippines, December 31, 1900. However, Bell did allow the use of indirect evidence, so 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."

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

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

121. This example comes from Roger W. Barrett and Lester Nurick, "Legality of Guerrilla Forces under the Laws of War," *American Journal of International Law* 40 (1946): 576–77.

122. NARA, RG 153, JAG Doc. File, #12291, list of Filipinos sentenced by military commissions; NARA, RG 153, JAG Doc. File, #17546, Complete List of Prisoners Under the Control of the Civil Government of the Philippine Islands, February 2, 1905; Springer,

initially convicted and sentenced to death for 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." But MacArthur disapproved this sentence, 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."[123] Remaining continuously in the field made guerrillas more vulnerable to the Americans; therefore, this interpretation of the law sought to push guerrillas like Gumban toward tactics more advantageous to the Americans.

Gumban was set free, and other Filipinos, accused of being spies, were acquitted of war crimes but kept in custody as prisoners of war; they had been acquitted of unlawful belligerency, but were still belligerents.[124] Similarly, many insurgents who surrendered were set free after swearing allegiance to the United States, 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 not commit *other* law-of-war or criminal violations.[125]

For MacArthur, this combination of immunity, limited belligerent privilege, and brutal punishment for unprivileged belligerency provided a way to punish guerrillas for their irregular tactics, while also inducing civilians not to cooperate with them. American officials believed that these measures suppressed, if not eliminated, the insurgency in many areas. Indeed, the

America's Captives, 129; *Annual Report*, App. C:1–2; and Barrett and Nurick, "Legality of Guerrilla Forces," 576–77. Seventy-nine people were executed between September 1900 and June 1901, with 164 sentenced to 10 years' imprisonment or more: 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,'" *Harvard National Security Journal* 3 (2012): 223–81.

123. Barrett and Nurick, "Legality of Guerrilla Forces," 577.

124. Robert Chesney, "Historical Examples of Remand to Military Detention after Commission Prosecution," *Lawfare* (blog), October 25, 2011, https://lawfareblog.com/historical-examples-remand-military-detention-after-commission-prosecution (accessed April 17, 2018).

125. 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; 136; and Springer, *America's Captives*, 130. Nurick and Barrett argue that the United States accorded combatant privilege to those who met the four criteria that were later codified in the 1907 Hague Rules: being responsible commanders, having distinctive emblems, openly carrying weapons, and fighting according to the laws of war: Barrett and Nurick, "Legality of Guerrilla Forces," 576.

Judge Advocate for the Philippine District, Stephen W. Groesbeck, claimed in 1901 that as the military commissions handed down more death sentences, there was a "sudden and most gratifying decrease, almost to cessation of all high crimes in some sections where the gallows has been set up."[126]

Communal Responsibility

Despite these claims, the insurgency persisted in the province of Batangas and on the island of Samar. In the late summer of 1901, a shocking American defeat provided the impetus for further escalation. The new measures, which devastated Filipino communities and caused an outcry in the United States, were again articulated through the laws of war, which were now subjected to novel readings, and further influenced by racial reasoning.

In September 1901, insurgents on Samar attacked and virtually annihilated an American infantry company, taking the soldiers by surprise as they ate breakfast in what they thought was a friendly village. As the press spread horrifying reports of what became known as the "Balangiga Massacre," American public opinion demanded strong action to pacify the remaining pockets of resistance in Batangas and Samar.[127] By now, MacArthur had been replaced by Major General Adna Chaffee, who turned to Franklin Bell and Jacob Smith for harsher measures. At first, Bell assumed command in Batangas with Smith as his subordinate, but soon the latter took charge of separate efforts on Samar.[128] Like MacArthur, these officers looked to the principles of G.O. 100: they believed that "short severe wars are the most humane in the end," and they sought to "place the burden" of the war on those who aided the insurgents.[129] Smith declared that his goal was to "create in the minds of all the people a burning desire for the war to cease,"[130] while Bell's policy was 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."[131]

To "place the burden" on Filipino civilians, Bell and Smith desired legal authority to detain them, to seize or destroy their property, and even to

126. *Annual Report*, App. C:3.

127. For the massacre and its aftermath, see, generally, Barnett, *Atrocity*, 65–66; and Miller, *Benevolent Assimilation*, 200–207.

