THE DOMESTIC POLITICS OF INTERNATIONAL NORMS:

FACTORS AFFECTING U.S. COMPLIANCE WITH THE GENEVA CONVENTIONS

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By

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ABSTRACT

How do embedded norms affect compliance decision-making? Contemporary constructivist scholarship assumes that once a norm is embedded—integrated in a state’s cultural, legal, military, and political framework—compliance will occur indefinitely. These theories about the role of norms in foreign policy decision-making generally overlook the possibility that international norms, once adopted and internalized domestically, are still subject to contestation about their meaning, application, and utility.

This manuscript argues that after embeddedness, a new phase of the norm’s life cycle commences in which actors struggle with the norm’s interpretation and constituencies consolidate in support of and against the norm. Rather than the end of the norm story, embeddedness is the beginning of a new phase of domestic contestation in which actors make choices about the compliance outcome. This research develops an integrative model designed to assess how decision-makers weigh the material and normative factors associated with compliance.

This manuscript examines the case of the embedded norm governing prisoner of war (POW) treatment, as American identity is inextricably linked with the idea of the humane treatment of individuals in our custody during war. By comparing compliance decision-making regarding POW treatment during the Vietnam conflict with the decision-making in the Global War on Terror, this research concludes that when a lacuna exists in an embedded norm, actors’
preferences and their ability to affect the decision-making process determine the ultimate compliance outcome. The Bush Administration consistently sought legal solutions to conduct its security policy, reaffirming the extent to which the Geneva Conventions provided the frame for decision-making. What is puzzling is that a similar amount of effort was spent making the opposite determination during the Vietnam conflict: that prisoners were entitled to expansive rights no matter what side they were on or what kind of war they were fighting. This research seeks to add to the ongoing national dialogue about the future applicability of the Geneva Conventions, America’s historical commitment to human rights principles, and the effects of these actions on U.S. identity.
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Chapter 1: Theory and Methods

... Now when we raise our heads and look in the mirror, we see an unfamiliar and hideous reflection... ourselves. Appalled, the French are discovering this terrible truth: that if nothing can protect a nation against itself, neither its traditions nor its loyalties nor its laws, and if fifteen years are enough to transform victims into executioners, then its behavior is no more than a matter of opportunity and occasion. Anybody, at any time, may equally find himself victim or executioner.

Happy are those who died without ever having had to ask themselves: "If they tear out my fingernails, will I talk?" But even happier are others, barely out of childhood, who have never had to ask themselves that other question: "If my friends, fellow soldiers, and leaders tear out an enemy’s fingernails in my presence, what will I do?"

Almost fifty years after the French examined the question of how human rights abuses and the maltreatment of captured combatants affected their identity, the United States faced a similar crisis. Both during and after the Algerian civil war, the French struggled to reconcile their treatment of Algerian insurgents with their beliefs in justice and the universality of human rights. Similarly, the horrific images of detainee abuse from Abu Ghraib by CBS News and The New Yorker and allegations of torture from the U.S. Naval Base in Guantánamo Bay, Cuba, introduced the world to terrifying scenes of humiliation at the hands of U.S. servicemen and women. The now iconic images—an Iraqi detainee draped in a poncho and hood standing with electrical wires attached to his hands on top of a box, a pyramid of naked detainees, and detainees crawling on the dirty floor at the ends of leashes—prompted questions about the future applicability of international humanitarian law, America’s historical commitment to human rights principles, and, ultimately U.S. identity.

Our identity is inextricably linked with the idea of the humane treatment of individuals in our custody and with Geneva Convention compliance. The presence of the norm governing POW

treatment and the central importance of respecting the laws of war in U.S. culture date back to
the U.S. Revolutionary War. It continued during the Civil War when the Union issued the Lieber
Code, a set of instructions ensuring that field commanders properly treated captured soldiers as
prisoners of war, rather than common criminals. In the intervening 150 years, this norm
governing POW treatment became embedded in U.S. law, military doctrine, and identity, to the
extent that the U.S. treatment of prisoners and the U.S. commitment to human rights defines who
we are as a nation. Against this backdrop, the disturbing visual accounts of the treatment at Abu
Ghraib and the chilling narratives of abuse emanating from Guantánamo Bay prompted
Americans and international observers to ask: “How could this happen?”

The interaction between domestic politics and international norms provides a framework for
understanding why we see variations over time in U.S. compliance with the Geneva
Conventions. Contemporary constructivist scholarship examines the emergence and diffusion of
international norms to a state’s domestic framework, but assumes that once a norm is
embedded—integrated in a state’s cultural, legal, military, and political framework—compliance
will occur indefinitely. Embedded norms thus provide a social structure that promotes
compliance. These theories about the role of norms in foreign policy decision-making generally
overlook the possibility that international norms, once adopted and internalized domestically, are
still subject to contestation about their meaning, application, and utility. Despite the claim that
“if constructivism is about anything, it is about change,”2 this school of thought has overlooked
the social change that occurs after norms are embedded and the ability of actors to interpret and
reinterpret the norm. After embeddedness, a new phase of the norm’s life cycle commences in
which actors struggle with the norm’s interpretation and constituencies consolidate in support of

2 Emmanuel Adler, "Constructivism and International Relations," in Handbook of International
and against the norm. The mobilization of these constituencies—and their access and influence to decision-makers—determines the ultimate compliance decision. Rather than being the end of the norm story, embeddedness is just the beginning of a new phase of domestic contestation in which actors still have choices about the compliance outcome.

One significant area of compliance decision-making that has received substantial recent attention in policy and academic analysis is U.S. behavior toward the laws of war. Through integration in law, doctrine, and culture, the Geneva Convention governing POW treatment has become embedded in U.S. domestic practice. Despite this domestic embeddedness—and contrary to constructivist predictions—automatic compliance with this embedded norm has not occurred. Actual U.S. treatment of POWs has varied tremendously in international armed conflicts. This variation underscores a gap in international relations theories of norm behavior and forms the basis for my research puzzle. Why do embedded norms show continuity in some cases but not others? Building on the insights of both realist and constructivist approaches to norm behavior, this manuscript argues that after a norm is embedded, a new phase of domestic contestation ensues, in which instrumental and normative factors affect compliance decision-making. This research problematizes norm behavior and probes the following questions: What happens to a norm after it becomes embedded domestically? How do norms interact with domestic political pressures and strategic interests to produce particular policy results?

The conventional dichotomy in international relations scholarship between instrumental behavior and norm-guided behavior is false. The tendency to emphasize this division not only overlooks the examination of important questions, but also does not reflect empirical realities. States draw upon both norms and strategic interests to construct their behavior. The laws of war provide one important empirical area in which normative principles may collide with strategic
interests. As a result, this chapter provides an integrative model with hypothesized causal mechanisms designed to assess how decision-makers weigh compliance with the laws of war. In the fourth stage of the norm’s life cycle, contestation about the meaning of the norm and its mandate occurs when there are areas in which the norm is vague or ill-defined. In this phase of contestation, we expect to see: (1) a subset of society that believes the embedded norm is inadequate and a subset of society that adheres to the tenets of the norm; (2) competing norms and beliefs; and (3) instrumental and normative benefits to be gained from compliance and non-compliance. As a result, the phase of contestation is marked by internal debate and uncertainty, as domestic actors struggle to interpret and reinterpret the norm. Examining the competing forces that give rise to state norm behavior will provide a richer explanation of why, when, and how states comply with embedded norms.

**Beyond Compliance**

International relations scholars have developed several propositions regarding state compliance with international obligations. In my research, compliance is defined as conforming to a regulation or standard as articulated in international law. Structural realist scholars maintain that international obligations as expressed in law do not independently affect state practice. The realist story is agent-centric: states rationally choose between the options of compliance and non-compliance, weighing the strategic costs and benefits. Based on this calculation, they “conform with international norms if it increases their political utility, and on the condition that the costs of adaptation are smaller than the benefits of external rewards.”

Constructivist scholars, however, reject this notion that states comply with international obligations solely to secure short-term or

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long-term benefits or to maximize self-interest. Rather, they argue that compliance occurs as a result of changes in a state’s culture and practice.\(^5\) According to constructivist scholars, norms constrain international actors by determining the range of possible options and shaping identity. They posit that once a norm is embedded domestically, state behavior will align with the proscriptions or prescriptions of the norm.

Neither of these explanations, however, accord with actual state behavior. As a result, the discipline still suffers from a high degree of indeterminacy in theorizing how norms affect policy outcomes. Structural realist scholars fail to systematically explain why states may not comply with norms that are in their material interest or why they sometimes comply with norms that are not in their interest. Constructivists, on the other hand, assume that embedded norms are universally complied with and frequently overlook instances of violation.\(^6\) Realist and constructivist understandings of norm compliance are not wrong; they are simply incomplete. States are “inescapably situated in a social context”\(^7\) in which they constantly make choices about the meaning and utility of norms, including norms that are embedded in a state’s domestic framework.

This research specifically examines a neglected phenomenon in constructivism: the possibility that embedded norms form the starting point for a new phase of contestation in the life cycle of norms. I argue that embedded norms constrain behavior, but that constraint does not


\(^6\) Stephen Krasner raised this critique of constructivism by noting, for example, that norm of Westphalian sovereignty, “has been widely recognized but also frequently violated. The multiple pressures on rulers have led to a decoupling between the norm of autonomy and actual practice.” See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 8.

reduce actors’ choices to “all-or-nothing” compliance.\(^8\) Actors have multiple options: their preferences and strategic interests interact with domestic structure to produce the compliance decision. During contestation, actors with access and influence to the decision-making process—as well as an interest in a new interpretation of the embedded norm—attempt to alter the existing consensus surrounding the embedded norm. To that end, this research does not seek to describe the totality of norm behavior that a state can engage in, but represents merely a first effort at understanding patterns in state behavior that do not fit neatly into the “comply or violate” dichotomy.

I will first briefly review the existing scholarship on compliance, differentiating between the prominent explanations emanating from the classical realist, structural realist, liberal, and constructivist approaches. My contribution to constructivist scholarship is needed in order to reaffirm the importance of agency in constructivist thought and to bridge the rationalist/normative gap. Then I will describe my dependent variable, U.S. compliance with the Geneva Convention norm governing POW treatment; my independent variable, mobilization of a constituency; and my intervening variable, the access and influence of that group, before proposing an integrative model to explain variations in compliance decision-making. Lastly, this chapter will outline the method, design, and approach of my dissertation.

\textit{Classical Realism}

The classical realist school of thought re-emerged in the study of international relations after World War II with the flourishing of international political, diplomatic, and economic institutions. The basic assumption underlying classical realism is the belief that states seek to maximize their material power, and that human nature is a powerful determinant of state

behavior. Classical realists acknowledge the existence of international legal norms, yet remain skeptical about their ability to independently influence state behavior. Scholar E.H. Carr states, “The power element is more predominant and more obvious in international than municipal law.” The absence of a centralized government in the international system exacerbates power discrepancies between states and inextricably links the viability of international legal norms to a state’s power to enforce them.

The work of Hans Morgenthau most clearly articulates the relationship that classical realists envision between power and international law. According to Morgenthau, objective laws exist that govern politics and are rooted in human nature. In his view, the main force driving international politics is the concept of interest defined in terms of power. Morgenthau argues, “… to recognize that international law exists, however, is not tantamount to asserting that it is as effective a legal system as the national legal systems are and that, more particularly, it is effective in regulating and restraining the struggle for power on the international scene.

International law is a primitive type of law.” He continues:

There can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. It makes it easy for the strong to both violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy.

For all of the reasons that international law is a “primitive” law—its lack of precision, enforcement, and its decentralized nature—classical realists view domestic law as the most advanced type of law. Domestic law can constrain behavior, a function made possible by the

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11 Ibid.
internal hierarchy and centralized enforcement mechanisms present in domestic systems, but not international systems. In this view, whereas international law can simply “ratify the fate of arms and the arbitration of force,” domestic law can function as an effective form of law by issuing commands and sanctioning violence.

Thus, according to classical realists, compliance with international law can occur, but only through the efforts of powerful states in the international system. This school of thought is inadequate in explaining trends in norm compliance, because it fails to explain cases such as compliance with international legal regimes that impose constraints on state sovereignty without providing any material benefit to the signatory states. For example, a classical realist would not be able to explain why the United States ratified treaties such as the Nuclear Nonproliferation Treaty, which limits the ability of the United States to maximize its material power through the development of nuclear weapons. In addition, a classical realist might argue that compliance with international norms would be the highest when pressure is applied by a powerful state in the system. This account seems to explain some instances of compliance—such as South Africa’s decision to voluntarily disassemble its nuclear arms—but fails to explain compliance in the absence of a hegemonic state applying pressure, such as compliance with international monetary regimes. In the case of the Geneva Conventions, a classical realist might argue that violations of the laws of war will occur when a conflict arises between the pursuit of state interests and compliance with the treaty; yet this school of thought inaccurately predicts failure every time a conflict arises. In addition, as elements of the Geneva Conventions are contained in domestic law—through the Constitution and the Uniformed Code of Military Justice (UCMJ)—classical realists would be unable to explain non-compliance with these norms.

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**Structural Realism**

First articulated by Kenneth Waltz in his works *Man, the State, and War* and *Theory of International Politics*, scholars working in this approach argue that the anarchical nature of the international system limits cooperation because it fosters uncertainty about another state’s intentions. Furthermore, dependence on other states reduces a state’s ability to ensure its survival in a self-help system. As a consequence, international law is given short shrift in structural realist scholarship. Structural realists posit that international law does not independently affect state behavior or cooperation. International laws are epiphenomenal and do not force states to do what they would otherwise not do.\(^\text{13}\) In this school of thought, the legal status of treaties has no effect on compliance or noncompliance; rather, compliance with international law may be explained as merely a coincidence between international law—whose content, according to structural realists, is driven largely by the powerful states in the international system—and self-interest.\(^\text{14}\) Scholars accept that states sign and ratify international treaties, but they argue that states will abandon the treaties when the legal rules fail to coincide with their interests. In this approach, state agents deliberately calculate the most efficient means to achieve their desired end.\(^\text{15}\) When the benefits of compliance outweigh the costs, according to this approach, compliance will frequently occur.

This view of compliance is underspecified as it fails to explain why states comply with international legal norms at all when no material interests are served from compliance. It further cannot predict why states continue to follow international norms when they are no longer


convenient for the state or in the state’s best interest. This approach also assumes that states can perfectly calculate their self-interest at all times in any given international legal context. A structural realist, for example, would explain participation in NATO during the Cold War as an instrumental mechanism to contain the Soviet Union, yet would be hard pressed to explain continued U.S. participation in this international institution since the end of the Cold War. As Thomas Risse has highlighted, U.S. participation in NATO since the disappearance of the Soviet threat defies realist predictions about state behavior. Though participation in this institution may no longer be in the U.S. strategic interest, the collapse of the Soviet Union and the end of the Cold War did not end “the Western community of values” and norms. ¹⁶ In the case of the Geneva Conventions, a structural realist might explain the periods of compliance as a coincidence between the tenets of the Conventions and U.S. national interest, but could not explain when the “cost/benefit scale of interest calculations tips against norms.”¹⁷

Liberalism

Rising out of an anomaly in structural realism—why states cooperate in a world without a hegemon—neo-liberal institutionalism shares the same underlying assumptions as realism: states exist in an anarchic setting and are rational decision-makers. Neo-liberal institutionalism, however, diverges with realism on the importance and causal impact of international institutions. Institutions, according to neo-liberal institutionalists, promote order and cooperation and can independently affect state behavior. Studying the norms and rules that constitute international

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institutions gave rise to a broader inquiry about the phenomenon of cooperation in the international system.

Neo-liberal institutionalist scholars examine how institutions facilitate agreements, promote the decentralized enforcement of agreements, increase transparency, enhance the likelihood of cooperation by reducing transaction costs, correct for moral hazard, and lengthen the shadow of the future. Robert Axelrod states that the shadow of the future is effective in promoting cooperation because states are more likely to cooperate with each other if they factor into their decision-making the effects of their behavior today on prospects for cooperation in the future. In particular, the shadow of the future provides a compelling rationale for why states may comply with international legal norms even when it is not in their immediate best interests to do so. Given the prospects for repeated interactions in the future, the shadow of the future provides a powerful incentive for compliance. These scholars argue that international institutions permit governments to attain objectives that would otherwise be unattainable. Scholars recognize that institutions foster compliance with norms by requiring states to document information regarding compliance, by providing legal channels for dispute resolution, and by signaling the state’s intentions. In this school of thought, states comply with international law when—after a careful weighing of costs and benefits—it suits their short-term or long-term interests by alleviating uncertainty in the international system.

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One subset of liberal scholars argues that the determinative factor affecting states’ compliance with international law is their domestic structure. They argue that regime type plays a significant role in compliance for three significant reasons. First, some scholars suggest that democratic leaders may be unwilling to enter into international conventions that they have no intention of keeping because they face higher audience costs for noncompliance than leaders in non-democracies. Others argue that due to the transparency of the political processes in democracies, these states may have more difficulty bluffing about their intentions regarding international commitments than non-democracies. Lastly, some scholars argue that democracies are more likely to comply with international law because they adhere to the same norm of respect for the rule of law.

In the case of the Geneva Conventions, neo-liberal institutionalism states that the United States complies with the norm governing POW treatment due to long-term reciprocal benefits gained from treating an opponent’s prisoners justly and humanely. Similar to realist explanations, however, neo-liberal institutionalist explanations are underspecified because they cannot explain decisions to apply Geneva protections without the promise of reciprocity and they cannot, similar to realist explanations, explain variation. In cases like the Vietnam conflict, neo-

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liberal institutionalism is ill-equipped to explain why the U.S. government extended Geneva protections to the Viet Cong when there were no expectations of reciprocal treatment.

**Constructivism**

The study of norms gained influence in international relations scholarship following the collapse of the Soviet Union and the inability of existing international relations schools of thought to predict or explain new geopolitical realities. Theories of structural realism and neoliberal institutionalism failed to account for change in the international system and could not explain how an actor acquired its identity or interests. Constructivism thus arose to explain the influence of norms on actors’ behavior and to prove that state identities and interests are socially constructed. For the purposes of this research, a norm is a “collective expectation for the proper behavior of actors within a given identity.”

Constructivism examines how the role of collectively-held ideas, beliefs, and norms affect social and political life. It is fundamentally based on two assumptions: that human interaction is shaped by ideational, not just material factors; and that agents and structures are mutually constituted. The first assumption does not suggest that constructivist scholars deny the existence of material structures; rather, they posit that material entities have constructed identities that possess meaning only through social interpretation. Contrary to realist theories of international relations, constructivist scholars believe that the meanings of material conditions are not fixed and static; rather, they change based on relationships and interactions.

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assumption, both material and non-material conditions determine the structure of the international system. The second guiding assumption of constructivism is the belief in the mutual constitution of agents and structure. The social environment constitutes the identity of human agency and, in turn, these agents create and reproduce the structure of the system through their daily practices. Their interaction is thus productive and reproductive.

The first wave of constructivist scholarship focused on defending the basic concept that norms matter against the bulwark of structural realist scholarship. This scholarship addressed the extent to which norms constituted the state actors themselves and the degree to which they provided a vernacular for international politics. Analyzing norms from the systemic level, these scholars sought to demonstrate that international norms could diffuse to the state level, substantially change states’ identity and preferences, and thus qualitatively affect foreign policy outcomes. They argued that a three-stage “life cycle” of norms (Figure 1) exists in which “some agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread.”

Figure 1: Life Cycle of Norms

<table>
<thead>
<tr>
<th>Norm Emergence</th>
<th>Norm “Cascade”</th>
<th>Embeddedness</th>
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<tbody>
<tr>
<td>Stage 1</td>
<td>Stage 2</td>
<td>Stage 3</td>
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and Legal Reasoning in International Relations and Domestic Affairs (Cambridge, UK: Cambridge University Press, 1989).


This early research focused entirely on the end stage of compliance and scholars bracketed many of the processes through which compliance was achieved.

The second wave of constructivist scholarship focused on examining the processes by which international norms affect domestic politics. These researchers sought to specify why, when, and which norms matter. They began by examining domestic structures and cultures to promote middle-range theorizing with predictive power about the conditions under which norms matter.\textsuperscript{30} Scholars have examined how the adherence to norms has catalyzed the prohibition against certain practices, such as the employment of military force,\textsuperscript{31} the use of weapons of mass destruction (WMD) and landmines,\textsuperscript{32} slavery,\textsuperscript{33} and apartheid.\textsuperscript{34} By extending the theory of “second image reversed,”\textsuperscript{35} scholars studied how the effects of international norms were mediated by the domestic cultural context,\textsuperscript{36} rhetoric,\textsuperscript{37} and the domestic political structure.\textsuperscript{38} In

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this way, scholars sought to explain cross-national variations in state adoption of norms. During this second wave of theorizing, constructivist scholars also turned their attention to the subject matter traditionally residing in the realist domain: security. In *The Culture of National Security*, Peter Katzenstein compiled the research of constructivist scholars who sought to demonstrate the impact of norms in the “high politics” issue area of international security. The table below (Table 1) synthesizes many of the existing explanations for compliance from realist, liberal, and constructivist schools of thought.

<table>
<thead>
<tr>
<th>Level of Analysis</th>
<th>Explanatory Factors</th>
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<tr>
<td></td>
<td>Self-Interest</td>
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<tr>
<td>Systemic</td>
<td>Material interest$^{40}$</td>
</tr>
<tr>
<td>Domestic</td>
<td>Regime Type$^{43}$ Interest Groups$^{44}$</td>
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</tbody>
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Whereas the first wave of norm theorizing defended the concept that norms matter and the second wave of theorizing examined how norms impact states, a third wave of constructivism is needed to specify the effects of norms after they become embedded in a state’s domestic


Katzenstein, ed.

Schimmelfennig, Waltz.

Finnemore and Sikkink, "International Norm Dynamics and Political Change."

Risse.


Schultz.


Checkel.

Cortell and Davis, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms."
framework and what factors account for their influence or lack of influence on state compliance decision-making. This research builds upon recent scholarship that examines how ideas change in the domestic context and how this transformation affects foreign policy output. Scholars such as Sonia Cardenas, Vaughn Shannon, and Jeffrey Legro have begun the investigation in this third wave. To contribute to this scholarship, I suggest the following two proposals: (1) a re-affirmation of the importance of agency in constructivist thought; and (2) a bridge between the rationalist and constructivist accounts of compliance.

**The Constructivist Turn: The Importance of Agency**

Since Alexander Wendt first advanced the agent-structure debate, some scholars have argued that constructivist scholarship has, “becom[e] the structural complement to rationalism’s agenticism.”47 Constructivist scholars have frequently highlighted this flaw in their analysis. Jeffrey Checkel notes that constructivist scholars assume that agents maintain fixed identities and preferences. In particular, he states:

> By bracketing theoretically how norms connect with domestic norm-takers, constructivists have been unclear about the process through which norms have constitutive effects... to the detriment of developing theories that capture and explain how the social constructivist world, at the unit level, really works.48

According to Ian Hurd, the primary reason that this area of scholarship has been overlooked has been the focus on the mechanisms of embeddedness.49 The current understanding of norm embeddedness is highly structural, as actors are socialized to follow the norms embedded in domestic systems. Embeddedness assumes perfect compliance: once a norm has been embedded in a state’s legal, political, and social culture, actors uniformly comply with that

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49 Hurd, "States and Rules, Norms and Interests."
norm. According to Shannon, “At some point norms become internalized [embedded] so that conformity is not a matter of conscious choice but of second nature.”50 In Finnemore and Sikkink’s three-stage life cycle of norms, the third stage of the life cycle was “internalization.” In other words, embeddedness was the final word on norm development. In this view, after the norm has been embedded, it is “internalized by actors and achieves a ‘taken for granted’ quality that is almost automatic.”51

Various scholars use different terminology to signify embeddedness. Andrew Cortell and James Davis use the term “salient”52 and others use the terminology of “legitimate norms,”53 “internalized norms,”54 “diffused norms,”55 or “socialized norms.”56 For the purposes of this research, I will use the term “embedded norm” to capture all of these meanings. It was the first phrase used to describe this phenomenon, coined by Goldstein and Keohane in 1993. In their book, Ideas and Foreign Policy: Beliefs, Institutions and Political Change, the authors examined the relationship between norm embeddedness and foreign policy. They argued that ideas affect policy through three distinct causal pathways: by providing road maps that increase clarity about ends-means relationships; by affecting outcomes of strategic importance in which there is no unique equilibrium; and by becoming embedded in political institutions. Goldstein and Keohane defined this concept of embeddedness as the “incorporation [of norms] into the terms of the political debate” yet they failed to delineate the specific processes by which norms become

50 Shannon.
51 Finnemore and Sikkink, "International Norm Dynamics and Political Change," 904.
52 Cortell and Davis, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms."
53 Huurd, "Legitimacy and Authority in International Politics."
54 Finnemore and Sikkink, "International Norm Dynamics and Political Change."
55 Checkel.
embedded.\textsuperscript{57} Other scholars advanced Goldstein and Keohane’s research program and delved more deeply into the concept of norm embeddedness and state behavior.\textsuperscript{58} According to Cortell and Davis, a norm is said to be embedded when:

The state has made concrete alterations in its policy choices, or has incorporated formal procedures into its domestic processes in an effort to be in accordance with the rule’s prescriptions. In this case, the norm or rule comes to be embedded within the nation’s own normative, juridical, or constitutional framework.\textsuperscript{59}

Cortell and Davis then developed pathways by which an international norm becomes embedded in the domestic arena: through assimilation into the beliefs and values of state actors, through domestic processes to embed norms, through absorption in domestic policy debates, and through integration into domestic laws.\textsuperscript{60} In these ways, states embed international norms and come to accept their tenets as intrinsically given.

Successive scholarship advanced the concept of embeddedness, arguing that domestic factors conditioned embeddedness. Cortell and Davis argued that cross-national norm variation is due to the domestic political structure of the state. Jeffrey Checkel advanced this proposition and added that the embeddedness of an international norm was conditioned by the extent to which it was compatible with the cultural characteristics of the domestic population. According to Checkel, this “cultural match” is defined as:

A situation where the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system

\textsuperscript{59} Cortell and Davis, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms."
\textsuperscript{60} Ibid.
(constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures). In this view, when a cultural match exists, actors tend to take the international norm as given and instinctively abide by the obligations associated with the norm. Thus, for an international norm to become embedded domestically, it must resonate with the existing cultural understandings of the domestic citizenry. A norm can become embedded simply by dint of its cultural match rather than by its international prominence.

Despite the proliferation of literature about norm diffusion and embeddedness, very few scholars examine the effect of a norm after it has become embedded domestically. In order to correct for this underdevelopment, constructivist scholars in the last decade have reintroduced the concept of agency into their analyses. While this scholarship provides a good baseline for analysis, even these scholars do not go far enough, as none of them examine U.S compliance with embedded norms. Shannon starts from the premise that norm interpretation and violation can only occur if the norm is ambiguous, abstract, or “fuzzy,” existing in customary international law but not embedded domestically. He examines “malleable, elastic norms” and states, “a clearly articulated, codified norm offers fewer accounts by which an actor within an identity can violate and maintain social integrity. Other scholars examine how states use

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61 Checkel, "Norms, Institutions, and National Identity in Contemporary Europe."
62 Cortell and Davis, "Understanding the Domestic Impact of International Norms: A Research Agenda."
65 Shannon, "Norms Are What States Make of Them: The Political Psychology of Norm Violation."
66 Ibid.
norms, but they focus their analysis on states, such as Cuba or China, who historically eschew international norm compliance and for whom variation in compliance behavior is not a puzzling phenomenon.\textsuperscript{67}

As this scholarship still assumes that an embedded norm will promote universal compliance, I seek to reaffirm the importance of agency in constructivist thought by examining a fourth stage in the norm life cycle. After embeddedness, these norms \textit{can} be—contrary to Finnemore and Sikkink—the “centerpiece of political debate.”\textsuperscript{68} Embeddedness is not the end of the norm story: it is just the beginning of a new phase of domestic contestation (Figure 2) in which the norm provides the overall structure for decision-making, but in which actors can freely exercise agency in formulating compliance decisions.

\textbf{Figure 2: Revised Life Cycle of a Norm}

<table>
<thead>
<tr>
<th>Stage 1</th>
<th>Stage 2</th>
<th>Stage 3</th>
<th>Stage 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Norm Emergence</td>
<td>Norm Cascade</td>
<td>Embeddedness</td>
<td>Contestation</td>
</tr>
</tbody>
</table>

This period of contestation is characterized by debate about the meaning of the norm, how it should be applied, and how it can be reconstructed and adapted. It is puzzling that the school of thought that explains the construction and reconstruction of identity has overlooked the possibility that norms do not ossify in the domestic context. Due to the constructivist emphasis on the mechanisms of embeddedness, the school of thought provides scant explanations for situations in which states fail to perfectly comply with embedded norms. When faced with these situations, constructivists may argue that the norm was not fully embedded, since embeddedness inheres that interests align with the tenets of the norm. But I argue that this understanding

\textsuperscript{67} Cardenas, "Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior."

\textsuperscript{68} Finnemore and Sikkink, "International Norm Dynamics and Political Change," 904.
overlooks both empirical realities and the actors’ agency in compliance. Domestic contestation—debate over the meaning of the norm and its proper application—is just the beginning of a new norm story.

*Bridging Rationalist/Constructivist Divide*

Rationalism and constructivism have been categorized as mutually exclusive approaches to studying international relations. By casting rationalism as a research agenda concerned with instrumental choice and by casting constructivism as a research agenda concerned with the social construction of ideas and identities, the discipline itself has created an artificial cleavage between these complementary approaches. State behavior is frequently explained as motivated by either normative obligations or calculations of strategic, instrumental gain. Incentive-guided behavior is thus characterized as opposed to norm and rule-guided behavior: states are either “pulled” by the prospect of future gains or “pushed” by normative considerations.69 This dichotomy is highlighted by the concept frequently echoed in introductory courses to international relations, stating that realists adhere to a “logic of consequences” while constructivists adhere to a “logic of appropriateness.”

In their seminal 1998 work, “The Institutional Dynamics of International Political Orders,” March and Olson argue that states can adhere to a logic of consequences, prioritizing instrumental behavior over norm-guided behavior, or states can adhere to a logic of appropriateness, prioritizing norm-guided behavior over instrumental behavior. The logic of consequences proffers that states, “will comply if the reputational gain from compliance exceeds

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the increase in non-reputational payoffs available if it violates the commitment.”\textsuperscript{70} In essence, states compare the total payoff of violation with the benefits of compliance. Thus, the logic of consequences is agent-centric: actors choose freely among options and weigh the costs and benefits of action. The logic of appropriateness proffers that states make decisions on the basis of legitimated rules and norms that circumscribe the realm of acceptable behavior. It is structure-centric: as a result of embedded norms, actors are socialized to follow legitimated rules. According to this logic, “human actors are imagined to follow rules that associate particular identities to particular situations.”\textsuperscript{71} These logics have become so engrained in international relations theory that, “The consequentialist and appropriateness schools define themselves in opposition to each other. Each lays claim to a distinctive approach to social science defined by referring back to what the other approach leaves out.”\textsuperscript{72}

Recent scholarship, however, argues that rationalism and constructivism are not discrete domains. According to Ian Hurd, “The ease with which states mix strategic considerations and social norms and conventions in the practice of foreign policy suggests that the two are not distinct domains.”\textsuperscript{73} Fearon and Wendt agree that, “the two approaches often yield similar, or at least complementary, accounts of international life.”\textsuperscript{74} In addition, they argue that many benefits can be gained by using the tools of one approach to answer the questions that are typically posed


\textsuperscript{72} Hurd, \textit{After Anarchy: Legitimacy and Power in the United Nations Security Council}, 75.

\textsuperscript{73} Hurd, "States and Rules, Norms and Interests," 1.

by the other approach.\textsuperscript{75} To that end, I argue that states can operate in social, norm-laden environments and be instrumentally motivated.

The fault lines between rationalism and constructivism prevent useful and much needed theoretical advancements and empirical applications. I argue that in the fourth phase of the norm life cycle, decision-makers weigh the normative and material impact of compliance. During this phase, embedded norms interact with strategic interests to drive the ultimate policy outcome. Examining both of these motivations avoids a purely structure-centric normative theory—in which it is inconceivable for an actor to violate an embedded norm—and a purely agent-centric instrumental theory of compliance—in which actors are not informed by the normative context at all. To that end, the next section illustrates my integrative model of compliance behavior, drawing upon the insights of both rationalist and constructivist assumptions of norm behavior.

**Integrative Model for Analyzing Compliance**

This research argues that the question—did a particular state comply with a particular norm—does not capture the complexity of state decision-making about norm behavior. My aim is to explain U.S. compliance decision-making, particularly related to the Geneva Convention regarding POW treatment, and to uncover the conditions under which the redefinition and adaptation of this embedded norm occurs. I do not seek to pit instrumental and normative logics against each other, but rather I argue that normative logic provides the frame for decision-making and strategic variables determine the ultimate decision. This work builds off of Legro’s research explaining state behavior as a “two-step:” first, preferences are formed and secondly,

\textsuperscript{75} Ibid.
strategic interaction among actors drives outcomes. Notably, Legro highlights the importance of examining domestic social influences as determinants of foreign policy outcomes.76

The standard constructivist model of state behavior is illustrated below in Figure 3. After becoming internalized in a state’s domestic laws and culture, policy-makers and society alike possess a durable set of preferences around this embedded norm. Constituencies emerge to defend the norm, its tenets become engrained in public rhetoric and symbols, and the norm becomes associated as part of the state’s identity.77 In this way, the embedded norm provides the actor with a relatively stable set identities and interests. As a result, compliance with the norm is assumed to be automatic and universal.

