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The Status of United States Prisoners of War Under The Code of Conduct For The Armed Forces

On December 24, 1968, pursuant to an appointing order of the Commander-in-Chief of the United States Pacific Fleet and by the authority to conduct investigations granted by Article 32 of the Uniform Code of Military Justice, a court of inquiry was directed to investigate the facts surrounding the capture of the U.S.S. Pueblo and to submit to higher authority its findings of fact, opinions and recommendations. Commencing January 20, 1969, less than one month after their release from captivity, the 82 officers and crew of the U.S.S. Pueblo were called to testify. For the next seven weeks, despite the fact that these men had suffered constant physical and mental tortures at the hands of their North Korean captors, the court of inquiry repeatedly asked the crew of the Pueblo why they had violated the Code of Conduct for members of the Armed Forces of the United States (Code). On May 6, 1969, the court’s disciplinary recommendations were made public. It recommended that Commander Bucher, Commanding Officer of the U.S.S. Pueblo and Lieutenant Harris, the intelligence officer, be court-martialled and that Lieutenant Murphy, the

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1. 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.
2. I will never surrender of my own free will. If in command I will never surrender my men while they have the means to resist.
3. 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.
4. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or 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.
5. 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 best of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
6. 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 the United States of America.

At the outset of the proceedings, Commander Lloyd M. Bucher, Commanding Officer of the Pueblo, was also warned by the court’s general counsel that he was under suspicion of violating Article 0730 of Navy Regulations, which forbids the captain of a ship to permit his command to be searched or his crew removed as long as he has the power to resist.
ship's executive officer, receive a letter of admonition.\(^3\) Thus, in addition to exposing the patriotism and reputations of these men to public scrutiny, the recommendations of the court of inquiry, if acted upon, would have placed their freedom at issue.

Many of the 82-man crew of the Pueblo, held captive and terrorized for 11 months by the North Koreans, made confessions of one kind or another that were used for Communist propaganda purposes. In so doing, they violated Article V (and other sections) of the Code. Still to be considered is the fate of American prisoners of war in Vietnam, Laos and Cambodia and those of future wars whose standard of behavior might fail to meet the rigid requirements of the Code. The purpose of this article is to examine and discuss the Code generally and Article V specifically in order to place its stern commandments in proper perspective in an era of Cold War diplomacy.

**Prior to the Code of Conduct**

Although all branches of the military services of the United States possessed regulations which governed the conduct of their members upon capture, a set of clearly defined guidelines for prisoner-of-war conduct had never existed prior to the enactment of the present Code.\(^4\) As a result, the drafters of the Code had difficulty in defining with clarity the limits of the prisoner's conduct and his relationship to his own country, his captors, his military superiors, and to his fellow prisoners.\(^5\) In order to appreciate the problems encountered in establishing a behavioral norm for the Armed Forces of the United States, a cursory look at the historical development of the status of the prisoner of war is necessary.

**Historical Attitudes Towards Prisoners of War**

From the dawn of time, since man first took up arms against his fellow man, the lot of the prisoner of war, the captured enemy, has been a difficult one.\(^6\) In ancient times, the solution to the prisoner of war problem was complete annihilation. Even among religious nations moderation towards prisoners was

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\(^3\) John H. Chafee, Secretary of the Navy, overruled the findings of the five admirals of the court of inquiry and reversed their recommendations for courts-martial and letters of censure. He summed up his actions by stating, "They have suffered enough." *N.Y. Times*, May 7, 1969, § 1, at 1, col. 8.

\(^4\) *DEPARTMENT OF DEFENSE, A REPORT BY THE SECRETARY OF DEFENSE'S ADVISORY COMMITTEE ON PRISONERS OF WAR* 6 (July 1955) (hereinafter cited as PRISONER REPORT).


\(^6\) For detailed studies of the plight of the prisoner of war throughout history, see W. FLORY, *PRISONER OF WAR* (1942); H. FOOKS, *PRISONERS OF WAR* (1924); J. SPAIGHT, *WAR RIGHTS ON LAND* (1911).
regarded as offensive; sections of the Old Testament attest to this feeling by calling for the complete destruction of subjugated tribes. The law of nations authorized the enslavement of prisoners until the influence of Christianity spread and somewhat mollified this practice by offering the alternative of holding prisoners for ransom.

However, with the growth of nationalism and national armies, a pattern of improved treatment toward the prisoner of war began to materialize. No longer was the captive considered personally responsible for the actions of his government. Instead, he was looked upon as a servant of his government and as such not subject to punishment for merely doing his duty as a soldier. During the second half of the nineteenth century a growing tendency toward the “humanizing” of war led to the formulation, at the Brussels Conference of 1874, of elaborate provisions for the improvement of conditions for prisoners.

