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PRISONERS OF WAR IN THE 21ST CENTURY: ISSUES IN MODERN WARFARE

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“War, then, is not a relation of man to man, but of State to State, in which individuals are enemies only accidentally, and not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders.”

*“Du Contrat Social ou Principes du Droit Politique” 1762
Jean-Jacques Rousseau, philosopher 1712 – 1778*

I. INTRODUCTION

Much has been said and written about the attacks of September 11, 2001. Since that date, the United States and some of its allies have been engaged in armed conflict in Afghanistan, Iraq, and virtually every corner of the globe. By early 2003 combat operations in Afghanistan in support of Operation Enduring Freedom (OEF) and in Iraq in support of Operation Iraqi Freedom (OIF) resulted in the capture of thousands of enemy combatants. The United States began taking custody of certain individuals, first as a result of battlefield surrenders, and thereafter via traditional law enforcement actions and local “bounties.” In Iraq alone, U.S. forces held over 7,300 captured or surrendered Iraqi troops by April 2003.¹ One result of such captures was the United States began temporarily holding detainees (as well as some deemed “enemy prisoners of war”) on board United States warships while another result was the transfer of a number of these individuals to the U.S. military base in Guantanamo Bay, Cuba.

In considering the unique aspects of fighting the “Global War on Terror” (GWOT) senior officials in the Bush Administration have argued that it need not apply the Geneva Conventions to all detainees in order to “preserve flexibility.”² White House Counsel Alberto Gonzalez asserts that,

[T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians... *this new paradigm renders obsolete Geneva’s limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments.*³

¹ Deborah Charles, *Coalition holds 7,300 PoWs in Iraq*, REUTERS, April 10, 2003.

² Alberto Gonzales, White House Counsel, Memorandum For The President: DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN, dated January 25, 2002, 3:30pm draft. Emphasis added.

³ *Id.*

Gonzalez may not be alone in his view. Less than one week after formally joining the United Nations as a full-fledged member, Switzerland disclosed a “new initiative” that would “look into whether the 53-year-old Geneva Conventions regulating the treatment of prisoners of war should be updated or reinterpreted in light of the dilemmas posed by terrorism.”⁴

Although this article will not discuss the GWOT *per se* or the legal status of those individuals who have become known as the “Guantanamo Detainees,” it will raise and discuss some of the weighty operational legal issues related to those individuals who are accorded the status of prisoners of war (known in present parlance as “Enemy Prisoners of War” or “EPWs”) under the Geneva Conventions.⁵

This article will focus primarily on the armed conflict in Iraq from the commencement of hostilities on March 19 (U.S. time) / March 20 (Baghdad time), 2003 through May 1, 2003 when President George W. Bush announced the “end of major combat operations.”⁶ During the forty-three days preceding President Bush’s May 1, 2003 declarations, the United States and its allies captured and took custody of thousands of EPWs. Under the laws of armed conflict, the “Detaining Power” is responsible for the humane treatment of these former combatants in accordance with GPW.⁷

There is little doubt that the United States and its allies have been treating EPWs humanely as a matter of policy and practice with some notable exceptions.⁸ Nonetheless, there are issues regarding the treatment of EPWs and how that treatment is governed by the Geneva Conventions that have arisen as a result of particular facts and circumstances on some occasions. Some issues arose during OEF and OIF, whereas other issues may eventually arise as a result of unforeseen modern means of warfare and accompanying technological advances. In the 21st century, those issues include the placing of EPWs

⁴ Nora Boustany, *Swiss Reconsider Geneva Conventions*, Washington Post, September 18, 2002; page A26.

⁵ For the purposes of this article “enemy prisoners of war” will be abbreviated as EPWs and a single “enemy prisoner of war” will be abbreviated as EPW.

⁶ White House Press Release at www.whitehouse.gov/news/release May 1, 2003, President Bush Announces Major Combat Operations in Iraq Have Ended.

⁷ The “Detaining Power” has control over the detainee and has numerous obligations and responsibilities under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135[hereinafter GPW]. Following this conflict, the U.S. and its allies became the de facto “Occupying Power” and the governing body of law became the Laws of Occupation. “The Annexed Regulations to Hague Convention IV of 1907, the 1949 Fourth Geneva Convention, and customary international law set forth the laws of belligerent occupation applicable in this conflict. Both the Nuremberg Tribunal and a 1993 Report of the U.N. Secretary-General characterized the Hague Regulations as reflecting customary international law binding on all States. Since Iraq, the U.S., and the U.K. are parties to the Geneva Conventions, that instrument also applies. Finally, there was extensive State practice of occupation in the 20th Century, particularly after the Second World War, much of which has matured into customary law bearing on the occupation of Iraq. It should be noted that while the 1977 Protocol Additional I to the Geneva Conventions contains the most recent codification of occupation law, that treaty does not apply in this case because neither the U.S. nor Iraq are Parties to the agreement.” MICHAEL N. SCHMITT, *THE LAW OF BELLIGERENT OCCUPATION, CRIMES OF WAR PROJECT*, April 15, 2003, website at <http://www.crimesofwar.org/special/Iraq/news-iraq5.html>

⁸ For more information see Final Report of the Independent Panel to Review DoD Detention Operations, August 2004, Chairman James R. Schlesinger at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>. See also AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R. Jones, USA and the AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay, USA at http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf. See also the related news stories on the still classified Article 15-6 Investigation of the 800th Military Police Brigade, MG Anthony Taguba, USA.

onboard ships (including hospital ships), blood drawing to collect DNA for identification purposes and testing for inoculations, providing vaccinations, and interrogation practices.

This article will undertake a brief history of the treatment of prisoners of war, the law of armed conflict as it pertains to them, and how they affect United States policy. It will then discuss implications of EPWs detained at sea onboard naval vessels. This discussion will incorporate the historical impetus for the international legal requirement of internment on land, the potential legal rationale for temporarily detaining individuals at sea, and policy considerations that could impact future conflicts. The discussion then undertakes an examination of the medical attention provided to EPWs, the history and protections afforded hospital ships, and whether or not interrogations of EPWs onboard hospital ships could strip such ships of their protected status. The article then turns to modern technology and blood testing in the context of international legal requirements for properly identifying EPWs and the potential use of DNA testing to make such identifications. Finally, this article will examine the potential testing of blood taken from EPWs to determine what inoculations they have received for medical protection and discuss whether such information could be acquired for intelligence gathering purposes in order to assess an enemy's biological and chemical weapons capabilities.

II. HISTORY OF PRISONERS OF WAR

Often times in history combatants surrendering on the battlefield became the chattel of their captors and could be killed, sold, or enslaved.⁹ In contrast, various rulers, writers, scholars, and civilizations around the world were also developing codes, laws, and agreements that called for the *protection* of prisoners of war.¹⁰ In the early history of conflicts to which the United States was a party, the emphasis with respect to prisoners of war was “placed on exchanges... paroles and in some instances the use of prisoners of war as instruments of real or threatened retaliation.”¹¹

The modern law of war with respect to prisoners of war was codified and then issued for the first time by a Government to its troops in the field when President Abraham Lincoln commissioned Dr. Francis Lieber to write a code for Union forces during the American Civil War. The Lieber Code, which became General Order No. 100 for the Union Army, contains 48 articles (Articles 48-80 and 119-

⁹ 1 REPORT ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 216 (1948). [hereinafter REPORT ON ACTIVITIES] During some of the Crusades both sides slaughtered their enemies who fell into their hands. See Howard Levie, *Terrorism and War: The Law of War Crimes* (1992), p. 9. Oceana Publications Inc.

¹⁰ See Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 Naval L. Rev. 176. See also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS [hereinafter HUMANITARIAN HANDBOOK] 322-325 (Dieter Fleck, ed., Oxford University Press 1995). See also Web site of the Yale University Law School Avalon Project (visited 09 July 04) <http://www.yale.edu/lawweb/avalon/avalon.htm>. Articles 133 -135 of the Code of Hammurabi deals specifically with “prisoners of war.”

¹¹ Department of the Army Pamphlet 27-161-2, *International Law (Volume II)*, October 1962, at page 69. “For example, General Robert E. Lee’s son, Major Rooney Lee, as a POW in 1864, was threatened with execution if the Confederacy executed two Federal officers, Sawyer and Flinn. The Federal threat was effective and no execution occurred.” *Id.* Page 70, note 3.

133) regarding prisoners of war.¹² The Lieber Code is the cornerstone and foundation for everything contained in the modern laws of war today.¹³

It was not until the Hague Convention of 1899 that States agreed to formally limit their respective sovereign rights in connection with the treatment of EPWs.¹⁴ The attempt to regulate the handling of EPWs internationally received a boost in 1907 with the Hague Regulations Respecting the Laws and Customs of War on Land, which were finalized and made more detailed than the 1899 Convention's provisions. Although the Hague Regulations gave EPWs a defined legal status and protected them against arbitrary treatment, the Regulations as a whole were primarily concerned with the means of warfare rather than the care of prisoners of war. Moreover, the initial concern was with the care of the wounded and sick rather than EPWs.¹⁵ However, World War I proved that the 1899 and 1907 Hague Conventions protections for prisoners of war were still "too indefinite and the belligerents were compelled to sign temporary agreements amongst themselves on disputed points."¹⁶

Human rights abuses and privations suffered by prisoners and civilians during the First World War and to a much more devastating extent in the Second World War – such as the "Bataan Death March" and the "Japanese Hell Ships" – became the impetus for a series of multilateral agreements that today provide uniform standards for the humane treatment of prisoners of war and civilian victims of war. The first such multilateral agreements were the Geneva Conventions of 1929, which played a significant role in World War II.¹⁷ The Geneva Convention Relative to the Treatment of Prisoners of War in 1929 served as a complement to articles 4 – 20 of the 1907 Hague Regulations and expanded safeguards for EPWs.¹⁸ "The 1929 treaties were technically much superior [and were in greater detail] to their antecedents, but did not break new ground in terms of doctrine or general scope."¹⁹

¹² INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, promulgated as GENERAL ORDER NO. 100 by President Lincoln, 24 April 1863. See *Web site of the Yale University Law School Avalon Project* (visited 09 July 04) <http://www.yale.edu/lawweb/avalon/lieber.htm>. See also Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 *Naval L. Rev.* 176 at 191-193.

¹³ See Howard Levie, *International Law Studies, Prisoners of War in International Armed Conflict* 107, 343, 365, and 367 (Blue Book Series, Naval War College, 1977).

¹⁴ REPORT ON ACTIVITIES, *supra* note 9. See also Regulations annexed to the Fourth Hague Convention of October 18, 1907, art. 4 through 20.

¹⁵ See Jean Pictet, *Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949*, International Committee of the Red Cross (1960), [hereinafter "ICRC Commentary to GPW"]. Available at <http://www.icrc.org/ihl.nsf/WebComART?OpenView>

¹⁶ Department of the Army Pamphlet 27-161-2, *International Law (Volume II)*, October 1962, at page 71. For example, the Agreement between the United States and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, signed at Geneva, November 11, 1918.

¹⁷ "The United States policy toward the treatment of prisoners of war in World War II is set out in 6 *Dept. of State Bulletin* 445-448, 741, 768 and 12 *Dept. of State Bulletin* 809-810 (1945)." Department of the Army Pamphlet 27-161-2, *International Law (Volume II)*, October 1962, at page 72, note 10.

¹⁸ The treaty was ratified by fifty-three states. Neither the Soviet Union nor Japan had ratified the 1929 Convention prior to the outbreak of World War II. In fact, during World War II "the Japanese were surprised at the concern for EPWs. To many Japanese, surrendering soldiers were traitors to their own countries and a disgrace to the honorable profession of arms. As a result, most EPW in the hands of the Japanese during World War II were forced to undergo extremely inhumane treatment." CDR Brian J. Bill, JAGC, USN, ed., *Law of War Workshop Deskbook*, The Judge Advocate General's School, U.S. Army (June 2000),

August 12, 1949 was a turning point in the history of law of armed conflict. On this day the Diplomatic Conference, convened after the Second World War, concluded after drafting four international conventions designed to reduce the suffering caused by war.²⁰ The four Geneva Conventions of 1949 provide protections for four different classes of people: the military wounded and sick in land conflicts; the military wounded, sick, and shipwrecked in conflicts at sea; military persons and civilians accompanying the armed forces in the field who are captured and qualify as prisoners of war; and civilian non-combatants who are interned, live in an occupied land, or are otherwise in the hands of a party to an armed conflict.²¹

The Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War (GPW), was adopted on Aug. 12, 1949 and entered into force on October 21, 1950.²² It is an international treaty designed to protect prisoners of war from inhumane treatment at the hands of their captors in conflicts covered by the Convention.²³ “The protections of the Convention apply when the members of the armed forces of one belligerent nation ‘fall into the hands’ of an enemy belligerent. This can happen through capture or surrender to enemy military forces.”²⁴ The GPW regulates the rights and duties of prisoners of war. The Convention “is the universally accepted standard for treatment of [prisoners of war]; virtually all nations are parties to it and it is now regarded as reflecting customary [international] law.”²⁵ Today, 190 of the world’s 194 nations, including the United States, are State parties to the GPW.²⁶

[hereinafter *Law of War Deskbook*] chap. 5, p.4. See also Richard Werly, *Hiroshima 1945: A Day in August that Changed the World*, (summary translated into English,

http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5RXJR5?OpenDocument&View=defaultBody&style=custo_print)

¹⁹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* 20, New York: Knopf (1992).

²⁰ See Howard Levie, *supra* note 13, at v-viii

²¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3144, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS-SEA]; GPW, *supra* note 7; 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 GCC]; Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The United States ratified the four Geneva Conventions of 12 August 1949 on 2 August 1955. Protocol I has been ratified by 161 countries, and Protocol II has been ratified by 156 countries. Neither Protocol I nor Protocol II has been ratified by the United States. See <http://www.icrc.org/ihl.nsf>

²² See GPW *supra* note 7, art. 22(1). This was a revision of the Prisoners of War Convention of July 27, 1929.

²³ *Id.*

²⁴ Statement by W. Hays Parks, Special Assistant for Law of War Matters, The Judge Advocate General, Department of the Army, before the House Armed Service Committee, United States House of Representatives, *Hearings on Iraq’s Violations of the Law of Armed Conflict* (April 4, 2003).

²⁵ Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations (NWP 1-14M) para. 11.7, p.11-10, footnote 47.[hereinafter *Commander’s Handbook*].

²⁶ For a list of ratifications, accessions, and successions, see States Party to the Geneva Conventions and Their Additional Protocols, at <http://www.icrc.org/eng/party-gc>. See also Statement by W. Hays Parks, Special Assistant for Law of War Matters, The Judge Advocate General, Department of the Army, before the House Armed Service Committee, United States House of Representatives, *Hearings on Iraq’s Violations of the Law of Armed Conflict* (April 4, 2003).

Under the Convention, the Detaining Party is responsible for providing EPWs with certain protections.²⁷ EPWs must be provided adequate food, shelter, and medical aid.²⁸ Representatives from the International Committee of the Red Cross (ICRC) must be permitted access to EPWs as soon as practicable.²⁹ All EPWs must be “humanely treated” and must be protected “against acts of violence or intimidation and against insults and public curiosity.”³⁰ EPWs are entitled “in all circumstances to respect for their persons and their honor” and to the extent possible shall “retain the full civil capacity which they enjoyed at the time of their capture.”³¹ EPWs may not be discriminated against on basis of gender, race, religion, or other similar distinctions.³² EPWs are required to provide no more than “surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”³³ “While the range of questioning is completely unlimited, the means of questioning are limited.”³⁴ They may not be forced to answer further than required under the GPW and may not be “threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind” should they refuse.³⁵ All EPWs must be protected against assault, including sexual assault.³⁶ Female EPWs shall be treated with the regard due to their gender and, like all EPWs, are entitled to respect for their person and their honor.³⁷

EPWs must be removed from the battlefield as soon as circumstances permit and at all times protected from physical and mental harm.³⁸ EPW camps must be located a sufficient distance from the combat zone to be out of danger.³⁹ State parties to the conflict must be informed of the location of EPWs. EPW camps should be clearly marked with the letters “PW” or “PG.”⁴⁰ EPWs may be interned only in premises located on land, and the camps must be clean and hygienic.⁴¹ No EPW may be detained in areas where they may be exposed to the fire of the combat zone.⁴² Moreover, EPWs may not be “interned in penitentiaries” unless necessary to protect their safety.⁴³ Rather, “[p]risoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area”⁴⁴ and shall be provided the ability to prepare their own meals,⁴⁵ access to a

²⁷ GPW, *supra* note 7, art. 12.

²⁸ *Id.*

²⁹ *Id.* art. 9.

³⁰ *Id.* art. 13.

³¹ *Id.* art. 14.

³² GPW, *supra* note 7, arts. 14 and 16.

³³ *Id.* art. 17.

³⁴ Supplement to the Commander’s Handbook, *supra* note 24, at 11-10, footnote 49.

³⁵ GPW, *supra* note 7, art. 17.

³⁶ *Id.* art. 13.

³⁷ *Id.* arts. 3, 13, and 25.

³⁸ *Id.* art. 19.

³⁹ *Id.* art. 23.

⁴⁰ GPW, *supra* note 7, art. 23. “PG” represents “Prisonnier de Guerre” in French and “Prisionero de Guerra” in Spanish.

⁴¹ *Id.* art. 22.

⁴² *Id.* art. 23.

⁴³ *Id.* art. 22.

⁴⁴ *Id.* art. 25.

⁴⁵ GPW, *supra* note 7, art. 26.

canteen,⁴⁶ medical inspections,⁴⁷ “complete latitude in the exercise of their religious duties,”⁴⁸ and “opportunities for taking physical exercise, including sports and games, and for being out of doors.”⁴⁹ Subject to valid security reasons, EPWs are entitled to retain their personal property and protective equipment.⁵⁰ These items may not be taken from an EPW unless properly documented.⁵¹ In short, the GPW prohibits contracting parties from treating EPWs as criminals.

What is novel about the Convention is that, as reflected in the various rights and obligations set forth in the preceding paragraphs, it established a comprehensive code of international law to regulate the conduct of war and to ensure that persons detained during combat are provided extraordinary legal protections. For over fifty years, the United States has expressly incorporated the Conventions into its policies, procedures, and regulations, and has adhered to them in numerous conflicts.⁵² Because the four Conventions are treaties ratified by the United States, the Conventions are the supreme law of the land.⁵³ Since 1949, the United States has demonstrated commitment to the principles of the GPW, consistently abided by it in conflict, and played a prominent international role in demanding that other countries treat detainees in accordance with the Geneva Conventions.⁵⁴ The United States’ principled compliance with the Convention is essential to the United States’ standing to demand compliance by other nations with those agreements. This support for the Conventions is due, at least in part, to the recognition that the Conventions have saved American lives.

The United States has an interest in following the Geneva Conventions in order to avoid acting in a way that would encourage other states to violate the Conventions.⁵⁵ Speaking to the Red Cross on the fiftieth anniversary of the Geneva Conventions, Senator John McCain explained,

⁴⁶ *Id.* art. 28.

⁴⁷ *Id.* art. 31.

⁴⁸ *Id.* art. 34.

⁴⁹ *Id.* art. 38.

⁵⁰ *Id.* art. 18.

⁵¹ GPW, *supra* note 7, art. 18.

⁵² AR 190-8 implements Department of Defense Directive 2310.1. It is a consolidation of Army Regulation 190-8 and Army Regulation 190-57 and incorporates SECNAV Instruction 3461.3 and Air Force Joint Instruction 31-304. See AR 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” 1 October 1997, [hereinafter AR 190-8] par. 1-5b.

⁵³ See U.S. Constitution Art. VI.

⁵⁴ See Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War (1992) [hereinafter Final Report] 577 (quoting the International Committee of the Red Cross as stating “The treatment of Iraqi prisoners of war was the best compliance with Geneva Convention by any nation in history.”)

⁵⁵ We leave for others the in-depth analysis and difficult set of issues pertaining to the extent to which the GPW protections apply to “terrorists” detained by nation-states in the “war on terrorism.” United States’ official policy declares its strong commitment to the principles embodied in the Geneva Convention, while arguing that that the Convention does not apply to every form of conflict in the war on terrorism. In a May 2003 press briefing, Press Secretary Ari Fleischer explained: “The war on terrorism was not envisaged when the Geneva Convention was signed in 1949. In this war, global terrorists transcend national boundaries and internationally target the innocent. The President has maintained the United States’ commitment to the principles of the Geneva Convention, while recognizing that the Convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.” Press Secretary Ari Fleischer, *Statement by the Press Secretary on the Geneva Convention*, May 7, 2003, at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>. *Infra* footnote 71.

I, along with millions and millions of others, have very personal reasons to be grateful for the Geneva Conventions and the subsequent founding of the International Red Cross. The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war... I am thankful for those of us whose dignity, health and lives have been protected by the Conventions. I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.⁵⁶

Starting with the Lieber Code, the United States has a long history as a leader in the law of armed conflict and rights of prisoners of war.⁵⁷ As suggested in Senator McCain's comments, the United States cannot afford to diminish its reputation as a leader in this area of the law. If it did, it would jeopardize the safety of the men and women of our armed forces and the ability of the United States to demand compliance by other States who have signed the Geneva Conventions.

III. THE LAW OF ARMED CONFLICT AND PRISONERS OF WAR

A. *The Law of Armed Conflict*

International humanitarian law, also known as the law of armed conflict or law of war, is the body of rules, which, in wartime, limits the methods of warfare and protects people who are not or are no longer participating in hostilities. The fundamental purposes of the law of war are both humanitarian and functional in nature.⁵⁸ The humanitarian purposes include protecting combatants and noncombatants from unnecessary suffering, safeguarding the fundamental human rights of persons who fall into the hands of armed belligerents, and facilitating the restoration of the peace.⁵⁹ The law of war prohibits the intentional targeting of protected places and persons.⁶⁰ The functional purposes include preventing the deterioration of good order and discipline in the unit, maintaining the humanity of the military personnel involved in the conflict, and maintaining public support for the conflict.⁶¹ To further these ends, attacks may only be made against targets that are valid military objectives.⁶² "Legitimate military objectives" include those "objects that, by their nature, use and location, or purpose, make an effective contribution

⁵⁶ Senator John McCain, (R - Arizona), *Address to the American Red Cross "Promise of Humanity Conference,"* May 6, 1999, at http://216.239.41.104/search?q=cache:NFLhMMJZlw0J:mccain.senate.gov/index.cfm%3Ffuseaction%3DNewscenter.ViewPressRelease%26Content_id%3D820+%22stark+recognition+of+the+true+horrors%22&hl=en&ie=UTF-8

⁵⁷ See Howard Levie, *supra* note 13, at 107, 343, 365, and 367.

⁵⁸ Operational Law Handbook (2004), International and Operational Law Dep't, The Judge Advocate General's Legal Center and School, p. 12 (J. Berger, D. Grimes and E. Jensen, eds., 2004).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

to military action.”⁶³ The destruction, capture, or neutralization of a military objective is justified if it offers a “definite military advantage.”⁶⁴

Guidance and criteria exist regarding “objects” to determine whether they constitute military objectives. Military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁶⁵ To be sure, objects which if used for their intended purpose, such as schools or buildings housing non-combatants or refugees, would not be considered military objectives and are therefore considered off limits. However, in certain instances, if combatants convert objects like those mentioned above for military purposes, the objects then lose their protected status and become legitimate military objectives.

Examples of military objectives that by their use make an effective contribution to the military action and are therefore valid targets include an enemy headquarters located at a school, an enemy supply dump located in a residence, and a hotel that is used for billeting enemy troops.⁶⁶ Examples of enemy military objectives which by their purpose make an effective contribution to the military action and are therefore valid targets include civilian buses and trucks which are being transported to the front to move soldiers from point A to point B, and a factory which is producing ball bearings for the military.⁶⁷

B. *Who is a Prisoner of War?*

Common article 3 provides that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* [out of action] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . [and] wounded, sick and shipwrecked shall be collected and cared for.”⁶⁸ All wounded and sick in the hands of the enemy must be respected, protected, and afforded humane treatment.⁶⁹

In addition to humane treatment, certain forces *hors de combat* are entitled to added benefits of the Geneva Conventions if they are classified as EPWs. Article 4 of the GPW defines categories of

⁶³ Operational Law Handbook (2004), *supra* note 57 at 13. See also Dep’t of Army Field Manual 27-10, The Law of Land Warfare (18 July 1956), [hereinafter Field Manual] par. 40(c) (“Military objectives – *i.e.*, combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage – are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations.”)

⁶⁴ Operational Law Handbook (2004), *supra* note 57 at 13 (indicating that there must be a nexus between the object and a ‘definite’ advantage toward military operations for an attack to be allowable).

⁶⁵ AP I, *supra* note 21, art. 52(2).

⁶⁶ Operational Law Handbook (2004), *supra* note 57 at 12.

⁶⁷ *Id.*

⁶⁸ GWS, GWS-SEA, GPW, and GCC, *supra* note 21, Common art. 3(1) and (2)

⁶⁹ GWS-SEA, *supra* note 21, art. 12 and GWS, *supra* note 21, art. 12. See Field Manual, *supra* note 62, par. 208.

persons entitled to EPW status.⁷⁰ To qualify for EPW status, one must be a lawful combatant – a member of a regular armed force, or belong to forces of an unrecognized government, part of a levée en masse, or a member of a militia which meets the four required criteria of: a responsible chain of command; a recognizable, distinct, and visible insignia; open carriage of arms, and obedience to the laws and customs of armed conflict.⁷¹ Under international law, unlawful combatants such as criminals and terrorists do not qualify for EPW status.⁷² Nevertheless, common article 3 to the Geneva Conventions of

⁷⁰ GPW, *supra* note 21, art. 4.

⁷¹ GPW, art. 4. contains descriptions of the six categories of persons (lawful combatants) that qualify for EPW status if they have “fallen into the power of the enemy.” Members of the regular armed forces, or a militia or “volunteer corps forming part of” the armed forces, involved in an international conflict qualify for EPW status. GPW, *supra* note 21, art. 4A(1). Members of militias, volunteers, partisans, guerillas or resistance fighters not fighting in association with the regular armed forces in an international conflict may also obtain EPW status if they: (1) are being commanded by a person responsible for their subordinates; (2) have a fixed and distinctive insignia; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war. GPW, *supra* note 21, art. 4. Members of the regular armed forces who profess allegiance to an authority not recognized by the Detaining Power qualify for EPW status (*see* GPW, *supra* note 21, art. 4A(3)) as do persons who accompany the armed forces without actually being members thereof provided they received authorization from the armed forces which they accompany and also receive an identification card (*see* GPW, *supra* note 21, art. 4A(2)(a)-(d)). It is worth noting that with Coalition operations in OIF, a different standard may apply since 147 nations (including some of the Coalition partners) adhere to AP I’s criteria under article 44(3) which “would significantly diminish these requirements for irregulars by requiring them to carry their arms openly only ‘during each military engagement and during such time as they are visible to the enemy while engaged in a military deployment preceding the launching of an attack.’” Perhaps more than any other provision, this proposed change is the most militarily objectionable to the United States because of the increased risk to the civilian population within [which] such irregulars often attempt to hide.” Commander’s Handbook, *supra* note 24, para. 11.7, p.11-12, footnote 53. AP I only requires that combatants carry their arms openly in the attack, be commanded by a person responsible for the actions of the organization, comply with the laws of war and have an internal discipline system. AP I, *supra* note 21, arts. 43-44. Thus, any person who takes part in hostilities and falls into the power of an adverse party “shall be presumed to be a prisoner of war” and shall be protected by the GPW “if he claims such status on his behalf.” AP I, *supra* note 21, arts. 43-44. Such an individual retains EPW status until a competent tribunal determines otherwise. *See* GPW, *supra* note 21, art. 5. While the U.S. is not a party to AP I, some of the other Coalition forces participating in OIF have ratified AP I, this “legal” disagreement could potentially pose some difficulties.

⁷² U.S. military officials argue that unlawful combatants include those who “raised up, took arms, not carrying them in an open manner, not wearing uniforms; in other words, engaging in tactics and techniques that were not in accordance with the law of armed combat.” UNITED STATES DEP’T OF DEFENSE PRESS BRIEFING BY ARMY COL. JOHN DELLA JACONO, DEPUTY CHIEF OF STAFF FOR COALITION FORCES LAND COMPONENT COMMANDER (May 8, 2003) [hereinafter PRESS BRIEFING]. EPWs are afforded key benefits additional to receiving the rights and protections of the GPW, including that as EPWs they are no longer lawful targets. EPWs receive immunity for warlike belligerent acts done during an armed conflict but not for pre-conflict offenses or pre-capture offenses amounting to violations of the law of war. Terrorists, however, can be tried by local criminal law or under military jurisdiction by either a court-martial or military tribunal. U.S. policy is consistent with this principle. *See* PRESIDENT OF THE UNITED STATES MILITARY ORDER OF NOVEMBER 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 Fed. Reg. 57833 (Nov. 16, 2001). *See also* DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 2 (April 30, 2003) (providing guidance with respect to crimes that may be tried by U.S. military commissions). Terrorist acts committed during peacetime military operations can also be prosecuted under U.S. law. *See, e.g.*, 18 U.S.C. 2332 (murder of U.S. nationals), 18 U.S.C. 32 (destruction of aircraft), 18 U.S.C. 1203 (hostage taking), and 49 U.S.C. 46502 (aircraft piracy). The definition of “terrorism” is often quite controversial but the US Government generally defines it as “the calculated use of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.” *See* DoD DIR. 2000.12, “DoD AntiTerrorism/Force Protection (AT/FP) Program,” April 13, 1999. Terrorists are not lawful combatants under GPW, art. 4 since they do not meet the requirements necessary for combatant status: they do not wear uniforms or distinctive insignia, they do not carry arms openly, and the conduct of their operations violates not only U.S. federal law but the laws of war, particularly their efforts to target civilians. Thus, captured terrorists are not EPWs under the Geneva Conventions and are not accorded the protection from criminal prosecution that EPWs receive.

1949, which requires that noncombatants be treated in a humane manner, also applies to detained terrorists captured during an armed conflict.

EPWs may not be attacked.⁷³ This includes surrendered enemy personnel as well as shipwrecked personnel.⁷⁴ Further, EPWs must be transported from the combat zone as quickly as possible.⁷⁵ All wounded and sick personnel in the hands of the enemy must be respected and protected.⁷⁶ The law of war prohibits the willful denial of needed medical assistance to EPWs, and priority treatment, regardless of nationality, must be based on medical reasons.⁷⁷

C. United States Policy

The U.S. signed and later ratified the Geneva Conventions of 1949.⁷⁸ As such, the Geneva Conventions are not only a codification of customary international law but U.S. domestic law as well.⁷⁹ U.S. policy, which is in accordance with these laws, provides that “[a]ll persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release and repatriation.”⁸⁰

This is the case even if doubt exists as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW, article 4. Upon capture, prisoners are initially called “detainees” pending further determination as to whether they are an unlawful combatant fighting in violation of the international laws of war (*i.e.* criminals or terrorists), an innocent civilian, or a lawful combatant entitled to EPW status.⁸¹ The policy states “[a]ll persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is

⁷³ GWS, GWS-SEA, GPW, *supra* note 21, Common article 3, and GC IV, *supra* note 21; GWS-SEA, *supra* note 21, art. 12, GWS, *supra* note 21, art. 12, and GPW, *supra* note 21, art. 13. *See also* Commander’s Handbook, *supra* note 24, par. 11.6.

⁷⁴ Operational Law Handbook (2004), *supra* note 57, at 26-27. *See also* Commander’s Handbook *supra* note 24, par. 11.6.

⁷⁵ *Id.*

⁷⁶ *See* GWS-SEA, *supra* note 21, art. 12, and GWS, *supra* note 21, art. 12. *See also* Operational Law Handbook (2004), *supra* note 57. *See also* Field Manual, *supra* note 62, par. 208.

⁷⁷ GWS-SEA, *supra* note 21, art. 12, and GWS, *supra* note 21, art. 12.

⁷⁸ The Geneva Conventions apply in “international armed conflicts.” OIF is a conflict between the U.S. and Coalition partners and Iraq, and is, therefore, an international armed conflict. *See* GPW, *supra* note 21, art. 2.

⁷⁹ *See* Art. VI, Constitution of the United States.

⁸⁰ *See* AR 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” 1 October 1997, par. 1-5a. When the U.S. Navy captured the Iranian AJR mine-laying ship in 1988, the injured survivors were pulled from the water and they were treated as EPWs but were officially called “detainees.” The detainees received medical care, humanitarian treatment and were then turned over to a “neutral” third nation for repatriation to Iran. *See also* DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR (1992) 668-670 [hereinafter FINAL REPORT] for a discussion of processing EPWs and displaced civilians during the earlier conflict with Iraq.

⁸¹ *See also* Knut Dormann, *The Legal Situation of “Unlawful / Unprivileged Combatants,”* IRRIC March 2003, Vol.85, No.849.

determined by competent authority.”⁸² Tribunals established pursuant to article 5 of the GPW determine a detainee’s status when it is in question.⁸³ Thus, personnel who come under the custody and control of U.S. forces are initially accorded humane treatment equivalent to that of an EPW even before their status is determined.⁸⁴ Thereafter, their status and subsequent treatment based on that status will be determined via competent evidence by the Detaining Power and, if that status is in question, by an article 5 tribunal in compliance with the GPW.⁸⁵

Within the framework of the United States military, responsibility for EPW and detainee treatment falls to the U.S. Army.⁸⁶ The United States Department of Defense (DoD) policy provides that “persons captured or detained by U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical.”⁸⁷ DoD policy further states that “[d]etainees may be interviewed for intelligence collection purposes at facilities and installations operated by U.S. Army Military Police.”⁸⁸ U.S. practice generally provides for the screening and interrogation of detainees by the Army and other U.S. military and intelligence officials under the direction and control of Army authorities.⁸⁹ The GWOT has required a close nexus between military and intelligence assets.

⁸² DOD DIR. 2310.1, “DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees,” August 18, 1994 (providing that “U.S. military forces shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions”). [hereinafter DOD DIR. 2310.1] See also DOD DIR. 5100.77, “Law of War Program,” December 9, 1998; AR 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” 1 October 1997, par. 1-5a; GPW, *supra* note 21, art. 5.

⁸³ Pursuant to GPW, *supra* note 21, art. 5, the tribunal will determine (1) whether each detainee referred to that tribunal committed a belligerent act and if so (2) whether the detainee falls within one of the classes of persons entitled to EPW status under GPW, art. 4. If the tribunal finds that the detainee qualifies for EPW status, the detainee shall be delivered to the Provost Marshal for transfer to an EPW internment camp. If the detainee is not entitled to EPW status, the detainee shall be delivered to the custody of civil authorities or released from custody (as in the case of a civilian non-belligerent). See also PRESS BRIEFING, *supra* note 71 (discussing how upon capture, the Iraqi prisoner is immediately segregated from those already determined to be deserving of EPW status and is held pending an Article 5 Tribunal where a final decision is made whether these persons deserve EPW status or whether they are unlawful combatants, *i.e.*, criminals who may be held over for prosecution.). See also *Law of War Deskbook*, *supra* note 18, at 78-80.

⁸⁴ Note that in the Persian Gulf War, civilians who had not taken part in hostilities surrendered to Coalition forces “to receive food, water and lodging.” When tribunals determined that these individuals were innocent civilians, the detainees were transferred to refugee camps. FINAL REPORT, *supra* note 79, at 619.

⁸⁵ GPW, *supra* note 21, art. 5. Article 5 tribunals conducted by the U.S. military generally consist of three officers, one of whom is a judge advocate, reviewing the information gathered about a detainee in order to make a “status” determination. Interviews on file with authors. However, it should be noted that a major source of criticism of the United States has been its failure to conduct Article 5 tribunals for *all* detainees captured in Afghanistan and Iraq.

⁸⁶ The Secretary of the Army is the DoD Executive Agent for the administration of the DoD EPW Detainee Program and he shall act on behalf of the DoD in the administration of the EPW Detainee Program. See DOD DIR. 2310.1, “DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees,” August 18, 1994, par. 4.2. [hereinafter DOD DIR. 2310.1]. The Assistant Secretary of Defense for Command, Control, Communications, and Intelligence is required to ensure that the Director of the Defense Intelligence Agency, among other things, coordinates all intelligence and counterintelligence aspects of the DoD EPW Detainee Program with other DoD Components and Federal Departments and Agencies as necessary. See DOD DIR. 2310.1, *supra* par. 4.7.4.

⁸⁷ DOD DIR. 2310.1, *supra* note 86, par. 3.4.

⁸⁸ *Id.* par. 3.4.

⁸⁹ See PRESS BRIEFING, *supra* note 72.

Accordingly, the issues being discussed within this article are germane not only to the U.S. Navy but to all combat commanders who capture, receive, or hold detainees. Kuwait's refusal to allow Iraqi prisoners of war inside their borders complicated matters.⁹⁰ As a result, wounded Iraqis were flown to U.S. and Coalition hospital ships hundreds of miles offshore in the Gulf.⁹¹

IV. ENEMY PRISONERS OF WAR ONBOARD NAVAL VESSELS AT SEA

A. Introduction

During OIF, a U.S. naval vessel in the Persian Gulf served as a temporary detention facility for EPWs. EPW internment camps in Iraq were not yet ready for prisoners.⁹² Additionally, Kuwait refused to allow Coalition forces to build EPW camps in Kuwait and they would not allow Coalition forces to bring EPWs into Kuwait.⁹³ The cavernous hold of USS DUBUQUE (LPD-8), an amphibious assault ship, was converted into a detention facility where prisoners were held and interrogated as EPWs until camps were operational on shore.⁹⁴

Similarly, early in operations in Afghanistan, the White House reported that John Walker Lindh was captured as a battlefield detainee and was being held in military custody on a United States ship in the Arabian Sea under the Geneva Conventions as a prisoner of war.⁹⁵ In November 2001 Mr. Lindh was identified among a number of "captured Taliban fighters . . . after Northern Alliance forces quelled a prison uprising at the Qala-i-Janghi fortress, near Mazar-e Sharif in northern Afghanistan. He was taken into custody by U.S. forces and flown to the Marine assault ship (sic) USS PELELIU [LHA-5], that at the time was located in the Indian Ocean off the coast of Pakistan."⁹⁶ A related news account on December 22, 2001 reported that:

American forces and their Afghan allies are holding about 7,000 Taliban and al-Qaeda prisoners in various jails, including fortresses, a desert compound, an aircraft hangar and a warship. The FBI and intelligence officers are screening the inmates to sift foot soldiers from leaders who might be prosecuted in the US on terrorism charges. The

⁹⁰ *Mixed Emotions as Medics Treat Enemy - WAR IN IRAQ - ON THE FRONT*, THE DAILY TELEGRAPH (Sydney, Australia), March 31, 2003, p. 6. See also James Harris, *My Two Wars*, N.Y. TIMES, April 20, 2003, section 4, p. 9 (describing an incident by a Navy doctor onboard a U.S. military helicopter that picked up two wounded Iraqi soldiers, but had to bring them to a Navy hospital ship in the Gulf since Iraq had no adequate facilities and Kuwait would not allow Iraqi prisoners of war to enter the country.).

⁹¹ *Id.*

⁹² Interviews on file with authors.

⁹³ Interviews on file with authors.

⁹⁴ Interviews on file with authors. As soon as camps became operational EPWs readily flowed from sea to shore.

⁹⁵ Eric Schmitt, *U.S. Captures Senior Al Qaeda Trainer*, N.Y. TIMES, January 6, 2002, at A1.

⁹⁶ See Rory Carrol, *War in Afghanistan: 7,000 Prisoners of War held as America Sorts Leaders from Foot Soldiers*, THE GUARDIAN, December 22, 2001, at <http://216.239.51.104/search?q=cache:31czGBchLsJ:www.guardian.co.uk/afghanistan/story/0,1284,623946,00.html+USS+Peleliu+rory+carrol+guardian&hl=en&ie=UTF-8>.

USS PELELIU, a warship in the Indian Ocean, has eight prisoners, including the American Taliban member John Walker Lindh, 20, and an Australian, David Hicks, 26, who converted to Islam and went to Afghanistan to fight.⁹⁷

Other news accounts during operations in Afghanistan widely reported that yet other Taliban prisoners were held aboard the amphibious assault ship USS BATAAN (LHD 5) in the Arabian Sea.⁹⁸

The question raised in this section of the article is whether the U.S. practice of detaining EPWs aboard ships violates article 22 of the GPW – a provision which expressly prohibits the “internment” of enemy prisoners of war other than on premises located on land.⁹⁹ The question focuses on those personnel captured on land, as opposed to those personnel who are captured at sea and brought on board an enemy warship who are also regarded as prisoners of war.¹⁰⁰ The length of time that a captor may hold such prisoners at sea is dependent upon the captor’s discretion under the circumstances.¹⁰¹ However, such detention at sea is to be employed merely as a “temporary measure pending transfer on land.”¹⁰²

Relevant questions remain. Does international law allow an interpretation that distinguishes between “internment” and the “temporary detention” of EPWs if for some reason a ship provides the only or the best available accommodation and protection? Is existing international humanitarian law flexible enough to allow for detention centers at sea on a temporary basis until better accommodation can be found on land?