128. Miller, *Benevolent Assimilation*, 219.

129. Codman and Storey, *Root's Record*, 112 (reproducing Bell's orders of December 24, 1901).

130. Ibid., 101 (reproducing Bell's orders of December 24, 1901).

131. Ibid., 105 (reproducing Bell's orders of December 24, 1901).

attack them. This required another round of reinterpretation. Earlier legal debates, as discussed, had focused on which Filipino combatants were legitimate belligerents, which were unprivileged belligerents or war traitors, and which were merely criminals. The concern there was who could be found guilty of what crimes. MacArthur had, in theory, made these determinations based on individual evidence, with the army bearing at least a low burden of proof. Now, Bell and Smith sought the authority to detain *all* Filipinos in their districts. They were not as concerned with formally trying and convicting them of (war) crimes, as with simply preventing them from aiding the insurgents but also making them suffer for their past support. They sought to impose responsibility on whole communities, and to shift the burden of proof onto the Filipinos themselves.[132]

To this end, on December 24, 1901, Smith ordered that "[e]very 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."[133] On the very same day, Bell also wrote that he assumed, "with very few exceptions, practically the entire population has been hostile to us at heart,"[134] and should be treated 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."[135]

Moreover, Bell believed that the inhabitants of Batangas had all put their hostility into practice. "Inasmuch," he declared, "as it can be safely assumed that at one time or another since this war began every native in the provinces of Batangas and 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."[136] 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."[137] All were belligerents.

132. They were not the only United States officers interested in this: Linn, *Counterinsurgency*, 144–45.

133. Codman and Storey, *Root's Record*, 102 (reproducing Bell's orders of December 24, 1901).

134. Ibid., 112 (reproducing Bell's orders of December 24, 1901).

135. Ibid., 107 (reproducing Bell's orders of December 9, 1901).

136. Ibid., 84 (quoting Bell's orders of January 23, 1902).

137. Barnett, *Atrocity*, 82.

This reasoning allowed Bell and Smith to detain Filipinos on a massive scale, even without evidence of individual hostile acts. Bell forced the inhabitants of Batangas—men, women, and children—into squalid "concentration camps," intended to separate civilians from the guerrillas. This drew on European practice in both Cuba and South Africa.[138] 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."[139] 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."[140]

Moreover, on December 13, Bell announced 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.[141] Local officials who allowed insurgents to be sheltered within their towns were also to be punished.[142] Bell also authorized the confiscation of all food within his jurisdiction, to be distributed only to those in the towns which he controlled, noting that G.O. 100 allowed him to starve "unarmed hostile belligerents as well as armed ones."[143] 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."[144] All Filipinos in these areas were now considered enemies, subject to detention, property confiscation, and even attack.

138. Kramer, *Blood of Government*, 152–54; Boot, *Savage Wars*, 123–24; and Gates, *Schoolbooks and Krags*, 260–61.

139. Codman and Storey, *Root's Record*, 103 (reproducing Smith's orders of December 24, 1901).

140. Ibid., 107 (reproducing Bell's orders of December 9, 1901).

141. NARA, RG 153, JAG Doc. File, #4275, memorandum regarding Bell's orders, July 8, 1904.

142. Ibid. See also Worcester, *Philippines*, 222–24 (summarizing Bell's policies approvingly).

143. Codman and Storey, *Root's Record*, 109 (reproducing Bell's orders of December 15, 1901). See G.O. 100, Article 17.

144. Codman and Storey, *Root's Record*, 111 (reproducing Bell's orders of December 21, 1901).

This was seen as militarily useful, but also reflected the Americans' hardening, and increasingly racialized, view of Filipino civilians.[145] MacArthur, for example, invoked race to explain the insurgency's stubborn persistence into late 1900: "the adhesive principle comes from ethnological homogeneity, which induces men to respond for a time to the appeals of consanguineous leadership." Young went further, arguing that the insurgency existed solely because of racial differences.[146]

Young had failed when he argued in late 1900 that race itself made the laws of war inapplicable. Now, a year later, amidst the Batangas and Samar campaigns, race explicitly reappeared, not to deny the law but to interpret it. Bell, for example, reported that "I have been in Indian campaigns where it took over 100 soldiers to capture each Indian, but 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."[147] Marine Major Littleton Waller, one of Smith's subordinates, was even more explicit: He claimed not to 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."[148] "By identifying the inhabitants of Balangiga as traitors capable of any outrage, then extending this definition to all Filipinos," Louise Barnett argues, "the American military found a rationale for whatever severe measures they wished to employ."[149]

This was a matter not only of stereotyping or rhetoric, but also of how the law of war was officially interpreted. Racism did specific legal work in specific contexts, to allow particular actions against particular groups (not necessarily all Filipinos, but those in given areas). Both Bell and Smith grounded their orders in legal reasoning, and indeed both had legal experience: Bell had passed the Illinois bar, whereas Smith, despite lacking formal training, had served as a temporary judge advocate in the late 1860s.[150] Stuart Creighton Miller has observed that Bell's orders in this period were written "much like a lawyer's brief."[151]

145. Kramer, *Blood of Government*, 89. See also Barnett, *Atrocity*.

146. Quoted in Kramer, *Blood of Government*, 138; Miller, *Benevolent Assimilation*, 150, 162; and LeRoy, *Americans in the Philippines*, 202 (he calls the principle "race-feeling").

147. *Charges of Cruelty*, 50 (reproducing Bell's 1901 report).

