

A NEW LOOK AT THE CODE OF CONDUCT

A Thesis

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ABSTRACT: This thesis examines the Code of Conduct for Members of the Armed Forces of the United States. The author reviews the performance of American prisoners of war in captivity preceeding the promulgation of the Code and examines the conduct of prisoners in the Pueblo Incident and the Vietnam War. Codal problems are identified in light of these experiences. The Code is reviewed and examined for its compatibility with the Geneva Convention Relative to the Treatment of Prisoners of War. This thesis concludes by recommending changes in the Code to make it more realistic and more consistent with the Convention.

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CHAPTER I
INTRODUCTION

This paper is an examination of the conduct of American prisoners of war and an evaluation of their performance in the Korean War, the Pueblo Incident and the Vietnam War. The conduct of these prisoners will be examined in respect to its relationship to the Code of Conduct.

The Code has proved to be a very important and controversial document. Following the two major tests of this document, the Pueblo Incident and the Vietnam War, great public concern has been voiced, and its qualities have been publicly questioned. It has been the object of controversy both within and outside of the military. A hue and cry has arisen for changes in the Code, and it has been attacked as being unreasonable and unrealistic. On the other hand, the Code has been defended and lauded by some, including many former prisoners.

The arguments for and against change should be carefully considered and weighed. If changes are warranted, they must be made as soon as practicable. The opportunity for change can best be addressed when few or no American prisoners are in confinement, as is now the case. History shows that the opportunity for change under such favorable

circumstances will probably be fleeting.

In Chapter II of this paper, the author will note the process by which the Code of Conduct emerged as a feature to guide the conduct of the American serviceman in captivity. The historical background of the Code will begin with an examination of the conduct of American prisoners of war in the Korean Conflict. A review will then be made of the popular conception that American prisoners in the Korean War performed in a poor and unprecedented manner while in captivity and evaluate its accuracy.

In Chapter III, attention will initially be directed toward the first major test of the Code, the Pueblo Incident, and the problems encountered with respect to the operation of the Code. These problems will be noted as observed from the actions of the crew and the record and findings of the Naval Court of Inquiry and the House Special Subcommittee which investigated the Pueblo Incident.

Next, the author will consider the second important test of the Code, the Vietnam War, and give considerable attention to the conduct of prisoners of that conflict under the various conditions of their confinement. A comparison of the problems of the two tests of the Code will be made. Throughout, the problems of the operation of Code will be examined and changes in the Code will be

suggested and evaluated, based on the experience gained by the Pueblo Incident and the Vietnam War.

In Chapter IV, the author will evaluate the compatibility of the Code of Conduct and various provisions of the Geneva Convention Relative to the Treatment of Prisoners of War.¹ Does the Code impair the operation of GPW in any way? If the operation of GPW is impaired, can the Code be reconciled to remove the impairment?

In Chapter V, the author will reach conclusions and recommend a proposed Code based upon the considerations of the relationship of the Code to GPW, and upon the experience of the two major tests of the Code.

CHAPTER II

HISTORICAL BACKGROUND OF THE CODE

A. PURPORTED NEED FOR A CODE OF CONDUCT

The author's examination of the Code of Conduct and the reasons for its emergence following the Korean Conflict will begin with a critical look at the purported reasons for the promulgation of the Code. Evidence will be offered as to which of the reasons advanced for its promulgation were supported in fact and which were erroneous perceptions of the performance of American prisoners of war in the Korean Conflict.

7,140 United States military personnel came under the power of the enemy during the Korean Conflict from its beginning, on June 27, 1950, when the United Nations Security Council adopted the Resolution calling for United Nations members to assist South Korea, until July 27, 1953, when the cease fire agreement was signed.²

In comparison to earlier wars, the number of members of United States military forces falling under the power of the enemy compares most closely with the number taken during the American Revolution.³ Certainly then, the United States had experienced, in other wars, greater losses of servicemen taken prisoner. This was true even during times when the population was markedly smaller, so

that the losses must have had a much greater impact on the country as a whole.

Another factor, which was cited as the basis for the necessity for the Code of Conduct, was that the mortality rate of prisoners in the Korean Conflict amounted to an "astonishing death toll (of) thirty-eight percent of the total captured."⁴ The impression that some of these deaths were due to moral inadequacy of the prisoners was fostered by the use of the term "give-up-itis" to describe deaths of prisoners that occurred without apparent immediate organic cause.⁵ Although the death toll was significant, it was far from unprecedented in light of the experience with captivity previously encountered in Asian camps where the environment was hostile and unfamiliar and the enemy largely unprincipled.⁶ Accordingly, the numbers of prisoners incarcerated and the death toll in captivity are not sufficient explanations for the necessity for the Code.

Before the Korean armistice was signed, the allegation was made in the popular press, particularly in magazines, that the conduct of U.S. prisoners had been quite different from that perceived in earlier wars and that such conduct was somehow related to the morality of the soldier involved.⁷

Another phenomenon that excited the public imagina-

tion and raised questions regarding the character of United States Servicemen in Korea was the decision of twenty-one individual servicemen to remain with the North Korean Communists rather than return to the United States.⁸ The popular media took great interest in the exploitation of this relatively minute number of Americans.⁹

Despite public concern over the conduct of American servicemen in captivity; however, upon repatriation, only 192 of the 4,428 returnees were suspected of having committed serious offenses against their comrades or the United States.¹⁰ The final resolution of these cases resulted in fourteen trials by courts-martial and eleven convictions, ten of which were for giving aid and comfort to the enemy in violation of Article 104, Uniform Code of Military Justice.¹¹

The public perception of widespread prisoner misconduct continued in spite of both the revelation of the small extent of such conduct and the publication of the Prisoner Report, which illustrated the minimal extent of the problem. Perhaps one of the difficulties contributing to public misunderstanding of the limited nature of the misconduct of the prisoners was the fact that other less dispassionate accounts received much broader publicity and circulation among the general public.

The most notable of the popular accounts was a lengthy

and seemingly scholarly article published as a lead in "The New Yorker" magazine.¹² The principal thesis presented by Eugene Kinkead was that collaboration by United States Army military personnel in the Korean Conflict represented a new and alarming weakness in the national character of young men in the United States. This weakness was said to be caused by such factors as

...diverse aspects of our culture; home training of children, education, physical fitness, religious adherence, and the privilege of existing under the highest standard of living in the world.¹³

The thrust of Kinkead's argument was that the moral fiber of United States servicemen had deteriorated from that which had been observed in previous conflicts and that:

In every war but one (Korea) in which the United States had fought, the conduct of its servicemen who were captured and held in enemy prison camps presented no unforeseen problems to the armed forces and gave rise to no particular concern in the country as a whole.¹⁴

In truth, the conduct of American POW's in captivity has always been a cause for concern. In the Revolutionary War a former American soldier was convicted of treason for becoming a "turncoat" when he entered into the service of the British Crown while interned as a prisoner of war.¹⁵ In the Civil War, the attempts of Union prisoners of war to escape by tunneling from the notorious Andersonville, Georgia Confederate prison were sometimes thwarted by other Union prisoners, who in return for preferential

treatment, or favors as insignificant as a plug of chewing tobacco, informed on their comrades.¹⁶ Incidents of this sort were so frequent that the term "tunnel traitors" gained wide currency in describing this sort of collaboration.¹⁷ Moreover, during the Civil War, 3,170 Union prisoners joined the Confederate forces, and about 5,452 prisoners of the Confederate armies joined the Union army.¹⁸ Concern over the conduct of soldiers in captivity during this war precipitated the promulgation of a general order intended to curb the practice of surrender and subsequent parole to escape further combatant service.¹⁹

Incidents of collaboration on a large scale occurred during the Mexican War when Mexican captors of American prisoners proved so effective in enlisting "turncoats" to the Mexican side for battle against the United States that a battalion of the Mexican Army was primarily comprised of these individuals.²⁰ Similar problems, on a small scale, occurred in World War I.

An American prisoner of war of the Germans who was entrusted with the job of censoring mail by the senior prisoner was discovered to have given information obtained in his censorship duties to the captor, and two other soldiers were found to have given useful information to the enemy by a board of noncommissioned officers convened for the purpose of investigating their conduct in captivity.²¹

Misconduct of prisoners of War in the Second World War also focused public attention on the collaboration issue,

as when Sergeant John Provoo, U.S.A., was tried by a United States federal court for alleged misdeeds committed while interned by the Japanese.²²

Thus, Kinkead's principal thesis, that the collaboration by United States Army personnel during the Korean Conflict was unprecedented, cannot be supported by the facts. Nevertheless, this thesis persists to this day and still continues to appear in popular histories regarding the performance of United States military personnel in the Korean War.²³

It is also possible that the very promulgation of the Code of Conduct has frequently been interpreted as a reaction to a recognition of greivous failures by prisoners, despite definite official statements to the contrary.²⁴ The conclusion that the conduct of prisoners of war has been a problem throughout the history of the United States seems inescapable in view of the facts noted. There have always been "turncoats" and "collaborators." Certainly, public awareness of prisoner conduct has been greater than in earlier conflicts, due to the Communists' widespread efforts to publicize it and because of the increased effectiveness of worldwide communications.

On May 17, 1955, Charles E. Wilson, as Secretary of Defense, directed that an ad hoc committee be formed to recommend an approach toward the study of problems concern-

ing the conduct of United States military personnel while in prisoner of war status.²⁵ This committee was composed of five civilian and five retired military leaders and was to operate under the direction of Mr. Carter L. Burgess, Assistant Secretary of Defense for Manpower and Personnel.²⁶

The formal instructions to the committee stated in part:

Our national military needs must be met. This requires that each member of the Armed Forces be thoroughly indoctrinated with a simple, easily understood code to govern his conduct while a prisoner of war. However, this military need must be met in a manner compatible with the principles and precepts basis to our form of government. Enforcement must be accomplished with justice and understanding.

I have appointed this Committee to advise me on this matter. I request that you consider the methods we may expect our potential enemy to employ, the obligation which national military needs impose on members of the Armed Forces and the obligation of the United States to afford protection to its citizens in the custody of a foreign power. I direct your deliberation toward the development of suitable recommendations for a Code of Conduct and indoctrination and training on preparation for future conflict.²⁷

To meet this requirement and others, the Committee was given a two month working period.²⁸ Considering the magnitude of the task, the report required was submitted in excellent time, on July 29, 1955, with an accompanying letter of reply to the Secretary which noted that the members of the committee had "been in constant session for the past two months."²⁹ The letter noted that the prisoner

of war situation resulting from the Korean Conflict had been the object of a great deal of adverse publicity and encouragingly noted that the proposed Code of Conduct which accompanied the Report was wholeheartedly supported by the consensus of opinion of all who consulted with the committee. Importantly, the committee noted "From no one did we receive stronger recommendation on this point than from the former American prisoners of war in Korea, officers and enlisted men."³⁰

The Committee recommended the Code of Conduct to Secretary Wilson, and in consonance with the recommendation, on August 17, 1955, President Eisenhower issued Executive Order No. 10631, promulgating the Code in the recommended form. The Order contained three elements—the preamble, the Code, and an explanation and will be referred to herein by those terms.

The Preamble states:

By virtue of the authority vested in me as President of the United States and as Commander in Chief of the Armed Forces of the United States, I hereby prescribe the Code of Conduct for members of the Armed Forces of the United States which is attached to this order and hereby made a part thereof.

Every member of the Armed Forces of the United States is expected to measure up to the standards embodied in this Code of Conduct while he is in combat or in captivity. To ensure achievement of these standards, each member of the Armed Forces liable to capture shall be provided with specific training and instructions

designed to better equip him to counter and withstand all enemy efforts against him, and shall be fully instructed as to the behavior and obligations expected of him during combat or captivity.

The Secretary of Defense (and the Secretary of the Treasury with respect to the Coast Guard except when it is serving as part of the Navy) shall take such actions as is deemed necessary to implement this order and to disseminate and make the said code known to all members of the Armed Forces of the United States.³¹

The Code, composed of six articles reads:

I

I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

II

I will never surrender of my own free will. If in command I will never surrender my men while they still have the means to resist.

III

If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information nor take part in any action which might be harmful to my comrades. If I am senior I will take command. If not I will obey the lawful orders of those appointed over me and will back them up in every way.

V

When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth. I will evade answering

further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

VI

I will never forget that I am an American fighting man, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

It is important to note that the Code of Conduct was from the beginning, intended only to serve as a moral guide and not a legal standard for conduct, as failure to adhere to its provisions was not intended to be the basis for punitive action.

The purpose of the Code of Conduct is to provide our fighting forces with a standard of conduct direct from the Commander in Chief, (President Eisenhower) who is also one of the great military leaders in American history. It is designed to aid the fighting men of the future, if ever they fall into such an enemy's hands, in the fight for their minds, their loyalty and their allegiance to their countryThe Code provides no penalties. It is not definitive in terms of offenses, rather it leaves to existing law and the judicial process the determination of personal guilt or innocence in each individual case.³²

B. KOREAN CONFLICT

When the North Korean Communist forces invaded South Korea on June 25, 1950, there were no United States units within that state. However, within six days of that date, a battalion of the 24th Infantry Division was rushed to Korea from Japan.³³ After the war, repatriated prisoners indicated that lack of training was a critical factor in their performance in captivity.³⁴ A subsequent study indicated that ninety-four percent of the prisoners who were, upon repatriation, classified by the Army as "participants" (those who performed corroborated acts meriting possible disciplinary action by courts-martial) were captured between July of 1950 and June of 1951. Only six percent of those similarly classified were taken after June, 1951.³⁵

Studies made following repatriation indicated that the "typical" American prisoner of war in the Korean Conflict was an enlisted man, captured in mass from a hastily organized unit during the earlier period of the conflict.³⁶ The "typical" Korean Conflict prisoner held the rank of private or private first class at the time of capture and after an average of two years in captivity was still less than twenty-five years old.³⁷ The median educational attainment of Korean Conflict repatriates was

less than nine years, at a time when the enlisted median educational level was twelve years for a corresponding sample of young men not in the service.³⁸ The Army General Classification Test score for the typical repatriate was below eighty-nine, which was far under the average for the Army and for correspondingly matched national samples.³⁹

A most important factor in all considerations of the state of the American prisoner of war in Korea was the time at which he fell into the hands of the enemy. During the period beginning June 27, 1950, the prisoner of war facilities and policies were under the control of the North Koreans. This control continued until April 1951 when the Chinese Communists intervened and assumed the operation of the camps, continuing in this capacity until the cessation of hostilities. These two periods were markedly different and will be referred to as the Korean and Chinese periods, respectively.

During the Korean period, imprisonment was characterized by a long and rigorous march to one of the more than twenty various prison camps throughout the North Korean interior. Often the march itself was the worst ordeal of confinement. Ill and injured prisoners were prodded, beaten, and kicked along the way. Many prisoners died because of brutal treatment from the captors, and some United States servicemen were shot upon capture or, later,

beside the road. During the winter of 1950-1951, when the trails of the rugged Korean hills were choked with snow, 500 of 700 marching prisoners perished enroute to one camp.

The rations provided prisoners were unfamiliar and inadequate, and the average American serviceman lost weight precipitously. Often, sickness ravaged the camps, which were generally foul and unsanitary.⁴⁰ There was great variety among the conditions prevailing in the camps. One of the worst and most notorious was the 'Interrogation Center' near Pukchin and a neighboring disciplinary center called "The Caves." Here, prisoners endured severe conditions in caverns lacking heat, light, plumbing, or sanitary facilities.⁴¹

The primary interest of the North Koreans was to show their "superiority" over "Western Barbarians," and their treatment of prisoners included savage beatings, inhumane displays, and murder of prisoners, possibly to impress Korean civilians with their prowess. The North Koreans generally practiced neither interrogation or political indoctrination during their control over the camps.⁴²

In the Chinese period, however, a different tack was taken. Many prisoners who had expected brutal treatment or death on capture were taken aback and confused by the

Chinese practice of expressing gratitude and appreciation at the receipt of a prisoner and the practice of treating a prisoner with care and kindness.⁴³ The Chinese established their camp organization around the prisoners in order to use them for their own purposes. They sought to indoctrinate prisoners through a formally organized process, involving the use of group pressures in "schools."

The POW "political" schools in North Korea were, of course, patterned after the Soviet Russian design. They were part of a mass program to spread Marxian ideology and gain converts for International Communism. The Progressives were called upon to deliver lectures, write pamphlets, and make propaganda broadcasts. Progressive leaders were sent among Reactionary groups to harangue the men.⁴⁴

The terms "progressives" and "reactionaries" were defined as follows:

The graduates from "Peaceful Valley" and others who accepted Communist schooling were called "Progressives." Prisoners who refused to go along with the program often remained in tougher circumstances. They were considered "Reactionaries."⁴⁵

Apparently the Communist effort at splitting the prisoner group proved highly effective in some camps.

Breakdown of leadership was exactly what the enemy desired. Officers were usually segregated. As soon as a natural leader stepped forward in a camp, he was removed. Progressives were usually placed in leadership positions. If they weren't obeyed by the other POW's, punishments were in store for the "insubordinate prisoners."

By design and because some officers refused to assume leadership responsibility, organization

in some of the POW camps deteriorated to an every-man-for-himself situation. Some of the camps became indescribably filthy. The men scuffled for their food. Hoarders grabbed all the tobacco. Morale decayed to the vanishing point. Each man mistrusted the next. Bullies persecuted the weak and sick. Filth bred disease and contagion swept the camp. Men died for lack of leadership and discipline.⁴⁶

Unlike the North Koreans, the Chinese made determined efforts to obtain propaganda materials for their psychological warfare efforts and to convert the prisoners to Communism as a way of life through indoctrination and manipulation.⁴⁷

In this connection, the Korean Conflict marked the first time that the mass media commonly carried reports of the process which came to be known as "brainwashing."

The term brainwashing is used to describe the process whereby a change in beliefs occurs.⁴⁸ The term comes from a literal translation of the Chinese colloquialism "hsi nao," used to describe a long term process applied against Chinese non-Communists by Communists following the revolution of 1948.⁴⁹ The Chinese concept was motivated by a sincere feeling that the changing of world view was necessary and resulted in what might be termed an ideological conversion of the individuals subjected to the process within China.⁵⁰ The much maligned term of "brainwashing" has been defined as a prolonged Communist effort "to erase a person's beliefs and give him new ones."⁵¹ Unfortunately, the term

is often indiscriminately used to describe any process of obtaining a false confession using intensive and protracted techniques.⁵² Public attention focused on the issue of Communist propaganda activities, including "brainwashing," during the period of Chinese control after captured American airmen publicly made confessions of "germ-warfare" bombardments as part of an intensive worldwide Communist propaganda campaign on this topic during 1952 and 1953.⁵³ Official response to such statements was heated and direct. Reacting to a Communist broadcast employing these "confessions" in 1953, General Mark Clark, then Commander in Chief of the UN Command, stated:

Lest silence regarding it be misinterpreted in any way, I feel under compulsion to denounce the word-warring Peking Radio's latest attempt to revive the totally baseless and totally discredited allegation that the United Nations Command has engaged in so-called germ warfare.

