OPENING STATEMENT

in the case of WAKABAYASHI, Seisaku

delivered by Lt. David Bolton, USN,
Judge Advocate.

Human society is largely the interrelation between individuals and groups of individuals. Equilibrium in such society, relative peace and security of these individuals and groups of individuals, depends upon the creation and enforcement of certain social so-called ethical standards of behavior. These are not absolute standards. They are not unchanging standards. They are relative standards which, within a given time and within a given society are applied in response to the needs and efforts of that society to maintain or develop the social order and the accepted social values.

The application of law, and more particularly criminal law, is one of the efficacious forces by which society attempts to create or maintain certain minimum standards of social conduct. In this respect international society is not basically different from local society, and international law in peace and in war seeks to maintain certain minimum standards of conduct. The so-called law and customs of war is the outgrowth of fundamental ethical considerations, agreements, treaties, usages and customs as accepted or practiced between nations. Violations of the standards of conduct embodied in the law and customs of war constitutes what is loosely termed war crimes.

When it became apparent in the early course of World War II that these fundamental standards of human conduct under the law and customs of war were being disregarded by enemy belligerents, efforts were made to dissuade the enemy from continuation of these barbarous acts and atrocities. In conformance with international practice, protests were made, and when disregarded these changed to warnings. On August 21, 1942, the President of the United States, Franklin D. Roosevelt, issued the following warning: "It is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders in Europe and Asia. It seems only fair that they should have this warning that the time will come when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts."

> This "warning" was not a creation of new law, it was merely an express declaration to all actual and potential offenders against the existing law and customs of war, that the time would come when all offenders would be punished. More than that, it was an implicit warning and caution to all, and particularly to high-ranking responsible officers, that they take all measures to prevent the commission of crimes in violation of the law and customs of war. This warning was issued prior to the time when the accused took command of the Fourth Base Force, and was repeated over and over again during the course of the war.

This warning, this solemn declaration of intention to hold offenders responsible for their criminal acts and commissions, was embodied in the Potsdam Declaration of 26 July 1945, issued by the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain. The Potsdam Declaration declared "We do not intend that the Japanese shall be enslaved ..."

as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." In the Surrender Document, September 2, 1945, Japan specifically accepted the provisions of the Potsdam Declaration.

> It was and is the duty of the Allied Powers, the United Nations, to enforce the standards of international law and society, and to punish those who have violated the law and customs of war. It is the duty of the victor to do this, just as it is the duty of the police and the courts to apprehend, to confine, to try, and to punish those who violate domestic criminal law. And it is specious reasoning that contends that it is unfair for the conqueror to try the vanquished. The "police", the forces of law and order, must be stronger than the criminals. If not, the power of society to punish for wrongdoing would perish, for the criminal and his kin do not apply the standards of lawful society to punish the wrongdoer. If the forces of law and order cease to be stronger than those who violate the standards of society, either revolution or chaos inevitably results. It is therefore clearly natural and proper that the victor nations, the "law and order" nations of international society, should punish those individuals who have violated the law and customs of international society, the law and customs of war.

The Potsdam Declaration was not a declaration of any novel concept of international law. The concept was clearly recognized at the close of the First World War, and was partially embodied in provisions of the Treaty of Versailles. International law has long recognized the necessity of enforcing established social standards of conduct by punishing those who violate them. Lawrence, in the Principles of International Law (7th Ed. 1923), pp. 373-374, comments on the law of war, as follows: "A ruler drunk with the consciousness of overwhelming power might venture to defy the moral sentiments of mankind, but only to discover by and by that outraged humanity avenges itself in unexpected ways...Those, therefor, who imagine that a state is free to ignore, because of the exigencies of the moment any rule...are as erroneous in their reasoning as they are anarchical in their sentiments. The laws of war are made to be obeyed, not to be set aside at pleasure."

The accused WAKABAYASHI is being tried before this commission for violation of the law and customs of war. It is not through any desire for vengeance or any sense of vindictiveness of the conqueror for the vanquished. The accused is tried for the same reason that society tries and punishes all criminals. Society is based upon a system of law, a system in which the weak as well as the strong must be protected if life and order are to continue. The individuals who violate the laws of society - whether local, state, or international, - must be punished in accordance with the law. Human nature is such that if we did not punish the individual who commits the crime, that individual and other individuals believing that crimes are not punished, would cease to respect the law and would violate it without fear of punishment. Punishment of individual offenders acts as a deterrent force.

> We have just finished a war in which at the cost of millions of lives we have reaffirmed our belief in a society of law and order in which the rights of individuals and nations are protected against the depredations of the strong or the ambitious. That war removed a crucial threat to the existence and security of

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independent nations in an international society based upon accepted principles of law and order.

The fact that the war was not climaxed with a regenerated international society providing and effectively guaranteeing peace and order for all nations and peoples, does not justify the rejection or repudiation of the accepted standards and practices of international law, the law and customs of war. International society has not stopped war; but it has established certain fundamental law and customs of war in accordance with the principle of humanity.

It is our duty and privilege to be engaged in the administration and enforcement of that law. Through the functions of this and similar commissions the law and customs of war take tangible form and deterrent effect, to warn potential wrongdoers that society will punish those who violate the law and customs of war.

The accused WAKABAYASHI, Seisaku, former vice admiral of the Imperial Japanese Navy, is charged with violation of the law and customs of war. The violation of law and customs of war is set forth in two specifications. The offenses set forth in these specifications occurred during the period when the accused was the Commandant of the Fourth Base Force during the period from July 26, 1943 to February 22, 1944, at a time when a state of war existed between the United States of America, its allies and dependencies and the Imperial Japanese Empire.

The first specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commandant of the Fourth Base Force to control the operations of members of his command and persons subject to his control and supervision, permitting them to commit the illegal acts, the specified war crimes set forth in paragraps (a) and (b). The duty set forth in this specification is the duty to control the operations of members of his command and persons subject to his control and supervision. The accused WAKABAYASHI is charged with having unlawfully disregarded and failed to discharge this duty in that he permitted these members of his command and persons subject to his control and supervision to torture, abuse, inhumanely treat and kill American prisoners of war. It is alleged and the prosecution will prove that at the times specified within the period when the accused was Commandant of the Fourth Base Force 7 American prisoners of war were murdered, and an additional forty-two American prisoners of war were subjected to abuse, torture, and inhumane treatment. The prosecution will prove that these vicious crimes were committed by members of the accused's command and persons subject to his control and supervision.

The second specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commandant of the Fourth Base Force to take such measures as were within his power and appropriate in the circumstances, to protect, as it was duty to do, American prisoners of war held captive by the armed forces of Japan under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, inhumane treatment, and killing of said prisoners of war. The gravamen of this specification is that the accused unlawfully disregarded and failed to discharge his duty to protect these prisoners of war. The acts and incidents set forth in paragraphs (a) and (d) of this specification are the same acts and incidents of unlawful torture, abuse, inhumane treatment and killing set forth in specification 1. The accused also failed in his duty to protect eight additional prisoners of war unlawfully tortured, abused, inhumanely treated and killed in the incidents set forth in paragraphs (b) and (c) of specification 2.

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Detailed presentation of the legal aspects of the duty to control one's subordinates and the duty to protect prisoners of war will be deferred until a more appropriate time during the final arguments of the prosecution. But certain focal points of the duty, and the applicable law and customs of war must be kept in mind during the course of the presentation of evidence in the instant case.

The existence under the law and customs of war of the duty to control subordinates and of the duty to protect prisoners of war, and the applicability of criminal punishment for violation of these duties under the law and customs of war is no longer the subject of legitimate dispute. The matter was concretely dealt with by the United States Supreme Court in the Yamashita case (327 U.S. 1).

The prosecution does not contend that the accused had an "absolute" duty, an absolute responsibility for the acts of his subordinates; and the charge and specifications against the accused do not envisage the application of such a doctrine of absolute responsibility.

The first specification which deals with the duty to control, alleges that the accused "disregarded" and "failed to discharge" his duty to control the operations of members of his command and persons subject to his control and supervision, "permitting them" to torture, abuse, inhumanely treat, and kill American prisoners of war. Discussion of the legal implications of the word "permit" will be deferred until the final arguments in the instant case. It should be noted at this point, however, that even the terms "disregarded" or "failed to discharge", clearly envisage something beyond the concept of absolute responsibility. They require that it be proved that the accused "disregarded" or "failed to discharge", that is to say, that he failed to take the required and appropriate action in accordance with the law and customs of war, to control the members of his command.

The second specification is similar to the first specification in that it does not require the application of any theory of absolute responsibility The second specification sets forth with greater particularity the scope of this duty for it alleges that the accused unlawfully disregarded and failed to discharge his duty "to take such measures as were within his power and appropriate in the circumstances" to protect prisoners of war.

The prosecution contends that the accused disregarded and failed to discharge these duties. The prosecution in proof of the specifications and charge will offer: documentary evidence, excerpts from prior court records (establishing the commission of, and conviction of participants in the incidents set forth in paragraph (b) of Specification 1, and paragraphs (b), (c), and (d) of Specification 2); affidavits; and the testimony of witnesses.

The prosecution will prove that during the entire period of the accused's command of the Fourth Base Force, the accused not only failed to take the necessary and appropriate measures, but in fact failed to take any tangible measures to control the members of his command so as to prevent torture, abuse, mistreatment and killing of prisoners of war.

The prosecution will prove that members of the command of the accused tortured, abused, inhumanely treated, and killed prisoners of war. The prosecution will prove that members of the staff at Fourth Base Force Headquarters knew, and that the accused should have known and in fact knew, of the plan by medical officers of the Fourth Naval Hospital, to conduct medical experiments upon the prisoners of war whom it was the duty of the accused to protect. The prosecution will prove that the accused took no measures to prevent these vicious criminal acts. The prosecution will prove that members of the staff of the accused knew, and that the accused should have known and knew, that prisoners of war whom the accused had the duty to protect were in fact tortured, abused, mistreated and killed. The prosecution will prove that despite this constructive or actual knowledge, the accused took no steps to control the members of his command or to protect prisoners of war. In short, the prosecution will seek to prove that the accused disregarded and failed to discharge his duty under the law and customs of war, to control his subordinates and to protect prisoners of war.

The basic question for the determination of the Commission is the factual question of whether the accused "neglected" his duty. The Commission must examine and consider all the circumstances, all the acts and omissions of the accused. In the light of the duty and responsibility of the accused as the Commandant of the Fourth Base Force, the Commission must determine whether the prosecution has proved beyond a reasonable doubt that as set forth in Specification 1 and Specification 2, the accused disregarded and failed to discharge his duty to control the operations of members of his command and persons subject to his control and supervision, and whether the accused disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

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本国法発意会が公知事実の認定
を為すことに対する異議の申立.

弁護人 高野統一郎.

一. 被告人はカロリン諸島がマリアナ方面司令部の地域であると云うことに対し其の理由に因り本国法委員会が公知事実の認定を為すことに異議を申立てる.

(1) 是等の島々が斯かる地域の一部であるか否かは本来常識的な事実ではなく検察官が立証せねばならぬ法律上の問題である. 前記諸島がマリアナ司令部の地域の一部であることの公知事実の認定が為される前に検察官は之が立証せねばならぬ.

(2) 日時を限定せずして唯漠然是等の諸島が現在マリアナ方面司令部の地域の一部であるとの公知事実の認定を申立つることは違法である. 之は裁判上の問題である. 換言すれば千九百四十五年乃至千九百四十四年に亘つて起つた事件を十年後の今日行おうとするの裁判に於ける問題である. 故に検察官は何年何月以後是等の島々がマリアナ方面司令部の地域であると日時を限定して申立てねばならぬ. 斯る裁判上に於ける事実の確定には日時が最も重要な要素の一つであるからである.

二. 千九百二十九年七月二十六日のジュネーブ俘虜条約及日本は正式に此の条約を批准しなかつたが瑞西国政府を通じ日本に拘束されている俘虜に対し同条約を適用することを同意した事実より本国法委員会が公知事実の認定を為すことに異議を申立てる.

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斯かる事柄は國家の政府と政府間で取極める外交上の交渉事項であって席にはまだ外部には公表されるものではない。」上記の事項は瑞西國政府を通じて日本が諾約したものであると検察官は言うのであるが之は検察官に於てお話せられない事項である。殊に日本は上記條約は批准してゐなかったのであるから其の條約の正式の謄文さへも来てゐなかったのである。

三、ポツダム宣言は本件裁判には関連がない。

第二回宣言第十項「吾等は日本人を民族として奴隷化せんとし又は國民として滅亡せしめんとするの意圖を有するものに非ざるも吾等此の俘虜を虐待せる者を含む一切の戦争犯罪人に対しては厳重なる處罰を加へらるべし…」は本件被告人岩林清作の裁判には何等の関連がないのであるから被告人は弁護人が上記事項は外交知事実の認定を為すことに異議を申立てるのである。

論言

高野弁護人

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OBJECTION TO THE COMMISSION TAKING JUDICIAL NOTICE

DELIVERED BY MR. TAKANO, JUNJIRO, DEFENSE COUNSEL.

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1. The accused respectfully objects to the Commission taking judicial notice that the Caroline Islands are part of the Commander Marianas Area on the following grounds:

a. Whether or not these islands are part of such area is not a matter of common knowledge here, but is a legal question which the judge advocate must prove. Before the commission takes judicial notice that the foregoing islands are part of the Commander Marianas Area the judge advocate should prove that they are.

b. It is not a proper way vaguely to request the Commission to take judicial notice that these islands <u>are</u> part of the Commander Marianas Area, without determining <u>since what time.</u> This is a judicial matter. In other words, it is a legal subject in the pending trial which deals with incidents which happened during 1943 and 1944, almost five years ago. Therefore the judge advocate must limit the time by stating that these islands have been part of the Commander Marianas Area since a specific month in a specific year because time is one of the most essential elements in establishing a fact in a trial.

2. The accused objects to the Commission taking judicial notice of the Geneva Prisoners of War Convention of July 27, 1929 and of the fact that although Japan has not formally ratified this convention, she agreed through the Swiss Government to apply the provisions thereof to prisoners of war under her control. Such is a matter of diplomatic negotiations between the government of a country and that of another, and a matter of this sort is not necessarily published, and therefore, the aforesaid fact must be proved by the judge advocate. Since Japan did not ratify the foregoing convention not even an official translation thereof was effected.

3. The Potsdam Declaration has no bearing upon the issues of this case. Especially paragraph ten thereof which reads:

> "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

This is irrelevant and immaterial to the present case. Therefore, the accused objects to the Commission taking judicial notice of the foregoing declaration.

Respectfully,

/s/ Takano, Junjiro.

I hereby certify the foregoing to be a true and complete translation to the best of my ability, of the original document written in Japanese.

EUGENE E. KERRICK, JR.
Lieutenant, U. S. Naval Reserve,
Interpreter.

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REPLY TO OBJECTION TO JUDICIAL NOTICE

Delivered by Lieutenant James P. Kenny, USN
Judge Advocate

1. Whether or not the Carolina Islands are part of the Commander Marianas Area is not a legal question. It is a question that is concerned with the organization of the Navy Department and which this commission is bound to know as a part of its own special duty and function (Naval Courts and Boards, Section 309). There is nothing vague in the request on this matter as to time. The verb "is" has always meant the present and does not refer to any other time.

2. The Geneva Prisoners of War Convention of July 27, 1929 is also a matter which this commission is bound to know as a part of its own special duty and function. In fact all members of the military are charged with a knowledge of the contents of this convention as it contains part of the International Law concerning the proper treatment of prisoners of war. The fact that Japan agreed through the Swiss Government to be bound by the terms of this convention is easily ascertainable, if not already known, from the contents of War Department Technical Manual 47-251.

3. The terms of the Potsdam Declaration were accepted by the Japanese in the surrender document. As was pointed out in the request of the judge advocate, this document is also available in authentic form. Since its contents deal with the subject of prisoners of war, it is proper that this commission take judicial notice of it.

Respectfully,

James P. Kenny

James P. Kenny,
Lieutenant, USN,
Judge Advocate.

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MOTION TO SUPPRESS DEPOSITION TAKEN ON INTERROGATORIES OF LT. CDR. GEORGE ESTABROOK BROWN, JR., USNR.

Delivered by

Commander Martin E. Carlson, USNR,
Counsel for the Accused.

The accused moves that the deposition taken on interrogatories, "the perpetuation of testimony of George Estabrook Brown, Jr., Lt. Comdr., USNR in the matter of beating and torturing of Lt. Comdr. George Estabrook Brown, Jr., 95383, USNR on Truk Island, at Ofuna Secret Questioning Camp, at Omori Prison Camp and at Mitsushima Prison Camp, from November 20, 1943 to September 4, 1945, by unknown Japanese personnel" be suppressed on the ground that no notice was given of the filing of these interrogatories and no opportunity was given to file cross-interrogatories and Brown is a lieutenant commander, USNR.

See Sec. 38 "Depositions," 16 Am. Jur. "The general rule is that the adverse party must have reasonable notice of the taking of depositions so as to be afforded an opportunity to be present at the examination, or to file cross-interrogatories and that failure to give notice renders the deposition vulnerable to a motion to suppress." Citing many cases in footnote 6.

Sec. 54: "The deprivation of the right of cross-examination, by lack of notice or otherwise renders a deposition vulnerable to a motion to suppress it."

Sec. 89 "In order to authorize the use of depositions as evidence, procedural requisites prescribed by statute or rules of court must be substantially complied with and a failure in this respect may constitute a ground for their suppression or exclusion."

See footnote 18, Sec. 89, Ibid.: "Depositions will be suppressed where they are taken in violation of a rule providing that testimony cannot be taken by either party until the cause is at issue by sufficient answer or decree pro confesso as to all defendants." In this present case issue was not joined until July 29, 1948 when the accused pleaded "not guilty" to the charge and the specifications.

A lieutenant commander, USNR, is certainly subject to the jurisdiction of this commission.

The first notice the defense had that the prosecution was to use this deposition was when it was handed to defense counsel during the period immediately preceding the convening of the commission the second day of the trial, Friday, July 30, 1948. Shortly after court convened we requested a recess in order to have time to read the depositions and other documents which the prosecution informed us for the first time they were to offer into evidence. There was no time to examine the deposition on Friday, July 30, 1948 during the short session of the court that day. This is the first opportunity we have had to bring to the attention of the court by this motion to suppress our objections to the use of this deposition on the grounds of the above enumerated substantial defects and irregularities.

The affiant is a lieutenant commander, USNR, and subject to the jurisdiction of this commission.

The accused prays that the deposition of George Estabrook Brown, Jr., Lt. Comdr., USNR, be suppressed.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the accused.

梳事側書類甲206号 G.E. BROWN ノ口供書ヲ
證據ニ提出スルコトニ対スル異議

辯護人 佐藤 敎

被告ハ左ノ理由ニ依リ G.E. Brown ノ口供書ガ證據トシテ提出サレルコトニ異議ヲ申立テル.

(一) 本口供書中ニ於テ G.E. Brown ハ日本ノ駆逐艦カラトラックノ陸上ニ移サレタコトヲ述ベテ居ルガ其處ノ如何ナル部隊ニ收容サレタカヲ述ベテ居ナイ

其ノ当時トラックノ陸上ニアッタ部隊ノ總ベテガ被告若林指揮下ニアッタトハ限ラナイノデアル. 從テ本口供書ニ依ッテハ, Brown ノ言フ俘虜ヲ虐待シタ部隊ト被告若林トノ間ノ指揮関係ヲ知ルコトガ出来ナイ. 斯ノ如キ不明瞭ナ資料ヲ以テ被告ノ責任追及ノ証據トスルコトハ不適当デアル.

(二) G.E. Brown ノ口供書中ニ述ベラレタ俘虜虐待ノ具体的事実ガ七月八日ニ発布サレテ居タ起訴罪狀項目第一及第二ノ夫々(a)項ニ記載サレテ居タガ又, 七月二十二日附マリアナ方面司令官カラ訂正サレテ Brown ノ口供書ニ述ベタ事実ト認メラレル、事項ガ削除サレタノデアル. 斯カル修正ガ行ハレタニ拘ラズ本口供書ヲ依然トシテ證據ニ採用スルコトハ起訴罪狀項目ノ主張スル事実以上ニ被告ニ対シ不利ナル先入觀ヲ委員会ニ与ヘルモノデアル

本軍事委員会召集命令書第六項ニ於テ證據ノ採用ニ当ッテハ海軍律ノ規定ヲ緩和シテ SCAP rule ヲ用ヒタ差支ナイ旨ヲ規定サレテ居ルガソレニハ "as are necessary to obtain justice" ナル條件ガ附セラレテ居ル. G.E. Brown ノ口供書ハ被告ニ不利ナル先入觀ヲ与ヘルモノデアリ公正ヲ失スルガ故ニ證據ニ採用スベカラザルモノデアル

敎 白.

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NUMBER 206, AFFIDAVIT OF G. E. BROWN AS EVIDENCE, DELIVERED BY SADAMU SANAGI, A COUNSEL FOR THE ACCUSED.

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The accused objects to the introduction into evidence of the affidavit of G. E. Brown for the following reasons:

1. In the affidavit, G. E. Brown states that he was transferred ashore on Truk from a Japanese destroyer, but does not say by what unit he was interned. All the land units, which were on Truk at that time were not necessarily under the command of the accused WAKABAYASHI. Therefore we are unable to trace the command relation between the unit which G. E. Brown alleges mistreated prisoners and the accused, WAKABAYASHI. With such ambiguous information it is inappropriate to accept this as evidence in seeking the responsibility of the accused.

2. The statement by G. E. Brown in regard to concrete facts of mistreatment of prisoners was included in paragraph a, of both specifications 1 and 2, issued on July 8. But this was corrected by Commander Marianas on July 23rd. Such parts as were recognized as facts which were stated in Brown's affidavit, were deleted. Despite these corrections, to accept this affidavit as evidence, will prejudice the commission toward the accused, much more than the facts which the prosecution will attempt to prove as it has alleged in the specifications.

In the 6th paragraph of the precept for the Military Commission it is provided that relaxation of the rules of naval courts and boards and use of such rules of evidence issued by the Supreme Commander for the Allied Powers are permitted. But it is limited by the condition "as are necessary to obtain justice." The affidavit of G. E. Brown is prejudicial to the interest of the accused and is incompatible with justice. Therefore this evidence should not be accepted.

SANAGI, Sadamu

I hereby certify the foregoing to be a true and complete translation of the original Japanese document, to the best of my ability.

EUGENE E. KERRICK, JUNIOR,
Lieutenant, U. S. Naval Reserve,
Interpreter.

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OBJECTION TO PROSECUTION DOCUMENT NUMBER 206 (The purported perpetuation of testimony of George Estabrook Brown, Jr.,) delivered by Commander Martin E. Carlson, USNR, counsel for the accused.

The accused objects to the introduction into evidence of these interrogatories said to be in perpetuation of the testimony of George Estabrook Brown, Jr., on the grounds that this witness, Commander Ogden, is incompetent as a witness to testify either as to the original or as to the copy.

We did make a motion to suppress the use of these interrogatories on the ground that no notice was given the accused at the time they were taken and that there is no provision for their use in this trial.

We cite Section 12 of Depositions in 16 Am. Jur. which definitely states that there is no right at common law to use depositions in criminal cases. We quote:

> "With respect to the taking and the use of depositions in criminal cases, a distinction is to be noted, at the outset, between the right to take testimony by depositions in advance of the trial for use upon the trial, which right does not exist under common-law rules of procedure and is therefore dependent upon statutory provisions therefor..." "...Such statutes, being in derogation of the common law, are strictly construed."

This accused does have the protection of the Constitution of the United States when he is brought to trial in this American court. Any statement that the accused has not the right to be confronted with the witnesses is unheard of in American courts. If American laws and rules of evidence are not in force in this military court, when a Japanese national is being tried, what law and what rules are being used in this trial? The accused does have the right of confrontation of witnesses.

Even those cases where statutes authorize the taking and the use of depositions in criminal cases the validity of such statutes has been challenged upon various constitutional grounds. See Section 13, "Depositions" 16 Am. Jur. and 90 A.L.R. 377; Ann. Cas. 1916 A 1091.

In taking these depositions no opportunity was given the accused to be present and to cross-examine the witness on July 10, 1946, although the accused, TAKABAYASHI, was being held in solitary confinement at the war criminal stockade, Guam, he having been held in such solitary confinement since the day he arrived, May 29, 1946, and without any charges being preferred against him. Not until July 8, 1948 was he charged with a crime.

"In the absence of statute, depositions can be taken for use in a foreign jurisdiction only by authority of a commission or letters rogatory issued by a court of such jurisdiction (5)" 16 Am. Jur. "Depositions", Sec. 74, citing the case of Stein v. Bowman, 13 Pet. (U.S.) 209, 10 L. Ed. 129, ex parte Harkins, 6 Ala. 63, 41 Am. Dec. 38.

"Except by consent of the adverse parties, depositions cannot ordinarily be taken before the execution of process or appearance or filing of the bill." (2) Sec. 19, "Depositions," 16 Am. Jur. citing Cooper v. Bennett 70 W.Va. 110, 73 S.E. 260, Ann. Cas. 1913 D. 851.

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The accused Wakabayashi, we can assume, did not consent to the taking of these interrogatories in perpetuation of testimony and this witness cannot and has not testified why it was necessary to perpetuate this testimony. The witness, Commander Ogden, cannot even testify that Brown is a competent witness.

The procedure in order to obtain a deposition is set forth in Sec. 213, N.C.&.B. We read:

"The party, prosecutor or defendant desiring the deposition submits to the court a list of interrogatories to be propounded to the absent witness, then the opposite party, after he has been allowed a reasonable time for this purpose, prepares and submits a list of cross-interrogatories. After the court has assented to the interrogatories and cross-interrogatories thus submitted, it adds such as, in its judgment may be necessary to elucidate the whole subject of the testimony to be given by the witness."

We refer to Sections 211 to 216 inclusive, Naval Courts and Boards.

No opportunity was given the accused at the time this deposition was taken and it should therefore not be admitted into evidence.

We maintain that this Commission should rule that this deposition from these interrogatories must be taken according to the rules set forth in Sections 211 to 216, Naval Courts and Boards, and since it was not so taken that this deposition cannot be admitted into evidence.

For the court to admit this deposition interrogatories in perpetuation of testimony of George Estabrook Brown, Jr., into evidence in this trial will be prejudicial to the substantive rights of the accused.

In Section 30, "Depositions," 16 Am.Jur., we read:

"A bill to perpetuate testimony may be filed in the court having jurisdiction of the controversy" (10) citing the case of Arizona v. California, 292 U.S. 341, 78 L.Ed. 1298, 54 S.Ct. 735.

The accused, the adverse party in this instance, was not given any notice of the taking of this deposition and the deposition must be suppressed. See Sec. 38, "Depositions," 16 Am.Jur., and the following cases cited in footnote 6, Teese v. Huntingdon, 23 How. (U.S.) 2, 16 L.Ed. 479; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C, 1097; Woodward v. Spiller, 1 Dana (Ky) 179, 25 Am.Dec. 139; Hunt v. Crane, 33 Miss. 669, 69 Am.Dec. 381; Cunningham v. Irwin, 7 Serg & R (Pa) 247, 10 Am.Dec. 458; Wainwright v. Webster, 11 Vt. 576, 34 Am.Dec. 707; Miller v. Neff (Miller v. McMechen) 33 W.Va. 197, 10 S.E. 378, 6 LRA 515; State ex rel. Drew v. Shaughnessy, 212 Wis. 322, 249 N.W. 522, 90 ALR 368.

Where a deposition de bene cause is taken before return of the writ, notice should be given to the defendant in person. Gilpin v. Semple, 1 Dall. (Pa.) 251, 1 L.ed. 123.

Depositions taken on interrogatories may be suppressed upon motion when no notice of the filing of the interrogatories and no opportunity to file cross-interrogatories have been given. National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am.St.Rep. 101.

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As to law governing requirements as to notice, see supra. SS. 23.

As to notice of retaking, see infra, SS 100. See generally Notice (Also 20 R.C.L. p. 339); Process (Also 21 R.C.L. p. 1258).

In Section 54, "Depositions," 16 Am. Jr. holds: "The deprivation of the right of cross-examination, by lack of notice or otherwise, renders a deposition vulnerable to a motion to suppress it." And we have made such a motion.

It is no excuse for failure to carry out the law regarding the taking of depositions to say that the judge advocate had no knowledge of this case because the accused was being held in solitary confinement without benefit of counsel. It is no excuse to say the judge advocate did not take the deposition. Naval Courts and Boards and the law quoted are clear that this deposition should be excluded.

In 71 "Depositions," 16 Am. Jur.: "The rule is well established that a deposition taken in a foreign jurisdiction cannot be admitted in evidence without some proof that the party taking the deposition had authority so to act.(5)" citing Ann. Cas. 1914B., 161.

No evidence has been introduced by the judge advocate; the witness, Commander Ogden, is incompetent to testify regarding this matter and he did not testify regarding the authority of Lieutenant Commander Elroy G. True, Jr., USNR, to take the deposition. The authority of Lt. Comdr. True to even administer an oath is questioned unless specifically authorized; a lieutenant commander in the U. S. Naval Reserve has no authority simply by virtue of his rank as a lieutenant commander to administer an oath.

Section 84, "Depositions," 16 Am. Jur. bears out the requirements for the transmission of depositions and neither this section nor sections 211 to 216 inclusive, Naval Courts and Boards were complied with.

We move that this deposition be excluded on the ground that to admit them will inflict substantial injury upon the accused, TAKABAYASHI. We point out that the defects enumerated above proceed from bad faith rather than from accident or mistake. See Partridge v. Stocker, 36 Vt. 108, 84 Am. Dec. 664. See Sec. 89, "Depositions," 16 Am. Jur.

In footnote 18, the rule is set forth:

"Depositions will be supressed where they are taken in violation of a rule providing that testimony cannot be taken by either party until the cause is at issue by sufficient answer to decree pro confesso as to all defendents." Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L.R.A. 673."

The cause was not at issue until July 29, 1948.

No practice however convenient can give validity to a deposition not taken according to law. This deposition was not taken according to law, and it should be excluded.

This right to object on the ground of defects and irregularities is not waived by any submission of cross-interrogatories now or in the future.

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Nor will the opportunity to now submit cross-interrogatories by the accused cure the defects in the deposition here offered into evidence.

A deposition may be taken only before some person who is duly authorized to act, citing De Rezes v. His Wife (De Renzes v. Palestine) 115 La. 675, 39 So. 805, 2 L.R.A. (N.S.) 1089, 5 Ann. Cas. 893, and See sec. 103, "Depositions," 16 Am. Jur.

We further object to this deposition on the ground that it is incompetent, irrelevant, and immaterial, and that the witness is incompetent. We object because the document is hearsay as to the accused, WAKABAYASHI. Nowhere in the deposition is the accused, WAKABAYASHI, mentioned, or is he accused of neglect of duty or of failure to protect the affiant, George Estabrook Brown, Jr.

Most of the interrogatories relate to a period of time outside of the time during which WAKABAYASHI was accused of neglect of duty.

Much of the interrogatories relate to his treatment aboard a Japanese auxiliary carrier, former NYK converted liner, at Ofuna Prison Camp, Omori Prison Camp, Tokyo Camp No. 1, Mitsushima Prison Camp, and Tokyo Detached Camp No. 2. This is all immaterial and irrelevant as to the neglect of duty charged against the accused, WAKABAYASHI, as Commandant of the Fourth Base Force, Imperial Japanese Navy, from July 26, 1943 to February 22, 1944.

We reserve all our rights to object and to appeal the ruling of the commission on this our objection when and if we do submit cross-interrogatories.

The use of this deposition by the prosecution of course limits the punishment which can be imposed. (See Sec. 454, N.C.&B.)

If the judge advocate has any ruling case law which is material to the question of the admission of this deposition into evidence in this criminal case he should state the law and give the citations.

As we stated in our objection to documents 5 and 8 the prosecution have had ample time to procure a deposition which is admissible according to the rules of evidence. Notice of taking of such a deposition could easily have been given defense counsel. Simply because it wasn't convenient to take this deposition in the proper way is not a good reason to admit it into evidence.

Objections which we have made go to the question of the admissibility of the document. It is indeed a strange theory which the judge advocate advances in offering irrelevant, immaterial and improperly secured documents which he says in effect admit the irrelevant, the immaterial and defective document as competent evidence and then try to clear your mind of all such objectionable matter by some mysterious formula which he labels "weight and sufficiency." Grant you the document is objectionable on the grounds of being irrelevant and immaterial and because it was not properly taken but this will be sure to prejudice the substantive rights of the accused.

We would like to have the basis for any answer by the judge advocate which includes a statement that, this accused a Japanese national has no rights guaranteed by the Constitution of the United States of America.

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We have tried to point out the right way to procure a deposition and it is clear that this deposition was not secured in the right way.

The deposition also shows that Lt. Comdr. George Estabrook Brown, Jr., 95383, is an officer of the United States Naval Reserve. He is therefore available as a witness and should be summoned as a witness. He is subject to the jurisdiction of this navy convened Military Commission.

For these many reasons we ask that no part of the deposition be admitted into evidence.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the accused.

"Z" (5)

1117

REPLY TO OBJECTIONS TO AFFIDAVIT OF GEORGE ESTABROOK BROWN, JUNIOR, LIEUTENANT COMMANDER, U. S. NAVAL RESERVE (PROSECUTION DOCUMENT NUMBER 206), DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE ON 2 AUGUST 1948.

- -

Addressing my remarks - first to the objections by Mr. SANAGI.

Mr. SANAGI contends that the affidavit does not state at what unit BROWN was interned at Truk, and counsel therefore questions the relevance of the affidavit. It is clear that the judge advocate is not bound to establish his proof with regard to any incident or portion thereof, by the use of any individual document or the testimony of any individual witness. The judge advocate will establish during the course of the presentation of his case that the accused was the Commandant of the Fourth Base Force - a subordinate unit of which was the Forty-first Naval Guard Unit; and the judge advocate will establish that the forty-two prisoners, one of whom was George Estabrook BROWN, junior, taken from a submarine, were incarcerated in the Forty-first Naval Guard Unit during the period from November 20 to November 28, 1943. The specific unit and the specific relevance of the BROWN affidavit will be amply proved, and it is proper to admit the document under that proviso.

The defense contends that the deletion of the specific facts of mistreatment that appear in the original specifications, prior to their modification, in some way prejudices the accused. The defense is in error in that regard. The affidavit and information contained therein can be applied by the commission only to those elements of the specifications which are charged and to which the content of the affidavit is relevant. So much for the objections by Mr. SANAGI. With regard to his final objections with regard to the use of affidavits, and SCAP rules of evidence, these objections will be answered in continuation of this reply with regard to the objections made by Commander CARLSON.

The defense counsel, Commander CARLSON, is apparently under the mistaken assumption that we are limited in the proceedings before a military commission to what are the standard procedures and proceedings before ordinary civil courts and before naval courts martial. This is an error which is clearly apparent when we examine the precept of this commission which specifically authorizes the commission to "use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers (Letter General Headquarters, Supreme Commander for the Allied Powers, APO 500, 5 December 1945 A. G. 000.5 (5 Dec. 45) LS, Subject: 'Regulations Governing the Trials of Accused War Criminals', and modifications thereof), as are necessary to obtain justice." These regulations specifically approved in Paragraph 5 d (1):

c

"The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. The commission shall apply the rules of evidence and pleading set forth herein with the greatest liberality to achieve expeditious procedure. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted: ..... (c) Affidavits, depositions or other signed statements."

"A4(1)"

With regard to the contention that the taker of the affidavit, Lieutenant Commander Elroy G. TRUE, U. S. Naval Reserve, was not shown by the witness to have been authorized to administer an oath. The oath, as evidenced by the affidavit offered in evidence, was in fact administered. It was administered by an officer of the United States Navy of the rank of Lieutenant Commander. Those who are familiar with navy law are cognizant of the fact that officers of the rank of Lieutenant and above are authorized to administer oaths in connection with navy business. It would appear therefore that this objection by counsel is without merit. It should also be noted that in attacking the validity of authority to administer oaths, where a document purports to be in correct form and does not prima facie disclose lack of authority to administer the oath, the burden is upon the party objecting to the admissibility of the document, and this burden defense counsel has not even attempted to assume.

With regard to the rights of an accused in accordance with Naval Courts and Boards, defense counsel is in error in believing that Naval Courts and Boards guarantees the accused any rights, or any privileges particularly with reference to the Constitution of the United States, or any limitations of punishment in regard to the use of depositions. As I have pointed out previously, naval courts martials are different from exceptional military commissions. In Appendix D of Naval Courts and Boards, the exceptional military commission is described and it is noted that its functions are different and distinct from general courts martials and other courts matials. I previously discussed the decision in the YAMASHITA case in detail with regard to the rights of the accused. In that case they dealt with the rights of YAMASHITA under the Articles of War and the Supreme Court indicated that the Articles of War were not applicable to the accused YAMASHITA. Similarly the judge advocate believes that the Articles for the Government of the United States Navy are not applicable to the accused war criminal in this present case.

It is clear that the instant affidavit is admissible in evidence, in accordance with the authority given to this commission by its specific precept. It is unnecessary to remind the commission that affidavit evidence has been consistently admitted in war crimes trials before international tribunals and military commissions. Military commissions serving in this area under the authority of Commander Marianas have heretofor received such documents in evidence. The records of trials before such commissions have been reviewed by higher military authority and the proceedings have been approved. This practice is not confined to military commissions of the United States, but is well-established and applied in proceedings before military commissions of many nations in their trial of war crimes.

The following interesting case is illustrative of how broad an acceptance the admission of this type of evidence has received. During the trial of ERICH KILLINGER and four others by a British Military Court, at Wuppertal, November 26 to December 3, 1945, the defense, before the tendering of the affidavit evidence for the Prosecution, applied for one deponent to be produced in person. The defense had been given to understand that the British officer in question would be available for questioning. The Court decided after hearing argument, that the deponent could not be produced without "undue delay" and the President of the Court added the significant statement that "we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a court, due weight." I cite this case from United War Crimes Commission, War Crime Trial Law Reports, Vol. IV, Trial and Law Report Series No. 50, p. 73.

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It is unnecessary to burden the Commission with citation of the numerous cases decided before military commissions of the United States, and of other nations, in which affidavits similar to the type here offered have been received in evidence.

The accused in his objection has argued that this practice is contrary to the protection of the Sixth Amendment to the Constitution of the United States of America. The Supreme Court of the United States, in the case of In Re YAMASHITA, 327 U. S. 1, had occasion to consider the evidence admitted by the Military Commission in that case, and the court did not find the use before a Military Commission of ex-parte affidavits and other documentary and photographic evidence repugnant to the Constitution. In this regard the Supreme Court of the United States specifically upheld the right of military commissions under the authority of controlling military command to receive such evidence, and the Supreme Court specifically stated (p. 15) "For reasons already stated we held that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities."

In an able discussion of this question in the American Journal of International Law, Vol. 40, No. 2, April 1946, p. 405, Professor Quincy Wright points out that while the Supreme Court did not cite international practice on this matter it is clear "that international tribunals have hesitated to exclude any sort of evidence and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials. Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in international law."

The question is also briefly discussed in War Crime Trial Law Reports, United Nations War Commission, Trial and Law Report Series No. 50, Volume IV, and the following excerpt from that report merits the attention of the Commission: "In general it may be said that the rules of evidence applied in war crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance, many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilised. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used.

"Furthermore, it should be pointed out that the historic function of many of the stricter rules of evidence such as the rule against hearsay was to protect juries from evidence which had not been subjected to cross-examination and the value of which, owing to their inexperience, they might not be able properly to assess. It has been argued with justification however, that the judges on war crime courts are less likely to need such protections than in the average juryman and that many of the stricter rules therefore lose their raison d' etre."

The judge advocate believes that the foregoing succinctly answers the objections of the accused. However, it should be noted before closing this reply, that substantial rights of the accused have not been prejudiced by the offer, or by admission, of this document in evidence. The accused is at liberty to submit interrogatories in connection with this affidavit, and to offer in evidence such deposition as may be received in reply to these interrogatories. Defense counsel is well aware of this procedure. The same counsel who are here serving the accused appeared as counsel in the prior trial of KOBAYASHI in which a certified copy of this identical affidavit was offered and received in evidence. In connection with the

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affidavit defense counsel submitted interrogatories to BROWN and received a deposition thereto. They are at liberty in the instant case to submit such interrogatories as they desire to be propounded. This procedure provides substantial protection to the accused.

The judge advocate respectfully requests that the objection of the accused be overruled,, and the document offered be admitted in evidence.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

1121

BB

(1)

検察官側書類第207号の
提出に対する異議の申立

弁護人 高野純二郎

弁護人は下記の理由で同号検察官書類第207号Joseph N. BAKER, Jr.の宣誓供述書を証拠書類として提出することに異議を申立てる。

(一) 此の宣誓供述書は47名のSCULPIN号の乗組員が拘留せられた場所を単に"the Prison Compound"又は"Compound"とのみ記載して居り、此の宣誓供述者が"吾が一行は全体で僅か12日間のみが其処に居たのであって"と述べ更に彼等がTrukに拘留せられた期間が極めて短期間であったから其の監禁せられた場所の同一性と詳細の確かさとは合致なかったであろうことは了解し得ることではあるけれども斯く正確さに合った答えである。例へば其の木造建舎の在った構内に在た部隊は日本の海軍であったか陸軍であったか又如何なる各科の部隊が居たか或は又乗組員は其の部隊の名称迄は記載し表たであろう。当時Truk上には被告人若林の部下でない部隊も居たであろうが上此の供述書の記載のみでは彼等が監禁せられたのは何れの部隊より依って監禁せられたか又其の彼等を監禁した部隊が果して被告人若林の指揮監督下に在った部隊であったか否かが明確でない。仍て斯かる宣誓供述書を以て本件被告人若林の部下統御監督上の責任を問う裁判の証拠とすることは云い得ては

"BB(1)"

1122

(2).

なり.

(二). 此の宣誓供述書は Truk に於て彼等一行を訊問したりは日本の陸軍及海軍の指揮達であったと記載してある. 然るに陸軍は本件被告人の指揮監督下になかったことは勿論であり又海軍も被告人が第四根拠地隊司令官として Truk 在任中彼の指揮監督下にない海軍部隊も Truk に居たのであるから上記の陸軍指揮に関しては被告人岩林は何等の責任を執るべき理由はないのみならず其等海軍指揮に関しても果して被告人岩林の指揮監督下に在った指揮かが不明である. 更に此の供述者は彼等の一團が Truk に於て監禁せられたのは千九百四十五年十一月十九日より同年十二月一日までの間と記載してあるけれども其一團の一人であった E. BROWN, Jr., の Deposition は上記の期間と同年十一月二十日より同月二十八日までとあって此の両者の記載の間には不一致がある. であるから第四根拠地隊司令官としての被告人の責任を問う本件裁判に於ては斯の如き漠然且不明瞭な記載の宣誓供述書は本件の証拠とは為し得ないのである. 仍て之が提出に異議を申立てる.

(三) 此の宣誓供述書は此の供述者及他の40名の人には "長さ 18 feet 幅 14 feet の木造建家" に収容せられ彼等を三組に分ちて之等の小さな独房に監禁した. 仍て其の各独房は長さ約 4 feet 幅約 3 feet であって第一の独房には 14 人, 第二の独房には 14 人, 第三の独房には 13 人が監禁せられたと記述してある. 然るが此の記載を付て

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(3)

各等の検討に於ける如くことは"長さ4 feet 幅3 feetの独房に14人大人を監禁した"ということである。米国人の体躯は一般的に日本人の体躯より遙かに大きいことは公知の事実である。此の大きな体躯の米国人を14人又は13人つゝ上記の小さな独房に監禁することは各等の経験則並に物理学の法則上不可能の事である。斯かる記載のある供述書は事実の正確なる供述とは言い得ない。仍て裁判上の証拠とすることは容認しがたい。

(四) 最後に此の宣誓供述書は九百四十八年六月二十日 MASSACHUSETTS 州 GREAT BARRINGTON, CASTLE STREET, 193 に居住する JOSEPH N. BAKER, JR. の作成にかゝるものである。此の宣誓供述書が検察官側書類第207号として本委員会に提出せられたのであるが、此の供述者は検察官よりは"当局とは氏名不詳の人"ではないことは言うを俟たない。検察官は充分知悉たる人物である。検察官は此の宣誓供述書を本事件の起訴状、各罪状項目が修正せられたる日即ち九百四十八年七月二十日以前に検察官に到達したのである。然るに検察官の修正起訴状及罪状項目には検察官は知り乍ら此の宣誓供述者の氏名が掲記せられていない。検察官は此の宣誓供述者は本件起訴状罪状項目其の一の(1)及其の二の(1)に記載せられた俘虜の一団の中の一員でなかったと言うにはあらずや。検察官の主張する俘虜虐待の被害者の一人でなかった者の宣誓供述書は如何ようとも

"BB(3)"

1124

本件裁判の証拠書類とは為し得ないものである。即ち此の宣誓供述書は本件とは何等の関係のない第三者の作成にかゝる書類である。斯かる本件との何等の関係を有たない第三者の供述書がどうして本件の裁判上の証拠となり得るであらうか。仍て此の宣誓供述書を本件の証拠書類とし検察官が提出することに異議を申立てる。

謹言

高野総三郎

"EB(4)"

Objection to the introduction of Prosecution Document No. 207
Delivered by Mr. Takano, Junjiro, counsel for accused.

The accused objects to the introduction of document No. 207, affidavit of Joseph N. Baker, Jr., as documentary evidence on the following grounds:

1. This affidavit only states the place of detainment of the 42 crew members of the submarine, Sculpin, as "the prison compound" or just "compound". As is stated in this affidavit, "since our group was there only about 12 days altogether," it is understandable that he did not know the detailed and accurate description of this place of confinement, since their confinement on Truk was for a very short period, but I suggest he should have known this place of confinement a little more accurately. For instance, couldn't he have stated what unit, army or navy, was at the compound where "the wooden structure" was situated, or what branch of service this unit was, or if possible the name of the unit? This affidavit does not clearly show at what unit they were confined or whether or not the unit by which they were confined was actually under the command of the accused Wakabayashi, because at that time there were units which were not subordinate to him. Therefore it is not proper that such an affidavit be admitted into evidence in a trial wherein the responsibility of the accused Wakabayashi for controlling and supervising his subordinates is in question.

2. In this affidavit it is deposed that the persons who interrogated them on Truk were officers of Japanese army and navy. However it is evident that the army was not under the control and supervision of the accused on Truk then and there were even navy units which were not subject to his control and supervision during his tour of duty as Commandant of Fourth Base Force on Truk. Therefore, not only does the accused Wakabayashi not have any reason to hold himself responsible for the above army officers, but it is also not clear whether or not these navy officers were under his control and supervision. Such a vague and indefinite affidavit cannot be used as evidence in this case in which the accused is charged with his responsibility as commandant of Fourth Base Force. The period of detention on Truk according to this affidavit was from 19 November 1943 through 1 December 1943 but the term of detention according to the Brown affidavit was 20 through 26 November 1943 and so there is a discrepancy between the affidavits even though both of them were members of the group. So the accused objects to the introduction of this document.

3. It is stated in this affidavit that the affiant with 40 other persons were quartered "in a wooden structure, eighteen feet long by fourteen feet wide...", that they were divided into three groups and imprisoned in three small cells approximately four feet in length by three feet in width each, and that fourteen men were distributed in the first and second cells and 13 men in the last cell. But we must carefully consider that this affidavit states that "14 men were confined in a cell 4 feet by 3 feet". It is a well known fact that Americans are generally much larger in stature than the Japanese. From the laws of physics and from our experience we well know it is impossible to confine 13 or 14 of those physically large Americans in each of those small cells. An affidavit with such a statement cannot be an accurate description of the facts; therefore, it is inappropriate that this be admitted as evidence in this court.

CC (1)

4. Lastly, this is the affidavit made on 30 June 1948 by Joseph N. Baker, Jr., residing at 193 Castle Street, Great Barrington, Massachusetts. Since this affidavit was submitted to the commission as prosecution document No. 207, it goes without saying, that the affiant was not a person whose name is unknown to the relator, that is to the prosecution. The judge advocate received this affidavit before 23 July 1948, whereupon the judge advocate amended the charge and specifications in this case. He is a person well known to the prosecution. Nevertheless in the revised charge and specifications of the prosecution, the name of this affiant, who is known to the prosecution, is not mentioned. In other words, we cannot but say that this affiant was not a member of a group of prisoners mentioned in charge and specifications 1 (a) and 2 (a). An affidavit of a person who was not a victim of the mistreatment of prisoners as alleged by the prosecution cannot be documentary evidence in the court trying this instant case. In short, this affidavit is a document wholly irrelevant to the present case. How can such an affidavit as this be evidence as it was executed by a third person who had nothing whatsoever to do with the incident alleged in the specifications of the charge of the present case. Therefore, the accused objects to the introduction by the prosecution of this affidavit as a documentary evidence in this case.

Respectfully,

Takano, Junjiro,
Counsel for Accused.

I certify that the foregoing is a true and complete translation of the original in Japanese, to the best of my ability.

Eugene E. Kerrick, Jr.,
Lieutenant, U. S. Naval Reserve,
Interpreter.

cc (2)

OBJECTION TO PROSECUTION DOCUMENT NUMBER 207 (The deposition of Joseph N. Baker, Jr.)

Delivered by
Commander Martin E. Carlson, U. S. N. R.
Counsel for the Accused.

The accused objects to the introduction into evidence of this document, the testimony of Joseph N. Baker, Jr., on the grounds that this witness, Commander Ogden, is incompetent as a witness to testify as to the document being offered into evidence.

The document is irrelevant and immaterial and hearsay as to the accused.

For all the reasons set forth in our objection to the prosecution document 206, the purported deposition of testimony of George Estabrook Brown, Jr., we object to this deposition being introduced into evidence.

We object to the document and move it should be suppressed on the ground that no notice was given the accused at the time the deposition was taken and that there is no provision for the use in this trial of such a deposition.

We cite Section 12 of Depositions in 16 Am. Jur. which definitely states that there is no right at common law to use depositions in criminal cases. We quote:

> "With respect to the taking and the use of depositions in criminal cases, a distinction is to be noted, at the outset, between the right to take testimony by depositions in advance of the trial for use upon the trial, which right does not exist under common-law rules of procedure and is therefore dependent upon statutory provision therefor..." "...Such statutes, being in derogation of the common law, are strictly construed."

As we read Article 68 the statute under which a deposition is allowed in naval courts there is no right to the use of this deposition.

We challenge any statement that this accused does not have the protection of the Constitution of the United States when he is brought to trial in this American court. Such a statement is unheard of in American courts. If American laws and rules of evidence are not in force in this military court, when a Japanese national is being tried, what law and what rules are being used in this trial. We challenge any such a statement.

Even those cases where statutes authorize the taking and the use of depositions in criminal cases the validity of such statutes has been challenged upon various constitutional grounds. See Section 13, "Depositions," 16 Am. Jur. and 90 A.L.R. 344; Ann. Cas. 1916 A 1091.

In taking this deposition of Baker or affidavit since it was taken ex parte, no opportunity was given the accused to be present and to cross-examine the witness on June 30, 1948, although the accused TAKABAYASHI was being held in solitary confinement at the war criminal stockade, Guam, he having been held in such solitary confinement since the day he arrived, May 29, 1946, and without any charges being preferred against him. Not until July 8, 1948 was he charged with a crime.

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On June 30, 1948 former vice admiral Kobayashi was being tried here on Guam and Wakabayashi the accused in this case testified as a prosecution witness in that trial. On June 10, 1948 the judge advocate Lieutenant Bolton put into evidence an affidavit of John Paul Rourke, chief gunner's mate, U. S. Navy. This commission reversed its ruling and struck that deposition, the affidavit of Rourke, from the evidence. No notice was given to us as defense counsel or to this accused that the judge advocate knew the names of any of these 42 American prisoners of war except the name of Lieutenant Commander George Estabrook Brown, U.S.N.R., until Lieutenant Bolton offered into evidence the deposition of John Paul Rourke. That affidavit was struck from the evidence.

Now for the first time we find out that there is an affidavit from Joseph N. Baker, Jr., a student at Dartmouth College, Hanover, New Hanpshire.

There was bad faith on the part of the judge advocate, Lieutenant Bolton, in not notifying the accused or defense counsel of the taking of this deposition of Joseph N. Baker, Jr., which must now be termed an affidavit.

"In the absence of statute, depositions can be taken for use in a foreign jurisdiction only by authority of a commission or letters rogatory issued by a court of such jurisdiction (5)" 16 Am. Jur. "Depositions," Sec. 74, citing the case of Stein v. Bowman, 13 Pet. (U.S.) 209, 10 L. ed. 129, ex parte Harkins, 6 Aln. 63, 41 Am. Dec. 38.

"Except by consent of the adverse parties, depositions cannot ordinarily be taken before the execution of process or appearance or filing of the bill."(2) Sec. 19, "Depositions," 16 Am. Jur. citing Cooper v. Bennett 70 W.Va. 110, 73 S.E. 260, Ann. Cas. 1913 D. 851.

The accused WAKABAYASHI assume did not consent to the taking of this deposition.

The procedure in order to obtain a deposition is set forth in Sec. 213, N.C. & B. We read:

> "The party, prosecutor or defendant desiring the deposition submits to the court a list of interrogatories to be propounded to the absent witness, then the opposite party, after he has been allowed a reasonable time for this purpose, prepares and submits a list of cross-interrogatories. After the court has assented to the interrogatories and cross-interrogatories thus submitted, it adds such as, in its judgment may be necessary to elucidate the whole subject of the testimony to be given by the witness."

We refer to Sections 211 to 216 inclusive.

No opportunity was given the accused at the time this deposition was taken and it should therefore not be admitted into evidence.

We maintain that this commission should rule that this deposition must be taken according to the rules set forth in Sections 211 to 216, Naval Courts and Boards, and since it was not so taken that this deposition cannot be admitted into evidence.

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For the court to admit this deposition the affidavit of Joseph N. Baker, Jr., into evidence in this trial will be prejudicial to the substantive rights of the accused.