148. See Barnett, *Atrocity*, 15.

149. Ibid., 61. Barnett emphasizes the role that stereotypes played in courts-martial. Arguably, this perceived "problem" led to postwar plans to document and identify the entire population. See McCoy, *Policing America's Empire*.

150. Bell, *Commanding Generals*, 98, 207; and David L. Fritz, "Before the 'Howling Wilderness': The Military Career of Jacob Hurd Smith, 1862–1902," *Military Affairs* 43 (1979): 187. There was no requirement that a judge advocate have legal training: William Winthrop, *Military Law* (Washington, DC: W.H. Morrison, 1886), I:247.

151. Miller, *Benevolent Assimilation*, 207.

Practicing lawyers agreed with Bell: in the summer of 1904, JAG officers apparently analyzed his December 1901 orders, holding that they were justified by the provisions of G.O. 100 and, in many cases, by the recently signed 1899 Hague Convention.[152] A 1906 JAG 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."[153] Therefore, even the most extreme measures formally endorsed by the United States during the conflict were articulated through legal reasoning within the framework of G.O. 100.

For Smith, however, this was still not enough. In the midst of the Samar campaign, he reopened the issue of how to deal with captured insurgents, with the harshest view yet. "I want no prisoners," he told his subordinate Waller. "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 that those in actual hostilities, particularly men and boys more than 10 years of age, were to be killed.[154] Thus, Smith tacitly endorsed the view that all Filipinos on Samar were belligerents subject to detention. Moreover, he suggested that they were *unprivileged* belligerents—effectively war rebels—subject to trial for war crimes or even to summary execution with no judicial process at all. Even Evans and Young had not gone quite so far in 1900, and in the end, Waller could not either. Although he summarily executed Filipino guides whom he suspected of betraying him (he was later court-martialed for this), Waller refused to follow Smith's orders. He explained to his subordinates that "we are not making war on women and children," at least not to this extent.[155]

The Debate at Home

Smith was far from the first American commander in the Philippines to go beyond official interpretations of the law. From the beginning of the conflict, some American soldiers had refused to take prisoners, whereas others, infamously, had used the "water cure"—analogous to modern-day waterboarding—in interrogations.[156] As early as 1899, Smith told newspapers

152. NARA, RG 153, JAG Doc. File, #4275, memorandum regarding Bell's orders, July 8, 1904; and Witt, *Lincoln's Code*, 358.

153. JAG's Department, *Digest*, 249–50.

154. Codman and Storey, *Root's Record*, 33.

155. Quoted in Barnett, *Atrocity*, 69. See also Miller, *Benevolent Assimilation*, 218–28.

156. See Witt, *Lincoln's Code*, 355–56; Frank Schumacher, "'Marked Severities': The Debate Over Torture during America's Conquest of the Philippines, 1899–1902,"

that he had shot insurgent prisoners (though it is unclear if he invoked any legal authority).[157] In 1901, his tough talk finally had greater consequences, after he told a reporter that he intended to set Samar ablaze and wipe out its people. A firestorm of public criticism erupted in the United States, as many became outraged by the violence that the United States Army had used against the insurrection: both those measures that were officially authorized, and those that were not. In Washington, Senator Henry Cabot Lodge led his Committee on the Philippines in a series of intensely antagonistic hearings, featuring testimony from MacArthur, Taft, and many other key players.[158]

In the face of this criticism, some Americans who supported the war defended the army by arguing—as some officers in the field already had—that the laws of war simply did not apply to this conflict.[159] 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 them."[160] 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." Senator Charles Dietrich then interrupted, asserting that "[i]n order to carry on civilized warfare both sides have to engage in such warfare."[161]

Theodore Woolsey, professor of international law at Yale, lent academic authority to this view. In the spring of 1901, a force under Brigadier General Frederick Funston, through a bold subterfuge involving the use of enemy uniforms, captured Aguinaldo. Critics charged that Funston had violated the laws of war, so Woolsey prepared a defense at the request of President Roosevelt.[162] He argued that, under the 1899 Hague Convention, every one of Funston's tactics had been legal, except for the

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Amerikastudien/American Studies 51 (2006): 475–98; Paul A. Kramer, "The Water Cure: Debating Torture and Counterinsurgency—A Century Ago," *The New Yorker*, February 25, 2008, https://www.newyorker.com/magazine/2008/02/25/the-water-cure (accessed April 17, 2018).

