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Major Jessica M. Farrell

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Lore of the Corps

Our Regimental March

Fred L. Borch
Regimental Historian & Archivist

Regimental March
The Judge Advocate General's Corps
CWR Paula Clark
Nov 87

While the Regiment does not have a “JAG Corps song,” there is a “Regimental March.” Although it was composed and first performed in 1987, little is known about it today, if for no other reason than it is heard infrequently.

After the Army created a “Regimental System” in 1981, the Corps applied for regimental status, which was granted in May 1986.¹ But even before members of the Corps had any regimental affiliation, Major General Hugh R. Overholt, then serving as The Assistant Judge Advocate General, was thinking of ways to build pride and camaraderie within the new Judge Advocate General Corps (JAGC) Regiment. Ultimately, there would be a new regimental flag and a “Distinctive Insignia” (DI) that all members of the Corps would wear on their uniforms. But Major General Overholt also looked beyond the obvious accouterments of a regiment and decided that a march—brisk music suitable for troops marching in a military parade—would be a good idea.

In early 1985, Major General Overholt approached then Lieutenant Colonel (LTC) Ronald P. Cundick, who was serving as Chief, Personnel, Plans and Training Division, Office of the Judge Advocate General. As then LTC Cundick remembers it, Major General Overholt said to him, “Ron, you are a musician, you play the piano, why don’t you compose us a regimental march?”² There was no timeframe or deadline to accomplish this task, but Cundick assumed that Major General Overholt was serious (which was not always the case with comments from Major General Overholt, who was known for mischievous nature and wry sense of humor).

In July 1985, Major General Overholt assumed duties as The Judge Advocate General and now Colonel (COL) Cundick departed Washington, D.C., for Fort Lewis, Washington, where he assumed duties as the Staff Judge Advocate, I Corps. In this new job, COL Cundick attended a variety of official functions, including those of the 9th Infantry Division (ID), which was part of I Corps. On more than one occasion, COL Cundick heard the 9th ID band perform, and was “impressed with the quality and variety of

¹ On 30 May 1986, the Department of the Army announced that the Corps was “placed under the US Army Regimental System effective 29 July 1986.” Headquarters, U.S. Dep’t of the Army, Gen. Order No. 22, at para. 3 (30 May 1986).

² Letter from Colonel (Retired) Ronald Cundick, to Fred L. Borch, Regimental Historian & Archivist (17 July 2013).

its music.”³ Most division bands he had observed previously “were pretty thin on talent and their repertoire was somewhat limited.” The 9th Division Band, however, was different, and COL Cundick “was particularly impressed with the enthusiasm and professionalism” of its bandmaster, Chief Warrant Officer Two (CW2) Paul Clark.⁴

After a year at Fort Lewis, COL Cundick decided that Major General Overholt’s idea for a Regimental March might be realized if CW2 Clark could be persuaded to author it. Colonel Cundick approached CW2 Clark. He asked the bandmaster “if he would be interested in composing and arranging a Regimental March for the JAGC, and whether he would have time to do it.” Colonel Cundick felt strongly that CW2 Clark not only had the talent to compose a march, but he also felt that any march for the Corps “should be composed by someone who was serving in or had served in the military.” Chief Warrant Officer Two Clark replied that he would be “honored” to take on the project. Colonel Cundick then contacted Major General Overholt to confirm Major General Overholt’s desire for a Regimental March. When the latter assured COL Cundick that he in fact did want a march, CW2 Clark began composing it.

Within two or three months, CW2 Clark had written a score titled “Regimental March, The Judge Advocate General’s Corps.” The original sheet music is dated November 1987 and includes a variety of instruments, including flute (piccolo), clarinet, alto saxophone, horn, trombone, tuba and drums (percussion). On 16 December 1987, Clark sent the score and a tape recording of it (performed by the 9th Infantry Division Band), to COL Cundick. The bandmaster also applied for a copyright for the Regimental March, which subsequently was issued by the U.S. Copyright Office, Library of Congress, on 26 May 1988.

The Regimental March was first performed for a judge advocate audience at the 1988 JAGC Regimental Ball.⁵ Since that time, it apparently has only been performed on one other occasion: by the Fort Lee band on 19 March 2012, during the activation ceremony of Advanced Individual Training for Military Occupational Specialty (MOS) 27D Paralegals at Fort Lee, Virginia.

Whether this recent revival of the Regimental March signals renewed interest in this piece of martial music is an open question. However, it does seem that a Regimental March was only one aspect of Major General Overholt’s concept for regimental music. Major General Overholt “also

wanted to adopt a Regimental Bluegrass song,” and selected “Bringing Mary Home.”⁶ For two years, Judge Advocate Reserve Brigadier General Thomas “Tom” O’Brien played the tune at the Regimental ball. Major General Overholt reminisced: “I think most folks, other than me, were kind of glad when it went away.”⁷

In addition to the Regimental March and the Regimental Bluegrass song, Major General Overholt, encouraged by Major General William K. Suter, The Assistant Judge Advocate General, also identified a Regimental “Fish” and a Regimental “Pizza.” There was also a Regimental “Hot Dog Cooker.” The history behind these three regimental accouterments, however, will have to wait for another day.⁸

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website

*Dedicated to the brave men and women who have served our
Corps with honor, dedication, and distinction.*

<https://www.jagcnet.army.mil/History>

⁶ E-mail, Major General (Retired) Hugh R. Overholt to Regimental Historian & Archivist, subj: Seeing Mary Home or Bringing Mary Home (24 July 2013, 08:57 EST). Major General Overholt was especially taken with the song as performed by Mac Wiseman (known as “The Voice With a Heart”). The lyrics follow:

I was driving down a lonely road on a dark and stormy night
When a little girl by the road side showed up in my head lights
I stopped and she got in the back and in a shaky tone
She said my name is Mary please won't you take me home

She must have been so frightened all alone there in the night
There was something strange about her cause her face was deathly white
She sat so pale and quiet there in the back seat all alone
I never will forget that night I took Mary home

I pulled into the driveway where she told me to go
Got out to help her from the car and opened up the door
But I just could not believe my eyes the back seat was bare
I looked all around the car but Mary wasn't there

A small light shown from the porch a woman opened up the door
I asked about the little girl that I was looking for
Then the lady gently smiled and brushed a tear away
She said it sure was nice of you to go out of your way

But thirteen years ago today in a wreck just down the road
Our darling Mary lost her life and we still miss her so
So thank you for your trouble and the kindness you have shown
You're the thirteenth one who's been here bringing Mary home

from <http://www.metrolyrics.com/bringing-mary-home-lyrics-red-sovine.html> (last visited 24 July 2013).

⁷ E-mail from Major General (Retired) Hugh R. Overholt, to Regimental Historian & Archivist, subj: More on the Regimental March (17 July 2013, 10:02 EST).

⁸ *Supra* note 5.

³ *Id.*

⁴ *Id.*

⁵ E-mail from Major General (Retired) Hugh R. Overholt, to Regimental Historian & Archivist, subj: JAGC Regimental March (16 July 2013, 17:31 EST).

Policing the Force: A Courtesy Patrol Primer for Judge Advocates

Major Jessica M. Farrell*

I. Introduction

Whether it is Crazy D's at Fort Bragg, Crazy Legs at Fort Drum, the Art Café in Vicenza, Italy, or the Henoko District in Japan, each military installation has its own flavor of enticing local entertainment. Despite the well-intentioned Friday afternoon safety briefings they receive, Soldiers, Airmen, Sailors, and Marines often find themselves testing the limits of their surroundings on a weekly basis. One tool commanders may use to limit the negative consequences of such outings is the courtesy patrol. Courtesy patrols are composed of noncommissioned officers (NCOs) and junior officers who are detailed to provide a presence, in uniform, at popular off-post establishments during weekends and training holidays. Courtesy patrols are a reminder to military personnel that good order and discipline are important on and off duty. If executed properly, courtesy patrols can prevent misconduct, improve relations with the local community, and increase safety. If improperly executed, courtesy patrols are a public nuisance, become witnesses at courts-martial, or are perceived to be complicit in military misconduct.¹

The impetus for and emphasis of courtesy patrols varies by installation. Courtesy patrols were implemented at Fort Bliss, Fort Lewis, Fort Campbell, and Fort Hood fairly recently in response to the Army's renewed focus on garrison operations.² At Fort Bliss, courtesy patrols are considered "the eyes and ears of the command."³ The

Marines have used courtesy patrols for years in Japan to develop and maintain positive relationships with the local community.⁴ In 2011, an off-post assault involving five Soldiers led to the reinstatement of courtesy patrols at Fort Benning.⁵ Courtesy patrols at Fort Hood focus on the enforcement of Army standards on post, while most other programs focus their efforts on servicemember conduct outside the installation.⁶ Most communities are happy to have courtesy patrols, though their presence has raised some questions regarding whether they are a permissible use of military forces.⁷

In order to have an effective courtesy patrol program, commanders must be aware of the various legal issues related to courtesy patrols before sending troops to the streets. This article will identify and explore some of these major issues and suggest some best practices. Part II will discuss the purpose of courtesy patrols, the authority for them, and the limitations set by the Posse Comitatus Act. Part III identifies areas of importance and provides an overview of the nuts and bolts of courtesy patrols. Judge advocates must be proactively engaged in the planning and execution of courtesy patrols in order to establish an effective courtesy patrol program.

II. Legal Issues

A. Authority

Courtesy patrols are off-installation operations used to enforce "regulations and orders pertaining to persons subject to their jurisdiction."⁸ The commander's authority to use

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¹ Mark Jacoby, *Does U.S. Abet Korean Sex Trade?*, ST. PETERSBURG TIMES ONLINE (Dec. 9, 2002), http://www.sptimes.com/2002/12/09/Worldandnation/Does_US_abet_Korean_s_; see also INSPECTOR GEN., U.S. DEP'T OF DEF., EVALUATION OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS, REP. NO. IE-2007-002, at 1 (Nov. 21, 2006). Congress demanded an investigation into allegations that the U.S. military leadership in Korea was condoning human trafficking after a Fox news affiliate aired a video of courtesy patrols at brothels outside Camp Casey, Korea.

² Specialist David Hauk, *Courtesy Patrols Watch over Fort Hood; Enforce Regulations, Standards*, FORT HOOD SENTINEL (Jan. 26, 2012), <http://www.forthoodsentinel.com/print.php?id=8401>; Rick Wood, *Courtesy Patrols to Maintain Good Community Relations* (Aug. 27, 2010), http://www.army.mil/article44372/Courtesy_patrols_to_maintain_good_community_relations/; *101st to Resume Courtesy Patrols at 15 Local Businesses on June 11th*, CLARKSVILLE ONLINE (June 11, 2009), <http://www.clarksvilleonline.com/2009/06/11/101st-to-resume-courtesy-patrols-at-15-local-businesses-on-june-11th/>.

³ Sergeant Richard Andrade, *Courtesy Patrol Establishes Community Ties, Keeps Soldiers Safe*, FORT BLISS MONITOR, <http://fbmonitor.com/2012/02/>

01/courtesy-patrol-establishes-community-ties-keeps-soldiers-safe/ (last visited Aug. 12, 2013).

⁴ MARINE CORPS BASES JAPAN/III MARINE EXPEDITIONARY FORCE, ORDER 1050.7A, LIBERTY CAMPAIGN ORDER 5-17 (1 Sept. 2011) [hereinafter MCO 1050.7A].

⁵ Jim Galloway, *Fort Benning Military Begins 'Courtesy Patrols' of Downtown Columbus*, POL. INSIDER (Apr. 25, 2011, 9:37 AM), <http://blogs.ajc.com/political-insider-jim-galloway/2011/04/25/fort-benning-military-begins-courtesy-patrols-of-downtown-columbus>.

⁶ Hauk, *supra* note 2.

⁷ Susanne Posel, *2011 Saw the End of Posse Comitatus*, OCCUPY CORPORATISM (Apr. 5, 2012), <http://occupycorporatism.com/2011-saw-the-end-of-posse-comitatus>.

⁸ U.S. DEP'T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS para. 3-2(b) (27 July 2006) [hereinafter AR 190-24]. This regulation has also been issued as Air Force Instruction 31.213, *Marine Corps Order 1620.2D*, *Chief of Naval Operations Instruction 1620.2A*, and *(Coast Guard) Commandant Instruction 1620.1E*.

courtesy patrols flows from the commander's responsibility to ensure that military personnel display proper conduct on and off duty.⁹ Commanders are required to be proactive in protecting military personnel from themselves and others who may enable misconduct.¹⁰

Army Regulation 190-24 sets the limits for courtesy patrols.¹¹ Courtesy patrols do not enforce local law and have no police authority. The primary objectives of the patrols are to:

- a. Render assistance and provide information to Service personnel.
- b. Preserve the safety and security of Service personnel.
- c. Preserve good order and discipline among Service personnel and reduce off-installation incidents and offenses.
- d. Maintain effective cooperation with civil authorities and community leaders.¹²

In order to successfully achieve these goals, commanders must develop thorough Standard Operating Procedures (SOPs) and properly educate those selected for courtesy patrol duties.

B. Courtesy Patrols and the Posse Comitatus Act

The presence of uniformed military members on Main Street is disturbing to most Americans, unless the military personnel are participating in a parade. This is not to malign domestic support of the military. It is a historical position

⁹ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4 (20 Sept. 2012).

¹⁰

Commanders are authorized to acquire, report, process, and store information concerning persons and organizations, whether or not affiliated with DOD, according to the applicable Service regulations of the sponsoring commander, which—

- (1) Adversely affect the health, safety, morale, welfare, or discipline of Service personnel, regardless of status.
- (2) Describe crime-conducive conditions where there is a direct Service interest.

AR 190-24, *supra* note 8, para. 2-5(a).

¹¹ AR 190-24, *supra* note 8.

¹² *Id.* para. 3-1.

dating back to English common law.¹³ This tradition is reflected both in federal law and Department of Defense (DoD) policy on military cooperation with civilian law enforcement officials.

The Posse Comitatus¹⁴ Act (PCA)¹⁵ is a federal law passed in 1878 in response to the military occupation of the South after the Civil War. The PCA, sponsored by Representative J. Proctor Knott of Kentucky, was an amendment to the Army appropriations bill.¹⁶ It was initiated by Senators from the former Confederacy in response to the frequent mobilization of federal troops to quell domestic disturbances before, during, and after the end of the Civil War.¹⁷ Southern legislators wanted to stop the use of federal troops to protect former slaves and former slave rights after the Civil War.¹⁸

The PCA, in its current form, reads as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁹

Before 1878, federal troops had functioned as posse comitatus—intervening in riots, strikes, and other civil disturbances at the request of local officials.²⁰ As long as low-level commanders agreed, the troops were used. The

¹³ Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1297 (1993).

¹⁴ Posse comitatus literally means "the power of the county." The term first appeared in English law in 1411 with the passage of a riot act that called for the sheriffs and justice of the peace to work together with the local community to arrest rioters. Lieutenant Colonel James G. Diehl, *The Cop and The Soldier: An Entangling Alliance? The Posse Comitatus Act and the National Security Strategy of Engagement and Enlargement*, STRATEGY RES. PROJECT 1-7 (Apr. 1997).

¹⁵ 18 U.S.C. § 1385 (2006). "The passage of the Posse Comitatus was the beginning of a grim new era for African-Americans in the South, whose lives for most of the next century were ruled by Black Codes, lynch mobs, and Jim Crow until the *Brown* decision and the passage of federal civil rights laws in the 1960s." DANIEL LEVITAS, *THE TERRORIST NEXT DOOR: THE MILITIA MOVEMENT AND THE RADICAL RIGHT* 51 (MacMillan, 2002).

¹⁶ ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 344 (1996).

¹⁷ *Id.* at 343.

¹⁸ LEVITAS, *supra* note 15, at 50.

¹⁹ 18 U.S.C. § 1385 (2006).

²⁰ Stephen Young, *Features—The Posse Comitatus Act: A Resource Guide*, LLRX.COM (Feb. 17, 2003), <http://www.llrx.com/features/posse.htm>.

PCA narrowed the authority to use federal troops by requiring presidential or congressional action. Though no one has ever been convicted under the PCA, it serves as a statutory limitation on the use of federal troops. The substantive provisions of the PCA were extended to the Air Force and Marine Corps through the enactment of Title 10 U.S.C. § 375:

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.²¹

The Secretary of Defense fulfilled this mandate with Department of Defense Instruction (DoDI) 3025.21 which reinforces the historic tradition of limiting direct military involvement in civilian law enforcement activities.²² The instruction prohibits military personnel from taking the following actions: interdicting vehicles, doing a search or seizure, making an arrest, apprehension, or stop and frisk, and doing surveillance or intelligence gathering.²³

Courtesy patrols do not violate the PCA or DoDI 3025.21 as long as they do not engage in law enforcement activities. Their authority over individuals derives from their rank and from Article 7 of the Uniform Code of Military Justice (UCMJ).²⁴

Department of Defense policy is “to support civilian law enforcement agencies consistent with the needs of military preparedness of the United States, while recognizing and conforming to the legal limitations on direct DoD involvement in civilian law enforcement activities.”²⁵ Since courtesy patrol members operating in the local community only act to prevent misconduct by military personnel and only engage in order to enforce the UCMJ, courtesy patrols

are considered “permissible direct assistance” to law enforcement under DoDI 3025.21.²⁶

III. Best Practices: Creating and Advising on the Courtesy Patrol Program²⁷

A. Command and Control

The successful courtesy patrol program, like many other activities in the military, requires command commitment. The Provost Marshal Office (PMO) is often tasked with the creation and implementation of courtesy patrol programs.²⁸ This practice is problematic because of the PMO’s limited tasking power and the danger involved in assigning a non-law enforcement role to military police. Courtesy patrols could become agents for the military police in a way that would frustrate the principles of the PCA by blurring the lines between law enforcement and the command’s interest in preserving good order and discipline. Courtesy patrols are operational in nature. They are in fact a function of command rather than a military police detail.

Accordingly, the best practice is for the commanding general to implement the courtesy patrol program through the G3.²⁹ The G3 usually has sufficient tasking power to properly resource the mission through operation orders. The commanding general should approve the courtesy patrol Standard Operating Procedures (SOP) and stress the importance of the program to command and staff. The power of that mandate hopefully results in better support and accountability for the program. Command and control at the division or corps level also prevents individual units from running ad hoc courtesy patrol programs that may not include proper practices. In addition, a high visibility courtesy patrol program gives senior leaders better awareness of potential discipline issues in the community.

The benefit of implementing the courtesy program through the G3 is proper staffing procedures. The Chief of Staff can ensure that the courtesy patrol program is vetted through each staff section. The G3 verifies training requirements; G4 ensures patrols are resourced properly; G6

²¹ 10 U.S.C. § 375 (2006).

²² U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (27 Feb. 2013) [hereinafter DoDI 3025.21].

²³ *Id.* para. E4.1.3.

²⁴ Article 7(c) gives officers and noncommissioned officers (NCOs) the right to “quell quarrels, frays, and disorders” among persons subject to the Uniform Code of Military Justice (UCMJ), and to apprehend persons who engage in them. 10 U.S.C. § 807(c).