Instead of the meaningless jargon of pseudo-scientists, it now introduces incredible statements linked with the names of captured American personnel. Whether the statements ever passed the lips of these unfortunate men is doubtful. If they did, however, too familiar are the mind-annihilating methods of the Communists in extorting whatever words they want for there to be mystery as to how they were fabricated. The men themselves are not to blame, and they have my deepest sympathy for having been used in this abominable way.⁵⁴

Although there was much public concern over the supposed "brainwashing" of prisoners in the Korean Conflict, an official Army study concluded that such long range prac-

tices were not actually involved, as "the exhaustive efforts of several Government agencies failed to uncover even one conclusively documented case...."⁵⁵

The Communists' use of prisoners for blatant propaganda purposes and the injection of such emotion evoking issues as "brainwashing" and "germ warfare" brought great public outcry and proved to be an impetus for action by the government. This, and the erroneous public perception of unprecedented, unsatisfactory conduct by prisoners of war in the Korean Conflict precipitated the writing of the Code of Conduct.

CHAPTER III
THE CODE IS TESTED

In this chapter the author will examine the Pueblo Incident and the Vietnam War as related to the Code. All factual information used was gained from published accounts, and in a few instances regarding Vietnam, from personal interviews. Certain difficulties with this method should be noted.

First, there can be no doubt that the conditions of capture, movement to camp, interrogation, and life in camp vary greatly. Imprisonment is certainly a singularly individual experience. This was demonstrated in World War II, when vastly different conditions were encountered by prisoners confined in the European Theater and the Pacific Theater. A truly comprehensive survey of the conditions encountered would be a monumental project in a large conflict, as it would be a study of the entire environment of that particular war. Further, since conduct is influenced not only by the physical conditions, but also by the individual's perception of them and by his emotions, the task is made even more difficult. There are few concepts more likely to be influenced by an individual's morality and emotion than his concern with torture, resistance, and collaboration.

Another problem involved in considering the conduct of prisoners of war is that the information used is largely anecdotal; that is, it is based upon short personal accounts or vignettes. This characteristic of the story of a prisoner of war may explain why there are vast numbers of personal diaries or accounts of imprisonment in war but a paucity of analytical material on the subject.

A further problem is the accuracy of the individual information. There is no doubt that returned prisoners have a great personal stake in their images of themselves, and it would thus be reasonable to expect that the presentation of that image influences their accounts in post hoc reports.

Accordingly, that which follows is not intended as an objective and complete survey of the conduct of prisoners of war in the Pueblo Incident and the Vietnam Conflict, but only as one which points out the problems of the Code.

It must be noted that both captor and captive have strong motives to falsify and selectively report information. Possibly the most reliable statements made are those made against some obvious interest of the maker, such as admissions of improper conduct or non-compliance with rules.

A. THE PUEBLO INCIDENT

1. Capture and Confinement

The first noteworthy test of the Code did not occur until more than twelve years following its promulgation. On January 23, 1968, the USS Pueblo (AGER-2), a small, slow, former cargo ship was laying in international waters some fifteen to eighteen miles off the coast of North Korea. One of the Pueblo's missions was to gather electronic intelligence.

The captain of the Pueblo, Commander Lloyd J. Bucher, USN, had been warned to expect some minor harassment from North Korean naval vessels but was surprised when his ship was approached by a North Korean subchaser which closed on the Pueblo and requested a signal of her nationality. When Bucher displayed the United States flag, the North Koreans signaled the order: "Heave to or I will fire."

The 83 crewmen of the Pueblo, including 6 officers and 2 civilians, were unarmed, although personal weapons and hand grenades were carried on the ship. The ship also had two exposed fifty caliber machine guns mounted on deck.

Bucher signaled "I am in international waters," and "I am departing the area," and attempted to leave. As this occurred, three heavily armed North Korean torpedo boats joined the subchaser, and two MIG 21 fighter aircraft passed

overhead. When the Pueblo continued under way, the North Korean vessels opened fire, striking the ship with cannon shells. Bucher stopped the ship, ordered that classified material aboard be destroyed and radioed for assistance.

In response to a North Korean signal, Bucher followed the subchaser until he discovered the destruction of classified materials was proceeding slowly and again stopped. At that point, the subchaser again opened fire. One Pueblo crewman received fatal injuries, two others were seriously wounded, and several others, including Bucher, were struck by shell fragments. The Pueblo was then boarded, and the North Koreans sailed the ship to Wonson.

Later, Commander Bucher stated: "I was acting in faithful response to the orders I had been given....My orders were specific as to my not to start a war out there." At no time did Bucher order weapons manned. He later stated that he felt that to offer armed resistance would have resulted in "complete slaughter," and that to do so would not have affected the outcome of the engagement.⁵⁶

Upon arriving at Wonson, the crew members proceeded to a building where interrogation commenced. Many of them were beaten and struck with rifle butts.⁵⁷

Bucher later related that in the moments immediately preceding the North Koreans boarding of the Pueblo, Chief Warrant Officer Gene Lacy had addressed the crew over the

loudspeaker system and announced: "Now hear this! Now hear this! All hands are reminded of our Code of Conduct. Say nothing to the enemy besides your name, rank and serial number."⁵⁸

One Pueblo crewman was later quoted in a news article as saying that some crewmen thought that the Code of Conduct was at least "partially" inapplicable to them since it was intended for "foot soldiers."⁵⁹ However, it is apparent that the injunction to maintain silence was not followed. Commander Bucher later wrote that prior to debarking from the Pueblo, in response to an accusation that he was a CIA operative by a North Korean who spoke through an interpreter, he replied:

Absolutely not! We are conducting oceanographic research in international waters. This is a research ship that has nothing to do with the CIA or any kind of armed aggression. What are you going to do for my men you have wounded? ...I demand you at least give them decent medical attention. And I demand that you let us leave in peace, or the United States will never let you get away with this.⁶⁰

Another Pueblo officer later stated that Commander Bucher said the ships mission was "[t]o measure the radioactivity of sunspots."⁶¹ Commander Bucher also noted that shortly after boarding a train for "The Barn," a barracks like building where they were imprisoned, he overheard other interrogations.

I thought I heard (Lt.) Tim Harris passing himself off as a chief petty officer,... Voices were muffled and broken up by the noisy rattling and creaking of the railroad coach and periodic shrieks from the chugging locomotive, but I got the impression that everybody aboard Pueblo was representing himself as a petty officer assigned to either the ship's laundry or galley departments.⁶²

Another of the officers of the Pueblo later recalled this period and stated that when he overheard Bucher replying to the interrogators about the Pueblo's mission that

...despite the announcement over the ship's loudspeaker...we were no longer playing by the rules. From here on, each man was on his own. Each would have to improvise, make his own way, but always at the risk of contradicting the others.⁶³

The records of the Pueblo crewmen indicated that all had received the initial Code of Conduct instruction then required by Naval regulations.⁶⁴

Commander Bucher later noted that he received five beatings during the first morning at "The Barn," and that thereafter he was subjected to a carefully staged mock "execution" in which an unloaded pistol was poised behind his head and "fired" in an attempt to coerce him into signing a confession to "spying."⁶⁶ Shortly thereafter he was taken to another building where a horribly mangled man, identified as a tortured South Korean spy, was displayed hung from a hook with his eviscerated eyeball dangling from its socket. Bucher was informed that he

would be similarly tortured if he refused to confess.⁶⁶ He related that shortly thereafter, he signed the first confession when an interrogator threatened to shoot the crew "starting with the youngest one first."⁶⁷ The confession was signed within the first twenty-four hours of captivity at "The Barn."⁶⁸

Stilted and peculiar language and sentence structure was a characteristic of the two major "confessions" made by Commander Bucher, the first of which was published in the Pyongyang Times during February of 1968, and the second, which was prepared by Commander Bucher and six other crew members, who worked together in drafting it, was delivered to the North Koreans on September 21, 1968, but apparently not published or widely distributed.⁶⁹ Bucher notes that shortly after signing the confession, he was offered food, but was unable to eat, and after the guard had left his cell, he attempted to take his own life by drowning himself in a bucket of water.⁷⁰

Other Pueblo officers later admitted that all crewmen had provided the North Koreans with their job descriptions by the second day of captivity.⁷¹ Many admitted they had composed and signed confessions similar to Bucher's during the first week of captivity following repeated beatings and kickings by the North Koreans.⁷²

Although no military action was taken in response to

the seizure of the Pueblo, the United States began negotiations for the release of the crewmen soon after their capture. United States representatives took the plight of the Pueblo crew to the floor of the United Nations General Assembly on January 23, 1968,⁷³ and began a series of meetings with North Korean representatives at the Mixed Armistice Commission in Panmunjom where they demanded the return of the Pueblo and her crew, along with an apology from the North Koreans.

Twenty-seven other direct meetings at Panmunjom followed, in which the North Korean position emerged in a series of demands that the United States apologize for the Pueblo's alleged intrusion, admit that the vessel had violated Korean territorial waters on a mission of espionage, and pledge that there would be no future violations of the claimed territorial waters of North Korea.⁷⁴

The direct meetings at Panmunjom continued without resolution until December 17, 1968, when General Gilbert Woodward, the chief United States negotiator presented a plan, acceptable to the North Koreans, whereby he would publicly and officially disaffirm the truth of the confession demanded by the North Koreans, then sign a prepared confession which included all the points desired by them.⁷⁵

General Woodward appeared to make the statement at

Panmunjom on December 22 and was quoted as supporting the United States position by stating:

...the ship was not engaged in illegal activity, that there is no convincing evidence that the ship at any time intruded into the territorial waters claimed by North Korea...and that we cannot apologize for actions which we do not believe took place....The document which I am going to sign was prepared by the North Koreans and is at variance with the above provisions...but my signature will not and cannot alter the facts. I will sign the document to free the crew and only to free the crew.⁷⁶

The confession which General Woodward signed was characterized by stilted and awkward language of the sort found in Commander Bucher's "first confession" and received wide distribution in the press.⁷⁷

The North Koreans distributed copies of the confession to Pueblo crewmen immediately preceding their repatriation on December 23, 1968. Later, one crewman stated that after he examined it, he concluded: "It read like all the bogus confessions we had been forced to sign...I couldn't conceive the United States government signing this."⁷⁸

Upon their return to the United States, a Naval Court of Inquiry was convened to examine the conduct of the officers and men of the Pueblo. It held its first open session at Coronado, California on January 20, 1969. The board was composed of five flag officers, including Vice Admiral Harold S. Bowen, USN, who presided as president.⁷⁹

The hearings generated enormous public interest.

Admiral Bowen noted receipt of numerous wires questioning Bucher's "court martial,"⁸⁰ and Bucher noted that he received "hundreds of telegrams," and "sacks" were required to carry the mail that came to him. The mail was generally sympathetic to their performance in captivity.⁸¹ President Nixon announced publicly that he would personally review the record of the proceedings.⁸²

On February 18, 1968, the Chairman of the House Committee on the Armed Services, Mendel L. Rivers, established a special subcommittee to conduct a "full and thorough inquiry" into all matters arising from the capture and internment of the U.S.S. Pueblo and its crew, including consideration of the requirement for possible changes in the Code of Conduct.⁸³

Shortly before the Naval Court of Inquiry convened to inquire into the conduct of the Pueblo crew, Captain William R. Newsome, the Naval Judge Advocate serving as counsel to the Court stated publicly on January 13, 1969,

The Code of Conduct is inapplicable in this present situation. We have had an opinion that the crew members of the Pueblo were not prisoners of war...and when we don't have prisoners of war, we don't have the application of the Code of Conduct....⁸⁴

Subsequently, on January 20, Captain Newsome announced that the Code of Conduct did apply to the Pueblo situation. However, due to the two apparently conflicting opinions which appeared on the record of the Court of Inquiry, the

special subcommittee requested by letter, that the Secretary of the Navy, John E. Chafee, resolve the issue.⁸⁵

In his reply, dated March 1, the Secretary of Navy quoted portions of an opinion of Rear Admiral Joseph B. McDevitt, the Judge Advocate General of the Navy, regarding the Pueblo, in which it is reported he stated:

It is my opinion that since the ship was engaged in legal activities on the high seas in time of peace, the logical term to apply to the status of the crew from the standpoint of international law is that of illegally held detainees. It is further my opinion that the Code of Conduct applies to all members of the Armed Forces who are held in hostile confinement regardless of their "status," but only as a guideline for their conduct and not as a basis for punishment.⁸⁶

Later, Captain Newsome conceded that his first opinion was erroneous.⁸⁷

However, the Special Subcommittee soon encountered further confusion regarding the Navy's position as to whether a violation of the Code of Conduct could be charged as a violation of a General Order of the Navy.

On April 28, 1969, Admiral Joseph B. McDevitt appeared before the Special Subcommittee and stated:

The entire Code of Conduct has been promulgated as a General Order of the Navy. I mentioned that in my prepared statement. General Order No. 4 promulgated the Executive Order and the entire Code of Conduct as a General Order of the Navy.

Now a violation of an article of the Code of Conduct, therefore, can be charged as a violation of a General Order of the Navy, and therefore is chargeable under the Uniform Code.⁸⁸

Later, on April 30, 1969, Admiral McDevitt commented by letter on his testimony of April 28th and concluded that he was in error in so far as he had stated that a violation of the Code of Conduct was punishable as a violation of a lawful general order.⁸⁹

In view of the Special Subcommittee's observation of this confusion on the part of the Navy on these two important issues, it is not surprising that the report of the committee concluded:

If the Navy Captain who was counsel to the Naval Court of Inquiry, with all of the books and information and consultants officially available to him could come up with an erroneous opinion as to the applicability of the code, and if the highest legal officer in the Navy found it necessary to change his own testimony before the subcommittee as to the effect of violating the code, it is certainly impossible to expect that 82 lonely, untrained and abandoned men, suffering imprisonment and torture by the North Koreans could come up with any clear and proper adherence to it.⁹⁰

2. Significance to the Code

The author's inquiry into the significance of the Pueblo Incident to the Code of Conduct will be addressed, in a practical sense, from an individual viewpoint. The Code was intended to serve as a guide to the individual, as it is addressed to "every member" of the armed forces.⁹¹ It is written in the first person, singular. In practice the Code also tends to be a document of individual significance. Resources for its interpretation are not available to the prisoner. Written materials are usually removed from his person upon capture, so he must rely upon the knowledge and understanding of the Code which he brings with him. Thus, its words are of great importance to his guidance. They are the basic framework of his understanding of the Code.⁹²

Therefore, it is assumed that it is more likely that the servicemen will have been exposed to the Code itself, including the Preamble and Explanation, rather than training and other materials associated with it.

The first problem evident in the "Pueblo Incident" involves the question of whether the Code applied at all. At the time, there was no hostile contention between the United States and North Korea. The armistice, ending the Korean War had been in effect for over fourteen years at the time of the Pueblo Incident.⁹³ The crewmen of the

Pueblo were thus technically upon the high seas during a time when there was no "war" in the accepted international sense. They were not involved in a hostile mission in that they did not wish to inflict harm or injury upon the North Korean nation. Their leader had apparently been ordered to avoid hostile involvement.⁹⁴

The six articles of the Code in themselves do not specify when the Code applies. The Executive Order No. 10631, containing the preamble, explanation and Code was incorporated in full in the then current Naval General Order.⁹⁵ The explanation to article I, states that it is a "fighting man's" duty to oppose the enemies of the United States regardless of the circumstances in which he may find himself, "whether in active participation in combat, or as a prisoner of war" (emphasis added).

A reading of the language emphasized, supra, appears to limit the application of the Code to "active participation in combat" or "prisoners of war." Since the Pueblo crewmen were in neither status, the applicability of the Code on its face appears questionable.⁹⁶ Moreover, it appears that the term "fighting man" may have been misleading. Since neither "fighting" nor "man" is required for application of the Code,⁹⁷ it appears that the use of the term may have caused some difficulty. The idea that the Code did apply occurred to some of the crew⁹⁸ at least

by the time capture became imminent, but it was certainly not universally accepted, as one crewman later admitted that he believed the Code applicable only to "foot soldiers."⁹⁹

Moreover, the confusion of counsel to the Naval Court of Inquiry regarding the same question¹⁰⁰ indicates a lack of clarity even after dispassionate consideration at the highest level of the service. The Code should if possible provide a clear key to its application.

A second problem arises in connection with the provisions of article II. The surrender provision relating to the duty of the commander is unequivocal. It states: "If in command I will never surrender my men while they still have the means to resist" (emphasis added). The Executive Order regarding this states: "The responsibility and authority of a commander never extends to the surrender of his command to the enemy while it has the power to resist or evade" (emphasis added). The individual standard noted in the first sentence of the Code, is equally unequivocal. However, it states: "I will never surrender of my own free will" (emphasis added). The concept of voluntariness rather than possession of means of resistance is therefore the standard of the individual. One author has noted that the use of the individual "free will" standard results in a paradoxical situation with respect to culpa-

bility of a service man for the offense of misbehavior before the enemy.¹⁰¹ This paradox is a result of the fact that the Code standard appears to excuse adherence when the will is overwhelmed.

No clear reason for the juxtaposition of these standards can be discovered. The individual "free will" standard is subject to question because of its misleading quality, and it should therefore be discarded, if possible.

Commander Bucher's actions in failing to offer armed resistance¹⁰² appear to fail to meet the plain meaning of either the "individual" or "command" standards of article II, as no consideration of reasonableness is suggested by the Code standard.

Commander Bucher noted that, in his judgment, by the time it was clear that the North Koreans meant to board his ship, resistance would have in his view, been futile.¹⁰³ Is resistance in the face of overwhelming odds required by the Code? Again the Code itself offers no answer. Even assuming that the Code was understood on its face, it would not have provided reasonable guidance in that the standard specified is absolute. One author has suggested that reasonableness of resistance should be considered with respect to the "individual" clause of article II, as "...it is unreasonable to expect useless resistance by an unarmed and possibly wounded soldier...."¹⁰⁴ Similarly,

it seems that a concept of reasonableness should be included in a "command" clause of article II. Useless or suicidal resistance should not be expected absent special circumstances.¹⁰⁵ The "explanation" to article II notes that evasion is an acceptable concept. The article fails to note this. The problems mentioned in connection with article II result from the unnecessary use of two standards and from the fact that the Codal language sets an unrealistically high standard.

Another problem lies in the difficulty of implementation of the "limited answers" provisions of article V. Article V states: "When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number and date of birth" (emphasis added). Pueblo crewmen prevaricated about their identity,¹⁰⁶ and the captain apparently spoke freely to his interrogators¹⁰⁷ to the irritation of other crew members.¹⁰⁸

The wording of article V may be responsible for some of the difficulty. The injunction "I am bound to give only..." can be seen as an absolute, commanding that no further communication follow. That is not the case.¹⁰⁹ Furthermore, it is obvious that more communication is necessary for mere survival, and the explanation to article V states: "A prisoner of war may also communicate with the enemy regarding his individual health or welfare...."

Another difficulty encountered relates to coerced action, including the writing of letters and the making of confessions.¹¹⁰ Many crewmen received brutal physical mistreatment,¹¹¹ and Commander Bucher signed his "confession" only after having suffered a variety of intensive mental and physical coercive techniques.¹¹² Nevertheless, when he signed the confession he was so overwhelmed by guilt that he attempted suicide.¹¹³ Why should he have felt such guilt? The second sentence of article V provides: "I will evade answering further questions to the utmost of my ability" (emphasis added). Surely literally this is a very subjective standard for who is better prepared to know his own ability than the individual in question. Commander Bucher was being asked to confess to "conducting espionage." In his mind, this was entirely untrue, and this admission could thus be regarded as a "disloyal statement." The third section of article V reads: "I will make no oral or written statements disloyal to my country and its allies or harmful to their cause." This provision appears to establish an absolute prohibition for such statements, as does the second sentence of article IV which states: "I will give no information nor take part in any action which might be harmful to my comrades." Thus, even if the Code is accurately remembered, its application to a confession of the sort made by Commander Bucher

involves the interpretation of several articles which interact.