B. The Historical Impetus for Requiring Internment on Land

The 1949 Geneva Diplomatic Conference, which brought the GPW to final form, could not have been any clearer in its requirement that internment facilities for EPWs be situated on land.¹⁰³ Article 22 provides in part:

⁹⁷ *Id.*

⁹⁸ In Afghanistan, during OEF, the United States was confronted with the difficult challenge of screening and interrogating detainees in the conflict in order to distinguish between lawful combatants entitled to GPW protection, terrorists not entitled to such protection, persons whom the U.S. wanted to prosecute or detain, and those who may have useful intelligence information concerning the whereabouts of Taliban or al-Qaeda leaders or knowledge about the inner workings of al-Qaeda. In the early phases of the operation, the United States took custody of several hundred detainees held by Afghan forces and transferred them to its own detention facilities: a U.S. military detention facility located outside Kandahar and detention facilities in off-shore Navy ships such as the USS Peleliu. *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, HUMAN RIGHTS WATCH PRESS BACKGROUNDER, January 29, 2002; see also Eric Schmitt and James Dao, *U.S. is Building up its Military Bases in Afghan Region*, N.Y. TIMES, January 9, 2002, at <http://query.nytimes.com/gst/abstract.html?res=F40B11F6395D0C7A8CDDA80894DA404482>.

⁹⁹ See GPW, *supra* note 21, art. 22(1).

¹⁰⁰ GWS-SEA, *supra* note 21, art. 16.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See REPORT ON ACTIVITIES, *supra* note 9; Howard Levie, *supra* note 13, at 121 and n.84; see also 1 THE CODE OF INTERNATIONAL ARMED CONFLICT 318.

Prisoners of war may be interned *only in premises located on land* and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.¹⁰⁴

This article of the Geneva Conventions was most likely made explicit in GPW in response to the use of ships to intern prisoners of war during World War II.¹⁰⁵ The Japanese reportedly transferred thousands of American POWs in twenty-three known “Hell Ships” to work as slave labor in the Philippines, Japan, China, Thailand, and Korea.¹⁰⁶ POW survivors describe being transported on Japanese freighters under appalling conditions.¹⁰⁷ One account recalls extremes of prisoners being battered under ships’ holds in tropical heat or packed together on the decks exposed to heavy tropical storms.¹⁰⁸ During transit on these ships, prisoners were given grossly inadequate nutrition. Often times the same bucket that was lowered into the hold with very little food and foul water was also to be used to remove urine and feces from the hold. Diarrhea and dysentery spread among the prisoners who were crammed below decks and often forced to live in close proximity to the areas used as latrines. Survivors from these Hell Ships commonly report that filth, lice, and vermin infested the areas where prisoners were forced to live, sometimes for journeys that lasted a month or longer.¹⁰⁹

In addition to harsh conditions aboard ship during the Second World War, there were several tragic incidents of Japanese vessels carrying Allied prisoners being torpedoed by American submarines.¹¹⁰ According to other information that emerged at the end of the war, at least 15,000 POWs and civilian internees were killed or drowned during their transport by sea as a result of torpedoing of

¹⁰⁴ See GPW, *supra* note 21, art. 22 (emphasis added).

¹⁰⁵ The practice had historically been used, especially during the Napoleonic Wars. 1 Report of the ICRC on its Activities During the Second World War at p. 248 (September 1, 1939 – June 30, 1947) (1948); Howard Levie, *supra* note 13, at 121 and n.84; 1 The Code of International Armed Conflict 318. Thousands of Americans died on the Jersey and similar vessels during the Revolutionary War. “American Revolution: England’s Last Chance” The History Channel found at historychannel.com. The U.S. Congressional Research Service reports that during World War II some 130,000 U.S. troops were captured and became EPWs. 7 CRS ISSUE BRIEF IB92101, EPW AND MIAS: STATUS AND ACCOUNTING ISSUES. Germany held almost 94,000 U.S. POWs, and Japan held over 27,000. CRS REPORT FOR CONGRESS, U.S. PRISONER OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION BY JAPAN (updated December 17, 2002) U.S. CONGRESSIONAL RESEARCH SERVICE [hereinafter REPORT FOR CONGRESS]; see also STENGER, CHARLES A. AMERICAN PRISONERS OF WAR IN WWI, WWII, KOREA, VIETNAM, PERSIAN GULF, SOMALIA, BOSNIA, AND KOSOVO. STATISTICAL DATA CONCERNING NUMBERS CAPTURED, REPATRIATED, AND STILL ALIVE AS OF JANUARY 1, 2000.

¹⁰⁶ *Law of War Deskbook*, *supra* note 18, at ch.5, p. 4.

¹⁰⁷ For purposes of this article American and allied prisoners of war are abbreviated as POWs vice the common usage of EPWs for “enemy prisoners of war.” The main purpose for this distinction within this article is the desire of the authors to not associate the word “enemy” with our US and allied service members from World War II or any other conflict.

¹⁰⁸ A.J. BARKER, PRISONERS OF WAR (Universe Books, NY, 1975)

¹⁰⁹ A.J. BARKER, *supra* note 108. See also Press Release, U.S. CONGRESS, HATCH GETS SENATE TO AGREE: U.S. SHOULD INCREASE EFFORTS FOR JUSTICE FOR BATAAN DEATH MARCH VICTIMS (Nov. 1, 2000), available at 2000 WL 7981014.

¹¹⁰ U.S. CONGRESSIONAL RESEARCH SERVICE Report for Congress, U.S. Prisoner of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan (updated December 17, 2002). Howard Levie, International Law Studies, Prisoners of War in International Armed Conflict 121 & n.84 (Blue Book Series, Naval War College, 1977), 189; Morison, History of United States Naval Operations in World War II, 400-01.

bombing of ships carrying POWs.¹¹¹ U.S. POWs were reportedly subject to attack when their unmarked prison ships, in violation of the requirement to mark prisoner of war locations under international law, came under attack by unwitting U.S. submariners.¹¹² According to one source, the greatest loss of life apparently occurred when the *Arisan Maru*, holding 1,800 U.S. POWs, was torpedoed by the USS SNOOK, killing all but five POWs.¹¹³ Another attack with major U.S. and Allied POW losses was the torpedo attack by the submarine USS PADDLE on the *Shinyo Maru*, which reportedly resulted in the deaths of all but eighty-two of the 750 U.S. POWs.¹¹⁴ Ironically, it was another such attack and subsequent rescue of POW survivors by the USS PAMPANITO that resulted in Allied loss of life but also provided critical information regarding the previously unknown Japanese Burma-Siam Railway.¹¹⁵

C. The Legality of Temporarily Detaining EPWs Onboard Ship

1. Army Regulation 190-8 (AR 190-8)¹¹⁶

U.S. policy expressly incorporates the requirement that EPWs be interned only on land.¹¹⁷ It may then seem somewhat contradictory that the placement of EPWs on board U.S. warships is authorized by official U.S. policy and regulations. Army Regulation 190-8 expressly acknowledges the requirement that EPWs must be “interned” only on land while also expressly authorizing the “detention” of EPWs on board naval vessels.

AR 190-8 generally permits detention of enemy prisoners of war, civilian internees, and detained persons on naval vessels in three circumstances:

1. When captured at sea and pending transfer to a shore facility or another vessel for evacuation to a shore facility;¹¹⁸

¹¹¹ *Id.* See also REPORT ON ACTIVITIES, *supra* note 9, at 319-320.

¹¹² REPORT FOR CONGRESS, *supra* note 104; Striking Back At Japan, Inc. TIME Asia, August 16, 1999, at <http://www.time.com/time/asia/asia/magazine/1999/990816/payback1.html>. Thousands Died in Hell Ships. Associated Press, Sept. 8, 2000, story posted on the St. Augustine Record’s Web site at http://staugustine.com/stories/090800/nat_20000908.029.shtml.

¹¹³ REPORT FOR CONGRESS, *supra* note 104; See also the listing for the USS SNOOK, confirming her sinking of the Arisan Maru on October 24, 1944, in the Dictionary of American Naval Fighting Ships, v. VI, p. 540, (Washington, Naval History Division, Department of the Navy, 1976).

¹¹⁴ REPORT FOR CONGRESS, *supra* note 103; See listing for USS PADDLE’s sinking of the Shinyo Maru on September 7, 1944, in Dictionary of American Naval Fighting Ships, v. V, p. 198.

¹¹⁵ Gregory F. Michno, *USS Pampanito: Killer Angel*, University of Oklahoma Press, May 2001. Several US submarines, including the USS PAMPANITO, the USS GROWLER, and the USS SEALION discovered a Japanese Navy convoy. On September 12, 1944, they fired upon the convoy and sank or disabled most of the ships. On September 15, 1944, the USS Pampanito went back to investigate and found Allied POWs in the water tied to makeshift rafts that were being transported to prison camps in Japan. PAMPANITO rescued 73 English and Australian POWs who were used as slave labor on the Burma-Siam Railway of the “Bridge over the River Kwai” fame. *Id.* During the same month the HMS Tradewind torpedoed the Japanese warship Junyo Maru while they were carrying 2300 Allied POWs and 4200 Japanese laborers. *Id.*

¹¹⁶ AR 190-8, *supra* note 51, par. 1-5b. For an excellent article on religious personnel as “Retained Personnel” see Jonathan Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 Naval L. Rev. 1 (2002).

¹¹⁷ *Id.*

¹¹⁸ See *Id.* at par. 3-2.

2. When being transported between land based internment facilities; and¹¹⁹
3. When it would appreciably improve their safety or health prospects.¹²⁰

2. *The Second Drafters' Conference and Historical Commentaries*

Although much has been written on the subject of the GPW, there is a surprising dearth of historical commentary on the drafting of article 22. The Second Committee volume references article 22 on at least six occasions, but none of the references provide any substantive discussion of either the reason for requiring internment on land or whether the article provides for a distinction between “internment” and “temporary detention” of EPW aboard ship.¹²¹ Similarly, the major commentaries provide little background on article 22. The ICRC Pictet Commentary provides the only substantive historical clarification regarding the scope and meaning of article 22.¹²² The Commentary states, “[t]he place of internment of prisoners of war may be either in an urban area or in the country, but it must be

¹¹⁹ See *Id.* at par. 3-2.

¹²⁰ See *Id.* AR 190-8 is applicable to all U.S. military services establishing “policies and planning guidance for the treatment, care, authority, legal status, and administrative procedures for enemy prisoners of war....” It provides U.S. military forces authorization to use naval vessels as at-sea detention facilities. The regulation expressly acknowledges the requirement that EPWs must be “interned” only on land; however, it expressly authorizes the “detention” of EPWs on board naval vessels for a limited duration. On the issue of internment, AR 190-8 closely tracks the language of GPW Article 22: “3-2. EPW internment facilities. a. The operation of all EPW internment facilities is governed by the provisions of the Geneva Conventions. b. The theater commander remains responsible for the location of EPW facilities. *EPW/RP[Retained Personnel] may be interned only in premises located on land* and affording proper health and hygiene standards. Except in extreme circumstances, in the best interests of the individual, EPW/RP will not be interned in correctional facilities housing military or civilian prisoners” AR 190-8 assumes, however, an important distinction between “internment” and the right to “temporarily detain” EPWs. While the regulation requires that internment facilities be located on land, the regulation specifically permits detention of prisoners of war, civilian internees, and detained persons on naval vessels as follows: “3-2. EPW internment facilities... d. Special policy pertaining to the temporary detention of EPW... aboard United States Naval Vessels:

- (1) Detention of EPW/RP on board naval vessels will be limited.
- (2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.
- (3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.
- (4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.
- (5) Use of immobilized vessels for temporary holding of EPW/ RP is not authorized without SECDEF approval.

¹²¹ 2A Final Record of the Geneva Conference of 1949, Minutes of the Plenary Meetings (1949), pp. 253, 347, 353-54, 399, 564, and 581.

¹²² ICRC Commentary to GPW, *supra* note 15, at 182.

located on land. The use of boats, rafts or “pontoons” is therefore absolutely forbidden.”¹²³

3. ICRC Report on its Activities During World War II

In 1948, the ICRC presented its Report of the ICRC on its Activities During the Second World War (September 1, 1939 – June 30, 1947).¹²⁴ The only reference to internment on ships is in its discussion of article 10 of the 1929 Convention, where the Report makes passing reference to the fact that during the Second World War, the ICRC was “obliged . . . to intervene to prevent use of ships for internment of PW.”¹²⁵

While the ICRC Report does not provide express insight into the policy motivation or scope of article 22, it does make clear that the ICRC’s concern regarding the use of ships as internment facilities had to do mainly with concerns for hygiene in camps and protections of prisoners against bombardment.¹²⁶ The Report discusses in some detail the failure of the 1929 Conventions to keep EPWs safe when being transferred from one place to another by sea. On this point, it is worth quoting the Report at some length:

During 1941, the extension of the war zones, the widely dispersed theatres of war and the mobility of the armies led the belligerents, for various reasons, to set up extensive transfers of PW, usually by sea. New factors arose during these operations which were likely to make these transfers become dangerous for PW. Not only had the use of modern weapons, such as the submarine and aeroplane, increased greatly since the last war, and their field of action widened to such vast dimensions; the special methods of combat which their use involves made it, for instance, impossible for belligerents to exercise their right of search in ships, to identify them precisely or to recognize the nature of their cargo. These conditions increased the likelihood of blunders occurring, e.g. the torpedoing or bombing of ships carrying PW.¹²⁷

On February 24, 1942 the ICRC expressed its concerns related to the dangers of transporting EPWs by sea to the “the States concerned.”¹²⁸ The ICRC found:

¹²³ *Id.* at 182. Pictet also states that “Internment of prisoners of war in penitentiaries is in principle prohibited because of the painful psychological impressions which such places might create for prisoners of war.... As a minimum requirement, the conditions of hygiene and healthfulness to be afforded by places of internment of prisoners of war should be at least equal to those required by the public authorities for the civilian population.” *Id.* p. 182-183.

¹²⁴ See REPORT ON ACTIVITIES, *supra* note 9, at 5.

¹²⁵ See *Id.* at 248.

¹²⁶ During the Second World War, articles 9 and 10 of the 1929 Convention governed the location and installation of EPW camps. Under the 1929 Convention, there is no prohibition requiring that internment facilities be located on land. As to location, article 9 only provides that persons “may be interned in a town, fortress, or other place” and “they may also be interned in fenced camps.” See *Id.* at 247. Article 10 lays down that the choice and equipment of places of detention must ensure that the premises are free from damp, adequately lighted, and also that precautions are taken against the danger of fire. *Id.*

¹²⁷ *Id.* at 319.

¹²⁸ *Id.*

[c]learly, the 1929 Convention should be supplemented by more explicit and more precise provisions, in relation to the safety of PW during their transport by sea. The only principles governing such protection are too general, though quite categorical, and they do not apply with sufficient accuracy to this matter. The Convention, in articles 7 and 9, provides in particular that “PW shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger”; that “PW shall not be unnecessarily exposed to danger, whilst awaiting evacuation from a fighting zone” (art. 7); and that no PW may “at any time be sent to an area where he would be exposed to the fire of the fighting zone.” (art. 9).... On the ground of these various articles, PWs lodged frequent complaints with the ICRC concerning the fact that the waters which they had to cross had been declared war zones by the belligerents, a fact which might bring about an attack and the destruction of any vessel discovered in them.¹²⁹

Based on the above concerns, in February 1942 the ICRC made recommendations to codify prohibitions regarding the use of ships to transfer EPWs. These recommendations included requiring the use of adequate shipboard safety measures, designating ships with EPWs on board with special markings, and prohibiting ships being used for prisoner transfers unless absolutely essential. The ICRC’s proposals were rejected by the Contracting Parties to the 1949 Convention. “[C]ertain Powers considered that they would not be called to send PW by sea, or declared that they left that to the care of their allies.” Others thought that such restrictions, in particular the marking of ships, would be subject to abuse.¹³⁰

What is clear from the above excerpts is that what concerned the ICRC most about the transport of prisoners by sea was the appalling conditions of confinement aboard the ships and the dangers of bombardment and sinking to which the ships were exposed during transit. The Report, like the commentaries, however, does not provide definitive insight into the legality of the use of warships or hospital ships as temporary detention centers as has occurred during recent conflicts.

4. *State Practice*

The United States’ use of vessels as detention facilities follows the precedent set by the United Kingdom and Argentina in 1982 when, during the Falklands War (or the Malvinas Conflict), thousands of Argentines were taken prisoner and placed aboard British warships prior to repatriation.¹³¹ Use of

¹²⁹ *Id.*

¹³⁰ *Id.* at 320-21.

¹³¹ The dispute between Argentina and Britain regarding possession of the Falkland Islands dates back to the Argentine claim over the islands starting in 1820 and settlement of the islands in 1826. Britain never accepted Argentina’s claim over the islands and began occupying the islands in 1833. This tension existed for many years, and the Falklands War erupted in April 1982 when Argentina invaded and took control of the islands. In 1980, the barren islands were home to a mere 1,813 inhabitants as stated by the census for that year. During the war, the British captured over 10,000 Argentine prisoners of war. Argentina suffered 655 casualties during the war, and Britain lost 236. Max Hastings and Simon Jenkins, *The Battle for the Falklands* (Norton Books) (1991); see also Martin Middlebrook, *Task Force: The Falklands War* 247, 381, and 385 (Penguin United Kingdom) (1982).

ships as detention facilities became necessary near the end of the conflict as nearly “13,000 Argentine soldiers surrendered, winter was fast approaching, and the tent shelters the British had sent were lost in the sinking of the *ATLANTIC CONVEYOR*.”¹³² The United Kingdom and Argentina orally agreed to create a “Red Cross Box” on the high seas located to the north of the Falklands/Malvinas Islands.¹³³ This informal agreement facilitated the helicopter transfers of wounded prisoners of war from hospital ship to hospital ship within the “Red Cross Box” while enabling the hospital ships to stay in a fixed position in a neutral zone.¹³⁴ While the actions of the U.K. and Argentina may be indicative of evolving and prior state practice there is a key distinction between the Falklands and OIF. In the Falklands the two countries – the U.K. and Argentina – mutually agreed to the practice of detaining prisoners on vessels, whereas there was no such undertaking between the belligerents to OIF in that the U.S. had no such agreement with Iraq.

Such state practice that has at its core the humanitarian treatment of prisoners of war is consistent with the fundamental tenets of the law of armed conflict. Therefore no “acts must be undertaken in this zone that would undermine the humanitarian action being undertaken” such as “using the area as a sanctuary for submarines.”¹³⁵

5. *The ICRC’s Contemporary Training Materials*

Some of the more compelling support for the approval of temporary detentions of EPWs aboard naval ships comes from a series of ICRC publications designed for such purposes as training, quick reference, and as a “model manual” for countries to adopt.

In its training materials, slides issued by the ICRC advising military commanders on the handling of captured combatants and other detainees during time of war, the Unit for Relations with Armed and Security Forces of the International Committee of the Red Cross emphasizes that the law requires EPWs to be held on premises located on land.¹³⁶ Furthermore, except in particular cases which

¹³² MARTIN MIDDLEBROOK, *TASK FORCE: THE FALKLANDS WAR* 247, 381, and 385 (Penguin United Kingdom, 1982).

¹³³ *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA EXPLANATION*, [hereinafter *SAN REMO MANUAL*], p. 159-160 (Louise Doswald-Beck ed., 1994). *San Remo Manual Part VI: Protected Persons, Medical Transports and Medical Aircraft*, Paragraph 160 states: “The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.”

¹³⁴ Captain Arthur M. Smith, Medical Corps, U.S. Naval Reserve, Retired, “Care Delayed Is Care Denied! Casualty Handling in Littoral Operations,” *Naval War College Review*, Volume LII, Number 4, Autumn 1999 online at <http://www.nwc.navy.mil/press/Review/1999/autumn/art6-a99.htm>. Footnote 10 states that the Red Cross Box “seems not to have been defined in precise geometric terms; it has also been described as having a ‘diameter of 25 miles’” (P. Eberlin, “The Identification of Medical Aircraft in periods of Armed Conflict,” *International Review of the Red Cross*, July–August and November–December 1982). See also R. T. Jolly, “Ajax Bay,” *Journal of the Royal Naval Medical Service*, vol. 63, 1983, pp. 35–9; Smith, “Safeguarding the Hospital Ships”; and Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict, Falkland-Malvinas Islands 1982: International Humanitarian Law and Humanitarian Action* (Geneva: International Committee of the Red Cross, 1984) sec. 3.1.3, p. 26.

¹³⁵ *SAN REMO MANUAL*, at 160.

¹³⁶ “THE LAW OF ARMED CONFLICT - LESSON 7 - LOGISTICS AND REAR AREAS,” [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW7_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW7_final.pdf) [hereinafter *LESSON 7*]

are justified by the interests of the prisoners themselves, they should not be interned in civilian-type jails or penitentiaries.¹³⁷ In support of the United States' position, however, the ICRC materials state that "[s]taff officers should interpret this rule sensibly."¹³⁸ The ICRC also states that "[t]he key criteria are the interests of the EPW and humane treatment. For example... if for some reason a ship provides the only or the best available accommodation and protection, then the law is flexible enough to allow for its use on a temporary basis until better accommodation can be found."¹³⁹ In support of this flexible approach, the ICRC specifically endorses as appropriate the British use of ships to hold EPWs during the Falklands conflict until the EPWs could be transferred to land and repatriated.¹⁴⁰

The issue of EPWs on board ships at sea is raised in another ICRC publication entitled, "Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces."¹⁴¹ Although the Manual is "not a legal textbook" it is designed as a resource for commanders and instructors as well as a "quick reference for the legal advisor."¹⁴² The ICRC states that "[t]he Manual can be adopted by interested countries as it stands," or they may modify it if they wish.¹⁴³ This "model manual" states that "[t]he reference to ships and prisons should be interpreted sensibly. If ships provide the best available accommodation and protection from the climate, they may be used on a temporary basis until a permanent solution can be found."¹⁴⁴ A third publication – the ICRC's "Handbook on the Law of War for Armed Forces" by Frederic de Mulinen – has a "double purpose, being intended for use as reference-book in international and national courses on the law of war [and] for use as a code of conduct within armed forces."¹⁴⁵ This "Handbook" states that "[p]risoner of war camps shall be located on land, except where there are better temporary conditions elsewhere (e.g. advanced camp in heated ship rather than open tents on land in an unusually cold climate)."¹⁴⁶

While there may be a tendency to dismiss the importance of the ICRC's training materials as a source of international law, Howard Levie, the internationally recognized and esteemed professor of international law and the former holder of the Stockton Chair at the United States Naval War College, underscores the important role the ICRC plays in interpreting the 1949 Conventions. Levie writes: "[t]he International Committee of the Red Cross . . . may well be considered to be both the midwife

¹³⁷ See GPW, *supra* note 21, arts. 21 and 22.

¹³⁸ LESSON 7, *supra* note 135.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces. International Committee of the Red Cross, Geneva, 1999. [hereinafter Fight it Right]

¹⁴² *Id.* at 3.

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.* at 100.

¹⁴⁵ FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES. INTERNATIONAL COMMITTEE OF THE RED CROSS. GENEVA, 1987., p. xvi. To be fair to the ICRC they do post a "NOTICE" on the inside cover stating that, "The Handbook does not engage the responsibility of the ICRC." With that said, the author was in charge of teaching the law of war to armed forces at the ICRC as well as at the International Institute of Humanitarian Law and for the International Committee of Military Medicine and Pharmacy.

¹⁴⁶ *Id.* at 151.

and the guardian of the 1949 Conventions.”¹⁴⁷ The ICRC has existed since 1864, and since that time it has been the motivating force behind the series of humanitarian “Geneva” Conventions. Its status and activities in wartime are officially recognized and formalized in the 1949 Geneva Conventions.¹⁴⁸ Although the ICRC has historically insisted that “it cannot interpret those Conventions and that such responsibility resides in the Contracting Powers, there are few ICRC publications which do not discuss and interpret some facet of the Conventions.”¹⁴⁹ Accordingly, the ICRC is generally recognized as the premier interpreter, or voice, in the realm of International Humanitarian Law.

6. *Howard Levie – “Prisoners of War in International Armed Conflict”*¹⁵⁰

In 1976 Howard Levie, under the auspices of the United States Naval War College, published “Prisoners of War in International Armed Conflict” as part of its “Blue Book” series.¹⁵¹ Although Levie’s work does not contain any significant analysis of article 22, he does briefly address the GPW’s requirements about the location of prisoner of war camps. On the matter of the location of prisoner of war camps, Levie notes that the Geneva Convention provides that prisoners must be quickly moved from the combat zone.¹⁵² Further, he cites article 22, which delineates the requirements and prohibitions governing the selection of EPW sites: “[t]hey must be located on land; they must afford every guarantee of hygiene and healthfulness; they must not, except in unusual circumstances, be located in a penitentiary; they must not be in unhealthful areas, or where the climate is injurious for them.”¹⁵³

As to the specific requirement that the prisoners be located on land, Levie observes: “[t]his was formerly of more importance than it is now. During the Napoleonic Wars, for example, ship hulls were the usual place for internment for prisoners of war. Nevertheless, the problem did arise again during World War II. The ICRC during World War II was obliged ‘to intervene to prevent use of ships for internment of PWs.’”¹⁵⁴

7. *Evacuation of EPWs to Safety*

In accordance with the GPW, EPWs must be evacuated to safety as soon as possible after capture and they may not be held near military targets.¹⁵⁵ Article 19 of the GPW provides that EPWs “shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger [and] only those enemy prisoners of war who, owing to

¹⁴⁷ Howard Levie, *supra* note 13, at 121 and n.84

¹⁴⁸ *Id.* at 1

¹⁴⁹ *Id.* at v-viii

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Howard Levie, *supra* note 13, at 121. *See also* GPW, *supra* note 21, arts. 19 and 23.

¹⁵³ *Id.*

¹⁵⁴ Lewis, Napoleon, 59-60. *See* REPORT ON ACTIVITIES, *supra* note 9.

¹⁵⁵ *See* GPW, *supra* note 21, arts. 19-20, 23. *See also* Dep’t of Army, Field Manual 5-104, “Medical Treatment and Prisoner Detainment Facilities,” (November, 1986).

wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.”¹⁵⁶ U.S. policy on the subject mirrors this article almost verbatim. It states that the “capturing unit may keep prisoners in the combat zone in cases where, due to wounds or sickness, prompt evacuation would be more dangerous to their survival than retention in the combat zone.”¹⁵⁷

Likewise, while awaiting evacuation from a fighting zone, EPWs must not be unnecessarily exposed to danger.¹⁵⁸ In accordance with article 20 of the GPW, evacuation must be effected humanely and under conditions similar to those used to evacuate the capturing force.¹⁵⁹ Article 20 is intended to prevent the recurrence of the prisoners of war experience during the Second World War, “when the most flagrant instances of ill-treatment of prisoners occurred during evacuation, both immediately after capture and when prisoners of war were transferred from one camp to another.”¹⁶⁰ The seminal issue under article 20 is the concept of humane treatment, which is briefly defined in article 13 of the GPW: “evacuation must not endanger the life or health of prisoners of war.”¹⁶¹ The second paragraph of article 20 also emphasizes the safety of prisoners of war and requires the Detaining Power to take “all suitable precautions.”¹⁶² Where the evacuation process is such that stops must be made, the last paragraph of article 20 contemplates that such stops will be made at “transit camps” and directs that EPWs be held in such camps for as brief a period as possible.¹⁶³

Howard Levie conducts an extensive discussion of GPW guidelines on the evacuation of EPWs from the combat zone and the use of transit camps when it is not possible to immediately evacuate prisoners of war from the combat zone.¹⁶⁴ AR 190-8 permits detention of EPWs aboard ships, but it arguably does so only within the constructs of the first sentence of article 20, which requires that Detaining Powers take appropriate precautions to ensure EPWs safety during evacuation, and article 20’s second sentence, which requires that if EPWs must pass through transit camps during evacuation their stay in such camps shall be as brief as possible.¹⁶⁵

Each of the circumstances in AR 190-8 allowing for the detention of EPW aboard ships is arguably consistent with and perhaps fashioned after the provisions of article 20. Under AR 190-8 military commanders wishing to use ships as detention centers must justify their use of the ship under one of several criteria. Under the regulation “EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to

¹⁵⁶ See *Id.* art. 19.

¹⁵⁷ See AR 190-8, *supra* note 52, par. 2-1a.(1)(e).

¹⁵⁸ See GPW, *supra* note 21, art. 19

¹⁵⁹ See *Id.* art. 20

¹⁶⁰ ICRC Commentary to GPW, *supra* note 15, at 173.

¹⁶¹ *Id.* at 174.

¹⁶² GPW, *supra* note 7, art. 20. See also ICRC Commentary to GPW, *supra* note 15, at 174-175.

¹⁶³ ICRC Commentary to GPW, *supra* note 15, at 182; Howard Levie, *supra* note 13, at 103.

¹⁶⁴ Howard Levie, *supra* note 13 at 98-104.

¹⁶⁵ See GPW, *supra* note 7, at art. 20

another vessel for transfer to a shore facility.”¹⁶⁶ Alternatively “EPW may be temporarily held aboard naval vessels while being transported between land facilities,”¹⁶⁷ or EPWs may be “treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.”¹⁶⁸ If these exigencies are met, then the second sentence of article 20 permits holding EPWs “on vessels temporarily, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.”¹⁶⁹

Wounded Iraqi EPWs and detainees arguably would receive better medical care and be safer on board U.S. ships (either combatants or hospital ships) than they would be on land. For example, U.S. troops came under fire from Iraqi missiles as they were erecting detention facilities at Umm Qasr.¹⁷⁰ The facility (known as “Camp Freddie”) faced attack from rocket-propelled grenades or sporadic rifle fire nearly every day.¹⁷¹ The Iraqi military under Saddam Hussein had a long history of attacking unarmed civilians (his use of indiscriminate SCUD missiles is well documented) and other persons recognized as protected by the Geneva Convention. Furthermore, Saddam Hussein stored weapons and armaments in protected places such as schools and hospitals in an attempt to discourage opposing forces from attacking and destroying the weaponry.¹⁷² Historically, Saddam Hussein had demonstrated his unwillingness to adhere to the laws of war, and therefore, U.S. troops along with the Iraqi EPWs and detainees at Umm Qasr faced more attacks despite the protection afforded EPW internment camps under the GPW.¹⁷³ As the Detaining Power the U.S. must ensure the safety of detainees in its custody.¹⁷⁴ Arguably, in this particular situation, EPWs would be safer onboard US ships at sea than at Umm Qasr or any other place

¹⁶⁶ See AR 190-8, *supra* note 52, par. 1-5b.

¹⁶⁷ *Id.* par. 2-1b(3).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* par. 2-1b(4).

¹⁷⁰ Laurie Goering, *POW Facility draws flocks of civilians; Scared Iraqi army deserters, frantic families arrive at camp*, CHICAGO TRIBUNE, April 3, 2003, p. 5.

¹⁷¹ *Id.*

¹⁷² Ron Martz, *WAR IN THE GULF: ON THE FRONT LINES: IRAQI RESISTANCE: Scattered remnants fight back*, THE ATLANTA JOURNAL CONSTITUTION, April 4, 2003, at p. 6A.

¹⁷³ There were numerous violations of the laws of war during OIF by the Iraqi military. In one notorious example an Iraqi military unit faked surrender to a U.S. Marine unit but then opened fire on the Marines and killed several of them. Pamela Hess, U.S.: IRAQI FAKE SURRENDER, KILL MARINES, March 23, 2003, United Press International. See NINE MARINES KILLED, 12 SOLDIERS MISSING, March 24, 2003, Associated Press. See also Jane Morse, GENERAL DESCRIBES U.S. LOSSES, BUT SAYS VICTORY IS CERTAIN, March 23, 2003, Washington File, International Information Programs, U.S. Department of State at <http://usinfo.state.gov>.

¹⁷⁴ See Field Manual, *supra* note 63, para. 99 (citing GPW, *supra* note 7, art. 23) (No prisoner of war may at any time be sent to or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations. Prisoners of war shall have shelters against air bombardment and other hazards of war to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favor of the population shall also apply to them. Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps. Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.)

in Iraq. The variable in this argument is of course what type of weapon is being used in attacking either the EPW camp on land or the ship at sea. Unsophisticated weapons are more likely to be able to impact an EPW camp on land but could not reach a ship at sea, whereas, if the weapon is more sophisticated and powerful enough, EPWs onboard ship could be facing greater danger if the ship sustains a direct hit and then struggles to survive and stay afloat.

D. Policy Considerations: What about the Future?

Some critics of the Geneva Conventions of 1949 have argued that although they have been effective in preventing a recurrence of the same types of atrocities that occurred during the Second World War, they do not really apply today. For example, some argue that because today's military ships are much more humane than the Japanese "Hell Ships," the concerns that this particular provision addressed no longer exist. In addition to debating whether or not there is a legal basis that supports at least temporary detention on a ship prior to establishing a stronghold on land, another question that arises is whether it is in our national security interest to do so.

One principal reason that the United States and other countries sign and ratify treaties obligating them to undertake specific responsibilities is to ensure reciprocal treatment. Notwithstanding, the Geneva Conventions of 1949 are a unilateral obligation and each nation undertakes to apply them irrespective of the conduct of another nation.¹⁷⁵ During OIF enemy combatants and/or insurgents, neither of whom follow the law of armed conflict, have taken harsh retaliatory actions to perceived or suspected breaches by Coalition forces in further violation of the law of armed conflict.¹⁷⁶ If the United States interprets the Geneva Conventions to legally permit detention on vessels, we can expect that other countries will adopt this interpretation as consistent with the Geneva Conventions.¹⁷⁷ Just as we look to examples such as the U.K. and Argentina agreement in the Falklands described above, other countries will look to see what the United States has done.

¹⁷⁵ "Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them (for example, most truces and armistices are of this nature). A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions." Commander's Handbook, *supra* note 24, para. 6.2.4, p.6-21. See also Vienna Convention on the Law of Treaties, art. 60(5) May 23, 1969, U.N. Doc. A/CONF.39/27 entered into force on January 27, 1990. The United States of America has not ratified the convention.

¹⁷⁶ For example, insurgents in Iraq beheaded U.S. and Coalition hostages citing "retaliation" for abuses of prisoners at Abu Ghraib prison. Although these insurgents clearly do not abide by the Geneva Conventions as evidenced by their taking of hostages – an activity which is expressly prohibited – there are those who argue that perceived abuses by U.S. and allied forces against their detainees may result in other brutal and disproportionate retaliatory acts against U.S. and coalition service members captured by foreign forces in the future.

¹⁷⁷ One possible solution would be to have "neutral observers who shall verify the strict observation of the provisions contained in the [Geneva Conventions]." See GWS-SEA, *supra* note 21, art. 31 as it pertains to hospital ships but this idea could be extended to ships temporarily detaining EPWs onboard. Problems may arise in obtaining security clearances for observers, reaching disclosure agreements, and identifying the undetermined sympathies of such observers.

What would happen if a country like North Korea applied this principle to a future conflict with the United States? It is not difficult to imagine a scenario in which a variety of smaller warships and fishing vessels along the North Korean coastline are being used to “detain” captured U.S. military personnel. Even if one were to assume that North Korean warships offered a humane environment for detention of PWs, there are still other concerns. For example, there is a potential risk that captured U.S. military could be tactically spread out among a large number of military or civilian ships, both to make their rescue more difficult and to serve as human shields to discourage us from sinking the ships.¹⁷⁸ If U.S. forces did sink one or several vessels containing U.S. prisoners of war, there is a potential risk that public support for the operation could wane, therefore achieving a strategic gain for the enemy. Finally, it would be naive not to consider the harsh reality that some of the captured personnel could be placed in the bottom of old fishing vessels in extremely inhumane conditions to conceal their locations. Victims of human smuggling and trafficking interdicted at sea have often been found in the bottom of such vessels in intolerable and inhumane conditions without access to food, water, or proper sanitation.

E. Conclusions

In limited circumstances the American use of warships during recent conflicts and the British use of its ships during the Falklands War to temporarily detain EPWs may well be consistent with the intent of the GPW. Based on the ICRC’s own training guidance there are circumstances when the temporary detention of EPWs aboard ships is appropriate. The key criteria in evaluating the circumstances of such detention are the interests of the EPW and humane treatment. If for some reason a ship provides the only or the best available accommodation and protection, then according to the ICRC the law is flexible enough to allow for its use on a temporary basis. Based on this assessment, article 22 does expressly prohibit “internment” of prisoners of war other than in premises on land, but it simply does not address temporary detention on board vessels at sea.

The GPW explicitly contemplates the use of “transit camps” during the evacuation of prisoners from the war zone, while obligating the Detaining Power to utilize such facilities “as briefly as possible.” As long as the United States removed EPWs from the amphibious ships as soon as practicable to facilities located on land, it arguably has abided by its treaty commitments under the GPW.

“The Geneva Conventions are primarily a code of legal rules for the protection of EPWs during the period of their captivity. These rules serve to prevent a recurrence of the appalling experiences of the Second World War.”¹⁷⁹ “The guiding principles underlying all these articles are that humane and decent treatment is a right and not a favor conferred on those combatants who are captured during war and become EPW.”¹⁸⁰ There are no public reports of how long the OIF prisoners were kept on board ship during recent conflicts, but neither is there any indication of human rights abuses. In fact, and to

¹⁷⁸ See also GPW, *supra* note 7, articles 91 and 92 on prisoners of war and escape.

¹⁷⁹ International Committee of the Red Cross, Commentaries to Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter “ICRC Commentary to GWS-SEA”], p. 19 (Jean S. Pictet, ed., 1960). Available at <http://www.icrc.org/ihl.nsf/WebComART?OpenView>.

¹⁸⁰ *Id.*

the contrary, individuals responsible for advising the commanders of the affected vessels reported that the commanders ensured that the prisoners received food, bedding, laundry, and medical care and were permitted to practice their religion if they desired.¹⁸¹

If the distinction between “detention” and “internment” is to have any meaning, detention on board vessels must be truly temporary and limited to the minimum period necessary to evacuate such persons from the combat zone, to provide necessary medical care or treatment of wounds if no other such facility is reasonably available on land, or to avoid significant harm such persons would face if detained on land.¹⁸²

In both Afghanistan and Iraq, unlike during Operation DESERT STORM in 1991, United States forces have operated at one time or another without the benefit of bases ashore.¹⁸³ Prior to the establishment of a “foothold” ashore, detention of EPWs at sea provides a viable and legal option to ensure the safety and welfare of EPWs as required by the GPW.¹⁸⁴ In this regard, safer and more humane conditions may well exist at sea as opposed to ashore. Both the spirit and letter of the GPW may be better served in certain engagements by temporarily detaining personnel at sea, particularly in light of the amenities available on aircraft carriers and large deck amphibious assault ships, which, in their current form, were most likely neither anticipated nor contemplated during the drafting of the Conventions in 1949.

Ultimately, the appropriateness of detaining EPWs aboard ships will depend on the facts and circumstances existing in the theatre of operations. As the ICRC explains, military commanders should interpret article 22 sensibly. The key criteria in determining whether EPWs may be temporarily detained on ships are the interests of the EPWs and the required humane treatment of such EPWs. In the ICRC’s words, “[i]f for some reason a ship provides the only or the best available accommodation and protection, then the law is flexible enough to allow for its use on a temporary basis until better accommodation can be found.”¹⁸⁵

Yet questions and unresolved issues remain. What then are the limitations of a warship that “temporarily detains” EPWs on board? Must the warship abstain from offensive operations until the EPWs are moved off the ship?¹⁸⁶ Certainly the warship can exercise the right of self-defense at any time, but can that ship then engage the enemy with EPWs on board? Would that not place the EPWs in harm’s

¹⁸¹ Interviews on file with authors.

¹⁸² See GPW, *supra* note 7, arts. 20 and 23.

¹⁸³ See Andrew Koch, USA Looks To Enhance Sea-Basing Capabilities, *Jane’s Defence Weekly*, May 22, 2002, available at http://www.onr.navy.mil/explog/explog/news/seabasing_22may2002.pdf hospitalship.topcities.com/history.html. Compare with Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War (1992) 580-82 (discussing construction of camps in Saudi Arabia).

