

CIVILIAN PRISONERS OF WAR: A PROPOSED CITIZEN CODE OF CONDUCT

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*The battlefield of modern warfare is all inclusive. Today there are no distant front lines, remote no man's lands, far-off rear areas. The home front is but an extension of the fighting front. In the dreaded event of another all-out war—a thermonuclear war—the doorstep may become the Nation's first line of defense. Under such circumstances, the new code of conduct for the American serviceman might well serve the American citizen.*¹

I. Introduction

For over fifty years, the U.S. military has used contractors in warfare.² Significant issues regarding the legal status of civilians on the

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¹ DEPARTMENT OF DEFENSE ADVISORY COMMITTEE ON PRISONERS OF WAR, POW, THE FIGHT CONTINUES AFTER THE BATTLE, THE REPORT OF THE SECRETARY OF DEFENSE'S ADVISORY COMMITTEE ON PRISONERS OF WAR 31 (Aug. 1955) [hereinafter PRISONER REPORT].

² See Gordon L. Campbell, Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them (Jan. 27-28, 2000), at <http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html> (last visited Oct. 22, 2004). During

WWII, civilian workers . . . provided support services in all the theaters of war. In the Korean War, contractors provided services ranging from stevedoring, road and rail maintenance to transportation. By Vietnam, contractors were . . . a major part of logistical capabilities within zones of operation providing

battlefield, however, only recently have begun to emerge. More attention is being paid to how the civilian presence impacts the battlefield.³ The issue of what happens if the enemy captures a civilian contractor, and how that civilian should behave while in captivity has not yet been addressed.

The Department of Defense (DOD) issued guidance on isolated personnel training for DOD civilians and contractors.⁴ The instruction outlines “training requirements for DOD civilians and contractor personnel serving overseas or about to deploy overseas.”⁵ The level of training depends on the risk of capture and focuses on helping contractors survive until they can be rescued.⁶ However, this instruction gives no specific guidance on civilian conduct while in captivity. Rather, the instruction directs the Commander, United States Joint Forces Command (USJFCOM) to “develop Code of Conduct training standards” in accordance with the armed forces Code of Conduct.⁷

construction, base operations, water and ground transportation, petroleum supply and maintenance/technical support for high-technology systems.

Id.

³ See, e.g., Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111 (2001); Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying the Armed Forces in the Field*, ARMY LAW., July 1994, at 29; Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001); Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3.

⁴ See U.S. DEP’T OF DEFENSE, INSTR. 1300.23, ISOLATED PERSONNEL TRAINING FOR DOD CIVILIAN AND CONTRACTORS (20 Aug. 2003) [hereinafter DOD INSTR. 1300.23].

⁵ *Id.* para. 2.2.

⁶ See *id.* Department of Defense Instruction 1300.23 designates three levels of training: Level A (low); Level B (medium); and, Level C (high). See *id.* para. 6.2.1. Personnel in jobs with a low risk of capture receive Level A training, which provides a minimum level of training. See *id.* para. 6.2.1.1. Personnel whose jobs put them at a moderate risk of capture and exploitation receive Level B training. See *id.* para. 6.2.1.2. Personnel whose jobs put them at a significant or high-risk of capture and exploitation and “[t]hose personnel who have position, rank, seniority, or exposure to Top Secret or higher classified information making them vulnerable to greater-than-average exploitation efforts by a captor” receive Level C training. *Id.* para. 6.2.1.3.

⁷ See *id.* para. 5.6.

The Code of Conduct is armed forces-specific.⁸ Each branch of the armed forces describes what is expected of service members in combat and in captivity.⁹ If a civilian, however, were to mirror the conduct expected of a service member, the civilian may jeopardize his noncombatant legal status. This oversight not only blurs the distinction between uniformed military combatants and civilian noncombatants,¹⁰ it places civilian noncombatants in a precarious position.

The distinction between civilian and soldier must be maintained. The DOD must enact civilian-specific guidelines and training. Without civilian-specific guidelines and training, civilian noncombatants could unintentionally violate the law of armed conflict (LOAC) or law of war.¹¹ If that happens, the civilian may lose his Geneva Convention protections.¹² A civilian could then face continued detention by an

⁸ See U.S. DEP'T OF DEFENSE, INSTR. 1300.21, CODE OF CONDUCT (COC) TRAINING AND EDUCATION (8 Jan. 2001) [hereinafter DOD INSTR. 1300.21]. "All members of the Armed Forces are expected to meet the standards the CoC embodies." *Id.* para. E2.1.1.

⁹ See U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION TO SUPPORT THE CODE OF CONDUCT (COC) para. 4.3.1 (8 Dec. 2000) [hereinafter DOD DIR. 1300.7].

¹⁰ See Colonel Steven J. Zamparelli, *Contractors on the Battlefield—What Have We Signed Up For?*, 23 A.F. J. OF LOGISTICS 11 (1999). Colonel Zamparelli discusses privatization and competitive sourcing, two terms used interchangeably to describe contracting with the private sector for goods and services, instead of directly hiring employees to do the work. *See id.* He argues that the increased reliance on nonmilitary members on the battlefield "has blurred the distinction between soldier and civilian." *See id.*

¹¹ See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 5a (25 Mar. 2002) (supporting the interchangeable use of the terms Law of Armed Conflict (LOAC) and Law of War to describe that part of international law that regulates the conduct of armed hostilities). "The law of war encompasses all international law for the conduct of hostilities, which is binding on the United States or its individual citizens. It includes treaties and international agreements to which the United States is a party, as well as applicable customary international law." *Id.*

¹² See Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva Convention III]; and, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

enemy state and subsequent punishment for war crimes or violations of foreign domestic law.¹³ Neither prospect is palatable.

Conflicts in Afghanistan and Iraq currently involve the U.S. The DOD employs civilians in a variety of roles in these conflicts.¹⁴ Department of Defense civilians and contractors, at times, work side by side with uniformed personnel. This close cooperation places civilians in danger of capture, captivity, and isolation. Civilians accompanying the force who are captured by the enemy will likely be classified as prisoners of war.¹⁵ Regulations, instructions and official memorandums, however, do not provide guidelines for surviving enemy capture. While the lack of material addressing civilian prisoner of war behavior has yet to pose a problem, America cannot afford to consider objectionable civilian prisoner of war conduct at the last minute, nor address it after the fact.¹⁶

¹³ See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 498 (15 July 1976) ("Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore[e] and liable to punishment."). In addition to potential prosecution by an enemy state, a U.S. national may be tried for war crimes under U.S. federal criminal law. See 18 U.S.C. § 2441(c) (2000). War crimes include "any conduct defined as a grave breach in any of the [Geneva Conventions] or any protocol to such convention to which the United States is a party;" conduct "prohibited by Article 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land;" and conduct constituting a violation of common Article 3 of the Geneva Conventions. *Id.*

¹⁴ Approximately 14,391 civilian specialists were deployed to the 1991 Persian Gulf War: 5,213 DOD civilian employees and 9,178 contractor personnel. See GOVERNMENT ACCOUNTING OFFICE, PUB. GAO/NSIAD 95-5, DOD FORCE MIX ISSUES, GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS app. IV (Oct. 19, 1994) [hereinafter DOD FORCE MIX]. Civilian functions include, but are not limited to, logistics, plumbing, food service, maintenance and supply, postal services, engineering, and transportation. See *id.* "[N]either DOD nor the services know the totality of contractor support being provided to deployed forces. However, military officials believe that the use of contractors for support to these forces has increased significantly since the 1991 Gulf War." GOVERNMENT ACCOUNTING OFFICE, PUB. GAO-03-695, MILITARY OPERATIONS, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 1 (June 24, 2003) [hereinafter MILITARY OPERATIONS]. The GAO completed their work as the 2003 war with Iraq began; therefore, they "were unable to fully ascertain the extent of contractor support to U.S. forces inside Iraq." *Id.* at 7.

¹⁵ See Geneva Convention III, *supra* note 12, art. 4A(4).

¹⁶ See PRISONER REPORT, *supra* note 1, at 32. Adverse media attention on a minority of prisoner misconduct cases prompted the Korean War prisoner of war study. See *id.* at 1-2. This attention was disproportionate to the number of Americans surviving Communist imprisonment. See *id.* at vi. Approximately 1.6 million Americans served in the Korean War. See *id.* Of the 4,428 Americans surviving imprisonment, only 192 (one out of every twenty-three) were suspected of committing serious offenses against their fellow prisoners of war. See *id.* at vi.

To avoid violations of the laws of war allegations against the U.S., or even the appearance of a violation, the DOD must develop civilian-specific guidelines and training without delay.

This article begins by identifying the typical civilians on the battlefield and defining their legal status upon capture. Following that discussion is a brief history of the Armed Forces Code of Conduct, which includes the establishment, development and enforcement of the Code. The Armed Forces Code serves as a model for similar, yet noncombatant specific, guidelines for U.S. citizen civilians as prisoners of war. As with the Armed Forces Code, the civilian guidelines will function as a moral obligation with enforcement through criminal prosecution for misconduct defined under current U.S. statutes. The U.S. may not want to acknowledge the potential for civilian prisoners of war, but the prospect seems inevitable. Under these circumstances, the opportunity for change is best addressed before American civilian contractors are captured.¹⁷

II. Background

“Since the end of the Cold War, the DOD has cut more than 700,000 active duty troops,”¹⁸ as well as more than 300,000 DOD civilian positions, without a similar reduction in operational requirements.¹⁹ Consequently, significant numbers of DOD contractors and DOD civilian employees will deploy for combat and other contingency operations with the United States military forces.²⁰ Given the current resistance to increasing the size of the active-duty force and the limits on the number of military personnel allowed in an area, deploying civilians will continue to be the standard practice.²¹

¹⁷ See Major Holman J. Barnes, Jr., A New Look at the Code of Conduct 1 (1974) (unpublished thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's Legal Center and School Library, Charlottesville, Virginia). Since World War I there have been 142,255 American prisoners of war: WWI, 4,120; WWII, 130,201; Korea, 7,140; Vietnam, 771; and Persian Gulf, 23. See STUART I. ROCHESTER & FREDERICK KILEY, HONOR BOUND: AMERICAN PRISONERS OF WAR IN SOUTHEAST ASIA, 1961-1973 597 (1998).

¹⁸ See Kathryn McIntire Peters, *Civilians at War*, GOV'T EXECUTIVE, July 1996, at 23.

¹⁹ See Zamparelli, *supra* note 10, at 13.

²⁰ See DOD FORCE MIX, *supra* note 14; Zamparelli, *supra* note 10, at 8.

²¹ See MILITARY OPERATIONS, *supra* note 14, at 8. “Limits on the number of military personnel allowed in an area, called ‘force caps,’ lead DOD to use contractors to provide

Due to the significant force drawdowns and budgetary constraints, current DOD policy is to “civilianize” positions whenever possible as a way to save costs while minimizing the impact on force effectiveness.²² Properly applied, civilian support is a force multiplier that enhances a commander’s operational capability.²³ Civilians can provide greater continuity in certain positions and free the uniformed personnel for combat-specific functions.²⁴ Civilian support, however, creates a quagmire of legal issues for the battlefield commander.

One of those issues is how civilian conduct in captivity will reflect upon the United States’ military. Before delving into the conduct required of civilians in a prisoner of war environment, it is necessary to define the types of civilians supporting military operations and their status under international law.²⁵ Following that will be a discussion of the development and utility of the Armed Forces Code of Conduct. The Armed Forces Code of Conduct will then be used as a model for a similar civilian code of conduct in prisoner of war situations.

A. Civilians Supporting Military Operations

“Civilians fall within three main categories: DOD civilian employees; contractor personnel which includes personnel under contract with or employed by an organization under contract with the DOD; and non-affiliated persons—a broad group of civilians who share overlapping interests with the military.”²⁶ Civilians serve in a variety of support

support to its deployed forces.” *Id.* “Since contractors are not included in most force caps, as force levels have been reduced in the Balkans, the Army has substituted contractors for soldiers to meet requirements that were originally met by soldiers. By using contractors the military maximizes its combat forces in an area.” *Id.*

²² See U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 53-54 (Sept. 30, 2001).