The provision of the second sentence of article V recognizes that every man has a "breaking point."¹¹⁴ Many researchers have reached the conclusion that all men can be broken, in the sense of being forced to perform desired acts by a number of subtle methods including sensory deprivation,¹¹⁵ and sleep deprivation.¹¹⁶ In fact, psychiatrists generally agree that a prisoner can deny information to a determined and skilled Communist interrogator only if he is equipped with some means of destroying either his memory or his life.¹¹⁷

In spite of this, the drafters of the Code stated:

...It is recognized that the POW may be subjected to an extreme of coercion beyond his ability to resist. If in his battle with the interrogator he is driven from his first line of resistance, he must be trained for resistance in successive positions. And, to stand on the final line to the end—no disclosure of vital military information and above all, no disloyalty in word or deed to his country, his service, or his comrades.¹¹⁸

The unrealistic quality of the absolute prohibitions against "disloyal statements" was further accentuated by the United States' official acknowledgement of the validity of the confessions made by the crewmen and the United States' admission of espionage in the confession made to obtain the return of the Pueblo crew.¹¹⁹

The problems of the Code highlighted by the experience

of the Pueblo Incident would appear to be these:

- (1) Code language is not clear on the issue of when and to whom the Code applies. Training on this matter appears to have been inadequate. Wording of the Code contributes to this problem.
- (2) The surrender provisions of article II of the Code are unnecessarily complex and confusing and establish a standard that is not reasonable of attainment.
- (3) The first sentence, "limited answers" provisions of article V is worded in such a way as to suggest by its "plain meaning" that the line of resistance in making answers be drawn at that point. This was not the intent of the drafters of the Code.
- (4) The second and third sentences of article V and the second sentence of article IV express concepts which interact with each other. These are complex and difficult to understand. The standard of absolute denial of information becomes impossible of attainment when mental and physical pressures reach a certain point. The Code only partially recognizes this fact and sets standards which have proven to be unattainable with regard to "disloyal statements."

B. THE VIETNAM CONFLICT

1. Prisoners of War in the Vietnam Conflict

Public attention focused on the plight of United States prisoners of war in Vietnam shortly after the first pilot was shot down and taken prisoner in August, 1964. Because of the increased aerial activity and consequent losses following the Tonkin Gulf Resolution,¹²⁰ many more pilots soon fell into the hands of the North Vietnamese.

By February 1 of 1973, four hundred fifty-six United States servicemen were known to be in prison camps located in North Vietnam. The vast majority of them were pilots or air crew members who were physically select, mature, and well-trained career professional military personnel.¹²¹

Most, if not all of these individuals, had received extensive training in the Code of Conduct and had also undergone Survival Evasion, Resistance and Escape (S.E.R.E.) training due to the recognition that, as fliers, they were subject to a particularly high risk of capture. One former prisoner who spent over seven years in Northern camps indicated that "S.E.R.E." training was provided all fliers under applicable regulations of the Navy, Marine Corps and Air Force.¹²²

The lives of prisoners in the northern camps centered around five camps in or near Hanoi. The largest camp, which

had been built as a prison by the French, was called the "Hanoi Hilton." It was located in downtown Hanoi, and although there was no "typical" prison situation, conditions there were representative of those prevailing at other Northern camps. Men were held two to nine to a cell,¹²³ but senior officers or prisoners who proved resistant and uncooperative were often kept apart from the others in solitary confinement. Prisoners were fed two meals each day, usually consisting of pumpkin or cabbage soup, rice or bread, and occasionally a piece of meat or fish. Many prisoners lost thirty or more pounds during captivity.¹²⁴

In the camps located in South Vietnam and under the supervision of the Vietcong, however, conditions were vastly different.¹²⁵ In these camps, no permanent facilities were used, and the prison system consisted of a few primitive jungle camps,¹²⁶ where prisoners commonly suffered malaria, chronic dysentery, acute malnutrition and severe dermatological problems.¹²⁷ Some of these prisoners felt that their training in the Code had been less than adequate.¹²⁸

These prisoners were exposed to the elements and shackled or confined to crude bamboo cages for security.¹²⁹ Within a relatively short time, on the usual diet of three cups of inferior rice per day, their health failed rapidly.

Many did not survive.¹³⁰

The accounts of the death of several of these prisoners are strikingly similar to the accounts of "give-up-itis" noted in the popular accounts of the Korean War experience.¹³¹ However, it must be stressed that careful studies of such deaths in Korea indicated that respiratory infection, diarrhea, and malnutrition, along with exposure to the elements, substantially contributed to these deaths. One authority concluded that: "Under such conditions it is amazing, not that there was a high death rate, but that there was a reasonably good rate of survival."¹³²

Prior to late 1969 or early 1970, prisoners encountered a fairly consistent practice of physical torture perpetrated against them throughout the Northern camps. The North Vietnamese used several methods of physical and mental torture to coerce required conduct or elicit "confessions." Little attention was given to the extraction of primarily military information.¹³³ One widespread technique generally used was described as the "rope trick." One prisoner stated:

They tie your hands behind your back...force your head and shoulders down until your feet or toes were in your mouth, and leave you in this manner until you acquiesced in whatever they were trying to do.¹³⁴

The "rope trick" had many variations. Sometimes a prisoner was suspended from a hook, tied to an object, left on the ground,¹³⁵ or gagged with a wooden plug while per-

forming the "rope trick." The wooden plug was reported to be particularly effective in producing compliance, as it caused a sensation of strangulation and an immediate apprehension of choking.¹³⁶

The ordinary and usual result of the determined application of these methods of physical torture was that the individual would eventually be forced to yield to some degree.¹³⁷

One prisoner, who had a reputation as a "hard nut" among the prisoners, a term reserved for those possessing qualities of resistance admired by others, noted that following such torture:

I made more than one tape...I wrote what they told me to write...If they told me the war was wrong, I said it was wrong...If they told me I was a criminal, I said I was a criminal.¹³⁸

Another high ranking prisoner, Rear Admiral James B. Stockdale later noted:

I am not aware that any POW was able in the face of severe punishment and torture to adhere strictly to name, rank and serial number, as the heroes always did in the old-fashioned war movies...¹³⁹

Methods of coercion varied greatly from the fairly subtle,¹⁴⁰ to the extremely barbaric.¹⁴¹ Although a government spokesman denied that there was any indication that any American prisoner was tortured to death either by the North Vietnamese or Vietcong,¹⁴² one prisoner interviewed indicated that

there was a general belief in his camp that some had died when torture was carried too far.¹⁴³

The content of coerced confessions was generally tailored to the political issues which were currently being advanced by the captor. Prior to 1968 most pilots were forced to make confessions of "illegal activities or war crimes,"¹⁴⁴ in accord with a North Vietnamese propaganda campaign in which they threatened to try and execute pilots as war criminals.¹⁴⁵

The North Vietnamese also staged mock executions and compelled prisoners to dig their own graves as part of the coercive process.¹⁴⁶

Prisoners later reported that even though they realized that they had gone to the limit of their endurance in resisting coercive techniques, they often felt overwhelmed by guilt when they acceded to their captors demands, and were "broken."¹⁴⁷

One prisoner noted that the North Vietnamese interrogators knew of the requirements of the Code. When a prisoner was coerced into making a prohibited statement, interrogators sometimes pointed out that the Code had been violated and urged that as a justification for repeated violations.¹⁴⁸

In spite of the difficulties imposed by the conditions of confinement, prisoners proved adept at organiza-

tion. The smaller camp organizations were combined in 1970. Senior prisoners were fortuitously placed in the same building, and the senior POW, Brigadier General John P. Flynn, USAF, conceived of and organized the "Fourth Combined POW Wing."¹⁴⁹ The "Fourth Combined POW Wing" developed an intricate and sophisticated command and staff organization and issued orders on the interpretation of several important points relating to the Code. Orders to resist "breaking" to the point of incurring permanent physical disability were issued when it was found that some prisoners had cooperated due to mere threats.¹⁵⁰ In effect, this policy was a re-writing of the Code, as disloyal statements are absolutely prohibited.¹⁵¹

A senior officer stated that it was recognized that prisoners commonly "lacerated themselves with guilt after having been broken."¹⁵² As a result, a policy was developed to ameliorate this effect of violating the Code. The policy exhorted prisoners who had "broken" after torture, to "bounce back" to the original hard line of resistance with the understanding that "breaking" would not be held against them.¹⁵³

These and other directives were communicated from prisoner to prisoner by various ingenious methods developed by the prisoners. Such methods included tapping the letters of the alphabet through walls, conveying letters or

words by broom sweeps, and by the use of blinks and coughs to transmit information within the compound.¹⁵⁴ Messages were also conveyed about camp by using rolled blankets or tin cups to listen through walls. Notes written with toothpaste tube lead, blood, charcoal, or soap was hidden in places where they would be found and read by other prisoners.¹⁵⁵ The North Vietnamese practice of moving prisoners from camp to camp greatly facilitated communication between camps and enabled the prisoner organization to develop so that, eventually, commands and other important messages were regularly sent between various northern camps.¹⁵⁶ The effective communication among prisoners probably contributed more than any other single factor to the mobilization of resistance and the unanimity of conduct by such a large number of the POW population. Rear Admiral Stockdale noted:

I saw men scoff at the threats and return to torture 10 and 15 times. I saw men perform in ways no one would have ever thought to put in a movie, and because they did perform that way, we were able to establish communication, organization, a chain of command and effective combat unit.¹⁵⁷

Similar sentiments were expressed by repatriated prisoners who noted that the communist attempts to turn the prisoners against the United States caused "...ninety-nine percent of us [to] build our patriotism even stronger."¹⁵⁸ Symbolic acts of patriotism became commonplace,¹⁵⁹ and

prisoners improvised expressions of their devotion to the United States.¹⁶⁰

Other practices of the captor proved troublesome. The North Vietnamese and Vietcong developed a policy, popularly called "early release," under which small groups of United States prisoners were returned to American control. Some returned prisoners who rejected early release noted that offers of early release were made contemporaneously with demands for propaganda material.¹⁶¹

Although the accounts of treatment of prisoners who received early release sometimes strongly indicated that they had been "groomed" from the moment of capture,¹⁶² other "early release" prisoners appeared to have been summarily selected, and they surmised that they were released for purely political reasons.¹⁶³

The North Vietnamese cited serious illness¹⁶⁴ as the reason for the release of several prisoners, and one died shortly after repatriation, apparently as a result of injuries inadequately treated during captivity.¹⁶⁵

The early release of prisoners was usually accompanied with propaganda activities which were widely reported in the U.S. press.¹⁶⁶ By September of 1970, twenty-three prisoners had been released from prisons in South Vietnam and nine from the North.¹⁶⁷

Following repatriation, a generally favorable image

of prisoner of war conduct was projected by the administration. On April 12, 1973, Dr. Roger Shields, Assistant to the Assistant Secretary of Defense and officer in charge of the prisoner of war recovery and repatriation operation, publicly announced that the Department of Defense did not plan to initiate any charges of violation of the Uniform Code of Military Justice against returning prisoners. He did not rule out, however, the possibility that some prisoners might charge others with offenses against the Uniform Code.¹⁶⁸

In this respect, as in others¹⁶⁹ the Department of Defense apparently applied a policy of allowing prisoners freedom in following the dictates of their consciences.¹⁷⁰ Shortly thereafter, a senior prisoner noted that the issue of charges of other prisoners should be left to "the organization" meaning the POW command, but he expressed hope that "angry ex-POW's not become involved in charging others."¹⁷¹

Following repatriation, a clearer picture of the dissension which existed among the elements of the American prisoners of war emerged, when on May 29, 1973, Colonel Theodore W. Guy, USAF, the former senior ranking officer at the "Plantation Gardens" camp in Hanoi preferred charges against three Marine enlisted men, Sergeant Able L. Kavanaugh, Staff Sergeant Alphonso E. Riate, and Private Frederick L. Elbert. Each was charged with violation of the Uniform Code

of Military Justice, Articles 81, conspiracy to undermine discipline and loyalty; 92, failure to obey a general order or regulation; 104, aiding the enemy; and 134, the general Article. Kavanaugh and Riate were additionally charged with violations of Article 89, involving disrespect toward a superior commissioned officer, and Riate was additionally charged with assault. Colonel Guy cited his "...personal conviction that the filing of charges was necessary to keep Communists in future wars from using prisoners for propaganda purposes."¹⁷²

Colonel Guy also preferred charges against five Army enlisted men, Specialist Fourth Class Michael P. Branch; Staff Sergeant Robert P. Chenoweth; Staff Sergeant James A. Daly, Jr., and Staff Sergeant John A. Young. Each was charged with a violation of the Uniform Code of Military Justice, Article 92, for alleged violation of an order to stop all collaboration and Article 104, collaborating, for accepting preferential treatment from the enemy and seeking political asylum. Young and Chenoweth were also charged with the construction of a model airplane, allegedly used by the North Vietnamese for target practice, and Branch was charged with an additional specification of disrespect to an officer. All of these enlisted men had originally been imprisoned together in South Vietnam prior to their incarceration in the "Plantation Gardens." To-

gether, these prisoners had been referred to by others in camp as the "Peace Committee."¹⁷³

It was reported that several of the "Peace Committee" cited their combat experiences on the ground as their reason for maintaining admittedly better relations with the North Vietnamese guards. They stated they felt these individuals were human beings, whereas the other prisoners called them "gooks" and considered them as racially inferior.¹⁷⁴

Several of the former prisoners accused by Colonel Guy replied through the press to deny collaboration,¹⁷⁵ and the attorney for one of the accused men announced plans to file a \$1 million civil lawsuit against Colonel Guy.¹⁷⁶ Branch was quoted as stating that "there was no command control or communication" between the prisoners at the Plantation.¹⁷⁷

Before any official decision was announced as to disposition of the charges preferred by Colonel Guy, Sergeant Kavanaugh died, apparently by suicide, on June 27, 1973, at the home of his wife's father. It was reported that relatives observed that he had been increasingly despondent following his learning of the charges.¹⁷⁸

On July 3, 1973, the Secretaries of the Army and Navy announced that the charges against the remaining seven of the "Peace Committee" had been dropped due to a lack of

evidence. Speculation widely linked the death of Sergeant Kavanaugh to the dismissal of charges.¹⁷⁹ The Secretary of the Army, Howard Calloway also stated that a review of the records of the servicemen charged indicated that they were below current qualitative standards for retention in the Army and would be ineligible for reenlistment.¹⁸⁰

Shortly before the charges against the former "Peace Committee" survivors were dropped, on June 26, 1973, charges were preferred against two former officer prisoners, Captain Walter E. Wilber, USN, and Lieutenant Colonel Edison Miller, USMC, by Rear Admiral James B. Stockdale, former senior ranking officer at the "Hanoi Hilton" camp.¹⁸¹ The charges against both officers included a specification of mutiny.¹⁸² Lieutenant Colonel Miller responded through the press and was quoted as "completely and vehemently denying all charges" in a lengthy statement issued by his attorney, Melvin Belli (who also stressed the severe emotional strain precipitated by the charges).¹⁸³ It was reported that superior authority in camp had "relieved" these two officers from command after they had failed to abide by an order to stop volunteering statements and meeting with visiting delegations.¹⁸⁴

On September 27, 1973, Secretary of the Navy John W. Warner dismissed all charges against both Captain Wilber and Lieutenant Colonel Miller, noting that evidence collected against them during an investigation of the charges warranted

further legal steps that might have led to courts-martial. However, he concluded that it was more important to spare other former POW's "the disruptive effects of such proceedings," but formally censured them for "failing to meet the standards expected of officers."¹⁸⁵

Secretary Warner announced that both officers would be retired "in the best interests of the naval service."¹⁸⁶

Later, Secretary Calloway added another reason for his dismissal of charges. At a Pentagon press conference he announced that one reason he had dismissed the charges was due to the fact that they had been brought by an officer of the Air Force and stated: An Air Force officer "has no authority over an Army sergeant in a prison camp—none whatsoever." He also was quoted as saying that the elaborate command structure set up by prisoners in North Vietnam "was not a legal or enforceable command structure." In response to questioning, he expressed no doubt that a man of one service could ignore an order from a superior of another service.¹⁸⁷ This startling statement elicited immediate questioning comment from the press.¹⁸⁸

Later, Secretary Calloway admitted that the former opinion had been erroneous, and noted that "There is authority to create a chain of command in a POW camp and to issue lawful orders to those of lesser rank, regardless of the service affiliation," stating "This is provided

for by law and Army regulation," citing Appendix A to
Army Regulations 350-30 and 600-20.¹⁸⁹

2. Significance of the Vietnam War to the Code

American prisoners in Vietnam did not duplicate the dismal image of breakdown in command which was reflected in the report of Korean War conduct.¹⁹⁰ Instead, the striking feature of Vietnam prisoner life was its organization and overall effectiveness in establishing control through effective command.¹⁹¹ Although the acceptance of such control was not universal,¹⁹² it seems that command control was able to establish and enforce policies in spite of the lack of immediate sanctions.¹⁹³

The only statements suggesting lack of exercise of command authority appeared to be minor in nature, or to originate from individuals who demonstrated interests which were inimicable to command authority.¹⁹⁴

Instead of a repetition of the major Korean War problem of absence of command or failure or refusal to assume responsibility, prisoners upon repatriation indicated that the problems of command and control arose in the area of interpretation and elaboration of responsibilities imposed under the Code.

Repatriated prisoners noted that the "take command" provisions of article IV had proved to be inadequate guidance in several respects. One indicated that the determination of the senior individual had proved difficult because of the captor's practice of transferring prisoners

between camps. This often disturbed an existing command structure and sometimes considerably set back its effectiveness.¹⁹⁵

In the North, rules for determining seniority among prisoners in camp became troublesome in other respects. Initially, the command policy was that rank and precedence should be determined as of the date of capture or "shoot down." No consideration of promotion while in confinement was to be made, although it was sometimes suspected that prisoners had been promoted while in camp. After the time of confinement dragged beyond several years, however, many officers who had not even entered the service at the time others already in camp had been shot down were promoted to grades superior to these latter officers. Consequently, those prisoners out ranked prisoners already in camp, even though they had entered the service after the "shoot down" of those already in camp.¹⁹⁶ Because of the apparent injustice involved, the rule was later changed to take into account time which had been spent in camp.

Although not specifically mentioned by repatriated prisoners, other possible difficulties abound in this area. Regulations within the departments are sometimes incomplete and inconsistent. For example; the current explanation to article IV states that:

The senior officer, non-commissioned officer or private (including comparable grades in other services...) within the war camp or group of prisoners will assume command in accordance to rank (or precedence) without regard to service.¹⁹⁷

No reference is made to the existence of the specialists' grades which are peculiar to the Army. However, the current Army Regulation governing Army command policy and procedures¹⁹⁸ notes that "senior specialists" will occasionally be called on to assume "emergency command," which is further specified as the class or type of command applying in the prisoner of war camp. Thus, although it appears that specialists would be omitted from the chain of command under the explanation, the last cited regulation makes it clear that they are at least to be considered for command within the camp. This difficulty could and should be simplified by providing identical inter-departmental policy and training, so as to provide clear guidance regarding this important point.