²⁵ DoDI 3025.21, *supra* note 22, enclosure 3, at 15.

²⁶ *Id.* at 15.

²⁷ Appendix A contains a model courtesy patrol SOP with a focus on discipline and accountability. It is largely based upon the Fort Riley Courtesy Patrol Program. Appendix B is a sample SOP with a focus on safety and assistance. Appendix B is largely based upon the U.S. Army Alaska Courtesy Patrol Program.

²⁸ 1ST INFANTRY DIV., STANDARD OPERATING PROCEDURES (SOP) FOR FORT RILEY COURTESY PATROL PROGRAM (14 Jan. 2012) [hereinafter FORT RILEY CP SOP]; First Lieutenant Jason A. Bennett, Courtesy Patrol Officer-In-Charge, 4th Infantry Div. Provost Marshal Office, Courtesy Patrol Legal Training Power Point Presentation (Dec. 2012) [hereinafter Fort Carson PP Training] (on file with author).

²⁹ See Appendix B, para. 3b.

provides appropriate communication assets; the Staff Judge Advocate (SJA) provides legal training and support; the Public Affairs Officer (PAO) liaises with the local community and press to publicize the program; and subordinate units provide personnel. The courtesy patrol SOP should provide clear guidance as to staff responsibilities.³⁰ The more specific the guidance, the more responsive staff and subordinate units will be.

B. The Role of the Judge Advocate

Regardless of how the courtesy patrol program is staffed, the legal office should be heavily involved in its planning and execution. This is as much a regulatory requirement as a practical one. "Off-installation operations will be coordinated with the local installation commander through the SJA, or higher authority, and appropriate civilian law enforcement agencies."³¹

Much of the success of the courtesy patrol mission depends on the proper training and education of the personnel involved. Since the legal office is expected to be the subject matter expert in both the PCA and local law, attorneys must proactively engage commanders at all levels to create adequate training programs. In addition, the final courtesy program plan, the SOP, and all training materials should be reviewed by multiple attorneys. Though administratively burdensome in some cases, such coordination avoids confusion and results in the best legal advice and training.

C. Nuts and Bolts of the Courtesy Patrol Program

Judge advocates should consider the following areas when assisting in the implementation of a courtesy patrol. The sample SOPs in Appendices A and B may help the reader envision a courtesy patrol program and the different components discussed below. Appendix A describes a courtesy patrol program designed to deliver justice and accountability. Appendix B is a program aimed at keeping military personnel safe.

1. Purpose

The first step necessary to establish a courtesy patrol program is to identify the purpose. Though the courtesy patrol mission is defined by regulation, the commander must choose what part of that mission is most important. The commander's intent will dictate what courtesy patrol members report, where they go, and what they say. Judge advocates must fully understand the purpose of the patrols before advising commanders or training courtesy patrol personnel.

For example, the U.S. Army Alaska (USARAK) Courtesy Patrol Program is "a 'Soldiers helping Soldiers' program, not a 'gotcha' program for reporting Soldiers to Commanders."³² Thus, USARAK courtesy patrol members are specifically prohibited from reporting personal identifying information (PII) on the courtesy patrol duty log provided by courtesy patrol personnel at the end of their shift.³³ The USARAK commander is more interested in disciplinary trends, Soldier support, and identifying locations that pose a risk to Soldiers than imposing punishment.

In a courtesy patrol program, commanders of Airmen and Marines in Japan want to maintain accountability and discipline to foster good will with the host nation. "Commanding Officers at all levels will be held accountable for the actions of their Marines and Sailors."³⁴ Joint courtesy patrol members in Japan are thus encouraged to record the name and unit of Marines, Airmen, and Sailors who fail to conduct themselves appropriately off base. They are also advised to record the PII of business owners who they deem uncooperative. Armed with this information, commanders can identify any areas that threaten good order and discipline and reach out to local authorities for assistance.

2. Community Relations

In order to properly establish the courtesy patrol program, representatives from the command or installation must meet with local officials and business owners to identify the nature of the proposed courtesy patrols and their area of operation. Depending on the level of command, the Deputy SJA, Chief of Justice, Trial Counsel, or Brigade Judge Advocate (BJA) will benefit from attending such planning meetings or consulting with those who do. As in

³⁰ AR 190-24, *supra* note 8, para. 3-2e ("The constraints on the authority of Soldiers . . . to act off-installation . . . and the specific scope of off-installation operations will be clearly delineated in all authorizations for off-installation operations."). See Appendices A and B for sample SOPs.

³¹ AR 190-24, *supra* note 8, para. 3-2e.

³² U.S. ARMY ALASKA, COURTESY PATROL STANDARD OPERATING PROCEDURES (15 Feb. 2013) [hereinafter USARAK CP SOP].

³³ *Id.* at 4.

³⁴ MCO 1050.7A, *supra* note 4, para. 4(a)(3).

any other operational endeavor, it is imperative that the legal advisor be present from the beginning.³⁵

Topics to discuss with local leaders include: whether the courtesy patrols will enter bars and clubs, what support local law enforcement will give to the patrols, and the rules of engagement for courtesy patrols. As a general rule, courtesy patrols should avoid entering bars and clubs.³⁶ The presence of a uniformed military member in a bar or club may provoke unappreciated attention or attack. Should disruptive military personnel require escort out of a bar or club, the best practice is to get local business owners to agree to bring the individuals outside where the courtesy patrol can then assess and respond to the situation.

Cooperation with local law enforcement is also important in defining the area of operations. Courtesy patrols require a great deal of support from local police. If a military member becomes overly belligerent or drives drunk despite the best efforts of the courtesy patrol to stop him, local police will be called to respond to the situation. In addition, courtesy patrol members are unarmed. Local law enforcement personnel may serve as protection for them. Courtesy patrols require local law enforcement support to be effective.

The good will of the local community is a critical component of courtesy patrol success. Discontent or lack of participation from local law enforcement or business owners will severely undermine the effectiveness of the courtesy patrol.³⁷ If there is healthy communication between the installation and local law enforcement agencies, cases will be disposed of quickly and fairly. Business owners are a great source of information, evidence, and support.³⁸ If they do not cooperate with the courtesy patrol program, or resent it, the program will suffer.

3. Personnel

Commanders must be cautious in choosing courtesy patrol members. Courtesy patrols are generally composed of

two to four military members.³⁹ They are typically staffed by a commissioned officer and a senior NCO at a minimum.⁴⁰ Rank and maturity are important criteria since the mission requires both. However, appointing only senior members to courtesy patrols has a potential chilling effect on the efficacy of the patrol. A junior military member is unlikely to approach an officer or senior NCO for help in a compromising moment out of intimidation or fear of punishment.

Occasionally, courtesy patrol programs require that at least one member of each courtesy patrol be a commander or first sergeant.⁴¹ This practice is not recommended. Although a good deterrent, command teams on patrol can hamper the military justice process. Leaders on patrol potentially forfeit their ability to act impartially on non-judicial punishment and negative administrative actions by witnessing misconduct.

Military occupational specialty (MOS) may also be a consideration in courtesy patrol assignments. For instance, many courtesy patrol SOPs prohibit military police, special forces Soldiers, and paralegals from serving on courtesy patrols.⁴² Since courtesy patrols are designed to have a positive effect on the community's perception of the military, commanders may request Soldiers who meet height and weight standards and are not on profile.⁴³ Given the nature of the duty, a logical requirement might be that courtesy patrol members have no pending or past adverse legal or administrative actions. On the other hand, some commanders may want to use courtesy patrols as a mentoring tool for young leaders who make mistakes.⁴⁴ Judge advocates should help commanders identify clear program goals in order to best identify the right criteria for selection. The criteria should be clearly stated in the courtesy patrol SOP and verified by the chain of command.⁴⁵

³⁹ 10TH MOUNTAIN DIV. COURTESY PATROL STANDARD OPERATING PROCEDURE 2 (Nov. 21, 2011) [hereinafter 10TH MOUNTAIN CP SOP].

⁴⁰ U.S. DEP'T OF ARMY IN EUROPE, REG. 190-62, POLICE AND INVESTIGATIVE SERVICES: EMPLOYMENT AND AUTHORITY OF MILITARY POLICE, UNIT POLICE, AND COURTESY PATROLS sec. V (7 July 2005) [hereinafter AER 190-62].

⁴¹ Fort Carson PP Training, *supra* note 28.

⁴² FORT RILEY CP SOP, *supra* note 32, at 4; USARAK CP SOP, *supra* note 32, at 3.

⁴³ See Appendix B.

⁴⁴ The Fort Benning Chief of Justice was impressed by courtesy patrol testimonials from Soldiers who were "scared straight" by their courtesy patrol duties. These testimonials were submitted to the commanding general in hopes he would locally file a pending general officer memorandum of reprimand (GOMOR). Telephone Interview with Major Evan Seamone, Chief of Justice, Fort Benning Office of the Staff Judge Advocate (Jan. 22, 2013) [hereinafter Seamone Telephone Interview].

⁴⁵ The sample Courtesy Patrol SOP at Appendix A suggests a battalion commander provide written verification that unit Soldiers fit the criteria for courtesy patrol. The commander also certifies their training.

³⁵ Judge advocates can help commanders by advising them on memoranda of understanding with local agencies. Identifying and documenting lines of support and division of labor avoids confusion later on.

³⁶ See Part III.C.8, *infra*.

³⁷ Fort Riley enjoys an extremely strong relationship with local law enforcement in Manhattan, Kansas. The program was not accepted by Junction City, Kansas, and, as a result, is only focused on the Aggiesville section of Manhattan. Telephone Interview with Major Irvin Drummond, Chief of Justice, Fort Riley Office of the Staff Judge Advocate (Jan. 23, 2013).

³⁸ Local business owners can become critical to gaining access to crime scenes and witnesses for courts-martial. They can also be helpful in protecting military members who run into trouble.

At some installations, a local law enforcement officer also joins the patrols. Fort Riley patrols are three-man teams: a commissioned officer, an E-6 or above, and a Riley County Police Officer.⁴⁶ It is important to note that even when patrolling with local police, courtesy patrols are never subject to police orders.⁴⁷ If military personnel were subject to the orders of the law enforcement officer on patrol, it would be a violation of the PCA. Courtesy patrol members are not police and should never appear to be.

Joint courtesy patrols feature representatives from all relevant services, depending on the installation. As servicemembers are told at the 18th Wing Joint Courtesy Patrol briefing in Kadena, Japan, multi-service courtesy patrols can improve the appearance of fairness. “A multi-service patrol will mitigate the misperceptions that we are ‘covering for our people’.”⁴⁸ The example given is an all-Marine patrol that comes upon a Marine who was simply at the wrong place at the wrong time. The Marine is completely innocent, but if an all-Marine patrol comes to that conclusion it may be perceived as a cover-up.⁴⁹ Multi-service patrols are helpful in preventing this perception. Commanders should be advised to establish memoranda of understanding (MOUs) with other services to encourage and streamline cooperation.

4. Uniform

Courtesy patrols are to be positive representatives of the military in the local community.⁵⁰ Uniform is key to their mission. Commanders should consider local culture when choosing which uniform to require for courtesy patrols. In Korea, a formal dress uniform may make the best local impression. Inhabitants of Fayetteville, North Carolina, on the other hand, are accustomed to Soldiers in the Army Combat Uniform (ACU). The uniform itself sends a message.

Military culture also plays a role. Joint courtesy patrols under the auspices of the Air Force wear the duty uniform common to that service.⁵¹ Whatever the choice, uniform is an important part of the courtesy patrol mission, which is to project a “visual representation of responsible ambassadors of the U.S. military.”⁵² Courtesy patrols in uniform are

supposed to be a symbol to the local community that the military is a good neighbor.

Uniforms also serve as a reminder to military members celebrating a night out that their conduct during periods of liberty or leave can affect their careers. Many patrols are given distinctive brassards to highlight their role. The courtesy patrol program SOP and pre-patrol checklist should specifically address uniform requirements.⁵³

Commanders should work with military police and local law enforcement to identify risks and make sure courtesy patrols are properly equipped for their area of operation. The equipment afforded courtesy patrols should be as conservative as possible to avoid offending the sensibilities of the local community. Courtesy patrol members should not carry weapons. Providing weapons creates the impression that the courtesy patrol is on an enforcement mission. Most courtesy patrols are unarmed for this reason. However, there is a degree of danger in courtesy patrol duty and, if possible, courtesy patrol members should have protection.⁵⁴

5. Training

Courtesy patrols are in a very difficult position. Unarmed, they head out at night on weekends to perhaps encounter intoxicated servicemembers not afraid to challenge authority. Courtesy patrol members are not to touch those they encounter unless they are an imminent threat to themselves or others.⁵⁵ Self-defense is a last resort and de-escalation is emphasized.⁵⁶ Essentially, courtesy patrol can be hazardous duty, and there is little the members can do about the hazards. Judge advocates are essential to arming courtesy patrol members with the only weapon they have: effective training.

Regulatory guidance provides some direction on the legal training courtesy patrols require. “The constraints on the authority of Soldiers . . . to act off-installation in CONUS [Continental United States] and United States—host nation agreements in OCONUS [Outside Continental United States] areas, and the specific scope of off-installation operations will be clearly delineated in all authorizations for off-installation operations.”⁵⁷ It is up to

⁴⁶ FORT RILEY CP SOP, *supra* note 28, at 4.

⁴⁷ AR 190-24, *supra* note 8, para. 3-2(c).

⁴⁸ 18TH WING JOINT COURTESY PATROL, STANDARD OPERATING PROCEDURES FOR COURTESY PATROL (n.d.) [hereinafter JOINT COURTESY PATROL SOP] (on file with author).

⁴⁹ 18th Wing Joint Courtesy Patrol Briefing (n.d.) (on file with author).

⁵⁰ MCO 1050.7A, *supra* note 4, at 5-1.

⁵¹ JOINT COURTESY PATROL SOP, *supra* note 48.

⁵² MCO 1050.7A, *supra* note 4, at 5-17.

⁵³ See Appendices A and B.

⁵⁴ Fort Riley issues courtesy patrols ballistic vests to wear for extra protection. The vests issued to courtesy patrols were already part of the PMO inventory. None of the vests were purchased specifically for courtesy patrol use. Telephone Interview with Major Irvin Drummond, Chief of Justice, Fort Riley Office of the Staff Judge Advocate (Jan. 23, 2013).

⁵⁵ Fort Carson PP Training, *supra* note 28.

⁵⁶ 10TH MOUNTAIN CP SOP, *supra* note 39, at 4.

⁵⁷ AR 190-24, *supra* note 8, para. 3-2(e).

legal advisors to clearly communicate the left and right legal limits for courtesy patrols.

Training should be multi-disciplinary and frequent. Ideally, military police, judge advocates, and command representatives should present training together. At a minimum, all those conducting the training should review all of the training materials to make sure the necessary issues are addressed. Brigade judge advocates should provide the training to their personnel. At the division level, the chief of justice or a trial counsel should train other staff elements participating in the program. It is imperative, however, that judge advocates discuss legal issues in advance with each other and with trainers from other sections to avoid conflicting advice.

6. Rules of Conduct

Proper training begins with proper terms. Courtesy patrols do not follow “rules of engagement” or “rules for the use of force” since they are not engaged in combat or law enforcement. Such material and language is better left to pre-deployment briefings and guard mounts. The principles to communicate to courtesy patrol members are better described as rules of *conduct*. In the courtesy patrol context, force is a last resort. The rules for courtesy patrols focus on properly identifying military personnel, verbal orders, and de-escalation.

First, courtesy patrols only have authority or jurisdiction over military personnel. Before engaging a person, the patrol member must positively identify him as a military member. This may be as easy as a haircut or personal knowledge on the part of the patrol members. Patrol members must follow-up by asking for military identification. If the individual refuses or denies being a military member, the courtesy patrol must treat the person as a civilian. Per the PCA, military personnel cannot exercise any control or authority over civilians. The engagement should simply be recorded on the courtesy patrol log for potential follow-up in case a servicemember is inappropriately claiming to be a civilian.

If the person confirms he is a servicemember and provides proper identification, the courtesy patrol has authority over him.⁵⁸ He is subject to the UCMJ and any lawful orders he receives from patrol members. If he is intoxicated, the courtesy patrol members should ensure he has a plan to avoid driving drunk or putting himself in danger. If he is belligerent, the courtesy patrol must de-escalate the situation verbally. If unsuccessful, local police must be called to arrest the servicemember or take other action.

⁵⁸ Uniform Code of Military Justice, Article 7(c) authorizes commissioned officers, warrant officers and NCOs to “to quell quarrels, frays and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.” UCMJ art. 7(c) (2012).

Most courtesy patrol programs employ vignettes to teach courtesy patrol members how to stay within legal limits.⁵⁹ Vignettes are an effective way of applying legal nuances to real world situations. Military bearing and interpersonal skills should be emphasized in order to provide patrol members the appropriate tools for the mission. In order to provide the most authentic training scenarios possible, judge advocates may consider joining a courtesy patrol on duty to get a better perspective of the situations they encounter on the street.

7. International Agreements

Judge advocates advising OCONUS commanders must understand and apply the various international agreements that may impact how off-post operations are conducted. Failure to properly coordinate with local authorities and respect international agreements invites political disaster.⁶⁰ For this reason, forces operating in foreign countries must be highly sensitive to local preferences.⁶¹ An overly aggressive or undirected courtesy patrol could unwittingly create an international incident. While the incident may not produce an unfavorable headline, it may result in increased taxes or more traffic tickets for servicemembers. Host nations can be creative when responding to perceived affronts from U.S. forces. Commanders therefore cannot take the approach that their authority over military personnel and their dependents is unfettered when operating in foreign countries.

In addition, judge advocates should be aware of the complexity of international agreements when advising OCONUS commanders. Despite some common provisions, international agreements differ widely. For example, Germany and Italy have very different approaches to courtesy patrols. Article VII of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) contains the following language:

- a. Regularly constituted military units or formations of a force shall have the right to police any camps, establishment or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may

⁵⁹ Fort Carson PP Training, *supra* note 28.

⁶⁰ MCO 1050.7A, *supra* note 4, para. 5. Commanders coordinated with the Okinawa Prefectural Government (OPG), Okinawa Prefectural Police (OPP), Okinawa Defense Bureau (ODB) and the Ministry of Foreign Affairs (MOFA) to implement patrols in Japan.

⁶¹ U.S. FORCES KOREA, REG. 1-44, CRIMINAL JURISDICTION UNDER ARTICLE XXII, STATUS OF FORCES AGREEMENT app. B-10 (1 Mar. 2010). Pursuant to the Korean Status of Forces Agreement, Air Force courtesy patrols at Osan Air Base are accompanied by Korean National Police whenever possible. This practice may lead to better relations since forces work together for their mutual benefit.

take all appropriate measures to ensure the maintenance of order and security on such premises.

b. Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.⁶²

A plain reading of this language requires the legal advisor to refer to the arrangements or agreements with the receiving State.⁶³ This language does not explicitly reference courtesy patrols, and different practices have arisen in different countries. In Germany, Army in Europe Regulation 190-62 allows courtesy patrols to augment and assist military police patrols.⁶⁴ In Italy, “disciplinary patrols” are prohibited by agreement with the host nation. Judge advocates operating OCONUS must be prepared to thoroughly analyze the relevant agreements and advise accordingly. Such work cannot be left to the Provost Marshal or unit representatives. Judge advocates should approach the courtesy patrol as they would any operation and seek to work closely with the command and staff in order to add value at all critical decision points.