²³ See DOD FORCE MIX, *supra* note 14, at 4.

²⁴ See *id.*

²⁵ See RESTATEMENT OF THE LAW (THIRD); THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) (providing the following definition: “International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”).

²⁶ Turner & Norton, *supra* note 3, at 4. “The category of non-affiliated persons includes media, IGOs, NGOs, PVOs, refugees, stateless persons, and IDPs.” *Id.* at 4 n.9. IGOs are intergovernmental organizations; NGOs are non-governmental organizations; PVOs are private voluntary organizations; and, IDPs are internally displaced persons. See *id.* at 2.

positions, including transportation, maintenance and repair, and weapon system support.²⁷

Civilians accompanying U.S. forces²⁸ typically include DOD civilian employees and DOD contractors.²⁹ Department of Defense civilian employees are “U.S. citizens or foreign nationals employed by the [DOD] and paid from appropriated or non-appropriated funds under permanent or temporary arrangement.”³⁰ A DOD contractor is “[a]ny individual, firm, corporation, partnership, association, or other legal non-federal entity that enters into a contract directly with the [DOD] to furnish services, supplies, or both, including construction.”³¹ While these definitions include persons other than U.S. citizens, this paper concentrates exclusively on U.S. citizen contractors and civilian employees, collectively referenced as civilians, unless otherwise noted.

Fortunately, the vast majority of U.S. civilians in a hostile fire or combat zone have volunteered for this hazardous service to their country.³² Civilians volunteer either by way of an emergency-essential agreement³³ or via a contract with a government agency. Nevertheless,

²⁷ See DOD FORCE MIX, *supra* note 14, at 30.

²⁸ As used throughout this article, civilians accompanying the force are non-uniformed persons called upon to follow the armed forces during conflict. See COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 64 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III].

²⁹ During Operation Iraqi Freedom (OIF), the DOD embedded media throughout military units. See generally BILL KATOVSKY & TIMOTHY CARLSON, EMBEDDED: THE MEDIA AT WAR IN IRAQ (2003). Technically, these reporters accompanied the U.S. forces; however, this has not been the typical method of media on the battlefield and is not critical to this paper’s proposal. See *id.* at xi.

³⁰ DOD INSTR. 1300.23, *supra* note 4, para. E1.1.1.

³¹ *Id.* para. E1.1.2.

³² See U.S. DEP’T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES para. 4.8 (10 Apr. 1992) [hereinafter DOD DIR. 1404.10]; U.S. DEP’T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES para. 6.7 (6 Nov. 1990) [hereinafter DOD INSTR. 3020.37].

³³ Emergency-essential (E-E) positions are “those positions specifically required to ensure the success of combat operations or the availability of combat-essential systems.” DOD DIR. 1404.10, *supra* note 32, para. 4.1. Further,

[t]he agreements document that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.

under current DOD policies and procedures, civilian employees can be directed or assigned to perform emergency-essential missions involuntarily or on an unexpected basis.³⁴ On the other hand, the terms and conditions of the contract govern a contractor's presence.

B. Status and Applicable Law

Whether on the battlefield voluntarily or involuntarily, each person must have a classification in order to determine his or her rights and responsibilities. Personnel on the battlefield are classified as either combatants or noncombatants.³⁵ This classification is critical in determining an individual's legal status under international law.³⁶

Combatants encompass uniformed members of the armed forces, with the exception of medical personnel and chaplains.³⁷ The Geneva Conventions do not define noncombatants; however, by implication, noncombatants include all personnel who are not members of an armed force.³⁸ Combatants have the right to participate directly in hostilities;³⁹ all others must refrain from participating in the hostilities.⁴⁰ Civilians acting inconsistent with their noncombatant status risk losing the protections of this status⁴¹ and facing war crimes allegations if captured. Refraining from participating in hostilities protects the noncombatant

Id. para. 4.6. These positions cannot be converted to military positions because of the need for uninterrupted performance. *See id.* para. E2.1.5. A sample written agreement can be found at Enclosure 3 to *DOD Directive 1404.10*.

³⁴ *See id.* para. 4.8.

³⁵ *See* LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 85 (1993).

³⁶ *See* A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 7 (1996).

³⁷ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, art. 43, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I]. The United States signed the protocols on December 12, 1977, subject to declarations but never formally ratified them; nor has the United States ratified Additional Protocol II. The United States, however, has stated it considers many provisions of Protocol I and almost all of Protocol II (all except for the limited scope of application in Art. 1), to be customary international law. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. POL'Y 419, 429-431 (1987); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 46 (2000).

³⁸ *See* Additional Protocol I, *supra* note 37, art. 50.

³⁹ *See id.* art. 43, para. 2.

⁴⁰ *See id.*; *see also* ROGERS, *supra* note 36, at 8; Turner & Norton, *supra* note 3, at 26.

⁴¹ *See* Additional Protocol I, *supra* note 37, art. 51, para. 3 (stating "[c]ivilians shall enjoy the protection. . . unless and for such time as they take a direct part in hostilities").

from targeted attack.⁴² Noncombatant civilians near the hostilities, however, risk incidental harm during an attack of legitimate military objectives, for example the armed forces. In other words, mere civilian presence does not immunize an area from military operations.⁴³

A noncombatant's legal status, rights, and obligations depend upon the issue addressed and the nature of the conflict. The full scope of the Geneva Conventions only applies during international armed conflicts or during occupation by one state of the territory of another.⁴⁴ During contingencies not amounting to international armed conflict, host nation law or applicable status of forces agreements determine a civilian accompanying the armed forces' status.⁴⁵ The Geneva Conventions also provide protections during non-international conflicts;⁴⁶ however, these protections are minimal.⁴⁷ The remainder of this article focuses on international armed conflicts.

⁴² See *id.* art. 51, para. 2.

⁴³ See *id.* para. 7.

⁴⁴ Geneva Convention I, *supra* note 12, art. 2; Geneva Convention II, *supra* note 12, art. 2; Geneva Convention III, *supra* note 12, art. 2; Geneva Convention IV, *supra* note 12, art. 2. Article 2 is the same in each of the four Geneva Conventions and is frequently referred to as Common Article 2. "Any differences 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 one of the Parties denies the existence of a State of War." COMMENTARY III, *supra* note 28, at 23.

⁴⁵ See Memorandum, Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb. 2001) (on file with author).

⁴⁶ Geneva Convention I, *supra* note 12, art. 3; Geneva Convention II, *supra* note 12, art. 3; Geneva Convention III, *supra* note 12, art. 3; Geneva Convention IV, *supra* note 12, art. 3. As with Article 2, Article 3 is the same in each of the four Geneva Conventions and is often referred to as Common Article 3.

⁴⁷ See COMMENTARY III, *supra* note 28, at 34. Article 3 applies to non-international conflict and,

will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the convention. . . It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization.

During international armed conflicts, international law determines the noncombatant's status upon enemy capture. The noncombatant is either a prisoner of war covered by Geneva Convention III or a civilian covered by Geneva Convention IV. "Every person in enemy hands must have some status under international law. . . *There is no* intermediate status; nobody in enemy hands can be outside the law."⁴⁸

Civilian employees and contractors are generally entitled to prisoner of war status if they have "fallen into the power of the enemy"⁴⁹ during an international armed conflict and are "persons who accompany the armed forces without actually being members thereof."⁵⁰ The civilian accompanying the force must also possess authorization from the armed forces, generally by way of an armed forces-issued identification card.⁵¹ However, possession of an identification card is not an absolute condition of the entitlement to be treated as a prisoner of war.⁵² The identification card, also known as a Geneva Convention Card, merely provides the civilian with a means to prove his status.

A civilian employee or contractor protected under Geneva Convention III as a prisoner of war will not also be protected under Geneva Convention IV.⁵³ When Geneva Convention IV protections apply, the enemy cannot confine civilians unless State security makes it

⁴⁸ COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV]. The Global War on Terrorism, however, brings into question the Commentary's statement, "Every person in enemy hands must have some status under international law." In a February 2002 press release, the White House formally acknowledged the difficulty of applying current international law to terrorists and those enemies not categorized as an "enemy state." Statement by the Press Secretary, The White House, Regarding the Status of the Detainees in Guantanamo Bay, Feb. 7, 2002, *available at* 2002 WL 191074. "The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949. . . [T]he Convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today." *Id.*

⁴⁹ Turner & Norton, *supra* note 3, at 66 n.445 (noting this phrase as "a broader concept than capture, including for example, members of the armed forces who are under enemy control after surrender before repatriation"); *see also* COMMENTARY IV, *supra* note 48, at 50.

⁵⁰ Geneva Convention III, *supra* note 12, art. 4A(4)

⁵¹ *See* Geneva Convention III, *supra* note 12, art. 4A(4); *see also* U.S. DEP'T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS para. 5.2 (5 June 1991) [hereinafter DOD INSTR. 1000.1].

⁵² *See* COMMENTARY III, *supra* note 28, at 65.

⁵³ *See* Geneva Convention IV, *supra* note 12, art. 4, para. 4.

absolutely necessary.⁵⁴ Additionally, the Detaining Power must follow specific procedures outlined in Geneva Convention IV, Article 43.

Civilians authorized to accompany the armed forces include civilian government employees, civilian members of military aircraft, war correspondents, members of labor units, and members of services responsible for the welfare of the armed forces.⁵⁵ These civilians receive authorization from the armed forces they accompany, and “their proximity to the fighting places them at greater risk of injury, death, and capture.”⁵⁶ Geneva Convention III provides that the enemy may hold prisoners of war until the end of active hostilities.⁵⁷ When active hostilities have ceased, prisoners of war must be released and repatriated, unless criminal proceedings are pending against the prisoner.⁵⁸

During captivity, prisoners of war should be treated in accordance with Geneva Convention III. This Convention details the prisoners’ rights and protections but does not explicitly prescribe prisoner conduct. Geneva Convention III does, however, require that the prisoner provide identifying information and comply with the laws in effect for the captor’s armed forces.⁵⁹ This lack of guidance for prisoner conduct partially influenced the creation of the Armed Forces Code of Conduct.⁶⁰

C. History of the Military Code of Conduct

1. *Establishment and Development*

President Dwight D. Eisenhower established the “Code of Conduct for Members of the Armed Forces of the United States” (Armed Forces

⁵⁴ See *id.* art. 42, para. 1. The internment should last only as long as the circumstances warranting such action continue to exist. See COMMENTARY IV, *supra* note 48, at 256.

⁵⁵ See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT’L L. STUD. 60-61 (1977).

⁵⁶ Guillory, *supra* note 3, at 115; see also Geneva Convention III, *supra* note 12, art. 4A(4).

⁵⁷ See Geneva Convention III, *supra* note 12, art. 118, para. 1.

⁵⁸ See *id.* arts. 118, 119. The detaining power is not obligated to hold prisoners pending criminal proceedings but may choose to do so. See COMMENTARY III, *supra* note 28, at 557.

⁵⁹ See Geneva Convention III, *supra* note 12, arts. 17, 82.

⁶⁰ See PRISONER REPORT, *supra* note 1, at 14-15.

Code) on 17 August 1955, by signing Executive Order 10,631.⁶¹ The Armed Forces Code grew out of the public response to the experiences of prisoners of war incarcerated during the Korean Conflict.⁶² Prior to establishing the Armed Forces Code, an Advisory Committee studied and recommended how the DOD could provide service members an adequate ideological foundation for the prisoner of war environment.⁶³

During the Korean War, public interest in U.S. prisoners of war flourished.⁶⁴ Maltreatment,⁶⁵ communist indoctrination,⁶⁶ brainwashing and forced confessions,⁶⁷ collaboration,⁶⁸ and U.S. defectors⁶⁹ were just some of the concerns. Adverse publicity, along with misperceptions, ran rampant.⁷⁰ This eventually led to the American perception that U.S. service members were inadequately prepared for the enemy captors' conduct.⁷¹ As a result, Secretary of Defense Charles E. Wilson identified

⁶¹ Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955). The current Armed Forces Code of Conduct is reproduced at Appendix A.