¹⁸⁴ See generally GPW, *supra* note 7.

¹⁸⁵ LESSON 7, *supra* note 136.

¹⁸⁶ During OIF the U.S. Navy made a conscious decision to limit the temporary detentions at sea to one ship – USS DUBUQUE – so all other amphibious ships could engage in combat operations while DUBUQUE did not. Interviews on file with authors.

way and violate article 23 of the GPW?¹⁸⁷ How does the ship notify the “world” that it is holding EPWs on board? Does it have to make clearly visible markings indicating that it is a floating “PW camp?”¹⁸⁸ What if the EPWs are not being “temporarily detained” but are on board for medical care only?

The presence of EPWs or other wounded, sick, or shipwrecked on board does not change the status of a warship to one that is immune from attack.¹⁸⁹ International law specifically allows warships to assist and protect EPWs collected at sea and anticipates such treatment. In general, sickbays of warships shall be respected and spared from destruction as much as possible.¹⁹⁰ Sickbays and their attendant equipment shall remain subject to the laws of warfare, so long as the equipment is not diverted from its purpose.¹⁹¹ Treating prisoners of war in the sickbay of a warship does not make that warship a “hospital ship,” since a hospital ship must meet certain criteria.¹⁹² Hospital ships are distinguished from warship sickbays. Both are protected, but the warship remains a warship and maintains its unprotected status.¹⁹³ Warships are permitted by international law to care for sick, wounded, and shipwrecked at sea in their sickbays and also to carry out their mission as warships without disengaging from war fighting activities and still be in compliance with international law.¹⁹⁴ Additionally there is a duty to ensure the respect and protection of all wounded and sick in all circumstances, which logically contemplates providing for that treatment on a ship if necessary.¹⁹⁵

V. HOSPITAL SHIPS AND INTERROGATIONS

A. Introduction

As previously discussed, the critical underpinning of the GPW is humane treatment of prisoners of war. After being placed in U.S. custody Iraqi detainees would be evaluated and treated for wounds by U.S. medical personnel at field hospitals on the front, and most Iraqis were immediately transported to the U.S. internment facility at Umm Qasr (“Camp Freddie”) in Southern Iraq.¹⁹⁶ Some seriously

¹⁸⁷ “No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.” GPW, *supra* note 7, art. 23 in part.

¹⁸⁸ “Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air.” GPW, art. 23 in part. This is most unlikely due to the conditional “whenever military considerations” language of this article.

¹⁸⁹ “[N]or may his presence be used to render certain points or areas immune from military operations.” GPW, art. 23 in part.

¹⁹⁰ Geneva Convention for the Amelioration of Wounded, Sick, and Shipwrecked of 1949 (GWS-SEA), art. 28; Adaptation to Maritime Warfare of Principles of the Geneva Convention of 1907 (Hague X). *See also* Department of the Army Pamphlet 27-161-2, *International Law (Volume II)*, October 1962, at page 109.

¹⁹¹ GWS-SEA, *supra* note 21, art. 28; Adaptation to Maritime Warfare of Principles of the Geneva Convention of 1907 (Hague X). *See also* Department of the Army Pamphlet 27-161-2, *International Law (Volume II)*, October 1962, at page 71.

¹⁹² GWS-SEA, *supra* note 21, art. 28; Adaptation to Maritime Warfare of Principles of the Geneva Convention of 1864 (Hague III) (1899)

¹⁹³ *Id.* art. 34.

¹⁹⁴ *Id.* art. 31 and 32.

¹⁹⁵ *Id.* art. 12.

¹⁹⁶ Kate Shatzkin, *Hospital ship Comfort attends mainly to wounded Iraqis; Most coalition cases are routine sickness, injuries; WAR IN IRAQ*, BALTIMORE SUN, April 12, 2003, at p. 12A. The Department of the Navy has guidelines regarding health service

wounded Iraqis requiring medical care were transferred by air to the U.S. hospital ship USNS COMFORT off the Iraqi coast in the North Arabian Sea rather than to Camp Freddie's ten-bed medical facility.¹⁹⁷ Other injured Iraqis were transported to USNS COMFORT *prior* to the establishment of field hospitals and internment camps due to the fact that Kuwait refused to allow any Iraqi prisoners of war inside its borders.¹⁹⁸ In all, the percentage of Iraqi EPWs transported to USNS COMFORT for medical treatment during the most intense period of fighting in the earliest stages of OIF was relatively small, approximately 200 individuals total.¹⁹⁹ Approximately another 125 Iraqis were civilian non-combatants also requiring medical treatment for wounds received as a by-product of combat.²⁰⁰

OIF military commanders were provided with legal advice regarding EPW and detainee operations. The judge advocates involved advised their commanders that the questioning of Iraqi detainees and EPWs beyond the legally required identification information on board U.S. hospital ships during armed conflict might strip the ship of its protected status under GWS-Sea, article 22.²⁰¹ In fact, GWS-Sea, article 34 provides that a hospital ship will lose its protected status if it performs "acts harmful to the enemy" and, after being warned, fails to cease and desist from such conduct.²⁰² The judge advocates' legal advice was followed, and as a result the Army personnel conducting the detainee interviews were tasked with ascertaining only the most basic information on each individual because most detainees did not have any form of identification.²⁰³ The U.S. press reported, however, that U.S.

support, and specific tactics, techniques, and procedures for providing medical treatment to fighting forces in the field, triage, and patient evacuation. See NTTP 4-02.2, Patient Movement, April 2001.

¹⁹⁷ Laurie Goering, *POW Facility draws flocks of civilians; Scarred Iraqi army deserters, frantic families arrive at camp*, CHICAGO TRIBUNE, April 3, 2003, p. 5. See also Jonathan Bor, *Hospital ship from Baltimore treats first patients; Coalition troops, Iraqis among 20 aboard Comfort*; WAR IN IRAQ, BALTIMORE SUN, March 26, 2003, at p. 8A.

¹⁹⁸ *Mixed Emotions as medics treat enemy - WAR IN IRAQ - ON THE FRONT*, THE DAILY TELEGRAPH (Sydney, Australia), March 31, 2003, p. 6. See also James Harris, *My Two Wars*, N.Y. TIMES, April 20, 2003, section 4, p. 9. As previously stated, EPWs were also transported to USS DUBUQUE. Whether an EPW was transported to COMFORT or DUBUQUE was mainly a medical determination based upon the medical needs of each individual EPW. Interviews on file with authors.

¹⁹⁹ Kate Shatzkin, *supra* note 196, at 12A. See also United States Dep't of Defense Press Briefing by Vice Admiral Timothy Keating, Commander of Coalition Naval Forces for Operation Iraqi Freedom, (April 12, 2003) (indicating that on April 12, 2003, 80 Iraqi military personnel and 40 Iraqi displaced civilians, all of whom suffered significant injuries, were airlifted to COMFORT). See also Gerry J. Gilmore, *Navy Hospital Ship Provides Comfort to Injured Enemy POWs*, AMERICAN FORCES PRESS SERVICE, April 11, 2003. See also interviews on file with authors reporting that nearly 200 EPWs and approximately 125 Iraqi civilians onboard COMFORT were screened and properly categorized in accordance with the Geneva Conventions.

²⁰⁰ Kate Shatzkin, *supra* note 196, at 12A.

²⁰¹ GWS-SEA, *supra* note 21, art. 22 (hospital ships are protected from attack). See also interviews on file with authors. The judge advocates involved were determined not to deviate from the Geneva Conventions.

²⁰² GWS-SEA, *supra* note 21, art. 34. The GWS-SEA, art. 34 also prohibits the possession or use of a "secret code" by hospital ships. The ICRC Commentary to GWS-SEA, states that hospital ships "may only communicate in clear, or at least in a code which is universally known, and rightly so, for the spirit of the Geneva Conventions requires that there should be nothing secret in their [hospital ships] behavior *vis-à-vis* the enemy." See ICRC Commentary to GWS-SEA, *supra* note 177, at 190. For a discussion regarding encrypted communications by hospital ships, see Philip R. Principe, *Secret Codes, Military Hospitals, and the Law of Armed Conflict: Could Military Medical Facilities' Use of Encrypted Communications Subject Them to Attack Under International Law?*, 24 U. Ark. Little Rock L.Rev. 727, 738-740 (Spring 2002). Citing both the prohibition against performing acts harmful to the enemy and the routine use of encrypted technology in modern computer and satellite communications, the U.S. Navy has taken the position that the prohibition on the use of encrypted technology by hospital ships is obsolete. See VII: 1 Judge Advocate Newsletter (Jan. 2003) at: http://sja.hqmc.usmc.mil/newsletter/2003/1_03/1%C2%AD_03.html

²⁰³ Interviews on file with authors.

military personnel interrogated (which generally implies an attempt to gather intelligence beyond identifying data) Iraqis brought on board USNS COMFORT for medical treatment.²⁰⁴ In general such interrogations in Iraq were handled primarily by military intelligence screening teams, as well as the Army's Criminal Investigation Division ("CID");²⁰⁵ however, this was not the case on board USNS COMFORT, where the Army personnel were collecting and inputting into a computer database only the most basic information such as name, address, military unit, fingerprints, and a photo.²⁰⁶ The ICRC had representatives on board USNS COMFORT who reviewed and inspected all aspects of the EPWs' treatment.²⁰⁷

This does, however, raise the question of the legal limitations for conducting interrogations of Iraqi EPWs and detainees on board hospital ships during an armed conflict. Would the interrogation of Iraqi prisoners on board USNS COMFORT effectively strip the ship of its protected status under the Geneva Conventions of 1949? Would the interrogation of Iraqi detainees constitute intelligence gathering, and if so, does this constitute "acts harmful to the enemy?" Is the intelligence gathered harmful, or is it a by-product of the legal and required screening process? Are U.S. military interrogators lawful targets? If they were present on a hospital ship would that justify an attack on the ship by enemy forces? Should it matter that the medical treatment available to Iraqi detainees on a hospital ship likely exceeds the care available at the U.S. internment camp at Umm Qasr much closer to the front (and the fighting)? Must U.S. military authorities wait to interrogate detainees until their medical care on a U.S. hospital ship is concluded and the detainee is taken off the ship? If interrogations may not lawfully take place until after a wounded soldier is captured, treated on a hospital ship, and then returned for permanent internment on land, would a Detaining Power potentially be discouraged from providing immediate and available medical treatment to captured soldiers? How should attacks by enemy forces on the internment camp play in the decision whether it is safer for detainees to be treated onboard a U.S. hospital ship?

There is no shortage of questions and legitimate concerns for military decision-makers when trying to resolve the legality of interrogating Iraqi detainees and EPWs on U.S. hospital ships during OIF or any other armed conflict. The following considerations may prove helpful in resolving these questions. The Detaining Power conducting interrogations of detainees or EPWs under its control must consider the *place* where the interrogations occur and the impact the interrogations could have on the protected status of that place, particularly in the case of a hospital ship.

B. Medical Attention

²⁰⁴ Kate Shatzkin, *supra* note 196 at 12A. There may be some discrepancies between press accounts and author interviews because the media was kept away from all EPWs so as not to violate any aspects of the GPW.

²⁰⁵ See PRESS BRIEFING, *supra* note 71.

²⁰⁶ Interviews on file with authors.

²⁰⁷ Interviews on file with authors. USNS COMFORT also had a number of children who were "orphaned / parents unknown" on board ship. The U.S. Navy in coordination with the ICRC and other nongovernmental organizations in theatre, and in accordance with the GCC as well as the United Nations Convention on the Rights of the Child (entered into force September 2, 1990, the U.S. signed on February 16, 1995 but has not ratified) facilitated the relocation and / or reunification of families. Nearly all of the children were reunited with their families.

Regardless of how an armed conflict is characterized, U.S. policy dictates that it will comply “with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.”²⁰⁸ Among these principles is the requirement that wounded prisoners receive necessary medical treatment from their captor. Specifically, the wounded and sick “shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.”²⁰⁹

Article 12 of the GWS and GWS-Sea as well as article 13 of GPW require that humane treatment be accorded detainees and EPWs.²¹⁰ Humane treatment means that medical treatment must be provided by the Detaining Power for wounds received during combat.²¹¹ Article 12 of the GWS and GWS-Sea also provides that EPWs have the right to be interned in a safe, healthy environment far from the front.²¹² Adverse distinctions in providing medical care, such as those based on sex, race, nationality, religion, or other similar criteria, are impermissible.²¹³ The Geneva Conventions thus require that medical care be provided to the most seriously wounded first, even if EPWs are treated before wounded friendly forces.²¹⁴

In the most recent war, the crew of USNS COMFORT, comprised mainly of military medical doctors, surgeons, nurses, and medical corpsmen, treated Iraqi and American wounded alike with treatment based on severity of their wounds rather than nationality of the patient.²¹⁵ In some cases, medical treatment was provided first on the battlefield or at field hospitals not far from the front. Depending on the severity of the wounds, the prisoner may require even more specialized medical treatment than is available at the field hospital. EPW internment camps are required to have sufficient medical facilities to treat wounds received by forces in combat.²¹⁶ Umm Qasr’s ten-bed facility, therefore, is required to have capabilities to care for Iraqi wounded regardless of the severity of the wounds received in battle.²¹⁷ U.S. practice in some severe cases, however, has involved the transfer of wounded Iraqi prisoners to U.S. hospital ships including USNS COMFORT.

²⁰⁸ DoD DIR. 2310.1, *supra* note 81 (indicating that the laws of war are to be applied in military operations other than war by U.S. forces).

²⁰⁹ GWS, *supra* note 21, art. 12; GWS-SEA, *supra* note 21, art. 12.

²¹⁰ GWS-SEA, *supra* note 21, art. 12, GWS, *supra* note 21, art. 12, GPW, *supra* note 7, art. 13.

²¹¹ *Id.*

²¹² GWS, *supra* note 21, art. 12, GWS-SEA, *supra* note 21, art. 12.

²¹³ GWS, *supra* note 21, art. 12.

²¹⁴ GWS, *supra* note 21, art. 12; GWS-SEA, *supra* note 21, art. 12.

²¹⁵ Kate Shatzkin, *supra* note 196, at 12A; Deborah Charles, *Coalition holds 7,300 PoWs in Iraq*, REUTERS, April 10, 2003; PRESS BRIEFING, *supra* note 71.

²¹⁶ See Field Manual, *supra* note 63, par. 107 (citing GPW, art. 30) (“Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.”). Hospital ships obviously have far better and more sophisticated medical facilities available to treat Iraqi wounded. However, caution should be taken by U.S. officials claiming that adequate medical care to treat the Iraqi wounded was available *only* onboard COMFORT and *not* at the Umm Qasr internment camp (or any other internment camp for that matter) because there is an obligation to have adequate medical care at every prisoner of war camp.

²¹⁷ GPW, *supra* note 7, art. 30.

The desire by field commanders or cognizant personnel to conduct immediate interrogations of detainees or EPWs was not and cannot be used as a predicate to deny immediate medical treatment to wounded enemy troops. Any delay of medical attention for purposes of interrogation would be an inexcusable violation of international humanitarian law. This absolute prohibition is an outgrowth of the practice by the German Army in the World War II to withhold medical treatment to wounded enemy personnel until after interrogation, since the wounded personnel “were profitable subjects for interrogation.”²¹⁸ The armed forces capturing enemy personnel are required to provide medical care to wounded enemy troops as soon as possible.²¹⁹

C. Interrogations

The Geneva Conventions of 1949 expressly provide that detainees and EPWs may be interrogated by their captors.²²⁰ An example of this would be questioning the detainee to establish his identity during the vetting process, but it is also “permissible to question prisoners of war to obtain tactical or strategic information.”²²¹ The Geneva Conventions include specific rules that anticipate and govern the conduct of EPW interrogations.²²² Article 17 of the GPW states in pertinent part that “[e]very prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”²²³ The Detaining Power must then “furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner’s surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth.”²²⁴ If the prisoner willfully fails to abide by this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.²²⁵ EPWs may not be physically or mentally tortured or coerced in order

²¹⁸ *Law of War Deskbook*, *supra* note 18, at 52 (citing G.I.A.D. Draper, *The Red Cross Conventions of 1949*, at 76 (1958)).

²¹⁹ GWS, *supra* note 21, art. 12, GWS-SEA, *supra* note 21, art. 12.

²²⁰ GWS-SEA, *supra* note 21, art. 12; GPW, *supra* note 7, art. 17.

²²¹ *Fight it Right*, *supra* note 140, at 97.

²²² GPW, *supra* note 7, art. 17 (“Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this equivalent information. If he willfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status. Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner’s surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him. No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph. The questioning of prisoners of war shall be carried out in a language which they understand.”). Note that detainees determined to be undeserving of EPW status, perhaps after a GPW, art 5 hearing, are not covered by GPW, art. 17, but are nonetheless accorded humane treatment pursuant to U.S. policy.

²²³ GPW, *supra* note 7, art. 17.

²²⁴ *Id.*

²²⁵ *Id.*

to secure information.²²⁶ EPWs refusing to answer questions “may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”²²⁷ “While the range of questioning is completely unlimited, the means of questioning are limited.”²²⁸

The bottom line is that every prisoner of war is obligated to provide identifying information in accordance with the GPW. The Detaining Power is obligated not to punish or torture the prisoner of war if the prisoner does not want to provide any further information than required of him. “Although a prisoner of war is not bound to give information (except about his identity), he may be willing to provide other information and there is no reason why the capturing power should not ask questions. Since no coercion may be used, this is best done by skilled, well-briefed interrogators who may be able to build up a rapport with the prisoner of war.”²²⁹ U.S. policy mirrors GPW, article 17. It provides that “[a]ll prisoners will receive humane treatment” and that “murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment” are prohibited.²³⁰ EPWs are to be protected from all threats or acts of violence.²³¹ “The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited... Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions.”²³² Conversely, “[i]t is not lawful to give particularly cooperative prisoners of war more favorable treatment, such as better accommodation, rations or pay, since all prisoners of war are to be treated alike.”²³³

In accord with accepted U.S. and international legal norms and consistent with established DoD policy Iraqi detainees were processed or “vetted” by U.S. forces for permanent internment.²³⁴ Vetting includes gathering information such as the detainee’s name, his place of residence, his identification

²²⁶ *Id.* (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever [and EPWs] who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”).

²²⁷ *Id.*

²²⁸ Commander’s Handbook, *supra* note 25, at 11-10, n. 49.

²²⁹ Fight it Right, *supra* note 141, at 98.

²³⁰ See AR 190-8, *supra* note 52, par. 1-5b.

²³¹ See AR 190-8, *supra* note 52, par. 1-5c. See also Vernon Loeb, *Army Officer’s Actions Raise Ethical Issues*, Washington Post, November 30, 2003, page A24, for a discussion of the “interrogation” methods used by Lieutenant Colonel Allen B. West, US Army in Iraq. See also “Article 15-6 Investigation of the 800th Military Police Brigade (Classification: Secret / No Foreign Dissemination).” The report was downloaded from the National Public Radio website (visited on 07 MAY 04) <http://www.npr.org/features/feature.php?wfId=1870746>. Click on “Read the U.S. Military’s Report on Prisoner Abuse at Abu Ghraib Prison.”

²³² See AR 190-8, *supra* note 52, paras. 1-4h and 2-1a(1)(d). “Prisoners may voluntarily cooperate with PSYOP [psychological operations] personnel in the development, evaluation, or dissemination of PSYOP messages or products.” Interrogations will normally be performed by intelligence or counterintelligence personnel. U.S. Army investigators also provide criminal investigative support to military commanders with regard to interrogations of EPWs and civilian internees.

²³³ Fight it Right, *supra* note 141, at 98. See also GPW, *supra* note 7, art. 16.

²³⁴ PRESS BRIEFING, *supra* note 72. See also Captain Vaughn A. Ary, U.S.M.C., *Accounting for Prisoners of War: A Legal Review of United States Armed Forces Identification and reporting procedures*, 199 Army Law. 16 (discussing the interrogation and medical treatment of Iraqi prisoners in the first Gulf War).

number, and his rank and military unit.²³⁵ Information gleaned during the vetting process is used by the Detaining Power to determine whether the detainee qualifies for EPW status under GPW, article 4.²³⁶ The U.S. Commanding Officer at Umm Qasr confirmed that “once [the prisoners] are vetted they are either fully accorded EPW (enemy prisoner of war) status, or they might at a future point and time be turned over for criminal prosecution for a crime committed against the Coalition or against the Iraqi people.”²³⁷

Information obtained during interrogations is also helpful in assisting U.S. forces to determine whether a detainee is merely a non-combatant inadvertently captured along with Iraqi forces.²³⁸ These civilian non-combatants might then be immediately released from custody. Information discovered during detainee interrogations might also help U.S. forces to determine if a detainee has participated in military-style, “terrorist”, or guerilla operations against U.S. forces in violation of the laws of war. This category is generally described as unlawful or unprivileged combatants, *i.e.*, criminals or terrorists. Unlawful combatants will likely be held for trial for war crimes. Interrogations of detainees could also yield critical information, for example that the detainee under questioning is a member of Saddam Hussein’s former ruling regime.²³⁹ Effective interrogation can potentially reveal information about the troop strength of the detainee’s unit as well as future military operations planned by enemy Iraqi forces. In the case of a detainee suspected of terrorist activities, interrogation might reveal information of future planned attacks against U.S. interests, citizens, or military personnel.

The Geneva Conventions provide no guidance to Detaining Powers as to *where* detainee or EPW interrogations may properly proceed; for instance, interrogations occur in prisoner of war camps, and yet those camps are protected places.²⁴⁰ There is no express prohibition regarding interrogations on hospital ships in the GWS, GWS-Sea, GPW, or GCC. There is also no express prohibition in U.S. or international customary law against hospital ship interrogations of detainees and EPWs. It therefore appears that the only limitation to conducting detainee or EPW interrogations on hospital ships is whether the practice constitutes “acts harmful to the enemy” within the meaning of article 34 of the GWS-Sea. Any such “acts” would strip the hospital ship of its protected status under the law of armed conflict.²⁴¹

²³⁵ See GPW, *supra* note 7, art. 17 (interrogations of EPWs permitted). See also Field Manual, *supra* note 62, par. 93 (citing GPW, *supra* note 7, art. 17).

²³⁶ See GPW, *supra* note 7, art. 4 (describing categories of persons entitled to EPW status).

²³⁷ Deborah Charles, *supra* note 214.

²³⁸ See Final Report, *supra* note 54, at 619 (discussing, in part, the release of detainees who were determined by tribunals to be displaced civilians who were captured while in proximity to Iraqi military units.).

²³⁹ Kate Shatzkin, *supra* note 196 at 12A.

²⁴⁰ Although the U.S. Military Intelligence doctrine dictates that interrogators set up outside the designated EPW facility – this is not always possible. Interviews on file with authors. See also AR 27-10 and AR 381-10.

²⁴¹ The ICRC Commentary to GWS-SEA states that hospital ships are not to take as prisoners “wounded or shipwrecked members of the enemy forces” because holding prisoners by force threatens the ship’s protected status. If such personnel are brought onboard a hospital ship they are not regarded as prisoners of war. “A hospital ship cannot take prisoner wounded or shipwrecked members of the enemy forces. If it rescues them at sea or receives them from a ship of their own nationality, they must not be considered as being prisoners of war[...] A hospital ship may belong to the naval forces, but it is not a warship... it is a charitable vessel... so it may not commit any act of war[.] It is an act of war to capture military personnel or hold them prisoner by force... and if a warship transfers wounded or shipwrecked prisoners whom it has captured to a hospital ship of its own nationality, their prisoner-

D. History and Protection of Hospital Ships

The use of hospital ships may have originated with the Ancient Greeks as early as 431 B.C., when a ship named *Therapeutic* supported the Athenian fleet.²⁴² Similarly, the Romans employed a ship named for the Roman God of healing and medicine, *Aesculapius*, in support of its fleet.²⁴³ Ships such as the *Aesculapius* were referred to as “immunes” and enjoyed some protection as non-combatant vessels.²⁴⁴ Hospital ships were first employed in American history with the commissioning of USS RED ROVER by the Union Navy on December 26, 1862.²⁴⁵ USS RED ROVER treated approximately 2,500 patients along the Mississippi River during the Civil War, including approximately 300 Confederate personnel.²⁴⁶ Despite the outstanding record of USS RED ROVER,²⁴⁷ the U.S. Navy did not design a vessel specifically for use as a hospital ship until USS RELIEF (AH 1), which was commissioned on December 28, 1920.²⁴⁸ USS RELIEF had a capacity for over 400 patients and served in both the Atlantic and Pacific theaters in World War II.²⁴⁹

A few years before the construction of USS RELIEF, hospital ships gained recognition in international law as a result of the Hague Conference of 1899. During that Conference, the contracting parties modified the Geneva Convention of August 22, 1864, known as the “Red Cross Convention,”²⁵⁰ to conform to maritime warfare.²⁵¹ Articles 1, 2, and 3 of that agreement, referred to as “Hague III,” emphasized the protected status of hospital ships and the “respect” they were to be afforded.²⁵² This convention, which entered into force in September 1900, was revised in 1907.²⁵³ The 1907 revision in turn provided the framework of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS-Sea).²⁵⁴

of-war status will be suspended temporarily[.]” GWS-SEA, *supra* note 21, art. 34, (prohibiting hospital ships from committing “acts harmful to the enemy”); ICRC Commentary to GWS-SEA, art. 16, *supra* note 178, at 113.

²⁴² See Ray Seiple, *The History of Hospital Ships from B.C. Time to Post World War II*, (Sep. 17, 2001) <http://hospitalship.topcities.com/history.html>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* See also Bureau of Medicine and Surgery, <http://navymedicine.med.navy.mil/bumed/index.cfm?docid=10358>.

²⁴⁶ See Ray Seiple, *supra* note 242. See also William M. Fowler, Jr., *Relief on the River: the Red Rover*, NAVAL HISTORY, Fall 1991, at 19.

²⁴⁷ William M. Fowler, Jr., *supra* note 246, at 19. Of the roughly 2,500 patients treated onboard RED ROVER, only 157 died.

²⁴⁸ A. D. Baker, III, *Historic Fleets*, NAVAL HISTORY, April 2002, at 12.

²⁴⁹ *Id.*

²⁵⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, August 22, 1864, 18 Martens Nouveau Recueil (1e ser.) 612, translated and reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, THE LAWS OF ARMED CONFLICTS 279 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

²⁵¹ Convention for the Adaptation To Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, July 29, 1899, 1 Bevans 263 [hereinafter Maritime Warfare Adaptation].

²⁵² Hague III, *supra* note 21, arts. 1, 2, and 3, 1 Bevans 263.

²⁵³ Maritime Warfare Adaptation, *supra* note 250, at 694.

²⁵⁴ GWS-SEA, *supra* note 21.

The Geneva Conventions provide that fixed or mobile medical units shall be respected and protected and shall not be intentionally attacked.²⁵⁵ This includes medical transports of the wounded or sick.²⁵⁶ It should be noted that land-based hospitals are protected as well.²⁵⁷ With respect to hospital ships GWS-Sea indicates that such vessels are accorded protected status and may not be attacked or captured.²⁵⁸ This prohibition is set forth in GWS-Sea, article 22, which states in part that:

[m]ilitary hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, *may in no circumstance be attacked or captured*, but shall at all times be respected and protected.²⁵⁹

This protection is also found in GWS, article 20 which provides in part that “[h]ospital ships entitled to the protection of the [GWS-Sea] shall not be attacked from the land.”²⁶⁰ Permanent medical personnel “exclusively engaged” in medical duties assigned to a hospital ship’s crew are similarly protected from intentional attack.²⁶¹

Under the GWS-Sea hospital ships are immune from attack or capture, so long as such vessels were “built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them...”²⁶² This protection is also contingent upon the exclusive use of the vessels as hospital ships for the duration of hostilities.²⁶³ “The exemption from attack or capture of medical vessels is based on their function, namely, that their purpose is to rescue the shipwrecked and to give medical care to the sick and wounded. It is in order to give protection to these categories of persons that protection from attack and capture is given to the vessels, subject to certain

²⁵⁵ *Id.* arts. 22, 38, 39. GWS, *supra* note 7, arts. 19-20, 35. *See also* Operational Law Handbook (2004), *supra* note 57, at 22; *See also* Field Manual 27-10, *supra* note 62, par. 257-258; and W. Hays Parks, *Memorandum of Law: Status of Certain Medical Corps and Medical Service Corps Officers Under the Geneva Conventions*, 1989 Army Law. 5 (April, 1989) (discussing protections afforded to medical personnel under the Geneva Conventions).

²⁵⁶ *See* GWS, *supra* note 7, arts. 19-20, 35. GWS-SEA, *supra* note 21, arts. 22, 38, 39. *See also* Operational Law Handbook (2004), *supra* note 57.

²⁵⁷ GWS, *supra* note 7, art. 19. “Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked.” A hospital may lose its protected status if it conducts activities outside the scope of humanitarian duties and such acts are considered harmful to the enemy. *See* GWS, art. 21. Thus, when receiving fire from a hospital, there is no warning requirement prior to taking action in attacking the hospital in self-defense. *See also* Commander’s Handbook, *supra* note 24, par. 8.2.3. For example, during the early stages of Operation Iraqi Freedom, U.S. Marines received fire from a hospital located in Nasiriyah, Iraq. Peter Baker, *A ‘Turkey Shoot,’ but With Marines as the Targets*, Washington Post, March 28, 2003, page A01. Apparently, Iraqi paramilitary forces were using the hospital as a staging area for missions. *Id.* Upon seizure of the hospital, the Marines discovered a cache of weapons and a large supply of chemical protection suits. *Id.*

²⁵⁸ GWS-SEA, *supra* note 21, art. 22. Their lifeboats are protected as well. *Id.* art. 26. Military hospital ships must be marked in the manner specified by *Id.* art. 43.

²⁵⁹ *Id.* art. 22. Emphasis added.

²⁶⁰ GWS, *supra* note 7, art. 20.

²⁶¹ *Id.* art. 24. *See also* GWS-SEA, *supra* note 21, art. 36 (medical personnel of ships and crews shall be respected and protected).

²⁶² GWS-SEA, art. 22.

²⁶³ GWS-SEA, *supra* note 21, art. 33; *see also* ICRC Commentary to GWS-SEA, at 158-60.

procedures and regulations that have been instituted in order to assure the *bona fide* use of these vessels.”²⁶⁴

GWS-Sea contains language describing the “Distinctive Emblem” that is to be displayed on personnel, equipment, and vessels associated with the Medical Service.²⁶⁵ Article 43 mandates that the exterior of all hospital ships be painted white.²⁶⁶ In addition, “[o]ne or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.”²⁶⁷ In addition to the vessel’s national flag “[a] white flag with a red cross shall be flown at the mainmast as high as possible;”²⁶⁸ however, “[t]hese means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.”²⁶⁹

In addition to the physical markings the protected status of hospital ships is also contingent on specific conditions regarding notice of the use of the vessel for the express purpose as a hospital ship.²⁷⁰ The “Parties to the conflict” must be notified of the name and description of the vessel ten days prior to that vessel’s use as a hospital ship.²⁷¹ The notification must also specify the “registered gross tonnage, the length from stem to stern and the number of masts and funnels.”²⁷² While the protections for hospital ships extend to vessels of any size, those used “for the transport of wounded, sick and shipwrecked over long distances and on the high seas” are to be in excess of 2,000 gross tons.²⁷³ Finally, the determination of the status of hospital ship “is a matter of common sense and good faith.”²⁷⁴

E. “Acts Harmful to the Enemy”

In exchange for protection from attack hospital ships and their crew may not be used except for providing medical treatment and care.²⁷⁵ Article 30, GWS-Sea, referring specifically to hospital ships,

²⁶⁴ SAN REMO MANUAL, *supra* note 132, para. 173.1, at 179

²⁶⁵ GWS-SEA, *supra* note 21, arts. 41-45. Aside from “the emblem of the red cross on a white ground,” other emblems are also recognized. GWS-SEA, *supra* note 21 art. 41. In particular, “the red crescent or the red lion and sun on a white ground,” were recognized by GWS-SEA, art. 41.

²⁶⁶ GWS-SEA, *supra* note 21, art. 43.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ SAN REMO MANUAL, *supra* note 132, para. 173, p.179

²⁷⁰ GWS-SEA, *supra* note 21, art. 22.

²⁷¹ *Id.*

²⁷² *Id.* Some commentators have suggested additional notification requirements, such as “the call sign or other recognized means of identification of the hospital ship; radio frequencies guarded and languages used; whether the hospital ship is accompanied by other medical transports, e.g., helicopters; whether it is equipped with means of defense; and the position of the hospital ship, its intended route and estimated time en route and of departure and arrival as appropriate.” J. Ashley Roach, Symposium: The Hague Peace Conferences: The Law of Naval Warfare at the Turn of Two Centuries, 94 A.J.I.L. 64, 75 (2000)(citing SAN REMO MANUAL, *supra* note 132).

²⁷³ GWS-SEA, *supra* note 21, art. 26.

²⁷⁴ ICRC Commentary to GWS-SEA, *supra* note 178, at 160.

²⁷⁵ GWS-SEA, *supra* note 21, art. 24.

captures the essence of the prohibition and states in part that: “[t]he High Contracting Parties *undertake not to use these vessels for any military purpose.*”²⁷⁶

Article 34 of the GWS-Sea provides that the “protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”²⁷⁷ The same article also provides that where a hospital ship is committing “acts harmful to the enemy,” it may be attacked only after being warned by its enemy of the discovery of the improper acts.²⁷⁸ The hospital ship has, therefore, a reasonable time to cease and desist and to comply with the warning before the attack commences.²⁷⁹ The ICRC in its Commentary to article 34 of the GWS-Sea observed that “[b]eing placed outside the struggle, [medical personnel and hospital ships] must loyally refrain from all interference, direct or indirect, in military operations.”²⁸⁰ “When committed by a hospital ship, an act harmful to the enemy is to be condemned not only for its treacherous nature, but also because the life and security of the wounded may be very seriously affected by its consequences.”²⁸¹ Whether a hospital ship commits “acts harmful to the enemy” is, therefore, the sole basis upon which a hospital ship may lose her protected status under the Geneva Conventions. What constitutes “acts harmful to the enemy?” Aside from the plain language in article 34 the GWS-Sea is silent with regard to the meaning of this critical language.²⁸²

The ICRC observed that: “in 1949 as in 1929, and as in the case of the First Convention [the GWS], it was considered [by the 1949 Diplomatic Conference] unnecessary to define ‘acts harmful to the enemy,’ for the meaning of the expression is self-evident and must remain quite general.”²⁸³ The framers of the GWS-Sea clearly believed that military commanders must know whether acts were or were not harmful to the enemy. Such harmful acts should not be conducted on hospital ships for fear the acts would strip the ship of her protected status.²⁸⁴ To some extent the ICRC shared this view; however,

²⁷⁶ *Id.* art. 30. Emphasis added.

²⁷⁷ *Id.* art. 34, GWS *supra* note 7, art. 21. See ICRC Commentary to GWS-SEA, *supra* note 178, at 190. See also Field Manual, *supra* note 62, paras. 257 and 258.

²⁷⁸ GWS-SEA, *supra* note 21, art. 34 further provides that “[p]rotection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded.” *Id.*

²⁷⁹ *Id.* See also GWS, *supra* note 21, art. 21 (containing similar language to GWS-SEA, art. 34); Field Manual, *supra* note 63, par. 222 (citing GWS, art. 21) (The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.).

²⁸⁰ ICRC Commentary to GWS-SEA, *supra* note 179, at 191.

²⁸¹ *Id.*

²⁸² GWS, art. 21 contains language identical to GWS-SEA, art. 34 except art. 21 refers to land-based medical units and hospitals. See Philip R. Principe, *Secret Codes, Military Hospitals, and the Law of Armed Conflict: Could Military Medical Facilities' Use of Encrypted Communications Subject Them to Attack Under International Law?*, 24 U. Ark. Little Rock L.Rev. 727, 738-740 (Spring 2002) (discussing the meaning and interpretation of “acts harmful to the enemy” under GWS-SEA, art. 34).

²⁸³ ICRC Commentary to GWS-SEA, *supra* note 21, at 190.

²⁸⁴ “An example of the forfeiture of protection is the 1944 case of the German hospital ship *Rostock*: the *Rostock* tried to reach a Spanish harbour starting from Bordeaux but was captured by Allied naval forces. It was discovered that the *Rostock* had the order to transfer weather reports which were of military importance by the means of secret codes.” HUMANITARIAN HANDBOOK, *supra* note 10, at 305, n. 29.

it suggested the following more “explicit” wording for article 34 during the 1949 Conference: “acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations.”²⁸⁵ The ICRC’s alternative language was not adopted.

In an effort to resolve the issue of what constitutes “acts harmful to the enemy,” the GWS-Sea provides examples of conduct that *do not* constitute “acts harmful to the enemy” and that do not strip hospital ships or the sick-bays of vessels of their protected status.²⁸⁶ The “object of [GWS-Sea, article 35] was to avoid disputes which arise only too easily between opposing Parties.”²⁸⁷ The examples in article 35 of GWS-Sea are as follow:

- (1) The fact that the crews of ships or sickbays are armed for the maintenance of order, for their own defense or that of the sick and wounded.²⁸⁸
- (2) The presence on board of apparatus exclusively intended to facilitate navigation or communication.
- (3) The discovery on board hospital ships or in sickbays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
- (4) The fact that humanitarian activities of hospital ships and sickbays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.
- (5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.²⁸⁹

As stated by the ICRC the foregoing are “cases where hospital ships and sick-bays retain their character as such and their right to immunity, despite certain appearances which might have led to the contrary conclusion or at least given rise to some doubt.”²⁹⁰

Other examples of cases that *do not* constitute “acts harmful to the enemy” by medical personnel or hospitals on land and do not deprive them of their protected status under the Geneva Conventions are found at GWS, art. 22.²⁹¹ They are as follow:

²⁸⁵ ICRC Commentary to GWS-SEA, *supra* note 178, at 190.

²⁸⁶ GWS-SEA, *supra* note 21, art. 35.

²⁸⁷ ICRC Commentary to GWS-SEA, *supra* note 178, at 194.

²⁸⁸ GWS-SEA, *supra* note 21, art. 35. Medical personnel may carry arms for self-defense only. The arms carried are for their personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war. See Commander’s Handbook, *supra* note 24, par. 8.2.3 (historically, only light, portable and individual weapons such as pistols and rifles, may be used by the crew of hospital ships in their defense). See also SAN REMO MANUAL, *supra* note 131, para. 170, at 172-173 for a discussion on the legality of chaff and flares use by hospital ships as a defense from modern means of warfare such as missiles. The San Remo Manual attempts to update and clarify the customary international law of armed conflict at sea and is the product of scholars and practitioners. See San Remo Manual on International law Applicable to Armed Conflicts at Sea, 89 Am. J. Int’l L. 192 (1995).

²⁸⁹ GWS-SEA, *supra* note 21, art. 35.

²⁹⁰ ICRC Commentary to GWS-SEA, *supra* note 178, at 194.

²⁹¹ GWS, *supra* note 7, art. 22.

- (1) Unit personnel armed for self-defense against violators of the law of war, *i.e.*, those attacking a medical unit, using small arms such as rifles and pistols (not machine guns or mines).²⁹²
- (2) Sentries guarding medical units using force only in self-defense as described in the previous paragraph.
- (3) Small arms taken from wounded are present in the unit.
- (4) Presence of personnel from the veterinary service.
- (5) Provision of care to civilian wounded and sick.²⁹³

Notwithstanding the list of examples in the GWS and GWS-Sea, the “list is not . . . to be considered as comprehensive . . . [since] cases can be imagined where the good faith of a hospital ship remains beyond question despite certain appearances to the contrary. For each Party, the question will always be one of good faith.”²⁹⁴ It is left to the Detaining Power’s armed forces to make a good faith determination whether the conduct on or by its hospital ship is an “act harmful to the enemy.”

Military commanders judging whether the interrogation of EPWs or detainees is considered an “act harmful to the enemy” may consider, in addition to reading the plain text of GWS-Sea articles 34 and 35 and GWS article 22, true-to-life examples contemplated by international legal commentators of what qualifies as “acts harmful to the enemy.” The ICRC in its Commentaries edited by Jean Pictet on the GWS-Sea and GWS described what they consider examples of acts harmful to the enemy that are “outside their humanitarian duties” and therefore would render medical units or hospital ships subject to warning and attack.²⁹⁵ With regard to hospital ships these include “carrying combatants or arms, transmitting military information by radio, or deliberately providing cover for a warship.”²⁹⁶ In the case of fixed or mobile medical units, such acts would include “the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as an observation post; or . . . the deliberate siting of a medical unit in a position where it would impede an enemy attack.”²⁹⁷ The San Remo Manual on International Law Applicable to Armed Conflicts at Sea states that medical ships are not to lose their protection as long as they “do not *intentionally* hamper the movement of combatants and

²⁹² See also *Law of War Deskbook*, *supra* note 18, at 62 (citing Dep’t of Army Field Manual 8-10, at para. 3-21).