8. Resourcing the Courtesy Patrol: Practical and Ethical Concerns

Courtesy patrol members are authorized to use government vehicles, phones, and additional military equipment to conduct their mission.⁶⁵ An officer or NCO on courtesy patrol is likely responsible for government property, and constantly engages with business owners off-post. This reality requires an analysis of potential fiscal law and ethics issues. Unless the installation is surrounded by bars and clubs, the courtesy patrol will likely travel in a government vehicle. Army Regulation 58-1 provides that “the use of Army-owned or controlled nontactical vehicles is restricted to official purposes only.”⁶⁶ The regulation specifically forbids the use of nontactical vehicles for

personal errands or visits to commercial entities.⁶⁷ Thus, the patrol may not use the vehicle for personal business or to take Soldiers to private establishments while “out on the town.”

Many times the courtesy patrol mission becomes a taxi service solely engaged in the transportation of intoxicated Soldiers back to base to avoid driving under the influence (DUI). Although there is nothing inherently illegal about courtesy patrols using government vehicles, courtesy patrol members must always be aware of public perception. Military personnel assigned to courtesy patrols are in uniform on official duty using the vehicles for an official purpose: to deter misconduct. Sending courtesy patrols to bars and clubs to transport intoxicated servicemembers back to post puts the command at risk for the perception that the unit is abusing government resources in order to cover for their Soldiers, Sailors, Marines, or Airmen.

To avoid this perception, intoxicated military personnel should first be encouraged to call a taxi or a friend to pick them up. Courtesy patrol members should have taxi contact information on hand for this purpose. Alternatively, the unit should be called to pick the person up. This approach enables the courtesy patrol to continue their mission without driving back to post. The absolute last resort should be to transport the intoxicated Soldier back to the unit headquarters in the courtesy patrol vehicle.

An ethical challenge arises from the fact that courtesy patrols are constantly engaged with the local community. Courtesy patrol members must be wary of accepting gifts or seemingly well-intentioned offers of food or drink from local business owners. Though accepting a modest, non-alcoholic beverage or snack may not violate any rules, it may create the perception that the military is supporting certain bars or clubs. The courtesy patrol SOP should affirmatively address this issue to protect courtesy patrol members from unwittingly putting themselves in an improper position.

IV. Conclusion

As our war-weary commanders refocus their energy toward the garrison, the courtesy patrol program is becoming an increasingly popular tool to prevent misconduct. The complexity of the mission should not be underestimated. As they would in any other operation, judge advocates must engage the command and staff early and often to develop the proper program. Despite their limitations, courtesy patrols can decrease misconduct and increase public confidence in the military if personnel understand the mission.

⁶² Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, U.S.-Ger., art. VII, para. 10b, June 19, 1951, available at http://www.nato.int/cps/en/natolive/official_texts_17265.htm.

⁶³ The receiving state is the country hosting U.S. forces.

⁶⁴ AER 190-62, *supra* note 40, para. 21.

⁶⁵ FORT RILEY CP SOP, *supra* note 28, para. 5-2.

⁶⁶ U.S. DEP’T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION AND USE OF MOTOR VEHICLES para. 2-3 (10 Aug. 2004).

⁶⁷ *Id.* para. 2-4.

Per regulation, judge advocates are responsible for adequately preparing the NCOs and officers who become the face of the command in the community. Judge advocates must master applicable local law, international agreements, and regulatory guidance in order to provide the best possible

advice. They must also fully consider how to tailor the program to best fit the command and local community.

Appendix A
Sample Courtesy Patrol Program SOP

1. REFERENCES.

- a. DoDI. 3025.21, Defense Support of Civilian Law Enforcement Agencies, dated 27 February 2013
- b. AR (MSR) 190-24 Armed Forces Disciplinary Control Boards and Off-installation Liaison and Operations, dated 27 July 2006
- c. Title 18, U.S. Code, Section 1385, Posse Comitatus Act

2. PURPOSE.

- a. To provide standing operating procedures (SOP) for xxx units with regard to the performance of courtesy patrols within the city limits of xxxxxx. The intent of the program is to provide command representatives the opportunity to engage Soldiers who are acting in an unsafe or inappropriate manner and to provide a command presence in the local communities to help deter misconduct by Fort xxxx Soldiers.
- b. Safeguard the Soldiers and Family members of xxxxx while providing a service to the community that supports the installation.
- c. Ensure compliance with Title 18, U.S.Code, Section 1385, Posse Comitatus Act.
- d. Reduce off-post incidents which may have a negative impact on the welfare and safety of our Soldiers.
- e. Improve public perception of Fort xxxx Soldiers within the surrounding communities.
- f. Provide units with visibility / flexibility to enhance unit discipline and educate leaders regarding Soldiers off post conduct.

3. APPLICABILITY. This SOP applies to all xxxxx units.

4. RESPONSIBILITIES.

- a. PMO: Will develop and implement the courtesy Patrol program and associated staff products and standing operating procedures. Any significant future changes to the program structure or responsibilities will be determined and coordinated through the PMO in conjunction with CG's guidance.
- b. G-3: Is responsible for the oversight of the Fort xxx Courtesy Patrol Program. They will maintain SOP's and incorporate unit taskings into DTOs. Units will be tasked NLT 14 days prior to the start of unit Courtesy Patrol responsibilities.
- c. Garrison / DES: Will coordinate with the Downtown partnership and local law enforcement authorities ensuring understanding and support of the program. DES will provide courtesy patrols with a brief update on current local police intelligence. DES will also distribute and maintain CP equipment sets to be hand-receipted to individuals as they report for duty. In the event that a unit has no shows, the DES will notify the G-3. The mission will not be stopped or scratched due to no shows.
- d. G-4: Will acquire all equipment as required to include but not limited to CP brassards prior to implementation of CP Program.
- e. G-6: Will acquire (cell phones or radios) for CP communications prior to implementation of CP Program.
- f. PAO: Will coordinate and conduct media action plan. PAO will also develop media relations training for Courtesy Patrols and provide training and media cards.
- g. SJA: Will maintain legal oversight of CP Program and evaluate any proposed changes to the SOP. SJA will also develop legal training for CPs, to include no less than Posse Comitatus Act and its relations to CP operations, limitations on

detention of Soldiers by CP's and Rules for the Use of Force. Training must be geared to SSG or above to include scenario based exercises. SJA, through Brigade legal teams are responsible for training the courtesy patrol teams of their respective Brigades using training packets provided by SJA. Separate Battalions need to coordinate with SJA for training if they have no organic legal team.

5. PROCEDURES.

a. DES will conduct coordination with local law enforcement authorities, in order to gain a positive reception from off-post officials with regard to the conduct of this mission, and to outline guidelines prescribed herein, which will aid to alleviate confusion as to roles and responsibilities of CPs. DES will provide Level IIIa concealable body armor for CP personnel.

b. Additional coordination will be conducted by on-post units in order to gain increased understanding of roles and responsibilities during the conduct of this mission.

c. Weekly training will be provided by SJA, and PAO in order to impart necessary knowledge of roles and responsibilities pertinent to the conduct of this order. Training will include instruction on Interpersonal Communications (IPC) skills, parameters set forth by Title 18, U.S. Code, Section 1385, and The Posse Comitatus Act. These records will be maintained at the unit level.

d. Those personnel serving in the career management fields of Special Forces (SF), Military Intelligence (MI), Military Police (MP) or SJA Soldiers will not perform duties as Courtesy Patrols.

5-1 Units.

a. Commanders will assure each Soldier working as a member for the Courtesy Patrols has completed all required training no later than one day prior to assumption of duty. Training will include classes on Posse Comitatus Act, limitations on detention of Soldiers, courtesy patrol SOP and media interaction training. These classes will be offered by the SJA and PAO on a weekly basis.

b. Battalion Commanders are the certifying officials for the CP program. Commanders shall ensure every member is properly trained and validated before performing CP duties. CP Soldiers must not be pending disciplinary actions, must possess sound, mature judgment, demonstrate proper military bearing and courtesies, and have no record of courts-martial convictions.

c. The lowest level commander responsible for a CP will maintain training records and conduct a formal risk assessment for each function of an off-installation CP.

d. Units will provide two 12-15 passenger TMP vans with off-post dispatch to each CP for secondary communications between the teams during their Courtesy Patrol shifts.

5-2 Reporting Procedures.

a. Courtesy Patrol shifts will take place between the hours of 2200-0200, on nights prior to non-duty days, to include Federal and Installation holidays. Recommended changes to duty hours based on patrol observations will be made through the Chain of Command to the G-3.

b. Courtesy Patrols will report for duty to the DES, Building xxx NLT 2130hrs for their daily briefing. All Soldiers, while on CP duty, will wear their ACUs with patrol cap, distinctive CP brassards, level IIIa concealable body armor, appropriate inclement weather gear (as needed), and communications equipment at all times during duty.

c. Courtesy Patrols will work in teams of xxxxx in the rank of SSG and above (one officer and one NCO per team is recommended).

d. Upon completion of activities at DES (equipment sign out/briefing), CPs will report to the local police department in order to make contact with, and receive situational updates from police department personnel on shift.

e. CP activities and incidents requiring CP intervention will be annotated on DA Form 1594, Staff Duty Log. Upon completion of each shift, the log will be returned to the DES Desk SGT. The DES will forward the completed 1594's to the PMO for distribution on the first duty day following completion of CP duties.

f. Once CPs check into the DES Desk SGT, they will be considered TACON to the DES for the duration of their shift. All situations and emergency's needing assistance other than from local law enforcement will be directed and routed through the DES Desk SGT. All emergency numbers will be pre-programmed into the issued cell phones.

5-3 Engagements.

a. The primary duty of the CPs is to maintain safety and good order and discipline in the Entertainment Districts of xxxxx. As such, NCOs and Officers serving on CP duty will have the authority to issue lawful orders at their discretion to military personnel in the Entertainment District. Failure of military personnel to obey lawful orders issued by CPs could result in punishment under the Uniform Code of Military Justice (UCMJ).

b. Personnel performing courtesy patrol duty will not carry weapons of any kind, to include clubs, firearms, knives, or any object that could be construed and subsequently utilized as a weapon.

c. Verbal Altercations.

1. Verbal altercations should, and often can, be easily mitigated by the use of Interpersonal Communications (IPC) skills, so as not to allow for escalation into physical conflicts. In the event that a Soldier and civilian become involved in a verbal altercation, CPs will approach the parties involved, attempt to separate the subjects without using physical force, identify all military personnel, and promptly notify the military member(s) staff duty so they can be turned over to unit control.

2. In the event that a verbal altercation occurs amongst military personnel only, those personnel will be identified as such and immediately notify the military member(s) staff duty so they can be turned over to unit control.

d. Physical Altercations, with Injuries.

If a Soldier is involved in a physical altercation and injuries are involved, the CPs will immediately notify xxxxx personnel, and render first aid as needed, until the arrival of qualified emergency medical service personnel. CPs will then notify the military member(s) staff duty so they can be turned over to unit control.

e. Physical Altercations, without Injuries.

If a Soldier becomes involved in a physical altercation with another Soldier, without injuries, those involved will be identified and immediately returned to their unit staff duty officers. If a Soldier becomes involved in a physical altercation with a civilian, CPs on scene will immediately notify local police, who will then determine disposition of the incident.

f. Criminal offenses committed by persons believed to be military personnel, that are witnessed by CPs will immediately be referred to local police for appropriate action and disposition.

g. All incidents involving CP's will be logged in the DA FM 1594.

5-4 Patrol Areas.

a. While on duty, CPs will remain in their respective patrol areas in order to maintain the most appropriate area of coverage with the ability to assist or other CPs in a timely manner.

b. The vans may be parked xxxxxxxxxx.

c. In cases of extreme necessity, the use of public facilities for the purpose of personal relief may be accomplished at an establishment whose primary business interest is not the consumption, distribution, or sale of alcoholic beverages.

d. CP members may accept unsolicited, modest, non-alcoholic refreshments not offered as part of a meal. CP members may not accept gifts to influence the performance of their official duties. It is a better practice to politely reject such gifts or

to pay market value for them. CP members must use sound discretion and judgment, ever mindful of their purpose and mission in civilian off-post businesses.

e. If the CP causes damage to civilian property or is involved in an incident that may cause a claim, the CP will contact OSJA Claims office at xxxx the next duty day. If the incident is significant (will produce media attention or the claim may exceed \$500) the CP will call the DES immediately and give a telephonic report.

f. CP members will not use a cell phone while driving a military vehicle. A cell phone ear piece **WILL NOT** be worn by the courtesy patrol outside of their vehicle.

g. CP members must remember that they represent the Commanding General and Fort xxx. CP actions will be scrutinized by the public. CP members will drive in a courteous manner that reflects well upon the Army. CP members will obey the rules of the road, keep radio volume at a low setting and stop completely for all stop signs.

6. Point of contact for this memorandum is xxxxxxxxxxxxxxxxxxxx

xxxxxxx
Major General, USA
Commanding

DISTRIBUTION:

A

Appendix B

Sample Courtesy Patrol Program SOP

Headquarters
XXXXXXXXXX

XXXXXXXXXX

Standard Operating Procedures

Courtesy Patrol

Reviewed by
OSJA
Approved by
Senior Commander
DISTRIBUTION:

Reviewed by
G3

Summary. This document outlines the Standard Operating Procedures (SOP) for the Courtesy Patrol (CP) program.

Applicability. This document applies to units and personnel assigned to Courtesy Patrol duties at XXXXX, and their surrounding communities.

Interim Changes. Interim changes to this SOP are not official unless they are reviewed by the Office of the Staff Judge Advocate and authenticated by G3.

Suggested Improvements. The proponent of this SOP is the G3. Users may send suggestions to improve this SOP on DA Form 2028 (Recommended Changes to Publications and Blank Forms) to Commander, xxxxx, ATTN: G3.

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Appendix B

1. Purpose:

a. The purpose of this document is to prescribe standard operating procedures for Courtesy Patrol (CP) and the conduct of patrols within our neighboring communities. The contents of this SOP are based on command guidance, legal authorities, and historical information.

b. The CP is a command program that helps prevent inappropriate Soldier activity, supports Soldier welfare, and sustains community relations. A CP is a three-Soldier Team (Team Leader, Assistant Team Leader, and Driver) that patrols locations considered by the command as high-risk areas. The primary objectives of CPs are to:

- (1) Render assistance and provide information to Service personnel.
- (2) Preserve the safety and security of Service personnel.
- (3) Preserve good order and discipline among Service personnel and reduce off-installation incidents and offenses.
- (4) Maintain effective cooperation with civil authorities and community leaders.

2. References:

- a. DoDI. 3025.21, Defense Support of Civilian Law Enforcement Agencies, dated 27 February 2013
- b. AR (MSR) 190-24 Armed Force Disciplinary Control Boards and Off-Installation Liaison and Operations, dated 27 Jul 06
- c. HQDA (OPMG) Memo for DCG HQ USA FORSCOM CDR: Subject: Change to Army Regulation 190-24, Para. 3-2(d), dated 5 Sep 07
- d. AR 600-20, Army Command Policy, 18 March 2008; RAR Issue Date 20 Sep 12
- e. Title 18, U.S. Code, Section 1385, Posse Comitatus Act
- f. MOU-045, Courtesy Patrol Memorandum of Understanding between xxxx and xxxx Police Department, 4 April 2012

3. Overview:

a. Historically, the tendency for Soldiers to engage in inappropriate conduct in bars or night-clubs in areas throughout xxxxxx are especially prevalent during weekend and holiday periods. Until recently, certain areas have been free of any military command presence during peak times for such inappropriate behavior.

b. Due to the frequency of incidents in these areas, the Commanding General (CG) directed the initiation of a consolidated, CP Program at the division level. This program is the only authorized CP Program for xxxxx units. Units shall not conduct separate CP operations without prior approval of the CG.

c. CPs will normally be conducted during normal (Friday and Saturday) and holiday weekend (Thursday, Friday, Saturday and Sunday, as required) nights, with a tour of duty from 2100 to 0500. A CP Team is a three-Soldier team under the direction of the Field Officer of the Day (FOD). Two CP Teams will be on duty each weekend. Prior to assuming duties, the CP Teams will receive a legal brief from a designated Judge Advocate regarding the limitations of their authority and rules of conduct and a brief from the FOD on their duties and responsibilities.

d. All Brigades are tasked to support CPs. Courtesy Patrols will interact with Soldiers to promote safety and good order and discipline by providing a command presence in off-post establishments and high risk areas. CPs shall not engage in law enforcement activities or provide direct assistance to civilian law enforcement officials. Direct assistance includes, but is not limited to, interdiction, search, seizure, arrest, stop and frisk, surveillance, pursuit, investigation and interrogation (see paragraph 6a for more information). Upon completion of their shifts, CPs will return to the HQ and submit a report on activities conducted on a CP Log to the FOD.

4. Responsibilities:

a. **G3:** Responsible for the oversight of CP Operations. G3 Operations maintains and updates the CP SOP. G3 tasks subordinate units and coordinates equipment and training requirements. G3 tracks recurring issues and provides issues and trends to the Command Group.

b. **G4:** Responsible for coordination and procurement of equipment as required. G4 coordinates for 4x brassards, and 4x Land Mobile Radios (LMR) with instructions.

c. **G6:** Responsible for procurement of 4x dedicated CP cell phones (1x per patrol).

d. **SJA:**

(1) Responsible for maintaining legal oversight of the program and evaluating proposed changes to the SOP. The OSJA establishes a training program on the following topics:

- (a) Posse Comitatus Act and its relationship to CP operations.
- (b) Limits on Detention and Arrest of Soldiers by CPs.
- (c) Use of Force for CPs.
- (d) Applicable Rules of Conduct.
- (e) Media Interactions (Incorporate PAO media engagement training).

(2) The training program must be geared to SFC or above and shall include scenario-based exercises. The OSJA provides updates to training as necessary.

e. **PAO:** Responsible for media awareness training. PAO coordinates with SJA to ensure PAO training is incorporated into SJA training. The PAO develops and maintains PAO plan for release of information to the media explaining the CP program to the local community.

f. **SUBORDINATE UNITS:**

(1) Provide Soldiers for CP duty on a weekly basis. Commanders may not assign Military Police, Military Intelligence, or SJA Soldiers to the CP. In assigning Soldiers to CP duties, Commanders should consider other categories of Soldiers who should not act as CP. Courtesy Patrol members should not be physically limited or create undue risk (e.g. injured or on profile, pregnant, high risk for PTSD including very recent redeployers). Courtesy Patrol members should not negatively impact public perception and media relations. For example, they should meet height/weight standard and maintain a professional appearance at all times. Each Soldier operating as a member of the CP will read the SOP, receive a brief from a legal advisor and the FOD, and sign an acknowledgment statement of their duties, responsibilities, and rules of conduct (Annex A).