Figure 3: Constructivist Model of Compliance Behavior

The typical structural realist model of state behavior is illustrated below as Figure 4. According to structural realist scholars, norms do not fundamentally constrain actors. Thus, states comply with norms when it promotes strategic interests, but will not comply with norms when the tenets of the norm conflict with the strategic interests of the state.

Figure 4: Structural Realist Model of Compliance Behavior

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Yet I argue that norm behavior transcends a simple “compliance or non-compliance” outcome as articulated in existing structural realist and constructivist literature. Embedded norms provide policy-makers with a set of enduring beliefs about appropriate behavior and consequently guide policy choices. They constitute the parameters for choice, but I argue that the existence of these norms does not reduce the choice set to one option.

I argue that contestation occurs because situations arise that the norm does not address. This is the case with all embedded norms because no norm can perfectly cover all situations and answer all questions. According to one scholar, “No system of rules can be complete, in the sense that rules cannot spell out the behavioral requirements for every situation, nor can they foresee all possible circumstances or disagreements.”78 In his book, *The Power of Legitimacy Among Nations*, scholar Thomas Franck affirms this belief. He argues that, “A rule is more likely to be perceived as legitimate when its contents are relatively transparent, when the content can be determined with relative ease and clarity.”79 We can determine *a priori* if there will be contestation based on the vagueness or clarity of the norm. The Geneva Conventions are deeply embedded, clearly expressed in doctrine and law, and they constitute U.S. military identity. Yet even with these norms, circumstances can emerge that are not covered by the tenets of the Conventions. The Conventions cannot be applied in a straightforward way in conflicts in which non-state actors or non-signatories of the Conventions complicate the question of who is entitled to these protections. Against this backdrop of norm incompleteness, contestation around the embedded norm will occur.

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This chapter will next examine the variables used to analyze this foreign policy-making puzzle. My dependent variable refers to U.S. compliance, my independent variable is the mobilization of a constituency, and my intervening variable is the access and influence of that group.

**Mobilization of a Constituency**

The mobilization of constituencies that both oppose and support the embedded norm is a context dependent, normative variable. What factors cause constituencies to oppose an embedded norm and where do these actors get their preferences from? In what ways do actors’ identities inform their preferences? Conversely, what factors cause a constituency to defend an embedded norm and where do they get their preferences from? It is through this variable that I seek to reintroduce the concept of agency into constructivist analysis. One of the guiding assumptions of constructivism is that actors’ identities form the basis of their interests, and these interests are not static.\textsuperscript{80} Whereas constructivists frequently examine how state identity, interests, and preferences are derived from the norms of behavior embedded in international society and transmitted to states through international organizations, regimes, informal networks, and even individuals, I seek to examine the parallel phenomenon of how actors’ preferences emerge. In chapter 2, I examine the process by which the norm of POW treatment shaped U.S. national policy by “teaching” the United States what its interests should be. Similarly, in both empirical cases, I examine the origin of actors’ political preferences and how that “teaches” them what their preferences are regarding POW treatment. The norm governing POW treatment informs actors’ preferences, but so do their education, background, and previous military and government service. In sum, I examine in chapter 2 the process by which social learning, training, and

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\textsuperscript{80} Finnemore, *National Interests in International Society*.  

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education leads actors to adopt the tenets embedded in international norms but, in each empirical case study, I examine these other factors that influence actors’ views regarding the norm.

**Access and Influence**

Secondly, the access and influence of these groups refers to the structural aspect of my argument. Domestic structure theories posit that generalizable foreign policy outcomes can be derived by examining the relationship between the executive and legislature and between the state and societal forces. This variable reflects this research program that examines how the domestic structure of the state affects the access and influence of actors.\(^81\) These theories examine the influence of policy networks, the informal and formal linkages between public and private actors in a specific issue area,\(^82\) and the organization of domestic institutional structure. This research will rely on the scholarship of Cortell and Davis,\(^83\) who develop a typology to characterize the structure of the decision-making authority and the pattern of state-societal relations. One aspect of the typology refers to the structure of decision-making authority, ranging on a continuum from centralized to decentralized. This characterization refers to the number of agencies, departments, or other government bodies that exercise authority over an issue area. The second aspect of the typology is the pattern of state-society relations. This characterization refers to the institutional arrangements that allow societal actors significant participation in the

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\(^{83}\) Cortell and Davis, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms."
formulation of policy for an issue area. When societal actors are left out of the policy making
process, this factor is coded as distant; conversely, when societal actors play a significant role in
the formation of policy, this factor is coded as close.

Figure 5: Typology of Domestic Structural Contexts

<table>
<thead>
<tr>
<th>Structure of Decision-Making Authority</th>
<th>Pattern of State-Societal Relations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Distant</td>
</tr>
<tr>
<td>Centralized</td>
<td>Type I</td>
</tr>
<tr>
<td>Decentralized</td>
<td>Type III</td>
</tr>
</tbody>
</table>

By arranging these factors in a typology, these domestic structural components yield four
potential structural outcomes. In a Type I structure, decision-making is tightly controlled by the
state apparatus and state agencies are relatively insulated from the input of societal actors. In this
configuration, international norms will only affect the domestic policy-making process if
authoritative government officials are sympathetic to the norm. In a Type I structure, societal
actors are unlikely points to be successful in persuading government officials to change policy
because many access to changing policy will be blocked. This configuration represents a top-
down, tightly controlled decision-making structure in which the decision to embed norms rests
largely with the decision-making of the political elite. By contrast, a Type IV structure represents
a less-centralized, more pluralistic state in which societal actors, NGOs, and interest groups have
ample ability to affect the policy-making process through the introduction of international norms,
but these norms are less likely to become embedded in the domestic structure because of the
fragmented nature of decision-making authority. In both empirical cases studied—1963-1965
decision-making regarding Vietnam and 2001-2004 decision-making regarding the Global War
on Terror (GWOT), U.S. domestic structure remains constant and reflects a Type I structure. Thus, only actors within the political elite can affect the compliance decision.

By examining these normative and structural factors, this research seeks to provide an integrative model of foreign policy decision-making. Figure 6 depicts this model.

Figure 6: Integrative Compliance Model

The first step of this model requires embedding the norm. Relying on the scholarship of Cortell, Davis, and Checkel, I argue that three indicators can be used to prove that an international norm is embedded domestically: integration into national law, assimilation in standard operating procedures, and inclusion into actors' identities and belief systems. The framework for this phase of the norm life cycle is provided by the norm itself: ideas provide the initial baseline and contours for foreign policy decision-making. An infinite range of possible foreign policy outputs does not exist, because all of the outcomes are inevitably constrained by the embedded norm. In addition, even when the norm is embedded, a lacuna can still exist in the norm. In the case of the

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For the purposes of this research, the GWOT refers to both Operation Enduring Freedom and Operation Iraqi Freedom.
Geneva Conventions regarding POW treatment, the norm is very clear about treatment of
uniformed soldiers and sailors of a traditional enemy, but is less clear about captured individuals
who do not fight with regular military forces.

H1: The more vague the embedded norm, the more heated the battle over its meaning and
application. Norms that are more clearly and concisely expressed, such as the Geneva
Conventions, will likely encounter intense domestic contestation only when aspects of the
international armed conflict are not directly addressed by the proscriptions of the norm.

The second step in this period of contestation is shaped by the access and the influence of
domestic actors. Anti-norm or pro-norm constituencies can emerge during contestation. Anti-
norm constituencies can benefit from non-compliance for a variety of reasons—economic,
social, moral, or political—and so their interests are threatened by norm compliance. This
constituency possesses strong notions about desirable and appropriate behavior in their
community; however, they believe that desirable behavior is achieved only by violating rather
than complying with certain norms. According to Sonia Cardenas, “State elites who rely on these
pro-violation groups for their power have strong domestic incentives to break international
norms, even in the face of pressures for compliance.”85 Particularly in a democratic regime such
as the United States, this group provides the executive with both material, in terms of re-election,
and normative, in terms of reputation and credibility, incentives to alter norm behavior. This
group’s ability to influence norm behavior depends on their access to and influence over the
decision-making apparatus of the state; thus, only those groups with institutionalized and
persistent access to decision-making can affect this calculus.

85 Cardenas, "Norm Collision: Explaining the Effects of International Human Rights Pressure on
State Behavior."
Pro-norm constituencies can also foster a new interpretation of this norm. Pro-norm groups possess strong feelings about the durability and scope of the embedded norm; they may even favor an expanded application of the norm. Thus, pro-norm constituencies will also be examined in this phase: actors who defend the embedded norm and believe that its tenets apply even more broadly than the traditional interpretation.

H2: If anti-norm constituencies have access to and influence over the decision-making elite, deviations from full compliance are likely to occur. If pro-norm constituencies have access to and influence over the decision-making elite, an expanded view of compliance is likely. In contrast, anti-norm constituencies and pro-norm constituencies that do not have access to or influence over the decision-making elite are less likely to affect the process of compliance or non-compliance.

The final step in contestation depends on the presence of a new set of beliefs to replace—or supplement—the embedded norm. In his assessment of foreign policy paradigm shifts, Legro argues that reconceptualizing collective national ideas requires more than the belief that the old ideas were inadequate. The next stage requires that actors “consolidate around some new replacement set of ideas, lest they return to the old simply by default.” In this phase, actors consider how the new beliefs might promote their material and/or normative interests, including increasing hard or soft power, achieving a relative advantage over an adversary, deterring an aggressor, or combating threats. The consolidation around a new set of ideas is not an easy process: this stage is challenged by the efforts of opposing constituencies and the difficulties in agreeing on a different belief system.

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In addition, agreeing on a new set of beliefs is challenged by concerns about reputation in the international legal regime. International legal scholars Abram and Antonia Chayes argue that states comply with treaties because their prior agreements have created normative obligations they cannot ignore. Rejecting the belief that states obey international treaties because of the threat of sanction, the Chayeses argue that states comply because of the dynamic created by the treaty regime itself. In their assessment, the central factor driving compliance is not fear of sanction but a loss of reputation.\(^87\) Similarly, Ian Hurd argues that, “When an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by calculation of self-interest, but instead by an internal sense of moral obligation.”\(^88\) Agreeing on a new set of beliefs may call into question the reputation of the state itself. Due to all of these challenges, the state may continue in the period of contestation or the actors may consolidate around a new set of beliefs.

H3: When actors cannot agree on a new of beliefs, contestation around the embedded norm will continue and compliance with the embedded norm is likely. Contestation around the embedded norm will continue until a new set of beliefs is developed or the anti-norm constituency dissipates.

H4: If actors can agree on a new set of beliefs to replace the embedded norms, the interpretation of the norm will occur according to this new orthodoxy.

Thus, I argue that in this fourth phase of the norm life cycle, contestation occurs among actors about how the norm should be applied, its meaning, and its mandates. In this phase, normative considerations interact with strategic variables to produce policy outcomes that are not


\(^88\) Hurd, "Legitimacy and Authority in International Politics," 387.
merely “comply or do not comply,” but are varied and complex. By examining how states engage embedded norms, this research enumerates some of the collage of norm behaviors that can occur in the process of foreign policy decision-making and seeks to understand why we see variation in compliance with embedded norms.

**Why Study the POW Norm?**

My research question emerged from the intense debates occurring in the United States in the years since the attacks of September 11, 2001 concerning the treatment of POWs. Questions about the tensions between power and norms, between the pursuit of state self-interest and the constraints of international law, and between the realities of modern warfare and the historical tenets of the laws of war have dominated academic and policy analysis. These debates have called into question not only the applicability of international humanitarian law but also its relevance for future military engagement. The Geneva Conventions comprise a series of protocols and treaties that call for the humane treatment of combatants and civilians during a time of war; the norm enshrined in Article III specifically prohibits violent, humiliating, and degrading treatment of POWs.

Constructivist scholarship posits that norms may possess two components: prescriptions (or proscriptions), and parameters.\(^89\) The prescription establishes the behavior of the actor within

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\(^89\) Finnemore and Sikkink posit that the three types of norms exist: “regulative norms, which order and constrain behavior, and constitutive norms, which create new actors, interests, or categories of action.” They point out that a third category of norms—prescriptive norms—exist but they are frequently omitted from constructivist analysis. They state: “This lack of attention is puzzling, since it is precisely the prescriptive (or evaluative) quality of “oughtness” that sets norms apart from other kinds of rules.” I will be examining this third type of norm because only by establishing appropriate standards of behavior can one evaluate what is noncompliant behavior. For a greater discussion about types of norms, see Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (Autumn 1998).
the given identity\textsuperscript{90} and the parameters determine the circumstances where the norm should hold.\textsuperscript{91} The norm governing POW treatment is a prescriptive \textit{and} proscriptive norm as it first establishes the rights of captured enemy fighters:

Members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.\textsuperscript{92}

It then proscribes inappropriate behaviors that members of the military must avoid, as they must not permit “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”\textsuperscript{93} The parameters of this norm apply to the military servicemen and women charged with POW handling, processing, and treatment during times of armed conflict. Article III of the Geneva Conventions—the norm governing POW treatment—represents the contemporary articulation of \textit{jus in bello} standards. States must take every measure during the course of armed conflict to ensure that prisoners are not subjected to violence, shameful, or degrading treatment.

\textit{1949 Geneva Conventions}

The Geneva Conventions are the embodiment of the historical tenets of the laws of war. Following the humanitarian atrocities in World War II, the International Committee of the Red Cross (ICRC) moved to promulgate a new set of standards for governing conduct during war. The ICRC was originally organized in 1864, following the widespread neglect of the sick and


\textsuperscript{91} Goldstein and Keohane, eds.

\textsuperscript{92} Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)," (1949).

\textsuperscript{93} Ibid.
injured soldiers at the Battle of Solferino during the Franco-Austrian War of 1859. Henri Dunant, who detailed these atrocities in his book, *A Memory of Solferino*, urged the international community to form an association to protect these victims of warfare. In 1863, a five-member association founded the International Community for Relief for the Wounded, which later became the ICRC.

In February 1945, the ICRC convened talks in Geneva for the purpose of modifying the existing Geneva Conventions. The results of this diplomatic conference were the four Geneva Conventions, adopted on August 12, 1949. The four conventions are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

The 143 articles and five annexes of the third convention specifically protect those individuals who can no longer fight, such as POWs and wounded troops. This convention regulates, among other things, the medical care, working conditions, discipline, internment standards, and trial of captured fighters. It safeguards prisoners’ rights by allowing the pursuit of religious, intellectual, and physical activities, by prohibiting “outrages upon personal dignity,” and by punishing “grave breaches” of the convention. Article two articulates the contours of the application of the convention: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

Article four defines who is entitled to POW status, which are

\[94\text{ Ibid.}\]
persons “who have fallen into the power of the enemy” and belong to one of the following categories, including: “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces;” participants in “organized resistance movements” who meet specific qualifications; “[m]embers of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power;” individuals who, “accompany the armed forces without actually being members thereof” and even “[i]nhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces.” Persons not entitled to POW status, including so-called “unlawful combatants,” can be entitled to the protections provided under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. All captured combatants fall somewhere within the protections of the Fourth Geneva Convention and Common Article 3, as no individual in war can fall outside the law. All persons are entitled to, at a minimum, Article 3 standards, which state that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular, humiliating and degrading treatment;

95 Ibid.
• The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The wounded and sick shall be collected and cared for. An impartial body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all of part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.  

Article five of the Geneva Convention Relative to the Treatment of Prisoners of War provides that when POW status is in doubt, individuals should benefit from the full protection of the Conventions until their status has been determined by a “competent tribunal.” According to this article, a captured combatant about whom any doubt exists regarding their POW status will be treated as a POW with the full panoply of Geneva rights, unless a tribunal determines otherwise. Derogation from the standards articulated in this Convention is strictly prohibited. Article 13 states: “Prisoners of war must at all times be humanely treated… [they] must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.”

Following the codification of these laws of war, the Conventions were again expanded in 1977 with the Additional Protocols to the 1949 Geneva Conventions. Protocol I applies to victims of international armed conflicts and Protocol II applies to victims of internal armed conflicts. These protocols do not create new standards of treatment for POWs. Protocol I expands the definition of who is entitled to POW status in international armed conflicts, to

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96 Ibid.
97 Ibid.
98 Ibid.
include any combatant “who falls into the power of an adverse Party shall be a prisoner of war”\textsuperscript{99} whereas Protocol II applies to the coverage of captured fighters in conflicts of a non-international character.\textsuperscript{100} The United States has signed but has not ratified either Additional Protocol; however, 194 states—including the United States—have signed and ratified the 1949 Geneva Conventions.

**Methods, Design, and Approach**

This research strives to enrich both the realist and constructivist accounts of norm compliance with an integrative examination of the conditions surrounding norm behavior. This approach complements previous scholarly analysis that has examined compliance and non-compliance of an ambiguous norm,\textsuperscript{101} norm behavior in states with weak domestic political structures,\textsuperscript{102} and domestic transformations of foreign policy paradigms.\textsuperscript{103} The outline for this research proceeds according to Legro’s “two-step” model: the process by which the POW norm has become embedded in the U.S. domestic context will be examined in Chapter 2 and the process of strategic action is considered secondly in subsequent empirical chapters.

My research consists of comparing structured qualitative case studies of different instances of norm behavior. Peter Gourevitch stated, “Comparison allows us to stage a

\textsuperscript{101}Shannon, "Norms Are What States Make of Them: The Political Psychology of Norm Violation."
\textsuperscript{102}Cardenas, "Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior.", Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure.*
\textsuperscript{103}Legro, *Rethinking the World: Great Power Strategies and International Order.*
confrontation between competing explanations in social sciences.”104 Because my interest lies in assessing the conditions that affect the behavior regarding an embedded norm, I am focusing solely on comparing U.S. cases involving the POW norm, a norm embedded in domestic law and military culture. The focus on the United States allows me to control for the cultural match of this norm and to specifically examine the causal processes affecting norm behavior. Though this research only examines U.S.-specific case studies, I argue that this approach can be used in future research to assess other similarly embedded norms both in the United States and in other states.

I proceed by developing structured, focused case studies in order to best capture variation across historical contexts and to enable me to isolate the casual mechanisms at work. My case studies will be structured to the extent that I use a standard set of research questions to guide my data collection for each case.105 A standard set of research questions applied to each case study allows me to ensure “the acquisition of comparable data in comparative studies.”106 My standardized set of research questions can be found in Appendix A. My case studies will be focused to the extent that they are undertaken with a single research objective: to determine the conditions under which U.S. compliance decisions regarding the POW norm were made. Case studies also allow the advantage of process tracing within each case. Process tracing involves studying “whether the intervening variables between a hypothesized cause and observed effect move as predicted… Put another way, process tracing looks at the causal mechanisms in

106 Ibid.
operation in a case.” My cases of POW decision-making in the Vietnam conflict and in the GWOT were selected to examine variations of norm behavior with different combinations of instrumental and normative motivations. The use of case studies allows me to “learn more about the complexity of the problem studied, to develop further the existing explanatory framework, and to refine and elaborate the initially available theory.”

For each case, I begin by reviewing the circumstances that gave rise to norm behavior: what were the details surrounding the armed conflict abroad, what was society’s response, and did U.S. norm behavior provoke a widespread domestic or international response? In order to assess U.S. compliance, I relied on a diverse set of sources including direct statements of policy intent, official statements by the executive, internal government memoranda, press reports, biographies, and secondary academic and journalistic accounts.

Because my independent and intervening variables cannot always be observed directly, I examined several proxies for them. To that end, I relied on the following two sources to assess actors’ preferences, mobilization, and ability to affect decision-making. First, I examined the policy and legal arguments, as the written reflection of the collective beliefs of the decision-making elite. In the case of POW treatment, the writings of the policy-makers and lawyers in the Office of Legal Counsel in the Department of Justice, the General Counsel of the Department of Defense (DoD), and the Judge Advocate Generals (JAGs) in the various military services were studied. Documented policy debates were also examined as they reflected important perceptions of the problems and options decision-makers faced in complying or violating the norm. My second source was the leaders’ biographical and autobiographical writings about their decision-making.

107 Ibid.
making. To that end, I also examined the autobiographies and private memoranda of the inner circle of decision-makers, as well as government archives, declassified memoranda, and interviews with relevant actors.

The following empirical chapters offer detailed case studies of specific instances when the United States faced a critical decision regarding POW treatment. These cases were chosen for three reasons. First, my practical interest in this research lies in explaining the variation in U.S. POW treatment over time rather than cross-national variation. Secondly, these cases are theoretically interesting as they have variation across independent and dependent variables. Lastly, these cases both represent instances of norm vagueness, as a non-state actor who rejected the applicability of the laws of war opposed the United States in war. Both cases include combatants who employed insurgent tactics against U.S. forces.

Chapter 3 examines the case of POW decision-making in the Vietnam conflict. Vietnam involved coalition warfare against conventional North Vietnamese forces that grew out of—and included—attributes of a classic counterinsurgency. In August 1965, Secretary of State Dean Rusk informed the ICRC that the U.S. Government intended to apply all Geneva protections to captured Vietnamese fighters and expected other parties—the Republic of Vietnam and the People’s Army of Vietnam—to do the same. Subsequently, in February 1966, the Chairman of the Joint Chiefs (CJCS) Earle Wheeler issued a directive that every detainee—regardless of affiliation or classification—was to be afforded full Geneva protections. The pro-norm constituency in this conflict sought a new interpretation of the Geneva norm that transcended even international legal standards. This chapter thus examines the role that affording all captured fighters Geneva protections played in President Johnson’s “soft power” battle against communism and in his efforts to legitimatize the war in the United States and abroad.
Chapter 4 examines U.S. decision-making about POW treatment in the GWOT. In this conflict, the anti-norm constituency sought to reverse the Vietnam-era embedded interpretation of Geneva standards, which extended Geneva protections, even if the combatants technically did not qualify for this treatment under international law. This constituency in the Bush Administration argued that the demands of the war on terror demanded new standards for treating captured fighters. In her famous 2000 *Foreign Affairs* piece, Condoleezza Rice stated that, “The Clinton Administration’s attachment to largely symbolic agreements and its pursuit of, at best, illusory ‘norms’ of international behavior have become an epidemic.” Yet, the considerable time the Bush Administration spent addressing the contours of the Geneva Conventions suggests that these “illusory” norms did frame U.S. decision-making and provided the backdrop for compliance decisions. Why did the president not choose to ignore the Geneva Conventions in their entirety? This chapter argues that the embedded norm of POW treatment affected decision-making during the Iraq and Afghanistan conflicts, yet due to the presence of an influential anti-norm constituency and the presence of a new belief system to replace the embedded norm, widespread deviation occurred. Ultimately, however, pro-norm constituencies rejected this new interpretation and it was abandoned.

Chapter 5 concludes with an assessment of the scholarly and policy ramifications of this research as well as suggestions for future scholarship. With regards to the theoretical ramifications, this research seeks to inform three primary areas: the continuing dialogue between rationalism and constructivism; the development of a fourth stage in a norm’s life cycle; and a resurrection of agency in constructivist analysis. This research will hopefully assist other scholars in developing theories of norm behavior for the laws of war, specifically, and for

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international norms more broadly. Thus, future research should examine variations in
compliance with other embedded norms to determine how domestic actors and their preferences
affect the compliance outcomes. In addition, future research should apply this integrative model
to Geneva compliance in other states. With explicit theories about embeddedness, constructivist
scholars can formulate, test, and develop generalizable predictions about how embedded norms
affect state foreign policy decision-making.

With regards to the policy ramifications, this research contributes to the ongoing
discourse regarding compliance with the Geneva Convention norms in international armed
conflicts. It seeks to address the larger dialogue occurring in the United States about the
appropriate next step to restoring the U.S. human rights reputation and to addressing the
challenges related to Guantánamo and Abu Ghraib. By developing a model of norm behavior, I
seek to enrich policy-makers’ understanding of how, when, and why the United States will
comply with the laws of war.
Chapter 2: Embeddedness of the POW Norm

This chapter addresses the first step of my argument: How did the norm governing POW treatment become embedded in U.S. domestic practice? I will rely upon the scholarship of Cortell, Davis, and Checkel to establish three empirical indicators that can be used to assess norm embeddedness: integration into both national and military law; assimilation into military doctrine; and inclusion in actors’ belief structures, as evidenced by DoD training and education on the laws of war. Since the creation of the United States, the belief that individuals in our custody during war have a right to be treated humanely and to be protected comprises an essential component of U.S. identity. The norm governing POW treatment has become deeply embedded in U.S. domestic practice and, as such, provides the frame for U.S. policy-makers and military leaders’ views regarding combatant treatment.

Norms exist at every level of political and social interaction—international,\(^1\) regional,\(^2\) domestic,\(^3\) tribal or community level\(^4\)—and can cross-cut levels of social life. The norm governing POW treatment represents a specific case of a norm cross-cutting levels of social life: it originated in the United States during the Civil War, became a model for other national military doctrines, became institutionalized internationally through the Geneva Conventions, and has consequently been integrated into U.S. military doctrine and training. This chapter establishes the embeddedness of the POW norm domestically by first tracing the origins of the

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\(^3\) Krebs and Lobasz, "Fixing the Meaning of 9/11: Hegemony, Coercion, and the Road to War in Iraq."
POW norm in the U.S. military tradition during the Revolutionary and Civil Wars and then providing evidence of the norm in military law, policy, doctrine, training, and education.

It is instructive to first locate the norm governing POW treatment within the broader framework of the laws of war. The laws of war—or the law of armed conflict—refer to the corpus of international law that governs the military’s duties, responsibilities, and activities with regard to combatants and non-combatants in conflict. The modern law of war canon is divided into two constituent parts: jus ad bellum—the legal permissibility of the decision to go to war—and jus in bello—how the war may legitimately be fought. These criteria embody a calculus for determining if military action is morally justifiable and emphasize that the moral permissibility of the decision to go to war and the conduct of hostilities are inextricably linked. In modern discourse, jus in bello refers to the principles of discrimination and proportionality as the restraints on belligerents during the course of conflict.5

**Origins of the POW Norm in the U.S. Military Tradition**

**U.S. Revolutionary War**

The U.S. tradition of adhering to restraints in warfare with regard to captured combatants dates back to the U.S. Revolutionary War. In its commission to Washington on June 17, 1775, Congress articulated the belief that established principles of humanity should prevail in warfare. It charged General Washington to, “Regulate your conduct in every respect by the rules and discipline of war.”6 At Washington’s request, Congress further issued a set of general POW regulations on May 21, 1776. These regulations included providing prisoner rations equal to the rations issued to American troops, segregating officers from enlisted prisoners, offering

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employment possibilities to captured prisoners, and prohibiting prisoner enlistment in American
armed forces.\textsuperscript{7}

Whereas American colonists captured by British forces were often subject to abuse and
neglect,\textsuperscript{8} Washington refused to engage in the same abusive practices with British and Hessian
captured troops. After winning the Battle of Trenton on December 25, 1776, Washington
commanded his troops to treat the captured Hessian solders “with humanity.” He ordered: “Let
them [the Hessians] have no reason to complain of our copying the brutal example of the British
army.”\textsuperscript{9} Other examples of U.S. restraint toward prisoners exist throughout the conflict. In the
Battle of Stony Point in July 1779, for example, Continental forces surprised the British Army
and consequently spared the 543 prisoners who surrendered. According to one scholar, “Stony
Point displayed American arms in a new light. Not only had the Americans proved their
discipline and martial prowess, they had demonstrated a higher moral standard than their
opponents.”\textsuperscript{10} Beginning in the Revolutionary War, humane POW treatment thus was established
as a uniquely American value and a testament to the justness of the American experiment.

As the United States grew from a collection of colonies to a sovereign state, the norm
respecting the rights of POWs became associated with the U.S. military. In the 1785 Treaty of
Amity and Commerce that the United States concluded with Prussia, Article 24 delineated rules

\textsuperscript{7} Ibid.
\textsuperscript{8} Herbert Aptheker, \textit{The American Revolution, 1763-1783} (New York, NY: International
Publishers, 1960), Stephen Carl Arch, ed., \textit{A Narrative of Colonel Ethan Allen's Captivity}
(Acton, MA: Copley Publishing Group, 2000), Larry G. Bowman, \textit{Captive Americans: Prisoners
During the American Revolution} (Athens, OH: Ohio University Press, 1976), Francis D.
Cogliano, \textit{American Maritime Prisoners in the Revolutionary War: The Captivity of William
Russell} (Annapolis, MD: Naval Institute Press, 2001), Charles H. Metzger, \textit{The Prisoner in the
American Revolution} (Chicago, IL: Loyola University Press, 1971).
\textsuperscript{9} Alex Markels, "Will Terrorism Rewrite the Laws of War," \textit{NPR}, October 23 2007, John C.
\textsuperscript{10} Armstrong Starkey, "Paoli to Stony Point: Military Ethics and Weaponry During the American
and standards for the treatment of captured prisoners. It prohibited sending prisoners “into distant and inclement countries, or… crouding [sic] them into close and noxious places.”\(^{11}\) It further allowed each officer who was taken prisoner “as many rations, and of the same articles and quality as are allowed… [by the capturing power] to officers of equal rank in their own army.”\(^{12}\) This treaty was the first significant international attempt to protect war victims\(^{13}\) and would lay the groundwork for national military codes regulating the treatment of captured prisoners.

Successive treaties, such as the 1786 Treaty with Morocco stipulated that, “In case of a War between the Parties, the Prisoners are not to be made Slaves, but to be exchanged one for another, Captain for Captain, Officer for Officer, and one private Man for another.”\(^{14}\) Both of these bilateral treaties reflect the importance that the new American state placed on treating captured combatants humanely.

**Lieber Code**

Prior to the formal articulation of the POW norm with the Lieber Code during the Civil War, norms of humane treatment on the battlefield already existed in the nineteenth century. These norms often existed as elements of ancient and European philosophy and theology rather than as elements in official military doctrine. According to one scholar, “Restraint [in war prior to the Lieber Code] did not stem from a conscious articulation of principles of international law so

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\(^{12}\) Trooboff.


\(^{14}\) Treaty with Morocco June 28 and July 15, 1786 (The Avalon Project, 1786, accessed March 8 2010); available from http://avalon.law.yale.edu/18th_century/bar1786t.asp.
much as a kind of soldier’s honor not unlike the medieval chivalric code of fair fight."15 Despite the customary practice of respecting the laws of war, the Lieber Code, also known as General Orders No. 100, was the first formal codification of these practices. The Code, written by Dr. Francis Lieber, a German immigrant, was the first modern military field manual.16 Earlier historical examples prescribe and codify the rules of warfare—such as the Book of Deuteronomy, the Third Lateran Council, the Hindu Code of Manu, law of Szu-ma in China’s Chou dynasty, and the proclamation of Caliph Abu Bakr in 634 AD17—but the Lieber Code was the first attempt of a sovereign country to place formal limitations on the activities of warfighters in battle. The Code was a series of instructions issued by President Lincoln to the Union forces in 1863, which ensured that field commanders properly treated captured soldiers as prisoners of war, rather than common criminals. It drew upon historical international law,18 existing state practice,19 contemporary precedents,20 and Lieber’s own experience as a soldier in Europe fighting both against Napoleon at Waterloo and in the Greek Civil War.

The catalyst for Lieber’s authorship of the Code was the Battle of Bull Run, in which the following question was raised: could prisoners be exchanged without recognizing Confederate

16 Markels.
sovereignty? The Union forces did not recognize the Confederate fighters as professional soldiers, but rather as armed insurgents. Yet as increasing numbers of Union forces were captured, it became evident that a military doctrine was needed to protect the rights of both forces. Recognizing a lacuna in the current military code, Secretary of War Edwin Stanton commissioned a panel of Army officers and international legal experts in 1862 to develop a manual on the rules of war. As a personal friend of Secretary Stanton and Major General Henry W. Halleck, the General-in-Chief of U.S. Land Forces, as well as a noted legal scholar at Columbia College of Law, Lieber was asked to participate on the panel. Lieber, the only civilian member, drafted the code of military conduct. He believed that a formal regulation of war was needed, articulating that:

Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Laws and Usages of War, and on which our Articles of War are silent.21

The Lieber Code lays out the rights of POWs as well as the obligations of the capturing troops in an attempt to codify jus in bello standards. In particular, Article 56 of the Code states:

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.22

Lieber clearly articulates that POWs were not criminals or thugs, but rather individuals who had suffered in war and were thus deserving of protection. It further articulates the “parole,” or prisoner exchange system, the punishment for deserters and spies, the meaning of flags of truce and flags of protection, and the rights of black POWs that were captured by Southern troops and

21 Hartigan.
often forced into hard labor or slavery. Article 58 states:

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint. The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.\(^23\)

Fundamentally, the Lieber Code stresses in Article 15 that, “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”\(^24\) Lastly, one of the innovations of the Code was the recognition that the purpose of laws governing POWs, “was the prevention of things being done in war which might hinder the return to return to peace.”\(^25\)

Despite its codification during the Civil War, the Code did not have an immediate impact on battlefield behavior and did not enjoy universal socialization. Confederate troops, in fact, dismissed the Lieber Code as Northern propaganda and refused to accept its tenets as binding on their military conduct.\(^26\) It is estimated that one half of all Union POWs died at the Confederate camp at Andersonville.\(^27\) It cannot be argued, however, that the Union troops completely complied with the Lieber Code during the war either. Some estimates claim that approximately 27,000 Confederate troops and 23,000 Union troops died in POW camps during the Civil War.\(^28\)

In fact, in one prison alone—the Elmira Prison in New York—approximately one in four

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\(^23\) Ibid.(accessed).
\(^24\) Ibid.(accessed).
\(^26\) Carnahan, Hartigan.
captured Confederate soldiers died.\textsuperscript{29} Though the Code laid the groundwork for future international humanitarian agreements, it had little practical effect for the prisoners captured during the course of the war.