⁶² See DEFENSE REVIEW COMMITTEE, REPORT OF THE 1976 DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT 1 (1976) [hereinafter VIETNAM REPORT].

⁶³ See PRISONER REPORT, *supra* note 1, at 37.

⁶⁴ See *id.* at vi (identifying much of the adverse publicity as caused by a "lack of information and consequent misconceptions").

⁶⁵ See *id.* at 8-9. "Prisoner rations were scanty—a basic diet of rice occasionally leavened with some foul kind of soup." *Id.* at 8. While indigenous persons could stomach such a diet, the average American could not, which often lead to long bouts of sickness. See *id.* at 9.

⁶⁶ See *id.* at 12-13. The enemy forced American POWs to read Communist literature, participate in debates, and tell what they knew about American politics and history. See *id.* at 12. Unfortunately, the captor frequently knew more about America than the American POW. See *id.* "Lectures—study groups—discussion groups—a blizzard of propaganda and hurricanes of violent oratory were all part of the enemy technique." *Id.*

⁶⁷ See *id.* at 13-14. In some cases, "American prisoners of war were subjected to mental and physical torture, psychiatric pressures or 'Pavlov Dogs' treatment." *Id.* at 13.

⁶⁸ See *id.* at 27. Some prisoners, at the request of their captors, informed on fellow prisoners, wrote Communist literature, taught Communism, delivered anti-U.S. speeches, and ordered fellow prisoners to sign peace petitions. See *id.* at 26-27.

⁶⁹ See *id.* at 12. A few prisoners sincerely converted to Communism while other converts were influenced by "[e]xpediency, opportunism, and fear of reprisal." *Id.* at 27. Enemy political officers held Communism "up as the salvation of the world and Marx as mankind's benefactor," which led some American POWs to accept Communism as an easy out. *Id.* at 12.

⁷⁰ See *id.* at vi.

⁷¹ See *id.* Such a perception was, in reality, not the only factor that contributed to U.S. service members unpreparedness for capture:

In truth, the American prisoners in Korea were victimized as much by youth and inexperience as by inadequate PW resistance and survival training. Most PWs in Korea were enlisted men—in most instances

a need for “providing Americans who serve their country in battle with every means we can devise to defeat the enemy’s techniques.”⁷²

After nearly three months of studying the Korean prisoner of war experience, the Defense Advisory Committee presented the Armed Forces Code to Secretary Wilson who, in turn, presented it to President Eisenhower. After President Eisenhower issued Executive Order 10,631, “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 unfortunate event of capture,”⁷³ had been issued.

The Armed Forces Code was an aspirational, moral guide for service member conduct in captivity as well as in combat.⁷⁴ In addition to promulgating the Code, President Eisenhower directed that “members of the armed forces liable to capture [] be provided with specific training and instruction designed to better equip them to counter and withstand all enemy efforts against them.”⁷⁵ The Code served as a foundation for all service members dealing with captivity. It was intended to provide a clear and concise guide to behavior while in captivity.⁷⁶ Controversy, however, arose during the first real test of the Code’s efficacy—Vietnam.

While intended to be clear and concise, the Armed Forces Code posed problems during the Vietnam War. When promulgated, President Eisenhower essentially left it to the individual services to educate and train their personnel on the Code. Each service approached Code training based on their mission and needs. As a result, disagreement over the Code’s proper interpretation surfaced.⁷⁷ The disagreement also

lower-ranking and less educated than PWs in Vietnam, the majority of whom were officers and thus could be expected to be more highly motivated and better trained.

ROCHESTER & KILEY, *supra* note 17, at 20 n.*.

⁷² PRISONER REPORT, *supra* note 1, at 37.

⁷³ Major George S. Prugh, Jr., *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678 (1956).

⁷⁴ See Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955).

⁷⁵ *Id.*

⁷⁶ See VIETNAM REPORT, *supra* note 62, at 1.

⁷⁷ See DEFENSE REVIEW COMMITTEE, REPORT OF THE 1976 DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT, REPORT SUPPLEMENT II-3 (1976) [hereinafter VIETNAM SUPPLEMENTAL REPORT]. The services could not agree on the implementation of

extended into the prisoner of war environment.⁷⁸ The disagreement over interpretation and attendant controversy over the validity of the Code, culminated in 1976 with the Code's first review.

In 1976, the Deputy Secretary of Defense appointed a Defense Review Committee to examine the provisions of the Armed Forces Code and prisoner of war conduct while in captivity.⁷⁹ The 1976 Committee's composition corresponded to that of the 1955 Committee that initiated the Code.⁸⁰ The 1976 Committee validated the Code and its necessity as an "instrument[,] which establishes high standards of behavior for all members of the Armed Services."⁸¹ To correct misunderstandings in the

the wording of Article V [which] repeatedly caused the greatest disagreement . . . Disagreement over the intent of this Article centered primarily on the issue of conditioning: the Army, Navy, and Marine Corps recommended teaching servicemen to adhere exclusively to the "big four" (name, rank, service number, date of birth), while the Air Force gradually began to advocate instruction in ruses and stratagems for "second line" defenses.

Id.

⁷⁸ See JOHN G. HUBBELL, A DEFINITIVE HISTORY OF THE AMERICAN PRISONER-OF-WAR EXPERIENCE IN VIETNAM, 1964-1973 153 (1976). As POWs, member of the different armed services

debate[d] over how to handle the Vietnamese interrogators . . . Many clung to a strict interpretation of the Code of Conduct. They argued that to give the enemy anything "free"—without torture—is to peel away a layer of defense; that no matter how unimportant, even silly, the item might seem, it puts the enemy one step closer to the important things he might seek. Far better to make him work for everything. Hang tough as long as you can.

Others advocated a policy of deceit. Be smart. Play it by ear. Give a little where it doesn't matter. When it comes to information of military or propaganda value, lie. If you can't get away with it, then time to clam up.

Id.

⁷⁹ See VIETNAM REPORT, *supra* note 62, at iv-vii. The committee's charter included formally reviewing the Code of Conduct and its supporting training programs. See *id.* at vi. The charter also directed that the committee specifically consider "the experiences of detainees and POWs with the Code." *Id.* at vii. The Deputy Secretary of Defense directed the committee "to reaffirm the validity of the Code of Conduct for its intended purposes or to recommend such changes as necessary." *Id.*

⁸⁰ See *id.* at v.

⁸¹ *Id.* at 8.

various articles, the Committee recommended word changes to Article V, and training improvements for Articles I, II, III, IV, and VI.⁸²

On 3 November 1977, President Jimmy Carter issued Executive Order 12,017, changing Article V to reflect the recommendations.⁸³ Since the change in 1977, only one additional modification has been made to the Code itself, when President Ronald Reagan eliminated the gender specific terms.⁸⁴

In six brief but powerful articles, the Armed Forces Code addresses those situations and decision areas that all military personnel may face in captivity. The Code provides “basic information useful to U.S. [prisoners of war] in their efforts to survive honorably while resisting their captor’s” exploitative efforts.⁸⁵ “It is designed to aid the fighting men of the future . . . in the fight for their minds, their loyalty, and their allegiance to their country,”⁸⁶ and is the initial protection against the psychological stress experienced in combat and captivity.⁸⁷

⁸² *Id.* The Committee recommended the following changes to the first sentence of Article V: “required” to replace “bound” and eliminate the word “only.” *See id.* at 9. Changes to training included a revision of the existing DoD training directive, which should encompass “training levels for all servicemembers, continuation training in the code of conduct and related topics, and training to inform all servicemembers of the Armed Forces’ responsibilities to their families.” *Id.* at 13. The committee further recommended centralized instructor training under the Secretary of Defense with a single service acting as the executive agent. *See id.*

⁸³ Exec. Order No. 12,017, 42 Fed. Reg. 57941 (Nov. 3, 1977). Article V now reads, “When questioned, should I become a prisoner of war, I am required to give 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 their cause.” *Id.*

⁸⁴ Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (Mar. 28, 1988). “American fighting man” in Articles I and VI became simply “American” and “never surrender my men” in Article II became “never surrender the members of my command.” On 28 February 2003, President George W. Bush issued Executive Order 13,286, which did not change the Code but merely added language to reflect the role of the Secretary of Homeland Security in implementing and disseminating the Code with respect to the Coast Guard, except when it is serving as part of the Navy. *See* Exec. Order No. 13,286, 68 Fed. Reg. 10,631 (Feb. 28, 2003).

⁸⁵ DOD INSTR. 1300.21, *supra* note 8, para. E2.1.2.

⁸⁶ Carter L. Burgess, *Foreword, Prisoners of War*, 56 COLUM. L. REV. 676 (1956).

⁸⁷ *See* Walter A. Lunden, *Captivity Psychoses Among Prisoners of War*, 39 J. CRIM. L. & CRIMINOLOGY 721 (1949) (providing a discussion of the psychological impact captivity has on a prisoner of war).

While some consideration had been given to making the Armed Forces Code a statutory law, or akin to a military order, the Defense Advisory Committee rejected this idea in 1955,⁸⁸ as well as 1977.⁸⁹ Therefore, the Code's articles remain as moral guides to behavior and are not binding as law. The Code's failure, however, to rise to the level of law does not necessarily mean a military member avoids disciplinary action after disobeying the Code.

2. *Enforcement*

Despite the decision to keep the Armed Forces Code as a moral guide rather than making it a statutory law, the military could discipline its members for violating the Code through administrative action, non-judicial punishment,⁹⁰ or trial by courts-martial. Violations of the Armed Forces Code of Conduct will fall under specific provisions of the UCMJ, such as mutiny or sedition,⁹¹ aiding the enemy,⁹² and misconduct as a prisoner.⁹³ Military prisoners of war have been found guilty of communicating or corresponding with, or holding intercourse with the

⁸⁸ See PRISONER REPORT, *supra* note 1, at 19; Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955). The committee found that

after listening to former prisoners of war, ranging from general to private, and after consulting with nationally known experts in the field of law, psychology, education, and religion, [] some might not measure up to the standards of the Code. However, the Code provides no penalties. It is not definitive in its terms of offenses; rather, it leaves to existing laws and the judicial processes the determination of personal guilt or innocence in each individual case.

Burgess, *supra* note 86, at 676.

⁸⁹ See VIETNAM REPORT, *supra* note 62, at 18. The Committee concluded, “[b]ehavior cannot be effectively legislated, but it can be affected by training and leadership. United States law, particularly the UCMJ, is appropriate for punishing all illegal PW activity.” *Id.*

⁹⁰ UCMJ art. 15 (2002). Administrative action, such as censures or reprimands, and non-judicial punishment, commonly called an Article 15, usually occur for minor offenses. While offenses enumerated on Article 15s must reflect a provision of the Uniform Code of Military Justice (UCMJ), administrative actions could document offenses under the UCMJ, service regulations, or command policy.

⁹¹ UCMJ art. 94 (2002).

⁹² See *id.* art. 104.

⁹³ See *id.* art. 105.

enemy,⁹⁴ aiding the enemy by participating in enemy psychological warfare,⁹⁵ and, receiving favorable treatment at the expense of other prisoners.⁹⁶ These activities, all resulting in convictions by general court-martial, violate the Code's requirements to "resist by all means available,"⁹⁷ not to "accept . . . special favors from the enemy,"⁹⁸ and not to give information or take part in actions "harmful to my comrades."⁹⁹ These examples demonstrate that the Armed Forces Code of Conduct reflects the type of conduct prohibited by the UCMJ.¹⁰⁰

The Armed Forces Code provides service members a concise guide for avoiding criminal offenses under a voluminous and complex series of U.S. statutes, DoD directives and instructions, as well as service instructions and regulations. The Code also provides service members

⁹⁴ See *United States v. Dickenson*, 20 C.M.R. 154 (C.M.A. 1955). During the Korean War, Corporal (CPL) Dickenson, while a prisoner of war, helped make radio broadcasts criticizing the U.S. and informed on other prisoners in return for special favors. See *id.* at 171. The *Dickenson* court determined that Article 105, misconduct as a prisoner, was not the exclusive provision governing prisoner misconduct. See *id.* at 165. Therefore, a service member could be charged for violating any provision of the UCMJ while a prisoner of war. See *id.* at 164. For his misconduct, CPL Dickenson received a dishonorable discharge, total forfeiture of all pay and allowances, and confinement for ten years. See *United States v. Dickenson*, 17 C.M.R. 438 (A.B.R. 1954).