(2) Units will conduct appropriate risk analysis and risk mitigation for the CP mission. In particular, units will ensure that CP members are afforded the opportunity to rest prior to assuming duty.

(3) Units will provide internal, Non-tactical Government Owned Vehicles (GOVs) to their CP members.

(4) Units will incorporate into weekly safety briefs the presence of the CP and a Soldier's inherent duty to comply with all orders given by the CP, including their obligation to produce their military identification card and identify their unit upon request.

5. Scope of Duties:

a. Reporting Procedures:

(1) First duty day of the week prior to duty – coordinate with SJA POC IOT receive Legal Brief.

(2) NLT 1200 hours on the last work day before duty – Legal Brief Complete.

(3) 1700 – CP Assumption brief by FOD at HQ (JBER) or Garrison HQ from G3.*

(4) 2000 – Equipment/COMMO checks. FOD coordinates with the Police Department to give notice of the CP presence in assigned areas. CPs will not be directly tasked by the local police.

(5) 2100 – CP departs.

(6) 0400 – CP Redeploys.

(7) 0500 – CP briefs engagements with Soldiers, with civilians, and interaction with police department to the FOD (comments will be annotated in the CP duty log). CP returns all equipment issued after every shift. CP records any AAR comments in the CP duty log.

b. Courtesy Patrol Duty Log (DA Form 1594):

(1) The CP Team maintains a DA Form 1594, Duty Officer's Log, recording the significant events and actions that occur during CP duty. The DA Form 1594 will be legibly hand written in single copy. The CP will turn the log into the FOD at the end of the duty.

(2) Intent of DA Form 1594: The intent of the CP Duty Log is to inform the FOD, G3 CUOPS, and, if needed, the Command Group of the significant events and actions that occurred during the CP tour of duty in order to assist in identifying possible trends of Soldier indiscipline, identifying locations that pose a risk to Soldiers, provide better support to Soldiers, improve community relations, and evaluate the overall effectiveness of the CP program. [Note: This log does not replace unit responsibility to submit applicable SIRs/CCIRs.]

(3) Recording Actions on DA Form 1594: The CP Duty Log is opened with an entry recording when the CP reports to the FOD to begin duty and ends with an entry recording when the CP reports to the FOD for their end of duty out brief. The CP records their actions in a "rolling" format, where the time at the end of one action is the beginning of the next action (example: 2000-2015 – Drove from X Bar to Y Bar; 2015-2100 – Conducted presence patrol at Y Bar). Record the names and units of Soldiers on the DA Form 1594 when appropriate.

(a) Significant Actions: Significant actions are situations that required CP intervention. Significant actions will be recorded in sufficient detail to allow the reader to fully understand the event and the actions taken to mitigate the event. Information recorded should be closely related to the CP's mission of protecting DoD personnel.

i. Good examples of "Significant Action" documentation are as follows:

(A) "Identified several Soldiers drinking alcohol to excess at Buffalo Wild Wings. Ensured they had a buddy who was watching out for them and ensured they had a safe and reliable method of transportation home/to the barracks. Reminded Soldiers to drink in moderation and avoid acts of indiscipline."

(B) "Identified an inebriated Soldier without a safe means of transportation on the corner of 5th and A Streets. Called a taxi for the Soldier and ensured the Soldier entered the taxi to return to his barracks."

(C) "Identified a Soldier who was extremely intoxicated in the parking lot of Crazy Legs. Offered to provide safe transportation for the Soldier but the Soldier refused. Despite efforts, the Soldier entered his vehicle. Called local police, who arrived on scene and took control of the situation."

ii. Poor examples of "Significant Action" documentation are as follows:

(A) "Saw intoxicated Soldiers and told them to not get in trouble."

(B) "Called a taxi for a Soldier."

(C) "Called the Police because a Soldier was about to drive while intoxicated."

c. Courtesy Patrol Team Duties and Responsibilities:

(1) Courtesy Patrol Team Leader: The CP Team Leader is a Soldier in the rank of 2LT (O1) thru CPT (O3) or WO1 through WO3. The Team Leader is responsible for all actions of the CP and is responsible for ensuring successful execution of the CP mission. The CP Team Leader's duties are as follows:

(a) Ensure identification of Soldiers is accomplished in accordance with the Rules of Conduct section of this SOP.

(b) Coordinate for CP Team to receive Legal Brief.

(c) Read and understand the CP SOP. Receive and understand any specific instructions from the FOD during the CP Team In-Brief. Develop a planned patrol route in coordination with the FOD and the other CP Team Leader in the same area of operations.

(d) Brief the CP Assistant Team Leader and CP Team Driver/RTO on the specifics of the CP team's mission, duties, responsibilities, and any specific instructions relative to the CP Team's tour of duty.

(e) Maintain positive communications with the FOD and any designated Civilian Law Enforcement Liaison throughout the CP Team's tour of duty.

(f) Conduct CPs in local communities surrounding xxxxxx as directed by the FOD in order to prevent and mitigate inappropriate Soldier activity, support Soldier welfare, and sustain community relations.

(g) Take appropriate corrective actions to resolve situations of Soldier disorder, indiscipline, and violent or unsafe situations observed during execution of CPs.

(h) Record CP significant actions on a DA Form 1594, Duty Officer's Log.

(i) Render an end-of-duty verbal out-brief to the FOD and turn in the Team's end-of-duty DA Form 1594 Duty log to the FOD.

(2) Courtesy Patrol Assistant Team Leader: The CP Assistant Team Leader is a Soldier in the rank of SFC (E7). The CP Assistant Team Leader is the primary assistant to the CP Team Leader and the supervisor of the CP Team Driver/RTO. The CP Assistant Team Leader's key tasks are as follows:

(a) Assume duties of the CP Team Leader when the CP Team Leader is unable of performing CP Team Leader duties.

(b) Ensure coordination of one non-tactical GOV for use as a CP vehicle. The preferred vehicle type is a multi-passenger van.

(c) Arrive on time for duty and ensure the Driver/RTO does the same.

(d) Read and understand the CP Team SOP and any specific instructions provided by the CP Team Leader.

(e) Assist the CP Team Leader in executing the CP Team's mission, duties, responsibilities, specific instructions, and the CP Team Leader's key tasks.

(f) Ensure the CP Team Driver is properly licensed to drive the CP Team vehicle and ensure the vehicle is properly dispatched, fueled, maintained, and cleaned prior to the CP mission and prior to turn-in.

(g) Ensure the CP Team Driver/RTO fully understands the CP Team's mission, his specific duties, responsibilities, and any specific instructions or tasks required by the CP Team Leader or CP Assistant Team Leader.

(h) Sign and account for CP Team equipment from the FOD and report any equipment deficiencies or suggested improvements when turning equipment in.

(3) CP Team Driver/RTO: The CP Team Driver/RTO is a Soldier who is currently in good standing with his or her unit and who possesses a valid driver's license. The CP Team Driver/RTO cannot be a Soldier who is currently flagged

for any adverse action and should be selected based on maturity, ability to act professionally, and even temperament. The CP Team Driver/RTO key tasks are:

(a) Read and understand the CP Team SOP and any specific instructions provided by the CP Team Leader and CP Assistant Team Leader.

(b) Familiarize themselves with the area map and specific area maps of the CPs focus areas. Obtain specific maps as requested by the Team Leader or Assistant Team Leader.

(c) Assist the CP Team Leader and Assistant Team Leader in their duties.

(d) Arrive on time for duty.

(e) Possess a valid driver's license for the CP Team vehicle.

(f) Ensure the CP Team vehicle is properly dispatched for the CP Team's tour of duty.

(g) Ensure the CP Team vehicle is properly fueled, maintained, and cleaned prior to the CP tour of duty and prior to turn in.

(h) Safely drive the CP Team Leader and CP Assistant Team Leader in the execution of their duties.

d. Field Officer of the Day (FOD): The FOD is identified in accordance with FOD SOP.

(1) The FOD briefs each CP at 1700 hours prior to duty. Using the CP Briefing Sheet in Annex B, the FOD will verify that each member of the CP meets necessary training, equipment, uniform, and appearance standards to assume CP duty.

(2) The FOD briefs the CPs on the CP Rules of Conduct and ensures each CP member reads and signs the Acknowledgement of Rules of Conduct (Annex A).

(3) Upon return of CP, the FOD will receive the CP debrief and CP duty log. The FOD will annotate the following significant actions for the CoS/G3:

(a) CP orders a person positively identified as a Soldier back to unit control.

(b) Soldier is engaged in or is about to engage in an activity that is likely to result in harm to him/her self or others.

(c) CP stops a quarrel, fray, or other disorderly conduct.

(d) CP observes or learns of any incident that seriously threatens the health and welfare of a Soldier.

(e) CP transports a Soldier back to the Installation.

(f) CP observes local authorities apprehend a Soldier.

(g) CP has a negative incident with law enforcement or an establishment owner or manager.

(h) Any other incident determined by the FOD to be of immediate concern to the Commander. This decision will be based on the nature of the incident, its potential to cause adverse publicity for the command, and its possible consequences.

e. Items in CP possession/Uniform and Equipment:

(1) Duty uniform is ACUs with head gear, CP Brassard, Rules of Conduct Card, and pen and note pad.

(2) Equipment required: DA Form 1594 (staff duty log), Government cell phone, list of contact numbers, CP SOP, Government Vehicle with flashlights and first aid kit. CPs should keep cleaning supplies and sickness bag in CP vans. If a

Soldier soils a CP van through vomiting, urination, or any other means, the CP may ask the Soldier to clean the vehicle out unless the Soldier is physically unable.

6. Rules of Conduct:

a. Courtesy Patrols do not perform law enforcement functions: The purpose of CPs is to ensure Soldiers act safely and responsibly in order to avoid harm to themselves, harm to others and legal issues. The Posse Comitatus Act prohibits members of the Army from acting in law enforcement capacities. As a result, CP Team members must ensure they do not act in a law enforcement capacity. Courtesy Patrol Team members are not police officers and may not conduct or assist the police in conducting law enforcement duties, such as traffic or other vehicular stops, arrests, searches, stop and frisks, seizures, interrogation, surveillance, or acting as an investigator or informant. CPs may not apprehend a civilian.

b. CPs cannot interfere with the actions of civilians: At no time will a CP Team member attempt to exercise control of any type over any civilian to include government employees, dependents of Soldiers, or spouses of Soldiers.

c. Identifying a Soldier: Because **the CP only has authority over Soldiers**, the CP must positively identify an individual as a Soldier before issuing that person any orders. The following subsection outlines the proper steps that the CP Team will use to positively identify Soldiers. **[Note: Regardless of the steps below, if a CP is not 100% sure of an individual's identity, that person MUST be treated as a civilian.]**

(1) Methods to positively identify a Soldier:

(a) **Verbal Confirmation with Military ID:** If the CP strongly believes a person in question to be a Soldier, they may directly ask the person, "Are you an active duty Soldier?" If the individual confirms that they are a Soldier, the CP should ask to see the person's military ID. If the individual displays a current (not expired) military identification card with a photo that reasonably matches the individual's appearance, this constitutes positive identification as a Soldier. If the individual in question denies they are a Soldier, assume they are a civilian and treat them accordingly. Also, treat Reserve and National Guard Soldiers who are not on Title 10 Active Duty Status as civilians.

(b) **Verbal Confirmation without Military ID:** If the CP strongly believes a person in question is a Soldier, they may directly ask the person "Are you an active duty Soldier?" If the individual confirms they are in the Army, but they do not have a military identification card, the CP may ask for the individual's full name and unit of assignment. If time permits, the CP should call the unit's Battalion Staff Duty desk and have them check the individual's name against the "Alpha Roster." If the individual's name is on their "Alpha Roster," this constitutes positive identification of a Soldier. If the CP is unable to call the proper Staff Duty in order to check the "Alpha Roster" (not enough time, do not have correct telephone number, etc), or if the individual's name is not on the "Alpha Roster," assume the individual is a civilian and treat them accordingly.

(c) **Positive Identification by a Credible Source:** If one or more credible Soldiers, who the CP has positively identified as Soldiers (this includes CP Team members), positively identifies the individual in question as being a Soldier, this information constitutes positive identification as a Soldier. The credible individuals must be sober and personally know the potential Soldier they are identifying. Based on this identification by a credible source, CP Team members may ask the Soldier for his or her identification. If the Soldier produces a valid military ID, follow the steps in paragraph 6c(1)(a) of this SOP. If the Soldier does not have a valid military ID, follow the steps in paragraph 6c(1)(b) of this SOP. If there is any doubt about the military identity of the person in question, the CP must treat them as a civilian.

(2) What to do if an Individual cannot be Positively Identified as a Soldier: If a suspected Soldier cannot be positively identified by one of the methods above, the person **MUST** be treated as a civilian – even if the CP Team has a strong belief that the individual is a Soldier. If a suspected Soldier refuses to provide identification or denies they are a member of the Army, they must be treated as a civilian.

(3) How to respond to civilians: In the event that the CP Team approaches an individual and is unable to positively identify them as a Soldier, the CP Team should briefly explain who they are and their role (a member of the CP whose mission is to ensure Soldier safety), apologize for bothering the individual, politely thank them for their time, and render an appropriate salutation ("have a good evening," "enjoy the concert," etc). If a CP Team is approached by a civilian, they should respectfully explain who they are (a representative of the CP Team), what they do (provide a positive Command influence to the community and ensure the safety and well being of Soldiers), and why they are in the location (because it is an area frequented by Soldiers in their off duty hours). CP Team members should politely disengage themselves from conversations with civilians as soon as reasonably possible in order to continue their mission as CP Team members ("I

appreciate you coming to chat with me and thank you for your support. We have a really busy night ahead of us so we need to keep moving. Thanks again!") Under no circumstances should CP Team members enter into an altercation (verbal or otherwise) with civilians.

d. Interaction with Soldiers: When meeting with any Soldier, the CP Team should follow these guidelines:

(1) Interaction with Soldiers (generally):

- (a) Positively confirm that the individual is a Soldier.
- (b) Explain the purpose of the CP ("We're here to make sure everyone has fun by staying safe and staying out of trouble").
- (c) Inquire about the Soldier's plans for the evening; ensure they have a responsible, well thought-out plan (sober "buddy" watching out for them, identifiable designated driver, encourage restrained alcohol consumption, etc).
- (d) Don't make the CP Team a "pest" – ensure everyone is acting safely and move on. Tell everyone to have a safe and fun evening.

(2) Interaction with an intoxicated Soldier: When interacting with an intoxicated Soldier, the CP Team should follow these guidelines:

- (a) Positively confirm that the individual is a Soldier.
- (b) Ask the Soldier how he or she is planning to get home/travel to his or her next destination.
- (c) If the Soldier is not a danger to themselves or others (has an identifiable, designated driver; is within reasonable walking distance from home and is not overly intoxicated; etc) give the Soldier advice and direction as necessary and leave the situation alone.
- (d) If the Soldier is a danger to themselves or others, first, assist the Soldier by calling the Soldier a designated driver or by calling the Soldier a cab. If this proves impossible/impracticable, then as a last resort, the Soldier may ride in the CP Team during a regularly scheduled return to post. CPs will only transport Soldiers to a Military Installation (unit headquarters) – they will not transport Soldiers to off-installation businesses or residences. Modifying the planned route or making a special trip back to the Soldier's unit is not permitted.

(3) Interaction with a violent or disorderly Soldier: When interacting with a disorderly or violent Soldier, the CP Team should follow these guidelines:

- (a) Positively confirm that the individual is a Soldier.
- (b) De-escalate the situation verbally.
- (c) Issue verbal orders to the Soldier to cease their disorderly conduct and/or to return to their unit.
- (d) Call civilian law enforcement.
- (e) Observe civilian law enforcement action; record incident in CP Duty Log.

(4) Apprehension/Use of Force: **The goal of the CP is for civilian police to conduct all apprehensions (when apprehension is necessary).** CP Team Members may temporarily detain a positively identified Soldier in very limited situations provided all the criteria listed below are met.

- (a) The individual must be a positively identified Soldier.
- (b) Law enforcement must not be readily available.
- (c) It must be necessary to detain the Soldier immediately in order to prevent an activity that is likely to result in serious harm to the Soldier or others; and

(d) The Soldier must be detained in a safe manner with minimal risk to CP Team Members.

(e) During an apprehension, CP Team Members are authorized to use minimum non-striking, physical force to detain a Soldier. This force includes holding a Soldier's arm, "bear hugging" the Soldier to prevent movement, or similar techniques. CP Team members are not authorized to strike, "take down," trip, or otherwise cause injury to a Soldier in the course of apprehension. In the event a Soldier escalates the use of force beyond that allowed for apprehension, (e.g. punches a CP Team member) the CP Team may respond only in self defense, should attempt to disengage themselves from the situation, and should call civilian law enforcement.

e. Medical Care of Soldiers: In the event that a Soldier accompanying the CP needs emergency medical care (e.g. significant bleeding; difficulty breathing; loss of consciousness; etc) the CP Team will immediately call 911. The CP Team will notify the FOD of the situation as soon as possible. In the event a Soldier accompanying the CP needs urgent medical treatment (e.g. bleeding requiring stitches, minor broken bones, etc), the CP may transport the Soldier to an on-post medical treatment facility.

f. Access to Off Post Establishments: Once off a Military Installation, CP Team Members have the same rights to enter a private establishment as a civilian; they do not have any special privileges or rights to enter off-post establishments.

(1) Requirement to vacate premise: Certain business owners/managers may choose to deny CP Team Members admission to their establishment or may ask CP Team Members to leave their establishment. If either of these situations takes place, CP Team Members should promptly and politely comply; the interaction should be logged on the CP Duty Log.

(2) Cover Charges: A location may attempt to charge CP Team Members a "cover charge" in order to enter their establishment. In the event this takes place, CP Team Members should politely decline and leave the venue. CP Team Members may not solicit free admission to a private venue for the purposes of conducting CP duties. However, if a private venue offers free admission to CP Team Members, they may accept this admission as a gift provided the admission amount is of a *de minimis* value (less than \$20 per person).

g. Use of Government Owned Vehicle (GOV):

(1) Use of Government Owned Vehicles is only authorized for limited situations. GOVs may be used to patrol regularly planned routes in execution of CP Team duties. **GOVs may NOT be utilized as a "free taxi service"** for transporting Soldiers from off-post establishments to their unit areas or barracks. Subject to the rules of paragraph 6d(2)d of this SOP, CPs may only transport Soldiers back to a Military Installation in the course of a planned CP return to the installation as a last resort.

(2) Accidents and Property Damage:

(a) Motor Vehicle Accidents: CP personnel involved in Motor vehicle accidents should comply with the instructions for reporting an accident in the issued GOV.