Though they were not universally applied during the Civil War, the tenets of the Lieber Code became integrated in U.S. practice through judicial activities immediately following the war. Upon the cessation of hostilities between the North and the South, the Judicial Branch began to hear cases that challenged former President Lincoln’s suspension of civil liberties during the war. One of the cases was \textit{Ex Parte Vallandigham}, a Supreme Court case in which Vallandigham, a candidate for the governor’s race in Ohio, was convicted by a military commission of expressing sympathy for the Confederacy. He sought to have this conviction overturned by the Supreme Court and though the Court denied his writ of certiorari, the Justice assessing his case referred to the Lieber Code in his decision-making. Justice Wayne stated that Vallandigham’s trial by military commission was valid because the commander acted: “In conformity with the instructions for the government of the armies of the United States, approved by the President… which were prepared by Francis Lieber.”\textsuperscript{30} According to one scholar, “For the military, Lieber’s Code may have been informational rather than directory, but for the [Supreme] Court, it was law, binding and prescriptive.”\textsuperscript{31} In addition, Supreme Court Justice Salmon Chase wrote to Lieber and called the Code a “great work.”\textsuperscript{32}

\textsuperscript{31} Ibid.
\textsuperscript{32} Friedel, Hartigan.
Hague and Geneva Conventions

The Lieber Code further influenced the development of international legal treaties in the late nineteenth and early twentieth century. In fact, one scholar claims that the Code was “so good and comprehensive that it became the prototype and model for Europe’s emulation in the succeeding decades.”33 In 1899, Czar Nicholas II of Russia convened a conference at The Hague in order to address arms limitations and legal standards for warfare. The result of this effort was the Hague Convention of 1899, which sought to balance respect for the laws of war against emerging warfare technologies and the “ever increasing requirements of civilization.”34 Eight years later, these standards were revised with the 1907 Hague Conventions, again dedicated to establishing limitations on the methods and means of warfare. Hague Convention IV contained a section dedicated to the rights of POWs, stating: “Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated.”35 These standards of humane treatment for POWs governed military conduct during World War I and through the 1920s, until the Geneva Conventions were concluded in 1929. Given the abuses of World War I, the incredible scale and devastation of the war, and the numbers of prisoners captured on both sides, it was evident that a further refinement of humane standards in war needed to be codified in international legal conventions.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War expanded the baseline standard of humane treatment for POWs established in the Hague Conventions,

33 Best, 155.
stipulating—among other items—the hygienic standards in POW camps, the intellectual and moral needs of the prisoners, the organization of work and pay for prisoners, and the penal and judicial sanctions for misbehavior. In addition, it included the provision that the humane standards articulated in the Convention applied to all signatories whether or not their opponent had signed the Convention. It stated:

Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisal against them are forbidden. Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex. Prisoners retain their full civil capacity.36

These conventions governed POW treatment during World War II. The Japanese government, under pressure from the international community, signed the 1929 Convention but never ratified it. To the Japanese, concern for the humane treatment of captured prisoners was a foreign concept; according to their culture, surrendering soldiers represented a disgrace to military profession.37 Early in the war, the U.S government sought to convince the Soviet government that it was in their best interests to sign and ratify the Conventions; the Soviet Union, however, informed the U.S. Ambassador in Moscow that it would comply with the 1907 Hague Conventions, the 1925 Gas Protocol, and the 1929 Geneva Conventions only with assurances of reciprocity from the German government.38 As the Soviet government refused to sign the Conventions, German forces refused to apply humane standards of treatment to captured

38 *FRUS, "Foreign Relations of the United States Diplomatic Papers (Volume 1, the Soviet Union): 1941,"* (Government Printing Office, 1941).
Soviet troops. Gross prisoner abuses thus occurred at the hands of both the Axis and Allied forces and prompted the expansion and codification of the laws of war in four Geneva Conventions in 1949.

The next section traces the evolution of the POW norm from its formal inception in the Lieber Code to its embeddedness in U.S. domestic law, doctrine, training, and education.

**Embeddedness in Law**

One of the pathways by which the norm governing POW treatment has become embedded in U.S. domestic practice is by its integration in domestic law. As opposed to other norms—such as the prohibition of the use of force, as examined by Vaughn Shannon—the norm governing POW treatment does not exist just at the international level of political and social interaction; rather, it is part of U.S. law and enforceable in U.S. courts. I will discuss two ways in which the laws of war have become embedded in the U.S. judicial system: general and specific embedding. General embedding refers to the incorporation of the laws of war into treaties and customary law. Specific embedding refers to codes, acts, and statutes detailing how U.S. courts should uphold the laws of war and punish violations of these laws.

**General Embedding**

**Treaty Law**

The first way in which the norms governing the laws of war have become generally embedded in U.S. practice is through the Supremacy Clause of Article VI of the Constitution. According to this Clause:

- This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

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Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.41

As the norm governing POW treatment is contained in the 1949 Geneva Conventions, it ipso facto constitutes part of the supreme law of the land. The U.S. Army, for example, affirms this duty to respect the laws of war because they constitute domestic law. The Army Training Circular “Prisoners of War” TC 27-10-2 states that Army servicemen and women should abide by the laws of war, “…because you have a duty to defend the Constitution and uphold the laws of the United States.”42 The training circular thus inextricably links the Geneva Conventions with U.S. domestic law and the Constitution.

The provisions in the Geneva Conventions thus have a force equal to those laws enacted by Congress.43 To that end, the Supreme Court stated in Whitney v. Robertson, 124 U.S. 190, 194 (1888) that:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.44

One important caveat about the relationship between treaty law and U.S. law is that the entry into and ratification of a treaty is not sufficient in all cases to make the provisions of that treaty the “supreme law of land.” The exception to the aforementioned belief that the judicial

enforcement of treaties is constitutionally equivalent to the judicial enforcement of federal statutes is what the Supreme Court refers to as “non-self-executing” treaties. In *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829), the Supreme Court distinguished between treaties that are “self-executing” and “non-self-executing.” According to this distinction, “self-executing” treaties are ones that become judicially enforceable as law immediately upon ratification and without prior legislation by Congress.45 “Non-self-executing” treaties require additional implementing legislation before they are deemed enforceable as law. In Footnote 2 of the recent Supreme Court majority opinion in *Medellín v. Texas*, 522 U.S. (2008), Chief Justice Roberts writes:

> The label “self-executing” has on occasion been used to convey different meanings. What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.47

While this distinction is highly problematic even for members of the legal community to parse, it is noteworthy to mention in this context as the U.S. District Court originally ruled in *Hamdan v. Rumsfeld* (2004) that “the Third Geneva Convention is not ‘self-executing’ and does not give rise to a private cause of action.” Though this position was not held in the eventual Supreme Court ruling, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), future scholarship should examine the extent to which the government may attach declarations of non-self-execution to human rights treaties in order to subject those treaties to legislative implementation, particularly in light of the fact that the United States argued that the Conventions were “non-self-executing.”

Customary Law

The second way in which the laws of war have become generally embedded in U.S. practice is by their inclusion in the body of international customary law and reaffirmed through case law. The 1984 Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment—to which the United States is a party—prohibits signatory states from engaging in acts of torture. The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.” As articulated by the Supreme Court in The Paquete Habana, 175 U.S. 677 (1900):

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Additional case law supports the belief that customary international law is embedded in a general sense in U.S. domestic law. First Chief Justice John Marshall stated in The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), that “the court is bound by the law of nations, which is a part of the law of the land.” In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Court stated, “It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”

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Though this position has been criticized by some scholars who question the appropriateness of customary international law’s position in the U.S. system, recent case law has affirmed the role of customary international law as constituting U.S. law. In particular, this question was addressed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 752 (2004). Justice Souter writes:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations… It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

The U.S. Court of Appeals for the 4th Circuit also recently ruled in *al-Marri v. Wright*, No. 06-7427 (2007), that:

> We note that American courts have often been reluctant to follow international law in resolving domestic disputes. In the present context, however, they, like the Government here, have relied on the law of war—treaty obligations including the Hague and Geneva Conventions and customary principles developed alongside them. The law of war provides clear rules for determining an individual’s status during an international armed conflict, distinguishing between “combatants” (members of a nation’s military, militia, or other armed forces, and those who fight alongside them) and “civilians” (all other persons).

Two general pathways thus exist to embed international law in domestic law: through treaty law and through customary international law.

**Specific Embedding**

This section will now examine the second way in which the laws of war have become embedded in U.S. domestic practice, through their specific incorporation in U.S. codes, acts, and statutes.

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Uniformed Code of Military Justice

The first specific way in which the laws of war have become embedded in U.S. practice is through their incorporation in the UCMJ, which forms the basis of military law in the United States. U.S. military law articulates the responsibilities of servicemen and women to protect the rights of POWs. Title 10 of the U.S. Code addresses the rules and regulations of the U.S. Armed Forces, and chapter 47 contains the UCMJ. Subchapter 10 of the UCMJ contains the punitive articles that address some of the legal consequences for the failure to follow the rights of POWs as articulated in the Geneva Conventions. Article 92, “Failure to Obey Order or Regulation” states:

Any person subject to this chapter who violates or fails to obey any lawful general order or regulation; having knowledge of any other lawful order issued by any member of the armed forces, which it is his duty to obey, fails to obey the order; or is derelict in the performance of his duties; shall be punished as a court-martial may direct (10 U.S.C §892).

In addition, Article 93, “Cruelty and Maltreatment” states: “Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct” (10 U.S.C §892). Thus, American service members accused of grave breaches of the Conventions can be punished by court martial or military commissions under the tenets of the UCMJ, or under state and federal criminal statutes, if the breach occurred on U.S. territory.\(^{54}\) Articles 77-134 of the UCMJ broadly outline the provisions under which military personnel who mistreat prisoners can be prosecuted.

Congressional Acts

A second way in which the laws of war have become specifically embedded in U.S. practice is through Congressional acts, such as the War Crimes Act of 1996 (18 U.S.C. §2441),

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\(^{54}\) Association.
which criminalize certain violations of the laws of war, specifically when those violations are either committed by or against a U.S. national or member of the U.S. Armed Forces. This Act was intended to address Article 129 of the Third Geneva Convention, which states that “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”  

Grave breaches are defined in Article 130 as:

> Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.  

Despite this, the United States has never prosecuted anyone for violations of the War Crimes Act; therefore, the scope as to what constitutes a criminal offense under the Act has not yet been defined.  

In response to the Supreme Court’s ruling in *Hamdan*, which affirmed that the military commissions created by President George W. Bush were inconsistent with both the UCMJ and the 1949 Geneva Conventions and thus unauthorized by law, Congress passed the Military Commissions Act of 2006. The Military Commissions Act amended the War Crimes Act and explicitly defined which violations of the Conventions would be punishable under U.S. domestic law, including: torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. In this way, both the War Crimes Act and the Military Commissions Act of 2006, available from [http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html](http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html).  

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55 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."  
56 Ibid.  
Commissions Act specifically embed the tenets of the Geneva Conventions in U.S. domestic law.

**Anti-Torture Statutes**

A third example of the Geneva Convention’s specific embeddedness in U.S. law is the federal anti-torture statute (18 U.S.C. § 2340A), enacted in 1994 and revised in 1999. This statute provides that, “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years” or “shall be punished by death or imprisoned for any term of years or for life” if the torture results in victim’s death.\(^5\)

Thus, with this 1994 statute, the U.S. government criminalized the commission of torture outside the United States by a U.S. citizen.

The Geneva Conventions are thus embedded through the general processes of incorporating treaties and customary law as the supreme law of the land and through the specific mention of the laws of war in U.S. codes, acts, and statutes, particularly the UCMJ, the War Crimes Act, the Military Commissions Act, and federal anti-torture statutes. The next section will outline how the POW norm has become embedded in the U.S. domestic system through military doctrine.

**Embeddedness in Doctrine**

The POW norm has also become embedded in U.S. domestic practice through its incorporation in military doctrine. Doctrine refers to a set of principles, methods, and standards that are codified in official or unofficial documents and that inform the military’s practices, training, mission, and organization. In his forward to the recent Army Field Manual (FM) 3-24, Colonel John Nagl states that doctrine is:

> The concise expression of how Army forces contribute to unified action in

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campaigns, major operations, battles, and engagements… Army doctrine provides a common language and a common understanding of how Army forces conduct operations.\(^6\)

Doctrine “codifies both how the institution thinks about its role in the world and how it accomplishes that role on the battlefield.”\(^6\) This section will trace the evolution of Geneva Convention embeddedness in U.S. military field manuals.

\textit{FM 27-10}

The Lieber Code was the military doctrine used to govern POW treatment through the Spanish-American War and the Philippine insurgency\(^6\) until a new field manual was issued in 1914. In 1914, Field Manual 27-10 (FM 27-10) “Rules of Land Warfare” was issued by the U.S. War Department and became the seminal military doctrine governing POW treatment. FM 27-10 used “everything practicable” from the original Lieber Code\(^6\) and opens with the statement:

\begin{quote}
The conduct of war is regulated by certain well established and recognized rules that are usually designated as “the laws of war,” which comprise the rules, both written and unwritten, for the carrying on of war, both on land and at sea.\(^6\)
\end{quote}

Most notably for this research, it contains the same prohibitions as the Lieber Code against causing physical suffering to POWs. It states:

\begin{quote}
Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them. They must be humanely treated… All physical suffering, all brutality which is not necessitated as an indispensable measure for guarding prisoners, are formally prohibited.\(^6\)
\end{quote}


\(^{61}\) Ibid.

\(^{62}\) Friedel.

\(^{63}\) Hartigan.


\(^{65}\) War, 26.
FM 27-10 also contains in its Appendix the 1907 Hague Conventions, making it the first field manual to explicitly reference international treaties as a basis for U.S. military doctrine.

An addendum to FM 27-10, entitled “Prisoners of War: Regulations and Instructions” (1918), laid out the responsibilities of the American Expeditionary Forces (AEF) in Europe during World War I. It stated: “No punishment will be inflicted on prisoners of war except such as might lawfully be imposed on United States troops.” This addendum was necessary to guide U.S. military action during World War I as several factors differed from U.S. treatment of POWs in previous conflicts. First, World War I was the largest overseas deployment of U.S. forces to date and thus planning for POW treatment, installation, and oversight required significant military planning. Secondly, the 1907 Hague Conventions did not articulate a system of transferring prisoners among belligerents and thus the task fell to the AEF to develop such a system. Lastly, though Germany was a signatory to the 1907 Hague Conventions, U.S. military leaders determined that the 1907 Convention as well as the 1785 Treaty of Amity and Commerce that the United States concluded with Prussia would apply to U.S. treatment of captured German prisoners. According to this treaty, the two countries pledged to hold all prisoners in the United States or Prussia rather than a third country. Thus, AEF’s “Prisoners of War: Regulations and Instructions” articulated the procedures for POW evacuation, transfer, sanitation, and labor standards.

The U.S. experience handling POWs in World War I demonstrated that additional doctrinal guidance, with a particular need for specific guidelines to ensure equal and humane

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67 Ibid.
68 Treaty of Amity and Commerce between His Majesty the King of Prussia, and the United States of America; September 10, 1785, (accessed), Trooboff.
treatment for prisoners, was needed. To that end, FM 27-10 was revised in 1934 and includes references to not only to the Hague Conventions of 1907 but also the 1929 Geneva Conventions. This version of FM 27-10 contains a substantial discussion of who qualifies to be considered a POW, including journalists and war correspondents associated with the enemy force.\(^69\) It was also the first time a prohibition against coercion was explicitly included in a field manual. It states:

No coercion may be used on prisoners to obtain information relative to the state of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.\(^70\)

The inclusion of this prohibition against coercion likely was the result of the significant use of prisoners as sources of intelligence during World War I. The AEF relied upon the captured prisoners to provide information regarding weapons placement, troop movement, and enemy intentions; coercion served to dilute the quality of information received. FM 27-10 was reissued again in 1940 and contains the same substantial discussion of the rights of POWs, including working hours, religious freedom, rights of POWs who are officers, and rights to medical care.\(^71\)

**FM 29-5, FM 19-5, and FM 19-40**

In addition to the seminal FM 27-10, other field manuals specifically enriched the doctrine informing the duties of military intelligence and military policemen and women who handled, processed, and interrogated POWs. In particular, FM 29-5 “Military Police,” issued in 1941, was the first military manual to specifically delineate the responsibilities of military

\(^70\) Ibid.
policemen during armed conflict. As opposed to FM 27-10 that articulates the doctrine for all aspects of land warfare, FM 29-5 only addresses the responsibilities of military police. It posits:

The civilized concept of humane treatment of prisoners governs the manner of administration and control of prisoners of war. The rules of land warfare contain the international law on the subject and will be strictly adhered to by all concerned with prisoners of war.\textsuperscript{72}

It further states:

In war, an important duty of military police is the care and security of prisoners of war committed to their charge, including any alien enemies turned over for custody. In the discharge of these duties they are governed by the Rules of Land Warfare (FM 27-10), the provisions of this manual, other pertinent War Department publications, and local regulations.\textsuperscript{73}

FM 29-5 was followed by FM 19-5 “Military Police,” issued in 1944, which sought to provide even greater clarity to the duties of military policemen during World War II. Whereas FM 29-5 addressed general procedures for POW handling and treatment in one chapter of 12 pages,\textsuperscript{74} FM 19-5 contains much greater detail about POW treatment. Unlike FM 29-5, which does not mention the 1929 Geneva Conventions, FM 19-5 contains explicit references to the Conventions and specific prohibitions against the use of force. It states:

The treatment of prisoners of war is governed by the Geneva Prisoners of War and Red Cross Conventions of 1929, both of which have been officially adopted by the United States and most of the other nations of the world.\textsuperscript{75}

FM 19-5 emphasizes the importance of the Conventions based on the reciprocal treatment that U.S. forces should expect to receive. It states:

Violation of any of such provisions is not only a violation of the laws of the United States, but may also result in retaliation by the enemy against our own prisoners of war, and may subject this nation to unfavorable criticism in the public

\textsuperscript{72} Department of War, "Field Manual 29-5 Military Police," ed. Department of War (1941), 131.
\textsuperscript{73} Ibid., 128.
\textsuperscript{74} Ibid.
\textsuperscript{75} Department of War, "Field Manual 19-5 Military Police," ed. Department of War (1944), 161.
opinion of people throughout the world.\textsuperscript{76}

In addition, this document also includes a section on coercion, similar to the 1934 version of FM 27-10. This section states:

Coercion will not be used on prisoners or other personnel to obtain information relative to the state of their Army or country. Prisoners or others who refuse to answer such questions may not be threatened, insulted, or unnecessarily exposed to unpleasant treatment of any kind. The examination of prisoners or others is not prohibited and provisions will always be made for such examination.\textsuperscript{77}

Lastly, FM 19-5 is the first field manual to specifically outline the necessity of training on the laws of war. The manual requires that all officers whose command includes the oversight of captured prisoners must be familiar with the laws of war generally and the Conventions specifically.

FM 19-40, entitled “Handling of Prisoners of War,” originally issued in 1952, served as an operational guide for military police and others involved in POW handling, processing, and interning. This manual superceded FM 19-5. Reissued in 1964, the new version differed from predecessor only in that it contained a chapter on Stability Operations. It was then reissued again in 1976, containing a shift in objectives from the predecessor. FM 19-40 (1976) states that the objectives of U.S. Army doctrine are: “Implementation of Geneva Conventions, humane and efficient care of detainees with full accountability, and appropriate support of the military objectives of the United States.”\textsuperscript{78} In addition, the 1976 version contains the same explicit mention of DoD doctrine on POWs:

Basic United States policy underlying the treatment accorded POWs and all other enemy personnel captured, interned, or otherwise held in United States Army

\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid., 163.
custody during the course of a conflict requires and directs that all such personnel be accorded humanitarian care and treatment from the moment of custody until final release or repatriation. The observance of this policy is fully and equally binding upon United States personnel whether capturing troops, custodial personnel, or in whatever other capacity they may be serving. This policy is equally applicable for the protection of all detained or interned personnel whether their status is that of prisoner of war, civilian internee, or any other category. It is applicable whether they are known to have or are suspected of having, committed serious offenses which could be characterized as a war crime. The punishment of such persons is administered by due process of law and under legally constituted authority. The administration of inhumane treatment, even if committed under stress of combat and with deep provocation, is a serious and punishable violation under national law, international law, and the Uniform Code of Military Justice.79

Lastly, FM 19-40 was reissued again in August 2001 and renamed FM 3-19.40, entitled “Military Police Internment/Resettlement Operations.” This version states that:

The inhumane treatment of EPW (enemy prisoners of war), CI (civilian internees), RP (retained personnel) is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

**FM 30-15 and FM 34-52**

In addition to the manuals that addressed military police duties, the War Department also issued FM 30-15 during World War II, entitled “Military Intelligence: Examination of Enemy Personnel, Repatriates, Documents, and Matériel” to address general doctrine regarding POWs. FM 30-15 consequently established basic Army doctrine for the handling of POWs from 1943 to May 1987.80 According to FM 30-15, Army interrogations must conform to:

The specific prohibitions, limitations, and restrictions established by the Geneva Conventions of August 12, 1949 for the handling and treatment of personnel captured or detained by military forces.

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79 Ibid. (accessed).
80 Karen J. Greenberg and Joshua L. Dratel, eds., The Torture Papers: The Road to Abu Ghraib (Cambridge, UK: Cambridge University Press, 2005), 283.
Moreover, it articulated that, “violations of the customary and treaty law applicable to the conduct of war normally constitute a concurrent violation of the Uniform Code of Military Justice and will be prosecuted under that code.”\(^81\) This mention of the UCMJ is the first instance of associating domestic punitive repercussions with a violation of the international laws of war. FM 30-15 thus links these two measures of embeddedness: doctrine and law. It reiterates the prohibition of the use of force during interrogations first stated in FM 27-10 (1934) as coercion was deemed a poor and unreliable interrogation technique.

Revisions of FM 30-15 subsequently occurred in 1951,\(^82\) 1960,\(^83\) 1967, 1969, 1973, and 1978.\(^84\) One paragraph in the 1967 and 1969 manuals justified the prohibition of force during interrogations because it was deemed “unnecessary to gain a subject’s cooperation and may induce subjects to fabricate information to end the force being applied.”\(^85\) In addition, the 1967 and 1969 versions of FM 30-15 contain the full text of Common Article 3 of the 1949 Geneva Conventions.\(^86\) The 1973 edition of FM 30-15 further expanded this prohibition against force and contains both the Geneva Convention and UCMJ warnings against violence to captured prisoners.\(^87\) It includes the full text of Articles 2, 3, 4, 17 and 31 of the 1949 Geneva Conventions.\(^88\) The 1978 version similarly contains the same strong Geneva Convention and UCMJ warnings and the same emphasis on prohibiting the use of force.\(^89\)

\(^{81}\) Ibid.
\(^{83}\) Gephardt, (accessed).
\(^{84}\) Ibid.(accessed).
\(^{85}\) Ibid.(accessed).
\(^{86}\) Cole, (accessed).
\(^{87}\) Gephardt, (accessed).
\(^{88}\) Cole, (accessed).
\(^{89}\) Gephardt, (accessed).
FM 34-52, entitled “Intelligence Interrogation” superceded FM 30-15 and guided Army doctrine on detainee interrogation from May 1987 till 2006 (with the release of FM 3-24). The application of Geneva Convention guidelines to interrogation practices was replicated in the manual’s preface as well as its prohibition on the use of force section and UCMJ warnings.\(^\text{90}\) It contains the same text in the section on “Prohibition Against Use of Force” as its predecessor.\(^\text{91}\) It further mentions training in the general provisions of the Geneva Conventions and the principles of land warfare.\(^\text{92}\)

As a result of Operation Desert Storm, FM 34-52 was revised in 1992 and contains a more expansive section on the prohibition of force than the 1987 version.\(^\text{93}\) It states:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the collector wants to hear. Revelation of the use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It may also place U.S. and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused U.S. and allied prisoners of war does not justify using methods of interrogation specifically prohibited by GWS, GPW, GC, or US policy.\(^\text{94}\)

The 1992 edition also contains a specific new list of 10 prohibited physical and mental activities:

Electric shock; infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape); forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; food deprivation; any form of beating; mock executions; abnormal sleep deprivation; chemically induced psychosis.\(^\text{95}\)

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\(^\text{90}\) Ibid.(accessed).
\(^\text{91}\) Greenberg and Dratel, eds., 283.
\(^\text{92}\) Gephardt, (accessed).
\(^\text{94}\) Ibid., 1-8.
\(^\text{95}\) Ibid.
Furthermore, the 1992 version contains an explicit definition of the concept of coercion. According to FM 34-52 (1992), coercion is defined as:

Actions designed to unlawfully induce another to compel an act against one’s will. Examples of coercion include: threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty; Intentionally denying medical assistance or care in exchange for the information sought or other cooperation; Threatening or implying that other rights guaranteed by GWS, GPW, or GC will not be provided unless cooperation is forthcoming.  

Lastly, it lists the UCMJ articles that may be applied to U.S. personnel following a violation of the Geneva Conventions:

- Article 78 - Accessory after the fact.
- Article 80 - Attempts (to commit one of the following offenses)
- Article 81 - Conspiracy (to commit one of the following offenses)
- Article 93 - Cruelty and maltreatment.
- Article 118 - Murder.
- Article 119 - Manslaughter
- Article 124 - Maiming.
- Article 127 - Extortion.
- Article 128 - Assault (consummated by battery; with a dangerous weapon; or intentionally inflicting grievous bodily harm)
- Article 134 - Homicide, negligent: Misprision of a serious offense (taking some positive act to conceal a serious crime committed by another); soliciting another to commit an offense; threat, communicating.

In this way, FM 34-52, which guided U.S. Army action in Iraq and Afghanistan, contains explicit prohibitions on the use of force and explicit links between violations of the Geneva Conventions and punishment under the UCMJ.

AR 190-8

DoD doctrine with regard to POW treatment was further enriched with the issuance of the 1982 Army Regulation (AR) 190-8, entitled “Enemy Prisoner of War Administration, Employment, and Compensation.” AR 190-8 affirms the Department of the Army as the executive agent for the DoD Enemy Prisoner of War and Detainee Program, meaning the Army

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96 Ibid.
as a service bears the primary responsibility for POW management. It was reissued in 1997 as “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees.”\(^97\) It states:

> The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ). All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: 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.\(^98\)

The norm governing POW treatment can thus be traced from its initial incorporation in U.S. Army doctrine with the Lieber Code to its embeddedness with FM 34-52. This chapter will now examine how the POW norm became embedded domestically through its inclusion in military training and education.

**Embeddedness in Training and Education**

Training and education is another pathway by which norms become embedded in the belief systems and values of state actors. In the aftermath of Vietnam and the recognized need to provide law of war training for soldiers and sailors, the Department of Defense promulgated a law of war program. Whereas the U.S. military had long recognized the importance of abiding by the laws of war, it was not until DoD Directive 5100.77, originally issued in November 1974, that the Department established a required training and education program to prevent violations of the laws of war. DoD Directive 5100.77 states that all members of the Armed Forces must “comply with the law of war during all armed conflicts, however such conflicts are

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\(^{97}\) Department of the Army, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Ar 190-8, Opnavinst 3461.6, Afji 31-304, Mco 3461.1)," ed. Department of the Army (1997).

\(^{98}\) Ibid., 2.
characterized, and with the principles and spirit of the law of war during all other operations."99

It further states that:

It is DoD policy to ensure that the law of war obligations of the United States are observed and enforced by the DoD Components; an effective program to prevent violations of the law of war is implemented by the DoD Components; and all reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.100

In addition to DoD Directive 5100.77, DoD Directive 2310.1—issued in 1994—states that: “The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.”101

Prior to Vietnam, training and education on the laws of wars consisted mainly of lectures on the abstract rules of the Conventions; following Vietnam, a greater emphasis was placed on real-life scenarios and case studies.102 DoD Directive 5100.77 was reissued in 1979 and again in 1998. In its current iteration, it was reissued as DoD Directive 2311.01E in 2006. The law of war program refers to:

That part of international law that regulates the conduct of armed hostilities. It is often called the “law of armed conflict.” The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.103

Whereas all “Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military

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100 Ibid.
operations,” the directive places the onus for training and implementation of the law of war program with the individual service components. According to the directive, each component is required to “institute and implement” a law of war training program. In addition to DoD Directive 5100.77, Chairman of the Joint Chiefs of Staff Instruction 5810.01, issued in January 2007, implements the law of war program and provides guidance regarding the law of war obligations in the U.S. military. This instruction states that: “The Armed Forces of the United States comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”

I will now turn to the specific Service training programs to establish the ways in which this norm has become embedded in individual components.

**Marine Corps**

The Marine Corps was the first service to institute law of war training as an essential component of its basic training. First articulated in Marine Corps Institute Order P1550.14D and later restated in the Marine Corps Order 3300.4, issued in 2003, the Corps’s training requirements are explicitly tailored to levels:

- **Entry-Level training:** This is the minimum level of knowledge regarding the laws of war required for all entry-level Marines.
- **Follow-On training:** Marines attending Marine Corps formal or unit-run schools (not including entry-level formal schools), operation and Marines identified by billet.
- **Specialized training:** Additional law of war training depends upon a Marine’s billet or assigned duties and responsibilities. In particular, all personnel responsible for directing or planning combat operations will receive law of war training sufficient to enable them to comply with applicable law, regulation, and policy in all situations reasonably contemplated.

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104 Ibid.

105 Department of Defense, "Implementation of the Dod Law of War Program (Cjcs 5810.01) ", ed. Chairman of the Joint Chiefs of Staff (2007).
• Detailed training: All Marine Corps judge advocates will receive “detailed” operational law training.\textsuperscript{106}

As Marine servicemen and women are promoted, they receive increased instruction on the laws of war. The Marine Corps provides law of war instruction through noncommissioned officer advanced courses, as well as through advanced courses at the staff colleges for officers.

An essential component of the entry-level training is instruction in “Basic Principles of the Laws of War.” The Corps instruction is based around these fundamentals. These basic principles stipulate:

• Marines fight only enemy combatants.
• Marines do not harm enemy soldiers who surrender. Marines disarm them and turn them over to their superiors.
• Marines do not torture or kill enemy prisoners of war or detainees.
• Marines collect and care for the wounded, whether friend or foe.
• Marines do not attack medical personnel, facilities, equipment, or chaplains.
• Marines destroy no more than the mission requires.
• Marines treat all civilians humanely.
• Marines do not steal; they respect private property and possessions.
• Marines do their best to prevent violations of the law of war, and report all violations to their superiors.\textsuperscript{107}

Fundamentally, Marine Corps entry-level training seeks to embed the belief that respecting the law of war is an essential element of Marine identity. According to Marine Corps Order 3300.4:

Marines are disciplined in combat. Violating the law of war dishonors our Nation, our Marine Corps, and ourselves. Far from weakening our enemy’s will to fight, disobeying the law of war strengthens it. Disobeying the law of war is also a crime punishable under the Uniform Code of Military Justice.\textsuperscript{108}

By reinforcing these nine principles during basic training, Marines are taught that the laws of war are absolute and unwavering. Respect for the law of war is thus not only a mandatory element of training and education, but is also reinforced as an essential component of Marine identity.

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
Army

Reacting to U.S. Army Lt. William Calley’s abuses during the My Lai massacre in Vietnam, the Department of the Army also moved quickly to institutionalize law of war training programs as a service prerogative. Prior to and during Vietnam, AR 350-216 laid out the rights and obligations for Army servicemen and women under the Geneva Conventions. Under AR 350-216, issued in 1967, soldiers received one hour of instruction on the laws of war during basic training and received annual refresher training. When soldiers were deployed to Vietnam, they received four informational cards—“The Enemy in Your Hands,” “Nine Rules,” “Code of Conduct,” and “Geneva Conventions”—which articulated the duty to respect the rights of combatants and noncombatants, yet failed to provide any information on the consequences of violating the laws of war or the consequences of following illegal orders from superiors.109

Following DoD Directive 5100.77 and in the aftermath of Vietnam, the Department of the Army took steps to institutionalize law of war training. Similar to the Marine Corps, they also mandated annual training and enhanced the role of the judge advocate generals in the Army, through AR 350-1 “Army Training and Education,” issued in 2007; FM 27-100 “Legal Support to Operations,” issued in 2000; and TC 27-10-2 “Prisoners of War,” issued in 2001. Similar to the levels of training provided in the Marine Corps, training on the laws of war increases with regard to the individual’s duties and responsibilities. No matter their rank or responsibility, however, all soldiers receive basic law of war training:

- Level A training is conducted during IET [initial entry training] for all enlisted personnel and during basic courses of instruction for all warrant officers and officers. Level A training primarily includes instruction on the “Soldier’s Rules” regarding the laws of war, the same nine principles established by the Marine Corps.

• Level B training is conducted in MTOE (modified table of organization and equipment) units. It includes additional instruction on the laws of war and is conducted annually and also prior to deployment. The goal of Level B training is to reinforce the principles set forth in The Soldier’s Rules. Additionally, training will emphasize the proper treatment of detainees, to include the 5 Ss and T (search, segregate, silence, speed to a safe area, safeguard, and tag). Soldiers will be required to perform tasks to standard under realistic conditions. Training for all unit leaders will stress their responsibility to establish adequate supervision and control processes to ensure proper treatment and prevent abuse of detainees.