Other problems related to the "take command" clause of article IV involve the "relief" from command of prisoners who are determined to be collaborators by their superiors, as in the "relief" of Captain Wilber and Lieutenant Colonel Miller.¹⁹⁹ Although no directive, policy, or other authority was cited as applicable to the "relief" of those officers it is apparent that the services follow a divergent policy regarding relief of

subordinates by superiors. Apparently, the Navy policy allows for relief only after a request for such action has been received from a superior and approved by the Chief of Naval Personnel, in whom the power is vested to act on such requests.²⁰⁰ Thus, the practice of providing specific regulations subjects the process concerned to the possibility of judicial review on "administrative due process" criteria. It is clear that once regulations prescribe "administrative due process" standards, substantial compliance with the duties required under them is needed to satisfy due process requirements.²⁰¹ In other words, when military regulations prescribe specific steps to be taken to assure due process, substantial compliance with those steps is required.²⁰²

On the other hand, the Army adopts the position that the right to relieve a subordinate is inherent in the function of command and provides no specific administrative procedures as a prerequisite of affecting such relief.²⁰³ The individual relieved, however, may have recourse after the fact for alleged improper action through the procedure of a complaint under Article 138, UCMJ, which provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against

whom it was made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

The commander's discretion as to standards for affecting relief are personal, and he is allowed broad authority in deciding the sufficiency of grounds for relief.²⁰⁴ Accordingly, the commander's decision to relieve will not be disturbed unless it amounts to an abuse of discretion.²⁰⁵ In absence of the "administrative due process" problem created by the promulgation of regulations governing the subject, general military due process standards would apply. These standards are fixed by a balancing of individual and government interests, considering all the circumstances.²⁰⁶ Thus it is apparent that there is a lack of a uniform policy for relief of subordinates which applies across service lines. This lack of uniform procedures impedes the relief of subordinates across service lines, and it must be remedied by the provision of uniform regulations applicable in POW camps. However, due to the requirement for compliance with any such regulations as a component of "administrative due process," the Army's present method of providing relief appears advantageous and could be implemented by the other services, at least in the POW situation.

A more difficult problem is presented when the senior's conduct approaches prohibited "collaboration." A junior may assume command only when the senior is "unable to act." The current explanation to article IV provides that: "If the senior officer, non-commissioned officer, or private is incapacitated or unable to act for any reason, command will be assumed by the next senior."²⁰⁷ Unless it can reasonably be concluded that improper action is equivalent to being unable to act, the subordinates are left in a very difficult position when their senior proves, for reasons of collaboration or other violations of the Code, to be unfit for continued leadership. Current Army regulations do not appear to further elaborate on the meaning of the above language in the explanation. However, it is submitted that although the senior has an inherent right to relieve a subordinate for reasons within his discretion, no similar duty could be found in the subordinate to relieve the superior if he acted in ways clearly inimicable to the interests of the other prisoners and hostile to the purposes of the prisoner organization. The need for interdepartmental guidance is particularly critical in this area, as unjustified concerted action to override or usurp the authority of a senior would constitute the capital offense of mutiny under the UCMJ.²⁰⁸

Again, the problem is not the Code itself, but rather

the lack of specific interdepartmental policy, which is essential to the proper functioning of the Code in accordance with its intended purpose. Resource to individual service regulations or policies is not satisfactory or desirable from the prisoner's viewpoint. The deficiency may again be solved by providing uniform interservice regulations dealing with the problem.

Although one writer,²⁰⁹ has concluded that the tenor of the Code itself suggests that a separate American command structure would always be maintained, the American prisoners in Vietnam included officers of the allied belligerents within their chain of command. The Fourth Combined POW Wing included Thai and South Vietnamese military personnel within its chain of command.²¹⁰ There does not appear to be any anticipation of this eventuality in the implementing directives of the Code, and the problem would be especially critical if the senior prisoner was, in fact, an allied officer. Whether or not an allied prisoner should be included in the command structure mandated by the Code should depend upon the ally's willingness to accept the standards of Code command and to abide by the Code itself. The best method of resolving this problem might possibly be to leave the decision as to inclusion or exclusion of allied personnel in the chain of command to the senior American prisoner, subject to his judgment

and the understanding that his decision be made known to the other prisoners. As the sanctions of punishment under the UCMJ are not available to deter misconduct by allied personnel, it would seem that the American senior's duty to "keep faith" with other prisoners under article IV of the Code should allow him latitude in determining whether or not to include the allied personnel in the POW chain of command.

Another problem involving the duty to command concerns the order of precedence of command duties. The possibility of conflict between the senior's orders and Code imposed duties is apparent when the scope of the senior's authority under the Code is considered. The current explanation to article IV notes that "...strong leadership is essential to discipline. Without discipline, camp organization, resistance and even survival may be impossible."²¹¹ It would appear that a strong argument can be made that almost any order issued by the senior could be associated with the Codal duties of maintaining discipline, affecting organization and resistance, and promoting survival. Within this broad context, what sort of orders may the senior issue and with what sort of orders must the junior comply? To find an answer to these questions, the Uniform Code of Military Justice must be considered, for the subordinates decision to follow the order may eventually, upon

repatriation, be finally decided in a trial by courts-martial.

Article 90(2) UCMJ, notes that any person subject to the Code

...who--willfully disobeys a lawful command of a superior commissioned officer shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment other than death, as a court-martial may direct.

Generally, subordinates disobey or fail to follow the orders of their superiors at their peril, but there is no duty to obey an unlawful order.²¹² At trial, the question of legality of an order is considered to be a question of law if it can be decided by the military judge as an interlocutory question which is not submitted to the finder of fact. An order, even though not unlawful on its face and presumed lawful, may sometimes be shown on a factual basis to be unlawful. A determination that an order is not illegal as a matter of law does not preclude the possibility that it may be unlawful as a matter of fact, and thus the issue is decided by the court members as finders of fact.²¹³ In determining the issue of legality of the order, the current Military Judges' Guide indicates that when it is to be decided by the court members, a recommended instruction will be given which provides:

You are further advised that an order, to be lawful, must relate to specific military duty and be one which the member of the Armed Forces is authorized to give under the circumstances. An order is lawful if it is reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (It is illegal if unrelated to military duty) (it has for its sole object the attainment of some private end) (arbitrary and capricious)...²¹⁴

The determination of unlawfulness is, however, not the ultimate concern, as all unlawful orders need not be disobeyed in order to avoid criminal liability for following them. Criminal liability only follows if the illegal order is such that the individual to whom it is issued has a duty to disobey it. Since the superior has the authority to issue orders, how can the subordinate determine when these orders must be followed or when they may be disobeyed without subjecting him to lawful punishment? Consider first, the superior's order to not attempt an escape under any circumstances. It is evident that the Code duty of escape is but an expression of a long accepted American military custom and tradition. It has been stated that escape is a "very natural act which is neither contrary to military honor nor moral law—that it is even regarded as the accomplishment of a patriotic duty."²¹⁵ If there are no facts to indicate that the order was issued after a responsible evaluation of the risks, the order would appear

to arbitrarily urge violation of military custom, tradition, and a specific duty imposed by the Code as an executive order. Thus it seems most likely that the order could be considered an illegal one as a matter of law, applying the principles noted in the instruction, supra.²¹⁶

Since the determination of the legality of the order depends upon the facts and circumstances of each case, however, when evidence indicating that the senior's decision was based upon his reasonable assessment of such factors as chances of success, risk to the group, or other considerations imposed by the Code (for instance, the duty to "keep faith," under article IV), the scale is tipped in favor of a finding that the order is legal.

No clear line may be drawn. The question in each case must be answered in light of the specific facts and decided by the trial court or the court members under proper instructions. Similarly, other conflicts are foreseeable between the senior's exercise of command under article IV and other Code duties; for example, the duty to resist and duties not to accept parole or special favors under article III.

The matter is much more serious in the case of the issuance of an order to perform an act which is illegal. Suppose that the superior's order is to execute another prisoner. In addition to considering the issues of legality

of such an order and the consequences of disobedience thereto, the criminal responsibility of the individual carrying out the order must also be noted.

Armed conflict justifies many acts which otherwise would be crimes if committed during times of peace. Clearly, however, much conduct remains outside of the ambit of lawful activity. When is the prisoner to know when he will reach the point when he must, under penalty of personal criminal liability, refuse to perform an order? The problem is one of longstanding. However, Winthrop, with characteristic clarity, addresses it as follows:

But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness....²¹⁷

Recently, the Court of Military Appeals in United States v. Calley²¹⁸ addressed the problem in detail. The court considered the legality of an order to kill unarmed civilians and concluded that such an order was palpably illegal so that the defense of obedience to superior orders could not be raised.²¹⁹ Chief Judge Quinn

examined the trial courts ruling that compliance with an unlawful order would be excused, and impart no criminal liability on the subordinate "...unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances know to be unlawful...." He concluded that the order to kill the people involved was palpably illegal, so that compliance with it did not constitute a defense.²²⁰

Thus, the prisoner is placed in a quandary. He has a duty to obey lawful orders, disobey unlawful orders, and abide by the Code. As noted, these duties may often appear to conflict. The Code itself gives no indication as to how such conflicts are to be resolved. On the one hand, a boundary is established by the Calley case, where the duty to disobey unlawful orders is absolute. The other boundary exists in the form of lawful orders, which must be obeyed in order to avoid prosecution for a failure to do so. Between these two extremes lies a vast grey area of Codal directives. It would be very difficult to anticipate more than a few of the possible problems. Accordingly, any attempt to arrange an absolute order of precedence of Code liabilities would prove futile. However, it seems certain that in view of the high value placed upon effective command by prisoners,²²¹ the seniors' authority should be regarded as paramount wherever possible.²²²

To emphasize the importance of the commander's authority, or any other principles thought important, Code articles could be arranged in precedential order.

Again, as in the Pueblo Incident, the use of known techniques of physical and mental coercion resulted in the violation of the absolute prohibitions of article V against "disloyal statements" and proved to be standards which were not capable of human attainment by any of the prisoners involved.²²³ Both physical and mental forms of coercion proved to be effective, but some prisoners were able to successfully convey their resistance even while performing acts which could be described as "collaboration."

The ability to communicate resistance seemed to be related to the degree of training in the Code received by the prisoners. One example of this phenomenon is the distinction observed between broadcasts originating from prisoners in the South and in the North which were transmitted from enemy sources and intercepted and analyzed by United States Government Intelligence experts from 1965 to 1972. A study divided radio broadcasts into three categories, one of which was broadcasts by captured U.S. servicemen containing political themes. The study noted that these servicemen were in the custody of either North Vietnamese or Vietcong captors. The broadcasts of American airmen held prisoner in North Vietnam were clearly distinguishable from the broadcasts

of U.S. Army and Marine Corps personnel in custody of the Vietcong. Airmen made statements, but in most of them, these individuals employed an "...ethical technique known as broad mental reservation," a systematic use of verbal qualifications as a device to establish the ingenuine quality of their broadcasts. On the other hand, the analysts found that U.S. Army and Marine Corps personnel held captive by the Vietcong used no such devices and possibly because of this concluded that their group included a "hard core" group of "progressives."²²⁴ However, inadequacy of training can certainly not explain the transgressions allegedly made by well-trained aviators,²²⁵ so that actually no facile distinction can be drawn. Again, in spite of the extent and degree of training, prisoners who were unable to adhere to the unrealistic standards of the Code regarding disloyal statements were stricken with guilt. However, apparently any deleterious effect of this guilt was successfully avoided through the innovative actions of the command in developing and implementing the "bounce back" doctrine.

A further problem of significance to the prisoners was the interpretation of article III of the Code. The last sentence states: "I will accept neither parole nor special favors from the enemy." The explanation to article III notes that:

...[p]arole agreements are promises given the captor by a prisoner of war on his faith and honor to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, usually release from captivity or lessened restraint. He will never sign or enter any parole agreement.²²⁶

Parole itself, contemplates the prisoner's promise of something in return. In other words, a quid pro quo is given for the captor's action. Thus some "early releases" which were granted under the GPW duty to return seriously wounded prisoners,²²⁷ clearly appeared to have been made under the Convention, and thus without a promise, so that there was no issue of parole involved at all in a technical sense.

However, except as to the releases authorized under the Convention, all "early releases" appear to clearly fit under the category of "special favors" which are prohibited by article III of the Code. The prohibition against the acceptance of special favors arises from the recognition that the enemy may attempt to manipulate prisoners and to compromise them into cooperating in the performance of desired conduct or acts. In the case of an unsolicited early release, the prisoner himself may have promised nothing nor bargained for anything. However, although he has done nothing in order to have been selected for early release, if the POW does in fact accept early release, the enemy has gotten what was desired without the "cooperation" of the prisoner. It is clear that early release was

made for political purposes. The employment of "early release" by the North Vietnamese usually was timed to coincide with public drives for acceptance of North Vietnamese aims, and releases were often arranged under the auspices of anti-war dissidents or other anti-administration individuals.²²⁸ Releases were frequently accompanied with blatant anti-war statements or statements on domestic American political issues which proved irritating to the administration. Thus, mere acceptance of unsolicited early release resulted in a benefit to the enemy through pre-release and post-release publicity over which the prisoner had absolutely no control. Although many prisoners recognized the deleterious effect of solicited release,²²⁹ apparently the effect of unsolicited release was not similarly recognized or at least was viewed as being outweighed by the advantages of allowing a prisoner to return to the outside for purposes of communication. In this instance, the Code of Conduct was in effect rewritten to allow for early release by the regulations of the Fourth Combined POW Wing, which provided that early release would be allowed only if it had not been sought and that it was taken without any specific compromise on the part of the prisoner. It was prohibited in all other cases.²³⁰ It would seem that the acceptance of early release by some prisoners would conceivably accrue to the

great benefit of all remaining prisoners, as conditions of confinement are better understood when described by those who have actually encountered them. Moreover, information regarding POW's could be conveyed to the outside world. It would seem that the policy allowing acceptance of limited "early release" affected by the Fourth Combined POW Wing was a recognition of the fact that the favor must not be "compromising." The problem of which favors are "compromising" and which are not is a very difficult one, especially when the individual prisoner concerned must make the judgment. However, the practice of allowing the senior to determine whether the favor is "compromising," so as to allow or disallow its acceptance, would obviate this objection. Thus, a possible solution to the interpretation of the special favors clause would be to allow the acceptance of a favor only when approved by the senior in command. This causes obvious difficulties when the individual is in solitary confinement or when the size of the group is questionable, and for those reasons does not offer a practical solution.²³¹

A more reasonable solution would be to include the word "compromising" in the special favors clause and define it, by doctrine to describe conduct by which the prisoner himself yielded something of benefit to the enemy. A further elaboration of this principle and careful training

would be required to make it effective.

Another problem closely related to the operation of the Code was the post-repatriation referral and disposition of charges under the Uniform Code of Military Justice. As noted earlier, the Code of Conduct was never intended to provide criminal penalties for its violation.²³² Although the Code does not coincide with specific punitive articles of the UCMJ, there are instances when direct parallels exist. For example, unauthorized intercourse or communication with the enemy is prohibited by Article 104(2) UCMJ which provides:

Any person who—without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly: shall suffer death or such other punishment as a court-martial or military commission may direct.

This prohibition is roughly parallel to the Code injunction, article V, which provides, "I will make no oral or written statements disloyal to my country and its allies or harmful to its cause."

Possibly, this parallel, among others, contributed to the feeling, later expressed by returned prisoners that the Code of Conduct itself was law and that one could be prosecuted for its violation or that individuals could be prosecuted for breaching it as if it were a general order with punitive consequences.²³³ Since all airmen prisoners

received extensive training in the Code, it can be assumed that training was largely ineffective in acquainting them with the Code's limitation as a moral, rather than legal guide, and distinguishing its role from that of the UCMJ.²³⁴

Prisoners who held this view were disappointed by the departmental decision not to proceed with charges against fellow POW's and by the later decision to dismiss charges preferred by individual prisoners. Referring to the dismissal of the charges against Captain Wilber and Lieutenant Colonel Miller, Rear Admiral James Stockdale stated:

... I think you can realize that as we prison leaders developed this organization, this unity, this mental trust and confidence, this loyalty that permitted us to ask a guy to give his all sometimes, we acquired a couple of things. We acquired a lot of close friends, but in addition, we acquired a constituency. And that constituency comes home and says to itself: you spoke with force of law, and at great personal pain and inconvenience I obeyed that law, and now I come home and no one seems interested in whether everybody obeyed it or not. What kind of a deal is that?²³⁵

Former prisoners expressed some resentment that individuals who had not done their best to adhere to Code standards were ultimately not tried and consequently not subjected to public view. Some former prisoners urged that the Code provisions be incorporated into the UCMJ and that penal sanctions be added to assure enforcement.²³⁶ However, it is urged that attaching penal sanctions to the Code would prove to be extremely inadvisable because of the

demonstrated inability of individuals to adhere to the absolute standards the Code provides with respect to limited answers and disloyal statements.²³⁷ It would be useless to urge enactment of a penal law with the knowledge that adherence thereto was in fact humanly impossible. In order to avoid liability for the violation of any Codal article incorporated in the UCMJ it is submitted that the standards of the Korean prisoner of war cases would continue to apply. In order to establish the criminal defense of duress, the prisoner would have to show that information given, allegedly involuntarily, was produced because of a well grounded apprehension of immediate and impending death or of immediate serious bodily harm in order to defend successfully his conduct on the basis of the defense of coercion or duress.²³⁸

Again, in consideration of the high value placed by prisoners upon effective command and organization, a solution to the problem is suggested. The action of the Department of Defense in stating soon after repatriation that no charges would be brought against prisoners, strongly suggests the public feeling about the suffering of prisoners was an important consideration in the decision not to press charges. The general adulation of prisoners probably contributed substantially to this feeling. A similar factor was present in the disposition of charges in the "Pueblo Incident."²³⁹

The action of senior prisoners in making the decision to proceed with preferring charges, within the "organization," after public announcement of the departmental policy not to bring charges strongly suggests that the prisoners themselves feel less constrained by public interests and opinion. Certainly the seniors, whose orders and directives were the core of the prisoner organization and the key to its success, are most vitally concerned with the individual aspects of disregard of their control and therefore are greatly interested in the discipline of prisoners because of that personal stake.

Accordingly, assuming that enhancement of effectiveness of the prisoner of war organization is a desirable goal, uniform interdepartmental policy could well provide that the initial opportunity to bring charges against repatriated POW's under the UCMJ would be left, within a specified time period, to the prisoner organization, so that the continuity of the prisoner organization and its functioning would be officially recognized. However, a change of this sort would entail ammendment of the Manual provision regarding who may bring charges.²⁴⁰

Thus, the ultimate lack of prosecution for apparent violations of the UCMJ where paralleled by Code provisions, as in the "disloyal statements" section of article IV, further diminished the credibility of Codal standard.

Of particular concern to the prisoners was the conduct of individuals such as members of the "peace committee," who allegedly set themselves aside from the command structure and allegedly refused to abide by orders issued by superiors.²⁴¹

Although confusion as to whether command or prerogatives of rank exist in camp was apparent on the part of high administration sources and was unfortunately aired in erroneous public statements on the subject,²⁴² it has been clear since United States v. Floyd, that the senior in camp can exercise prerogatives of his rank. Also, that, upon repatriation, sanctions for assault, or disrespect toward superior commission, warrant or non-commissioned officers may be applied under Article 90(2), 91(2) and 92(2) UCMJ, respectively.²⁴³ Accordingly, the failure to prosecute repatriated prisoners should not be attributed to an absence of applicable penal standards sanctioning their conduct in camp.

The reason ultimately given for dismissal of charges against the survivors of the "peace committee," which may be summarized as a lack of sufficient evidence, did not result in any clearing of the air surrounding the individuals accused. The publicity and action taken administratively against all of these individuals affected an indelible staining of their conduct without providing

them the fairness inherent in the trial process.²⁴⁴ Moreover, this resolution of the problem did not provide other prisoners with a public forum in order to determine whether or not violations of the UCMJ had occurred in camp. Thus, the resolution was unsatisfactory from both points of view. That is, the persons accused suffered the stigma of being publicly condemned as violators of the Code of Conduct and Uniform Code of Military Justice without the guarantees inherent in the trial process, and the seniors preferring charges felt undercut in their responsibility to other prisoners and the "organization" through the ultimate dismissal of the charges without trial, by the Secretaries of the services.