⁹⁵ See *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1957). Master Sergeant (MSG) Olson, while a prisoner of war, made speeches, gave talks and wrote articles all of which were contrary to the interests of the U.S. See *id.* at 253. The court convicted him of giving aid to the enemy through his participation in the enemy's psychological warfare against the U.S. and other American prisoners of war. See *id.* at 258. The appellate court considered whether the government properly charged MSG Olson under Article 104, UCMJ, or whether he should have been charged under its predecessor, Article of War 81. See *id.* at 254-55. The court determined that there was enough evidence to allege an offense under both Article 104 and Article of War 81. See *id.*

⁹⁶ See *United States v. Batchelor*, 22 C.M.R. 144 (C.M.A. 1956). Corporal (CPL) Batchelor, while a prisoner of war, led voluntary "study groups" wherein he repeatedly expressed views contrary to the United Nations and U.S. interest. See *id.* at 150. He also made daily broadcasts over the camp public address system expressing similar statements and informed guards of misconduct by a fellow prisoner. See *id.* at 150-51. Corporal Batchelor's actions resulted in a favored prisoner status such that he was permitted to come and go almost as he pleased in the camp, had better food to eat and received Chinese currency to spend rather than being issued rations. See *id.* at 150. At trial, the court sentenced CPL Batchelor to a dishonorable discharge, total forfeiture of all pay and allowances, and confinement for twenty years. See *id.* at 149.

⁹⁷ Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955) (art. III).

⁹⁸ *Id.*

⁹⁹ *Id.* art. IV.

¹⁰⁰ See Major Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85, 124 (1966) (noting, however, that there is no indication the Code drafters intended code violations to be criminal).

with a mechanism for increasing their chance of survival in captivity. The Armed Forces Code accomplished this without the passage of a new law or service regulation. Civilians, working side by side with military members on the battlefield, and similarly at risk of enemy capture, deserve analogous comprehensive guidance. Without such guidance, the United States does a disservice to its citizen employees because “DoD civilians and contractors are presently operating around the world unprepared for a potential isolating incident.”¹⁰¹

III. Analysis

*America no longer can afford to think in terms of a limited number. . . becoming prisoners of war. . . Modern warfare has brought the challenge to the doorstep of every citizen.*¹⁰²

Any civilian accompanying the armed forces could become a prisoner of war, either alone, or along with military personnel.¹⁰³ The armed forces may minimize the odds of a civilian becoming a prisoner of war by keeping civilians away from actual combat. However, as with service members,¹⁰⁴ a civilian, however, could end up being in the wrong place at the wrong time.¹⁰⁵ Therefore, civilians require behavioral

¹⁰¹ Defense Prisoner of War/Missing Personnel Office, *2001 Department of Defense Personnel Recovery Conference After Action Report, Executive Summary* pt. II, 3.h.1.a (Jan. 22-24, 2001), available at http://www.dtic.mil/dpmo/pr/2001conf_aar.htm.

¹⁰² PRISONER REPORT, *supra* note 1, at v.

¹⁰³ See ERNEST C. BRACE, *A CODE TO KEEP* 23-32 (1988). During the Vietnam War, Ernest Brace, a civilian pilot, was the longest held civilian prisoner of war. See JOHN MCCAIN, *FAITH OF MY FATHERS* 212 (1999). When the Pathet Lao first captured Mr. Brace, he was with a Thai national, Harnavee. See BRACE, *supra*, at 23-32. Mr. Brace was held in Laos for over three years before his transfer to the Hoa Lo Prison (Hanoi Hilton), where other American prisoners of war were held. See MCCAIN, *supra*, at 213-14 (noting that Brace, as a civilian, “was under no obligation to adhere to the Code of Conduct. The United States expected him not to betray any highly sensitive information, the disclosure of which would endanger the lives of other Americans. But other than that, he was not required to show any fidelity to his country and her cause beyond the demands of his own conscience.”).

¹⁰⁴ See Lynch *Criticizes Military Portrayal* (Nov. 7, 2003), available at http://www.usatoday.com/news/nation/2003-11-07-lynch-laments_x.htm (last visited Dec. 16, 2004).

¹⁰⁵ See BORGNA BRUNNER, *IRAQ TIMELINE: 2002-PRESENT*, available at <http://www.infoplease.com/spot/iraqtimeline2.html> (referencing the hostage-taking of an American Contract worker in April 2004). *Department of Defense Instruction 1300.21*

guidelines to increase their chance of survival in captivity, and to avoid potential criminal sanctions upon repatriation.

Maintaining the distinction between the uniformed member, a combatant, and the civilian necessitates a separate code for the civilian. Civilians are not combatants,¹⁰⁶ regardless of prior military experience or reserve status. Civilians are not expected to act like combatants, nor do they enjoy the universally recognized combatant immunity.¹⁰⁷ However, each person subject to the laws of the United States, military and civilian, remains accountable for his acts even while isolated from friendly forces. A United States citizen civilian employee or contractor also remains accountable to the United States of America.

A. Captive's Allegiance

Every U.S. citizen, whether by birth or naturalization, as a matter of law, owes an absolute and permanent allegiance to the U.S.¹⁰⁸

identifies three different forms of captivity: prisoner of war, detainee, and hostage. *See* DOD INSTR. 1300.21, *supra* note 8, at encls. 2, 3. The hostage situation usually involves capture by terrorists and “is generally the least predictable and structured form of captivity.” *Id.* para. E3.11. “[H]ostages play a greater role in determining their own fate since the terrorists in many instances expect or receive no rewards for providing good treatment or releasing victims unharmed.” *Id.* Unlike State Actors who have signed and ratified the Geneva Conventions and other treaties governing the treatment of prisoners of war, terrorists do not follow any particular rules for the treatment of their captives. “[P]ersonnel captured by terrorists . . . are often held for individual exploitation, or to influence the U.S. Government, or both.” *Id.* para. E3.4.

¹⁰⁶ Geneva Convention III, *supra* note 12, art. 4; and, Additional Protocol I, *supra* note 37, art. 43, details the qualifications of a combatant.

¹⁰⁷ *See* THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR & SPACE FORCES 29 (2002). Combatant immunity is immunity from prosecution for warlike acts:

In general, any person who engages in violent acts on behalf of a party to an armed conflict is a *combatant*. Assuming combatants act with the authority of a sovereign state, they are immune from prosecution for their violent acts as long as they have acted in accordance with the laws of war.

Id.

¹⁰⁸ *See, e.g.*, *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919); *United States v. Tomoya Kawakita*, 96 F. Supp. 824, 826 (S.D. Cal. 1950). Frequently, the terms citizen and national have the same meaning. However, while all citizens of the U.S. are nationals thereof, all nationals of the U.S. are not citizens thereof. *See* *Law Don Shew v. Dulles*, 217 F.2d 146, 147 (9th Cir. 1954); *see also* 8 U.S.C. § 1101(a)(22) (2000).

Allegiance is defined as the loyalty of a citizen to his or her government.¹⁰⁹ That is, “allegiance to the political entity the United States, not to the person of the President nor to the party in power for the time being.”¹¹⁰ To be relieved of one’s duty of allegiance imposed by citizenship, one must voluntarily act to renounce or abandon their American nationality and allegiance.¹¹¹ For example, a U.S. citizen can lose his nationality by taking an oath or other formal declaration of allegiance to a foreign state,¹¹² by voluntarily serving in the armed forces of foreign state when that armed force is engaged in hostilities against the United States,¹¹³ or upon conviction by a court of competent jurisdiction of committing any act of treason against the United States.¹¹⁴

Simply falling into an enemy’s hands does not change a captive’s allegiance.¹¹⁵ Captivity merely removes the combatant or noncombatant from the active battlefield, and in no way affects the duty of allegiance to

¹⁰⁹ RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 55 (2d ed. 1998).

¹¹⁰ *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

¹¹¹ *See Gillars v. United States*, 182 F.2d 962, 983 (D.C. Cir. 1950) (finding sufficient evidence to support voluntary renunciation of American allegiance with one overt act).

¹¹² *See* 8 U.S.C. § 1481(a)(2) (2000).

¹¹³ *See id.* § 1481(a)(3)(A). For a comprehensive discussion of U.S. citizenship and the question of denationalization, *see* J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003). The author argues, “given the [United States Supreme] Court’s view of the 14th Amendment and citizenship, it is highly unlikely that a denationalization proceeding against Walker would succeed absent compelling evidence of treason.” *Id.* at 264. John Walker Lindh’s indictment did not include a count of treason. *See* John Walker Lindh Indictment, *United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Feb. 5, 2002). “It was widely reported that the government decided against charging Lindh with treason . . . because it couldn’t prove the elements of the crime.” Audio broadcast: Michael Ryan, *President Bush Spares John Walker Lindh* (July 19, 2002), available at <http://www.tompaine.com/feature2.cfm/ID/6034> (last visited Dec. 6, 2004). Further, the plea agreement reached with prosecutors and personally approved by President Bush, had Walker Lindh pleading “guilty to serving in the Taliban army and carrying weapons in doing so.” Bob Franken & John King, *‘I Plead Guilty,’ Taliban American Says, Plea Bargain Precludes Possible Life Sentence* (July 17, 2002), available at <http://cnn.com/2002/LAW/07/15/walker.lindh.hearing> (last visited Dec. 6, 2004). In exchange for the plea, prosecutors dropped charges which “included conspiring to kill Americans overseas, providing support to al Qaeda and other terrorist groups, and using firearms and other destructive devices during crimes of violence.” *Id.*

¹¹⁴ *See* 8 U.S.C. § 1481(a)(7).

¹¹⁵ *See* PRISONER REPORT, *supra* note 1, at 22. Prisoner of war status does not change the fact that “[a]n American is responsible and accountable for his actions. . . nor does it change the obligation to remain faithful to the United States and the principles for which it stands.” *Id.*

one's own nation.¹¹⁶ Captivity does, however, subject the prisoner of war to a duty of obedience to certain laws, rules, and regulations of his captor.¹¹⁷ Nevertheless, obedience to a foreign power's laws does not provide an American citizen a license to commit treason.¹¹⁸ Moreover, when war breaks out, a citizen's obligation of allegiance further limits the freedom to act contrary to American interests.¹¹⁹

When war breaks out between the U.S. and a foreign state, the foreign state becomes the enemy and remains the enemy for the duration of the war. Obviously, all members of the foreign state's armed force are considered enemies. Additionally, all persons working for the foreign state, either by assisting the foreign state in the prosecution of its war or by hampering the U.S. in the prosecution of its war against the foreign state, are also considered enemies of the U.S.¹²⁰

Whenever appropriate, provisions of U.S. law continue to apply to American citizens, including while they are prisoners of war.¹²¹ The entire body of United States law will not apply. American prisoners of war, however, should still be concerned about certain statutes with significant penalties. These statutes prohibit such conduct as privately corresponding with foreign governments,¹²² communicating defense information to aid a foreign government,¹²³ and intentionally interfering

¹¹⁶ See *id.*

¹¹⁷ See Geneva Convention III, *supra* note 12, art. 82; Prugh, *supra* note 73, at 682.

¹¹⁸ See *United States v. Olson*, 22 C.M.R. 250, 255 (C.M.A. 1957) (exceeding an area of permissible obedience to a foreign power may constitute treason).

¹¹⁹ See *Chandler v. United States*, 171 F.2d 921, 944 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949) (finding that a citizen may provide aid and comfort the enemy but if not done with adherence to the enemy or an intent to betray, treason cannot be found).

¹²⁰ See *United States v. Fricke*, 259 F. 673, 675 (S.D.N.Y. 1919) (during war, all military members and those engaged by or working for the enemy state as agents or spies are enemies of the U.S.).

¹²¹ See *United States v. Bowman*, 260 U.S. 94, 97-98 (1922) (noting that statute applicability may "depend[] upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations").