• Level C training is conducted in TASS (The Army School System). This level of training is geared to warrant officer, officer, and noncommissioned officer training for law of war issues in command planning and execution of combat operations.110

Within the U.S. military establishment, the U.S. Army bears the primary responsibility for the administration of POW camps and thus has a “special role in ensuring that the Third and Fourth [Geneva] Conventions are complied with.”111

**Navy**

Prior to DoD Directive 5100.77, the rules guiding the Navy’s law of war compliance program were contained in the Law of Naval Warfare, NWIP 10-2, issued in 1955. It covered the general principles of the laws of war, with a particular emphasis on the legal restrictions on the methods of naval warfare. It did not mention training requirements for the laws of war, but did articulate that harming prisoners of war constituted a war crime. “Harming a prisoner” included the following activities:

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Killing without due cause; infliction of ill-treatment and torture; denial of minimum conditions conducive to life and health; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right of a fair and regular trial.\(^{112}\)

Following DoD Directive 5100.77, the Navy moved to institutionalize training on the laws of war in its service requirements. The document promulgated by the Navy to institutionalize Directive 5100.77 was OPNAVINST 3300.52 “Law of Armed Conflict (Law of War Program) to Ensure Compliance by the U.S. Navy and Naval Reserve,” issued in 1983. This document sought to implement SECNAVINST 3300.1A within the U.S. Navy and the U.S. Naval Reserve, which “promulgate[d] regulations and guidance to insure compliance by all personnel of the naval establishment with the law of armed conflict.”\(^{113}\) According to SECNAVINST 3300.1A, “All persons in the Department of the Navy, commensurate with their duties and responsibilities, should receive, through appropriate publications, instructions of training programs, adequate training and education in the law of armed conflict.”\(^{114}\) Similar to the Army guidelines, the Navy articulated three levels of training required:

- **Level One:** Minimum level of understanding for all members of the U.S. Navy and Naval Reserve to be imparted during entry training of all personnel. Teaching the basic principles of the law of armed conflict at the accession level is essential for the establishment in the trainee of good order and discipline, as it relates discipline to the use of force in combat. Individuals entering military service either possess no knowledge of or a considerable misperception regarding the limitation on the use of force in combat, and the degree to which there is adherence to or respect for those limitations. That ignorance or misperception must be corrected at the earliest practicable moment in an individual’s military service.

- **Level Two:** Minimum level of understanding for members whose military specialty or assignment involves participation in combat operations, or whose


\(^{113}\) Department of the Navy, "Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment, Secnavinst 3300.1a," ed. Secretary of the Navy (1980).

\(^{114}\) Ibid.
military specialty or level of rank requires additional training... Examples include naval aviators and bombardier-navigators assigned to fleet units, special warfare personnel, personnel connected with target selection and evaluation, and other combat personnel.

- Level Three: Minimum level of understanding for naval personnel whose military job, specialty, or assignment involves participation in the direction of combat operations. Examples include commanding and executive officers of combatant ships and aircraft squadrons, groups and wings, designated officers on fleet staffs and on the staffs of unified and subunified commanders, and target intelligence selection officers.\(^\text{115}\)

OPNAVINST 3300.52 also contains similar rules to the nine Soldier’s Rules adopted by the Army and the Marine Corps, with an additional tenth rule:

- Fight only enemy combatants.
- Destroy no more than your mission requires.
- Do not attack enemy soldiers, sailors, airmen or marines who surrender. Disarm them and turn them over to your superior.
- Prisoners of war and other detainees shall never be tortured or killed.
- Collect and care for the wounded, sick and shipwrecked survivors, whether friend or enemy—on land or at sea.
- Medical personnel and chaplains, medical and religious facilities and medical transportation are protected. Respect them and do not attack them.
- Treat all civilians humanely and respect their property. Do not attack them.
- Do your best to prevent any violation of the above rules—Report any violations to the appropriate authority promptly.
- You cannot be ordered to violate these rules.
- Discipline in combat is essential. Disobedience of the law of armed conflict dishonors your nation, the Navy, and you. Far from weakening the enemy’s will to fight, such disobedience strengthens it. Disobedience of the law of armed conflict is also a crime punishable under the Uniform Code of Military Justice (UCMJ).\(^\text{116}\)

In this way, law of war training became embedded in the Navy’s training and education programs.

*Air Force*


\(^\text{116}\) Ibid.
Following DoD Directive 5100.77 and the requirement of each of the services to develop a training program in the laws of war, the Air Force issued Air Force Pamphlet (AFP) 110-31 entitled “International Law: The Conduct of Armed Conflict and Air Operations,” which articulated the unique role that the air servicemen and women play in safeguarding the laws of war. AFP 110-31 was largely seen as completing the triumvirate of military doctrine on the laws of war, FM 27-10 and NWIP 10-2. After AFP 110-31 was published in 1976, the Air Force formally implemented the DoD law of war program with Air Force Regulation 110-32 Training and Reporting to Insure Compliance with the Law of Armed Conflict. AFP 110-31 was then reissued as Air Force Instruction 51-401, which requires annual training on the laws of war.

According to Air Force Policy Directive 51-4, issued in 1993, the Air Force law of war training program mandates:

Once each year, all commanders make sure their people are trained in the principles and rules of LOAC [law of armed conflict] needed to carry out their duties and responsibilities. At a minimum, it will include training required by the 1949 Geneva Conventions for the Protection of War Victims and the Hague Convention IV of 1907, including annexes.

In addition, the 1994 Air Force Instruction 51-401 “Training and Reporting to Ensure Compliance with the Law of Armed Conflict” states:

Air Force personnel will comply with LOAC in the conduct of military operations and related activities in armed conflict, regardless of how such conflicts are characterized. In support of such policy, the Air Force will conduct training programs designed to prevent violations of the law of armed conflict.

The USAF Academy will develop plans, policies, and procedures to provide instruction to all cadets on the content and requirements of LOAC as part of their basic educational and training requirements. All course instruction will be consistent with LOAC, as well as other legal obligations of the United States. To implement DoD Law of War Program objectives, discuss LOAC in academic courses and in military training, whenever it is relevant and appropriate.

Annually, all commanders will ensure that assigned personnel are trained in the principles and rules of LOAC. At a minimum, training will include subjects required by the 1949 Geneva Conventions for the Protection of War Victims and the Hague Convention IV respecting the Laws and Customs of War on Land of 1907. A judge advocate should review all command plans, policies, procedures, and operations in the coordination process to determine that they meet current US legal obligations under LOAC.\textsuperscript{118}

**Summary and Conclusion**

This chapter examined the process by which the norm of POW treatment became embedded in the U.S. domestic system. Examining this process achieved three primary objectives: to demonstrate the high degree of cultural match between the Geneva Conventions governing POW treatment and U.S. culture, to prove that the POW norm is deeply embedded in U.S. domestic processes, and lastly to add to constructivist literature regarding embeddedness. One of the primary criticisms of constructivism, by its adherents, it that in its attempt to defend normative analysis, the question of why states comply with norms was never asked. Rather, the processes of embedding were “bracketed” with research focusing on the end state of compliance. As a result, constructivist analysis overlooked the interaction in which the agent changed and assumed instead that agents maintained fixed identities and preferences.\textsuperscript{119} In particular:

By bracketing theoretically how norms connect with domestic norm-takers, constructivists have been unclear about the process through which norms have constitutive effect. Put more bluntly, these researchers are employing their own variant of “as if” reasoning (agents operating as if governed by logics of appropriateness), to the detriment of developing theories that capture and explain how the social constructivist words, at the unit level, really works.\textsuperscript{120}


\textsuperscript{120} Checkel, "Norms, Institutions, and National Identity in Contemporary Europe."
This chapter explicitly focuses on the role of the agent; in particular, it examined the ways in which the U.S. military was inducted into the norms and rules of the Geneva Conventions and the efforts by the Armed Services to include this norm in their doctrine, training, and education requirements.

To that end, I have examined three empirical indicators—integration into both national and military law, assimilation into military doctrine, and inclusion in actors’ belief structures as evidenced through training and education—to prove that the norm governing POW treatment has become embedded in U.S. domestic law and practice. The following chapters will subsequently evaluate the compliance decision-making during the international armed conflicts in Vietnam and Iraq and Afghanistan.
Chapter 3: POW Policy in the Vietnam Conflict

The Vietnam conflict provides a useful case to examine the connections between actor preferences, domestic structure, and the decision to comply with the norm governing POW treatment. Norm compliance in the Vietnam conflict is puzzling for several reasons. First, the Viet Cong technically did not “qualify” for POW status because they did not wear any uniforms, did not carry arms openly, and commonly violated the laws of war. Furthermore, North Vietnam refused to provide to POW status to many captured U.S. military personnel, notwithstanding their legal qualifications to receive these protections. Despite these factors, U.S. policy-makers and the U.S. Military Assistance Command, Vietnam (MACV) made the decision early in the combat phase of the conflict to provide full Geneva protections to not only the captured North Vietnamese fighters, but also the Viet Cong. An influential pro-norm constituency in the Johnson Administration sought an expansive interpretation of Geneva protections. This chapter will demonstrate how the actors’ preferences shaped the decision to comply with the norm.

This chapter begins with a background of the Vietnam conflict, detailing its inherent legal challenges and ambiguities. Following this discussion, I will summarize the U.S. decision to provide Geneva protections to all of the captured fighters and the doctrine and training developed to ensure Geneva compliance before turning to an analysis of my independent and intervening variables. Though U.S. engagement in Vietnam spanned four U.S. presidents, this chapter will only examine the political and legal landscape of the Johnson Administration, as the decisions regarding U.S. treatment of POWs were made during his tenure. Finally, I will summarize my findings and comment on the applicability of this model to explaining POW decision-making regarding the North Vietnamese and Viet Cong combatants during the Vietnam conflict.
Vietnam Conflict

The Vietnam conflict raised several questions about the scope of the Geneva Conventions, such as the lack of a declaration of war, questions about the legitimacy of both the North and South Vietnamese governments, and the irregular status of many of the participants. As the Vietnam conflict unfolded from the counterinsurgency struggle against the French forces, it did not possess the traditional characteristics of warfare exhibited in either the Korean War or World War II. U.S. military planners and legal scholars had never previously engaged the international legal questions that would arise during the conflict. Staff Judge Advocate George Prugh summarized these challenges:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas. Fighting occurred over the length and breadth of South Vietnam, on the seas, into Laos and Cambodia, and in the air over North Vietnam. It involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.¹

U.S. involvement in Vietnam began in an advisory capacity in September 1950 and incrementally expanded with the deployment of logistical and combat forces. With the adoption of the Gulf of Tonkin Resolution by Congress in August 1964, U.S. military presence increased substantially in South Vietnam. By the end of 1964, more than 24,000 U.S. forces were deployed in Vietnam. The question of the appropriate disposition of captured fighters did not arise until late 1964 and early 1965, coinciding with the large-scale deployment of combat troops and the first instances of U.S. troops being captured by enemy forces.

Significant legal issues exist in the analysis of the Vietnam conflict that this chapter will not address. In particular, this chapter will not engage the question of whether the United States could lawfully provide military assistance to the government in Saigon in its exercise of self-defense against the North Vietnamese government. While this concern constituted a serious debate among scholars, government officials, journalists, and the American public during the conflict, this debate is not germane to the issue of prisoner treatment after the United States committed forces to military engagement. Thus, for the purposes of this research, this chapter will not engage the question of whether the United States could aid the South Vietnamese government, but rather will engage the legal questions regarding declarations of war, the legitimacy of the partitioned governments, and non-signatory status of some of the participants that complicated the application of the Geneva Conventions.

First, the Geneva Conventions presume a formal declaration of war between opposing sovereign states, with each state fielding an army on a traditional battlefield. In the Vietnam conflict, however, no such declaration was issued, nor did the fighting occur on a traditional battlefield. Neither the North Vietnamese nor the U.S. government issued a formal declaration of war. The South Vietnamese government formally declared war in 1965, yet primarily issued the declaration in order to increase its domestic authority and control.

Secondly, ambiguities existed regarding the legitimacy of the partitioned governments. The United States—along with 87 other states—recognized the legitimacy of South Vietnam, yet refused to recognize the legitimacy of the North Vietnamese government. In addition, neither

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Vietnamese government recognized the legitimacy of the other. Throughout the course of the conflict, the North Vietnamese government maintained that the government in the South was a puppet regime and that the National Liberation Front (NLF) was the “sole representative of the people of South Vietnam.” The government in Hanoi argued that the conflict was an internal domestic dispute and denied that any member of its armed forces was present in the South. The South Vietnamese government, in turn, did not recognize the government in Hanoi or the Viet Cong. The South Vietnamese government feared that classifying any captured fighters as POWs would legitimize the Northern government. To that end, they refused to accord them POW status, trial in a military court, or even imprisonment in a military prison. Combatants were treated as political prisoners and were officially called “Communist rebel combat captives” by the South Vietnamese government. This classification allowed the South Vietnamese government to treat captured fighters as illegitimate insurgents acting against a legitimate government and to house them in “provincial and national jails along with… common criminals.” As a result, in 1965, the number of political and military prisoners in South Vietnamese civilian confinement rose almost 100 per cent, from 9,895 prisoners in January to 18,786 in December.

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3 The National Liberation Front was the name that the North Vietnamese government used to refer to the Viet Cong.
5 Lewy.
8 Ibid.
9 Prugh.
Lastly, the fighting forces in the conflict involved a range of combatants, many of who did not constitute sovereign state militaries. Most of the participants in the conflict represented signatories of the Geneva Conventions: the Free World Military Assistance Force (FWMAF), composed of the United States, South Vietnam,\(^{10}\) the Republic of Korea, the Philippines, Thailand, and Australia; and North Vietnam.\(^{11}\) Table 2 provides the Geneva Convention ratification date for each of these participants.\(^{12}\)

Table 2: Geneva Convention Ratification per Vietnam Participant

<table>
<thead>
<tr>
<th>Country</th>
<th>Date Ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philippines</td>
<td>October 6, 1952</td>
</tr>
<tr>
<td>South Vietnam</td>
<td>November 14, 1953</td>
</tr>
<tr>
<td>Thailand</td>
<td>December 29, 1954</td>
</tr>
<tr>
<td>United States</td>
<td>August 2, 1955</td>
</tr>
<tr>
<td>North Vietnam</td>
<td>June 28, 1957</td>
</tr>
<tr>
<td>Australia</td>
<td>October 14, 1958</td>
</tr>
<tr>
<td>Korea</td>
<td>August 16, 1966</td>
</tr>
</tbody>
</table>

The Viet Cong, however, did not represent a sovereign state and, as such, did not constitute a signatory to the Conventions. The combat forces involved in the conflict thus included the regular forces of the FWMAF, the regular forces of North Vietnam, as well as the main and local forces of the Viet Cong, the secret self-defense corps of the Viet Cong, the civilian irregular

\(^{10}\) Prior to partition, Vietnam acceded to the Prisoners of War Convention on November 14, 1953. Please see 181 UN Treaty Series 351 (1953).

\(^{11}\) After partition, North Vietnam acceded separately to the Prisoners of War Convention on June 28, 1957. Please see 274 UN Treaty Series 339 (1957). Though the government in North Vietnam ratified the treaty, it registered several reservations. Notably, one reservation related to Article 85 of the Third Geneva Conventions, under which POWs “[P]rosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention” See Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."It was according to Article 85 that the government in Hanoi based their opposition to treating captured American pilots as POWs.

defense group of South Vietnam, and the regional and popular forces of South Vietnam. Since the Conventions presume an opponent who is “commanded by a person responsible for his subordinates;” who possesses “a fixed distinctive sign recognizable at a distance;” who carries “arms openly;” and who conducts “their operations in accordance with the laws and customs of war,” they do not account for this range of participants in the Vietnam conflict.

These legal issues—the lack of a formal declaration of war, the questionable legitimacy of the governments, and the range of regular and irregular participants—posed challenges to policy-makers, military planners, and scholars. Despite these ambiguities, and the repeated claim by the North Vietnamese government that the conflict was a domestic struggle, the U.S. government assessed that Vietnam represented an international armed conflict and it did not waver in its application of the Geneva Conventions to the full range of combatants. Furthermore, the U.S. government did not hesitate to apply pressure to the South Vietnamese government to similarly comply.

The next section outlines the evolution of U.S. attitudes regarding POW treatment and the timeline of correspondence between the U.S. government, the ICRC, and South Vietnam. Lastly, it will address the efforts of the U.S. military to ensure compliance with the Conventions.

**MACV POW Policy**

Prior to the post-Tonkin buildup of U.S. combat troops, the U.S. attitude toward captured fighters could be characterized as indifferent. Existing policy, as directed by the U.S.

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13 Prugh.
14 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
Commander of the MACV, stated that capturing U.S. forces should conduct a brief tactical intelligence exploitation of battlefield captives before turning them over to South Vietnamese forces. The captured fighters would then be sent to camps run by the South Vietnamese Army under the guidance of U.S. military police advisors. Serving as advisors to the South Vietnamese Army at this time, U.S. forces could not dictate prisoner policy to the South Vietnamese. Transferring prisoners in this way was permitted under the Conventions as long as both the capturing and detaining forces ensured humane treatment for the captured fighters. This transfer did not, however, relieve the United States of its additional responsibilities under Conventions. Namely, under Article 12:

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

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16 Clarke.
17 The Protecting Power is a “state which has accepted the responsibility of protecting the interests of another state in the territory of the third, with which, for some reason, such as war, the second state does not maintain diplomatic relations.” See Howard S. Levie, "Prisoners of War and the Protecting Power " The American Journal of International Law 55, no. 2 (1961). The United States lobbied throughout the war to make the ICRC the Protecting Power, but the North Vietnamese government refused to allow this arrangement.
18 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
In this way, the United States retained the contingent responsibility for the humane treatment of the captured fighters even after their transfer to the South Vietnamese forces.

**ICRC Enters the Conflict**

As U.S. policy-makers debated the extent of the military commitment to South Vietnam during the summer of 1965, the ICRC determined on June 11 that:

> The hostilities raging at the present time in Vietnam both North and South of the seventeenth parallel have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied.\(^{19}\)

This letter was sent to the governments of the United States, South Vietnam, and North Vietnam. The ICRC had become aware of gross abuses of misconduct on both sides and believed the extent of belligerent activities had crossed the threshold of a civil war. Secretary of State Rusk responded to this statement by affirming that the United States, “had always abided by the humanitarian principles enunciated in the Geneva Conventions and will continue to do so.” He assured the ICRC that the United States was already applying “the provisions of the Geneva Conventions [in Vietnam] and we expect the other parties to the conflict to do likewise.”\(^ {20}\)

In response to the ICRC’s position that the fighting in Vietnam had reached the level of “international armed conflict,” the government of South Vietnam responded on August 11, 1965 that it was “fully prepared to respect the provisions of the Geneva Conventions and to contribute actively to the efforts of the International Committee of the Red Cross to ensure their application.”\(^ {21}\) These formal commitments in August 1965 also indicated that both U.S. and

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\(^ {19}\) Association, "The Geneva Convention and the Treatment of Prisoners of War in Vietnam."


South Vietnamese governments would increase their programs of instruction on the requirements of the Geneva Conventions to their armed forces.\textsuperscript{22}

In its August 31, 1965 response to the ICRC, North Vietnam stated that it would treat captured U.S. pilots humanely, but it would not grant them POW status. According to the government in Hanoi, the U.S. pilots were “pirates” engaging in unprovoked attacks against North Vietnam.\textsuperscript{23} They informed the ICRC that they intended to:

\begin{quote}
Regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Vietnam, as major [war] criminals caught in flagrante delicto and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam, although captured pilots are well treated.\textsuperscript{24}
\end{quote}

The government in Hanoi also tried to justify its refusal to apply the provisions of the Conventions on the basis that those protections did not apply in the absence of a formal declaration of war. North Vietnamese diplomats circulated the notion that the struggle did not represent an international armed conflict regulated by the Conventions. The North Vietnamese ambassador to Egypt stated that treating captured airmen as POWs was impossible “because this is a case where no war has been declared.”\textsuperscript{25} In addition, the North Vietnamese Ambassador to China told the Norwegian Ambassador to China that, “North Vietnam is formally not at war with the United States and following international conventions on handling of war prisoners does not therefore apply.”\textsuperscript{26} Despite these diplomatic maneuvers to deny the applicability of the Conventions, Common Article 2 states, however,

\begin{footnotesize}
\footnotesubtext{23} Prugh.
\footnotesubtext{25} Ibid., 368.
\end{footnotesize}
The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.\textsuperscript{27}

Regarding this refusal by Hanoi to apply the Conventions, a U.S. Embassy telegram to the Department of State in the fall of 1965 argued:

Hanoi has refused to respond substantively to ICRC question about whether it is willing to apply Geneva Conventions to present conflict, and it therefore presumably regards itself as not bound by their provisions. Admittedly, its position is equivocal and inconsistent, since it has cited one of its reservations to Geneva Conventions in laying groundwork for possible trial of U.S. prisoners as war criminals, and has accused U.S. of violating Conventions in our bombings.\textsuperscript{28}

Following the North Vietnamese government’s refusal to apply the Conventions, the Viet Cong also unequivocally rejected their applicability, stating that it “was not bound by the international treaties to which others beside itself subscribed.”\textsuperscript{29}

Seeking to demonstrate full compliance with the Conventions in order to place pressure on the North Vietnamese and the Viet Cong to comply, a joint U.S.-South Vietnamese military committee and a South Vietnamese interministerial committee were appointed in September 1965 in order to work out the details of the application of the Geneva Conventions in Vietnam.\textsuperscript{30} The joint committee agreed to interpret the provisions of the Conventions broadly and to apply all of the provisions to the Viet Cong personnel.\textsuperscript{31} In a subsequent September 13, 1965 letter to the ICRC, Secretary Rusk reaffirmed the U.S. intent to follow the humane guidelines articulated in the Conventions and expressed the U.S commitment to full compliance on the part of the

\textsuperscript{27} Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
\textsuperscript{29} LeVie, "Maltreatment of Prisoners of War in Vietnam."
\textsuperscript{30} Chief of Staff.
\textsuperscript{31} Mowery, Hutchins, and Rowland.
South Vietnamese. He stated:

In view of the fact that prisoners taken by United States forces are transferred promptly to the Government of the Republic of Viet-Nam, we think it is more appropriate for that Government to supply such lists and to arrange for such visits by International Committee representatives, and we have every reason to believe that it will do so. You will recall that the Government of the Republic of Viet-Nam informed your representatives on August 11 [1965] that it will fulfill its obligations in this regard under the Geneva Conventions of 1949.³²

To that end, on September 27, 1965, the Commander of U.S. MACV forces, General William Westmoreland negotiated,

The agreement for the establishment of a combined U.S./Republic of Vietnam Armed Forces Military Interrogation System from the national to the sector level, which provided that all captives, who were taken to the combined US/RVNAF Interrogation Center would initially be treated as PWs.³³

In this way, the ICRC letter and the successive correspondence prompted the U.S. government to pay greater attention to the issue of prisoner treatment.

**Reprisal Executions of U.S. Servicemen**

Two seminal events transformed the U.S. attitude toward POW policy from indifference to full engagement: the aforementioned North Vietnamese letter to the ICRC on August 31, 1965 stating that it intended to treat captured U.S. pilots as war criminals, and the execution of American POWs in June and September 1965 in reprisal for the execution of Viet Cong personnel by the South Vietnamese.

On June 24, 1965, the Viet Cong executed U.S. Sergeant Harold G. Bennett, defending his execution on the grounds that the South Vietnamese government publicly executed a Communist. This act prompted the U.S. Embassy in Saigon to issue the following message:

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³³ Mowery, Hutchins, and Rowland.
[The] Viet Cong execution of Sergeant Bennett… brings into sharp focus [the] blackmail potential VC and Hanoi possess in numbers of U.S. hostages in their hands and the usefulness of this blackmail to support a stepped-up terrorist campaign. Since they [are] well aware we place higher value on human life than do they, Hanoi/VC [are] prepared to use this weapon to own advantage. They have evidently decided that [the] execution of U.S. prisoners will be very sensitive issue for [the] USG, and their experience with Hertz\(^{34}\) case in which they undoubtedly aware that we have caused GVN to delay execution of Hai, may have led them to believe that we will pay [a] very high price to prevent execution of our personnel. They thus hope to cause political problems between U.S. and GVN, to stir up U.S. public opinion against Viet-Nam policy, to damage U.S. troop morale, and also [to] raise morale [among] their terrorist cadre by showing their ability to retaliate for GVN executions and by [the] possibility of delaying or halting further GVN executions.\(^{35}\)

Despite the execution of Sergeant Bennett in June 1965, the U.S. government did not elevate this international legal violation to the ICRC. The September executions, however, of Captain Humbert R. Versace and Sergeant Kenneth M. Roraback prompted a re-thinking of U.S. POW policy. On September 26, 1965, Captain Versace and Sergeant Roraback were executed by the Viet Cong as a reprisal for the shooting deaths of Viet Cong members by the government in Saigon. The State Department took immediate action and protested these actions as violations of the Geneva Conventions at the ICRC’s Twentieth Conference in Vienna on October 7, 1965.\(^{36}\)

At the conference, the ICRC condemned the executions and called upon:

All authorities in an armed conflict to ensure that every prisoner is given the treatment and full measure of protection prescribed by the Geneva Convention of

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\(^{34}\) The kidnapping and execution of Gustav Hertz, a foreign service officer assigned to the U.S. Agency for International Development, was the first U.S. experience with Viet Cong reprisal killings. The Viet Cong captured Hertz on February 2, 1965 and threatened to execute him if the government in Saigon executed Nguyen Van Hai, a highly valued Viet Cong member. At the State Department’s request, the DRV government postponed Hai’s execution indefinitely. Hertz, unfortunately, was executed two and a half years later in captivity. Please see Vernon E. Davis, \textit{The Long Road Home: U.S. Prisoner of War Policy and Planning in Southeast Asia} (Washington, D.C.: Office of the Secretary of Defense, 2000).


\(^{36}\) Davis.
1949 on the Protection of Prisoners of War, including the judicial safeguards afforded to every prisoner of war charged with any offense, and that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the conditions of prisoners of war.\footnote{Law.}

Following this condemnation by the ICRC, Secretary Rusk sent a cable to the U.S. Embassy in Saigon on October 13, 1965, stating:

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Greatly appreciate your most thoughtful message on VC reprisal executions of American prisoners [Versace and Roraback] and DRV threats to treat their U.S. prisoners as war criminals. We agree that we can neither submit tacitly to these actions or threatened actions, nor can we ignore them. However, [the] problem is to find ways and means of bringing effective pressure against DRV and VC to move them to treat prisoners in accordance with 1949 Geneva Convention. At same time, GVN must be free to go on treating VC terrorists in accordance with Vietnamese law (but ensuring that punishment is commensurate with crime) and we must continue to do everything possible to reaffirm and emphasize to world clear distinction between such terrorists and prisoners of war.\footnote{FRUS, Foreign Relations of the United States: 1964-1968 (Volume 3, Vietnam): June-December 1965 (Department of State, 1965f, accessed July 14 2008); available from http://www.state.gov/www/about_state/history/vol_iii/150.html.}
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Rather than prompting retaliation against the North Vietnamese or the Viet Cong, the execution of Versace and Roraback prompted the U.S. government and the MACV to increase their pressure on the South Vietnamese to comply with the Conventions.

**South Vietnamese Prisoner Abuse**

Following the urging of the MACV, the South Vietnamese Joint General Staff (JGS) issued JGS Memo 2537 on October 19, 1965, which articulated a standard operating procedure for the capture and treatment of Viet Cong.\footnote{Joint General Staff, "Jgs Memorandum 2537," ed. South Vietnamese Joint General Staff (U.S. National Archives, Suitland, Maryland, 1965).} According to JGS Memo 2537, captured communist insurgents were briefly interrogated for tactical intelligence, then transferred to divisional collection points at which they would receive additional interrogations. Despite these procedures, U.S. military advisor noted that the South Vietnamese forces were committing prisoner abuses.
On October 22, 1965, the ICRC informed the Secretary of State Rusk that South Vietnam was not in compliance with Common Article 3 and retained the right to ask the United States to remedy the situation.\textsuperscript{40} Reports of prisoner cruelty and abuse at the hands of the South Vietnamese forces were surfacing to the media, U.S. military, and policy-makers.

These reports provoked widespread domestic and international criticism. In 1965, \textit{The New York Times} reported that,

\begin{quote}
The favorite methods of torture by [South Vietnamese] Government troops are to slowly beat a captive, drag him behind a moving vehicle, apply electrodes to sensitive parts of his body or block his mouth while water spiced with hot pepper is poured down his nostrils.\textsuperscript{41}
\end{quote}

Other accounts of cruelty stated that, “There also have been substantiated accounts of on-the-spot executions of prisoners. Torture of prisoners in the field has not been uncommon.”\textsuperscript{42}

General Westmoreland himself briefed a meeting at the U.S. Embassy in Saigon, which included White House Staff such as McGeorge Bundy, and stated that the South Vietnamese were treating their captured prisoners harshly.\textsuperscript{43} To gain greater insight into these abuses, General Westmoreland authorized Staff Judge Advocate at MACV Headquarters Colonel Prugh to question the U.S. soldiers departing Vietnam at the end of their advisory tours about their knowledge of these allegations. Based on these “exit interviews,” Prugh learned that both sides often killed wounded and captured enemy fighters\textsuperscript{44} and that South Vietnamese POW

\textsuperscript{40} Gephardt, (accessed).
\textsuperscript{41} \textit{New York Times}, September 30 1965.
\textsuperscript{42} Melman.
commanders often ignored the recommendations of U.S. advisors regarding POW compliance.\textsuperscript{45}

In a letter dated August 14, 1965 from General Westmoreland to Major General Louis Walt, Commander of the Third Marine Division, Westmoreland stated:

> We have no command authority over the Vietnamese troops that accompany U.S. troops on operations but we must try to moderate the conduct of the Vietnamese in their treatment of prisoners so that it conforms to the spirit of the Geneva Conventions, which the GVN [Government of Vietnam] has agreed to in principle. In any case we should attempt to avoid photographs being taken of these incidents of torture and most certainly in any case try to keep Americans out of the picture.\textsuperscript{46}

U.S. elected officials also began to notice this startling pattern of abuse by the South Vietnamese.

According to the Congressional Record, Senator Stephen Young (D-Ohio) argued:

> The United States is a signatory to the Geneva Convention requiring humane treatment of prisoners of war. It has been our policy and practice throughout all of our involvement in the miserable civil war raging in Vietnam to surrender and turn over to officers of the ARVN [South Vietnamese army] all Viet Cong prisoners of war we have taken. Our officers in the field in South Vietnam and our officials in Washington, in the name of humanity and decency, should rescind this policy and practice. It is well known that not only are these prisoners of war taken in combat by Americans mistreated following the time they are turned over to the South Vietnamese authorities, but also the facts are, and they are well known, that many of these prisoners of war are executed. Probably more of these prisoners of war are executed than are permitted to survive. How can we Americans evade responsibility for the mistreatment of these war prisoners?\textsuperscript{47}

Members of the executive branch also paid close attention to South Vietnamese noncompliance with the Conventions. A memorandum from the administrator of the Bureau of Security and Consular Affairs, Abba Schwartz, to Chester L. Cooper of the National Security Council Staff sent on October 25, 1965 stated:

> Up to the present the GVN has failed to comply with the Conventions in a number of important ways. It has not furnished the ICRC with lists of prisoners. It has

\textsuperscript{46} Lewy.
\textsuperscript{47} Melman.
refused to permit the ICRC delegate in Saigon to make the kind of unescorted visits to prisoner camps that he believes are his responsibility under the Conventions. As far as I know it has taken no steps to transmit prisoner mail to relatives. Nor has it established a central office for collecting names of prisoners as required by the Conventions. In addition, the GVN thesis that all but a handful of the thousands of prisoners in custody are refugees or criminals subject to trial under domestic law is unlikely to convince the ICRC.

The matter is acute for several reasons:

(a) The ICRC may publicly criticize the GVN for failure to comply with the conventions. This would reduce the GVN's already precarious standing in the eyes of many other countries.

(b) As long as GVN compliance is incomplete U.S. military forces in Viet-Nam are obligated not to turn over prisoners they take to GVN custody.

(c) GVN non-compliance inhibits our ability to take public or private actions to obtain better treatment for American military personnel held by the Viet Cong and the DRV.

If the ICRC delegates in Saigon are not satisfied with the degree of GVN compliance very soon the U.S. Government must examine its own position very carefully. For one thing, our mission should take care not to place itself between the ICRC and the GVN, explaining the one to the other and, ultimately, satisfying neither. The ICRC should go direct to the GVN, the Ministries of Defense and Interior as well as the Foreign Office, to explain their obligations under the Conventions and in turn to hear from the Vietnamese themselves what they are doing to comply. **The U.S. position must be squarely on the side of the Conventions.** If the ICRC delegates aren’t able to make their case with sufficient force to the GVN Ministries of Interior and Defense, the U.S. mission should be instructed to approach the Saigon Government at the highest level to explain the importance of full and prompt compliance.48

In light of this substantial criticism of South Vietnamese noncompliance, Colonel Prugh and his MACV JAG staff sought to convince Colonel Nguyen Monh Bich, Saigon’s Director of Military Justice, that it was in South Vietnam’s best interest to construct POW camps and to ensure the humane treatment of captured fighters. Colonel Prugh told Colonel Nguyen that the more North Vietnamese POWs in custody and treated humanely, the greater the likelihood that

an exchange of South Vietnamese and American POWs could be worked out with the Northern
government. Moreover, Prugh reasoned that application of the Geneva Conventions to the
prisoners being held in the South would reduce domestic and international criticism of the war.