In Section 30, "Depositions," 16 Am. Jur. we read:

"A bill to perpetuate testimony may be filed in the court having jurisdiction of the controversy"(10) citing the case of Arizona v. California, 292 U.S. 341, 78 L. ed. 1298, 54 S. Ct. 735.

The accused, the adverse party in this instance, was not given any notice of the taking of this deposition and the deposition must be suppressed. See Sec. 38, "Depositions," 16 Am. Jur., and the following cases cited in footnote 6, Teese v. Huntingdon, 23 How. (U.S.) 2. 16 L. ed. 479; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C, 1097; Woodward v. Spiller, 1 Dana (ky) 179, 25 Am. Dec. 139; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Cunningham v. Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; Wainwright v. Webster, 11 Vt. 576, 34 Am. Dec. 707; Miller v. Neff (Miller v. McMechen) 33 W.Va. 197, 10 S.E. 378, 6 L.R.A. 515; State ex rel. Draw v. Shaughnessy, 212 Wis. 322, 249 N.W. 522, 90, A.L.R. 368.

Where a deposition de bene case is taken before return of the writ, notice should be given to the defendant in person. Gilpin v. Semple, 1 Dall. (Pa.) 251, 1 L. ed. 123.

Depositions taken on interrogatories may be suppressed upon motion when no notice of the filing of the interrogatories and no opportunity to file cross-interrogatories have been given. National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101.

As to law governing requirements as to notice, see supra, SS. 23.

As to notice of retaking, see infra, SS 100. See generally Notice (Also 20 R.C.L. p. 339); Process (Also 21 R.C.L. p. 1258).

In Section 54, "Depositions," 16 Am. Jur. holds: "The deprivation of the right of cross-examination, by lack of notice or otherwise, renders a deposition vulnerable to a motion to suppress it." And we have made such a motion.

In 71 "Depositions," 16 Am. Jur.: "The rule is well established that a deposition taken in a foreign jurisdiction cannot be admitted in evidence without some proof that the party taking the deposition had authority so to act.(5)" citing Ann. Cas. 1914B, 161.

Section 84, "Depositions," 16 Am. Jur. bears out the requirements for the transmission of depositions and neither this sectionnor sections 211 to 216 inclusive, N.C. & B. were complied with.

We move that this document be excluded on the ground that to admit it will inflict substantial injury upon the accused, WAKABAYASHI. We point out that the defects enumerated above proceed from bad faith rather than from accident or mistake. See Partridge v. Stocker, 36 Vt. 108, 84 Am. Dec. 664; See Sec. 89, "Depositions," 16 Am. Jur.

In footnote 18, the rule is set forth:

"Depositions will be suppressed where they are taken in violation of a rule providing that testimony cannot be taken by either party until the cause is at issue by sufficient answer or decree pro confesso as to all defendants." Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L.R.A. 673.

No practice however convenient can give validity to a deposition not taken according to law. This deposition was not taken according to law, and it should be excluded.

This right to object on the ground of defects and irregularities is not waived by our submission of cross-interrogatories.

A deposition may be taken only before some person who is duly authorized to act, citing De. Renzes v. His Wife (De Renzes v. Palestine) 115 La. 675, 39 So. 805, 2 L.R.A. (N.S.) 1089, 5 Ann. Cas. 893, and see Sec. 103, "Depositions," 16 Am. Jur.

We further object to this deposition on the ground that it is incompetent, irrelevant, and immaterial, and that the witness is incompetent. We object because the document is hearsay as to the accused WAKABAYASHI. Nowhere in the deposition is the accused WAKABAYASHI mentioned, or is he accused of neglect of duty or of failure to protect the affiant, Joseph N. Baker, Jr.

For the above enumerated reasons and for the reasons we advanced against the introduction of prosecution document number 206, the perpetuation of testimony of George Estabrook Brown, Jr., into evidence, we object to the introduction into evidence of the deposition of Joseph N. Baker, Jr., a student at Dartmouth College, Hanover, New Hampshire.

We reserve all our rights to object and to appeal the ruling of the commission on this our objection when and if we submit cross-interrogatories.

The use of this deposition by the prosecution limits the punishment which can be imposed. (See Sec. 454, N.C. & B.)

When all else fails then the prosecution says in effect but S.C. A.P. allows us to do anything. We do not think so.

We call the commission's attention to a paragraph in the deposition of Joseph N. Baker, Jr. I quote what Baker subscribes to and swears to under oath: "I am interested in helping out the Navy Department in every way concerning war crimes, and can be available as a witness for these cases on reasonable notice."

Why doesn't the judge advocate in good faith call Joseph N. Baker, Jr.? It isn't convenient for them to do so.

The accused moves that this deposition taken without any notice to the accused be not accepted into evidence for any purposes whatsoever.

If the judge advocate insists that it is necessary to obtain justice that the deposition of Joseph N. Baker, Jr., taken without notice to the accused, taken without opportunity being given the accused to be present when the deposition was being taken, and without opportunity to file cross-interrogatories and taken before issue was joined in this case, we ask that the judge advocate clearly show why to admit such a deposition or affidavit is necessary to obtain justice. We know of no instance whereby the law is evaded, yes the law is deliberately violated and all the safeguards guaranteed by the Constitution to the accused are flouted and disregarded and justice is thereby secured. Certainly in this instance it is not necessary to use this deposition or affidavit because according to the list of witnesses which the prosecution will use there are listed two persons, survivors of the U.S.S. SCULPIN to be used as witnesses. Is it necessary then to

DD(4)

violate the rules of evidence by using a deposition which as we have pointed out was taken without notice to the accused and before issue was joined in this case and having other irregularities?

Joseph N. Baker, Jr., states in his deposition, "I am interested in helping out the Navy Department in every way concerning war crimes and can be available as a witness for these cases on reasonable notice."

Do not therefore admit this deposition of Joseph N. Baker, Jr.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

DD(5)

1132

REPLY TO OBJECTION TO PROSECUTION DOCUMENT NUMBER 207 (The affidavit of Joseph N. Baker, Jr.)

Delivered by
Lieutenant David Bolton, USN,
Judge Advocate.

Addressing myself to the remarks of Mr. Takano. In substance Mr. Takano stated that the affidavit should establish whether he was confined by Army or Navy units and which units. The judge advocate realises that it is necessary to supplement the information of this affidavit by other evidence showing that in fact the accused Wakabayashi was in command of the units which confined prisoners of war. It is not necessary that all of the prosecution's proof or evidence should be contained in any one document or the testimony of any one witness. It is apparent from the prior exhibit that the same situation exists with regard to Brown, another survivor of the SCULPIN for they were both confined at the same time in the same guard unit cells.

The fact that there is a minor discrepancy as to the dates alleged in the specifications and the dates alleged in the affidavit of Baker is certainly not material since they both cover the period charged against the accused, namely the period from November 20 through November 28.

The defense counsel makes an interesting point as to the description of the size of the cells by Baker. His description proves that they were too small for human beings. That is the precise treatment of the prisoners, the fact that they were confined in such a cell that was too small to properly confine human beings, that is alleged as mistreatment and abuse of these POWs. The fact that they were too small, too small for the proper treatment of prisoners, will be established by subsequent testimony as well as the former exhibit, the Brown affidavit.

Defense counsel has made much of the fact that the charge and specifications were amended, and they have attempted to imply that the amendment was due to the receipt of the Baker affidavit. What effect, if any, the Baker affidavit had upon the charge and specifications is not relevant; the only question before the commission is whether or not the contents of the Baker affidavit are relevant to the charge and specifications now alleged against the accused. It is clear from the content of the affidavit that it deals with the treatment of the prisoners on Truk and the judge advocate will establish that the unit at which the prisoners were confined at Truk was under the command of the accused. The relevance as conditionally established is sufficient to justify admission of this document.

Addressing myself to the objections of Commander Carlson. First, Commander Carlson alleges that the witness is incompetent to testify as to the execution of the documents. It is apparent that the document speaks for itself. The affidavit in question contains proof that it was subscribed and sworn to, and that it was sworn to before an authorised notary public whose seal is placed upon the original affidavit. The affidavit, therefore, is proper in form.

The contention, the insistent contention, by defense counsel that it was obtained by bad faith is objected to very strongly by the judge advocate. There has been no bad faith. The affidavit was obtained as the witness has testified through a blanket request from the office of the Director War Crimes, to the War Crimes Division of the Judge Advocate General's office in Washington, D. C. The blanket request was

EE(1)

that any statements be received from survivors of the SCULPIN who could be located concerning the treatment they received during their confinement at Truk. The judge advocate had no knowledge as to whose affidavits would be obtained, or as to who would be asked to submit an affidavit. It was not known that the affidavit of Baker or the affidavit of any other individual was being taken. It was therefore impossible for the judge advocate to give notice to the accused prior to the taking of such affidavits. The allegation of bad faith is in bad taste and improper.

There has been no deprivation of the right to file cross-interrogatories. In accordance with our procedure counsel has had ample opportunity since he received these documents to submit cross-interrogatories and request the permission of the court or directly through the consent of the judge advocate, to obtain the deposition of Baker and establish any facts which he seeks to establish through such cross-interrogation.

Counsel contends that because the judge advocate has attempted to procure and is currently trying to procure the services of two survivors of the SCULPIN, namely Rourke and Cecil Eugene Baker, counsel contends that we should not therefore be permitted to offer and admit this document in evidence. The judge advocate is not bound in his method of proof by the desires of the defense, nor is he limited to prove, nor would it be the proper performance of his duties so to limit himself by neglecting important sources of information. The judge advocate believes that it is necessary in the interest of justice to bring before the commission knowledge of any relevant facts with regard to the issues and allegations against the accused. The judge advocate is attempting to do that by use of this affidavit as well as other pertinent information. If the judge advocate is successful in procuring as witnesses two actual survivors of the incidents and their subsequent confinement in Japan, these witnesses will be asked to offer what evidence they can.

With regard to the basic question of admissibility of ex parte documents, I will not burden the commission with detailed discussion, but will point out that in reply to the prior objection to Exhibit 5, the judge advocate established the fact that the practice of admitting ex parte documents before military commissions has been accepted and approved by military authorities not only of this country but in other countries. The practice of military commissions in receiving, and of higher military authorities in approving the acceptance of such evidence has received clear recognition by the Supreme Court of the United States. In the Yamashita case the court specifically held that it was within the province of the military authorities to determine what evidence shall be admitted and what rules of evidence shall be applied.

In addition I have pointed out that the basic concepts of justice are not violated by the admission of this type of evidence, which is admissible in international proceedings as shown by the authorities of international law I previously cited, and as approved by leading authorities on the use of evidence before judicial bodies.

Respectfully,

David Bolton.

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

1134

検事側書類第271号ヲ証拠ニ提出スルコトニ対スル異議

弁護人 佐藤 敬

被告ノ左ノ理由ニ基キ検事側書類第271号. 1947年9月22日附作製サレタ田中政治ノ陳述書ノ証拠ニ提出サレルコトニ対シ異議ヲ申立テル

田中政治ハ一九四六年十一月當軍法委員会ニ於テ被告トシテ公判ニ附セラレ有罪ヲ言渡サレタノデアル. 彼ハ彼ノ公判ノ際自分自身ノ爲ニ証人台ニ立チ、主張サレタル俘虜虐刑事件ノ報告ニ関シ又ハ一九四四年二月十七日夜ノ会議ガ終ッタ後. 若林ノ参謀ニ対シテナシタ旨ヲ明言シテ居ル

然ルニ. 本陳述書ニ於テハ田中ハ. 前回ノ証言トハ全ク異ッタ陳述ヲナシ、右報告ハ、会議ノ席ヒデ. 被告若林ノ面前ニ於テナシタ旨ヲ述ベテ居ル. 本陳述ハ被告若林ヲ新ニ罪ニ陥レル可能性ノアル重大ナ証言デアルガ. 斯カル証言ガ田中公判后ニ. 一才的ニナサレ. 之ニ対シ反対訊問ノ機会ノ与ヘラレナイコトハ被告ノ利益ヲ著シク害シ公正ヲ失スルモノデアル

更ニ又田中ノ公判廷デナシタ証言ハ若シ虚言偽ヲ云ッタ場合ハ罰セラレルトカ警告ノ下ニ. 真実ヲ語リ且彼自身ノ意志ニ依リ証人台ニ立ッ旨ノ宣誓ヲナシタル后ニトサレタモノデアル. 之ニ反シ本陳述書ハ. 自己ノ自発的意志ニ依リ書イタトカ宣誓セトサレテ居ラヌ.

本委員会ノ召集命令書第六項中ノ証拠ノ採用ニ当リ海軍律ノ規定ヲ緩和シSCAP ruleヲ用ヒ得ルトヲ規定シテ居ルケレドモソレニハ "as are necessary to obtain justice" トカヲ條件ガ附セラレテ居ラヌ.

本陳述書ノ作ラレタ経緯ハ前述ノ如クデアッテ. 被告ノ利益ヲ著シク害シ公正ヲ失スルモノデアル. 本委員会召集命令書第六項ノ規定ニ鑑ミテモ、証拠トシテ採用スベカラザルモノデアル

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1135

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 271

Delivered by Mr. Sanagi, Sadamu, Counsel for the Accused.

The accused objects to the introduction in evidence of prosecution document Number 271, a statement by TANAKA, Masaharu made on 22 September 1947, for the following reasons:

The affiant, TANAKA, Masaharu was tried and convicted in November 1946 by this Military Commission. Tanaka at his own trial took the witness stand in his own behalf and testified, with regard to the execution of prisoners of war that he reported this matter to a staff officer of Wakabayashi after the conference of the night of 17 February 1944. But this statement varies greatly with Tanaka's testimony at his trial in that it states that he made a report in front of the accused Wakabayashi at the conference. This statement admits new incriminating and important fact against the accused Wakabayashi, and furthermore, as it was taken ex parte after the trial of Tanaka and does not give the accused any opportunity for cross-examination, it is most prejudicial to the substantive rights of the accused.

Furthermore, at his own trial Tanaka swore that he would state the truth and nothing but the truth, took the stand of his own free will, and was warned that if he failed to tell the truth as he was sworn to do, he would be punished, and testified in his own behalf. On the other hand, he did not swear that he made this statement of his own free will - voluntarily.

In paragraph 6 of the precept for this Military Commission it is provided that the relaxation of the rules of Naval Courts and Boards, and use of such rules of evidence issued by SCAP are permitted. But it is limited by the clause "as are necessary to obtain justice."

As this statement was made under the circumstances stated above, it is prejudicial to the substantive rights of the accused, and in view of the 6th paragraph of the precept of this military commission, it should not be admitted as evidence.

Respectfully,

Sanagi, Sadamu,
Counsel for the accused.

I certify that the foregoing is a true and complete translation of the original in Japanese, to the best of my ability.

Eugene E. Kerrick, junior,
Lieutenant, U.S. Naval Reserve,
Interpreter.

"CC"

1136

OBJECTION TO PROSECUTION DOCUMENT NUMBER 271
Dolivered by Commander Martin E. Carlson, USNR, Counsel for accused.

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We object to the judge advocate offering a document said to be an exhibit from Kobayashi, Masashi trial not yet even approved by Convening Authority and then only offering a document marked as the statement of Tanaka and not Exhibit 12 (a) from the trial of Kobayashi, Masashi.

We object to the introduction into evidence of the document purporting to be the affidavit of Tanaka, Masaharu, former Captain, IJN, former Commanding Officer of the Forty-first Guard Unit, because to admit this document as evidence in this case is a violation of the constitutional guaranty of the right of the accused, Wakabayashi, Seisaku, to be confronted in this case, a criminal case, with the witness, Tanaka, Masaharu. The document itself is objected to on the grounds that it is irrelevant, incompetent, and immaterial and hearsay as to the accused Wakabayashi. It is not even a translation of the document made by Tanaka in Japanese.

The sixth amendment to the Constitution of the United States of America provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, ...; to be confronted with the witnesses against him;...."

This amendment to the Constitution of the United States applies to all criminal prosecutions; it includes this criminal prosecution of Wakabayashi, before this Military Commission. Even Japanese nationals are included in the term "the accused" and Wakabayashi, Seisaku, is guaranteed the right to be confronted with the witnesses who appear against him.

There is no exception to this rule because Captain Tanaka is nor dead. Captain Tanaka was tried by this military commission for murder and for neglect of duty in that he unlawfully disregarded and failed to discharge his duty to control as it was his duty to do, the operations of members of his command and persons subject to his control and supervision permitting them to kill seven American prisoners of war on or about February 17, 1944 and because he Tanaka, Masaharu unlawfully disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect as it was his duty to do, seven American prisoners of war. The charge and specifications under which this commission tried and convicted Captain Tanaka, Masaharu of both murder and neglect of duty are serial 10717 dated August 26, 1946 of the Commander Marianas Area, On April 16, 1947 the Acting Secretary of the Navy confirmed the sentence of death in the case of Captain Masaharu Tanaka and on September 24, 1947 at Guam Captain Masaharu Tanaka was hanged.

On the day that Captain Tahaka was hanged, the accused in this case, former Vice Admiral Wakabayashi, Seisaku, was being held in solitary confinement at the War Criminal Stockade, Guam. He had been so held here on Guam since May 29, 1946. Now comes the prosecution and they ask that the man that was hanged on September 24, 1947 be allowed to testify in this criminal trial by way of a statement. We do object to such evidence.

This statement of Captain Tanaka's made two days before he was hanged is certainly not an official record made by Captain Tanaka as Commanding Officer of the Forty-first Guard Unit and should not be admitted as proof of the fact that there was a meeting at the Fourth Naval Base Force.

"HH (1)"

The fact that there was such a meeting is irrelevant to the issues in this case. The meeting held at the Fourth Naval Base headquarters was held after the execution according . Such a meeting held after Captain Tanaka executed American prisoners is not relevant and material to the particular inquiry here before this commission. The neglect of duty by Admiral Wakabayashi as commandant, Fourth Base Force, Imperial Japanese Navy, cannot be proved by knowledge after the crime was committed.

It is true that Captain Tanaka did testify at his trial but it is also true that Admiral Wakabayashi testified at the trial of Captain Tanaka and denied all knowledge of the crime. Admiral Wakabayashi testified he was sick in bed. See his answers to questions 7, 8, 9, the third day of the trial, Thursday, November 7, 1946 and his answers to questions 62, 81, 82, 85, 123. Captain Tanaka himself testified differently than what is contained in his statement.

Is this commission to now accept this statement alleged to have been signed by Captain Tanaka as evidence when it is clearly at variance with his sworn testimony at his trial on the fifth day of the trial, Tuesday November 12, 1946.

The declarent, Captain Tanaka, is dead and this fact does not render his declaration admissible. See the case of Queen v. Hepburn, 7 Crouch (U.S.) 290, 3 L.Ed. 348. There are no circumstances which will attribute verity to Captain Tanaka's statement. In fact Captain Tanaka took the witness stand as a witness in his own behalf and there was ample opportunity afforded him to testify regarding the murder of the seven American prisoners of war and for the neglect of duty and failure to protect these seven prisoners of war. Captain Tanaka was found guilty of both murder and neglect of duty and failure to protect. If the prosecution desired that Captain Tanaka change his testimony in any way and that he testify as a prosecution witness in this case, the prosecution should have made a request for a stay of execution. Not having requested a stay of execution, justice and the rules of evidence prohibit any testimony from the deceased, Captain Tanaka by way of a statement or do the prosecution prefer this self-serving statement of Captain Tanaka to his testimony on the stand.

According to this statement Captain Tanaka made a report in front of C. O. Wakabayashi, Kawamura and other persons. The declarant states the report was made after the prisoner had been disposed of by him.

Such a statement as is here being offered into evidence is irrelevant and hearsay as to the accused, Wakabayashi.

This statement of Captain Tanaka's was not a memoranda which the deceased made in the performance of his duty and the deceased Captain Tanaka is in no way connected with the trial. The statement is therefore not admissible in evidence to prove the facts therein stated or recited. The following cases are cited: Cummings v. Pennsylvania F. Ins. Co. 153 Iowa 579, 134 N.W. 79, 37 LRA(US) 813, Ann. Cas. 1916C, 715; Vinal v. Gilman, 21 W.Va. 301, 45 Am.Rep. 562, Hay v. Peterson, 6 Wyo 419, 45 P. 1073, 34 LRA 581.

The prosecution have not even shown the proper foundation for the admission of such a statement as is here offered in evidence. This statement was not made by Captain Tanaka at or about the time of meeting referred to. We object for these various reasons principally because the declaration is immaterial, irrelevant, and incompetent.

"HH (2)"

1138

How self-serving this statement of Captain Tanaka's is can be clearly seen by comparing it with his testimony at the trial. Now that he is dead it should not be admitted. It is hearsay as to this accused Takabayashi.

The witness, Commander Ogden, testified that Captain Tanaka gave him additional information different than was given on the witness stand. Yet nothing was done about getting a stay of execution for Captain Tanaka. Captain Tanaka went to the gallows according to the sentence in his case and his voice is forever silenced.

Now a document, a self-serving statement, a statement which the witness says he requested from Captain Tanaka two days before he was hanged is sought to be introduced into evidence. The witness knows the rights guaranteed by the Constitution the right to be confronted with the witnesses and yet nothing apparently is done to stay Tanaka's execution but the affiant Tanaka goes to the gallows and is hanged thereby making him unavailable as a witness. But not so. Tanaka is to be made unavailable only for cross-examination because the prosecution seek to introduce a self-serving statement of Captain Tanaka's into evidence. Apparently it is necessary to have Captain Tanaka's testimony. Self-serving we say because Captain Tanaka was tried on specifications and charges dated August 26, 1946 and his sentence of death announced to him by the commission on the completion of his trial was not carried into effect according to this witness on the stand now until September 24, 1947. We cannot cross-examine Tanaka because Tanaka is dead.

Why if the prosecution wanted Captain Tanaka to witness in this case didn't they seek a stay of execution rather than get a statement from him. Can it be that Captain Tanaka makes a better witness when he is not subject to cross-examination.

The accused in this case was being held in solitary confinement at the time Captain Tanaka was being questioned by Commander Ogden. The accused was not present or was he represented by counsel at the questioning. How can he be bound. The accused objects particularly in this instance to the procedure by which the prosecution seeks to deny to this accused the right guaranteed by the United States Constitution to be confronted with the witness against him. Why was not a stay of execution requested.

Because it is immaterial and irrelevant to this case, because to admit it violates the rules of evidence as to documentary evidence, because it is hearsay, because the prosecution have not shown it was made voluntarily, because the prosecution have not shown it is the truth, the statement being different than the sworn testimony of Captain Tanaka, we object to the introduction into evidence of this statement of Captain Tanaka, prosecution document 271.

Respectfully,

Martin E. Carlson,
Commander, USNR,
Defense Counsel.

"HH (3)"

1139

被告若林，陳述書，證據ニ提出
サレルコトニ対スル異議

弁護人 佐藤 敬

被告ハ左ノ理由ニ依リ検事側書類甲130乃至138．即チ被告若林ガ九四八年三月中旬ニ作ッタ陳述書八通ガ証據トシテ提出サレルコトニ異議ヲ申立テル

(一) 被告若林ハ陳述書ノ原本ヲ英語デ書イタ．彼ハ自ラ進ンデ英語デ陳述書ヲ書クコトヲ申出タノデハナクシテ．訊問官カラ英語デ書クコトヲ提案セラレタ之ニ従ッタノデアル 彼ノ英語ノ能力ハ被告ガ本法廷デ證言シタ如ク訊問官ノ質問ヲ全部通譯ニ依ッテ日本語ニ譯シテ貰ハネバ意味ヲ了解出来ナイ程度デアッタ．又陳述書ヲ日本デ日本語ニ飜譯シタガ其ノ日本語ノ飜譯ニハ誤ガアリ．又英文ヲ正シク理解シテ居ナカッタコトガ明瞭ニナル．即チ彼ノ英語ノ能力タルヤ極メテ貧弱デアッタノデアル サレバコソ．被告ハ最初訊問官ノ提案ニ全意シテ英語ノ陳述書ヲ書キ始メタケレドモ訊問過程ニ於テ自分ノ意志ヲ充分ニ発表スルコトガ出来ナクテ困ッタト本法廷デ証言シタノデアル

斯ノ如ク被告ノ英語ノ能力ハ自分ノ意志ヲ英語デ発表シ得ナイノミカ．人ニ依ッテ書カレタ英文ノ意味ヲ充分ニ理解スルコトノ出来ナイ程貧弱ナモノデアッタノデアル．ソシテ実際ニ於テ彼ハ本陳述書ヲ書クニ当ッテ可成リ束縛ヲ受ケタノデアル．換言スレバ被告若林ハ英語デ陳述書ヲ書ク資格ノナイ者デアル．斯カル資格ノナイ者ノ書イタ英語ノ陳述書ヲ証據ニ採用スルコトハ妥当デナイ

(二) 被告ハ数次ニ亘リ陳述書ノ内容ニ修正又ハ削除ヲ申入ルノ勿論之ノ容レラレタ場合モアルガ．三月十六日ノ陳述書甲134ニ於テハ被告ガ削除シテ貰ヒ度ト希望シタ二個所ノ容レラレナカッタ．更ニ彼ガ追加スルコトニ不同意ヲ表明シタガ"In my opinion

II(1)

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…… ”ナル一節ガ追加サレタノデアルカラ本陳述書ノ内容ハ一種ノ強要ニ依ッテ書カシメラレテ判決ニテ被告自身ノ自発的意図ニ基クモノトハ云ヘナイ

海軍律第182節ニ依レバ被告ヲ起訴サレル罪ニ関係アル特殊ノ事実又ハ状況ニ就テ述ベタ被告ノ陳述ガ証拠ニ採用サレル場合ニハ夫レガVoluntary statementデアルコトガ先決要件デアル然ルニ本陳述書ノ実際ニハVoluntaryニ作ラレタモノデハナイ

前述ノ根拠ニ基キ是等陳述書ガ証拠ニ採用サレルコトニ対シ異議ヲ申立テル。特ニ三月十六日ノ陳述書検事側書類第134号ガ証拠ニ採用サレルコトニ異議ヲ申立テル。

三月二十二日附ノ陳述書ハ被告若林ガ自発的ニ日本語デ作製シタモノデアルケレドモ之ハ三月十九日ノ被告ノ陳述書ノ補足ニ過ギズ独立シタ書類デハナイ。従テ之モ亦証拠ニ提出スルコトニ異議ヲ申立テル。

敬白。

1141

OBJECTIONS TO THE INTRODUCTION OF STATEMENTS OF THE ACCUSED WAKADAYASHI, INTO EVIDENCE, DELIVERED BY MR. SADAMU, SANAGI, DEFENSE COUNSEL.

The accused objects to the introduction into evidence of Prosecution Documents Numbered 130, 131, 133 to 138 inclusive, namely, the eight statements made by the accused in the middle of March, 1948, on the following grounds:

1. The accused WAKABAYASHI wrote the originals of these statements in English. He did not volunteer to write them in English, but it was so proposed to him by the investigator and he obeyed him.

His ability concerning the English language is, as he has testified in this court, such that he had to have the help of an interpreter to have all the questions of the investigator translated in order to understand them. He translated the originals of his statements into Japanese but mistakes were frequently found in his translations. It has been made clear that he did not catch the right meaning of the original English. That is to say his ability concerning the English language was and is very poor.

That is the reason why he testified in this court that, although he consented to the proposal of the investigator and started writing his statements in English, he could not clearly express what he meant during the course of the investigation.

Thus the proficiency of the accused in the English language was of such a low grade that he could not understand English written by a third person to a sufficient degree, let alone express clearly his thoughts in that language.

In actual fact the accused was placed under considerable restraint in the composition of these statements.

In other words, the accused WAKABAYASHI is incompetent to make statements in the English language.

It is not proper that statements in English made by an incompetent person be received in evidence.

2. The accused several times requested corrections and deletions of certain parts of the statements. Some of these requests were granted, while in statement number 134 of March 16, the request of the accused to strike out two parts from this statement was not permitted. Besides, the paragraph beginning "In my opinion," etc., was added in spite of the accused's opposition. It then follows that the contents of this statement were written by the accused under duress, and not on any account in accordance with the voluntary will of the accused.

According to Section 182, Naval Courts and Boards, a statement of an accused relating to some particular fact or circumstances which tends to connect him with the crime charged should necessarily be made voluntarily in order to be admitted into evidence. However, the statements in this case were not made voluntarily as a matter of fact.

"JJ (1)"

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On the above mentioned grounds the accused objects to the admission of these statements into evidence. The accused makes this objection maintaining that all these statements, especially Prosecution Document Number 134, the statement of March 16, should not be admitted into evidence.

The statement of March 22, although it was made voluntarily in Japanese by the accused, WAKABAYASHI, is not an independant document because it only supplements the statement of March 19. Since it is an annexed document to the March 19th statement, we object to its introduction as independant evidence.

Respectfully,

SADAMU SANAGI,
Counsel for the Accused.

I hereby certify, to the best of my ability, that the foregoing translation is a true and complete translation of the original document written in Japanese.

EUGENE E. KERRICK, JR.
Lieutenant, U. S. N. R.
Interpreter.

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OBJECTION TO THE DOCUMENTS SAID TO BE THE STATEMENTS OF WAKABAYASHI, Seisaku, FORMER VICE ADMIRAL, IMPERIAL JAPANESE NAVY, DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, A COUNSEL FOR THE ACCUSED, ON AUGUST 7, 1948.

Gentlemen of the Commission:

The accused objects to introduction as evidence of any and all of the nine documents purporting to be statements of the accused because to admit these documents into evidence is strictly at variance with Section 734 of Naval Courts and Boards.

The witness Commander OGDEN has testified that he is the legal custodian of these documents. He testified he was ordered to investigate war crimes and interrogated the accused at the stockade at Guam. He further testified that these statements, the documents purporting to be written by the accused WAKABAYASHI were not even written in his presence. We maintain that the witness Commander OGDEN is not competent as a witness to testify regarding these documents which are said to contain the statements of the accused. There is a presumption that a witness is competent to testify regarding matters at issue, but in this case the witness has stated that the statements were not made or written in his presence. He is by his own testimony admitted as being incompetent to testify as to whether or not these statements were made under threat, intimidation, promise of reward, or that he was told he did not have to answer any incriminating questions.

Since the witness is incompetent to testify regarding these matters we hold that the judge advocate still has the burden of proof and must prove that the documents being offered into evidence are regular, that the documents were written by the accused, that the accused was warned, that he was a party defendant, that he was notified of the gist of the evidence that tends to implicate him, that he was instructed he would be accorded the rights of an accused before a court martial, namely the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request and to make a statement and argument. He must be told he has the right to refuse to answer incriminating questions. Not now at this trial but at the time he was being investigated.

No where on these documents does there appear anything to indicate that these safeguards guaranteed by the Constitution of the United States were ever accorded to this accused whose alleged statements are sought to be introduced to prove the case against him.

To allow these documents to be introduced into evidence will be most prejudicial to the substantive rights of the accused. He will be made to testify against himself.

CMO-1, 1940, p. 72 lays down the rule: "A general court martial received in evidence, over the objection of the accused, extracts from the testimony of the accused before a Board of Investigation. The accused appeared before the Board of Investigation as an interested party. The record did not show that he took the stand at his own request, but did show that he was sworn and allowed to testify at length after it was apparent that he was involved to such an extent that an accusation against him could be implied although he was not made a defendant until he concluded his testimony. It follows therefore that his testimony before the Board of Investigation could have no evidential value in the instant case, and it should have been excluded by the court."

This is the situation we have here. The accused has been held in solitary confinement for two years. Then he is investigated, and made to sign statements, eight of them. Only after he had signed them - Yes! Months after

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he had signed them and after he had testified against his Fleet Commander Vice Admiral KOBAYASHI was this accused charged with a crime, the crime of neglect of duty in violation of the law and customs of war.

We further object because these documents do not show on their face that they were given voluntarily and that the accused, Vice Admiral WAKABAYASHI, waived all the rights of a defendant.

We hold that the judge advocate still has the burden of proof and must show by competent witness that this document is regular and that the Fifth and Sixth Amendments of the Constitution of the United States of America and Section 734 of Naval Courts and Boards have not been violated.

The accused, Vice Admiral WAKABAYASHI, objects to these documents being offered into evidence. If offered as confessions we insist that the judge advocate affirmatively show that they were entirely voluntary on the part of the accused.

Section 174, Naval Courts and Boards, requires that it "be affirmatively shown that the confession was entirely voluntary on the part of the accused." Further on, in the same section, it is stated: "In some cases before courts-martial it appears that the accused has signed a paper confessing his guilt, stating in the paper that he confesseos freely without hope of reward or fear of punishment, etc. Such statements are not conclusive that the confession was voluntary," and I repeat "such statements are not conclusive that the confession was voluntary." In accordance with Section 734, of Naval Courts and Boards: "A person whose conduct is the subject of investigation is a defendant..... Any person, not a complainant or defendant, who has an interest in the subject matter of the inquiry may, within the discretion of the convening authority, be designed in the precept as an interested party."

Both the Fifth and Sixth Amendments to the Constitution of the United States guarantees to all persons certain inalienable rights. The Sixth Amendment reads: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In this particular case when these documents were signed, this accused had already been in custody for almost two and one-half years. The right to counsel was never offered to this accused until after the charge and specifications in the present case had been served upon him, that is on July 8, 1948. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

All these things have been set out in Section 734, Naval Courts and Boards, and the two officers before whom these statements were subscribed to from March 12 to March 22, 1948, officers of the United States naval service are charged with knowledge of the Fifth and Sixth Amendments of the Constitution of the United States and also of Section 734, Naval Courts and Boards. Those safeguards that are guaranteed by the Constitution and are set forth in Section 734, which is quoted herewith is applicable in this particular case because the rights of the defendant were never accorded Vice Admiral WAKABAYASHI.

"KK (2)"

"If the rights of a defendant be not accorded when they should be, the court of inquiry or investigation, so far as concerns the person denied the rights, will be held of no evidential effect. This is one of the most important rules to be observed." Inasmuch as this accused, Vice Admiral WAKABAYASHI, was not accorded the rights he was entitled to under the Constitution of the United States and the rights set forth in Section 734, Naval Courts and Boards, we object to this document being offered in evidence at this time.

Section 235, Naval Courts and Boards states: "The Constitution provides that no person shall be compelled to give any evidence against himself."

We maintain that Appendix D-14, Naval Courts and Boards, in no way permits or authorizes the abrogation of the fundamental rights guaranteed by the Constitution of the United States.

We further hold that SCAP /rules cannot vitiate the Fifth Amendment or the Sixth Amendment of the Constitution of the United States of America. The SCAP rules are but ex post facto rules promulgated for army military commissions.

The Geneva Prisoners of War Convention of 1929, Article 61, states: "No prisoner may be obliged to admit himself guilty of the act of which he is accused."

The accused, Vice Admiral WAKABAYASHI, was never told he did not have to sign statements admitting his guilt. He was never accorded the rights of a defendant or any of the rights guaranteed by the Constitution.

To admit these documents into evidence will be most prejudicial to the rights of the accused. It will result in the accused being made to testify against himself. Because of the admission of these statements into evidence, the accused will be deprived of all Constitutional guarantees.

We object to these documents being admitted into evidence on the above enumerated grounds.

You have heard the accused testifying under oath, protected by counsel and the judgment of you members of the Commission.

The accused has testified that investigating officers, Yes! Commander OGDEN and Lieutenant BOLTON came to the stockade where former Vice Admiral WAKABAYASHI was still being kept in solitary confinement in a small cell in a quonset hut. Here he had been kept in solitary confinement for almost two years without any charges being preferred against him.

Both these investigators are lawyers and both know what the law is regarding the rights of an accused to the benefit of counsel. Commander CURRIE had questioned the accused while he was confined at Sugamo Prison, Tokyo. This must have been the preliminary examination because soon thereafter WAKABAYASHI was sent to Guam and placed in solitary confinement. Let me remind these two gentlemen, the witness Commander OGDEN and the judge advocate Lieutenant BOLTON that: "The rule now prevails in most, if not all, the states that an accused is entitled as a matter of constitutional rights to the services of counsel upon his preliminary examination." 14 Am. Jur. Crim. Supp. "Criminal Law", Section 167, p. 74. Add new par. 884.

Why didn't this accused, former Vice Admiral WAKABAYASHI have the benefit of counsel until after he had been served with charge and specifications?

That question is important; it is relevant and material to the issue now before this commission whether these eight statements are voluntary statements and whether they are true statements. What is the answer to the question?

The answer is that the investigating officers denied to this accused the benefit of counsel.

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That is the answer! This judge advocate, Lieutenant BOLTON, and the investigator, Commander OGDEN, who is now testifying regarding these confessions (both persons in positions of authority as regards the accused) didn't allow and didn't permit the accused the benefit of counsel.

If the accused had been given the benefit of counsel there wouldn't have been any such statements as are here being offered into evidence as the statements of the accused but which are in realty the statements of these two United States Navy officers, both lawyers and interested in seeing that there was a case against the accused.

The accused has testified that these two lawyers, both persons in positions of authority, came to the stockade and told him to write and submit a statement. These two lawyers asked the accused various questions all in English and when the accused protested that he couldn't understand English very well, a Mr. Fred SAVORY acted as an interpreter. Remember Lieutenant BOLTON and Commander OGDEN do not understand Japanese and the accused WAKABAYASHI only learned a little English at the Japanese Naval Academy some thirty-five years ago so that his ability to speak, write and understand English is negligible. The accused therefore answered in Japanese. Now neither Commander OGDEN or Lieutenant BOLTON can understand Japanese and yet Commander OGDEN is put on the witness stand by his partner Lieutenant BOLTON and between the two of them they have tried hard to convince you members of the commission that they treated former Vice Admiral WAKABAYASHI fairly and justly and as you members of the commission would want to be treated if you were being questioned under like circumstances.

NO! I don't think you would want to be prisoners in the custody of Commander OGDEN and Lieutenant BOLTON, kept in solitary confinement for two years and then questioned all day long, given a statement in a language foreign to you and which you couldn't possibly understand and ordered to copy it, in this foreign language and sign it. Not only was the accused made to sign these statements, eight of them mind you, but each of the statements contains this paragraph:

> "I swear that the foregoing is true to the best of my knowledge, recollection and belief, and is voluntarily made by me, and I have not been induced to make this statement by the use of force, threats, promises of rewards or other inducements."

All you have to do is just to read such a statement and you know it isn't the statement of the accused but it is the well thought out statement of this pair of investigators, both lawyers and officers of the United States Navy and persons in position of authority.

I am afraid that these two lawyers overplayed their hand when they made the accused, Vice Admiral WAKABAYASHI sign each and every statement in these exact and identical words.

And why did the accused sign such statements? Statements in English which he couldn't understand? Because after two years in solitary confinement without being charged with a crime, knowing he hadn't committed a crime, he believed these American naval officers when they told him that Vice Admiral KOBAYASHI had written statements in English and it will facilitate clerical matters and will be very convenient.

Writing these eight statements without benefit of counsel certainly facilitated matters, facilitated the trial of the accused because now he finds himself accused of a crime, a neglect of duty. It also made it very convenient, convenient for the two gentlemen, the witness, Commander OGDEN, and the judge advocate, Lieutenant BOLTON because they say "Look at what he signed?":

> "I swear that the foregoing is true to the best of my knowledge, recollection, and belief, and is voluntarily made by me, and I have not been induced to make this statement by the use of any force, threats, promises of reward or other inducements."
>
> "KK (4)"

There must have been misgivings as to the propriety of these statements in English because on April 1 and again on July 7, 1948, WAKABAYASHI was again shown the statements. This in no way made these documents valid because the same circumstances prevailed.

If these two gentlemen hadn't been so anxious to get an air tight case against the accused they would have allowed him to write a statement which would have been all it purported to be. But I can assure you it would never have been like any of the eight statements here being offered by these two gentlemen, nor would any of the statements have contained the legend and what a legend they had WAKABAYASHI sign. Identical on each and every one of the eight statements.

Do any of you members of the commission think for a moment you would have worked late into the night laboriously copying a Japanese statement made up by two Japanese officers and bearing such a legend, if you had been held prisoner in solitary confinement by the Japanese as was this accused by the Americans? You know you don't believe that these statements were made voluntarily.

I want to read to you CMO - 2 - 1943, pages 66 and 67:

"CMO 2-1943, pp 66-67.

"CONFESSIONS.

"Admissibility: Made to person in position of authority.

"During a general court martial trial a written confession was received in evidence over the objection of the accused. The evidence clearly showed that the alleged confession was obtained while the conduct of the accused was the subject of investigation. The investigating officer prepared and dictated the confession, incorporating there in 'the substance of our interview' as well as other information which he had in his possession. He included therein an assertion that the statement was voluntarily made without any threats or promises having been used. All witnesses who testified as to the conditions under which the confession was obtained agreed that the accused was encouraged and advised to tell the truth. The investigating officer himself testified that he told the accused the truth was the more desirable procedure in any situation. Confessions made by enlisted men to officers or petty officers, though not shown to have been made under influence of promises or threats, should, nevertheless, in view of the military relations of the parties, be received with caution. The statement appearing in the paper that the accused confessed voluntarily without any threats or promises having been used is not conclusive that the confession was, as a matter of fact, voluntary. (63)(Sec. 174, N.C.&B.) 'The requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntarily in law if, and only if, it was, in fact, voluntarily made.' (64)(Wan v. U.S. 266 U.S. 1, 14). Advice or encouragement to an accused that he tell the truth, in itself, is generally considered sufficient to operate on the mind of an accused person and to induce either hope or fear or both. (65) (CMO 12, 1931, 13-14; 11, 1932, 6-7.) Since the evidence, aside from the confession, was not sufficient to establish a prima facie case as to either of the two specifications found proved under the charge, the findings on the charge and specifications thereunder and the sentences were set aside. (File: MM--Tombs, Buford 4/417-20, Apr. 30. and May 26, 1943.)"

It is true that this is a Navy General Court Martial case, but I don't believe we should throw out of the window all the navy law there is on the subject when we try a Japanese national for criminal neglect of duty as a vice admiral of the Imperial Japanese Navy on duty as the Commandant of the Fourth Base Force.

"KK (5)"

The precept convening this commission states that: "The proceedings of the military commission will be governed by the provisions of Naval Courts and Boards, except that the commission is permitted to relax the rules for naval courts to meet the necessities for any particular trial and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander For The Allied Powers, 5 December 1945."

Under such a precept the judge advocate must then show the necessity for using SCAP rules which are ex post facto rules. Unless the necessity is shown the commission will be governed by the provisions of Naval Courts and Boards.

Since the prosecution have witnesses who are available there can be no need for evidence such as the statements of the accused taken from him by two naval officers, persons in authority, after the accused had been held in solitary confinement for two years and while being so held in solitary confinement at the War Criminal Stockade, Guam.

For all these reasons we object to the introduction of all eight documents ~~copies~~ in English by the accused and the Japanese translations of these documents.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. N. R.
Defense Counsel.

"KK (6)"

REPLY TO OBJECTIONS OF THE ACCUSED TO THE INTRODUCTION OF PROSECUTION DOCUMENTS 130, 130A, 131, 131A, 133, 133A, 134, 134A, 135, 135A, 136, 136A, 137, 137A, 138, 138A, 139, and 139A, DELIVERED BY LIEUTENANT JAMES P. KENNY, U. S. NAVY, JUDGE ADVOCATE.

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The judge advocate through the witness, Commander OGDEN, showed the voluntariness of the statements of the accused which have been offered in evidence. At no point in his testimony on voir dire did the accused complain that any of these statements were made under duress, fear of punishment or hope of reward. On the contrary his own testimony shows that eight of these statements and their translations resulted from a free discussion of the matter between himself and the investigating officer. The ninth statement is one which was initiated by the accused and no question is raised as to its voluntariness. The fact that the information contained in the eight statements in question resulted from questions put by the investigating officer in no way makes the statements involuntary, even if the form of the questions assumed the guilt of the accused (N.C.&B. Sec. 178.)

The accused argues that he did not volunteer to write the statements but only agreed after it was so proposed by the investigating officer. Assuming this to be true, it does not render the statement involuntary. It is standard practice for an investigating officer to initiate the request The resulting statement would become involuntary only if the request were accompanied by a promise of benefit or threat of force. These statements, whether they be considered confessions or admissions, are not inadmissible merely because they do not contain the entire oral statement of the accused nor because they are not in the exact words orally used by him. (Underhill's Criminal Evidence, Fourth Edition, Section 276.)

The proficiency of the accused in writing or translating the English language has no bearing upon the voluntariness of his statements. It might possibly have some value on their content after admission. The fact that the accused did write eight of these statements in English and translate them from the English into the Japanese should convince the commission that he is not a novice in the use of our language. It is not unusual for even our experienced court interpreters to make a few errors in translation from English into the Japanese.

The accused testified that he made requests to have his statement of March 16, 1948 changed and that some but not all of his requests were granted. This testimony was contrary to that of prosecution witness, Commander OGDEN, and the truth of the matter is for the commission to decide. In any event the question has no bearing upon the admissibility of this or any of the other statements. Once these statements were written there was no requirement that the investigating officers allow the accused to make changes in them. Whether or not these requests were made before or after the affixing of the signature of the maker is of no impertance. They would have been admissible even if not signed by the accused (Underhill's Criminal Evidence, Fourth Edition, Section 276.)

Counsel for the accused has contended that it was necessary that the investigating officers warn the accused that the statements might be used against him. There is no such requirement and the fact that he was not warned does not affect the admissibility of the statements. (Naval Courts and Boards, Section 181). Nor does the period of confinement of the accused have any bearing upon the voluntariness or admissibility of the documents. Nor was WAKABAYASHI entitled to the rights of an interested party or a defendant before a court of inquiry or a

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Board of Investigation as set out in Section 734, Naval Courts and Boards.. The matter contained in this section pertains, as stated therein, only to interested parties or defendants in a Board of Investigation or a court of inquiry. Whether or not the accused had counsel at the time has no bearing on the question of admissibility.

The attach of defense counsel upon the investigating officers has no bearing on the admissibility of these documents. Reference to standard modes of subscription at the end of these statements and the inferences made by defense counsel on such practice prove nothing. Guesswork as to what these statements might have contained if written originally in Japanese has no bearing upon the question of admissibility. What happened in other cases where there were threats or promises in securing statements proves nothing covering this case. There has been no proof of threats or promise here. The sole point advanced by the accused on his voir dire is that he was not allowed to change one of the statements which he admits had been written voluntarily by him in his own handwriting. Because the investigating officer allowed the accused to make other changes in this statement, it does not follow that he had any right to make further changes or that he had any right to make any changes. The investigating officer could have refused to allow any change and such action would not have affected the voluntariness of the statement as originally written.

Even without proof of voluntariness these statements would be admissible under the SCAP rules which this commission is authorized to use by the precept. Section 5 d(5) of those rules states:

"All purported confessions or statements of the accused shall be admissible in evidence without any showing that they were voluntarily made. If it is shown that such confession or statement was procured by means which the commission believes to have been of such character that they may have caused the accused to make a false statement, the commission may strike out or disregard any such portion thereof which was so procured."

The judge advocate feels that there is no need for the commission to invoke the use this SCAP rule in this instance since the proof of voluntariness has not been rebutted by the accused.

We, therefore, respectfully request that these statements of the accused be admitted in evidence.

Respectfully,

James P. Kenny

JAMES P. KENNY,
Lieutenant, U. S. Navy,
Judge Advocate.

"LL (2)"

FF12/A17-10(1)
C2-JDM-fsk

UNITED STATES PACIFIC FLEET
COMMANDER NAVAL FORCES, MARIANAS

Serial: 13218

10 AUG 1948

From: Commander Naval Forces, Marianas.
To : Rear Admiral Arthur G. Robinson, U. S. Navy,
President, Military Commission, Guam.

Subject: Change in Membership of Military Commission.

1. Lieutenant Colonel Newton L. CHAMBERLAIN, Signal Corps, United States Army, is hereby appointed a member of the military commission of which you are president convened by precept dated 27 July 1948, vice Lieutenant Colonel Victor J. GARBARINO, Coast Artillery Corps, United States Army, hereby relieved, except in event of revision of cases already tried.

C. A. POWNALL,
Rear Admiral, U. S. Navy,
Commander Naval Forces, Marianas.

cc:
Lieutenant Colonel Newton L. CHAMBERLAIN.
Lieutenant Colonel Victor J. GARBARINO.
Judge Advocate, Military Commission.
Judge Advocate General, U. S. Navy.
Commanding General, Marianas Bonins Command.

"10"

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CASE

OF

WAKABAYASHI, SEISAKU

Volume II

Original Copy

1153

検察官書類第213号 Mr. PETERSON
の宣誓供述書を証拠書類として提出
することに対する異議の申立

弁護人 高野統二郎

被告人若林満作は下記の理由に因り上掲宣誓供述書を証拠書類として提出することに対し異議を申立てる

第一、此の宣誓供述書は本件被告人若林の元日本海軍第四根據地隊司令官としての部下統御及監督上の職務怠慢の責任を問う本件裁判の争点には何等の関連がなく加之斯かる供述書を証拠として被告人の責任を問擬することは被告人の権利を侵害するものである

第二、本軍法会議に於ては Naval Courts and Boards の規定に依り宣誓供述書を証拠として採用することは許さないのである。唯例外的にそれが必要なる場合に於てのみ此の規定を緩和して宣誓供述書を証拠として採用することを認めるSCAP RULESを適用することになっている。然るに検察官が例外的に適用せざる、SCAP RULESに基き斯かる宣誓供述書を証拠物として提出すべき必要ありとは認められないのである。

仍て前記異議を申立てる次第である。

謹言

高野統二郎

1154

OBJECTION TO INTRODUCTION IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 213

Delivered by

Mr. Takano, Junjiro
Counsel for the Accused

The accused objects to the introduction in evidence of this prosecution document for the following reasons:

1. This sworn affidavit has no relevance to the responsibility of the accused WAKABAYASHI, Seisaku, during his tour of duty as Commandant of the Fourth Base Force of the former Imperial Japanese Navy for neglect of duty to supervise and control subordinates, which responsibility is at issue in this trial. Further it against the interests of the accused to introduce this document into evidence in the light of responsibility of the accused.

2. This Military Commission is not authorized to accept sworn affidavits as evidence according to the regulations of Naval Courts and Boards. Only in exceptional and necessary cases may it apply the SCAP rule which relaxes this regulation and recognizes the acceptance of sworn affidavits. There exists however no necessity for the prosecution to introduce such affidavits at this time on such a basis.

Respectfully,

Takano, Junjiro,
Counsel for the accused.

I hereby certify the above translation to be a true and complete translation of the original document in Japanese, to the best of my ability.

Eugene E. Kerrick Jr.

EUGENE E. KERRICK, JR.,
Lieutenant, U.S. Naval Reserve,
Interpreter.

66

OBJECTION TO INTRODUCTION IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 213

Delivered by

Martin E. Carlson,
Commander, U. S. N. R.,
Counsel for the Accused.

At this time we would also like to point out that Naval Courts and Boards provides for neither affidavits nor depositions to be used in the trial of capital cases. In accordance with Section 217, Naval Courts and Boards, which reads:

> "An affidavit differs from a deposition in that it is taken ex parte and offers the opposite party no opportunity to cross-examine the maker thereof. An affidavit, therefore, is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals."

This affidavit was just received according to the testimony of this witness in the office of Director War Crimes yesterday, the inference being that it was requested while this trial was still in progress. However, no opportunity was afforded the accused nor defense counsel of a chance to send cross-interrogatories or be present at the time the affidavit was made. This is strictly at variance with the taking of a deposition as we stated in Section 217, Naval Courts and Boards.

No evidence has been introduced which proves that the affiant is not in the service. The affidavit is it is true of a recent date. It is common knowledge that there has been a draft law enacted within the past few months whereby persons of a certain age are subject to the draft. It may well be that this affiant is in the armed services and subject to the jurisdiction of this court. Unless the judge advocate proves that he is not, and the judge advocate has that burden, we feel that the commission should not accept this affidavit and they should not accept it if the rules found in Naval Courts and Boards and the rules of evidence are being followed here.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for the accused.

PP

1.

検察官書類〃208,〃210,〃211,〃212
を証拠書類として提出することに対する
異議の申立

弁護人 高野統二郎

被告人若林清作は下記の理由により上記検察官書類を証拠書類として提出することに對し異議を申立てる。

第一 此等の宣誓供述書は本件被告人若林の元旦本海軍第四根拠地隊司令官としての部下統御及監督上の職務怠慢の責任を問う本件裁判の争点とは何等の関連がなく徒に斯かる供述書を証拠として被告人の責任を問擬することは被告人の実体的権利を侵害するものである。

第二 本軍法会議に於ては NAVAL COURTS AND BOARDS の規定に依り宣誓供述書を証拠として採用することは許さないのである。唯例外的に之が必要ある場合に於てのみ此の規定を緩和して宣誓供述書を証拠として採用することを認めSCAP RULES を適用することになっている。然るに検察官が例外的に適用せよとSCAP RULES を基き此の際提出する宣誓供述書を証拠書類として採用すべき必要ありとは認められないのである。

第三. 此等宣誓供述書の作成者は WRIGHT 氏を除きいづれも米国海軍現役軍人である。此等の人々は民間人の場合とは異り容易に本軍法会議法廷に召喚し得るのである。然るに此

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等の人はを証人として召喚せずして第則とこれは許さ
ざる急速迅速書を証拠として提出することは被
告人の実体的権利を侵害するものである。
仍て茲に異議を申立つる次第である。

証言

高野孫一郎

OBJECTION TO INTRODUCTION IN EVIDENCE OF PROSECUTION DOCUMENTS NUMBERED 208, 210, 211 AND 212

Delivered by

Mr. Takano, Junjiro
Counsel for the Accused.

The accused objects to the introduction in evidence of these prosecution documents for the following reasons:

1. These sworn affidavits have no relevance to the responsibility of the accused WAKABAYASHI, Seisaku, during his tour of duty as Commandant of the Fourth Base Force of the former Imperial Japanese Navy for neglect of duty to supervise and control subordinates, which responsibility is at issue in this trial. Further it is against the interests of the accused to introduce these documents into evidence in the light of responsibility of the accused.

2. This Military Commission is not authorized to accept sworn affidavits as evidence according to the regulations of Naval Courts and Boards. Only in exceptional and necessary cases may it apply the SCAP rule which relaxes this regulation and recognizes the acceptance of sworn affidavits. There exists however no necessity for the prosecution to introduce such affidavits at this time on such a basis.