²⁹³ GWS, *supra* note 7, art. 22. See also *Law of War Deskbook*, *supra* note 18, at 62 (citing Dep’t of Army Field Manual 8-10, at para. 3-21).

²⁹⁴ See ICRC Commentary to GWS-SEA, *supra* note 178, at 194.

²⁹⁵ GWS-SEA, *supra* note 21, art. 34. GWS, *supra* note 7, art. 21.

²⁹⁶ ICRC Commentary to GWS-SEA, *supra* note 178, at 190-191. “In World War I the German hospital ship *Ophelia* was condemned because it had not afforded assistance and because it had transmitted encrypted messages that had not been properly documented. Moreover, the *Ophelia* was equipped with a radio system, then unusual for a hospital ship. The radio installations were destroyed by their crew prior to capture.” See HUMANITARIAN HANDBOOK, *supra* note 10, at 479, n. 408.

²⁹⁷ See Jean Pictet, Geneva Convention Relative to the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949, International Committee of the Red Cross (1960), [hereinafter “ICRC Commentary to GWS”]p. 200-201 Available at <http://www.icrc.org/ihl.nsf/WebComART/OpenView>

obey orders to stop or move out of the way when required.”²⁹⁸ A corollary to acts that are intentionally harmful to the enemy are humane acts that may also be possibly harmful to the enemy but wrongly interpreted as intentionally malicious. Such humane acts could include a medical unit’s mere presence or activities that “might interfere with tactical operations,”²⁹⁹ for example, the medical unit’s use of “lights at night... [or] the waves given off by an X-ray apparatus could interfere with the transmission or reception of wireless messages by a military set, or with the working of a radar unit.”³⁰⁰

In light of the foregoing is there a “good faith” basis for the U.S. as the Detaining Power to believe that the interrogation of Iraqi detainees or EPWs on board their hospital ships for the purpose of medical treatment is *not* an “act harmful to the enemy” within the meaning of article 34 of the GWS-Sea?

The mere gathering of identifying information from a detainee such as his name, military unit and serial number is not likely an “act harmful to the enemy” as contemplated by the Geneva Convention. The gathering of such information is *required* by the Geneva Conventions.³⁰¹ Failure to get the information from an EPW could be viewed as a breach of the Geneva Conventions, and this issue will be discussed in greater detail below.³⁰² The U.S. is *required* to provide medical treatment to wounded detainees or EPWs.³⁰³ Should the Detaining Power simply ignore the duty to secure the detainee’s identity, or should medical care be delayed long enough to collect it? Neither is acceptable. Presently, based on the advanced state of mobile medical facilities such as those found aboard the hospital ships in the U.S. inventory, these issues need not be mutually exclusive. The U.S. may in good faith provide quality medical care to detainees and EPWs afloat and also question them on board these same hospital ships in accord with GPW, article 17.

Questioning EPWs or detainees to obtain identifying information in accordance with the dictates of the Geneva Convention cannot be viewed as “acts harmful to the enemy.” There is, however, an argument to be made that any information provided beyond identifying information does provide a military advantage to the forces receiving it. By way of example, no one would seek to argue that information obtained from reconnaissance planes as part of intelligence gathering is not an act harmful to the enemy. To say that information gathering from captured or surrendered enemy forces is not harmful to the enemy is to deny what all nations know to be true – that intelligence gathered about the enemy’s forces, plans, and capabilities from an EPW would be used as a matter of course in developing military plans and strategy.

²⁹⁸ SAN REMO MANUAL, *supra* note 132, para. 48(c), p.69 emphasis added. “The word ‘intentionally’ is used to make it clear that these vessels do not lose their protection because they may sometimes in practice hamper the movements of combatants whilst carrying out their work. This is bound to inadvertently happen sometimes and the exempt vessel should not be penalized for it.” *Id.*

²⁹⁹ ICRC Commentary to GWS, *supra* note 296, at 201.

³⁰⁰ *Id.*

³⁰¹ GPW, *supra* note 7, art. 17. See ICRC Commentary to GPW, *supra* note 15, at 156 (stating that “the first duty of a belligerent Power which has prisoners of war in its hands is to establish their identity [and] it must immediately determine the rank and status of those whom it has captured, in order to accord them the treatment to which they are entitled.”).

³⁰² GPW requires that all means necessary be used to determine the EPW’s identity. GPW, *supra* note 7, art 17.

³⁰³ GWS, *supra* note 21, and GWS-SEA, *supra* note 21, art. 12.

Based on the above it is a real possibility that the interrogation of EPWs aboard hospital ships in an attempt to get information beyond that mandated by the Geneva Convention could have the effect of stripping these vessels of their protected status and rendering them subject to lawful bombardment or attack by enemy forces.³⁰⁴ Navy judge advocates on scene in OIF successfully advocated the position that interrogations of EPW or detainees beyond identifying information could legally proceed only *after* medical treatment on board was concluded and the individual was returned to shore.³⁰⁵

VI. MODERN TECHNOLOGY AND BLOOD TESTING

Modern scientific advances raise novel questions as to whether new technologies that assist in identification, inoculation, and medical treatment that did not exist in 1949 are permissible under the Geneva Conventions. For example, we can derive a great deal more information from a person's body than we could just a few years ago. We can test almost any part of the body and collect accurate and unique information. Modern technology allows us to identify individuals by their DNA (deoxyribonucleic acid), scans of their eyes, faces, palms of their hands and fingerprints, as well as record, identify, and analyze voices. X-rays, CAT scans, sonograms, and blood tests are either new or perfected technologies since 1949.³⁰⁶ Beyond personal identification issues a blood test could be used to identify any contagious pathogens, life threatening illnesses, or inoculations an individual has received. Determining which inoculations an individual has received can help protect that individual from receiving the same vaccination twice, which can be dangerous, or it could possibly be used for intelligence purposes to determine what diseases a particular enemy force is inoculated against and by logical extension what biological and chemical weapons they may have in their arsenal. During OIF no blood tests beyond those necessary for standard medical screening were performed on board USNS COMFORT;³⁰⁷ however, this section will examine some of these interesting potential legal issues and how they comport to the Geneva Conventions of 1949.

³⁰⁴ See ICRC Commentary to GWS-SEA, *supra* note 179, at 191. GWS-SEA requires that before an attack on a hospital ship committing acts harmful to the enemy may commence, the enemy has to warn the hospital ship to put an end to the harmful acts and must fix a time-limit within which the ship must heed the warning or be subject to capture or attack. GWS-SEA, *supra* note 21, art. 34. Another potential issue which will not be discussed in this article is the status of the military interrogators (whether MI or CID) on board a hospital ship under the law of armed conflict. U.S. Army personnel interrogating EPWs on board USNS COMFORT are *not* medical personnel and are not therefore protected from attack. GWS, *supra* note 21, art. 24. See also GWS-SEA, *supra* note 21, art. 36 (medical personnel of ships and crews shall be respected and protected). Where a lawful target is located or situated at the location of a protected place, such as a hospital ship, the protection accorded that protected place does not extend to the lawful target in order to prevent an attack. Saddam Hussein often positioned his missiles inside of Iraqi hospitals in obvious violation of the laws of armed conflict and perhaps with the hopes that U.S. forces would refrain from attacking the location. See Ron Martz, *WAR IN THE GULF: ON THE FRONT LINES: IRAQI RESISTANCE: Scattered remnants fight back*, THE ATLANTA JOURNAL CONSTITUTION, April 4, 2003, at p. 6A (citing Iraqi Republican Guard "guerilla" tactics such as hiding their armored vehicles near mosques, schools and hospitals).

³⁰⁵ Interviews on file with authors. The judge advocates involved did not allow any interviews of detainees while under medication without a doctor's approval.

³⁰⁶ A CAT (Computed Axial Tomography) scan is the process of using computers to generate a three-dimensional image from flat (i.e., two-dimensional) x-ray pictures, one "slice" at a time.

³⁰⁷ Interviews on file with authors. The medical staff on board USNS COMFORT did *not* conduct any blood tests other than those necessary for standard medical screening consistent with medical treatment of wounded Iraqis. *No tests* were conducted for identification purposes or to determine potential vaccinations present in an EPW's system for intelligence gathering purposes. *Id.*

A. Identification

1. All Possible Means May Be Used to Determine EPWs' Identity

The Geneva Conventions require parties to a conflict to make efforts to identify captured and detained persons.³⁰⁸ For example, it is necessary for a detaining party to determine whether a captured or detained person is a protected person, a prisoner of war, or an unlawful combatant.³⁰⁹ Each classification of detained or captured person is afforded different rights and duties.³¹⁰ Historically identification of detained persons has been achieved through asking questions in conformity with the Geneva Conventions, showing a Geneva Conventions Card, or seeking assistance of the medical service if necessary.³¹¹

EPWs who as a result of their physical or mental condition are unable to provide their identity when questioned “shall be handed over to the medical service [and their] identity shall be established by all possible means” not otherwise prohibited by article 17 of the GPW.³¹² Assuming that the U.S. as the Detaining Power carefully abides by the parameters of GPW, art. 17 respecting the prohibition against torture and coercion, “*all possible means*” may be used to establish the detainee’s identity.³¹³ Extensive interrogation designed to identify the detainee may be legally employed without violating any U.S. or customary international legal requirement. Presumably, therefore, a wounded Iraqi soldier unable to identify himself to his U.S. captors on the battlefield as a result of his wounds may properly be “handed over” to U.S. medical personnel for necessary treatment.

2. Why is it imperative to identify EPWs?

The Geneva Conventions do not allow a nation to force EPWs, retained personnel, other detainees, or civilian internees (collectively “detainees”) to reveal any information. All detainees are required, however, to reveal their name, rank, serial number, and date of birth.³¹⁴ These requirements are acknowledged in OPNAVINST 3461.6, para 1-7. Although it does not define how to collect other information, this instruction also states:

³⁰⁸ GPW, *supra* note 7, art. 17.

³⁰⁹ See generally, GPW, arts. 4, 5 and GC, arts. 4,5, 43, 68, 79, 84.

³¹⁰ *Id.*

³¹¹ GPW, *supra* note 7, art. 17. See also interviews on file with authors whereby most detainees brought on board USNS COMFORT did not have identification cards or “dog tags.”

³¹² GPW, *supra* note 7, art. 17. “Prisoners of war who are unable to state their identity because of physical or mental disability must be handed over to medical services.” Fight it Right, *supra* note 130, at 98.

³¹³ See GPW, *supra* note 7, art. 17. (italics added) See also Field Manual, *supra* note 62, par. 93 (citing GPW, art. 17). “The identity of prisoners of war is to be established by all possible means short of coercion.” Fight it Right, *supra* note 130, at 98.

³¹⁴ GPW, *supra* note 7, art. 17.

[t]he Geneva Convention requires the National Prisoner of War Information Center (NPWIC) to collect and store the following information: Complete Name, Internment Service Number (ISN), Rank, Serial Number, Date of Birth, City of Birth, Country of Birth, Name and Address of Next of Kin, Date of Capture, Place of Capture, Capturing Unit, Circumstances of Capture, Location of Confiscated Personal Property, Nationality, General Statement of Health, Nation in Whose Armed Services the Individual is Serving, Name and Address of Person to be Notified of the Individual's Capture, Address to Which Correspondence May Be Sent, Certificates of Death or Duly Authenticated Lists of the Dead, Information Showing The Exact Location of War Graves Together With The Particulars of the Dead, Notification of Capture, and List of Personal Articles of Value Not Restored Upon Repatriation.³¹⁵

This information would then be made available to the ICRC so that it may transmit it back to the EPWs' families. It is the responsibility of every Detaining Power to account for every individual detained. One of the more devastating aspects of armed conflict is the disappearance of people for whom no account is ultimately rendered.

3. *Humanitarian Reasons for Conducting DNA Tests*

There are humanitarian reasons for a detaining or capturing party to obtain DNA samples. At the very core of the GPW is the critical desire to account for all personnel who fall into the enemy's hands; therefore, identification and recording of all detainees is an immediate requirement.³¹⁶ It is "the right of families to know the fate of their relatives."³¹⁷ Parties in conflict have a duty to search for missing persons of the adverse party.³¹⁸ Detaining authorities have a duty to provide information about protected persons and "to obtain the information which is asked for if it is not in its possession."³¹⁹ Death certificates must be provided using the information in article 17 of the GPW.³²⁰ Death certificates must also be provided for those prisoners who cannot state their identity due to physical or mental condition.³²¹ This information is to be acquired by "all possible means."³²² Parties to a conflict "shall endeavor to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas...."³²³ "Parties to the conflict shall record as soon as possible, in the respect of each wounded, sick, or dead person of the Adverse Party falling into their hands, any particulars which may assist in his

³¹⁵ See AR 190-8, *supra* note 51, par. 1-7.

³¹⁶ The Army requested permission to conduct DNA testing via cotton swabs of the mouths of EPWs, but the request came towards the end of the conflict, and only the most badly injured Iraqis remained on board USNS COMFORT. The judge advocates did advise against blood draws for DNA testing, because they were viewed as too invasive. Interviews on file with authors.

³¹⁷ AP I, *supra* note 21, art. 32.

³¹⁸ *Id.* art. 33.

³¹⁹ See GPW, *supra* note 7, art. 122(7) and GC, *supra* note 21, art. 137(1).

³²⁰ See GPW, *supra* note 7, art. 120 and art. 17 respectively.

³²¹ *Id.*

³²² *Id.*

³²³ AP I, *supra* note 21, art. 33(4).

identification.”³²⁴ This approach would also comport with current U.S. practice of collecting DNA samples of U.S. service members for use as an identifier if the member is captured or killed.³²⁵

4. *EPWs Taken Onboard Hospital Ships*

Compliance with the directive to determine a detainee’s identity by all possible means is certainly hindered if an individual’s identity cannot be determined because of his medical condition. It could, therefore, be argued that GPW, article 17, which requires the Detaining Power to identify detainees using all possible means, mandates that commanders ask questions of detainees and EPWs receiving medical care on hospital ships. Absent coercion or torture, all means may be used to question the EPW. If questioning must wait until a wounded detainee or EPW departs the hospital ship after care is concluded, then the identification process will have been delayed, and, arguably, the U.S. as the Detaining Power may have actually breached GPW, article 17 by failing to identify the detainee using all means necessary. This reasonably includes interrogating the EPW to obtain the required identifying information.³²⁶ It appears incongruous that otherwise legal interrogations required for purpose of interrogation could strip the hospital ship of its protected status. As stated previously the more critical issue arises when the interrogation goes beyond mere identification.

B. *Drawing of EPWs’ Blood*

1. *Vaccinations*

Prior to administering a vaccine to an EPW, it would appear to be justifiable under the Convention to draw blood to see what vaccinations an EPW has already received, perhaps by screening the blood for the existence of antibodies to certain diseases. While we do not currently screen U.S. service members in this manner, the health risks of administering unnecessary vaccinations would medically justify such a screening since, as previously discussed, vaccines pose some potential risk to the patient.³²⁷

³²⁴ GWS, *supra* note 21, art. 16.

³²⁵ See Vaughn Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 Army Law. 16, 18 (August 1994) (“With the emergence of deoxyribonucleic acid (DNA) technology as a valid and viable means of identification, the United States is working to establish a new identification card that includes the DNA information of the service member. This testing will provide a tremendous advance in the ability to identify prisoners and the remains of unidentified personnel.”) Another consideration is whether we would want it done to our service members, i.e., whether we would object to the enemy drawing the blood of our captured troops to test for the existence of certain vaccinations.

³²⁶ GPW, *supra* note 7, art. 17.

³²⁷ See Karin Schumacher, *Informed Consent: Should it be Extended to Vaccinations?*, 22 T. Jefferson L. Rev. 89 (Fall 1999); see also Donald McNeil Jr., “A Death May be Related to Vaccines,” *New York Times*, Nov. 19, 2003, reporting that the death of an Army reservist in April 2003 might have been caused by an adverse reaction to the combination of vaccines for smallpox, anthrax, hepatitis B, typhoid, measles, mumps and rubella; and DoD News Release 868-03, “Panels Find Vaccines May Relate to Reservists Death, Illness,” Nov. 19, 2003, available at <http://www.dod.mil/releases/2003/nr20031119-0656.html>.

Chapter III of the GPW pertains to the medical care that must be provided to all prisoners of war as well as the hygiene of prisoner of war camps.³²⁸ Article 29 specifically binds the Detaining Power with the requirement to “prevent epidemics” in camps.³²⁹ The ICRC Commentary to GPW has taken the position that upon entry into a camp a prisoner of war should be given a “strict examination” and “inoculation with all necessary vaccines.”³³⁰ The ICRC Commentary specifies that these vaccines will “vary according to the climate and latitude and will be re-administered as frequently as necessary; even if they are not currently in use in the armed forces to which the prisoners belong, that is no reason why they should not be administered.”³³¹ The ICRC Commentary also has taken the position that “[p]risoners of war must be vaccinated as their health requires, taking into account their constitution and the risks to which they are exposed, with no restrictive considerations other than those accruing from article 13.”³³² Article 13 prohibits “medical or scientific experiments of any kind which are not justified by the medical treatment of the prisoner concerned and carried out in his interest,” and will be discussed below.³³³

In determining what is a “necessary vaccine” for a detainee, the starting point is to examine what diseases U.S. service members are vaccinated against. U.S. service members are routinely immunized against several common diseases including influenza, measles, pertussis, mumps, rubella, polio, tetanus, diphtheria, meningococcus, hepatitis A, varicella, and hepatitis B.³³⁴ While these inoculations are routinely given in the early childhood of most Americans, the armed forces verify that these vaccinations have been given and will inoculate recruits entering the services who lack these inoculations. Service members deploying to areas considered high-risk for biological attack such as Southwest Asia are inoculated against meningococcal, typhoid, yellow fever, immune globulin, anthrax, and botulinum toxoid.³³⁵ More recently smallpox vaccinations were begun.³³⁶

It would therefore seem to be required under current international law to vaccinate EPWs against these diseases as well depending on the risk posed to the detainees. This would be in accordance with the dictates of article 29 of the GPW.³³⁷ It is probably not necessary to inoculate detainees against

³²⁸ GPW, *supra* note 7, chapter III.

³²⁹ GPW, *supra* note 7, art. 29.

³³⁰ ICRC Commentary to GPW, *supra* note 15, at 206.

³³¹ *Id.* at 207.

³³² *Id.*

³³³ GPW, *supra* note 7, art. 13.

³³⁴ Joint Air Force, Army, Navy, and Coast Guard publication (AFJI 48-110, AR 40-562, BUMEDINST 6230.15, CG COMDTINST M6230.4E), Nov. 1, 1995. *See also* Medical Surveillance Monthly Report, Vol. 9, No.2, Feb/Mar 2003, at 2. For a complete overview of current DoD policy on vaccinations, see Vaccines in the Military: A Department of Defense-Wide Review of Vaccine Policy Practice, A Report for the Armed Forces Epidemiological Board (August 1999), available at <http://www.ha.osd.mil/afeb/reports/vaccines.pdf>.

³³⁵ *See* DoD Directive 6205.3, “DoD Immunization Program for Biological Warfare Defense,” Nov. 26, 1993; Medical Surveillance Monthly Report, Vol. 9, No.2, Feb/Mar 2003, at 4.

³³⁶ For current U.S. Armed Forces’ policy on smallpox vaccinations, see www.smallpox.mil. For a detailed history of smallpox see Jonathan B. Tucker, Scourge: The Once and Future Threat of Smallpox, Atlantic Monthly Press, 2001. *See also* Jonathan B. Tucker, Biosecurity: Limiting Terrorist Access to Deadly Pathogens, United States Institute of Peace, Peaceworks No. 52, November 2003.

³³⁷ GPW, *supra* note 7, art. 29.

anthrax when they are detained outside of southwest Asia, where the threat posed by anthrax would be minimal.³³⁸ U.S. service members are not regularly inoculated against anthrax when they are stationed outside of Southwest Asia. When EPWs are detained in a region that can be struck by biological weapons, and if U.S. service members are inoculated against biological weapons, then a persuasive argument could be made that detainees should be inoculated against the same biological weapons that U.S. service members are so there is no discrepancy in the level of medical care.³³⁹

Various pathogens could be employed as biological weapons, the most likely of which would be smallpox, anthrax, the plague, hemorrhagic fevers, tularemia, Venezuelan equine encephalitis, and ricin.³⁴⁰ Not all of these pathogens have vaccines available, and of the ones that do only certain ones are regularly provided to U.S. service members.³⁴¹ While the anthrax vaccine is regularly given to U.S. service members deploying to Southwest Asia the vaccination program has been highly controversial, in large part due to concerns about the vaccine's safety record and lack of approval from the U.S. Food and Drug Administration (FDA).³⁴²

Similarly, another issue to be concerned about is new infectious diseases. In February 2003 Severe Acute Respiratory Syndrome (SARS) first appeared in China and quickly spread throughout the world, gaining for itself the moniker "epidemic."³⁴³ At first very little was known about the disease, and no vaccine exists to this day.³⁴⁴ Even if a vaccine for SARS or other new infectious diseases were to be developed and licensed by the FDA, a first-generation vaccine may pose dangers and have its licenses withdrawn.³⁴⁵ How should a Detaining Power, specifically the U.S. Government, handle its requirement to prevent an epidemic outbreak of SARS or any other new or resurgent disease?³⁴⁶ Could an experimental vaccine that is still in development be used if it could contain an outbreak in a prisoner of war camp?

³³⁸ This is in keeping with the ICRC's Commentary to GPW article 29, which allows for the varying of vaccinations upon "latitude and climate" considerations. Adding the consideration of threat posed by biological warfare as a "latitude and climate" consideration would arguably be in keeping with the spirit of Article 29. ICRC Commentary to GPW, *supra* note 15, at 207.

³³⁹ Of course, per article 19 EPWs are required "to be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger." Thus EPWs should not theoretically be in a position to be exposed to biological weapons; however, given the reach of biological weapons, any camp in-theater is potentially a target.

³⁴⁰ Barry Kellman, Biological Terrorism: Legal Measures for Preventing Catastrophe, 24 *Harvard J. L. & Pub. Pol'y* 417, 432-37 (Spring 2001); Gail Javitt, Drugs and Vaccines for the Common Defense: Refining FDA Regulation to Promote the Availability of Products to Counter Biological Attacks, 19 *J. Contemp. Health L. & Pol'y* 37, 41-46 (Winter 2002).

³⁴¹ Barry Kellman, *supra* note 340, at 417, 432-37.

³⁴² See George Annas, Protecting Soldiers from Friendly Fire: The Consent Requirement for Using Investigational Drugs and Vaccines in Combat, 24 *Am. J. L. and Med.* 245 (1998); Gail Javitt, Drugs and Vaccines for the Common Defense: Refining FDA Regulation to Promote the Availability of Products to Counter Biological Attacks, 19 *J. Contemp. Health L. & Pol'y* 37 (Winter 2002).

³⁴³ George Annas, Blinded by Bioterrorism: Public Health and Liberty in the 21st Century, 13 *Health Matrix* 33, 64 (Winter 2003).

³⁴⁴ See Claudia Kalb, "The Mystery of SARS," *Newsweek*, May 5, 2003; "A Deadly Mystery," *The Economist*, Apr. 5, 2003. See also Lawrence Altman, "Progress Reported in SARS Vaccine Effort," *New York Times*, Nov. 9, 2003.

³⁴⁵ The FDA withdrew the license for the rotavirus vaccine in 1999, one year after it was granted, because immunizations were linked to a painful and potentially fatal bowel obstruction. Lawrence Altman, "Progress Reported in SARS Vaccine Effort," *New York Times*, Nov. 9, 2003.

³⁴⁶ See Raymond Baxter, Caroline Steinberg and Jennifer Shapiro, Is the U.S. Public Health System Ready for Bioterrorism? 2 *Yale J. Health Pol'y L. & Ethics* 1, 17 (Fall 2001).

An important caveat to inoculating EPWs with experimental vaccines is article 13, which requires EPWs to “at all times be humanely treated.”³⁴⁷ Medical and scientific experiments are expressly prohibited where not “justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest[.]”³⁴⁸ and Additional Protocol I (AP I) adds that medical procedures must be consistent with “generally accepted medical standards.”³⁴⁹

The Pictet Commentaries by the ICRC explicitly recognize that this language “does not prevent doctors from using treatment for medical reasons with the sole object of improving the patient’s condition. It must be permissible to use new medicaments and methods invented by science, provided that they are used only for therapeutic purposes.”³⁵⁰ All vaccines possess some potential risk to the health of patients.³⁵¹ It would seem that as long as they are medically justified, it is permissible and in some cases required to vaccinate EPWs with experimental vaccines. As in many areas of the law a balancing test is required, weighing the risk to the patient-EPW of contracting a disease versus the risk to the patient-EPW of the vaccine itself.³⁵²

Who conducts this balancing test? Informed consent is an issue, and against the backdrop of this issue one must ask if an EPW can ever give “informed” or voluntary consent. Informed consent is defined as “voluntary consent given by a person or a responsible proxy for participation in a study, immunization program, treatment regimen, etc., after being informed of the purpose, methods, procedures, benefits and risks.”³⁵³ This concept has its origins in the Nuremberg Trials conducted by Allied forces in the aftermath of the Second World War.³⁵⁴ In the case of *United States v. Karl Brandt, et al.*, commonly referred to as the “Doctors Trial,” the International Military Tribunal at Nuremberg found that Nazi doctors had committed crimes against humanity by, *inter alia*, performing experiments on persons without their consent.³⁵⁵ The Tribunal’s decision contained ten points that came to be called the “Nuremberg Code.” The first point requires the “voluntary consent of the human subject” after being informed of the risks involved.³⁵⁶ While not having the force of a binding treaty the Code was the

³⁴⁷ GPW, *supra* note 7, art. 13. Violation of this Article is specifically noted to be a “grave breach” of the Convention.

³⁴⁸ *Id.* art. 13.

³⁴⁹ AP I, *supra* note 21, art. 11. See also Yves Sandoz et al., Eds., Additional Protocol to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, International Committee of the Red Cross (1987), art. 11, page 150-159 [hereinafter “ICRC Commentary to AP I”]. Available at <http://www.icrc.org/ihl.nsf/WebComART?OpenView>.

³⁵⁰ ICRC Commentary to GPW, art. 13, p. 141. The Commentary continues: “The prisoners must not in any circumstances be used as ‘guinea-pigs’ for medical or scientific experiments.”

³⁵¹ See Karin Schumacher, *supra* note 325; see also Donald McNeil, *supra* note 325; and DoD News Release 868-03, *supra* note 325.

³⁵² This article will not attempt to discuss any ethical issues, either medical and/or religious, regarding humans as test subjects.

³⁵³ Stedman’s Medical Dictionary 871 (26th ed. 1995).

³⁵⁴ Benjamin Meier, International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent, 20 Berkeley J. Int’l. L. 513, 521-24 (1992).

³⁵⁵ *Id.* at 522-23.

³⁵⁶ *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 2, pp. 181-182. Washington, D.C.: U.S. Government Printing Office, 1949, available at <http://ohsr.od.nih.gov/nuremberg.php3>.

first international standard limiting medical experimentation.³⁵⁷ In 1964 the World Medical Association adopted the Declaration of Helsinki entitled “Ethical Principles for Medical Research Involving Human Subjects.”³⁵⁸ This Declaration codified the concept of informed consent yet distinguished between medical research combined with clinical care and non-therapeutic biomedical research involving human subjects.³⁵⁹ In 1982 the World Health Organization and Council of the International Organization of Medical Societies adopted the International Ethical Guidelines for Biomedical Research Involving Human Subjects as a model for the drafting of national legislation on human research.³⁶⁰ In the United States the FDA and Institutional Review Boards regulate informed consent.³⁶¹

Investigational vaccines require informed consent; however, in 1990, prior to Operation Desert Storm, the U.S. Department of Defense (DoD) cited military expediency and sought a waiver from the FDA of the informed consent requirements for experimental drugs.³⁶² This request was granted by FDA, which promptly drafted a new general regulation, Rule 23(d), permitting drug-by-drug waiver approval for the military on the basis that consent is “not feasible” in a “specific military operation involving combat or the immediate threat of combat.”³⁶³ This waiver permitted the DoD to authorize the use of investigational drugs and vaccines on US service members without their informed consent.³⁶⁴ Current DoD policy is to “make preferential use of products approved by the FDA” but to seek an FDA waiver “at the time of the need for a force health protection countermeasure against a particular threat.”³⁶⁵ To date only two waivers have been granted pursuant to Rule 23(d), one for pyridostigmine bromide for use as a “pretreatment” prior to nerve gas attack and the other for pentavalent botulinum toxoid vaccine to

³⁵⁷ See Benjamin Meier, *supra* note 354, at 513, 523 (1992).

³⁵⁸ World Medical Association, Declaration of Helsinki, “Ethical Principles for Medical Research Involving Human Subjects,” June 1964, available at www.nihtraining.com/ohsr/site/guidelines/helsinki.html.

³⁵⁹ *Id.* Article 9 reads: “In any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail. He or she should be informed that he or she is at liberty to abstain from participation in the study....”

³⁶⁰ See Benjamin Meier, *supra* note 354, at 513, 526-27.

³⁶¹ Code of Federal Regulations, Title 45, Section 46, and Title 21, Sections 50 and 56. See Esther Chang, Fitting a Square Peg into a Round Hole?: Imposing Informed Consent and Post-Trial Obligations on United States Sponsored Clinical Trials in Developing Countries, 11 S. Ca. Interdis. L. J. 339, 346 (Spring 2002).

³⁶² George Annas, *supra* note 342, at 245, 247 and Executive Order 13139, Sec. 3, “Improving Health Protection of Military Personnel Participating in Particular Military Operations,” September 30, 1999, recognizes that informed consent applies to investigational drugs unless a waiver applies and states that “[i]n accordance with 10 U.S.C. 1107(f), the President may waive the informed consent requirement for the administration of an investigational drug to a member of the Armed Forces in connection with the member’s participation in a particular military operation, upon a written determination by the President that obtaining consent: (1) is not feasible; (2) is contrary to the best interests of the member; or (3) is not in the interests of national security.”

³⁶³ George Annas, *supra* note 342, at 245, 247, citing 21 C.F.R. § 50.23(d) (1997); see DoD Directive 6200.2 “Use of Investigational New Drugs for Force Health Protection,” Aug. 1, 2000, for current U.S. Armed Forces policy regarding the administration of investigational drugs and informed consent.

³⁶⁴ George Annas, *supra* note 342, at 245, 247.

³⁶⁵ DoD Directive 6200.2 “Immunization Requirements” (Aug. 1, 2001), available at http://www.dtic.mil/whs/directives/corres/pdf/d62002_080100/d62002p.pdf. See also DoD Directive 6205.3, *supra* note 332.

protect against botulism in biological warfare.³⁶⁶ Additionally, while the anthrax vaccine is FDA approved, its use as a vaccine against aerosol forms of anthrax is not approved.³⁶⁷

The issue then is how does the concept of informed consent apply to the inoculation of EPWs with experimental drugs, i.e., vaccines not approved by the FDA? Ultimately the overall context of any such treatments and inoculations would need to contemplate the meaning of articles 13 and 29 of the GPW and article 11 of Additional Protocol I (AP I), which expressly prohibit medical or scientific experiments even with the EPW's consent.³⁶⁸ The administration of FDA approved vaccines, especially ones that are administered to U.S. service members, if done to prevent the spread of a known and likely epidemic and for the health of the detainee and other detainees in the camp should be permissible under article 29 of GPW.

One does not have to imagine a scenario where vaccines not approved by the FDA or vaccines with uses not approved by the FDA may be necessary to prevent epidemics or safeguard the health of EPWs. Certainly the botulism vaccine, *supra*, presents one possible dilemma, if botulism is feared as a biological weapon. Another such dilemma is the outbreak of newer diseases such as SARS in EPW camps. A decision to use a vaccine not approved by the FDA should be made only under extraordinary circumstances necessary to protect the detainee population from a disease and only if we are vaccinating our own service members with the same vaccine. Anytime there is an outbreak of a major disease in a detention facility, questions will arise as to whether the Detaining Power adequately protected the detainee population; however, the Geneva Conventions do not expressly require Detaining Powers to inoculate detainees.³⁶⁹ That is the responsibility of their respective governments. There is no doubt, however, that some would claim that the Detaining Power was irresponsible if it provided certain vaccines to their own service members but not to EPWs and a camp was subsequently struck by either a biological / chemical attack or an outbreak of a deadly epidemic.

2. Intelligence Gathering

What if in addition to examining the blood of EPWs for medical purposes the screening was performed for intelligence purposes (i.e., to see what the EPW was vaccinated against as a possible warning as to what biological weapons the enemy might possess)? Would this be justifiable under the Geneva Conventions? Article 17, GPW states that “[e]very prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”³⁷⁰ Torture and coercion are prohibited to acquire any information, and those EPWs “who refuse to answer may not be threatened,

³⁶⁶ George Anna, *supra* note 339, at 245, 247.

³⁶⁷ Randall Katz, Friendly Fire: The Mandatory Military Anthrax Vaccination Program, 50 Duke L. J. 1835, 1852-53 (Apr. 2001); Ruth Miller, Informed Consent in the Military: Fighting a Losing Battle Against the Anthrax Vaccine, 28 Am. J. L. and Med. 325, 340-42 (2002).

³⁶⁸ AP I, *supra* note 21, art. 11. See also ICRC Commentary to AP I, *supra* note 346, at 150-159.

³⁶⁹ See generally GPW, *supra* note 7, arts. 30-31

³⁷⁰ *Id.* art. 17.

insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”³⁷¹ Article 12, GWS precludes torture or biological experimentation of armed force members who are at sea and are wounded, sick, or shipwrecked.³⁷² The question is whether the drawing of blood from an EPW is torture or coercion designed to secure information pertaining to the enemy’s possession of biological weapons.

While U.S. domestic law is not dispositive in interpreting the Convention, it is relevant when considering how the U.S. Government interprets the word “questioning.” It is well established in the United States that the forced drawing of blood is not a violation of an individual’s right against self-incrimination or an unlawful search and seizure. In the seminal case of *Schmerber v. California*, a case wherein the accused in a driving while intoxicated case had his blood forcibly withdrawn and analyzed, the Supreme Court of the United States stated that “[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis.”³⁷³ Employing this interpretation, drawing the blood of detainees would not be “questioning,” that implicates article 17.

An important consideration, however, is whether medical personnel who draw blood for the sole purpose of intelligence gathering and not for the health of the patient-EPW lose the protections of the Convention.³⁷⁴ In accordance with article 21 of the GWS medical units may lose their protection if they “are used to commit, outside their humanitarian duties, acts harmful to the enemy.”³⁷⁵ The ICRC’s Commentary to article 21 states that “[m]edical establishments and units must observe, towards the opposing belligerent, the neutrality which they claim for themselves and which is their right under the Convention.”³⁷⁶ Drawing blood for intelligence purposes would arguably violate this requirement of neutrality.³⁷⁷

To bring these issues to closure, it appears that drawing blood in order to collect DNA for identification purposes or to determine whether an EPW can be vaccinated against a disease, comport with the Geneva Conventions and would therefore not forfeit the protected status of either a hospital ship or medical personnel. Drawing blood for the purposes of intelligence-gathering is much more questionable, however, and runs the risk that the medical personnel performing the blood draw and the hospital ship, if it takes place on board one, could possibly lose their protected status. Another related

³⁷¹ *Id.* “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”

³⁷² *Id.* art. 12.

³⁷³ *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 1832, 16 L.Ed.2d. 908, 917 (1966).

³⁷⁴ A potential side issue here is whether possession by the U.S. of evidence that an enemy has biological weapons specifically banned by the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (opened for signature on 10 April 1972 and entered into force on 26 March 1975) would justify surveillance methods such as checking the blood of EPWs to see if they have been vaccinated against prohibited weapons.

³⁷⁵ GWS, *supra* note 21, articles 19 and 21.

³⁷⁶ ICRC Commentary to GWS, *supra* note 15, art. 21.

³⁷⁷ Before a medical unit loses its protection and can be lawfully targeted, the belligerent must give “due warning” with a “reasonable time limit.” See GWS, *supra* note 21, art. 21. If a belligerent did conclude that drawing blood for intelligence-gathering was an “act harmful to the enemy” and a violation of the protected status of medical personnel, then they would have to place the medical personnel on notice prior to an attack.

issue to consider is whether intelligence personnel can access the medical records of EPWs in order to review information that was gathered by medical personnel for proper medical purposes.³⁷⁸

VII. CONCLUSION

International Humanitarian Law is designed to protect those who cannot protect themselves, whether they are wounded or sick, on land or at sea, *hors de combat*, prisoners of war, or civilians caught in an armed conflict. This canon of law like all others is certainly not perfect, but arguably it is civilization's best hope.

Rousseau's fundamental breakthrough in the way combatants are viewed was a critical development in the elevation of the treatment afforded individual fighting men. No longer were captured combatants to be viewed as war prizes belonging to the victor or as criminals merely because they engaged in armed conflict.³⁷⁹ Instead they were seen as humans sent forth by their nation, and as such they should be spared inhumane treatment. Today the law of armed conflict reflects this belief.

International law is organic and grows in a number of different ways. Most often international law grows out of state practice. Its major sources are treaties and conventions, customary international law, general principles of law, judicial decisions, and the writings of scholarly publicists.³⁸⁰ Of these the development of customary international law best illustrates the dynamic character of international law development.³⁸¹ In order to become customary international law, an act must be regular and repeated widespread state practice accompanied with the subjective element that there is a sense of legal obligation (*opinio juris*) and that a departure from such practices that would result in sanctions. The law of armed conflict, a subset of international law, is a combination of treaties and customary international law. Like international law in general, the law of armed conflict will be impacted by state practice as it too evolves.

We have reached a historic dichotomy in international law. One position is that we are in a whole new arena of warfare, and there are no existing rules for many of the issues and circumstances with which we are now dealing. The other position is the strict interpretation of existing law. It is therefore critical when evaluating and analyzing the issues to be cognizant of the historical perspective of how particular rules came into effect and evolved into customary international law. Some of the articles included in the Geneva Conventions of 1949 appear to have been overtaken by events – most notably the notion of monthly advance pay ranging from eight to seventy-five Swiss francs.³⁸² Each and every article

³⁷⁸ See also Peter Slevin and Joe Stephens, *Detainees' Medical Files Shared*, WASHINGTON POST, June 10, 2004, page A-1. This article cites an October 9, 2003 Department of Defense memo which discusses the ICRC's complaints that the medical records "are being used by interrogators to gain information in developing an interrogation plan."

³⁷⁹ The underlying philosophy of the GPW is that prisoners of war are not to be punished for "merely having engaged in armed conflict, and that their captivity should be as humane as possible."

³⁸⁰ Statute of the International Court of Justice. June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. See Article 38. All member states of the United Nations are automatically parties to the statute.

³⁸¹ See Ian Brownlie, *Principles of Public International Law* (Fifth Edition), Oxford University Press 1998, for a discussion of "International Custom" pages 4-11.

³⁸² GPW, *supra* note 7, art. 60.

of the GPW clearly has a purpose, and that purpose is to protect those who have fallen into the hands of the enemy. Although some of the specifics may seem outdated, the intention behind each article is usually quite obvious. The spirit of the GPW remains intact, and countries are obligated to follow these laws. Any and all deviations from the text of the Geneva Conventions should be handled with great care and trepidation. Such deviations should only be made by the highest authorities and must remain firmly within the spirit and intent of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

NATIONAL ARCHIVES & RECORD ADMINISTRATION v. FAVISH: PROTECTING AGAINST THE PRYING EYE, THE DISBELIEVERS, AND THE CURIOUS

Lieutenant Commander Joseph Romero, JAGC, USN*

“The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.”¹

In a landmark decision long awaited by information access professionals, the Supreme Court unanimously decided in *National Archives & Records Administration v. Favish*² that certain death-scene photographs of Vincent W. Foster, Jr.³ were exempt from release pursuant to Exemption 7(C)⁴ the Freedom of Information Act (hereinafter FOIA).⁵ This case is particularly noteworthy in that it lays the analytical foundation for future FOIA cases dealing with the complex and contradictory interests of the public’s right to access Government records and the privacy rights of individuals about whom information is contained in those same records. Of note, the Court fully recognized for the first time that surviving family members enjoy a privacy interest that must be considered when analyzing the release of agency records.⁶ Additionally, the Court established a new standard of review for analyzing Exemption 7(C) cases.⁷ Moreover, the Court briefly commented on what impact public personage may have when balancing the public’s interest in release of the records in question against the privacy interest of the individual(s) involved.⁸ Specifically, the Court held that the public stature of the decedent did not detract from his privacy interests.⁹ The opinion of the court on this particular issue was rendered in a single

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¹ Samuel D. Warren and Louise D. Brandeis, *The Right of Privacy*, HARV. L. REV. 193, 196 (1890).