One possible solution to this problem would be to adopt standards in effect in some state criminal jurisdictions which stipulate that once charges have been preferred, they must be resolved by trial without the possibility of intervening dismissal. Such a policy would have the salutary effect of making it clear to prisoners that they would continue to be accountable to their superiors, regardless of public opinion or political pressures felt in the public sphere. This would also avoid the possibility of placing an indelible taint upon individuals who have been unjustly accused of offenses in camp.

To sum up, the Vietnam War experience with the Code indicated that:

- (1) The standards demonstrating absolute denial of disloyal statements were unattainable even when prisoners were well trained and select personnel.
- (2) The "command" provisions of article III proved inadequate to resolve problems in
 - (A) identification of the senior
 - (B) establishing equitable ranks during long periods of confinement
 - (C) relief of subordinates (or seniors) from command, and
 - (D) inclusion of members of allied belligerent forces in the command structure. The problems noted in (2) above arise from a lack of policy on the subject and may be resolved by provision of uniform departmental policies.
 - (E) The broad scope of the seniors command permits many potential conflicts with Codal duties. Training and doctrine need to be developed to resolve anticipated problems.
- (3) The parole and special favors clause of article III provided inadequate guidance and was recognized as unrealistically rigid in certain "early release" situations. This problem may be ameliorated by modifying the Code language and appropriate training.
- (4) Resolution of disciplinary matters under the UCMJ became confused with allegations of conduct falling below Code standards. Disciplinary charges were resolved in a manner unsatisfactory to former prisoners. This might best be remedied by departmental regulations or a change in the Manual for Courts Martial which would require a trial be held when charges are brought through the POW command structure, if one exists.

CHAPTER IV
THE CODE AND GPW

The author's purpose herein is to examine the six articles of the Code and explore their relationship with the provisions of the GPW.²⁴⁵ The author's consideration will extend to the GPW and the writings of learned publicists with attention being focused, where appropriate, toward conflicts between it and the Code.²⁴⁶ Treaties, that is, any international agreements, however denominated are binding upon the United States through ratification by the President with the advice and consent of the Senate, two-thirds of the senators present concurring therein. These are declared to be the supreme law of the land.²⁴⁷ Since the GPW is such a law, it is therefore entitled to such status. The President, when promulgating the Executive order providing for the Code, exercised his authority to make rules for the Armed Forces as Commander-in-Chief.²⁴⁸ The rule-making power of the President is held to be subject to the limitation that it be exercised consistent with the Constitution,²⁴⁹ and therefore, when the convention and executive order are found to be in conflict, the convention, being the superior norm, must be followed. On the other hand, there is little question that when possible, the provision of the Code and GPW should be construed to be

consistent. National and international norms will be found consistent if a reasonable basis can be discovered for doing so. Moreover, it would appear that the doctrine of Pacta Sunt Servanda, so often solemnly stated by international writers would provide a basis for requiring the fulfillment of international litigations in through such international treaties as the Geneva Convention.²⁵⁰

The article I phrase "fighting man" is not entirely consistent with the provisions of GPW Article 3(1), which provides that "...persons taking no active part in the hostilities including members of armed forces who have layed down their arms shall in all circumstances be treated humanely." The leading commentator, Pictet, notes that the fundamental principle of humane treatment underlies all four of the Geneva Conventions and arises in reference

...to individuals and not to units of troops, and a man who has surrendered individually is entitled to the same humane treatment as he would receive if the whole army to which he belongs had capitulated. The important thing is that the man in question will be taking no further part in the fighting.²⁵¹

Light is shed upon this important principle, humane treatment, by Pictet's comment, relative to discipline among prisoners of war:

To the extent that the convention must be operative in a normal way, there is no doubt that prisoners of war are legally required to

respect the rules set forth in it. This is indisputable if captivity is to be bearable for prisoners of war and they are to receive humane treatment. Otherwise the detaining power would have no alternative but to resort to force in order to overcome lack of cooperation on the part of the prisoners.²⁵²

Another authority, attributing the statement to the Sixteenth Century French philosopher Jean-Jaques Rousseau, noted that

war is in no way a relation of man to man, but a relation of state to state, in which individuals are enemies only through accident, not as men or even as citizens but as soldiers. No state could have anything but the other states for enemies, not men. The aim of war being the destruction of the enemy state, the right to kill its soldiers exists so long as they are armed, but as soon as they surrender, ceasing to be instruments of the enemy, they have become once again ordinary men.²⁵³

Thus observed, the current doctrine of extending the battle into the prisoner of war camp represents a step away from the GPW principle of "humane treatment" which discourages wider acceptance of GPW generally. Also, the use of the words "fighting man" is on its face inconsistent with the clear purpose of the executive order, which by its terms applied the Code to "all members of the Armed Forces." This incompatibility arises because of the fact that GPW clearly anticipated the presence of women prisoners by requiring that the captor maintain special accommodations and protections for them. GPW requirements for special treatment of women include separate facilities, Article 25 (dormitories), Article 29 (sanitary installations),

Articles 97 and 98 (execution of punishment), and other provisions designed to protect honor and modesty, Article 13, and special considerations regarding interrogation, Article 17.

Recent changes to Army regulations specifying authority to exercise command appear to make possible the assumption of command in camp by women. Although it has been the policy of the military services to prohibit women from combat assignments, it is well-known that women did play some role in the Vietnam War effort and importantly, the Navy has recently awarded the first woman flier wings and announced that she will be assigned to fly transport aircraft for the service.²⁵⁴

The former barriers to women assuming command appear to have been removed.²⁵⁵ Accordingly, since the term "fighting man" is not intended to limit the application of the Code to the male gender, and since it now appears possible for women to exercise command, the retention of the phrase "fighting man" appears by its plain meaning to limit applicability of the Code unduly. Accordingly, it should be omitted.

Article II states, "I will never surrender of my own free will." GPW deals with the treatment of prisoners of war. The applicability of the convention is noted in Article 5 as applying "to the persons referred to in

Article 4 (describing prisoners of war) from the time they fall into the power of the enemy and until their final release and repatriation." Accordingly GPW does not itself become concerned with the method of surrender, and therefore there is no conflict, or possibility of conflict with the Code.

The article III phrase, "If I am captured," can conceivably be a source of difficulty, as it conflicts with the GPW article which applies the benefits of the Convention to eligible persons "who have fallen under the power of the enemy."²⁵⁶ Since it was not the intent of the drafters of the Code to limit its application to those who had been "captured" as distinguished from those who had surrendered, there is no reason for not accepting the broader GPW term.

The statement that even after capture, the prisoner "will continue to resist by all means available," constitutes a much more substantial and less technical conflict with the contrary purposes of GPW. As noted, humane treatment is the foundation of the GPW.²⁵⁷ Further, the fact that GPW requires prisoners to submit to the authority of the detaining power makes it clear that some recognition of the Detaining power's need for control of prisoners is necessary for the purposes of attaining the goals of the Convention. GPW Article 82 states:

A prisoner of war shall be subject to the laws, regulations and orders enforced in the armed

forces of the detaining power; the detaining power shall be justified in taking, judicial or disciplinary measures in respect of any offense committed by a prisoner of war against such laws, regulations and orders.²⁵⁸

In referring to the turbulent and violent conduct of certain Communist prisoners of war in Korean camps operated by United Nations personnel, one current Army source states,

...international law as represented by the 1949 Geneva PW Convention, did not contemplate an open contest between the captor and the captive. If such practice should continue in any future war, many of the humanitarian provisions of the 1949 Conventions would become difficult to implement.²⁵⁹

It must be noted, however, that some current departmental guidance does stress the value of "passive" resistance.

A current training source states,

obviously the prisoner's means of resisting are limited. He simply has to take some treatment against which his instincts rebel....For the time being, the prisoner's best resistance is passive resistance.²⁶⁰

Humane treatment, the underlying concept of GPW, results from the prisoner being removed from the battle, a concept which is upset and contradicted at least by the plain language of the Code requirement that resistance be affected by "all means available." Accordingly, as suggested by one author, the provisions of article III "ought more properly read: ...I will continue to resist by all legitimate means available."²⁶¹

With regard to the Code sentence, "I will make every

effort to escape and aid others to escape," a similar conflict with the plain meaning of the Code injunction and the provisions of GPW is presented. Prior note has been made of the fact that it has long been recognized that escape by a prisoner of war occasions no offense for which he may be liable to punishment.²⁶² GPW Article 9 recognizes the preferred nature of escape:

Escape or attempt to escape, even if it is a repeated offense, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect to an offense committed during his escape or attempt to escape. In conformity with the principle stated in Article 33, offenses committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, the wearing of civilian clothing, shall occasion disciplinary punishment only.

Conversely, if escape involves violence to life or limb or other offenses not devoid of prohibited criminal intent, and hence not excused because of the honorable motive of escape, then the offender is subject to the regular judicial proceedings of the detaining power.²⁶³ Thus, the Code could be modified so as to bring it more into accord with the GPW provisions by revising it to read, "I will make every reasonable effort to escape..."²⁶⁴

The phrase: "I will not accept parole" is completely consistent with the provisions of GPW, as GPW recognizes

that the laws of parole of the power in whose service the prisoner of war was at the time of coming under the power of the enemy must be observed by the detaining power under the provisions of Article 21.²⁶⁵ Although the Code injunction against parole appears absolute, that has not always been the policy of the United States,²⁶⁶ and whether the absolute prohibition is valid in respect to certain limited parole is still a matter of some question. It is interesting to note that current Army information still indicates:

...a member of the United States Army may be authorized to give his parole to the enemy that he will not attempt to escape, if such parole is authorized for the specific purpose of permitting him to perform certain acts materially contributing to the welfare of himself or of his fellow prisoners. Such authorization will extend only for such short period of time as is reasonably necessary for the performance of such acts and will not normally be granted solely to provide respite from the routine rigors of confinement or for other purely personal relief. A parole of this nature may be authorized for example, to permit a prisoner to visit medical establishment for treatment or to allow a medical officer or chaplain to carry out his normal duties. A member of the United States Army may give a parole of this nature only when specifically authorized to do so by the senior officer or non-commissioned officer exercising command authority.²⁶⁷

The first two sentences of article IV read as follows: "If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information nor take part in any action which might be harmful to my comrades." The duty to "keep faith" cannot be regarded as contrary to GPW

since, as noted, the patriotism of the captive is to be respected under the provisions of the Convention.²⁶⁸

Moreover, the sentence "I will give no information nor take part in any action which might be harmful to my comrades," is likewise consistent with GPW, since the only duty imposed upon prisoners to provide information is that necessary to assure proper application of the individual protections accorded by the Convention.

Consideration of the compatibility of the Code duty to "take command" must begin with an examination of the role of the prisoners' representative and the "command responsibility" under the Code. Experience indicates that both roles will usually be played by the same individual. Article 79 of GPW requires that the senior officer, in camps where officers are present, be the prisoners' representative. The POW representative is selected by secret written ballot in camps where there are no officers.²⁶⁹ The duties of the prisoners' representative are specifically listed in the Convention. The responsibilities and duties of the prisoner's representative include the duty to remain in contact with prisoners (Art. 57); to receive and relay reports to the protecting power (Art. 78); the right to inspect all prisoners and camp areas, communicate with the detaining and protecting power, International Red Cross and others (Art. 81); the

duty to secure property for prisoners undergoing punishment (Art. 98); and probably the most important duty, that of "furthering the physical, spiritual and intellectual well-being of prisoners of war" (Art. 80). Although Pictet suggests that the prisoners' representative is to insure the proper implementation of the Convention,²⁷⁰ no specific article can be found to support this proposition. The prisoners' representative does not occupy a position in the chain of authority between the captor and the POW's. The disciplinary authority of the captor is carried out through the responsibility of the camp commander.²⁷¹ The rights of the prisoners' representative under the GPW often operate in a manner complementary to the duties of the superior under the Code. Examples of this are found in the right to be notified three weeks in advance of any judicial proceedings against any prisoner in camp (Art. 104), the right to immediate notice of results (Art. 107), and the right to appoint assistants, inspect prisoners in all areas of the camp and the freedom to be consulted by other prisoners under (Art. 81).²⁷²

The first sentence of article V states, "...when questioned should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth."

The language of the Code is nearly identical to that of Article 17 GPW.²⁷³

The compliance with the GPW injunction to provide such information is important, however, as willfull failure to provide it renders the captive liable to loss of privileges due his rank or status.²⁷⁴ Thus, the first sentence of article V is consistent with GPW. The second sentence of article V provides "I will evade answering further questions to the utmost of my ability." Although as noted the language of the first sentence of the Code and GPW cannot be regarded as being in conflict, the second sentence of the Code seems to prohibit any further communication. There is nothing in the Code to emphasize the right of prisoners to communicate with the exterior. However, the GPW is replete with provisions for the furtherance of the prisoner's right to communicate with the exterior. Listed seriatum, they are the capture card (Art. 70); the forwarding of letters and other forms of correspondence (Art. 71); relief shipments (Art. 72); collective relief (Art. 73); exemption from postal and transport charges (Art. 74); special means of transport for correspondence (Art. 75); and lastly, preparation and execution of legal documents (Art. 77). The most important of the enumerated rights of communication with the exterior is probably the right to complete the capture card. GPW Article 70 requires:

Immediately upon capture or at least within one week after arrival at camp, even if it is a transient camp, likewise in case of sickness or

transfer to hospital or another camp, every prisoner of war shall be enabled to write directly to his family, on the one hand, and to the Central Prisoner of War Agency provided for in Article 123, on the other hand, a card similar, if possible to the model annexed to the present convention, informing his relatives of his capture, address and state of health.

The capture card is required to be forwarded as rapidly as possible and may not be delayed in any manner. Additional information included on the capture card is the first name of prisoner's father, place of prisoner's birth, present address, address of next of kin, name of camp, date, signature and entries describing capture or transfer from camp or hospital with block entries allowing indication of condition of the prisoner's health.²⁷⁵

The importance of allowing the prisoner to communicate with the exterior, especially in respect to informing his officials and family that he is alive is universally recognized. In reference to the Korean War experience, one authority has stated:

Among the most powerful motivations experienced by the ordinary prisoner of war is the desire to let his family, or simply the "outside," know that he is alive and a prisoner. While communication with "the outside" beyond this minimum was keenly valued, the desire of prisoners somehow to get out their own names and those of their fellow prisoners was as powerful a lever as the Communists possessed for gaining "collaboration." It was for this reason that many POW's fixed their names to propaganda petitions, made broadcasts and wrote letters incorporating propaganda themes. Western powers have not neglected this motivation of the prisoner for exploiting captives for psychological

warfare purposes. During World War II allied psychological warfare maintained shuttle air service to fly newly captured German prisoners to broadcast back to their units from BBC facilities within hours after their capture. The opportunity to let comrades and family know immediately that they were alive and well was an attraction that few could resist.²⁷⁶

As is well-known from the Vietnam experience, the motivation to discover the status of individuals who are missing is equally strong on the part of their family members. During the Vietnam Conflict, families of prisoners and missing personnel became actively involved in the process of investigation and discovery of information regarding their welfare and status.²⁷⁷

Although current Army training materials permit Army personnel to complete a capture card in the proper form, containing the entries previously referred to,²⁷⁸ it appears that the placement of the word "only" within the Code, in juxtaposition with the phrase "...evade answering further questions...", immediately there following, creates an inference that the line of resistance to providing additional information must be drawn ahead of the recognized right to complete the capture card.

Even partial exercise of rights allowed under the Convention would probably lead to the discovery of information of the sort noted on the capture card, as the GPW gives prisoners rights to communicate with the exterior,²⁷⁹ subject only to the right of censorship by the detaining

power.²⁸⁰ Because of the psychological pressure upon prisoners to advise the outside world of their status and the desire of the families of missing individuals to know of this fact, the capture card should be specifically authorized by a Code article. Completion of the capture card and its forwarding by the detaining power are certainly desirable goals, as the information provided is less likely to prejudice military interests of the United States than is the information likely to be provided by exercise of the Convention right of correspondence. However, it is not likely that the enemy Detaining power would be enthusiastic about use of the capture card. Experience certainly indicates general Communist intransigence in failing to provide the lists identifying those held captive.²⁸¹ Emphasizing the captor's duty to allow notification of status by completion of the capture card might well provide an additional benefit, however. It would bring the Code into accord with the GPW in that respect. Thus, the inclusion of the clear authority to complete a capture card could serve as a moral basis to mobilize world public opinion against the captor's failure to reveal the identity of prisoners. Communist regimes have proved quite responsive to world public pressures urging them to abide by the provisions of GPW. Urging the Communists to adhere to humanitarian principles because of reciprocity appears to have been unsuc-

cessful, judging from the conduct of Communist regimes in North Korea, China and Vietnam which contrive consistently to deny correspondence, parade and humiliate prisoners, and deny inspection of camps to international authorities. However, Communist regimes have demonstrated an increasing awareness of the pressure of world public opinion, particularly during the Vietnam War.²⁸²

The first phrase of article VI: "I will never forget that I am an American fighting man," is largely a device to emphasize by repetition the similar section of article I and is in conflict with the provisions of GPW for the same reasons previously discussed.²⁸³ The remainder of article VI appears to be entirely consistent with the provisions of the Convention. The further phrase, "...responsible for my actions, and dedicated to the principles which made my country free" appears consistent with the provisions of GPW, as no specific article requires that the allegiance to the country of the power upon which the prisoner depends be diminished by reason of his confinement. Moreover, it serves as a further reminder of the prisoner's amenability to penal sanctions upon repatriation. The final injunction of the Code: "I will trust in my God and in the United States of America," is entirely consistent with the provisions of GPW. GPW specifically provides for the exercise of religious freedom by prisoners.²⁸⁴

In conclusion, the Code and GPW conflict or are inconsistent in the following particulars:

- (1) The article I term "fighting man" is inconsistent with the GPW principles encouraging humane treatment insofar as it encourages continuing the battle into the prison camp. The plain meaning of the term also fails to recognize the increasing likelihood of the presence of female prisoners of war, anticipated by GPW.
- (2) The article III phrase "[i]f I am captured," is subject to misinterpretation tending to unnecessarily limit the application of the Code. The requirement to "resist by all means available" also tends to foster conduct running contrary to the principle of encouraging humane treatment which underlies GPW. The requirement to make "every effort to escape" fails to take account of the GPW Art. 33 provision recognizing the special nature of the offense of escape without violence against life or limb.
- (3) Read together, the first, "only name, rank, service number, and date of birth," and second, "evade answering further questions to the utmost of my ability" sentences of article V, suggest an unnecessary restriction upon the extent of the prisoner's right to communicate with the exterior and appears to restrict him from completing a capture card. In so doing the Code provisions fail to recognize the psychological need for prisoners to notify the exterior of their status and neglects utilization of GPW provisions as an affirmative instrument for mobilization of world public opinion.

CHAPTER V

CONCLUSIONS AND PROPOSED CODE

The author's consideration of the major tests of the Code has traversed a broad area of prisoner experiences. Some Code problems noted have been peculiar to one of the tests, and others have been common to both. Others have been shown to be in conflict with GPW provisions. Throughout, the author assumes that the full provisions of GPW apply to POW conduct. Thus, the interaction of the Code and GPW provisions is material.