(b) Other Personal or Property Damage: CP personnel involved in any incidents that result in personal harm or property damage will obtain witness information at the scene and report the incident to their Commander and FOD. CP Teams should utilize a DA Form 2823 Sworn Statement, or any other document at their disposal that captures a witness' recollection of events, his/her name, and his or her contact information.

(c) CP Team members should avoid discussing the incident or making statements without first consulting with the Claims Office. This instruction does not prohibit CP Team members from providing basic, factual statements to law enforcement officers investigating the incident.

(d) Commanders and the FOD shall notify the Claims Office at (xxx) xxx-xxxx of any property damage incident involving CP personnel.

(e) Vandalism: In the event that a GOV is vandalized in the course of CP Team duty, the CP Team should immediately contact local law enforcement in order to document the vandalism. The CP Team Leader is responsible for obtaining a copy of the completed police report and submitting it to his or her chain of command as soon as possible.

(3) Parking fees/tickets: CP Team members are only authorized to park in free parking areas. CP Teams are not authorized to pay parking fees via personal or government funds; CP Team members will not be reimbursed for parking fees

paid with personal funds. Any tickets received by CP Team Members will be the personal responsibility of the CP Team member who authorized parking in an unauthorized location.

h. Interaction with Media: Any requests for interviews should be directed to the Public Affairs Office. Any interaction with media should be recorded on the CP Duty Log.

i. Assistance to SMs from other Services: Although the CP Team's primary responsibility and purpose is to ensure the safety of Soldiers, CP Teams may assist active duty SMs of other Armed Services (Air Force, Navy, or Marines) should they be encountered during the course of normal CP Team duties.

j. Taxi Cab fares for Soldiers: CP Team Members are not responsible for providing funding for Soldiers to return to their place of residence (i.e. taxi fares) and will not be reimbursed for paying for Soldier's taxi fees. Commanders cannot use unit funds to pay for taxi services. A variety of free transportation services are available and are listed in the phone contact roster (Annex D).

k. Transporting Dependents or Civilian Friends of Soldiers:

(1) Dependents: A CP will not separate a Soldier from an accompanying spouse or other dependent. All efforts will be made to get the Soldier and dependent home by taxi or via friends of the Soldier. In the event there is no other safe, feasible method of transportation, the CP may transport a dependent to the installation in a GOV provided the CP is on a regularly scheduled return to the installation, the dependent is directly accompanied by their sponsor, and the dependent voluntarily agrees to the transportation.

(2) Civilian Friends of Soldiers: CP Teams members will not transport civilians (including civilian friends of Soldiers) in GOVs.

l. Planned Routes/Designated Patrol Areas: Prior to conducting CPs, the CP Team Leader will coordinate a planned route with the FOD and any other CP Teams who may be operating in the same general location as the CP Team. The FOD and CP Team Leaders will ensure routes are planned in a manner to maximize coverage and avoid "double coverage" of the same location. In order to determine areas of special interest for CP Team coverage, FODs will consult the previous three weeks CP Duty Logs. Specific business or locations (commercial city blocks, streets in commercial districts, etc) may be listed as areas of special interest on a CP Team's route. Specific private homes or residences and primarily residential locations (residential city blocks or streets) may not be listed as areas of special interest areas for CP Team coverage. **These routes can and should include return trips to the Installation** throughout the tour of duty in order to monitor Soldier behavior on post.

m. Acceptance of Gifts: CP members may accept unsolicited, modest, non-alcoholic refreshments not offered as part of a meal. CP members may not accept gifts so often that acceptance interferes with their duties or creates an appearance of impropriety. CP members may not accept gifts to influence the performance of their official duties. It is always appropriate to politely reject such gifts or to pay fair market value for them. CP members must use sound discretion and judgment and be ever mindful of their purpose and mission in civilian, off-post businesses.

n. Off Limits Establishments: CPs will not enter establishments designated off limits by the Commanding General or the Garrison Commander unless given specific instructions to enter from the Command Group or Garrison Commander.

o. Prohibited Items/Activities:

(1) CP members are prohibited from possessing weapons during CP duty. Weapons include, but are not limited to the following: Firearms (to include black powder firearms, air powered firearms) and firearms that have a non-metal projectile (e.g. "Airsoft" and paintball guns); knives (or other edged tools) to include multi-tools (Gerbers, Leathermans, etc); blunt weapons such as bats, clubs or saps; brass knuckles; tazers; pepper spray or mace; anything that is designed or intended to be used as an offensive or defense weapon; and replicas of weapons.

(2) CP members will not consume alcohol while on duty.

(3) Courtesy Patrol members should expect and plan to remain active during their duty hours. CP members will not bring computers, DVD players, electronic game systems, or other entertainment devices with them during CP duties. At the discretion of the CP Team Leader, personal cell phones are allowed to the extent that their use does not interfere with CP duties; however, CP members are only allowed to use them for communication – playing electronic games and excessive text messaging is prohibited. Communications will be of a limited duration (no more than five minutes per hour) unless directly related to CP duties.

ANNEX A: RULES OF CONDUCT ACKNOWLEDGEMENT

Courtesy Patrol Acknowledgement of Rules of Conduct

ACKNOWLEDGEMENT: I _____ have read and understand the Courtesy Patrol SOP and Rules of Conduct, and I understand my duties as the Courtesy Patrol _____ (insert Team position). I agree to comply with the Courtesy Patrol SOP and Rules of Conduct in the course of my duties.

_____ Signature	_____ Date
_____ Name and Rank	_____ Unit

ANNEX B: FOD CP BRIEFING SHEET
COURTESY PATROL BRIEFING SHEET

GENERAL

DTG:

CP Team Members Names:

Unit(s):

Duty/off duty phone:

Vehicle Information

Make:

Model:

License Number:

Equipment Check/Issued (initial)

____ CP Brassard

____ Critical Phone numbers (MSC SDNCO, FOD, Local Police Desk Sergeant)

____ Rules of Conduct Card

____ DA Form 1594

____ Radio

____ Government cell phone

____ Non-Tactical Government Owned Vehicle (Van preferred).

Training (initial)

____ Received Legal Brief

____ Received FOD In Brief

____ Reviewed CP SOP

____ Reviewed Media interaction

____ Sign Acknowledgement of Rules of Conduct

Note:

1. Remind CP Team to submit close-out report to FOD upon completion of shift.
2. Include any AAR comments in your close-out report.

_____	_____
FOD Signature	Date
_____	_____
Name and Rank	Unit
_____	_____
CP Team Leader Signature	Date
_____	_____
Name and Rank	Unit

ANNEX D: PHONE ROSTER

IOC	XXX-XXXX
CP #1	TBP
CP #2	TBP
CP #1	TBP
CP #2	TBP
Police Department	
Police Department	
DES	XXX-XXXX
FOD	XXX-XXXX
Medical Emergency	911

UNIT	PHONE NUMBER	BLDG #	LOCATION (STREET INTERSECTION)
List BDE Staff Duty			
Followed by Subordinate BNs			

A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Overhaul or a Little Tune-Up?

Major J. Michael Jones Jr.*

*Reprehensible examples of abuses by disreputable contractors and the failure to exclude these already known bad actors from getting new Federal contracts is a call for reform.*¹

I. Introduction

The government's suspension and debarment (S&D) system has come under scrutiny by Congress and government watchdog groups over recent years.² A few reasons for this attention include the rising national debt,³ the significant amount of money wasted on contracts during the wars in Iraq and Afghanistan,⁴ the substantial amount of taxpayers' dollars the government spends on contracts annually,⁵ and government contractors who violate the law but continue to receive federal contracts.⁶ There have been

numerous audits, studies, and reports conducted on various federal agencies' S&D systems.⁷ Congress has taken note and has proposed legislation to deal with their concerns about S&Ds.⁸

Federal agencies are under greater pressure to suspend or debar contractors who violate the law or perform poorly.⁹ Not only is pressure coming from Congress and watchdog groups, but President Obama's administration is also placing a greater emphasis on utilizing the S&D system.¹⁰ Some want federal agencies to use the S&D system as a way to punish contractors even though the Federal Acquisition Regulation (FAR) clearly states that punishment is not a purpose of S&D.¹¹ Although the government's S&D system

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¹ *How Convicts and Con Artists Receive New Federal Contracts: Hearing Before the H. Comm. on Oversight and Gov. Reform*, 111th Cong. 56 (2009) [hereinafter *How Convicts and Con Artists Receive New Federal Contracts Hearing*] (statement of Rep. Darrell E. Issa, Ranking Minority Member).

² See *Weeding Out Bad Contractors: Does the Government Have the Right Tools?: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. (2011) [hereinafter *Weeding Out Bad Contractors Hearing*]; *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov. Reform*, 112th Cong. (2011) [hereinafter *Protecting Taxpayer Dollars Hearing*]; *Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?: Hearing Before the H. Comm. on Oversight and Gov. Reform*, 111th Cong. (2010) [hereinafter *Rewarding Bad Actors Hearing*]; *How Convicts and Con Artists Receive New Federal Contracts Hearing*, *supra* note 1; Scott Amey, *Is the Federal Suspension and Debarment System Broken?*, PROJECT ON GOVERNMENT OVERSIGHT (Nov. 17, 2011), <http://pogoblog.typepad.com/pogo/2011/11/is-the-federal-suspension-and-debarment-system-broken.html>.

³ The national debt as of 26 October 2012, was over \$16 trillion. Information on the national debt is available at <http://www.treasurydirect.gov/NP/BPDLogin?application=np>.

⁴ The Commission on Wartime Contracting in Iraq and Afghanistan (CWC) found that at least \$31 billion, and possibly as much as \$60 billion, was lost to contract waste and fraud during the wars in Iraq and Afghanistan. See COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS (2011), http://wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf [hereinafter CWC FINAL REPORT].

⁵ The U.S. government spent \$514 billion on contracts for goods and services in fiscal year 2012, \$537.5 billion in fiscal year 2011, and \$538.8 billion in fiscal year 2010. Information on government contract spending is available at <http://www.usaspending.gov/>.

⁶ See Sen. Bernie Sanders, Summary of the Final Report on Contracting Fraud (Oct. 20, 2011), <http://www.sanders.senate.gov/imo/media/doc/>

Summary_of_Contracting_Fraud.pdf. See also U.S. DEP'T OF DEF., UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT TO CONGRESS ON CONTRACTING FRAUD (Oct. 2011).

⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-012-932, SUSPENSION AND DEBARMENT: DOD HAS ACTIVE REFERRAL PROCESSES, BUT ACTION NEEDED TO PROMOTE TRANSPARENCY (2012), <http://gao.gov/assets/650/648577.pdf> [hereinafter GAO-012-932]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-011-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011), <http://www.gao.gov/new.items/d11739.pdf> [hereinafter GAO-011-739]; see also *infra* note 37.

⁸ See Overseas Contractor Reform Act, H.R. 3588, 112th Cong. (1st Sess. 2011) [hereinafter H.R. 3588]; Contracting and Tax Accountability Act of 2013, H.R. 882, 113th Cong. (1st Sess. 2013) [hereinafter H.R. 882].

⁹ See Jason Miller, *Push for More Suspension, Debarments Receive Mixed Reactions*, FED. NEWS RADIO (Nov. 18, 2011), <http://federalnewsradio.com/index.php?nid=851&sid=2638305> ("The push by Congress and the administration for agencies to be more aggressive in suspending and debarment contractors . . ."); Jared Serbu, *Suspension and Debarments Rise Amid Pressure from Congress*, FED. NEWS RADIO (Jun. 14, 2012), <http://federalnewsradio.com/index.php?nid=851&sid=2903240> ("For years, Congress has pressed federal agencies to employ suspension and debarment process more often to weed out irresponsible contractors.").

¹⁰ On 15 November 2011, Jacob Lew, Director of the Office of Management and Budget (OMB), issued a memo to the heads of the executive departments and agencies discussing the importance of the suspension and debarment (S&D) system. Mr. Lew directed the departments and agencies to take numerous actions to improve their S&D programs. Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, Office of the President, to Heads of Executive Dep'ts and Agencies, subject: Suspension and Debarment of Federal Contractors and Grantees (Nov. 15, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf>.

¹¹ See Alexina Jackson, Government Contracts Legal Forum, *Rehabilitation or Punishment? The Evolution of Suspension and Debarment* (9:51 AM May 15, 2012), <http://www.governmentcontractslegalforum.com/2012/05/articles/suspension-debarment/rehabilitation-or-punishment-the-evolution-of-suspension-and-debarment/>; see also FAR 9.402(b) (Jan. 2013) (stating

is garnering attention recently, the foundation and fundamentals of the system are solid and sound; the system just needs to be used consistently and correctly by all federal agencies equally.

In order to illustrate this point, this article examines the S&D system as it now exists. It explores whether there are problems in the current system, whether Congress should mandate more automatic S&Ds, and whether agency suspension and debarment officials (SDOs) have too much discretion in the system. In order to answer these questions, the article reviews the findings and recommendations of some of the recent audits, studies, and reports on agencies' S&D systems as well as some of the recently proposed pieces of congressional legislation dealing with S&Ds. The article concludes by making recommendations for a little tune-up, not a major overhaul, and argues the government's current S&D system just needs to be executed properly.

II. Background of the Suspension and Debarment System¹²

A. The Basics

The main purpose of the S&D system is to protect the taxpayers and the government from contracting with contractors who are not trustworthy and "responsible."¹³ Part 9 of the FAR discusses contractor qualifications and requires the government to deal only with "responsible" contractors.¹⁴ There are numerous requirements a contractor must meet to be considered responsible.¹⁵ One such requirement is the contractor must "have a satisfactory record of integrity and business ethics."¹⁶ If a contractor is determined to not be "presently responsible" and it is in the government's best interest to do so, the government can suspend, propose for debarment, or debar the contractor.

A contractor can be suspended or debarred from receiving government contracts either administratively under FAR Subpart 9.4¹⁷ or statutorily.¹⁸ A suspension or

the "serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for the purposes of punishment").

¹² Suspensions & Debarments occur in the procurement and nonprocurement setting. This article will not focus on the nonprocurement setting, which includes grants, awards, loans, etc. See Exec. Order No. 12,549, 3 C.F.R., 1986 Comp. 189; Nonprocurement Common Rule, 2 C.F.R. pt. 180 (2008).

¹³ See FAR 9.402.

¹⁴ See *id.* 9.103(a); *id.* 9.402(a).

¹⁵ See *id.* 9.104-1.

¹⁶ See *id.* 9.104-1(d).

¹⁷ See *infra* Part II.B.

¹⁸ See *infra* Part II.C.

debarment generally has government-wide effect¹⁹ and applies to all future contracts unless an agency head or authorized person determines there is a compelling reason to waive the suspension or debarment.²⁰ Once a contractor is suspended, debarred, or proposed for debarment, the agency is required to list the contractor in the General Services Administration's (GSA) System for Award Management (SAM)²¹—which consolidates several procurement databases, including the Excluded Parties List System (EPLS)²²—for the public, and more importantly, contracting officers to see.²³ While the effects of being suspended or debarred may be the same, how the suspension or debarment comes about, either administratively or statutorily, is very different.

B. Administrative Suspension and Debarment

Federal Acquisition Regulation Subpart 9.4 contains the regulations which control how federal agencies can administratively suspend or debar. Administrative S&Ds are discretionary actions of the federal agencies' SDOs.²⁴ Suspension is "a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest."²⁵ A suspension is for a temporary period, usually no longer than twelve months unless an extension has been requested by an Assistant Attorney General and then no longer than eighteen months unless legal proceedings have been initiated in that period.²⁶

¹⁹ See, e.g., FAR 9.401; Exec. Order No. 12,689, 3 C.F.R., 1989 Comp. 235.

²⁰ See FAR 9.405; *id.* 9.405-1; *id.* 9.406-1(c); *id.* 9.407-1(d).

²¹ The General Services Administration's (GSA) System for Award Management (SAM) combines several federal procurement systems and the Catalog of Federal Domestic Assistance into one new system. The consolidation is being done in phases. The SAM currently includes the functionality from the Central Contractor Registry (CCR), Federal Agency Registration (Fedreg), Online Representations and Certifications Applications (ORCA), and Excluded Parties List System (EPLS). The benefits of SAM include streamlined and integrated processes, elimination of data redundancies, and reduced costs while providing improved capabilities. The SAM is available at <https://www.sam.gov/portal/public/SAM/>.

²² The Excluded Parties List System (EPLS) was an electronic database maintained by the GSA that contained certain information about all parties suspended, proposed for debarment, debarred, or otherwise disqualified from government contracts, awards, or grants. Even though the EPLS was retired on 21 November 2012, the requirements of Federal Acquisition Regulation (FAR) 9.404 regarding the EPLS are still applicable to SAM.

²³ See FAR 9.404.

²⁴ See *id.* 9.402(a); see also *infra* Part V (providing further discussion on suspension and debarment official (SDO) discretion).

²⁵ FAR 9.407-1(b)(1).

²⁶ *Id.* 9.407-4.

Debarment is a final action and it is for a definite period of time, depending on the seriousness of the cause but generally not to exceed three years.²⁷ Causes for debarment fall into four different categories: (1) when a contractor is convicted of or found civilly liable for certain offenses;²⁸ (2) when the SDO finds, by a preponderance of the evidence, that a contractor committed certain offenses;²⁹ (3) when the Secretary of Homeland Security or the Attorney General of the United States determines that a contractor is not in compliance with Immigration and Nationality Act employment provisions;³⁰ or (4) when the SDO finds, by a preponderance of the evidence, that “any other cause of so serious or compelling a nature” exists “that it affects the present responsibility of the contractor or subcontractor.”³¹ Causes for suspension are very similar to causes for debarment except the standard of proof is adequate evidence—as opposed to preponderance of the evidence—for debarment.³² While administrative S&Ds are discretionary actions of SDOs, statutory S&Ds are more strict and rigid and do not allow for much discretion.

C. Statutory Suspension and Debarment

A contractor can be suspended or debarred because a federal statute requires it. Some statutes prohibit certain conduct and contain provisions stating a contractor who

violates the statute shall be debarred from contracting with the federal government in the future.³³ Sometimes these statutes limit the suspension or debarment to contracts with certain agencies³⁴ or to certain facilities where the violation occurred.³⁵ Statutory S&Ds do not allow for SDO discretion like administrative S&Ds. While administrative and statutory S&Ds are in place to protect the government from contracting with nonresponsible parties, is the current system meeting its objective or have recent audits and congressional inquiries exposed some faults in the system?

III. Are There Problems With the Current Suspension and Debarment System?

A. Recent Audits, Studies, and Reports

Over the years, the Government Accountability Office (GAO) has conducted studies and provided reports regarding the government’s S&D system as a whole and with respect to some of its parts.³⁶ What may have spurred the GAO to study and examine the S&D system were the numerous federal agencies’ inspectors general’s (IG) audits, studies, and reports regarding their S&D programs, which showed minimal or uneven application of S&Ds by the various agencies.³⁷

²⁷ *Id.* 9.406-4.