Following this direct personal intervention by Colonel Prugh, the joint U.S.-Vietnamese
military committee began increased training on the laws of war in October 1965. A general
program of instruction on prisoner processing, handling, and treatment was instituted for all U.S.
and Vietnamese units and the MACV JAGs briefed the Vietnamese military legal attaches on the
legal aspects of the Geneva Conventions. After one month of constant deliberations, on
November 27, 1965, the joint military committee developed a solution to bring all FWMAF
combat forces into compliance with the Geneva POW Conventions. This plan included
constructing five POW camps; identifying and removing all captured North Vietnamese and Viet
Cong prisoners from civil prisons; increasing training on the provisions of the Geneva
Conventions for all forces; establishing a program of repatriation for the POWs; developing
effective POW accountability procedures and record-keeping; and adhering to the Conventions
as accurately as possible, with regards to health and labor standards, visiting privileges, and
required ICRC visits. The Committee determined that the new POW camps, designed to hold
1,000 prisoners each, would be staffed by South Vietnamese military police, but would retain
U.S. military police as advisors. Under this agreement, captured fighters were first sent to a
combined U.S.-Vietnamese center for classification, interrogation, and further processing by the
South Vietnamese. Then, POWs were transferred to POW camps, innocent noncombatants were
released and returned to the place of capture, and guerrillas seeking amnesty under the “Chieu

49 Borch, (accessed).
50 Prugh.
51 Ibid.
Hoi” (“Open Arms”) program were sent to the Chieu Hoi center.\textsuperscript{52} Chieu Hoi, a political indoctrination program, was intended to be used as an effective instrument in combating Communist ideology\textsuperscript{53} by turning former insurgents into peaceful citizens.\textsuperscript{54}

In January 1966, the South Vietnamese government released 24 North Vietnamese POWs and allowed them to return to North Vietnam. Following this humane release of prisoners, the JCS directed the Commander in Chief, U.S. Pacific Command, to develop the following policy:

1. The United States must comply with the GPW.

2. The United States must maintain pressure on the GVN to comply fully with the GPW with the object of improving Viet Cong and Democratic Republic of Vietnam of U.S. PWs, maintaining and increasing South Vietnamese population support of the GVN and reducing communist opportunities to exploit inhumane PW treatment.

3. A complementary and continuing Department of State program to achieve GVN compliance with the GPW is required.\textsuperscript{55}

The allies reiterated their determination to apply the provisions of the Convention in the Joint Statement of Honolulu on February 8, 1966.\textsuperscript{56} By mid-1966, the South Vietnamese government constructed five suitable prisoners of war camps,\textsuperscript{57} and POW capacity in these camps had increased from 3,000 to 13,000 by the end of 1967. On October 2, 1966, Ambassador-at-large Averell Harriman sent a memorandum to the Department of Defense proposing a solution to any future instances of South Vietnamese noncompliance with the norm governing POW treatment.

\textsuperscript{52} Borch, (accessed).
\textsuperscript{54} Nguyen Hieu Trung, "Change from Pw Status to Returnee Status," ed. U.S. Army (U.S. National Archives, Suitland, Maryland, 1969).
\textsuperscript{55} Mowery, Hutchins, and Rowland.
\textsuperscript{57} Borch, (accessed).
He suggested, at the forthcoming Manila conference on October 24-26 for leaders of the FWMAF countries, that the United States:

Be prepared to offer material and advisory assistance as needed. Unless the GVN immediately takes the necessary steps (with our cooperation) to handle prisoners in Compliance with the Convention, the United States and the other states with fighting forces in the field will be compelled by Article 12 of the Geneva POW Convention to hold their own prisoners.\footnote{58}

By the end of 1971, the South Vietnamese held approximately 35,665 POWs in six different camps: Da Nang, Pleiku, Bien Hoa, Can Tho, Phu Quoc, and Qui Nhon.\footnote{59} The U.S. military, through its advisory capacity in POW matters, reaffirmed that:

The application and enforcement of the Conventions is of the essence. The military must apply them in war... therefore, the military must be privy to, and directly participate in, all discussion and conferences relating to the protection of war victims.\footnote{60}

In addition to the six POW camps, the U.S. forces worked with the Vietnamese Police Special Branch to create 33 Province Interrogation Centers (PICs) in order to provide in-depth interrogation reports about the captured Viet Cong prisoners. At the PICs, neighbors from the villages and hamlets supplied biographic information about the captured Viet Cong members to supplement the prisoner’s interrogation about immediate tactical intelligence. After the initial interrogation about tactics, they were then interrogated by the South Vietnamese forces for knowledge about the local Viet Cong political apparatus, its members, plans, and policies. Lastly, these reports were provided to all the FWMAF forces.\footnote{61}

\footnote{58} Mowery, Hutchins, and Rowland.  
\footnote{59} Prugh.  
Despite the construction of the six camps and 33 PICs, the United States struggled throughout the entire Vietnam conflict to pressure the South Vietnamese government to comply with the Geneva Conventions. Despite frequent pleas by the U.S. advisors, compliance by the South Vietnamese was variable.\footnote{Rowland.} In addition to the frequent allegations of abuse, challenges with record keeping were also raised as a result of transferring the captured prisoners. The South Vietnamese government did not maintain records on the classification and disposition of the captured military prisoners, resulting in severe discrepancies. For example, in 1965 alone, the MACV reported that South Vietnamese and U.S. forces captured 6,000 Viet Cong prisoners, yet South Vietnamese prison records identify only 400 Viet Cong prisoners.\footnote{Clarke.} Despite U.S. pressure to conform to Geneva standards, conditions at the camps were often dreadful, overcrowded, and unsanitary. ICRC visits to the island prison of Phu Quoc revealed many signs of prisoner abuse,\footnote{Levie, "Maltreatment of Prisoners of War in Vietnam."} including nutritional deficiencies,\footnote{Prugh.} scars, burns, and shortages of food and water.\footnote{ICRC, "Report on Visit Made to Phu Quoc Pw Camp," ed. U.S. Army (U.S. National Archives, Suitland, Maryland, 1968), ICRC, "Annex to Report on Visit to Phu Quoc Pw Camp," ed. U.S. Army (U.S. National Archives, Suitland, Maryland, 1968b).} A memorandum from National Security Advisory Walt Rostow to President Johnson on December 29, 1967 entitled “Prisoner of War in Vietnam” stated:

Herewith a State memorandum on the prisoners of war situation and what we have been doing about it. In summary, here is what we have done:

1. Persuaded the International Committee of the Red Cross (ICRC) repeatedly to
   a. Call Hanoi's attention to its obligations under the Geneva Convention;
   b. Request lists of prisoners;
   c. Request improved mail facilities;
   d. Request right to visit prisoners.
2. Persuaded the UAR to offer itself as the Protecting Power for our prisoners in Vietnam. Hanoi refused.

3. Persuaded the ICRC to offer itself as substitute Protecting Power. Hanoi refused.

4. Generated storm of official, press and public protests when Hanoi announced its intention to try American pilots as war criminals. Ho Chi Minh publicly set the trials aside and stated that the prisoners would be humanely treated.

5. We have also generated a good deal of pressure protesting the Hanoi practice in late 1966 and early 1967 of pressuring our prisoners to make public statements criticizing our actions and sympathizing with the North Vietnamese. As a result, these statements have stopped and Hanoi has permitted selected prisoners to be interviewed by journalists and other travelers.

6. We continue to press for better mail facilities (80 letters a week going forward through the ICRC with no indication that they are being delivered to the prisoners—and Christmas packages from the American Red Cross, all of which were returned).

7. We have put great effort into ensuring that the GVN treatment of prisoners meets all the requirements, thus focusing world humanitarian concern for the welfare of prisoners on Hanoi and the VC.

8. We continue to keep the record clear that we are interested in a prisoner exchange (the Manila Communiqué, the White House statement of July 17, and the actual release of North Vietnamese prisoners last February). We are now attempting to arrange a further release of some sick and wounded prisoners in GVN hands.

9. We responded to the few prisoners released by the VC (nine in two years) by getting the GVN to make reciprocal releases.

10. We are also encouraging U.S. commanders in Vietnam to try to arrange battlefield exchanges, but so far without success.

11. Finally, the Pope's assistance has been enlisted through your appeal to him last week.  

Research indicates that the United Sates not only complied with the norm governing POW treatment, but exerted pressure on South Vietnam, both bilaterally and internationally, to treat

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captured prisoners according to the standards stipulated in the Geneva Conventions.

**Military Doctrine Guiding POW treatment**

During the Vietnam conflict, FM 19-40, entitled “Handling of Prisoners of War,” issued in 1952, served as the operational guide for military police. This manual was revised as a result of the lessons learned during the Korea War in handling, processing, and treating POWs. The subsequent revision of FM 19-40 contained similar discussions of the Geneva Conventions but with the addition of one notable sentence: “POWs are treated humanely but are handled with firmness at all times.”

As the Vietnam conflict continued, additional doctrine was developed to handle POW treatment. FM 30-15, entitled “Intelligence Interrogations,” was originally issued in 1943, and was reissued several times throughout the conflict, including in 1967, 1969, and 1973. Each revision carried stronger prohibitions against the use of force during interrogations, additional content from the Geneva Conventions, and UCMJ warnings about the use of violence against captured prisoners. Other standards that guided U.S. treatment of prisoners during the conflict were derived from the Conventions. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War provides that when POW status is in doubt, individuals should benefit from the full protection of the Conventions. Article 5 states that:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

According to this article, a captured combatant about whom any doubt exists regarding their

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68 Appendix C contains the complete list of the military doctrine used by the MACV during the Vietnam conflict.
70 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
POW status will be treated as a POW with the full panoply of Geneva rights, unless a tribunal determines otherwise. In compliance with this article, the MACV issued three directives: first, MACV Directive 381-11, which established the base line of treatment for the captured fighters; secondly, MACV Directive 381-46, to establish the criteria to be applied when screening the captured fighters; and lastly, MACV Directive 20-5, to outline the composition of these tribunals.

To address the legal difficulties outlined above in granting POW status to North Vietnamese and Viet Cong combatants without recognizing the legitimacy of the North Vietnamese government, the MACV first issued Directive 381-11, entitled “Military Intelligence: Intelligence Procedures for Handling, Processing, and Exploitation of Captives, Returnees, Suspects, and Documents” in March 1966 that stipulated that detainees were to receive full humane treatment, consistent with Common Article 3 of the Conventions. General Westmoreland continually stressed the importance of this norm. In August 1966, Westmoreland personally wrote to all of his major commanders to emphasize that, “… prisoners of war and combat captives are properly processed and handled in accordance with International Law is vital.”\(^71\) In addition, in October 1966, a MACV command information bulletin, entitled “Application of the Geneva Prisoner of War Conventions in Vietnam,” informed U.S. troops that the Geneva Conventions applied in Vietnam even without formal declaration of war and that treatment, consistent with the Conventions, was to be extended to all captured North Vietnamese units and Viet Cong, whether captured in combat or not.\(^72\)

MACV policy concerning the classification and treatment of prisoners of war was then codified in MACV Directive 381-46 “Military Intelligence: Combined Screening of Detainees”

\(^71\) Prugh, 75.
\(^72\) Ibid.
in December 1967, which established the criteria for the classification and disposition of the captured combatants. Directive 381-46 states that all detainees must be classified either as: POWs; or non-prisoners of war, including civil defendants, returnees, and innocent civilians.\footnote{Howard S. Levie, ed., \textit{Documents on Prisoners of War}, ed. Naval War College, International Law Studies (Newport, RI: Naval War College, 1979).}

According to the MACV, the following groups were determined to be POWs:

a. \textbf{Viet Cong (VC) Main Force (MF).} Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.

b. \textbf{Viet Cong (VC) Local Force (LF).} Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specified VC province or district.

c. \textbf{North Vietnamese Army (NVA) Unit.} A unit formed, trained and designated by North Vietnam as an NVA unit, and composed completely or primarily of North Vietnamese.

d. \textbf{Irregulars.} Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village or hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

i. \textbf{Guerillas.} Full time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

ii. \textbf{Self-Defense Force.} A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

iii. \textbf{Secret Self-Defense Force.} A clandestine VC organizations which performs that same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collections, as well as sabotage and propaganda activities.\footnote{Ibid.}
In cases in which POW status was in doubt, the MACV then issued Directive 20-5 “Inspections and Investigations—Prisoners of War—Determination of Eligibility” in March 1968 in order to establish the detailed procedures for establishing Article 5 tribunals. MACV Directive 20-5 directs that a captured fighter would be granted an Article 5 tribunal in all instances in which there was doubt as to whether or not he or she was entitled POW status. The tribunals consisted of three of more officers, at least one of which was a JAG or military lawyer familiar with the Geneva Conventions. To that end, MACV Directive 20-5 affirmed:

All U.S. military and DoD personnel who take or have custody of a detainee will: Afford to each detainee in their custody treatment consistent with that of a prisoner of war, unless or until it has been determined by competent authority in accordance with this directive that the detainee is not a prisoner of war.

Including a right to “reasonably available” counsel—including JAG counsel if necessary—Directive 20-5 also provided captured fighters with other safeguards, such as fair and consistent recording procedures, rights to an interpreter, and rights to testify or not during the POW screening process. Under this Directive, the MACV ensured that all fighters captured by U.S. and Vietnamese forces were treated initially as POWs and that the capturing units retained responsibility for the prisoners until they were turned over to Vietnamese authorities. MACV Directive 20-5 thus guided the U.S. military’s POW detention policies and procedures during Vietnam and insured compliance with the Geneva Conventions Article 5 stipulations.

The final broad MACV Directive guiding U.S. military behavior toward POWs during Vietnam was MACV Directive 190-6, entitled “Military Police: ICRC Inspections of

75 Ibid.
78 “Viet-Nam Information Notes."
Detainee/Prisoner of war Facilities.” According to Article 126 of the Geneva Conventions Relative to the Treatment of Prisoners of War:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be... Representatives or delegates of the Protecting Powers shall have full liberty to select the places they wish to visit.79

Through Article 126, the MACV stipulated that the ICRC and any Protecting Power representatives would have full access to the prisoner of war camps maintained by the Detaining Power.80 The North Vietnamese and the Viet Cong, on the other hand, did not allow the ICRC access to the prisoner of war camps in North Vietnam.81

Training and Education on POW Treatment

In order to deal with the new challenges inherent in the Vietnam conflict, training and education regarding POW treatment reflected the importance of complying with the Conventions, both the letter and the spirit of the laws. In August 1965, Westmoreland directed that all soldiers receive an orientation in the Geneva Conventions and four informational cards, entitled “The Enemy in Your Hands,” “Nine Rules,” “Code of Conduct,” and “Geneva Conventions.”82 The “The Enemy in Your Hands,” a three by five inch card, states:

As a member of the U.S. military forces, you will comply with the Geneva Prisoner of War Conventions of 1949 to which this country adheres. Under these Conventions:

You can and will
Disarm your prisoner
Immediately search him thoroughly
Require him to be silent

79 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
80 Due to resistance by the government in Hanoi, however, there were no Protecting Powers during the U.S. involvement in Vietnam.
81 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
82 Lewy.
Segregate him from other prisoners
Guard him carefully
Take him to the place designated by your commander

You cannot and must not
Mistreat your prisoner
Humiliate or degrade him
Take any of his personal effects which do not have significant military value
Refuse him medical treatment if required and available

Always treat your prisoner humanely

In September 1965, a list of “Do and Don’ts” was published by the MACV with the directive that these measures be explained to the troops. To that end, a 60-minute class narrative was developed and issued to each troop unit in order to provide orientation on the enemy threat, the challenges of the Vietnamese operational environment, and the imperatives of following the laws of war.83 By October 1965, cards had been issued in English for U.S. personnel and Vietnamese personnel84 and soldiers were required to carry the “Nine Rules” and “The Enemy in Your Hands” at all times.85 The Nine Rules differed from the nine “Soldier’s Rules” that became embedded in the armed forces’ training. These Rules stated:

1. Remember that we are guests here: We make no demands and seek no special treatment.
2. Join with the people! Understand their life, use phrases from their language and honor their customs and laws.
3. Treat women with politeness and respect.
4. Make personal friends among the soldiers and common people.
5. Always give the Vietnamese the right of way.
6. Be alert to security and ready to react with your military skill.
7. Don’t attract attention by loud, rude, or unusual behavior.
8. Avoid separating yourself from the people by a display of wealth of privilege.
9. Above all else, you are members of the U.S. Military Forces on a difficult mission, responsible for all your official and personal actions. Reflect honor upon yourself and the United States of America.86

83 Chief of Staff.
84 Prugh.
85 Chief of Staff.
86 Ibid.
With regards to specific doctrinal guidance on law of war training, AR 350-216, entitled “Training: The Geneva Conventions of 1949 and Hague Convention No. IV of 1907” and dated December 19, 1965, stipulated that all members of the Army must be familiar with the Geneva Conventions. Under this doctrine, a soldier received two hours of instruction on the Geneva Conventions during basic training and then the principles of the Conventions were integrated into training exercises. In addition, the Army developed three half-hour training films—The Geneva Conventions and the Soldier, When the Enemy is my Prisoner, the Geneva Conventions and the Military Policemen—in order to support AR 350-216. Upon arrival in Vietnam, training for all soldiers increased. Each incoming serviceman received initial training on the laws of war within seven days of assignment to Vietnam and supplemental training was required quarterly. The following table details the mandatory individual training required for all personnel within a week of entering Vietnam:

Table 3: Mandatory Training on the Laws of War

<table>
<thead>
<tr>
<th>Subject</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Why Vietnam*</td>
<td>1</td>
</tr>
<tr>
<td>Weapons Training*</td>
<td>9</td>
</tr>
<tr>
<td>Viet Cong/North Vietnamese Army Tactics Orientation</td>
<td>1</td>
</tr>
<tr>
<td>Mines and Booby Traps</td>
<td>3</td>
</tr>
<tr>
<td>Gas Chamber Exercise</td>
<td>1</td>
</tr>
<tr>
<td>Medical Training</td>
<td>2</td>
</tr>
<tr>
<td>Rules of Engagement, Minimizing Noncombatant Battle Casualties, and</td>
<td>1</td>
</tr>
<tr>
<td>Relations with the Vietnamese *</td>
<td></td>
</tr>
<tr>
<td>Geneva Conventions</td>
<td>1</td>
</tr>
<tr>
<td>Code of Conduct</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>20</td>
</tr>
</tbody>
</table>

* Required for quarterly review and supplemental training

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87 Prugh.
88 Chief of Staff.
89 Ibid.
90 Ibid.
A 1970 study conducted by the Army Concept Team in Vietnam determined that, from the period of initial capture to the delivery to South Vietnamese forces, U.S. forces complied with the Geneva Conventions.\footnote{Army Concept Team in Vietnam, "Accountability, Classification, and Record/Reporting System for Captured Enemy Personnel," ed. U.S. Army (U.S. National Archives, Suitland, Maryland, 1970).} In light of the noncompliance by the North Vietnamese and the difficulties in compelling the South Vietnamese to comply, why did the United States never waver in its commitment and application of the Geneva standards?

**Contestation**

As articulated in Chapter 1, the first step in the process of norm contestation is examining the norm itself. I hypothesize that there is a higher probability for domestic contestation when there are aspects of the armed conflict not specifically addressed by the proscriptions of the norm. By 1964, the norm governing POW treatment was embedded in U.S. practice through its integration in U.S. law, military doctrine, and training and education. Whereas the norm was very clear about treatment of captured uniformed soldiers and sailors in the previous conflict in Korea, it was less clear about the standards of treatment for the Viet Cong, who did not fight with regular military forces and were therefore not covered by these Conventions. As a result, this norm was open for contestation during the Johnson Administration.
The second step affecting compliance decision-making regarding an embedded norm is the presence of constituencies who support or oppose the norm. I hypothesize that the presence of these constituencies and their access to and influence over the foreign policy decision-making process greatly affects the probability of deviation from compliance.

In the case of the Vietnam conflict, anti-norm constituencies did not exist in the early years of combat. Even as greater numbers of U.S. troops were captured by the North Vietnamese and the Viet Cong forces between 1964-1968, no contemporary journalistic accounts provide evidence that any U.S. group advocated denying Geneva Conventions protections to the North Vietnamese and the Viet Cong who were captured by the South Vietnamese and U.S. troops. Even as groups\textsuperscript{92} emerged within the U.S. public to challenge the uneven rate of U.S. compliance.

\textsuperscript{92} One of these groups was the “Vietnam Veterans Against the War.” As a representative of this group, John Kerry made a statement before the U.S. Senate Committee on Foreign Relations, arguing: “We are here in Washington to say that the problem of this war is not just a question of
with the Geneva Convention norm governing noncombatant immunity, particularly after the My Lai massacre in 1968, research does not indicate that any similar constituency emerged with regard to the norm governing POW treatment. The absence of this norm-violating constituency makes norm violation less likely to occur.

On the contrary, pro-norm constituencies existed inside the Johnson Administration who argued that an expansive view of the Geneva Conventions should be taken for three primary reasons: the belief that extending Geneva protections was good for winning “hearts and minds;” the belief that an expansive view of the Conventions would ease domestic and international criticism of the conflict; and lastly, the hope that if the U.S. military provided humane treatment for North Vietnamese and Viet Cong POWs, that it would earn reciprocal treatments for captured U.S. soldiers and sailors. Members of this pro-norm constituency included both political and military actors. Political actors like Secretary Rusk, Secretary McNamara, and Chester Cooper as well as military actors like Colonel Prugh, General Westmoreland, and CJCS Wheeler all believed that an expansive view of Geneva standards would benefit U.S. strategic goals in Vietnam. In this view, actors’ preferences are critical to understanding the eventual U.S. POW policy, particularly as these actors sought to use the POW norm to achieve instrumental goals.

*Winning Hearts and Minds One POW at a Time*

One of the guiding beliefs of the Johnson Administration was that POW treatment could be used as a powerful tool of public diplomacy; essentially, by expanding POW treatment even...
to combatants who did not qualify for it, the United States could increase its “soft power.” This view reflects the “hearts and minds” approach to winning an insurgency: that control is measured by who has more sympathizers and committed supporters. Whereas the insurgents seek the support of the people for food, shelter, recruits, and intelligence, the counterinsurgent seeks to regain the allegiance of a population. This approach assumes that an insurgency is a battle for the loyalty of the people.

In a meeting in Press Secretary Bill Moyer’s office on August 10, 1965—the same day Secretary Rusk responded to the ICRC that the United States would fully comply with the Conventions—an interagency group met and discussed the POW issue. The participants included: Bill Moyers and Chester Cooper, representing the White House; Arthur Sylvester and Orville Splitt, representing the Department of Defense; John Chancellor and Barry Zorthian, representing the U.S. Information Agency; and James L. Greenfield, William J. Jorden, Abba Schwartz, Leonard Meeker, and Frank Sieverts, representing the Department of State. After Leonard Meeker informed the group that the ICRC was entering the conflict and that Secretary Rusk was preparing a statement indicating full compliance, he proposed the following plan for handling the POW issue. He stated, “We should:

1. Instruct our troops in the field to conduct themselves in conformity with the Geneva convention and accepted standards of warfare (without hampering their efforts to prosecute the war); and

2. Publicly demonstrate our concern that the rules of war be observed in Viet-Nam. This should be accomplished by publicizing our willingness to cooperate with the Red Cross, and the Viet Cong-North Viet-Nam unwillingness to do likewise. We should call on the other side to mark their hospitals, permit inspection of prison camps, etc. We should also publicize directives and guidelines given to our troops in the field."

Chester Cooper agreed with that assessment and added, “At issue here is how the war should be fought…. Our object is not so much to destroy an enemy as to win a people. We must make sure our military operations are in fact productive.”

One component of winning hearts and minds was the Chieu Hoi program, an institution to persuade captured North Vietnamese soldiers, Viet Cong, and North Vietnamese civilians to side with South Vietnam. Initiated in 1963 by President Diem and authorized by the United States in 1965, the Chieu Hoi program promoted the defection and neutralization of more than 194,000 North Vietnamese through vocational training, education, and political amnesty. Thus, the Chieu Hoi program served two goals: depleting the man power of the North Vietnamese and diminishing the effectiveness of Communist ideology. In an October 1965 memo, Johnson Administration officials articulated why the expansive definition of POW served this goal:

A change in definitions so that the bulk of prisoners taken in military operations are classified in the first instance as subject to the protection of the Conventions should not cause serious inconvenience. Since education or indoctrination programs free of duress are not proscribed by the Conventions the Chieu Hoi program could continue. Individual terrorists convicted of specific acts could still be charged as criminals and handled outside the Conventions.

In this way, the U.S. military recognized that humane standards of conduct toward captured Vietnamese prisoners was necessary to winning the hearts and minds of the Vietnamese people. According to General Westmoreland, “It is both dishonorable and foolish to mistreat a captive.”

**Ease Domestic and International Criticism of the War**

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94 Ibid.(accessed).
Many conventional portrayals of this Administration claim that Johnson was immune from—and unaffected by—the emerging criticisms of war from members of Congress, the American public, and even international observers. He was not, however, uninformed and isolated with regards to primary press outlets or public opinion. He “insisted on there being additional ways for him to hear of important differences of view.” Johnson had three different television sets installed in his office, three sets in the green room next to his office, and three sets in his bedrooms in the White House and in his ranch in Texas. In addition, he installed Associated Press and United Press International wire services in the Oval Office and read these tickers many times each day. “Johnson read and saw almost everything—papers, magazines, news tickers, all three networks at once.” He was an ardent consumer of information and, as such, was perfectly aware of the views regarding Vietnam in the public. One of the ways to promote a more positive image of the Vietnam conflict was to send the message that the United States was treating all of the captured fighters humanely. In fact, Colonel Prugh, Staff Judge Advocate, recommended that applying the Geneva Prisoner of War Convention would “ameliorate domestic and international criticism of the war.”

**Expectations of Reciprocity**

The third underlying reason behind expanding Geneva protections to all combatants was that if the United States provided humane standards of treatment for POWs, then the North Vietnamese army and the Viet Cong would similarly reciprocate with captured U.S. prisoners.

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100 Bundy, (accessed).
101 Borch, (accessed).
Policy-makers and military planners consistently referred to the need to abide by the Geneva
Conventions in order to insure that captured U.S. pilots and soldiers were treated humanely.

In its handling of prisoners of war in Vietnam, the United States government has
placed great emphasis upon proper treatment in accordance with its
responsibilities under international law and its desire to insure equal treatment of
its own personnel captured by enemy forces. 102

Throughout the course of the Vietnam conflict, the North Vietnamese and the Viet Cong
often did not treat their prisoners humanely. Their first response to the ICRC in 1965 stated that
they would not accord Geneva protections to the captured fighters because they deemed them
“war criminals” and not POWs. To further this claim, on July 6, 1966, the North Vietnamese
handcuffed the captured U.S. pilots and forced them to be paraded through the streets of Hanoi,
explicitly violating Article 13 of the Geneva Convention governing the treatment of POWs,
which states: “Prisoners of war must at all times be protected, particularly against acts of
violence or intimidation and against insults and public curiosity.”103 Attempts to indoctrinate
captured prisoners, brutal conditions, insufficient food, and torture characterize most of these
U.S. POW accounts. Despite these reports, the U.S. government never wavered in its belief that
the application of Geneva protections to the North Vietnamese and the Viet Cong would prompt
reciprocal compliance.

The U.S. government did not regard POW treatment in Vietnam as a U.S. strategic
instrument until Hanoi refused to accord captured pilots with Geneva protections and executed
two U.S. soldiers in June 1965. Colonel Henry Gibson, MACV head of POW operations,
observed that, “the question of treatment of enemy prisoners of war is inexorably interwoven

102 "Viet-Nam Information Notes."
103 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August
1949)."
with the treatment of captured Americans by the enemy.”¹⁰⁴ On October 14, 1965, CJCS Wheeler, recognizing the challenges encountered during POW handling during the Korean conflict, directed his staff to conduct an examination of current POW policy, evaluate their adequacy with regards to the standards articulated in the Geneva Conventions, and provide recommendations. In evaluating POW policy and treatment, his findings determined that, “the U.S. was motivated by the fact that the enemy was holding American personnel in captivity and the U.S. desired the GVN to adhere to the GPW in the hope that the enemy would reciprocate.”¹⁰⁵

Concerns about reciprocal treatment also prompted the U.S. government to put pressure on the South Vietnamese government to comply with the Conventions.

Another motive was the keen interest of the U.S. in world opinion with respect to GVN treatment of EPWs. In its consultations with GVN authorities, the U.S. continually stressed the need for PW policies in consonance with the GPW.¹⁰⁶ A telegram from the U.S. Embassy in Vietnam to the Department of State on October 20, 1965 explicitly states: “His [Ky’s¹⁰⁷] treatment of prisoners concerned us very intimately because of the fate of our own prisoners.”¹⁰⁸ One month later, a telegram from the Department of State to the U.S. Embassy in Vietnam concurred with this assessment. The telegram, drafted by Abba Schwartz and approved by Secretary of State Rusk, stated:

¹⁰⁵ Mowery, Hutchins, and Rowland. Underlined in the original.
¹⁰⁶ Ibid.
¹⁰⁷ After Ngo Dinh Diem’s execution in November 1963, South Vietnam struggled to secure a stable leader for the government. After several unsuccessful coups, the leaders of the military appointed Nguyen Cao Ky Prime Minister. Ky was Prime Minister from 1965-1967, the time period in which the critical decisions regarding POW treatment were made.
I am deeply concerned about limited degree of GVN compliance with Geneva Conventions on treatment of prisoners. As you know, U.S. is responsible under GC for treatment of prisoners transferred from US to GVN custody. Matter is urgent for sake of GVN and U.S. image abroad and as it affects plight of US prisoners held by DRV and VC.\textsuperscript{109}

The telegram continued:

Leverage we can bring to bear on DRV and VC through ICRC and other international efforts depends to considerable extent on degree to which U.S. and GVN standards of prisoner treatment meet requirements of Geneva Conventions. I believe that substantial compliance by GVN and USG with Convention and publicity given such compliance constitute one of best available protections against further mistreatment American prisoners.\textsuperscript{110}

Throughout the conflict, the U.S. government tried to use diplomatic, financial, and military assets to pressure the South Vietnamese government to comply. One scholar noted that Ky’s government only agreed to comply with the Conventions following promises of material assistance from the United States.\textsuperscript{111} The U.S. government continued to apply pressure on South Vietnam to comply with the Conventions even though the government, media, and public became aware of the inhumane treatment that the captured soldiers and pilots received at the hands of the North Vietnamese and the Viet Cong.

Extensive examination of oral histories, national archives, and declassified national security documents indicate that the U.S. government expanded the definition of who could legitimately receive Geneva protections for three reasons: in order to win “hearts and minds;” to ameliorate domestic and international criticism; and to promote reciprocal treatment for captured U.S. soldiers and sailors. Figure 8 depicts the mobilization of this pro-norm constituency.

\textsuperscript{110} Ibid.(accessed).
\textsuperscript{111} Davis.
Access and Influence

This section posits that the Johnson foreign policy style typifies the Type I domestic structure, as he relied upon a small, hierarchical group of advisors. The legislature was not only unified during Johnson’s tenure, but Democrats controlled an unprecedented majority in both the House and the Senate during the early period of decision-making on Vietnam. Lastly, interest groups and the public did not possess any avenues to affect Johnson’s decision-making. This section carefully examines these aspects of domestic structure during the Johnson Administration in order to establish the Johnson foreign policy style as a representative Type I structure. As a result of this domestic structure, the pro-norm constituents in Johnson’s Administration were able to advance their expansive view of Geneva standards.

Preference for a Centralized Inner Circle
Immediately following President Kennedy’s assassination in November 1963, Johnson decided that he would keep the majority of Kennedy’s advisors as his own. Seeking to maintain continuity with his predecessor’s Administration, he not only retained the Kennedy cabinet, but also some members of Kennedy’s personal staff.\textsuperscript{112} It was this group of men—Kennedy’s “best and brightest”—that he turned to for advice on his foreign policy decision-making. Over this group, Johnson maintained an “autocratic” leadership style\textsuperscript{113} in which he solely controlled the creation and implementation of policy. This preference for a strongly hierarchical, insulated group to enhance control over the policy process can be traced back to his tenure in the Senate.

His control of the Senate machinery was complete. When it was used to pass one’s bills or to secure a choice committee assignment, it was welcome, but it was oppressive to those in opposition. His constant pressure for unanimous-consent agreements, which enabled legislation to reach a vote without exhausting delays, often came close to harassment. In terms of classical theory, his eagerness to cut off debate was undemocratic.\textsuperscript{114}

Johnson’s need for centralized control of the decision-making process differed from his predecessors in the White House. In particular, scholars have contrasted his approach to decision-making with the organization of Eisenhower’s Cabinet.

His [Eisenhower’s] hierarchy was an orderly structure with many fixed relationships, but he alone was at the top with direct lines of communications and authority to the several men who occupied the level below. In Johnson’s Administration, there was no Sherman Adams [President Eisenhower’s Chief of Staff]. The President was his own chief of staff: he made the staff assignments; he received the product of his staff’s work and reconciled or decided between the competing report; he set the pace of action and the tone of discussion. And, unlike Eisenhower, the kind of personal control that Johnson could not establish over the government he retained over that more manageable domain—the White House.