8. C. Fenwick, International Law 574-75 (3d ed. 1948). The Greeks and Romans were infamous for their treatment of prisoners of war. However, the Greeks would allow other Greeks to be ransomed, and the Romans either enslaved prisoners or permitted them to become “freedmen.” The differences in treatment resulted from the policy considerations of the two powers. Greece was concerned with asserting its power, and therefore it tended towards a concept of complete annihilation. Rome, on the other hand, was interested in economic and territorial expansion and therefore chose to sell or enslave its captives, just as it chose to subjugate rather than destroy conquered nations. W. Flory, Prisoner of War 12 (1942).
10. The United States took an early lead in attempting to stipulate by treaty the proper treatment of prisoners of war. On Sept. 19, 1785, Benjamin Franklin signed for this country a treaty of friendship with Prussia, whereby regulations for treatment of prisoners were set forth. See 8 Stat. 84, 96 (1785).

However, Franklin’s attempts were easier to publish than to practice. The conditions in prison camps during the American Civil War were often deplorable. In Southern camps, particularly Andersonville and Florence, men suffered immeasurably from malnutrition and lack of medication. The Union prison on Johnson’s Island in Lake Erie was not much better, and Union stockades at Point Lookout on the Potomac River were described as “hell holes.” Prisoner Report 14.

Humane citizens from both the North and South appealed for lenient treatment of captured soldiers. In 1863, President Lincoln requested Professor Lieber to prepare a set of rules for immediate promulgation. Lieber’s Instructions for the Government of Armies of the United States were probably the first comprehensive codification of regulations governing the treatment of prisoners of war under international law issued by a government. Based on moral precepts which recognized the enemy as a fellow human with lawful rights, they embodied the first code pertinent to prisoners of war. Lieber’s code contained the following instructions:

No Belligerent has the right to declare that he will treat every captured man in arms . . . as a brigand or a bandit. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the international infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death,
Soon prisoners were regarded as being "in the power of the hostile government," rather than subject to the whims of the individuals who captured them. Therefore they were expected to be "humanely treated" by the captive country.

This improvement in the plight of the prisoner of war was attributed mainly to an adoption by contemporary political theorists of Montesquieu's opinion that war gave no right over captives other than to prevent them from doing further harm to the captor state.

Following each of the World Wars, the Geneva Conventions of 1929 and 1949 produced detailed provisions directed towards ameliorating the conditions which the prisoner of war endured. At the Convention of 1949, specific articles were enacted which covered each moment of a prisoner of war's life from the time of capture, through the various stages of interrogation and imprisonment, and up until the time of repatriation.

It soon became evident, however, that the development of moral rules based upon an overriding idealistic concern for the prisoner of war would not insure civilized treatment of the captive. The humanitarian provisions formulated at the Brussels Conference, and later adopted in greater detail at the Hague Conference, failed to take into account the conditions of modern total war.

or any other barbarity. A prisoner of war remains answerable for his crimes committed before the captor's army or people, for crimes committed before he was captured, and for which he has not been punished by his own authorities.

A prisoner of war . . . is the prisoner of the government and not of the captor. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are subject to no other intentional suffering or indignity.

A prisoner of war who escapes may be shot, otherwise killed in flight, but neither death nor any other punishment shall be inflicted on him for his attempt to escape, which the law of order does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

Every captured wounded man shall be medically treated according to the ability of the medical staff.


12. Id.

13. IV L'Esprit des Lois, 11 (1748), cited in W. Flory, Prisoner of War 15 (1942). This was consistent with Montesquieu's belief that "nations ought to do one another in peace the most good, and in war the least evil that is possible without injuring their true interests." J. Westlake, International Law 36-37 (2d ed. 1913).


15. C. Fenwick, International Law 574 (3d ed. 1948). Eventually the First and Second Hague Conferences incorporated these and other proposals into the Regulations annexed to the
World War I, which provided the first significant testing ground for these conferences, indicated that the rules as drafted were inadequate to cope with warring nations who refused to comply with them on the grounds of "military necessity." Although the Geneva Convention of 1929 was described as "an instrument which lays upon the detaining power considerably more obligations toward its captive than it requires from the captive towards the captor," it did little or nothing to alleviate the lot of prisoners of war during World War II. In addition, the failure of the Geneva Convention of 1949 to keep pace with the intricacies of the Cold War and the atrocities of the Vietnamese War has resulted in a backward trend to an "extension of the battlefield into the prisoner of war compound to making the captive a prisoner at war, rather than of war."

The Prisoner of War

"The international agreements of the Hague and Geneva Conventions in the late nineteenth and early twentieth centuries set the prisoner of war apart in a quarantine status." The main purpose was to remove the prisoner from the battlefield to where he could no longer inflict harm upon the captor nation. However, the Korean War marked a new phase in the evaluation of the status of the prisoner of war. More than ever before, war was "as much a struggle for the minds of men as a battle for territorial gain." As a result, the prisoner was taken from his isolation and once again was involved in the battle.
Where centuries ago torture was recognized as a valued and legitimate technique of prisoner treatment, "more enlightened minds" emerged during the Korean War who saw the need to supplement these primitive methods by applying the fruits of the great advances in biological and psychological knowledge to obtain coerced confessions from the hapless prisoner of war. As a result, evidence soon appeared of a barbarism towards prisoners of war as devastating to mind and body as that perpetrated by the cruelest of medieval captors.24

With the termination of hostilities in Korea, interest in American prisoners of war had reached a high point.25 Attention was focused on what appeared to be breaches of conduct by a few of these prisoners. When the Department of the Army commenced court-martial proceedings against some of the alleged offenders,26 a concerned public sought the answers to such questions as the truth about so-called "brainwashing" techniques, the existence or creation of a uniform standard of conduct for servicemen, and the propriety of punishing returned prisoners of war for collaborating with the enemy while under duress.