157. Miller, *Benevolent Assimilation*, 95.

158. See Barnett, *Atrocity*, 23–31; and Miller, *Benevolent Assimilation*, 95, 212–18, 231–52.

159. See Kramer, *Blood of Government*, 146–47.

160. Quoted in Miller, *Benevolent Assimilation*, 211.

161. Quoted in Miller, 215; see also Codman and Storey, *Root's Record*, 98.

162. Theodore S. Woolsey, "The Legal Aspects of Aguinaldo's Capture," *The Outlook*, April 13, 1901, 855–56. For accounts of the capture, see Boot, *Savage Wars*, 118–19; and Miller, *Benevolent Assimilation*, 169. For Roosevelt's involvement, see Witt, *Lincoln's Code*, 355. Funston himself had earlier executed prisoners while being careful to maintain that his actions were lawful: Linn, *Counterinsurgency*, 78–79.

use of enemy uniforms, but that even this would only be illegal if fighting another *signatory* to the convention, "a civilized power which was itself governed by similar rules." Woolsey argued that the Americans had, up to this point, applied the laws of war only out of humanity, not out of obligation.[163] He thus lent scholarly credibility to the contractual view put forward by Young: that the Filipinos were, by their own behavior, ineligible to be treated in accordance with the laws of war. With the Hague Convention now in effect, however, he was able strengthen the argument slightly: the Filipinos' ineligibility was not just because their guerrilla tactics breached an *implied* contract, but because they were not party to an *express* contract: the treaty.

The United States government, however, never adopted Woolsey's position. Instead, as MacArthur and Otis had in the field, officials in Washington reiterated that the law did apply, and that they were complying with it, according to their interpretation. Therefore, Secretary of War Root responded to the Lodge Committee's hearings by issuing a report, *Charges of Cruelty, Etc. to the Natives of the Philippines*, attempting to demonstrate United States compliance with the law. This 150 page tome published the results of 348 courts-marital of American servicemen (mostly low-ranking) accused of abusing Filipinos, along with accounts of atrocities by the insurgents.[164]

Opponents of the war were unconvinced. The anti-imperialist Philippine Investigating Committee commissioned two prominent Boston lawyers, Moorfield Storey and Julian Codman, to take Root's report head on with their own publication, which was pointedly titled *Secretary Root's Record: "Marked Severities" in Philippine Warfare.*[165] They argued that Root and his subordinates had been far too willing to tolerate violations of the laws of war, and indeed had themselves violated those laws.[166] In particular, they systematically analyzed and rebutted the legal reasoning that Bell had used to classify all Filipinos in certain areas as "presumptive belligerents."

First, they argued that he had improperly lowered the burden of proof by assuming that "practically the entire population has been hostile to us at

163. Woolsey, "Aguinaldo's Capture," 856.

164. See *Charges of Cruelty*. Most of these courts-martial concerned the "criminal acts of individuals who happened to be military personnel," and thus were not "entwined with military policy": Barnett, *Atrocity*, 41, 58.

165. See Codman and Storey, *Root's Record*; Kramer, *Blood of Government*, 145–46; and William B. Hixson Jr., *Moorfield Storey and the Abolitionist Tradition* (Oxford: Oxford University Press, 1972).

166. Codman and Storey, *Root's Record*, 3–62 passim.

heart."[167] Reiterating MacArthur's earlier view, Storey and Codman insisted that "[i]t is the overt act, not the inevitable feeling of the conquered" that was relevant.[168] Moreover, even if it were acceptable to designate whole populations as belligerents, Bell was too quick to punish them indiscriminately for alleged law-of-war violations. G.O. 100, they pointed out, provided that "retaliation shall only be resorted to after careful inquiry into the real occurrence and character of the misdeeds that may demand retribution."[169] Likewise, Bell's order to execute captives in retaliation for assassinations was illegal, as was his decision to deprive whole villages of food.[170]

In short, Storey and Codman contended that Bell's legal interpretations were wrong on multiple levels: "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."[171] To bring Bell's policies home, Codman and Storey turned to the Civil War, as the government itself had, for very different purposes. They asked their readers to "[i]magine the whole population of a Virginia district put to the sword because [Confederate raider John S.] Mosby had surprised a detachment, or Winchester [Virginia] burned because a soldier was found dead in the street."[172] These arguments implicitly used concepts of race against the government, as Codman and Storey likely expected that white Americans would be more shocked to imagine these measures being applied to white Southerners than to Filipinos.

The two Boston lawyers went beyond this attack on Bell, critiquing the policies of property confiscation and burning that had been adopted early in the conflict and legitimated by JAG opinions. The army held that such measures were "military necessities," but to Codman and Storey this was merely the "'*tyrant's plea*,' and would justify anything, if the discretion of the commander is unfettered."[173] "[T]he rule," they wrote, "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

167. Ibid., 112 (quoting Bell's December 24, 1901 orders).

168. Ibid., 112.

169. Ibid., 80. See G.O. 100, Article 28.

170. Codman and Storey, *Root's Record*, 81–82.

171. Ibid.

172. Codman and Storey, *Root's Record*, 25. Union generals did destroy crops and buildings and arrest Southern civilians en masse to combat guerrillas: Neff, *Justice in Blue and Gray*, 90–93.

173. Codman and Storey, *Root's Record*, 87.

of noncombatants, to hunt and kill people, to lay waste a province?"[174] For the two anti-imperialist lawyers, war *could* be conducted lawfully—but this one had not been.