If only Article 3 GPW, one of the articles common to all four Geneva Conventions of 1949²⁸⁵ applies or if no GPW provision applies, adherence to the Code as a partial guide is still useful to the soldier who may inadvertently stray across a border or otherwise falls into the hands of authorities of an unfriendly state. Also, partial or full applicability of the Code, regardless of a condition of war or peace, could be based upon encountering an "enemy," as defined by Paragraph 178a of the Manual.²⁸⁶

Basically, the issue involved in determining whether the Code should be changed stems from an uncertainty as to what the Code should be. Should it be realistic? That is, should it require only conduct which is reasonably capable of human attainment. Or may its apparent command require

conduct known to be humanly impossible of achievement? Surely, the further from reality Code standards depart, the less credible they are and the less they will be respected.

Thus, the author submits that Code standards capable of attainment are the most likely to be the basis for common consensus and universal agreement. Moreover, such standards are most likely to be respected and understood by the general public.

A critic of this view may reply that since the Code was intended to be only a moral guide and its violation never intended to occasion punishment (unless a parallel Article of the UCMJ was breached), the unattainable nature of the goal should make no difference. This assumes that there is a distinction between a legal and moral guide, which is less than clear.²⁸⁷ Although most authorities suggest that a distinction between law and morality is found in the existence of sanctions punishing the violation of law but not morality,²⁸⁸ others indicate that the disapprobation of one's fellows, a moral sanction, is probably the most powerful of all pressures in human society.²⁸⁹ It would appear certain that exercising the breach of a rule will eventually lead to its disrespect and eventually to its disregard. Certainly, in those situations where it is humanly impossible to adhere to the Code, bringing

it closer to attainable conduct and reality is logically more consistent with assuring respect and adherence than is the practice of forgiving the individual who breaches it.

The author's examination of article I indicates that the term "fighting man" proved to be misleading as to determining applicability of the Code in the Pueblo Incident. Moreover, the term conflicts with GPW in that it encourages conduct that undermines the GPW principle encouraging "humane treatment." In addition, the plain meaning of the term is not in accord with its broader intended meaning which does not limit applicability of the Code on the basis of mission or gender. Accordingly, the term should be omitted from the article so that the proposed Code article I reads: "I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense."

With respect to article II, experience in the Pueblo Incident indicated that the standards of the surrender clauses are unnecessarily complex and confusing from the standpoint of the individual. No justification can be found for the use of an individual "free will" standard as opposed to a command standard based upon the "possession of means to resist." Also, the plain meaning of both standards appear to be so absolute as to provide no basis for employment of the technique of evasion, although it is

recommended by current doctrine. In order to make the Code more easily understood by military personnel, reduce the likelihood of public misunderstanding of the Code standard, and reduce the possibility of confusion, Code language should be modified to provide a single criteria which is less absolute and more in accord with the realities encountered in the Pueblo Incident. The proposed article II reads: "I will never surrender while I have reasonable means to resist or evade."

The author's examination of article III disclosed that the phrase "If I am captured," tends, by its plain meaning, to suggest that applicability of the Code is limited by distinguishing capture from other modes of coming under the power of the enemy. The phrase requiring the prisoner to "resist by all means available" contradicts the underlying principle of the GPW, that as the prisoner is removed from battle, he is entitled to humane treatment. Although the principle of unqualified resistance seems to have been of great value as a means of strengthening the prisoner organization in Vietnam, it seems that even the many restraints on resistance were accepted, as is suggested by the current training materials. Therefore, no doctrinal change would be required by addition of the qualifying word "legitimate" to the "resistance" clause. Thus, the proposed article III "resistance clause" reads: "If I come under the

power of the enemy I will continue to resist by all legitimate means available." The second sentence of article III appears to impose an absolute duty to make "every" effort to escape, which is inconsistent with the GPW provisions recognizing the honorable nature of escaping without endangering life or limb. Such escape attempts are treated as mere disciplinary offenses. Code language should be tempered to reflect this distinction. The proposed "escape clause" reads: "I will make every reasonable attempt to escape and aid others to escape."

The "parole" and "special favors" clause of article III offered special difficulties when the "early release" program was encountered in the Vietnam War. The policy effected by the prisoners' organization, allowing certain limited early releases, recognized the unrealistic and restrictive quality of the absolute prohibition against accepting special favors. The problem could be ameliorated by the revision of the "parole" and "special favors" clause to read: "I will accept neither parole nor compromising special favors from the enemy." However, the problem of defining which favors are not compromising is a very difficult one. Thus, a revision would not be desirable unless the term "compromising" could be defined with particularity and clearly defined in thorough training.

The first phrase of article IV, which reads "If I

become a prisoner of war," appears to be misleading, as the experience of the Pueblo Incident has indicated that applicability of the Code does not depend on one's status as a prisoner of war. It should be omitted. The "keep faith" clause and second sentence of article IV are retained unchanged. The Vietnam War experience disclosed that the "command" provisions of article IV and doctrine and training were inadequate to resolve difficulties encountered in:

- (1) Identifying the senior;
- (2) Establishing equitable rank during long periods of confinement;
- (3) Providing guidance for relief of a subordinate (or senior); and
- (4) Inclusion of members of allied belligerent forces in the prisoner command organization.

These problems are best addressed by the promulgation of doctrine and the provision of specific uniform departmental policies with a vigorous training program, identical throughout the services. They are not amenable to solution by a change in the Code.

Moreover, the broad scope of the senior's authority under the Code and the real possibility of issuance of orders in conflict with Code duties suggests serious problems in determining whether precedence should be given the senior's order or the Code duty. As prisoners place a high value on solidarity and strength of the chain of

command, obedience to the senior's order should be afforded the highest possible precedence, within the guidelines of the Calley decision.²⁹⁰

Due to the recognized importance of effective command, the "command" clause of article IV should be placed in higher sequence within the Code to emphasize its importance.

Since it is obvious that all conduct prescribed by the Code following article II relates to behavior after coming under the power of the enemy, the language in article V, "When questioned, should I become a prisoner of war," adds nothing new to the Code in sequential reading or recall and should therefore be omitted. Experience in the Pueblo Incident and Vietnam War indicated that the prisoners often regarded the phrase, "give only name..." as indicative of the maximum, rather than the minimum required information. Moreover, the use of the term "only" in juxtaposition with the injunction to "evade answering further questions to the utmost of my ability" operates to unduly restrict the GPW provisions allowing communication with the exterior and is inconsistent with universally recognized psychological needs of the prisoner to initially advise the exterior of his status. The plain meaning of the Code should be changed to bring it into consonance with current doctrine by changing the second sentence of article V to read: "I am required to give name, rank,

service number and date of birth." Additionally, a specific provision should be added, stating: "I may complete a Capture Card."

The most extensive controversy and the source of most public and military discomfort over the Code has centered around the article V provisions directing prisoners to "...evade answering further questions to the utmost of my ability....[and] make no oral or written statements disloyal to my country and its allies or harmful to their cause."

As training and preparation of the Pueblo crewmen for their experience as prisoners was apparently deficient and the applicability of the Code questioned, their failure to adhere to the absolute prohibitions against disloyal statements could arguably be attributed to this deficiency. From this standpoint, the Pueblo Incident might not have been a fair test of the Code, as the results may have been an indication of inadequacy in training rather than of a shortcoming of the Code. However, the similar inability of the most mature, well-trained, and determined Vietnam War prisoners to adhere to the Code absolutes confirms beyond cavil that the prohibitions against "disloyal statements" have established unattainable standards and fail to recognize that every man has his "breaking point." In fact, both the major tests of the Code indicated that the established standard was almost universally impossible

to meet. Thus, it appears that the Code requires too much by demanding the impossible. Moreover, the Code emphasis on prohibiting disloyal statements seems misplaced due to the failure to proceed with prosecution in the Pueblo Incident and the policy decision not to bring or to dismiss charges in the Vietnam War. It is submitted that the decision not to proceed with charges arising from making "disloyal statements" constitutes an implicit recognition that such statements are less harmful than they were thought to be during the Korean Conflict, possibly due to increased public sophistication about Communist methods of obtaining them. Therefore, Code emphasis should be directed to the area of greatest potential harm to the national interest, disclosure of vital military information. The Vietnam prisoners' development of their own standard for determining when a disloyal statement would be excused indicates one way of approaching an attainable standard. However, substitution of the prisoner criteria, that is to excuse the disloyal statement when made at or beyond the point of incurring "permanent physical disability," seems inadvisable, as it could conceivably encourage an enemy to develop and use methods of torture responsive to the Code standard. Moreover, the use of the conjunctive "and" in the phrase "disloyal to my country and its allies" creates an ambiguity which makes the provision susceptible to misunderstanding.

Use of the disjunctive "or" would be more appropriate. The last two sentences of article V should be amended to provide: "I will deny the enemy military information and will, to the utmost of my ability, avoid making statements disloyal to my country or its allies or harmful to their cause." Individual ability to resist should be recognized as a function of training. The Vietnam experience indicated that specialized training did enhance the ability of prisoners to survive and resist. Additionally, prisoners themselves developed techniques that proved useful in avoiding the enemy's attempts to compel compliance, or in communicating their resistance, even during the performance of coerced acts.²⁹¹ These techniques should be included in training.

Similarly, the concept of "military information" would have to be broadly defined and explained by meaningful training. These changes would be accompanied by an increased emphasis on the nature of Communist interrogation techniques and by publicity stressing that disloyal statements made during imprisonment should be assumed to have been involuntarily made under duress.²⁹² Inevitably, the prisoner's conduct would have to be judged by comparing it with that which is deemed reasonable under the circumstances.

The first sentence of Article VI should be modified by omitting the words "an American fighting man" for the

reasons noted supra, under the discussion of article I.

Thus, the proposed article VI reads:

I will never forget that I am responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

The proposed Code, taking into account the deletions, changes and additions mentioned is reorganized in precedence to emphasize the relative importance of the various clauses and to coincide with the usual sequence of events experienced by those coming under the power of the enemy.

Proposed Code

I

I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

II

I will never surrender while I have reasonable means to resist or evade.

III

If I come under the power of the enemy I will continue to resist by all legitimate means available. I am required to give name, rank, service number and date of birth. I may complete a capture card.

IV

If I am senior I will take command. If not, I will obey the lawful orders of those appointed over me and back them up in every way. I will deny the enemy military information and will, to the utmost of my ability, avoid making statements disloyal to my country or its allies or harmful to their cause. I will keep faith with my fellow prisoners. I will give no information nor take part in any action which might be harmful to my comrades.

V

I will make every reasonable effort to escape and aid others to escape. I will accept neither parole nor compromising special favors from the enemy.

VI

I will never forget that I am responsible for my actions and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

Certainly the decision to change the Code cannot be undertaken lightly. As in other matters of great importance, the decision for change has offered the occasion for painful reflection, sometimes seeming to require higher guidance, so that the plea of the noted philosopher Reinhold Niebuhr might appropriately be recalled: "O God, give us serenity to accept what cannot be changed, courage to change what should be changed and wisdom to distinguish the one from the other."²⁹³

FOOTNOTES

1. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (effective February 2, 1956) [hereinafter cited as GPW].
2. THE ARMY ALMANAC 382-384 (U.S.G.P.O. 1950).
3. THE ARMY ALMANAC 411 (U.S.G.P.O. 1950), indicates that the following numbers of American servicemen came under the power of the enemy in wars preceeding the Korean Conflict: Revolution 6,642; Civil War 211,411; World War I 4,416; World War II 125,558.
4. Manes, Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp, 10 MIL. L. REV. 1 (1961).
5. Cf. A. BIDERMAN, MARCH TO CALUMNY 19 (1963).
6. THE ARMY ALMANAC 382-384 (Stackpole Co., 1959), provides the following data comparing prisoner of war mortality rates for World War II: 40.4% of the Army and Air Force personnel captured by the Japanese died in captivity; 1.2% of the Army and Air Force personnel captured in the European or Mediterranean theater died in captivity.
7. Numerous articles cast aspersions on the loyalty of United States servicemen in Korea and characterized their actions in camp, including signing of "germ warfare confessions" as reflections of disloyalty to the United States. Representative of these were: How U.S. Prisoners Broke Under Red "Brainwashing," LOOK, Jun. 2, 1953, at 180-183; Cowardice in Korea, TIME, Nov. 2, 1953, at 31; Fay, It's Easy to Bluff Americans, COLLIERS, May 16, 1953, at 20; "Sick POW's," NEWSWEEK, Aug. 17, 1953, at 58.
8. The background, education, intelligence, family relationships, ages and military histories of these men, apparently the only such defectors of the Korean War out of the 1,600,000 United States servicemen who served there are examined in V. PASLEY, TWENTY ONE STAYED (1955).
9. POW's of the Reds Do Not Want to Come Home to America, LIFE, Oct. 19, 1953, at 1; 23 Americans, TIME, Oct. 5, 1953, at 33.

10. REPORT BY THE SECRETARY OF DEFENSE'S ADVISORY COMM. ON PRISONERS OF WAR, POW—THE FIGHT CONTINUES AFTER THE BATTLE 25 (Aug. 1955) [hereinafter cited as PRISONER REPORT].
11. Prugh, Misconduct in the Prison Camp; A Survey of the Law and an Analysis of the Korean Cases, 56 COLUM. L. REV. 709, 742 (1956).
12. Kinkead, "A Reporter at Large: The Study of Something New in History," THE NEW YORKER, Oct. 26, 1957, at 102 to 153. The same material, except for minor deletions not important here was later published as a book. E. KINKEAD, IN EVERY WAR BUT ONE (1959) [hereinafter cited as KINKEAD].
13. KINKEAD at 18.
14. Id. at 15.
15. Republica v. M'Carty, 2 U.S. 86 (1781).
16. O. FUTCH, HISTORY OF ANDERSONVILLE PRISON 53 (1968).
17. Id.
18. PRISONER REPORT at 5.
19. War Dep't Gen. Order No. 207 July 3, 1863.
20. H. FOOKS, PRISONERS OF WAR 84 (1924).
21. Id. at 87-88.
22. United States v. Provoo, 124 F. Supp. 185 (S.D.N.Y. 1954), rev'd, 215 F.2d 531 (2d Cir. 1954). Provoo was convicted of mistreatment of a fellow prisoner and also of making numerous radio propaganda broadcasts to the United States on behalf of the Japanese.
23. An example of such continuing misunderstanding is seen in R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 520 (1967). "A somewhat disproportionate amount of national and intra-Army soul-searching and hand-wringing has occurred over collaboration with their captors by some of the American soldiers who fell into Communist hands. Many proved unable to bear the physical and mental strains of Communist prisoner of war camps, and a few even defected to the enemy. In the light of the American performance on the early Korean

battlefields, lack of toughness and stamina in prison should not have been surprising. Soldiers unprepared for battles as the first to reach Korea were, naturally also unprepared for the rigors of prison camps. Yet American weakness in the prisons have attracted much more attention than the closely related shortcomings in battle. Of course, defeat in battle had been suffered before, while collaboration with the enemy by American prisoners was something new" (emphasis added).

24. The Secretary of Defense's Advisory Committee on Prisoners of War took the view that only one out of twenty-three American POW's was suspected of serious misconduct and compared this ratio to the one in fifteen persons who have been arrested and fingerprinted as suspects for alleged commission of criminal acts. It concluded that: "When one realizes that the Armed Forces comes from a cross section of the national population, the record seems fine indeed. It seems better than that when one weighs in the balance the tremendous pressures the American POW's were under. Weighed in that balance, they cannot be found wanting." PRISONER REPORT at vi.

25. The committee was issued instructions by Memorandum from the Secretary, Subject, Terms of Reference, May 17, 1955 in PRISONER REPORT at 37.

26. The names of the members of the committee are listed in PRISONER REPORT at iv.

27. PRISONER REPORT at 37.

28. Id.

29. Letter from the Chairman and members of the Defense's Advisory Committee on Prisoners of War to the Secretary of Defense, Jul. 29, 1955 in PRISONER REPORT at v-vi.

30. Id. at vii.

31. Executive Order No. 10631, Aug. 17, 1955, 20 Fed. Reg. 6057 (1955).

32. Carter L. Burgess, Assistant Secretary of Defense and Chairman of the Defense Advisory Committee on Prisoners of War in, Foreword to Prisoners of War, 56 COLUM. L. REV. 676 (1956). See also JAGJ 1960/8387, 18 May 1960; stating that conduct in contravention of the Code can be punished

only if it also violates some provision of the Uniform Code of Military Justice. The Code of Conduct is not intended to be a penal code. It is rather a moral guide for conduct while a prisoner of war.

33. PRISONER REPORT at 7. On June 30, President Truman ordered the dispatch of these forces, and the first engagements with the enemy occurred on July 5th near Seoul. W. DEAN, GENERAL DEAN'S STORY 229 (1954).

34. A. BIDERMAN, MARCH TO CALUMNY at 177 (1963), states: "Of all the reasons returned prisoners gave for things that went wrong, the one by far the most frequently given was their total lack of preparation for what they were to encounter: 'We had no idea of what to expect.' 'We were given no idea of how to handle that kind of situation.' 'We had no instructions on how to act as prisoners.' These were the most frequent reasons prisoners gave for what went wrong, and this was said of all of the ills suffered or committed by prisoners collaborating with the enemy, succumbing to indoctrination, illness, death, disorganization, ineffective escape attempts, ineffective harassment of the captor, and so on."

35. J. SEGAL, FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY POW'S IN KOREA, Human Resources Research Office, George Washington U., Wash. D.C. HumRRO Tech. Rep. No. 33, at 50 (1956).

36. Lifton, Home by Ship, Reaction Patterns of American Prisoners of War Repatriated from North Korea, 110 AM. J. PSYCHIATRY, 732 (1954).

37. Id.

38. J. SEGAL, supra note 35, at 45.

39. Id. at 47.

40. PRISONER REPORT at 8-10.

41. Id.

42. U.S. DEP'T OF ARMY PAMPHLET No. 30-101, COMMUNIST INTERROGATION, INDOCTRINATION AND EXPLOITATION OF PRISONERS OF WAR 15-16 (May, 1956) [hereinafter cited as D.A. PAM. 30-101].

43. Indicative of this policy was a Chinese document captured on May 19, 1951 which read in part: "Basic consideration of the American prisoner of war are fear of death, home sickness, tiredness of war, and not knowing why they should fight in Korea. If we treat them well and convince them of our policies, they are apt to give us valuable information due to their weakness and lack of convictions." The document is reprinted in D.A. PAM. 30-101, at 20.
44. PRISONER REPORT at 11.
45. Id. at 10-11.
46. Id. at 11-12.
47. SENATE COMM. ON GOVT. OPERATIONS, COMMUNIST INTERROGATION, INDOCTRINATION AND EXPLOITATION OF AMERICAN MILITARY AND CIVILIAN PRISONERS, S. REP. 2832, 84th Cong. 2d Sess. 8-9 (1956).
48. R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM 5 (1961).
49. E. HUNTER, BRAINWASHING, FROM PAVLOV TO POWERS 1-5 (1965).
50. J. FRANK, PERSUASION AND HEALING 90 (1973). Frank suggests that the enormous efforts, including the investment of very long time, involving periods of up to several years during which individuals were enrolled in Revolutionary Colleges in China shortly after the revolution, represents an effort by the Communists to confirm their own world view, since they attempted to and did obtain conversions from Chinese "reactionaries" of all classes, not just influential persons of high status, and since no propaganda or other discernable value of conversion of these persons can be discovered.
51. U.S. DEP'T OF ARMY PAMPHLET No. 360-522, THE FIGHTING MAN'S CODE, 46 (1967) [hereinafter cited as D.A. PAM. 360-522].
52. PRISONER REPORT at 57.
53. N.Y. Times, Feb. 23, 1953, at 3, col. 6.
54. N.Y. Times, Feb. 24, 1953, at 2, col. 2.