Therefore, on August 7, 1954, the Secretary of Defense directed that a committee be formed under the chairmanship of the Assistant Secretary of Defense for Manpower and Personnel to recommend a suitable approach to a comprehensive study of the problems concerning the conduct of military personnel while in a prisoner-of-war status.27

To assist the Chairman, the Secretary of Defense issued a memorandum

24. "[P]risoners of war may still be subjected to the caprice and malice of a captor whose passions differ in no wise from those of the Carthaginian or Goth, and from the violence of which no regulations are likely to assure adequate protection." C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, § 668, at 1845 (2d ed. 1945). For specific examples of contemporary means used to extract confessions from prisoners of war, see Gardner, Coerced Confessions of Prisoners of War, 24 Geo. Wash. L. Rev. 528 (1956).


26. See, e.g., United States v. Dickenson, 17 C.M.R. 438 (1954); United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); United States v. Floyd, 18 C.M.R. 362 (1955). A total of about 1,600,000 Americans served in the Korean War. Of the 4,428 Americans who survived communist imprisonment, 192 were found chargeable with serious offenses against comrades or the United States. PRISONER REPORT.

27. This ad hoc committee, composed primarily of military personnel representing the several armed forces, set out to develop the main issues and to prepare a basic plan for their study. The work of this group resulted in the appointment by the Secretary of Defense on May 17, 1955, of the Defense Advisory Committee on Prisoners of War. The committee was composed of ten members—five drawn from the civilian leaders of the military departments and a like number from military ranks. The chairman was Mr. Carter L. Burgess, the Assistant Secretary of Defense for Manpower and Personnel, assisted by General John E. Hull, U.S. Army, as vice-chairman. Prugh, The Code of Conduct for the Armed Forces, 56 Colum. L. Rev. 678 (1956).
which set forth the following guidelines:

I request that you consider the methods which 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.  

On August 17, 1955, after one year of coordinated Department of Defense study in this area, the President issued Executive Order No. 10,631,29 prescribing a six-point Code of Conduct for members of the Armed Forces of the United States. The order stated that “every member of the armed forces . . . is expected to measure up to the standards embodied in this Code of Conduct while he is in combat or in captivity.” Thus, for the first time in American military history, a definitive statement of the principal rules governing the war conduct of American servicemen and their deportment in the event of capture was promulgated.

The Code of Conduct

The duties, obligations, disabilities and privileges of the American prisoner of war are defined by the Uniform Code of Military Justice,30 military customs, precedents and directives, the Code of Conduct for Members of the United States Armed Forces, and the various international conventions and agreements to which the United States is party.

In general, a prisoner of war continues to be a member of the Armed Forces in the same status as when captured. As such, he is entitled to all privileges, and is held responsible for all obligations to his service and to the United States, except those rendered impossible by captivity or illegal by international agreement. The period of captivity is treated as time in military service and if the prisoner is captured through no fault of his own, his family and dependents are entitled to all pay and benefits during this time. A prisoner of war is considered to be in the service for purposes of promotion, demotion, administrative discharge and executive clemency. Governmental protection is not to be forfeited by capture, and a soldier’s death during such time is deemed

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28. Memorandum from the Secretary of Defense, to the Chairman, Defense Advisory Committee on Prisoners of War, Subject: Terms of Reference, May 17, 1955, reproduced in PRISONER REPORT at 37.
"in the line of duty." 

Prior to the Code, the limitations imposed upon an American prisoner of war by his own country were for the most part negative. Certain conduct was forbidden, but with the exception of his duty to return to the service of his government as soon as he was able, the prisoner was not required to play an active role while in captivity. The American serviceman, if taken captive, was prohibited from revealing any information to the enemy beyond his name, rank and serial number. A major reason for the development of the Code was the alleged violations of this restriction by American prisoners of war in Korea.

**Name, Rank and Serial Number**

The prisoner of war has consistently been enjoined to give no military information to the enemy. Article 9 of the Annex to the Hague Peace Conference of 1907, which was drawn from Article 29 of the Brussels Convention, provided that "[e]very prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed." This phrasing was carried over into the 1949 Convention virtually intact, with the first section of article 17 providing: "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name, and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he willfully infringes this rule, he may render