Root disagreed, and even as *Root's Record* was published in 1902, he took further steps to support his position, including court-martialing slightly more senior officers than before.[175] He began with Major Littleton Waller. Waller, as noted, was one of Smith's subordinates on Samar, and in the course of the campaign he had summarily executed eleven Filipino guides whom he suspected of disloyalty. Waller argued that they had been guilty, and moreover that their killing had been a military necessity. He was acquitted, partly, Barnett argues, because Americans saw all Filipinos as inherently treacherous.[176]

However, in the course of Waller's court-martial, he revealed Smith's orders (which he claimed to have disobeyed) to kill all Filipino males over the age of 10.[177] Now Smith himself was put on trial, and he turned partly to the same argument used by Young and Woolsey: his orders were not illegal, because the law did not apply. The law of war "was never intended to apply to an inferior and savage race."[178] The court rejected this claim, finding that the law *had* been applicable, but that Waller had vindicated it by ignoring Smith's orders.[179] Smith was convicted, but not severely punished. The court qualified the claim that Smith "wanted all persons killed who were capable of bearing arms" by noting it applied only to those "in actual hostilities against the United States" (Codman and Storey argued he had initially included no such limitation).[180] This made Smith's orders legal, by limiting them only to active belligerents, allowing the court to find that Smith's only crime had been overly heated and "misleading" speech. Therefore, he was convicted of "[c]onduct to the prejudice of good order and military discipline," and dismissed from active duty.[181]

174. Ibid., 84.

175. For an account of both these and earlier courts-martial, emphasizing the role of racism, see generally Barnett, *Atrocity*, 60–120.

176. Ibid., 84–85; see also Leon Friedman, ed., *The Law of War: A Documentary History* (New York: Random House, 1972).

177. Miller, *Benevolent Assimilation*, 230.

178. Barnett, *Atrocity*, 86.

179. Friedman, *Law of War*, 810.

180. Ibid., 801, 812; and Codman and Storey, *Root's Record*, 33.

181. Barnett, *Atrocity*, 87; and Friedman, *Law of War*, 800, 812–13. The court had recommended a reprimand, but Roosevelt increased this to dismissal. Courts-martial for lower-ranking offenders featured similar evasions: Barnett, *Atrocity*, 22–59.

Several other officers were court-martialed for their role in using the "water cure."[182] Among them was Major Edwin F. Glenn, a University of Minnesota Law School graduate who had been a prominent intelligence officer throughout the war, before serving as Waller's defense counsel. Glenn was court-martialled twice: in May 1902, he was convicted for his prominent role in using the water cure; and in February 1903, he was acquitted on charges of unlawfully killing prisoners. In his defense, Glenn argued in part that the water cure was "a method of conducting operations," and more broadly, that "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."[183]

This was the same argument made earlier by Young, and by Woolsey, and the army categorically rejected it yet again. In reviewing and upholding Glenn's conviction, JAG George B. Davis insisted that Glenn's argument "fails completely, 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." Nevertheless, Glenn's punishment for using the water cure was minimal: 1 month's suspension and a $50 fine.[184]

By the time Glenn's second court-marital concluded, the war in the Philippines had officially ended. On July 4, 1902, President Roosevelt declared victory, pardoning violators of both those laws and the criminal law, with the exception of those who had committed murder, rape, and other severe crimes.[185] He proclaimed 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."[186] In November, the Brigandage Act "defin[ed] any remaining Filipino resistance to American authority as 'banditry.'"[187]

182. See, generally, Witt, *Lincoln's Code*, 358–61; Barnett, *Atrocity*, 90–99, 112–13; and Miller, *Benevolent Assimilation*, 228.

183. Barnett, *Atrocity*, 112; Friedman, *Law of War*, 818. Glenn does not seem to have made this argument quite as explicitly in his first court-martial; the quotation is from his second trial.

184. Friedman, *Law of War*, 819; see also Witt, *Lincoln's Code*, 358–63; and Barnett, *Atrocity*, 96. Davis also rejected Glenn's claim that the water cure was justified by military necessity, as the court had.

185. See Charles E. Magoon, "The Exercise of the Pardoning Power in the Philippines," *Yale Law Journal* 12 (1903): 405–18.

186. Quoted in JAG's Department, *Digest*, 1082.

187. Kramer, *Blood of Government*, 155.

However, military counterinsurgency continued for years against the Muslim Moros, whom one United States general described as "not . . . enemies but religious fanatics."[188] Perhaps because of such religious prejudices, there was little inquiry after the Americans massacred civilians at Bud Dajo in 1906.[189]

Throughout the Philippine–American War proper—from the early days of "conciliatory action," to MacArthur's harsher policies on unlawful belligerency, to Bell's and Smith's campaigns of destruction, and even the token court-martialing of a few officers—the army had upheld the original United States theory of the war: the Filipino insurgents were fighting for a nonexistent state, but were themselves, by default, legitimate combatants, subject to the laws of war. This does not mean that the army had restrained itself operationally. Enforcement of the law was often lax, and more importantly, officials frequently reinterpreted it to fit their military objectives, racism, opposition to guerrilla warfare, and extreme violence.

