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Waterboarding Used to Be a Crime

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By Evan Wallach

Sunday, November 4, 2007; B01

As a JAG in the Nevada National Guard, I used to lecture the soldiers of the 72nd Military Police Company every year about their legal obligations when they guarded prisoners. I'd always conclude by saying, "I know you won't remember everything I told you today, but just remember what your mom told you: Do unto others as you would have others do unto you." That's a pretty good standard for life and for the law, and even though I left the unit in 1995, I like to think that some of my teaching had carried over when the 72nd refused to participate in misconduct at [Iraq's Abu Ghraib](#) prison.

Sometimes, though, the questions we face about detainees and interrogation get more specific. One such set of questions relates to "waterboarding."

That term is used to describe several interrogation techniques. The victim may be immersed in water, have water forced into the nose and mouth, or have water poured onto material placed over the face so that the liquid is inhaled or swallowed. The media usually characterize the practice as "simulated drowning." That's incorrect. To be effective, waterboarding is usually *real* drowning that simulates death. That is,

the victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut. The main difference is that the drowning process is halted. According to those who have studied waterboarding's effects, it can cause severe psychological trauma, such as panic attacks, for years.

The United States knows quite a bit about waterboarding. The U.S. government -- whether acting alone before domestic courts, commissions and courts-martial or as part of the world community -- has not only condemned the use of water torture but has severely punished those who applied it.

After World War II, we convicted several Japanese soldiers for waterboarding American and Allied prisoners of war. At the trial of his captors, then-Lt. [Chase J. Nielsen](#), one of the 1942 [Army Air Forces](#) officers who flew in the Doolittle Raid and was captured by the Japanese, testified: "I was given several types of torture. . . . I was given what they call the water cure." He was asked what he felt when the Japanese soldiers poured the water. "Well, I felt more or less like I was drowning," he replied, "just gasping between life and death."

Nielsen's experience was not unique. Nor was the prosecution of his captors. After [Japan](#) surrendered, the United States organized and participated in the International Military Tribunal for the [Far East](#), generally called the [Tokyo](#) War Crimes Trials. Leading members of Japan's military and government elite were charged, among their many other crimes, with torturing Allied military personnel and civilians. The principal proof upon which their torture convictions were based was conduct that we would now call waterboarding.

In this case from the tribunal's records, the victim was a prisoner in the Japanese-occupied Dutch East Indies:

A towel was fixed under the chin and down over the face. Then many buckets of water were poured into the towel so that the water gradually reached the mouth and rising further eventually also the nostrils, which resulted in his becoming unconscious and collapsing like a person drowned. This procedure was sometimes repeated 5-6 times in succession.

The United States (like [Britain](#), [Australia](#) and other Allies) pursued lower-ranking Japanese war criminals in trials before their own tribunals. As a general rule, the testimony was similar to Nielsen's. Consider this account from a Filipino waterboarding victim:

Q: Was it painful?

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

Q: Like you were drowning?

A: Drowning -- you could hardly breathe.

Here's the testimony of two Americans imprisoned by the Japanese:

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

And from the second prisoner: They laid me out on a stretcher and strapped me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. . . . They then began pouring water over my face and at times it was almost impossible for me to breathe without sucking in water.

As a result of such accounts, a number of Japanese prison-camp officers and guards were convicted of torture that clearly violated the laws of war. They were not the only defendants convicted in such cases. As far back as the U.S. occupation of [the Philippines](#) after the 1898 Spanish-American War, U.S. soldiers were court-martialed for using the "water cure" to question Filipino guerrillas.

More recently, waterboarding cases have appeared in U.S. district courts. One was a civil action brought by several Filipinos seeking damages against the estate of former Philippine president [Ferdinand Marcos](#). The plaintiffs claimed they had been subjected to torture, including water torture. The court awarded \$766 million in damages, noting in its findings that "the plaintiffs experienced human rights violations including, but not limited to . . . the water cure, where a cloth was placed over the detainee's mouth and nose, and water producing a drowning sensation."

In 1983, federal prosecutors charged a [Texas](#) sheriff and three of his deputies with violating prisoners' civil rights by forcing confessions. The complaint alleged that the officers conspired to "subject prisoners to a suffocating water torture ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning."

The four defendants were convicted, and the sheriff was sentenced to 10 years in prison.

We know that [U.S. military](#) tribunals and U.S. judges have examined certain types of water-based interrogation and found that they constituted torture. That's a lesson worth learning. The study of law is, after all, largely the study of history. The law of war is no different. This history should be of value to those who seek to understand what the law is -- as well as what it ought to be.

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