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32. The British, French and Canadian views of the duties of the prisoner of war were similar. For a brief comparison of their approach to the prisoner, see Prugh, The Code of Conduct for the Armed Forces, 56 Colum. L. Rev. 678, 683 (1956). A Russian soldier was forbidden to surrender, but if he was taken prisoner without any possibility of resistance, his surrender was not a criminally punishable act. H. Berman & M. Kerner, Documents on Soviet Military Law and Administration, 72-86 (1955).
33. Escape renders the prisoner liable for desertion if he fails to rejoin friendly forces when able to do so.
34. War Dep't Field Manual No. 30-15, ¶ 1b (1940) states that "all officers and men will be informed that in case of capture they are required to give only their name, grade, and serial number. Any additional information will harm our own cause and aid that of the enemy." War Dep't Field Manual No. 30-25, ¶ 7c(3) (1940) elaborated on the same rule and added that an officer or soldier who has committed treason or given information to the enemy while a prisoner is liable to severe disciplinary action on return to his own army. Armed Forces Talk, No. 430, (Dec. 19, 1952) declared that the usual rules about not giving information to the enemy and the continuance of military discipline even in the POW camp were still in effect.
himself liable to a restriction of the privileges accorded to his rank or status."38

Article 17 does not prohibit the captor nation from asking questions of the prisoner and recognized the desire of the interrogator to do so: "The Detaining Power may very naturally be tempted to obtain additional information from the prisoner, both in regard to himself and concerning the circumstances which preceded his capture, for this is obviously of interest from the military point of view."37

However, once the prisoner declined to answer further questions, the second section of Article 17 provided that: "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 whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."38 However, inherent ambiguities in specific provisions of Article 1739 and certain reservations by captor nations40

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36. Geneva Conventions Relative to the Treatment of Prisoners of War, Aug. 12, 1949, (1955) 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N. T.S. 135 [hereinafter cited as PRISONERS CONVENTION]. Article 53 of Lieber's code (see note 10 supra), employed during the American Civil War, evidenced an early concern with the limits of interrogation:

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for giving false information.


37. J. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 156 (1960) [hereinafter cited as COMMENTARY].

38. PRISONERS CONVENTION, art. 17, ¶ 4. This article attempted to broaden the coverage of similar provisions incorporated in Article 5 of the 1929 Geneva Convention. For example, Article 5 stated that: "[n]o coercion may be used on prisoners to secure information relative to the condition of their army or country." Article 17 expanded "coercion" in Article 5 to include "physical or mental torture, nor any other form of coercion." This reflected an attempt to redefine and make more encompassing the term "coercion." The 1949 Convention made clear that physical and mental torture do not exhaust the possibilities. Any form of coercion was to be prohibited. In addition, Article 17 changed "information relative to the condition of their army or their country" as contained in Article 5 to read "information of any kind whatsoever." Recognizing the increased brutality of interrogation techniques developed in World War II, the drafters saw the need for a more inclusive clause. Smith, The Geneva Prisoner of War Convention: An Appraisal, 42 N.Y.U. L. Rev. 880, 891-92 (1967).

39. Reading this provision narrowly, it is possible to conclude that the prisoner is not prevented from volunteering information on his own initiative. COMMENTARY 156. While threats, insults, and unpleasant and disadvantageous treatment are forbidden when a prisoner refuses to answer, could the promise of preferential treatment be considered mental torture? In short, Article 17 may well be defective in that it "does not protect the prisoner against the wiles and cunning of enemy interrogators. . . ." Comment, Interrogation under the 1949 Prisoners of War Convention, 21 MILITARY L. REV. 145, 146 (1963) (hereinafter COMMENT ON INTERROGATION). A further problem in article 17 interpretation is whether truth serum and other drugs may be considered mental torture if given to a prisoner. An opinion by the Judge Advocate General of the Army noted "that Article 17 justly and logically must be extended to protect the prisoner against any inquisitorial practice
greatly affected the degree to which Geneva Convention provisions were implemented in a combat zone.

Article V of the Code attempted to clarify ambiguities regarding the right of the interrogator to ask further questions and included several additional sentences intended to limit prisoner response:

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.41

This provision should be read with the second sentence of Article IV which states: “I will give no information or take part in any action which might be harmful to my comrades.”42 When read together, these sections imply that when a prisoner no longer has the ability to evade answering further questions, he may respond and give additional information, as long as this information could not be harmful to his comrades or is not disloyal to his country or its allies and their cause.43 Thus, the Code follows the tenor of current international agreements and does not demand absolute silence from the prisoner. The drafters of the Code agreed that a line of resistance had to be drawn somewhere and felt that this should be as early in the interrogation procedure as possible. Therefore, the “Spartan Code”—the name, rank and service number provisions of the Geneva Conventions—was adopted as the initial line of resistance. Recognizing that even the most courageous prisoner might be driven from this first line of resistance, the Code permitted the captive to communicate to the enemy information relating to his individual health or welfare as a prisoner of war, and when appropriate, routine matters of camp administration. However, the final line of resistance was drawn there, and the prisoner was

by his captors which would rob him of his free will.” Id. at 163-164.