\textsuperscript{114} Harry McPherson, \textit{A Political Education} (Boston, MA: Little, Brown and Company, 1972), 169.
And he extended that control down to the least significant levels of activity, handling such details as approving the guest list for social functions, checking the equipment for the White House cars, determining the correct temperature for the rooms in the Mansion.\textsuperscript{115}

Johnson’s need for centralized control extended to all aspects of his Cabinet members’ lives, as he “couldn’t stand for anyone to be beyond his reach or not working”\textsuperscript{116} and he “felt a need to wholly dominate those around him.”\textsuperscript{117} With regards to decision-making on Vietnam:

President Johnson was his own desk officer. He was actually the Commander-in-Chief. This was a great preoccupation with him so that every detail of the Vietnam matter was a matter of information to the President, and the decisions on Vietnam were taken by the President.\textsuperscript{118}

Johnson was thus at the center of all foreign policy decision-making: no decision was made without his approval and no policy initiatives were advanced without his consultation. Because of this leadership style, some scholars have noted that he created an atmosphere in the White House of “permanent intimidation.”\textsuperscript{119}

The group of individuals who primarily advised the President on Vietnam and other foreign policy issues comprised his Tuesday lunch group. As Johnson preferred to make his foreign policy decisions in small, tightly-knit groups, he relied on this small group rather than the larger National Security Council (NSC) for decision-making. Regular members of the Tuesday lunch group included: Secretary of State Dean Rusk, Secretary of Defense Robert McNamara (later Clark Clifford), National Security Advisor Walt Rostow, Director of Central Intelligence (DCI) Richard Helms, CJCS Earle Wheeler, Press Secretary George Christian (later Bill Moyer),

\textsuperscript{116} Califano, 26.
\textsuperscript{117} Paul H. Nitze, \textit{From Hiroshima to Glasnost: At the Center of Decision} (New York, NY: Grove Weidenfeld, 1989), 261.
\textsuperscript{118} Rusk, (accessed).
\textsuperscript{119} Kearns, 240.
and Tom Johnson, the record-keeper.\textsuperscript{120} This group formed after 1964 as U.S. involvement in Vietnam increased. This Tuesday lunch group was essentially “an inner War Cabinet.”\textsuperscript{121}

Johnson himself stated:

> The National Security Council were like sieves, I couldn’t control them. You knew after the National Security Council meeting that each of those guys would run home and tell his wife and neighbors what they said to the President. That’s why I used the Tuesday lunch format instead. That group never leaked a single note. Those men were loyal to me. I could control them, but in those larger meetings, why every Defense Department official and his brother would be leakers at one time or another.\textsuperscript{122}

Each Tuesday, this small group of men met with the President and covered all facets of the Vietnam conflict. Each week National Security Advisor Rostow would prepare the agenda after calling Secretaries Rusk and McNamara to determine what issues were their highest priorities.

According to Rostow:

> The President would come in and in a relaxed way talk about whatever was on his mind. Sometimes we would go in directly; sometimes we’d sit around and talk. Then the President would lead the conversation on whatever path he wanted to. Suddenly the agenda would grip, and then we’d march through it. But the advantage of this device was not only its regularity. It had the relevant principals, and the staff work. It was also a human and quasi-social occasion which underlined a fact which I think for most presidents—not all, but I think President Johnson—should be the case, that these men should regard themselves as a kind of family. They’re pulled out of their bureaucracies when they’re with the president, and they should be. They’re the president’s personal advisers. They have the duty of administering bureaucracies. They have the duty to present the interests of the bureaucracies and represent them to the extent that a president ought to take into account their abiding interests. But, in the end, we have a system of government under the Constitution in which only one man is responsible. He’s the only one elected, except the vice president. All the rest are hired hands. And the ultimate responsibility of a cabinet member is to the president—and to help him make decisions. Therefore, this apparently informal manner and the treatment of this group of men as family, in the family dining

\textsuperscript{121} Rusk, (accessed).
\textsuperscript{122} Kearns, 319-320.
room, had to me an important constitutional meaning—and a correct constitutional meaning.\textsuperscript{123}

Though these advisors presented various policy options to Johnson, the ultimate decision-making rested with him. In his Administration, Cabinet members were responsible for proposing policy options, not choosing the solution.\textsuperscript{124}

One advantage of this small, tight-knit group of advisors was that it created a strong bond among the various members of Johnson’s Cabinet. Each member could determined what their colleagues’ preferences were and what factors were driving their decision-making.\textsuperscript{125} It “made a great difference to the ease of working relationships among those who were carrying the top responsibility.”\textsuperscript{126} A second advantage was that it allowed each Cabinet member to voice their—and their agency’s—opinions freely, without fearing leaks to the press.\textsuperscript{127} Johnson “knew that he could talk in the most intimate way, the most provisional or tentative way, at that Tuesday Luncheon without having things leak out to the press. We transacted an enormous amount of business at that Tuesday Luncheon.”\textsuperscript{128} In fact, National Security Advisor Rostow stated, “I don’t we think ever had a leak out of the Tuesday lunch.”\textsuperscript{129}

One disadvantage of this decision-making apparatus, however, was that with decision-making centralized at the top, very few other advisors had the ability and the access to affect Johnson’s decision-making. Johnson rarely sought advice from subordinates in the departments and agencies represented at his Tuesday lunch group and typically only operated through each

\textsuperscript{125} Rostow, (accessed).
\textsuperscript{126} Rusk, (accessed).
\textsuperscript{127} Barrett, Rusk, (accessed).
\textsuperscript{128} Rusk, (accessed).
\textsuperscript{129} Rostow, (accessed).
Cabinet officer himself.\textsuperscript{130} This hierarchical system thus magnified the opinion of a few and silenced the opinions of many. In fact, Secretaries Rusk and McNamara,

Never went to the President with a divided opinion. We took it upon ourselves to make a special effort to reach a common conclusion, and that didn't mean that President Johnson would always accept our common conclusion. He had views of his own, but he wanted to have the best effort of his colleagues invested in the problem before the President himself came to a final result.\textsuperscript{131}

This concerted effort to present Johnson with unified advice from the Departments of State and Defense inevitably eliminated the ability for a variety of viewpoints on foreign policy issues. Johnson “was impatient about the inability or the unwillingness of senior colleagues to agree among themselves”\textsuperscript{132} and therefore sought consensus from his advisors on his policies.

According to McNamara:

[Johnson] did not like working toward a decision in company—he wanted to go one-on-one. He never let anyone see his hole card in any context… His way of doing business was a major factor contributing to the deficiencies… of the Administration’s management of the war.\textsuperscript{133}

This hallmark of Johnson’s leadership style—a centrally controlled, tightly hierarchical decision-making structure—both facilitated the working relationships among the Cabinet officers through the Tuesday lunch groups and his dominance over the policy process, but also hampered Johnson’s ability to receive diverse viewpoints from advisors outside his inner circle.

\textit{Relationship with the Legislature}

Despite Johnson’s desire to be in total control of the policy process, his tenure in the Senate imbued in him a keen appreciation of the power structures in Washington and a respect for the role of Congress in foreign policy decision-making. Johnson, having spent six years as

\textsuperscript{\begin{tabular}{ll}
130 & Rusk, (accessed). \\
131 & Ibid.(accessed). \\
132 & Ibid.(accessed). \\
133 & McNamara, 294. \\
\end{tabular}}
the Senate Majority Leader as well as twenty-three cumulative years in Congress, felt that developing close interpersonal relationships with the members of Congress was everyone’s “most important job.”

Johnson, as I recall him from the first days, was a political operator. Now I use the word “operator” not in a nefarious sense, but he understood the pieces; he understood the mechanisms, and he always kept relationships that he could call on; his personal relationships with senators were such that he could call on them if he needed them.

Johnson was not only the “recognized authority on dealing with Congress,” but also the “master craftsman of politics, someone who knew where the power was, and how to use it—within the mistrusted world of Washington.” With regards to his relationships with members of Congress:

Johnson was like a psychiatrist. Unbelievable man in terms of sizing up people, what they would do, how they would stand under pressure, what their temperament was. This was his genius. He used to tell me many times, “You’ve got to study every member of this body to know how they’re really going to ultimately act. Everything about them, their family, their background, their attitudes, even watch their moods before you even ask them to vote.” He was a master of human relations when it came to that Senate.

To a large extent, Johnson “was a chief of government, not a chief of state. People suspected the former and admired the latter.”

During the early decision-making regarding the war in Vietnam, Johnson not only interacted with a unified legislature, in which his Democratic party controlled both houses of Congress, but the early to mid-1960s saw some of the most significant Democratic majorities in

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134 Califano, 82.
136 McPherson, 267.
137 Ibid., 263.
138 Humphrey, (accessed).
139 McPherson, 263.
the modern political era. In the 1960 elections, in which Kennedy and Johnson assumed control of the White House, the Democrats controlled Congress with 64 members to the 36 Republican members. In the House, the Democrats actually lost 20 seats to the Republicans in the 1960 elections, but maintained a majority of 263 seats to 174. In the 1962 House race, the Democratic party lost a few more seats but still retained their control of the House by a majority of 259 to 176. The 1964 elections, in which Johnson and running mate Hubert Humphrey carried 44 states against Republican candidate Barry Goldwater, saw the House Democrats reclaim their lost seats. The House Democrats now controlled 295 seats to the House Republicans’ 140 seats. In the 1964 Senate race, the Democrats picked up two seats, vaulting them to a 66-seat majority. In fact, from 1964-1966, the Democrats maintained a two-thirds majority in both houses of Congress.

Even after assuming the Presidency, Johnson retained many of his old habits developed from a career on the Hill. Johnson was a “child of the Congress” and “his calendar was the congressional calendar.”\(^1\) With his appreciation for the centers of power in Washington and his ties on the Hill, he sought to inform members of Congress about his policy goals in Vietnam.

President Johnson briefed the Congress on Viet Nam more extensively than any President has briefed the Congress on anything. When he first became President he used to have briefing sessions at the White House for Senators and Congressmen. He brought them down in groups and he'd have the Secretary of Defense and the Secretary of State give them a full discussion and Congress at least twice in this course. There was not evident at that time in those briefings and the reactions of the Senators and Congressmen to those briefings—there was not evident any serious opposition to what we were trying to do in Viet Nam.\(^2\)


Despite Johnson’s attempt to “associate the Congress with him in the effort in Vietnam,”\textsuperscript{142} he sought to inform—not consult—Congress of his policy in Vietnam. Thus, in spite of his personal relationships with individual members, tremendous respect for the legislative institution, and an overwhelming Democratic majority in both houses during his tenure, Johnson still drew boundaries around his decision-making and did not include any legislative avenues into his inner circle.

The Johnson Administration was an archetypal Type I domestic configuration: he organized his advisors in a tightly controlled, hierarchical structure in which there were few, if any, other avenues for societal actors to affect policy. While Johnson collected information from the legislature and the media, he kept his decision-making isolated and autonomous from these outside actors. Johnson, backed by a solid Democratic stronghold on Congress, possessed both the ability and the discretion to draw boundaries around his decision-making. Against this domestic backdrop, pro-norm constituencies inside his Administration promoted an expanded interpretation of U.S. obligations under these Conventions. Figure 9 depicts the access and influence of the pro-norm constituents in Johnson’s Administration.

\textsuperscript{142} Ibid.(accessed).
Summary and Conclusion

The integrative compliance model provides a pathway for understanding the decision-making regarding U.S. treatment of captured fighters during the Vietnam conflict. This research demonstrated that when tenets of an embedded norm are vague, there is a higher probability for contestation about the application of the norm. Given that the Geneva Conventions only address state actors who are signatories of the Convention, a lacuna existed regarding the treatment of non-state actors, such as the Viet Cong. Compliance in this conflict resulted from a series of deliberate decisions made in light of actor preferences. The eventual compliance decision represented a very broad definition of who qualified for Geneva protected status, including in their definition members of the Viet Cong, though they did not wear any uniforms, did not carry arms openly, and frequently violated the laws of war. Policy-makers such as Rusk and members
of the military, such as Wheeler, Westmoreland, and Prugh, were committed to adhering to the Geneva Prisoner of War Convention and to pressuring the South Vietnamese government to comply as well.

Vietnam represented the first challenge to the traditional state versus state paradigm that dominated military thinking about combat, training, and the laws of war. Replacing this traditional battle space was one in which the front line was ill-determined and the definition of a combatant was even more ambiguous. In addition, the relationship between the U.S. government and the South Vietnamese government posed legal and logistical challenges. Given their constraints as advisors to the South Vietnamese military, U.S. commanders had no unilateral authority to change POW camps operations, yet they sought throughout the conflict to induce the South Vietnamese to comply with the Conventions. Figure 10 depicts the new norm outcome: an interpretation of the norm such that the United States would apply the Geneva Conventions, even if the combatants technically did not qualify for this treatment under international law.
In light of these challenges, Vietnam provides a fascinating comparison to the GWOT, in which the range of participants in the conflict also included non-signatories to the Geneva Conventions. Unlike in the GWOT, however, decisions were made early in the combat phase of the Vietnam conflict to not exclude these combatants from Geneva protections, but rather to adopt an expansive view of this treatment.

Future research should examine the extent to which this compliance decision was affected by the change in domestic structure with the 1968 presidential election—resulting in President Nixon’s tenure—and the 1968 Congressional election, in which the Republican party netted five seats. This shift in domestic structure and domestic political culture as the Vietnam conflict dragged on could provide a compelling comparison to this first phase of the conflict.
Chapter 4: POW Policy in the Global War on Terror

The GWOT provides a compelling comparison to the Vietnam conflict: in both cases, many of the U.S. opponents technically did not “qualify” for POW status because they did not wear uniforms, did not carry arms openly, and commonly violated the laws of war. Aspects of both conflicts were not directly addressed by the proscriptions of the Geneva Conventions. Whereas insurgents were afforded full Geneva protections in Vietnam, a significant anti-norm constituency existed inside the Bush Administration during the GWOT that opposed this application and promoted a new belief system to replace the embedded norm. This powerful constituency sought to reverse the embedded interpretation of applying the Geneva Conventions, even if the combatants technically did not qualify for this treatment under international law. This constituency argued that the exigencies of the war on terror demanded new standards for treating captured fighters. As a result, this domestic contestation represented the most extensive discussion about the rules governing military conduct in warfare, the definition of torture, and U.S. identity since the Vietnam conflict. This chapter does not attempt to grapple with the complex questions of the true legal character of the captured al-Qa‘ida and Taliban fighters. For the purposes of this research, their classification—as enemy combatants, insurgents, terrorists, or POWs—is less important than the political decision-making and contestation that resulted in their ultimate classification.

This chapter demonstrates how the interaction between the tenets of the Geneva Conventions, actors’ preferences, and domestic structure determined POW decision-making in the GWOT. Due to the nature of the GWOT, a war against non-state actors rather than traditional state opponents, the Bush Administration determined that neither al-Qa‘ida nor the Taliban should receive Geneva Convention protections as POWs. In the case of captured members of al-
Qa‘ida, the Administration determined that because the group was not—and could not be—a signatory to the Conventions, they were not eligible to receive Geneva rights. Whereas the Taliban could reasonably be considered to be representatives of Afghanistan, a signatory to the Conventions, the Bush Administration determined that they relinquished any rights they might have been afforded by failing to meet the Geneva standards for combatants: possessing a responsible command structure; affixing a fixed distinctive sign recognizable at a distance; carrying arms openly; and obeying the laws and customs of war.

Thus, due to the vague proscriptions of the Conventions surrounding non-state actors, significant contestation occurred around the norm. In addition, a significant anti-norm constituency existed inside the Administration, with extensive and continued access to policy-making. Members of this anti-norm constituency included officials in the Department of Justice, Department of Defense, and Office of the Vice President. This constituency promoted a new set of beliefs and legal determinations that initially were included in foreign policy decision-making. However, due to continued contestation and concerns about the material and normative costs of this new interpretation, the new interpretation of the norm was consequently abandoned and the previous interpretation of the Conventions was restored. As a result, this chapter demonstrates that the embedded norm of POW treatment is not static: the norm provided the framework for its own transformation and re-affirmation.

This chapter will first provide the background for the norm behavior, detailing the military action that gave rise to POW questions. It will then emphasize the embeddedness of the POW norm prior to the GWOT by examining the military doctrine and law governing POW treatment. After establishing embeddedness, this chapter will examine the anti-norm constituency that existed during this conflict and their beliefs for a new orthodoxy regarding
prisoner treatment. The chapter will consequently assess the contestation that occurred around this norm, outlining the deliberations between the anti-norm and pro-norm constituencies. It will conclude with an assessment of the applicability of the model to the GWOT case.

**Operation Enduring Freedom and Operation Iraqi Freedom**

Following the attacks of September 11, 2001 against the World Trade Center and the Pentagon, the Administration took immediate action to condemn the perpetrators and the attacks. Unlike in previous conflicts, the United States declared war not against sovereign states, but rather against an amorphous set of enemies. In an address to a joint session of Congress, President Bush stated: “On September the 11th, enemies of freedom committed an act of war against our country. Our war on terror begins with al-Qa’ida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”¹ In a speech to the employees at the Pentagon on September 17, 2001, President Bush stated,

> I know that this is a different type of enemy than we’re used to. It’s an enemy that likes to hide and burrow in, and their network is extensive. There are no rules. It’s barbaric behavior. They slit throats of women on airplanes in order to achieve an objective that is beyond comprehension. And they like to hit, and then they like to hide out… It’s going to require a new thought process. And I’m proud to report our military, led by the Secretary of Defense, understands that; understands it's a new type of war, it's going to take a long time to win this war.²

On September 18, 2001, Congress authorized military action against the “nations, organizations, or persons” that “authorized, committed, or aided the terrorist attacks.”³ In addition to this authorization, the UN Security Council also condemned the attacks, adopting two resolutions in

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September 2001: Resolution 1368, which signaled that the attacks constituted a threat to peace, and Resolution 1373, which sought to prevent the organization, movement, and fund-raising activities of terrorist groups. On October 7, 2001, Operation Enduring Freedom commenced an aerial bombing campaign against the Taliban and al-Qa‘ida in Afghanistan. Twenty-seven coalition countries with forces in Afghanistan deployed more than 14,000 troops in support of the war on terror.\(^4\)

Significant concerns surfaced with regard to whether Common Article 3 and the Third Geneva Convention would apply to the prisoners captured in the coalition campaign. In the field, however, compliance with the embedded norm was initially assumed. According to the Schlesinger Report, the final product of a four-member panel led by former Secretary of Defense James Schlesinger, the Commander of CENTCOM issued an order on October 17, 2001 stating that the Geneva Conventions would be applied according to their embedded interpretation. According to this order,

Belligerents would be screened to determine whether or not they were entitled to prisoner of war status. If an individual was entitled to prisoner of war status, the protections of Geneva Convention III would apply. If armed forces personnel were in doubt as to a detained individual’s status, Geneva Convention III rights would be accorded to the detainee until a Geneva Convention III Article 5 tribunal made a definitive status determination.\(^5\)

This CENTCOM order is consistent with the embedded norm of prisoner treatment, which states when POW status is in doubt, captured fighters shall benefit from Geneva protections until a determination is made about their status.


Whereas compliance was assumed in the field, Geneva standards of protection and guidelines for the interrogation of captured fighters were questioned domestically. Would al-Qa’ida and the Taliban receive the same protections and treatment as members of a uniformed military? And, if not, what standards were they entitled to? Two months after the commencement of Operation Enduring Freedom, President Bush issued a Military Order regarding the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. This order authorized the creation of military tribunals, deprived accused terrorist defendants of trial by an independent court, and restricted the right to choose a defense counsel.

Following the President’s military order, DoD General Counsel William Haynes solicited interrogation information from the Joint Personnel Recovery Agency (JPRA), which trains U.S. personnel to withstand various interrogation measures that are banned under the Geneva Conventions. JPRA oversees Survival Evasion Resistance and Escape (SERE) Training, based significantly on the actions the Chinese Communist regime used against prisoners in the Korean War. SERE training instructs soldiers and sailors to develop immunities to harsh techniques if they are captured in a warfight. These techniques can include: face and body slaps, extreme temperatures, sleep deprivation, hooding, stress positions, subjection to loud music and disruptive light, and waterboarding.6 Thus, as early as December 2001, the Administration sought additional information on tactics and techniques, banned by the Geneva Conventions, which could be used to extract information from captured fighters in the GWOT.

During the early months of the GWOT, the Department of Justice sought to articulate a legal framework for the treatment of the captured fighters. In particular, John Yoo and Robert

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Delahunty, attorneys in the Department of Justice’s Office of Legal Counsel (OLC), authored a memo to Haynes on January 9, 2002, providing an OLC assessment of the detainees’ status. According to this memo, the OLC determined that the Geneva Conventions did not protect al-Qa’ida and the Taliban. This memo argued that the Geneva Conventions applied only to state parties and, as al-Qa’ida was not a state signatory, those prisoners would not be afforded Geneva Convention protection. In addition, despite the fact that the Taliban controlled most of Afghanistan, the memo determined that it was a “militia” that did not abide by the laws of war and thus was also unprotected by the Conventions. The memo further stated that any attempts to restrict the President’s power and authority in wartime—including the treatment of prisoners—would be “constitutionally dubious.” The Yoo and Delahunty memo ultimately provided the analytical framework for the treatment of captured al-Qa’ida and the Taliban fighters. As a result of this analysis, Secretary Rumsfeld issued a memorandum for the Chairman of the Joint Chiefs of Staff on January 19, 2002 that stated that al-Qa’ida and the Taliban individuals were not to receive POW status consistent with the Geneva Conventions.

Sixteen days after the OLC memo was sent to Haynes, then-White House Counsel Alberto Gonzales authored a memorandum for President Bush regarding this decision. In his January 25, 2002 memo, Gonzales articulated the political advantages and disadvantages of refusing Geneva Convention protections to the captured fighters. Gonzales authored this memo in part to address the domestic contestation in the Administration regarding this embedded norm; specifically, Gonzales sought to respond to Secretary of State Colin Powell’s appeal that the President reconsider his determination regarding al-Qa’ida and Taliban detainees. Powell argued

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8 Ibid.
that President Bush faced a choice between two options: determining that the Conventions did not apply on the basis of Afghanistan’s categorization as a failed state; or determining that the Conventions do apply to the conflict, but that members of al-Qa’ida as a group and Taliban individuals or as a group are not entitled to POW status. Powell argued that the President consider applying the latter option—applying Geneva protections to the conflict—because it possessed the advantage of providing a “defensible legal framework” and presenting a “positive international posture, preserv[ing] U.S. credibility and moral authority by taking the high ground, and put[ting] us in a better position to demand and receive international support.”

In his response, Gonzales first asserted the advantages of not affording Geneva protections to the detainees. One of the advantages listed included the ability to:

Preserve flexibility. As you have said, the war against terrorism is a new kind of war…. In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions…

A second advantage of not applying Geneva to the captured fighters is that such a policy would, “substantially reduce the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).” Essentially, the determination that the Geneva Conventions do not apply eliminated the possibility that the War Crimes Act could be leveled against U.S. officials in the course of their treatment of these groups. Notably, this memo also contains several disadvantages of the policy decision not to apply the Geneva Conventions to the captured fighters. First among these reasons is the argument that since 1949, the United States has never denied the

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11 Ibid.
applicability of the Conventions in armed conflict. After the presentation of advantages and disadvantages, Gonzales ultimately concluded that the argument to provide Geneva Convention protections to al-Qa‘ida and Taliban detainees was “unpersuasive.” In light of the “new type of warfare,” Gonzales determined that a “new approach” toward captured fighters was needed. These legal determinations were enveloped in a 7 February 2002 White House directive on the treatment of Taliban and al-Qa‘ida detainees. This directive articulated the standard that would guide detainee policy for the beginning of the GWOT. The directive stated that the Third Geneva Convention did not apply to the conflict with al-Qa‘ida or the Taliban. The memo stated,

Our Nation recognizes that this new paradigm—ushered in not by us, but by the terrorists—requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

Five months after this directive was issued, Richard Shiffrin, a Deputy General Counsel in the Department of Defense, requested information on SERE techniques from Lt. Col. Daniel Baumgartner, then Chief of Staff of JPRA. In response to this request, Lt. Col. Baumgartner returned a two-page memo on July 25, 2002 detailing JPRA’s mission, the role it plays in administering SERE training, a historical overview of effective interrogation methods used against U.S. prisoners, and lesson plans used for JPRA instruction. The memo concludes by stating: “JPRA will continue to offer exploitation assistance to those government organizations

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12 Ibid.
13 Ibid.
14 The directive was sent to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff.
charged with the mission of gleaning intelligence from enemy detainees.”\textsuperscript{16} In his statement before the Senate Armed Services Committee, Lt. Col. Baumgartner acknowledged that he also shared “detainee questioning” information with the Defense Intelligence Agency and “one other agency” during this period.\textsuperscript{17}

One month later, the OLC issued two opinions to the White House about the standards to qualify for torture under Convention Against Torture as embodied in 18 U.S.C. §2340-2340A. These two memos were sent on August 1, 2002 and were signed by Jay Bybee, then Assistant Attorney General for the OLC. Though addressed to Gonzales from Bybee, this memo was authored by John Yoo, according to press accounts and Yoo himself.\textsuperscript{18} The so-called “first Bybee memo” provided an analysis of the conduct allowed under the U.S. federal torture statute. The memo concluded that “acts may be cruel, inhumane, or degrading, but still not produce the pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.”\textsuperscript{19} The first Bybee memo stated that for physical acts to qualify as torture, they must inflict pain that is hard to endure and that “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”\textsuperscript{20} In the case of mental suffering, acts qualify as torture if they result in “significant

\textsuperscript{20} Ibid.
psychological harm or significant duration, e.g., lasting for months or even years.” The “second Bybee memo,” also issued on August 1, 2002, analyzed classified interrogation techniques. This 18-page memo was addressed to John Rizzo, acting General Counsel of the CIA, and examined whether or not proposed actions in the course of the interrogation of Abu Zubaydah, an al-Qa’ida senior leader, would violate federal prohibitions against torture. It analyzed ten techniques to apply to Zubaydah—attention grasp, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and the waterboard—and concluded that these methods, used either separately, or as a course of increasing pressure, would not violate Section 2340 of the U.S. federal anti-torture statute.

One month after the Bybee memos, interrogators and behavioral scientists from Guantánamo Bay traveled to JPRA headquarters at Fort Bragg, North Carolina, and attended training on SERE techniques. After that staff returned from training, senior Administration lawyers, including Haynes and David Addington—counsel to the Vice President—traveled to Guantánamo on September 25. Jonathan Fredman, chief of the CIA’s Counterterrorist Center, similarly traveled to Guantánamo on October 2, 2002 to discuss aggressive techniques. His advice to the interrogators mirrored the analysis in the first Bybee memo. According to the meeting minutes, Mr. Fredman stated:

Under the Torture Convention, torture has been prohibited by international law, but the language of the statutes has been written vaguely. Some mental and

21 Ibid.
22 Concurrent with ongoing litigation, the Department of Justice released the second Bybee memo in April 2009.
physical pain is prohibited... It is basically subject to perception. If the detainee
dies, you’re doing it wrong.25

The memo addressed the potential for a public backlash if a detainee died during interrogation;
thus, it recommended approving and documenting every action. In these same meeting minutes,
LTC Diane Beaver, a member of the Army’s Judge Advocate General Corps assigned to
Guantánamo, also acknowledged the public diplomacy disaster that could result from an ICRC
condemnation. She stated:

Disrupting the normal camp environment is vital. We need to create an
environment of ‘controlled chaos.’ [Sleep deprivation] is officially not happening.
It is not being reported officially. The ICRC is a major concern. They will be in
and out, scrutinizing our operations, unless they are displeased and decide to
protest and leave. This would draw a lot of negative attention.26

One week later, MG Michael Dunlavey, Commander of Joint Task Force 170 at
Guantánamo, sent a memo to U.S. Southern Command requesting the authority to use more
aggressive interrogation techniques. This October 11, 2002 memo outlined three categories of
interrogations techniques, ranging from least aggressive to most aggressive. Category I
techniques included yelling, deception, employing more than one interrogator, or recognizing the
interrogator as a citizen of a country known for harsh tactics. Category II techniques included
stress position “for a maximum of four hours,” isolation for up to 30 days, the use of false
documents, hooding, sensory deprivation, forced grooming, nudity, 20 hour long interrogations,
removal of all comfort items (including religious material), and the use of individual phobias to
induce stress. Category III techniques included exposure to cold weather or water; the use of
scenarios to convince the detainee that death is imminent for himself or his family; grabbing,
poking, and light pushing; and the use of a wet towel to induce the feeling of suffocation, or

Agency (Department of Defense, 2002).
26 Ibid.
waterboarding.\textsuperscript{27} Accompanying this memo was a legal analysis conducted by LTC Beaver, which stated that the “proposed strategies do not violate federal law.” On October 25, 2002, General James Hill, Commander of U.S. Southern Command, forwarded the request for more aggressive interrogation techniques to the Chairman of the Joint Chiefs of Staff.\textsuperscript{28}

Despite these legal analyses, the Services resisted these new standards for interrogation and expressed their reservations to the DoD General Counsel. The Air Force argued that some of the techniques under Category III could be construed as torture under 18 U.S.C. §2340. The memo stated that, “Implementation of the proposed techniques would require a change in Presidential policy.”\textsuperscript{29} The Criminal Investigative Task Force’s (CITF) Chief Legal Advisor expressed his concerns about liability under the UCMJ for the use of misuse of the proposed techniques.\textsuperscript{30} The Army concurred and stated that the Category III techniques violated “various UCMJ articles.”\textsuperscript{31} The Army memo further stated that,

From a policy standpoint, employing many of the suggested techniques would create a PA [public affairs] nightmare. The War on Terror is expected to last many years and ultimate success requires strong domestic and international support. Whatever interrogation techniques we adopt will eventually become public knowledge. If we mistreat detainees, we will quickly lose the moral high ground and public support will erode. The techniques noted above will not read well in either the New York Times or the Cairo Times. Additionally, many of the techniques arguably violate the torture and inhumane treatment provisions of the ICC. While we may not be subject to the ICC, failure to adhere to these

\textsuperscript{31} John Ley, "Memorandum for Legal Counsel to Chairman, Joint Chiefs of Staff Regarding Sjs 02-06697," ed. Department of the Army (2002).
provisions severely undercuts our stated position that we follow international law and principles and will police our own.³²

Both the Navy and the Marine Corps expressed similar reservations. The Navy expressed concern that public awareness of the employment of these techniques would lead to international scrutiny.³³ Similarly, the Marine Corps stated,

While the principle of Geneva may be “waived” because of military necessity, humane treatment is not subject to waiver. In addition, several of the Category II and II techniques arguably violate federal law and would expose our Service Members to possible prosecution.³⁴

In this way, the Chief Legal Advisor in each military service—Air Force, Army, Navy, and Marine Corps—argued that additional analysis was required before the implementation of these new standards in light of potential domestic prosecution and international and domestic backlash.

In light of these memos and reservations, DoD General Counsel issued a memo on November 27, 2002 that withdrew all Category III techniques except for one: grabbing, poking, and light pushing.³⁵ Thus, of the original eighteen techniques proposed in the October 11, 2002 JTF Memo, Haynes approved fifteen of the eighteen. On December 2, 2002, Secretary of Defense Rumsfeld signed Haynes’s memo, agreeing with the recommendation that fifteen of the eighteen techniques should be employed. The bottom of the signed Haynes memo includes a now famous handwritten note by Rumsfeld, quipping (with regards to the four-hour limit of stress positions), “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”³⁶

³² Ibid.
³⁶ Ibid.
Immediately following Rumsfeld’s memo authorizing the new interrogation techniques, the staff at GTMO circulated a memo entitled “JTF GTMO ‘SERE’ Interrogation Standard Operating Procedures” on December 18, 2002. These procedures were to be followed for detainee interrogations, based on the assumption that these SERE tactics were appropriate and acceptable to “break real detainees during interrogation.” Immediately following the authorization of these procedures, additional red flags were raised in the field about the unintended consequences of this policy. CITF argued on December 17, 2002 that the use of these more aggressive tactics would reinforce the negative perceptions of the United States held by members of al-Qa’ida. “In essence, we end up proving ourselves worthy of the righteous resolve and inspiring continued resistance.” Despite this warning, on December 30, 2002, SERE specialists traveled to GTMO for the purpose of instructing staff there on “physical pressures” training. Two SERE instructors from JPRA taught these techniques to 24 personnel at GTMO.