² 124 S. Ct. 1570 (2004).

³ Mr. Foster was the Deputy White House Counsel during the first year of the Clinton administration. Mr. Foster was found dead of a gunshot wound to the head in Fort Mercy Park, located just outside of Washington, D.C. on July 20, 1993. *Id.* at 1574.; See also Gwen Ifill, *White House Aide Found Dead; Close Associate of the Clintons; Clinton Aide Is Found Dead; Suicide Is Suspected*, N.Y. TIMES, July 21, 1993, at A1.

⁴ 5 U.S.C. §552(b)(7)(C).

⁵ 5 U.S.C. §552.

⁶ *Favish*, 124 S. Ct. at 1579.

⁷ *Id.* at 1581.

⁸ *Id.* at 1580.

⁹ *Id.*

sentence.¹⁰ This significant sentence, easily overlooked by a casual reader, contains language that is absolute in its holding and which on its face contradicts several lower court rulings regarding the privacy interest of “public figures” under FOIA.

Although the opinion of the Court covers many more significant FOIA principles than those described above, this note will analyze the following aspects of the Court’s opinion. First, this note will provide a brief history and analysis of FOIA, particularly of Exemptions 6 and 7(C), and the manner in which Congress worked to balance the competing interests of public disclosure and individual privacy. In the subsequent sections, this note will analyze the *Favish* opinion, particularly how it has created new precedent in the areas described above. Specifically, this note will analyze survivor privacy rights, a new standard of review created for certain Exemption 7(C) cases, and the privacy interests of public figures in light of *Favish*. In addition, the note will discuss whether the Court’s ruling in *Favish* upholds or detracts from the legislative intent behind FOIA. Finally, this note concludes that, contrary to a sizeable number of opinions that the Supreme Court has drifted away from the legislative intent of FOIA, the Court in *Favish* acted squarely within Congress’ design of protecting the privacy rights of individuals while still preserving FOIA’s essential goal of opening the Government to the public’s scrutiny.

I. *Favish* and Foster.

A fair amount of controversy surrounds Mr. Foster’s death. His death generated a number of conspiracy theories¹¹ and was the subject of no less than five different Government investigations.¹² The United States Park Police initially investigated Foster’s death and determined that the death was a suicide.¹³ Independent Counsel Robert B. Fisk subsequently reinvestigated the death in connection with his investigation of the Madison Guarantee and Whitewater matter.¹⁴ The expansive investigation¹⁵ concluded that the death was a suicide.¹⁶ The Senate Committee on Banking, Housing, and Urban Affairs conducted their own investigation into Foster’s death.¹⁷ The investigative panel unanimously

¹⁰ *Id.* (“Neither the deceased’s former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.”)

¹¹ One need only conduct a word search of “Vincent Foster suicide conspiracy” on Yahoo! to obtain an appreciation of the sheer volume of conspiratorial theories that exist. The author’s search using those terms obtained 30,000 results. See also CHRISTOPHER RUDDY, *THE STRANGE DEATH OF VINCENT FOSTER: AN INVESTIGATION* (1997). Mr. Ruddy has been a leading advocate of the theory that Foster may have been murdered. An excellent source of such conspiratorial information is found at the respondent’s own website, <http://www.allanfavish.com>. At this site, he has collected a large warehouse of information that he claims shows how the Government’s investigations are not credible; however, there are others who hold opposing views. See <http://www.moldea.com/Rivero.html>. Investigative reporter Dan E. Moldea has conducted his own investigation much as Allan Favish has conducted his and has determined that Vincent Foster acted alone and committed suicide.

¹² Brief for the Petitioner at 2, *Favish*, (No. 02-954)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The investigation consisted of “interviews with approximately 125 individuals, review of voluminous documentary and photographic evidence, extensive examination of physical evidence, and analysis by a panel of four nationally renowned forensic pathologists...” *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.* The investigation assembled nearly 2700 pages of evidence and testimony from individuals involved in the investigation. *Id.*

concluded that the death was a suicide.¹⁸ The House of Representatives conducted an investigation, led by Representative William Clinger, Jr., which similarly concluded that Foster took his own life. Finally, after enactment of the Independent Reauthorization Act,¹⁹ Kenneth Starr once again investigated the death of Vincent Foster in connection with the Whitewater affair.²⁰ At the conclusion of his investigation,²¹ Starr also concluded that the death of Foster was a suicide.²²

Allan Favish, the respondent, is a California insurance lawyer²³ who has a particular interest in the Foster death. He is “not convinced by the reasoning” of the prior Foster investigators and is “skeptical of the thoroughness of their investigations.”²⁴ A review of his website shows that Favish has amassed a voluminous repository of records and information involving the Foster death.²⁵ Favish describes himself as “just a citizen who’s very concerned about the integrity of the nation’s law enforcement agencies....”²⁶ Favish was involved in an earlier FOIA case involving the same death-scene photographs in issue before the Supreme Court.²⁷ During that case, he served as associate counsel for Accuracy in Media (AIM).²⁸ AIM describes itself as “a non-profit, grassroots citizens watchdog of the news media that critiques botched and bungled news stories and sets the record straight on important issues that have received slanted coverage.”²⁹

On January 6, 1997 Favish filed a FOIA request for the Foster death scene photographs in his individual capacity.³⁰ On January 24, 1997 the Office of Independent Counsel (OIC) denied his request stating that the photographs were exempt, in part, under Exemption (7)(C).³¹ Favish appealed this decision to the agency, and on February 19, 1997, the OIC denied his appeal reiterating the exemptions asserted in its original response.³² On March 6, 1997 Favish filed suit in District Court. One of the first issues decided by the lower court was whether Favish was collaterally estopped in his own case due to his previous representation of AIM.³³ Both the district court and the Ninth Circuit Court of Appeals held

¹⁸ *Id.* The committee issued a 54-page report that concluded that the death was a result of a self-inflicted gunshot wound. *Id.*

¹⁹ 28 U.S.C. §591.

²⁰ Brief for the Petitioner at 4, *Favish*, (No. 02-954).

²¹ *Id.* Much like Fiske, Starr reviewed all available evidence and relied on a pool of experts and investigators to assist him. Starr filed a 114-page report that agreed with the conclusion of every other investigation conducted up to that date that Foster had committed suicide. *Id.*

²² *Id.*

²³ *Court To Hear Vincent Foster Photos Case*, CNN, Dec. 2, 2003, available at <http://cgi.cnn.com/2003/LAW/12/02/foster.photos.ap/>.

²⁴ *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000), *rev'd*, 124 S. Ct. 1570 (2004); See <http://www.allanfavish.com>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Favish v. OIC*, 217 F.3d at 1171.

²⁸ *Id.*

²⁹ <http://www.aim.org>.

³⁰ *Favish v. OIC*, 217 F.3d at 1170. See also *Supreme Court Decides to Hear "Survivor Privacy" Case*, available at <http://www.usdoj.gov/oip/foiapost/2003foiapost17.htm>. Favish’s FOIA request involved a much larger number of pictures than was in issue before the Supreme Court. In total, Favish’s FOIA request encompassed 150 photographs. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Favish v. OIC*, 217 F.3d at 1171.

that Favish enjoyed standing in his own right separate from AIM and rejected the estoppel argument of the OIC.³⁴ The District Court ordered the release of the majority of the photographs in issue, but determined that ten photographs were not releasable.³⁵ In considering the ten photographs the District Court ruled in favor of the OIC, holding that in balancing the privacy interest of Foster's surviving family members against the public interest served by new copies of the photographs, the privacy interest outweighed the public interest.³⁶

Favish appealed the District Court's ruling to the Ninth Circuit regarding the withheld pictures, arguing that the statute limited the protected privacy interest only to the person whom the information relates. The Ninth Circuit held that "the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure."³⁷ After finding that a privacy interest was at stake, however, the Circuit Court felt that it could not balance the interests involved since no court had viewed the pictures in question up to that point.³⁸ The Court remanded the case to the District Court to review the pictures in question and to determine whether the potential invasion of the family's personal privacy outweighed the public interest in disclosure.³⁹ On remand, the District Court ordered the release of five out of the ten photographs, and the Ninth Circuit affirmed without providing further explanation.⁴⁰

II. FOIA: History and Purpose

The FOIA establishes a presumption that information, or more specifically records, maintained by the Executive Branch of the Federal Government should be accessible to the people.⁴¹ This recognition, that the individual maintains an entitlement to obtain Government information, was not always the case. Prior to the enactment of the FOIA, Section 3 of the Administrative Procedures Act (APA) controlled the release of Government records.⁴² The APA "gave agencies broad discretion

³⁴ *Id.* The court stated, "in response, arguing for estoppel, the OIC cited decisions of this circuit where privacy leading to estoppel has been found when a party to a judgment virtually represented a person now sought to be estopped. Virtual representation, however, has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697 (9th Cir. 1984); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). We have not found a case where a client is accountable to its lawyer. The identity of interest between Favish and Accuracy In Media is an abstract interest in enforcement of FOIA, an interest insufficient to create privity. *ITT Rayonier, Inc.*, 627 F.2d at 1003. Collateral estoppel does not apply." *Id.* (citations omitted).

³⁵ *Id.* at 1171.

³⁶ *Id.*

³⁷ *Id.* at 1173.

³⁸ *Favish v. OIC*, 217 F.3D at 1173.

³⁹ *Id.*

⁴⁰ *Favish*, 124 S. Ct. at 1576.

⁴¹ A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP. NO. 108-172 (2003) at 3 (hereinafter CITIZEN'S GUIDE).

⁴² 5 U.S.C. §1002 (1964) (amended in 1966 and now codified as 5 U.S.C. §552); See generally Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy have Missed the Target of Legislative Intent*, 4 COMM. L. & POL'Y 111 (1999). The author provides a detailed summary of the history of information access in the Federal Government. Specifically, the

concerning the publication of governmental records.”⁴³ The effectiveness of the Act, however, was “generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute.”⁴⁴ The burden of showing a need for the records fell squarely on the requestor.⁴⁵ There were no procedures or guidelines in place to aid the requestor in obtaining the information, nor were there any provisions for judicial remedy in the face of an agency’s wrongful denial to release requested information.⁴⁶ Recognizing the shortfalls of the APA, Congress proceeded to revise the very philosophy surrounding Government information availability when it enacted the FOIA.⁴⁷ If the APA standard could be described as a “need to know,”⁴⁸ the FOIA is best described as a “right to know.”⁴⁹ FOIA was specifically drafted to shift the burden away from the individual requestors and to give them the right to access Government records without a need to show the reason why they require such information or even to show that they have any reason at all.⁵⁰ The identity of the requestor under FOIA is irrelevant and cannot be used as a basis for denial of release.⁵¹ A request may be made under FOIA by “any person.”⁵² The term “any person” is broadly defined and includes individuals, including non-citizens of the United States, corporations, associations, and foreign and domestic governments.⁵³ There are only two exceptions to the scope of “any person.”⁵⁴ The first

author details the development of Government secrecy after World War II and how the citizen lacked any right to access to Government information prior to the enactment of the APA. *Id.* at 114.

⁴³ United States Dep’t of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 784 (1989).

⁴⁴ EPA v. Mink, 410 U.S. 73, 79 (1973). “The section was plagued with vague phrases, such as that exempting from disclosure ‘any function of the United States requiring secrecy in the public interest.’ Even ‘matters of official record’ were only to be made available to ‘persons properly and directly concerned’ with the information.” *Id.* A 1965 Senate report characterized the APA as “full of loopholes” used to “cover up embarrassing mistakes or irregularities... .” S. REP. NO. 89-813 (1965); *See also Halstuk, supra* note 41, at 114.

⁴⁵ CITIZEN’S GUIDE, *supra* note 40, at 3.

⁴⁶ *Id.* *See Mink*, 410 U.S. at 79 (“And the section provided no remedy for wrongful withholding of information.”).

⁴⁷ Dep’t of the Air Force v. Rose, 425 U.S. 352, 360 (1976). “Congress therefore structured a revision whose basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’” *Id.* at 360, 361, (citing S. REP. NO. 89-813 (1965)); “The provisions of the Freedom of Information Act stand in sharp relief against those of § 3.” *Mink*, 410 U.S. at 79.

⁴⁸ CITIZEN’S GUIDE, *supra* note 40, at 3.

⁴⁹ *Id.*

⁵⁰ *Id.* *See Favish*, 124 S. Ct. at 1580. “[C]itizens should not be required to explain why they need the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to the citizens to do with as they choose.” *Id.* The language and provisions of the statute itself shows a clear shift in the burden from the individual to the Government. The Act required agencies to publish their rules of procedure, 5 U.S.C. §552(a)(1)(C), make available for public inspection and copying their opinions, statements of policy, interpretations, and staff manuals, §552(a)(2), and to make records promptly available to any person who requests such records. §552(a)(3). By far, the most commonly used section of FOIA is (a)(3). DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE (2004), *available at* <http://www.usdoj.gov/oip/foi-act.htm> (hereinafter DOJ GUIDE). If an agency withholds a document or information within that document, the requestor now has a means of obtaining judicial relief via the district court, which can order the production of the records in question. 5 U.S.C. §552(a)(4)(B)

⁵¹ *Favish*, 124 S. Ct. at 1580. “Furthermore, as we have noted, the disclosure does not depend on the identity of the requestor. As a general rule, if the information is subject to disclosure, it belongs to all.” *Id.*

⁵² 5 U.S.C. §552(a)(3)(A).

⁵³ 5 U.S.C. §551(2).

⁵⁴ DOJ GUIDE, *supra* note 49, *available at* <http://www.usdoj.gov/oip/procereq.htm#requesters>.

exception is when fugitives from justice request records related to their own fugitive status.⁵⁵ The second results from the Intelligence Authorization Act of 2003.⁵⁶ The statute amended FOIA to “preclude agencies of the intelligence community from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or through a representative. This means that agencies such as the Central Intelligence Agency, National Security Agency, and some parts of the Federal Bureau of Investigation and the Department of Homeland Security, may refuse to process such requests.⁵⁷

With the enactment of FOIA, Congress intended to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”⁵⁸ In sharp contrast to the APA, virtually every record possessed by the Executive Branch of the Federal Government was made available to public inspection under FOIA.⁵⁹ Congress realized that requestors needed an enforcement mechanism, something wholly lacking under the APA. Thus, “[a]grieved citizens are given a speedy remedy in district courts” where the burden of showing that nondisclosure is appropriate is placed on the Government.⁶⁰ Noncompliance with court orders may be punished by contempt.⁶¹

Congress also recognized that certain classes of information necessitated nondisclosure under FOIA.⁶² There are nine categories of information that are exempt from compelled disclosure.⁶³ These

⁵⁵ *Id.*; See *Maydak v. United States*, No. 02-5168, slip op. at 1 (D.C. Cir. 2003) (refusing to dismiss the case because there was no connection between the requestor's fugitive status and his current FOIA action); *Doyle v. United States Dep't of Justice*, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (holding that fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); *Meddah v. Reno*, No. 98-1444, slip op. at 2 (E.D. Pa. Dec. 3, 1998) (dismissing escapee's FOIA claim because escapee "request[ed] documents which were used to determine that he should be detained").

⁵⁶ PUB. L. NO. 107-306, 116 STAT. 2383 (2002)

⁵⁷ DOJ GUIDE, *supra* note 49, available at <http://www.usdoj.gov/oip/procereq.htm#requesters>.

⁵⁸ *Rose*, 425 U.S. at 361. “Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.” *Id.* (citing S. REP. NO. 89-813, at 3).

⁵⁹ DOJ GUIDE, *supra* note 49, available at <http://www.usdoj.gov/oip/procereq.htm#agency>.

⁶⁰ *Rose*, 425 U.S. at 361; see 5 U.S.C. §552(a)(4)(B). “On complaint, the district court of the United States ... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.” *Id.* (emphasis added).

⁶¹ *Favish*, 124 S. Ct. at 1580

⁶² *Mink*, 410 U.S. at 79. “Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not ‘an easy task to balance the opposing interests, but it is not an impossible one either.... Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.’” *Id.* (citing S. REP. NO. 89-813, p. 3. n6); See also *United States Dep't of Justice v. Julian*, 486 U.S. 1 (1988)(recognition that there are times where release of information may be harmful to government and private interests); *CIA v. Sims*, 471 U.S. 159 (public disclosure is not always in the public benefit).

⁶³ 5 U.S.C. §552(b)(1) - (9). Broadly summarized, FOIA does not apply to: (1) classified information; (2) internal agency information; (3) information specifically exempted from FOIA disclosure under another federal statute; (4) trade secrets; (5) inter- or intra-agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological and geophysical information. *Id.*

exemptions are unambiguously exclusive⁶⁴ and are “plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed.”⁶⁵ In 1986, Congress amended FOIA and created three *exclusions*.⁶⁶ These exclusions allow the agency to treat especially sensitive records as not subject to FOIA.⁶⁷

The difficult task of balancing the specific intent of FOIA, which is to promote full and unfettered disclosure, with the recognized need to exempt information from disclosure is most evident when dealing with privacy interests.⁶⁸ The Government maintains a vast amount of personally-identifiable information.⁶⁹ Various individuals seek this information for different reasons, including the desire to exploit this information for commercial purposes and to obtain information deemed potentially newsworthy.⁷⁰ Congress’ solution to this natural conflict was to enact Exemptions 6⁷¹ and 7(C)⁷² of the FOIA, which specifically address privacy. Generally speaking, both exemptions allow the Government to withhold release of records pursuant to the FOIA when there is a finding that this release will constitute an unwarranted invasion of privacy. Although their language and application are similar, there are two significant differences between them.⁷³

Exemption 7(C) specifically omits a key qualifier in its language, a qualifier found in Exemption 6.⁷⁴ While Exemption 6 exempts release of documents that will lead to a “clearly unwarranted” invasion of personal privacy,⁷⁵ Exemption 7(C) omits the word “clearly.”⁷⁶ This was no accident or omission in

⁶⁴ 5 U. S. C. § 552 (d). “This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section.” *Id.*

⁶⁵ *Mink*, 410 U.S. at 80.

⁶⁶ 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (2000).

⁶⁷ *Id.* Each subsection under section (c) states that the records described in the particular subsection are “not subject to the requirements of this section.” *Id.*; see also DOJ GUIDE *supra* note 49. “At the outset, it is important to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as “Glomarization.” That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.... The application of one of the three record exclusions, on the other hand, results in a response to the FOIA requestor stating that no records responsive to his FOIA request exist. While “Glomarization” remains adequate to provide necessary protection in certain situations, these special record exclusions are invaluable in addressing the exceptionally sensitive situations in which even “Glomarization” is inadequate to the task.” *Id.*

⁶⁸ *Rose*, 425 U.S. at 373. “It is not an easy task to balance the opposing interests, but it is not an impossible one either.” *Id.* (citing S. REP NO 89-813, at 3).

⁶⁹ Michael Hoefges, Martin E. Halstuk, Bill F. Chamberlin, *Privacy Rights versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally- Identifiable Information In Government Records*, 12 WM. & MARY BILL OF RTS J. 1 (2003).

⁷⁰ *Id.*

⁷¹ 5 U.S.C. §552(b)(6). Exemption (6) exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.*

⁷² 5 U.S.C. §552(b)(7)(C). Exemption 7(C) exempts “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]” *Id.*

⁷³ *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 862 (D.C. Cir. 1981).

⁷⁴ *Id.*

⁷⁵ 5 U.S.C. §552(b)(6).

⁷⁶ 5 U.S.C. §552(b)(7)(C); see *Reporters Committee*, 489 U.S. at 756 (noting the adverb “clearly” is omitted from Exemption 7(C)).

drafting by the legislature.⁷⁷ As originally enacted in 1966, Exemption 7 protected “investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.”⁷⁸ However, courts construed this language as a blanket exemption for all law enforcement records.⁷⁹ Congress, seeing that the intent behind FOIA was not being fulfilled, amended the statute in 1974 and included six specific harms that the Government needed to demonstrate before records could be withheld under Exemption 7;⁸⁰ however, Congress amended Exemption 7(C) again in 1986, broadening its scope.⁸¹ The former language allowed exemption from release of a particular record only if the release “would” result in an unwarranted invasion of privacy.⁸² Congress replaced that phrase with “the more flexible and predictive standard of ‘could reasonably be expected to constitute’ an unwarranted invasion of privacy.”⁸³ “The change was ‘designed to make clear that the courts should apply a common sense approach to this balancing test,’ and to ‘eliminate any possibility of an overly literal interpretation of the exemption.’”⁸⁴ Thus, Exemption 7(C) provides for a significantly broader standard for determining whether disclosure of a record will constitute an unwarranted invasion of an individual’s personal privacy and lessens the agency’s burden in showing that withholding a record from public disclosure is appropriate.⁸⁵ “In addition, Exemption 7(C) means the public interest in disclosure carries less weight.”⁸⁶

Information contained in law enforcement records is treated distinctly because of the very nature of law enforcement documents.⁸⁷ Law enforcement records are inherently more invasive of personal privacy, and there is a strong personal interest of the subject of the investigation, of a witness, or even of an investigator, with being associated with a criminal investigation.⁸⁸ Normally an individual’s name appearing in personnel or medical files does not give rise to speculation or innuendo.⁸⁹ In law enforcement documents, however, the revelation of a person’s name in connection with a criminal investigation, regardless of the nature of such a connection, may create an inference of misfeasance or

⁷⁷ *Fund for Constitutional Gov’t*, 656 F.2d at 862.

⁷⁸ Act of July 4, 1966, PUB. L. NO. 89-487, §3(e), 80 STAT. 251.

⁷⁹ *NLRB v. Robins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978).

⁸⁰ 5 U.S.C. §552(b)(7)(A) through (F).

⁸¹ PUB. L. NO. 99-570, §§1801-1804, 100 STAT. 3207, 3207-48; *see also Reporters Comm.*, 489 U.S. 749, 778 n.22.

⁸² *Reporters Comm.*, 489 U.S. at 756 n.9.

⁸³ Brief for the Petitioner at 17, *Favish*, (No. 02-954), (citing *Dep’t of Justice v. Reporters Comm.*, 489 U.S. 749, 756 n.9 (1989)); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989).

⁸⁴ *Id.* (citing S. REP. NO. 98-221 at 22).

⁸⁵ *Reporters Comm.*, 489 U.S. at 756; *Favish*, 124 S. Ct. at 1577. “This provision is in marked contrast to the language in Exemption 6.... We know Congress have special consideration to the language in Exemption 7(C) because of specific amendments to the statute.” *Id.* (quoting *Dep’t of Justice v. Reporters Comm.*, 489 U.S. 749, 756 n.9 (1989)); *Halstuk*, *supra* note 41, at 124.

⁸⁶ *Halstuk*, *supra* note 41, at 124.

⁸⁷ *Fund for Constitutional Gov’t*, 656 F.2d at 863.

⁸⁸ DOJ GUIDE, *supra* note 49, available at <http://www.usdoj.gov/oip/exemption7c.htm>; *see FBI v. Abramson*, 456 U.S. 615 (1982)(11 public figures whose personal information was subject to a criminal investigation enjoyed privacy interest in nondisclosure); *Halpern v. FBI*, 181 F.3d 279 (2d Cir. 1999)(FBI agents have privacy interest in nondisclosure of their identities in connection with FBI investigations); *Quinon v. FBI*, 86 F.3d 1222 (D. C. Cir. 1996)(people who are part of an investigation have a substantial interest in keeping that participation secret); *Neely v. FBI*, 208 F.3d 461 (4th Cir. 2000)(FBI agents and suspects have substantial interest in nondisclosure of their identities and connections to a criminal investigation); *Fitzgibbon v. CIA*, 911 F.2d 84 (D.C. Cir 1990)(persons named in FBI files have strong interest in not being associated with alleged criminal conduct).

⁸⁹ *Id.* (citing *Congressional News Syndicate v. United States Dep’t of Justice*, 438 F. Supp 538 (D.D.C. 1977)).

simply initiate rumor that may harass the individual.⁹⁰ Law enforcement records may contain information about individuals whose connection to a criminal investigation is tenuous or secondary or whose personal information may have been collected by mere coincidence but is ultimately determined to have little or no connection with the underlying subject of the investigation.⁹¹

In sum, Congress created a statute that expresses a clear desire to make as much information publicly available as possible.⁹² Congress also made clear that there are times when the release of information is not in the public's or an individual's interest.⁹³ This is particularly true when an individual finds his or her information within a record compiled by the Government for law enforcement purposes.⁹⁴ We now begin our review of *Favish* in this light.

III. Survivor Privacy Rights.

Perhaps one of the most notable aspects of the *Favish* ruling is that the privacy interest analyzed by the Court was not that of the decedent, but that of his surviving family members.⁹⁵ The fact that the surviving family members enjoyed a privacy right protected under Exemption 7(C) was not certain prior to the ruling in this case.⁹⁶ Although the Court's holding overturned the Ninth Circuit's decision,⁹⁷ this aspect of the Ninth Circuit's holding was upheld. The Court of Appeals found, contrary to *Favish*'s argument, that Foster's family members did enjoy a privacy interest that fell within the ambit of Exemption 7(C).⁹⁸ *Favish* argued that this portion of the Ninth Circuit's holding should be overturned and strenuously argued before the Supreme Court that "Foster's family members have no privacy interest in the photos."⁹⁹

Although *Favish* correctly surmised that "the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause,"¹⁰⁰ he further argued that "before any weighing occurs, it must first be determined whether there is a privacy interest to be weighed. In the present case there is no privacy interest to be weighed, and therefore, no weighing is required."¹⁰¹ *Favish* contended that legislative history supports his contention that Congress intended for "privacy" to apply only to the individual directly affected by the release of the record in question.¹⁰² He further stated: "First, as used in the Exemption, 'privacy' only

⁹⁰ *Id.*

⁹¹ *Favish*, 124 S. Ct. at 1577.

⁹² See *supra* notes 57 through 60 and accompanying text.

⁹³ See *supra* notes 61 through 66 and accompanying text.

⁹⁴ See *supra* notes 67 through 90 and accompanying text.

⁹⁵ *Favish*, 124 S. Ct. at 1574.

⁹⁶ Prior to *Favish*, the Supreme Court has never ruled that surviving family members enjoyed a privacy right under FOIA distinct from the deceased subject of the Government record.

⁹⁷ *Favish*, 124 S. Ct. at 1582.

⁹⁸ *Favish*, 217 F.3d at 1173.

⁹⁹ Brief on the Merits of the Respondent at 3, *Favish*, (No. 02-954).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 4.

means the right to control information about oneself.”¹⁰³ The basis for this conclusion, according to Favish, is that when it amended Exemption 7 in 1974, Congress used the word “privacy,” a word already being used in Exemption 6 as applicable to “personnel and medical files and similar files,”¹⁰⁴ without providing any additional explanation that the word extended beyond the specific categories of files detailed in Exemption 6.¹⁰⁵ As Favish contended:

Except for the omission of “clearly,” the language of Exemption 7(C) is the same as that contained in the original FOIA for Exemption 6, the exemption for personnel, medical, and similar files. There is no reason to believe that when Congress added privacy to Exemption 7(C) in 1974 it meant for the word to have a different meaning than it did when the word was used in Exemption 6 in 1966. Therefore, the definition of the word “privacy” that Congress intended in 1966 when it used the word in Exemption 6 is the definition that Congress intended for the word as used in 1974’s amendment of Exemption 7.¹⁰⁶

Favish further supported his argument with specific quotes from Senate reports regarding Exemption 6¹⁰⁷ and from Attorney General Levi’s discussion of “privacy” as used in Exemption 7(C).¹⁰⁸ Besides using purported legislative history and the Attorney General’s position in 1974 regarding Exemption 7(C) to support his argument, Favish went on to contend that the Supreme Court’s holding in *Dep’t of Justice v. Reporters Committee for Freedom of the Press*¹⁰⁹ limits the concept of “privacy” protected by FOIA directly to the individual who is the subject of the record in question.¹¹⁰ Favish argued that “this Court expressly described only two definitions of ‘privacy’ and neither of them was a broad right to have one’s memory of a deceased family member protected. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”¹¹¹ In sum, Favish contended that “[the Supreme Court] made it extremely clear that ‘privacy,’ as that word was used by Congress in Exemption 7(C), is the right to control information about oneself....”¹¹²

The Supreme Court rejected all of Favish’s arguments and upheld the Ninth Circuit’s finding that the privacy interests protected under Exemption 7(C) include those of the family members.¹¹³ Justice Kennedy, who wrote the majority opinion, poignantly stated, “[t]o say that the concept of personal

¹⁰³ *Id.*

¹⁰⁴ 5 U.S.C. §552(b)(6).

¹⁰⁵ Brief on the Merits of the Respondent at 5, *Favish*, (No. 02-954).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 6 (quoting S. REP. NO 88-1219, at 7 (1964)).

¹⁰⁸ *Id.* at 7. Favish argues that, “Consistent with the legislative history of ‘privacy’ as used in Exemption 6, Attorney General Levi’s discussion of ‘privacy’ as used in Exemption 7(C) in 1974, was predicated on ‘privacy’ being a protection of ‘information about an individual’ and ‘information about a person’ without any other definition of ‘privacy’ being advanced.” *Id.*

¹⁰⁹ 489 U.S. 749 (1989).

¹¹⁰ Brief on the Merits of the Respondent at 9, *Favish*, (No. 02-954).

¹¹¹ *Id.* (quoting *Dep’t of Justice v. Reporters Committee*, 489 U.S. 749, 762 (1989)).

¹¹² *Id.* at 10.

¹¹³ *Favish*, 124 S. Ct. at 1576.

privacy must ‘encompass’ the individual’s control of information about himself does not mean it cannot encompass other personal privacy interests as well.”¹¹⁴ *Reporters Committee*, which Favish uses as support of his arguments, involved the dissemination of a “rap sheet” of an individual who was very much in existence.¹¹⁵ The Court in *Reporters Committee* “had no occasion to consider whether the individuals whose personal data are not contained in the requested materials also have a recognized privacy interest under Exemption 7(C).”¹¹⁶ On the contrary, the case held that the protections against the unwarranted invasion of personal privacy found in Exemption 7(C) should not be limited or held to “cramped notions.”¹¹⁷

The Court made clear that the privacy rights being analyzed in this case were those of Foster’s family in their own right and not Foster’s rights superimposed upon them.¹¹⁸ Based on that starting point, the Court found no difficulty finding support for the notion that the privacy interest protected in Exemption 7(C) can include that of the surviving family.¹¹⁹

The Court first looked to common law to analyze survivor privacy rights. It noted that protections afforded by Exemption 7(C) are broader than those found in common law and that common law has long accepted the right of a family’s control of the body and death images of a decedent.¹²⁰ The Court also found that there is no accepted tradition or custom in our society that would give public access to autopsy photographs.¹²¹ Families have long been recognized as controlling the affairs of the decedent

¹¹⁴ *Id.*

¹¹⁵ 489 U.S. at 751. The case involved a request by a CBS news correspondent and the Reporters Committee for Freedom of the Press for information concerning the criminal records of family members of the Medico family, who were suspected of having ties to organized crime figures. *Id.* at 757. Ultimately the case involved the “rap sheet” of Charles Medico after 3 of the Medico family members died and their information was subsequently released. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Favish*, 124 S. Ct. at 1577.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Favish*, 124 S. Ct. at 1578; see Brief for the Petitioner at 26, *Favish*, (No. 02-954). “Those cases and laws grow out of long-established cultural traditions acknowledging familial control over the body and image of the deceased. Few events in life are more profoundly intimate and personal than grieving over and coming to terms with the loss of a loved one. American tradition respects the privacy of the event by affording close family members the right to decide, consistent with their own religious and moral preferences and any views expressed beforehand by the deceased, whether a loved one’s body will be publicly viewed or not and whether funeral services or disposition of the remains will be public or private. n15 Similarly, the bodies of individuals who die in public places are routinely draped to prevent trauma to family members and unwarranted public exposure.” *Id.* at 28. The petitioner also provides an extensive list of supporting cases that have held that autopsy photos are not normally releasable to the public; see *Comaroto v. Pierce County Med. Examiner’s Office*, 43 P.3d 539 (Wash. Ct. App. 2002) (convicted child molester denied access to his victim’s suicide note); *Bodelson v. Denver Pub. Co.*, 5 P.3d 373 (Colo. Ct. App. 2000) (restrictions on public inspection and disclosure of autopsy reports, where disclosure would harm privacy interests of family members of victims of Columbine school shooting); *Shuttleworth v. City of Camden*, 610 A.2d 903 (N.J. Super. Ct. 1992) (autopsy photographs are not public records), *certif. denied*, 627 A.2d 1135 (N.J. 1992); *Globe Newspaper Co. v. Chief Med. Examiner*, 533 N.E.2d 1356 (Mass. 1989) (autopsy reports exempt from disclosure); *Herald Co. v. Murray*, 136 A.D.2d 954 (N.Y. App. Div. 1988) (autopsy reports exempt from disclosure); *Galvin v. Freedom of Info. Comm’n*, 518 A.2d 64, 71 (Conn. 1986) (autopsy reports exempted from state freedom of information law, in part because they “could contain information which, if disclosed, might cause embarrassment and unwanted public attention to the relatives of the deceased”).

and controlling how images of the decedent are displayed in the public forum.¹²² The Court recognized that the privacy interest at stake here was that of the family’s personal stake in “honoring and mourning their dead” while avoiding unwanted “public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”¹²³

One case the Court used to highlight this conclusion was *Schuyler v. Curtis*,¹²⁴ a New York case decided in 1895. In *Schuyler* the plaintiffs sought to stop the construction of a statue that honored the memory of a deceased aunt.¹²⁵ Although the Court in *Schuyler* found that the proposed statue would not constitute an invasion of privacy,¹²⁶ the Court made clear that it was “the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of the deceased.”¹²⁷

The Court specifically rejected Favish’s claim that legislative intent supported his position¹²⁸ and emphasized the comparative breadth of Exemption 7(C).¹²⁹ It also recognized that Congress took special consideration in drafting the language found in Exemption 7(C) when it amended FOIA in 1974 and again in 1986.¹³⁰ Because of the special nature of law enforcement documents,¹³¹ the Supreme Court found special reason to provide protection to the privacy interests involved, particularly since the public does not ordinarily have a general right of access to such information.¹³²

Analyzing congressional intent, the Court reviewed the common law and also reviewed existing precedent in determining the backdrop against which the legislation was created.¹³³ There have been a number of cases involving very public events that clearly demonstrate the acceptance of the principle that surviving family members enjoy their own compelling privacy interest in the memory of a deceased family member and of the family’s interest in preventing a parade of graphic displays of the decedent in the public forum.¹³⁴

In *Lesar v. Dep’t of Justice*,¹³⁵ the District Court for the District of Columbia considered whether papers and investigative material maintained by the Department of Justice related to the

¹²² *Favish*, 124 S. Ct. at 1578.

¹²³ *Id.*

¹²⁴ 147 N.Y. 434, 42 N.E. 22 (1895).

¹²⁵ *Schuyler*, 147 N.Y. at 442.

¹²⁶ *Id.* at 455. This opinion was not unanimous. In his dissent Judge Gray found that “[t]he threatened offense is of a permanent and continuing nature and, in many senses, differs from cases of mere libelous publications. I think that a case was made out where equity was unfettered in its exercise by any legal principle and where the decree of the court below should be affirmed.” *Id.* at 456.

¹²⁷ *Id.* at 447.

¹²⁸ *Id.* at 1577.

¹²⁹ *Favish*, 124 S. Ct. at 1577; *see supra* notes 72 through 90 and accompanying text.

¹³⁰ *Id.* at 1577 (citing *Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 756 (1989)).

¹³¹ *See supra* notes 72 through 91 and accompanying text.

¹³² *Favish*, 124 S. Ct. at 1578.

¹³³ *Id.*

¹³⁴ *See infra* notes 134 through 153 and accompanying text.

¹³⁵ 455 F. Supp 921 (D.C. Cir. 1978).

assassination of Martin Luther King, Jr. were releasable under FOIA.¹³⁶ In a short opinion the Court held that Exemption 7(C) protected the “privacy of Dr. King’s family”¹³⁷ against “personal embarrassment or discomfort.”¹³⁸

*Katz v. National Archives & Records Administration*¹³⁹ was a case very similar to *Lesar* and is a harbinger of *Favish*. In *Katz*, Dr. Mark Katz sought autopsy records of President John F. Kennedy which included photographs taken during the autopsy.¹⁴⁰ The case involved Exemption 6 as opposed to Exemption 7(C).¹⁴¹ However, in that Exemption 6 encompasses a narrower scheme of exemption,¹⁴² and the word “privacy” in Exemption 7 is accompanied by no other qualifier that would distinguish it from Exemption 6,¹⁴³ the holding in *Katz* is clearly applicable to the analysis of *Favish*. Interestingly, in *Katz* the plaintiff did not dispute that the Kennedy family had a privacy interest in the records, “limited, however, to preventing public disclosure that would cause clearly unwarranted anguish or grief.”¹⁴⁴ The Court concluded that the Kennedy family “has a clear privacy interest in preventing the disclosure of both the x-rays and optical photographs taken during President Kennedy’s autopsy”¹⁴⁵ and that “there could be no mistaking that the Kennedy family has been traumatized by the prior publication of unauthorized records and that further release of the autopsy materials will cause additional anguish.”¹⁴⁶

Survivor privacy rights were once again recognized in *New York Times v. NASA*.¹⁴⁷ Shortly after taking off from Cape Canaveral on January 28, 1986, the space shuttle Challenger disintegrated over the Atlantic Ocean and crashed into the sea, killing all seven astronauts onboard.¹⁴⁸ A digital tape from the space shuttle’s “OPS 2” system recorded the astronauts’ voices and various background sounds until the system lost power during the catastrophe.¹⁴⁹ NASA was able to recover the OPS 2 tape from the ocean floor approximately six weeks after the disaster.¹⁵⁰ In July of that year, a New York Times reporter submitted a FOIA request asking for a copy of the recordings.¹⁵¹ In response to the request, NASA released a transcript of the OPS 2 tape but would not release a copy of the tape itself based on Exemption 6.¹⁵² The requestor subsequently filed suit in the District Court for the District of Columbia. Unlike *Katz*,

¹³⁶ *Lesar*, 455 F. Supp at 923. The Court considered the issue in light of Exemptions b(1), b(2), b(7)(C), (D), and (E). For purposes of this note, the discussion regarding this case will focus only on that portion of the Court’s ruling that discussed Exemption 7(C).

¹³⁷ *Id.* at 925.

¹³⁸ *Id.*

¹³⁹ 862 F. Supp 476 (D.C. Cir. 1994).

¹⁴⁰ *Id.* at 477.

¹⁴¹ *Id.* at 483.

¹⁴² See *supra* notes 72 through 90 and accompanying text.

¹⁴³ 5 U.S.C. §552(b)(6) and (b)(7).

¹⁴⁴ *Katz*, 862 F. Supp at 483.

¹⁴⁵ *Id.* at 485.

¹⁴⁶ *Id.*

¹⁴⁷ 782 F. Supp. 628 (D.C. Cir. 1991).

¹⁴⁸ *Id.* at 629.

¹⁴⁹ *Id.* at 630.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *New York Times*, 782 F. Supp. At 630.

the plaintiff in this case argued, much like in *Favish*, that the family members did not enjoy a privacy right in the tape because they were not a subject of the recording.¹⁵³ Rejecting this argument, the Court held that:

[T]he privacy interest asserted on behalf of the Challenger families is a valid and substantial one. Plaintiff's claim that the Challenger families cannot assert a privacy interest in the tape because none of the relatives actually speak or are referred to on the tape is specious. This Circuit has recognized Exemption 6 privacy interests of relatives in various records of deceased family members. More importantly, the Court of Appeals acknowledged such a privacy interest in this very case.¹⁵⁴

Moreover, in addition to the cases described above, there are a number of other cases that clearly support the principle that surviving family members have a privacy interest in the memory of a deceased family member and that they enjoy protection from the emotional distress that would result from a parade of the decedent's images in the public forum.¹⁵⁵ Finally, the Court reviewed Exemption 7(C) taking into consideration the "consequences that would follow were we to adopt *Favish*'s position."¹⁵⁶ The Court noted that child molesters, rapists, and murderers frequently submit FOIA requests for autopsy photographs and records of their deceased victims.¹⁵⁷ To hold that the privacy right protected under FOIA does not apply to existing family members would allow these individuals to obtain these records, thus further traumatizing the family already suffering from the loss that resulted from the original crime.¹⁵⁸ The Court found it "inconceivable that Congress would have intended a definition of 'personal privacy' so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members' personal privacy."¹⁵⁹ The assassinations of President Kennedy and Dr. King and the Challenger accident were nationally traumatic events and were extraordinarily well publicized in the public forum, both during their time and since. Congress would have been very aware of these cases and the impact on FOIA, yet the language of Exemption 7(C) has not been amended in response. Historically, Congress has amended FOIA when it noted developments in the law it deemed were contrary to the intent of the statute.¹⁶⁰ It is a notable statement of congressional

¹⁵³ *Id.* at 631.