²⁸ The certain offenses are (1) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; (2) violations of federal or state antitrust statutes relating to the submission of offers; (3) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property; (4) intentionally affixing a “Made in America” label inappropriately; and (5) commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the present responsibility of the contractor or subcontractor. *See id.* 9.406-2(a)(1)-(5).

²⁹ These offenses are (1) serious violations of terms of a government contractor or subcontract, such as (a) willful failure to perform the terms in one or more contracts or (b) a history of failure to perform or unsatisfactory performance of one or more contracts; (2) certain violations of the Drug-Free Workplace Act of 1988; (3) intentionally affixing a “Made in America” label inappropriately; (4) commission of an unfair trade practice as defined in FAR 9.403; (5) delinquent federal taxes exceeding \$3,000; (6) knowing failure by a principal, until three years after final payment on any government contract awarded to the contractor, to timely disclose to the government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, credible evidence of (a) violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found under Title 18 of the United States Code, (b) violation of the civil False Claims Act, or (c) significant overpayments on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001. *See id.* 9.406-2(b)(1)(i)-(vi) (Jan. 2013).

³⁰ *Id.* 9.406-2(b)(2).

³¹ *Id.* 9.406-2(c).

³² *See id.* 9.407-2 (Jan. 2013).

³³ *See* Davis-Bacon Act, 40 U.S.C. § 3144 (2006) (debarment for not paying certain wages); Buy American Act, 41 U.S.C. § 8303 (2006) (debarment for not using American materials in construction project in the United States).

³⁴ *See* 10 U.S.C. § 2408 (2006) (prohibitions on persons convicted of Department of Defense (DoD) contract related felonies and debarment from Department of Defense contracts).

³⁵ *See* Clean Air Act, 42 U.S.C. § 7606 (2006), and Clean Water Act, 33 U.S.C. § 1368 (2006) (limiting suspension to facility where violation occurred).

³⁶ *See* GAO-012-932, *supra* note 7; GAO-011-739, *supra* note 7; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-174, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS (2009), <http://www.gao.gov/assets/290/286493.pdf> [hereinafter GAO-09-174].

³⁷ *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REP. No. 12-01, AUDIT OF ADMINISTRATIVE SUSPENSION, DEBARMENT, AND OTHER INTERNAL REMEDIES WITHIN THE DEP’T OF JUSTICE (2011), <http://www.justice.gov/oig/reports/2011/a1201.pdf> (finding that during fiscal years 2005-2010, 77 contracts and modifications totaling approximately \$15.6 million were made to six separate suspended or debarred parties by DOJ components and fourteen of these awards were made because the awarding official failed to review EPLS; seventeen referrals for S&D were made involving thirty-five individuals or firms resulting in thirteen debarment actions and DOJ did not promptly or accurately input its debarment decisions to EPLS); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF DEF, REPORT No. D-2011-03, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS (2011), <http://www.dodig.mil/audit/reports/fy11/11-083.pdf> (finding that during fiscal years 2007-2009, the DLA SDO suspended or debarred many more contractors based on poor performance than the Services’ SDOs and seventeen contract actions totaling about \$600,000 were awarded to eight suspended or debarred contractors who were listed in the EPLS); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REP. No. 50601-14-AT, EFFECTIVENESS AND ENFORCEMENT OF

In February 2009, the GAO issued a report finding contractors that had been suspended or debarred for serious offenses ranging from national security violations to tax fraud continued to receive federal contracts.³⁸ The GAO determined most of the improper contracts awarded could be attributed to ineffective management of the EPLS database³⁹ or to control weaknesses at both excluding and procuring agencies.⁴⁰ With respect to ineffective management of the EPLS database, the GAO found no single agency is proactively monitoring the content or function of the

database, the database contains incomplete information,⁴¹ its search functions are inadequate,⁴² and agency points of contact information are incorrect.⁴³ With respect to control weaknesses at both the excluding and procuring agency, the GAO found excluding agencies did not always enter a Data Universal Numbering System (DUNS) number,⁴⁴ excluding agencies did not enter exclusions in a timely manner, contracting officers did not check EPLS, automated purchasing systems may not interface with EPLS, and excluded parties remain listed on the GSA schedule.⁴⁵

SUSPENSION AND DEBARMENT REGULATIONS IN THE U.S. DEPARTMENT OF AGRICULTURE (2010), <http://www.usda.gov/oig/webdocs/50601-14-AT.pdf> (finding that USDA has not fully implemented a S&D program—it assigned only one inexperienced staff official to handle procurement S&D cases as one of a number of the official’s collateral duties; it did not train agency contracting officials on S&D procedures so officials did not always check EPLS and four contracts were awarded to excluded parties; and from 2004–2007, USDA had only two debarment cases); OFFICE OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., REP. NO. 10-50, DHS’ USE OF SUSPENSION AND DEBARMENT ACTIONS FOR POORLY PERFORMING CONTRACTORS (2010), http://www.oig.dhs.gov/assets/Mgmt/OIG_10-50_Feb10.pdf (finding that the department is reluctant to apply its S&D policies and procedures against poorly-performing contractors—twenty-three instances where contractors were terminated for default or cause but were not reviewed to determine whether a S&D referral was warranted and twenty-one instances where the contractor was terminated for default but the reasons were not recorded in the government-wide databases); OFFICE OF THE INSPECTOR GEN., U.S. AGENCY FOR INT’L DEVELOPMENT, AUDIT REPORT NO. 9-000-10-001-P, AUDIT OF USAID’S PROCESS FOR SUSPENSION AND DEBARMENT (2009), <http://oig.usaid.gov/sites/default/files/audit-reports/9-000-10-001-p.pdf> (finding U.S. Agency for International Development’s (USAID) S&D processes did not adequately protect the public interest for a number of reasons including too few S&D actions (two procurement and seven nonprocurement actions during fiscal years 2003–2007), untimely or complete failure to enter S&D information into EPLS, and poor documentation for the actions it took; the SDO and the Evaluation Division cannot devote enough attention to S&D because they are burdened with too many responsibilities); OFFICE OF THE INSPECTOR GEN., DEP’T OF TRANSP., REP. NO. ZA-2010-034, DOT’S SUSPENSION AND DEBARMENT PROGRAM DOES NOT SAFEGUARD AGAINST AWARDS TO IMPROPER PARTIES (2010), http://www.oig.dot.gov/sites/dot/files/Suspension_and_Debarment_1.7.10_0.pdf (finding DOT’s Operating Administrations’ (OAs) (Federal Highway Administration, Federal Aviation Administration, and Federal Transit Administrations) S&D decisions and reporting were significantly delayed because they failed to assign sufficient priority to their S&D workload, as staff usually performed this work as a collateral duty and OAs did not always enter accurate or complete information in EPLS).

³⁸ See GAO-09-174, *supra* note 36, at 3.

³⁹ This is not the first Government Accountability Office (GAO) report criticizing the EPLS database. In July 2005, the GAO found that the information in the EPLS database may be insufficient to enable contracting officers to determine with confidence that a prospective contractor is not currently suspended, debarred, or proposed for debarment. While FAR 9.404 requires agencies to enter numerous pieces of information in the EPLS database, including contractors’ Data Universal Numbering System (DUNS) numbers—a unique nine digit identification number assigned by Dun & Bradstreet, Inc., to identify business entities—GAO found that the DUNS numbers were routinely omitted. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-479, FEDERAL PROCUREMENT: ADDITIONAL DATA REPORTING COULD IMPROVE THE SUSPENSION AND DEBARMENT PROCESS (2005), <http://www.gao.gov/new.items/d05479.pdf> [hereinafter GAO-05-479].

⁴⁰ See GAO-09-174, *supra* note 36, at 4, 16.

In August 2011, the GAO released another study wherein it examined a couple of different aspects of the government’s S&D system.⁴⁶ The GAO analyzed the relationship, if any, between practices at ten selected federal agencies⁴⁷ and the level of S&Ds under the FAR as well as government-wide efforts to oversee and coordinate the use of S&Ds across federal agencies.⁴⁸ The GAO found the four agencies⁴⁹ with the most procurement-related S&Ds shared common characteristics that the other six agencies did not.⁵⁰ While every agency’s S&D system is unique, the common characteristics between the four agencies were “a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process.”⁵¹ The other six agencies had few or no procurement-related suspensions or debarments, regardless of the agency’s volume of contracting activity.⁵²

⁴¹ This same issue was highlighted by GAO in its July 2005 report. See GAO-05-479, *supra* note 39, at 14–16.

⁴² This same finding was highlighted by GAO in its July 2005 report. See *id.*

⁴³ See GAO-09-174, *supra* note 36, at 17–18.

⁴⁴ The GAO highlighted this same issue in its July 2005 report wherein it recommended that GSA modify the EPLS database to require contractor identification numbers for all actions entered into the EPLS database. See GAO-05-479, *supra* note 39, at 14, 18.

⁴⁵ See GAO-09-174, *supra* note 36, at 18–19.

⁴⁶ See GAO-011-739, *supra* note 7.

⁴⁷ *Id.* The ten agencies GAO analyzed were GSA; the Departments of State (DOS); Justice (DOJ); Commerce; Health and Human Services; the Defense Logistics Agency (DLA); the Department of the Navy; the Department of Homeland Security’s (DHS) U.S. Immigration and Customs Enforcement (ICE); and Federal Emergency Management Agency (FEMA); and the U.S. Treasury. Each of these ten agencies had more than \$1 billion in contract obligations in fiscal year 2009. *Id.* at 3.

⁴⁸ *Id.* at 2.

⁴⁹ The four agencies were the Navy, DLA, GSA, and ICE. *Id.* at 12.

⁵⁰ *Id.* at 11–12.

⁵¹ *Id.* at 12.

⁵² GAO-011-739, *supra* note 7, at 11. “Officials at the agencies with few or no procurement-related suspensions or debarments, acknowledged that their agencies need to place greater emphasis on suspension and debarment as a

Another significant finding from this August 2011 GAO report was that government-wide efforts to oversee S&Ds faced challenges and could be improved.⁵³ In 1986, the Office of Management and Budget (OMB) assigned responsibility for government-wide S&D oversight and coordination to the Interagency Suspension and Debarment Committee (ISDC).⁵⁴ The ISDC provides support to assist agencies in implementing their S&D programs as well as serving as a forum for agencies to share ideas and help in coordinating S&D actions among agencies.⁵⁵

However, in order to accomplish its mission, the ISDC relies on voluntary agency participation in its processes and its member agencies' limited resources.⁵⁶ The GAO recommended improving all agencies' S&D programs and enhancing government-wide oversight; thus, Administrator of Federal Procurement Policy, which falls under OMB, should issue government-wide guidance that describes the elements of an active S&D program and emphasizes the importance of cooperating with the ISDC.⁵⁷ To that end, in 2008, Congress passed legislation to strengthen the role of the ISDC.⁵⁸ While this legislation has helped increase the effectiveness of the ISDC, it did not provide the ISDC with any of its own resources, personnel, or enforcement capabilities to truly effect those changes successfully.

The GAO and federal agencies' reports brought potential issues with the S&D system to light. Most of the highlighted issues involved the inconsistent and improper use of EPLS as well as the uneven application of S&Ds by the various agencies. These reports piqued Congress's interest in the area and prompted hearings to look into the S&D system for any flaws.

tool to ensure that the government only does business with responsible contractors." *Id.* at 18.

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 20. The Interagency Suspension and Debarment Committee (ISDC) was established by Executive Order 12,549 on 18 February 1986. The ISDC's standing members include each of the twenty-four agencies covered by the Chief Financial Officers Act as well as participation from nine independent agencies and government corporations. *See id.* n.13, at 5.

⁵⁵ *Id.* at 5–6.

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 23.

⁵⁸ The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 873, 122 Stat. 457 (2008), strengthened the ISDC's role by specifying certain functions it was to perform, including (1) resolve lead agency responsibility and coordinate actions among interested agencies with respect to suspension or debarment proceedings; (2) report to Congress annually on agency suspension and debarment actions and accomplishments as well as agency participation in ISDC's work; (3) recommend to OMB ISDC approved changes to the government S&D system and its rules; and (4) encourage and assist agencies in cooperating to achieve operational efficiency in the government-wide S&D system. GAO-011-739, *supra* note 7, at 20.

B. Congressional and Commission Oversight

The audits, studies, and reports from the previous section provided Congress with good reason to question the government's S&D system and to hold hearings to inquire into the system's utility. On 26 February 2009, just one day after the GAO released Report 09-174 criticizing EPLS and finding that suspended or debarred contractors continued to receive federal contracts,⁵⁹ the House of Representatives' Committee on Oversight and Government Reform held a hearing entitled "How Convicts and Con Artists Receive New Federal Contracts."⁶⁰ The hearing focused on GAO's report, EPLS's deficiencies, and how those deficiencies impact the S&D system.⁶¹ The committee heard testimony from representatives of GSA, which was responsible for the management of EPLS, who tried to defend EPLS and discuss what actions GSA was taking to cure some of the issues raised by the GAO report.⁶² On 18 March 2010, the same House Committee held another hearing regarding why poorly performing contractors continue to receive government business.⁶³ The committee heard testimony from representatives of the Department of Transportation (DOT), U.S. Agency for International Development (USAID), and Department of Homeland Security (DHS) regarding the weaknesses of their S&D programs and steps they were taking to improve them.⁶⁴

On 6 October 2011, a House procurement reform subcommittee held its own hearing on the use of S&D actions.⁶⁵ This hearing focused on the findings of GAO Report 11-739, which found six of the ten federal agencies studied had few or no procurement-related suspensions or debarments over a five-year period.⁶⁶ The committee heard testimony from GAO discussing its report as well as from representatives from federal agencies with active and non-active S&D programs.⁶⁷ The representatives from agencies with non-active programs averred they would heed GAO's

⁵⁹ *See* GAO-09-174, *supra* note 36.

⁶⁰ *See How Convicts and Con Artists Receive New Federal Contracts Hearing, supra* note 1.

⁶¹ *Id.*

⁶² *See id.* at 71–76 (statement of James Williams, Commissioner, Federal Acquisition Service, GSA); *id.* at 77–83 (statement of David Drabkin, Acting Chief Acquisition Officer & Senior Procurement Executive, GSA).

⁶³ *See Rewarding Bad Actors Hearing, supra* note 2.

⁶⁴ *See id.* at 47–52 (statement of Gregory Woods, Deputy Gen. Counsel, Dep't of Transp.); *id.* at 60–68 (statement of Drew W. Luten, Senior Deputy Assistant Admin'r for Mgmt., U.S. Agency for Int'l Dev.); *id.* at 53–59 (statement of Elaine C. Duke, Under Sec'y for Mgmt., Dep't of Homeland Sec.).

⁶⁵ *See Protecting Taxpayer Dollars Hearing, supra* note 2.

⁶⁶ *See* GAO-011-739, *supra* note 7.

⁶⁷ *See Protecting Taxpayer Dollars Hearing, supra* note 2.

recommendations and take the steps necessary to upgrade their programs.⁶⁸

Not only has Congress held hearings on the government's S&D system but the Commission on Wartime Contracting in Iraq and Afghanistan (CWC)⁶⁹ has as well. On 28 February 2011, the CWC held a hearing entitled "Ensuring Contractor Accountability: Past Performance and Suspension & Debarment," which examined some of the issues and obstacles facing federal agencies' S&D programs during contingency operations.⁷⁰ The hearing highlighted a lack of acquisition workforce needed to run S&D programs and questioned the role, power, and utility of the ISDC.⁷¹

Over the last few years, the GAO reports, federal agencies' IGs' reports, and congressional hearings and oversight brought much attention to and focus on the S&D system. With all this new attention directed at the S&D system, federal agencies had to look at their own programs and evaluate if they were truly doing enough.

C. Has Increased Attention Caused an Increase in Suspension and Debarment Actions?

Over the last few years, many in Congress thought that S&Ds were not being utilized enough.⁷² For some reason, possibly due to the various reports and audits, the numerous congressional hearings, or the push by OMB,⁷³ the number of S&D actions has increased significantly.⁷⁴ According to

the ISDC, in fiscal year 2011, there were 5,838 combined S&D actions.⁷⁵ In fiscal year 2010, there were 4,208 combined S&D actions (1,630 fewer than in the following year), while in fiscal year 2009, there were only 2,668 combined S&D actions (fewer than half that were to take place a mere two years later).⁷⁶ This begs the questions, was the substantial increase in actions justified or just a knee-jerk reaction to the new attention? Was the increase in S&D actions used to punish contractors and if so, is that a legitimate reason for the actions?

IV. Should Congress Mandate More Suspensions and Debarments?

A. Recently Proposed Legislation Pushing for Mandatory Suspensions and Debarments

Administratively suspending or debaring a contractor just to punish the contractor clearly violates the FAR.⁷⁷ Due to stories of contractors committing crimes or poorly performing current contracts but continuing to receive new government contracts, some government watchdog groups and members of Congress want these contractors punished.⁷⁸ One way to punish these contractors is to automatically suspend or debar them by passing legislation mandating suspension or debarment for certain conduct.⁷⁹ While there are already statutory S&Ds in place,⁸⁰ there has been an increase in proposed legislation containing mandatory suspension or debarment language.

Recently proposed legislation that would create an automatic proposal for debarment⁸¹ are House of

⁶⁸ See *id.* at 43–48 (statement of Nick Nayak, Chief Procurement Officer, Dep't of Homeland Sec.); *id.* at 49–54 (statement of Nancy J. Gunderson, Deputy Assistant Sec'y, Office of Grants and Acquisition Pol'y and Accountability, Dep't of Health and Hum. Servs.).

⁶⁹ The CWC was an eight-member independent, bipartisan legislative commission established to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions in Iraq and Afghanistan. It was created from Section 841 of the National Defense Authorization Act for Fiscal Year 2008. See <http://wartimecontracting.gov/> for more information on the CWC.

⁷⁰ See *Ensuring Contractor Accountability: Past Performance and Suspension & Debarment: Hearing Before Commission on Wartime Contracting In Iraq and Afghanistan* (2011) [hereinafter *CWC Hearing*].

⁷¹ *Id.*

⁷² See *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 2 (statement of Sen. Joseph I. Lieberman, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs) ("[I]t is a tool that is used all too rarely . . ."); *id.* at 4 (statement of Sen. Susan M. Collins) ("The failure of agencies to use their suspension authority regrettably is not a new revelation."); *Rewarding Bad Actors Hearing*, *supra* note 2, at 1 (statement of Rep. Edolphus Towns, Chairman, H. Comm. on Oversight and Gov. Reform) ("Unfortunately . . . the suspension and debarment tools often go unused, quietly rusting away in the procurement toolbox.").

⁷³ See *supra* note 10.

⁷⁴ Kenneth B. Weckstein & Michael D. Maloney, *View from Brown Rudnick: Contractor Debarment and Suspension Numbers Go Up—What's Going On?*, 98 FED. CONTRACTS REP. 558 (Nov. 13, 2012); see also David

Hansen, *Increased Suspensions, Debarments Raises Legal Questions for Contractors*, 98 FED. CONTRACTS REP. 358 (Sept. 25, 2012).