While more aggressive policies were being implemented in the field, a battle was waging inside the Pentagon between proponents and opponents of the POW norm. While serving as General Counsel of the Navy, Alberto Mora learned from the Director of the Naval Criminal Investigative Service (NCIS) on December 17, 2002 that some detainees in Guantánamo were being subjected to “physical abuse and degrading treatment.” According to the NCIS, the treatment had been administered by individuals attached to JTF-170 and authorized at a “high level” in Washington. The NCIS Chief Psychologist reported that the treatment “would violate

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the interrogation guidelines taught to military and law enforcement personnel and believed they were generally violative of U.S. law if applied to U.S. persons.41 On December 19, 2002, Mora reported his concerns to the Army General Counsel Steven Morello, who provided Mora with a copy of the December 2, 2002 memo from Donald Rumsfeld that approved the use the fifteen interrogation techniques in Guantánamo. The next day, Mora briefed Navy Secretary Gordon England on the NCIS report of detainee abuse and met with Haynes, who informed Mora that those techniques did not constitute torture. Mora was concerned, however, that some of the techniques authorized in Rumsfeld’s memo could rise to the level of torture.42 On January 9, 2003, Mora met again with Haynes, who told him that the coercive techniques had not been stopped because some U.S. government officials believed that the new techniques were vital to obtain information about al-Qa‘ida operations.43

On the basis of Mora’s concerns about the applicability and legality of these techniques, Secretary Rumsfeld created a working group on January 15, 2003 to assess the legal, policy, and operational issues related to detainee interrogations and to develop recommendations by the end of that month on detainee interrogation issues. The working group was advised that the OLC would be developing a comprehensive legal memorandum to serve as definitive guidance for these issues. On January 15, 2003, Secretary Rumsfeld rescinded his December 2, 2002 memo authorizing the interrogation techniques.

While these legal definitions were being developed and refined by members of the Administration, press accounts surfaced that the U.S. government was subjecting detainees to treatment that violated the laws of war, customary international law, and U.S. domestic law

41 Ibid., 4.
42 Ibid., 7.
43 Ibid., 10-11.
against torture. One month after the U.S. Army reported that seventeen soldiers had been removed from duty for mistreating Iraqi soldiers, CBS’s *60 Minutes II* broadcast the details of the story in April 2004. The CBS segment detailed accounts of physical, psychological, and sexual abuse of individuals held at Abu Ghraib prison in Iraq at the hands of the 372nd Military Police Company of the U.S. Army. The photographs shown during the *60 Minutes* segment graphically portrayed U.S. soldiers humiliating and abusing Iraqi prisoners through forced nudity, stress positions, and the use of dogs to frighten them. Further allegations of torture by journalist Seymour Hersh in *The New Yorker* and revelations of the existence of “black site” covert prisons by *The Washington Post* reporters Dana Priest and Barton Gellman stunned many domestic and international observers and caused some to question not only the U.S. commitment to the Geneva Conventions, but also the viability of the Conventions themselves. Non-government organizations were also instrumental in calling attention to counter-normative behavior. Notably, the American Civil Liberties Union used the Freedom of Information Act to acquire documents regarding the military, FBI’s, and CIA’s decision-making; in addition, Human Rights First supported a lawsuit against former Secretary of Defense Rumsfeld on behalf of captured prisoners.

**Executive Branch Response**

In response to the uproar sparked by the Abu Ghraib photos, the Justice Department summarily rescinded the Bybee memo and issued a statement reaffirming the U.S. commitment to humane treatment of prisoners in December 2004. This December 2004 memo states:

Torture is abhorrent both to American law and values and to international norms... Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum (“Bybee memo”), and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent in intensity to the pain accompanying
serious physical injury, such as organ failure, impairment of bodily function, or even death.” We decided to withdraw the August 2002 Memorandum… This memorandum supersedes the August 2002 Memorandum in its entirety.

In addition, the Department of Defense conducted a series of internal investigations to determine the standard of treatment provided to detainees while in U.S. custody and to ascertain the political and military motivations that drove DoD behavior regarding detainee treatment. The Jacoby Report, conducted in June 2004 by BG Charles Jacoby, investigated detainee treatment in Afghanistan. The Jacoby Report affirmed that the humane treatment of detainees was U.S. policy; however, U.S. military commanders in the field often relied on their own judgment rather than doctrinal guidance regarding the treatment and handling of prisoners. The second DoD report on detainee policy, the Formica Report, was conducted by BG Richard Formica in November 2004 and assessed detention operations in Iraq. LG Richard Sanchez, Commander of the Multinational Force in Iraq, commissioned Formica to determine the level of compliance in Iraq with DoD guidelines on detainee treatment. Formica’s report, while heavily redacted, states that units should, “prevent a recurrence of conditions such as those at [REDACTED] which, in my opinion, did not comport with the spirit of the principles set forth in the Geneva Conventions.”

The Formica Report revealed that commanders in Iraq relied on outdated policy, specifically the rescinded guidance that authorized an expansive list of authorized techniques in interrogations, and subsequently misunderstood which techniques were permitted. Other DoD reports—the Taguba Report, the Schlesinger Report, the Fay-Jones Report, and the Mikolashek

Report—were released to the public in 2004 and addressed detainee policy. The Taguba Report stated:

Very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention Relative to the Treatment of Prisoners of War, FM 27-10, AR 190-8, or FM 3-19.40. Moreover … few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees.47

The Schlesinger Report noted that the Department of Defense had already begun to deal with the “personal and professional failures” that resulted in the abuses of detainees.48 The Fay-Jones report states that the events at Abu Ghraib occurred because of “misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and Soldiers… and a failure or lack of leadership by multiple echelons.”49 The Mikolashek Report denied any systemic failures and determined that, “The abuses that have occurred in both Afghanistan and Iraq are not representative of policy, doctrine, or Soldier training.”50

In 2006, the Schmidt Report, the Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, and the Church Report, conducted by Naval Inspector General Vice Admiral Albert Tom Church III that examined DoD interrogation policies in Guantánamo, Iraq, and Afghanistan, were both released to the public. All of the documents reflected the internal analysis occurring in the DoD with regards to detainee treatment, appropriate policy, and U.S. military identity. Taken together, the reports recognize that violations of the Geneva Conventions occurred during the GWOT, yet the reports differ in the

48 Schlesinger, (accessed).
causes of this abuse, ranging from doctrinal confusion, poor education and training, to failures of leadership.

As a result of these investigations and internal discussions, the Department of Defense issued a new set of interrogation rules specifically designed to prevent the techniques that occurred at Abu Ghraib. In September 2006, the Department of Defense promulgated DoD Directive 2301.01E, which revised the DoD’s detainee policy and fostered a new direction for the Department’s detainee responsibilities. These new guidelines required,

At a minimum, that all detainees in the custody of the Defense Department be treated in a manner consistent with the requirements of Common Article 3 of the Geneva Conventions that prohibits cruel, inhumane or degrading treatment or punishment.  

At a minimum, this stipulation recognized that some of the treatment of captured fighters in the GWOT failed to meet this threshold. DoD Directive 2301.01E affirmed that, “it is DoD policy that all detainees should be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.” In addition, the Army published a new army field manual, Human Intelligence Collector Operations (FM 2-22.3), which provided guidelines for prisoner interrogations. FM 2-22.3 provided extensive detail about who qualifies for POW status and stated that, “There will be no difference in the treatment of a detainee of any status from the moment of capture until such a determination is made.” It described prohibited interrogation techniques, including acts that specifically refer to Abu Ghraib. The manual stated: “If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to:

52 Defense, "Dod Law of War Program (Dod Directive 2311.01e)."
• Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
• Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
• Applying beatings, electric shock, burns, or other forms of physical pain.
• “Waterboarding.”
• Using military working dogs.
• Inducing hypothermia or heat injury.
• Conducting mock executions.
• Depriving the detainee of necessary food, water, or medical care.\textsuperscript{54}

In addition, the 2006 counterinsurgency (COIN) manual, FM 3-24, emphasized that compliance with Common Article 3 of the Geneva Conventions and domestic law in COIN operations is not only consistent with international law, but is also a military priority. FM 3-24 explicitly tied the prohibition of excessive force with the successful operation of the COIN campaign and stated that U.S. military forces should not harm detainees because violence toward captured fighters is counterproductive. It stated:

One of the insurgents’ most effective ways to undermine and erode political will is to portray their opposition as untrustworthy or illegitimate… To combat these efforts, Soldiers and Marines treat noncombatants and detainees humanely, according to American values and internationally recognized human rights standards. In COIN, preserving noncombatant lives and dignity is central to mission accomplishment.\textsuperscript{55}

According to this manual, harming detainees inhibited the ability to win “hearts and minds” and resulted in poor HUMINT. FM 3-24 stressed the important HUMINT advantages to be gained from detainee interrogations, and argued that, “All questioning of detainees is conducted to comply with U.S. law and regulation, international law, execution orders and other operationally specific guidelines.”\textsuperscript{56} It further stated that,

While enemy prisoners in conventional war are considered moral and legal equals, the moral and legal status of insurgents is ambiguous and often contested. What is not ambiguous is the legal obligation of Soldiers and Marines to treat all prisoners and detainees according to the law. All captured or detained personnel,

\textsuperscript{54} Ibid.
\textsuperscript{55} Petraeus and Mattis.
\textsuperscript{56} Ibid.
regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005 and DODD 2310.01E.\textsuperscript{57}

FM 3-24 thus goes farther than previous manuals in prohibiting force—stating that it is not only against international and domestic law, but because using force against captured enemy forces is “immoral” and a betrayal of “standards of the profession of arms and U.S. laws.”\textsuperscript{58}

The Bush Administration issued an Executive Order in July 2007 requiring the CIA interrogators to comply with federal statutes:

Including the prohibition on ‘cruel, inhuman, or degrading treatment or punishment’ in the Detainee Treatment Act of 2005, the federal prohibition on torture, and the War Crimes Act, all of which protect against violations of Common Article 3.\textsuperscript{59}

Lastly, as one of his first actions as President, Obama issued an executive order to close Guantánamo Bay within the year and to ban harsh interrogation tactics.

\textit{Legislative Branch Response}

The Legislative Branch has further contributed to the investigation of U.S. norm decision-making. Many Generals and members of the Administration have been called to testify—and continue to be called—in an attempt to understand this decision-making process. In addition, through hearings, reports, and legislation, the Legislative Branch has acted to re-affirm the embeddedness of the Geneva Convention norm in U.S. domestic practice. Under the 110\textsuperscript{th} session of Congress, legislators in both the House of Representatives and the Senate introduced bills to restore \textit{habeas corpus} for individuals residing in Guantánamo Bay. Legislators also sought to amend the Detainee Treatment Act to include waterboarding under the category of “cruel, inhuman, and degrading treatment.” Furthermore, in June and September 2008, the

\textsuperscript{57} Ibid.

\textsuperscript{58} Ibid.

Senate Armed Services Committee (SASC) under Senator Carl Levin conducted an inquiry into the treatment of detainees in U.S. custody. The SASC report—issued jointly by Senator Levin and Senator John McCain—rejected the narrative that the abuses committed represented the actions of a few individuals. The report argued that the abuses reflected a systemic policy, in which “senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”

In June 2008, Congress sent a letter to Attorney General Michael Mukasey requesting the appointment of a special counsel to investigate whether the Bush Administration’s detainee interrogation policies violated federal law. Fifty-six members of the House of Representatives signed this letter.

The 111th Congress has also vigorously worked to assess the allegations of torture against the Bush Administration. The Senate Select Committee on Intelligence has worked to provide an unclassified, public narrative of how the OLC opinions were derived. In addition, the House Judiciary Committee in April 2009 requested that Attorney General Holder nominate a special counsel to investigate instances of torture against detainees. Lastly, the Senate Judiciary Committee called for a nonpartisan commission of inquiry to investigate instances of rendition, torture, and indefinite detention. Several pieces of legislation have been introduced to limit the use of certain interrogation techniques and to require notification of the International Committee of the Red Cross of U.S.-held detainees.

Judicial Branch Response

The Judicial Branch also examined the legality of the military commissions and legal

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directives issued during the GWOT. In four notable Supreme Court cases—*Hamdi v. Rumsfeld*, *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*—the Court checked the power of the Executive and Legislative Branch during this conflict and called into question the Administration’s norm behavior. In *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), the Court ruled that Hamdi, a U.S. citizen held as an enemy combatant in a military brig, had the right to contest his classification before a judge or other neutral decision-maker. The Supreme Court thus rejected the position that executive branch officials were the sole arbiters of whether there was sufficient basis to hold persons as enemy combatants. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that federal courts have the jurisdiction to hear the *habeas corpus* petitions of Guantánamo detainees. In addition, the Supreme Court affirmed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the military commissions established by the Bush Administration violated international law and were unauthorized by federal law. The Court ruled that Hamdan’s trial by military commission was unlawful because it proceeded without the determination by a competent tribunal that he was not a POW. The Court further held that Common Article 3 of the Geneva Conventions was applicable to the prisoners held at Guantánamo Bay, despite the fact that the combatants were non-state actors. Lastly, *Boumediene v. Bush*, 553 U.S. 723 (2008) affirmed that prisoners held at Guantánamo Bay have *habeus corpus* rights under the U.S. Constitution. This ruling also struck down a component of the Military Commissions Act of 2006, which denied federal *habeas corpus* jurisdiction over the combatants imprisoned at Guantánamo Bay. The decision represented the first time in U.S. history that the Supreme Court has held that an act of Congress violated the Suspension Clause of the Constitution, affirming that the privilege of the writ of *habeas corpus* shall not be suspended.
Military Doctrine Guiding POW Treatment

When Operation Enduring Freedom and Operation Iraqi Freedom began, Army FM 34-52, updated in 1992, governed interrogation rules and procedures. As mentioned in Chapter 2, FM 34-52 highlighted the importance of adhering to humane standards of treatment because of both domestic law and international law. It strictly prohibited the use of force in interrogations and emphasized that,

Acts of violence or intimidation, including physical or mental torture, or exposure to inhumane treatment as a means of or aid to interrogation are expressly prohibited. Acts in violation of these prohibitions may be a violation of U.S. law and regulation and the law of war, including the Geneva Conventions of 1949, and may be criminal acts punishable under the UCMJ and other U.S. law. Moreover, information obtained by the use of these prohibited means is of questionable value.\(^{61}\)

In addition, significant training on the laws of war existed prior to the GWOT. DoD Directive 5100.77—the law of war program—articulated that each Service component was required to “institute and implement” a law of war training program. Prior to deployment in the GWOT, all service members—both enlisted and officers—received at least a minimum orientation in the Geneva Conventions and the law of war.

Contestation

As mentioned in Chapter 1, the first step in the process of norm contestation is examining the norm itself. I hypothesize that there is a higher probability for domestic contestation when aspects of the armed conflict are not specifically addressed by the proscriptions of the norm. It is instructive to compare the intense domestic contestation over the Conventions during the GWOT with the previous 1991 Persian Gulf War, as this conflict represented the most recent major

engagement of the U.S. military in a conventional battlespace. According to the DoD’s Final Report to Congress on the Conduct of the Persian Gulf, “Coalition care for EPWs was in strict compliance with the 1949 Geneva Convention relative to the treatment of Prisoners of War.”62 In fact, relative to the length of the military campaign, the Persian Gulf War was the most extensive U.S. POW operation since World War II.63 U.S. forces captured enemy combatants from one month before the commencement of ground operations until the March 3, 1991 surrender of Iraqi forces.64 U.S., French, and British forces captured and held 69,882 Iraqi prisoners during the conflict in U.S.-constructed POW camps. These prisoners were subsequently turned over to Kingdom of Saudi Arabia forces after the cessation of armed conflict.65 The 800th Military Police Brigade, which would one decade later be investigated for the abuses at the Abu Ghraib prison, conducted tribunals to determine the status of the captured individuals who claimed to be displaced civilians. During this conflict, 1,196 Article 5 tribunal hearings were conducted, resulting in 310 persons being granted POW status and the rest were treated as refugees and released to U.S.- and Saudi-operated refugee camps.66 In fact, following the conclusion of U.S. custody of Iraqi prisoners, ICRC officials reported that treatment of Iraqi prisoners by U.S. forces complied more fully with the Geneva Conventions than the treatment provided by any other state in any previous conflict.67 A monograph assessing the role of Army reservists in the Persian Gulf War stated that,

The United States had to demonstrate to the World—and to Iraq—that it played

63 Ibid.
64 Gephardt, (accessed).
65 Ibid.(accessed).
66 "Final Report to Congress: Conduct of the Persian Gulf War."
by the rules and treated its prisoners with respect and humanity. This was essential to influence global public opinion positively to U.S. policy and U.S.-led actions against Iraq.  

The monograph concluded with an overall assessment of POW policy in the Persian Gulf War and argued that:

- Approval by the ICRC is an important asset for US foreign policy.
- There was a distinct linkage between our treatment of the Iraqis and the release by Iraq of the Coalition prisoners.
- Even more important is that humane treatment of enemy prisoners of war is consistent with our beliefs and our principles.
- Good treatment of the Iraqi prisoners will also have beneficial long-term effects. The United States Army took good care of almost 70,000 Iraqis and put to rest the propaganda of their own Government. Surely this good—even kind—treatment has some positive effect and left some positive feelings toward the United States which just might be helpful in the future.

In fact, one legal advisor to General Norman Schwarzkopf described the Persian Gulf War as “the most legalist war [the United States] ever fought.”

In the case of the 1991 Persian Gulf War, the norm governing POW treatment was very clear about the treatment of Iraqi uniformed soldiers. While legal questions did surface during the conflict regarding POW issues—could POWs be used for psychological operations or could POWs spy for U.S. forces—no legal questions arose regarding the application of the Conventions and subsequent humane treatment of the Iraqi prisoners. The captured fighters were members of the Iraqi uniformed military and Iraq was a signatory to the Geneva Conventions. By contrast, the Geneva Conventions possessed a lacuna with regards to the treatment of the

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69 Ibid., 67-68.

captured fighters in the GWOT, leaving it open for contestation. Figure 11 demonstrates the contestation that occurred during the Bush Administration.

**Figure 11: Contestation During the Bush Administration**

The second step affecting compliance decision-making regarding an embedded norm is the presence of constituencies who support or oppose the norm. I hypothesize that the presence of anti-norm constituencies and their access to and influence over the foreign policy decision-making process greatly affects the probability of deviation from compliance. In the Bush Administration, many actors opposed the standards articulated in Geneva as they were deemed outdated, outmoded, and ineffective in confronting the realities of a war against a non-state actor. The belief that the GWOT was an unprecedented geopolitical event requiring new rules and standards was repeated by various members of the Administration. Secretary Rumsfeld argued that, “They will be handled not as prisoners of wars, because they're not, but as unlawful combatants. The—as I understand it, technically unlawful combatants do not have any rights
under the Geneva Convention.” As a result of this new era of warfare—characterized by warfare against non-state actors and not regular foreign armies—the historic rules of warfare were challenged. As Alberto Gonzales stated in his January 25, 2002 memo to the President,

> The 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. 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 constituency possessed institutionalized and ongoing access to decision-makers. Even though many vocal anti-norm constituents were not principals of their offices—Feith, Addington, and Yoo—their memos and beliefs memos reached and influenced the highest echelons of U.S. government because they had sympathetic recipients at higher levels of decision-making.

In fact, the anti-norm constituency represented the broader ideological position that norms such as the Geneva Conventions should not constrain the Executive Branch during war. The war on terror demanded new rules, new norms, and a new approach to Geneva Convention compliance. As such, the President required an expanded scope of executive power to protect the American citizens from additional attacks and to punish those who threatened the safety of the country. The underlying view expressed in the OLC opinions argued that it was the President’s prerogative to take any action he deemed necessary to both respond to the September 11 attacks and to prevent any future attacks. In the words of John Yoo,

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72 Gonzales.

73 Jane Mayer, *The Dark Side: How the War on Terror Turned into a War on American Ideals* (New York, NY: Doubleday, 2008), 64.
In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the long-standing practice of the executive branch, and the express affirmations of the President’s constitutional authorities by Congress, we think it is beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001.\textsuperscript{74}

The anti-norm constituency consisted of members of the Department of Justice, the Department of Defense, and the Office of the Vice President.

\textit{Department of Justice}

The OLC constituted a significant anti-norm faction in the Administration, particularly through the legal analyses of John Yoo and Jay Bybee. Yoo had previously been a faculty member at the University of California at Berkeley’s Boalt Hall School of Law, clerked for Supreme Court Justice Clarence Thomas, and served as general counsel to the Senate Judiciary Committee under Orrin Hatch. As an OLC staff attorney, Yoo reported to Jay Bybee, who served as Assistant Attorney General for the OLC from 2001 to 2003 and had been the Associate White House Counsel from 1989-1991. Unlike Yoo, however, Bybee lacked any significant background in international law. Yoo strongly believed that the war on terror placed “unique demands”\textsuperscript{75} on policy-making and claimed that,

\begin{quote}
To pretend that rules written at the end of World War II, before terrorist organizations and the proliferation of know-how about weapons of mass destruction, are perfectly suitable for this new environment refuses to confront new realities.\textsuperscript{76}
\end{quote}

According to Yoo, the character of the opponent—a non-state actor potentially armed with

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\textsuperscript{75} John Yoo, \textit{Terrorists Have No Geneva Rights} (2004, accessed October 8 2008); available from \url{http://www.opinionjournal.com/extra/?id=110005144}.
\end{flushleft}
WMD—invalidated any U.S. obligations under the historical rules of warfare. Importantly, Yoo argued that treatment of al-Qa‘ida and Taliban detainees was not a question of law, but rather of policy. He stated that the decision of what treatment to afford the detainees required a measurement of the political costs and benefits of specific policies.\(^77\) Yoo believed that customary international law did not constitute federal law because it was not given that authority by the Supremacy Clause of the Constitution; therefore, the Geneva Conventions were not binding on U.S. practice in war. Yoo further argued that al-Qa‘ida and the Taliban forfeited their rights to Geneva status by violating the laws of war. In his view,

Al-Qa‘ida violates every rule and norm developed over the history of war. Flagrant breach by one side of a bargain generally releases the other side from the obligation to observe its end of the bargain.\(^78\)

The OLC attorneys thus determined a conflict between the policy goals of the Administration in conducting the GWOT and the norm governing POW treatment. They issued a series of opinions from 2001 to 2003 stating that it was the President’s prerogative to take any action he deemed necessary to both respond to the September 11 attacks and to prevent any future attacks, regardless of the stipulations of the Geneva Conventions.\(^79\)

**Department of Defense**

The attorneys at the OLC comprised only one component of the anti-norm constituency in the Bush Administration. In the Department of Defense, Secretary Rumsfeld, General Counsel William Haynes, and Under Secretary of Defense for Policy Douglas Feith all played active roles in redefining the norms governing prisoner treatment. With a career stretching back to the Nixon Administration, Rumsfeld served as both a domestic and foreign policy advisor for several

\(^77\) Ibid., 44.  
\(^78\) Ibid., 23.  
\(^79\) Mayer, 64.
Republican presidents. Secretary Rumsfeld argued that, “The reality is the set of facts that exist today with the al-Qa’ida and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned.” General Counsel William Haynes, also represented this anti-norm constituency. Despite the repeated objections from the branches of the military and specific requests for reconsideration from some of his colleagues, Haynes authored the memo that Rumsfeld would sign authorizing more aggressive techniques to be employed at Guantánamo. In addition, Feith, argued that “If we hand out POW status to fighters who don’t obey the rules, you are undermining the incentive system that was wisely built into the Geneva Conventions.” During the GWOT, Feith authored a memo for Rumsfeld that he shared with President Bush, stating that, “It would defile the Geneva Conventions to extend their rights to such disreputable warriors.”

**Office of the Vice President**

In addition to the anti-norm constituencies that existed in the Departments of Justice and Defense, major players in this period of contestation emerged from the Office of the Vice President, specifically, Vice President Dick Cheney and his General Counsel, David Addington. Just five days after the attacks of September 11, Cheney stated on NBC’s “Meet the Press”: “We also have to work, though, sort of the dark side, if you will… it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.” Addington wrote the text of the

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82 Mayer, 122.
January 25, 2002 memo, which was based on Yoo’s January 9, 2002 memo. He counseled that the Presidential directive regarding detainee treatment be worded to look as though the detainees would be treated humanely, but would be deliberately ambiguous.

Access and Influence

This section posits that the Bush foreign policy style typifies the Type I domestic structure: he relied upon a small, hierarchical group of advisors and it was very hard for outside actors to have access to and influence over the policy process. Members of the anti-norm constituency—Yoo, Rumsfeld, Haynes, Feith, Cheney, and Addington—all possessed institutionalized and ongoing access to decision-making regarding prisoner treatment and generally were successful at excluding any potential dissenters from the decision-making.

While a pro-norm constituency did exist, comprised of the uniformed military services and the State Department, they lacked access to and influence over policy-making. During the decision-making on compliance issues, these constituencies were largely shut out of the process. Whereas State Department attorneys had always been consulted in matters of international law, even if the matter was classified, in 2002, they lacked access over and influence on the process. In fact, “only a small handful of lawyers in the White House, Justice Department, and CIA were involved in drafting and reviewing the interrogation opinion,” and the State Department attorneys were not present. Observers have noted that the State Department attorneys were likely cut out of the process because of their objections to the OLC position regarding the Torture Convention and the Geneva Conventions.

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84 Gellman.
85 Ibid.
86 Goldsmith, 167.
87 Sands, 73.
Military Services

Core members of the military services opposed the Bush Administration’s POW policy. One notable pro-norm actor was Chairman of the Joint Chiefs of Staff, General Richard Myers. Myers believed that it was in U.S. military culture to follow the Geneva Conventions. As quoted in Sands, Myers stated: “When I found out there was a decision pending that the Geneva Conventions would not apply, I thought that was contrary to everything we’ve ever been taught.”88 Myers’ sentiment was echoed by the military services, in particular, the Navy’s response to Rumsfeld’s December 2002 memo authorizing new interrogation techniques. On July 7, 2004, Mora submitted a twenty-two page memo to Vice Admiral Albert Church that chronicled his attempts to provide legal analysis and criticisms of the broadening interrogation policy. In his testimony before the Senate Armed Services Committee in 2008, Mora stated that, “This interrogation policy—which may aptly be labeled a ‘policy of cruelty’—violated our founding values, our constitutional system and the fabric of our laws, our over-arching foreign policy interests, and our national security.”89 In addition, several members of the services submitted their concerns regarding this new detainee policy to Secretary Rumsfeld during the fall of 2002. Memos from the Air Force, the Criminal Investigative Task Force, the Army, Navy, and Marine Corps all expressed concerns that these new standards not only constituted torture, but would ultimately erode U.S. reputation in the international system.

State Department

In addition to the military services, the State Department emerged as a pro-norm constituency. Secretary Powell, Deputy Secretary Richard Armitage, and Chief Legal Advisor to

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88 Ibid., 89.
the U.S. Department of State William Howard Taft IV all articulated their vocal opposition to the proposed new policy. The belief at the State Department was not that the captured fighters were necessarily entitled to POW status, but that they were entitled to a review of their status.\textsuperscript{90}

Powell and Taft sent Yoo a confidential 40-page memo on January 11, 2002 in an attempt to convince him that his analysis regarding POW treatment and the Geneva Conventions was incorrect. According to Taft,

> From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al-Qa‘ida and Taliban detainees in the way we intend to treat them. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations.\textsuperscript{91}

He continued: “The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years.”\textsuperscript{92} Following this memo to Yoo, Powell decided that other principals in the Administration needed to become aware of the consequences of this policy decision. To that end, on January 25, 2002, Powell called Rice to argue that U.S. obligations under the Conventions could not be ignored. He notified her that he had already received cables from allied countries who were dismayed that the United States would abandon its treaty negotiations.\textsuperscript{93} Ultimately, the anti-norm constituency dominated decision-making regarding this norm. Figure 12 illustrates how the anti-norm constituency was able to promote their interpretation of U.S. obligations under the Conventions.

\textsuperscript{90} Gellman.
\textsuperscript{92} Ibid.
\textsuperscript{93} Mayer, 124.
New Belief System

The presence of anti-norm constituencies is a necessary but not sufficient condition for compliance decision-making. The final component of this process is the consolidation around a new orthodoxy to replace the embedded norm. I hypothesize that contestation around the embedded norm will continue until a new set of beliefs emerged to replace the embedded norm or until the anti-norm constituency dissipates. The new set of beliefs that emerged during this period was that the nature of warfare invalidated the protections and rights outlined in the Geneva Conventions and that the President retained the authority for determining interrogation standards.

One of the challenges in this phase is overcoming both the presence of pro-norm constituencies, but also overcoming fears about violating the embedded norm. In the case of the GWOT, members of the Administration were cognizant that not adhering to the embedded norm carried significant material repercussions. According to Jack Goldsmith,
Many people in the government were nervous about implementing the President’s post-9/11 counterterrorism policies: military lawyers objected to military commissions, which departed from well-settled ways of conducting modern military trials; so too did some Justice Department prosecutors, who preferred the civilians trial system where they were in charge; the State Department objected to parts of the GTMO Detention programs; and some in the CIA were reportedly anxious about the special interrogation program for high-value detainees.\(^94\)

In his notable January 25, 2002 memo to the President, Gonzales argued that determining that the Geneva Conventions did not apply to al-Qa‘ida and the Taliban “substantially reduces the threat of domestic criminal prosecution under the War Crimes Act.”\(^95\) In his position as White House Counsel, Gonzales was keenly astute of the domestic legal ramifications for members of the U.S. military who engaged in interrogation techniques that were deemed to violate the Geneva Conventions. According to Philippe Sands, Gonzales believed that the legal opinions of the OLC “were dangerous for the Administration and had to be neutralized.”\(^96\) Fears of breaking the law were expressed by many in the government, including John Bellinger, NSC Counsel. Bellinger told Rice, his principal, that arguing that the Geneva Conventions did not apply placed the President, “in breach of international law.”\(^97\)

In addition to the material consequences of noncompliance, members of the Administration also recognized that the proposed new behavior carried reputational consequences for the U.S. military and U.S. identity. According to Mora,

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\text{The consequences of such practices [at GTMO] were almost incalculably harmful to U.S. foreign, military, and legal policies. Because the American public would not tolerate such abuse, I felt the political fallout was likely to be severe.}^98
\]

The practices proposed by the Bush Administration went against decades of U.S. norm behavior

\(^{94}\) Goldsmith, 131.
\(^{95}\) Gonzales.
\(^{96}\) Sands, 19.
\(^{97}\) Gellman, 169.
in war and against U.S. military culture and doctrine.

As a result, the new belief system proposed—a rejection of the embedded norm and a new frame for detainee treatment—was ultimately rejected due to the material and normative consequences as well as the domestic and international backlash of this position. In this case, the norm laid the groundwork for change but, in conjunction with domestic political factors and strategic interests, the new interpretation was rejected as the costs associated with this new orthodoxy proved to be too substantial.

**Summary and Conclusion**

The integrative compliance model provides a pathway for understanding the decision-making regarding U.S. treatment of captured fighters during the GWOT. This research demonstrated that when tenets of an embedded norm are vague, there is a higher probability for contestation about the application of the norm. Given that the Geneva Conventions only address state actors who are signatories of the Convention, a lacuna existed with regards to the treatment of non-state actors such as al-Qa‘ida and the Taliban. Furthermore, a significant anti-norm constituency existed in the Bush Administration, including members of the Department of Justice, the Department of Defense, and the Office of the Vice President. Not only did individuals in these departments have on-going and institutionalized access to decision-making regarding the treatment of captured fighters, but they possessed a new set of beliefs to replace the embedded norm, namely that type of warfare changed U.S. obligations under international and federal law.
Due to the increasing influence of the pro-norm constituency and the domestic repercussions in the Judicial, Legislative, and Executive branches, the new norm interpretation was abandoned. Beginning in 2004 and continuing through the Obama Administration, the U.S. government renounced this previous interpretation and reinforced its commitment to both federal anti-torture statutes and the Geneva Conventions. In addition, Attorney General Holder released four previously classified OLC memos in April 2009 and announced that the interrogation techniques described in the memos would not be condoned under the Obama Administration.  

As a consequence, the new interpretation has been abandoned and the embedded norm has been reinforced. Future research should examine the extent to which this compliance decision was affected by both the change in domestic structure with the mid-term Congressional elections in

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2006 and the 2008 presidential election.

The case of the GWOT provides an interesting puzzle for examining compliance with the embedded norm of POW treatment. Time and time again, the Bush Administration sought legal solutions to conduct its security policy, reaffirming the extent to which the Conventions still provided the frame for decision-making. What is puzzling is that a similar amount of effort was spent making the opposite determination during the Vietnam conflict: that prisoners were entitled to expansive rights no matter what side they were on or what kind of war they were fighting.
Conclusion: After Embeddedness

Constructivism seeks to privilege agency and offer an account of where and when change may occur; recent scholarship, however, has fallen short of these scholarly aspirations. Too often constructivist analysis has assumed that once embedded, norms structure state interests and decision-making. Existing scholarship has overlooked how norms change in the domestic context and how actors make choices all the time about compliance. This static view of embedded norms and their effect on decision-making is surprising, given that constructivism promotes the possibility of transformation based on agency. Since its emergence as a mainstream approach in the last twenty years, constructivists have demonstrated that international relations is more complex than a balancing act between realism and liberalism. Early constructivist research focused on the end stage of compliance and sought to prove that norms have a causal impact on state behavior. A second wave of constructivism engaged in middle-range theorizing to determine why, when, and which norms matter. A third wave of constructivist scholarship is needed to specify the effects of norms after they become embedded in a state’s domestic framework and what factors account for their influence or lack of influence on state compliance decision-making.

This research concludes that after embeddedness, a new phase of the norm’s life cycle commences in which actors struggle with the norm’s interpretation and constituencies consolidate in support of and against the norm. In this phase of contestation, a subset of society believes the norm is inadequate and a subset of society accepts its embedded tenets, competing norms and beliefs emerge, and actors weigh the instrumental and normative benefits to be gained from compliance and non-compliance. Simply put, actors have a range of compliance options.
Preferences, strategic interests, access, and influence determine the choice between these options. Embeddedness is thus the beginning—rather than the end—of the norm story.