¹⁵⁴ *Id.*

¹⁵⁵ *Favish*, 124 S. Ct. at 1578; see *Reid v. Pierce County*, 961 P.2d 333, 1365 Wash. 2d 195, (Wash. 1998)(family has privacy interest in autopsy records of the deceased), *McCambridge v. Little Rock*, 298 Ark. 219, 766 S.W. 2d 909 (1989)(recognizing privacy interest of murder victim's mother in crime scene photographs), *Bazemore v. Savannah Hospital*, 155 S.E. 194, 171 Ga. 257, (Ga. 1930)(recognizing parents' privacy rights in deceased child's photographs), *Badhwar v. United States Dep't of Air Force*, 829 F.2d 182, 185-86 (D.C. Cir. 1987) (families of deceased aircraft pilots have privacy interest in autopsy reports). Indeed, one need only look at *Favish*'s own website to see the potential outcome of release of these photographs; see <http://www.allanfavish.com>. On his website Mr. Favish maintains an incredible repository of documents regarding various issues of interest, one being the death of Mr. Foster.

¹⁵⁶ *Id.* at 1579.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* notes 46 through 83 and accompanying text.

intent that Exemptions 6 or 7(C) have not been amended in response to the clearly developing theory of survivor privacy interest.¹⁶¹

IV. New Exemption 7(C) Standard of Review

Once the Court determined that the surviving family members enjoyed a privacy interest that warranted protection, it proceeded to balance that privacy interest against the public benefit that could be gained from disclosure of the photographs.¹⁶² The Court reiterated the bedrock FOIA principle that the identity of the requestor and the purpose for which the information would be used are irrelevant and should not be considered, either for or against the requestor.¹⁶³ The information, if released, would belong to all.¹⁶⁴ The benefit that had to be considered with release was the general interest in disclosure, not the interest of an individual.¹⁶⁵ However, there is a caveat to this. When release of a record might infringe on a compelling privacy right, the requestor must show that: 1) the public interest to be advanced is a significant one, and 2) the information to be released will actually advance that interest.¹⁶⁶

Favish argued that the public interest in disclosure clearly outweighed any privacy interest.¹⁶⁷ Favish addressed the two-prong test established by the Supreme Court by extensively detailing various alleged inconsistencies in the numerous investigations into Foster's death.¹⁶⁸ These inconsistencies, Favish argued, created a significant public interest in allowing full public review of the investigations that Favish concluded were inherently flawed.¹⁶⁹ Since the investigations were so "demonstrably untrustworthy," the public had no factual basis to determine that Foster's death was truly a suicide.¹⁷⁰ In fact, Favish tendered the conclusion that the Fiske and Starr reports were "deceptive,"¹⁷¹ that Starr and Fiske were not merely negligent, that they actively "concealed" significant evidence that indicated the death was not a suicide,¹⁷² and that Starr misled the public by intentionally issuing false information.¹⁷³

¹⁶¹ *Id.* Congress specifically amended the statute twice in 1974 when it felt that judicial decisions were unduly limiting the effective use of FOIA. It is worthy to note that one amendment of 1974 specifically carved out 5 specific reasons when law enforcement records would not be releasable, and only 2 of those reasons do not allow discretion on denying release. One of those areas is Exemption 7(C). Congress amended that statute again in 1986 to increase, not decrease, the scope of the privacy interest that was to be protected. The *Lazar*, *Katz*, and *Times* cases were decided in 1978, 1994, and 1991, respectively. Congress had ample time to have acted if it saw a need to do so. The Supreme Court has never ruled in favor of the release of government records when they contained personally-identifiable information in a FOIA privacy case; despite this, Congress has not moved to amend FOIA in a manner that would overrule any of the Supreme Court cases.

¹⁶² *Favish*, 124 S. Ct. at 1574. "The initial question is whether the exemption extends to the decedent's family.... If we find the decedent's family does have a personal privacy interest recognized by the statute, we must then consider whether the privacy claim is outweighed by the public interest in disclosure." *Id.*

¹⁶³ *Id.* at 1580.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1581.

¹⁶⁷ Brief on the Merits of the Respondent at 18, *Favish*, (No. 02-954).

¹⁶⁸ See generally Brief on the Merits of the Respondent, *Favish*, (No. 02-954).

¹⁶⁹ Brief on the Merits of the Respondent at 19, *Favish*, (No. 02-954).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 22.

¹⁷² *Id.* at 19 and 20.

¹⁷³ *Id.* at 28.

He argued that the photographs in question would then advance this public interest by giving the public the opportunity to determine whether the images in the photographs were consistent with the Government investigations.¹⁷⁴ Favish argued that the photos could possibly contain information that would show that the investigations were improper. "The photos at issue.... are directly relevant.... For example, if the photos contain evidence that is inconsistent with suicide in the park, then the photos will establish that the Government investigation is fundamentally flawed...."¹⁷⁵ Favish then provided an analysis on how certain photos in issue could theoretically answer the alleged inconsistencies that Favish detailed earlier in his brief.¹⁷⁶

As it did with the issue of survivor privacy, the Court wholly rejected Favish's arguments. The Court highlighted that normally, the requestor need not provide any reason for release of Government records.¹⁷⁷ However, the Court also noted that Congress specifically created a category of information that is protected from disclosure, namely information that could lead to an unwarranted invasion of personal privacy.¹⁷⁸ In order to determine whether the invasion of privacy is unwarranted, the Court must balance the privacy interest in question against the purported public interest.¹⁷⁹ Acting as an exception to the general rule, the requestor in a case that may invade the personal privacy interest of another has the burden of showing that the records sought will advance a significant public interest.¹⁸⁰ In this case, Favish could not show that the photographs would advance the purported public interest or even that there was a significant public interest remaining in Foster's death.¹⁸¹

The Court recognized that uncovering Government error or wrongdoing is a significant public interest;¹⁸² The Court highlighted, however, that the Ninth Circuit erred in creating a standard of proof where the requestor, in order "to substantiate his public interest claim,"¹⁸³ need only tender information and argument that "if believed, would justify his doubts...." Such information would then successfully overcome any privacy interest in the records in question.¹⁸⁴ The Government argued and the Supreme Court fully accepted that this rule would require courts to "engage in a state of suspended disbelief with regard to even the most incredible allegations."¹⁸⁵ As pointedly highlighted by the Government, "allegations of governmental misconduct are 'easy to allege and hard to disprove.'"¹⁸⁶ The Government went on to explain:

¹⁷⁴ Brief on the Merits of the Respondent at 19, *Favish*, (No. 02-954).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 41 through 45.

¹⁷⁷ *Favish*, 124 S. Ct. at 1580.

¹⁷⁸ 5 U.S.C. §552(b)(6) and (b)(7)(C).

¹⁷⁹ *Favish*, 124 S.Ct. at 1573, 1580; see *Reporters Committee*, 489 U.S. at 776.

¹⁸⁰ *Favish*, 124 S.Ct. at 1580.

¹⁸¹ *Id.* at 1582.

¹⁸² *Id.* at 1581.

¹⁸³ *Id.*

¹⁸⁴ *Favish*, 217 F.3d at 1172-73.

¹⁸⁵ *Favish*, 124 S. Ct at 1581.

¹⁸⁶ Brief for Petitioner at 41, *Favish*, (No. 02-954) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

[I]ndeed, some FOIA requestors have an unlimited capacity to see new indicia of governmental conspiracy or coverup at every turn. Simply asking, as the court of appeals did here, whether such speculation and suspicions, "if believed," would suggest governmental misconduct--which, by definition, they would--would transform FOIA's "workable balance" into an easily circumvented pleading requirement.¹⁸⁷

The Court fully accepted and adopted the Government's position and held that the Ninth Circuit rule would transform "Exemption 7(C) into nothing more than a rule of pleading. The invasion of privacy under its rationale would be extensive."¹⁸⁸

Although *Favish* provides an extensive list of alleged inconsistencies, the Court refused to accept these allegations at face value. The Court recognized that Government actions enjoy a presumption of legitimacy that can be rebutted only with clear evidence indicating Government negligence or misconduct may have occurred.¹⁸⁹

Regarding the burden of proof required to overcome the presumption of legitimacy and show that alleged Government misconduct does constitute a significant public interest, the Court felt that the "clear evidence" standard was far too stringent for purposes of FOIA.¹⁹⁰ After all, the Court noted that the fundamental goal of FOIA was to open the Government to the public's review and scrutiny.¹⁹¹ The Court felt that requiring the requestor to produce "clear evidence," even in privacy cases, when the requestor normally need not present any evidence at all to support their request under FOIA would unnecessarily interfere with FOIA's purpose.¹⁹²

The Court decided against the creation of a blanket rule that should be applied when determining when the nexus between the record in question and the purported public interest is sufficiently met to warrant disclosure for all FOIA privacy cases.¹⁹³ Nevertheless, the Court did want to create some structure. "Otherwise, courts will be left to balance in an ad hoc manner with little or no real guidance."¹⁹⁴ The Court proceeded to create a rule specifically for "photographic images and other data pertaining to an individual who died under mysterious circumstances...."¹⁹⁵ The Court placed the burden on the requestor to show that the "information is necessary to show the investigative agency or other

¹⁸⁷ *Id.*

¹⁸⁸ *Favish*, 124 S. Ct at 1582.

¹⁸⁹ *Ray*, 502 U.S. at 179; *Favish*, 124 S. Ct at 1581 (citing *U.S. v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L.Ed. 2d 687 (1996) (Government agents are presumed to have properly discharged their duties absent clear evidence to the contrary)); *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 47 S. Ct. 1, 71 L. Ed. 131, (1926) (there is a presumption of regularity in the official acts of Government officials absent clear evidence to the contrary).

¹⁹⁰ *Favish*, 124 S. Ct at 1582.

¹⁹¹ See *supra* notes 49 through 60 and accompanying text.

¹⁹² *Favish*, 124 S. Ct at 1582.

¹⁹³ *Favish*, 124 S. Ct at 1581

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

responsible officials acted negligently or otherwise improperly in the performance of their duties.”¹⁹⁶ The requestor must show this through evidence that would lead a reasonable person to believe that the alleged Government impropriety could have occurred.¹⁹⁷

This new standard of proof may cause a degree of controversy and possible confusion. It is a departure from the accepted rule regarding the presumption of legitimacy in Government actions and creates a specific rule tailored only for Exemption 7(C) cases that involve the death of an individual by mysterious circumstances. That a new standard of proof was necessary is questionable. The need for “clear evidence” to rebut the presumption enjoyed by Government action has been an accepted standard for nearly 80 years.¹⁹⁸ In addition, the “clear evidence” standard would not have applied to all or even most FOIA cases. It would have applied only to those cases where privacy interests are potentially impacted and where the requestor alleges Government impropriety.¹⁹⁹ This is wholly consistent with the legislative intent. Congress has repeatedly acted to protect and expand the privacy protections afforded by FOIA.²⁰⁰ This is in light of modern society’s thirst for voyeurism and the plethora of conspiracy theorists today that do not trust any action performed by the Government.²⁰¹ As Senator Hatch stated during the congressional investigations into Vince Foster’s death, “I suspect conspiracy theorists will always differ with this conclusion and little this Committee does is going to muffle their speculation.”²⁰² When faced with a potential invasion of personal privacy resulting from a FOIA request that is based on alleged Government misfeasance, it would have supported the congressional intent to protect the private information from speculation and theory, unless those theories can be supported by clear evidence.²⁰³ Congress has delineated privacy as an area requiring special protection from the interests and curiosities of others.

Despite the adoption of this new relaxed standard for certain Exemption 7(C) cases, Favish could not present enough evidence to satisfy the Supreme Court.²⁰⁴ The Court noted that Favish did “not produce any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred....”²⁰⁵ Favish’s ‘evidence’ was all theoretical argument, not factual. The Court relied heavily on the extensive investigations that were conducted by the Government in the Foster case.²⁰⁶ “It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion.”²⁰⁷ Based on the “thousands of pages of reports, witness testimony, evidence, and analysis, and more than one hundred photographs that have

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Chemical Foundation*, 272 U.S. 1.

¹⁹⁹ Brief for Petitioner at 38, *Favish*, (No. 02-954).

²⁰⁰ See *supra* notes 49 through 90 and accompanying text.

²⁰¹ See generally Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 722 (2004); see also *supra* note 10.

²⁰² Brief for Petitioner at 4, *Favish*, (No. 02-954).

²⁰³ See *supra* notes 67 through 71 and accompanying text.

²⁰⁴ *Favish*, 124 S. Ct at 1582.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

already been released to the public in conjunction with the inquiries into Foster's death,"²⁰⁸ the Court determined that there was no public interest in the matter.²⁰⁹ The public interest had already been satisfied.²¹⁰ There was little that five additional photographs were going to do to spark renewed public interest.

In holding as it did and despite the new standard created in the *Favish* decision, the Court reestablished the fundamental purpose of FOIA. The statute is intended to part the veil of secrecy in Government operations and ensure that the Government is performing its duties in a reasonable manner.²¹¹ In this case the public interest would be to ensure that Mr. Foster's death was investigated "properly and reasonably--not obsessively."²¹² "Such a distinction is critical because the interests of 'someone who has spent many years studying every aspect of [a government] investigation in great detail...and the public interest are not necessarily identical.... After all, 'the same bit of new information considered significant by zealous students of the...investigation could be nothing more than minutiae of little or no value in terms of the public interest.'" ²¹³ "The fact that the respondent is not persuaded by the unanimous conclusions of those investigations is beside the point. FOIA's purpose is to promote an informed citizenry, not achieve universal agreement."²¹⁴

The fundamental flaw in the Ninth Circuit's holding was that it rested on the beliefs of the requestor, not on the public interest.²¹⁵ In effect the standard allowed the requestor to show that there was a significant public interest in the records sought if the requestor forwarded a theory of Government misconduct the requestor himself believed. "But this case is not about respondent's right to persist in his own beliefs.... It is about whether FOIA allows respondent to feed his curiosity with personal information the disclosure of which would inflict anguish on other private individuals.... It is about whether, given the five prior investigations, the general public has an interest in a sixth guess by the respondent."²¹⁶ Given the Legislature's clear desire to protect private information in law enforcement records²¹⁷ and given that *Favish* offered "mere speculation about hypothetical public benefits,"²¹⁸ the Court's path was defined. Mere speculation alone cannot outweigh a clearly demonstrable privacy interest.²¹⁹ The Court, in effect, dismissed *Favish*'s allegation of inconsistencies in the prior investigations. Five prior investigations by trained experts had reached identical conclusions, and all of

²⁰⁸ Reply Brief for petitioner at 15, *Favish*, (No. 02-954).

²⁰⁹ *Favish*, 124 S. Ct at 1582.

²¹⁰ *Id.*

²¹¹ See *supra* notes 61 through 90 and accompanying text.

²¹² Brief for Petitioner at 38, *Favish*, (No. 02-954).

²¹³ *Id.* (quoting *Stone v. FBI*, 727 F. Supp 662, 667 n.4 (D.D.C. 1990)).

²¹⁴ Reply Brief for Petitioner at 15, *Favish*, (No. 02-954).

²¹⁵ *Favish*, 217 F.3d at 1173 ("Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts; but it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments."); *contra* Reply Brief for Petitioner at 14, *Favish*, (No. 02-954). "A balance that requires nothing of meaningful weight on the other side is no balance at all--it is 'effectively an irrefutable presumption' in favor of invading the privacy of third parties." *Id.*

²¹⁶ Reply Brief for Petitioner at 40, *Favish*, (No. 02-954).

²¹⁷ See *supra* notes 87 through 90 and accompanying text.

²¹⁸ *Id.*

²¹⁹ *Favish*, 124 S. Ct. at 1582; Brief for Petitioner at 40, *Favish*, (No. 02-954).

these were made available to the public at large. The Court then decided that the hypothetical speculations of one person who is untrained in criminal investigative techniques or forensic science cannot overcome the presumption of legitimacy in Government actions and the privacy interests of the family concerned.

V. Public Figure Status

One area where *Favish* may have sowed the seeds of confusion and future controversy is the impact that an individual's status as a public or famous figure has on the level of protection afforded by Exemptions 6 and 7(C). The Court simply stated: "[n]either the deceased's former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved."²²⁰ The Court provides no further explanation or clarification on what it means by this sentence. It is arguable that this portion of the holding is mere dicta.²²¹ Nonetheless, this statement involves more than Court musings about potential future issues or how the opinion of the Court may be interpreted by others. Foster was a public figure, and this fact had the potential to impact the privacy interest analysis in determining whether to release the documents in question.²²² In addition, Foster's status as a public figure was in issue during this case.²²³

It appears that the common law began recognizing a right of privacy as a cause of action in equity around the turn of the century.²²⁴ As the common law more fully recognized the right of privacy, it has also recognized that someone's celebrity or public status may reduce their privacy interests.²²⁵ Courts determined that public figures, by injecting themselves into the public light, could not then seek relief for the very publicity they themselves sought.²²⁶

²²⁰ *Favish*, 124 S. Ct. at 1580.

²²¹ Dicta is defined as "[o]pinions of the judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

²²² See generally DOJ GUIDE, *supra* note 49, available at <http://www.usdoj.gov/oip/exemption6.htm#initial>.

²²³ Brief for Petitioner at 22, *Favish*, (No. 02-954).

²²⁴ See generally Claire E. Gorman, *Publicity and Privacy Rights: Evening out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247 (2004). Gorman traces the right of privacy as a civil cause of action and the development of this theory in the common law, stating that the right to privacy was first recognized in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905); in fact, 10 years before *Pavesich*, the *Schuyler* court found that courts of equity could entertain cases alleging violations of the right to privacy. See *supra* note 122 through 125 and accompanying text. The *Schuyler* court determined that a right to privacy could be violated if someone used another's image or name in such a manner as to be deemed derogatory or injurious to an individual's reputation. *Schuyler*, 42 N.E. at 24, 147 N.Y. at 443. In describing this relatively new and uncharted area of privacy rights, the Court noted "[o]bjection has, however, been made to the carrying out of this project, and we must examine this record in order to see whether there is any evidence of a violation of this alleged right of privacy belonging to the plaintiff.... It may be admitted that courts have power in some cases to enjoin the doing of an act where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject." *Id.*

²²⁵ See generally Gorman, *supra* note 223, at 1257, 1258; but see *FBI v. Abramson*, 456 U.S. 615 (1982) (11 public figures whose personal information was subject to a criminal investigation enjoyed privacy interest in nondisclosure).

²²⁶ Gorman, *supra* note 223, at 1257; see also RESTATEMENT (SECOND) OF TORTS §652D (1977) ("One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having

This common law understanding that public figures enjoyed a lesser degree of a right to privacy carried forward in cases specifically involving FOIA. Case law supporting the notion that public officials enjoy a diminished privacy right under FOIA has been concentrated in the Circuit for the District of Columbia. In *Lesar*²²⁷ the Court held that FBI agents, in their capacity as public officials, may not have as great a claim to privacy as that afforded ordinarily to private citizens.²²⁸ In *Common Cause v. National Archives & Records Service*²²⁹ the Court unambiguously stated that public figures enjoyed less of a privacy interest in information related to their public status.²³⁰ This concept was reaffirmed in *Quinon v. FBI*,²³¹ where the Court commented that Government officials enjoyed a diminished privacy interest.

In all of these cases the courts found that there was a privacy interest present, even if it was diminished; however, the contradictory nature of this issue is best represented in *Fund for Constitutional Government v. National Archives & Records Service*.²³² The Court held that Government officials may have a somewhat reduced privacy interest, even if they do not surrender all of their privacy interests, when they accept public office.²³³ Yet the Court also stated in the same opinion that the “degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure....”²³⁴

The holding in *Favish* now begs the question whether the concept that public figures enjoy a diminished privacy right has been effectively overruled. The opinion of the Court on this one issue is simple, short, and apparently unambiguous. The Court does not use any qualifier in its sentence, stating only that Foster’s public status “does not detract” from the privacy interests being weighed in the case.²³⁵ The Department of Justice (DOJ) has clearly adopted this position. On DOJ’s FOIA website,²³⁶ DOJ maintains that “[t]he Court’s decision in *Favish* makes clear that a person’s status as a ‘public figure,’ including by virtue of being a high-level public official, should not be treated as a privacy-lessening factor under the FOIA.”²³⁷ DOJ concludes that the language used by the Court can only mean that someone’s privacy interest stands entirely and wholly undiminished despite their public figure status.²³⁸

general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him.”) *Id.*

²²⁷ 636 F.2d 472 (D.C. Cir. 1980).

²²⁸ *Id.* at 487.

²²⁹ 628 F.2d 179 (D.C. Cir. 1980).

²³⁰ *Id.* at 184.

²³¹ 86 F. 3d 1222 (D.C. Cir. 1996).

²³² 656 F.2d 856(D.C. Cir 1981).

²³³ *Id.* at 865.

²³⁴ *Id.*

²³⁵ *Favish*, 124 S. Ct. at 1580.

²³⁶ *Supreme Court Rules for “Survivor Privacy” in Favish*, DOJ FOIA POST, available at <http://www.usdoj.gov/oip/foiapost/mainpage.htm> (posted April 9, 2004).

²³⁷ *Id.* The website states that, in response to arguments by *Favish* that no privacy interest existed because Foster was a high-level official, Justice Kennedy “gave relatively short shrift to each of these arguments but dispatched them in no uncertain terms....” *Id.*

²³⁸ *Id.*

It is difficult to argue with this conclusion. The sentence is written in the absolute. If he chose to, Justice Kennedy could have easily inserted language that limited or clarified the extent or meaning of this idea, whether the impact that someone's public figure status would have somehow limited or diminished their privacy interest. Considering the importance of a Supreme Court decision, it must be assumed that the language used was not accidental; nevertheless, the very simplicity of the sentence will undoubtedly lead to conflicting opinions and application in the future.

VI. Upholding Legislative Intent.

There have been a fair number of authors and commentators who lament what they perceive to be a Supreme Court trend of ignoring legislative intent regarding FOIA when faced with cases impacting the application of Exemptions 6 and 7(C).²³⁹ Indeed, "the Supreme Court has never ruled in favor of disclosure of personally-identifiable information in a FOIA privacy-exemption case."²⁴⁰ The Court's ruling in *Favish* will likely provide additional fuel to those who share in this sentiment. A close review of both the legislative intent of FOIA and the Supreme Court's treatment of privacy issues concerning this statute, culminating in *Favish*, reveal that this sentiment itself ignores legislative intent.

The intent behind FOIA was to open the Executive branch's activities to public scrutiny. Congress very clearly intended to protect personally-identifiable information contained in those records from unwarranted invasions of personal privacy.²⁴¹ This aspect of the legislative intent behind FOIA is often ignored in literature critical of the Supreme Court's holdings regarding privacy exemptions. This somewhat myopic view of legislative intent, that FOIA was to provide near unlimited disclosure of public records, ignores the reverse side of this coin: that Congress also recognized that there are times when the release of records is harmful to the public and private good.²⁴² One cannot analyze the FOIA without looking at the entire legislative intent, which supports the notion that public access to records shall be reasonable,²⁴³ but limited by practical boundaries.²⁴⁴

In determining whether the Supreme Court honored legislative intent with its holding in *Favish* and in previous FOIA privacy-exemption cases, it is instructive to look at Congressional action in response to or contemporaneous with these cases. That review demonstrates that Congress has acted to clarify its intent when it saw the need. A starting point is the enactment of FOIA itself. FOIA was specifically enacted in 1966 in response to what Congress rightfully perceived as the ineffectiveness of the Administrative Procedures Act to make Government information available to the public.²⁴⁵ At FOIA's inception, however, Congress recognized that while the broad right to freedom of information

²³⁹ See e.g. *Halstuk*, *supra* note 41 (concluding that Supreme Court decisions involving privacy rights have failed to follow the legislative intent of FOIA and is defeating the very purpose of the statute); *Hoefges*, *supra* note 68, at 15.

²⁴⁰ *Hoefges*, *supra* note 68, at 39.

²⁴¹ See *supra* notes 67 through 90 and accompanying text.

²⁴² See *supra* notes 61 through 66 and accompanying text.

²⁴³ See *supra* notes 48 through 60 and accompanying text.

²⁴⁴ See *supra* notes 61 through 66 and accompanying text.

²⁴⁵ See *supra* notes 40 through 46 and accompanying text.

could be an essential tool in our democracy, there was a need to protect “certain equally important rights of privacy with respect to certain information in Government files.”²⁴⁶

Congress amended FOIA in 1974 in response to what it perceived to be judicial decisions that improperly limited the scope of FOIA.²⁴⁷ Congress specifically amended Exemption 7 to ensure that the application of this exemption did not bar the release of all law enforcement material but only those documents that fell within very specific categories.²⁴⁸ These amendments to FOIA also made “explicit its agreement with judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files.... Thus, 5 U.S.C. §552 (b) (1970 ed., Supp. V) now provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”²⁴⁹ In *Dep’t of the Air Force v. Rose*²⁵⁰ the court noted that amendments to FOIA specifically approved a line of cases interpreting FOIA up to that point.²⁵¹ The FOIA was again amended in 1986, not to restrict but to increase the scope of protection provided for in Exemption 7.²⁵² Congress specifically intended that Exemption 7 not be interpreted in an “overly formalistic way.”²⁵³ The FOIA was once again amended in 1996, but that amendment did not address Exemption 7(C).²⁵⁴

It is telling that Congress acted when it saw the need to protect the purpose of FOIA, but it did not act when the converse was true. As noted above there have been a number of cases interpreting Exemptions 6 and 7(C). Congress does not operate in a vacuum, and “[w]e can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.”²⁵⁵ Congressional ratifications of Supreme Court interpretations of legislative intent seems readily apparent in that the legislature itself has not acted to overturn or amend the FOIA in response to these cases. As poignantly stated by the Government, “Congress knows how to express its dissatisfaction with judicial constructions of the FOIA when it wants to, and when it does, it does not do so elliptically.”²⁵⁶

The most recent Congressional action with regard to FOIA was not to expand its scope but to limit it further. In *City of Chicago v. Dep’t of the Treasury*²⁵⁷ the City of Chicago sought Bureau of

²⁴⁶ *Rose*, 425 U.S. at 372 n.9 (quoting S. Rep. No. 98-221 (1965)). Of FOIA’s nine exemptions, two deal specifically with privacy; see 5 U.S.C. §§552(b)(6) and (b)(7)(C).

²⁴⁷ See *supra* note 80 and accompanying text.

²⁴⁸ *Id.*

²⁴⁹ *Rose*, 425 US at 374.

²⁵⁰ 425 U.S. 352 (1976).

²⁵¹ *Rose*, 425 U.S. at 374. The Court cited to *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 345, 484 F. 2d 820, 825 (1973); *Soucie v. David*, 145 U.S. App. D.C. 144, 156, 448 F. 2d 1067, 1079 (1971); *Bristol-Myers Co. v. FTC*, 138 U.S. App. D.C. 22, 26, 424 F. 2d 935, 938-939 (1970).

²⁵² See *supra* note 81 and accompanying text.

²⁵³ S. REP. NO. 98-221 (1983); see *supra* notes 83 through 86 and accompanying text.

²⁵⁴ Reply Brief for the Petitioner at 19, *Favish*, (No. 02-954).

²⁵⁵ *Favish*, 124 S.Ct. at 1579.

²⁵⁶ *Id.*

²⁵⁷ 287 F.3d 628 (7th Cir. 2002).

Alcohol, Tobacco, and Firearms (ATF) gun records in connection with their civil lawsuit against gun manufacturers.²⁵⁸ ATF denied release of the records under Exemptions 6 and 7(C), claiming that they maintained personally-identifiable information of gun owners.²⁵⁹ The Seventh Circuit determined that the records were releasable because the gun transactions were not private transactions insofar as the purchasers were on notice that their information would be forwarded to the ATF.²⁶⁰ The Supreme Court granted certiorari in the case²⁶¹ and then vacated the Seventh Circuit's judgment and returned the case for reconsideration in light of Congress' enactment of legislation that banned the ATF from using its appropriated funds to comply with FOIA requests for information such that the City of Chicago was seeking.²⁶² There can be no clearer a statement of Congressional intent than legislation specifically banning an Executive agency from complying with FOIA in an Exemption 6 and 7(C) case. There is no doubt that many will view this Congressional act as clearly partisan and perhaps as a defense of the National Rifle Association. Nevertheless, it is abundantly clear that Congress will act when it sees the need. To say that the Supreme Court has violated legislative intent clearly ignores the legislature itself. While the commentators are concerned, Congress apparently is not.

Congress functions within modern society. Our society's notion of privacy has evolved as technology provides ever greater opportunities to pander to our voyeuristic tendencies.²⁶³ This is most evident in the dramatic increase in reality television shows that exacerbate the notion that everyone has something to offer and erode our notions of privacy.²⁶⁴ One need only do a cursory search through the Internet to obtain an appreciation for the number of web sites dedicated to voyeurism, conspiracy theories, and gore.²⁶⁵ These media are not at all concerned with the impact they have on individual rights to privacy or the emotional harm they may cause by placing disturbing pictures of loved ones in the public forum.²⁶⁶ Congress is aware of this issue and has attempted to address this problem of unwanted

²⁵⁸ *Id.* at 631.

²⁵⁹ *Id.* at 635-637.

²⁶⁰ *Id.* at 637.

²⁶¹ *Dep't of the Treasury v. City of Chicago*, 537 U.S. 1018 (2002).

²⁶² *Id.* at 1018.

²⁶³ *Calvert*, *supra* note 223, at 722 (2004).

²⁶⁴ *Id.* (citing Kate Zernike, *The Nation: What Privacy?; Everything Else But the Name*, N.Y. TIMES, Aug. 3, 2003, 4; and Alex Kuczynski, *In Hollywood, Everyone Wants to Be Ozzy*, N.Y. TIMES, May 19, 2002, 9 (noting how the voyeurism of a show like *The Osbournes* has changed celebrities' notions of privacy).

²⁶⁵ See *supra* note 223 and accompanying text; see also Brief for Petitioner at 31, *Favish*, (No. 02-954). Examples of such websites include <http://deathgallery.com> (broad collection of pictures ranging from World Trade Center victims, to American soldiers, to celebrities); <http://www.drudgereport.com/md323.htm> (pictures of American soldiers killed in Iraq); http://whyaretheydead.net/lisa_mcperson/autopsy/ (pictures of individual who died while in care of the Church of Scientology); <http://www.bobaugust.com/photo.htm> (Nicole Brown Simpson crime-scene photograph); <http://www.jfklancer.com/aphotos.html> (purported autopsy photographs of President Kennedy's body); <http://www.findadeath.com> (includes crime-scene photographs of Jeffrey Dahmer's victims); see also *supra* note 10.

²⁶⁶ The Foster family was very active in the *Favish* case and filed an *amicus* brief detailing the emotional harm they would suffer if the pictures in question were released to the public. The Court accepted the position of the Foster family. "In a sworn declaration filed with the District Court, Foster's sister, Sheila Foster Anthony, stated that the family had been harassed by, and deluged with requests from, '[p]olitical and commercial opportunists who sought to profit from Foster's suicide. In particular, she was 'horrified and devastated by [a] photograph [already] leaked to the press.' 'Every time I see it,' Sheila Foster Anthony wrote, 'I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life.'" *Favish*, 124 S.Ct. at 1577; see also *Court to hear Vincent Foster Photos Case*, CNN, Dec. 2, 2003, available at

voyeurism.²⁶⁷ It is therefore no surprise that the privacy protections of FOIA would be strengthened, not relaxed, in our sensation-seeking culture.

VII. Conclusion.

Favish represents one of the most important recent FOIA cases. It firmly recognized that surviving family members enjoy a privacy interest under the statute. In addition, *Favish* establishes a new, limited standard of review applicable to cases involving photographic images and other data pertaining to an individual who died under mysterious circumstances, placing the burden on the requester to prove that the information is necessary to show that the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties. The requestor must show this through evidence that would lead a reasonable person to believe that the alleged Government impropriety could have occurred. An analysis of FOIA and Supreme Court cases likewise makes it evident that, despite interpretations to the contrary, the Court has firmly supported Congress' intent to protect personally-identifiable information in Government records from release under FOIA. *Favish* recognizes that while broad release of information under FOIA is an important goal, it is not the only goal, and there are times where release of information is not beneficial to either public or private interests.

Favish also provides the seeds for future controversy. It appears that the Court has repudiated the legal theory that a public figure has a diminished privacy interest under FOIA; however, the simplicity of the Court's holding on this issue will no doubt lead to future controversy. Another interesting aspect of the *Favish* decision is the extent to which the Court relied on previous Government actions to show that there was little if any public interest remaining in the subject of Foster's death.²⁶⁸ Specifically, the Court took notice of the incredible breadth of the Government's various investigations into the death.²⁶⁹ The extent of these investigations allowed the Court to conclude that the public's interest has been satiated.²⁷⁰

This begs the questions whether the Government possesses the ability to manipulate the public interest prong of Exemption 6 and 7(C) and whether a less extensive investigation into Foster's death would have resulted in a different conclusion. Does the Government have the ability to effectively lessen the public interest prong of the balancing test by being candid, perhaps even voluminous, in its disclosure

<http://www.cnn.com/2003/law/12/02/foster.potos.ap/>. Quoting Solicitor General Theodore Olsen, the article stated, "Foster's widow chose not to open his casket because she did not want to see his damaged body. Releasing the photographs would expose her to the sight merely because of the whims of a curious member of the public." See also *Campus Comm., Inc. v. Earnhardt*, 821 So. 2d 388, 402 (Fla. Dist. Ct. App. 2002) ("Publication of the nude and dissected body of Mr. Earnhardt would cause his wife and children pain and sorrow beyond the poor power of our ability to express in words."), *review denied*, No. SC02-1635 (Fla. July 1, 2003); *Earnhardt v. Volusia County*, No. 2001-30373- *CICI*, 2001 WL 992068, at *3 (Fla. Cir. Ct. July 10, 2001) ("Examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members.")

²⁶⁷ *Clavert*, *supra* note 223, at 723.

²⁶⁸ *Favish*, 124 S. Ct. at 1582.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

of information prior to any FOIA litigation? The Court's holding would appear to answer this question in the negative. Very few cases will ever result in multiple and extensive investigations like those seen in Foster's case. The Court relied more on the lack of evidence of Government impropriety in determining whether there was a remaining public interest as opposed to the unusual extent of the investigations.²⁷¹ The holding in *Favish* clearly leads to the conclusion that the Government would be well-served to ensure that its investigations and activities are properly conducted and documented in the public forum. This will allow the Government to enjoy the presumption of legitimacy in its actions that it currently enjoys.

Considering society's current fascination with the private lives of others and the legislatures intent to protect personally-identifiable information found in Executive branch records, the Court's decision in *Favish* properly strikes the difficult but necessary balance between these conflicting but essential interests of personal privacy and government accountability. It serves to protect a citizen's private life while still upholding the citizen's ability to find out "what their Government is up to."²⁷²

²⁷¹ See *supra* note 204 and accompanying text.

²⁷² *Rose*, 425 U.S. at 360-361.

DRUG USE CASES IN THE MILITARY: THE PROBLEMS OF USING SCIENTIFIC CIRCUMSTANTIAL EVIDENCE TO MEET THE BURDEN OF PROOF

Lieutenant Anthony Yim, JAGC, USNR*

I. Introduction

“Because they had worked out their art so well, each of them claimed also to be wisest on other topics, on the most important things; and this immodesty of theirs overshadowed their wisdom, so that I asked myself on behalf of the oracle whether I would prefer to be as I am, neither wise with their wisdom nor ignorant with their ignorance, or to have both things they have, and then I answered myself - and the oracle - that I was better off to stay as I am.”¹

In what could be considered the predecessor to the unsworn statement, Socrates defends himself in front of a jury of ancient Athenians by orally recounting his entire quest for true knowledge.² On one such occasion, the philosopher travels to the builders and craftsman of beautiful furnishings and buildings.³ After engaging them in conversation, Socrates comes to the realization that while these artisans may know a great deal about their craft, they also unjustly claim the same level of expertise on other unrelated matters.⁴ Socrates recognized that expertise in one area does not imply expertise in another.

Socrates’ conclusion is reflected in the body of law concerning servicemembers’ illegal use of drugs. As held in *United States v. Green*⁵, the presence of a controlled substance within the body, supported by admitted scientific evidence, is allowed to uphold a conviction for knowing drug use.⁶ The Navy currently relies on a three-part urinalysis procedure to detect the presence of drugs;⁷ however, drug

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¹ PLATO, APOLOGY OF SOCRATES § 22c at 9 (James Redfield trans., University of Chicago) (2003).

² *See Id.* § 17a–38b at 1-32.

³ *See Id.* § 22c at 9.

⁴ *Id.*

⁵ 55 M.J. 76 (2001). Decided in June of 2001 by the Court of Appeals for the Armed Forces (CAAF), this landmark case delineated the current scope of drug use prosecution for the Armed Forces.

⁶ *Green*, 55 M.J. at 81.

⁷ Telephone Interview with LCDR Kevin Klette, MSC, USN, Ph.D., Commanding Officer, Navy Drug Screening Laboratory, Jacksonville, FL (17 Oct. 02) [hereinafter *Interview*].

laboratory experts will admit that this urinalysis procedure is not designed to test for the servicemember's knowledge or awareness of illegal drug ingestion.⁸ A drug use conviction requires the Government to prove beyond a reasonable doubt not mere drug use but knowing drug use.⁹ Once the military judge admits the scientific evidence concerning the drug testing and results, the members may infer knowing drug use from the mere presence of the drug.¹⁰ To use a scientific test to prove a fact that it was not designed to test for is akin to using duct tape to do car repair. Sooner or later, the wheels are going to come off.

This article will address the impact of *Green* in light of the Constitution. Part II will review the laboratory urinalysis procedures after a sample is collected and attempt to explain in common terms the urinalysis procedure. Part III will review the prior case law leading up to *Green*. Part IV will review the legal standards of admitting scientific evidence. Finally, Part V will illustrate that *Green* is likely in conflict with the Constitutional provisions governing the use of both permissive inference and scientific admission of evidence.

II. Urinalysis laboratory procedures after collection

The only drug screening test the Navy currently administers fleet-wide is the urinalysis test.¹¹ Once samples are collected, they are delivered to a Navy Drug Screening Laboratory.¹² Personnel assigned to the laboratory intake all the specimens.¹³ The boxes containing the urine specimens are inspected for evidence of tampering.¹⁴ During that inspection, the bottles are inventoried against the enclosed chain-of-custody document. They are then checked to insure the tamper-resistant tape is intact and properly applied. Finally, the bottles are checked to determine that the information on the bottle label is the same as on the chain-of-custody document and checked to insure that information on the bottle label is complete and in accordance with service regulations.¹⁵ If any discrepancies are discovered, they are noted and appropriate corrective action is taken.¹⁶

All samples are kept in an Accessioning Area, a secure storage area within the laboratory itself.¹⁷ The entrance to this room is secured by a key card entry system that is tied to a database recording entries and exits.¹⁸ The room is accessible only to Accessioning personnel, persons on the

⁸ *Id.*

⁹ UCMJ art. 112(a) (2002)

¹⁰ *Green*, 55 M.J. at 81.

¹¹ *Interview*, *supra* note 6.

¹² LCDR KEVIN L. KLETTE, MSC, USN, ROBERT CZARNY, OVERVIEW OF FORENSIC URINE DRUG TESTING (FUDT) PROCEDURES (2002) [hereinafter *Overview*].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Overview*, *supra* note 12.