3. These affidavits were written by U. S. naval personnel on the active list except for the one submitted by Wright. These men are, unlike civilians, all easily available to the summons of this Military Commission.

For the prosecution to introduce these affidavits into evidence without calling these affiants as witnesses, but to introduce these affidavits as evidence, which procedure is in principle not permitted, is prejudicial to the substantive rights of the accused. We therefore object to their introduction into evidence.

Respectfully,

Takano, Junjiro,
Counsel for the accused.

I hereby certify the above translation to be a true and complete translation of the original document in Japanese, to the best of my ability.

Eugene E. Kerrick

EUGENE E. KERRICK, JR.,
Lieutenant, U.S. Naval Reserve,
Interpreter.

RR

OBJECTION TO PROSECUTION DOCUMENTS NUMBERED 208, 210, 211 AND 212 (The purported affidavits of Eldon Wright, George Rocek, Leo Joseph Murray, and Michael Thomas Gorman) delivered by Commander Martin E. Carlson, U. S. Naval Reserve, counsel for the accused.

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The accused objects to the introduction into evidence of the alleged affidavits of Eldon Wright, George Rocek, Leo Joseph Murray, and Michael Thomas Gorman on the grounds that this witness, Commander Ogden, is incompetent as a witness to testify regarding the execution of these documents and because the affidavits are irrelevant, immaterial, and hearsay.

We also make a motion to suppress the use of these affidavits on the ground that no notice was given the accused at the time they were taken and that there is no provision for the use of such affidavits taken ex parte in this trial.

Section 217, N.C.&B. provides: "An affidavit differs from a deposition in that it is taken ex parte and offers the opposite party no opportunity to cross-examine the maker thereof. An affidavit, therefore, is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals."

We also cite Section 12 of Depositions in 16 Am. Jur. which definitely states that there is no right at common law to use depositions in criminal cases. We quote:

> "With respect to the taking and the use of depositions in criminal cases, a distinction is to be noted, at the outset, between the right to take testimony by depositions in advance of the trial for use upon the trial, which right does not exist under common-law rules of procedure and is therefore dependent upon statutory provisions therefore..."".."Such statutes, being in derogation of the common law, are strictly construed."

Article 68, Articles for the Government of the Navy and 35 Stat 622 does not permit use of even depositions in this present trial.

This accused does have the protection of the Constitution of the United States when he is brought to trial in this American court. Any statement that the accused has not the right to be confronted with the witnesses is contrary to American law. American laws and rules of evidence are in force in this military court when a Japanese national is being tried. The accused does have the right of confrontation of witnesses.

Even those cases where statutues authorize the taking and the use of depositions in criminal cases the validity of such statutes has been challenged upon various constitutional grounds. See Section 13, "Depositions" 16 Am. Jur. and 90 A.L.R. 377; Ann. Cas. 1916 A 1091.

In taking these affidavits no opportunity was given the accused to be present and to cross-examine the witness on July 22, 1948, although the accused, WAKABAYASHI, was being held in solitary confinement at the war criminal stockade, Guam, he having been held in such solitary confinement since the day he arrived, May 29, 1946, and without any charges being preferred against him. Not until July 8, 1948 was he charged with a crime.

The affidavit of Eldon Wright purports to be a deposition but it is not a deposition.

"In the absence of statute, depositions can be taken for use in a foreign jurisdiction only by authority of a commission or letters rogatory issued by a court of such jurisdiction (5)" 16 Am. Jur. "Depositions," Sec. 74, citing the case of Stein v. Bowman, 13 Pet. (U.S.) 209, 10 L. Ed. 129, ex parte Harkins, 6 Ala. 63, 41 Am. Dec. 38.

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"Except by consent of the adverse parties, depositions cannot ordinarily be taken before the execution of process or appearance or filing of the bill." (2) Sec. 19, "Depositions," 16 Am. Jur. citing Cooper v. Bennett 70 W.Va. 110, 73 S.E. 260, Ann. Cas. 1913 D 851.

Wright's purported deposition is sworn to October 5, 1945 before Lieutenant Kehoe, USNR - again certifed to by another Lieutenant, USNR. Neither Lieutenant Kehoe, USNR nor Lieutenant M. J. Wilson state they are on active duty or are authorized to administer oaths. Sec. E-1, Appendix E, N.C.&B. states:

> "Oaths administered by officers of the naval service, to be given legal effect, must be administered only by those specifically authorized by law to administer them."

It has not been shown that these two lieutenants, U. S. Naval Reserve, are or were authorized on October 5, 1945 to administer oaths for the purpose of administration of naval justice.

It is not enough that Lieutenant M. J. Wilson, USNR, certified that on October 5, 1945, Eldon Wright "testified concerning war crimes and that the foregoing (that is, this affidavit of Wright's, prosecution document number 208) is an accurate transcription of the answers given by (Him) [that is, Eldon Wright] to the several questions set forth." That does not make this document a deposition. It is still an affidavit because it was taken ex parte and the accused had no opportunity to cross-examine nor does the accused now have an opportunity to cross-examine Eldon Wright. All the rules of evidence forbid this document as legal evidence. Again I quote from Section 217, N.C.&B.:

> "An affidavit, therefore, is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals."

And this document number 208 is but an affidavit, not a deposition.

The accused WAKABAYASHI, we can assume, did not consent to the taking of these affidavits or purported deposition and this witness Commander Ogden cannot and has not testified why it was necessary to take these affidavits without notifying the accused. The witness, Commander Ogden, cannot even testify regarding any circumstances of the execution of these affidavits and deposition.

The procedure in order to obtain a deposition is set forth in Sec. 213, N.C.&B. We read:

> "The party, prosecutor or defendant desiring the deposition submits to the court a list of interrogatories to be propounded to the absent witness, then the opposite party, after he has been allowed a reasonable time for this purpose, prepares and submits a list of cross-interrogatories. After the court has assented to the interrogatories and cross-interrogatories thus submitted, it adds such as, in its judgment may be necessary to elucidate the whole subject of the testimony to be given by the witness."

We refer to Sections 211 to 216 inclusive, Naval Courts and Boards.

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No opportunity was given the accused at the time these affidavits were taken and they should therefore not be admitted into evidence.

For the court to admit these affidavits into evidence in this trial will be prejudicial to the substantive rights of the accused.

The accused, the adverse party in this instance, was not given any notice of the taking of these affidavits and they must be suppressed. See. Sec. 38, "Depositions," 16 Am. Jur., and the following cases cited in footnote 6, Teese v. Huntingdon, 23 How. (U.S.) 2, 16 L.Ed. 479; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916 C 1097; Woodward v. Spiller, 1 Dana (Ky) 179, 25 Am. Dec. 139; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Cunningham v. Irwin, 7 Serg & R (Pa) 247, 10 Am. Dec. 458; Wainwright v. Webster, 11 Vt. 476, 34 Am. Dec. 707; Miller v. Neff (Miller v. McMechen) 33 W.Va. 197, 10 S.E. 378, 6 LRA 515; State ex rel. Drew v. Shaughnessy, 212 Wis. 322, 249 N.W. 522, 90 ALR 368.

Where a deposition de bene cause is taken before return of the writ, notice should be given to the defendant in person. Gilpin v. Semple, 1 Dall. (Pa) 251, 1 L.ed. 123.

Depositions taken on interrogatories may be suppressed upon motion when no notice of the filing of the interrogatories and no opportunity to file cross-interrogatories have been given. National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101.

As to law governing requirements as to notice, see supra. SS. 23.

As to notice of retaking, see infra, SS 100. See generally Notice (Also 20 R.C.L. p. 339); Process (Also 21 R.C.L. p. 1258).

In Section 54, "Depositions," 16 Am. Jur. holds: "The deprivation of the right of cross-examination, by lack of notice or otherwise, renders a deposition vulnerable to a motion to suppress it." and we hereby make such a motion.

It is no excuse for failure to carry out the law regarding the taking of depositions to say that the judge advocate had no knowledge of this case because the accused was being held in solitary confinement without benefit of counsel. It is no excuse to say the judge advocate did not take the deposition. Naval Courts and Boards and the law quoted are clear that this deposition of Wrights should be excluded.

In 71 "Depositions," 16 Am. Jur.: The rule is well established that a deposition taken in a foreign jurisdiction cannot be admitted in evidence without some proof that the party taking the deposition had authority so to act. (5)" citing Ann. Cas. 1914 B 161.

No evidence has been introduced by the judge advocate; the witness, Commander Ogden, is incompetent to testify regarding this matter and he did not testify regarding the authority of Lieutenant Kehoe, USNR and Lieutenant M. J. Wilson, USNR, to take the deposition. The authority of Lieutenant Kehoe to even administer an oath is questioned unless specifically authorized, because a lieutenant in the U. S. Naval Reserve has no authority simply by virtue of his rank as a lieutenant to administer an oath.

Section 84, "Depostions," 16 Am. Jur. bears out the requirements for the transmission of depositions and neither this section nor sections 211 to 216 inclusive, Naval Courts and Boards, were complied with.

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We move that this purported deposition be excluded on the ground that to admit it will inflict substantial injury upon the accused, WAKABAYASHI. We point out that the defects enumerated above proceed from bad faith rather than from accident or mistake. See Partridge v. Stocker, 36 Vt. 108, 84 Am. Dec. 664. See Sec. 89, "Depositions," 16 Am. Jur.

In footnote 18, the rule is set forth:

> "Depositions will be suppressed where they are taken in violation of a rule providing that testimony cannot be taken by either party until the cause is at issue by sufficient answer to decree pro confesso as to all defendants." Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L.R.A. 673.

The cause was not at issue until July 29, 1948.

No practice however convenient can give validity to a purported deposition not taken according to law. This deposition was not taken according to law, and it should be excluded.

This right to object on the ground of defects and irregularities is not waived by any submission of cross-interrogatories now or in the future.

Nor will the opportunity to now submit cross-interrogatories by the accused cure the defects in the deposition here offered into evidence.

A deposition may be taken only before some person who is duty authorized to act, citing De Renzes v. His Wife (De Renzes v. Palestine) 115 La. 675, 39 So. 805, 2 L.R.A. (N.S.) 1089, 5 Ann. Cas. 893, and See Sec. 103, "Depositions," 16 Am. Jur.

We further object to this deposition on the ground that it is incompetent, irrelevant, and immaterial, and that the witness is incompetent. We object because the document is hearsay. Nowhere in the deposition is the accused, WAKABAYASHI, mentioned, or is he accused of neglect of duty or of failure to protect the affiant, Eldon Wright.

Most of the deposition or affidavit relates to a period of time outside of the time during which WAKABAYASHI was accused of neglect of duty.

Much of the deposition relates to his treatment aboard a Japanese destroyer and at Ashio Prison Camp. This is all immaterial and irrelevant as to the neglect of duty charged against the accused, WAKABAYASHI, as Commandant of the Fourth Base Force, Imperial Japanese Navy, from July 26, 1943 to February 22, 1944.

We reserve all our rights to object and to appeal the ruling of the commission on this our objection when and if we do submit cross-interrogatories.

The use of this purported deposition by the prosecution of course limits the punishment which can be imposed. (See Sec. 454, N,C.&B.)

If the judge advocate has any ruling case law which is material to the question of the admission of this deposition into evidence in this criminal case he should state the law and give the citations,

As we stated in our objection to documents 206, 207, and 271, the prosecution have had ample time to procure a deposition which is admissible according to the rules of evidence. Notice of taking such a

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deposition could easily have been given defense counsel. Simple because it wasn't convenient to take this deposition in the proper way is not a good reason to admit it into evidence.

Objections which we have made go to the question of the admissibility of the document. It is indeed a strange theory which the judge advocate advances in offering irrelevant, immaterial and improperly secured documents which he says in effect admit the irrelevant, the immaterial and defective document as competent evidence and then try to clear your mind of all such objectionable matter by some mysterious formula which he labels "weight and sufficiency."

We have tried to point out the right way to procure a deposition and it is clear that this deposition was not secured in the right way.

The deposition also shows that Eldon Wright is an electrician's mate third class of the United States Naval Reserve. He is therefore available as a witness and should be summoned as a witness. He is subject to the jurisdiction of this navy convened military commission.

For these many reasons we ask that no part of the deposition be admitted into evidence.

The affiant George Rocek, is a chief engineman, U. S. Navy and on active duty aboard the U.S.S. SEA LEOPARD (SS 483). Leo Joseph Murray is a chief engineman, U. S. Navy, on active duty aboard the U.S.S. BAYA (SS 318). Michael Thomas Gorman is a torpedoman's mate first class, U.S. Navy, on active duty aboard the U.S.S. BAYA (SS 318). All three of these affiants are available and as in the case of John P. Rourke, chief gunner's mate, USN, and Cecil E. Baker, engineman first class, USN, if it is desired to have them testify should be called as witnesses. In the case of Rourke and Baker the right of confrontation of the witness was had by the accused and a full cross-examination of these two witnesses was had. Such a procedure is in keeping with legal procedure and American law both civil and military.

Now, the judge advocate having followed the law and brought Rourke and Baker here as witnesses comes in with affidavits from three other persons all on active duty in the U. S. Navy and because of convenience to him asks that the affidavits be admitted.

We ask that the affidavits not be admitted into evidence.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the accused.

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REPLY TO OBJECTIONS TO PROSECUTION DOCUMENTS NUMBERED 208, 210, 211 AND 212

Delivered by

LT. JAMES P. KENNY, USN,
Judge Advocate

Defense counsel makes the objection to the depositions because they do not show that the officer who took them had the power to take them. According to SCAP rules, "Affidavits by military authorities are admissible." It is obvious that these officers were detailed to take these affidavits; that would be the only way they would come about getting them.

Defense counsel makes the point that the judge advocate called certain witnesses on this same issue before this commission and the commission heard them testify here. That has no bearing on the admissibility of these documents. We followed authorized procedure in that regard and we are following correct procedure at the present time in offering these affidavits in evidence.

The judge advocate points to SCAP rules which by its precept this commission is authorized to invoke, Section 5 d (1):

> "The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. The commission shall apply the rules of evidence and pleading set forth herein with the greatest liberality to achieve expeditious procedure. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted: Affidavits, depositions or other signed statements."

The fact that the makers happen to be in the armed services of the United States does not make these affidavits inadmissible. They should have probative value and under the relaxed rules, they should be received in evidence.

Respectfully,

James P. Kenny
JAMES P. KENNY

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Cincpacflt File	THE PACIFIC COMMAND	CinCPac File
A17-10	AND UNITED STATES PACIFIC FLEET	A17-10
Serial 3490	HEADQUARTERS OF THE COMMANDER IN CHIEF	Serial: 2955

1 August 1948

From: Commander in Chief Pacific and U. S. Pacific Fleet.
To: Commander Naval Forces, Marianas.

Subject: War Crimes and related matters; authority in connection with.

1. All authority in connection with war crimes and crimes occurring during the course of the war charged against Japanese nationals and others who worked with, were employed by or served in connection with the former Japanese Imperial Government, heretofore vested in The Commander Marianas Area by virtue of my authority as Commander in Chief U. S. Pacific Fleet and Pacific Ocean Areas, and now as Commander in Chief Pacific and U. S. Pacific Fleet, is vested in Commander Naval Forces, Marianas.

2. In connection with the above, Commander Naval Forces, Marianas is vested with authority to act as convening authority relative to military commissions convened by the Commander Marianas Area, including required action on cases now pending and, in event of revision, on cases already tried.

3. Nothing in this letter limits the inherent authority of a military commander to convene military commissions.

/s/ D. C. Ramsey
D. C. RAMSEY

Copy to:
JAG

A true copy. Attest:
James P. Kenny
JAMES P. KENNY,
Lieutenant, U.S. Navy,
Judge Advocate.

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1166

若林清作事件ニ於ケル
辯護側冒頭陳述

辯護人　佐藤　敎

本事件檢事側段階ノ当初、檢事ハ冒頭陳述ニ於テ戰爭犯罪處罰ノ敎義ニ関スルコトヲ述ベタ。然シ乍ラ其ノ中ニハ本委員会ノ正シイ判断ヲ誤リ導ク虞アリト思ハレル所論ガアツテ弁護側トシテハ其ノ所論ニ対シテ全意ヲ能ハザルモノガアル。然シ弁護側トシテハ最終弁論ノ際ニ弁護側ノ主張ヲ開明スルコトトシ、茲ニ辯護側ガ今ヨリ提示セントスル證據ニ関聯シテ若干ノ豫備的説明ヲ行ハウト思フ。

被告若林清作ハ彼ガ日本海軍ニ於ケル根據地隊司令官トシテトラック島ニ在任中、一ハ彼ノ部下ノ行動ヲ抑制スベキ彼ノ義務ヲ違法的ニ無視シ遂行セズ彼ノ部下ヲシテ米国俘虜ノ虐待又ハ殺害ヲ許可シムルコト及ビニハ俘虜ヲ保護スベキ彼ノ義務ヲ違法的ニ無視シ遂行セズ日本軍隊ノ人々ヲシテ米国俘虜ノ虐待又ハ殺害ヲ許可シタリトノ廉ニ依リ之ガ戰爭法規及慣習ノ違反デアルトシテ訴追サレタ者ル

第一ニ、被告若林ハ戰爭法規及慣習ノ違反ニ依ツテ訴追サレテ居ルケレドモ、国際法ニハ指揮官タル若林ノ如キ中間指揮官ノ部下ニ対及俘虜保護ニ対スル義務及其ノ刑事責任ノ範圍ニ就テ何等明示シタ條項ガナイ。抑モ何人ト雖モ義務解怠ニ依ツテ刑罰ニ附セラレル為ノ要件トシテハ怠ツタト主張サレル義務ガ彼ノ義務デアリト云フコトガ法規上明示サレテ居リ且ツ其ノ義務解怠ガ刑事責任トナルコトノ明瞭ナモノデナケレバナラヌ

檢事ノ其ノ冒頭陳述ニ於テ被告ガ部下ノ行為ニ対シテ絶對的義務及絶対的責任ヲ持ツモノデアルトハ主張シナイ旨ヲ述ベテ居ル。米国法理学ニ於テ云フ Negligence ノ部ニ於ケル第

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=:: "The law does not charge a man with all the possible consequence of his neglect act. He is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is possible, according to ordinary and usual experience ..... A man's responsibility for his negligence must end somewhere."
ト述ベテ居ル

換言スレバ絶対責任ノ教義ヲ採用シナイ限リ被告若林ノ部下又日本軍隊ノ人々ノ間ニ俘虜ニ対スル非行ガアッタトシテモ、彼ノ責任ハ何レカ点ニ留マルベキモノデアル。従ヲ彼ヲ義務懈怠ニ依ッテ刑罰ニ附スル為ニハ、彼ノ義務、彼ノ部下ノ義務及其ノ責任ノ範囲ガ如何ナルモノデアッタカヲ法規ニ依ッテ検討スル必要ガアル然ルニ、国際法規ニハ之ニ関スル何等明白ナ條項ガナイ。

検事ハ、総ユル主張スル戦争ノ法規慣習ヲ示サナカッタ。我々ハ bill of particular ヲ要求シタガ此モ尚戦争ニ関スル法規及慣習ハ我々ニハ知ラセラレナカッタ。検事側ハ其ノ立証段階ヲ終ッテイルモ違反シタトイフ戦争法規及慣習ニ対スル証拠ハ挙ゲラレナカッタ。

尤モ故ノ日本海軍ニ於ケル被告、被告ノ上級指揮官、下級指揮官ノ義務及俘虜保護ニ関スル法規ニ之ニ対スル刑罰ヲ参照スルヲガ必要トナッテヲ来ル之ガ為、弁護人ハ之ヲ求ムル日本海軍法規ヲ證據ニ提出シヨウト思フ

日本海軍法規ニ照ラストキハ、部下監督ノ義務ニ懈怠ガアッタトシテモ、其レハ刑罰ニハ該当セズ行政的懲罰ノ部類ニ属スルモノデアルコトガ明瞭ニナルデアロー。

第二ニ、本事件ニ於ケル重要ナル論争点ハ、起訴ノ罪状項目ニ関連サレタル如ク被告若林ガ彼ノ部下及日本軍隊ノ人々ニ俘虜ニ

対スル非行又ハ殺害ヲ許可シタカ否カニ在ルノデアル. 此ノ許可ナル言葉ノ法律的解釋ニ就テハ最終弁論ニ於テ論述スルコトトスルガ此ノ言葉ガ実際ニ適用サレル為ニハ次ノ三ツノ事実ノ内ノ何レカガ存在セネバナラヌト考ヘル. 即チ被告若林ガ部下カラノ申請ヲ承認シタカ, 或ハ部下ガ俘虜ニ対スル虐待又ハ殺害ヲ実施セントスルコトヲ承知シ作ラシムヲ黙認シタカ或ハ理性的ニ慎重ナル人ガアレバ誰デモ事件ノ発生ヲ予期シテ之ニ対シテ適当ナル措置ヲ講ズベキデアッタニ拘ラズ之ヲ行ハナカッタカノ何レカノ事実ノ存在スルコトガ根本要件デアル.

今日迄ニ検事側ニ依ッテ本委員会ニ提出サレタル證據ニハ, 問題サレタル各事件ニ就テ, 被告若林ニ部下ノ非行ヲ許可シタト云フ事実ヲ正当ナル疑ヲ起ヘテ立證シ得ルモノハ無カッタ. ガ辯護側ノ證據ニ依リ被告若林ノ斯カル行為又ハ不作為ノ全然ナカッタコトヲ更ニ明瞭ニシヨウト思フ. 特ニ潜水艦俘虜事件ニ就テハ被告若林ハ彼ガ潜水艦出身将校デアルトコロカラ特ニ俘虜達ニ同情シ親切ニ取扱ウベキコトヲ巡洋隊司令ニ指示シタコト. 二月十七日事件ニ就テハ事前ニ於テハ勿論事後ニ於テモ斯カル事件ノ発生ヲ知ラナカッタコト又東海軍病院ニ於ケル二ツノ事件ニ就テハ之亦事前事後共ニ之ヲ知ラザリシコトヲ明瞭ニシヨウト思フ

辯護側ハ叙上ノ證據ヲ提出スルニ当ッテ, 日本海軍諸法規ノ書類ニ依リ探ネン, 各事件ノ事実ニ関シテハ, 一部前哨判ノ記錄又ハ訊問書ヲ提出スルガ主トシテ各事件ニ直接関係シタ人々及被告自身ニ依ッテ之ヲ証言セシメルツモリデアル.

之ヲ以テ弁護側予備的説明ヲ終リマス

敬白

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OPENING STATEMENT OF THE DEFENSE IN THE TRIAL
OF WAKABAYASHI, SEISAKU, VICE ADMIRAL, I.J.N.

Delivered by
Mr. SANAGI, Sadamu,
Counsel for the Defense.

The Judge Advocate in his opening statement at the beginning of the case for the Prosecution in this trial stated some doctrine pertaining to punishment of war criminals. There were some arguments in that same document which may mislead the commission into error and away from a just decision. Although the defense cannot agree with such views, the defense will clarify its contentions only in the final argument and at this point submits some preliminary explanations of the evidence which it will subsequently introduce.

The accused Wakabayashi, Seisaku is charged with violating the law and customs of war in that during his tour of duty as Commandant of the Fourth Base Force, Imperial Japanese Navy at Truk Atoll, he unlawfully disregarded and failed to discharge his duty to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to mistreat and kill American prisoners of war and that he unlawfully neglected to take measures to protect prisoners of war and permitted members of the armed forces of Japan to mistreat and kill American prisoners of war.

In the first place, though the accused Wakabayashi is charged with violation of the law and customs of war there is no clearly defined clause in international law which sets forth the scope of duty of a commanding officer, especially of an intermediary commanding officer such as was Wakabayashi, to supervise subordinates and protect prisoners of war, nor any clause that clearly defines the scope of criminal responsibility for such alleged neglect of duty.

For a person to be criminally punished for neglect of duty an absolute pre-condition is that it be legally established that the alleged duty he shown to have been his. Further it must be clearly shown that the neglect of that duty constituted a criminal responsibility.

The prosecution too mentioned in its opening statement that it did not contend that an absolute duty and absolute responsibility were incumbent on the accused for the actions of his subordinates.

American Jurisprudence 35, Section 61 on "Negligence" states as follows:

> "The law does not charge a person with all the possible consequences of his negligent act. He is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is possible, according to ordinary and usual experience. ... A man's responsibility for his negligence must end somewhere."

In other words, unless the theory of absolute responsibility is accepted, the responsibility of Wakabayashi has to stop somewhere even if there had been unlawful acts visited on prisoners of war by his subordinates or members of the armed forces of Japan. Consequently, to punish him criminally for neglect of duty, it is necessary first to examine whether there were regulations and laws determining his duties, those of his subordinates, and the scope of responsibility of such duties.

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However, there are no clearly defined clauses in regard to this matter in international law. The prosecution did not set out the law and customs of war alleged to have been violated. We asked for a bill of particulars and still no law or customs of war were made known to us.

The prosecution has rested its case and there has been no evidence as to what law and customs of war have been violated.

Hence it becomes necessary to refer to regulations in the one-time Imperial Japanese Navy concerning the duty of the accused, his superior commanding officers, and subordinate commanding officers and protection of prisoners of war. For this very purpose counsel for the accused desires to submit Japanese Naval Regulations concerning these matters into evidence.

When referred to Japanese Naval Regulations, it would doubtless be seen that neglect of duty to sepervise subordinates, even supposing that such neglect were present, would not be punishable by criminal law but would fall under the category of offenses to be punished in accordance with administrative disciplinary punishment.

Secondly, one of the major points of contention in this trial is whether the accused Wakabayashi permitted his subordinates or members of the armed forces of Japan to commit unlawful acts against or murder prisoners of war as alleged in the charge and specifications. Counsel for the accused will dwell on the legal interpretation of this word permit in his final argument. He will here merely state that for that word to be truly applicable one of the three follwoing conditions are necessary.

In other words it must be a basic requirement that one of the following facts exist, namely; the accused Wakabayashi approved requests from his subordinates, he gave tacit consent to mistreatment or murder of prisoners of war knowing of their intent, or he did not take any appropriate measures against the inception of incidents where any rational and prudent man would have taken such measures.

The evidence presented by the Prosecution to the Commission to date has not proved beyond reasonable doubt that the accused Wakabayashi permitted his subordinates to commit illegal acts in connection with the alleged incidents.

Counsel for the accused will attempt to clarify further by evidence that there was absolutely no such commission or omission on the part of the accused Wakabayashi. Especially will the following parts be clarified. The accused Wakabayashi having been a submarine officer himself showed special sympathy towards the prisoners of the American submarine Sculpin and that he ordered the Commanding Officer of the Naval Guard Unit to treat them kindly.

We shall show that the accused had no knowledge of the February 17 incident even after the fact let alone prior to its occurrence. Further we shall show that he had no knowledge whatsoever of the two incidents at the 4th Naval Hospital prior to after their occurrence.

The defense in presenting the above evidence will present the regulations of the Japanese Navy by documents, the facts related to the incidents in part through introduction of portions of records from previous trials

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and interrogatories, but mainly through direct examination of persons immediately connected with the incidents and of the accused himself.

With this, counsel for the accused concludes his introductory explanation.

Respectfully,

Sadamu Sanagi

SANAGI, Sadamu,
Counsel for the Defense.

I hereby certify the above, consisting of three typewritten pages to be a true and complete translation of the original statement to the best of my ability.

Eugene E. Kerrick Jr.

Eugene, E. Kerrick, Jr.,
Lieutenant, U. S. N. R.,
Interpreter.

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OBJECTION TO RECEIPT IN EVIDENCE OF TESTIMONY OF WAKABAYASHI, SEISAKU, FROM THE RECORD IN THE CASE OF TANAKA, MASAHARU

Delivered by

LT. JAMES P. KENNY, USN,
Judge Advocate

The judge advocate objects to the receipt in evidence of the testimony of the accused at a previous trial. The testimony of a witness at a previous trial can be read into evidence only in certain exceptional cases. Most of these cases are based upon the unavailability of the witness. Wakabayashi is the accused in this case and he is available as a witness in his own behalf. Testimony of a witness at a previous trial can be read into the record in the case in order to disprove prior contradictory statements.

Naval Courts and Boards enumerates certain instances wherein testimony at a previous trial or a court of inquiry can be introduced. These are all listed as exceptions to the hearsay rule. It will be noted in Section 218 of Naval Courts and Boards: "Testimony given in a former trial either by court martial or in a civil court of the same accused on substantially the same issues may be admitted in evidence on showing that the record thereof is complete, that the witness was duly sworn and testified, that the accused had full opportunity for cross-examination, and that the witness had since died, or is physically or mentally incapable of being present at the trial...." "Former testimony before a court martial or civil court may also be admitted in evidence under circumstances corresponding to those enumerated in section 219, sub-paragraphs (a), (b), (c), (d), (e), and (f)." Section 219 says "Where oral testimony can not be obtained, the use of court of inquiry proceedings as evidence before a court martial is expressly authorized by article 60, A. G. N., subject to certain limitations as explained in section 220. However, former testimony before a court of inquiry may be received in evidence by a court martial in certain cases which are not provided for by article 60, A. G. N., and when so received the limitations contained in that article do not apply and any authorized sentence may legally be adjudged."

Section 219 of Naval Courts and Boards states that testimony of an accused in a court of inquiry is admissible under certain circumstances when offered by the prosecution at his trial, when offered by the prosecution. Here the testimony is being offered by the defense and it is not an exception to the hearsay rule.

I quote from Underhill's Criminal Evidence, 4th Edition, Section 255: "Declarations which are self-serving are rejected. - The statements or declarations of the accused in his own favor which are independent of the res gestae of the crime and which are simply narrative in their character are not relevant as part of his defense. The theory back of this rule is that such evidence is not rejected because it may not aid in finding the truth, but because in the majority of instances it is false and misleading, and a person charged with crime can not make evidence for himself."

Confessions and admissions are exceptions to the hearsay rule because they are evidence against an accused, but an accused can not make evidence for himself whether it be testimony or statements even though that testimony or statement might be a sworn document. We therefore request that the commission refuse to receive the testimony of the accused at a former trial.

Respectfully,
James P. Kenny.
JAMES P. KENNY

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NAKABAYASHI's statement

陳述書

元海軍中将　　林　清一

私ハ自分ノ為ニ証人台ニ立チ証言ヲスルコトガ
希望ニ反スルコトヲ承知シテ居リマスガ私ハ良心ノ命ズルマヽニ
本件ニ関シ真実ヲ述ベル為ニ此ノ場ニ来リマシタ

私ハ海軍生活三十五年間ニ於テ外国人ト接スル機会ガ非常ニ多クアリマシタガ
其ノ間ニ於テ私ハ国際法ノ規則ヲ厳重ニ守リ且ツ国際親善ノ精神ヲ以テ
常ニ之ヲ実行スルコトニ努メテ来タノデアリマス

次ニ私ガ曾テ米国ヲ訪問シタ際ニ親シク接触シタ米国人ノ中ニハ
私ガ日本ノ軍人ノ中デ最モ米国ヲ理解シ且ツ米国ニ対シ友好的ノ感情ヲ
持ツテ居ルト言ツテ呉レタ人モアリマス

私ハ日本ガ国際法ヲ尊重スル国デアルト言フ事ヲ世界ニ知ラシメル為ニ
特ニ注意ヲ払ヒ努力シテ来タノデアリマス

私ハ日本ガ国際法ヲ尊重スル国デアルト言フ事ヲ世界ニ知ラシメル為ニ
特ニ注意ヲ払ヒ努力シテ来タノデアリマス

研究ニ際シ潜水艦ノ活動ニ関スル国際法規ヲ精通スルコトニ努メ又ソノ
ガ潜水艦特有ノ戦闘行動ニ機会ノ多キニ鑑ミ特ニ私自身ガ潜水艦ノ
特殊性ヲ理解スルコトニ努メマシタ

私ハ第一次世界大戦ニ於ケル日本ノ地中海ニ於ケル連絡作戦ニ関シ
マルタガ英国ノ重要ナ海軍基地デアリ又英国ガ英国ノ重要ナ海軍基地デアリ
且ツ英国ノ海軍作戦ニ関シ英国ノ海軍作戦ニ関シ

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合軍作戦ニ参加シ「マルセイユ」「アレキサンドリア」間ノ所謂陸
軍輸送ノ「グランド、コンボイ」ヲ組ミ其他多数ノ輸送船団ノ
護送ニ従事シマシタ

休戦後私ハ新嘉坡ヨリ日本軍艦矢矧ニ便乗シテ本国帰還ノ途ニ就キマシタ 途中同艦ハ「スパニシュ、インフルエンザ」ニ冒サレ忽ニシテ乗員ノ殆ド全部之ニ罹リ遂ニ馬尼刺ニ入港ノ已ムナキニ至リマシタ 之レ実ニ大正七年十二月上旬ノコトデアリマシタ
同艦入港ニ先チ艦長ヨリ馬尼刺駐在日本総領事ニ電報シテ救援ヲ求メ米国官憲ヨリノ援助ヲ請ヒマシタ 全艦ガ入港スルヤ馬尼刺ノ救護所ニ乗員ノ殆ンドスベテノ者ハ副長以下六十余名ハ病院ニ運バレマシタ 同船ノ救護ニ従事シタモノハ救護所以外ノ陸軍病院ニ入院シ病院長ニ看護ヲ受ケ看護婦ニ於テモ之ヲ総テ艦長ト同シ待遇ヲ受ケテアリマシタ 私ハ此ノ時罹病シ居リテ上甲板天幕下ニ横臥シテ居リマシタ

同艦入港スルヤ否ヤ米国陸軍ハ直ニ救援隊ヲ派遣シ在留日本人ト共ニ米兵及看護婦ノ如キ数百名ノ診察、陸揚患者ノ運搬、次ニ病者ノ陸揚、病舎ノ準備等万端ノ世話ヲシテ呉レマシタ

私モ亦陸揚患者ノ一員トナリ此ノ米国陸軍救援隊ニ救ハレタノデアリマス 私ハ此ノ時米国民ノ国際愛ニ対シテハ真ニ心ヨリ感謝感激シタノデアリマスガ爾来私ハ常ニ此ノ体験ヲ忘レルコトガ出来マセンデシタ

ノ理由ニテ私ガ本件ヲ訴追シタ時ニ憫ミヲ以テシ[illegible]

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氏ノ第一回大統領就任ニ
ノ"パレード"ヲ参観スルコトガ出来マシタ、私ハ此ノ機会ヲ
米二ヶ月間ノ滞在ニ於テ更ニ民主的ナ米国精神ヲ認
識スルコトガ出来テ米国ニ対スル愛敬ノ念ヲ強メタノデ
アリマス

不幸、第二次世界大戦勃発ニテ誓テ戦度ト敵
対スルニ至リシコトヲ最モ遺憾トシテ居タノデアリマス、此ノ
時、私ハ遠信省海務院部長デアリマシタガ現役海軍特
校デアリマシタノデ戦争ノ中期ニ海軍ニ復帰ヲ命ゼラレ
昭和十八年七月、市田根拠地隊司令官トシテトラック
島ニ赴任致シマシタ

此ノ花ヲ中佐ニ昭和十八年十月潜水艦ノ生存者ガ
帰トシテトラック島ニ送致サレテ来タコトヲ知リマシタ
貴方達ヲ海上ニ勤務ノ経験ヲ有セラレ、況ヒ善ク即
語解ノコトト思ヒマスガ絶テ海軍々人間ニ国境ヲ
超ヘタ或種ノ精神的ナ紐帯ノアルコトデアリマス
日本海軍ニ於ケル如ク各種ノ精神的ニ肉体的ニ非常ニ苦労
勤務ガ危険ヲ伴ヒ精神的ニ米海軍ニ於テモ潜水艦ノ
ノ大キイモノガアルト察シテ居リマス 夫レ故我艦艇ガ
ト戦闘シテ不幸沈没シ又ハ被撃シテ漂流スル米潜水艦ノ乗
員ニ対シテ私ハ衷心ヨリ同情ヲ禁ジ得ナイノデス
方針ヲ堅持シテ居リ部下ニモ之ヲ要求シテ居タノデア
リマスガ一般ニ潜水艦ノ人道的ニ取扱ヒ特ニ親切ニ取扱ノ
様、警告シタノデアリマス

私ハ昭和十五年八月潜水戦隊司令官ヲシテ居ル時

演習中潜水艇
其ノ失綿事件ガ起リ其ノ乗員全部
ヲ失ヒマシタ。私ハ是等遺族ニ対シテハ出来得ル限リノ
救済扶助ヲ尽シテ来マシタ。今次モ二次世界大戦生
起後、私ハ此ノ戦争ノ犠牲者及遺族ノ救済扶助ノ重要
ナルヲ痛感シ直ニ政府民間諸団体ニ提案シ之ガ救
済資金ノ調達及ビ実行ニ対シ指導協力シテ来マシタ
又私ハ終戦特ニ高等高松学校長トシテ高松乗員
ノ養成ニ当ツテ居リマシタガ終戦ノ結果高松乗員
養成機関ノ大縮少ニ依リ約
職ヲ解カレナケレバナラヌ困難ナ問題ニ逢着シマシタ
私ハ百方奔走シテ之ガ解決ニ努メ多数生徒ノ身ノ
振リ方ヲ結着サセテカラ高等高松学校長ノ職ヲ
辞任シマシタ

私ハ前ニ述ベマシタ如ク米国ノ温イ手ニ依リ馬尼刺
ニ於ケル流行病ニ依ル死ノ危険カラ助ケラレテ来タ私ヲ再
ビ苦シイ立場ニ陥レ着々ト勝ヲ収メツヽアル米国ノ底
深イ好意ニ対シテハ果シテ如何ニ感謝シテヨイカ分リマセン
故国ノ為ニ最大ノ任務ヲ果シタ底ニ酬ヒラルベキ傷痍
軍人ガ労ヘリ助ケラルヽコトヽソ、私ノ真実ノ気持デアツテ之ガ為ニ
過ギルカ如キ手厚イ夢想ダモシナカツタコトデアリマス

私ノ部下ノ部隊ニ於テ米国傷病兵ヲ取扱ヒ又ハ救
害スルカ如キ事件ノ生起ハ全ク意想外デアリマス。斯ノ
如キ理由ハ全然ナカツタノデアリマス。此ノ事ニ関シテハ
ドウカ米国傷病兵ヲ処刑スルカ如キ
戦闘中ト雖モ田中大佐ガ傷ヲ受ケ
キ過誤デアリマス。此ノ事ニ関シテハ
いう居リマス

私トシテハ總參謀副長官ニ對シ俘虜取扱ニ就イテハ嚴
敷示シテ居タノデアリマスガ昭和十八年末以後殊ニ
田中大佐ガ總參謀副長トナツテカラハ自分自身常
ニ病臥ノ爲彼ニ任セテ發示スル俘虜ニ關シテハ知ラナカツタガ
故ニ或ハ自分ノ氣持ガ彼ニ充分ニ徹底シテ居ナカツタ
事ガアツタカモ知レマセン

從ツテ私ハ部下ニ非行ヲ許サヌト云フ氣持ニ
更ニ嚴シイ文書ニ依ル命令ヲ出サナカツタコトハ重大ナ誤
解ガ充分認識サレナカツタモノト信ジマス
是ヲ以テ私ノ陳述ヲ終リマス

（終）

STATEMENT OF WAKABAYSHI, SEISAKU,

I have testified before on the witness stand in my own behalf, but I now wish to make a statement mainly in connection with my mental attitude.

In the 35 years of my naval career, I did not have much occasion to come into contact with foreigners or to travel abroad but on those rare occasions, I was able to appreciate the importance of international courtesy keenly. I always had an international sense of justice and understanding, and in guiding my subordinates, I had this in mind at all times.

On the occasion of my inspection tour of the United States and various European countries, not only did I travel through central Europe; I went to the Scandanavian countries, to Holland, entered Soviet Russia, and from there went to Asia Minor, thereby greatly broadening my outlook. Even after my return to Japan, irrespective of my post, I exerted every effort to come into contact with those who were well-read in foreign affairs, and endeavored to assimilate knowledge of foreign countries in order to attain that purpose for which I sought so fervently, especially as that purpose is the basis of international morality.

Especially, as I was a submarine officer, and in view of the fact that there were numerous opportunities for submarine officers in wartime to go on solo missions, I acutely felt the need of mastering international law, and not only did I study it myself, but I took every care to see that all submariners were given the necessary guidance and education in this respect.

During World War 1, I participated in operations on two different occasions. The first was the invasion of Tsingtao, and the consequent operations in the Indian Ocean in pursuit of the cruiser Emoen. The second was my participation in the allied operation in the Mediterranean, the first of which was the "Grand Convoy", which transported allied forces from Marseilles to Algeria, and many other subsequent convoys. With the Armistice, I boarded the Japanese warship Yahagi from Singapore to return to Japan. On the way home, we had an epidemic of Spanish influenza; in a few moments the crews were stricken by it, and we were forced to enter Manila. This happened in the beginning of December 1918. Before entering the port of Manila, the captain of the ship sent a despatch concerning this calamity, to the Japanese Counsul General there, asking for help, as well as medical supplies which were very short on the ship. When the ship at last dropped anchor in Manila bay, more than 60 men including the executive officer of the ship were already dead. The seaman who threw in the anchor fell dead on the foredeck. The only persons standing on the bridge were the captain and a signal man.

At this time, I was also infected, and lay seriously ill on the upper deck beneath a tent. As soon as the ship entered the harbor, the United States Army and Navy despatched a rescue party, and together with the Japanese residents, took every conceivable care of us from the replenishment of medical supplies, the consultation of patients, carrying ashore the patients who could be moved, to the unloading and preparations for the funeral of the deceased.

I was one of those who were removed ashore, and was saved by the United States Army and Navy rescue party. I was overwhelmed and deeply moved by this show of international goodwill on the part of the United States forces and their people. Since that time I have never forgotten this experience.

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In 1933, when I visited Washington, it was on the occasion of Franklin Roosevelt's first inauguration in the presidency, and fortunately I was able to witness the parade in his celebration. Through this opportunity and my two months stay in the States, I was able to appreciate further the spirit of democracy in America and heighten my respect and love for the American people.

Unfortunately, with the outbreak of the Second World War, I had to confront the friends of yesterday as my enemies, and nothing ever hurt me more than this. At this time I was the Chief of the Maritime Affairs Bureau of the Communication Ministry, but as I was a regular naval officer, around the middle of the war, I was re-instated in the navy, and in July 1943, I came to Truk as Commandant of the Fourth Base Force.

During my tour of duty in November 1943, I learned of submarine survivors who had been sent to Truk, as prisoners of war. You who have been to sea and in the service of your country know there is a bond of service between all Navy men no matter of what nation. In the Japanese navy as in your American navy the submarine service was considered dangerous and it entailed innumerable hardships. I felt a strong sense of pity for the American submarine men who had been forced to abandon their submarine in their fight with one of our destroyers. I always had a determined policy to treat prisoners humanely, and persistently demanded the same from my subordinates. I instructed Captain Minematsu, the commanding officer of the Guard Unit, to treat these submarine prisoners with special kindness.

In August 1940, when I was Commandant of a submarine squadron, I lost a submarine with all hands in a manouver. Since that time I have been doing my utmost to succor and aid the bereaved families of the crew. After the commencement of World War II, I felt the importance of relief and aid to war victims and their families and made suggestions to the Government and to civilian organizations, and took a leading and co-operative part in the collection of donations and in their distribution. At the time of the surrender, I was the principal of the Higher Mercantile Marine School and engaged in the training of merchant marine officers. I was faced with the difficult task of discovering new occupations for over 10,000 students who had to turn to other vocations because of drastic reductions in the training organizations for mercantile officers. I endeavored to solve this problem by exerting my efforts in all directions, and only after I had established numerous students in different new fields of activity did I retire from the principalship of the Higher Mercantile School.

As I have stated previously, since the day I was saved by the sympathetic aid of the Americans from the danger of death through the epidemic, I too made it my creed to help the weak and needy, and offered them aid.

My sincere thoughts were to console and help prisoners who needed protection and who had done their supreme duty to their country, and to mistreat them never occurred to me even in my dreams.

I deeply deplore the fact that incidents of mistreatment and murder of American prisoners of war occurred in units subordinate to my command. Captain Tanaka in the fury of battle executed prisoners of war. I am sure this was a mistake on his part, because there was absolutely no reason for the execution. It was a most regrettable incident and I am deeply mortified. Although I had always instructed the Commanding Officer of the Naval Guard Unit on the treatment of prisoners of war, after the end of 1943, namely after Captain Tanaka became Commanding Officer of the Guard Unit, I was almost always confined to bed, so that I did not have the opportunity to instruct him. It might therefore have been that he did not fully comprehend my wishes.

However I firmly believe that the Commission will fully understand that I never had any intent to permit my subordinates to misconduct themselves, nor that there was ever such a fact.

I herewith conclude my statement.

Respectfully,

Wakabayashi Seisaku.

I hereby certify that the foregoing statement, consisting of two and one-fourth (2 ¼) pages, is a true and complete translation of the original in Japanese, to the best of my ability.

EUGENE E. KERRICK, Junior,
Lieutenant, U. S. Naval Reserve,
Interpreter.

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Opening Argument for the Prosecution
Delivered by
Lieutenant James P. Kenny, USN
Judge Advocate

The accused is charged with a violation of the law and customs of war in that he neglected his duty when he failed to control his subordinates (specification 1) and failed to protect American prisoners of war (specification 2). It is charged that because of this neglect of duty on the part of the accused, fifteen (15) American prisoners of war were killed and forty-two (42) other American prisoners of war were tortured, abused and mistreated.

The judge advocate will first review the applicable law, secondly, review the evidence which the prosecution believes establishes the guilt of the accused beyond a reasonable doubt, and finally show how the law fits the facts of this case.

Neglect of duty has long been recognized as a penal offense both in civil and military law. It has become a well established principle in the field of International Law. This duty with reference to prisoners of war is expressed in Article IV of the Annex to the Fourth Hague Convention of October 18, 1907 in the following words: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated..." The Geneva Prisoners of War Convention of July 27, 1929, restated and reaffirmed this principle of the law of war in almost identical language when it stated in Article 2: "Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity. Measures of reprisal against them are prohibited." That the law of war placed a responsibility upon Commanders of troops was recognized by the United States Supreme Court when it stated: "It is evident that the conduct of military operations by troops whose ... excesses are unrestrained by the orders or efforts of their commander would

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almost certainly result in violations which it is the purpose of the law to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates ... These provisions plainly imposed on petitioner, who at the time specified was Military Governor of the Phillipines, as well as Commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty as a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals" (In re Yamashita, 327 U.S. 1). This principle of the law of war has been applied not only in the Yamashita case but in numerous other cases tried before Military Commissions in this and other areas.

As noted by the Supreme Court of the United States, the breach of this duty by commanding officers has been penalized by our own military tribunals. An outstanding and recent example is the conviction of Colonel James A. Kilian, Commanding Officer of the 10th Reenforcement Depot, European Theater of Operations, in that he "did wrongfully and unlawfully fail and neglect to properly perform his duties as such Commanding Officer of said Depot, in that ... he permitted the imposition of cruel, unusual, and unauthorised punishment upon ... all these prisoners in confinement at said depot,..." It is important to note that in the Yamashita charge there was no allegation that the accused had knowledge of the offenses at the time they were committed within his command. Although in the Kilian case it had been charged that the accused "knowingly permitted," the court found the accused guilty except for the word "knowingly." In fact, in the review of the Kilian case by the Assistant Judge Advocate General in Charge of Military Justice Mat-

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ters we read the following "I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know they are occurring. At least within reasonable limits it is the duty of a commanding officer to see to it that his command operates in accordance with established standards and that deviations from those standards do not occur." The reviewer also indicated that proof of knowledge on the part of the accused prior to the occurrence of the incidents would be matter in aggravation and not an essential averment of the charge.

So much for the law. We now go to a discussion of the evidence and facts of the present case. The judge advocate has shown that during the tour of the accused as Commandant of the Fourth Base Force, Truk, there occurred, as alleged, four incidents involving prisoners of war. These incidents involved American prisoners of war who were in the custody of one of the subordinate units of his command, viz. the Forty-first Naval Guard Unit.

We have proved specification 1 (a) and 2 (a) by showing through testimony of witnesses and affidavits that forty-two (42) American prisoners of war were confined for excessive periods into three small unsanitary cells of the Forty-first Naval Guard Unit, that these prisoners were denied proper medical care, and that they were repeatedly beaten with fists and clubs by personnel of the Forty-first Naval Guard Unit during their ten days confinement in the brig of that unit.

The remaining incidents alleged in specification 1 and specification 2 of the charge were all proved by the introduction of certified extracts from the records of previous cases.

In order that the accused be found guilty as charged it must be proved that (a) there existed a duty to control and a duty to protect and (b) that the accused breached that duty by nonfeasance or misfeasance.

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Earlier in this argument the judge advocate by reference to the law and cases has established that there existed upon the accused because of his position as Commander of the Fourth Base Force the dual duty to control his subordinates and to protect prisoners of war. Article 1 of the Annex of the Fourth Hague Convention lays down as a condition which an armed force must fulfill in order to be accorded the rights of a beliggerent that it must "be commanded by a person responsible for his subordinates." The accused Wakabayashi could not shift his responsibility under the law to subordinate commanders. His position of command carried with it commensurate responsibilities under the law. As stated in Vol. 1, Staff, J./. 24 December 1945, in the case of USA v Isamu Morimoto, Lt. Col., et al, "It is further established (FM 101-5) that that commander is responsible...for all that his unit does or fails to do. He cannot shift this responsibility to his staff or subordinate commanders."

Did the accused breach this duty? Did he, in the words of the specification, disregard and fail to take such measures as were within his power in the circumstances? The accused was an officer of 35 years experience in the Imperial Japanese Navy. He had been stationed with the Vice Ministry of the Navy at the outbreak of the war and during the first two years of the war was Chief of the Maritime Affairs Board. During that time he must have become aware of the repeated protests by the Government of the United States of America concerning the mistreatment of American prisoners of war at the hands of their Japanese captors. Even assuming the possibility that he did not know of these protests, certainly he must have known or should have known that among combat troops war conditions breed strong animosities toward prisoners of war, and that instructions, orders, and vigilant supervision were the only means of assuring conformance to international law with regard to the treatment of prisoners of war. The accused knew that the only place on Truk where prisoners of war were confined was at his Forty-first Naval Guard Unit. However he issued no instructions for the handling

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or treatment of these prisoners of war. Although there were instructions that all prisoners of war were to be sent to the Japanese homeland, he never established any procedure to make certain that these instructions were carried out. Although the Guard Unit Headquarters was within a mile and a half of his own headquarters and he knew that any prisoners of war captured on or brought to Truk would be confined there, he did not visit or inspect the place of confinement to see that International Law was being observed. He admits that he knew that the forty-two submarine prisoners of war were confined at the Guard Unit when he was making inspections in the month of November at the Guard Unit but that he did not go near their place of confinement. Evidently the problem of prisoners of war was not commensurate with the importance of defense installations. Evidently the accused was content to rely upon his subordinates when it came to the treatment and handling of prisoners of war. He could assign the duty but the Law prevented him from assigning his responsibility. As stated in the review of the Kilian case, "This responsibility could not be delegated to some inferior officer or officers, and the accused cannot and should not be permitted to escape responsibility therefore by merely saying in effect that he was so preoccupied in the performance of other necessary duties that he did not know such things were taking place in his command."

At this point we see that proof of knowledge on the part of the accused prior to the incidents was not necessary for his conviction and that the mere proof that these incidents did occur during the period of his command was sufficient for the prosecution to establish its case. However, as indicated, by the reviewer in the Kilian case, the judge advocate believes that where such proof does exist it is an aggravation of the offense of neglect of duty. It is the contention of the prosecution that such proof does exist in this record with reference to each of the four incidents charged against this accused.

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Let us review the evidence with reference to the knowledge of the accused of these incidents at the time they happened. He admits that he knew that forty-two (42) American prisoners of war were confined at the Guard Unit in November 1943. Minematsu, the commanding officer of the Guard Unit at the time, in his deposition submitted by the defense says that Commander Higuchi, the senior staff officer of the Fourth Base Force, was present at some of the interrogations of these prisoners by personnel from another unit. The evidence shows that the prisoners were beaten during the course of these interrogations at the Guard Unit. Minematsu, in his deposition of 28 August 1948, states that Higuchi was present about two times and "just listened to the interrogations." Minematsu further testifies that the forty-two submarine prisoners of war were all confined in three cells in one building, and that each cell was constructed to accomodate only one prisoner. He states that he reported to Chief of Staff Higuchi concerning the confinement of the prisoners at the Guard Unit and that it was Higuchi's duty to report the matters to the accused. It is apparent from this evidence that Higuchi was present at these interrogations as the staff representative of the accused and since the questioning took place immediately outside the place of confinement he must have been aware of the nature of their confinement. Higuchi testified that he informed the accused concerning the interrogation of the POW's at dinner on the day following the arrival of the POW's at the Guard Unit.

The evidence shows that about fifteen days prior to the killing of the eight (8) American prisoners of war (paragraphs (b) and (c) of specification 2) Captain Iino, Chief Surgeon at the Fourth Base Force and Forty-first Naval Guard Unit, informed the accused that Captain Iwanami of the Fourth Naval Hospital had telephoned and requested permission to use some of the prisoners of war then at the Guard Unit for physical experiments. The evidence shows that Iwanami did get these prisoners and that they were experimented upon and then killed.