After the war, some officers suggested that these interpretations had gone too far (except against the Moros). When an outbreak of rebellion in early 1903 prompted the military to deploy troops to Surigao Province, taking control away from the civil authorities and imposing martial law, Major General George Davis (not the same officer as the JAG) issued a caution. In these operations, he insisted, that there must be "no water-curing or severity that is not plainly authorized without strained interpretation [of the] laws of war."[190] It was precisely such interpretation—however strained—that allowed Americans to articulate counterinsurgency *through* the law, rather than by emphasizing exclusions.

Conclusion

This story of the law of war points to the Philippine–American War's importance in both United States and international history. As other scholars have emphasized, the law's relationship to race was vital in defining the role of the conquered regions within the United States after the Spanish–American War. A series of Supreme Court decisions–the "Insular Cases"—engaged constitutional and racial anxieties to hammer out the status of Filipinos, Puerto Ricans, and Cubans in American law and empire, but at the same time,

188. Joshua Gedacht, "'Mohammedan Religion Made It Necessary to Fire': Massacres on the American Frontier from South Dakota to the Southern Philippines," in *Colonial Crucible: Empire in the Making of the Modern American State*, ed. Alfred W. McCoy and Francisco A. Scarano (Madison, WI: University of Wisconsin Press, 2009), 406–7.

189. Ibid., 406–7.

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

the United States turned away from further formal conquests.[191] In the Insular Cases, as in wartime, the United States legitimized empire through official legal interpretation, especially of the Constitution, rather than simply by carving out exclusions, even though these interpretations were heavily colored by racial assumptions.

Likewise, just as the Insular Cases lived on long past that peak moment of formal empire, so did the Philippine–American War's legal legacy. The records of military commissions have provided a body of precedent for military lawyers ever since. This was true of JAG officers concerned about the legal status of potential Axis guerrillas at the end of the Second World War, and more recently those trying post-9/11 terrorism suspects.[192]

That the law of war was so important to American military lawyers during the Philippine–American War—important enough to create this body of precedent—suggests the conflict's broader lessons. The Philippine–American War marked the United States's entry into the world of European imperialism; however, its legal position and legal debates, as traced previously, offer a different picture than what one might expect of the nineteenth century's imperial wars.

Most scholarship on international law and empire tells a story of exclusion.[193] Many Western legal theorists, in the late nineteenth century, did not recognize non-Western polities as sovereign, and they argued that those polities were, therefore, neither entitled to the benefits of customary international law, nor able to participate in treaty arrangements. John Stuart Mill, indeed, contended that, "[t]o characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject."[194] The 1914 British *Manual of Military Law* agreed that "the rules of

191. See Sparrow, *Insular Cases*; Burnett and Marshall, *Foreign in a Domestic Sense*; Erman, "Citizens of Empire"; and Erman, "Meanings of Citizenship."

192. See *U.S. v Hamdan*, 801 F.Supp. 2d 1247 (U.S. Ct. Mil. Comm'n Rev. 2011); Government Response To Defense Motion To Dismiss, *United States v. Al-Nashiri*, No. AE 048 (U.S. Ct. Mil. Comm'n Rev. March 26, 2012), http://www.lawfareblog.com/2012/04/motions-hearing-preview-in-united-states-v-al-nashiri-defense-challenge-to-the-conspiracy-charge/ (accessed April 17, 2018); Thravalos, "History, *Hamdan*, and Happenstance"; Barrett and Nurick, "Legality of Guerrilla Forces"; and Chesney, "Remand to Military Detention." See for example *U.S. v. Hamdan*, 801 F.Supp. 2d 1247; Thravalos, "History, *Hamdan*, and Happenstance"; Glazier, "Precedents Lost"; and Chesney, "Remand to Military Detention."

193. See Kinsella, *Image before the Weapon*; Koskenniemi, *Gentle Civilizer*; and Mégret, "From 'Savages' to 'Unlawful Combatants.'"

194. Quoted in Jennifer Pitts, "Empire and Legal Universalisms in the Eighteenth Century," *American Historical Review* 117 (2012): 118. See also Anghie, *Imperialism*.