⁷⁵ There were 928 suspensions, 2,512 proposed debarments, and 2,398 debarments. INTERAGENCY SUSPENSION AND DEBARMENT COMM., REPORT BY THE INTERAGENCY SUSPENSION AND DEBARMENT COMM. ON FEDERAL AGENCY SUSPENSION AND DEBARMENT ACTIVITIES (Sept. 18, 2012), http://www.epa.gov/isdc/pdf/isdc_section_873_fy_2011_report_to_congress_s_lieberman.pdf [hereinafter ISDC 2012 REPORT].

⁷⁶ In fiscal year 2010, there were 612 suspensions, 1,945 proposed debarments, and 1,651 debarments while in fiscal year 2009, there were only 417 suspensions, 750 proposed debarments, and 1,501 debarments. INTERAGENCY SUSPENSION AND DEBARMENT COMM., REPORT ON FEDERAL AGENCY SUSPENSION AND DEBARMENT ACTIVITIES (Jun. 15, 2011), <http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/isdc-report-to-congress-61411.pdf>.

⁷⁷ See *supra* note 11.

⁷⁸ See *id.*

⁷⁹ See Jackson, *supra* note 11 ("Fiscal Year 2012 legislation and proposed legislation, however, suggest a punitive purpose for suspension and debarment, replacing discretion with mandatory outcomes.").

⁸⁰ See *supra* Part II.C.

⁸¹ Proposal for debarment is a notice issued by the SDO advising a contractor that debarment is being considered. The notice contains the

Representatives Bill 3588 (H.R. 3588), Overseas Contractor Reform Act,⁸² and House of Representatives Bill 882 (H.R. 882), Contracting and Tax Accountability Act of 2013.⁸³ House Bill 3588 requires that any person found to be in violation of the Foreign Corrupt Practices Act of 1977 must be proposed for debarment from any federal contract or grant within thirty days after judgment of a violation becomes final.⁸⁴ The bill also allows for the head of a federal agency to waive the proposal or to exempt the proposal if the person self-reported the violation.⁸⁵ House Bill 882 requires, absent a waiver, the head of an executive agency to propose a person for debarment after receiving an offer for a contract from such person if the person's offer contains a certification that such person has a seriously delinquent tax debt⁸⁶ or submitted false information regarding his federal tax debt.⁸⁷ These proposed pieces of legislation would erode the discretion of SDOs and preclude SDOs from utilizing the procedures in FAR 9.4 to decide whether a contractor needs to be suspended, proposed for debarment, or debarred on a case-by-case basis.

B. Proposed Automatic Suspensions Withdrawn After Hearings

1. Commission on Wartime Contracting in Iraq and Afghanistan's Recommendations

Recommendation 24 of the CWC's second interim report, which was released on 24 February 2011, calls for the increased use of S&Ds.⁸⁸ In particular, it recommends that suspension actions based on contract-related indictments be mandatory for a predetermined time and not subject to the discretion of SDOs.⁸⁹ On 28 February 2011, the CWC held a

reasons for the proposed debarment and informs the contractor that he may submit matters in opposition. The notice also contains the procedures governing the debarment decisionmaking procedures. A contractor who is proposed for debarment is barred from receiving new government contracts while the decision is being made. *See* FAR 9.406-3(c) (Jan. 2013).

⁸² *See* H.R. 3588, *supra* note 8.

⁸³ *See* H.R. 882, *supra* note 8.

⁸⁴ *See* H.R. 3588, *supra* note 8.

⁸⁵ *Id.*

⁸⁶ A "seriously delinquent tax debt" is defined in the bill as an outstanding debt under the Internal Revenue Code of 1986 for which a notice of lien has been filed in public records pursuant to section 6323 of such Code. *See* H.R. 882, *supra* note 8.

⁸⁷ *See id.*

⁸⁸ *See* COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 50-51 (2011) pdf, available at http://wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf.

⁸⁹ *Id.*

hearing to discuss the contents of its second interim report and focused on contractor accountability by using past performance data and S&Ds.⁹⁰ The CWC heard testimony from federal agency acquisition executives and SDOs, some of whom testified regarding their concern about automatic suspensions.⁹¹

On 31 August 2011, the CWC issued its final report to Congress which included many recommendations.⁹² Recommendation 12 dealt with strengthening contract enforcement tools.⁹³ While part of Recommendation 12 discusses facilitating the increased use of S&Ds by revising regulations to lower procedural barriers, it does not include language requiring mandatory suspensions.⁹⁴ In fact, the CWC intentionally withdrew its previous recommendation for mandatory suspension after additional research and deliberation on the subject.⁹⁵

2. The Comprehensive Contingency Contracting Reform Act of 2012

The Comprehensive Contingency Contracting Reform Act of 2012 (CC CRA) was first introduced as Senate Bill 2139 (S. 2139) on 29 February 2012 by Senator Claire McCaskill.⁹⁶ This proposed legislation was based on the findings and recommendations of the CWC.⁹⁷ Section 113 of Senate 2139 called for amending the FAR to add three additional bases for automatically suspending a contractor.⁹⁸

⁹⁰ *See* CWC Hearing, *supra* note 70.

⁹¹ *See id.* at 127 (statement of Daniel I. Gordon, Adm'r for Fed. Procurement Pol'y) ("I have concern when I hear people talk about automatic suspension . . ."); *id.* at 149 (statement of Willard D. Blalock, Chair of ISDC) ("I am strongly opposed to automatic exclusions because I believe the SDO needs to have discretion to judge each case on its own facts and circumstances.").

⁹² *See* CWC FINAL REPORT, *supra* note 4.

⁹³ *See id.* at 160.

⁹⁴ *See id.*

⁹⁵ *See id.* at note 4.

⁹⁶ The Comprehensive Contingency Contracting Reform Act (CC CRA) of 2012, S. 2139 [hereinafter S. 2139].

⁹⁷ *See* The Comprehensive Contingency Contracting Reform Act of 2012: Hearing on S. 2139 Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Sec. and Governmental Affairs, 112th Cong. 7 (2012) [hereinafter CCCRA Hearing] (statement of Sen. Claire McCaskill).

⁹⁸ The three additional bases were: (1) a charge by indictment or information of the contractor on a federal offense relating to the performance of a contract with DoD, DoS, or USAID in connection with an overseas contingency operation; (2) a final determination by the head of a contracting agency of DoD, DoS, or USAID that the contractor failed to pay or refund amounts due or owed to the federal government in connection with an overseas operation; and (3) a charge by the federal government in a civil or criminal proceeding alleging fraudulent actions on the part of the contractor, whether by an employee, affiliate, or subsidiary of the contractor

On 17 April 2012, the Senate's Ad Hoc Subcommittee on Contracting Oversight from the Committee on Homeland Security and Governmental Affairs held a hearing to discuss Senate Bill 2139.⁹⁹ The subcommittee heard testimony from representatives from DOS, DOD, and USAID who clearly opposed Section 113 and the new automatic suspension bases.¹⁰⁰

On 12 June 2012, Senator McCaskill sponsored a second version of CCCRA—which was Senate Bill 3286 (S. 3286).¹⁰¹ Unlike Section 113 of Senate Bill 2139, Section 113 of Senate Bill 3286 calls for revising the FAR to provide for automatic referral of a covered person¹⁰² to the appropriate SDO to make a suspension or debarment determination.¹⁰³ After hearing arguments opposing automatic suspensions, Senator McCaskill changed the automatic suspensions into automatic referrals which does achieve a more balanced approach by requiring federal agencies to really examine contractors whose integrity or business ethics may be in question, while still preserving the SDO's discretion and ability to handle these matters on a

or any business owned or controlled by the contractor, on any contract with the federal government whether or not in connection with an overseas contingency operation. See S. 2139, *supra* note 96, sec. 113.

⁹⁹ See CCCRA Hearing, *supra* note 97.

¹⁰⁰ See *id.* (prepared statement of Patrick Kennedy, Under Sec'y for Mgmt. for DoS) (“[W]e believe that the current, long-standing policy requiring a reasoned decision from the SDO based on a totality of information remains a sound approach, and would have concerns with a provision that imposes automatic suspension and debarment which will likely lead to due process challenges by the affected contractor community and potential court action that could delay necessary action in crisis situations.”); *id.* (prepared statement of Richard T. Ginman, Dir., Def. Procurement and Acquisition Pol’y) (“DoD opposes mandating automatic suspension because for the suspension and debarment process to have legitimacy and credibility, SDOs need independence, freedom of action, and discretion to exercise judgment regarding whether an exclusion is appropriate.”); *id.* (prepared statement of Angelique M. Crumbly, Acting Assistant to the Adm’r, Bureau for Mgmt. for USAID) (“We must take issue, however, with any mandate that removes the procedural protections for a case-by-case review of allegations, or reduces the discretionary authority of the SDO.”).

¹⁰¹ The Comprehensive Contingency Contracting Reform Act (CCCRA) of 2012, S. 3286 [hereinafter S. 3286].

¹⁰² A covered person is someone who: (1) has been charged with a federal criminal offense relating to the award or performance of a contract of a covered agency; (2) has been alleged, in a civil or criminal proceeding brought by the United States, to have engaged in fraudulent actions in connection with the award or performance of a contract of a covered agency; or (3) has been determined by the head of a contracting agency of a covered agency to have failed to pay or refund amounts due or owed to the federal government in connection with the performance of a contract of the covered agency. A covered agency includes DoD, DoS, and USAID. See *id.* sec. 113.

¹⁰³ Senate Bill 3254, National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Section 881A is very similar to Senate Bill 3286 Section 113 as it calls for revising the FAR to provide for the automatic referral of a covered person (dealing with a DoD contract) to the appropriate SDO for a suspension or debarment determination. This provision was not incorporated into House of Representatives Bill 4310 (H.R. 4310), the final signed NDAA 2013. See H.R. 4310 (NDAA 2013) [hereinafter H.R. 4310].

case-by-case basis. Ultimately, there is no need for more automatic S&Ds and they should not be used to punish contractors who violate the law as there is a criminal justice and civil legal system for that purpose.

V. Do Suspension and Debarment Officials Have Too Much Discretion?

People who criticize the awarding of new contracts to contractors who may have transgressed in the past sometimes fail to understand the purpose of the S&D system.¹⁰⁴ The main purpose of the system is to protect the government's interests by not contracting with people who are untrustworthy and irresponsible; it is not to punish.¹⁰⁵ In order to accomplish this purpose, the FAR specifically states “debarment and suspension are discretionary actions”¹⁰⁶ and it is the SDO's “responsibility to determine whether debarment is in the Government's interest.”¹⁰⁷

The existence of a cause for debarment or suspension listed in FAR 9.406-2 and 9.407-2 does not necessarily require the contractor to be debarred or suspended. Before arriving at any debarment or suspension decision, the SDO should consider the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors.¹⁰⁸ Federal Acquisition Regulation 9.406-1(a) also lists ten specific factors¹⁰⁹ the SDO should consider before

¹⁰⁴ See Acquisition Reform Working Group 2012 Legislative Recommendations 29–33 (Apr. 10, 2012) (“It is important for policy makers to understand that debarment or suspension is not intended to be punishment; rather it is a prophylactic measure to protect the government from doing business with a person or business that is not presently responsible.”); see also Jessica Tillipman, The FCPA Blog, *Suspension and Debarment Part II: ‘Seriously, S&D May Not be Used to Punish Contractors’* (6:28 AM June 18, 2012) (“One of the most fundamentally (and frequently) misunderstood aspects of the FAR 9.4 Suspension and Debarment (S&D) regime is that S&D are only to be used for the purpose of protecting the Government, not to punish contractors for their past misconduct.”), <http://www.fcpcbog.com/blog/2012/6/18/suspension-debarment-part-ii-seriously-sd-may-not-be-used-to.html>.

¹⁰⁵ See FAR 9.402 (Jan. 2013); see also *supra* notes 11, 104.

¹⁰⁶ FAR 9.402(a).

¹⁰⁷ *Id.* 9.406-1(a).

¹⁰⁸ See *id.* 9.406-1(a); *id.* 9.407-1(b)(2).

¹⁰⁹ The ten factors are: (1) whether the contractor had effective standards of conduct and internal control systems in place; (2) whether the contractor reported the activity in a timely manner; (3) whether the contractor has fully investigated the cause for debarment and, if so, made the result of the investigation available to the debarring official; (4) whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action; (5) whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability or has made or agreed to make full restitution; (6) whether the contractor has taken appropriate disciplinary action against the responsible individuals; (7) whether the contractor has implemented or agreed to implement remedial measures; (8) whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs; (9) whether the contractor has had adequate time to eliminate the

making a debarment decision. These aspects of the FAR encourage the SDO to utilize his discretion.

The SDO has numerous ways to handle a contractor whose actions fall into one of the causes for debarment. The SDO can suspend, propose for debarment, debar, enter into an administrative agreement,¹¹⁰ or do nothing at all as long as whatever action is taken protects the government's interests.¹¹¹ The SDO requires as much discretion as possible when deciding how to handle a specific contractor because every case's facts and circumstances are different; this is why mandatory suspension or debarment is not appropriate.¹¹² The SDO must protect the government's interest by making sure the government is only contracting with responsible parties and these decisions are based on numerous factors and made on a case-by-case basis. Therefore, this paper argues SDO discretion is integral to a successful administrative S&D system.

VI. Recommendations to Improve the Suspension and Debarment System

A. Need More Acquisition Workforce

The congressional procurement reforms of the 1990s mandated a reduction in the acquisition workforce.¹¹³ The

circumstances within the contractor's organization that led to the cause for debarment; and (10) whether the contractor's management understands the seriousness of the misconduct and has implemented programs to prevent recurrence. *Id.* 9.406-1(a)(1)-(10).

¹¹⁰ An administrative agreement is a voluntary agreement between an SDO and a company who may be facing a potential suspension or debarment. While the terms will differ depending on the case, most will require the contractor to take certain verifiable actions, such as implementation of enhanced internal corporate governance practices and procedures, and adoption of compliance, ethics, and reporting programs. Some may also call for the use of independent third party monitors or the removal of individuals associated with a violation from positions of responsibility within the company. See ISDC 2012 REPORT, *supra* note 75, at 9. See also U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 209.406-1 (Dec 2012).

¹¹¹ In order to make a debarment determination, the SDO will follow the agency's decision-making process which should be as informal as practicable but consistent with principles of fundamental fairness to the contractor. See FAR 9.406-3(b).

¹¹² See *Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 62-63 (statement of Steven A. Shaw, Deputy Gen. Counsel for Contractor Responsibility, Dep't of the Air Force); *Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 63 (statement of Richard A. Pelletier, SDO, U.S. Envtl. Protection Agency); see also Todd J. Canni & Steven A. Shaw, *Comments on the Wartime Commission's Recommendations on Suspension and Debarment*, SERV. CONTRACTOR, Sept. 2011, at 13-17, available at http://www.pscouncil.org/c/p/ServiceContractorMagazine/Service_ContractorMagazine/Service_Contractor_M.aspx.

¹¹³ See Matthew Weigelt, *Panel Finds Contracting Disarray*, FED. COMPUTER WEEK, Nov. 12, 2007, http://fcw.com/Articles/2007/11/08/Panel-finds-contracting-disarray.aspx?sc_lang=en&p=1 ("Congress legislated acquisition workforce cuts of 25 percent in the 1990s . . ."); see also Joseph J. Petrillo, *Wrong Lessons Learned*, FED. COMPUTER WK., Sept. 17,

"workforce shrunk from 460,516 in fiscal 1990 to 230,556 in fiscal 1999."¹¹⁴ "The acquisition workforce has yet to recover from the earlier reductions. Since 2000 federal procurement spending rose 155 percent, while the acquisition workforce only increased by 10 percent."¹¹⁵ The acquisition workforce must increase significantly in order to handle the increase in procurement spending.¹¹⁶ For the S&D system to work properly there needs to be an adequate acquisition workforce in place actually accomplishing all the requirements and tasks the FAR calls for, such as documenting and reporting contractors' past performance,¹¹⁷ making referrals for S&Ds, and making proper award fee determinations. Contracting officers, contracting specialists, and contracting officer representatives cannot be spread so thin and overworked that they are not fulfilling all their required duties under the FAR, such as use of EPLS (now SAM).¹¹⁸ Even with the large national debt in mind and trying to find ways to cut government spending, increasing the acquisition workforce is truly needed.¹¹⁹

B. Need More Suspension and Debarment Personnel

2007, <http://fcw.com/Articles/2007/09/16/Petrillo-Wrong-lessons-learned.aspx> ("[I]t was the procurement reforms of the 1990s that hallowed out government acquisition offices.").

¹¹⁴ Steven L. Schooner, *Keeping Up with Procurement*, GOVEXEC.COM (July 1, 2006), <http://www.govexec.com/magazine-advice-and-dissent/magazine-advice-and-dissent-viewpoint/2006/07/keeping-up-with-procurement/22210/>.

¹¹⁵ Michael J. Davidson, *Creekmore Lecture, Where We Came from and Where We May Be Going*, 211 MIL. L. REV. 263, 274-75 (2012); see also *How Convicts and Con Artists Receive New Federal Contracts Hearing*, *supra* note 1, at 87 (statement of Edward M. Harrington, Deputy Assistant Sec'y of the Army (Procurement)) ("My concern is that the acquisition workforce . . . has declined significantly in the last decade while the number of dollars that we are executing from a contract perspective has more than doubled.").

¹¹⁶ See Daniel I. Gordon, *The Twenty-Seventh Gilbert A. Cuneo Lecture in Government Contract Law*, 210 MIL. L. REV. 103, 105-06 (2011) ("We badly need to build up our acquisition workforce.").

¹¹⁷ See Memorandum from Joseph G. Jordan, Adm'r, Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Office of the President, to Chief Acquisition Officers and Senior Procurement Execs, subject: Improving the Collection and Use of Information about Contractor Performance and Integrity (Mar. 6, 2013), <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/improving-the-collection-and-use-of-information-about-contractor-performance-and-integrity.pdf>.

¹¹⁸ See GAO-09-174, *supra* note 36; see also *supra* note 37 (summarizing the federal agencies' reports.).

¹¹⁹ Congress realized this point with respect to DoD and in 2008 established the Defense Acquisition Workforce Development Fund (DAWDF). The DAWDF was established to ensure DoD's acquisition workforce was adequately sized, trained, and equipped to meet department needs. See NDAA for Fiscal Year 2008, Pub. L. No. 110-181, § 852, 122 Stat. 3 (2008) (codified at 10 U.S.C. § 1705).

Federal agencies' S&D systems are set up differently as each agency is unique in its composition and mission.¹²⁰ While the FAR allows for agencies to establish their S&D systems as they see fit in accordance with some guidelines,¹²¹ all agencies' systems should have adequate personnel and policies in place to accomplish the FAR's objective of contracting only with responsible parties. Government Accountability Office Report 11-739 clearly highlighted the fact that agencies with active S&D programs had certain characteristics and a dedicated program with full-time staff was one such characteristic.¹²² Management and resources devoted to S&D programs are widely inconsistent across agencies.¹²³ Congress is trying to force federal agencies to become more consistent in their S&D personnel, resources, and structure,¹²⁴ which can be a good thing as long as the requirements or limitations are not too restrictive considering every federal agency has its own mission and structure.¹²⁵ However it happens, federal agencies need to devote more personnel and resources solely to their S&D systems.