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The evidence shows that prior to the execution of the seven (7) American prisoners of war at the Guard Unit on 17 February 1944 the Fourth Base Force was contacted and gave approval for the execution. That such approval was given is evident not only from the testimony of prosecution witness Ishii but also from the testimony of Tanaka, the then commanding officer at the Forty-first Naval Guard Unit. Tanaka tells how he ordered Ishii to contact Fourth Base Headquarters to ascertain what should be done with the prisoners of war, that later Ishii returned and reported that "he had received orders from headquarters." Tanaka was asked "Is it certain that the Fourth Base Headquarters put out an order for the execution of the prisoners?" and he replied "Yes, this is certain and I have learned afterwards the way headquarters were thinking at that time was that the enemy landing was imminent and it was necessary to dispose of the prisoners." The evidence shows that during the air raid of February 17th, the accused was at all times in the vicinity of his headquarters, receiving reports from his staff and issuing orders. From this evidence there can be no doubt that orders for the execution of the seven prisoners of war came from the Fourth Base Force where the accused was Commandant. The evidence further shows that Captain Tanaka reported concerning these executions at a staff conference held at the Fourth Base Force Headquarters on the evening of February 17th. Tanaka, in his affidavit (Exhibit 9), states that he reported, "Prisoners have been disposed of. I gave this report in front of C. O. Wakabayashi; Staff Officer Higuchi, Fourth Fleet Staff Officer Kawamura and other persons who assembled there." Captain Inoue, a staff officer of the Fourth Fleet, testified before this commission that upon his late arrival at the conference Kawamura reported to him on the progress of the conference to that time from written notes and in the course of the report said "The prisoners of war have been executed at the Guard Unit."

It is obvious from this evidence that the accused could have been charged with the murder of the eight prisoners of war who were killed by personnel of the Fourth Naval Hospital and the seven prisoners of war who

were killed at the Guard Unit on February 17, 1944 by personnel of the Guard Unit. The accused in his official capacity as Commandant of the Fourth Base Force was legally bound to protect all these prisoners of war who were at the time in his custody and additionally, with reference to the February incident, to control his subordinates. His failure to act or to do anything to prevent these incidents in the face of his knowledge that they were likely to occur make him an accessory to the subsequent murders. 26 American Jurisprudence, Homicide, Section 205, p. 295, states: "Where death ensues in consequence of a wilful omission of duty it is said to constitute murder." However, the accused has not been charged with murder but with Neglect of Duty. The proof of his prior knowledge of these incidents aggravates the degree of the alleged neglect and makes it wilful.

This, in short, is the prosecution's case. The judge advocate feels that neglect of duty on the part of the accused has been proved beyond any reasonable doubt. The law of war placed a heavy responsibility upon him because of his high position; it is obvious from what has been heard in this courtroom that he failed miserably in shouldering that responsibility.

Respectfully,

James P. Kenny

James P. Kenny,
Lieutenant, U.S. Navy,
Judge Advocate.

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最終辯論

被告人元日本海軍第四根拠地隊司令官海軍中將
若林淸作辯護人
高野紋二郎

軍法會議會長並に會員各位

私は被告人若林淸作の辯護人として茲に最終辯論を爲すに當り本件審理が終始公平且愼重に行はれたことに對し深甚の感謝の意を表するのである。

第一編　法律の見地よりの辯論

第一、檢察官は本件の冒頭陳述に於て一の社會即ち一の國家に於ける人の行爲の規準を定めたる法律殊に刑法の遵守を確保維持することは警察權の任務であつて之が爲警察權は其の法律の侵犯者よりも更に強力なる力を有することを必要とする、之と同樣に國際社會に於て國際法規及慣習法の遵守を確保維持する爲戰勝國が敵の國際法規並に慣習法の違反者を處罰する任務を有し且動くことが適當であり又當然であると論じてゐる。併し檢察官は國家と國際社會の本質の差異を看過してゐることを吾々は茲に指摘せねばならぬ。

國家と其の人民は統治者と被統治者との關係即ち權力と服從の關係が其の組織の基礎を成してゐるのである。何も警察權が法律の

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侵及者より大一層係大なる力を有すること或は有すべきことが警察権の属性ではない。警察権は主権の一作用である。然るに國際社会は各國家間の協約又は合意に依って組織せられた一の團体であって此の國際社会と各國家との関係は相互對等の関係即ち権利義務の関係である。戦勝國は超國家的國家ではなく又國際警察権を有する國家でもない。それであるから國際警察権とか國際刑法等の設定が國際法學者間に於て討論研究の題目となっている訳である。

吾には國際正義と國際秩序を確保維持するために戦争法規並に慣習法を違反した者を処罰することは全く同感であって當に其の当然なることを認めるのである。然しながら正義と公平を基準とすれば、戦争犯罪容疑者の裁判に於て検察官の言う如く國際法規並に慣習法の実施を確保し其の違反者を処罰することは戦勝國の任務であり特権であると云う観念の表示は甚だ不適當である。斯かる表現は人を誤解し易く且つ危険である。斯の如き思想は現今の司法制度を封建時代へ再び逆行せしむるものであると言わなければならぬ。検察官の此の思想が國際法規並に慣習法に何等の規定なき上官の命令並に部下の職務忠慾を戦争犯罪と擅断的に看做し無差別的に起訴することになるのである。

検察官は又冒頭陳述に於て先の四十二年八月廿一日ルーズヴェルト大統領が発した指示

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拳銃帯載許可が許はるいておうことを警告した弁明を引用した此の弁明が責任ある高級指揮官に対する警告であるかの如き意味のことを述べた。併しルーズヴェルト大統領の弁明は単に捕虜の引用に留まるは大統領の述べた責任者処罰の範囲に関し重要が脱けてゐる。ルーズヴェルト大統領は其の後外交四十二年十月六日に更に「集団暴行の民に対する組織的殺害及び虐待を基礎数の教育を通じ又は惨虐行為に対し責任ある首謀に対し而も確実なる処罰の加へよとのことが吾々の意図するところである」と述べてゐる。之に依れば聯合国の最高方針は責任ある首謀者は勿論のこと下位の関係者又は高級指揮は誰でも罰すると云ふ意味ではないことを了解し得るのである。

第二、本件の起訴罪名は戦争法規及慣習法の違反となって其の罪状項目一として日本帝国海軍第四根拠地隊司令官海軍中将(当時)岩村清次は前記第四根拠地隊司令官として勤務中アメリカ合衆国連合諸国及其の属領が日本帝国と戦争状態にあった昭和十八年七月二十六日から昭和十九年二月二十日に至る間カロリン諸島トラック環礁夏島において彼の指揮下にあった人に対し彼の抑制監督下にあった人の行動を抑制すべき前記第四根拠地隊司令官としての職責をそむき彼の職責であったも拘らず不法に無視し遂行せず彼等に日本軍隊に抑留せられてゐたアメリカ従属民を奴隷、酷使、虐待、又は殺害することを許可し戦争法規及慣習法に違反したと云ふに在る

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罪状項目其の二とし右林清作は前記第四根拠地隊司令官として勤務中アメリカ合衆国連合諸国及其の属領が日本帝国と戦争状態にはいった昭和拾六年七月二十六日から昭和拾九年二月二十二日に至る間カロリン諸島トラック環礁要塞において彼の指揮下にあって彼の抑制管轄下に従属していた日本軍隊に抑留されていたアメリカ俘虜を保護すべき彼の権限内において適切な手段を講ずることが彼の職責であったにも拘らずこれを怠り日本軍隊の人員に前記俘虜の不法な苛責、酷使、虐待及殺害を許可して前記第四根拠地隊司令官としての職責を不法に無視し遂行せず漸次常規並に慣習法を違反したと云うにある。

第三、右件起訴状を検討するに罪状項目其の一は被告人は第四根拠地隊司令官という職責上自己の指揮下並に統御監督下にあり人々の行動を抑制すべき拘束する其の職責を全うせず其等の人員に俘虜を苛責、酷使、虐待、殺害することを許可し其の部下統御監督の職務を怠ったと云い罪状項目其の二は被告人は第四根拠地隊司令官として自己の指揮下並に統御監督下にある人々に抑留されていた俘虜を保護する為自己の権限内において適切なる措置を講ずべきに拘らず右此等の人々に俘虜を苛責、酷使、虐待、殺害することを許可し其の部下の統御監督の職務を怠ったと云うのであるが罪状項目其の一の(イ)と其の二の(イ)及其の一の(ロ)と其の二の(ニ)とは被告人の全く同一の統御監

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頭上の職務怠慢であって二個の別異の職務怠慢ではない旨主張し、検事は前者は被告人と嘉の部下に対する関係に主眼を観たものであって後者は被告人と柳営中の侍臣に対する関係の観点を観たものである。そもそもかかる二者は唯観点を異にしたのみであって其の実体は唯一の部下統御監督上の職務怠慢であり、罪状項目其の二の(ロ)及(ハ)は本件上は特異性なきものと云える。

茲に特に指摘せねばならぬことは本件起訴状中、ハルの動向するにしても被告人吉林が(イ)彼自身暴行、脅迫、監禁、殺害の為と為したとか又は之に参与したとか(ロ)嘉等の行為を命令又は容赦若は黙認したと云う検察官の主張のないことである。此のことは後に述べるところに関係を持つから茲に一言述べて置くのである。

第四、職務怠慢が犯罪を構成し且刑事上の責任を負う要件として(1)或る人が法律又は規則に依って課せられた特定の義務を怠ったこと、(2)其の犯罪となるべき職務怠慢行為は故意(犯意)又は法律が刑事責任を負はしめる程度の過失のあること、(3)更に其の職務怠慢たる不作為と発生したる客観的事実との間には直接の因果関係のあること、(4)其の之を罰する法規は其の犯罪行為の為されたる当時現に実施せられてあったものであって此の法律又は規則に依って其の特定の義務が課せられ且此の法律又は規則に違反したることと本罪と

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者の行為の行はれた後に制定せられた法律又は規則を以てこれを処罰することを得ないのである。

職務怠慢とは本質上二つの種類がある。一は自己の犯したる犯罪行為が職務怠慢であつて他は他の者が犯したる犯罪行為に付き幼き人が責任を問はる、抑制監督上の職務怠慢である。監督者（上官）が被監督者（部下）の犯したる犯罪行為に付き其の監督者（上官）として統御監督上の職務を怠つたと云ふ理由で其の責任を採るのであつて之は以上の後者の例である。本件において検察官が被告人若林の第四根拠記載の上官として部下の職務怠慢の責任を問うているのは此の後者の例である。併し監督者（上官）が被監督者（部下）の犯したる一切の犯罪行為に付無条件無制限に其の監督上の責任を負うと云うのではない。若し仮に監督者（上官）が被監督者（部下）の総ての犯罪行為に付無条件無制限に監督上の責任を負うというのは公平を失し酷に失する法として妥当ではない。そこには一定の限界がなければならない。然らば如何なる要件が具はれば監督者（上官）は其の被監督者（部下）の犯したる犯罪行為に付統御監督上の職務を怠つたものとして責任を負うべきかということについては以下項を改めて述べてみやう。

第五、刑事上、人が他人の犯罪行為に付刑事責任を負うは其の他人の犯罪行為を幇助、教唆、助言、命令、したることを要件とするのが刑事法一般の

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第則である。而して其の人と其の他人とか支配者と被支配者の関係又は監督者と被監督者の関係にある場合には前者が後者の犯罪行為を命令、指令、許可したるか又は知りて之を黙認したる事実があるのみなりしは前者をして刑事責任を負はしむることは出来ないのである。CLARK and MARSHALL も犯罪論の中に左の如く論じて居る。

「普通法の下においては前述のごとき成文法の下においても一般に人は其の代理人又は被傭者の犯罪行為又は懈怠それが雇傭中なされたりとても其の行為が本人の指令に基きなされたるか或いは其の本人がそれを知って黙許したのみなりしは其の本人に対し刑事責任を問うことは出来ない。蓋し或る人を犯罪の有罪とするには犯意を必要とすることがその一般に認められたる原則であるからである」(CLARK and MARSHALL, CRIMES, §188. 本人又は主人の責任。(C) 230頁)。

右も之は本人と代理人或は主人と被傭者との関係を論じたものではあるけれども其の根本理論は一般的に監督者と被監督者或は上官と部下の関係にも等しく適用せらるべきである。

斯此の原則を軍隊の上官と其の部下の関係に当てはめて見るに上官が部下の犯したる犯罪行為に付相当監督上の職務を怠ったという点で刑事責任を負うのは其の上官が部下に其の犯罪行為を命令、指揮、指示、許可したるか、又は其の犯罪行為を知って之を黙認したのみなりしはまたは、CLARK and

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MARSHALLが其の犯罪論に於て論じてゐるやうに犯罪を構成するには犯罪行為と犯罪意思（犯意）とがなければならぬのである。（同書§106, p.147）。換言すれば上官は部下の其の犯罪行為を知ることが必要條件である。若し上官が其の部下の犯罪行為に付何等知るところがなければ上官は原則上は刑事責任を負はないのが原則である。然しながら其の知らなかったことに付上官に過失があったならば其の責任を免れることは出来ない。但し茲に謂ふ「過失」は單純なる過失ではなくて上官自身が其に刑事責任を負はしめてゐる程度の過失でなければならないことは言ふを俟たぬ。CLARK and MARSHALLも「不作為を理由として刑事責任を負はしむるには其の人が法律上の作為義務を有し且其の不作為が故意に基くものか或は刑事責任を問はる、過失に基因するものでなければならない」（同書§53, 総論, (4) 不作為p.80）と論じてゐる。

第六、本件に於ては被告人岩林が彼の部下に対し毒殺、酷使、虐待、殺害することを許可したといふ訴因であるから此の「許可した」といふ語句に付若干の考察を加へてみやう。

BLACKの法律字典（第3版）に依れば「許可する」といふのは「…することに任せる—To suffer, 「許す—To allow」, 「…せしめる—To let」, 「許又は免許を與へる—To give leave or license, 「防止せずして默認する—To acquiesce, by failure to prevent」, 「或る行為をなすことを禁ずる

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に賛成し若は同意を與へる — to expressly assent or agree to the doing of an act」と云ふ意味である。此等の一つ丈の意義丈を法律的に解釋すれば或る行為をなすことを「許可する人」は其の計畫してゐる行為を知つて之を爲さしむるか若はそれを知りながら爲すに任せるかであつて其に此等の意義に從つて之を他人の犯罪行爲を「許可する」と云ふことにあてはめて言へば或る人が他人の犯罪行爲を知りながら其の他人が其の行爲をなすに任せるか若は其の犯罪行爲を知つて之を防止せずに黙認することである。

以上述べたる「許可する」と云ふ語の何れの意義によるとも或る人が他人の犯罪行爲を「許可した」上は其の人が該犯罪行爲に付刑事責任を負ふべき場合は其の「許可した」人が法律上依り明かに其の他人を(犯罪行爲の實行者)を監督又は統御すべき義務を負ふべかりしことと共通に且其の犯罪行爲を知つてゐたことが必要條件である。

本件の起訴狀に記載せられてゐる「許可する」なる語は以上何れかの意義に有せしめようとするのであるか其の外の意義は有せしめようとするのである。結局被告人が彼の數十の犯したる罪狀項目記載の犯罪行爲に上記何れかの意義に於ける許可を與へたのであるか何れの場合に於ても被告人若林は其等の犯罪行爲を知つてゐたことが此の字句の中に含まれてゐるのである。然しあか被告人が果して其等の犯罪行爲を知つてゐたか否かに付ては後に事實論に於て明かにせんとする。

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第七、本件は被告人若林が彼の部下に俘虜を虐待、酷使、暴行、殺害することを許可し命令を拒否し得べき職務上俘虜を保護すべき職務を怠りたる事実を認定し俘虜虐待の罪を以て処断したと信ずる検察官の主張である。然れども一体戦争犯罪とは何か？国際法上上官の命令、軍隊指揮官の職務怠慢は無条件無制限に戦争犯罪と成るであろうかと云う一個の疑問が生じ来るのである。以下此等の問題に付き若干の考察を試みてみよう。

(1) 戦争犯罪は刑法上の一般犯罪と其の性質を異にするものではない。両者の本質は同一のカテゴリーに属するものである。(CLARK and MARSHALL の説)従って「犯罪とは公衆保護の為めの法律を侵し禁止せられ且国家が国家の名に於て司法手続に於て処罰すべきものとしたる作為又は不作為を謂う。それは単なる私的非行若しくは一個人に対する民事的危害と区別せられたる公衆に対する非行である」と定義されている。(同書 Chap. I. §1. p.1.)。更にアメリカ法理学の強くところを見るに「或る種の非行はそれが広く一般公衆に影響を与える害悪の要素を具え且つそれが個人の財産上の権利又は身体が侵害されたと云う事に止まらないが公的性質を有するものと認めらるるものが多い。斯かる非行を「犯罪」と称する。此の語の定義を下すことは容易ではないが、次の如く定義するのが最も適当と信じられる。即ち犯罪とは法律に依って禁止せられ且それに対し刑が附せられ更に国家が自己の名に於て訴追

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和一切の行為又は不作為となる」と、更に説明して次のごとき。(American Jurisprudence, Vol. 14, Criminal Law, §2. — Definitions, p. 753).

(2) 犯罪となるべき行為又は不作為はこれを一般人に周知せしめねばならない。如何なる行為又は不作為が罰せらるべきものとなるかを知ることなくして、これらの行為又は不作為を理由としてこれを罰することは、とりもなおさず公の秩序を紊乱するものである。此のことに関してアメリカ法理学は

「立法者は犯罪即ち罰せらるべき行為が何となるかを明白確実に市民に周知せしめねばならぬ。然らば市民は行為の規準を了解し、各自はいかなる行為はこれを避くべき義務があるかを知るのである。若しも犯罪を規定している刑法上の字句その意味が裁判官の上において確定し得ないか、或は刑法が犯罪行為の要素を確定するに当って曖昧不明瞭であって、その又犯罪を構成するものであることを印象付けるには普通平均の知識ある人をして理解し得ざる程度を『漠然』としている場合には、裁判所は其の缺陥を補い其の法律を明確に、確実的ならしむる自由は有たない。仮に法律が的確な意味の語句を用いて、其の言葉が罰すべき行為と罰すべからざる行為とを倶に包含するが如き全般的に不確定なものであるときには、その法律は不確定なるの故をもって無効である。犯罪を規定しこれを宣言している法律は、其の法律の意図に依って拡張せらるべきものではない

(11)

ことは公理的である。法律に規定せられた犯罪は合意に依って犯罪なりとせらるることは、解釈上の犯罪なるものは此場合いーーーと論じてある。(同書、§19.- Requisites of Criminal Law Statutes, p.76).

(3) 上に述べたる犯罪の主体は即ち戦争犯罪とは戦争の法規並に慣習法に依って禁止せられ且罰せらるべき行為又は不作為であると言うことが出来る。随て戦争犯罪行為(不作為を含む)は一般に承認せられた戦争法規並に慣習法に明瞭且確実なる形を以て存在しなければならない。OPPENHEIMの国際法は戦争犯罪という本質的に異なる性質の如何を掲げてある。即ち(a)軍隊の成員が敵に対し戦争に関する規定の違反行為 (b) 敵国軍隊の成員又は非戦闘の個人に対する武器としての一切の敵対行為 (c) 間諜行為及戦時反逆行為 (d) 一切の掠奪行為である。而て戦争法規の重大なる違反行為という二四の例を列挙してある (LAUTERPACHT.- OPPENHEIM's International Law, 6th Ed., Vol. II.- §252, pp. 451-2).

第八。然しながら実際上は戦争犯罪並に其の処罰に関しては従来一般に承認せられた国際法上の原則はない。軍隊上官又は司令官に関する部下の為したる国際法違反の犯罪行為の管轄上の責任に関しては国際法上の原則は全然なく又先例と為るべきものも殆んどないのである。即ち此等の問題は今次世界戦争の終末と共に始めて

BBB (12)

政治と法律上の重要課題として登場するにまった問題と言ってよい

これ等に付ては従来一般に承認せられた国際法上の原則がなく学説も一定して居ないのであるから具体的な我利を言っては従来の動向的な立法上の学説なりと参考にすべきである現在の有様である。

上に引用したOPPENHEIMの国際法の列挙している戦争法規の重大なる違反行為の外は俘虜の虐待、GENEVA條約の違反行為等を掲げているけれども「上官又は司令官の部下統御監督上の職務怠慢」を戦争犯罪として掲げておらない。加之最近の著書の何れの部分を捉えても上官の監督上の職務怠慢を戦争犯罪として認めておらないのみならず此の事項に関しては言及しておらないのである。

上官は部下の行為に付て責任を負うべきやの問題も付ては主として公法上の一般的観念が之に国際法上の学説等を参照して之を論じ来りの被告人吉林の根拠地たる司令官としての責任に言及せんとする陸軍刑法に於ては指揮命令する地位にある上官が其の指揮命令下に在る部下の為した国際法違反行為に付て指揮命令者として又は上官として監督上の責任を負うべきであるか否か、これは刑事責任の本質に関連する困難なる問題である。

此の上官の監督責任の点に付ては従来の見解は区々である。一方の行ては上官は部下の一切の行為に付て責任を負うと云う見解もあり又他方の行ては特に自己の指揮命令に基く行為に付てのみ責任を負うと云う為一方もある。併し普通には其の中間的又は折衷的の為一方が採られる。聯合軍最高司令官指令

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務部長 CARPENTER 大佐が指摘せる「戦争犯罪及暴虐行為を命令し又は許容し或は勧誘した軍司令官」は戦争犯罪の責任を負うと云う見解も此の折衷的な考え方の一つである。此の意味に於ける指揮官の責任は部下の国際法違反に対する一種の刑事責任に他ならぬ。而て刑事責任は近代文明諸国に於ける刑法の一般原則に基づき、其の本質上自己の故意又は過失に基く犯罪行為に対する責任でなければならぬ。

此の見地から本官は部下の一切の行為に対して責任を負うと云う見解は広きに失し妥当とは言へぬ。蓋し一般的又は主観的要件を欠く場合には刑事責任を認め得ぬからである。之は上掲第四に述べたところである。仮又反面から言へば自己の指揮し命令した行為に付てのみ責任を負うと云う見解は狭きに失し是亦妥当とは言へぬ。仮に積極的に指揮命令することなく部下の国際法違反行為を黙認し抑制すべきに抑制しなかった様な場合には所謂不作為犯の成立することも考へられるのであらう。要するに刑事責任の要件たる主観的要件は故意のみに限らず過失の有無もこゝに問題となり得るからである。

第九 斯く考へるからは如何なる範囲に於て上官責任即ち統御監督上の責任が認められるべきか。一般的に言へば上官が部下に対して国際法違反の行為を指揮命令した場合は勿論これを知りつゝ黙認した場合及これを知り且これを抑制すべくまた抑制し得べき地位に在りながらこれを抑制せず黙認した場合とは

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之に對し責任を負わへき者のであると言うことが出来る。
下に具体的に場合を分けて考察しやう。

(1) 上官が部下を對し國際法違反行為を指揮命令した場合

部下がこの指揮命令に基き違反行為を実行した場合に上官が之に付て責任を負わへきは極めて當然である。上官は共同正犯者は間接正犯として又時には教唆犯として責任を負わのである。これは注意せねばならぬことは上官は部下に依て犯された國際法違反行為に對しこの違反行為が命令に從て且命令の執行としては必要なる範囲を超えてのみ責任を負わのであって法に上官の命令中に含まれなかった部下の行為に對しては上官は責任を負わものでないと云うことである。

上官が部下の國際法違反行為を知りつゝこれを制禁した場合に於ける上官の行為は教唆的な性質を有するに止まる。

(2) 上官が部下に對し國際法違反行為を指揮命令したと云う事実はなきも單に部下が違反行為を行ってゐることを知りながらこれを默認し特にこれを抑制するの適當なる措置を講じなかった場合。

上官が部下の國際法違反行為を知った場合にこれを抑制する國際法上の義務を負わものなりや否やは疑がある。此の問題に関しては從來のいろ〳〵の條約の中にも亦國際法の文献中にもこれに言及

1204

せるものは足りないのである。 係る上官の指揮命令権は反面に於て国家が国際法上負担する戦争の実際的執行者と云うの指揮者の責務と包含するものと解すべきであるから上官の部下の違反行為を知りつゝ之を黙認しそれを抑制する為の適切なる措置を執るべく又執り得るに拘らず執らなかったときには上官は指揮命令権者或は教唆者或は幇助の為めに国際法上の戦争の実際的執行者として其の責任を負はねばならぬのである。

この問題に付て具体的に責任の有無に付て断定を下すに当っては指揮命令関係の実体を究明することが先ず第一につかさる前提となることを注意せねばならぬ。 即ち(イ)高級上官と部下との関係が果して直接具体的に指揮命令し得る関係であったかどうか。 (ロ)又高級具体的事情の下に於て果して適切なる措置を講じ得べきであるに拘らず知りつゝ之を講じなかったかどうかを究明しなければならぬ。

(3) 上官が部下の国際法違反行為を知らなかった為に之を抑制する為適切なる措置を執らなかった場合。

此の場合は二つに分けて考へねばならぬ。即ち上官は若し高級上記の事情を知るべきであるに拘らず知らなかったと云ふやうに其のことに付て特に過失の責むべきものがある場合（重過失の場合）には其の責任を免れ難いであらう。 但し此の過失責任の場合には刑の軽減を認むべきである。 之に反し上官に

過失の責むべきものがなき場合又は責任を負わ
ざる場合

「凡そ行為の完全無缺は人間には不可能なり。
法は何人に対しても不満なる高尚の注意
は之を強要せず。為慢は唯履行の可
能ある義務不履行より生ずるのみ。法は
人間の知慧と先見とを以てして危害を防止
し得る場合には何等の責任をも負はしむ
ることなし」とはアメリカ法理学の説くところ
である。(同書、Vol.38, NEGLIGENCE, 324,
Generally: Ordinary or Reasonable care, p.673)

第十、之を要するに新上の国際法違反行為又は之に
関する監督抑制の責任の有無を判断するに当っては先ず指揮
命令関係の実体を明確にしなければならぬ。単に形
式上に指揮命令系統に属すると云うのみで新上の
行為に付て直ちに一般的に上官の責任を肯定する
ことは刑事責任の性質が言って不可能と言はねば
ならぬ。尊ろ実質上に指揮命令し得る関係に於
て国際法違反行為を指揮命令したか(勧奨した
場合を含む)又は抑制すべき且抑制し得べき状
況を抑制せず黙認したか(重過失の場合を含む)
に依って始めて其の責任を問い得るにとどまるのである。

第十一、根拠地隊司令官は許属長官に隷して彼の
許属艦船部隊を統率したのである(Exh. "23" 一特設
艦船部隊令第49條、三)。根拠地隊は特設防
潜隊、特設海軍航空隊、特設通信隊、特設掃海
隊等を以て編制し之に必要なる艦船、特設艦船を

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附属せしめた（Exh. "23" 第49條）。其の任務は前進根拠地の防衛及其の附近海面の警戒、測量、遠警、及通信等の目的要と応じ船舶の補給、工作及患者の診療等に関することを掌ることにあった（Exh. "23" 第49條、二）。

第四根拠地隊司令官としての被告人若林の所属長官は連合艦隊司令長官と第四艦隊司令長官であって被告人は此等両司令長官の指揮命令を承けて部下の部隊を統率することが其の任務であった（Exh. "1" 第四根拠地隊編制表）。此の根拠地隊司令官の部下部隊としては第41警備隊を始め其の他の警備隊、配潜艦隊、航空隊、通信隊等があって其等各部隊には夫々司令（指揮官）が配置されてあった（Exh. "1"）。而して此等部隊の司令は諸法規のあるところに依り上長の命するところに従い部下を指揮統率すべき責任を負担してあった（前掲 Exh. "23" 第57條、四；Exh. "25" 海軍警備隊職員服務規程 第8條；Exh. "24" 艦船職員服務規程 第4條、第3條）。叙上の如く被告人若林は第四根拠地隊司令官として上は二重に上官を戴き下は各部隊の司令を率いてみた中間的の司令官であったのである。

第十二. 国際法違反行為即ち戦争犯罪は特に国際法上のみ関連のある特殊な犯罪例えば軍隊の構成員と非ざる者の武装敵対行為、間諜行為、又は戦時反逆行為等を除いては一般的に国際法上の問題であると同時に各国内法の刑法上（軍の刑事法を含む）の問題でもある。而して上述せるが如く上官

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の部下の国際法違反行為に対する統御監督上の責任に関しては国際法上何等の規定なく又従前の判例は各時に異なりたる先例もあいのである。加之之は国際法の原則法規より関連のある事項であるから国内法特に本件に於ては日本の国内法に於ける上官の部下監督上の責任に関し如何なる法規があったかを参酌的に述べることは決して無用ではないと思う。下に論ずるところは本件に関係ある日本海軍の人に関する事項に限定する。

本委員会に提出せられた日本海軍刑法（Exh. "27"）に於ては上官が部下に対する統御監督上の職務怠慢を以って本件の如き犯罪を処罰すべき條文はないのである。従って上官たる者は此の監督不行届の職務怠慢に対し何等の責任を負担しないのではない。斯かる場合の上官の責任は刑事上の責任ではなくして懲戒的の責任である。随って之に対して懲戒的の処分を受けるのであるか之は別として、いま其の処罰は海軍刑法に依り科せらるる、刑罰ではなくして海軍懲罰令（Exh. "28"）に依る懲罰である。上官の部下監督上の責任を問うている罰則は唯上記懲罰令第四條に規定があるのみである。同條は次の通り規定している。

第九條「左に掲ぐる行為ありたる者故意又は過失により左の区分に従い懲罰す

一、監督指導に適切を欠きたるとき

二、前各号の外職務の怠慢若は職役上、軍紀の維持又は統率に適さる者は厳重譴責又は

行刑アリタルトキ」

此の規定による懲罰が即ち上に謂ふ所の懲罰である。併し此の場合と雖ども懲罰を科するのは当該上官の部下監督上の職務怠慢より生ずる又は過失のあることと少異とすることは條文の解釋上明かである。

尚ほ刑罰は犯罪即ち実定法に依って刑罰的效果が付與せられた所の行為に対する制裁である。然るに懲罰は公法上の特別権力関係又は之に準ずる公法的監督関係に在る者に対して其の関係の紀律を維持する為に科する一種の制裁である。此の両者は性質を異にするから原則として併科すると得る点から看ても其の差異は了解出来る。

第十三、國際法上俘虜の取扱及保護の責任の帰属に関する原則は次の如くである。又之に関する承認せられた学説も次のとおりである。

千九百七年十月十八日の陸戦條約第四の附属書(The Annex to Hague Convention No. IV. of 18 October, 1907)第四條第二項には次の規定がある。

「俘虜ハ敵ノ政府ノ権内ニ属シ之ヲ捕ヘタル個人又ハ部隊ノ権内ニ属スルコトナシ…」

又千九百二十九年七月二十七日のジュネーブ俘虜條約(The Geneva Prisoners of War Convention of July 27, 1929)第二條第一項には次の規定がある。

「俘虜ハ敵国ノ権内ニ属シ之ヲ捕ヘタル個人又ハ部隊ノ権内ニ属スルコトナシ」

更に同條約第十八條第一項は

「各俘虜収容所ニ責任アル将校、管下ニ置カ

ルベシ」

と規定されている.

上に引用した此等の規定に依れば上記国際法は俘虜の取扱及其の保護の責任及責任者に付ては其の俘虜を捕へた国家の国内法の定むるところに委ねてゐることは疑を容れない.

次は此の問題に関して日本の国内法殊に日本海軍の法律規則中には如何なる規定があつたかを調べてみやう.

前掲日本海軍の特設艦船部隊令第十三章, 二, 特設警備隊第57條, 三に

「特設警備隊ハ其ノ所在地及其ノ附近ノ防衛及警衛ニ任ジ且状況ニ応ジ港務, 通信, 軍需品ノ補給等ニ関スルコトヲ掌ルコトヲ得」

と規定し, 又上掲海軍警備隊職員服務規程第3條には

「司令官又ハ司令ハ衛兵ヲ組織シ軍港, 要地又ハ所在地附近ノ海軍官衙, 倉庫等ヲ守衛セシムベシ. 但シ現ニ海軍守衛ノ任ニ当ル官衙倉庫等ハ此ノ限リニアラス」

と規定せられてゐる.

日本海軍部隊に於て俘虜を収容したのは前掲各地の警備隊又はJunkを以ては第41警備隊となつた. 而して其の部隊長たる警備隊司令が俘虜の収容, 取扱, 保護に関する責任者であつた. 此のことは検察官側証人澤郷信平, 植田信夫, 被告人側証人中瀬淳七, 被告人岩林喜の証言に徴して明かである.

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警備隊司令は前掲 艦船 職員服務規程第二章に規定せられた艦長に相当する職員であって該規程は警備隊の職員にも準用せられた（同規程第2條）。該規程の第105條は

「艦長は、国際法上、事件に関しては特に艦重を意味する命令、規則、法條約の範囲内において適当と認むる範囲外を問わず、その上級指揮官又は直接海軍大臣の指令を請うべし」

と規定せられてある。それが故に警備隊司令は国際上の事項に関しては特に艦重なることを取扱い且つ命令規則は勿論條約を遵重しこれを厳守するやう指令されてあるのである。それであるから俘虜の取扱、保護等に関しては俘虜の取扱に関する條約の規定の趣旨に則って職務を行うことになってゐたことは極めて明瞭である。加之、後に重宣誓にて言及する如く各艦隊には海軍諸例則が備付けてあって其の中に俘虜取扱規則が含まれており各艦隊はこの規則に則って俘虜を取扱うことになっておったことは明かである。（捜査官側私人としての植田信夫の証言 75° Q.&A.）。

第十四、以上本件に付ては法律の見地から之を論じたのであるが之を要するに上官の部下の国際法違反に対する抑制監督上の責任並に之が免責に関しては従来の国際法上何等の明則もなく又一般に承認せられた学説、先例もないのであるから本件は現今文明諸国において認められてゐる一般

（24）

の刑法の第何条に当たるかを判断するの他はない。而して此の刑法の一般第則を捨って被告人岩林が其の部下が国際法違反行為を犯したことに付根拠地隊司令官たる監督其他創設の職務怠慢の責任を負うべきものであるとするは苟くも訴状に列挙せられた其等の国際法違反行為を知っていたか否か、若し知っていたとすれば之に対し適当なる措置を講じ得べき状況にあったか否か、若し又之を知らなかったとすれば其の知らなかったことに付て彼に過失があったか否か、等を明確に確定したる上でなければ彼に本件起訴の責任を負わしむることは出来ない。

更に之を犯罪行為と事実との間の因果関係の第則に照して考察してみるに本件に於て検察官が主張する被告人岩林が第四根拠地隊司令官として部下を統御監督する為又俘虜を保護する為の等の措置を執らなかったということ、即ち現に列挙せられる事実との間に果して直接の因果関係があったか否かを確定することは絶対に出来ないのであって此の両者の間に直接の因果関係があったということを証明なければ被告人に本件起訴の責任を負わしむることは出来ない。

仮に被告人岩林が上揚の国際法違反の行為を実際知らなかった又其の知らなかったことに付責むべき過失もなかったとすれば被告人は何等の罪責を負うべきものでないことは当然である。

第十五、弁護人の主張を次のとおりに述べて被告人岩林に第四根拠地隊司令官として検察官の主張

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する裁判法規並に慣習法の違反即ち職務怠慢があったか否かの主張責任を負わしめてみたり、

主張責任を負うアメリカ法理学は次の如く説明されるに―

「主張責任―即ち訴訟の主張責任は訴訟の当事者を肯定的に主張する当事者にある。而してそれは訴訟手続と基の事件の性質に依って定まると云うのが証拠法の根本原則であって此の根本原則は怠慢を因する訴訟上の主張責任の問題も支配する。此の怠慢に関する訴訟手続では原告は自己の為に被告に対し訴訟に於ける怠慢の主要なる要素と証する事実を主張しなければならぬ。其の主要なる要素と云うのは被告が原告に対し負担している義務の存在、其の義務の違反、生ぜしめたる損害等である。当該訴訟の主要なる主張が争点となっている限り当事者は主要なる主張事実の重要性が認容せられない限り原告は当該事件の主要なる一切の要素を証拠の優勢に依って確定する義務がある。又被告の怠慢に因って被ったと主張する損害に対する賠償請求を充たさんとする者は証拠の優勢に依って被告は原告に対して負担している義務を怠ったこと、或は被告は原告に対し負担している法律上の義務に違反し其の義務の懈怠に因って訴状に記載の如く原告に損害又は傷害を与えたと云うこと、

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等を立証する責任がある。検言または被告の義務怠慢を訴訟の理由とする場合は善に訴の原因たる作為か性質上怠慢であるということのみならず更にそれが原告または被告が負担している義務の履行であるということ、進んでは此の怠慢の立証の他に其の義務の不履行即ち怠慢が直接訴訟の原因たる傷害又は損害の直近の原因であるということを立証しなければならない。原告は直接に動かし得べき推定に依って被告の注意の欠缺が原告の被った損害の原因となったと公平且合理的に考へ得る程度に立証しさえすればよいのだ……」と。(American Jurisprudence, Vol. 38, NEGLIGENCE, §. EVIDENCE, I. Burden of Proof, §285. Generally, pp. 973-5).

此の説明に依って明確にされた国の本件の訴追に付被告人若林が国際法上探究義務を負担していたということ。即ち領国動乱の国際法違反行為を知っていたということ。被告人の措置を執らなかったということ、即ち領国動乱の事実との間に直接の因果関係があったということの立証責任は検察官に存する。

然には果して此等の立証せらるべき事項が何人も合理的疑念を抱き得ないまでに検察官より立証せられたであろうか。吾の事実論に於て其の然らざることを明かにせんとする。

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第二編　證據ノ基ノ事実ノ検討

第一章　一般的事実ノ検討

一、トラック島ニ於ケル第四根據地隊司令官トシテノ被告ノ地位

本弁護人ノ證據ニ基キ、法規ニ及実際上ノ両方面カラ、第四根據地隊司令官タリシ被告若林ガトラック島ニ於テ如何ナル立場ニ在ッタカ、更ニ俘虜ノ取扱ニ如何ナル立場ニ在ッタカニ就テ検討ヲシヨウト思フ。

Ex. 23中ノ特設根據地隊編成令第四条ノ三ニハ「根據地隊司令官ハ所属長官ニ隷シ」ト規定シテアル。Ex. Iノ第四根據地隊編成表ニハ第四根據地隊ハ第四艦隊司令長官ノ指揮下ニ在リ且第四艦隊ハ聯合艦隊司令長官ノ指揮下ニ在ッタコトヲ示シテ居ル。

実際問題トシテ、峯松壽夫ノ口供書、樋口信夫ノ証言(第　問100ノ答)及被告若林ノ証言(第　問　　ノ答)ノ示ス如ク、潜水艦修理ノ第四ト一緒ニ陸ニ収容サレ、又之ガ航空母艦ニ依ル以外ニ送還サレタコトハ当時トラック・若クハ聯合艦隊司令長官ノ命令ニ依ッテ為サレタノデアル。

又九四四年二月十七日ニハ第四艦隊司令長官ガトラック夏島ノ陸上ニ居ッテ全般ノ指揮ヲ執テ居タノデアル(若林証言)

被告若林ハ後ノ三月十六日附陳述書(Ex 14)及本委員会ニ於ケル証言(堂内　　ニ対スル答)ニ於テトラックニ於ケル修理ノ到着収容、以地送還輸送等ノ事務ハ第四根據地隊ノミデハ處理シ得ズ、第四艦隊及聯合艦隊司令部ガ関係シナケレバ處理シ得ザル事柄デアル。斯ノ如ク数個ノ司令部ニ関係アル事項ニ就テ規定ヲ設ケントスレバ夫レハ最上級司令部ノ任務デアッテ旨ヲ述ベテ居ルガ之ハ何レノ国ノ軍隊ニ於テモ共通ノコトデアロー。

検事ハ被告若林ガ在任中俘虜取扱ニ関シ何等ノ規則又ハ命令ヲ発布シナカッタコトヲ以テ彼ノ職務怠慢デアッタト指摘スルカモ知レナイガ、トラック ニ於ケル実情ハ被告若林ガ二段ノ上級司令部ヲ差シ措イテ、単独ニハ規定命令ヲ発布シ得ル立場ニナカッタコトヲ容易ニ肯首セシメルノデアル。

二、日本海軍ニ於ケル戦争法規慣習並ニ
俘虜取扱ニ関スル規定。

被告若林ハ彼ガ俘虜ノ取扱ニ関シ規定ヲ発布シナカッタ理由トシテ、日本海軍ニ於テハ必要ナル関係法規ガ発布サレテ居リ、之ガ一般ニ周知セシメラレテ居ル趣旨ノコトヲ証言シタ。

日本海軍ニ於テ戦争法規ニ関スル條約、又日本海軍俘虜取扱規定ガ海軍諸例則第四巻及戦時国際法規綱要ニ記載サレテ居リ、之ガ各部隊ニ配布サレテ居タコトハ、多クノ証言又ハ証拠書類ニ依ッテ立証サレタ所デアル。

又国際法規ヲ遵守スルコトガ艦長ノ職責ニ明示サレテ居リ、コノ職責ハ警備隊司令ニモ準用スベキコトガ Ex 25、26 ニ依ッテ明瞭ニサレタ。

海軍ノ特性トシテ平戦時ヲ問ハズ軍艦ガ単独デ行動シ或ハ部隊ガ遠隔ノ孤島ニ派遣サレル機会ガ多イノデ、国際法規ニ関シテハ、平時カラ一般ニ周知セシメラレ、教育サレテ来タノデアル。又主ヲ遵守スルコトガ艦長又ハ司令ノ責任デアルトシテ特ニ要求サレ、服務規律ニモ明示サレテ居タノデアル。戦時或ハ俘虜ヲ捕ヘルコトヲ豫期スル時機ニナッテ各指揮官ガ必要ナ規律ヲ作リ、命令ヲ出サナクテモ済ム様ニナッテ居タノデアル。

若シトラックノ実情ニ即シテ俘虜ヲ収容シ送還ニ近イ船舶輸送便待機ノ為、一時仮収容センルニ必要ナ規定ヲ作ル必要ガアッタト仮定シテモ、ソレハ前述ノ如ク トラック ニ於ケル最高指揮官ノ是

理スベキ事項デアツテ、第四根據地隊司令官ノ單獨ニナシ得ル事デハ無カツタ

後述ノ諸證據ガ示ス通リ、被告若林ハ、水要・懸ケテ警備隊司令ニ對シテ俘虜ニ對スル取扱ヒノ指示ヲ爲ヘ、警備隊司令自身モ充分ニ此ノ事實ヲ認メテ居ルノデアル。

以上ヲ總合シ、被告若林ハ在任中、俘虜ノ取扱ニ關スル規定命令ヲ書類ニ依ツテ發布シナカツタトイフ事ハ遠ク後ノ職責怠慢ヲ問責スル根據ニハナラナイノデアル

三、第四根據地隊ト第四海軍病院トノ指揮關係

第四海軍病院ガ第四根據地隊司令官ノ指揮下ニナク、第四艦隊司令長官ノ直屬ノ指揮下ニ在ツタコトハ、有馬、淺野、岩坂ノ被告若林ノ証言ノ何レモ一致スル所デアル。又日本政府ノ提出サレタ口供書（オデン帳証言）中ニモ明示サレテ居ル

被告若林ハ第四海軍病院ノ人々ノ爲ス行爲ニ就テ責任ヲ問ハレテ居ルガ指揮關係ノ無イ者ガ、若林自身ガ何モ知ラヌ行爲ヲ犯シタ事ニ對シテ監督ノ責任ヲ問ハレル筋合ハ遠クナイノデアル。

第二章　各事件ト被告ト／関聯性

一、潜水艦俘虜事件

本軍検察官ノ提出セル証拠ニ依レバ米潜水艦スカルピン號ノ生存者42名ガ俘虜トシテ捕ハレ、1943年11月20トラック夏島ノ第四十一警備隊ニ収容サレタコト、其ノ収容ニハ主トシテ警備隊兵舎ノ物置ガ用ヒラレタコト、並ニ其ノ建物ガ比較的狭イモノデアッタ事ハ事実デアロー。

然シ乍ラ其ノ収容場所ガ廣クナカッタトイフ事ハ当時ニ於ケル警備隊ノ日本兵ノ収容状況――証人中根ノ証言ニ如ク、当時警備隊ハ満員デアリ兵舎ノ床下ニ休ンダモノヘアルトイフ状況――ニ於テハ兵ニ己ノヲ得ヌモノガアッタトイフベキデアル　是ヲ、俘虜ニ直接関係ノアッタ中根ノ俘虜達ノ書面ニ三ツノ独房ノ外ニ物置所次ノ上面ヲ併用シタコト、又夜間ノ一部ノ者ガ衛兵所ノ裏ト・休ンダコトヲ証言シテ居ル。

俘虜ニ対スル食事及賄薄ニ関シテハ日本海軍ノ前線部隊ノモノト、米軍ノモノトノ間ニハ相当ナ差違ガアッタデアローカラ、米軍将兵ノ眼カラ見レバ、日本軍ノモノガ不潔或ハ虐待ノ感ヲ与ヘタ点ガアルカモ知レナイ。然シ之ハ一ニハ日米両軍ノ生活様式ノ相違ニ帰スルモノデアッテ、一概ニ第四十一警備隊ノ過失デアルト責メルコトニハ無理ガアル。

俘虜ニ対シテ或ル程度ノ殴打或ハ悪感ヲ与ヘル行為ガ下級ノ番兵ニ依リ将校ノ監督ノ届カナイ場所又ハ時機ニ於テ行ハレタコトノ可能性ニ就テハ我々ハ必ズシモ之ヲ否定スルモノデハナイ

然シ乍ラ問題ノ争点ハ被告若林ノ部下ニ対シテ斯カル行為ヲナスコトヲ許可シタ事実ガアッタカ否カニ在ルノデアル。

被告若林ハ潜水艦俘虜到着ノ翌日警備隊司令峯松大佐ガ俘虜ニ関シ報告ヲナシタコト、峯松ノ報告ニ依リ、彼ノ俘虜ノ取扱ガ満足ナモノデアルコトヲ承知シタガ更ニ若林ハ彼自身ガ潜水艦将校デアル所ノ経験カラ是キノ俘虜ニ対シ特ニ考慮ヲ払ッテ取扱ノ様ニト注意ヲ与ヘタ旨ノ証言ヲナシタ

峯松ハ彼ノ口供書ノ訊問第十一ニ於テ彼ハ俘虜ニ関シ報告ヲナシタ際ニ若林カラ特ニ指示ガナカッタト答ヘテ居ルガ訊問第二十ニ於テ「自分ハ今様ノ指示ヲ与ヘテ居タ其ノ理由ハ俘虜ヲ人道的ニ取扱ヘ様ニトノ古賀大将及若林中将ノ希望ガアッタカラデアル」ト証言シテ居ル更ニ訊問第二十一ニ於テ若林ハ自分及他ノ参謀ヲ度々呼ンデ海軍省軍務局課長矢野大佐カラノ俘虜ヲ人道的ニ取扱フ事ニ関スル指示ヲ伝ヘタ旨ヲ証言シテ居ル

若林ガ峯松ニ潜水艦俘虜ノ取扱ニ就テ指示ヲ与ヘタノガ潜水艦俘虜到着ノ翌日デアッタカ否カニ就テハ両者ノ記憶ノ相違ニ依ッテ何レモ一致シナイカヲ知レナイ然シ若林ガ峯松ニ対シ俘虜ヲ人道的ニ取扱フコトヲ一度ナラズ度々指示ヲ与ヘ、峯松ガ充分ニ之ヲ承知シテ居タコトハ峯松ノ口供書ノ明示シテ居ル所デアル

被告若林ハ前進根拠地ノ防衛及海上護衛ノ任務ヲ有シテ居タガ聯合艦隊ノ主力ガトラックニ在泊シテ居タ当時彼ノ任務ガ多忙デアッタコトハ想像ニ難クナイ従ッテ若林トシテハ俘虜取扱ノ直接ノ責任者カラ満足ナ報告ヲ受ケ又常々俘虜ヲ人道的ニ取扱フベキコトヲ指示シテ居タノデアルカラ、当時ノ状況ニ於テ被告若林ハ俘虜保護ニ関シ部下ノ行為ヲ監督スベキ彼ノ職責ハ充分ニ果シテ居タト云フベキデアル

之ヲ要スルニ本弁護委員会ニ提出サレタ諸証拠ニ依ルニ、被告

○ ○　　○ ○

若林ハ関スル限リ潜水裕保虜ノ虐待ヲ許可スルガ如キ事実ハ全然立証セラレズ却ッテ其ノ反対ノ度々俘虜ヲ人道的ニ取扱ウベキコトヲ指示シタル事ガ立証サレタノデアル。

二、二月十七日事件

本事件ニ関シ検事側ハ検事側証人石井ノ証言ニ依リ此ノ処刑ガ事前ニ第四根拠地隊司令部ノ命令又ハ認可ニ依リ行ハレタノデアルト、又田中政治ノ口供書、検事側証人井上ノ証言ニ依リ此ノ処刑ノ報告ガ被告若林ノ面前デナサレタモノデアルト主張シ従テ被告若林ガ彼ノ部下ニ七名ノ米国俘虜ノ殺害ヲ許可シタト結論付ケルカモ知レナイ。

然シ乍ラ本軍律委員会ニ提出サレタ證據ニハ右ノ證言ヲ覆スニ足ル多ノ反証ガアルノデアル。以下是等ノ反証ヲ指摘シテ検事側ノ提出シタ證據ガ正当ナル証ヲ経ヘテ立証サレタモノデナイコトヲ明カニセン。

(a) 先ヅ最初ニ本事件ノ発端ヲ探究スルニ、本委員会ニ提出サレタ田中政治ノ公判時ニ於ケル彼ノ証言(筆耐75.76ニ対スル答)ニ依レバ此ノ処刑ガ第四十一警備隊以ヲ発シタモノデアリ、第四根拠地隊司令部ガ斯カルコトヲ考ヘテ居タトハ考ヘラレズ又首肯自身認メテ居ル様デアコノ処刑ヲ行ハントスル考ガ警備隊以ニ起ッタモノデアル事ニ疑ヒ無イ。

田中ノ証言又検事側証人石井ノ証言ニ依レバ俘虜ヲ処刑シマセウカト第四根拠地隊ニ電話ヲカケテ照会シタ所、実行スベキ旨ノ回答ガアッタト謂フコトデアル。然シ田中ハ石井ガ電話ヲ実際ニカケタカ否カニ就テハ知ラズ(筆耐84ノ答)又石井ガ電話ヲ誰ト話ヲシタカヲ知ラヌ(筆耐89ノ答)ノデアルカラ田中ノ証言ハ全然ノ又聞キデアッテ證據力ニ乏シイ。問題ハ石井ガ電話ニ依ッテ如何ニ第四根拠地隊

司令部ト連絡ヲ行ッタカ知レヌデアル。石井ハ指揮電話ヲ用ヒテ弟四根拠地隊ト話ヲシタト証言シタガ被告若林ハ随時参謀隊カラ弟四根司令部ヲ呼ビ出シテ交話ハ全ク未ダ曾テ一回モナカッタト証言シタ。コノ両者ノ証言ハ正反対デアルガ指揮電話ニ経験ノ深イ被告若林ノ詳細且明瞭ニ説明シタ所ニ依ッテ彼ノ証言ヲ信ズルコトガ至当デアルト考ヘル

極メテ稀ナ場合トシテ弟四十一参謀隊ト弟四根司令部トノ間ノ指揮電話ガ交話中デアッテ、石井ガ指揮電話ニ依ッテ弟四根拠地隊司令部トノ会話ガ可能デアッタトシテモ、石井ガ為シタ所ノ交話ノ方法デハ決シテ会話ノ目的ヲ達シ得ルモノデナカッタコトヲ何人モ起ナク納得スルデアロー。

石井ノ証言ニ依レバ彼ハ交話ニ当リ自分ノ氏名ヲ告ゲズ、単ニ弟四十一参謀隊トノミ名乗リ相手ガ弟四根拠地隊ト答ヘタノヲ聞イタダケデアッテ相手ノ誰デアルカヲ確メナカッタ。彼ガ用件ヲ話スト直グニ「オイ」ト云フ一言ガアッタノヲ聞イタダケデ、之ガ弟四根拠地隊司令部デ傍受ノ慣ガヲ承認シタモノト了解シタト云フノデアル。

斯ノ如キ電話ノカケ方デ如何ニシテ用件ヲ達スルコトガ出来ヨーカ。弁護側証人中根ハ日本海軍デ常用サレテ居ル電話ノカケ方ヲ証言シタガ之ハ日本海軍ノミナラズ世界共通ノ方法デアル。自分ノ名ヲ告ゲズ、相手ノ誰デアルカヲ確メルノデナケレバ、重要ナ事柄ハ勿論、簡単ナ用件ヘモ達スルコトノ出来ナイコトハ云フ迄モナイコトデアル

更ニ石井ハ「オイ」ト云フ言葉ハ日本海軍デハ承認、実行ノ意味ニ用ヒラレルト証言シタガ、福留、中根ハ「オイ」ト云フ言葉ガ日本海軍ニ於テ斯カル特別ノ意味ニ用ヒラレルコトハナイ、「オイ」ト云フ言葉ハ人ヲ呼ビカケルトキノ言葉デ英語ノHallowヌハHeyト全意味ノ言葉デアルコトヲ

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証言シタ。第四根拠地隊ノ電話室ニハ戦中交換手ガ三、四名居ル規定ニナッテ居ルコトヲ若林、植口ガ証言シテ居ル。石井ノ云フ「オイ」ハ、交換手ガ Hallow ノ意味デ使ッタモノトシカ誰ニモ考ヘラレナイ。

二月十七日ノ晩、被告若林ト、後ノ参謀植口ト、俘虜ニ関スル何等ノ照会連絡ヲ受ケタコトガナイト証言シタガ、石井ノ証言セル如キ方法ニ依ッテハ第四根司令部ニ用件ガ達セラル、若ハ全然アリ得ナイ。

其ノ外ニ、石井ノ証言ニハ信頼出来ナイ点ガ若干アル。例ヘバ石井ハ第四根司令部ニ電話ヲカケタノガ午前十時半頃デアリ俘虜ノ処刑ハ約二十分位ニ行ハレタト証言シタガ、田中政治及檀崎留吉ノ証言ニ依レバ俘虜ノ処刑ハ午后二時半頃デアル。又石井ハ電話ヲカケタ時、田中政治ガ後ニ立ッテ居タト証言シタガ田中ハ全然反対ノコトヲ証言シテ居ル(第四84ノ巻)即石井ノ証言ニハ信頼出来ナイ点ガ相当ニアル。

二十七日、被告若林ガ依然胃潰瘍デ病床中デアッテ空襲中ハ防空壕ニ入ラズトモ司令官室ノベランダデ休ンデ居タノデアル。石井ノ証言セル如ク電話会話方法ニ依リ病床中ノ若林カラ俘虜処刑ノ許可ヲ得ルコトガ出来タトカ又ソンナ事ハ苟クモ常識アル人ナラバ誰ニモ信ズルコトノ出来ナイ所デアル。

(b)第二ノ問題ハ二月十七日頃ノ夜第四根司令部ニ於ケル会議ニ於テ田中大佐ガ俘虜ノ処刑ニ関スルコトヲ被告若林ノ前デナニカ云ヒカトキヲ得タノデアル。

之ニ関シ被告若林ト検事側証人植口ト共ニ斯カル報告ヲ聞イタコトガ無イト証言シテ居ル

田中ハ彼ノ公判ニ於テ自分自身ノ為ニ証人台ニ立ッタ時、会議終了后、植口参謀ニ俘虜処刑ノコトヲ話シタト雖モシタ、若シ田中ハ死刑

ヲ執行サレル直前ニ陳述書(Ex 9)ヲ書キ其ノ中ニ、会議ノ席ヒ、若林ガ先席ニテ居ル所デ虎刑報告ヲナレタ旨ヲ述ベテ居ルガ、本陳述書ハ自発的ニ書カレタトユフ証明モナケレバ、又反対訊問ノ機会モ与ヘラレナカツタモノデアツテ其ノ証拠カハ薄イモノデアル

検事側証人井上ハ此ノ会議ニ遅レテ出席シタガ到着後河村第四飛隊参謀カラ報告ヲ受ケ其ノ中ニ、第四十一飛行隊デ俘虜ヲ虐刑シタトノ報告ガアツタト証言シテヰル、処レ乍ラ之ニ関シテ最モ重要ナ点ハ河村ガ俘虜虐刑ノ話ヲ田中カラ会議ノ公開ノ席ヒデ聞イタカ否カニ在ルノデアルガ井上ハ之ニ就テハ知ラヌト証言シテ居ル(第四(11)ノ㈠)、即井上ノ証言ハ又聞ニアラズンバ心ノ中ノ事ヲ不明デアルノデ此ノ証言ハ寧ロ若林ガ田中カラ俘虜虐刑報告ヲ聞イタコトヲ立証スルモノデハナイ

一方河村陽良大尉ハ彼ノ口供書ニ於テ田中政治ガ俘虜虐刑報告ヲナシタル事ニ就テハ知ラヌ(第八回ノ㈠)ト述ベ又彼ハ斯カルコトヲ誰ニモ話シタコトハナイ(第十二回ノ㈠)ト証言シテ居ル

叙上ノ諸證拠ヲ綜合スルニ、田中大佐ガ会議ノ公開ノ席ヒデ俘虜虐刑ノコトヲ勲。シタカ否カニ就テハ多大ノ疑問ガ残サレテ居ル。換言スレバ被告若林ガ田中ノ報告ヲ聞イタトユフコトハ正当ナル疑ヲ超ヘテハ立証サレナカツタノデアル。

尚本事件ノ證拠ヲ検討スルニ当ツテハ被告若林ハ病体ヲ押シテ会議ニ出席シタガ会議途中ヨリ退席シナケレバナラヌ程度ノ容態デアリ大変苦痛ヲ感ジナガラ、来嶋ヲ伴ヒテ梅軍病院ニ入院シ、病院船ニ依リ内地ニ送還サレタ状況デアリ、事件当時十分ニ職務ヲ執リ得ナカツタトユフ当時ノ環境ヲ常ニ考慮ニ入レベキデアロ

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三、第四海軍病院事件.