¹²² See 18 U.S.C. § 953 (2000) (forbidding U.S. citizens from carrying on unauthorized "correspondence or intercourse with any foreign government . . . with intent to influence the measures or conduct of the foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States").

¹²³ See *id.* § 794 (prohibiting the obtaining or delivering of information connected with or relating to the national defense "with intent or reason to believe that [the information would] be used to the injury of the United States, or to the advantage of any foreign nation").

with the loyalty, morale, or discipline of the military forces.¹²⁴ With these statutes, the Geneva Conventions, and the Armed Forces Code of Conduct in mind, a Citizen Code of Conduct would briefly but comprehensively define the conduct expected of American civilian prisoners of war. All American prisoners of war may then “stand firm and united against the enemy” and aid one another in surviving.¹²⁵

B. A Citizen’s Code of Conduct

*The responsibility for the maintenance and preservation of the United States and all it stands for is one which must be shared by every citizen.*¹²⁶

The proposed Citizen Code of Conduct provides a framework of behavioral standards to guide U.S. citizen civilian conduct while a prisoner of war. While the Geneva Conventions set forth the rights and protections that should be afforded prisoners, the Conventions, do not prescribe conduct that a nation may require of its personnel who could become prisoners.

As with the Armed Forces Code, the proposed Citizen Code is a “moral” code, imparting behavioral limits. The Citizen Code is designed to assist civilians being held as prisoners of war with surviving captivity and avoiding criminal prosecution upon repatriation. The proposed Citizen’s Code consists of five overarching principles.¹²⁷ The principles emphasize mutual trust, honor and obligation between the prisoner of war, those similarly situated, and the United States. The principles serve as a benchmark of simple ideals an American citizen can easily comprehend and follow. The next five subsections follow the format of the proposed principle, with an analysis of the provision.

¹²⁴ See *id.* § 2387(a) (penalizing the “advis[ing], counsel[ing], urg[ing], or in any manner caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military” and the “distribut[ion] or attempt[ed] distribut[ion] of any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty”).

¹²⁵ See PRISONER REPORT, *supra* note 1, at 23.

¹²⁶ *Id.* at 31.

¹²⁷ Although analogous to the Armed Forces Code, the proposed Citizen’s Code of Conduct specifically considers the limitations imposed on noncombatants. A code that acknowledges the noncombatants’ constraints reduces the likelihood that the distinction between soldier and civilian will erode the prisoner of war environment.

1. *American Allegiance*

I am an American, accompanying the forces which guard my country and our way of life. I am prepared to fulfill my obligation of allegiance to the United States of America.

Being an American has meaning and one should take pride in being an American. An American enjoys numerous freedoms, not the least of which are the advantages of democratic institutions and concepts. “The great thing about being an American is that no matter what our nation of origin might be, once we pledge our loyalty to this country, we become Americans, regardless of sex, age, creed or nationality.”¹²⁸ All too often, however, Americans take these concepts for granted and need to be reminded of their freedom and way of life as an American. This reminder is especially needed for the prisoner of war.

Two key factors greatly affected survival in a prisoner of war environment—dedication and motivation.¹²⁹ These two factors were incorporated into *DOD Instruction 1300.21, Code of Conduct (COC) Training and Education*.¹³⁰ Dedication and motivation do not depend on the military status of the individual. Dedication and motivation are universal concepts applicable to all individuals finding themselves in a prisoner of war environment.

Therefore, this first principle necessarily focuses the American citizen on the United States and what it means to be a U.S. citizen. This focus is necessary because “[a] prisoner’s world is subject to a variety of influences, both internal and external, influences that can cause . . . perceptions to expand and contract as the situation changes.”¹³¹ What does not change is what it means to be an American. This principle is a common reference point for all American prisoners of war and “when

¹²⁸ Michael T. Moseley, *Code of Conduct Empowers Military* (Apr. 11, 2003), available at http://public.travis.amc.af.mil/news/tailwindonline/stories/2003/apr/20030411_11.htm (last visited Dec. 7, 2004).

¹²⁹ See generally ROCHESTER & KILEY, *supra* note 17, at 597.

¹³⁰ DOD INSTR. 1300.21, *supra* note 8.

¹³¹ Commander Robert J. Naughton, *Motivational Factors of American Prisoners of War Held by the Democratic Republic of Vietnam*, 27 NAVAL WAR C. REV. 2, 3 (1975) (reflecting the author’s six years of experiences and observations as a prisoner of war during Vietnam).

properly understood and followed makes the captive's belief structure increasingly resistant to any external efforts to alter it."¹³²

This principle also focuses the American on individual responsibility as well as the United States' responsibility. It serves as a reminder that every American is part of a team working together—the prisoner of war working to survive with honor and the U.S. working toward the prisoner's release.¹³³ “The combination of pride and obligation seems to motivate men, time and time again, to resist to the limit of their endurance.”¹³⁴ This principle is intended to evoke a sense of pride, duty, and patriotism.¹³⁵

2. *Special Favors, Parole and Escape*

If I am captured, I will not negotiate my own release nor accept special favors from the enemy. If offered and approved, I may accept a simple parole. When directed, I will make every effort to escape and aid others to escape.

This principle, as with the corresponding principle from the Armed Forces Code, is aimed at enemy efforts to influence, manipulate and compromise prisoners of war. This principle is necessary since it is unlikely that a captor would offer special favors without expecting some benefit. Special treatment by the enemy “is a technique used to break the will of those who are captured. It helps to propagate the Stockholm Syndrome, in which the captured begins to identify with the captors and assist them unwittingly.”¹³⁶ Further, under the appropriate set of

¹³² Lieutenant Colonel Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR UNIV. REV. 107, 111 (1983).

¹³³ See generally U.S. DEP'T OF DEFENSE, DIR. 2310.2, PERSONNEL RECOVERY (22 Dec. 2000). The DOD has primary responsibility for recovering U.S. military, DOD civilian employees and contract personnel deployed outside the United States and its territories. *Id.* at para. 4.2; see also U.S. DEP'T OF DEFENSE, INSTR. 2310.4, REPATRIATION OF PRISONERS OF WAR (POW), HOSTAGES, PEACETIME GOVERNMENT DETAINEES AND OTHER MISSING OR ISOLATED PERSONNEL para. 4.2 (21 Nov. 2000) [hereinafter DOD INSTR. 2310.4]. A prisoner's release “can occur through military or diplomatic means; through efforts of International Organizations [], Non-Governmental Organizations[] or persons; or through a combination of these means.” DOD INSTR. 2310.4, *supra*, para. 4.2.

¹³⁴ *Id.*

¹³⁵ See Naughton, *supra* note 131, at 4.

¹³⁶ Moseley, *supra* note 128.

circumstances, the acceptance of special favors might subject a repatriated prisoner of war to trial for unauthorized intercourse or communication with the enemy.¹³⁷

Under international law, parole traditionally consisted of the release of a prisoner in return for a promise not to bear arms.¹³⁸ Geneva Convention III, Article 21, however, places no restrictions on the types of promises required of a prisoner in exchange for parole,¹³⁹ with the exception that parole must be authorized by the prisoner of war's country.¹⁴⁰ DOD defines parole as "promises a POW gives the captor to fulfill stated conditions. . . in consideration of special privileges."¹⁴¹ Current U.S. policy prohibits military prisoners of war from accepting parole, but is silent regarding parole for civilians.¹⁴²

A civilian that accepts a parole agreement from an enemy captor potentially violates U.S. law if the civilian initiated and negotiated the parole agreement without authorization or if the parole agreement contains conditions that violate other U.S. statutes.¹⁴³ The United States has conferred upon the DOD the primary responsibility for recovery and repatriation of U.S. military personnel, DOD civilian employees and DOD contractor prisoners of war.¹⁴⁴ Any interference with this authority by a civilian prisoner of war acting on his or her own initiative, may find

¹³⁷ See 18 U.S.C. § 953 (2000); *supra* note 122 (providing the text of the "Logan Act"); see also *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955) (holding that "voluntarily attending social functions conducted by his captors; by living, eating, drinking with, and otherwise fraternizing with his captors; and by otherwise unnecessarily cooperating with his captors" could be tried in the U.S. courts); *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.C.D.C. 1951) (confirming such treacherous acts as crimes under federal law).

¹³⁸ See COMMENTARY III, *supra* note 28, at 178.

¹³⁹ See *id.* "The Convention makes provision for liberty on parole or promise, but with a reservation: the laws and regulations of the Power on which prisoners depend must be respected. This reservation is imperative for the Detaining Power itself." *Id.* at 179. "Such laws and regulations may either forbid prisoners of war to accept release on parole in any circumstances, or may allow them to do so subject to certain conditions." *Id.*

¹⁴⁰ See Geneva Convention III, *supra* note 12, art. 21.

¹⁴¹ DOD INSTR. 1300.21, *supra* note 8, para. E2.2.3.1.5.

¹⁴² See *id.*

¹⁴³ See *supra* note 122 (providing the text of 18 U.S.C. § 794). Any parole agreement conditioned upon giving information to the enemy likely violates this statute. However, "[t]he Detaining Power may not . . . offer release on parole to prisoners of war if the laws and regulations of the Power on which they depend forbid them to accept." COMMENTARY III, *supra* note 28, at 179.

¹⁴⁴ See Missing Persons Act, 10 U.S.C. §§ 1501-1513 (2000); DOD INSTR. 2310.4, *supra* note 135, para. 4.2.

him or herself facing an indictment under the Logan Act for unauthorized interjection into the conduct of United States' foreign affairs.¹⁴⁵

As far as escape is concerned, Geneva Convention III recognizes that the prisoner's country may impose upon him a duty to attempt to escape and that prisoners make such attempts.¹⁴⁶ Geneva Convention III has also placed certain restrictions upon the Detaining Power's ability to punish escape attempts. A prisoner may only receive disciplinary punishments for unsuccessful escape attempts.¹⁴⁷ A prisoner of war is subject to judicial trial and punishment for any offense that entails violence against life or limb or otherwise is committed without the sole intention of facilitating the escape.¹⁴⁸ Escapes and attempted escapes cannot be used as an aggravating circumstance during a trial for an offense committed during an escape or attempt to escape.¹⁴⁹

The United States has imposed an escape obligation on its military members;¹⁵⁰ there is no similar obligation on U.S. civilians. Escape can have a detrimental effect on an enemy's war effort. It can also, however, have an equally detrimental effect on the welfare of the prisoners of war who remain behind.¹⁵¹

¹⁴⁵ See 18 U.S.C. § 953 (2000); *supra* note 122 (providing the text of this section).

¹⁴⁶ See VIETNAM REPORT, *supra* note 62, at 23-24; Geneva Convention III, *supra* note 12, arts. 91-94.

¹⁴⁷ See Geneva Convention III, *supra* note 12, art. 92. Disciplinary sanctions include fines, eliminating certain privileges, additional duties, or more rigorous confinement. See *id.* art. 89. Additionally,

[i]t is easy to determine at what point an attempt to escape ends and becomes a successful escape, but much more difficult to determine when it actually begins. To escape is to elude the custody and authority of the Detaining Power, and an attempt to escape logically begins when any preparatory action is undertaken for that purpose. An attempt to escape may be considered as beginning when prisoners of war acquire tools, maps, or plans, or when they start to dig a tunnel or stock food supplies, etc.

COMMENTARY III, *supra* note 28, at 449.

¹⁴⁸ See Geneva Convention III, *supra* note 12, art. 93, para. 2.

¹⁴⁹ See *id.* art. 93, para. 1.

¹⁵⁰ See Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955); DOD INSTR. 1300.21, *supra* note 8, paras. E2.2.3, E2.2.3.1.4.

¹⁵¹ See BRACE, *supra* note 103, at 58. During his time in captivity, Ernest Brace attempted escape three times. See MCCAIN, *supra* note 103, at 213. While each attempt led to progressively more severe suffering upon capture, he knew that the likelihood of a

Escape is the ultimate form of resistance and prisoners of war, including civilians “must be prepared to take advantage of escape opportunities whenever they arise.”¹⁵² The Geneva Conventions do not prohibit civilian prisoners of war from escaping,¹⁵³ nor would an escape jeopardize the civilian noncombatant’s prisoner of war status. An escaping noncombatant civilian, would, of course, jeopardize his or her protected status if, subsequent to escape, he or she engaged in hostilities.¹⁵⁴

To increase the chance of success, however, escape attempts must be a coordinated effort. Impulsive or ill-planned escape attempts may endanger or cancel well-planned escape attempts, which have been properly coordinated. Irrational escape attempts may also serve as an excuse for a captor to impose harsh or abusive treatment on all prisoners in an attempt to preclude any further escape attempts.