40. The Soviet Union and its satellites refused to adhere to Article 85, Relative to the Treatment of Prisoners of War. This article reads:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention. Under Communist Bloc reservations to the Geneva Convention, the signing of a confession or the making of a statement by a prisoner is likely to be used to convict him as a war criminal under the laws of his captors. This conviction removes him from prisoner-of-war status, denies him protection under the Geneva Convention and prevents repatriation until his prison sentence is served. Levie, Maltreatment of Prisoners of War in Vietnam, 48 B.U. L. REV. 323 (1968).


expected from that point on to "resist to the end." As a result, oral or written confessions (true or false), questionnaires, personal history statements, propaganda recordings and broadcasts, appeals to other prisoners of war, signatures to peace or surrender appeals, self criticisms or any other oral or written communications favorable to the enemy or critical of or harmful to the United States are forbidden.

The spirit and intent of the Code, and Article V in particular, is to make the prisoner of war aware that he will be held accountable for all his actions while in captivity. The most current Department of Defense position on the Code stresses that its purpose is to inculcate in each member of the Armed Forces:

A positive and unswerving acceptance of, belief in, and devotion to the spirit and letter of the Code of Conduct, and the recognition that the code is a binding military obligation.

Any deviation from the strict standards of the Code are considered to be done "entirely at the prisoner's own responsibility."

Legal Effects of the Code

The Code, both in form and content, is more a credo than a code of law. Therefore, a major problem in evaluating the Code is to determine, as far as possible, its precise legal effect.

The President, in his position as Commander-in-Chief of the Armed Forces, has the authority to issue a mandatory order which if not obeyed may be the basis for punishment under the Uniform Code of Military Justice (U.C.M.J.). However, there is some doubt as to whether President Eisenhower intended the issuance of such an order. Although the Executive Order promulgating the Code used the words "I hereby prescribe the Code of Conduct," it does not direct the members of the Armed Forces to measure up to the standards of the Code. Instead, the President merely said that every serviceman is expected to do so.

44. PRISONER REPORT 18.
45. Id. at 22.
46. Id. at 18.
47. Dep't of Defense Directive No. 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (1964) [hereinafter cited as DOD DIRECTIVE].
48. Id. at 2.
49. Id. at 3.
Although there is some question as to the intended effect of the Code, it is evident that it has become a standard against which American prisoner-of-war misconduct is to be measured. The spirit of the Code has been enforced in the past through the U.C.M.J. and it is through this source that it will continue to be implemented.

The Uniform Code of Military Justice

The Department of Defense requires that instruction in the Code “be so explicit that each serviceman understands the consequences of not holding to name, rank, service number, and date of birth.” Service indoctrination emphasizes that the provisions of the U.C.M.J. continue to apply to members of the Armed Forces even while prisoners of war. Accordingly, the serviceman is advised that upon repatriation, the “conduct of prisoners will be examined as to the circumstances of capture and through the period of detention . . . .”

The majority of repatriated prisoners of war brought to trial after the Korean War were charged with “aiding the enemy” under article 104 of the U.C.M.J.

One of those charged with collaborating with the enemy was Army Lieutenant Colonel Harry Fleming who was convicted of charges of praising the enemy on broadcasts, leading discussion groups, writing pamphlets and signing propaganda appeals. The Colonel testified that after initially refusing to broadcast, he was forced to watch thirteen prisoners of war die of starvation and in filth. Eventually, he capitulated to the requests made of him asserting

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52. Some authorities considered the Code as primarily a pedagogical device. See, e.g., Note, Misconduct in the Prison Camp, 56 COLUM. L. REV. 709 (1956).

53. DOD DIRECTIVE at 2.

54. Id. at 3.

55. Article 104 reads:

Aiding the enemy. Any person who—(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or (2) 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.

Of the 4,428 American fighting men who survived Communist imprisonment, the conduct of 565 was questioned. 365 cases were cleared or dropped and 192 were found subject to charges. Of this number, 12 prisoners were court-martialled and convicted on collaboration charges. PRISONER REPORT at VI.

Although the overt acts of misconduct committed in North Korean prison camps were basically the same as some of those already prosecuted under the law of treason, the military crime is significantly different in that no intent to betray is required as an element of the offense. See Comment, POW Collaboration—104 or Treason, 6 CATHOLIC U. L. REV. 56 (1956).

56. 19 C.M.R. 438 (1954). Colonel Fleming's conviction of collaborating with the enemy and the sentence of dismissal from the service and total forfeitures of pay were affirmed by the convening authority and forwarded for review. The Board of Review reversed the findings of guilty on two of the charges and affirmed the sentence.
that he did so not only for his own interest, but for that of his fellow prisoners. Convictions were also obtained in cases where American prisoners were coerced into giving false confessions concerning the use of germ warfare and other war crimes.  

Conduct violative of the Code also comes within the prohibition of various other articles of the U.C.M.J. In addition to being subject to court-martial under the U.C.M.J. for acts of misconduct and the public opprobrium which accompanies such action, the repatriated prisoner of war may also be denied various Veterans Administration and service-connected benefits.

Current Status of the Code of Conduct

The Code is often looked upon as being primarily a matter of United States municipal law, rather than international law. However, recent developments in world diplomacy appear to have far-ranging implications in both areas.