第四海軍病院ノ人々ニ依ツテ行ハレタ二事件ハ、最ニ指摘セル如ク全病院ガ若林ノ指揮下ニナカツタトシテ誣搆ニ基キ彼ヲ責コトガ假令條理ニ對シナサヌモノデアツタトシテモ、被告若林ノ責任ヲ問フベキ筋合ハ何等ナイノデアル

檢事ハ飯野軍醫大尉ガ被ト岩波トノ間ニ交ハシタ傳聞ノ体力實驗ニ關スル電話ノ件ヲ被告若林ニ話シタトシテ飯野ノ証言ヲ採用シ、從テ若林ガ斯ル傳聞ニ對スル實驗ノ行ハルルコトヲ承知シテ之ヲ阻止スル何等ノ適當ナ措置ヲ講ジナカツタト主張スルカモ知レヌ、然シ乍ラ本軍法會議ニ提出サレタ證據ノ中ニハ飯野ノ証言ヲ覆ス幾多ノ有力證據ガアリ、被告若林ガ飯野カラ斯ル會話ノ有ツタコトヲ聞カナカツタノガ眞實デアロート認メラルル、又飯野ガ若林ニ話シタコトガ事實デアツタト假定シテモ飯野ノ話シタ事柄ノ内容ハ主張サレタ事件ヲ未然ニ防ガナケレバナラヌ若林ヲシテ斯ル事件ノ發生ヲ豫想セシメルガ如キモノデハナク、若林ヲシテ斯ル事件ノ發生ヲ豫想セシメルガ如キモノデハ全然ナカツタ事ガ明瞭デアル、以下證據ニ依ツテ之ヲ指摘スル

元ト岩波ハ斯ル電話ヲ飯野ニカケタコトハナイト否定シテ居リ被告若林ガ胃潰瘍ニ罹ツテヨリ來岩波ト飯野トハ毎日若林ノ病室デ會ツテ居タノミナラズ第四海軍病院ニ於テモ會フ機會ガアツタノデアル、從テ飯野ニ電話ヲカケル必要ガナカツタトシテ岩波ノ証言ハ尤モナコトト肯ケルノデアル、又飯野ハ電話會話ノ當日ノ夕方岩波ガ若林ヲ診察シテ帰リ夕食後尚モ又電話ヲカケテ来タト述ベテ居ルガ岩波ノ証言及若林ノ陳述書(Ex11)中ニ毎朝午前十時頃ニ診察ガ行ハレタト述ベテ居ルコトト對照シテ飯野ノ證言ニハ相當ノ疑問ガアル

飯野ハ從ガ岩波カラ電話ヲ受ケタノハ一月十二日デアルト証言シタガ之ハ後ニ對スル反對訊問デ明瞭ニナル如ク後ノ小林裁判ニ於ケル証言

ト対照スルト此ノ期日ニモ極メテ疑問ガアル

第二ニ、飯野ハ岩波トノ電話会話ノ件ヲ植口及被告若林ニ話シタト証言シタガ、植口及若林共ニ之ヲ聞イテ居ラヌトテオッテ否定シテ居ル

第三ニ、飯野ハ岩波トノ電話会話ニ於テ一寸シタ体力実験ヲ行ヒ度イトユフコトヲ話サレタノミデアッテ、実験ノ内容ニ就テハ話サレズ、従ッテ之ヲ質問シナカッタ（宮岡38、39ノ答）又数回ノ実験ガ前ニ行ハレタコトハ知ラヌ又若林ニハ実験ノ内容ニ就テハ話サナカッタト証言シテ居ル

飯野ガ若林ニ此ノ話ヲシタ時ニ若林ハ絶食療法約一週間目デアッテ最モ衰弱シタ時デアッタ、ソコテ氷嚢ヲ胸ノ上ニ載セテ天井ヲ見ツメテ居タトユフ容態デアッタ、飯野ガコノ時若林ニ語ッタ言葉ハ後ノ質問ニ対スル答ニ見ル如ク唯冗長ナニデアッテ、実験ノ内容ヲ説明シテ居ナイカラ聞ク者ニハ何ノコトカ頭ニ了解困難デアル況ンヤ被告若林ノ如ク当時最モ悪イ容態ニ在ッタ患者ニトッテハ了解ノ来ヌ筈ガナイ

叙上ノ諸証拠ヲ綜合スルニ、被告若林ガ弁護ニ対シ残虐ナル実験ノ行ハレルコトヲ承知シテ居ラヌ又ヲ許可シタトユフコトハ毫モ確証ナキテ居ラヌ又、被告若林ガ病院事件ノ発生ヲ承知シテ居リ且之ヲ許可シタト判断スルトラバ夫レハ余リニモ不合理ナモノト謂ハネバナラヌ

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第三編　結論

第一．最後に以上縷述したところを要約するに被告人吉林清次が第四根拠地隊司令官として在任中起訴の罪状項目書の一及至二に列記せられたる戦争法規並に慣習法違反行為とこの部下に第一編第六点に記述したいづれかの意味を有する"PERMIT"をしたという事実並に吉林がそれ等の違反行為を知りながら之に対し何等適当なる措置を講じなかったという事実は検察官に於ても何人も合理的疑念を挟さまるまでに立証せられてゐないのである。　之と反対に検察官側及被告人側の証人の憲法並に於ける証言並に双方より提出せられたる証拠書類を依れば寧ろ被告人吉林は此等の戦争法規並に慣習法違反行為は報告せられなかった、従って彼としては之を知る由もなかった事実が明かにせられたのである。

第二．更に検察官は検察官の主張する被告人吉林の指揮監督上の職務怠慢と罪状項目書の一及至二に記載せられたる各事件の事実との間に直接の因果関係が存すること何人も合理的疑念を挟さまるまでに立証し得なかったのである。

第三．憲法並に提出せられた降伏文書の宣誓口供書に依れば被告人吉林は第十六軍司令官降伏（此の宣誓口供書）に

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作為を決して庇護せんがため態々に取扱われたと
思われる事実を明らかにされた。加之
被告人若林の供述によれば潜水艦作業（罪
となるべき事実第一の一の(イ)及び第二の(イ)）に対しては若林は
被告会社潜水艦搭乗出身者であった関係上此
等の作業を特に親切に取扱われるべき旨を指示
した事実がある。斯のようて若林としては被告人の
為に図るべき最適の措置はこれを執ったことが明
らかにされたのである。

第四　以上の理由により私は若林は本件起訴の
罪状、即ち其の一及び其の二よりては無罪である
ことを主張する次第である。

願はくは本件被告人若林清作に対し本軍法
会議は無罪の判決を言渡されんことを。

謹　言

[illegible]

(37)

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WAKABAYASHI, SEISAKU (29 JUL 1948)

(166096)

PART 3 OF 4

002

Argument for the Accused
delivered by:
TAKANO, Junjiro,
Counsel for the Accused.

The Honorable President and Members of the Commission,

I have the honor to deliver my closing argument before this learned Commission in defense of the accused Nakabayashi, Seisaku. I would like to express my great gratitude for the fair and sincere way in which this trial has been conducted.

Part I.

1. The Prosecution in its opening statement has contended that the police have the duty to maintain and guarantee the observance of laws which set forth the standards of conduct of the people of a society or of a state, especially in respect to criminal law/ that for the achievement of this end the police of necessity have to be stronger than the violator; that in the same way the duty is naturally and properly incumbent on the victor nations to punish those individuals who have violated the law and customs of international society for the continued guarantee of observance of international law and customs. We must here point out that the judge advocate has overlooked the essential difference between the state and international society.

The very basis of the relationship between the state and its subjects is the relationship of the ruler to the ruled, namely, that of authority to the governed. Whether it must or should be stronger than the violators of law is no required attribute of the police. The concept of police is a phase of the function of sovereignty. Now international society is organized as a result of agreement and accord among the nations. The relationship among the nations of this international society is one of equality, namely, a relationship of right and duty. The victor nations are not ultra-nationalistic nor do they possess international police power. It is for these reasons that the establishment of an international police force and international criminal law are being discussed and studied by scholars of international law today.

We fully concur with the contention that violators of the law and customs of war must be punished to assure the continued preservance of international justice and order and naturally recognize the necessity for such action. It is most inappropriate however, for the judge advocate to give expression to the concept that, "It is the duty and privilege of the victor nations to enforce international law and customs and to punish violators thereof," in a trial of war criminal suspects which is based on justice and fairness. Such expressions run the danger of misleading people. It must be said that such thinking and ideas will cause the retrogression of the present day legal system back to primitive ages. From such thinking of the judge advocate results the indiscriminate indictment on the arbitrary premise that neglect of duty of a superior officer to control and supervise his subordinates which nowhere is set forth in international law and customs constitutes a war crime.

The judge advocate in his opening statement citing a speech made by the President of the United States, Franklin D. Roosevelt, on August 21, 1942 stated in effect that this declaration was a warning to higher ranking officers that they would be punished. However in the portion of the speech cited by the judge advocate that part is missing which relates to the scope

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of punishment to be meted out to the responsible persons as stated by the President. President Roosevelt later on October 7, 1942 further stated: "It is our intention that just and sure punishment shall be meted out to the ring-leaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian Faith."

According to the above it is the supreme policy of the Allied nations to punish the responsible ring-leaders and it may be interpreted as not to mean punishment of all high-ranking officers who were in any way connected.

2. The Charge in this case is entitled "Violation of the Law and Customs of war" and specification 1 reads as follows: "In that WAKABAYASHI, Seisaku, then a vice admiral, IJN, Commandant of the Fourth Base Force, Imperial Japanese Navy, and while so serving as the Commandant of the said Fourth Base Force, did, at Dublon Island, Truk Atoll, Caroline Islands, during the period from July 26, 1943 to February 22, 1944, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as the Commandant of the said Fourth Base Force, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to torture, abuse, inhumanely treat and kill American prisoners of war held captive by the armed forces of Japan, in violation of the law and customs of war."

And Specification 2: "In that WAKABAYASHI, Seisaku, then a vice admiral, IJN, Commandant of the Fourth Base Force, Imperial Japanese Navy, and while so serving as the Commandant of the said Fourth Base Force, did, at Dublon Island, Truk Atoll, Caroline Islands, during the period from July 26, 1943 to February 22, 1944, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as the Commandant of the said Fourth Base Force, to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, American prisoners of war, held captive by the armed forces of Japan under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, inhumane treatment, and killing of said prisoners of war, by members of the armed forces of Japan, in violation of the law and customs of war."

3. On examination of the present charge we discover that specification 1 specifies that the accused, failed to discharge his duty as the Commandant of the Fourth Base Force to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to torture, abuse, inhumanely treat and kill prisoners of war, while specification 2 specifies that the accused failed to discharge his duty as the Commandant of the Fourth Base Force, to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, prisoners of war held captive under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, and inhumane treatment and killing of these prisoners of war by members of his command. However paragraph (a) of specification 1 and paragraph (b) of specification 2 are exactly the same and alleged identical neglect of duty of the accused to control and supervise, and not two different types of neglect of duty on the part of the accused. In other words the former is the matter seen from the standpoint of the relation of the accused to his subordinates and the latter the same viewed from standpoint of the relation of the accused to the POW's interned. Hence the two views in substance are the same but viewed from two different angles,

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and are in essence one, and only one neglect of duty to control and supervise subordinates. Paragraphs (b) and (c) of specification 2 of the charge are peculiar to this case.

What should here be strongly stressed is that the accused is not charged with having abused, tortured, inhumanely treated or killed POW's nor of having participated in such action, neither is he accused of having ordered, condoned, or induced such action. What has just been stated has reference to what will follow and therefore has here been inserted.

4. In order that neglect of duty constitute a crime and in order that criminal responsibility arise from it the following conditions are necessary: (a) A certain person fails to discharge specific duties set forth by law or regulations. (b) For the negligent act to constitute a crime, intent (criminal intent) or negligence of such a degree as to make the omission one of legal or criminal responsibility must be present. (c) The existence of proximate causal connection between the negligent act and the objective facts arising from such neglect. (d) That the law of punishment to be applied in the punishment of this crime was effective at the time of commission or omission of the act. It is required that specific duties be assigned under certain laws or regulations, that these laws or regulations be violated. It cannot be that acts are made punishable by laws or regulations established after such act.

Neglect of duty may be grouped in two essentially varied classes. One is where one's own offense constitutes neglect of duty and the other neglect of duty to supervise and control, where one is held responsible for offenses committed by another party. Where the supervisor (superior) takes the responsibility for offenses committed by the supervised (subordinates) because he assumes responsibility for the neglect of his duty to supervise and control, it would fall into the latter category of neglect of duty. The judge advocate's allegation of neglect of duty of the accused Wakabayashi as Commandant of the Fourth Base Force in this trial is of the latter group.

It does not however mean that the supervisor (superior) assumes unconditional and unlimited responsibility for supervision for all offenses committed by the supervised (subordinates). If the supervisor (superior) were to assume unconditional and unlimited responsibility for all offenses committed by the supervised (subordinates), it would be unjust and too stern and never fair. Then under what conditions is a supervisor (superior) to assume responsibility for offenses committed by the supervised (subordinates) conceding that there was neglect of duty to supervise and control on his part? Let us examine this matter.

5. It is a generally accepted principle in criminal law that for a person to be criminally responsible for the offenses of another, it is conditional that he aid, abet, counsel, order or command the other person. However when the two persons involved stand in a relationship of controller and controlled or supervisor and supervised, then for the former to assume criminal responsibility for the offenses of the latter, the former must order, instruct, the latter or affirm or knowingly acquiesce in the acts of the latter. Clark and Marshall in their Law of Crimes state as follows: "Certainly, at common law, and generally under statutes as well, a man is not indictable for the criminal act of his agent or servant, though committed in the course of his employment, unless the act was committed by his direction, or unless he knew of it and acquiesced in it, for, as we have seen, the general rule is that criminal intent is necessary to render one guilty of a crime." (Ibid, Sec. 188 - Responsibility of Principal or Master. (c) Unauthorized Acts, p. 230)

Of course the above is an argument concerning the relationship of a person and his agent or of a master and his servant; however the basic argument may be applied generally to the relationship of supervisor and supervised or to that of superior to subordinate.

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Viewing the relationship of the superior to the subordinate in the armed forces in the light of this principle, for the superior to assume criminal responsibility for neglect of duty to control and supervise the offenses committed by his subordinates, the superior must have ordered, commanded, instructed or permitted the commission of these offenses or knowingly acquiesced in their commission. As Clark and Marshall state in their Law of Crimes: "To constitute a crime there must be a criminal act, as well as a criminal intent." (Ibid., Clark and Marshall Crimes, Sec. 106, p. 147). In other words, it is an absolute condition that the superior have knowledge of the offense of the subordinate. If the superior has no knowledge whatsoever of his subordinate's offense it is the principle that he assume no criminal responsibility for same.

If however there is carelessness or negligence on the part of the superior in not knowing of the offense, then he cannot avoid that responsibility. It does not require explanation that the negligence referred to here must not be a simple negligence but negligence of a degree up on which the law would place criminal responsibility. It is stated in Clark and Marshall as follows: "To render one criminally liable, however, because of an omission to act, he must be under a legal duty to act, and the omission must be wilful or due to culpable negligence." (Ibid., Negligence, (b) Omission to act, Sec. 53, p. 80.)

6. In the present case the accused Wakabayashi is charged with having permitted his subordinates to abuse, turture, inhumanely treat and kill prisoners of war. Let us examine this word "permit".

According to Black's Law Dictionary (3rd Edition.) "to permit" means to suffer; to allow; to give leave or license; to acquiesce, by failure to prevent; to expressly assent or agree to the doing of an act. The legal interpretation of any one of the foregoing meanings must require the person "permitting" the act to have knowledge of the act in question and to order the act or to have the knowledge and not take any action about it. Going a step further if in accordance with these meanings we think of the matter in terms of "permitting" some other person to perpertrate offenses, it would be to let the other person commit the offense, knowing of the offense of this other person, or with knowledge of the offense, not preventing the offense or acquiescing in its commission.

Under any one of the meanings of the word "permit" given above, for a person to be held criminally responsible for "permitting" another to commit an offense, it is necessary that it be clearly established legally that the duty to supervise and control the other party (perpertrator of the offense) was required of the person who did the "permitting" and it is an absolute condition that he had knowledge of the offense.

The word "permit" used in the charge in this case must have one of the meanings given above, and it can have no meaning other than those given above. In final analysis it is alleged by the prosecution that the accused Wakabayashi permitted, in the light of one of the meanings of that word given above, his subordinates to commit the offenses enumerated in the specifications. In whichever instance, it is implied that the accused Wakabayashi know of these incidents.

As to whether the accused actually had knowledge of these incidents I shall demonstrate in my argument on the basis of facts.

7. The Prosecution contends in the present trial that the accused, Wakabayashi permitted his subordinates to abuse, torture, inhumanely treat and kill prisoners of war and that he neglected his duty to supervise and control his subordinates and to protect prisoners of war, thereby violating

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the law and customs of war. In short that he committed a war crime.

Here two questions arise. What, then, is a war crime? Does neglect of duty to supervise and control subordinates incumbent on the superior officer unconditionally and limitlessly constitute a war crime from the standpoint of international law? Let us examine these issues below.

(a) War crimes are essentially no different from general crimes under criminal law. The essence of both are in the same category. Clark and Marshall defines crime as follows: "A crime is any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name. It is a public wrong, as distinguished from a more private wrong or civil injury to an individual." (Ibid., Clark and Marshall Chap. 1 Sec. 1, p. 1).

American Jurisprudence defines it as follows: "Certain kinds of wrongs are considered as of a public character because they possess elements of evil which affect the public as a whole, and not merely the person whose rights of property or person have been invaded. Such a wrong is called a "crime". The term is not easy to define. Perhaps it can best be defined as any act or omission which is forbidden by law, to which a punishment is annexed, and which the state prosecutes in its own name." (American Jurisprudence Vol. 14, Criminal Law, Sec. 2, Definitions, p. 753.)

(b) Acts or omissions which will constitute crimes must be made known to the general public. If acts or omissions are punished without it first having been made known which acts and which omissions would be punishable, would rather counter than further justice and disrupt public order. On this point American Jurisprudence states as follows:

"The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain neces-

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sary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakeably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." (Ibid. Criminal Law Sec. 19, Requisites of Criminal Statutes p. 776.)

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(c) In conformance with the above definition of crime, war crimes may be defined as those acts or omissions which were prohibited and made punishable by the law and customs of war. Consequently acts of war crimes (omissions inclusive) must be clearly and unambiguously set forth in generally accepted (recognized) law and customs of war. Oppenheim's International Law distinguishes four different kinds of war crimes essentially different in character. Namely (1) violations of recognized rules regarding warfare committed by members of the armed forces, (2) all hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason, (4) all marauding acts. (Lauterpachat, - Oppenheim's International Law, 6th Ed. Vol. II - section 252, pp. 451-2.)

8. However in actual fact there are no international principles which have been generally accepted heretofore concerning war crimes and their punishment. Especially are there no international doctrines governing responsibility of supervision and control of the superior or commanding officer for offenses committed by subordinates in violation of international law. And there are hardly any precedents which can be considered as such. It may be said that these problems came into political and legal importance only after this last world war.

Since there are no generally recognized principles in international law pertaining to these matters nor any established theory we are constrained today when faced with a concrete trial to turn for reference to incomplete and partial legislation and theories of the past.

Although ill-treatment of Prisoners of War as acts in violation of the Geneva Convention etc., are enumerated among the more important in violation of the laws of warfare set forth in Oppenheim's International Law cited above, "neglect of duty on the part of a superior officer or commanding officer to control and supervise his subordinates" is not therein listed as a war crime. Moreover, not in any part of this book is neglect of duty to supervise of a superior officer recognized; let alone any mention made.

With regard to the problem of whether the superior officer should be held liable for the acts of his subordinates, I shall, taking into account the theories of international law, argue from the general point of view of public law, and refer to the responsibility of the accused Wakabayashi, as Commandant of the Base Force. Whether a superior officer occupying a position to command and order in the chain of command of the armed forces, is liable for responsibility to control and supervise the acts of his subordinates which are in violation of international law in his capacity as the originator of commands or orders, or as a superior officer, is a difficult problem touching upon the essence of criminal responsibility.

The opinions expressed to date with regard to this responsibility to supervise, on the part of the superior officer, have been at variance. On the one hand, there is the opinion that the superior officer is liable for all the acts of his subordinates, and on the other that he is responsible only for acts specifically ordered and commanded by him. Ordinarily, however, an intermediate opinion or compromise between the two is adopted. The view held by Colonel CARPENTER, Director of Legal Section, SCAP, that "Military commanders who ordered or allowed or induced war crimes and atrocities", is one such compromise. The responsibility of the commanding officer for the violation of international law by his subordinates in this sense is one kind of criminal responsibility. Criminal responsibility is, in the light of the general principle of criminal law in modern civilized countries, essentially a liability for a criminal act based upon one's own wilfulness (intent) or negligence.

On the basis of this view, the opinion which holds that the superior officer is liable for all the acts of his subordinates, is too extensive in scope and inappropriate, because, generally criminal responsibility cannot be recognized where the subjective element is lacking. This is as I have stated in (4) of the foregoing. On the other hand, the opinion which holds that the superior officer is liable for only those acts commanded or ordered by him, is to narrow in scope and also inappropriate. Because under those circumstances, in the hypothetical event that a superior officer failed to exercise appropriate measures when he should have done so and acquiesced in the acts of his subordinates in violation of international law, without his having positively given an order or command, not only will the constitution of the so-called omission to act have to be brought into consideration but the subjective element of wilfulness (intent), as well as negligence, will have to be considered as an element of criminal responsibility.

9. From the above reflection of the problem, then, what limitation on the responsibility of the superior officer, that is the responsibility to supervise and control, should be recognized? Generally speaking, we may say that the superior officer is held liable, certainly, when he ordered and commanded such acts, and also when he knowingly induced acts in violation of international law, and when he, knowing of such acts, and being in a position where he should and could have controlled, failed to do so. In the following, I shall argue concerning each specific instance mentioned above.

(1) <u>When a superior officer commands, orders, or directs his subordinates to act in violation of international law.</u>

It goes without saying that the superior officer is liable for responsibility when he commands or orders the perpetration of acts in violation of international law. The superior officer should be held responsible as a principal in the second degree, or accessory or instigator for the acts of his subordinates which violate international law, only to the natural and logical extent of the acts done in accordance with his orders, and of the consequences involved in the execution of such orders. A superior officer is, in no way, liable for the acts of his subordinates which are not included in his order.

In case a superior officer, having knowledge of the acts of his subordinates in violation of international law, induces them to do such acts, his act can only be regarded as that of an abettor.

(2) <u>When the superior officer knowing that his subordinates were committing acts in violation of international law, acquiesced in them, and particularly failed to take appropriate measures to control such acts, without any facts indicating that the superior officer commanded or ordered such acts.</u>

There is doubt as to whether a superior officer is liable under international law for the duty to control, when he is aware of the acts in violation of international law committed by his subordinates. There has been no mention made in any treaties and conventions or reference books on international law up to the present day, with respect to this problem. However, as the power to command and order vested in the superior officer, should be interpreted on the other hand, as being included in the duty of the commanding officer regarded as the actual executor of the duty of the state owed under international law, the superior officer, as the person having authority to command or order, or, in other words as the actual executor of the obligation of the state owed under international law, must be held responsible, if he knowingly

acquiesced in the acts of his subordinates in violation of international law, and failed to take appropriate measures to control them when he should and could have done so.

We must note that the essential premise, in determining concretely whether there is liability or not regarding this problem, is to scrutinize the actual command relationship. That is, we must examine and clarify (a) whether the relationship between the superior officer and the subordinate was one which enabled the superior to issue a direct and detailed command or order, hence making it possible for the superior to take appropriate measures to control, (b) whether the superior officer under such actual circumstance knowingly failed to take appropriate measures as was his duty to do.

(3) <u>When a superior officer failed to take appropriate measures to control his subordinates' acts in violation of international law because he was unaware of them.</u>

We must examine the above by dividing it into two categories. That is, in case where there is, in particular, negligence for which a superior officer is blamable, such as, when he should have known about the acts and did not know of them, in case of gross negligence, it would probably be difficult for him to be absolved from liability. Mitigation of punishment, however, should be recognized for such negligence. On the other hand, in a case where there is no negligence liable against the superior officer, he cannot be held responsible.

It is as stated in American Jurisprudence "Perfection of conduct is humanly impossible; and the law does not exact an unreasonable amount of care from anyone. ...Negligence can arise only from a failure of duty possible of performance and the law imposes no liability where wisdom and foresight cannot prevent the injury." (Ibid. Vol. 38, Negligence, S. 29, Generally: Ordinary or Reasonable Care, p. 673.)

10. In effect, we must first clarify the substance of the command relationship in determining whether there is responsibility on the part of the superior to control and supervise the acts of the subordinate in violation of international law. We must say that it is impossible on the basis of the nature of criminal responsibility, to immediately affirm in a general manner the responsibility of a superior officer, merely because he belongs, in form, in the chain of command. Rather, for such responsibility a superior officer can only be held liable when in substance in a relationship where he was able to command and order, he commanded or ordered acts in violation of international law (including when he gives inducement), or, when he failed to control and acquiesced therein when he should and could have controlled his subordinates (including when there is gross negligence on his part.)

11. The Commandant of a Base Force was subordinate to his cognizant Commander in Chief and controlled naval forces attached to his command. (Exhibit 23: Article 49a3 of Ordinance Governing Specially Established Naval Forces.) The Base Force was composed of a specially established defense unit, a specially established naval air group, a specially established communication unit, a specially established minesweeper division, etc., and had attached to it necessary naval vessels and necessary converted vessels. (Exhibit 23, Article 49). Its duties were to control the defense of an advance base, and control of the security, surveying, harbor affairs and communications of the sea frontier of such advance base, and when occasion demanded control of matters concerning supply and repair of vessels, medical treatment of patients, etc., (Exhibit 23, Article 49 a 2).

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The cognizant commanders in chief of the accused, WAKABAYASHI, as Commandant of the Fourth Base Force were the Commander in Chief of the Combined Fleet and the Commander in Chief of the Fourth Fleet. The accused was subject to the command and orders of both these commanders in chief and it was his duty to control the units under him. (Exhibit 1, Organization Chart of the Fourth Base Force.)

The subordinate units under this Base Force Commandant included some naval guard units headed by the 41st Naval Guard Unit, sub-chaser squadrons, air groups, communication units, and to each of these units was assigned a commanding officer. (Exhibit 1). As the various regulations show, these unit commanders were responsible officers who commanded and controlled their subordinates in conformance with orders of their superior officers. (Article 57 c 4 of previously cited Exhibit 23; Exhibit 25 Article 8 of Service Regulations of Personnel of Naval Guard Units; Articles 2 and 3 of Service Regulations of Personnel aboard Naval Vessels.) As stated above the accused Wakabayashi as Commandant of the Fourth Base Force was an intermediary commanding officer having above him two commanders in chief and below him commanding officers of the respective units.

12. Acts in violation of international law, namely war crimes, are not crimes which are characterized solely by their relationship with international law. For example, except for acts such as hostilities committed by individuals who are not members of the armed forces, espionage or wartime treason, they constitute a problem of domestic criminal law (including military criminal law) as well as a problem of international law in general. However, as previously stated, there are no regulations in international law pertaining to this type of responsibility of a superior officer to supervise and control acts of his subordinates in violation of international law, nor theories nor precedents which may be used as reference. Moreover, as the matter is related to penal regulations of domestic law it is believed that it would not be without point to state here what laws or regulations there were in the domestic laws and in this case especially in the domestic laws of Japan relative to the responsibility of a superior officer to control his subordinates. I shall restrict my discussion which follows, to the matter pertaining to Japanese naval personnel which alone have relevance to the case.

In studying the Japanese Naval Criminal Code presented to this commission (Exhibit 27), there are no articles in the code which impose punishment upon superior officers for omission in neglecting his duty to control his subordinates. However, a superior officer is not free from all responsibility for remissness in his duty to control his subordinates. In such instances the responsibility of the superior officer is not of a criminal nature but of a disciplinary one. Consequently, although the superior officer is subject to disciplinary action, because the act is not crime, the punishment imposed will not be according to the Naval Criminal Code but in accordance with the Naval Disciplinary Punishment Code (Exhibit 28). The only place where provision is made for punishment of a superior officer for responsibility to supervise subordinates is in Article 9 of the above mentioned Naval Disciplinary Punishment Code. It is set forth as follows in that article:

Article 9. "When the following acts are committed they shall be punished whether they be done intentionally or through mistake.

23. Losing means of supervision or leadership.
27. Besides the above points, when neglecting duty or violating official duties or violating discipline or committing acts tending to cause loss of authority or confidence."

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The disciplinary punishment set forth in this regulation is the disciplinary punishment referred to above. However, in this case also, it is clear from the interpretation of the above article that to mete out disciplinary punishment to superiors for neglect of duty to control subordinates, wilfulness or negligence have to exist.

Criminal punishment, furthermore, is punishment imposed upon crimes, that is, upon acts whose punitive effect is imposed by substantive law. Disciplinary punishment, on the other hand, is a certain punishment imposed upon persons who have a special relationship with authority in public law, or any corresponding supervisory relationship, for the purpose of maintaining discipline and order of such relationship. As the two forms of punishment differ in nature, and as the two, as a principle, may be imposed together, the difference in the two forms of punishment may be understood.

13. There is no explicit principle in international law as to who is responsible for treatment and protection of prisoners of war. Furthermore there is no accepted theory relative to this.

The following regulation is found in paragraph 1, Article 4 of the Annex to the Hague Convention No. IV of 18 October 1907:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who have captured them."

Again, the following regulation is found in paragraph 1 of Article 2 of the Geneva Prisoners of War Convention of 27 July 1929:

"Prisoners of war are in the power of the hostile power, but not of the individuals or corps who have captured them."

And in paragraph 1 of Article 18 of the same convention the following is set forth:

"Every camp of prisoners of war shall be placed under the command of the responsible officer."

According to the articles cited above, there can be no doubt that the above two conventions delegate the determination of the responsibility and the responsible persons for the treatment and protection of prisoners of war, to the laws of the state in whose custody the prisoners of war are held.

Let us then examine what regulations concerning this problem existed in the domestic laws of Japan and in particular in the laws and regulations of the Japanese Navy.

Article 57 b 3, Specially Established Guard Units, of Chapter 13-2 of the Specially Established Naval Forces Ordinance, previously cited, provides as follows:

> "A specially established guard unit shall have charge of the defense and security of the locality of its station and its vicinity, and may have control of matters concerning harbor affairs, communications, supply of munitions, etc., when occasion demands."

Again, Article 3 of the Service Regulations for Personnel of Naval Guard Units reads:

> "The commander or commandant shall organize a guard unit to guard the naval establishments, warehouses, etc., in the area of a naval port or its vicinity, except those government buildings, warehouses, etc., which actually have sentries."

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In cases when prisoners of war were interned by Japanese naval units they were held in confinement at the guard units located in various places at the front; on Truk this was the 41st Naval Guard Unit. And the commanding officers of these guard units were the persons responsible for their custody, treatment, and protection. This is quite clear in the light of the testimony of prosecution witnesses Asano, Shimpei; Higuchi, Nobuo, and defense witness Nakase, Shichichi and the accused Wakabayashi.

The commanding officer of the guard unit held a post corresponding to that of a captain of a warship as determined by Chapter II of the above cited Service Regulations for Personnel on Naval Vessels. The above regulation applied mutatis mutandis to personnel of naval guard units. (Article 2 of same regulations).

In Article 105 of the above regulations the following is set forth:

"The captain of a vessel shall exercise particular prudence with regard to incidents involving international law, and shall always deal with such matters within the limitation of orders and regulations, and treaties; in case there arise incidents beyond such limitations, he shall request instructions from higher echelon commanders or directly from the Minister of the Navy."

As a result thereof, the commanding officer of a naval guard unit was instructed to handle matters relative to international law with particular care and to observe to the letter treaties and conventions, and needless to say the orders and regulations pertaining to these matters. It is manifestly clear from the foregoing, that commanding officers of naval guard units in their treatment and protection of prisoners of war, were to follow the import and aim of the provisions of the conventions relative to the treatment of prisoners of war.

I shall later elaborate on this point in my argument on the basis of facts but it has been made manifestly clear that to each unit were distributed the naval regulations which incorporated the regulations governing the treatment of prisoners of war and that each unit when handling prisoners of war did so in conformance with those regulations. (HIGUCHI's testimony as a witness for the prosecution, Q. and A. 75.)

14. In the foregoing I have argued with regard to the instant case from point of view of law.

In short, since there have been no principles, no generally recognized theories, no precedents in international law, with regard to the responsibility and punishment imposed on a superior officer to control and supervise the acts of his subordinates in violation of international law, there is no way but to judge and determine the instant case in the light of the fundamental principles of ordinary criminal law recognized by the modern civilized countries. In order to decide whether the accused Wakabayashi as Commandant of the Fourth Base Force should assume responsibility from the standpoint of these general principles of criminal law for his neglect of duty to supervise and control his subordinates, it is imperative that we first clarify whether the accused Wakabayashi knew of the acts in violation of international law as alleged in the charge, and if he knew of them, whether he failed to take appropriate measures despite the fact that he could have done so under the circumstances, and if he was aware of them, whether there was negligence on his part in not knowing, et cetera.

Unless this is first determined it is not appropriate to impose the responsibility set forth in the charge of this case on the accused.

Furthermore, in examining the above in the light of the rule of causal connection between an offense and the facts, it is imperative that it be established that there was a direct and proximate causal connection between the fact that the accused Wakabayashi as Commandant of the Fourth Base Force allegedly, according to the prosecution, took no measures to supervise his subordinates nor to protect prisoners of war and the facts as enumerated in the specifications. Unless this causal connection is established it is not possible to impose the responsibility of the charge of this case on the accused.

If however, the accused Wakabayashi actually had no knowledge of the above acts in violation of international law mentioned above and there was no negligence on his part in not knowing of them, it is only natural that he should not in any way be held criminally responsible.

15. In concluding my argument on the basis of law I would like to discuss the burden on the judge advocate to prove that there was violation of laws and customs of war and neglect of duty on the part of the accused Wakabayashi as alleged by him.

As regards burden of proof, American Jurisprudence explains as follows:

"Burden of Proof - The fundamental principle of the law of evidence, the burden of proof in any case rests upon the parties who, as determined by the pleadings or the nature of the case, assert the affirmative of the issue, governs the question of burden of proof in negligence actions. In such an action the plaintiff must allege facts which show the essential elements of actionable negligence in his favor against the defendant, namely, the existence of a duty owing to him by the defendant, the breach of duty, and the resulting injury, and so far as issue is joined upon those essential allegations, that is, so far as there is no admission upon the pleadings of the truth of any of the essential facts alleged, the burden is cast upon the plaintiff of establishing, by a preponderance of the evidence, all of these essential elements of his case. The general rule is that one suing for damages for injuries, either to person or property, occasioned by the alleged negligence of the defendant, has the burden of proving, by a preponderance of the evidence, that the defendant was negligent in the performance of some duty owing to the plaintiff, as charged in the declaration or complaint or that he breached a statutory duty owing to the plaintiff and of showing further that such negligence occasioned loss or injury to the plaintiff in the manner described therein. In other words, a plaintiff who grounds his action upon an allegation of negligence by the defendant must show not only that the conduct of which he complains was negligent in character, but also that it was violative of some duty which the defendant owed to him, and, in addition to such proof of negligence and injury, must prove that such breach of duty or negligence was the proximate cause of the injury or loss complained of. The plaintiff must establish directly or by just inference some want of care on the part of the defendant to which his injury may fairly and reasonable be traced..." (38 Am.Jur. "Negligence, 1. Burden of proof, Section 285, Generally, pp. 973-5.)

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As is clearly shown by the above explanation the burden to prove the following rests with the judge advocate: in connection with the charge the accused Wakabayashi had such a duty from the standpoint of international law as that is alleged by the judge advocate; that the accused knew of the acts in violation of international law enumerated in the specifications; that there was a proximate causal connection between the inaction on the part of Wakabayashi and the facts enumerated in the specifications. Has the prosecution proved these facts beyond a reasonable doubt? The attempt will be made in the following argument on the basis of facts to show that such clearly is not the case.

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Part II. Investigation of the Facts in Accordance with the Evidence.

Chapter 1. Investigation of the General Facts.

1. Position of the Accused as Commandant of the Fourth Base Force on Truk.

Counsel for the accused will examine, according to the evidence, what the position of the accused Wakabayashi was from both legal and actual standpoints, as Commandant, Fourth Base Force, on Truk, and further as regards the handling of prisoners of war.

Article 49 - 3, Ordinance Governing Specially Established Naval Forces, which was admitted in evidence as Exhibit 23, provides: "The commandant is subject to the cognizant commander-in-chief." Exhibit 1, the table of organization of the Fourth Base Force, shows that the Fourth Base Force was under the command of Commander in Chief, Fourth Fleet, which was under Commander in Chief, Combined Fleet.

As a matter of fact, as disclosed by the deposition of Minematsu, Yasuo, the testimony of Higuchi, Nobuo (A. to Q. 100) and the testimony of the accused Wakabayashi (A. to Q. _____), the confinement of the submarine prisoners at the Forty-first Naval Guard Unit and their transfer to the Japanese homeland aboard two aircraft carriers were carried out in accordance with orders of the Commander in Chief of the Combined Fleet who was stationed at Truk at that time.

On the 17th of February, 1944, the Commander in Chief of the Fourth Fleet was ashore on Dublon Island, Truk Atoll and was commanding all the navy forces under him. (Testimony of Wakabayashi).

The accused Wakabayashi, in his statement dated March 16 (Exhibit 14) and in his testimony before this military commission (A. to Q. 142, 143), stated, in effect, that the Fourth Base Force alone could not deal with the checking-in, confinement, and transferring to the Japanese mainland of prisoners of war on Truk unless Fourth Fleet and Combined Fleet Headquarters would take part in these matters and that it was the duty of the highest headquarters to issue orders or regulations in regard to such matters with which the several headquarters were all connected. This kind of thing is common to the armed forces of any country.

Although the judge advocate might point out the neglect of duty on the part of the accused Wakabayashi on the ground that he didn't issue any instructions or orders with regard to the treatment of prisoners of war during his tour of duty, the actual circumstances will cause agreement that the accused was in such a position that he could not issue any instructions or orders on his own iniative concerning the matter which the two higher echelons had to decide and give instructions.

2. Regulations concerning the laws and customs of war and the treatment of prisoners of war in the Japanese Navy.

The accused Wakabayashi testified in effect, that he did not issue any written instructions or orders concerning the treatment of prisoners of war because in the Japanese Navy necessary regulations as regards these matters were promulgated and made known to all service personnel.

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Much testimony and documentary evidence has proved that in the Japanese Navy the treaties on the law of warfare and the Japanese Navy regulations concerning the treatment of prisoners of war were set forth in "Navy Regulations Vol IV" and "Wartime International Law Manual" respectively, and that these books were distributed to each unit.

Exhibits 25 and 26 showed that the observance of international law is one of the duties of a captain of a ship and that this duty shall be applicable to commanding officers of guard units.

As to the special characteristics of the Navy, as occasions for a warship to act independently or a unit to be despatched to a far flung island both in time of peace and war were frequent, international law was publicized and made known to all personnel beginning in peace time. It had been especially required and was clearly provided in the service regulations that it was the duty of a captain or a commanding officer to observe international law. The circumstances were such that it was necessary (as a matter of fact) for each commanding officer to make up regulations or to issue orders in time of war or at a time when a capture of prisoners of war was expected.

Even if we assume in accordance with the actual circumstances on Truk, that the regulations for the temporary custody of prisoners of war who were waiting for transportation to the Japanese homeland were desirable, such a matter, as I have mentioned, should have been dealt with by the highest echelon commander on Truk, not by the Commandant, Fourth Base Force on his own initiative.

As the evidence which will be referred to later will show, the accused Wakabayashi when occasion demanded gave necessary instructions to the commanding officer of the guard unit who himself fully admits that he was given such instructions from the accused Wakabayashi.

To sum up, the fact that the accused Wakabayashi did not issue any written instructions or orders concerning the treatment of prisoners of war during his tour of duty cannot, on any account, be a ground on which to accuse him of neglect of duty.

3. Command Relationship between the Fourth Base Force and the Fourth Naval Hospital.

Arima, Asano, and Iwanami and the accused Wakabayashi all testified that the Fourth Naval Hospital was not under the command of the Commandant of the Fourth Base Force but was directly attached to the Commander in Chief, Fourth Fleet. A deposition submitted by the Japanese Government (testimony of Cdr. Ogden) corroborates this fact.

Though the accused Wakabayashi is alleged to be liable for acts done by members of the Fourth Naval Hospital, there is no reason that Wakabayashi who had no command relationship with these persons should be held responsible for their acts of which he knew nothing.

Chapter 2. Connection between the several alleged Incidents and the Defendant.

1. Incident of the submarine prisoners.

According to the evidence introduced before this commission, there is no contradiction of the facts that 42 survivors of an American submarine, SCULPIN, were captured and then confined at the 41st Naval Guard Unit, Dublon Island, Truk Atoll, in November, 1943, that the brig of the guard unit was used to accomodate these prisoners, and that the size of this brig was comparatively small.

However, it was unavoidable that the place of their confinement was apparently not large enough because of the condition for the accommodation of Japanese personnel at the guard unit at that time. The condition was, according to the testimony of the witness, Nakase, that the buidings at the guard unit were fully occupied at that time and some personnel had to find shelter beneath the floor of the barracks. Nakase, who had a direct connection with these prisoners of war, testified that in the daytime the dirt floor of the brig, together with the three cells, was used by the prisoners and at night some of the prisoners slept in the adjoining guard house.

As to the medical treatment and food, there would be a great difference between that given Japanese Navy units at the front and that of the American forces. In the eyes of American military personnel, Japanese medical treatment and food might seem to be unsanitary and might give the impression that the prisoners were mistreated. However this should mainly be attributed to the difference in living standard between the Japanese and American forces, and it is not always fair to say it was the fault of the 41st Naval Guard Unit.

Counsel for the accused does not necessarily deny the possibility that beatings and mischievous acts were done by low ranking guards to some extent at such time and place where they would not be discovered by their superior officers.

However, the point at issue is whether the accused Wakabayashi permitted his subordinates to commit such acts.

The accused Wakabayashi testified that on the day following the arrival of the submarine prisoners Captain Minematsu, the commanding officer of the guard unit, reported to him about these prisoners and that he learned from the report of Minematsu that the treatment of the prisoners was satisfactory and that he gave instructions to treat these prisoners with special consideration according to his own experience as a submarine officers..

Minematsu in his deposition of August 10, 1948 in answer to the 11th interrogatory states that Vice Admiral Wakabayashi did not give any specific instructions when he reported to him concerning the prisoners of war, but he testified to the 20th interrogatory, "I would give the same instructions. The reason for this was that it was the desire of the higher officers, Admiral Koga and Vice Admiral Wakabayashi, that prisoners be treated humanely." He further testified to the 21st interrogatory that Vice Admiral Wakabayashi many times called him and other staff officers together and relayed to them instructions to treat prisoners humanely. These instructions had been received from a naval captain, Yano, who was a section chief of the Naval Affairs Bureau of the Naval Ministry.

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Because of the difference in recollection between Wakabayashi and Minematsu it is not always definite whether it was the day following the arrival of the submarine prisoners that Wakabayashi gave instructions to Minematsu as regards treatment of submarine prisoners of war. However, the deposition of Minematsu definitely shows that Wakabayashi instructed Minematsu more than once to treat prisoners of war humanely and that Minematsu was fully aware of these instructions.

Having the duty to defend the advanced fleet base while the main force of the Japanese Combined Fleet was at anchor in Truk and to escort surface transportation, the accused Wakabayashi might easily be supposed to have been very busy. So it is naturally concluded, as the accused Wakabayashi was receiving satisfactory reports from persons directly in charge of prisoners and as he frequently instructed them to treat these prisoners humanely, that he was fully discharging his duty to supervise his subordinates as regards protection of prisoners of war.

In short, the evidence introduced before this military commission has not proved that the accused Wakabayashi permitted mistreatment of the submarine prisoners of war, but on the contrary has proved that he gave instructions that the prisoners should be treated humanely.

2. February 17 incident.

As regards this incident, the judge advocate, referring to the testimoney of prosecution's witness Ishii, contended that this execution was performed after obtaining permission or orders from the 4th Base Force Headquarters. He also cited the affidavit of Tanaka, Masaharu and the testimony of prosecution's witness Inoue and maintained that the report of this execution was made in the presence of the accused Wakabayashi. Therefore, the judge advocate might conclude that the accused Wakabayashi permitted his subordinates to execute seven American prisoners of war.

However, in the evidence introduced before this commission, there is much which disproves the above cited testimony. Counsel for the accused will point out this counter-evidence and will show conclusively that the evidence introduced by the judge advocate does not prove his case beyond a reasonable doubt.

(a) Let us examine first how this incident happened. According to the testimony of Tanaka, Masaharu, in his own trial which was introduced in this court (Answers to Questions 75 and 76), Tanaka, himself, admits that the idea of this execution was originated at the 41st Naval Guard Unit and that he did not think that the 4th Base Headquarters was considering such a matter. Therefore, the idea to perform this execution indubitably originated at the guard unit.

According to the testimony of Tanaka and the prosecution witness, Ishii, when Ishii asked the 4th Base Headquarters by telephone about the execution of the prisoners, he received a reply that he should perform it. But Tanaka does not know whether or not Ishii actually telephoned (Answer to Question 84), nor does he know to whom Ishii telephoned (Answer to Question 79). So the testimony of Tanaka is entirely hearsay and has no weight as evidence. The question, therefore, is how Ishii established contact with the 4th Base Headquarters by telephone.

Ishii testified that he talked to 4th Base Headquarters through the command telephone, while the accused Wakabayashi testified that the guard unit could not at any time call and talk to the 4th Base Headquarters by command telephone. The testimony of these two witnesses is contradictory.

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But counsel believes it is much more reasonable to trust the detailed, clear, plausible account of the accused Wakabayashi who has had much experience with the command telephone.

A very rare case can be imagined where the command line was being used between the 41st Guard Unit and the 4th Base Headquarters and Ishii could thereby talk to the headquarters. However, anyone will understand without doubt that Ishii could not have transmitted his message by this method.

According to the testimony of Ishii, he introduced himself only as the 41st Guard Unit without giving his name. He only heard the opposite party reply "4th Base Headquarters" he did not ascertain who it was. As soon as he said what he wanted, he heard a word, "Oi," which he maintains to have been the approval of 4th Base Headquarters to execute the prisoners of war.

How can an important matter be such a hurried telephone call? Defense witness Nakase testified in regard to the common way of using the telephone in the Japanese Navy. The method about which Nakase testified is commonly used not only in the Japanese Navy but in every place in the world. Needless to say, not only an important matter but also even simple business cannot be decided without giving the name of the speaker and without ascertaining the identify of the person to whom the speaker is talking.

Ishii further testified that in the Japanese Navy the word, "Oi," meant approval or execution. But Higuchi and Nakase testified that the word "oi" in the Japanese Navy was never used with such a special connotation. Oi is a word to call a person, and means "Hello" or "Hey" in English. Both Wakabayashi and Higuchi testified that as a rule there were three or four operators in the telephone room during battle condition. The only possible conclusion is that "Oi" which Ishii mentioned was used by the operator in the sense of "Hello."

The accused, Wakabayashi, and his staff officer, Higuchi, testified that they did not receive any request or message concerning prisoners of war during daylight of February 17. His request could never have reached 4th Base Headquarters by the method about which Ishii testified.

Besides these matters there are several incredible points in the testimony of Ishii. For instance, according to Ishii, he phoned to 4th Base Headquarters around 10:30 a.m., and the execution of the prisoners was carried out about 30 minutes later, while Tanaka, Masaharu and Danzaki, Tomoroku testified that the prisoners were executed about 3:30 p.m. Ishii testified that Tanaka was standing behind him when he telephoned, while Tanaka's answer to Question 84 is entirely different. In other words there are a considerable number of incredible points in Ishii's testimony.

On the 17th of February, the accused Wakabayashi was still in bed suffering from stomach ulcers. He was in the air raid shelter during the bombings and on the other occasions he was resting on the veranda of the commanding officer's room. Common sense shows that it was not possible for Ishii, as he testified, to have been able to obtain permission to execute the prisoners from Wakabayashi, who was sick in bed, by his method of utilizing the phone.

(b) The second question is whether or not Captain Tanaka reported the execution of the prisoners in the presence of the accused Wakabayashi at the conference held at 4th Base Headquarters around the night of February 17th.

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Both the accused Wakabayashi and prosecution witness Higuchi testified that they did not hear such a report.

Although Tanaka, when he took the stand in his own behalf at his trial, affirmed that he told Staff Officer Higuchi about the execution of the prisoners after the conference, immediately before he was executed, he made a statement (Exhibit 9) in which he stated that he made the report at the conference in the presence of Wakabayashi. However, there is no attestation on this statement that it was voluntarily made, nor were we given any opportunity to cross-examine him. So it has little value as evidence.

Prosecution witness, Inoue, was late in arriving at this conference. He testified that after he arrived at the conference he received a report from Kawamura, a staff officer of the 4th Fleet, that the prisoners were executed at the 41st Guard Unit. However, the most important issue which is relevant to this question is whether or not Kawamura heard a report of the execution of the prisoners from Tanaka at the conference. Inoue testified that Kawamura did not state that Tanaka made this report openly at this conference; therefore in examining this evidence he does not know whether Tanaka told Kawamura about this execution aside because Kawamura was a staff officer of the 4th Fleet or not. (Answer to Question 111.) Inoue's testimony is not only hearsay but it is very vague as regards important points. This testimony, therefore, does not establish in any way that Wakabayashi heard from Tanaka the report of the execution of the prisoners.

On the other hand, Kawamura, Torao testified in his deposition that he knew nothing about the report of Tanaka as regards the execution (Answer to Question 8) and that he did not talk to anybody in regard to such a matter (Answer to Question 12).

Referring to the evidence I have cited above, many doubts are yet unresolved as to whether or not Captain Tanaka reported the execution at the conference. In other words, it has not been proved beyond reasonable doubt that the accused Wakabayashi received Tanaka's report.

Counsel would like to describe the surrounding circumstances at that time. The accused Wakabayashi had to leave the conference before it ended though he attended in spite of his illness. He fell ill from dysentery immediately after the big air raid. He entered the naval hospital and was sent back to Japan aboard a hospital ship. He could not carry out his duty to the full extent at the time of the incident. These circumstances should be taken into consideration in examining this evidence.