3. Loyalty

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will obey the directives of those in command and I will give no information or take part in any action, which might be harmful to my comrades or my country.

One of the highest priorities of the DOD is “[p]reserving the lives and well-being of U.S. military, DOD civilian employees, and DOD

successful escape depended upon a coordinated plan. *See id.* Hardly a day passed that he “did not devote some time to the prospect of escaping.” BRACE, *supra* note 103, at 85. Mr. Brace suffered his confinement alone, despite being captured with a Thai national, until his transfer to the Hoa Lo Prison. *See id.* Upon initially arriving at the Hoa Lo Prison, Mr. Brace was placed in the same room as Harnavee, the Thai national, for the night, giving Mr. Brace his first opportunity to talk with Harnavee in nearly three years. *See id.* at 137. It was here Mr. Brace learned that his escape attempts resulted in harsher treatment not just for himself, but also for Harnavee. *See id.*

¹⁵² DOD INSTR. 1300.21, *supra* note 8, para. E2.2.3.1.4.

¹⁵³ While the Geneva Conventions do not prohibit escape, the Detaining Power may prohibit such conduct through laws, regulations, or orders applicable to prisoners of war. “If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.” Geneva Convention III, *supra* note 12, art. 82, para. 2; *see also id.* arts. 92-93.

¹⁵⁴ *See id.* art. 3(1); Additional Protocol I, *supra* note 37, art. 51, para. 3.

contractors placed in danger of being isolated, beleaguered, detained, [or] captured. . . while participating in U.S.-sponsored activities.”¹⁵⁵ “The [DOD] has a moral obligation to protect its personnel, prevent exploitation of its personnel by adversaries, and reduce the potential for captured personnel being used as leverage against the United States.”¹⁵⁶ The DOD’s policy, however, does not distinguish between the battlefield and the prisoner of war environment, nor does it distinguish between neutral, allied or enemy soil. These DOD obligations correspond to the obligations required of the prisoner of war—the mutual trust, honor and obligation that are the foundation of the Code.

“Keep faith,” pronounces the fundamental necessity that prisoners of war remain faithful to one another. Further,

[t]he adage “divide and conquer” is true both with regard to the tactics of the captor and as the antithesis to a formula for survival in a prisoner of war environment. A prisoner that has suffered extreme hardship through torture, illness, disease, or personal tragedy . . . can be pulled through his crisis only with aid of fellow prisoners. The prisoner who fails to assist fellow prisoners in the long run is acting contrary to his own best interests as well as those of the group.¹⁵⁷

The prisoner of war environment can be compared to that of surviving a storm on a ship at sea.¹⁵⁸ “The survival of each individual is not a function of his individual survival skills but is dependent on the combined actions of each man to save the ship and get to calm waters. The key to saving the ship is a coordinated effort.”¹⁵⁹

A coordinated effort demands that one individual be in charge. In the prisoner of war environment, that individual is the senior military officer present. Military individuals receive CoC training prior to

¹⁵⁵ DOD INSTR. 1300.23, *supra* note 4, para. 4.1.

¹⁵⁶ *Id.*

¹⁵⁷ Colonel J. Howard Dunn & Major W. Hays Parks, “*If I Become a Prisoner of War. . .*,” U.S. NAVAL INST. PROC., Aug. 1976 at 25.

¹⁵⁸ Commander Michael L. Kalapos, *A Discussion of the Relationship of Military and Civilian Contractor Personnel In the Event Members of Both Groups Become Prisoners of War* 8 (1987) (unpublished Executive Research Project, Industrial College of the Armed Forces) (on file with author).

¹⁵⁹ *Id.*

deploying “commensurate with their risk-of-capture level.”¹⁶⁰ Furthermore, military members receive training in the Armed Forces Code from the moment they enter military service.¹⁶¹ As duties and assignments change, so does the level of knowledge and training expected of a military member.¹⁶² Therefore, the most qualified, trained individual to command the prisoner of war organization is the senior military officer present. This command organization, with civilians under the senior military officer, would be limited to the prisoner of war environment.¹⁶³

The need for and benefit of a unified command structure was recognized during Vietnam. While “[i]n nearly every previous conflict . . . [civilians] had been repatriated or interned . . . the North Vietnamese and their associates disregarded this rule and held them as captives.”¹⁶⁴ Civilians returning from captivity during Vietnam expressed the view that “civilians in a combat zone and liable to capture be clearly placed under the [Armed Forces] Code of Conduct.”¹⁶⁵ This would include all civilians whether a contractor, a general schedule employee, or a member of the senior executive service.¹⁶⁶

Command and discipline are essential, particularly in prisoner of war environment where they “permit unity of effort and a degree of strength and consistency in communicating with a captor.”¹⁶⁷ In the psychologically vulnerable prisoner of war environment, loyalty to fellow captives, survival, and allegiance to the U.S. should be paramount

¹⁶⁰ See DOD INSTR. 1300.21, *supra* note 8, para. 4.4.3.

¹⁶¹ See *id.* para. 5.2.1.1.

¹⁶² See *id.* paras. 5.2.1.2, 5.2.1.3.

¹⁶³ See Kalapos, *supra* note 158, at 2 (recognizing that although civilians had no legal obligation to follow a chain of command, they did so during the Vietnam War).

¹⁶⁴ Harold L. Hitchens, *Factors Involved in a Review of the Code of Conduct for the Armed Forces*, 30 NAVAL WAR C. REV. 47, 58 (1978). If persons qualify as a prisoner of war in accordance with Geneva Convention III, Article 4, there is no requirement for repatriation or internment based upon the person’s status as a civilian. Repatriation and internment, however, appeared to be common practice during prior conflicts. On the other hand, “internment” is a term used in Geneva Convention IV. An Occupying Power generally uses internment when necessary for reasons of security. See Geneva Convention IV, *supra* note 12, art. 78.

¹⁶⁵ *Id.*

¹⁶⁶ During Vietnam, “some prisoners were not sure what was acceptable behavior. Those who did not have the guidance coming down through a chain of command often were the ones who wound up cooperating with the enemy.” BRACE, *supra* note 103, at 149.

¹⁶⁷ Dunn & Parks, *supra* note 157, at 26.

rather than bickering over who is going to be responsible for what and to whom. When survival is dependant upon a combined effort of all individuals similarly situated, it is not the time to be asserting an “I don’t have to” attitude.

A unified command structure facilitates communication, cohesion, and the orderly return of the greatest number of prisoners of war.¹⁶⁸ One command structure under the senior military member would also prevent civilians from interfering with activities required of the armed forces, which may subject a civilian to prosecution upon repatriation.¹⁶⁹ The senior civilian should not hesitate to advise the senior military officer on civilian-specific matters; however, there should only be one commander of the prisoner of war organization.

Although primary responsibility for the well being of all United States civilian citizens abroad rests with the Department of State,¹⁷⁰ the Department of State has little, if any, control over civilians while held in captivity. The Department of State would certainly be working toward the release of all captured U.S. personnel. During their captivity, DOD-uniformed personnel, however, are in the better position to provide for their safety and security.

4. *Providing Information*

When questioned, should I become a prisoner of war, I
am required to give my full name, date of birth, and rank

¹⁶⁸ See Kalapos, *supra* note 158, at 2.

¹⁶⁹ See 18 U.S.C. § 2387 (2000); *supra* note 123 (providing the text of this section). This statute does not by its terms specifically embrace acts committed outside the U.S.; however, it is the type of criminal statute that would be inferred to have extra-territorial application in the absence of a provision to the contrary. See *Martin v. Young*, 134 F. Supp. 204, 208 (N.D. Cal. 1955) (stating that acts by a prisoner of war, such as participating in the preparation of propaganda writings and articles designed to promote disloyalty and disaffection among U.S. troops and attacking the war aims of the United States by asserting the United States had used germ warfare, could be prosecuted under 18 U.S.C. § 2387); *United States v. Bowman*, 260 U.S. 94, 97-98 (1922) (criminal statutes dealing with acts that are directly injurious to the government, and capable of perpetration without regard to particular locality, are to be construed as applicable to U.S. citizens upon the high seas or in a foreign country, despite no express declaration to that effect).

¹⁷⁰ See 22 U.S.C. § 2656 (2000); Exec. Order No. 12,656, 53 Fed. Reg. 47491 (Nov. 18, 1988) (amended by Exec. Order No. 13,074, 63 Fed. Reg. 7277 (Feb. 12, 1998)).

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

Upon capture, one of the first duties of the detaining power is to establish the identity of the captured individuals.¹⁷¹ To assist in the identification process, Article 17, Geneva Convention III, requires every prisoner of war, when questioned on the subject, to “give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”¹⁷² This information not only establishes the prisoner’s identity, it also designates the treatment to be accorded the prisoner of war.¹⁷³ The prisoner must give sufficient information to establish beyond any doubt the status as a member of an enemy armed force.¹⁷⁴ If a prisoner fails to provide this information, the detaining power may restrict the privileges accorded the prisoner based on rank or status.¹⁷⁵ A prisoner may not be coerced in any manner to provide this information nor be punished for refusing to answer.¹⁷⁶

Privileges under Geneva Convention III depend upon the “rank” of the prisoner of war. Geneva Convention III does not delineate the status of persons accompanying the force beyond conferring the prisoner of war status upon such individuals. The knowledge of an individual’s rank is necessary “to insure equality of treatment between prisoners of equal rank.”¹⁷⁷ *Department of Defense Instruction 1000.1* contains equivalent

¹⁷¹ See COMMENTARY III, *supra* note 28, at 156.

¹⁷² Geneva Convention III, *supra* note 12, art. 17; see also Rick S. Lear & Jefferson D. Reynolds, *Your Social Security Number or Your Life: Disclosure of Personal Identification Information by Military Personnel and the Compromise of Privacy and National Security*, 21 B. U. INT’L L.J. 1, 7 (2003) (providing a thorough discussion of the history of the social security number as an identifying number for military members and the security issues technology has created).

¹⁷³ Article 16, Geneva Convention III requires the Detaining Power to take into consideration rank and sex, as well as state of health and age, in determining the prisoner of war treatment. Articles 44 and 45 of the same Convention also direct that prisoners of war “be treated with the regard due to their rank and age.” Geneva Convention III, *supra* note 12, art. 16.

¹⁷⁴ See COMMENTARY III, *supra* note 28, at 156.

¹⁷⁵ See Geneva Convention III, *supra* note 12, art. 17, para. 2.

¹⁷⁶ See *id.* art. 17, para. 4.

¹⁷⁷ See *id.* art. 43.

rank guidance for civilians.¹⁷⁸ Civilian employees are assigned to an appropriate Geneva Convention Category, based upon the civilian's pay grade.¹⁷⁹ Contractors are assigned "to an appropriate category . . . based upon the individual's standing in his profession or line of work and the difficulty and responsibility of the duties to be performed."¹⁸⁰ The rank equivalency should appear on the individual's identification card.¹⁸¹

Geneva Convention III does not require the prisoner of war to give a captor any information beyond name, rank, identification number, and date of birth.¹⁸² Prisoners may give additional information. The commentary to Geneva Convention III, however, cautions against giving military information to the captor,¹⁸³ and U.S. domestic law prohibits communicating defense information to a foreign government.¹⁸⁴ Article 17 of Geneva Convention III prohibits the use of physical and mental torture or coercion in any form on prisoners "to secure from them information of any kind."¹⁸⁵ This does not mean, however, that a detaining power cannot ask a prisoner for information.