The Pueblo Incident

The imbroglio between the United States and North Korea over the "spyship" U.S.S. Pueblo resulted in the issuance of a false "confession and apology" by the United States to obtain the release of the Pueblo crew. Both sides agreed to the public utterance of a false statement by one of them. This "confession and apology" was the climax of a four-step process. At the outset, Major-General Gilbert 1-1. Woodward, the United States representative at the negotiations, announced orally that the position of the United States had been that

the ship was not engaged in illegal activity, that there is no convincing evidence that the ship intruded into the territorial waters claimed by North Korea and that we could not apologize for actions which we did not believe took place . . . . [M]y signature will not and cannot alter the facts. I will sign the document to free the crew and only to free the crew.

58. See, e.g., Article 99 ("cowardly conduct"), Article 105 ("misconduct as a prisoner"), Article 133 ("conduct unbecoming an officer and a gentleman") and Article 134 ("conduct of a nature to bring discredit upon the armed forces").
61. 60 Dep't State Bull. 1-3 (1969).
General Woodward then signed the document\(^2\) which attested to the "validity of the confessions of the crew of the U.S.S. Pueblo" and acknowledged that the seizure and the acts of the Pueblo prior to seizure took place "in the territorial waters of the Democratic People's Republic of Korea." In addition, this document labelled the mission of the ship as a "grave act of espionage" and gave "firm assurance" that no American ships would intrude "again" into North Korean waters. After the contents of this "confession" were published and exploited fully for their propaganda value, the North Koreans returned the crew of the Pueblo to the United States. Finally, Secretary of State Rusk issued a press release\(^3\) which repudiated the United States' "confession":

> We repeatedly offered to express our regrets if shown any valid evidence of a transgression. But this Government had—and has now—no reliable evidence that the Pueblo in any way violated her sailing orders and intruded into waters claimed by North Korea. If you ask me why these two contradictory statements proved to be the key to effect the release of our men, the North Koreans would have to explain it. I know of no precedent in my 19 years of public service. The simple fact is that the men are free and our position on the facts of the case is unchanged.\(^4\)

Thus, parties to an international dispute actually engaged in a fiction in order to achieve a humanitarian result. With the fate of the Pueblo crew hanging in the balance, two nations agreed to falsify facts so that an acknowledged false confession might appear justified. Contemporaneous with the signing of the tongue-in-cheek apology was the issuance of statements denying the validity of the document. As a result of this transaction, doubt has been cast upon the value of good faith in international dealings. Prior to this development, good faith had been regarded as a fundamental principle in international law.\(^5\) The effects, if any, which the suspension of good faith will have upon future negotiations is purely conjectural.\(^6\) However, it is possible that this modern

\(^{62}\) Id.

\(^{63}\) 8(1) INTERNATIONAL LEGAL MATERIALS 198 (1969).

\(^{64}\) Id. at 199.

\(^{65}\) G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 147 (5th ed. 1967). International transactions of a legal character are considered to be regulated primarily by the rules governing three of the fundamental principles of international law: good faith, consent, and international responsibility. Others, such as the rules underlying the principles of sovereignty, recognition, freedom of the seas and self-defense, though relevant, were deemed to be of lesser significance in this area. Id.

\(^{66}\) See, e.g., Rubin, supra note 60, at 965. The author feels that the modern precedent for bad faith, established by the Pueblo Incident, will be repeated in future cases "in which both sides agree that the prospect of favourable public relations arguments outweighs whatever value there may be in maintaining minimal standards of public honesty." It is his opinion that there exists "a Gresham's Law in international affairs which assures the triumph of short term, ad hoc arrangements over the more abstract values of an effective legal system . . . ." In addition, he
precedent of bad faith will be resorted to by one or both parties to an international dispute whenever overriding considerations of humanitarianism compel its use.

Although the effect of the United States' coerced confession on future international proceedings cannot be determined now, its effect upon the Code would appear to be a natural consequence. It would be unjust to expect an American prisoner of war to rigidly adhere to the Spartan Code of Conduct when the United States abandoned it in dealings with the North Koreans. To expect a soldier to conform to a higher standard of conduct than his country would be not only unrealistic, but also unreasonable.

The Pueblo incident and the ordeal of its captain and crew, raise cruel questions about the application of the Code in the Cold War. Commander Bucher (and his crew) was so ingrained with the spirit of the Code that, in the midst of heavy cannon and machinegun fire from North Korean vessels and with himself and several of his crew members wounded, he chose to advise his crew that Article V of the Code was to be observed and that every man was expected to give only name, rank and serial number to the impending boarders.77

When taken prisoner, Bucher was informed that the protections of the Geneva Convention would not be accorded to the Pueblo crew. He and his crew were to be tried as war criminals in the North Korean People's Court and shot. In the ensuing period, Bucher and his men were subjected to extremes of physical and mental brutality. Despite the tortures, Bucher refused to sign propaganda statements prepared by his communist captors. Finally, after being told that “each member of his crew, starting with the youngest man first, would be executed before his eyes,”88 Bucher capitulated. Realizing he had signed a false confession denouncing his country and thus violating the Code, Commander Bucher attempted unsuccessfully to commit suicide.89

The guilt which Bucher experienced was shared by his crew. Attesting to this fact, he stated that:

67. Bucher of the Pueblo: the Cruel Dilemmas of Duty, LIFE, Feb. 7, 1969, at 22, col. 2. Bucher's comment to the navy court of inquiry indicated that his sense of military propriety held up even in the most dismal situation. "I realized," he said, "I did not have on my navy hat. I raced below to my stateroom and grabbed my navy hat, and wrapped my ankle with a pair of black socks in order to stay the bleeding." Id.