3. The 4th Naval Hospital Incident.

There are two incidents involving members of the 4th Naval Hospital. As we have pointed out, the 4th Naval Hospital was not under the command of the accused Wakabayashi. Even if they had committed these acts against the prisoners, there is no ground for charging the accused Wakabayashi with that.

The judge advocate will refer to the testimony of Iino and say that Iino told the accused Wakabayashi about the telephone conversation between him and Iwanami as regards the physical examination of prisoners of war. He will perhaps maintain that the accused did not take any appropriate measures to prevent the experiment knowing that it was going to be performed.

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However, in view of much strong evidence which disproves Iino's testimony, we reasonably presume that it may be true that the accused Wakabayashi did not hear from Iino about the telephone conversation. Even if Iino actually told Wakabayashi about that, what Iino told him would in no way have suggested the alleged incidents, and the accused Wakabayashi could not have guessed the occurrence of such an incident. Counsel will point out these facts through evidence.

In the first place, Iwanami, Hiroshi, denies that he made such a telephone call to Iino. After the accused Wakabayashi began suffering from stomach ulcers, Iwanami and Iino met every day at the sick room of Wakabayashi. Besides they had many opportunities to meet at the 4th Naval Hospital. Iwanami's testimony that he did not have to telephone to Iino is perforce quite reasonable. Iino testified that Iwanami visited Wakabayashi to treat him and left in the evening of the day of the telephone call and that he telephoned to him immediately after supper. Comparing this with the testimony of Iwanami (Answer to Question _____) and the statement of Wakabayashi (Exhibit 11) in which they said that the visit was made around 10 o'clock every morning, the testimony of Iino is open to serious question.

Iino testified that it was January 13 that he was called by Iwanami on the phone. But in view of his testimony on cross-examination and his contradictory testimony in the Kobayashi case, there is a doubt as regards this date.

Secondly, Iino testified that he told Higuchi and the accused Wakabayashi about the telephone conversation, while both these persons denied that they ever heard of it.

Thirdly, Iino testified that in the telephone conversation with Iwanami he was told that Iwanami wanted to make a little physical experiment, that he was told nothing about the nature of the experiment, and that he did not ask the nature of the experiment (Answer to Questions 38 and 39). He also testified that he did not know whether such an experiment had been performed before (Answer to Question _____) and that he did not tell Wakabayashi about the nature of the experiment. (Answer to Question _____)

When Iino told Wakabayashi about this matter, Wakabayashi had been on his starvation diet for one week. It was the time when he was in the weakest condition. With an ice-bag on his chest, all he could do was just watch the ceiling. As we can see in his answer to question _____, what Iino said to Wakabayashi at this time was not only diffuse but did not give any explanation as to the nature of the experiment. What Iino said is exceedingly difficult to understand. Still less could the accused Wakabayashi have understood his explanation because he was then a patient and was in his worst condition.

To sum up, it has not proved in any manner whatsoever that the accused Wakabayashi knowingly permitted the experiments on the prisoners of war to be performed. It is too unreasonable to conclude that the accused Wakabayashi knew of the occurrence of the hospital incident and that he permitted it.

IV. SUMMATION.

1. Finally in summing up the main points of the foregoing, the prosecution has not proved beyond a reasonable doubt that (1) the accused Wakabayashi, Seisaku permitted, in the sense of that word as used in Chapter 1 Part 6 of the above, his subordinates to commit the acts in

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violation of international law enumerated in Specifications 1 and 2 of the charge during his tenure of office as Commandant of the Fourth Base Force, and (2) that Wakabayashi knowing of these unlawful acts did not take any appropriate measures. On the contrary, according to the testimony in this court of witnesses both for the prosecution and defense and the documentary evidence presented to the commission by both sides, these acts in violation of international law were not reported to the accused Wakabayashi with the consequence that he could not have known about them.

2. Furthermore, the judge advocate also failed to prove beyond a reasonable doubt the existence of any proximate cause and effect relationship between the neglect of duty to control and supervise which the judge advocate alleges existed on the part of the accused Wakabayashi and the facts of the various incidents enumerated in specifications 1 and 2.

3. Through the deposition of Minematsu, Yasuo which was submitted to this commission, it was clearly shown that the accused Wakabayashi repeatedly instructed the commanding officer of the 41st Naval Guard Unit Minematsu (the deponent) never to ill-treat prisoners of war but to treat them with care and kindness. And further according to the testimony of the accused Wakabayashi the fact has been brought out that he instructed his subordinate to treat these submarine prisoners of war (Specification 1 (a), 2 (a)) with special kindness because he himself had been a submarine officer. Thus it was clearly shown that Wakabayashi took the most appropriate measures open to him.

4. For the above reasons I hold that the accused Wakabayashi is not guilty of specifications 1 and 2 of the charge.

I respectfully request the commission that a finding of not guilty be granted the accused Wakabayashi.

Respectfully,

TAKANO, Junjiro

I hereby certify the foregoing to be a true and complete translation of the original document written in Japanese to the best of my ability.

EUGENE E. KERRICK, JUNIOR,
Lieutenant, U. S. Naval Reserve,
Interpreter.

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FINAL ARGUMENT OF DEFENSE IN THE TRIAL OF
WAKABAYASHI SEISAKU
delivered by
Commander Martin E. Carlson
on September 3, 1948.

After such an able argument as was given this morning by defense counsel Mr. Takano it is not necessary for me to argue the case for the defense because Mr. Takano summed up both the law and the facts in this case.

This argument in defense of Wakabayashi, Seisaku charged with criminal negligence would be given to emphasize the points already argued and to reemphasize the innocence of Wakabayashi, Seisaku.

The prosecution have neither alleged nor have they proven that the accused had any knowledge of any of the incidents said to be the basis for his neglect of duty.

The accused is charged with neglecting his duty regarding two killings by three doctors and a corpsman warrant officer all attached to and on the staff of the Fourth Naval Hospital at Truk and for neglecting his duty regarding 42 survivors from the American submarine SCULPIN, but these three incidents are in no way any justification for a charge of criminal neglect of duty. The prosecution have admitted and we have shown that the Commanding Officer of the hospital and his staff were not a part of the command of the accused. The alleged mistreatment of the 42 survivors of the SCULPIN isn't even grounds for trying the guards or the officer in charge of the guards, the interrogating officers from the submarine fleet, or the commanding officer of the Forty-first Naval Guard Unit. At least none of them have been tried and the alleged mistreatment took place five years ago. Remember all 42 survivors left Truk for Tokyo aboard two Japanese carriers after only one week at Truk. So these three incidents as set forth in specifications 1a and 2a, the submarine prisoners alleged mistreatment, and the hospital incidents, set forth in specifications 2b and 2c should not even be considered by the commission. Of course there wouldn't have even been the remotest appearance of a case which would justify holding former Vice Admiral Wakabayashi in solitary confinement here on Guam for two and one-half years if he were only to be tried for neglect of duty regarding the execution of seven prisoners at the Guard Unit during an American air raid February 17, 1944. Remember the accused was a hospital patient even then and had to be carried in and out of the air raid shelter that day. Although he is a hospital patient today he is able to walk and appear here in court, thanks to the United States Navy doctors and the Navy Hospital here on Guam.

There is really only one incident then for which there is the remotest connection or possibility of his having neglected his duty and that is the execution of the prisoners as alleged in specification 1b and repeated for purposes of exigency of proof in specification 2d. Let us look at the charges and specifications and the evidence.

The accused is a former vice admiral, Imperial Japanese Navy, and has learned to speak, read, and write English. He does not, however, understand what is meant by the vague generality included in the phrase "in violation of the law and customs of war." We did make a motion for a bill of particulars and for a more definite statement of the charge in order to enable the accused to prepare for trial. We cited the opinion of Mr. Justice Murphy in the case of General Tomoyuki Yamashita (66 S.Ct. 340 at 357, a dissenting opinion but nevertheless a strong and sound opinion by a United States Supreme Court justice that: "International law makes no attempt to define the duties of a commander of an enemy under constand and overwhelming assault; nor does it impose liabilities under such circumstances for failure to meet the ordinary responsibilities of command...To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgement as to deviation from duty."

DDD (1)

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Japanese defense counsel Mr. Takano in his scholarly closing argument pointed out the vague and uncertain law regarding criminal negligence and the absolute lack of any law justifying such a charge under the facts in the case. Was the accused told what he was charged with so that he could understand the crime that he must defend himself against? No! The judge advocate in his reply to the motion by the accused for a bill of particulars says the accused has no right to move for a bill of particulars in a military court. That is a right inherent only in civil courts. Thus the judge advocate would have all the world believe that military courts and this military commission in particular is less liberal in granting one accused of a crime the rights guaranteed by the Constitution of the United States to all persons accused of crimes and that in military courts we do not find the same fundamental rights and procedure guaranteed to an accused that there is in civil courts. So <u>the accused in only generally told that he is charged with criminal negligence in violation of the law and customs of war</u>.

In this case the accused Wakabayashi, Seisaku, then a Vice Admiral, IJN, Commandant of the Fourth Base Force is charged with failing to control the operations of members of his command permitting them to torture, abuse, inhumanely treat, and kill American prisoners of war. Then in specification two the accused is charged with failing to take such measures as were within his power to protect American prisoners of war in that he permitted the unlawful torture, abuse, inhumane treatment and killing of said prisoners of war. All this is alleged to be "in violation of the law and customs of war." But that law and those customs of war are not set forth in the specification made known to the accused. There was never one word of evidence as to what this law was or what the customs were that imposed upon Vice Admiral Wakabayashi Commandant of the Fourth Base Force Truk a duty to act or evidence what he did not do was the proximate cause and that therefore even justified bringing the criminal charge of neglect of duty against him.

What is the standard for measuring conduct? In 38 Am. Jr. "Negligence" Section 30, the rule is: "The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent is the care which an ordinary prudent person would exercise under like circumstances. (3)" citing the footnotes of Chapter 30 in 38 American Jurisprudence, "Negligency."

We continue to quote: "As has been said, negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or the doing of something which a prudent and reasonable man would not do. (4)" citing the following cases: (4) Heller v. New York, N.Y. & H.R. Co. (CCA 2d) 265 F 192, 17 AIR 823; Field v. Webber, 132 Mo. 236, 169 A. 732, citing RCL; Altman v. Aronson, 231 Mass. 588, 121 NE 505, 4 AIR 1185; Brotherton V. Manhattan Beach Improv. Co. 48 Neb. 563, 67 NW 479, 33 LRA 598, 58 Am. St. Rep. 709; Smith v. Maher, 84 Okla 49, 202, P. 321, 23 AIR 270; Benedict v. Marks shows, 178, SC 169, 182 SE 299, citing RCL.

Concisely stated, the test of due care is the suppositious care of an ordinarily prudent and careful person under the same circumstances.

"The standard man, that is, the ordinarily prudent man, or, as he is sometimes called, the average prudent individual, the reasonable and prudent man, or the careful and diligent man is an abstract man of ordinary mental and physical capacity, but he is an ideal man, in the sense that his conduct is in every case the gauge of due care under the circumstances notwithstanding the precautions attributed to him are not those of usage and custom."

The evidence proved that Japanese Navy Regulations contained rules and regulations relating to prisoners of war and that Commander in Chief Combined Fleet issued orders that international rules as relates to warfare must be observed. And that the Commander in Chief Combined Fleet did issue rules

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and regulations regarding prisoners of war, and that unit commanders did receive rules and regulations regarding the treatment of prisoners of war from the Navy Ministry Tokyo.

And that the commanding officer of the Forty-first Naval Guard Unit Truk was a graduate of the Japanese Naval Academy, and that both Minematsu and Tanaka were acquainted with the Wartime International Law Manual excerpts from which were introduced into evidence. What ought to be done under the circumstances alleged is fixed according to the standard of the ordinarily prudent man. Who is this ordinarily prudent man or rather the ordinary prudent commander of a base force by whose standard you are to judge the accused, former Vice Admiral Wakabayashi, Seisaku, Commandant of the Fourth Base Force Truk? The record of this trial is lacking in any evidence as to this. The judge advocate has not presented any evidence and has given you no standard by which to judge the accused for criminal neglect of duty. All he has said is that prisoners were mistreated and some were killed. The accused is a Japanese and he must be punished because he was on duty on Truk when the incidents occurred. Why must this accused former Vice Admiral Wakabayashi, Seisaku be punished? In his opening statement the judge advocate said that enemy belligerents were warned by the President of the United States that they would be punished, not once but the warning "was repeated over and over again during the course of the war."

Listen to what the judge advocate says about the warning contained in the Potsdam Declaration:

"This warning, this solemn declaration of intention to hold offenders responsible for their criminal acts and ommissions, was embodied in the Potsdam Declaration of 26 July 1945, issued by the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain. The Potsdam Declaration declared "we do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

It would seem as if the judge advocate is not too certain about the legal aspects of this Potsdam Declaration, that is the legal authority of the makers of this declaration to punish the Japanese for having a different social standard of conduct because he says the Potsdam Declaration is not new but the same concept was embodied in the Treaty of Versailles. Why, then we ask wasn't the Treaty of Versailles signed by the United States of America? How is it that the judge advocate of this military commission ask that you members of the commission carry out Potsdam concept of law found in the provisions of a treaty which wasn't even signed or approved by the United States of America by punishing the accused because he was a Japanese national. Perhaps if President Roosevelt had submitted the Potsdam Declaration to the representatives of the people of the United States, it would not have been approved either. Certainly it is not a legal document for punishing this accused. There has been no evidence that the accused committed any crime. His only sin is that he was born a Japanese national and Japan is a defeated nation and on July 26, 1945 three persons declared at Potsdam: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out..."

This accused is not charged with having committed any crime. He is only charged with having neglected his duty as Commendant Fourth Base Force. No law or customs of war is set out or proved during the trial which this accused can be said to have violated.

What was the existing law which made it the paramount duty of the Fourth Base Force Commandant at Truk to control such junior officers as Lt. Nabetani Reijiro and Warrant Corpsman Sakagami Shinji both attached to the Fourth Naval Hospital, a separate command, absolutely separate from and in no way related to the Forty-first Guard Unit and to take appropriate steps to protect American prisoners of war held in custody at the Forty-first Naval Guard Unit

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which was commanded by a responsible officer, a graduate of Japanese Naval Academy or to supervise the medical work at the Fourth Naval Hospital at Truk which hospital was commanded by a licensed doctor, a Captain in the Medical Corps Imperial Japanese Navy, certainly a responsible doctor and a responsible naval officer. The hospital was not a subordinate unit of the Fourth Base Force. The accused is charged with neglect of duty for acts performed by others, acts of which he had no knowledge of before or afterwards. The accused is not even charged with wilfully neglecting his duty. To charge the accused for neglect of duty without charging wilfullness or knowledge is new law. It is a radical departure from any existing law heretofore known in the law of criminal negligence.

In Section 34 of Negligence in 38 Am. Jur. the rule is:

"While, as stated, a custom is not conclusive as a standard of reasonable prudence, there is a reasonable basis for the contention that what is ordinarily done by men generally, engaged in a similar activity, has some relevancy to the inquiry as to what an ordinarily prudent person would do under the same circumstances (19)" citing Seaboard Air Line R. Co. v. Watson, 94 Fla. 571, 113 So. 716, citing R.C.L.; Sweeney V. Blue Anchor Beverage Co. 325, Pa. 216, 189, A. 331, citing R.C.L.

Where do we find the law which makes a person guilty of criminal negligence because some admiral and other persons in authority from another fleet questioned prisoners of war taken by a ship of a third fleet, questioned them rather harshly in order to gain information regarding American submarines, or because a doctor didn't perform an operation entirely to the satisfaction of the prisoner. No person likes to be held in confinement. Wakabayashi isn't very happy that he has been held in solitary confinement for two and one half years. No person likes to have a hand amputated or a leg cut off even if shattered beyond any hope of saving. The surgeon who has taken the Hippocratic oath upon entering his profession must remain the best judge of whether an operation is necessary or not.

This is what the accused, former Vice Admiral Wakabayashi, Commandant of the Fourth Base Force is being tried for and we know of no previous trial under such a state of facts.

We asked for a bill of particulars as to what law the accused was charged with having violated but have never been informed. Now in the argument by the judge advocate he can only say there are numerous cases but still he doesn't cite the law. In effect he says because an Army Commission convicted General Yamashita that is reason enough to convict the accused. The judge advocate talks about command responsibility and the Supreme Court of the United States. The Supreme Court however, did not weigh the evidence in the Yamashita case. That was done by an Army commission.

The judge advocate depends upon the Yamashita case as a precedent and a reason for finding Wakabayashi guilty of criminal negligence. Remember that was a military trial of a commanding general and we believe there were hundreds, perhaps thousands of incidents occurring in the Philippines. The court could therefore have reasoned as we believe they did find that Yamashita knew of these widespread atrocities, that is he had actual knowledge before the atrocities took place. Yamashita was on the scene. Yamashita was the Japanese general with headquarters ashore in the Philippines. He must have had guilty knowledge otherwise no American court could have found him guilty of criminal negligence. But in order to find out just what happened at the trial of General Yamashita the record of the proceedings of the commission which tried General Yamashita must be made available to the commission in order that they might see whether there was evidence that Yamashita did have knowledge, actual knowledge and a guilty knowledge.

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The Supreme Court refused to review the evidence or to consider what measures, if any, the general took to control his troops or whether such measures were appropriate, these being questions for decision by the military commission which tried General Yamashita.

Let the judge advocate show how the Yamashita case applies in this case. We hold that the Yamashita case is irrelevant. General Yamashita was a general and in command of all the Philippines. Wakabayashi was not in command of the Japanese forces at Truk. There were many officers senior to him such as the Commander in Chief of the Fourth Fleet and the Commander in Chief of the Combined Fleet, and the Commanding General at Truk of all army and navy. The only similarity in the case of Yamashita and Wakabayashi is that both of them were Japanese.

The Kilian case has been cited. Is the commission familiar with that case? I hope you read the case because there is absolutely no similarity between that case and this case. Colonel James A. Kilian, commanding officer of 10th Reinforcement Depot at Lichfield Staffordshire, England, was charged with violation of the 96th Article of War. This was no vague charge as in this Wakabayashi case. Kilian was charged that he did "wrongfully and unlawfully perform his duties as such Commanding Officer of said Depot, in that he authorized, and aided and abetted the imposition of cruel, unusual and unauthorized punishment upon" then follows certain named American soldiers.

In Specification 2 it was charged he did "wrongfully and unlawfully fail and neglect to properly perform his duties as such Commanding Officer of said Depot, in that he knowingly permitted the imposition of cruel, unusual and unauthorized punishment upon" then follows the names of certain American soldiers.

Does this read like a war crimes case? No, it is only the case of an Army officer with duty as a jailer who was tried for violation of the 96th Article of War. It is altogether irrelevant in this present trial.

But even in the Kilian case the charge was not even proven. The court found Kilian "not guilty" of specification 1 and "guilty" of specification 2 except that there follows twelve lines of excepted words of which they found him "not guilty" including the word "knowingly". So in effect the general court martial found Colonel Kilian "guilty" of practically nothing which is borne out by the sentence "To be reprimanded and to pay a fine of $500.00". The reviewing authority made further exceptions to the court's findings.

The commission should by all means read the Kilian case to see how different it is from this present case.

From excerpts from the defense brief in that Kilian case we cite Wharton's Criminal Law, paragraph 166 that negligence cannot constitute accessoryship. Read this: "But with these exceptions, a party, who by negligence produces anothers negligence, cannot as we have seen, be chargeable with the consequences of the latters negligence. Morally reprehensible, also, as may be he who by negligence induces another to perform a guilty act, he cannot be made responsible without unduly enlarging the range of criminal law."

In this present trial there has been no evidence that Wakabayashi induced any of the guards, the doctors at the hospital, or the Base Force commanders or the commanding officers to perform guilty acts. Quite to the contrary - Wakabayashi by example and precept set the precedent which ordinarily they would have and did follow to treat prisoners of war humanely and send them to Japan by the first available transportation. You have heard the testimony of Captain Minematsu, Yasuo who was the commanding officer of the Forty-first Naval Guard Unit during the three months from September to December 1943 and during the short week when the submarine prisoners were confined at the Guard Unit November 20 to November 28, 1943. He testified

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he did not permit his subordinates to beat prisoners of war and that he did not see any prisoners beaten or mistreated. He further testified regarding his policy that "I would treat them as humanely as possible. Their food was the same as I had. Since they were naked, we provided them with adequate clothing. The prisoners seemed to be very happy."

No prisoner is very happy and it may well be that looking back on their experiences at Truk none of these prisoners can say they liked it. None of them liked to surface the SCULPIN and fight it out with Japanese destroyer YAMAGUMO but it was either that or die, trapped in the submarine underwater. Then these submariners had to abandon their submarine. They had lost their fight with the Jap destroyer. They were not now heroes but prisoners of war. Let us be realistic and not vindicative in this case. The 42 survivors were taken to Truk and the only place of confinement available was the guard house at the Forty-first Naval Guard Unit. Here all 42 prisoners were confined and the prosecution have made much of the fact that these survivors were confined in a small cell and they were very crowded. The commission must consider the circumstances at Truk at that time. No other place was available. Japanese sailors were so crowded that they lived underneath the barracks because there wasn't room in the barracks.

Captain Minematsu testified that he did implement his policy of humane treatment for prisoners of war by issuing instructions to and making an officer responsible for the custody and care of these prisoners of war while they were at the guard unit. He said: "yes, there was an officer in dharge of the guards to whom I gave specific instructions; and to the men at large whenever opportunities presented themselves I would give the same instructions. The reason for this was that it was the desire of the higher officers, Admiral Koga and Vice Admiral Wakabayashi that prisoners be treated humanely." Captain Minematsu further testified: "I do not recall any written instructions from Vice Admiral Wakabayashi, but Vice Admiral Wakabayashi many times called me and other staff officers together and relayed to us the following instructions which had been received from a naval captain, Yuno, Hideo, later killed in Saipan, who was a section chief of the Naval Affairs Bureau of the Naval Ministry in Tokyo: Since the prisoners are to be used to obtain American intelligence and information, they should be treated humanely, otherwise, if they are mistreated, it would be difficult to obtain this intelligence."

This is the sworn testimony of the Commanding Officer of the Guard Unit in whose custody these prisoners of war were.

To prove that the guards did beat the prisoners notwithstanding this policy and the specific instructions to treat the prisoners humanely, otherwise the Japanese would be unable to get American intelligence and information , the prosecution brought two of the survivors, John Paul Rourke and Cecil Eugene Baker, here to testify on the 10th day of the trial Tuesday August 10th.

Rourke described the heroic battle that the SCULPIN put up against the Jap destroyer YAMAGUMA. After attacking a convoy which had been spotted about midnight. At 0600 the SCULPIN dove and proceeded to make the attack. Surfacing after the attack the SCULPIN was discovered by the Jap destroyer YAMAGUMA and after an eight and one half hour battle the SCULPIN was so badly damaged she had to surface, and try to fight it out on the surface with enemy destroyer. Soon the SCULPIN was abandoned and 42 survivors were picked up by the YAMAGUMO. That must have been about 1500. The YAMAGUMO brought these survivors to Truk. The exact time of arrival is not clear but it was at least 12 hours later.

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Rourke testified that he was not interrogated until within a day after his arrival (Answer to Q. 12) and not until after he was interrogated was he beaten (See answer to Q. 95 & 96).

Baker also testified that he was beaten by the guards at the time he was questioned when he either failed to answer or gave an answer the interpreter didn't think was accurate.

There isn't any doubt but that the officers and interpreters were from a Submarine Fleet either the Eighth Fleet or the Sixth Fleet. Most of the testimony given by Rourke and Baker related not to what happened to them but what they heard from someone else as to what happened to still another person a third party.

Rourke testified he went to the hospital for medical treatment but didn't go back. He said: "I guess if I had requested it I would have gone again."

Neither Rourke or Baker testified that any of the Guard Unit officers beat them or mistreated them. There is no evidence that either the accused, Vice Admiral Wakabayashi, or Captain Minematsu, the commanding officer of the Guard Unit mistreated any of the prisoners, was present when they were mistreated, ordered them mistreated or condoned the alleged mistreatment. Quite to the contrary both Vice Admiral Wakabayashi and Captain Minematsu did everything possible to see that the prisoners were humanely treated.

After a week all 42 prisoners were put aboard two carriers to be transported to Japan. This was in accordance with the policy of the Japanese government to send all prisoners to Japan.

Captain Minematsu testified that the senior staff officer of the Eighth Fleet was in charge of the interrogation. The interrogation was held in his area but Minematsu testified that he had no direct connection with the interrogation. All this was done under orders of the Commander in Chief of the Combined Fleet aboard his flagship anchored off the Forty-first Naval Guard Unit at Truk. Military men can understand the authority of the senior officer present particularly in time of war.

You members of the Commission know that the Commander in Chief having given the orders regarding these prisoners of war did not accept any excuses from the unit he had ordered to confine them that they had no adequate jail to house these prisoners. It was an emergency and the guard unit did the best they could to carry out the order of Commander in Chief of the Combined Fleet. After one week the Commander in Chief, Combined Fleet ordered the prisoners of war transferred to the Japanese homeland and provided two carriers to transport the 42 prisoners.

But while the prisoners of war were being held at Truk awaiting transportation there did occur one incident at the Forty-first Naval Guard Unit, just one incident.

Wakabayashi was the Commandant of the Fourth Base Force. The execution occurred at the Forty-first Naval Guard Unit. The conduct of Wakabayashi, the alleged negligence had nothing to do with causing the alleged injuries. The <u>proximate cause</u> was the conduct of the unit commander. The guilty persons have all been tried, found guilty, sentenced and are serving their sentences. Captain Tanaka has been hanged for allowing the incident to take place as alleged at the Forty-first Naval Guard Unit. The judge advocate however is not satisfied. He is asking that you accept his theory that a commanding officer has an absolute responsibility for the acts of his subordinates because all has proved is that in this one instance there was an atrocity committed.

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On the theory of absolute command responsibility for everything it is not necessary to charge that Wakabayashi did wilfully and knowingly disregard his duty. The principle of command responsibility is only another name for this theory of absolute responsibility. There are some theorists who contend that a commanding officer has an absolute responsibility for the acts of his subordinates but who are these theorists other than the judge advocate in this trial?

The Kilian case is not an illustration of command responsibility because the court and the convening authority in that case didn't hold with this theory. From the excerpts from the defense brief in that case I point out to the commission that under Army Regulations and the same is true under Navy Regulations, a commanding officer by virtue of his position is responsible for everything within his command, yet he is not <u>criminally</u> responsible for the same. For improper performance of duty he may be administratively reprimanded, given a less responsible position, not recommended for promotion, etc. But to convict a commanding officer, a public officer, or any person of criminal responsibility for acts of omission intent, (knowledge - actual or imputed), yes a guilty knowledge, is a necessary element.

This the prosecution have failed to do in this present trial.

To hold Wakabayashi as commanding officer <u>criminally</u> responsible for unauthorized offenses of subordinates of which he has no knowledge merely by virtue of his position as commanding officer of the Fourth Base Force is to establish a dangerous precedent.

If as the judge advocate argues there goes with command the criminal responsibility for all acts of subordinates, officers will shun the now much coveted command position, discipline will be destroyed in all grades, individual justice and the reliance of law to protect the innocent person will have vanished.

As in the Kilian case so in this case the prosecution have relied on the Yamashita case. In the Kilian case it was contended by the defense and we contend in this case that the Yamashita case have no application. The prosecution keeps trying to apply the Yamashita case to all war crimes trials held here on Guam.

Both Justice Murphy and Rutledge wrote strong dissenting opinions in the Yamashita case when it was brought to the Supreme Court of the United States on a writ of habeas corpus. They held that the due process clause of the Fifth Amendment applied to any person accused of a crime in our American courts.

Justices Murphy and Rutledge further held (dissenting opinion) in the Yamashita case that the offense of failing to control his troops without showing the accused had knowledge of their acts was not known as an offense heretofore under the laws of war.

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Legally a person, a commanding officer nor anyone else cannot be guilty of a criminal offense without intent (culpable knowledge.)

If we are to accept the theory advance by the judge advocate of absolute command responsibility, criminal responsibility for all illegal acts of subordinates, acts which he did not authorize, nor aid nor abet, nor approve of or condone, acts of which he had no knowledge actual or imputed then the higher commanders of the accused are equally criminally responsible.

The court evidently did not accept this theory of command responsibility in the KILIAN case because such superior higher commanders as Colonel HERR, Brigadier General VAUGHAN, Lieutenant General LEE, Major General BROWN, General DWIGHT D. EISENHOWER and General GEORGE C. MARSHALL, were not brought to trial for the alleged illegal acts of Colonel KILIAN, Commanding Officer of the 10th Reinforcement Depot. All these officers were KILIAN's superior commanding officers in the regular chain of command.

Consider what the principle of command responsibility, criminal responsibility for all illegal acts of subordinates would mean in the American Navy. Such a theory or principle is untenable from the standpoint of law or of justice to the accused and all other commanding officers and other individuals concerned.

Are we Americans in the moment of victory to set the rules of war for our adversary? Are we to say to Japan you must observe the Hague Convention and the Geneva prisoner of war convention and then incorporate into our own rules of warfare such exceptions as suit our convenience? In the "Foreword to the War Department Technical Manual, TM 27-251 there is the following: "This manual is intended to serve as a supplement to FM 27-10 Rules of Land Warfare..."

The Hague Declaration Number XIV, October 18, 1907, prohibiting the discharge of projectiles and explosives from balloons (H.D. XIV), is not binding and will not be observed."

I ask that the judge advocate clearly and unequivocally set forth the law of criminal neglect of duty as it applies in the instant case and not evade the question by stating that the commission members are "thoroughly familiar with the military concept of neglect of duty."

We hold with Mr. Justice RUTLEDGE in his dissenting opinion in the YAMASHITA case when he says: "It is not our tradition for anyone to be charged with crimes which is defined after his conduct, alleged to be criminal has taken place, or in language not sufficient to inform him of the nature of the offense or to enable him to make defense. Mass guilt we do not impute to individuals, perhaps in any case but certainly in not where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so." In re YAMASHITA, No. 61, motion for writ of habeas corpus and 672 for writ of certiorari.

The judge advocate quotes from a review of the KILIAN case. Colonel KILIAN remember was the commanding officer of the prison. Of course, he couldn't delegated his responsibility anymore than Vice Admiral WAKABAYASHI could not delegate his responsibility as commandant of the Fourth Base Force. WAKABAYASHI was not preoccupied with operational duties; he was occupied with operational duties. Those duties were paramount. TANAKA, MINEMATSU, and the guard unit commanders who had the duty of and custody of prisoners of war, also had other duties but they had a duty as regards

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prisoners of war. We are not here concerned with whether the command functions exercised by Minematsu and Tanaka carried with them an inexcapable responsibility for preventing mistreatment of prisoners of war because Tanaka has been tried, found guilty, sentences, and hanged for the mistreatment of these prisoners of war for which Wakabayashi, a higher command is also now being tried. There isn't even any consistency in the program of trial of Wakabayashi as a superior and higher commander because the prosecution have dipped down into the lower ranks of officers charging Wakabayashi as Commandant of the Fourth Base Force with failure to control SAKAGAMI, Shinji, a corpsman warrant officer, (SAKAGAMI by sworn deposition denied any participation in the incident alleged in paragraph 2 (c) and Surgeon Lieutenant NABETANI, Reijiro, and Surgeon Commander OKUYAMA, Tokikazu (and OKUYAMA and NABETANI have never been tried for the incidents set forth in paragraph 2 (b) and 2 (c)) and a failure to control Danzaki and Yoshinuma enlisted guards whose names are even today - five years after the incidents took place still unknown.

The judge advocate naively says there would have been no mistreatment of prisoners of war if WAKABAYASHI had issued specific instructions to all his subordinates. We have a law which in effect says "Thou shalt not kill" and yet we have murders. In some of our large cities, to our shame, there are as many as 267 murders a year.

There was at the Forty First Naval Guard Unit responsible officer in command and theirs was the responsibility for the custody of prisoners of war confined there. To push the responsibility upward in the chain of command and even outside the chain of command is without precedent.

On a case like this present case there is a tendency to think of negligence in the popular sense and judge the accused on the basis only that he should have prevented the guards from striking the prisoners as it is alleged they did do or that he should have guaranteed a better operation that is saved the arm instead of amputating it.

Let us not forget however that Wakabayashi did not order the alleged executions; he was not present at any of the alleged mistreatment of submarine prisoners of war or he did not approve of them; and he did not condone them.

We maintain that the prosecution have not even set out a good case against the accused. The prosecution know full well what legal negligence is so they use the words "as it was his duty to do" but the evidence presented shows no such duty in any of the allegations. We point out at this time the lack of evidence as to the allegations set forth in paragraphs 2 (b) and 2 (c).

In 38 American Jurisprudence "Negligence" section 2 there is defined legal negligence, "Actionable negligence, or negligence in the legal sense has been defined as a violation of duty to use care." 18 citing Ft. Smith Gas Co. v. Cloud (CCA 8th) 75 F(2d) 413, 97 ALR 833; Union Traction Co. v. Berry, 188 Ind. 514, 121 NE 655, 124 NE 737, 32 ALR 1171; Brotherton v. Manhattan Beach Improv. Co. 48 Neb. 563, 67 NW 479, 33 LRA 598, 58 AmStRep 709. Actionable negligence is a breach of duty owed by defendant to the plaintiff. Saunders v. Boston & M.R. Co. 82 NH 476, 136 A 264, 50 ALR 367.

"It is doubtful, according to some authorities, whether a more comprehensive definition is practicable. Negligence such as the law takes cognisance of in imposing liability depends upon the existence of various

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essential elements hereinafter discussed such as a duty owed by the person charged, and an injury which follows the violation of that duty in such direct and natural sequence that the breach of duty can be said to be the proximate cause of the injury.

Iwanami testified he made no reports of deaths or experiments that two of his subordinates, Okuyama and Nabetani, made at the 41st Naval Guard Unit dispensary nor was it his duty to make any such reports. What Okuyama and Nabetani did no one has testified to at this trial.

So we have a hospital operated as are our own Naval hospitals by orders of the Bureau of Medicine and Surgery, Navy Department and the treatment of prisoners of war is as prescribed by doctors and not by any rules or regulations established by a line officer, the Commandant of the Fourth Base Force.

There has been direct proof therefore that the accused Wakabayashi had no duty as regards the work of the doctors at the Fourth Fleet Hospital. There has been no proof that the injury and the deaths alleged were in violation of any duty Wakabayashi had toward the prisoners of war nor that the injury or deaths can be said to be because of any breach of duty owing to the prisoners by Wakabayashi. In other words there is no evidence that there was a breach of duty by the accused Wakabayashi which is the proximate cause of the injury or deaths complained of. Quite to the contrary there has been direct proof beyond a reasonable doubt that the Fourth Naval Hospital and the personnel attached thereto were not a part of or subordinate to the Fourth Base Force.

Continuing to quote from 38 American Jurisprudence "Negligence" Sect. 2 "In any event, negligence in the legal sense is a relative 5" Workman v. New York, 179 US 552, 45 L.Ed. 314, 21 S.Ct. 212; Southern P. Co. v. Buntin, 54 Ark. 180, 94 P(2d) 639, 124 ALR 1422; Katz v. Helbing, 205 Cal 629, 271 P 1062, 62 ALR 825; Effinger v Ft. Wayne & W Valley Traction Co. 175 Ind. 175, 93 NE 855, 33 LRA (NS) 123; Palsgraf v. Long Island R. Co. 248 NY 339, 162 NE 99, 59 ALR 1253; Gibson v. Payne, 79 Or 101, 145 P 422, Ann Cas 1918C 383; Shobert v. May, 40 Or 68, 66 P 466, 55 LRA 810, 91 Am. St. Rep. 453; Appalachian Power Co. v. Hale. See also infra, SS 29 et seq. Negligence is a word of broad significance and may not readily be defined with accuracy. Jamison v. Encarnacion, 281 US 635, 74 LEd 1082, 50 S.Ct 440 "Its existence must depend, in each case upon the particular circumstances which surrounded the parties at the time and place of the occurrence on which the controversy is based" citing: Jacksonville, T. & KWR Co. v. Peninsular Land, Transp. and Mfg. Co. 27 Fla 1, 157, 9 So. 661, 689, 17 LRA 33, and many other cases.

We have pointed out the particular circumstances and the relationship between Surgeon Captain Iwanami and the accused Wakabayashi. We further call the commission's attention to the answers to the interrogatories sent to Sakagami, Shinji. Here are the interrogatories submitted to Sakagami and the answers he gave under oath:

First Interrogatory: It is alleged that two American prisoners of war were killed at Dublon Island, Truk Atoll, on or about 1 February 1944 by explosions of dynamite. Did you kill two American prisoners of war at Dublon Island on or about 1 February 1944 by explosions of dynamite?

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Second Interrogatory:	Did you kill two American prisoners of war at Dublon Island, Truk Atoll, on or about 1 February 1944 by strangulation?
Third Interrogatory:	Did you ever mistreat any American prisoners of war during the time you were on duty at Dublon Island, Truk Atoll?
Fourth Interrogatory:	Did you ever kill any American prisoners of war on Dublon Island, Truk Atoll during the period of time you were stationed on Dublon Island?
Fifth Interrogatory:	During what period of time were you stationed on Dublon Island, Truk Atoll?
Sixth Interrogatory:	What was your rank and your duty during this period?
To the first interrogatory:	No, I did not.
To the second interrogatory:	No, I did not.
To the third interrogatory:	No, I never did.
To the fourth interrogatory:	No, I did not.
To the fifth interrogatory:	I was stationed at Dublon Island, Truk Atoll, from June 1943, until June or July 1944.
To the sixth interrogatory:	My rank was warrant officer, Medical Corps, Imperial Japanese Navy. Technically speaking, I was in charge of building and repair work at the hospital. I was also kampanshikan at the hospital

The evidence is clear that Sakagami, Shinji did not kill two Americans as he is alleged to have done in specifications paragraphs 2 (c). Remember Okuyama has never been tried for the offense so he too as far as the evidence in this case goes is not guilty of the offense.

In footnote 14 on page 643 of 38 American Jurisprudence "Negligence" the following cases are cited: Altman v. Arvinson, 231 Mass. 588, 121 NE 505, 4 ALR 1185; Keyser Canning Co. v. Klots Throwing Co. 94 W.Va. 346, 118 SE 521, 31 ALR 283. The case of Hulley v. Moosbrugger, 88 NJL 161, 95 A 1007, LRA 1916 C 1203 is cited as authority for the rule: "When negligence arises out of an act of commission by one for whose conduct another is responsible it must be with reference to some duty which the responsible party owed to the party injured."

In Wharton's Criminal Evidence, Volume 2, section 1126, p. 678 the rule of evidence is set forth: "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable. Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court, citing U. S. v. Angell (CC) 11 F. 34 the court says that under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him, a witness, if living must be produced, and

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the mere fact, that he is beyond the jurisdiction is immaterial. The court further says that it cannot fairly be maintained that if the witness has once been confronted with the accused before the committing magistrate the requirements or guarantees of the Constitution are answered.. The fair meaning of the Constitution is that wherever and whenever he is put on his final trial he shall be confronted with the witnesses against him, if they be alive."

So under paragraphs 2 (b) and 2 (c) Okuyama, Nabetani, and Sakagami should be produced. The defense put on Iwanami who testified he owed no duties to the accused as regards his work as a doctor nor did he report or have a duty to report deaths to the accused Wakabayashi. By means of interrogatories Sakagami answered that he didn't kill two American prisoners of war on or about February 1, 1944 at Dublon Island, Truk and furthermore he never killed or mistreated any American prisoners of war at Dublon Island.

The rule of law is that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence. Wakabayashi the commandant of the Fourth Base Force, Truk, was sick in bed at Truk when Captain Tanaka, C.O. of the 41st Naval Guard Unit is said to have executed prisoners of war and the evidence shows that there was no proximate cause as between the accused Wakabayashi and the execution of seven prisoners of war.

In 45 Corpus Juris "Negligence" sec. 666 on page 1093 the rule is clearly stated as to negligence and proximate cause. "In accordance with the rule that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence,78" (citing sec. 477 C.J.) a mere allegation of negligence on the part of defendant and of the loss or injury sustained by plaintiff does not charge defendant with responsibility for the damage (79) citing Fay v. Cox, 45 Cal. A. 696, 188 P 623., but the declaration or complaint must show a causal connection between the negligence charged and the injury sustained, that is, it must, either by a direct averment or by a statement of facts, show that the negligence charged was the efficient and proximate cause of the injury sustained." (80) citing 45 Corpus Juris. Negligence, Section 666 The connection between negligence charged and injury (1) Necessity of allegation, p. 1093, footnote 80.

It must show either that defendant's alleged negligence was the sole cause of the injury (81)" citing the following cases: Rome R., etc. R. Co. v. Jones, 33 Ga. A. 1617, 127 SE 786; Gillestie v. Andrews, 27 Ga. A. 509, 108 SE 906, "or that it contributed to the injury (82)" citing Manwell v. Durst, 178 Ca. 752, 174 P 881, 1 ALR 669; Ingalls v. Monte Cristo Oil, etc. Co., 176 Cal. 128, 167 P. 857; Fay v. Cox, 45 Cal. A. 696, 188 P. 623. As that it put in operation other causal forces which were the direct natural and probably consequences of the original act."

For a definition of proximate cause I cite section 477 from 45 Corpus Juris "Negligence" page 897: "In the law of negligence" proximate cause "has variously been defined as: That which immediately precedes and produces the effect (2) citing Longabough v. Virginia City etc. R. Co. 9 Nev 271 and other cases "As distinguished from a remote, (3) mediate or predisposing cause (4) citing Birmingham Southern R. Co. v. Harrison, 203 Ala. 284, 82 S. 534, for the rule that "Proximate cause means the direct efficient cause of injury as distinguished from the indirect remote cause."...Continuing we quote further Ibid, "the efficient cause - the one that necessarily sets the other causes in operations,...; the nearest independent cause which is

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adequate to produce and does bring about the accident."... A comprehensive definition, and one which is perhaps most often stated, is that proximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred." (15) citing the following cases footnote 15, page 898. Section 110 Ibid: although a defendant may be negligent in the performance or omission of some duty owed to the person injured, no liability attaches unless such negligence was the proximate, rather than the remote cause of the injury" (27) citing the following cases, Footnote 27.

In none of the killings or injuries is it alleged nor is it proved that because the accused Takabayashi was negligent that such negligence was the nearest independent cause which was adequate to and did produce the injury. The negligence alleged is therefore not the proximate cause and the accused Takabayashi is therefore not guilty. We cite the following cases from 45 CJ, Negligence Sec. 481; Yeates v. Illinois Cent. R. Co. 241 Ill 205, 89 N.E. 338; Grigsby v. Beatton, 128 Tenn. 597, 163 S.W. 804.

Persons were executed at the guard unit and the accused as Base Force Commandant is charged with the responsibility for the acts of the guard unit personnel, a separate and independent command. What is the requirement in case of murder?

All the evidence shows that the accused Takabayashi performed his duty in a lawful manner. The rule as to criminal responsibility is that "The performance of a lawful act in a negligent manner does not give rise to criminal responsibility" (16) 45 C.J. Negligence, Section 951 p. 1371 citing People v. Anderson 310 Ill. 389, 141 N.E. 727; People v. Adams 289 Ill. 339, 124 N.E. 575.

The charge and the specifications fail to show that the negligence charged was the cause of the injuries complained of and the evidence shows that the injuries were not proximately caused by the negligence charged but the injuries were proximately caused by an independent intervening agency. According to law therefore the charge is insufficient to state a cause of action against a demurrer. I shall quote the rule of law set forth in 45 Corpus Juris "Negligence" section 666. "The declaration or complaint is insufficient to state a cause of action as against a demurrer, where it fails to show that the negligence charged was the cause of the injury complained of (84)" citing the following cases: Footnote 84, "Or where it appears from the facts alleged that the injury was not proximately caused by the negligence charged (85)" citing the following cases: Footnote 85, "but by an independent intervening agency."

In 26 Am. Jur. "Homicide" Sect. 45 the rule is stated very clearly: "A person is not criminally responsible for a homicide unless his act can be said to be the cause of death (19)" citing Re Hugho, 18 Idaho 566, 1101 1029, 32 LRA (US) 877, An. Cas. 1912A 138, and other cases.

Wechsler and Michael in "A Rationale of the Law of Homicide" Columbia Law Review Vol. XXXVII Nos. 5 and 8 May and Dec. 1937, p. 723, 724 in discussing causality say: "The requirement both in murder and in manslaughter that the death be the result of the defendant's act presents the problem of causality.... The effort has been to reduce the scope of liability for results that are unintended and only slightly probably. In the next paragraph the death by omission to act is discussed. "Death may result not only from an act but also from an omission to act. An omission may be accompanied by the same states of mind that may accompany an act, and the consequences of an omission are susceptible of the same analytical treatment as those of

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an act. But a homicide resulting from an omission is non-criminal, even though intentional, unless there is a duty to act. Such a duty does not arise merely because death is probable or even inevitable."

The specifications allege the duty to control and the duty to protect was "in violation of the law and the customs of war" but notwithstanding our objections to the charge and our motion for a bill of particulars there is only this vague and indefinite reference to "the law and customs of war" Since the prosecution absolutely refuses to state "the law and the customs of war" the logical conclusion is that the prosecution are seeking to extend the criminal law to some moral duty which they have placed upon the accused. That the criminal law extend to reach, building upon the foundation of acknowledged moral duty, has prevailed for a long time and so in this particular instance is clearly the argument of the prosecution. I would like to quote from Macaulay, Notes on the Indian Penal Code (1837) notes 105 at 105 quoted in footnote 106 on p. 725 Wechsler and Michael, Ibit: "It is indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active service to their neighbours. In general however the penal law must content itself with keeping men from doing positive harm; and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstances which marks them out as peculiarly fit objects of penal legislation." His proposal was for drawing the line at omissions which are "on other grounds illegal" i.e. " an offense, ...a breach of some direction of law or...such a wrong as would be a good ground for a civil action." (p. 104) These views were approved by The Criminal Law Commissioners of 1845. See Second Report (1846) 14, proposing the following rule: "An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission shall be deemed to be unlawful whensoever it is a breach of some duty imposed by law, or gives cause for a civil action." Macauley said this more than a hundred years ago yet today we can find no duty imposed by law upon the accused former Vice Admiral Wakabayashi to control members of his command or to protect American prisoners of war. Neither the Hague Convention or the Geneva (Prisoners of War) Convention imposed any such duty upon the accused. Quite to the contrary the Geneva (Prisoners of War) Convention of 27 July 1929 specifically exempted individuals from any responsibility for prisoners of war by providing in Article 2 that "Prisoners of war are in the power of the hostile Power but not of the individuals or corps who have captured them." That, gentlemen, was the studied and mature opinion of the international lawmakers representing forty-three Sovereigns and Heads of States who sent Plenipotentiaries to the Prisoners of War Convention held at Geneva Switzerland in 1929. That is still the law today. The international lawmakers have as yet not seen fit to change that law. There is no international law, no penal legislation which makes it the duty of the accused Wakabayashi to protect prisoners of war held captive by a guard unit commander who was a responsible officer. Particularly when the alleged neglect of duty on the part of Wakabayashi was not the proximate cause of the injury complained of.

Although everyone will be held to be responsible for the natural consequences of his own acts, he will not be held criminally responsible for a homicide unless his act can be said to be the cause of the death. Letner v. State, 156 Tenn. 68, 299 SW 1049, 55 ALR 915.

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As we have said the evidence shows that Wakabayashi did not do anything which can be said to be the cause of the deaths alleged. Nor did the acts of Wakabayashi accelerate any of the deaths. The evidence clearly shows that other acts of other persons responsible third persons were the proximate cause of the mistreatments and deaths alleged.

We do agree that "The law holds everyone who is so situated that his acts may endanger the life of another bound to exercise caution, and holds him responsible criminally for the loss of life consequent to his failure to exercise the proper degree of caution" 26 Am. Jur. Section 205 but Wakabayashi is not charged with homicide but only neglect of duty and in the rule cited above "familiar illustrations of theprinciples of criminal liability for homicide resulting from negligence are the reckless use or handling of firearms and the casting of stones or timbers from a housetop into the street where people are known to be passing." 26 A. Jur. Ibid. This present case is entirely different.

The judge advocate has said that a commander is responsible for all that his unit does or fails to do. That he says is the Morimoto case, and he was punished; he was hanged. We have tried to get this case but have been unable to do so.

We ask only for a clear statement of the law of criminal negligence as it applies to the accused, former vice admiral Wakabayashi, commandant, Fourth Base Force. We take issue with such a ruling as the judge advocate says the Morimoto case stands for.

If the judge advocate is to cite rulings from such unknown cases as the Morimoto case we feel he should make the case available to the Commission at least. Defense counsel have been unable to secure any such case and have no means to verify the ruling. Since only a part of the sentence is quoted it may well be that the principle of law enunciated is conditioned as we have pointed out it should be, conditioned upon "guilty knowledge."

The judge advocate has said that if theaccused had issued instructions, and orders and had exercised vigiland supervision prisoners of war would not have been mistreated. We again call the commission's attention to the evidence which proves beyond a reasonable doubt that Admiral Wakabayashi did issue instructions and did order Captain Minematsu to treat the prisoners humanely and that Captain Minematsu did appoint an officer responsible for the custody and care of prisoners of war held in custody at the Guard Unit. Japanese Naval Regulations and Wartime Instructions regarding international law as it applied to prisoners of war were issued to the commanding officer of the 41st Naval Guard Unit and both Captain Minematsu and Captain Tanaka were graduates of the Japanese Naval Academy. But as we have pointed out we are concerned with proximate cause of the injury complained of. The alleged negligence of Wakabayashi was notthe proximate cause of injury and therefore the accused Wakabayashi must be acquitted.

We have said that the argument of the accused is confusing. In order to prove that Wakabayashi an individual is responsible for prisoners of war the judge advocate cites the Annex to the Hague Convention, Article 4 as relates to prisoners. The words he cites are clear and unequivocal: Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them." If the judge advocate can produce any dictionery definition or any case at law which holds that the above quoted words mean absolutely what they do not say he should produce his authority which gives new meaning to such simple, unambiguous words as

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"government" and "individuals." I would call the judge advocate's attention that it was Louis XIV who said "I am the State." It was not this little old man who was so sick that he had to be carried on a stretcher into the air raid shelter. He was then as he is now a hospital patient. We would like the record to show that this accused although a patient at the Navy hospital is nevertheless present in court today. Unusual is it? Well I suppose it is and it is hard to believe. I call your attention to this fact because I want you to know it is possible for this accused to be so sick as to be under a doctor's constant care and yet as he did back there in January and February 1944being as it were, leading the fight from a stretcher with two nurses and a doctor at his side.

And the judge advocate says this man neglected his duty because two miles away a responsible Navy Captain, the Commanding Officer of the 41st Naval Guard Unit, executed seven prisoners of war. It was this sick man's duty, the judge advocate says, to exercise constant supervision over the Navy Captain two miles away. The judge advocate is not using objective and realistic norms of conduct in forming his judgment as to whether the accused Wakabayashi deviated from his duty that day. The prosecution have failed to prove that Captain Tanaka received approval for the execution or that he ever even informed Wakabayashi that he had executed these prisoners. A couple of days later this sick man Vice Admiral Wakabayashi left Truk on a hospital ship. He never knew there were prisoners of war at the Forty-first Naval Guard Unit that day or that they were executed by Captain Tanaka. It was not until he was questioned by American investigators years later that he found out about this execution. As a prosecution witness he was asked to and he did witness as a witness for the prosecution at the trial of Captain Tanaka. At that time it was most important for the prosecution to show there was no telephone message regarding these prisoners on February 17, 1944 and vice admiral Wakabayashi testified to this effect at that trial.

Captain Tanaka was found guilty and was hanged for the offense. The evidence at that trial failed to show there was any approval by telephone from the Fourth Base Force for the execution. The evidence is even stronger in this case that there was no approval by anyone from Fourth Base Force or that anyone ever received even a request for approval. The evidence proves beyond a reasonable doubt that Captain Tanaka never mentioned the execution to Wakabayashi or anyone else at the conference said to have held to discuss losses and defense measures. There was no "guilty knowledge" before or after the execution of these seven American prisoners of war on February 17, 1944.

The evidence proves the accused is not guilty of Criminal Negligence. The evidence shows beyond any coubt that the accused was innocent of any neglect of duty. He did not fail in his duty. We ask you acquit the accused of criminal negligence because his conduct was not the proximate cause of the injury complained of.

We ask that you release this former vice admiral, Wakabayashi, Seisaku, and prove to him -- yes and to the world -- that American justice can determine the truth of the issue in this case. Wakabayashi, Seisaku is innocent of criminal negligence. We ask that you acquit him.

Respectfully,

Martin E. Carlson,
Commander, USNR,
Counsel for Accused.

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CLOSING ARGUMENT FOR
THE PROSECUTION
Delivered by
Lieutenant James P. Kenny, USN,
Judge Advocate.

Mr. Takano of defense counsel early in his argument makes the general statement that nowhere in international law is it set forth that neglect of duty of a superior officer to control and supervise his subordinates is a war crime. It is true that international law is not concerned with this duty in so far as it relates generally to his command but international law does concern itself with that duty when it relates to prisoners of war. When a person becomes a prisoner of war, be he civilian or military, he immediately comes within the protection of that body of the international law which is commonly known as the law of war.

Mr. Takano is of the opinion that no law existed which placed a duty upon the accused to prevent the mistreatment or killing of the prisoners of war who had come into the custody of the accused. Since in the opening argument of the prosecution this duty was shown to exist by reference to the Hague Convention of October 18, 1907, the Geneva Prisoners of War Convention of July 27, 1929 and the opinion of the Supreme Court in the Yamashita case, the judge advocate will refrain from further discussion at this time. Again counsel has argued that the prosecution is attempting to apply ex post facto law to acts of the accused. We again point out that this phase of the law of war was well defined prior to time the alleged acts were committed. General Yamashita was tried and convicted on a charge similar to the wording of the charge against this accused and the Supreme Court of the United States on review found that the charge adequately stated a violation of the law of war.