During any conflict, a detaining power will try to obtain military information from a prisoner to use to the detaining power's advantage.¹⁸⁶ "Contractor personnel are relied on for technical assistance; advice; instruction; and training of military personnel in the installation, operation, and maintenance of weapon systems and equipment."¹⁸⁷ Their

¹⁷⁸ See DOD INSTR. 1000.1, *supra* note 51, at Attachment 1 to Enclosure 3 (providing a Table of Military and Civilian Equivalent Grades for Prisoner of War Identification).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* para. E3.1.4.

¹⁸¹ *Id.* para. 5.2.4.

¹⁸² See U.S. DEP'T OF ARMY, REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING para. 2-7a (10 Dec. 1985). Communication is allowed with those outside the prisoner of war environment. Prisoners have the right to write to family and the Central Prisoners of War Agency. See Geneva Convention III, *supra* note 12, art. 70. Prisoners are allowed to send and receive letters and cards. See *id.* art. 71. Communications with those outside the prisoner of war environment, however, are subject to censorship. See *id.* art. 76. Prisoners also have the right to make known their requests regarding the conditions of captivity and to remain in communication with the prisoners' representatives. See *id.* arts. 78 and 57.

¹⁸³ COMMENTARY III, *supra* note 28, at 156.

¹⁸⁴ 18 U.S.C. § 794 (2000).

¹⁸⁵ Geneva Convention III, *supra* note 12, art. 17 para. 4; COMMENTARY III, *supra* note 28, at 163.

¹⁸⁶ See *id.*

¹⁸⁷ U.S. DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, AUDIT REP. NO. 91-105, CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES 1 (June 26, 1991).

knowledge and security clearance level makes them at great risk of exploitation by an enemy force. Any information beyond the minimum required under Geneva Convention III might aid the enemy in its war efforts. Any information on military operations or other information relating to national security, in the hands of the enemy, potentially poses a significant risk to the military and security of the United States.

Following the experiences of American prisoners of war during the Korean conflict, American service members were directed to give only the information specified in Article 17.¹⁸⁸ This is evident from the text of the Armed Forces Code as well as the instructional material that accompanied the original text.¹⁸⁹ However, this proved unworkable, which led to the two word changes to Article V, previously discussed.¹⁹⁰

Minimizing the disclosure of important information, surviving captivity, and returning home without selling out or betraying his country or comrades should be the objective of any American prisoner of war. There must be some degree of resistance to providing additional information if a prisoner of war regards himself as a citizen. There is no clear distinction as to what may be information harmful to the military aspects of war and what information is intended for political and propaganda aims. The face of warfare is changing dramatically and drastically as technology forges forward. Therefore, resistance to propaganda, indoctrination and other enemy techniques to gain

¹⁸⁸ See Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955).

¹⁸⁹ *Id.* The training material accompanying Article V of the Code of Conduct for Members of the Armed Forces of the United States directs,

When questioned, a prisoner of war is required by the Geneva Convention and permitted by this Code to disclose his name, rank, service number and date of birth. A prisoner of war may also communicate with the enemy regarding his individual health or welfare as a prisoner of war and, when appropriate, on routine matters of camp administration. 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 communication on behalf of the enemy or critical or harmful to the United States, its allies, the Armed Forces or other prisoners are forbidden.

Id.

¹⁹⁰ See *supra* note 82 and accompanying text.

information begins with providing the minimum information required to be disclosed.

“I will evade answering . . . to the utmost of my ability,” however, allows for the realities of interrogation and individual susceptibility to sustained coercion. It acknowledges that everyone has a breaking point. “Make no oral statement . . .” is more of an absolute because disloyal statements are contrary to established law. Mere words or disloyal thoughts would not be criminal;¹⁹¹ however, propaganda statements that further the enemy efforts or hamper the United States’ interests would.¹⁹² The Citizen’s Code “seeks to minimize the ability of hostile nations to use American prisoners as propaganda tools and sources of information.”¹⁹³

Divulging false information may be an invaluable tool for avoiding intense interrogation but it has drawbacks.¹⁹⁴ Convincing information generally requires credible answers and constant vigilance because an interrogator will test the story’s veracity. In this era of technology and

¹⁹¹ See *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). During WWII, Douglas Chandler, a U.S. citizen, worked as an employee of the German Radio Broadcasting Company, an agency of the German government. See *id.* at 924. He volunteered to prepare “commentaries” and record them for broadcast to the United States. See *id.* at 925. The broadcasts were used extensively as a means of psychological warfare to support the German war effort. See *id.* at 925-26. On appeal, Chandler challenged his conviction based on the fact that mere words, the expression of opinions and ideas for the purpose of influencing people, could not constitute the overt act of treason and is protected by the First Amendment. See *id.* at 938. The Court disagreed:

It is well settled that one cannot, by mere words, be guilty of treason. That is true in the sense that the mere utterance of disloyal sentiments is not treason; aid and comfort must be given to the enemy. But the communication of an idea, whether by speech or writing, is as much a[n] act as is throwing a brick, though different muscles are used to achieve different effects . . . Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment.

Id. at 938-39 (internal citations omitted).

¹⁹² See *Gillars v. United States*, 182 F.2d 962, 968 (D.C. Cir. 1950). Preparing and making speeches in Germany for broadcast to the U.S. for the purpose of showing discontent with the U.S. government, impairing the morale of the armed forces and creating dissension between the American people and the people of allied countries constituted treason. See *Burgman v. United States*, 188 F.2d 637, 639-40 (D.C. Cir.), *cert. denied*, 342 U.S. 838 (1951).

¹⁹³ Lear & Reynolds, *supra* note 172, at 11.

¹⁹⁴ Dunn & Parks, *supra* note 157, at 27.

the rapid access to information, information is more readily verifiable. What may have taken days or weeks during Vietnam to verify, is easily verifiable today in matter of hours, if not minutes.

A prisoner of war should also be aware of other legal concerns in making or signing statements, whether the statements are true or false. A prisoner could possibly be confessing to acts which are clear violations of international law or the law of the country in which they are held prisoner. Such confessions, although likely forced, might place the prisoner in greater jeopardy. This is especially true if the statement involves acts committed prior to capture because some states have expressed reservations in regard to Article 85, Geneva Convention III.¹⁹⁵ These reservations essentially remove Geneva Convention III protections from prisoners of war convicted for acts committed prior to capture.¹⁹⁶

5. *Reminder*

I will never forget that I am an American, 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 final principle in the Citizen Code of Conduct ties into the first, reinforcing an American's allegiance to the United States. It serves to instill discipline and acknowledge responsibility and accountability for individual actions. Finally, it reminds individuals that the United States is dedicated to the return of all prisoners of war and to not give up in the face of adversity.

C. Enforcement

Although not subject to the discipline of the U.S. while interred by the enemy,¹⁹⁷ a prisoner is, upon repatriation, subject to prosecution for

¹⁹⁵ COMMENTARY III, *supra* note 28, at 423.

¹⁹⁶ *Id.* at 424.

¹⁹⁷ Geneva Convention III, *supra* note 12, arts. 82-88. The prisoner is subject to discipline under the laws and regulations of the detaining power. *Id.* During captivity, "disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers." *Id.* art. 96, para. 2. "In no case may

criminal acts committed during captivity.¹⁹⁸ The DOD may investigate the circumstances of capture and the period of detention.¹⁹⁹ Since the two World Wars, American prisoners of war have been tried for their misconduct while in the hands of the enemy.²⁰⁰ “Prisoner misconduct during the two World Wars consisted primarily of giving military information, doing acts detrimental to other prisoners, making propaganda broadcasts, and generally collaborating with and giving aid and comfort to the enemy.”²⁰¹

There are at least a half dozen criminal statutes at the United States’ disposal that can be used to punish misconduct by its citizens while in captivity. Some of these statutes have been previously mentioned and linked to specific provisions of the proposed Citizen’s Code. Current U.S. statutes capture the majority of documented misconduct²⁰² and misconduct contemplated by the Citizen’s Code. The existing U.S. laws, judicial processes, and the recently enacted Military Extraterritorial

such powers be delegated to a prisoner of war or be exercised by a prisoner of war.” *Id.* para. 3. The camp commander is “a responsible commissioned officer belonging to the regular armed forces of the Detaining Power.” *Id.* art. 39, para. 1.

¹⁹⁸ See *United States ex. rel. Hirshberg v. Malanaphy*, 73 F. Supp. 990, 992 (E.D.N.Y. 1947) (holding that a repatriated prisoner of war may be held liable for offenses committed during captivity against his country and his fellow prisoners of war and cannot defend on the grounds that his country’s legislation does not apply because it is suspended by Geneva Convention III, art. 82); see also COMMENTARY III, *supra* note 28, at 409.

¹⁹⁹ See DOD INSTR. 2310.4, *supra* note 135, para. E1.1.2.3. The repatriation process consists of three phases. See *id.* para. E1.1. “Phase I begins when the returnee first comes under U.S. military control.” See *id.* para. E1.1.1. Phase II “upon arrival at the theater treatment and processing facility.” See *id.* para. E1.1.2. And, Phase III “when the returnee is transported to a CONUS facility.” See *id.* para. E1.1.3. During Phase II, intelligence personnel conduct a tactical debriefing of the repatriated prisoners of war. While this debriefing is focused on obtaining “time-sensitive information on U.S. personnel last seen alive in a POW camp system, but who are still unaccounted for,” the instruction acknowledges the potential for prisoners to divulge incriminating information. See *id.* para. E1.1.2.3. The instruction provides direction for the interviewer should this occur. See *id.*

²⁰⁰ Prisoners of war were tried under the civilian law of treason since military law had no provision specifically covering prisoners of war until 1951 (UCMJ art. 105). Note, *Misconduct in the Prison Camp: A Survey of the Law and An Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 719 (1956). Prior to the Korean War, Chief Signalman Harold Hirshberg was the only American tried by court-martial for his misconduct offenses. See *id.* at 719 n.68. The effective date of the Uniform Code of Military Justice was 31 May 1951.

²⁰¹ *Id.* at 720.

²⁰² See generally PRISONER REPORT, *supra* note 1; *Misconduct in the Prison Camp*, *supra* note 200, at 742-64.

Jurisdiction Act²⁰³ not only provide criminal sanctions but also an enforcement mechanism. Determining whether the existing scheme satisfactorily addresses criminal behavior, however, will not be possible until after the first prosecution of civilian prisoner of war misconduct.

One area of the law that should be amended today is the statute of limitations for prosecuting criminal conduct committed by prisoners of war. In general, no person may be prosecuted, tried, or punished for any non-capital offense more than five years after the commission of the offense.²⁰⁴ Based upon recent conflicts, five years might not be a problem for prosecuting criminal acts committed while a prisoner of war. During Vietnam, however, the enemy held some prisoners over eight years.²⁰⁵ Theoretically, criminal acts committed upon initial capture would be beyond a prosecutors reach. The limitations period, however, may be suspended under certain circumstances.²⁰⁶

The War Suspension Act statute stops the statute of limitations from running when the United States is at war.²⁰⁷ Unfortunately, this statute is limited to crimes involving fraud against the United States and has been restricted to declared wars.²⁰⁸ Consideration should be given to amending the War Suspension Act to encompass a broader scope of criminal offenses, as well as international armed conflicts.

The United States last declared war on another country in World War II. However, the United States continues to be involved in military conflicts around the world. The War Suspension Act is essentially moot because of the now settled practice of becoming involved in conflicts without formally declaring a war and the limits on war as a method of settling international disputes.²⁰⁹ Failing an amendment to the War Suspension Act to include "international armed conflict," consideration should be given to expanding the statute that suspends the limitations

²⁰³ 18 U.S.C. §§ 3261-3267 (2000). Enacted on 22 November 2000, these laws extend federal criminal jurisdiction over civilians accompanying the armed forces who commit serious offenses overseas when a host country does not exercise criminal jurisdiction. 18 U.S.C. § 3261(b).

²⁰⁴ *See id.* § 3282(a).

²⁰⁵ *See* ROCHESTER & KILEY, *supra* note 17, at 598.

²⁰⁶ *See* 18 U.S.C. § 3287.

²⁰⁷ *See id.*

²⁰⁸ *See* United States v. Shelton, 816 F. Supp. 1132, 1135 (W.D. Texas 1993) (defining a conflict as a "war" provided by in the Suspension Act).