International Law apply only to warfare between civilized nations."[195] Creating such exclusions may have been a primary objective of legal theorists, as they could justify greater latitude in both how wars were fought, and why they could be started.[196] European powers argued that they could use prohibited weapons or tactics against those who resisted colonization, because the latter were either inherently inferior (the racial argument) or they had not or could not adhere to the treaties that created obligations within war (the contractual argument).[197] One United States Army officer, Elbridge Colby, summed up this view in a 1927 *American Journal of International Law* article dealing with situations in which "combatants and non-combatants are practically identical among a people, and savage or semi-savage peoples take advantage of this identity to effect ruses, surprises, and massacres." "[S]trictly speaking," in such cases an American or European officer "is not bound to observe the precepts of international law against any nation that is not a cosigner of the conventions covering any particular point in question," though pragmatism suggested that officers would be well advised to use "such rules of justice and humanity as recommend themselves."[198]

Non-Western polities that were not colonized—such as the Ottoman and Qing Empires—were excluded in a different way. Although scholars often accorded them a greater degree of recognition, the rules that applied to them remained disputed, including by lawyers from those polities themselves. Thus, for example, European scholars and diplomats debated whether the Ottoman Empire could be subject to foreign military interventions aiming to protect its Christian subjects from abuses.[199]

Drawing on such debates, historians have often seen exclusion, justified by ideas of racial or civilizational inferiority, as the dominant legal paradigm for late nineteenth century imperial wars. It was certainly an approach

195. Quoted in Elbridge Colby, "How to Fight Savage Tribes," *American Journal of International Law* 21 (1927): 180.

196. See Mégret, "From 'Savages' to 'Unlawful Combatants.'"

197. See, for example, Anna Chotzen, "Beyond Bounds: Morocco's Rif War and the Limits of International Law," *Humanity* 5 (2014): 33–54.

198. Colby, "How to Fight Savage Tribes," 279, 287–88. For the article's background, see Mégret, "From 'Savages' to 'Unlawful Combatants,'" 289–90.

199. See Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford: Oxford University Press, 2015); Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914* (Princeton: Princeton University Press, 2012); Aimee M. Genell, "The Well-Defended Domains: Eurocentric International Law and the Making of the Ottoman Office of Legal Counsel," *Journal of the Ottoman and Turkish Studies Association* 3 (2016): 255–75; and Arnulf Becker Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation," *Harvard International Law Journal* 51 (2010): 475–552.

available to United States officers in the Philippines. Indeed, high-ranking politicians and even legal theorists such as Woolsey gestured in that direction, describing the Filipinos as "not civilized" and not signatories to the Hague Convention. United States Army officers also believed that Europeans approached colonial wars this way: recall Brigadier General S.B.M. Young's mention of European wars against those "worse than ordinary savages."

However, those who actually had to make legal decisions with binding effect—the JAG and officers in the field—consistently ended up rejecting arguments based on exclusion. Instead, they interpreted specific rules to allow specific actions. International law, and in particular the law of war, JAG Davis held, was binding on all "modern State[s]." From Davis on down, officers believed that G.O. 100's particular provisions already gave them the legal resources they needed. They found these resources through specific interpretations of specific provisions, not through broad exemptions or exclusions. Racism played a complex role, influencing not whether the law was applicable, but how it was interpreted: informing what officers saw as "facts," as when Waller claimed that he could not tell Filipinos apart.[200]

This does not mean that the United States Army restrained itself, and it certainly does not mean that all officers obeyed the laws of war. Much brutality was authorized. Many violations were punished belatedly and half-heartedly, if at all, and under public pressure. But even the behavior that, from a modern viewpoint, appears most objectionable, was often explicitly justified by legal arguments. This occurred not only early in the conflict, and not only after the fact in courts-martial, but at every step of the way, even as United States brutality escalated. Such adaptation was not without its challenges, and it entailed the contentious debates and sometimes radical reinterpretations discussed.

Why did the United States adopt this approach? There were likely several reasons. Lively debates about law and war had a long history in the United States.[201] As we have seen, many army officers (even outside the JAG's office) had legal training or had practiced law, and they may have been uncomfortable with carving out exceptions from the law. The law provided a way to structure and articulate military action in an unfamiliar environment. G.O 100 itself had, since the Civil War, become "the

200. See generally Barnett, *Atrocity*; see also Kramer, *Blood of Government*; Hull, "Prisoners in Colonial Warfare," 166–67, shows race's varied meanings in another colonial context.

201. Witt, *Lincoln's Code*.

conventional wisdom of the Army officer corps."[202] They had even been seen as fitted to the brutal tactics of the Indian wars after 1863, although many officers did see Indigenous peoples as outside the law. The result was an "ad hoc" system of practices in which "the majesty of the law more often gave way to a mix of tragedy and farce."[203]

These reasons to cling to legal justifications in the midst of brutal imperial counterinsurgency were particular to the United States, and to its history. But Americans had other motivations that may illustrate broader global dynamics. Symbolically, the United States claimed that conquest brought "civilization" to the Philippines, not only because Americans were inherently more civilized, but because adhering to the law *proved* that they were more civilized.[204] Therefore, Smith asserted that "[n]o civilized war, however civilized, can be carried on on a humanitarian basis."[205] Dean Worcester, a member of the Philippine Commission, likewise referred ominously to "[s]trict enforcement of the rules of civilized warfare."[206] And MacArthur, as noted, saw his December 1900 proclamation as proof of America's civilization and commitment to "civilize" Filipinos. Indeed, Groesbeck, the chief JAG in the Philippines, saw the military commissions as a way to instill "a wholesome fear and respect for law," supplanting "the time honored and despotic rule of the headman."[207] Harsh violence, if legally justified, could still be civilized violence, and could be all the more useful for civiliz*ing* the Philippines.