¹⁸ *Id.*

access list, and escorted individuals who are escorted.¹⁹ Each specimen bottle is assigned a unique Laboratory Accession Number (LAN) and recorded for future identification.²⁰

Standard federal government drug testing procedures include two separate tests, an immunoassay (IA) test and a gas chromatography/mass spectrometry (GC/MS) test.²¹ The Navy employs three different tests, the first being the IA test, and the second being the IA test with water blanks to indicate no cross contamination.²² If there is a positive on both tests, then a third test using GC/MS is given.²³ It is cost-prohibitive to employ GC/MS tests on all samples that a Drug Screening Laboratory receives.²⁴ The IA test is designed to screen out negative samples in a cost effective manner.²⁵ The redundancy of the IA test is designed to reduce the error rate.²⁶ Only if there is a positive on both IA tests are GC/MS procedures employed.²⁷

The GC/MS test is actually two different processes.²⁸ Gas chromatography (GC) is the process in which urine, a jumble of different molecules, is separated into groups of similar molecules.²⁹ Only when the molecules are properly separated can a scientist begin the search for the presence of drugs. A liquid sample is heated until it reaches its gaseous state, much like boiling water into steam.³⁰ When a liquid becomes steam, the molecules essentially separate themselves by molecular weight.³¹ The steam is then collected through a long, narrow tube.³² It travels down this tube because it is pushed by an inert gas, a gas that will not react to any of the molecules.³³ Because different groups of molecules will have different weights, if the same force is applied to all the molecules equally, they will move at different speeds³⁴. Lighter molecules will travel faster down the tube than heavier molecules³⁵. A scientist can use the speeds to calculate molecular weights and look for suspected drug molecules.³⁶ Other molecular weights are disregarded, and future testing is done only with the group of molecules at a specific molecular weight³⁷.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Dana Hawkins, *Tests on Trial*, U.S. NEWS & WORLD REPORT, Aug 12, 2002, at 46-47.

²² *Interview, supra* note 6.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Interview, supra* note 6.

²⁸ *Overview, supra* note 12 at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Overview, supra* note 12 at 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ The drug lab screens for drug metabolites, drug molecules that have been partially “digested” by the body and are now considered waste products.

³⁷ *Overview, supra* note 12 at 2.

Gas chromatography alone, however, is insufficient to identify possible drug molecules³⁸. For example, it is easy to separate bowling balls and golf balls by weight but harder to separate billiard balls and baseballs by weight. While gas chromatography can distinguish molecules with significantly different weights, it cannot precisely distinguish molecules with weights that are not significantly different. Further testing is needed.

Mass spectrometry (MS) is the procedure of identifying specific molecules within the group of molecules that have been isolated³⁹. From the group of molecules that have been collected, the molecules are “fractured” by a high-energy beam.⁴⁰ The molecule is then broken down into smaller molecules but not by random chance⁴¹. When a molecule is fractured in this manner, it consistently breaks at the same points due to the weak molecular bonds at specific places.⁴² Scientists can then measure three smaller molecules in proportion to each other to determine whether drugs are present in the sample.⁴³

The three parts must be present in the correct proportions in order to report the identity of a specific drug.⁴⁴ For example, assume that lemonade consists of three parts sugar, one part lemon, and five parts water. If the mass spectrometry results yield six parts sugar, two parts lemon, and ten parts water, then scientists can conclude that the original sample contained lemonade; however, if the results yielded only ten parts sugar, no part lemon, and three parts water, then scientists can conclude that the sample was not lemonade. To ensure the accuracy of the identification it is critical to identify the correct fragments in the correct proportions.

After the lab establishes a molecule’s identity, it uses the original sample to determine the nanogram level of concentration.⁴⁵ If the concentration is higher than the drug lab cut-off level, then the lab will report the test as positive.⁴⁶

This article references two drug concentration levels. The first is a Department of Defense (DoD) drug cut-off. This cut-off level is a number that the laboratory results must exceed in order to be considered a positive result.⁴⁷ The cut-off number used by the Department of Defense is reached after an extensive review process.⁴⁸ The second level is the *Campbell* level, which this article defines as the scientific level at which an average person must have felt the euphoric effects of a drug.⁴⁹ It is possible

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Overview, supra* note 12 at 2.

⁴³ *Id.*

⁴⁴ The Jacksonville Drug Screening Laboratory allows for a +/- 20% differential for proportions. *Interview, supra* note 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Overview, supra* note 12 at 3-4.

⁴⁸ *Interview, supra* note 6.

⁴⁹ *See* United States v. Campbell, 50 M.J. 154, 160 (1999).

to exceed the Department of Defense cut-off level and not exceed the *Campbell* level. Currently the DoD cut-off level for marijuana (THC metabolite) is 15 ng/ml.⁵⁰

A drug expert would not be able to say that a person was impaired at any given urinalysis level.⁵¹ Urinalysis is not designed to test for drug impairment.⁵² The only accurate measure of drug impairment is a blood test given at the time in question.⁵³ Urinalysis is a test that is designed only to quantify the amount of drug metabolite/drug in urine.⁵⁴ There is no correlation between urine drug levels and impairment.⁵⁵ A urinalysis expert may testify only that at a high urinalysis level there is at best a likelihood that the accused was impaired or felt the euphoric effects of the drug.⁵⁶

III. Case History

Use of scientific evidence as the sole basis of a drug conviction first appeared in 1953, forty-eight years before the decision in *Green*. In *United States v. Ellibee*⁵⁷ an Army corporal was examined by a medical officer and demonstrated no signs of being under the influence of narcotics.⁵⁸ He then gave a voluntary urine sample that was shipped to an Army laboratory to detect the presence of narcotics.⁵⁹ The lab used a drug test known as the alkaloid color test.⁶⁰ Alkaloids were extracted from the urine sample, and a color reaction with a reagent indicated a positive drug result for morphine.⁶¹

The only evidence introduced to convict Corporal Ellibee was the testimony of Captain Dixon, a duly qualified Army chemist and toxicologist.⁶² According to his testimony, analysis of a specimen of the accused's urine showed the presence of morphine.⁶³ The inference was that the morphine was recently used by the accused.⁶⁴

The Army Board of Review reversed the conviction and ordered the charges dismissed.⁶⁵ The Army Board of Review was not willing to base a conviction solely upon the introduction of a positive drug test. The court was heavily influence by many medical treatises stating that such an alkaloid color test was of limited value and not highly accurate, and it rejected the expert testimony.⁶⁶

⁵⁰ *Interview, supra* note 6.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Overview, supra* note 12 at 3-4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 13 C.M.R. 416 (A.B.R. 1953).

⁵⁸ *Id.* at 417.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Ellibee*, 13 C.M.R. at 417.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 420.

⁶⁶ *Id.* at 418-20.

In *United States v. Ford*,⁶⁷ the sole evidence presented in order to secure a drug conviction was testimony from the same Captain Dixon who testified in *Ellibee* that the alkaloid reaction tested positive for morphine.⁶⁸ In an action that seems to foreshadow the current case law, the Court of Military Appeals reversed the holdings of the Army Board of Review almost a year later. The *Ford* court, using the *Frye*⁶⁹ test for admission of scientific evidence, ruled that an alkaloid color drug test was reliable enough to be properly admitted before the trier of fact.⁷⁰ There was no mention of why the Military Court of Appeals chose to ignore the same medical treatises relied upon by the Army Board of Review.

Thirty-two years later, in *United States v. Harper*,⁷¹ the Court of Military Appeals once again addressed the question of whether the laboratory results of a urinalysis were sufficient to prove illegal drug use beyond a reasonable doubt.⁷² The evidence used against Hull Technician Fireman Apprentice Harper was the results of the urinalysis obtained at the Naval Drug Screening Laboratory at the Naval Hospital, Oakland, California.⁷³ The court ruled that such a urinalysis obtained by mass spectrometry does allow the inference to be made that marijuana was used.⁷⁴ Of importance is the fact that the reported nanogram level in *Harper* was above the *Campbell* level established to show knowing use.⁷⁵

CAAF has long established that expert scientific testimony is critical evidence in the prosecution of drug use. In *United States v. Murphy*⁷⁶ the prosecution introduced the laboratory results but failed to introduce scientific testimony to explain the material.⁷⁷ The court ruled that where scientific evidence is relied upon to prove the use of marijuana, the Government may not presume that the judge or members are experts capable of interpreting such evidence.⁷⁸ Expert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the factfinder may draw an inference that marijuana was used.⁷⁹ Another important fact is that CAAF explicitly mandated that an expert is needed to provide a rational basis in order to admit the results of a urinalysis into evidence.⁸⁰

CAAF addressed a true permissive inference on a reported drug level below the *Campbell* level in *United States v. Pabon*.⁸¹ Airman Basic Pabon was accused of wrongfully ingesting cocaine.⁸² The

⁶⁷ 16 C.M.R. 185 (C.M.A. 1954).

⁶⁸ *Id.* at 186-87.

⁶⁹ The *Frye* standard was based from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), establishing a guideline for admitting scientific evidence.

⁷⁰ *Id.* at 190.

⁷¹ 22 M.J. 157 (C.M.A. 1986).

⁷² *Id.*

⁷³ *Id.* at 159.

⁷⁴ *Id.*

⁷⁵ *Id.* at 163. "Doctor Jain...testified that these particular results indicated that the user at sometime experienced the physical and psychological effects of the drug."

⁷⁶ 23 M.J. 310 (C.M.A. 1987).

⁷⁷ *Id.* at 311.

⁷⁸ *Id.* at 312.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 42 M.J. 404 (1995).

⁸² *Id.* at 405.

urinalysis results were introduced and were below the level of knowing use.⁸³ The prosecution's drug expert conceded that the level was consistent with unknowing ingestion;⁸⁴ however, a prosecution witness testified that he observed the accused buy rock cocaine on August 3, 1991.⁸⁵ He stated that he observed Pabon receiving a single rock of cocaine from another person for some cash.⁸⁶ He further testified without objection that the drug dealer subsequently told him that Pabon bought a rock of cocaine for \$20.00.⁸⁷ CAAF affirmed the conviction.⁸⁸ The strong corroborative evidence in this case invalidated the concerns made by the permissive inference.⁸⁹

Another notable case is *United States v. Bond*.⁹⁰ Electrician's Mate Third Class (EM3) Bond was stationed at Naval Weapons Station Earle, Colts Neck, New Jersey and was assigned to duties as a patrolman in the Base Security Department in March of 1991.⁹¹ The Naval Investigative Services (NIS) offered him the opportunity to join in an investigation of drug use by dependent wives on base.⁹² An NIS special agent asked Bond to go undercover and to socialize with the suspects and report back on their activities, but he was not given authorization to use drugs.⁹³

A few months later NIS received an informant's tip that EM3 Bond was using narcotics with the subjects of the investigation.⁹⁴ Upon learning this NIS arranged a urinalysis test.⁹⁵ EM3 Bond was originally scheduled to take the urinalysis on 29 July 1993, a Thursday;⁹⁶ however, NIS cancelled and rescheduled for Tuesday, 3 August 1993. Although EM3 Bond was aware of the test beforehand,⁹⁷ the results of the urinalysis indicated a positive drug result.⁹⁸

At his court martial EM3 Bond contended that it would be "absurd" to believe that he, a security officer, would knowingly use cocaine the night before a known, scheduled urinalysis.⁹⁹ EM3 Bond took the stand and offered an explanation as to how the cocaine could have gotten into his system unbeknownst to him.¹⁰⁰ He testified that on 2 August 1993 he encountered the subjects of the investigation at a baseball game.¹⁰¹ He stated that while talking to the subjects at the game he drank three

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Pabon*, 42 M.J. at 405.

⁸⁷ *Id.* at 407

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 46 M.J. 86 (1997).

⁹¹ *Id.* at 87.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Bond*, 46 M.J. at 88.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Bond*, 46 M.J. at 88.

¹⁰¹ *Id.*

or four beers and two shots of brandy.¹⁰² EM3 Bond stated that at one point he lost sight of his cup when he placed it on the hood of a car while talking.¹⁰³ He suggested that the subjects of the investigation might have spiked his drink when he lost sight of it.¹⁰⁴ EM3 Bond testified that this was the only time he might have unknowingly consumed cocaine.¹⁰⁵ Additionally, EM3 Bond presented testimony that unbeknownst to him his cooperation with NIS was widely rumored throughout the local naval community.¹⁰⁶

The U.S. Court of Appeals for the Armed Forces upheld the conviction, finding that the evidence presented was legally sufficient in order to sustain a conviction.¹⁰⁷ This was one of the first times CAAF had addressed a pure permissive inference case where the reported drug level concentration was below the *Campbell* level and there was no independent evidence, i.e. witness testimony, to corroborate drug use. No distinction was drawn as to the level of knowing use. CAAF based their ruling upon the preceding three cases: *Harper*, *Pabon*, and *Murphy*.¹⁰⁸

Was CAAF's reliance misplaced? *Harper* was one of the first cases to find that a urinalysis case with mass spectrometry is legally sufficient evidence to support a conviction.¹⁰⁹ A key distinction was that the level in *Harper* was above the *Campbell* level. In *Pabon* there was eyewitness evidence that the accused had purchased and used the drugs in question.¹¹⁰ While the level in *Pabon* was under the *Campbell* level, the eyewitness account constitutes independent and adequate evidence.¹¹¹ If the permissive inference is the only proof of guilt, then it must meet a higher standard than "more likely than not." It must flow from the proved fact beyond a reasonable doubt.¹¹² Also of importance is that *Murphy* held that the prosecution must introduce the scientific testimony to explain the urinalysis results.¹¹³ None of the cases cited explain or justify why CAAF allowed a blind permissive inference to be made in *Bond*.

Judge Gierke's dissent in *Bond* highlights the problems with making a blind permissive inference. He states:

[t]he only evidence on the issue of appellant's knowledge is his own sworn denial of knowing use and the testimony of the Government expert that the low metabolite level

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 89.

¹⁰⁵ *Bond*, 46 M.J. at 89.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *United States v. Pabon*, 42 M.J. 404 (1995); *United States v. Murphy*, 23 M.J. 310 (C.M.A.1987); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

¹⁰⁹ *Harper*, 22 M.J. at 161-62.

¹¹⁰ *Pabon*, 42 M.J. at 405.

¹¹¹ *Id.* at 407.

¹¹² *Turner v. United States*, 396 U.S. 398 (1970).

¹¹³ *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).

was consistent with unknowing use. In my view the prosecution failed to meet its constitutional burden of proving guilt beyond a reasonable doubt.¹¹⁴

Judge Gierke recognized that applying a permissive inference too broadly interferes with an accused's Due Process rights.¹¹⁵ Assume *arguendo* that EM3 Bond's account was truthful: that the people he was sent to investigate set him up. The problem with a broad permissive inference is that there is virtually no way to dispute the allegation with any concrete evidence. EM3 Bond only had his word that he never felt the effects of any drug. The urinalysis results themselves were consistent with unknowing ingestion. The only proof the Government had that EM3 Bond's actions were criminal was a legally-sanctioned inference that he must have experienced the effects of knowingly-ingested narcotics despite all evidence to the contrary. The fact that EM3 Bond was convicted on the basis of an inference highlights why a permissive inference under the *Campbell* level violates Due Process.

The problem created in *Bond* was remedied with *United States v. Campbell* (hereinafter *Campbell I*), decided two years later.¹¹⁶ In *Campbell I* the sole evidence on the charge of wrongful use of LSD consisted of the urinalysis results, which fell below the level of knowing use.¹¹⁷ The evidence was collected through a routine unit inspection in which members of appellant's unit were required to produce urine samples.¹¹⁸ This was not prompted by any concern about Campbell's performance or behavior.¹¹⁹ CAAF ruled that a urinalysis result with expert testimony alone is insufficient evidence that would permit a reasonable factfinder to conclude beyond a reasonable doubt that appellant knowingly used drugs.¹²⁰ CAAF was concerned that "the Government introduced no evidence to show that it had taken into account what is necessary to eliminate the reasonable possibility of unknowing ingestion or a false positive."¹²¹ In other words, if the evidence did not show that the accused had knowingly felt the euphoric effects of the drug, the Government was not allowed to make up evidence to allude to the fact that he did. CAAF would require direct evidence in order to satisfy the element of knowing use.

In *Campbell I*, CAAF highlighted two critical factors in the prosecution's case. First, there was a lack of evidence concerning the probability of a false positive due to machine error.¹²² Second, there was no evidence introduced concerning when a person would have experienced the physical and psychological effects of the drug.¹²³ Upon reconsideration (hereinafter *Campbell II*) CAAF clarified its ruling by stating that it would be sufficient if the expert testimony reasonably supports the inference with respect to human beings as a class.¹²⁴ In defense of what superficially appeared to be the reversal of

¹¹⁴ *Bond*, 46 M.J. at 93.

¹¹⁵ *Id.*

¹¹⁶ 50 M.J. 154 (1999).

¹¹⁷ *Id.* at 156.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 160-61.

¹²¹ *Campbell*, 50 M.J. at 161.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *United States v. Campbell*, 52 M.J. 386, 389 (2000).

established case law, CAAF justified its decision on the fact that “drug testing . . . is designed and performed by humans and, as such, is fallible.”¹²⁵

The opinions in *Campbell I* and *Campbell II* were highly criticized.¹²⁶ CAAF quickly reconsidered its opinion in *United States v. Green*.¹²⁷ In *Green* CAAF declared that once a military judge admits a urinalysis test with expert testimony, such a test and testimony *per se* establishes an adequate foundation to infer knowing use (unless the test used involves “novel” science).¹²⁸ In order to admit the urinalysis results, however, CAAF mandated that a military judge must “ensure a careful and thorough *Daubert*-type analysis in such cases.”¹²⁹

IV. *Daubert* and the legal standard for admitting scientific evidence

A trial ultimately determines facts. The trier of fact may be presented two sets of facts, often in conflict which each other, and must come to a resolution of those facts in favor of one party or another. One hopes that the truth emerges in the process. Science, on the other hand, attempts to ascertain the truth in a different way – by determining a consistency of framework.

*Frye v. United States*¹³⁰ was the first attempt to establish legal procedures for admitting scientific evidence.¹³¹ In *Frye* the defendant wanted to introduce the results of a systolic blood pressure deception test, a more primitive version of a lie detector test.¹³² In questioning whether this novel scientific testimony should be entertained, the court ultimately ruled:

[j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.¹³³

The court established that a scientific principle must have garnered general acceptance in its particular field before it can be admitted in a court of law.

¹²⁵ *Id.* at 160.

¹²⁶ I.e. LCDR David A. Berger, JAGC, USN, Capt John E. Deaton, USMC, *Campbell and Its Progeny: The Death of the Urinalysis Case*, 47 Naval L. Rev. 1 (2000).

¹²⁷ 55 M.J. 76 (2001).

¹²⁸ *Id.* at 81.

¹²⁹ *Id.*

¹³⁰ 293 F. 1013 (D.C. Cir. 1923)

¹³¹ *Id.* at 1014.

¹³² *Id.*

¹³³ *Id.*

While at first this result might seem logical, it ignores the constantly evolving nature of science. Under the *Frye* standard, Galileo Galilei could not win an argument in a Renaissance court of law that the Earth revolves around the sun, for at that time, the majority of people believed that the Earth was the center of the universe around which all celestial bodies rotated.¹³⁴ Although *Frye* succeeded in eliminating junk science, it had the effect of quashing fledgling science, at least insofar as its ability to be used in the courtroom, that would later prove to be reliable.

While the military later developed its own admissibility standards,¹³⁵ the Supreme Court replaced the *Frye* standard. In *Daubert v. Merrell Dow Pharmaceuticals*¹³⁶ the plaintiffs alleged that ingesting the drug Bendectin during pregnancy caused their children's birth defects.¹³⁷ The plaintiffs relied upon independent research, conducted by respected leaders of their scientific fields, which had not yet been published.¹³⁸ The Ninth Circuit, citing *Frye*, upheld the defendant's motion for summary judgment. The Court stated that expert opinion based on a scientific technique was inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.¹³⁹ Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected the petitioners' reanalysis as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation."¹⁴⁰ The Court also emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalysis of epidemiological studies that had been neither published nor subjected to peer review.¹⁴¹

Citing Federal Rule of Evidence 702, the Supreme Court reversed.¹⁴² Instead of relying upon consensus from the scientific community the Court ruled that a trial judge must merely determine if the proposed scientific evidence will assist the trier of fact to understand or determine a fact in issue.¹⁴³ This would entail a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.¹⁴⁴

Of particular relevance to the issue at hand are the additional requirements of *Daubert*, including whether the theory or technique is subject to testing; whether it is subject to peer review; whether there is

¹³⁴ Adopting the idea from Copernicus, Galileo was subsequently tried by the Roman Catholic Church for heresy. In 1633 the Inquisition convicted him and forced him to recant his support of Copernicus. They sentenced him to life imprisonment, but because of his advanced age allowed him serve his term under house arrest at his villa outside of Florence, Italy. The Catholic Church finally forgave Galileo for his heresy in 1992. WILLIAM MANCHESTER, *A WORLD LIT ONLY BY FIRE* 294-95 (1993).

¹³⁵ In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), CAAF ruled that Mil.R.Evid. 702 superceded the *Frye* test. This standard was later elaborated upon in *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993).

¹³⁶ 509 U.S. 579 (1993).

¹³⁷ *Id.* at 582.

¹³⁸ *Id.* at 583.

¹³⁹ *Id.* at 584.

¹⁴⁰ *Id.*

¹⁴¹ *Daubert*, 509 U.S. at 584.

¹⁴² *Id.*

¹⁴³ *Id.* at 592.

¹⁴⁴ *Id.* at 592-93.

a known or potential rate of error; and whether it is generally accepted in the pertinent scientific community.¹⁴⁵ The Court held that, “in a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.”¹⁴⁶ *Daubert* requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.¹⁴⁷

V. The failure of integration between *Green* and *Daubert*.

When a person ingests a drug, the concentration of the drug in the body will rise and fall much like the shape of a bell curve.¹⁴⁸ It will rise as the drug is being introduced into the body and fall as the body digests the drug and converts it to waste products.¹⁴⁹ The greater the quantity of drug introduced into the body, the higher the peak of the bell curve.¹⁵⁰ The urinalysis results, which themselves do not provide a perfect analogy to the concentration bell curve, only provide one reference point on the curve.¹⁵¹ This is usually not the highest point on this curve.¹⁵² In essence it provides only a snapshot of drug usage at a specific time.¹⁵³ Most scientists agree that there is a drug concentration level at which an average person would probably have felt the effects of the drug. This level previously was referred to as the *Campbell* level.¹⁵⁴

There is no problem with the holding of *Green* if the drug laboratory reports a concentration level higher than the level necessary for knowing drug use. It does not matter if that point is the highest point on the bell curve or a point on the ascending or descending face of the curve so long as the point lies above the level at which the test subject must have felt the effects of the drug at one time. The snapshot taken by the urinalysis proves that at one point in time, an accused most likely would have felt the physical or psychological effects of the drug.

The problems with the *Green* decision arise when the reported concentration level falls below the *Campbell* level, the level of knowing use. By using the urinalysis results alone, the Government cannot directly prove that the defendant knowingly used drugs.¹⁵⁵ The snapshot taken by the urinalysis proves only that the drug was present in the body. Because the level reported is below the level at which a drug expert can testify that an accused must have felt the effects of a drug, the Government must rely on circumstantial evidence to satisfy the elements of criminal drug use.

¹⁴⁵ *Id.* at 593-94.

¹⁴⁶ *Daubert*, 509 U.S. at 590, note 9.

¹⁴⁷ *Id.* at 592.

¹⁴⁸ *Interview*, *supra* note 6.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Interview*, *supra* note 6.

¹⁵⁴ *Id.*

¹⁵⁵ *Overview*, *supra* note 12.

Paragraph 37(b)(2) of Article 112(a) of the Uniform Code of Military Justice (UCMJ) lists the elements of wrongful drug use. The prosecution must demonstrate beyond a reasonable doubt:

- a) That the accused **used** a controlled substance; and
- b) That the use by the accused was **wrongful**.¹⁵⁶

The source of contention is the definition of “use.” The UCMJ defines “use” as:

to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use.¹⁵⁷

The prosecution is required to prove that an accused “knew” that he or she was ingesting a controlled substance. According to the UCMJ definition, to “use” a drug is to know that you are introducing it into your body. Other ways to prove knowing use would be to demonstrate that the accused read the drug label and then ingested the substance, ingested the drugs in front of an eyewitness, or felt the euphoric effects. For example, assume that somebody slips a narcotic into a Sailor’s drink unbeknownst to the Sailor and the Sailor does not feel any euphoric effects. Then the Sailor has not violated the UCMJ, because he or she did not knowingly ingest a controlled substance.

In establishing knowledge, the UCMJ allows the Government to introduce evidence of a drug concentration point below that established in *Campbell* for just this purpose:

[k]nowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused’s body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government’s burden of proof as to knowledge.¹⁵⁸

This permissive inference has been a continuing struggle throughout the case law.¹⁵⁹

The ability to assume “knowing” drug use based on the presence of drugs in an accused’s system, depending on the drug level, can violate *Daubert* - the very test that CAAF mandated the trial courts follow.¹⁶⁰ A urinalysis result below the *Campbell* level cannot be used as a basis for a permissive inference because the urinalysis result cannot be admitted into evidence for that purpose. *Daubert* specifically states “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”¹⁶¹ Under a *Daubert* analysis, the evidence must be both relevant and

¹⁵⁶ UCMJ art. 112(a) (2002) (emphasis added).

¹⁵⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt IV, ¶37c, (2002) [hereinafter MCM].

¹⁵⁸ *Id.*

¹⁵⁹ *Green*, 55 M.J. at 79.

¹⁶⁰ “[T]he military judge must ensure a careful and thorough *Daubert*-type analysis in such cases.” *Green*, 55 M.J. at 81.

¹⁶¹ *Daubert*, 509 U.S. at 589 (1993).

reliable for *all* purposes for which the evidence will be used.¹⁶² The *Daubert* analysis cannot be limited to just determining admissibility, but must also analyze if a urinalysis can be admitted as the foundation for a permissive inference.

Urinalysis results falling below the *Campbell* level fail a *Daubert*-style analysis. Using *Daubert's* terminology, drug experts typically testify that a urinalysis test alone is insufficient to determine whether a person felt the effects of a drug.¹⁶³ This is because the urinalysis test was designed to test for the *presence* of the drug and not to determine if that person *felt* the effects of the drug.¹⁶⁴ In addition, when scientists testify as to levels above the *Campbell* level, they are basing their opinions on other scientific literature in the community.¹⁶⁵ Conversely, there is no scientific literature which conclusively indicates that a test result falling below the *Campbell* level indicates that a person knowingly felt the effects of the drug. By definition it is scientific evidence that determines the *Campbell* level. If the urinalysis result the Government attempts to use is not reliable for its ultimate purpose, it cannot be admitted under *Daubert*. Therefore, there can be no permissive inference below the *Campbell* level. As such, these types of cases should have urinalysis evidence admitted only to establish the presence of a drug within the body. The Government should not be able to rely upon a permissive inference when the foundational evidence is scientific in nature. In the words of *Daubert*, the evidence is not reliable for this purpose.

When the concentration level of the drug is above the *Campbell* level, there is no *Daubert* problem. Because a drug expert can use the urinalysis result as the basis for determining that the accused must have felt the effects of the drug, the *Daubert* analysis is satisfied. It is not the urinalysis result itself that satisfies the *Daubert* analysis. Instead, it is the result coupled with expert testimony (who relies upon other scientific data) that satisfies the analysis.¹⁶⁶ The urinalysis result is both relevant and reliable for proving knowing use, because the drug expert can rely upon knowledge gained from the urinalysis report and outside scientific studies.

Since *Green*, some drug experts have stated that they refuse to give an opinion as to the *Campbell* level of the drug in question.¹⁶⁷ These experts state that they cannot give an accurate urinalysis drug concentration range to demonstrate knowing use in an average human body.¹⁶⁸ While the author of this article believes the *Campbell* level exists, this article is not intended as a forum for scientific debate but rather, legal debate. If a drug expert states that he or she cannot use a drug test to determine whether

¹⁶² MIL. R. EVID. 105. Because the evidence is introduced to prove both the presence of the drug and the basis for a permissive inference, it must comply with a *Daubert* style analysis for each prong or else receive a limiting instruction. See, e.g., *United States v. Jackson*, 38 M.J. 106 (C.M.A. 1993); *United States v. Burks*, 36 M.J. 447 (C.M.A. 1993); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983).

¹⁶³ Interview, Mr. Bob Sroka, Jacksonville Drug Expert.

¹⁶⁴ *Id.*

¹⁶⁵ See *i.e.*, *Passive Inhalation of Marijuana Smoke*, *infra* note 154.

¹⁶⁶ See, *i.e.*, Edward J. Cone, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-Tetrahydrocannabinol*, 11 JOURNAL OF ANALYTICAL TOXICOLOGY 89, 89-96 (1987).

¹⁶⁷ Interview, *supra* note 6.

¹⁶⁸ *Id.*

a person knowingly used drugs, than the factfinder should not be allowed to *infer* such a conclusion. Recall that *Daubert* mandates a “valid *scientific connection* to the pertinent inquiry as a precondition to admissibility.”¹⁶⁹ The urinalysis alone, therefore, cannot be used as a foundation for a permissive inference because there is no valid scientific connection between a urinalysis test and knowing use.

Daubert necessitates a return to *Campbell*. If a drug level is above the *Campbell* level, then a urinalysis, coupled with expert testimony which will rely upon other scientific studies, will clear the *Daubert* hurdle and can provide the basis for a drug conviction. Because a scientist cannot rely on studies that determine at what nanogram level the average human being will feel the euphoric effects of a drug at levels below the *Campbell* level, *Daubert* prohibits a urinalysis from being used as a basis for a permissive inference.¹⁷⁰ It does not prohibit the introduction of the urinalysis *per se*, but more evidence, such as an independent eyewitness, is needed to use the urinalysis results for a permissive inference.

Returning to the *Campbell* standard holds many benefits for the Navy as well. The greatest benefit would be the provision of extra procedural safeguards to ensure that innocent servicemembers are not wrongfully convicted.

As an example of this benefit, assume a case of innocent ingestion. If the incident happened weeks before a positive drug report comes back to the command, it is oftentimes impossible for an accused to preserve any evidence of innocence. The accused cannot retake the urinalysis. His or her memory of surrounding events that may explain the positive test result might be hazy at best. Any place or location that could have contaminated the sample has long past been altered. Many times the only evidence that a truly innocent accused could present would be military character evidence. Due to the temporal nature of the alleged crime, the extra procedural safeguards afforded by use of the *Campbell* standard would significantly reduce the likelihood that a servicemember who has innocently ingested a controlled substance will not be wrongfully convicted of illegal drug use.

The elimination of the permissive inference would not result in the elimination of drug convictions. On the contrary, it would ensure the accuracy of drug convictions within the military. Returning to a *Campbell* standard would simply mean that the Government would have to satisfy its burden for a drug conviction by introducing both a urinalysis and *other corroborating evidence*.¹⁷¹ Forcing the Government to a higher burden regarding drug cases would improve efficiency and faith in the Military Justice system analogous to the exclusionary rule forcing the Government to perform more efficient searches and seizures. While the need for a drug-free military is important, the need for servicemembers to receive their Constitutional protections should remain paramount.

The author proposes that UCMJ art. 112(a) should be amended as follows:

¹⁶⁹ *Daubert*, 509 U.S. at 591-92 (emphasis added).

¹⁷⁰ MIL. R. EVID. 105. *supra* note 150.

¹⁷¹ *Campbell*, 52 M.J. at 388 (emphasis added).

(10) "Use" means to inject, ingest, inhale, or otherwise introduce into the human body any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body only if:

- (1) the metabolite is not naturally produced by the body or any substance other than the drug in question;
- (2) the drug cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug for an average human being; and
- (3) the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

This amendment to the UCMJ would allow the Government to use the permissive inference only if the results were above the *Campbell* level or if there was other corroborating evidence of drug use.

VI. Conclusion

Courts-Martial are allowed to consider both scientific evidence and circumstantial evidence. The Constitution prohibits the use of *scientific circumstantial evidence*. To allow fact finders to infer knowing drug use from a scientific experiment not designed to test for knowing drug use violates this prohibition. Scientists are not allowed to make such a conclusion. On the other hand, CAAF allows a permissive inference that violates protections recognized by the Supreme Court that prevent the improper use of scientific evidence. The resulting harm impacts not only the Constitutional safeguards afforded to an accused but also the confidence placed in the military justice system.

UNITED STATES V. REDLINSKI: PROVIDENCY INQUIRY REVISITED

Captain Joseph E. Galvin, USMC*

Imagine a scenario where a Marine, Lance Corporal (LCpl) Jones, is accused of an attempted assault under the Uniform Code of Military Justice¹ (UCMJ). LCpl Jones frequently meets with his assigned defense counsel and is thoroughly advised of all of his rights and possible defenses. The defense counsel outlines the Government's case against him, explaining each of the elements of the charge of attempted assault and the evidence the prosecution possesses. LCpl Jones tells his counsel he completely understands the criminal charge and the elements of that charge. He further adds that he wants to plead guilty to the attempted assault charge because he is truly guilty of the offense. The defense counsel explains to LCpl Jones that by pleading guilty to the charge he gives up certain rights that would otherwise be available to him. The defense counsel additionally explains that LCpl Jones should not plead guilty unless he truly is guilty of all the elements of the charge because the Government has the burden of proving each element beyond a reasonable doubt. Cognizant of all the prerequisites for a guilty plea, LCpl Jones insists on pleading guilty to the charge.

Satisfied that LCpl Jones understands all the elements of the charge and the consequences of the guilty plea, the defense counsel enters into negotiations with the prosecution to obtain a pre-trial agreement that will reduce his client's possible sentence. The two parties reach an agreement whereby LCpl Jones will plead guilty and stipulate to the fact that he attempted to assault the victim, in exchange for a maximum sentence limitation of 30 days confinement and reduction of one grade to Private First Class. Such a pre-trial agreement is effective only if the accused completes his end of the bargain.² Encouraged by the agreement, LCpl Jones signs the stipulation of fact and awaits his guilty-plea court date.

During the guilty-plea hearing, LCpl Jones voluntarily enters a plea of guilty during the providency inquiry. The military judge properly informs the accused of the elements of the charge of attempted assault. The judge explains the four main elements of attempted assault from the Military Judge's Benchbook and asks pertinent questions regarding the accused's understanding of the elements of the charged offense to which he has plead guilty. Assume that during this questioning, the military judge fails to inquire directly into the third element: that the act amounted to more than mere preparation.³

* The positions and opinions stated in this note are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Marine Corps. Captain Joseph E. Galvin, is an active duty Marine Corps judge advocate assigned to the Joint Law Center, Marine Corps Air Station, Miramar, California. The author is a graduate of the Thomas M. Cooley Law School, Lansing, MI, and Central Michigan State University. The author would like to thank his wife Gretchen and sons Hunter and Brody for their love and support.

¹ The Uniform Code of Military Justice is the set of regulations and rules that all members of the uniformed armed services of the United States are bound to follow.

² Rules for Courts-Martial 705(d)(4)(B), Manual for Courts-Martial, United States (2002 ed.).

³ Manual for Courts-Martial, United States (2002 ed.), Part IV ¶80c(2).

The judge does not ask him about this element because she believes this element has been satisfied by LCpl Jones's other responses. LCpl Jones answers all the questions to the satisfaction of the military judge and makes a sworn statement that he attempted to assault the victim. The military judge then asks both trial and defense counsel if they desire further inquiry into the charge and its elements. Neither counsel requests further inquiry; they either did not notice the military judge's failure to inquire into the third element of the offense or they believe the judge has satisfied the inquiry. The military judge then accepts the accused's guilty plea.

Upon sentencing, the judge issues a sentence of three months confinement, forfeiture of two-thirds pay per month for three months, and a bad-conduct discharge. As a result of the pre-trial agreement between the parties, its sentence limitation provisions will be approved rather than the adjudged sentence.⁴

In accordance with the pre-trial agreement, LCpl Jones begins to serve his 30 days in confinement. Fourteen days into his sentence, he attempts to escape from the brig where he is serving his confinement. The convening authority justifiably withdraws from the pre-trial agreement.⁵ Realizing he is facing a bad conduct discharge and additional confinement, LCpl Jones appeals his original guilty plea by claiming that the military judge failed to adequately question his guilty plea. LCpl Jones asserts that the judge's providency inquiry did not sufficiently explain the third element of attempted assault – the "preparation" element – in order for him to knowingly and intelligently plead guilty to the offense. On appeal LCpl Jones contends that he believes himself to be innocent of the attempted assault charge.

Although the example outlined above is only hypothetical, the likelihood of such an event happening is possible. The facts of this example identify the apparent injustices that may result from the current providency inquiry requirements in military courts-martial. The goal of the military providency inquiry is to determine whether the "accused's guilty plea is truly voluntary,"⁶ not to provide the accused with a way to avoid just punishment.

This note will explore a situation similar to that presented in the hypothetical by examining the United States Court of Appeals for the Armed Forces (hereinafter CAAF) case *United States v. Redlinski*.⁷ The case focuses on the providency inquiry requirements necessary to establish that an accused's guilty plea is acceptable in a court-martial.⁸ Current precedent mandates that a guilty plea must be "knowing and voluntary" and "the record of trial 'must reflect' that the elements of 'each offense charged have been explained to the accused's by the military judge;'"⁹ if the military judge does not provide such guidance, the guilty plea is not acceptable "unless 'it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty'" of the

⁴ RCM 705(b), Discussion.

⁵ RCM 705(c)(4).

⁶ *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

⁷ 58 M.J. 117 (2003).

⁸ *Id.*

⁹ *Id.* at 119 (*quoting* *United States v. Care*, 18 C. M. A. 535, 541, 40 C.M.R. 247, 253 (1969)).

crime.¹⁰ The interpretation of knowing whether or not the accused understands his or her guilty plea is the crux of the note.

A guilty plea from an accused is provident even if each element of the offense is not explained if the accused reliably demonstrates that he understands the elements of the charge and voluntarily pleads guilty. It is the author's position that the United States Court of Appeals for the Armed Forces incorrectly interprets the requirements set forth in Rule for Courts-Martial 910(c) – (e) prescribing the requirements to ensure that the accused understands the elements and nature of the charges.¹¹ Additionally, there are social policy concerns with the current precedent, and a better policy would be to allow a balance of justice in the military courts. Such a social policy would afford Due Process protections to the accused while alleviating the Government of the burden of innumerable appeals raising technical challenges of no practical significance.

This note is divided into three parts. Part I provides a background of the important facts and history of *United States v. Redlinski* and a general overview of the current requirements for completing a guilty plea in a court-martial. Part II discusses Rule for Court-Martial 910 and its interpretation as well as the social policy concerns underpinning the holding of *Redlinski*. Part III articulates an alternative interpretation of the current requirement for a guilty plea and applies this interpretation to the facts of the introductory hypothetical.

I. Background

A. Facts of *United States v. Redlinski*

During the winter of 1998-1999 the appellant, Seaman Apprentice (SA) Redlinski, USCG, was stationed on board USCGC POINT WELLS (WPB 83243) at Station Montauk in New York.¹² An informant told the Officer-in-Charge that SA Redlinski had used and sold marijuana to other Coast Guard personnel.¹³ The Coast Guard Investigative Service launched an investigation.¹⁴ In January of 1999 the Commanding Officer of POINT WELLS ordered a health and safety inspection and a drug-urinalysis inspection.¹⁵ The investigation conducted by the Coast Guard Investigative Service identified SA Redlinski as a person involved in the drug activity.¹⁶ On February 16, 1999 SA Redlinski met with Coast Guard Petty Officer (MK2) Agati, outside of Montuak, New York and agreed to take \$300.00 from him to purchase marijuana.¹⁷ SA Redlinski took the money in order to purchase the marijuana but

¹⁰ *Id.* at 119 (quoting *United States v. Jones*, 34 M. J. 270, 272 (C.M.A. 1992)).

¹¹ See Rules for Courts-Martial 910(c) – (e), Manual for Courts-Martial, United States (2002 ed.) (explaining the rules relating to the pleas in military tribunals; more specifically: (c) advice to accused, (d) ensuring that the plea is voluntary, and (e) determining accuracy of plea).