²⁰⁹ *See* U.N. CHARTER art. 2, paras. 3, 4.

period to permit the U.S. to obtain foreign evidence.²¹⁰ Without the ability to stop the limitations period from running during international armed conflicts, some prisoner of war misconduct may go unpunished.²¹¹

The United States has an affirmative obligation to prevent misconduct from recurring. Declining to punish or the inability to punish those who violate domestic law could adversely affect future prisoners in captivity. Prosecution may be difficult, however, it is the only way to enforce compliance of the code for the greater good, and ensure justice. Administrative or contractual remedies are insufficient to ensure compliance with the Citizen's Code and ensure the safety of all personnel, uniformed as well as civilian, in captivity. Only an individual's own moral character and the deterrent of punishment upon repatriation can prevent misconduct. "Morally undesirable conduct may or may not warrant legal action depending on the requirements of the law for prosecution, but it is fair to say that legal prosecution always consists of morally undesirable conduct. The requirements for legal prosecution exceed those for morally acceptable conduct."²¹²

D. Training

Cohesiveness, discipline, and leadership are essential to survival in a prisoner of war environment. Without proper training, however, these three elements of survival will not exist. *Department of Defense Directive 1300.7*, discusses the policy behind training in the Armed Forces Code of Conduct.²¹³ "CoC training fosters the high degree of motivation and dedication necessary . . . to survive captivity."²¹⁴ This is no less true for the Citizen's Code.

Citizen Code of Conduct training will promote compliance with the law of war,²¹⁵ and U.S. law. Citizen Code training will also serve as a reminder to all Americans of the democratic ideals and institutions that make the U.S. such a great country. To accomplish these objectives,

²¹⁰ See 18 U.S.C. § 3292.

²¹¹ This is especially true if the United States finds itself involved in another Vietnam type conflict where some prisoners of war were held over eight years. See ROCHESTER & KILEY, *supra* note 17, at 598.

²¹² Porter, *supra* note 134, at 111.

²¹³ DOD DIR. 1300.7, *supra* note 9, para. 3.

²¹⁴ See *id.* at para. 3.1.

²¹⁵ See *id.* (promoting service members' compliance with the Law of War).

training “must be presented with understanding, skill and devotion sufficient to implant a conviction in the heart, conscience, and mind . . . that full and loyal support of the code is to the best interests of his country, his comrades, and himself.”²¹⁶

Training also would not be complete without exposure to the culture of the country to which the civilian is deploying. All potential prisoners of war should have a basic understanding of the enemy’s culture and the anticipated methods that an enemy captor may employ against prisoners of war.²¹⁷ Those at risk of becoming a prisoner of war need the best tools available to resist and cope with current, known practices, since an enemy is liable to work harder on Americans than other prisoners because of our seemingly superior attitude. The next enemy is likely to employ a combination of physical and ideological techniques, to weaken allegiance to the United States and western ideals.

As the Defense Review Committee concluded in 1976, “the six articles of the Code will never stand alone without supportive training, no matter how well they are worded.”²¹⁸ This is also true with civilian training in the Citizen’s Code. The DOD has taken the first step toward training civilian employees and DOD contractor personnel by issuing *Department of Defense Instruction 1300.23, Isolated Personnel Training for DOD Civilian and Contractors*. The instruction, however, has yet to be fully implemented and is deficient in several respects.

First, the DOD instruction mandates training to support the Code of Conduct.²¹⁹ The only Code of Conduct that currently exists is the Armed Forces Code. Training civilians on this standard gets dangerously close to erasing, not just blurring, the distinction between uniformed combatants and noncombatant civilians authorized to accompany the force. A civilian should understand what is required and expected of a military member; however, a civilian should not be trained to comply with those expectations. The Armed Forces Code conflicts with the obligations of a noncombatant civilian under the law of war and the Geneva Conventions. A Citizen’s Code, specifically tailored to the rights and obligations of a civilian prisoner of war, would cure this deficiency.

²¹⁶ PRISONER REPORT, *supra* note 1, at 15.

²¹⁷ VIETNAM REPORT, *supra* note 62, at 11.

²¹⁸ *Id.* at 8.

²¹⁹ See DOD INSTR. 1300.23, *supra* note 4, para. 5.6.

Second, the instruction anticipates implementing instructions from each of the Military services.²²⁰ Separate implementing instructions and training ignores the results from the 1976 Defense Review Committee's review of the Armed Forces Code.²²¹ The 1976 Committee devoted a significant amount of attention to the issue of the Armed Forces Code and related training.²²² The wide disparity in training caused many prisoners to view their obligations under the Code differently, which often caused friction within a group of prisoners.²²³ Centralized, combined service and realistic training that includes uniformed and civilian trainees would help remedy this deficiency. While the time available to train is often limited, consistency of interpretation may be the key to survival in the prisoner of war environment.

Finally, in addition to training on a Citizen's Code of Conduct, civilians must be informed that their behavior in captivity or detention is fully accountable under U.S. law and be reminded of their duty of allegiance. The consensus of repatriated prisoners of war interviewed by the 1976 Committee "was that those who violated the UCMJ were not required to account for their actions; they were put to no test of justice; and, their apparent immunity would serve to undermine the command authority in any future PW organizations."²²⁴ Similarly, this can be expected from civilian prisoners of war. The Citizen's Code serves to protect the prisoner of war and the U.S. by placing equal obligations on the prisoner and the U.S.²²⁵ United States civilians need to fully understand their obligations as an American and the United States' obligations to its citizens.

IV. Conclusion

America must not fall into the trap of thinking that U.S. civilians are not at risk of capture because of the United States' military superiority. America has yet to see any major incidents involving civilian employees or contractor personnel but that day could be just over the horizon. All civilians accompanying the armed forces, therefore, must be trained on how to behave in the event of capture. Not only must the DOD train

²²⁰ See *id.* paras. 5.7.1, 6.1.

²²¹ See PRISONER REPORT, *supra* note 1, at 12-13.

²²² See VIETNAM REPORT, *supra* note 62, at 9.

²²³ See *id.*

²²⁴ *Id.* at 16.

²²⁵ See VIETNAM SUPPLEMENTAL REPORT, *supra* note 77, at IV-2.

these civilians for survival in captivity, the DOD must also inform and train civilians on their rights and obligations if captured.

With the ever-increasing number of civilians near active hostilities, an isolating incident, such as enemy capture, is virtually inevitable. Therefore, “[i]t is critical to establish standards of behavior for DOD civilians and contractors for conduct as isolated individuals”²²⁶ today. These standards of behavior are embraced in the proposed Citizen Code of Conduct.

Untrained and uninformed civilians would be easy victims of an unscrupulous enemy. Many of our “enemies” today fear United States dominance and imposition of western ideals. Our enemy is also well aware of the fact that the law significantly constrains U.S. conduct, military as well as civilian. The next American prisoners of war are likely to encounter an enemy that employs a combination of ideological tactics, to weaken allegiance to the United States and western ideals, as well as torture. Improper and objectionable behavior not only puts the civilian at risk but also all other prisoners of war, including service members. All service members’ conduct is fully accountable under the UCMJ; civilians should learn that their behavior in captivity is also fully accountable under U.S. law.

The Citizen’s Code provides a framework of ideals and ethical standards that will help an individual in resisting the physical, mental, and moral onslaughts of an enemy captor. The Citizen’s Code will provide Americans with the “unified and purposeful standard of conduct”²²⁷ that the 1955 Committee stated Americans required. If the individual lives up to the ideals and ethical standards, the individual need not worry about an investigation concerning their behavior. The individual will also not have to live the rest of their life knowing that something they said harmed fellow prisoners or their country and its allies.

The Citizen’s Code does not ask Americans to put themselves in harms way, nor does it ask them to do something they are not already

²²⁶ Defense Prisoner of War/Missing Personnel Office, *2001 DoD Personnel Recovery Conference After Action Report, Executive Summary* pt. II, 3.h.1.b (Jan. 22-24, 2001), available at http://www.dtic.mil/dpmo/pr/2001conf/2001conf_aar.htm (last visited Nov. 23, 2004).

²²⁷ PRISONER REPORT, *supra* note 1, at vii.

required to do as U.S. citizens. Domestic law, as well as Geneva Convention III, requires these things. As with the Armed Forces Code, the Citizen's Code does not conflict with U.S. law, international law or the law of war.²²⁸ All of which continue to apply to all Americans, civilian or military, during captivity or other hostile detention. Every individual is responsible and accountable for his or her conduct at all times.

Failure to adhere to a Citizen's Code may subject an individual to prosecution.

Recognizing the importance and necessity for considering evidentiary, extenuating, mitigating, and psychological factors as well as the political ramifications of postwar prosecution of former prisoners of war, the role of the prisoner of war . . . in future conflicts will be more difficult if we do not insure now that the words "responsible for my actions" . . . enjoy a firm basis of support.²²⁹

Former prisoners of war have been court-martialed for misconduct after every major conflict in our nation's history. If the present U.S. statutory scheme does not adequately address civilian prisoner of war misconduct, we owe it to our potential future prisoners to identify and rectify the deficiencies.

Today's battlefield will almost certainly continue to bring new issues to the forefront of our legal community, especially with the increasing number of civilians as part of the battle space. The situation is becoming increasingly complex. Despite the complexity and the emphasis on delineating a policy with respect to civilians on the battlefield, one area has been ignored—the civilian prisoner of war. Just because civilians are not uniformed members of the armed forces, does not mean they are out of harms way. Civilians are considered a part of the total force package, yet their risk of enemy capture falls by the wayside. As the Army recommended to the 1976 Committee, "effort should be made at the appropriate level of government to clarify the responsibilities and

²²⁸ See generally Smith, *supra* note 101 (providing an excellent discussion of the compatibility of the Armed Forces Code with Geneva Convention III).

²²⁹ Dunn & Parks, *supra* note 157, at 23.

expected standards of conduct of U.S. civilian persons . . . confined by the enemy.”²³⁰

Today’s battlefield presents major challenges, including challenges that will extend to the treatment and conduct of prisoners of war. These challenges demand moral guidance and realistic, joint training. Service members have the Armed Forces Code of Conduct, the UCMJ and continuous training obligations. Without a comparative set of guidelines and training, specifically tailored for the civilian, individually and collectively, civilians will pay a higher price than their military colleagues.²³¹

²³⁰ VIETNAM SUPPLEMENTAL REPORT, *supra* note 77, at II-7.

²³¹ *See* Porter, *supra* note 134, at 110. Lieutenant Colonel Porter uses the civilian hostages in Iran to demonstrate how their lack of guidance created difficulty and uncertainty as to what constituted proper conduct in the situation. *See id.* at 110. “Each [civilian] had to probe the ‘minefield of survival and personal dignity’ using intuition. Each had to agonize over which of the captor’s demands justified compliance and which did not . . . Military hostages appear to have had a discernible advantage because they understood their overall moral responsibility.” *Id.*

Appendix A

Armed Forces Code of Conduct

I

I AM AN AMERICAN, FIGHTING 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 THE MEMBERS OF MY COMMAND 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 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.

V

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE 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 FOR FREEDOM, 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.

Appendix B

Proposed Citizen Code of Conduct

I

I AM AN AMERICAN, ACCOMPANYING THE FORCES WHICH GUARD MY COUNTRY AND OUR WAY OF LIFE. I AM PREPARED TO FULFILL MY OBLIGATION OF ALLEGIANCE TO THE UNITED STATES OF AMERICA.

II

IF I AM CAPTURED, I WILL NOT NEGOTIATE MY OWN RELEASE NOR ACCEPT SPECIAL FAVORS FROM THE ENEMY. IF OFFERED AND APPROVED, I MAY ACCEPT A SIMPLE PAROLE. WHEN DIRECTED, I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE.

III

IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL OBEY THE DIRECTIVES OF THOSE IN COMMAND AND I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION, WHICH MIGHT BE HARMFUL TO MY COMRADES OR MY COUNTRY.

IV

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE MY FULL NAME, DATE OF BIRTH, AND RANK EQUIVALENT. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

V

I WILL NEVER FORGET THAT I AM AN AMERICAN, 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.