Such an approach was not unique to the United States. In the South Asian context, "even when at its most violent and 'criminal', colonialism often sought to steep itself in the language of legitimacy and law."[208] Even closer parallels come from several other late nineteenth century wars. The Russian and Japanese Empires both assiduously maintained that their adherence to international law vindicated their claims to be "civilized" "European" empires, and indeed vindicated the rightness of their wars. Russia made this argument against the Ottoman Empire in the 1877–78 Russo–Turkish War, Japan made it against Qing China in the 1894–95

202. Ibid., 328.

203. Ibid., 330–35. See also Kinsella, *Image before the Weapon*, 82–103; and Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," *Stanford Law Review* 43 (1990): 13–98.

204. For similar suggestions, see Barnett, *Atrocity*, 240; Carvin, *Prisoners*, 81; Kramer, *Blood of Government*, 112; and Kinsella, *Image before the Weapon*, 107–8.

205. Codman and Storey, *Root's Record*, 101 (quoting Bell's December 24, 1901 orders).

206. Worcester, *Philippines*, 222. On this particular occasion, he noted, such enforcement "was threatened, but not actually resorted to."

207. *Annual Report*, App. C:3.

208. Mark Condos, "License to Kill: The Murderous Outrages Act and the Rule of Law in Colonial India, 1867–1925," *Modern Asian Studies* 50 (2016): 489.

Sino–Japanese War, and both sides made it in the 1904–5 Russo–Japanese War.[209] In the first of these conflicts, the Russian government even implied that although it might not be obligated to respect the laws of war while fighting the Ottomans, it *chose* to do so. Applying and complying with the law could demonstrate Russia's superiority.[210]

This might explain the JAG's position, but not necessarily lower-level officers' consistent attempts to produce legal justifications for even their most extreme actions. They seem to have been committed to using the law, and to have seen value in this. Isabel Hull's study of the German state's position during late nineteenth century imperial conflicts offers a partially parallel, and partially contrasting, case. She argues that German officers saw both colonial and European wars as governed by the same "immutable precepts of warfare," which gave them much latitude. It seems, however, that German officers were less enthusiastic about the work of legal interpretation than Americans were.[211] This suggests that the law's role in the Philippines was particularly American, but perhaps also reflective of global dynamics. The law of war could be relevant to imperial wars as more than a static set of constraints to be obeyed, a symbol invoked to justify colonialism, or an obstacle to be avoided. It was also a way to structure and articulate violence itself. Indeed, as legal critics Chris af Jochnik and Roger Normand argue in another context, the law of war could be relevant more by *legitimating* state violence, than by restraining it.[212]

This study of how and why the United States military deployed the law of war during the Philippine–American War is therefore significant for understanding the role of law not only in this conflict, but in the age of

209. See Douglas Howland, "Sovereignty and the Laws of War: International Consequences of Japan's 1905 Victory over Russia," *Law and History Review* 29 (2011): 53–97; Douglas Howland, "Japan's Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894–1895)," *Journal of the History of International Law* 9 (2007): 179–201; and Peter Holquist, "The Russian Empire as a 'Civilized State': International Law as Principle and Practice in Imperial Russia, 1874–1878" (Washington, DC: The National Council for Eurasian and East European Research, 2004).

210. Holquist, "Russian Empire as a 'Civilized State,'" 15.

211. Hull, *Absolute Destruction*, 3, 126–30, 146. See also Hull, "Prisoners in Colonial Warfare."

212. See Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard International Law Journal* 35 (1994): 49–95; for parallel concerns see also John Fabian Witt, "Two Conceptions of Suffering in War," in *Knowing the Suffering of Others: Legal Perspectives on Pain and Its Meanings*, ed. Austin Sarat (Tuscaloosa, AL: University of Alabama Press, 2014), 129–57; and Samuel Moyn, "From Antiwar Politics to Antitorture Politics," in *Law and War*, ed. Austin Sarat, Lawrence Douglas, and Martha Umphrey (Stanford: Stanford University Press, 2014), 154–97.

colonial conquests more generally. Generals and JAG lawyers did not simply choose between obeying the law and reasoning around it. Instead, they persistently justified extreme violence by reasoning through the law, interpreting it in light of their racial assumptions and perceived military needs. This offers an important, and perhaps chastening, lesson in the history of international law. In the Philippines—and probably elsewhere—imperial wars were not lawless. But this does not mean that they were any less brutal, and indeed it might make their legal legacy more concerning.