55. D.A. PAM. 30-101 at 51.

56. The preceding account of what was later known as the "Pueblo Incident" is taken from M. Haggard, "The Pueblo Incident—A Short Narrative Summary," Washington D.C., U.S. Library of Congress, Legislative Reference Service, multilith No. F-368, April 15, 1969 [hereinafter cited as Short Narrative Summary].

57. L. BUCHER, MY STORY 224 (1970) [hereinafter cited as BUCHER]. Numerous Pueblo crew members wrote books about the "Pueblo Incident," giving their personal and sometimes very different views and accounts of the experience. Some of the books are: E. BRANT, THE LAST VOYAGE OF THE USS PUEBLO (1969); S. HARRIS, MY ANCHOR HELD (1970); E. MURPHY, SECOND IN COMMAND (1971); F. SHUMACHER, BRIDGE OF NO RETURN (1971).

58. BUCHER 207.

59. Seaman J. Law, in N.Y. Times, Feb. 21, 1969, at 14, col. 1.

60. BUCHER 218.

61. E. MURPHY, SECOND IN COMMAND 160 (1971) [hereinafter cited as MURPHY].

62. BUCHER 223.

63. MURPHY 160.

64. REPORT OF HOUSE SPECIAL SUBCOMM. ON THE U.S.S. PUEBLO, OF THE COMM. ON ARMED SERVICES, 91st Cong., 1st Sess., 1690 (1969) [hereinafter referred to as REPORT OF HOUSE SPECIAL SUBCOMM.].

65. BUCHER 236-241.

66. Id. at 243.

67. Id. at 245.

68. Id. at 250.

69. Id. at 433. The peculiar character of these "confessions" which strongly suggests that they are not the work of the signer, can be discerned from the following

representative excerpt from the first "confession":
"Then we disguised my ship as one engaged in researches on oceanic electronics and left the port of Sasebo, Japan, and conducted espionage acts along the coast of the Democratic People's Republic of Korea via the general area off the Soviet Maritime Province. We pretended ourselves to conduct the observation of oceanic conditions on high seas, electronics, research on electric waves, magnetic conditions and exploitation of oceanic materials." The "first confession," as published in the Pyongyang Times, Feb. 5, 1968, is reprinted in BUCHER, app. IV, at 423. The "second confession," as recalled by Commander Bucher, is quoted therein at app. V, at 426.

70. Id. at 247.

71. N.Y. Times, Feb. 19, 1969, at 14, col. 1.

72. N.Y. Times, Feb. 18, 1969, at 2, col. 3.

73. N.Y. Times, Jan. 24, 1968, at 15, col. 1.

74. Short Narrative Summary at 16-17.

75. N.Y. Times, Dec. 23, 1968, at 2, col. 1.

76. Id.

77. A full text as quoted in the N.Y. Times, Dec. 23, 1968, at 2, col. 1 read as follows: "To the Government of the Democratic People's Republic of Korea

The Government of the United States of America:

Acknowledging the validity of the confessions of the crew of the U.S.S. Pueblo and of the documents of evidence produced by the representative of the government of the Democratic People's Republic of Korea to the effect that the ship, which was seized by the self-defense measures of the naval vessels of the Korean Peoples Army in the territorial waters of the Democratic People's Republic of Korea on Jan. 23, 1968, had illegally intruded into the territorial waters of the Democratic People's Republic of Korea.

Shoulders full responsibility and solemnly apologizes for the grave acts of espionage committed by the U.S. ship against the Democratic People's Republic of Korea after having intruded into the territorial waters of the Democratic People's Republic of Korea.

Meanwhile, the Government of the United States of America earnestly requests the government of the Democratic People's Republic of Korea to deal leniently with the former crew members of the U.S.S. Pueblo confiscated by the Democratic People's Republic of Korea side, taking into consideration the fact that these crew members have confessed honestly to their crimes and petitioned the Government of the Democratic People's Republic of Korea for leniency.

Simultaneous with the signing of this document, the undersigned acknowledges receipt of 82 former crew members of the Pueblo and one corpse.

On behalf of the Government of the United States of America. s/Gilbert H. Woodward, Major General, United States Army.

78. MURPHY 315.

79. BUCHER 385.

80. N.Y. Times, Jan. 28, 1969, at 10, col. 3.

81. BUCHER 385.

82. N.Y. Times, Feb. 7, 1969, at 2, col. 4.

83. REPORT OF HOUSE SPECIAL SUBCOMM. at iii.

84. REPORT OF HOUSE SPECIAL SUBCOMM. at 691. It should be noted that the provisions of Article 4A(1) GPW extend POW status to "members of the armed forces of a party to the conflict." Article 2 GPW provides: "In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Thus, a cursory reading of these two Articles may produce an impression that since there is no war or no armed conflict, as the Pueblo had offered no armed resistance, the Convention may not apply; however, such is not the case. The leading commentator, Pictet, states: "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2...Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application." 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 23 (Pictet ed. 1960).

85. REPORT OF HOUSE SPECIAL SUBCOMM. at 1691.

86. Id.

87. Id. at 1692.

88. Id.

89. Id. at 1693.

90. Id. at 1693-1694.

91. See text supra accompanying note 31.

92. The primary training directive pertaining to the Code states that it and Executive Order No. 10631 are the basic policy documents for instruction regarding the Code. U.S. DEP'T OF DEFENSE DIRECTIVE No. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT, at para. 3 (July 8, 1964) [hereinafter cited as DOD DIRECTIVE, July 8, 1964].

93. The military armistice agreement was signed at Panmunjom on July 27, 1953, by the Commander-in-Chief United Nations Command, on the one hand, and the Supreme Commander of the Korean Peoples Volunteers on the other. The armistice, in Art. II, para. 12 ordered a "complete cessation of all hostilities in Korea by all armed forces." The armistice was not intended to establish peace itself, as in Art. II, para. 13 it established a Military Armistice Commission to hold conferences to facilitate a "peaceful settlement." Agreement with Commander-in-Chief United Nations Command and Supreme Commander of Korean Peoples Army and Commander of Chinese Peoples Volunteers Concerning Military Armistice in Korea, July 27, 1953, [1953] 4 U.S.T. 235, T.I.A.S. No. 2322.

94. See text supra accompanying note 57.

95. U.S. Naval Dep't Gen. Order No. 4, March 18, 1957.

96. DOD DIRECTIVE, July 8, 1964, at para. 3 states: "The Code of Conduct is applicable to all members of the armed forces at all times" (emphasis added). To similar effect were training materials then available which indicated that "it (the Code) applies uniformly to all military services at all times, in peace or in war." D.A. PAM. 360-522 at 1.

97. DOD DIRECTIVE, July 8, 1964 at para 3.
98. See text supra accompanying note 58.
99. See text supra accompanying note 59.
100. See text supra accompanying notes 84 to 87.
101. Prugh, The Code of Conduct for the Armed Forces, 54 COLUM. L. REV. 678, 689 (1956) [hereinafter cited as Prugh, The Code of Conduct]. The author pointed out that a will overwhelmed by great fear would not constitute a defense to misbehavior before the enemy, as fear must be proved as a necessary element of that offense, citing: United States v. Parker 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953).
102. See text supra accompanying note 56.
103. Id.
104. Prugh, The Code of Conduct at 689.
105. Suicide is not accepted in the Judeo-Christian morality prevalent in the United States. Nevertheless, it seems that some forms of sacrifice itself are accepted generally, for example ordering volunteers to cover the retreat of fellow soldiers, ordering the captain to go down with his ship unless all others have left, or ordering the pilot to ride down his plane rather than to allow it to crash in a populated area.
106. See text supra accompanying note 62.
107. See text supra accompanying note 60.
108. See text supra accompanying note 63.
109. DOD DIRECTIVE, July 8, 1964, at para. b(3)(c) states [that] training should: "explain that dogmatic refusal to answer a question of an interrogator with: I will not answer your questions; I will not say anymore; my orders are to give my name, rank, service number, and date of birth; I will not give you anything else; or to claim inability to think, or to claim ignorance, to claim inability to talk, and to claim inability to comprehend, constitute adherence to name, rank, service number, and date of birth." Some further communication is thus authorized.

110. See text supra accompanying notes 66-69 and text accompanying note 72.
111. See text supra accompanying note 72.
112. See text supra accompanying notes 66-68.
113. See text supra accompanying note 70.
114. The feeling that every man has a breaking point was given at least passing reference by the authors of the Code who took note that men of great integrity, including the noted Catholic prelate, Cardinal Mindszenty had repeatedly "broken" under recognized Communist interrogation techniques. PRISONER REPORT at 17.
115. Bexton, Heron and Scott, Effects of Decreased Variations in Sensory Environment, 17 CAN. J. PSYCHOLOGY 70, 71 (1954).
116. N. KLIETMAN, SLEEP AND WAKEFULLNESS (1939).
117. Miller, Brainwashing; Present and Future, 13 J. SOCIAL ISSUES 48, 54 (1957).
118. PRISONER REPORT at 18.
119. See note 77 supra and accompanying text.
120. Act of August 10, 1964, Pub. L. No. 88-408, 79 Stat. 384.
121. Only nine of these prisoners were enlisted personnel. Detroit News, Feb. 21, 1973, at 8, col. 2.
122. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Feb. 15, 1974. Davis indicated that his training consisted of a one day long prisoner compound situation (which he viewed as having been "realistic" in light of his experience) and several additional days of field training, some of which was related to various aspects of the Code.
123. Later, after the Son Tay Raid in 1970, prisons were consolidated and as many as fifty were kept together in one room, thus greatly facilitating communication. Washington Post, Dec. 25, 1973, at A4, col. 6.

124. Inside North Vietnam's Prisons—How Americans Coped, U.S. NEWS & WORLD REPORT, Mar. 26, 1973, at 58-61.
125. Of the ninety-three prisoners known to be in Southern camps on February 1, 1973, the majority were enlisted personnel. Detroit News, Feb. 21, 1973, at 8, col. 2.
126. Washington Post, Apr. 5, 1973, at A1, col. 3.
127. Washington Post, Mar. 2, 1973, at A12, col. 1.
128. One repatriated prisoner was quoted as stating: "Present resistance training in the Army is very inadequate. We attempted to capture students, but they knew it was only for an hour and we wouldn't hurt them so they went the name, rank, serial number route. It's not like that in real life." Sergeant First Class Donald J. Rander, USA in: Mallicoat, A POW Returns, 28 SOLDIERS MAGAZINE Sept. 1973, at 29.
129. Washington Post, Apr. 5, 1973, at A1, col. 2.
130. The only United States Army physician to be taken prisoner in the Vietnam Conflict, Major F. Harold Kushner, who was in one of the more difficult camps for over three years, noted that during that time ten of the twenty-seven prisoners in the camp died of disease and acute malnutrition. Since the captor provided inadequate means of treatment and only occasionally provided required medicine, he stated that he was unable to provide effective treatment. Washington Post, Apr. 4, 1973, at A5, col. 1.
131. See text supra accompanying note 5.
132. Anderson and Boyson, Medical Experiences in Communist POW Camps in Korea: Experiences and Observations of Five American Medical Officers Who were Prisoners of War, 156 J.A.M.A. 120, 121 (1954).
133. Interview with Lieutenant Commander Edward Davis in Charlottesville, Virginia, Jan. 14, 1974.
134. Colonel Robinson Risner, USAF. Washington Post, Mar. 30, 1973, at A1, col. 2.
135. N.Y. Times, Apr. 30, 1973, at 38, col. 1.
136. Interview with Lieutenant Commander Edward Davis in Charlottesville, Virginia, Jan. 9, 1974.

137. One former prisoner, Captain James A. Mulligan Jr., USN, who was a prisoner in one of the larger Northern camps estimated that ninety-five percent of American prisoners were physically tortured and that about eighty percent made some sort of statement for the enemy. Washington Post, Mar. 30, 1973, at A 13, col. 1.

138. Colonel Robinson Risner, USAF, in Washington Post Mar. 30, 1973, at A1, col. 4.

139. Address by Rear Admiral Stockdale, USN, to the Executive's Club of Chicago, in Naval War College Review, (Jan.-Feb. 1974) at 4.

140. Captain (now Rear Admiral) Jeremiah Denton, USN, related that he was tied to a stool by his interrogators and left, unwashed almost and unfed or otherwise unrelieved for ten days before he finally complied with the demands of his captors. Washington Post, Apr. 5, 1973, at A1, col. 4. One authority has noted that mistreatment of this sort is the most troublesome type, since the victim is pitted against his own endurance rather than the endurance of a hostile interrogator. The technique also has an additional propaganda advantage since victims must admit that "no violence" in the normally accepted term was used against them. A. BIDERMAN, MARCH TO CALUMNY 138 (1963).

141. Lieutenant Commander Richard Stratton, USN, later reported that North Vietnamese interrogators burned him with lighted cigarettes and bent back his fingernails in a most painful way. Washington Post, Mar. 30, 1973, at A 13, col. 1.

142. Statement of Dr. Roger Shields, Chief of the Department of Defense Task Force on Prisoner of War Affairs. N.Y. Times, Apr. 13, 1973, at 7, col. 1.

143. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Jan. 14, 1974.

144. Washington Post, Mar. 30, 1973, at A1, col. 4.

145. N.Y. Times, July 15, 1966, at 1, col. 3. An effective public appeal was launched in the United States to counter the threat of such trials, and many individuals, including anti-war activists appeared publicly to advise North Vietnam against the action. N.Y. Times, Jul. 20, 1966, at 1, col. 8. Thereafter the North Vietnamese decided that no trials would be held. N.Y. Times, July 25, 1966, at 1, col. 8.

146. Testimony of Captain Isaac Comacho, USAF, in Hearings on American Prisoners of War in Southeast Asia, before the House Subcomm. on National Security Policy and Scientific Developments of Comm. on Foreign Affairs, 92d Cong. 1st Sess. pt. 2, at 59 (1971).

147. Lieutenant David Rehmann, USN, recalled that upon "breaking" he thought that he would be condemned as a traitor and ostracized from the United States; Lieutenant Colonel Leo Thorsness, USAF, was quoted as stating: "We feel that we are superior, and I hope rightfully so, but there you can learn for yourself, that you can be broken, and you feel I am the only man this has happened to, everybody else has been able to stand up for however many days it goes on, and it's a fantastically traumatic experience and thoughts of suicide ran through my mind." Roberts, POW's Felt their Mission was to Resist, N.Y. Times, Apr. 30, 1973, at 38, col. 1.

148. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Jan. 14, 1974.

149. Denton, Prisoners of War Camps Had Tight Organization, Colorado Springs Colo. Gazette Telegraph, Apr. 8, 1973, at 4, col. 1.

150. Roberts, POW's Felt their Mission was to Resist, N.Y. Times, Apr. 30, 1973, at 38, col. 1.

151. See text supra accompanying note 118.

152. Rear Admiral James B. Stockdale. N.Y. Times, Apr. 30, 1973, at 38, col. 3.

153. Id. at col. 5.

154. N.Y. Times, Apr. 30, 1973, at 1, col. 5.

155. N.Y. Times, Apr. 1, 1973, at 1, col. 2.

156. Inside North Vietnam's Prisons—How Americans Coped, U.S. NEWS & WORLD REPORT, Mar. 26, 1973, at 59.

157. Address by Rear Admiral Stockdale, supra at note 139.

158. Major Ronald Webb, USAF, as quoted in N.Y. Times, Apr. 30, 1973, at 38, col. 1.

159. Prisoners at the "Hanoi Hilton" regularly pledged allegiance to the United States. Inside North Vietnam's Prisons—How Americans Coped, U.S. NEWS & WORLD REPORT, Mar. 26, 1973, at 60.

160. Commander Claude Clower, USN, noted that he received a package from his wife containing a washcloth decorated with red, white and blue. For three years, he and his cell mates dutifully pledged allegiance every morning to their washcloth "flag." N.Y. Times, Apr. 30, 1973, at 38, col. 2.

161. Colonel Robinson Risner, USAF, noted that early release offers were made to him in 1966. Washington Post, Apr. 2, 1973, col. 1.

162. One prisoner who admitted holding anti-war sentiments denied favorable treatment but related that upon parachuting to the ground he was approached by a group of North Vietnamese civilians who took him to a home, gave him dry clothes, cigarettes and a duck dinner. He indicated that the people were never hostile and described meals in prison as regularly including fish, meat, vegetables, fruit and candy during his nine months imprisonment preceeding release on September 17, 1972. Lieutenant Junior Grade Norris A. Charles, USN, in U.S. NEWS & WORLD REPORT, Oct. 19, 1972, at 66-67.

163. Colonel Norris Overly, USAF, related that he was released in 1967 after having asked to be allowed to send a letter. Shortly afterwards, a guard returned and told him that he was to be released. He believed that his release was given to combat the poor world image induced by circulation of photographs of American prisoners being publicly displayed following capture which appeared shortly before he was told he would be released. Statement of Colonel Norris Overly, in Hearings on Prisoners of War in Southeast Asia, Before the House Subcomm. on National Security Policy and Scientific Developments of Comm. on Foreign Affairs, 92d Cong., 1st Sess., at 9 (1971).

164. GPW Art. 109 provides: "Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel...."

165. N.Y. Times, Jan. 18, 1969, at 13, col. 1.

166. Antiwar activists went to Hanoi to escort many groups of "early release" prisoners back to the United States. N.Y. Times, Feb. 1, 1968, at 14, col. 8.
167. Address of Frank Borman, former Astronaut, before a joint session of Congress. CONG. REC. 9,019 (daily ed. Sept. 22, 1970).
168. Washington Post, Apr. 25, 1973, at A 17, col. 4.
169. The similarly patriotic tone of returning prisoners' speeches were suggested to be the products of influence by the Defense Department; however, such influence was universally denied. The similarity was attributed by many prisoners to patriotism acquired in camp. N.Y. Times, Apr. 30, 1973, at 38, col. 1.
170. Also, under military law any person subject to the Uniform Code of Military Justice may prefer charges against any individual subject to its provisions. THE UNIFORM CODE OF MILITARY JUSTICE § 10 U.S.C. 801-940 (1970) [hereinafter referred to as UCMJ]. MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (REV. ED.), para. 29b [hereinafter referred to as the Manual or MCM].
171. Colonel Robinson Risner, USAF. Taylor, Firm Justice Promised for ex-POW's, Washington Post, Apr. 27, 1973, at A 12, col. 4.
172. Washington Post, May 30, 1973, at A1, col. 1.
173. Id.
174. N.Y. Times, Jul. 15, 1973, at 38, col. 2.
175. Young is reported to have denied all charges, although he admitted going on a number of tours to museums. He suggested that all prisoners participated at one time or another in such tours. He portrayed the camp as being sharply divided between officers and enlisted men, with many of the enlisted men opposing the war and the officers opposing the enlisted men. Washington Post, Jun. 8, 1973, at A4, col. 4. Kavanaugh was quoted as denying guilt of all charges. Washington Post, Jun. 28, 1973, at A4, col. 1.
176. Washington Post, Jun. 12, 1973, at A 15, col. 5.
177. Washington Post, Jun. 12, 1973, at A 15, col. 6.