Mr. Takano further argues that the duty of the accused to control his subordinates and the duty to protect prisoners of war were one and the same duty and therefore could not be divided, as they have been, with reference to the same incidents. That these duties were in fact separable and distinct is evident from an analysis of the incidents set forth in paragraphs (b) and (c) of specification 2. It is alleged therein and has been proved that eight American prisoners of war were killed by personnel of the Fourth Naval Hospital at Truk. The record shows, and the prosecution hasn't ever contended otherwise, that the Fourth Naval Hospital and its personnel were under the command of the Fourth Fleet and not under the Fourth Base Force, commanded by the accused. However, at the time, these eight prisoners of war were in the custody of the accused and were entitled under the law of war to be protected. It is obvious from this that although the duty to protect these prisoners existed with reference to the accused, the duty to control the immediate performers of the illegal incidents did not exist since these persons were not "members of his command and persons subject to his control and supervision." This is precisely why the accused was only charged with a failure to protect these eight prisoners. On the other hand this dual duty did exist with reference to the incidents concerning the forty-two American submarine prisoners of war who were mistreated at the Guard Unit in November, 1943, and the seven American prisoners of war executed on February 17, 1944. These incidents were performed by personnel who were members of the command of the accused and subject to his control and supervision and the victims were at the time in the custody of the accused and entitled under the law to his protection; therefore, it was properly alleged that he violated his dual responsibility with reference to them.

Mr. Takano goes into a technical discussion concerning the definition and meaning of the word "permitting" which is used in the wording of the charge. He argues that permission implies knowledge and in order to prove that the

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accused permitted these alleged incidents, the prosecution must have proved that the accused had prior knowledge that the incidents were to take place. In support of this contention the accused quotes from Black's Law Dictionary a definition of the term "to permit" as follows: "to acquiesce by failure to prevent." This is a definition that aptly shows that knowledge is not necessarily implied in the term. It is obvious that this is what the term "permitting" connotes in the charge against this accused. By not issuing instructions, orders or properly supervising his subordinates he acquiesced in their violation of the law. That is what apparently was meant by the reviewer in the Kilian case when he stated: "I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within the command although he may not know that they are occurring." At this point the judge advocate would like the commission to note that although the prosecution argues that knowledge is not a necessary element of the crime charged against the accused, we do contend that it has been proved in this case that prior knowledge did, in fact, exist. As pointed out in the opening argument, this proof is in aggravation of the offense charged.

Mr. Takano argues at length that the responsibility for these illegal acts rests not upon the accused who was the Commandant of the Fourth Base Force but upon his subordinate officers who commanded the particular units under his command. That the accused cannot escape his responsibility for these incidents by shifting the blame to his subordinate commanders is obvious from the decisions of previous war crime cases. The Yamashita case involved numerous acts that were committed by personnel attached to subordinate units of General Yamashita's command. Apparently Colonel Kilian attempted to evade responsibility on a similar ground in his court martial for it is stated by the reviewer, "This responsibility could not be delegated to some inferior officer or officers...." The issue was also met in the case of USA v Isamu Monumoto, Lt.-Col., et al. where it was stated, "It is further established that that Commander is responsible...for all that his unit does or fails to do. He cannot shift this responsibility to his staff or subordinate commanders."

The argument of the defense that since there were regulations in the Japanese Navy that international law should be observed, there was no duty upon him to take any measures to insure that the requirements of the law were observed by his subordinates, is obviously unsound. It would be equally as illogical to say that since all members of the military are charged with knowledge of the international criminal law, that no one but the individual or individuals who performed a particular crime are responsible; that any commanding officer who shut his eyes to illegal acts and avoided being present when they were committed would be free of any violation of law. This is to say that since there was a law against it, the commanding officer would have no duty to take measures to insure that violations of that law of war would not and could not occur within his command. A commander of troop could then, like the ostrich, bury his head in the sand to hide from responsibility and avoid trouble. Life would be simple if he could do so. But unfortunately for him and for the intended good fortune of prisoners of war, the law of war prevented him from imitating the ostrich and required that, at risk of be punished for not doing so, he protect prisoners of war and control his subordinates. If this were not true the words of the Supreme Court in the Yamashita case that "the law of war presupposes that its violation is to be avoided through the control of operations of war by commanders who are to some extent responsible for their subordinates" would be meaningless. The Supreme Court was aware of the fact that the law of war prohibited the commission of atrocities against prisoners of war but they affirmed the lat that, regardless of that, there was a positive duty upon commenders of troops to see that their subordinates observed that law. The court said that General Yamashita had an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war...."

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The commission that tried Yamashita concluded that where "there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them." The facts of this case are, even leaving aside the proof of knowledge on the part of the accused, stronger than in the Yamashita case. General Yamashita was in command of the entire Philippine Islands - the command of this accused was confined to the Naval units in the Carolines and all the offenses charged were committed at a subordinate unit located about one and one half miles distant from his headquarters on Dublon Island. In the Yamashita case the proof showed that the offenses took place over a widely scattered area. In this case they were all committed within a subordinate unit of the accused which was specifically designated as the place of confinement for all prisoners of war who arrived at or were taken prisoner on Truk. The proof in the Yamashita case showed that at the time the atrocities occurred the troops under the command of the accused were disorganized due to the onslaught of the American forces; at the time that the offenses in this case occurred there was no disorganization. Yamashita had assumed command of some of the troop who committed the atrocities only one month before. Wakabayashi had been in command four months when the first of these incidents occurred. Yamashita was 150 miles away from the scene of some of the atrocities charged against him - Wakabayashi was at most one and one half miles away when the incidents charged against him occurred. The accused knew that his duty under the law of war towards prisoners of war rested within the confines of that Guard Unit; that if violations of the law occurred, here would be the site of them; yet he still issued no orders or directions for the care and treatment of the prisoners of war who were expected to be confined there. Defense counsel would have us believe that in the light of these facts it was sufficient for the accused to sit back with the realization that the Japanese Navy had put out some regulations many, many years before and that such regulations were available in book form to all his subordinate commanders. To argue that such was the responsibility of his command is to say that neither he nor any other commander of troops had any responsibility under the law. Could not all argue that there was a law against mistreatment or murder of prisoners of war and that anyone could find this out by reference to the Naval Regulations? By such a specious argument Mr. Takano entirely ignores the doctrine of command responsibility which has been recognized in all the annies of history and so clearly expounded by the Supreme Court in the Yamashita case. It overlooks entirely the duty of the accused to control the operations of his command.

Another argument advanced by Mr. Takano is that there was no duty upon the accused to take any affirmative action to protect prisoners of war because no such action was taken by his superiors in a higher echelon of command. It is novel, to say the least, to argue that one is justified in not performing his duty under the law merely because others have been lax in their responsibilities. To carry such an argument to its logical conclusion would be to say that, if everybody in the chain of command did nothing, then only the top man could be held responsible. The prosecution has charged the accused with a failure to perform <u>his</u> duty - - - not that of his <u>superiors</u>'.

In discussing the evidence of this case both Mr. Takano and Commander Carlson have been guilty of grave understatements with reference to the forty-two prisoners of war from the submarine SCULPIN who were confined to the Guard Unit in November, 1943. Mr. Takano describes that the accomodations at the brig were comparatively small. Comparatively, indeed. Minematsu as a rebuttal witness testified that there were solitary cells built to accomodate only <u>one</u> prisoner but that about fourteen prisoners of war were crowded into each of the cells. One wonders with what defense counsel was making a comparison. Mr. Takano then passes this off as being unavoidable. The only reason it was unavoidable was because their Japanese captors made it so. This was the designated unit for the confinement of prisoners of war but nobody bothered to see to it that there were proper accomodations. He then reminds the commission that Nakase testified that some of the prisoners were moved

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from the brig to the guard house to make them more comfortable. In the light of the testimony of the two SCULPIN survivors, Rourke and Baker, there can be no doubt that Nakase lied on the witness stand. Nakase - - himself the convicted murderer of two American prisoners of war at this same Guard Unit and who, himself, was in charge of the guards who mistreated the submarine prisoners of war. The accused took up this lie in his testimony when he said that Minematsu, the commanding officer of the brig at the time, came to him and reported that some of the prisoners had been removed from the brig because of the crowded conditions. The judge advocate realizing that that was a fabrication put interrogatories to Minematsu and the commission heard his answers in the rebuttal evidence. Those answers discredited the story of both Nakase and the accused and impeached them as credible witnesses.

Note the other terminology used by Mr. Takano in describing the treatment of the submarine prisoners - the systematic beatings by their guards he calls "mischievous acts" - "Japanese medical treatment and food might seem to be unsanitary and give the impression that the prisoners were mistreated". It is presumed that counsel is referring to the maggot ridden ball of rice when he speaks of food. And what medical treatment does he refer to? That which was given five or six days after their confinement - it having been denied to them before that in the face of repeated requests - and after the wounds of three of the men had become gangrenous from their confinement in a filthy cell with no medical care. Then to finally get their treatment they had to undergo mistreatment and beatings on a march to the Fourth Naval Hospital where at least two of the prisoners had amputations performed without benefit of anaesthetic. Defense witness, Iwanami the head of the Fourth Naval Hospital, testified that he didn't think the amputations were necessary and defense witness Minematsu says this same Iwanami performed the amputations.

With reference to the execution of the seven prisoners of war on February 17, 1944, Mr. Takano argues that Ishii could not have been telling the truth about receiving orders from Fourth Base Headquarters because the accused and his Chief of Staff Higuchi says it isn't so. Truth does not lie in numbers. It is not unnatural that the accused, along with all other matters that implicate him, denies this. Higuchi, too, has a strong personal interest, for an admission by him on this matter would incriminate him along with the accused. The prosecution was unable to prove that word of this phone call definitely reached the accused in person but we do feel that we have established (and such a fact does not have to be established beyond a reasonable doubt) that a request was made to his headquarters and approval for the executions given. Mr. Takano argues that this commission should accept the testimony of Captain Tanaka on those points that meet with his approval but should reject that portion which is damaging to the accused, namely that Fourth Base Headquarters approved the executions, because, Mr. Takano says, this is heresay and has no evidentiary value. The prosecution feels that this commission will weigh the evidence in a less biased light.

With reference to the report made at the conference on the evening of February 17th by Captain Tanaka concerning the execution of the prisoners, Mr. Takano would have us believe that this did not occur and that everyone except the accused is confused about the matter. The evidence shows that Captain Tanaka reported the matter in the presence of the accused and his staff. Captain Inoue testified that on his arrival Kawamura reported from his notes of the meeting to the effect that Tanaka had made a report on the execution of the prisoners. Counsel might have many doubts as to whether this report was made but this military commission should have no such doubts from the evidence presented.

Mr. Takano left for final discussion the incident of the execution of the eight prisoners of war by the personnel of the Fourth Naval Hospital although in point of time and precedence in the charge it comes before the

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February 17th incident. And well he might leave it to the last because it is the most damaging piece of evidence in aggravation against the accused and the most difficult to attempt to explain away. The argument of counsel on this point is interesting. First he tells you that Iino could not have received a telephone request from Iwanami to get permission to use prisoners of war for physical experiments because Iwanami says he didn't make the call; secondly even if he did and reported it as he claims to the accused, it would not mean anything because the accused was on an ulcer diet at the time. Let us examine his first argument - Captain Iwanami's denial of the phone call requesting the use of the prisoners for physical experiments. Who is this witness Iwanami that counsel would have you believe as against Captain Iino? It is the same Iwanami, who the record shows was commanding officer of the Fourth Naval Hospital, and did in fact perform experiments upon and kill six American prisoners of war about two weeks after the alleged phone request by him. The fact that Iwanami a short time thereafter did obtain eight prisoners from the Guard Unit and did perform physical experiments upon them bears forcibly on the truth of the testimony of Captain Iino. Bearing further on the credibility of Iwanami is his admission of conviction of the murder of two other American prisoners of war on Dublon Island in July 1944. One who thought so little of the life of prisoners of war could hardly be expected to speak truthfully in matters concerning them. The second contention of defense counsel is that because the accused at the time was on an ulcer diet he could not possibly have understood the nature of Iwanami's request as relayed to him by Captain Iino. This contention borders on the ridiculous. The diet of the accused could in no way affect his hearing powers, any more than the ulcer diet he is now on could prevent him from hearing my words. Captain Iino testified that he not only reported to the accused that Iwanami had requested prisoners for physical experimentation but that he also explained to the accused that he, Iino, was against experiments on humans and that such experiments were unnecessary. There can be no doubt that the accused heard and understood what was said by Iino. This evidence is, as I have said, most damaging to the accused because it has been proved that although he was in daily contact with Iwanami on the days following this conversation he at no time breached the subject to Iwanami or warned him against using prisoners of war for physical experimentation. The proper warning from him to Iwanami would have prevented the inhumane experiments upon eight prisoners of war and their murder. Even a word of caution or direction to the commanding officer of the Forty-first Naval Guard Unit would have prevented these crimes. But nothing was done and eight prisoners, whom the accused had a duty to protect, met horrible deaths.

Mr. Takano concludes his argument with the statement that since, as he claims, the prosecution has not shown that the accused had prior knowledge of the incidents, he cannot be found guilty as charged. The judge advocate has previously pointed out that there was no averment of knowledge in the charge, the charge adequately stated an offense without such an averment, and no proof of prior knowledge is necessary for a conviction of the accused as charged. However, we disagree with counsel's contention that prior knowledge on the part of the accused has not been proved to have existed. We contend that there is positive, definite, and credible evidence that the accused had prior knowledge.

In refuting the arguments of Mr. Takano the judge advocate feels that he has, with a few exceptions, at the same time answered all the arguments raised by Commander Carlson of defense counsel. Commander Carlson raises the point that since the Kilian case did not involve a war crime, it cannot be used as a precedent. He loses sight of the fact that the offense in that case was similar to the charge against Takabayashi -- Neglect of duty on the part of a

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commanding officer. For that reason it is a valuable precedent on the question of command responsibility. It should be noted that Col. Kilian's position was analagous to that of the accused -- both he and Wakabayashi had a large command, of which the brig was only one fraction. The judge advocate feels that precedents in the field of ordinary torts or criminal action are of little if any value but that precedents in the field of military and international law are important guide posts. It is for this reason that so much stress has been placed upon the decisions and opinions of the court and reviewing authorities in both the Yamashita and Kilian cases and mention of the law or cases pertaining to ordinary criminal actions avoided.

Commander Carlson, like his associate Mr. Takano, minimizes the mistreatment and the murder of the prisoners of war and infers that the prosecution witnesses were either telling untruths or exaggerating. The prosecution is content to leave to the commission the decision as to the credibility of prosecution witnesses Baker, Rourke, Iino, Inoue and Ishii as against the convicted murderers of POW's Nakase, Iwanami, Yoshinuma, Danzaki, and Asano, upon whose testimony the defense relies.

The judge advocate feels that the guilt of the accused for the alleged neglect of duty has been proved beyond any reasonable doubt and the weight of credible evidence shows that that neglect was aggravated because of prior knowledge of the incidents. He should be found guilty as charged.

Respectfully,

James P. Kenny

James P. Kenny,
Lieutenant, USN,
Judge Advocate.

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PETITION FOR MITIGATION

Delivered by

Mr. Sadamu Sanagi
A Counsel for the Accused.

1. The accused Wakabayashi has been incarcerated for more than two years ever since he was put in Sugamo Prison on May 15, 1946. When it is considerable discomfort even for a healthy man to pass many months in solitary confinement, it is not difficult to think that the accused Wakabayashi who has been rather weak after his past illness must have suffered during these days. We request that his confinement for more than two years be taken into consideration when you deliberate on his sentence.

2. Two incidents among the three with which the accused Wakabayashi is charged happened when he was suffering from stomach ulcers and was even then as he is now a hospital patient. Although he is held liable as Commandant of the Fourth Base Force for the incidents which occurred within his subordinate command, we feel the situation that he was ill in bed at the time of their occurance should be fully understood. We request that this point be taken into consideration by you.

3. As regards the character of the accused, much evidence was read before this commission. It is our conviction that you have fully understood his character.

We humbly beg that the above circumstances be taken into consideration upon deliberation of his sentence and that you will deal leniently with him.

Respectfully,

/s/ Junjiro Takano

/s/ Sadamu Sanagi

I certify the above to be a true and complete translation of the original in Japanese to the best of my ability.

EUGENE E. KERRICK, JUNIOR,
Lieutenant, U. S. Naval Reserve.
Interpreter.

FFF

0048

REPLY TO THE PLEA OF THE ACCUSED FOR LENIENCY

Delivered by

LT. JAMES P. KENNY, USN,
Judge Advocate

As pertains the plea for leniency, defense counsel has pointed to period of confinement of the accused prior to trial and has requested that the commission take that into consideration in considering the sentence to be meted out to the accused. The judge advocate feels that the period of confinement prior to trial has no bearing upon the gravity of the offense of which the accused has been found guilty. Defense counsel also urges that this military commission consider the alleged poor health of the accused at the time the offenses were committed. The evidence shows that during the period in question the accused was at all times in active command of his forces and the judge advocate therefore is of the opinion that the poor health of the accused should not be given any weight in considering the sentence to be adjudged.

The judge advocate at this time offers no evidence in aggravation but points out that during the trial evidence was given that the accused had prior knowledge of the atrocities that were committed. This should be considered by the commission as matter in aggravation.

Respectfully,

James P. Kenny

JAMES P. KENNY

GGG

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JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT : Japanese Naval Documents.

C.L.O. No. 7376(PD) 19 September 1947

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No. 7357(PD) dated 12 September 1947, subject as above.

c. C.L.O. Memorandum No. 7231(PD) dated 15 September 1947, subject as above.

d. C.L.O. Memorandum No. 7284(PD) dated 16 September 1947, subject as above.

e. C.L.O. Memorandum No. 7335(PD) dated 18 September 1947, subject as above.

2. Four (4) blue prints and six (6) tables showing the geographical jurisdiction and organization of the 4th Fleet, IJN. successively, as required in Paragraph 1a. of the reference a. Check Sheet, are enclosed herewith.

3. A report of the Second Demobilization Bureau with regard to Paragraph 1f. of the reference a. Check Sheet, is stated on the attached paper (Annex I).

4. A report of the Second Demobilization Bureau with regard to Paragraph 1j. and k. of the reference a. Check Sheet, is stated on the attached papers (Annex 2), and the required documents in that regard are submitted herewith as mentioned therein.

FOR THE PRESIDENT:

/s/ Y. Katsuno
(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

Enclosures:
a. 4 blue prints and 6 tables as stated in para. 2 above.
b. A report as stated in para. 3 above.
c. A report as stated in para. 4 above, accompanied by 15 books.

Certified to be a true copy.

Herbert L. Ogden
HERBERT L. OGDEN, Commander, U. S. Navy.

EXHIBIT 1 (1)

0050

Annex table No. 3 — As of 1 April 1943.

Organization		Location	Commanding Officer	Remarks
	KASHIMA (Flag-ship of 4th Fleet)		TAKADA, Sakae (1 Jul., HAYASHI) ((.....)	1 Nov., NAGARA added 10 Nov., KASHIMA removed.
	14th Squadron	NAKA, [illegible]ZU	ITO Kenzo (Mid-Jan 1944 KIYOTA Takahiko)	1 Nov., 22nd Air Squadron added.
	3rd Special Base Force		TOMONARI Saichiro (late Sept., SHIBAZAKI Keiji)	
		IKUTA-MARU	Palau	
		67th Naval Guard	Nauru	
Combined Fleet (YAMAMOTO Isoroku) (Mid-Apr., KOGA MINEICHI)	4th Base Force		TAKEDA Moriji (15 Jul. NAKABAYASHI Seisaku)	
4th Fleet (KOBAYASHI Masashi)		31st Sub-Chaser Division Sub-Chaser Nos. 31, 32, 33, KIMI-MARU, No. 2 CHOAN-MARU, No. 2 CHOKO-MARU HEI-JO-MARU, 57th Aux. Sub-Chaser Division	Truk	1 May, 32nd Aux. Sub-Chaser Division added.
		41st Naval Guard	Truk	KIMIIE Tanetsugu (Early Apr., KOBAYASHI Matsushi; early Jul., NAITO Atsushi; late Sept., ---------- Mid Dec., TANAKA, Seiji)

EXHIBIT 1 (2)

	42nd Naval Guards	Ponape	NAKANO Toji (Late Sept. NAITO Atsushi)	
	43rd Naval Guards	Palau	IKEDA Jin (Reorganized into 30th Special Base Force on 10 Jan. 1944)	Army Nankai 3rd Garrison (Wake) and Army Nankai 4th Garrison (Marshall) were put under the Command of 4th Fleet since mid-June 1943.
	902nd Flying Corps	Truk	KAKIDA Akiyuki (Mid-Jul. 1943, HAYASHIDA Yukitora	
	85th Submarine Base Corps	Truk	HIRANO Takeshi (Until 31 Mar. 1944)	
	3rd Communication Corps	Palau	FUKAMACHI Yuzuru (Until)	
	4th Communication Corps	Truk	ISOBE Atsushi (Until mid-Aug. 1944)	
	4th Harbormasters Office	Truk	?	
5th Special Base Force		Saipan	FUKUZAWA Tsuneji (1 Oct. FUJIMURA Takehisa)	1 June, 5th Communication Corps added.
	SHOTOKU-[redacted] SHOEI-MARU 60th Sub-Chaser Div.			
	54th Naval Guards	Guam	SUGIMOTO Yutaka (Late July ?)	
	5th Communication Corps	Saipan	SHOJI Kookichi (Early June ?)	
6th Base Force		Kwajalein	ABE Koozoo (Late Sept. AKIYAMA Monzoo)	

EXHIBIT 1 (3)

005

(KATORI-MARU, (MITSUSHIMA-MARU (DAIDO-MARU, 16th (Aux. Minesweeper (Div., 63rd & 65th (Aux. Sub-Chaser (Divisions			15 June, 66th Naval Guards ~~(Mille)~~; 20 Dec., 68th Naval Guards (Brown) organized and added.
(61st Naval Guards	Kwajalein	NARITA Kiyoji (1 May, ARIMA Seisuke mid-Sept. YAMAGATA Seiji)	
(62nd Naval Guards	Jaluit	TAKEDA Jitsuke (Until termination of War)	
(63rd Naval Guards	Maloelap	(Late Sept. KUMAZAWA Sotozo; mid-Oct. KAMADA Shoichi)	
(64th Naval Guards	Wotje	NAKATSU Narimoto (Mid-July YOSHIMI Shin-ichi)	
(65th Naval Guards	Wake	SAKAIBARA Shigematsu (Until termination of War)	
(952nd Flying Corps	Kwajalein	OKADA Shiro (Late Oct. TSUKAIE Giichi)	
(6th Submarine Base Force	Kwajalein	(30 Apr. ARIMA Seisuke; 15 Sept. YAMAGATA Seiji	
(6th Communication Corps	Kwajalein	SUZUKI Tadayoshi (1 July, WADA Sueotsu)	

EXHIBIT 1 (4)

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2nd Escort Group	(YUZUKI, OITE (ASANAGI, OKI (HIYODORI, OTORI, (CHOUN-MARU ((	Staff Officer HIGUCHI Nobuo	15 Jul. FUKUE added. 15 Aug. MUTSURE added. 30 Oct. MIKURA added. 1 Nov. HIRATO added. 15 Nov. 2nd Escort Group removed.

EXHIBIT 1 (5)

Annex table No. 4. As of 1 January 1944.

Organization	Location	Commanding Officer	Remarks
Combined Fleet (KOGA Mineichi) (TOYODA Soemu Since early in May)	NAGARA	?	
	14th Squadron (NAKA, ISUZU)	ITO Kenso (KIYODA Takahiko, Since mid-Jan.)	
	22nd Air Squadron	HASEGAWA Kiichi	
	775th Flying Corps	YAMASHITA Sakae (KUSUMOTO Shigeto, Since early in Mar.)	
	802nd Flying Corps	KAMO Yuhao (Affiliated with 14th Air Fleet in mid-Feb.)	
4th Fleet (KOBAYASHI Masashi) (HARA Chuichi Since Late in Feb.	252nd Flying Corps	YANAMURA Yoshitane (FUNAKI Tadao, Since mid-Feb.)	
	552nd Flying Corps	TANAKA Yoshio (Up to mid-Mar.)	
No Flagship; H.Q. located ashore, Truk.	3rd Special Base Force		
	IKUTA-MARU	Palau	
	67th Naval Guards	Nauru, Ocean	SOEDA Hisayuki (Up to end of War)	Eliminated on 5 Jan.
	4th Base Force	NAKABAYASHI, Seisaku (ARIMA Kaoru, Since mid-Feb	IKUTA-MARU newly added on 5 Jan.

EXHIBIT 1 (6)

(32nd Sub-Chaser Division, Sub-chasers Nos. 31, 32, and 33, KOEI-MARU, 57th Sub-chaser Division	Truk		67th Naval Guards (Nauru, Ocean) newly added on 5 Jan. C.O., SOEDA Hisayuki.
(41st Naval Guard	Truk	TANAKA Seiji (ASANO Shimpei Since late in Feb.)	69th Naval Guards (Ulthe) newly added on 1 Feb. and eliminated on 1 Mar. C.O., OHOYA Goichi.
(42nd Naval Guard	Ponape	NAITO Atsushi (Up to the end of war)	44th Naval Guards (Mele-yon) newly added on 1 Mar. C. O., MIYATA Yoshinobu.
(43rd Naval Guard	Palau	IKEDA Jin (Reorganized into 30th Special Base Force on 10 Jan.)	Eliminated on 10 Jan.
(902nd Flying Corps	Truk	HAYASHIDA Yukitora (Up to early Jul.)	
(85th Submarine Base Corps	Truk	HIRANO Takeo (Up to 31 Mar.)	
(3rd Communication Corps	Palau	FUKAMACHI Yuzuru (Unknown since then)	Eliminated to be re-organized into 30th Special Base Force on 10 Jan.
(4th Communication Corps	Truk	ISOBE Atsushi (Up to mid-Aug.)	
(4th Harbormaster's Office	Truk	MIURA Tomosaburo	
5th Special Base Force	Saipan	TSUJIMURA Takehisa (Up to early Jul.)	

EXHIBIT 1 (7)

950054

	(60th Auxiliary Sub-Chaser Division.			((55th Naval Guards (Saipan) C.O., OSHIMA Sanji; 56th Naval Guards (Tenian), C.O. OHOYA Goichi newly added on 1 Mar. Reorganized into 5th Base Force on 1 Mar. 21st Sub-Chaser Div. Newly added on 1 Mar. 5th Communication Corps, C.O., MIYAZAKI Shinsaku, newly added on 1 Mar.)) All eliminated on 4 Mar.
	(54th Naval Guards	Guam	SUGIMOTO Yutaka (Up to late Jul.)	
	6th Base Force	Kwajalein	AKIYAMA Monzo (Up to early Feb.)	
	(DAIDO-MARU, 16th Auxiliary Minesweeper Division, 63rd and 65th Auxiliary Sub-chaser Divisions			DAIDO-MARU eliminated on 5 Feb.
	(61st Naval Guards	Kwajalein	YAMAGATA Seiji (Up to early Feb., Unknown since then)	
	(62nd Naval Guards	Jaluit	MASUDA Nisuke (Up to the end of war)	
	(63rd Naval Guards	Maloelap	KAMADA Shoichi (Up to the end of war)	
	(64th Naval Guards	Wotje	YOSHIMI Shinichi (Up to the end of war)	
	(65th Naval Guards	Wake	SAKAIBARA Shigematsu (Up to the end of war)	
	(66th Naval Guards	Mille	SHIGA Masanori (Up to the end of war)	

EXHIBIT 1 (8)

952nd Flying Corps	Kwajalein	HORIIF Giichi (Up to early Feb., Unknown since then)	
6th Submarine Base Corps	Kwajalein	YAMAGATA Seiji (Up to 4 Mar.)	
6th Communication Corps	Kwajalein	WADA Sumihisa (Up to 4 Mar.)	
30th Special Base Force		ITO Kanzo	((Newly added on 10 Jan. Reorganized into 30th Base Force on 1 Mar. 45th Naval Guards (Yap), C.O. MORI Kaku newly added on 1 Mar. 5th Communication Corps newly added on 1 Mar.)) All eliminated on 4 Mar.

EXHIBIT 1 (6)

058

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO: GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM: Central Liaison Office, Tokyo.

SUBJECT: Japanese Naval Documents.

C. L. O. No. 7284(PD) 16 September 1947

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."
b. C.L.O. Memorandum No. 7178(PD) dated 12 September 1947, subject as above.
c. C.L.O. Memorandum No. 7231(PD) dated 15 September 1947, subject as above.

2. Submitted below is a report on the period of duty of Commander-in-Chief and others of the Fourth Fleet, as required in paragraph 1c. of reference Check Sheet:

a. Period of duty of the Commanders-in-Chief of Fourth Fleet.

Name and Rank	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
INOUE Shigeyoshi, Vice-Admiral	From: 11 Aug. 1941 To : 25 Oct. 1942	From: 21 Aug. 1941 To : 31 Oct. 1942
SAMEJIMA Tomoshige, Vice-Admiral	From: 26 Oct. 1942 To : 31 Mar. 1943	From: 31 Oct. 1942 To : 5 Apr. 1943

b. Period of duty of four personnel in the posts connected with 4th Fleet.

NAME	RANK	POST	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
HARA Chuichi	Vice-Admiral	C-in-C 4th Fleet	From: 19 Feb.1944 To : End of War	From: 23 Feb.1944 To : End of War
KOBAYASHI Masashi	Vice-Admiral	C-in-C 4th Fleet	From: 1 Apr.1943 To : 18 Feb.1944	From: 5 Apr.1943 To : 23 Feb.1944
WAKABAYASHI Seisaku	Vice-Admiral	Commandant, 4th Base Force, & 2nd Escort Force.	From: 15 July1943 To : 18 Feb.1944	From: July 1943 To : 23 Feb.1944

Certified to be a true copy.

Herbert L. Ogden

HERBERT L. OGDEN, Commander, U. S. Navy.

EXHIBIT 2 (1)

0059

NAME	RANK	POST	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
ARIMA Kaoru	Rear-Admiral	ditto	From:19 Feb.1944 To :30 Apr.1944	From:23 Feb.1944 To :30 Apr.1944
		and Chief of Staff, 4th Fleet	From:30 Mar.1944 To :30 Apr.1944	
ARIMA Kaoru	Rear-Admiral	Chief of Staff, 4th Fleet.	From: 1 May 1944 To :11 Aug.1944	From: 1 May 1944 To :12 Aug.1944

Remarks: (a) The Japanese Navy did not use such compliance of order form, and, as a rule, the responsibility of duty was assumed or transferred at the time of actually assuming or leaving the duty.

(b) The date of actually assuming duty of Vice Admiral WAKABAYASHI is under investigation.

FOR THE PRESIDENT:

/s/ Y. Katsuno
(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

EXHIBIT 2 (2)

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT : Japanese Naval Documents.

C.L.O. No. 7693(PD) 2 October 1947

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No. 7284(PD) dated 16 September 1947, subject as above.

2. In regard to the date on which ex-Vice-Admiral WAKABAYASHI, Seisaku actually took office as Commander of the Fourth Naval Base Force and concurrently Commander of the Second Naval Escort Force, ex-Naval Captain YAMADA, Tadashi, then Aide-de-Camp of the Fourth Fleet stated that the date in question was presumed to have been 24 or 25 July 1943.

FOR THE PRESIDENT:

/s/ Y. Katsuno
(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

EXHIBIT 2(3)

0061

JAPANESE GOVERNMENT
CENTRAL LIAISON AND CORRDINATION OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison and Corrdination Office, Tokyo.

SUBJECT : Rosters of Staff Officers of Fourth Fleet, Fourth Base Force and Sixth Base Force.

C.L.O. No. 581(3.I.) 5 March 1948

1. Reference: Legal Section's Check Sheet No. 15139 LS-Z dated 19 February 1948, subject: "Request for Rosters."

2. The required rosters of the Staff officers of the Fourth Fleet, Fourth Base Froce and Sixth Base Force, as prepared by the Second Demobilization Bureau Liquidation Division, are submitted herewith.

FOR THE PRESIDENT:

/s/ K. Yoshida
(K. Yoshida)
Chief of Liaison Section,
Central Liaison and
Corrdination Office.

Enclosures: Three (3) rosters.

Certified to be a true copy:
Herbert L. Ogden
HERBERT L. OGDEN, Commander, U.S. Navy.

EXHIBIT 3 (1)

0062

EXHIBIT 3 (2)

Roster of Commandants and Staff Officers of 4th Naval Base Force.

Name	Ex-Rank	Post	Tenure	Present Address
MOIZUMI Shin-ichi	Vice Admiral	Commandant	11 Aug. 41- 15 Jun. 42	950, 2-chome, Den-enchofu, Ota-ku, Tokyo-to.
TAKEDA Morji	"	"	15 Jun. 42- 15 Jul. 43	56, Aza Hotarutani, Oaza Asamushi, Nouchi-maru, Higashitsugaru-gun, Aomori-ken.
WAKABAYASHI Saisaku	"	"	15 Jul. 43- 19 Feb. 44	Under detention on Guam Island.
ARIMA Kaoru	Rear Admiral	"	19 Feb. 44- 1 May 44	"
ABE Tokuro	Commander	Staff Officer	11 Aug. 41- 31 Oct. 41	Bunda, Bunda-mura, Kitakanbara-gun, Niigata-ken.
HORI Yoshifusa	"	"	10 Feb. 43- 17 Nov. 43	Killed in action on 17 Feb. 44.
URAYAMA Chiyosaburo	"	"	31 Oct. 41-	149, Oaza Hiiwa, Hiiwa-machi, Nishimurayama-gun, Yamagata-ken.
HIGUCHI Nobuo	"	"	10 Feb. 43-	Under detention in Guam Island.
TAKUMA Tokio	Lt-Commander	"	11 Aug. 41- 15 Dec. 42	Jutaku Ha-No. 3, Hirasaku-machi, Yokosuka-shi.
MIZUNO Denzaburo	"	"	15 Dec. 42- 20 Apr. 43	c/o Hase, 56, Onichi, Nishi, Naga-machi, Sendai-shi.
AGO Shigeju	"	"	5 Nov. 43- 1 May 44	2179, Kamishioji, Shioji, Izuno-shi, Shimane-ken.

KINOSHITA Teisuke	Lieutenant	Staff Officer	11 Aug. 41- 10 May 42	9, Machiya, Fukui-shi.
TSUNEISHI Hiroshi	Lieutenant	"	10 May 42- 15 May 43	c/o Daiso Morioka, Nagahama, Miro-machi, Jure-shi.
MORITA Yasushi	"	"	15 May 43- 15 Oct. 43	383, Oaza Kino, Shirokita-mura, Kikuchi-gun, Kumamoto-ken.

EXHIBIT 3 (3)

064

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO. : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT : Japanese Naval Documents.

C.L.O. No. 7231(PD) 15 September 1947

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No. 7157(PD) dated 12 September 1947, subject as above.

2. Copies in English and in Japanese of the Naval Staff Regulations as required in paragraph g. of the reference a. Check Sheet, are enclosed herewith.

FOR THE PRESIDENT:

/s/ Y. Katsuno.
(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

Enclosures: Copies in English and Japanese of a document.

Certified to be a true copy.

Herbert L. Ogden
HERBERT L. OGDEN, Commander, U. S. Navy.

EXHIBIT 4 (1)

0065

Enclosure

I. There were no regulations whatever in the laws or ordinances issued by the Japanese Government or the regulations or orders issued by the Navy Ministry or by the Naval General Staff charging any specified staff officer with responsibility for the custody of POWs detained in a unit, their administration or their operation.

II. The duties of staff officers and aides-de-camp in a headquarters are fixed by the commander-in-chief or the commandant. It follows therfore that in a headquarters there should always be a staff officer or an aide-de-camp assigned to the duty of handling POWs. The competence of such staff officer in carrying out his assigned duty is in any case the competence of a staff member of the commander-in-chief or the commandant; a staff officer in the Navy is never authorized to issue orders, directions, etc. by himself.

III. Concerning the duties of the staff officers in the fleet or squadron the following are stipulated in the Fleet Ordinance:-

Article 35.

The Chief of Staff, who is a member of the Staff to the Commander-in-Chief, shall assist the Commander-in-Chief in arranging the affairs of the Fleet and in supervising other members of the Staff and other personnel associated in the affairs of the Headquarters relative to the discharging of their duties.

Article 36.

The Staff Officers who are members of the Staff to the Commander-in-Chief, shall handle affairs concerning discipline, morale, education, training, operation, etc. of the fleet. UNDER ORDERS OF THE CHIEF OF STAFF

Engineer Staff Officers shall, in addition to the foregoing regulation, carry out their duties under the direction of the Chief Engineer of the Fleet.

Article.37.

The Aides-de-Camp, who are members of the Staff to the Commander-in-Chief, shall handle affairs concerning ceremonies, personnel and miscellany. UNDER ORDERS OF THE CHIEF OF STAFF

Article 38.

The Staff Officers and Aides-de-Camp, who are members of the Staff to the Commandant, shall carry out their duties in conformity with the preceding two articles under orders of the Commandant.

But the duties of the Senior Staff Officer shall conform to those of the Chief of Staff; and where there is no Aide-de-Camp, his duties shall be assumed by a staff Officer.

EXHIBIT 4 (2)

Enclosure to C. L. O. No. 7231 (PD)

0066

Article 51.

All reports and opinions to the Commander-in-Chief or the Commandant submitted by a member of the Staff or by other personnel affiliated with the Headquarters in carrying out their duties shall always be made through the Chief of Staff, or through the Senior Staff Officer in case there is no Chief of Staff.

IV. Concerning the duties of the Staff Officers of a Temporary Base Force, the Converted Vessels and Temporarily Established Units ordinance stipulates as follows:-

Article 49-4.

The Temporary Base Force shall have the following personnel as the staff to the Commandant; but depending on the organization of a temporary base force or on the situation, a part of them may be dispensed with:

Chief of Staff, Staff Officers, Aide-de-Camp, Chief Engineer, Chief Surgeon, and Chief Paymaster.

The regulations covering the duties of the chief of staff and other corresponding personnel of the fleet in the Fleet Ordinance shall apply with the necessary modifications to the personnel mentioned in the preceding paragraph.

EXHIBIT 4(3)

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HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N.Y.

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In the matter of the beating and torturing of Lieut.Commander George Estabrook Brown, Jr., 98383, U.S.N.R., on Truk Island, at Ofuna Secret Questioning Camp, at Omori Prison Camp and at Mitsushima Prison Camp, from November 20, 1943 to September 4, 1945, by unknown Japanese personnel.

Perpetuation of Testimony of George Estabrook Brown, Jr., Lieut.Commander, U.S.N.R.

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Taken at: Legal Office, Third Naval District, 90 Church Street, New York, N.Y.

Date: 10 July 1946

In the Presence of: Lieut.Commander Elroy O. True, Jr., (D), U.S.Naval Reserve.

Reporter: Charles N. Laird, stenographic-reporter.

Questions by: Lieut.Commander Elroy O. True, Jr., (D), U.S.Naval Reserve.

Q. Please give your name and rank.

A. George Estabrook Brown, Jr., 98383, U.S.Naval Reserve, Lieut. Commander, now on inactive duty.

Q. Please state the date and place of your birth.

A. April 9, 1919, Cleveland, Ohio.

Q. Are you married or single?

A. Single

Q. Please state the extent of your formal education.

A. I attended Yale University for two years, 1937 to 1939, and New York University for one year, 1939-1940.

Q. Where is your official residence?

A. 1172 Park Avenue, New York, N.Y.

Q. What is your occupation?

A. Banking.

EXHIBIT 5 (1)

Q. Please state the date of your capture and the dates and locations where you were held as a prisoner of war.

A. The date of my capture was November 19, 1943. From November 20, 1943 to about November 28, 1943, I was at Truk Island; from November 28, 1943 to December 5, 1943, en route to Japan on board a Japanese auxiliary carrier, former NYK converted liner; from December 5, 1943 to January 15, 1944, retained in the Ofuna secret questioning and intimidation camp, Ofuna, Japan, eight miles from Tokyo; from January 15, 1944 until March 1, 1945, Omori Prison Camp, Tokyo POW Camp No. 1; from March 1, 1945 until September 4, 1945 at Hitoushima Prison Camp, Hitoushima, Japan, Tokyo Detached Camp No. 2.

Q. Please relate the treatment you received immediately after your capture?

A. Thirty-nine men and two officers and myself were taken aboard the Japanese destroyer. The Japanese put poles and ropes over the side for us to climb up if we had the strength. Upon coming on deck my crew were stripped of any excess clothing they had, all personal effects and jewelry. We were then ordered forward through two rows of Japanese enlisted men who lined the deck, with small paddles and clubs and sticks who pounded us on the head and the body and legs as we passed forward to the forecastle. Upon arrival in the forecastle, the Japanese made us face forward while they continued to pick up the rest of the men, in a crouched position. At that time the Japanese pharmacist's mate performed slight medical treatment to those with wounds. One man who appeared to be too far gone, was thrown over the side after a brief inspection. The Japanese officials then took one of my enlisted men around behind a gun turret and worked him over to get information about the submarine and about our destination and home port. When they were through questioning the enlisted man they called me and proceeded to beat me with their fists and a small club for having given them false information about the name of the ship, the skipper and the tonnage. They questioned me concerning the date of sailing and destination. When I refused to answer they again beat me with their fists and told me the answers they received from the enlisted man. Then they returned me to the group of men on the forecastle of the destroyer and proceeded to Truk.

Q. Can you describe or give the names of any of the persons responsible for the beating or torture to which you were subjected?

A. I don't remember anything about any of the personnel on the destroyer. However, a Japanese captain in the naval intelligence who was in charge of the questioning at the Ofuna Prison Camp, knows the name of the skipper of this destroyer. This Japanese captain was known by Commander John Fitzgerald, U.S.N. of the Grenadier, and Captain Mayer, former gunnery officer of the Houston, whose name could be found in their reports under the nick-name of the "little commander". This same intelligence captain was

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also attached to the Japanese Embassy in Washington at the time of Pearl Harbor and was detained at Hot Springs, Virginia. He was a post-graduate of the Princeton University and University of Vermont.

Q. Please relate the treatment you received immediately after you were taken off the destroyer.

A. I was blind-folded, bare-footed and the only clothing I had was a pair of torn underdrawers. We were forced to walk across a coral beach bare-footed with a Jap guard prodding us with rifles; our hands were handcuffed with rope. We were pushed into a truck and taken to a small detention camp or prison on the far side of this island. Upon arrival at this camp, still blind-folded, we were forced out of the truck and made to walk across more sharp coral and forced into small 8 x 6 cells, with thirteen men to each cell. The Japanese guards were poking clubs and beating the men who were near the door. After ten minutes in this cell I was removed and again blind-folded and hands bound and led across the coral to a table set up in the yard behind which a Japanese Rear Admiral and five or six other ranking officers of the Japanese Navy were seated. They proceeded to question me through an interpreter. The method of questioning was to have two Japanese enlisted men stationed behind the personnel with six foot, 2 x 2 clubs. Upon a signal from the Admiral, the Japanese seaman would apply four or five swats across the back and legs of the personnel being questioned, then the Admiral would ask a question through the interpreter. Upon the person's giving his answer, true or false, the admiral would again signal and another rain of blows would be showered from behind. At one time during the questioning, the force of the blows were such that they lifted me off the ground and across the table and I fell upon the Japanese Admiral. I was then dragged off and severely beaten for daring to attack a Japanese Admiral. After this questioning I was led blind-folded to a pill-box and made to stand at attention for 48 hours, broken only by intervals of questionings and beatings. At any time that I relaxed from a position of rigid attention, the guard would drop his rifle on my bare foot or kick me in the shins and beat me over the head with his rifle butt. After two days the more serious part of the questioning seemed to cease and I was returned to the cell block where my enlisted men were. The Japanese made no segregation of the wounded and the healthy men and gave no medical treatment while in Truk. We were constantly harassed and clubbed by guards stationed in the compound of the cell block for the ten days we were on Truk. There was only sufficient space in the cell for three men to lie down at a time. Therefore ten men had to squat or stand while three rested for a short period. After ten days we were removed from the cell block and marched across the coral to small boats and were taken out to two Japanese converted NYK carriers.

EXHIBIT 5 (3)

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Q. Did these beatings or any one particular blow cause you any continuing disability?

A. I don't believe so.

Q. What information did the admiral seek to obtain from you?

A. The admiral sought to obtain information concerning the operation of other submarines in the Truk area, the operation of submarines from Pearl Harbor, fleet operations in Pearl Harbor and the Solomons; information concerning radar; information concerning construction and engineering problems aboard the Sculpin; information concerning other war patrols made; information concerning past naval history, education, naval schooling, health conditions, and what I believe was for his own personal information, morale conditions of Americans and their allies, and code and communication information.

Q. What happened to you after this assault?

A. After ten days I was removed from Truk and sent to Honshu, Japan, and landed at Yokosuka, where we were again blindfolded and placed aboard a train and sent to Ofuna. At Ofuna station the blind-folds were removed and we were marched two miles to a small questioning camp where we were lined up and logged in. At this time I believed I was in a regular POW camp but since the camp did not have any regular Japanese interpreter, the Japanese were using an Australian POW, Lieut. Limpiere, as an interpreter, and while interpreting the Japanese questions, he sandwiched in information to me to the effect that we were in a secret questioning and intimidation camp where no prisoner of war rules were in effect. After induction into the camp, they issued Japanese seamen uniforms to us and we were led to individual cells and instructed that we could not talk either to each other or to anyone else in the camp. We were given a small sheet of paper with three or four Japanese words on it and instructed that these were Japanese orders that we must learn immediately and obey. Failure to obey meant clubbing by the Japanese guard or severe beating with fists. For the first ten days we had no shoes and very little clothing. I had a very severe cold, chronic diarrhea and no medical service was available. Japanese naval intelligence officers from Tokyo came daily to question us. The questions were the same or about the same as those at Truk. The treatment received in this camp and the conditions were fully described in the report made by Captain Mayer, former gunnery officer of the U.S.S. Houston, and Captain John Fitzgerald, former gunnery officer of the submarine Grenadier. I would also like to add that upon induction at this questioning camp, I was informed by the Japanese commanding officer of the camp, a warrant officer, that we were not in a POW camp, that we were lower than the lowest Japanese seaman, no matter what our rank had been in our own country and that we would be treated as such. This was told to us many times during the thirteen months

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that I was detained in this camp. While at Truk the Japanese Admiral instructed me through the interpreter, that I was not a prisoner of war and was a captive, that the Japanese were at liberty to kill me and it was only their kindness that prevented them from doing so, therefore I must answer all their questions under the penalty of death, if I was caught lying or withholding information. He said the Japanese had never signed the Geneva Convention and that they were at liberty to treat us in any way in which they saw fit.

Q. Are there any other occurrences that you recollect while you were at Ofuna Prison Camp which to you constituted atrocious and inhuman treatment by the Japanese?

A. While at Ofuna Prison Camp no personnel were registered as prisoners of war. We was not permitted to write or communicate or receive communications of any sort with the outside. No facilities that should be provided to prisoners of war were provided in this camp; by that I mean, there was no canteen to buy or provide toilet articles or small luxuries that under normal circumstances a prisoner would have been able to buy either with his pay or with the money for which he worked. At no time during my thirteen months at Ofuna was I recognized as an officer in the U.S.Navy and I can say that being an officer was the cause of additional harassing and beatings by the Japanese seamen who acted as guards. The seamen guards seemed to derive great pleasure and satisfaction from working over and torturing American officers. No Red Cross supplies by way of clothing or articles of comfort were received while I was in this camp. I was made to perform tasks even considered undignified by the Japanese, such as emptying the latrines, cleaning latrines, fertilising the gardens from the latrines, scrubbing the guards' clothes and doing manual tasks for the Japanese enlisted men. No proper medical supplies were available at this camp. For a period of nine months I acted as the medical orderly and interpreter for the Japanese pharmacist's mate who was stationed at this camp. Very often I was severely beaten and disciplined for endeavoring to wash or clean the bandages that had been used many times before by other guards because they personally disliked the Japanese pharmacist's mate. I volunteered to perform these duties and on several occasions was beaten. I observed that the bandages used by the Japanese pharmacist's mate were never washed or properly sterilized and that extreme disregard of all sanitary conditions prevailed, therefore I volunteered to assist the Japanese pharmacist's mate in his medical duties and I washed the bandages and endeavored to sterilize his instruments as best I could and even this was futile in obtaining any sanitary conditions and worse than would obtain in even the worst possible dispensary in the United States. The same bandages that had been applied to a gangrenous wound or scabbies or infected wound, would be applied time and time again to other flesh wounds after

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only the slightest rinsing. I also noted the Japanese pharmacist's mate treat one man for piles and use the same tweezers to treat another man for an infected throat. It was conditions such as these that I endeavored to eliminate as best as possible by indirectly showing the Japanese how they should be done. It was impossible to instruct them or request anything directly for we were considered the lowest of all people and could not possibly know anything of value to the Japanese.

Q. Upon arriving at Ofuna Prison Camp, were you at any time interrogated by the Japanese?

A. Yes.

Q. Will you please give an account of these interrogations and if possible, describe the persons who interviewed you.

A. I was questioned almost daily for the first 3 months and then about three times a week for the rest of the time I was at Ofuna, usually by officers of the Japanese naval intelligence who had received some education either as a graduate of American universities or as post-graduates of American universities. Those few officers who could not speak English employed interpreters who were graduates of American universities. My best recollection is certain nick-names of those who interviewed me, such as the "little commander", "hansom Harry", and "the torpedo expert". These are names that the American prisoners gave to them.

Q. Along what lines were they seeking to examine you?

A. For the first 3 months they worked on my naval history, then they started working on me and asking questions pertaining to my naval history, in regard to harbors and ports that I had visited in regard to ships that I had been stationed aboard, regarding land stations and naval installations, equipment that I had seen or heard of, methods of depth charge evasion, methods of submarine attack, methods of repair, logistic questions, technical questions in regard to submarines and cruisers, and many questions concerning the method of education and the training program of the United States personnel. However, at no time did I give any information which would prove of military value to the Japs. You had to answer every single question; for refusal to answer questions they gave me a severe beating and if they thought the truth was not being told the other shipmates in the camp would suffer.

Q. As a result of these interviews, were you at any time punished by the Japs?

A. Frequently they were not satisfied with my answers, feeling that I was not telling the truth and I would suffer severe beatings on many occasions.

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Q. When were you removed from the Ofuna prison camp?

A. January 15, 1945, and marched to the local train station, about two miles, and boarded a train for Yokohama; disembarked at Yokohama and marched two miles to Omori and was turned over to the Japanese Army authorities who were technically in charge of all prisoners of war. I then signed what I believe were the first papers registering me as a prisoner of war. I was forced to sign these papers under duress, claiming that I would not escape, would obey all commands and orders issued by the Japanese Army. All prisoners of war were required to sign this paper. I believed at that time that I was being registered as a prisoner of war and that my family would be notified officially through Geneva, that I was a prisoner of war in Japan. However, later events showed that I was never registered officially or unofficially as a prisoner of war, nor was my family ever notified.

Q. What were the conditions under which you lived at Omori prison camp?

A. Lieut. George G. Bullard and I were assigned to a small room 10 x 6 in the back of one of the many barracks at Omori. This room had a dirt floor. We were able to steal four or five discarded straw rice bags which we used as mattresses or floor covering. We were then issued by the Japanese four small torn and filthy blankets. At this time the temperature in Japan ranged from 40 degrees during the daytime to 10 and 12 degrees at night. The snow and rain poured in through large cracks in the barracks wall. Bullard and myself were forced to sleep in all the clothes we had in order not to freeze to death at night. I can't recall any time from November to May during the two winters in Japan that I was actually warm. Many times we requested additional clothing or more food or additional medicinal supplies or fires in the barracks and upon one of these occasions I was severely beaten for being dissatisfied. No action was ever taken on these requests. Our hands and feet were crippled with chilblains and frostbite; we had severe colds and at one time I had pneumonia, as an X-ray taken when I was repatriated, disclosed. We were also required to have our heads shaved every two weeks. To obtain rations necessary to live, we were forced to work at Omori in a leather shop, which was not heated. During the cold spells the work was painful and almost impossible but we had to turn out our quota in order to get food to sustain life. If you did not work or were ill you only got two-thirds ration, which caused in many instances, deaths of American prisoners. International Red Cross representatives came to inspect conditions at the camp but the prisoners were not allowed to speak to the representatives and those few that did were severely beaten later.

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Q. Were you ever beaten during your stay at Omori?

A. I was late one morning as I failed to hear the signal for quarters and was forced to stand at attention for eight hours in front of the administration building and the temperature was about 18 degrees and a biting wind.

Q. Did you at any time see any of the allied prisoners beaten by the Japs at this camp?

A. Yes; there were frequent beatings of allied prisoners and ill prisoners, whom the Japs thought were feigning illness, and for minor infractions of their unreasonable rules of conduct such as saluting, not seeing an officer at the other end of the camp and standing at attention while he passed. In one instance an American Army Air Force Lieutenant, did not hear a Jap speak to him and the infuriated Jap rushed across the compound and stood him at attention and beat him severely with a Japanese web belt, across the face and body, with resulting hideous welts across his face.

Q. Can you recall the names of any of the Japs who administered beatings to and inhuman treatment to the allied prisoners?

A. Yes; the one I can remember is Fukiama, or some such name, who was in charge of the galley.

Q. When were you transferred from the Omori Prison Camp and where did they send you?

A. On March 1, 1945, I was transferred from the Omori Prison Camp and sent to Mitsushima POW Camp 2-B, where I was senior American officer.

Q. Will you describe the conditions which prevailed at this camp with respect to the questioning by the Japs?

A. There were no questions asked me except just prior to the end of the war -- a group of student interpreters came from Tokyo and questioned many of us in this camp. However, at this time our information was so outdated and of so little value, that we realized they were just practicing and also by this time we had a standard story which was sort of automatic procedure. No punishments were involved for not answering because we knew that all questions must be answered and we had "pat" answers ready for their questions.

Q. Was any inhuman treatment administered to prisoners at this camp?

A. Yes, sir; this camp was run by a Japanese first lieutenant and one Sergeant of the Japanese Imperial Army and under them they had six or seven granted men who were retired or medically discharged enlisted men from the Japanese Army and a few civilian guards, the youngest being fourteen.