In particular, this research has examined the case of the embedded norm governing POW treatment. This norm was chosen for study because American identity is inextricably linked with the idea of the humane treatment of individuals in our custody during war. The norm governing POW treatment has informed U.S. military practice since the Revolutionary War and has been codified in U.S. military doctrine since the Civil War. Based on its doctrine regarding prisoner treatment, U.S. military manuals were used as models for European manuals in the late 1800s. In the last 150 years, the United States participated in the vast majority of international conferences that developed or modified the laws of war and thus has played an instrumental role in developing the laws of war as they exist today. In addition, the norm has been integrated into U.S. military law, assimilated into military doctrine, and extensively promoted through military training and education. The norm governing POW treatment represents a deeply embedded norm; if any norm should possess universal compliance, according to constructivist predictions, it would be this norm.

Yet, this research has demonstrated that compliance with the norm governing POW treatment is anything but universal. In the recent GWOT, captured combatants were subject to beatings, sodomy, sleep deprivation, water boarding, guard dogs, hooding, prolonged nudity, and psychological abuse that defies even Common Article 3’s minimum prescription that all captured individuals—insurgents and terrorists included—have the right to be treated humanely at all times. The photographs from Abu Ghraib and the narratives from Guantánamo brought the question of Geneva Convention compliance and U.S. identity to the center of public debate in the United States and abroad. These photos and stories also served as a powerful recruiting tool for
al-Qa‘ida and the Taliban, who pointed to images from Abu Ghraib, the continued existence of Guantánamo, and the weak prosecution of the responsible individuals as further evidence of U.S. inhumanity. U.S. prisoner treatment threatened to undermine vital counterterrorism cooperation from our Western allies, who viewed these actions as inconsistent with their own and U.S. values. Lastly, it challenged the identity of the United States itself and called into question our historic commitment to upholding the law and basic principles of human rights. How did this happen? The answer can be found through an examination of the domestic politics of this embedded norm. Though the norm was deeply embedded, the Conventions were vague and imprecise about the treatment of non-state actors, such as terrorists and insurgents in an international armed conflict. As a result of this lacuna, domestic actors who had a preference for a new interpretation of the norm and who also possessed access to and influence over the policy-making process challenged the existing, agreed-upon understanding and proposed a new interpretation of U.S. obligations to captured combatants.

Prisoner policy and treatment in the GWOT sharply contrast with the case of the Vietnam conflict. During the Vietnam conflict, the United States was also faced with an opponent, the Viet Cong, who did not represent a state signatory to the Geneva Conventions. As a result, the U.S military was under no international legal obligation to provide Geneva standards of treatment. Despite this reality, the United States did not waver in its application of the Geneva Conventions to the full range of combatants and did not hesitate to apply pressure to the South Vietnamese government to comply as well. U.S. policy-makers and the MACV made the decision early in the combat phase of the conflict to provide full Geneva protections to not only the captured North Vietnamese fighters but also the Viet Cong. From the onset of the war and the initial letter from the ICRC stating that the conflict in Vietnam had escalated to the level of
“international armed conflict,” the United States pledged its willingness not only to comply with the norms governing POW treatment but to develop broad definitions for POWs, which were even more generous than those definitions provided in the Geneva Conventions. What was the reason for broad POW definitions? Similar to the GWOT, there were domestic actors who had a preference for a new interpretation of the norm and who possess access to and influence over the policy-making process. Yet, unlike in the GWOT, this constituency believed that the goal of the conflict was “not so much to destroy an enemy as to win a people.” Rather than exploiting the norm’s ambiguity regarding the treatment of the Viet Cong to deny them Geneva protections, U.S. policy-makers sought to use the expansive definition of Geneva rights to demonstrate the attractiveness of democracy and the benevolence of the United States. The Johnson Administration determined that in order to gain the popular support it needed—both domestically and internationally—to confront the Vietnamese insurgency, the United States must be seen as a defender of human rights. Both of these cases demonstrate that when a lacuna exists in an embedded norm, actors’ preferences and their ability to affect the decision-making process determines the ultimate compliance outcome. In order to explain the variation in POW decision-making in these cases, examining the preferences of political and military constituencies provides the answer.

This chapter first summarizes the manuscript’s conclusions regarding the suitability of the integrative compliance model to the analysis of embedded norms. This research demonstrates that while it provides a generalizable framework to studying compliance decision-making regarding embedded norms, it possesses some limitations. The primary limitation of the model is an under-specification of actors’ access and influence; as a result, this chapter provides some measures to improve the durability of this model. Then, this chapter will outline the theoretical
implications of this study—bridging the gap between rationalism and constructivism, analyzing norm change in the domestic context, and reaffirming the importance of agency in constructivism—before addressing the policy ramifications of this research. Lastly, additional areas of research will be recommended.

**Integrative Compliance Model**

This research develops an integrative model for assessing compliance with embedded norms in light of the recognition that existing realist and constructivist models provide an overly parsimonious, and often inaccurate, portrait of compliance behavior. Realists argue that states will comply with embedded norms when compliance promotes their strategic interests and will not comply when the norm conflicts with state interests. Constructivists argue, on the other hand, that after norms become embedded in a state’s domestic laws and culture, they are “taken for granted” by policy-makers and society. Compliance is thus assumed to be automatic. Yet these binary outcomes do not account for the full range of norm behavior. In both the Vietnam and GWOT case, the embedded norm provided the parameters for the POW decision, but normative and material interests shaped the ultimate compliance outcome. In the case of the Vietnam conflict, policy-makers constantly referred to the tenets of Geneva, but made the decision to expand the Geneva standards based on their instrumental calculation of the U.S. national interest. In the case of the GWOT, it is telling that even when members of the Bush Administration sought a new interpretation of U.S. legal obligations under the Geneva Conventions, they consistently framed their arguments in terms of the Conventions. Thus, embedded norms provide the context in which actors make choices about compliance based on normative and material calculations. The integrative compliance model can be found below in Figure 14.

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1 Finnemore and Sikkink, "International Norm Dynamics and Political Change."
Figure 14: Integrative Compliance Model

Step One: Embeddedness

The first step of this model is embedding the norm itself. Embedded norms are integrated into domestic law, assimilated into doctrine, and included in actors’ belief structures to the extent that they provide the frame for decision-making. Contrary to realist assumptions, embedded norms constrain strategic actors’ decision-making and shape calculations of their self-interest, as even strategic maximers evaluate the costs and benefits—both material and normative—of particular actions and calculate how other actors will respond to that compliance decision. In order to make these assessments, the actor must understand the social context in which he or she operates. An infinite range of possible compliance decisions does not exist, because all of the outcomes are inevitably constrained by the embedded norm.

Even embedded norms, however, possess gaps and vagueness, as situations arise over time that are not clearly covered by the existing interpretations. International law, almost by definition, is imprecise. According to H.L.A. Hart,
Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or “open texture.”

Even the most commonly accepted rules are not clear, either in terminology or scope. In the case of the Conventions, this ambiguity occurs when combatants do not readily fall into the categories outlined by the Conventions: in the Vietnam conflict, these combatants included the Viet Cong; in the case of the GWOT, these combatants included members of al-Qaeda and the Taliban. It is when the embedded norm lacks clarity or is perceived as outdated that there is a higher probability for contestation about the application of the norm.

**Step Two: Mobilization of Actors**

Domestic contestation arises in these areas of norm incompleteness. In this phase, actors with access and influence to the decision-making process—as well as an interest in a new interpretation of the embedded norm—attempt to alter the existing consensus surrounding the norm. This group’s ability to influence norm behavior depends on their access to and influence over the state decision-making; thus, only those groups with institutionalized and persistent access to decision-making can affect this compliance outcome. If the actors are successful, the modified embedded norm provides the new frame for decision-making and behavior.

Both President Johnson and President Bush’s domestic structure represented the Cortell and Davis Type I structure, in which decision-making is tightly controlled and it is difficult for external actors to affect policy. In the case of Vietnam, President Johnson’s central political and military advisors both in Washington and Vietnam recommended compliance with the Geneva Conventions as a means to demonstrate the benevolence of the United States and the attractiveness of the democratic regime. In the case of the GWOT, the actors with access and

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influence over the policy-making process—President Bush’s political advisors in the Department of Justice, Department of Defense, and the Office of the Vice President—possessed strong notions that the exigencies of the war of terror invalidated the historic tenets of the laws of war. This constituency believed that the President had the Constitutional authority in war time to make any decision regarding prisoner treatment.

**Step Three: New Beliefs**

The final step in contestation depends on the presence of a new set of beliefs to replace—or supplement—the embedded norm. Consolidating around a new set of ideas is not an easy process, as this stage is challenged by the efforts of opposing constituencies and the difficulties in agreeing on a different belief system. Actors are concerned about the material and normative repercussions of their compliance decision. In Vietnam, the new interpretation was a political decision that all combatants were entitled to Geneva protections. The new interpretation of the norm in the GWOT, however, was that al-Qa‘ida and the Taliban were not entitled to even the minimum prescriptions of Common Article 3. This decision was eventually challenged by the Judicial, Legislative, and Executive branches and has been consequently replaced by the traditional interpretation.

Whereas some observers might argue that this contestation weakens or invalidates the norm, contestation in fact strengthens the norm and may be necessary for the norm to remain embedded over time. It is not as simplistic as assuming that compliance reinforces norms and non-compliance weakens them. Consistent with the judgment in the 1986 Nicaragua v. United States case heard before the International Court of Justice, if a state acts in a way that is incompatible with customary international law,

… But defends it conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state’s conduct is in fact justifiable
on that basis, the significance of that attribute is to confirm rather than to weaken the rule.3

States can be constrained by rules and, at the same, shape those norms and rules to their strategic interest. As result, contestation affects normative change: either through the modification of the embedded norm or the strengthening of the existing norm. Norm change is thus a constant interplay between embedded norms, identity, and behavior. There is a constant loop between the framework provided by the embedded norm, actors’ preferences, contestation, and norm transformation. Figure 15 depicts this cycle of embedded norm change.

Figure 15: Embedded Norm Transformation

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**Limitations and Additional Specifications of the Model**

While the integrative compliance model provides a good starting point for understanding policy decisions that transcend the dichotomous “comply or do not comply” outcome, the model does possess some limitations regarding the specification of domestic structure. Cortell and Davis’s typology proposes that the domestic structural context varies depending on the structure of the decision-making authority and the pattern of state-societal relations. Yet, their typology does not inform how we know who has access and influence. In addition, some actors can have access without influence; conversely, other actors can have influence without access. Future research needs to add specification to this important intervening variable of domestic structure and needs to examine different domestic structures to determine how this variation affects compliance.

In order to add specification, one next step would be to rely on the scholarship of Matthew Evangelista, who has examined variations in the ability of transnational actors to affect policy. In his study of the role of policy entrepreneurs in the United States and Soviet Union, Evangelista found that once these actors could gain access into the strong, hierarchical Soviet state apparatus, it was relatively easy to have influence over policy. Conversely, in the open and decentralized domestic structure of the United States, it was relatively easy to have access to the policy process, but difficult to have influence over policy.\(^4\) Future research needs to add a greater level of specification to this variable.

In addition, this model assumes that domestic structure remains constant throughout the duration of the conflict, yet significant events challenge this assumption. In the case of Vietnam, the Presidential election in 1968, which resulted in the election of President Richard Nixon, and

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the Congressional election of 1968, in which the Republican Party netted five seats, clearly affected domestic structure. In addition, U.S. domestic political culture changed as the Vietnam conflict dragged on and the issues of U.S. prisoner treatment received greater visibility. Similarly, domestic structure shifted in the Bush Administration in 2006 with the Democratic sweep of the Congressional midterm elections, the resignation of Secretary Rumsfeld, and the commencement of Secretary Robert Gates’s leadership at the Department of Defense. Further change occurred in the GWOT case study with the Obama Administration and the deliberate steps taken by many central actors in the Departments of Defense and Justice to reaffirm the U.S. commitment to the Geneva Conventions. Future research may benefit from dividing these cases to account for domestic structural changes: the Vietnam case could be separated into one case examining the Johnson Administration’s decision-making in 1964-1965 and a second case examining the POW decision-making in light of the new domestic structure in 1968. Similarly, the GWOT case could be divided between one case examining decision-making in 2001-2003, then a second case examining the decision-making in 2006, and finally a case examining the early years of the Obama Administration’s decision-making on POW treatment.

**Theoretical Implications**

This manuscript primarily argues that fruitful research exists at the intersection of rationalism and constructivism, that ideas can change in the domestic context, and that agency needs to be resurrected in constructivist analysis.

**Bridging the Gap**

The three-cornered paradigm fight between realism, liberalism, and constructivism that dominated the field of international relations in the 1990s appears to have dissipated in favor of drawing connections between these approaches. In fact, building bridges between rationalist and
constructivist approaches has become “trendy” in international relations.\(^5\) An emerging research program in international relations explores the complementary nature between realism and constructivism. Recent work by Samuel Barkin, Patrick T. Jackson, and Daniel H. Nexon suggests that there are significant areas of overlap between these approaches and that important research can be pursued by studying these tensions, similarities, and challenges.\(^6\) The goal of this exchange is to “reconcil[e] the two approaches so that both stasis and change in global social order are explained simultaneously.”\(^7\) The goal of bridge building has proceeded first by examining the ontological and epistemological bases of these approaches and, secondly, by developing testable middle-range propositions. My research seeks to add to the second of stage of this dialogue by developing testable propositions that emanate from both rationalist and constructivist approaches.

It was not always this easy to transcend the fault lines between these approaches. Even just one decade ago, the divide seemed insurmountable between rationalist approaches, which argue that self-regarding agents always rationally pursue the optimal outcome for their strategic interests, and constructivist approaches, which argue that other-regarding agents pursue the outcome that accords with expectations of legitimacy. Broadly, rationalist approaches are unified by their emphasis on the determinative effects of anarchy, the importance of material factors in driving outcomes in international relations, states as the primary units of analysis, and the fixed preferences of actors. In this view, states will sign international treaties and follow international

laws when it promotes their self-interest. Constructivist approaches, on the other hand, broadly emphasize that actors do not exist independently of their social environment, which defines and constitutes actors. They stress that material facts only have meaning when ideas are included, and that collectively-held ideas guide state decision-making and interests. Whereas rationalist approaches treat interests of actors as exogenously given, constructivists seek to understand how actors come to acquire their current identity. These alternative analytical frameworks provide useful and complementary approaches to examining international legal norms: in this case, complying with international law can achieve both normative and material goals.

Even freshmen in introductory international relations courses recognize that state behavior frequently integrates strategic considerations and social norms. By separating the explanations for state behavior into categories of instrumental action and norm-guided action, the international relations discipline has overlooked the study of phenomena that include both. One such phenomenon is how actors understand embedded norms. After rules and norms are embedded in a state’s domestic structure and laws, domestic actors struggle with the norm’s interpretation and make choices about compliance based on preferences and strategic goals.

**Norm Change in the Domestic Context**

Secondly, this research concludes that by bracketing agency, constructivists have hindered their own research on the important role that domestic agents, structure, and context have upon state identity and interests. Essentially, constructivism is—and should be—a theory about social life and change. Constructivism emerged from a gap in existing international relations theories, as these existing schools of thought were ill-equipped to explain change. Whereas structural realists saw the world as immutable, constructivists argued that individuals

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8 Finnemore, *National Interests in International Society*. 
can transform the world through ideas that can reconstruct reality. This school of thought sought to demonstrate how dominant ideas were created, how they evolved, and how states used them. At the base of this theory was the belief that international politics is inherently social and that state relations can be transformed through the causal power of ideas.

Many have argued, in fact, that constructivism has failed in this central promise. Constructivists are often unable to account for change because of their reliance on the predetermined structure that embedded norms prescribe. The adherence to Finnemore and Sikkink’s three-stage norm life cycle inherently overlooks the possibility that once embedded, the norm itself continues to change as a result of actors’ preferences and strategic calculations. As a result of embeddedness, “States are socialized to want certain things by international society in which they live and the people in them live.” This manuscript argues that the research program of embeddedness has generated “structure specific” constructivist research. Constructivists have become incapable of explaining compliance decisions with embedded norms that do not fall neatly into the category of “comply” or “non-comply.” Assuming that embedded norms have become engrained in actors’ preferences and beliefs means that any behavior that is not perfectly compliant means acting against one’s own interests. Too often “there has been a noticeable proclivity to adopt the same functional-institutional causal logic” present in rationalist theorizing.

This research supports the conclusion that norms do not ossify in the domestic context. Embedded norms are in a state of constant evolution and progression: they provide the stable

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9 Ibid., 2. Emphasis added in the original.
frame for guiding actors’ behavior and simultaneously provide the frame for their own transformation.

**Resurrection of Agency**

Constructivist theorizing has consistently emphasized the importance of agency both below and above the level of the state. States are assumed to have a wide variety of choices and actions available to them, and constructivists consequently argue that states have “more agency” than realists assume. Despite this significance of agency, however, few constructivist articles explicitly examine how actors make choices and instead focus on how international institutions and other systemic factors structure agents’ decision-making. Whereas some research programs in constructivism do privilege the role of agency, namely the research that examines the role of norm entrepreneurs or transnational civil society activists, very few scholars examine the role of domestic agents. Unfortunately, constructivists have frequently “erected a black box around processes of social choice,” and overlooked the reality that actors make choices all the time.

In addition to these theoretical contributions, this research also advocates two policy recommendations: the ratification the 1977 Additional Protocols to the Geneva Conventions and the revision the Geneva Conventions to account for terrorist movements.

**Policy Recommendations**

During the recent period of norm contestation, the United States has abdicated the central role it once played in the articulation, codification, and application of the laws of war. In the recent GWOT, the United States refused to apply standards that it had previously extended even

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11 Finnemore, *National Interests in International Society*.
to adversaries who did not reciprocate, or even deserve, these standards. If the United States is to restore its position in the international community as a leader and to demonstrate the importance of this body of law, the United States should:

1. **Ratify the 1977 Additional Protocols to the Geneva Conventions.**

   The impetus for expanding the Geneva Conventions to include the 1977 Additional Protocols were the twin stimuli of de-colonization and claims of self-determination in the developing world. These documents recognized that non-international conflicts were often longer and bloodier than international conflicts. These Protocols consequently expanded the legal status of POWs to include combatants fighting for independence, particularly in insurgent movements. Additional Protocol I addresses the protection of victims in international armed conflicts, and Additional Protocol II relates to the protection of victims in non-international conflicts. While insurgents and other irregular fighters are covered, those who engage in “isolated and sporadic acts” of violence such as terrorists are not covered by the tenets of the Additional Protocols.\(^{14}\)

   Additional Protocol II only applies in,

   … The territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.\(^{15}\)

   As a result, this Protocol does not technically apply to clashes between two insurgent groups, or to clashes between a state and an insurgent group that lacks a territorial base. Military operations between a state and a terrorist movement, even if such an operation involves a state operating

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\(^{15}\) Ibid.
outside of its territory, does not fall under the range of provisions outlined in the 1949 Geneva Conventions and the 1977 Additional Protocol I or II.

The United States has signed, but not ratified, these Additional Protocols. Though it was signed by the United States on the first day that it was opened for signature,\(^{16}\) the United States refused ratification of Protocol I, for example, of the grounds that it privileged terrorists. In his submission of Protocol I to the Senate for ratification, President Ronald Reagan referred to the document as “fundamentally and irreconcilably flawed.”\(^{17}\) In this 1987 speech, President Reagan charged that this Protocol contained subjective and politicized dimensions of what constituted a war of national liberation and would consequently, “undermine humanitarian law and endanger civilians in war.”\(^{18}\) He stated that the United States should,

> Reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts.\(^{19}\)

In his view, the repudiation of Protocol I was an important step to deny terrorist movements “legitimacy as international actors.”\(^{20}\)

Even though the United States follows these Protocols as a matter of customary international law, their ratification would have important ramifications for the future applicability of international humanitarian law. Ratification would reaffirm America’s historical commitment to human rights principles and would signal the importance of international law.


\(^{18}\) Ibid.(accessed).

\(^{19}\) Ibid.(accessed).

\(^{20}\) Ibid.(accessed).
2. Revise the Geneva Conventions to Account for Terrorist Movements

The central role of non-state actors, non-signatories to the Geneva Conventions, has raised calls for reform of the Conventions, particularly in light of the recognition that the United States will be engaged in a “long war” against terrorism. Some scholars assert that, “today’s terrorist threat is but one form of war among many that appear to fall outside the conventions’ guidelines.” Increasingly, international conflict includes non-state actors on at least one side, including guerrilla fighters, maritime pirates, terrorists, and narco-traffickers. How can we hold non-state actors accountable to laws created only for state-on-state violence?

Diffuse terror networks like al-Qa‘ida defy easy categorization according to the Conventions. International law depicts two kinds of conflicts: international armed conflicts, between two or more states in the international system, and civil wars, occurring within the territory of a single state. The U.S. conflict against al-Qa‘ida does not fall cleanly into the category of international armed conflict, as al-Qa‘ida is not a state entity, much less a High Contracting Party to the Conventions. This conflict also does not meet the criteria for an internal armed conflict: while elements adhering to al-Qa‘ida do exist inside the United States, the majority of al-Qa‘ida senior leaders and the broader al-Qa‘ida network exist in other states. This does not mean, however, that the Geneva Conventions are silent regarding terrorist movements. On the contrary, Common Article 3 stipulates that all captured individuals, including terrorists, have the right to be treated humanely at all times. It prevents “outrages upon personal dignity, in particular, humiliating and degrading treatment.” At a minimum, Common Article 3 protects all persons regardless of their status—including terrorists, insurgents, and spies—and it applies to all types of conflicts. In

22 Geneva, "Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)."
addition, all individuals captured in war have the right to receive an Article 5 tribunal to
determine their legal status in the conflict.

One challenge in crafting a law of war regime to deal with international terrorist movements
is reconciling the goals of these groups with the underlying assumptions of the laws of war. The
first tenet of the laws of war is that conflict should be directed against legitimate combatants and
not civilians. The goal of a terrorist group, however, is to employ organized violence against
non-combatants. In addition, counterterrorist campaigns are complicated by the difficulty of
distinguishing terrorists from civilians. Secondly, one of the underpinnings of the Geneva
Convention governing POW treatment is the belief that humane treatment of prisoners will
compel others combatants to surrender peaceably and will compel reciprocal humane treatment
by the opponent. Yet terrorists are not swayed by concerns about humanity and reciprocity as
outlined in the Conventions. Lastly, one of the central tenets underlying the laws of armed conflict is
that combatants are to be removed from the battlefield and only repatriated at the conclusion of
armed hostilities. While this tenet did not previously support indefinite detention, when engaged
in a long war, it appears that this underlying principle of the Conventions might need to be
considered.

As a result, since the promulgation of the 1977 Additional Protocols to the Geneva
Conventions, the United States has struggled with the extent to which terrorism can—and should
be—incorporated into a law of war framework. In many ways, in fact, this struggle parallels the
struggle faced by the United States during the Civil War: how can we recognize rights, duties,
and obligations to be followed in a conflict with terrorists without conferring legitimacy upon

23 Thomas M. Franck, "Criminals, Combatants, or What? An Examination of the Role of Law in
these movements? We still need a legal framework for guiding military action in conflict involving terrorist actors to protect the basic rights of these actors as well as to promote U.S. counterterror goals. Potential revisions to the Geneva Conventions will not come easily, however, as any proposal could deeply divide states.

Just as the laws of war were revised in 1977 when a new type of conflict dominated in the international system, it is necessary to revise the laws of war to provide even greater precision with regards to combatant and non-combatant status in contemporary war. The underlying premise of the Geneva Conventions is that it is necessary and possible to distinguish between the international and domestic realms, between war and between peace, and between combatant and non-combatant. The rise of non-state actors as important actors in international relations and the advent of globalization have complicated these binary distinctions, making it even more important to revise the Conventions to reflect these new realities.

**Future Areas of Research**

This research will hopefully assist other scholars in developing theories of norm behavior for other laws of war and for embedded norms more broadly. One future avenue for research is to apply this integrative model to Geneva compliance in other states. This research would proceed by tracing how the Conventions have become embedded in the national and military laws, doctrine, and educational practices governing behavior in conflict in other states. In particular, this research should examine states with different domestic structures than the United States to examine the variation that occurs as a result of actors with different levels of access and influence. Secondly, future research should examine variations in U.S. compliance with other embedded norms to determine how domestic actors and their preferences affect these compliance outcomes. Lastly, additional research is needed on the GWOT case study to determine the extent
to which compliance decision-making is altered with the Obama Administration. While the Conventions were already ambiguous with regards to the specific rights of non-state actors, the Bush Administration may have expanded this gap through its designation of the category of “unlawful enemy combatant,” a concept whose plasticity renders it equally ambiguous in domestic and international law, as well as in war and crime. This nomenclature seems to indicate that criminal gangs, international drug traffickers, and even perhaps professional military firms might fall into this classification. It is too soon to evaluate the extent to which the domestic contestation around the norm has affected the ability of the Obama Administration to achieve its foreign policy preferences.

The goal of this research was to inform scholars and policy-makers about how, when, and why the United States will comply with the Geneva Convention governing POW treatment and to demonstrate that, despite the embeddedness of the POW norm, actors can still make choices about its applicability. By examining the events at Abu Ghraib, Guantánamo Bay, and Vietnam, this research seeks to add to the ongoing national dialogue about the future applicability of the Geneva Conventions in light of the rise of non-state actors in warfare, America’s historical commitment to human rights principles as a significant source of our soft power, and the effects of these actions on U.S. identity.
Appendix I: Research Questions

Dependent Variable

Compliance

1. What conflict gave rise to the question of prisoner treatment?

2. Was there a formal declaration of war? Was there a UN Security Council Resolution?

3. What was the doctrine guiding military action at this time?

4. What was the decision regarding prisoner treatment?
   a. What actions were taken?
   b. What was society’s response?
   c. Did this action provoke widespread domestic or international criticism?

5. Who were the opponents? Were they combatants of sovereign state militaries? Were the parties in the conflict signatories of the Geneva Conventions?

6. What was the official reason given by the executive for the compliance decision? Was this message consistent across time? What constituencies was the executive trying to influence, domestic or international? Was the message consistent across the two?

7. What was the timing of the decision?

8. Did the leader perceive his actions as counter-normative?

9. Did the leader perceive a conflict between policy goals and the POW norm?

Independent Variable

Mobilization of a Constituency

1. What individuals oppose the embedded norm?

2. How institutionalized and ongoing is their access to decision-making?

3. What is the basis for their opposition to the norm?
4. What factors affected these preferences? How are their interests threatened by compliance?

5. How do they benefit from the new interpretation of the norm?
   a. Are there economic reasons for this new interpretation?
   b. Are there political reasons for this interpretation?
   c. Are there social gains from this new interpretation?

6. Is there a threat that has caused these groups to mobilize?

7. Are there pro-compliance groups that this constituency has mobilized against?

8. What individuals support the embedded norm?

9. How institutionalized and ongoing is their access to decision-making?

10. What is the basis for their interest in compliance?

11. What factors affected these preferences? How are their interests enhanced by compliance?

12. How do they benefit from the embedded interpretation of the norm?
   a. Are there economic reasons for the embedded interpretation?
   b. Are there political reasons for the embedded interpretation?
   c. Are there social gains for the embedded interpretation?

13. What beliefs did these individuals have about law prior to working for the government?

14. Did any of these individuals have prior combat experience? If so, where? In what role?
**Intervening Variable**

**Domestic Structure**

1. Which actors and agencies are the most influential in the compliance decision? Who is primarily advising the president? What are their views?

2. To whom does the leader turn for critical information and advice for decisions about POW treatment?

3. How much control do leaders exercise over the policy agenda? Over decision-making?

4. What were each the leader’s positions on compliance?

5. What offices influence compliance decisions?

6. Is the legislature unified or divided?

7. Does the same party hold the executive and a majority in the legislative branch?

8. Did the legislature support the compliance decision?

9. How does the public feel about POW treatment? What are the indications of public support or non-support for POW decision-making?

10. What are the avenues for public influence on government decisions?

11. Were elections held during the decision-making?

12. What are the primary press outlets? What is their political leaning? Where they supportive or critical of the president’s decision?
## Appendix II: Table of Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AEF</td>
<td>American Expeditionary Forces</td>
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<tr>
<td>AFP</td>
<td>Air Force Pamphlet</td>
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<tr>
<td>AR</td>
<td>Army Regulation</td>
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<tr>
<td>ARVN</td>
<td>Army of the Republic of Vietnam</td>
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<tr>
<td>BG</td>
<td>Brigadier General</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture</td>
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<tr>
<td>CENTCOM</td>
<td>Central Command</td>
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<tr>
<td>CI</td>
<td>Civilian Internees</td>
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<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
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<tr>
<td>CITF</td>
<td>Criminal Investigative Task Force</td>
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<tr>
<td>CJC</td>
<td>Chairman of the Joint Chiefs of Staff</td>
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<tr>
<td>COIN</td>
<td>Counterinsurgency</td>
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<tr>
<td>COMUSMACV</td>
<td>Commander, U.S. Military Assistance Command, Vietnam</td>
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<tr>
<td>COSVN</td>
<td>Central Office for South Vietnam</td>
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<tr>
<td>DOD</td>
<td>Department of Defense</td>
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<tr>
<td>DCI</td>
<td>Director of Central Intelligence</td>
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<tr>
<td>DRV</td>
<td>Democratic Republic of Vietnam (North Vietnam)</td>
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<tr>
<td>EPW</td>
<td>Enemy Prisoner of War</td>
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<td>FM</td>
<td>Field Manual</td>
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<td>FWMAF</td>
<td>Free World Military Assistance Force</td>
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<tr>
<td>GC</td>
<td>Geneva Conventions</td>
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<tr>
<td>GPW</td>
<td>Geneva Convention Relative to the Treatment of Prisoners of War</td>
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<td>GTMO</td>
<td>Guantánamo Bay</td>
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<td>GVN</td>
<td>Government of Vietnam (South Vietnam)</td>
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<td>GWOT</td>
<td>Global War on Terror</td>
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<td>GWS</td>
<td>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</td>
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<td>HUMINT</td>
<td>Human Intelligence</td>
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<td>ICC</td>
<td>ICC</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IET</td>
<td>Initial Entry Training</td>
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<td>JAG</td>
<td>Judge Advocate General</td>
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<td>JCS</td>
<td>Joint Chiefs of Staff</td>
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<td>JGS</td>
<td>Joint General Staff</td>
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<td>JPRA</td>
<td>Joint Personnel Recovery Agency</td>
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<td>JTF</td>
<td>Joint Task Force</td>
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<td>LF</td>
<td>Local Force</td>
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<tr>
<td>LG</td>
<td>Lieutenant General</td>
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<tr>
<td>LOAC</td>
<td>Law of Armed Conflict</td>
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<td>LTC</td>
<td>Lieutenant Colonel</td>
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<td>MACV</td>
<td>U.S. Military Assistance Command, Vietnam</td>
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<td>MF</td>
<td>Main Force</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>MG</td>
<td>Major General</td>
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<tr>
<td>MP</td>
<td>Military Police</td>
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<tr>
<td>MTOE</td>
<td>Modified Table of Organization and Equipment</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NCIS</td>
<td>Naval Criminal Investigative Service</td>
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<td>NLF</td>
<td>National Liberation Front (Viet Cong)</td>
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<td>NSC</td>
<td>National Security Council</td>
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<td>NWIP</td>
<td>Naval Warfare Information Publication</td>
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<tr>
<td>OLC</td>
<td>Office of Legal Counsel</td>
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<tr>
<td>OPNAVINST</td>
<td>Office of the Chief of Naval Operations Instruction</td>
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<tr>
<td>PA</td>
<td>Public Affairs</td>
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<tr>
<td>PIC</td>
<td>Province Interrogation Center</td>
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<td>POW</td>
<td>Prisoner of War</td>
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<td>PW</td>
<td>Prisoner of War</td>
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<td>RP</td>
<td>Retained Personnel</td>
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<td>RVN</td>
<td>Republic of Vietnam (South Vietnam)</td>
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<td>RVNAF</td>
<td>Republic of Vietnam Armed Forces</td>
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<tr>
<td>S and T</td>
<td>Search, Segregate, Silence, Speed to a Safe Area, Safeguard, and Tag</td>
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<tr>
<td>SASC</td>
<td>Senate Armed Services Committee</td>
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<tr>
<td>SECNAVINST</td>
<td>Secretary of the Navy Instruction</td>
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<td>SERE</td>
<td>Survival Evasion Resistance and Escape</td>
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<tr>
<td>TASS</td>
<td>The Army School System</td>
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<td>TC</td>
<td>Training Circular</td>
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<td>UAR</td>
<td>United Arab Republic (Egypt)</td>
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<td>UCMJ</td>
<td>Uniformed Code of Military Justice</td>
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<td>U.S. Air Force</td>
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<td>U.S. Code</td>
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<td>USG</td>
<td>U.S. Government</td>
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<td>VC</td>
<td>Viet Cong</td>
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<tr>
<td>WMD</td>
<td>Weapons of Mass Destruction</td>
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<td>WOT</td>
<td>War on Terror</td>
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<td>Tactics and Technique for Employment of U.S. Forces in RVN</td>
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<td>Combat Operations: Conduct of Artillery/Mortar and Naval Gunfire</td>
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<td>U.S. Military Augmentation of Civilian War Causalities Treatment Program</td>
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**Geneva Conventions Training**
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**War Crimes**

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**Reporting of Incidents**

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<th>Reports of Serious Crimes or Incidents</th>
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<td>27 Sep</td>
<td>29 Nov</td>
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Appendix IV: Bibliography


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