¹² *United States v. Redlinski*, 56 M. J. 508, 512 (C.G. Ct. Crim. App. 2001).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *United States v. Redlinski*, 58 M. J. 117, 122 (2003).

was stopped by the Drug Enforcement Agency and the Coast Guard Investigative Service prior to purchasing the marijuana.¹⁸ SA Redlinski was apprehended¹⁹ and put into pre-trial confinement for six days.²⁰ He was released from pre-trial confinement on February 24, 1999.²¹ SA Redlinski's Commanding Officer brought multiple charges against him for attempted distribution and use of marijuana.²²

B. Procedural History

In a special court-martial, SA Redlinski pled and was found guilty of “two specifications of wrongful distribution of marijuana, two specifications of wrongful use of marijuana, one specification of wrongful possession of marijuana, and one specification of attempted distribution of marijuana.”²³ SA Redlinski personally admitted and stipulated to the fact he committed all four offenses.²⁴ SA Redlinski received a sentence of “a reduction to E-1, forfeiture of \$600 pay per month for six months, four months confinement, and a bad-conduct discharge.”²⁵ The convening authority approved the sentence as adjudged but suspended all confinement in excess of 100 days in accordance with the pre-trial agreement.²⁶ The United States Coast Guard Court of Criminal Appeals affirmed the findings and sentence but credited Redlinski with eight days pay because of a violation of RCM 305(k).²⁷ SA Redlinski appealed to the United States Court of Appeals for the Armed Forces, arguing that the inquiry by the military judge on the guilty plea to attempted distribution of marijuana was improvident.²⁸ CAAF reversed and remanded the decision of the United States Coast Guard Court of Criminal Appeals on the charge of attempted distribution of marijuana.²⁹

C. General Overview of the Elements of a “Guilty Plea”

In order to establish a proper “guilty plea” in accordance with the UCMJ, the plea of guilty must meet a determined standard. The two main attributes of this “guilty plea” standard are that the plea is voluntarily and knowingly made. The accused's guilty plea must be both voluntary and knowing or it will have “been obtained in violation of due process” and “therefore void,”³⁰ due to the accused giving

¹⁸ *Id.* at 122-23.

¹⁹ *Id.* at 123.

²⁰ *Redlinski*, 56 M. J. at 513.

²¹ *Id.*

²² *Id.* at 510.

²³ *Id.*

²⁴ *Redlinski*, 58 M. J. at 122.

²⁵ *Id.*; See also Rules for Courts-Martial 201 (f)(2)(B), Manual for Courts-Martial, United States (2002 ed.) (explaining the proper punishment for a special court-martial upon a finding of guilty for a charged offense under the UCMJ).

²⁶ *Redlinski*, 56 M. J. at 510.

²⁷ *Redlinski*, 58 M. J. at 118.

²⁸ *Id.*

²⁹ *Id.* at 119.

³⁰ *United States v. Care*, 18 C.M.A. 535, 539, 40 C.M.R. 247, 251 (1969) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

up certain “constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accuser.”³¹

The Rules for Courts-Martial (RCM) outline the specific issues a military judge needs to consider in determining the voluntariness of the guilty plea.

The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under RCM 705.³² The military judge shall also inquire whether the accused’s willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.³³

This voluntariness rule is based upon Rule 11(d) of the Federal Rules of Criminal Procedure and requires the military judge to personally determine whether the accused is pleading voluntarily or as a result of an unpublished agreement or threat.³⁴

With regard to the voluntariness of the guilty plea, the accused must know what offense he is pleading guilty to in order for there to be a valid plea. Voluntariness and knowledge are further conjoined “because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the accused possesses an understanding of the law in relation to the facts.”³⁵ In order to determine whether the accused understands the charges to which he is pleading guilty, the judge must address the accused.³⁶ The military judge must ensure the accused understands the following:

(1) [t]he nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by the law, and the maximum possible penalty provided by law; (2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings; (3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such a trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination; (4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has, so pleaded so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and (5) That if the accused pleads guilty, the

³¹ *Id.*

³² Rules for Courts-Martial 705, Manual for Courts-Martial, United States, (2002 ed.) (describing the agreements that the convening authority of the accused and the accused may enter into prior to trial. This section outlines the nature and terms acceptable in a court-martial proceeding).

³³ RCM 910(d).

³⁴ *Redlinski*, 58 M. J. at 121.

³⁵ *Care*, 18 C.M.A. at 539 (quoting *McCarthy*, 394 U.S. at 466).

³⁶ RCM 910(c).

military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.³⁷

These standards were codified in the RCM to reflect the holding in *United States v. Care* and to be consistent with Rule 11 of the Federal Rules of Criminal Procedure.³⁸ These elements must be personally addressed to the accused and explained by the military judge in order for the judge to determine whether the accused understands the guilty plea.³⁹

In addition to the set standards in the RCM, the record of trial must show that the military judge personally explained the elements of each charge to the accused and “questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear . . . whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty.”⁴⁰ The inquiry by the military judge must be more descriptive and in-depth than simply questioning the accused as to whether the “guilty plea admits ‘every element charged and every act or omission alleged and authorizes conviction of the offense without further proof.’”⁴¹ After the military judge personally explains the charge to the accused, the record of trial will document whether the accused's guilty plea was provident.⁴² The providency inquiry will be supported, “because he [the accused] admitted to the facts which established the charges; he believed he was guilty; and there were no inconsistencies between the facts and the pleas.”⁴³

If during the providency inquiry the military judge fails to explain every element of each offense with which the accused is charged, grounds for appeal exist based on “reversible error” by the judge.⁴⁴ Nevertheless, “if it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty” then the abridged providency inquiry will stand.⁴⁵ The military judge should look “at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially.”⁴⁶

The goal of the military judge's providency inquiry is to determine whether the accused is pleading guilty based upon facts of the charged offense.⁴⁷ RCM 910(e) outlines this requirement: “[t]he military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy

³⁷ *Id.*

³⁸ *Redlinski*, 58 M. J. at 120.

³⁹ *Id.* at 119 (*citing Care*, 18 C.M.A. at 541).

⁴⁰ *Care*, 18 C.M.A. at 541.

⁴¹ *Id.*

⁴² *United States v. Jones* 34 M.J. 270, 272 (C.M.A. 1992) (*citing United States v. Davenport*, 9 M.J. 364, 366-67 (CMA 1980)).

⁴³ *Id.*

⁴⁴ *Redlinski*, 58 M. J. at 119 (2003) (*citing Jones*, 34 M.J. at 272).

⁴⁵ *Id.*

⁴⁶ *Redlinski*, 58 M.J. at 119 (*citing Jones*, 34 M.J. at 272, *United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982), and *United States v. Kilgore*, 21 C.M.A. 35, 37, 44 C.M.R. 89 (1971)).

⁴⁷ Rules for Courts-Martial, 910(e), Manual for Courts-Martial, United States (2002 ed.),

the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.”⁴⁸ The establishment of guilt does not need to be “from personal recollection” of the accused, but the accused must be able to “describe all the facts necessary to establish guilt.”⁴⁹ The accused can confirm his or her guilt by adopting other witnesses’ views and descriptions of the event as his or her own if he or she knowingly believes them to be true.⁵⁰

D. Congressional Intent

During the first session of the 81st Congress (1966), the House Armed Services Committee deliberated on the effect and process of guilty pleas within the Uniform Code of Military Justice (UCMJ).⁵¹ A primary focus of the hearings was dedicated to delineating the procedures necessary to safeguard a guilty plea in a court-martial.⁵² Through Article 45, 10 USC § 845, Congress intended that the President would supplement the UCMJ by promulgating regulations to ensure that a providency inquiry was conducted properly for a guilty plea.⁵³ The intent of Congress was to prescribe a set method that would be followed in all guilty pleas.

- (1) In general and special court-martial cases, the plea should be received only after the accused has had an opportunity to consult with counsel appointed for or selected by him. If the accused has refused counsel, the plea should not be received.
- (2) In every case the meaning and effect of a plea of guilty should be explained to the accused (by the law officer of a general court-martial; by the president of a special court-martial; by the summary court), such explanation to include the following:
 - (a) That the plea admits the offense as charged (or in a lesser degree, if so plead) and makes conviction mandatory.
 - (b) The sentence which may be imposed.
 - (c) That unless the accused admits doing the act charged, a plea of guilty will not be accepted.
- (3) The question whether the plea will be received will be treated as an interlocutory question.
- (4) The explanation made and the accused’s reply thereto should be set forth in the record of trial exactly as given.⁵⁴

The Court of Military Appeals recognized these requirements in *Chancellor* and recommended that the military develop a standard operating procedure that would comply with Congressional intent.⁵⁵ The

⁴⁸ *Id.*

⁴⁹ RCM 910(e), Discussion.

⁵⁰ *Id.*

⁵¹ *United States v. Chancellor*, 16 C.M.A. 297, 299 (1966); *See Uniform Code of Military Justice: Hearings on H. R. 2498 Before House Armed Services Comm.*, 81st Cong. 1052-57 (1950).

⁵² *United States v. Care*, 18 C.M.A. 535, 538, 40 C.M.R. 247, 250 (1969) (citing *Chancellor*, 16 C.M.A. at 299-300).

⁵³ *Care*, 18 C.M.A. at 538 (citing *Chancellor*, 16 C.M.A. at 299-300); *See H.R. Rep. No. 81-491*, at 23 (1950).

⁵⁴ *Chancellor*, 16 C.M.A. at 299-300 (quoting H.R. Rep. No. 81-491, at 23-24 (1950)).

⁵⁵ *Care*, 18 C.M.A. at 538.

court was looking for a standard set of questions and regulations that would “insure the providency of the [guilty] plea” and provide a clear record of guilt.⁵⁶

The Assistant General Counsel of the Department of Defense, Felix Larkin, testified before the House Armed Service Committee and suggested that Congress should establish a standard providency inquiry for all guilty pleas in the military.⁵⁷ Mr. Larkin argued that a congressionally prescribed procedure for all guilty pleas would protect young military members from mistakenly pleading guilty to charges they really did not understand.⁵⁸ He further opined that a “verbatim” transcription would be generated that detailed the military judge’s assessment of the accused’s guilt.⁵⁹

As a result of the hearings by the House Armed Services Committee, the President promulgated the procedures to be used in all guilty pleas.⁶⁰ At the same time, the Manual’s Trial Procedure Guide tried to “codify the necessary inquiry into a pro forma advice to the accused,” which resulted in the accused not always being “advised of the elements of the offense and his guilt is not always established on the record.”⁶¹ This pro forma advice resulted in many appeals and decisions proclaiming that the accused was wrongly convicted.⁶² If the intent of Congress and the President had been followed, there would have been a full record of the elements of the charge and a sustainable guilty plea.⁶³

E. Federal Rules of Criminal Procedure – Rule 11

Rule 11 of the Federal Rules of Criminal Procedure ties directly into the study of the providency inquiry requirements of servicemember’s guilty plea.⁶⁴ Like RCM 910(c), Rule 11 outlines the proper procedures that the judge needs to follow when considering a guilty plea.⁶⁵ The rule states “the court must address the defendant personally in open court.”⁶⁶ During this providency inquiry, the court must determine, among other things, whether the defendant understands that he or she can be questioned under oath by the judge, that those statements can be used against him or her in perjury charges, the right to plead not guilty, the right to be represented by counsel, the waiver of certain rights if he or she pleads guilty, and the nature of the offense.⁶⁷ The purposes of Rule 11 are twofold: first, it allows the court to

⁵⁶ *Id.*

⁵⁷ *Chancellor*, 16 C.M.A. at 300.

⁵⁸ *Id.* (citing the quote of Mr. Felix Larkin in *Uniform Code of Military Justice: Hearings on H. R. 2498 Before House Armed Services Comm.*, 81st Cong. 1052-57, 1054 (1950)).

⁵⁹ *Chancellor*, 16 C.M.A. at 300.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See FED. R. CRIM. P. 11 (explaining that the rule’s main topic is that of pleas in the federal court system.).

⁶⁵ FED. R. CRIM. P. 11.

⁶⁶ FED. R. CRIM. P. 11(b)(1).

⁶⁷ *Id.* (explaining that the subsection of this rule mandates that the court also insure the accused understands: “(C) the right to a jury trial; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; (J) any applicable forfeitures; (K) the court’s authority to order restitution; (L) the court’s obligation to impose a special assessment; (M) the court’s obligation to apply

determine whether the defendant is voluntarily pleading guilty to the charges and second, it allows for a complete record of trial with regard to the voluntariness of the plea.⁶⁸ The voluntariness and knowledge of the guilty plea must be clear, so that the plea is not in violation of the Due Process Clause. Because the defendant “waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and the right to confront his accusers,”⁶⁹ the waiver must be “an intentional relinquishment or abandonment of a known right or privilege.”⁷⁰ Thus the defendant must knowingly and intelligently understand the charges and voluntarily plead guilty.

The defendant’s understanding of the charges, the rights abandoned, and the actions of the court must be satisfied before the court accepts a guilty plea. Federal Rule for Criminal Procedure 11 also requires that the judge “determine that there is a factual basis for the [guilty] plea.”⁷¹ Similar to rules set out in the Rules for Courts-Martial, the Federal Rules require the judge to examine the defendant to determine whether the acts to which he or she is pleading guilty meet the elements of the offense with which he or she is being charged.⁷² Furthermore, the goal of such an inquiry by the judge is to “protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”⁷³ The personal questioning by the judge facilitates the voluntariness and knowledge of the defendant concerning the guilty plea and protects the rights of the defendant in asserting that plea.

II. Analysis

The issue of the providency inquiry requirements necessary to sustain an accused’s guilty plea in military courts-martial is a topic that has a significant history and is determined largely on interpretation of the facts. The first part of the analysis focuses on two main areas: interpretation of RCM 910 and the policy considerations affected by how the providency inquiry is applied.

The first part of the analysis focuses on the interpretation of RCM 910. The interpretation of RCM controls how to apply the rule to guilty-plea court-martial proceedings. In *United States v. Redlinski*, CAAF held that part of the accused’s guilty plea was improvident, because the record of trial did not show that the accused “understood the distinction or that he had sufficient knowledge of any of the four elements of attempt.”⁷⁴ Before this decision, CAAF created a standard in *United States v. Care* to determine when a guilty plea was knowing and voluntary.⁷⁵ The *Redlinski* Court quoted *Care* by holding that “the record of trial ‘must reflect’ that the elements of ‘each offense charged have been

the Sentencing Guidelines, and the court’s discretion to depart from those guidelines under some circumstances; and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence”).

⁶⁸ *United States v. McCarthy*, 394 U.S. 459, 465 (1969).

⁶⁹ *Redlinski*, 58 M.J. at 121 (citing *McCarthy*, 394 U.S. at 466).

⁷⁰ *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁷¹ FED. R. CRIM. P. 11(b)(3); *See also McCarthy*, 394 U.S. at 467.

⁷² *McCarthy*, 394 U.S. at 467 (citing FED. R. CRIM. P. 11 advisory committee’s note).

⁷³ *Id.*

⁷⁴ *United States v. Redlinski*, 58 M.J. 117, 119 (2003).

⁷⁵ *Id.*

explained to the accused's by the military judge."⁷⁶ The *Care* Court established a basic foundation for the requirements needed for the military judge to accept a guilty plea from the accused. The requirements from *Care*'s holding were codified for use in military court-martials in RCM 910(c)(1)-(5) in the Manual for Court-Martial in 1984.⁷⁷ Nevertheless, the judges on the United States Court of Military Appeals interpret the codified rules in divergent ways.⁷⁸ The *Redlinski* majority and dissenters focused on two main points; the interpretation of RCM 910 and second, its relation to the providency inquiry by a military judge. The interpretations of the majority and dissenters differentiated on the requirements to satisfy when a guilty plea is knowing and voluntary in situations wherein the elements of an offense are not explained to the accused.⁷⁹

The majority in *Redlinski* offered a literal interpretation of the RCM 910(c) elements outlined in *Care*. The Court supported this strict interpretation by relying on the complexity of the "attempt" elements and how they differ from other charges.⁸⁰ Contrary to this viewpoint, the dissent offers a relaxed interpretation that aligns itself with the United States Supreme Court.⁸¹ This view looks to see whether the accused understands the nature of the charge from all relevant sources, not just the literal explanations of the judge.⁸² As long as the judge ensures the guilty plea is a knowledgeable factual admission that is made voluntarily, the providency inquiry should be satisfied.⁸³

Beyond the RCM interpretations, policy plays an important role in the acceptance of a guilty plea. The policy consideration advanced by adhering to a strict interpretation of the providency inquiry requirements is the protection given to the accused to ensure an overall fair trial in terms of Due Process rights.⁸⁴ In addition, strict interpretation protects the court system from future claims of improvidency by the accused in post-conviction appeals.⁸⁵ The disadvantage to adhering to such a strict interpretation of the providency inquiry requirements is the lack of respect for courts and the legal profession.⁸⁶ The disadvantages of a strict interpretation are, in turn, the advantages of a more realistic interpretation that more accurately balances the scales of justice.

In interpreting RCM 910 the majority in *Redlinski* adopts a strict interpretation of the rule as it is applied to the elements of attempt. The Court acknowledges the elements of attempt in the *Redlinski* decision and stresses the importance of abiding by the exact definitions.⁸⁷ The Court concedes that the

⁷⁶ *Id.* at 119 (quoting *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)).

⁷⁷ *Id.* at 120.

⁷⁸ *Id.* at 117.

⁷⁹ *Redlinski*, 58 M.J. at 119-22.

⁸⁰ *Id.* at 119 (citing *United States v. Byrd*, 24 M.J. 286, 288-90 (C.M.A. 1987); *United States v. Schoof*, 37 M.J. 93, 103 (C.M.A. 1993); *United States v. Church*, 32 M.J. 70, 72 (C.M.A. 1991); Wayne R. LaFave, *Criminal Law* 544-52 (3d ed. 2000)).

⁸¹ *Id.* at 121.

⁸² *Id.* at 119-122.

⁸³ *Id.* at 121-123.

⁸⁴ *Care*, 18 C.M.A. at 250-251 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁸⁵ *United States v. McCarthy*, 394 U.S. 459, 465 (1969).

⁸⁶ *Redlinski*, 58 M.J. at 121.

⁸⁷ *Id.* at 119.

judge advised SA Redlinski of all the elements, but that he also failed to *explicitly* explain any of them.⁸⁸ The Court held that the judge never advised SA Redlinski that “the offense requires that he commit an ‘overt act,’ with ‘specific intent’ and that the act amount ‘to more than mere preparation’ and apparently tend ‘to effect the commission of the intended offense.’”⁸⁹ The Court reasoned the record failed to show SA Redlinski understood any of the elements.⁹⁰

To bolster its position that SA Redlinski did not have the proper knowledge to plead guilty to the attempt crime, the Court reasoned it is a complex and difficult offense because of the distinct meaning of preparation and attempt.⁹¹ The Court opined that the record did not show that SA Redlinski understood his act had to be “a direct movement toward the commission of the intended offense.”⁹² The Court noted that because there was no evidence that SA Redlinski knew, directly or inferentially, of the difference, he then had insufficient knowledge of the elements of the attempt crime.⁹³

In contrast to the majority’s position on RCM 910(c), the dissent offers a relaxed interpretation more in line with how the United States Supreme Court addresses the providency issue.⁹⁴ The crux of that position is that if the accused understands the nature of the charge, no matter how the accused acquires the knowledge, then the providency inquiry is satisfied.⁹⁵ In this application the intent of Congress is satisfied and justice is better served by helping eliminate the gaping hole the majority’s position leaves open. The relaxed interpretation provides a judge with multiple avenues to determine whether the accused understands the nature of the charge rather than just a strict question-and-answer providency inquiry.

In order to support a relaxed interpretation of RCM 910(c) one must establish how this section is consistent with the Supreme Court of the United States’ applicable rules. In *Boykin v. Alabama*,⁹⁶ the Supreme Court held that RCM 910(c) was directly taken from Federal Rules of Criminal Procedure Rule 11(c).⁹⁷ The language of the rule is verbatim.⁹⁸ With such a close connection between RCM 910(c) and Rule 11(c), Supreme Court precedent is directly on point.⁹⁹

As the dissent in *Redlinski* points out, there are alternative measures to determine whether an accused understands the nature of a charge without a specific recital of the elements and a personal

⁸⁸ *Id.*

⁸⁹ *Id.* at 119 (quoting Manual for Courts-Martial, United States (2002 ed.), Part IV ¶ 80b).

⁹⁰ *Id.* at 119.

⁹¹ *Redlinski*, 58 M.J. at 119 (citing *United States v. Byrd*, 24 M.J. 286, 288-90 (C.M.A. 1987); *United States v. Schoof*, 37 M.J. 93, 103 (C.M.A. 1993); *United States v. Church*, 32 M.J. 70, 72 (C.M.A. 1991); Wayne R. LaFave, *Criminal Law* 544-52 (3d ed. 2000)).

⁹² *Redlinski*, 58 M.J. at 119 (citing *United States v. Pretlow*, 13 M.J. 85,88 (C.M.A. 1982)).

⁹³ *Id.* at 119.

⁹⁴ *Id.* at 119-22.

⁹⁵ *Id.*

⁹⁶ *Boykin v. Alabama*, 395 U.S. 238 (1969)

⁹⁷ *Redlinski*, 58 M.J. at 120 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

⁹⁸ *Redlinski*, 58 M.J. at 120.

⁹⁹ *Id.* at 120-21.

questioning.¹⁰⁰ In its discussion, the dissent highlighted the U.S. Supreme Court's decision in *Henderson v. Morgan*¹⁰¹ whereby the defendant failed to receive adequate instruction on the nature of the charges.¹⁰² In *Morgan*, the Supreme Court provided an important recitation as to when the elements of a charge and direct questioning about the charge are not needed.¹⁰³ The Supreme Court held that such charges need not be directly given by the judge if: (1) the defendant stipulated to the fact of the charge; (2) the defendant made a factual statement showing that the defendant understood the charge; or (3) the counsel for the defendant says that the offense was completed as charged.¹⁰⁴ The Court acknowledged that if one of these situations existed on the record, it would be possible to show that the defendant understood the nature of the charge.¹⁰⁵

The Supreme Court reasoned that the test to determine whether a defendant voluntarily plead guilty to the charge could be a "totality of the circumstances" test.¹⁰⁶ The Court noted that this test could be used instead of the "rigid rule of law" where "a ritualistic litany of the formal legal elements of an offense" was explained to the defendant.¹⁰⁷ In its explanation, the Court directly stated that a charge need not always have a "description of every element of the offense."¹⁰⁸ The Court assumed that a complete description of the elements is not needed by the judge when the defendant has received adequate notice of the nature of the charges.¹⁰⁹ The Court made reference to how a direct recitation of the elements could be omitted and still have a valid guilty plea:

There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense Counsel did not purport to stipulate to the fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent.¹¹⁰

The Court implies that if there was a representation that the defense counsel explained the nature of the charge to the defendant, if there was a stipulation of this fact by the defendant, or if there was an admission by the defendant, an explanation of the elements by the judge would not be necessary.¹¹¹ The Court further commented that even if there is not a direct explanation of the charges, it can be presumed that the defense counsel advised and explained the nature of the charge to the defendant enough to give the defendant notice of the charge.¹¹²

¹⁰⁰ *Id.* at 120 (citing *Henderson v. Morgan*, 426 U.S. 637 (1976)).

¹⁰¹ 426 U.S. 637 (1976)

¹⁰² *Redlinski*, 58 M.J. at 121 (citing *Henderson v. Morgan*, 436 U.S. at 647).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Morgan*, 436 U.S. at 644.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 647, n. 18.

¹⁰⁹ *Id.*

¹¹⁰ *Redlinski*, 58 M.J. at 121 (quoting *Henderson v. Morgan*, 426 U.S. at 646).

¹¹¹ *Id.* at 121.

¹¹² *Morgan*, 426 U.S. at 637.

Applying these standards to the rigid rule of listing the exact elements of the charge to the accused would allow a military judge to conduct a providency inquiry without giving up the accused's Due Process rights. The accused still receives all Due Process rights he would have received if the judge had personally addressed each element as the strict interpretation suggests. The only difference is that the judge can look at the totality of the circumstances to see whether the accused really understands and does not rely on the answers from canned questions on the elements. In this way the judge can come to an accurate understanding of the voluntariness of the guilty plea and makes a decision by that standard.

This view is further supported by the Supreme Court decision in *Marshall v. Lonberger*,¹¹³ where the Court considered the accused's intelligence and experience in the criminal justice system and held that the defendant's guilty plea was knowing and voluntary.¹¹⁴ In this case the defendant's guilty plea to "attempt" was deemed knowing, because the Court found that in the "totality of the circumstances" the defendant had knowledge.¹¹⁵ This finding of knowledge was attributed largely to the fact that the defendant was adequately represented by counsel, the defendant knew the nature of the charges, and there was only one attempt charge.¹¹⁶

The *Marshall* case further exemplifies the ability of a court to substitute a more relaxed procedure that satisfies Due Process for the strict elemental procedures for determining a guilty plea. The Court is holding the defendant to a subjective standard in determining whether the defendant has knowledge of the nature of the charge. In this way the Court can determine whether a specific defendant has the knowledge necessary to plead guilty voluntarily without being tied to formalistic rules that may inhibit the wheels of justice.

By using the Supreme Court of the United States' approach military courts can use RCM 910(c), and the result would be a more legally accurate way to determine knowledge and voluntariness of an accused's guilty plea. This approach focuses on the totality of the circumstances that make up the accused's guilty plea, including any acknowledged stipulations of fact, admissions of guilt, or representations by the defense counsel that the accused understood the charges. Additionally, the validity of the accused's guilty plea is held to a subjective standard; one that considers the particular accused's intelligence and knowledge of the situation. Through this totality of circumstances a court may find that the accused knew and understood the nature of the charges, and it may find this without a direct recitation and explanation of the elements of the charge by the judge.

Aside from the interpretation of RCM 910(c), another section, RCM 910(d), plays an important role in a providency inquiry. RCM 910(d) sets forth the basic procedures to ensure the accused's plea is voluntary.¹¹⁷ This provision directs that the military judge personally address the accused and determine

¹¹³ 459 U.S. 422 (1983)

¹¹⁴ *Marshall*, 459 U.S. at 437.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 437-38.

¹¹⁷ Rules for Courts-Martial 910(d), Manual for Courts-Martial, United States (2002 ed.).

if the plea is voluntary before accepting a guilty plea.¹¹⁸ The section specifically instructs the military judge to inquire into whether the accused's plea has been influenced by discussions with the defense counsel, trial counsel, or the convening authority.¹¹⁹

This section simply directs the military judge to talk to the accused about his willingness to plead guilty voluntarily. It does not instruct the judge to articulate and explain each element associated with the nature of the charge. The main thrust of this section is to ensure that the accused is not pleading guilty because of threat or coercion by an outside force.

Tied into the discussion of pleading guilty voluntarily, RCM 910(e) ensures that the military judge will accept a plea of guilty if there is a "factual basis" for the accused to plead guilty.¹²⁰ The purpose of this provision is to guarantee that the guilty plea is true as shown by the "Discussion" section of the rule: "[b]efore the plea is accepted, the accused must admit every element of the offense(s) to which the accused pled guilty. *Ordinarily*, the elements should be explained to the accused."¹²¹ The use of the word "ordinarily" clarifies the military judge's duty in the providency inquiry. The military judge need not "always" explain the elements to the accused before accepting the guilty plea. The job of the military judge is to assure the accuracy of the plea.¹²²

In line with the interpretation of RCM 910, policy concerns play a substantial part in determining whether the accused has the knowledge to plead voluntarily to satisfy his or her Due Process rights. One can argue that providing adequate Due Process protection to the accused is accomplished through strict, elemental inquiry. The balancing of the accused's rights with the basic goal of legal justice is better carried out by looking at the entire record of facts, not just the providency inquiry discussions.

Above everything the Due Process rights of the accused must be protected in determining what form of providency inquiry to use; however, those rights need not be over-protected as to prevent justice from being served. The court should take a broad look at the entire record to determine if the accused's Due Process rights were protected, not a limited view of whether each and every element of the charges were explained to the accused. Even though no absolute way exists to ensure every accused is completely protected, the relaxed method of providency inquiry offers a practical balance of due process and service of justice.

In the landmark case *United States v. Care*¹²³ the Court of Military Appeals (C.M.A.) reasoned that the totality of the record established that the accused understood the charge and voluntarily pled guilty.¹²⁴ The C.M.A. reached this decision despite conflict with the Supreme Court of the United

¹¹⁸ *Redlinski*, 58 M.J. at 121 (citing Rules for Courts-Martial 910(d)).

¹¹⁹ *Id.*

¹²⁰ Rules for Courts-Martial 910(d), Manual for Courts-Martial, United States (2002 ed.).

¹²¹ RCM 910(e), Discussion (emphasis added).

¹²² *Id.*

¹²³ 40 C.M.R. 247 (C.M.A. 1969).

¹²⁴ *Care*, 40 C.M.R. at 251.

States' holdings in *Boykin v. Alabama*¹²⁵ and *Halliday v. United States*.¹²⁶ In *Boykin* the Court held that the guilty plea was improvident, because the judge failed to question the accused appropriately on the record;¹²⁷ however, the Court earlier held in *Halliday* that a guilty plea where the judge did not personally address the accused would not be reversed for improvidency, because there were many valid convictions that may have been held without a full, proper providency inquiry.¹²⁸ Additionally, in *United States v. Jones* the judge did not clearly explain every element of the charged offense to the accused during the providency inquiry, but the C.M.A. reasoned that the failure to explain the charge "is not reversible error if it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty."¹²⁹ The result is that a guilty plea may meet the required standard of a providency inquiry and thus satisfy his Due Process rights, even if the accused is not personally addressed by the judge.

Directly tied into fulfilling the accused's Due Process rights, the providency inquiry must also balance the needs of the accused with the needs of legal equality. A providency inquiry cannot be so loose as to deny the accused Due Process and other rights but, on the other hand, the inquiry cannot be so strict as to leave a loop-hole for a dissatisfied accused to bring a claim of improvidency on appeal. Problems with the plea agreement are a frequent basis of attack for defendants seeking a post-conviction remedy.¹³⁰ If an accused is able to take unfair advantage of a system designed to promote justice, the system is not credible or workable.

Another shortcoming that stems from a strict providency inquiry system is that an accused can claim he never understood the explanation set forth by the judge. Although the judge may have explicitly detailed the elements of the charge and explained each element completely, an accused can claim he did not understand the explanation but only agreed with the judge because of the intimidating circumstances of the courtroom. The ability of an accused to claim improvidency is limitless when the entire record and the judge's discretion are not taken into account to determine the accused's knowledge and voluntariness of the guilty plea. Protecting against future claims of improvidency on appeal is difficult in a system bound by a rigid elemental system of "form" questions and insufficient explanations. A providency inquiry procedure that looks at the entire record – stipulation of fact, factual admission, and assurances from the defense counsel of a client's guilt¹³¹--promotes a balanced legal system dedicated to finding the truth. Such a system will decrease the improvidency claims on appeal, because the entire record will clearly show whether the accused had knowledge of the charge and voluntarily plead guilty.

III. Conclusion

¹²⁵ 395 U.S. 238 (1969).

¹²⁶ 394 U.S. 831 (1969).

¹²⁷ *Care*, 40 C.M.R. at 251 (citing *Boykin*, 394 U.S. at 239).

¹²⁸ *Halliday*, 394 U.S. at 833.

¹²⁹ *Id.* (citing Art. 45(a), Uniform Code of Military Justice; 10 USC § 845(a)).

¹³⁰ *McCarthy v. United States*, 394 U.S. 459, 465 n. 12 (1969) (quoting Chief Judge Walter E. Hoffman, *What Next in Federal Criminal Rules?*, 21 Wash & Lee L. Rev. 1, 8 (1964)).

¹³¹ *Redlinski*, 58 M.J. at 122-23.

The current interpretation of the providency inquiry procedure for a guilty plea is too rigid. A better alternative exists: a guilty plea from an accused should be acceptable even if each element of the offense is not explained as long as the accused indicates to the judge through any reliable method that he or she understands the elements of the charge and is voluntarily pleading guilty.

The existing interpretation by the United States Court of Appeals for the Armed Forces requires that each element of an offense be listed and explicitly explained to the accused before a guilty plea may be accepted by the military judge. It can be argued that the Court has incorrectly interpreted the requirements set forth in the RCM 910(c) – (e) that prescribe the requirements to ensure the accused understands the elements and nature of the charges. A more realistic interpretation of the requirements would allow the military judge to accept a guilty plea by analyzing all the available evidence that shows the accused understood the nature of the charge and voluntarily pled guilty. By considering an accused's stipulated facts, an accused's factual admissions or statements of understanding, and representations by defense counsel that the offense was completed as charged, the military judge can make an accurate and supportable determination of the accused's understanding of the charges and the voluntariness of the pleading. This view exemplifies Congressional intent to establish a more relaxed providency inquiry procedure that is fair as well as the Supreme Court's holdings that allow a "totality of the circumstances" approach to providency inquiry. A broader interpretation of RCM 910 would provide a more comprehensive and accurate determination of the accused's understanding of the charges.

Policy reasons behind improving the providency inquiry procedures also suggest a better option for protecting both the accused's rights and the goals of justice. Such an option fully protects an accused's Due Process rights by ensuring that the accused voluntarily pleads guilty only to a charge he or she understands. The relaxed view of the providency inquiry system balances the needs of the accused with the needs of legal equality. It provides the accused his or her Due Process and other rights and at the same time is not so strict as to leave a loop-hole to bring claims of improvidency on appeal. Guarding against creating a providency inquiry procedure that fails in its purpose to find truth and justice is necessary to limit the accused's ability to take unfair advantage of a system that is designed to protect the accused.

Applying this proposed view to the hypothetical LCpl Jones,¹³² the outcome of this case would change dramatically. LCpl Jones's claim that he did not understand the offense to which he was pleading guilty because the judge failed to explain the third element of the attempted assault charge would fail. Accordingly, he would not be afforded an opportunity to contest the guilty plea based on improvidency on appeal, because the entire record would show he fully understood the nature of the charge and pleaded guilty knowingly and voluntarily. The Due Process rights of LCpl Jones would be protected, and justice would be served.

Such an approach would have similarly affected the outcome of *United States v. Redlinski*. Applying the new procedure, SA Redlinski's appeal of improvidency would most likely have failed

¹³² See *supra* note 1.

because the entire record shows he knew the nature of the charge and pled guilty voluntarily. SA Redlinski admitted under oath to all the elements of attempt.¹³³ The stipulation of fact made by SA Redlinski through his defense counsel supports all the elements of the attempt charge.¹³⁴

A providency inquiry procedure that looks at the entire record to decide whether the accused understands the nature of the charge and pleads guilty voluntarily is the better procedure. This providency inquiry procedure ensures that the scales of justice are balanced.

¹³³ *Redlinski*, 58 M.J. at 122.

¹³⁴ *Id.* at 122-23.

WHERE IS THE LONE RANGER WHEN WE NEED HIM? AMERICA'S SEARCH FOR A POST-CONFLICT STABILITY FORCE

By Robert M. Perito

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Robert Perito's *Where is the Lone Ranger When We Need Him? America's Search for a Post Conflict Stability Force* addresses a subject that is both disturbingly relevant and prescient in a post Operation Iraqi Freedom world. Perito, a career U.S. Foreign Service Officer with worldwide post-conflict peace operations experience, calls for the creation of a new U.S. armed force. This force would assert control over a theatre of operations once military forces have secured locations of conflict. Perito's construct, a "Stability Force," would provide a "turn-key" post-conflict policing framework in which withdrawing / redeploying military forces would cede control to a highly trained force of police, constabulary, judges, lawyers, and corrections professionals, whose role would be to begin mopping up from the military campaign by asserting the rule of law and enforcing it.

Author Perito confronts the need for the creation of a sustainable post-conflict security apparatus, an apparatus separate from the military forces whose successful work would predicate for a post-conflict stabilizing deployment. Citing recent hotspots of unrest where international forces, that included both American and NATO troops, were deployed to bring a modicum of control to the regions under their control, Perito explains the fundamental differences between the military forces required to subdue combatants and the post conflict forces needed to assist the affected societies in regaining their footing. Unapologetically, Perito addresses these issues from an American perspective.

As a baseline, Perito asserts that the military, in its present incarnation, is not equipped, trained, or constituted to handle long-term post-conflict security. This is the type of statement that one might expect to be lobbed in the first round of a partisan political debate about military funding; however, in the context in which Perito makes it, this is not the case. Perito is quite impressed with the ground level work done by soldiers generally and the US Military Police specifically. Rather, the position taken, and

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one supported by military officers, is that post-conflict peace keeping operations are debilitating to the US military for no less than two specific reasons.

The first reason is that, excepting out specialized units such as military police, soldiers are simply not sufficiently trained or equipped to handle peacekeeping. While skills such as weapons handling and marksmanship are transferable and necessary for both traditional soldiers and peacekeepers, items such as the choice of weapons, to a large extent, are not. Soldiers carry high-powered automatic weapons because that is what modern battlefields require. However, these same weapons are not optimal for the post-conflict peacekeeper. Rather, smaller caliber side arms with a compliment of more serious firepower should the need arise are what fully constituted gendarmerie such as Italy's Carabinieri have successfully employed in the past. Yet, U.S. soldiers patrol with battlefield weapons. Finally, in the often highly charged and emotional settings in which post-conflict peacekeepers regularly find themselves, soldiers without specialized training are often placed in a law enforcement capacity, which puts both the soldiers and the population at risk.

The second proposition deals with a decline in mission readiness. Perito points out that "mission creep," tasking soldiers with duties beyond their traditional specialized role as war fighters, ultimately plagues the operational readiness of these same military units. The insertion of soldiers into a post-conflict peacekeeper role means that these same soldiers are not available to deploy elsewhere and their training schedule is disrupted. The equipment they use is degraded and will require maintenance on a faster timetable. Furthermore, morale could suffer because of the possibility of being deployed away from home for a longer period of time than anticipated. Perito correctly asserts that all of these factors detract from the military fighting capabilities of a soldier.

According to Perito the deleterious effect of removing soldiers from their training pipeline or lengthening deployment schedules in order to cobble together a post conflict peacekeeping force is not the only negative associated with the current way the United States conducts post conflict peacekeeping missions. Perito asserts that fundamental differences in both the construct and the training between war fighters and peacekeepers can inadvertently have tragic consequences. Aside from the most obvious difference, namely that war fighters are made up of military personnel and police and peace officers are made up of civilians, Perito asserts that military personnel have a distinct culture from their civilian counterparts which sometimes will not translate and could lead to a tragic result. Recently, Perito spoke to a group in metropolitan Washington DC where he cited an example of this difference in cultures.² He used an example that arose during the course of the riots during the early 1990s, which swept Los Angeles following the acquittal of four police officers charged with the beating of Rodney King. As the civil unrest spread and it became clear that the police were not able to control the situation, United States Marines were dispatched to patrol with members of the Los Angeles Police Department. During one situation, a police officer stated to the group of Marines with whom he was patrolling that he wanted them to "cover" him as he sought to approach a building. The police officer had moved less than three feet from behind his area of concealment, when the Marines released a barrage of automatic weapons fire

² Book Lecture at Politics and Prose, Washington DC, 13 March 2004.

directly at the building. This episode according to Perito epitomizes the difference between the two. To a Marine or a soldier “cover me,” means to lay down suppressive fire. To a police officer, it means watch out and react if necessary.

Citing the national police of both France and Italy as examples of the type of forces he envisages and urges the United States to constitute, Perito nonetheless sees a force that would also include judges, prosecutors, and professional corrections officers. He points to the wholesale destruction of Baghdad by Iraqis after Coalition forces swept through the city, as the type of post-conflict destruction that could be avoided by using such a force. In Perito’s construct the post-conflict forces would follow behind advancing military forces and be ceded control by these forces once military operations were completed. By following behind the military, Perito’s theory is that professionals would be in place to enforce the civil laws, reconstitute those public services necessary to maintain law and order, and thus minimize the length of civil upheaval left as a result of the armed conflict. Absent such a force, in the wake of an advancing military force, history has shown time and again the utter destruction wrought by looters and marauding criminals unchecked by any law enforcement authority.

Perito clearly knows his subject and cites numerous examples in the recent past where a force such as the one he advocates would have been not only more helpful than continued military presence but incredibly useful in minimizing the post-conflict destruction, destruction often watched by soldiers whose orders did not permit them to engage or prevent the destruction. This very destruction could prove even more damaging to the morale and effectiveness of the combat forces as they witness their decisive battlefield victories erode into a hazy post-conflict situation.

However, the successful constitution of such a force could potentially lead to several problems that author Perito does not attempt to address in this book. Namely, that the United States would institutionalize its often perceived role as the world’s police force. This could have a two-fold negative effect. The first is that other nations, knowing that the United States would deploy this force to post-conflict areas, perhaps would simply not provide forces when requested to do so or provide just a token force. The second, related to the first, is that the United States would, more often than not, probably find itself as the lead element in a post-conflict force, and, as a result, be subject to grousing by other nations of the “Ameri-centric” flavor of the overall post-conflict force. These potential concerns when placed in conjunction with what would have to be exhaustive domestic and international legal review are matters that should be recognized and perhaps would make an interesting and useful follow-up to this work.

Notwithstanding these potential negatives, the constitution of a national post conflict constabulary, as advocated by Perito, is certainly worthy of study, discussion, and review for its feasibility, at the highest levels of Government policy makers.

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