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At this camp, as at every other camp I had been to, each individual guard administered according to his own set of rules which were usually different than the other guards, therefore a person never knew at any time just what rule was in effect and many times the rules were conflicting, therefore the prisoners, including myself, suffered many severe beatings by clubs, rubber shoes, wooden shoes, wooden swords, belts and clubs, because of conflicting orders and misunderstandings in no way the fault of the prisoners. The Japanese in this camp were responsible for many deaths of the prisoners by incompetent and foolhardy orders. For example, the sergeant ordered twenty men, whom the American doctor, Dr. Albert Weinstein, and the British doctor, Dr. George Whitfield, had analyzed as having beri-beri of the heart, to go up the mountainside and climb up some 2,000 feet and a walk of ten miles to bring back logs for camp fuel. Many logs weighed as much as 120 to 150 pounds. At this time the physical condition of the men was extremely poor. Men who used to weigh 160 or 175 pounds now weighed 105 or 110 pounds. As a result of this order, against the request and advice of the doctors, two of these men died as a result of a heart attack upon return to the camp. Many men suffered from pneumonia and colds, chilblains and the like, because of insufficient clothing. Private Tatchun, known as "little glass eye" who has since been convicted, was in charge of the storeroom in which there were many American Red Cross shoes, blankets and clothing. However, he would not issue this clothing to the men. As a result many men climbed the mountainside in 10 to 14 inches of snow in straw shoes or bare-footed to bring back wood.

Q. What treatment was accorded you as an officer of the U.S. Navy at this camp?

A. As an officer of the United States Navy, I was given no official recognition and many times was stood up in front of the men while the Japanese sergeant stated that though I was an officer of the U.S. Navy, I had no charge over them now and they were ordered not to obey any command I might give. I was ordered to work on the farm and was carrying wood and made to carry refuse from the latrines to fertilize the gardens.

Q. How were the sanitary and food conditions at this camp?

A. The sanitary conditions were extremely poor. The well from which we derived our only source of water, was located at the bottom of a hill directly below the four camp latrines which contaminated the water through drainage. Ninety percent of the men, including myself, had diarrhea and dysentery the whole time in this camp. We were ordered to work in the rain and snow and in the severest kind of weather and provided no change of clothing. At this camp the ration was below the amount of food necessary to sustain life. The Japanese substituted for nourishing foods

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in our normal ration, such articles as leaves from trees, which the prisoners were ordered to pick, weeds and grass, seaweed in great quantities, and sticks that were soaked in brine. Occasionally fish came from Tokyo but because of lack of refrigeration in Japan, the fish was hardly fit for consumption by the time it arrived at our camp. The seaweed and rotten fish, as well as the leaves and the weeds caused diarrhea among the men which resulted in their losing all benefit from what little rice or potato ration which we did receive. As a result all men, including myself, had beri-beri and many died from beri-beri of the heart or malnutrition.

Q. What sanitary and medical conditions existed at this camp?

A. Although we had an American doctor, Captain Albert Weinstein, and a British surgeon, Lieut. George Whitfield, extremely limited supplies were available, of which the Japanese managed to steal most for their personal use and friends on the outside, and the Japanese totally disregarded 95% of the analyses made by these two doctors and a private or civilian guard would be the one to make the decision of whether a man would go to the hospital or be put on the sick list. If a man was sick, he received two-thirds rations for not working. It is my belief that many of the sixty prisoners who died in this camp would be alive today had the Japanese authorities heeded the advice of the doctors and had to some small extent complied with our requests for medicinal supplies.

Q. Have you made a report of these conditions at any other time?

A. Upon repatriation, I made a report to the Army Intelligence concerning the Japanese guards who had beaten the American soldiers and gave the name of the Americans involved, witnesses and the name of the Japanese, to the best of my knowledge, and Dr. Albert Weinstein, U.S.Army, is making a report on the medical, sanitary and food conditions at this camp.

Q. Did you suffer any permanent injuries as a result of your captivity by the Japanese?

A. I had two teeth that were chipped off and since my return have suffered from a nervous disorder affecting my stomach and digestion. To date I have been in the United States for about ten months and as yet have not felt physically able to perform a normal task either physically or mentally which I was able to perform before being captured. I am suffering from constant nausea and excess of gas and

EXHIBIT 5 (10)

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have great difficulty in remembering incidents for any length of time.

Q. Is there anything else concerning the foregoing incidents of which you have any information?

A. No, I believe that is all.

George Estabrook Brown Jr.

George Estabrook Brown, Jr.
Lt. Comdr. 96593, USNR.

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~~CONFIDENTIAL~~

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, George Estabrook Brown, Jr., of lawful age, being duly sworn on oath, state that I have read the foregoing transcription of my interrogation and all answers contained therein are true to the best of my knowledge and belief.

George Estabrook Brown, Jr.
George Estabrook Brown, Jr.
Lieut.Cmdr. USNR.

Subscribed and sworn to before me this 10th day of July, 1946.

Elroy G. True Jr.
Elroy G. True, Jr.,
Lieut.Commander, U.S.N.R.

C E R T I F I C A T E

I, Elroy G. True, Jr., Lieut.Commander, U.S.N.R., certify that George Estabrook Brown, Jr., former Lieutenant Commander, U.S.Naval Reserve, personally appeared before me on 10 July 1946 and testified concerning war crimes; and that the foregoing is an accurate transcription of the answers given by him to the several questions set forth.

Place: Legal Office,
Third Naval District,
90 Church Street,
New York, N.Y.

Elroy G. True Jr.
Elroy G. True, Jr.,
Lieut.Commander, USNR.

Date: 10 July 1946.

EXHIBIT 5 (12)

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Commonwealth of Massachusetts)
) ss
County of Berkshire)

I, Joseph N. Baker, Jr., residing at 193 Castle Street, Great Barrington, Massachusetts, now a student at Dartmouth College, Hanover, New Hampshire, being first duly sworn according to law, do depose and say:

That from January 1942 to March 1946, I was on active duty with the U. S. Navy, from the rank of Apprentice Seaman to Motor Machinist Mate Second Class. My serial number was 212-76-01. From about 19 November 1943 to 1 December 1943 I was confined as a prisoner of war by the Japanese on the Island of Truk. I do not know the name of the Commander (Japanese) of this island, any of his assistants or any of the Japanese guards, since our group was there only about twelve days altogether. I was quartered at Truk along with a group of 41 survivors from the U.S.S. Sculpin in a wooden structure, eighteen feet long by fourteen feet wide, which I will refer to as the prison compound. Within this compound all forty-one members of our group were imprisoned in three small cells approximately four feet in length by three feet in width each, located at the southerly end of the compound. The men were distributed fourteen men in the first cell, fourteen in the second cell and thirteen in the last cell.

The living conditions within these cells were intolerable. Sanitary conditions consisted of a hole in the floor in the far corner of each cell. There was no running water, and the ventilation within each cell consisted of one window, twelve inches by twelve inches, protected by wooden bars. The men were not permitted outside these cells for recreation or for any other reason except when special beatings were administered by the guards or when the men were blindfolded (individually) each day and taken out for questioning. At least two guards always remained on duty outside the compound, and during the daytime there were more. The men were so cramped in these cells that no one could obtain any rest whatever. Most of the men were in a state of shock as the result of the ordeal we had been through. Added to this was the fact that the guards would come into the compound day and night and from outside the cell doors poke or beat our men with clubs resembling baseball bats, regular baseball bats, and bamboo poles about six feet in length.

We were given very little food and very little water during our imprisonment at Truk. The Japanese guards would feed us once a day on rice and a little water. At about 1630 each day, a guard would bring in a platter of boiled rice and give each man a rice ball about as big as the palm of one's hand. During mealtime, the doors of the cells were open and we were allowed to obtain water from two bottles, each bottle just a little bigger than a quart in size. Since this was our allowance of water each day and since it was unbearably hot, the men usually would not eat the rice as it would tend to make them all the more thirsty but would threw the rice ball down the hole in the corner of the cell. The men constantly requested more water, but the Japanese guards stated that there was no more water available for drinking.

Each day I was taken out of my cell, blindfolded, and brought under guard to an interrogation tent where I was questioned by Japanese Army and Navy officers. This questioning would last between ten and fifteen minutes after which I was turned over to the guards again who beat me with clubs and baseball bats on all parts of my body. I was hit mostly on the bottom of my spine. I did not hear nor could I obtain the names of any of the Japanese officers who questioned me, nor the names of

EXHIBIT 6 (1)

the guards who beat me up daily. Each man in our group went through this procedure each day, the same as I did, during our interment on Truk.

One day, shortly after our arrival at Truk, when the Japanese guards were poking at one of my colleagues with a bamboo pole through the cell door, I tried to protect my colleague as he had had an arm blown off on the Sculpin at the time of our capture. The guards removed me from the cell, and two of them beat me unconscious with clubs and closed fists. They used closed fists on my face and the clubs on my head, shoulders, back, the bottom of my spine, and other parts of my body. All of the men in the cells witnessed this beating. I have forgotten the name of the man I was trying to protect; however, he was about 235 lbs., 6 feet, 2 inches in height, had long black hair, a big round face, and was tattooed on both forearms. I believe he was a torpedoman, and remember he had previously served with the U.S. Navy in Australia. I know he died 5 December 1943, when we were being transported by Japanese carrier to Yokohama and this Jap carrier was hit by the U. S. S. Sailfish and sunk. The records of the Sailfish might reveal the name of this carrier. There were two carriers; 20 men on one, 21 on another.

Lieutenant Brown, the only officer in our group, was beaten up more severely than any of the others, each day at these interrogations, as he was the only officer present. Although neither myself nor any of my colleagues witnessed the Japanese beat Lt. Brown, it was obvious to all of us, since he would come back under guard each day from these interrogations black and blue from head to foot.

Another day, Edward Ricketts, MMM 2/C of 927 North Livingston Street, Indianapolis, Indiana, was taken out of his cell and beaten in the open section of the compound before all of us. Three guards used baseball bats, clubs, and their fists on Ricketts working over him from head to foot, but hitting him mostly on the bottom of his spine, his back, shoulders and face, until he was unconscious. Then the guards threw him bodily, still unconscious, back into his cell. On another occasion, the guards came in and took another man from his cell, whose name and description I cannot recall. They beat this man to unconsciousness in the same manner as they did Ricketts, but this time they left him in a corner of the compound still unconscious. Later, the guards threw this man into his cell after he had regained consciousness but would not give him any food that day and night.

We were continually being slapped, poked with clubs or poles, beaten and kicked by the guards who, in my opinion, were cowards. The guards always came in twos, threes, or in greater numbers, since they were afraid of us. Also, the guards were always being changed during our time here and it was not possible for me to recognize any of them, having seen them only once or twice. None of the men died from beatings, nor were any men killed by the Japanese while we were interned at Truk.

The situation as far as medical treatment was concerned was negligible. During the twelve days we were there, only once was any attempt made to give us medical treatment. One day, shortly after we were interned there, an enlisted corpsman dressed in whites of the Japanese Navy came through to look at and treat those wounded. The treatment consisted of wiping off dried bloodstains with a very dirty rag, using some sort of liquid from a green bottle. The liquid might have been alcohol or even water, so far as I knew. However, the condition of the men was very bad at that time. Many were still suffering from shock, bullet wounds, and all had at least a minimum of shrapnel wounds on their bodies. One man, previously mentioned above, whose arm had been

EXHIBIT 6 (2)

0081

blown off received no medical treatment whatever. No attempt was made to take out the bullet which I had in my leg nor to alleviate the conditions of the others at this time. Lt. Brown made constant demands to the Japanese for adequate medical treatment, as well as more food, water, and better living conditions. It was my opinion that Lt. Brown was beaten up more than the rest of us because he tried to have our conditions made more tolerable.

The physical condition of all of this group was wretched. We were not allowed to wash, shave, or in any way make ourselves comfortable. The odors within the compound, along with the stifling heat, made us constantly sick and miserable. Many of the men had no clothes on whatever, others were just wearing shorts which were in tatters and which afforded little or no protection to their bodies. However, on 1 December 1943, when we were leaving Truk for Yokohama, we were issued old Japanese clothes to wear.

All of the above incidents happened to me and my colleagues as prisoners of war on Truk. The following men are survivors from the U.S.S. Sculpin who were with me at Truk, and witnessed the above-mentioned incidents also. So far as I know these men are the only survivors from the U.S.S. Sculpin, as of March 1946:

George E. Brown, Jr.,	Lieutenant	1172 Park Avenue, New York City
William H. Haverland	CMM	2660 Asbury Road, Dubuque, Iowa
Paul Albert Todd	PhM 1/C	2323 North Penna. Ave., Indianapolis
John P. Rourke	GM 1/C	Groton, Connecticut
Harry S. Milbourne	Fireman 1/C	2656 North Orchard St., Chicago, Ill.
Edward Ricketts	MMM 2/C	927 No. Livingston St., Indianapolis
Cecil E. Baker	F 1/C	1638 Carrollton St., Indianapolis
William M. Cooper	QM 2/c	3810 Dartmouth Ave., St. Petersburg, Fla.
Bob Wyatt	GM 1/C	8830 Zampre Ave., Los Angeles, Cal.
Eldon Wright	Em 3/c	Hurricane, Utah
Michael Gorman	Seaman 2/C	1655 So. Hamilton St., Pomona, Cal.
Edwin Keller	Seaman 2/C	216 West Pine St., Auduburn, N. J.
George Rocek	MMM 1/C	2217 South 61st St., Cicero, Illinois
Edward Anderson	SC 1/C	2211-17th Street, Sacramento, Cal.
~~L. A. Behaldsen~~ Eskilsen	F 1/C	Northwood, Iowa
Leo Joseph Murray	MM 1/C	Box 235, Lawler, Iowa
J. G. Peterson	R 2/C	Box 4, Wendell, Idaho
Herbert Joseph Thomas	T 1/C	114 Adams Street, Waterloo, Iowa
Paul L. Murphy	F 1/C	1615 Huron Avenue, Newcastle, Penn.
Tony (last name unknown)		New Mexico

I believe that some of these men are presently in the Naval service, but I am not sure as to just which ones or as to where they are stationed.

I am interested in helping out the Navy Department in every way concerning War Crimes, and can be available as a witness for these cases on reasonable notice.

Joseph N. Baker, Jr.

Subscribed and sworn to before me this 30TH day of June, 1948, at Great Barrington, Mass.

Mildred Kane Cassedy
Notary Public

My commission expires: My commission expires February 20, 1953

EXHIBIT 6 (3)

0082

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

29 JUL 1948

I hereby certify that the annexed are true excerpts taken from the official records of Commander Marianas Area.

The annexed excerpts taken from the official record in the case of Hiroshi IWANAMI, et al, consist of the following:

1. Excerpts from the charges and specifications dated 8 May 1947.

2. Excerpts from the findings of the Military Commission as recorded on Pages 670, 671 and 672 of the record.

3. Excerpts from the action of the convening authority, The Commander Marianas Area, dated 8 November 1947.

4. Excerpts from the action of the reviewing authority, the Commander in Chief Pacific and United States Pacific Fleet, dated 28 November 1947.

5. Excerpts from the action of the confirming authority, the Secretary of the Navy, dated 9 April 1948.

W. L. OGDEN,
Commander, U. S. Navy.

EXHIBIT 7 (1)

0083

FF12/A16-2
13-JDM-cn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Serial: 12147

8 May 1947

From: The Commander Marianas Area.
To: Lieutenant Commander Joseph A. REGAN, USN, and/or
Lieutenant James P. KENNY, USN, and/or
your successors in office as Judge Advocates,
Military Commission, Commander Marianas.

Subject: Charges and Specifications in the case of:

IWANAMI, Hiroshi,
.....
SAKAGAMI, Shinji
.....

1. The above named persons will be tried before the Military Commission of which you are Judge Advocate upon the following charges and specifications. You will notify the president of the commission accordingly, inform the accused of the date set for trial, and summon all witnesses, both for the prosecution and for the defense.

CHARGE I
MURDER

SPECIFICATION 1

In that IWANAMI, Hiroshi, then a Surgeon Captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at the said Fourth Naval Hospital, with OKUYAMA, Tokikazu, deceased, then a Surgeon Commander, Imperial Japanese Navy, attached to the Fourth Naval Hospital, and NABETANI, Reijiro, deceased, then a Surgeon Lieutenant, Imperial Japanese Navy, attached to the Fourth Naval Hospital, and others unknown, did, at Dublon Island, Truk Atoll, Caroline Islands, on or about 30 January 1944, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethough, and without justifiable cause, assault, strike, injure, infect and kill, by experimenting, with injections of virulent bacteria, with exposures to shock and with other methods, the exact nature and character of which are to the relator unknown, six (6) American Prisoners of War, names to the relator unknown, then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

SPECIFICATION 2

In that ..... SAKAGAMI, Shinji, then a corpsman warrant officer, Imperial Japanese Navy, attached to the Fourth Naval Hospital, ... attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands and while so serving at said military installations of the Imperial Japanese Navy, acting with OKUYAMA, Tokikazu, deceased, then a Surgeon Commander, Imperial Japanese Navy, and others unknown, did, each and together, at Dublon Island, Truk Atoll, Caroline Islands, on or about 1 February 1944, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premoditation and malice aforethought, and without justifiable cause, assault, strike, injure, blast and kill by explosions of dynamite and strangulation, two (2) American Prisoners of War, names to the relator unknown, then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

EXHIBIT

EXHIBIT 7 (2)

0084

SPECIFICATION 3

.....

CHARGE II

VIOLATION OF THE LAW AND CUSTOMS OF WAR

SPECIFICATION 1

.....

SPECIFICATION 2

.....

SPECIFICATION 3

.....

SPECIFICATION 4

.....

SPECIFICATION 5

.....

SPECIFICATION 6

.....

/s/ C. A. Pownall
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

EXHIBIT

EXHIBIT 7 (3)

0085

.....

The judge advocates were recalled and directed to record the following findings:

As to the accused, Iwanami, Hiroshi:
The first specification of the first charge proved.
.....
And that the accused, Iwanami, Hiroshi, is of the first charge guilty.

.....

As to the accused Sakagami, Shinji:
The second specification of the first charge proved in part, proved except the words "....." which words are not proved.
And that the accused, Sakagami, Shinji, is of the first charge guilty.

.....

EXHIBIT 7 (4)

FF12/A17-10/WC-26
02-JBM-rhj

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Serial: 20965

Nov 8, 1947

.....

.....

.....

The proceedings, findings of guilty, except on specifications 1, 4, and 5 of Charge II as to the accused IWANAMI, Hiroshi, and the sentences in the foregoing case of IWANAMI, Hiroshi; .....; SAKAGAMI, Shinji; .... are approved.

.....

.....

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

To: Commander in Chief Pacific and U.S. Pacific Fleet.
Re: Record of Proceedings of Military Commission - case of former Surgeon Captain Hiroshi IWANAMI, IJN, et al.

EXHIBIT 7 (5)

0087

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET
Headquarters of the Commander in Chief

Cincpacflt File
A17-25

c/o Fleet Post Office,
San Francisco, California.

Serial 6801

28 NOV 1947

The proceedings, findings of guilty, except the findings on specifications 1, 4 and 5 of charge II as to IWANAMI, Hiroshi, and the action of the convening authority in the foregoing case of IWANAMI, Hiroshi; KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei; SAKAGAMI, Shinji; YOSHIZAWA, Kensaburo; HOMMA, Hachiro; WATANABE, Mitsuo; TANABE, Mamoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro, are approved.

The record is, in conformity with section D-14, Naval Courts and Boards, and Chief of Naval Operations serial 01P22 of 28 November 1945, transmitted to the Secretary of the Navy for confirmation of the death sentence as to accused IWANAMI, Hiroshi, and to the Judge Advocate General of the Navy for revision and record.

LOUIS DENFELD
Admiral, U. S. Navy,
Commander in Chief Pacific
and United States Pacific Fleet.

To: Secretary of the Navy (Office of the Judge Advocate General)
Re: Record of proceedings of a trial by a Military Commission of former Surgeon Captain Hiroshi IWANAMI, I.J.N., et al.

Copies to: (end. only)
ComMarianas
IsComGuam
War Crimes Officer (Guam)

EXHIBIT 7 (6)

Cincpacflt File
A17-10

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET
HEADQUARTERS OF THE COMMANDER IN CHIEF

Serial: 1895

22 APR 1948

FIRST ENDORSEMENT on
Secnav letter JAG:I:
RAS:bem A17-10/CQ
(4-2-48) serial 160413
dated 9 April 1948.

From: Commander in Chief Pacific and U. S. Pacific Fleet.
To: Commander Marianas.

Subject: Action upon Record of Military Commission Trial.

1. Forwarded for execution of the death sentence as confirmed in the case of former Surgeon Captain IWANAMI, Hiroshi, I.J.N., and report to Secnav in accordance with paragraph 4 of the basic letter.

/s/ D. C. Ramsey
D. C. RAMSEY

Copies to: (1st end. only)
Secnav
CNO

0089

Address Reply To
Executive Officer of the Secretary

And Refer to

NAVY DEPARTMENT

JAG:I:RAS:bem
A17-10/CQ (4-2-48) WASHINGTON 25, D. C.
160413

9 APR 1948

To: Commander Marianas Area.

Via: Commander in Chief, United States Pacific Fleet.

Subj: Action upon Record of Military Commission Trial.

1. In accordance with the provision of Section D-14, Naval Courts and Boards, 1937, the Secretary of the Navy, on 31 March 1948, confirmed the following sentence of death, adjudged by Military Commission:

(a) In the case of former Surgeon Captain Hiroshi Iwanami, Imperial Japanese Navy, tried in joinder with former Surgeon Lieutenant Hidehiro Kamikawa, Imperial Japanese Navy, former Surgeon Lieutenant Tetsuo Oishi, Imperial Japanese Navy, former Ensign Shunpei Asamura, Imperial Japanese Navy, former Corpsman Warrant Officer Shinji Sakagami, Imperial Japanese Navy, former Corpsman Chief Petty Officer Kensaburo Yoshizawa, Imperial Japanese Navy, former Corpsman Chief Petty Officer Hachiro Homma, Imperial Japanese Navy, former Paymaster Chief Petty Officer Mitsuo Watanabe, Imperial Japanese Navy, former Corpsman Chief Petty Officer Mamoru Tanabe, Imperial Japanese Navy, former Corpsman Chief Petty Officer Yoshihisa Mukai, Imperial Japanese Navy, former Corpsman Petty Officer First Class Tatsusaburo Kawashima, Imperial Japanese Navy, former Paymaster Petty Officer First Class Tsuneo Sawada, Imperial Japanese Navy, former Corpsman Petty Officer First Class Tokunosuke Tanaka, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Toichiro Akabori, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Hiroyuki Kuwabara, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Kisaburo Tsutsui, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Kazuo Nemetame, Imperial Japanese Navy, former Corpsman Petty Officer First Class Susumu Takaishi, Imperial Japanese Navy, and former Corpsman Petty Officer Second Class Kichigoro Mitsuhashi, Imperial Japanese Navy, by a military commission, convened 10 June 1947, by the Commander Marianas Area -

"The commission, therefore, sentences him, Iwanami, Hiroshi, to be hanged by the neck until dead, two-thirds of the members concurring."

EXHIBIT 7 (G)

0090

JAG:I:RAS:bem
A17-10/QQ (4-2-48)
160413

The Commander, Marianas Area, the convening authority, on 8 November 1947, subject to remarks, approved the proceedings, findings of guilty, except on specifications 1, 4 and 5 of Charge II as to the accused, Iwanami, Hiroshi and the sentence in this case.

The Commander in Chief, United States Pacific Fleet, the reviewing authority, on 28 November 1947, approved the proceedings, findings of guilty, except the findings on specifications 1, 4 and 5 of Charge II as to Iwanami, Hiroshi, and the action of the convening authority thereon, in this case.

4. Subject to any directives issued by the Commander in Chief, United States Pacific Fleet, the Commander Marianas Area is hereby directed to effect the execution of the sentence as confirmed. It is further directed that the sentence be carried into effect at a date to be designated by the Commander Marianas Area not earlier than 1 June 1948 at Guam, Marianas Islands, and that a report of the execution of the sentence be submitted to the Secretary of the Navy.

/s/ John L. Sullivan

Secretary of the Navy.

Copy to:
Chief of Naval Operations.

EXHIBIT 7 (D)

0091

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

29 JUL 1948

I hereby certify that the annexed are true excerpts taken from the official records of Commander Marianas Area.

The annexed excerpts taken from the official record in the case of Captain Masaharu TANAKA, IJN, et al, consist of the following:

1. Excerpts from the charges and specifications dated 26 August 1946.

2. Excerpts from the findings of the Military Commission as recorded on pages 101 and 102 of the record.

3. Excerpts from the action of the convening authority, The Commander Marianas Area, dated 21 December 1946.

4. Excerpts from the action of the reviewing authority, the Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, dated 3 January 1947.

5. Excerpts from the action of the confirming authority, The Secretary of the Navy, dated 16 April 1947.

H. L. OGDEN,
Commander, U. S. Navy.

Exhibit 8 (1)

0092

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

A16-2/FF12/
13-JDM-gmr

Serial: 10717

26 August 1946

From: The Commander Marianas Area.
To: Lieutenant Daniel FLYNN, USNR, and/or
Lieutenant Edward L. FIELD, USNR, and/or
Lieutenant Frodric T. SUSS, USNR, and/or
your successors in office as Judge Advocates,
Military Commission, Commander Marianas.

Subject: Charges and Specifications - in the case of:

Captain TANAKA, Masaharu, Imperial Japanese Navy,
Lieutenant Commander DANZAKI, Tomoroku, Imperial Japanese Navy,
Lieutenant, junior grade, YOSHINUMA, Yoshiharu, Imperial
Japanese Navy.

1. The above named persons will be tried before the Military Commission of which you are Judge Advocate upon the following charges and specifications. You will notify the President of the commission accordingly, inform the accused of the date set for trial, and summon all witnesses, both for the prosecution and for the defense.

CHARGE I

MURDER

SPECIFICATION

In that TANAKA, Masaharu, then a captain, IJN, DANZAKI, Tomoroku, then a lieutenant, IJN, YOSHINUMA, Yoshiharu, then an ensign, IJN, all attached to the 61st Naval Guard Unit, and other persons unknown, all attached to the military installations of the Imperial Japanese armed forces, Dublon, Truk Atoll, and while serving at the said military installations of the Imperial Japanese armed forces at Dublon, Truk Atoll, did, each and together, on or about 17 February 1944, on Dublon, Truk Atoll, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, maliciously, feloniously, with premeditation and malice aforethought, without justifiable cause, and without proper trial or other due process, assault, strike, and kill, with dangerous weapons, to wit, swords and a loaded firearm, further description to the relator unknown, seven (7) American prisoners of war, names to the relator unknown, then and there held captive by the armed forces of Japan, this in violation of the laws and customs of war and the moral standards of civilized society.

CHARGE II

ASSAULT WITH INTENT TO COMMIT MURDER

SPECIFICATION

.....

CHARGE III

NEGLECT OF DUTY IN VIOLATION OF THE LAWS AND CUSTOMS OF WAR

SPECIFICATION 1

.....

SPECIFICATION 2

.....

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

EXHIBIT

Exhibit 8 (2)

0093

.....

The judge advocate was recalled and directed to record the following findings:

As to the accused, TANAKA, Masaharu:
The specification of the first charge proved.
And that the accused, TANAKA, Masaharu, captain, Imperial Japanese Navy, is of the first charge guilty.

.....

As to the accused, DANZAKI, Tomoroku:
The specification of the first charge proved.
And that the accused, DANZAKI, Tomoroku, lieutenant commander, Imperial Japanese Navy, is of the first charge guilty.

.....

As to the accused, YOSHINUMA, Yoshiharu:
The specification of the first charge proved.
And that the accused, YOSHINUMA, Yoshiharu, lieutenant (junior grade), Imperial Japanese Navy, is of the first charge guilty.

.....

CERTIFIED TO BE A TRUE COPY

/s/ E. L. Field, Lt., USNR.

EXHIBIT

Exhibit 8 (3)

0094

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

A17-10/FF12/
13-JDM-gmr

21 DEC 1946

Serial: 19962

.....

The proceedings in the foregoing case of Captain Masaharu Tanaka, IJN, Lieutenant Commander Tomoroku Danzaki, IJN, and Lieutenant, junior grade, Yoshiharu Yoshinuma, IJN, are approved. The findings of guilty on Charges I and III and the specifications thereunder and the sentences are approved.

.....

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

To: Commander in Chief United States Pacific Fleet and Pacific Ocean Areas.
Re: Record of proceedings of military commission - case of Captain Masaharu TANAKA, IJN, et al.

EXHIBIT

Exhibit 8 (4)

0095

THE PACIFIC COMMAND
and United States Pacific Fleet
Headquarters of the Commander in Chief

Cincpacflt File
A17-25

c/o Fleet Post Office,
San Francisco, California.

Serial 20

3 JAN 1947

.....

Subject to the foregoing, the proceedings, findings of guilty, sentences, and the action of the convening authority thereon, in the foregoing case of Captain Masaharu TANAKA, IJN, Lieutenant Commander Tomoroku DANZAKI, IJN, and Lieutenant, junior grade, Yoshiharu YOSHINUMA, IJN, are approved.

Prior to the execution of the death sentence adjudged in the case of Captain Masaharu TANAKA, IJN, the record is, in conformity with section D-14, Naval Courts and Boards, respectfully referred to the Secretary of the Navy.

J. H. TOWERS
Admiral, U. S. Navy,
Commander in Chief, Pacific,
and United States Pacific Fleet,
and Military Governor of the Marianas Area.

To: Judge Advocate General.
Re: Record of proceedings of Military Commission - case of Captain Masaharu TANAKA, IJN, et al.

EXHIBIT

Exhibit 8 (5)

0096

Address reply to

NAVY DEPARTMENT
Washington 25, D. C.

and refer to
JAG:I:MDS:bcm
A17-10/OQ 151334 - 154637
(4-2-47)

16 April 1947

From: The Secretary of the Navy.
To: Commander Marianas Area.
Via: Commander in Chief, United States Pacific Fleet.

Subj: Action upon records of Military Commission trials.

1. In accordance with the provision of Section D-14, Naval Courts and Boards, 1937, the Acting Secretary of the Navy has this date confirmed the following sentences of death, adjudged by Military Commissions:

(a) .....

(b) In the case of Captain Masaharu Tanaka, Imperial Japanese Navy, tried in joindor with Lieutenant Commander Tomoroku Dansaki, Imperial Japanese Navy, and Lieutenant junior grade, Yoshiharu Yoshimuma, Imperial Japanese Navy, by a military commission, convened 15 October 1946 by the Commander Marianas Area -

> "The commission, therefore, sentences him, Tanaka, Masaharu, captain, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring."
>
> The Commander, Marianas Area, the convening authority, on 21 December 1946, approved the proceedings, findings of guilty, and sentence, in this case.
>
> The Commander in Chief, United States Pacific Fleet, the reviewing authority, on 3 January 1947, subject to remarks, approved the proceedings, findings of guilty, and sentence in this case, and the action of the convening authority thereon.

2. Subject to any directives issued by the Commander in Chief, United States Pacific Fleet, not inconsistent with this directive, the Commander Marianas Area is hereby directed to effect the execution of the sentences as confirmed. .....

/s/ JOHN L. SULLIVAN
Acting Secretary of the Navy.

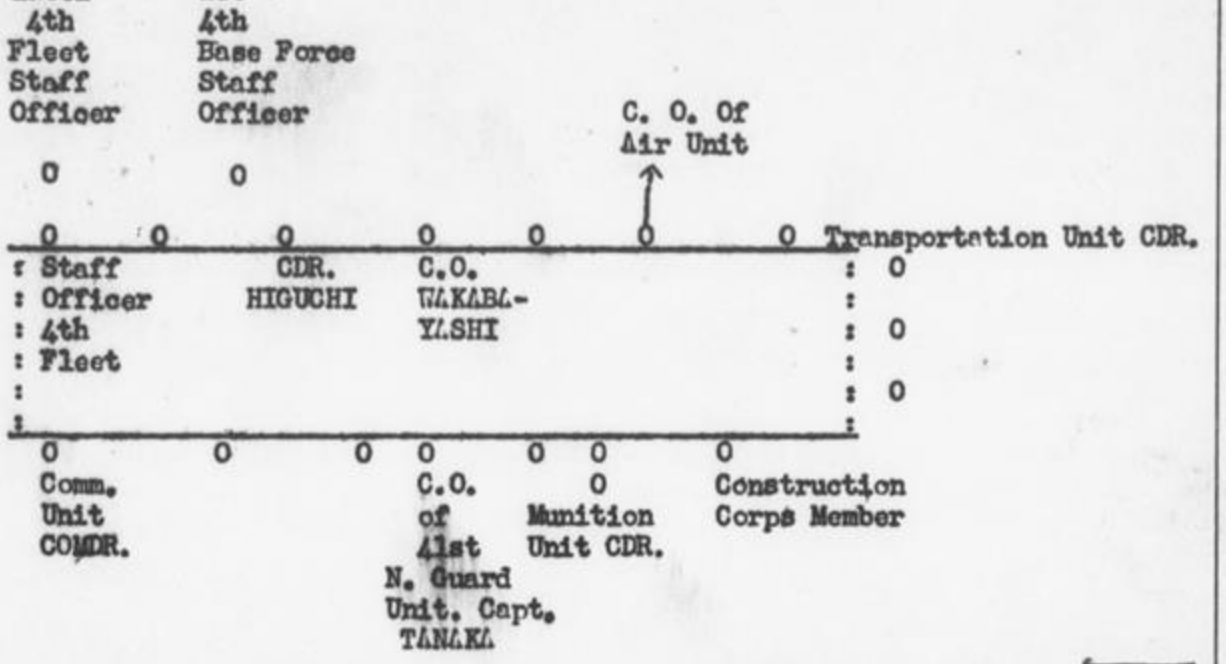
EXHIBIT

Exhibit 8 (6)

0097

From about 7 P.m., of the 17th February 1944, a meeting was held at the headquarters of the 4th Naval Base Force. The persons assembled there were members of the 4th Naval Base Force Headquarters, Staff Officers of the 4th Fleet and various cognisant commanding officers of units in that area or their representatives, in all about twenty in number.

The appearance of the seating at that meeting is given in the following sketch:



When each department head reported on the battle conditions I reported, "Prisoners have been disposed of." I gave this report in front of C.O. WAKABAYASHI, Staff Officer HIGUCHI, 4th Fleet Staff Officer KAWAMURA and other persons who assembled there.

When I gave this report C.O. WAKABAYASHI and Staff Officer HIGUCHI did not appear particularly surprised more than usual and did not change. After that until the conclusion of the meeting, C. O. WAKABAYASHI and Staff Officer HIGUCHI did not say anything concerning this incident.

After the meeting once again I went before Staff Officer Captain HIGUCHI to make sure and reported the fact that the execution of prisoners had been carried out. Capt. HIGUCHI did not say anything.

The above facts are correct.

I swear that the contents of the above is the truth.

/s/ TANAKA MASAHARU
Former Capt., IJN.
Former C.O., 41st G.U.

Subscribed and sworn to before me this the 22nd day of Sept. 1947.

/s/ Herbert L. Ogden
Comdr., USN.

I swear that I have truly translated the administration of the above oath.

/s/ Frederick A. Savory.

EXHIBIT 9(1)

0098

I hereby certify that the above is a true and complete translation of the original statement written in Japanese to the best of my ability.

/s/ Eugene E. Kerrick, Jr.
EUGENE E. KERRICK, JR.
LT., USNR., Interpreter.

Certified to be a true copy of the translation of the statement of TANAKA, Masaharu, former Captain, Imperial Japanese Navy, dated 22 September 1947.

HERBERT L. OGDEN
Commander, U. S. Navy.

EXHIBIT 9(2)

0099

Statement of vice admiral Seisaku Nakagayaki war ciminal stockade Guam M.I. 12th March. 1968.

I have examined and checked the attached military and biographical history scaps ~~2-N~~ Investigation division No: 1880 dated 2nd April 1947.
This is a true and accurate statement of biography listing the official dates of my orders but not the exact dates I took over the duties or functions.
My tour duty as commanding officer of 4th Base Force began on 24th July 1943 and ended on 22nd, February 1944.
Units under my command during my tour of duty were:
41st Naval Guard Unit - C.O. Capt. Takata Truk.
42nd Naval Guard Unit - C.O. Capt. Naito Ponape.
43rd Naval Guard Unit - C.O. Capt. Ike

Palau.
(dissolved 10 Jan. 1946)
4th Harbor master's office - C.O. Capt. Miura,
Truk.
3rd Communications corps - C.O. Capt. Takamaki
Palau.
(dissolved 10 Jan. 1946)
902nd Flying corps - C.O. CDR. Hayashida. Truk.

All POWs arriving on or captured on Truk Atoll were incarcerated at the 41st Naval Guard Unit.

I swear that the foregoing is true to the best of my knowledge, recollection and belief, and is voluntarily made by me, and I have not been induced to make this statement by the use of any force, threats, promises of reward, or other inducements.

Seisaku Wakabayashi.

Subscribed and sworn to before the undersigned this the 15th day of March 1948. Herbert K. Ogden Lieut. USNR

Date: 2 April 1947

Report of Investigation Division, Legal Section, GHQ, SCAP.

Inv. Div. No. 1289	CRD No.	Report by: L. E. Barnard, Maj., GD O-29540

Title: Vice Adm. Seisaku WAKABAYASHI alias Seiso WAKABAYASHI

Synopsis of facts:
Military and biographical history of WAKABAYASHI ect ent.

- 6 -

Reference: Report of Mr. John J. Marshall, dated 27 February 1947.

DETAILS:

At Tokyo:

On 19 March 1947, T. KATSUKI, Chief of Liaison Section, Central Liaison Office of the Japanese Government, forwarded the following military and biographical history of Seisaku WAKABAYASHI, the original of which is being transmitted to the Criminal Registry Division with their copy of this report:

Permanent Domicile: No. 486, Taishido, Setagaya-ku, Tokyo.
Date of Birth: 1 March 1889.

14 Sept. 1908: Cadet, Naval College.
18 July 1911: Graduated from Naval College.
18 July 1911: Midshipman.
1 Dec. 1912: Resign.
1 Dec. 1914: Lieutenant J.G.
1 Dec. 1917: Lieutenant.
1 Dec. 1923: Lt.-Commander.
1 Dec. 1925: Commanding Officer, Submarine No. 47.
1 Dec. 1926: Attached to Yokosuka Naval Station.
1 Dec. 1926: Despatched to Bureau of Military Affairs, Navy Ministry.
8 Mar. 1927: Member, Bureau of Military Affairs, Navy Ministry.
10 Dec. 1928: Commander.
10 Dec. 1928: Attached to and concurrently Staff Officer, Combined Fleet.
5 Nov. 1929: Staff Officer, 2nd Submarine Squadron.
1 Nov. 1930: Attached to Yokosuka Naval Station.

Distribution:
1 Prosecution
1 GHD (Exec)
2 Com-Marianas L.S.
1 Mr. Marshall
2 Inv. Div. (File #1289)

Do not write in this space.

LEGAL SECTION
INV. DIV.
File No._____ Serial No._____
Initials_____

Exhibit 10(3)

0104

15 Nov. 1939: Staff Officer, Yokosuka Naval Station.
1 Dec. 1939: Attached to Yokosuka Naval Station.
15 Dec. 1939: Official tour to Europe and America.
31 Jan. 1940: Left Yokohama aboard Taiyo-maru.
25 Aug. 1940: Returned home.
15 Sept 1940: Ordered to serve under the direction of Chief of Staff, Yokosuka Naval Station.
15 Nov. 1940: Captain.
15 Nov. 1940: Commanding Officer, Special Service Ship [redacted].
1 Nov. 1941: Commanding Officer, NUBA.
25 Oct. 1941: Attached to Naval Technical Department.
25 Nov. 1941: Member, Naval Technical Department.
15 Nov. 1942: Attached to Kure Naval Station.
1 Dec. 1942: Director, Administrative Division, Kure Navy Yard.
15 Nov. 1943: Rear Admiral.
15 Nov. 1943: Commandant, 4th Submarine Squadron.
1 Nov. 1944: Attached to H.Q., 4th Fleet.
22 Nov. 1944: Attached to Naval General Staff.
5 Feb. 1945: Concurrently attached to Navy Ministry.
19 Dec. 1945: Chief, Maritime Affairs Board.
1 May 1945: Vice Admiral.
15 July 1945: Commandant, 4th Base Force and concurrently 2nd Escort Division.
19 Feb. 1946: Attached to Naval General Staff.
1 Nov. 1946: President, Shimizu Mercantile Marine School.
15 Sept 1945: Placed on Reserve List.

In view of the fact that all leads in this matter have been covered, this case is considered closed.

[redacted]

-2-

Exhibit 10(4)

0105

海軍中佐 岩林清作 陳述書

於1948年3月12日 マリアナ諸島 グアム島
戦犯容疑者収容所

私 別紙 昭和22年4月2日 附 連合軍 最高 司令官 調査団
第1880号 宛 参謀飛龍ノ調査 照会ニ対シ
次ノ如キ私ノ仕官セラレタル公式ノ日附ヲ記載シ
且ツ信実ニシテ正確ナル後庭ノ陳述ヲナスベキ旨ノ
命ヲ受ケタルニ付 左ノ通リ陳述ス

私ノ第四根拠地隊司令官トシテ実際ニ勤務
期間ハ昭和18年7月24日ヨリ昭和19年2月22日
終ツテヰマス

此ノ間私ノ指揮下ノ部隊ノ次ノ通デアリマス

第41警備隊 ― 司令 田中大佐 「トラック」
第42 〃 ― 〃 内藤大佐 「ポナペ」
第43 〃 ― 〃 池田大佐 「パラオ」
(昭和19年1月10日 廃止)
第4港務部 ― 部長 三浦大佐 「トラック」
第3通信隊 ― 司令 深町大佐 「パラオ」
(昭和19年1月10日 廃止)
第902航空隊 ― 〃 木村中佐 「トラック」

(2)

0106

トラック島ニ到達者ハトラック諸島ニ於ケル捕虜ハ捕虜ノ全部第四十一艦備隊ニテ保護セラレタリ

以上ノ事実ニ私ノ知リ記憶シ且ツ信ズル限リニ於テ真実デアルコト及夫レハ私ノ自由意志ニヨルモノデアツテ、作製ニ当リ何等強制、脅迫、報償ノ約束又ハ其ノ他ノ誘導ガ用ヒラレナカツタコトヲ宣誓シマス

若林清作
Seisaku Wakabayashi.

下記署名者面前ニ本日昭和23年3月12日宣誓署名セラレマシタ

Herbert L. Ogden.
Comdr. U.S.N.

最高司令官　　日附 1947年4月2日

聯合軍総司令部 法務局調査局報告

調査局第1880号 | メモ番号 | L.H. Barrard, Maj., CMP O-39540 蒲生

題名:- 海軍中将 若林清作.
Seisaku Wakabayashi.
別称- Seisa Wakabayashi

要約: 若林(Wakabayashi)、軍参職履歴

説明

参照: 昭和22年2月27日附 Mr. John J. Marshall ノ報告

細目:

東京(Tokyo)ニ於テ:

昭和22年3月19日 日本国政府中央連絡局渉外部長 T. カツベ (T. Katsube) ヨリ若林清作(Seisaku Wakabayashi)、軍参職履歴ノ次ノ通提出セリ

其ノ原本ハ此ノ報告ノ写ト共ニ "The Criminal Records Division" ニ提出サレタリ

本籍: 東京都世田谷区太子堂字486番地

出生年月日: 明治22年3月1日

明治41年9月14日 海軍兵学校生徒

〃 44年7月18日 海軍兵学校卒業

明治 44年 7月 18日　海軍少尉候補生
大正 元 -12- 1;　海軍少尉
〃 3 -12- 1;　海軍中尉
〃 6 -12- 1;　海軍大尉
〃 12 -12- 1;　海軍少佐
〃 〃 -12- 2;　第4潜水艇長
〃 14 -12- 1;　横須賀鎮守府付
〃 〃 -12- 1;　海軍省軍務局へ派遣
昭和 2 - 3 - 8;　海軍省軍務局員
〃 3 -12 -10;　海軍中佐
〃 〃 -12- 1;　聯合艦隊司令部付兼聯合艦隊参謀
〃 4 -11 - 5;　第二潜水戦隊参謀
〃 5 -11 - 1;　横須賀鎮守府付
〃 10 -11 -15;　横須賀鎮守府参謀
〃 17 -12 - 1;　横須賀鎮守府付
〃 〃 -12 -15;　欧米各国へ公務旅行
〃 18 - 1 -31;　横濱出帆太平丸乗船
〃 〃 - 8 - 25;　帰朝
〃 〃 - 9 -13;　横須賀鎮守府参謀兼軍令部部員

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昭和8年11月15日　海軍大佐
〃　〃　〃　特務艦鶴見艦長
9〃　11〃　1〃　鎮守府参謀兼海軍艦政本部員
10〃　11〃　15〃　海軍艦政本部員
12〃　11〃　15〃　呉鎮守府付
〃　12〃　1〃　呉海軍工廠総務部長
14〃　11〃　15〃　海軍少佐
〃　〃　〃　第四艦隊戦隊司令官
15〃　11〃　1〃　第四艦隊戦隊司令部附
〃　11〃　22〃　海軍省出仕
16〃　2〃　5〃　海軍省出仕兼務
〃　12〃　19〃　海務院（逓信省）部長
18〃　5〃　1〃　海軍中佐
〃　9〃　15〃　第四根拠地隊司令官兼第二海上警備隊司令官
19〃　2〃　19〃　海軍省出仕
19〃　11〃　1〃　清水高等商船学校長
20〃　9〃　15〃　予備役編入

本件ニ対スル総テノ事ハ上記ノ通リナリ

（印）

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面e作先	中此、受日：記入之
1 Prosecution	
1 CRD (Encl)	
2 Com-Mariana L.O.	
1 Mr. Marshall	
3 Inv. Div. (File 1880)	

0116

Statement of Vice-Admiral Saisaku Nakabayashi, war Criminal Stockade, Guam, M.I., 12th March 1948.

During my tour of duty I made one trip to Moklok inland in October 1943 and returned on the same day. I made one trip to Ponape in November 1943 and returned the following day. I made no other trips during my tour of duty on Truk.

I relieved Vice-Admiral Moriji Takeda, I.J.N., as C.O. of the 4th Base force on 24th July 1943. When I relieved Vice-Admiral Takeda, I examined the more important orders and instructions which he had issued. The only document or instructions dealing with POWs was a document stating that it was the policy of the 4th fleet to send POWs to Japan as soon as possible, and that all POWs should be confined at the 41st Naval Guard

Unit. There were no existing instructions concerning the handling, treatment or protection of POWs.
Shortly after 19th November 1943, a despatch was received from the General Staff of the Navy addressed to the Combined Fleet and to the 4th Fleet, information to the 4th Base Force, instructing that POWs should be sent to Japan as soon as possible.
During my tour of duty I did not receive any instructions or orders from the 4th Fleet regarding the treatment, handling or protection of POWs.
During my tour of duty, I did not issue any standing orders with regard to the handling, treatment or protection of POWs.
I received only one report concerning the arrival of POWs on Truk and that was concerning the arrival of 42 submarine POWs

in November 1943, Capt. Minematsu, then C.O. of the 41st Guard Unit, came with a member of my staff and reported this to me. As I am a former submarine officer myself, I told Minematsu that these prisoners should be treated with kindness. This is the only instruction I ever gave regarding POWs. This was the only incident when I actually knew of the arrival of POWs.

I established no system of accounting or reporting the number of POWs arriving or confined on Truk.

During my tour of duty I inspected the various units under my command twice officially and on numerous unofficially inspections, but did not have an established schedule of inspection. I inspected the 41st Guard Unit at least 5-6 times each month unofficially until Capt. Tanaka became C.O. late in Dec 1943. My last visit to the 41st Guard Unit

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was about 20th December 1943.
After that date I became ill and
did not make any more inspections.
During all my visits to the 41st
Guard Unit, I did not see any POWs.
On many of my inspections of the
Guard Unit, I asked if they had
any POWs on board. The answer
was always that they had none.
The 41st Guard Unit was the only
organization on Truk authorized to
confine POWs. During my visits to the
41st Guard Unit I never gave them any
instructions regarding the treatment of
POWs. I did not specifically instruct
them to inform me when they received
POWs, but it was the duty of the C.O.
of the 41st Guard Unit to advise me
when any POWs were received.
During the period of my illness from
8th January 1944 to 22nd Febru-
ary 1944, Capt. Iwanami was my
attending physician and visited me

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at my quarters every day about ten o'clock in the morning. These daily visits usually lasted about twenty minutes. The 4th Base Force medical officer, Comdr. Tino, attended during these visits. In addition comdr. Tino was always on hand and attended me constantly during the cause of my illness I was suffering from ulcers and later a mild complication of Beri-beri.

From October 1943 to 10th February 1944 I was administrative head of a board consisting of the leading medical men from the Combined Fleet which met at least twice a month to discuss medical and health problems.

Capt: Iwanami was one of the medical officers present. Iwanami boasted at these meetings of his medical experiments but during the time I attended these meetings, Iwanami did not tell me about any experiments on POWs. I did not attend any meetings after 8th Jan

1944. Capt. Okubo attended for me thereafter.
The 4th Naval Hospital was about 500 yards from the 4th Base Force Headquarters. My quarters adjoined the 4th Base Force Headquarters.

I swear that the foregoing is true to the best of my knowledge, recollection and belief, and is voluntarily made by me, and I have not been induced to make this statement by the use of any force, threats, promises of reward or other inducements.

Seisaku Wakabayashi
(Sgd) former Vice Admiral, J.J.N.

Subscribed and sworn to before the undersigned this the 13th day of March 1948.

Herbert L. Ogden
Comdr, USN

0128

海軍中将 名林清作陳述書

マリアナ諸島グアム島
戦争犯罪人收容所
昭和二十三年三月十二日

私の勤務期間中 私は昭和十年十月 モルトロック島への旅行
し同日帰りました。私は一回昭和十八年十一月ポナペ島へ旅行
し翌日帰りました。私のトラック於ける勤務期間中私は
其の他の旅行をしませんでした。
私は海軍中将武田孟治のあとをつぎ昭和十八年七月二日
第四根拠地隊司令官に就任しました。私は武田中将と交
代したとき私は機密書類又は指令及指令を検
査しました。修慶に関する唯一の書類又は指令は 修慶を
お来る限り速く日本に送ることを及修慶はすべて第四十一設営隊に
配属せらるべきことが第四根拠地隊の設置であることを述
べてある一つの書類でありました。修慶の取扱待遇
又は保護に関する指令はありませんでした。
昭和十八年十一月十九日から少し経つて軍令部総長から
電令が来ました、その電令は軽合艦隊及第四艦隊
に宛てられ第四根拠地隊に通知せられたものであつて
修慶はお来るだけ速く日本に送るべきことを指示
してありました。

私の勤務期間中 私は俘虜の待遇取扱又は保護に関して
常に脳裏から何も指令や命令は受け取りませんでした。私の
勤務期間中私は俘虜の取扱待遇又は保護に関して
何も現行命令を受けませんでした。

私は俘虜がようやく到着した報告は一部が受け
ましたそれは昭和十八年十一月四十二名の潜水艦俘虜
が到着に関するものでした。当時それに十一名の備隊司令
幸松大佐は私の参謀と共にやって来て此の事を私に
報告しました。

私は以来潜れ暗の七月Bであるを教育し取扱わ私は
私が俘虜に関して与えた唯一の指令であります。私が現実
に俘虜の到着を知ったのは此の一回だけであります。

私はようやく到着し監視を開始されてみる俘虜の計算方法、支払人
数の報告を確実にしませんでした。私の勤務期間中
私は私の指揮下の部隊を公式に二回又非公式
には何回も検閲しました。なし検閲の項目にも予定
を持ってはおりませんでした。昭和十八年十二月の末日中
大佐が司令官として私は非公式にも毎月五六
回位は十一名の備隊を検閲しました。私の最後の分は十一
名備隊の検閲は昭和十八年十二月二十日以であります。

その日から後 私は病気にかかってそれ以上検閲をしません
でした。私が市に十一教会備除と訪問してる間を通じて
私は修養を見ませんでした。多数回ん回る私の教会備
除検閲に際して私は修養がみるかどうか聞きましたがそのご答
へは言ん修養はみるかいと言ふ答でありました。トうこう島と
で修養を監禁することと思はされた唯一の部除は市
に十一教会備除でありました。私が市四十一教会備除と訪問
してみる間 私は修養の待遇ん関して何も指示をよへ
ませんでした。私は修養の待遇ん関して何も指示をよへ
教会指示しませんでした。なぜなら私は報告書を受取ったとき それを私ん報告書
なときそれを私ん報告するは市に十一教会備除司令
の任務でありました。

昭和十九年一月八日から同年二月二十二日ん至る私の病気
の期間中 吉岐大佐が私の主治医でありて彼は毎朝十
時以次私の宿舎を訪問しました。此等の毎日の訪問は通常
は二十分かゝりました。市に招集地除軍医鎌野中佐
は二等の訪問ん至ました。又鈴木佐は言ん
私の病気の問言ん私のそばん居て仲添ってみました。
私は田舎ヨウんかゝり後(軽減な)胆気を並べました。

昭和十八年十月から一九年二月十日まで 私は連合艦隊
の主要な軍医より成る委員会の委員長でありました。

その事実会は少くとも月二回召集され医学的問題(問題)を論議しました。
吉性大佐はそれらの中の一人でした。吉性大佐はそれらの会合に彼の実験を自慢しましたから私が立寄の会合に参加してみる間は吉性は私に依存しようとしていました。
私は昭和十九年一月以後どの会合にも出席しませんでした。
大久保大佐が私の代りに出席しました。
軍医学校は次第に疎開地から疎開地へと雑本部は次第に疎開地から疎開地へと移動しました。私の所在は次第に疎開地から疎開地へと移動しました。
即ち終戦まで居りました。

元日本帝国陸軍中将
吉村清作

右記署名者の相違ないことを証明し且つ記名捺印致します。
十三日
昭和二十三年三月

アメリカ合衆国陸軍中佐
H・L・オグデン

(印)