68. Id. at 21, col. 6.

69. L. BUCHER, BUCHER: MY STORY 241 (1970). [Hereinafter cited as BUCHER]. Without a weapon of self-destruction and too weak to strike his head against the prison walls, Bucher attempted to drown himself in a bucket of water. Id.
Virtually everybody had been threatened or physically bludgeoned into signing some form of confession or other. Many were now worried over having broken the Code of Conduct, which governs the statements and behavior of all U.S. Armed Forces personnel captured by an enemy. There are certain aspects of the Code of Conduct that must immediately be broken by the senior officer and noncommissioned officers when captured. He must make demands concerning his men and their treatment. Only information of military value need be protected. I let it be known that I would assume full responsibility on everybody's behalf where pure propaganda was involved. When and if I ever got the chance, I would inform my superiors that the Code of Conduct was unenforceable and impractical and unrealistic in a case such as ours when an entire ship's company with some documents falls into the hands of a ruthless enemy who does not shrink from applying torture methods to extract what they want. There might be one or two men out of a hundred with the power to physically and mentally resist such methods, even to a horrible prolonged death, but their sacrifice is bound to be made useless by the inevitable breaking of decent, loyal yet more average shipmates. Better to confess to the enemy's accusations, the more outrageous the better, showing him up as a liar and a cheat, than to risk torture and death. I tried to convey this philosophy to all of my people.\footnote{Id. at 311. There is much evidence to the effect that guilt and fear of punishment were the strongest factors motivating the voluntary nonrepatriation of American "turncoats" after the Korean War. \textit{U.S. News and World Report}, Nov. 13, 1953, at 38.}

Throughout his captivity, Commander Bucher was convinced that the United States would not accede to North Korea's insistence upon an official confession.\footnote{\textit{Id.} at 317.} The disbelief which Bucher experienced when he first learned of his country's false confession is understandable.\footnote{\textit{Id.} at 351.} By attempting to adhere to the Code and by refraining from signing similar documents, the Pueblo crew had endured long periods of torture.

In light of the United States' false confession, the temptation is present to term the ordeal of the Pueblo crew a futile effort. In both instances similar results were achieved by means of contrasting methods. The false confession of the Pueblo crew was obtained by torture, whereas the false confession of the United States was obtained by appealing to the country's concern for its captive servicemen. Any propaganda value derived from these documents was substantially minimized by subsequent repudiations. Yet rather than take pride in the courage displayed by the Pueblo crew, a court of inquiry chose to question their conduct.
At this moment, hundreds of American servicemen are imprisoned in Southeast Asia. Many of these prisoners are subjected to the same conditions which the Pueblo crew endured. Several American prisoners of war have been held captive for over 5 years. During this time, a few have been coerced into making statements against the United States. Officially, these men are still subject to the Code and the implementing articles of the U.C.M.J. The two main reasons advanced for the increase in the percentage of American prisoners who did some act which was punishable, or at least serious enough to merit investigation and trial, during the Korean War as compared with the two World Wars are: first, the misunderstanding and vagueness of the United States policies and goals in Korea, and second, the utilization of different techniques for indoctrination and interrogation purposes. Certainly the United States' goals in Vietnam are no less vague than they were in Korea, nor are the interrogation and indoctrination techniques of the Vietnamese less harsh than those of the Koreans. Perhaps the time has come to review the Code in order that future repatriated prisoners are not subjected to the plight of the crew of the U.S.S. Pueblo.

An Alternative to the Code of Conduct

In striving to design a Code for United States servicemen, the Defense Advisory Committee weighed the opposing points of view in regard to the "name, rank, serial number and date of birth" provision embodied in the Geneva Conventions. One of the positions considered was that of retired Rear Admiral D.V. Gallery who stated that:

We've got to find a better choice for defenders of our freedom than torture, suicide or disgrace. Our military regulations say that a prisoner may state his name, rank and serial number, beyond that

73. More than 300 American prisoners of war will soon be entering their fourth, fifth and sixth year of captivity in Southeast Asia. Stockstill, Inside Prisons of Hanoi, Reader's Digest, April 1971, p. 67.
74. DOD Directive at 3.
75. Note, Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases, 56 Colum. L. Rev. 709 (1956). Occasionally, the exploitation of prisoners of war has been attributed to a general decline in civilization. Institute of World Polity, Prisoners of War 11, 15-16 (School of Foreign Service, Georgetown Univ., 1948). However, in regard to the Korean conflict, considered by many an "ideological war," it seems more likely that the communist policy of prisoner mistreatment was designed for the twofold purpose of gaining converts to the communist cause, not only from among the captured United Nations troops, but from among their relatives and others in the free world and for creating material for the communist propaganda program. See Segal, Initial Psychiatric Findings of Recently Repatriated Prisoners of War, 3 Am. J. Psychiatry 358 (1954); Palmer, The War for the POW's Minds, N.Y. Times, Sept. 13, 1953, at 13, col. 1.
76. Prisoner Report at 17.
he must endure whatever tortures are in store for him. As far as the regulations go, anything more can bring public disgrace when and if he ever gets home. This harsh rule is uncivilized, un-American and stupid. It plays right into the communists' hands, lending credibility to the few confessions which they are able to extract by torture and brainwashing.\textsuperscript{77}