178. Washington Post, Jun. 28, 1973, at A4, col. 1.
179. Washington Post, Jul. 4, 1973, at A1, col. 4.
180. Id.
181. Washington Post, Jun. 26, 1973, at A 14, col. 1.
182. Id.
183. Id.
184. N.Y. Times, Apr. 30, 1973, at 38, col. 7.
185. Washington Post, Sep. 28, 1973, at A 16, col. 1.
186. Id.
187. Washington Star, Jul. 27, 1973, at 6, col. 2.
188. N.Y. Daily News, Jul. 31, 1973, at 7, col. 2.
189. Army Times, Sep. 12, 1973, at 3, col. 1.
190. See text supra accompanying note 46.
191. See text supra accompanying note 150.
192. See supra note 175.
193. See text supra accompanying note 157.
194. See text supra accompanying note 177.
195. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Jan. 14, 1974.
196. Interview with Lieutenant Commander George T. Coker, USN, in Charlottesville, Virginia, Jan. 10, 1974.
197. Army Reg. No. 350-30, app. A, at 7 (5 November 1971).
198. Army Reg. No. 600-20, para. 4-3(b) (Change No. 3, 22 June 1973).
199. See text supra accompanying note 184.
200. The Naval procedure was judicially reviewed in *Arnheiter v. Ignatius*, 292 F. Supp. 911 (D.C.N.D. Cal.

1968). Lieutenant Commander Marcus Arnheiter, USN, was summarily relieved by order of the Chief of Naval Personnel on March 31, 1966. He sued the Secretary of the Navy for declaratory relief and the court examined the applicable naval regulations, Navy Personnel Manual C-7801-4. Procedures established therein required that summary relief could be ordered only by the Chief of Naval Personnel and that his action would not become final until an investigation had substantiated the reasons for relief and the officer relieved given an opportunity to reply in writing. For determining the facts surrounding relief, a "one man inquiry" was convened under Naval Regulations and Arnheiter was afforded a limited hearing with the rights of representation of counsel, cross-examination of witnesses and presentation of witnesses in his behalf. In declining relief, the court noted that the "Navy acted in substantial conformance with [its] regulations and well within the bounds of fundamental due process." The decision was affirmed on review. *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970).

201. Cases supporting this proposition are discussed in *Mindes v. Seaman*, 435 F.2d 197, 199 (5th Cir. 1971).

202. *Friedberg v. Resor*, 452 F.2d 935 (2d Cir. 1971); *United States ex. rel. Durham v. Resor*, 436 F.2d 751 (2d Cir. 1971).

203. DAJA-AL 1973/3839, 3 May 1973.

204. An Army Lieutenant Colonel was relieved of command on April 9, 1973, for substandard performance of duty. Refuting such grounds given for his, including failure of his units to pass inspection, he filed an Article 138 UCMJ complaint alleging that his relief had been wrongful, unjust and unfair, requesting that his relief be vacated. In denying his complaint, the Administrative Law Division of the Judge Advocate General of the Army opined that: "the commander may remove one of his subordinates from command whenever he feels, in his own judgment, that he no longer is able to fulfill his assigned mission," and concluded that although the relief was precipitated by a single incident the decision to relieve was not arbitrary or capricious. DAJA-AL 1973/4149, 18 Jun. 1973 (emphasis added).

205. JAGA 1971/5047, 22 Sept. 1971; DAJA-AL 1972/3764, 14 Mar. 1972.

206. In *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972), the court considered the question of minimum standards in respect to the expulsion of a U.S. Military Academy cadet for accumulated demerits. Regulations required only that he be allowed to submit rebuttal or other material for the consideration of the Academic Board considering the cadet's expulsion and transfer to active duty in an enlisted grade. The court weighed the government's interest to prompt action in military matters against the individual's interest and found the sanction of call to active duty and expulsion sufficient to tip the balance in favor of the individual. Accordingly, they held he was entitled to a fair hearing, at which he could appear, present evidence and testimony without counsel. This case draws the present limit of military due process rights and is easily distinguishable from the relief of a prisoner problem, as relief does not in itself result in the ending of a career, or potential career and the need for effective summary action is undoubtedly greater in the prisoner-of-war camp than in the academy.

207. Army Reg. 350-30, app. A, at 7 (5 November 1971) (emphasis added).

208. UNIFORM CODE OF MILITARY JUSTICE § 10 U.S.C. 801-940 (1970) at 894 [hereinafter referred to as UCMJ].

209. Manes, Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp, 10 MIL. L. REV. 1, 12 (1961).

210. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Jan. 14, 1974.

211. Army Reg. No. 350-30, app. A, at 7 (5 November 1971).

212. *United States v. Cason*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965).

213. *United States v. Trani*, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1951); *United States v. Kapla*, 22 C.M.R. 825 (ABR 1956).

214. U.S. DEP'T OF ARMY PAMPHLET No. 27-9, MILITARY JUDGES GUIDE para. 4-29 (Change No. 1, 22 October 1969).

215. W. FLORY, PRISONERS OF WAR (1942). War Dep't Gen. Order No. 207, art. 3, July 3, 1863 stated: "It is the duty of the prisoner to escape if able to do so."

216. See text supra accompanying note 214.

217. W. WINTHROP, MILITARY LAW AND PRECEDENTS 296-297 (2d ed. 1920).

218. United States v. Calley, 22 U.S.C.M.A. 539, 48 C.M.R. 19 (1973).

219. Lieutenant William L. Calley, Jr. was convicted of the premeditated murder of twenty-two Vietnamese who were unarmed and in custody of soldiers under his command. Uncontradicted evidence indicated that they were offering no resistance when killed on March 16, 1968, in the area of My Lai Village, Republic of South Vietnam. Calley defended on the theory that he had killed the individuals in obedience to a superior's order to "waste them." The trial judge found the order to kill the individuals illegal as a matter of law. His ruling stated, "military effectiveness depends on obedience to orders, on the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders. The acts of a subordinate done in compliance with an unlawful order given to him by his superiors are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances know to be unlawful, or if the order in question is actually known to the accused to be unlawful...." United States v. Calley, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973)(emphasis added).

220. United States v. Calley, 22 U.S.C.M.A. 539, 48 C.M.R. 19, 29 (1973).

221. See text supra accompanying note 157.

222. In this respect it should be noted that the senior operates under penal constraints imposed by the UCMJ, as any prisoner who maltreats another over whom he occupies a position of authority is guilty of an offense under the provisions of Article 105(b) UCMJ. In discussing this offense the Manual states: "The source of authority is not material. It may arise from the military rank of the accused, through designation by the captor authorities or from voluntary election or selection by other prisoners for their self-government. The maltreatment must be real, although not necessarily physical, and it must be without

gratifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense. To assault, to strike, to subject to improper punishment, or to deprive of benefits would constitute a maltreatment if done without justifiable cause." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.) para. 184(b).

223. See text supra accompanying note 139.

224. Memorandum from Joseph E. Thach to Donald G. Sanders, re Radio Broadcasts from North Vietnam by U.S. Citizens, in Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas, before the House Comm. on Internal Security, 92d Cong., 2d Sess., at 7688 to 7693 (1972).

225. See text supra accompanying note 184.

226. Army Reg. No. 350-30, app. A, at 7 (5 November 1971) (emphasis added).

227. See text supra accompanying note 165.

228. Father Daniel Berrigan, a noted anti-war figure was employed as an escort for a group of three "early release" prisoners. Enemy authorities were willing to enter into release plans only with persons of anti-war or anti-administration views. N.Y. Times, Feb. 1, 1968, at 14, col. 8.

229. See supra note 161 and accompanying text.

230. Interview with Lieutenant Commander Edward Davis, USN, in Charlottesville, Virginia, Jan. 14, 1974.

231. However, it would be analogous to an earlier United States doctrine. Liebers' Code, the first general instructions for the conduct of United States prisoners, permitted officers to give their parole with permission of their superior if the superior were within reach. U.S. Dep't Army Gen. Order No. 100, April 23, 1863, at arts. 126, 127.

232. See text supra accompanying note 31.

233. Interview with Lieutenant Commander George T. Coker, USN, in Charlottesville, Virginia, Jan. 9, 1974.

234. See text supra accompanying note 122.

235. Address by Rear Admiral Stockdale, USN, to the Executive's Club of Chicago, in Naval War College Review (Jan.-Feb. 1974) at 5.

236. Interview with Lieutenant Commander George T. Coker, USN, in Charlottesville, Virginia, Jan. 9, 1974.

237. See text supra accompanying note 137 to 139.

238. This standard was applied in United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957); United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); United States v. Bayes, 22 C.M.R. 487 (A.B.R. 1956), petit for rev. denied, United States v. Bayes, 7 U.S.C.M.A. 798, 23 C.M.R. 421 (1957).

239. See text supra accompanying note 81.

240. The President's authority to prescribe Manual rules is conferred specifically as to procedure by Article 36 of the UCMJ. Since the UCMJ, Article 30, does not specify who may bring charges, other than to note that charges; "shall be signed by a person subject to the Code," a proposed change to the Manual provision allowing charges against prisoners to be first considered by the prisoners organization does not appear to be contrary or inconsistent with the Code, and such a change could therefore be validly effected within the President's authority, thereby having the effect of law upon members of the armed forces. See, Noyd v. Bond, 395 U.S. 683, 692 (1969), wherein the Supreme Court concluded that the Manual has the force of law unless contrary or inconsistent with the UCMJ.

241. See text supra accompanying note 175.

242. See text supra accompanying note 187.

243. In U.S. v. Floyd, CM 374314, 18 C.M.R. 362, 366 petit. for rev. denied, 6 U.S.C.M.A. 817, 17 C.M.R. 431 (1955), affirming conviction of a prisoner of war for striking an officer in execution of his office the Army Board of Review stated: "We cannot and do not concur with any view advanced by the defense that an American officer may be deprived of his office by any act of an enemy power while he is detained by such power as a prisoner of war. It is true that he can be deprived of the means and opportunity to exercise his command or authority and from taking appropriate disciplinary action in instances where it may be called for. In fact, the Detaining power may, as was apparently done here by the communist captors, subject the officer to indignities, humiliations and degradations, in violation of all the principles

and precepts of international law relating to the treatment to be accorded prisoners of war, and ordinarily adhered to by all civilized nations whether parties to prisoner of war treaties or not. But we know of no principles or precepts in international law, or of any treaty or convention provision, which provides that a commissioned officer of a belligerent power may be or is deprived of his office by reason of capture by the forces of another enemy belligerent power.

244. See text supra accompanying note 180.

245. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (effective February 2, 1956) [hereinafter cited as GPW].

246. No consideration of the I.C.R.C. Draft Protocols of the Geneva Convention of August 12, 1949, Geneva, July 1973, will be attempted since agreement has not yet been reached as to their form and content.

247. U.S. CONST., art. VI § 2.

248. U.S. CONST., art. I § 8, cl. 14.

249. *United States v. Symonds*, 120 U.S. 46 (1887). An order of the Secretary of the Navy, as a presidential delegate to reduce the amount of officers pay was found subordinate to the act of Congress establishing pay at a specific amount. The court concluded that the authority of the Secretary to issue orders, regulations and instructions, with the approval of the President is subject to the implied condition that they be consistent with the enactments of Congress. Thus, since orders and regulations are subordinate to statutory and constitutional law, it is clear that as executive regulation may not conflict with or contravene with the Constitution or the provisions of an act of Congress, and that, where it does so, it is of no effect.

250. See C. HYDE, *INTERNATIONAL LAW*, 1369, 1454 (2d ed. 1945). *Harvard Research in International Law, Treaties*, 29 AM. J. INT'L L. Supp. 977-992 (1935).

251. 3 COMMENTARY, *GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* 38 (Pictet ed. 1960) (emphasis added) [hereinafter cited as 3 PICTET, COMMENTARY].

252. 3 PICTET, COMMENTARY 238.
253. W. FLORY, PRISONERS OF WAR 16 (1942).
254. N.Y. Times, Feb. 22, 1974, at 29, col. 3.
255. Army Reg. No. 600-20, para. 3-1e (Change No. 3, 22 June 1973) provides: "Members of the Women's Army Corps may be assigned to any command positions except those associated with combat or tactical combat support units." Para. 3-6 of the same regulations, referring to "Emergency Command," the class of command operative in the prisoner of war situation concludes specifically from its operation officers of the medical departments (para. 3-12c) and chaplains, (para. 3-12d) but makes no reference to exclusion of women as was formerly done in predecessor regulations, e.g., Army Reg. No. 600-20, para. 5g (15 February 1957).
256. GPW Art. 4. Pictet notes in reference to Art. 4: The words "fallen into the power of the enemy" replace the word "captured" which appeared in the 1929 Convention, the first expression having a wider significance and also covering the case of soldiers who became prisoners without fighting, for example following a surrender. 3 PICTET, COMMENTARY 50.
257. See text supra accompanying note 251.
258. Pictet recognizes that a balance of the authority of the systems of the detainee and captors exists in camp in his comment to Art. 82 GPW: "The penal code applicable to members of the armed forces is designed to maintain strength and unity, and it usually provides for very severe penalties. There is, however, no reason for treating prisoners of war so severely; they remain enemies whose patriotism must be respected, so that certain acts which may be offered on the part of military personnel engaged in serving their country cannot be considered as such when committed by prisoners of war whose only link with the Detaining power is that they are its captives." 3 PICTET, COMMENTARY 407.
259. U.S. DEP'T OF ARMY PAMPHLET No. 27-161-2, INTERNATIONAL LAW 95 (1962).
260. D.A. PAM. 360-522 at 60.
261. Prugh, The Code of Conduct at 691.

262. See note 215 supra and accompanying text. Similar expressions of the honorable nature of escape are found in W. WINTHROP, MILITARY LAW AND PRECEDENTS 793 (2d ed. 1920).

263. 3 PICTET, COMMENTARY 454.

264. Of course inclusion of the word "reasonable" would not in itself suggest the nature of the GPW limits on escape. Nevertheless, it would indicate that the Code duty is not absolute and thus improve the present situation. The nature of the GPW limits would require definition by training relating them to the word "reasonable."

265. GPW Art. 21(2) states: "Prisoners of war may be partially or wholly released on parole or promise, insofar as it is allowed by the law of the power on which they depend."

266. See supra note 231.

267. U.S. DEP'T OF ARMY, LAW OF LAND WARFARE, para. 187b (FIELD MANUAL 27-10, 1956). Although the conflict has been called to attention of those in authority by one author, Smith, The Code of Conduct in Relation to International Law, 31 MIL. L. REV. 85, 100 (1966), the conflict remains. Although the same author suggests that a provision of parole authority is necessary to allow medical personnel and chaplains to discharge their duties; Id. at 101, it appears that a better case could be made for the exercise of a specific Convention grant, rather than parole when they must leave the camp, since as retained personnel their only reason for retention is to minister to the needs of the prisoners. GPW Arts. 33 and 35 give them authority to move outside the camp.

268. See supra note 258.

269. GPW Art. 79.

270. 3 PICTET, COMMENTARY 395.

271. GPW Art. 30 provides that: "Every prisoner-of-war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power."

272. Conversely, there is a possibility of conflict between the respective duties required by each role. For example, his duty to further the physical well being of prisoners as prisoner's representative required by GPW (Art. 80) may conflict with his duty to enforce the Code. This would occur if the senior, knowing serious physical injury to inevitably result, ordered a prisoner to refuse to make a disloyal statement prohibited by article IV of the Code.

273. GPW Art. 17, states: "Every prisoner of war, when questioned in the subject is, bound to give only his surname, first names and rank, date of birth and army, regimental, personal or serial number, or failing this, equivalent information." Additionally, coercive conduct to obtain further information is expressly prohibited: "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

274. If he conceals his rank by wilfully stating an inferior one, he loses privileges accorded his true rank. If he wilfully claims a superior rank, he may be deprived of all privileges of rank. Pictet lists fourteen privileges of rank. 3 PICTET, COMMENTARY 160.

275. The proposed form of capture card is reproduced in 3 PICTET, COMMENTARY, ANNEX IV B.

276. A. BIDERMAN, MARCH TO CALUMNY 47 (1963).

277. Many such groups were active, among them, the National League of Families," whose members made speeches, held press conferences and generally attempted to keep the plight of the prisoners before the public. ARMY TIMES, Sept. 5, 1973, (Family Supplement) at 9, col. 3.

278. D.A. PAM. 360-522, supra note 51, at 77, notes that the capture card may be completed without any fear of violating the Code of Conduct.

279. GPW Art. 71 provides: "Prisoners of war shall be allowed to send and receive letters and cards...."

280. GPW Art. 76 provides: "The censoring of correspondence addressed to prisoners of war or dispatched by them shall be done as quickly as possible. Mail shall be censored only by the dispatching State and the receiving State and only once by each."

281. GPW Art. 70.

282. In July of 1966, the North Vietnamese paraded several American pilots through Hanoi and publicly threatened to try and execute them as "war criminals." N.Y. Times, July 15, 1966, at 1, col. 3. Because of the apparent intentional circulation of these stories in the world press and the apparent seriousness of the North Vietnamese, President Lyndon B. Johnson threatened severe retaliatory action on the part of the United States if the North Vietnamese carried out their threat. N.Y. Times, July 19, 1966, at 3, col. 3. The United States then mounted a public appearance campaign by many prestigious individuals, including astronauts, Casella, The Politics of Prisoners of War, N.Y. Times Magazine, May 28, 1972, at 34, col. 1., and anti-war political figures., N.Y. Times, July 20, 1966, at 1, col. 8. Shortly thereafter, apparently as a result of this campaign, North Vietnam announced that there would be no trials for the American airmen. N.Y. Times, July 25, 1966, at 1, col. 8.

283. See text supra accompanying note 252.

284. GPW Art. 34(1) provides: "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith on condition that they comply with the disciplinary routine prescribed by the military authorities." In reference to this provision, Pictet observes: "It has often been noticed that people who paid little or no attention to their religion reverted to their childhood practices once they became prisoners of war, and found comfort." 3 PICTET, COMMENTARY 225.

285. GPW Art. 3 provides: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply...certain minimum standards, including humane treatment of all placed hors de combat, preventing humiliating and degrading treatment and violence to life or person, among others."

286. MCM, para. 178a defines "enemy" to include not merely the organized forces of the enemy in time of war, but also "any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades." For a good discussion of which Code provisions should apply under such circumstances see: Smith, The Code of Conduct in Relation to International Law, 31 MIL. L. REV. 85, 128-129.

287. See generally. R. POUND, LAW AND MORALS (2d ed. 1936).
288. E. PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 30 (1953).
289. LORD LLOYD OF HAMPSTED, INTRODUCTION TO JURISPRUDENCE 49 (3rd ed. 1972).
290. See text supra accompanying note 221.
291. Techniques recognized as useful in avoiding compliance or communicating resistance were: absolute denial; disclosure of minimum information combined with half truths or lies; feigning physical or mental illness or deficiency; suggesting a "brainwashed" mentality; use of inappropriate or "slang" language in confessions and finally absolute "mindless" compliance with the "party line." Interview with Lieutenant Commander George T. Coker, USN, in Charlottesville, Virginia, Jan. 10, 1974.
292. The practice of allowing prisoners to reveal all but military information was widely publicized as the "Gallery view," prior to the adoption of the Code. It was explained in a popular magazine article. Gallery, We Can Baffle the Brainwashers, SATURDAY EVENING POST, Jan. 22, 1955, at 20. The practice suggested here differs from the "Gallery view" in that Gallery suggested that such disloyal statements could be freely made. The author suggests that they may be made only after the prisoner has evaded by employing successive lines of resistance.
293. Quoted in J. BINGHAM, COURAGE TO CHANGE: AN INTRODUCTION TO THE LIFE AND THOUGHT OF REINHOLD NIEBUHR 1 (1961).

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