Gallery believed that the Spartan Code was unrealistic, especially in light of modern interrogation methods. Therefore, “in order to save our men from futile resistance to torture,” he proposed that the President issue an Executive Order to the armed forces informing them that “they would be free to sign anything the enemy put in front of them or to make whatever statements the enemy wanted on TV or radio.”\textsuperscript{78} In addition, a statement was to be transmitted to the United Nations explaining why the Executive Order was issued and announcing that all confessions of American prisoners were presumed to have been obtained under duress, and therefore invalid. Through proper publication of this action, Gallery hoped to prevent further suffering by future American prisoners of war and to negate any propaganda value derived from coerced confessions.\textsuperscript{79} However, Gallery’s recommendations were not adopted and the Defense Advisory Committee opted for the Spartan provisions embodied in the present Code.

Gallery’s entire theory is predicated on the assumption that the life and health of the American prisoner of war is a greater value to be protected than a Code which has been rendered obsolete by the Cold War.\textsuperscript{80} Although perhaps not an ideal solution,\textsuperscript{81} it is an alternative worthy of consideration.

\textsuperscript{77} Gallery, \textit{We Can Baffle the Brainwashing}, \textit{Saturday Evening Post}, Jan. 22, 1955, at 20. [Hereinafter cited as \textit{GALLERY}].

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} Support for this contention is found in the case of Czechoslovakian Catholic Cardinal Mindzenty who was forced by the Communists to publicly confess to “crimes against the state.” The Cardinal foresaw that he would be unable to withstand communist interrogation techniques, therefore, prior to his arrest, he disavowed any confessions he was to make subsequently. This prior repudiation was widely publicized and the confessions obtained by the Communists were considered useless for propaganda purposes. \textit{Id.} at 21.


\textsuperscript{81} Gallery, in referring to the treatment of repatriated American prisoners of war who “collaborated” with the enemy, stated that:

As an American, I am ashamed at the position we put them [United States prisoners of war] in. This must never happen again. We must fix it so that no prisoner will ever again have to endure torture to preserve the good standing of the United States before the other free nations or will feel that an absurd confession extorted from him may be held against him if he survives.

\textit{GALLERY}, supra note 77, at 21.

\textsuperscript{82} It was argued that Gallery’s policy of free talk was both unworkable and self-defeating in that the enemy might still subject the prisoner to “brainwashing” to convert him thoroughly, and that the enemy could argue to the world that the repudiations were just attempts to destroy
Conclusion

Every profession places heavy demands upon its members, requires them to make certain risks, and imposes a spirit of sacrifice often incomprehensible to the layman. The military profession, even for those required to pursue it, also has its special burdens. Though heavy, these burdens are inevitable in a calling which arms and keeps its members, for the sole purpose of protecting their country.

However, any profession, in order to remain effective, must keep pace with changing conditions. Perhaps the military profession, in focusing its attention on the development of more modern weapons, has failed to take into account the plight of the captured soldier. In any event, studies have shown that the morale of an army is more properly based on a conviction that what they are fighting for is right and just rather than on a fear of punishment should they fail to conduct themselves properly when taken prisoner. Since ideological warfare has changed the entire concept of what the detaining power can force or encourage a prisoner of war to do, the military and the legislature must make appropriate adjustments to the Code. In particular, an attempt must be made to redefine what constitutes collaboration with the enemy. The American prisoner of war deserves better than a choice between torture and death or trial and dishonor.

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the credibility of converts to their cause. Moreover, it was feared that if the United States was called upon to make repudiations it would appear to indicate a lack of confidence in the American prisoner's integrity. In addition, there was concern that the interrogator, by misdirection and other subtle tactics, might extort actual military information from the prisoner who was not fully resisting the effort to make him "talk." See, e.g., Murroy, Singing is for the Birds, ARMY COMBAT FORCES J., Aug. 1955, at 16. In answer to those who object to his theory on the grounds that it amounts to the telling of a lie, Gallery states, "a lie is a deliberate false statement, made with intent to deceive someone who has a right to demand the truth. This is not an attempt to deceive, but to prevent deception." GALLERY, supra note 77, at 21.

In reply to those who fear his theory would make military information available to the enemy, Gallery maintains that the enemy could obtain more information of military value from United States newspapers and periodicals than the front-line soldier. Since conditions on the battlefield are always changing, Gallery feels that the chances of an enemy's gaining a tactical advantage from prisoner information is minimal. GALLERY, supra note 77 at 21.