C. Need More Interagency Suspension and Debarment Committee Staff and Authority

As discussed earlier, the GAO found that the ISDC faced challenges and could be improved.¹²⁶ The fact that the

¹²⁰ See *CWC Hearing*, *supra* note 70, at 72 (statement of Willard D. Blalock, Chair of ISDC) ("Each executive-branch agency manages its responsibilities for suspension and debarment differently, based on its own statutory and functional responsibilities.").

¹²¹ See FAR 9.402(e) (Jan. 2013) ("Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.").

¹²² See GAO-011-739, *supra* note 7, at 13–14; see also *CWC Hearing*, *supra* note 70, at 73 (statement of Willard D. Blalock, Chair of ISDC) ("The system would undoubtedly be more effective if each agency had a dedicated full-time suspension/debarment staff to process cases.").

¹²³ See *CWC Hearing*, *supra* note 70 (written statement of Daniel I. Gordon, Adm'r for Fed. Procurement Pol'y).

¹²⁴ H.R. 4310 (NDAA 2013), Section 861 places requirements and limitations on SDOs in DoD, DoS, and USAID. It requires SDOs to be independent of acquisition officials and Inspector Generals, to document final decisions on formal referrals, and to establish written policies for the consideration of referrals. More importantly, the bill also requires SDOs to have adequate staff and resources. See H.R. 4310, *supra* note 103.

¹²⁵ On 7 February 2013, Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, released a discussion draft of a bill titled "Stop Unworthy Spending Act" or "SUSPEND Act." The draft bill would consolidate more than 41 civilian agency and government corporations' S&D offices and functions into one centralized board called the Board of Civilian Suspension and Debarment. The centralized board would be responsible for all the consolidated civilian agencies' S&Ds. The SUSPEND Act discussion draft can be found at http://oversight.house.gov/wp-content/uploads/2013/02/Draft_SUSPEND_Act_2-5.pdf.

¹²⁶ See *supra* Part III.A; GAO-011-739, *supra* note 7, at 19–21; see also *Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 12 (statement of William T. Woods, Dir., Acquisition and Sourcing Mgmt. for GAO).

ISDC relies on voluntary agency participation and does not have its own dedicated staff or resources is troublesome. Even though Congress passed legislation in 2008 to strengthen the ISDC's role¹²⁷ and OMB issued a memo in November 2011 requiring agencies to participate regularly in the ISDC,¹²⁸ more must be done. The ISDC chairman's sole job should be to run the ISDC; not be an additional duty to his regular job.¹²⁹ The ISDC also needs dedicated staff to help carry out its mission of overseeing the government's S&D system. Since every agency's S&D program is unique, the ISDC's oversight duties are integral to a well functioning government S&D system and it must be resourced appropriately. Implementing these three recommended changes will provide the workforce greatly needed resources to properly run and execute the government's S&D system.

VII. Conclusion

While there has been much scrutiny of the government's S&D system, at its core, the system and its policies are sound but it must actually be followed to be effective.¹³⁰ The fact that there were many studies, audits, and reports which led to congressional hearings is a good thing since they shined a spotlight on a system that for some federal agencies had not seen the light of day in a while. With this renewed focus and emphasis on S&D programs, many federal agencies that did not have active programs are now realizing they must make significant changes to meet their obligation of protecting the taxpayers by contracting only with responsible parties.

¹²⁷ See *supra* note 58.

¹²⁸ See *supra* note 10; *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 43 (statement of Daniel I. Gordon, Administrator for Federal Procurement Policy) ("[W]e are directing each CFO Act agency to actively participate in the ISDC.").

¹²⁹ The current ISDC chairman is David M. Sims who is also the Program Manager of S&Ds for the Department of Interior. The previous ISDC chairman was Mr. Willard D. Blalock who also worked for the Navy while he was chairman. When questioned by the CWC regarding why the ISDC's mandatory annual report to Congress was not submitted, Mr. Blalock stated "the fact of the matter is, let me cut to the chase. My responsibilities at the Navy have been increased by an order of magnitude, and I have simply not had the opportunity to finish the report." See *CWC Hearing*, *supra* note 70, at 87.

¹³⁰ See *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 55–57 (statement of David M. Sims, Chair of ISDC) ("The basic Federal policies and procedures governing suspension and debarment . . . are sound . . . [T]he rules as currently stated provide agencies and departments with a highly effective tool kit . . . Those agencies with robust programs show that the tool kit is effective when used. The tool kit needs employment by more agencies and departments, rather than modification."); *CWC Hearing*, *supra* note 70 (written statement of Daniel I. Gordon, Adm'r for Fed. Procurement Policy) ("The FAR's basic policies and procedures remain sound . . ."). *Id.* (written statement of Willard D. Blalock, Chair of ISDC) ("The current suspension and debarment system is appropriate. What is required is the will to use it.").

Subpart 9.4 of the FAR provides the essential guidance and building blocks for a successful S&D program. Congress does not need to pass more legislation mandating suspensions or debarments in order for the system to be effective or to punish bad contractors, as that is what the criminal justice system and civil remedies, such as the False Claims Act, are for. An integral aspect of subpart 9.4 of the FAR's guidance is the discretion it provides SDOs when running their programs. Suspension and debarment officials require as much discretion as possible in order to ensure the government's interests are truly protected, and sometimes that discretion means SDOs enter into administrative agreements with contractors rather than suspending or debarring them. The government's interests are not always met by a shrinking pool of potential contractors but rather may be met when contractors are rehabilitated and there is a larger pool of potential offerors which in the end can promote competition and reduce the cost to the taxpayer.

The key to achieving a successful program is having the people in place with the resources, will, and drive to utilize the tools at their disposal. Federal agencies must foster and develop an adequate, well-trained acquisition workforce which fulfills all duties and responsibilities under the FAR, for example, inputting complete and accurate data in SAM

and also checking SAM when required. Federal agencies need SDOs with full-functioning staffs to discharge their duties and responsibilities. Suspension and debarment officials must emphasize open and frequent communication with the acquisition workforce and IG so all three are all in agreement about referrals for potential suspension or debarment actions. The ISDC should be properly staffed so it can fulfill its vital role as a liaison among the various agencies and to make sure less mature programs are taking the steps necessary to become fully operational and effective. The ISDC must ensure every federal agency's program has the characteristics the GAO listed in its 2011 report and if they do not, help the agency to achieve those characteristics.

While numbers are one indication of a robust program, it should not only be about how many S&D actions are taken. Rather, it should be more about the quality of an agency's program and what steps are being taken to ensure the government is only contracting with responsible parties. Because the system contains indicators of improvement and is headed toward more robustness, a major overhaul is not needed as the current regulations, policies, and procedures in place provide for a sound system when they are actually being used properly.

**Power and Constraint:
The Accountable Presidency After 9/11¹**

Reviewed by Major Ryan A. Howard*

At the close of the Constitutional Convention of 1787, a woman queried Dr. Benjamin Franklin as he left Independence Hall, "Well Doctor what have we got—a republic or a monarchy?" The Doctor replied, "A republic . . . if you can keep it."²

I. Introduction

In the years following 9/11, the executive branch amassed tremendous power to address national security challenges. While a temporary increase in executive power is customary during a time of war, many believe this era of persistent conflict has resulted in a permanent transfer of power to the executive branch.³ In this context, Jack Goldsmith⁴ counters that presidential power remains checked by a "remarkable and unnoticed revolution in wartime presidential accountability."⁵ Although Goldsmith's conclusion is well supported overall, his argument is both weakened by relying on extra-governmental actors and limited by the executive branch's ability to adapt moving forward. Nonetheless, Goldsmith's insider account of executive power is informative and well supported. In sum, *Power and Constraint* offers readers remarkable insights into the constraints placed on the executive branch in the decade following 9/11.⁶

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¹ JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

² MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, vol. 3, app. A, at 85 (1911, reprinted 1934), available at <http://www.bartleby.com/73/1593.html>.

³ Numerous texts have recently concluded that modern day executive power is largely unchecked. *See, e.g.*, MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED & UNBALANCED* (2007); RACHEL MADDOW, *DRIFT: THE UNMOORING OF AMERICAN MILITARY POWER* (2012); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012).

⁴ Jack Goldsmith is an expert on matters of national security law, international law, and presidential power. In addition to publishing numerous national security periodicals, he is the author of *The Terror Presidency* and *The Limits of International Law*. Goldsmith served as Assistant Attorney General, Office of Legal Counsel from 2003 to 2004 and Special Counsel to the Department of Defense from 2002–2003. Currently, Goldsmith is the Henry L. Shattuck Professor of Law at Harvard Law School. Goldsmith's curriculum vitae is available at <http://www.jackgoldsmith.org/jackgoldsmithcv.pdf> (last visited Jul. 10, 2013).

⁵ GOLDSMITH, *supra* note 1, at xi.

⁶ Christopher Caldwell's review of *Power and Constraint* offers an excellent summary and insight into the text. *See* Christopher Caldwell, *Vetted, Altered, Blessed 'Power and Constraint,' by Jack Goldsmith*, N.Y. TIMES, June 8, 2012 (describing the text as "bone dry and tightly reasoned" and concluding Goldsmith's legitimated policies represent a "dangerous melding of powers"); *see also* Gary Schmitt, *Safety First: the constitutional*

II. Executive Power in Context

Making few assumptions, Goldsmith thoroughly yet efficiently addresses the history of executive power. Traditionally, the executive branch has accumulated power during times of national crisis.⁷ Prior to World War II, the executive branch surrendered the additional power following each conflict.⁸ After World War II, however, the executive departed from this pattern and accumulated more and more power with each successive crisis.⁹ Executive power appeared to reach its zenith in the early 1970s when several scandals triggered congressional intervention.¹⁰ The executive branch, however, was able to evade these reforms and further accumulate national security power throughout the 1980s and 1990s.¹¹ Following 9/11, executive power grew even more robust as President George W. Bush's administration asserted itself on rendition, indefinite detention, interrogation, targeted killing, surveillance, and state secrets.¹² Many believe these recent expansions represent a permanent increase in executive power as President Barack Obama has maintained, largely unchanged, many of these policies.¹³

seesaw in the war on terror, WKLY. STND., Apr. 30, 2012; Roger Lowenstein, *Obama's Anti-Terror Program Is More or Less Bush's*, SAYS BOOK, BUS. WK., Apr. 4, 2012; and Anthony Dworkin, *Power and Constraint: The Accountable Presidency after 9/11 by Jack Goldsmith and Democracy's Blameless Leaders: From Dresden to Abu Ghraib, How Leaders Evade Accountability for Abuse, Atrocity, and Killing by Neil James Mitchell*, WASH. POST, May 18, 2012.

⁷ GOLDSMITH, *supra* note 1, at 33.

⁸ Goldsmith documents this pattern with Abraham Lincoln during the Civil War, Woodrow Wilson during World War I, and Franklin D. Roosevelt during World War II. *See id.* at 31.

⁹ Goldsmith points to Harry Truman's actions during the Soviet threat as the clear demarcation of the pattern of returning power to Congress. *See id.* at 32.

¹⁰ Goldsmith offers My Lai, Watergate, and the Pentagon Papers as scandals that triggered congressional action in the form of "the War Powers Resolution, the Foreign Intelligence Surveillance Act, the Presidential Records Act . . . a revised Freedom of Information Act, [and] the Privacy Act." *See id.* at 34.

¹¹ *See, e.g., id.* at 35 (providing historical examples of Grenada, Lebanon, Iran, Libya, Panama, Haiti, Bosnia, [and] Kosovo.)

¹² *Id.* at 37.

¹³ Goldsmith persuasively and objectively argues that the Obama administration largely maintained many of the Bush administration's policies. *See id.* at 5–20 (citing Dafna Linzer, *Obama Makes Indefinite*

III. Checking Presidential Power

Goldsmith's thesis rests on constraints arising from within the federal government, the legislative and judicial branches, and by forces external to the federal government, the press corps and civil society.¹⁴ In making his case, Goldsmith organizes his text around a series of compelling case studies that demonstrate how various institutions checked executive power in the years following 9/11.¹⁵

In the aggregate, these case studies offer readers a pattern. Investigative journalism, legal discovery, or a leak from within the executive branch moves information into the public square. Once in the open, the information catalyzes action by civil society to engage the judiciary or Congress, who in turn, move to check executive power. For example, Goldsmith draws on Dana Priest's journalism concerning CIA secret prisons¹⁶ to demonstrate how an article in the Washington Post set the conditions for the Detainee Treatment Act¹⁷ and the Supreme Court's application of the Geneva Conventions to Al Qaeda.¹⁸ Ultimately, Goldsmith concludes that this process has refined and strengthened national security policy by both legitimating executive power and securing an equilibrium between the competing branches of government.¹⁹ This is Goldsmith at his best.

IV. A Weakened Argument

Goldsmith's thesis is supported by two categories of constraints: those arising from within the federal government and those imposed by civil institutions outside the federal government. While the constraints imposed by the legislative and judicial branches provide a solid foundation for Goldsmith's conclusion, his heavy reliance on extra-governmental institutions to constrain executive power weakens his argument. Moreover, his position is further

eroded by relying on constraints that harm the federal government as a whole.

Goldsmith's argument is strongest when he outlines the checks on executive power that arise from within the federal government. Goldsmith makes clear that the judicial and legislative branches are critical to constraining and legitimating executive power.²⁰ Moreover, the interplay of the three branches demonstrated that the Framers' brilliant separation of powers scheme was flexible enough to address the most modern and unique challenges.²¹ In response to executive action following 9/11, debate within the public square gave rise to meaningful constraints imposed by the Supreme Court²² and Congress.²³ Goldsmith summarizes, "the virtue of the system lies in its ability to self-correct: democratic and judicial forces change presidential authorities and actions deemed imprudent or wrong and constrain presidential discretion in numerous ways."²⁴

Goldsmith also heavily relies on civil institutions located outside the federal government. These extra-governmental constraints, largely the press corps and civil society,²⁵ provide shaky support to Goldsmith's thesis. According to James Madison, these external institutions check presidential power less effectively than the limitations engineered into the checks and balances of the federal government itself:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by

Detention and Military Commissions His Own, PRO PUBLICA, Mar. 8, 2011 (indefinite detention and military commissions); Charlie Savage, *Detainees Barred from Access to U.S. Courts*, N.Y. TIMES, May 21, 2010 (Habeas Corpus at Guantanamo Bay); Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 14, 2010 (targeted killing); Lisa Mascaro, *Patriot Act Provisions Extended Just in Time*, L.A. TIMES, May 27, 2011 (surveillance); and Charlie Savage, *Court Dismisses a Case Asserting Torture by CIA*, N.Y. TIMES, Sept. 8, 2010 (state secrets)).

¹⁴ GOLDSMITH, *supra* note 1, at xiii.

¹⁵ While Goldsmith could have organized his text by institution (e.g., the judiciary, Congress, press, and civil society), readers are offered a far more interesting journey through a series of compelling narratives.

¹⁶ GOLDSMITH, *supra* note 1, at 55 (citing Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005).

¹⁷ Detainee Treatment Act, 42 U.S.C. § 2000dd (2006).

¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁹ GOLDSMITH, *supra* note 1, at 243.

²⁰ *Id.* at 209.

²¹ *Id.*

²² See, e.g., *id.* at 164 (citing *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that foreign nationals detained at Guantanamo Bay had the right to file habeas corpus petitions in federal court)); *id.* at 179 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that Common Article 3 of the Geneva Conventions applied to the conflict with al Qaeda)); and *id.* at 189 (citing *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 was unconstitutional and extending habeas corpus to foreign nationals detained at Guantanamo Bay)).

²³ *Id.* at 185–87 (citing the Detainee Treatment Act, 42 U.S.C. § 2000dd (2006) for the proposition that legislative action effectively ended the CIA's interrogation program and the Military Commissions Act, Pub. L. No. 111-84, 123 Stat. 2574 (2009) for the proposition that Congress reformed the military commissions).

²⁴ GOLDSMITH, *supra* note 1, at xv.

²⁵ *Id.* at 38.

their mutual relations, be the means of keeping each other in their proper places.²⁶

Ironically, Goldsmith relies on Federalist 51, but his argument cites only the portion extolling the virtues of internal constraints and wholly omits the portion finding external constraints inadequate.²⁷

External constraints are weaker because they are discretionary—the check on the executive depends on their decision to constrain the executive. In other words, these external checks are voluntary in contrast to the compulsory checks engineered into the separation of powers. Goldsmith makes this point himself in an insightful discussion concerning the voluntary nature of civil society’s check on executive power. Specifically, executive power is often unchecked when presidential action runs counter to the partisan expectations of civil society.²⁸ When the public expects a president to aggressively assert national security powers, they trust executive action that shows restraint.²⁹ Conversely, when the public expects a president to exercise “soft” power, they trust aggressive action by the executive branch.³⁰ The inverse relationship between trust and constraint allow for the executive branch to operate unchecked when presidential action defies expectations. Goldsmith’s reliance on extra-governmental institutions to check executive power weakens, but does not debunk, his thesis.

Goldsmith then needlessly obscures his argument by including information leaks and bad bureaucracy within his calculus of executive limitations. While these variables certainly limit the executive branch, they offer a dubious means to check power. These checks corrode the federal government as a whole, rather than providing a healthy and proper check on executive power.

Goldsmith finds that information leaks “operate as an important check on the presidency by spurring Congress, the courts, and civil society to action.”³¹ Goldsmith illustrates this constraint with WikiLeaks and PFC Bradley Manning.³²

²⁶ THE FEDERALIST NO. 51 (James Madison).

²⁷ GOLDSMITH, *supra* note 1, at 243 (citing THE FEDERALIST NO. 51 (James Madison) (“A well structured government is one in which ‘its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.’”)).

²⁸ GOLDSMITH, *supra* note 1, at 47.

²⁹ *Id.* (The public supported President Bush’s decision to prosecute terrorists in civilian courts, while President Obama faced significant resistance to similar civilian trial objectives.).

³⁰ *Id.* (Civil society largely supports President Obama’s aggressive national security policies, while President Bush was heavily criticized for similar, if not identical, policies).

³¹ *Id.* at 69.

Goldsmith then captures the impact of leaks. According to Michael Hayden, former director of the CIA, “there are a few operational things I have done that are as secret now as the day they were conceived.”³³ In sum, the executive branch is constrained by leaks because there are fewer secrets.

Additionally, Goldsmith determines that bureaucracy constrains the executive branch by requiring various echelons of consensus-building and legal reviews.³⁴ Goldsmith offers the example of a CIA covert operation, which requires “more than 100 executive branch officials, including ten or so lawyers [to] . . . weigh in” prior to presidential approval.³⁵ Executive action is limited by the national security bureaucracy.

The Founders established the separation of powers to strengthen the system of federal government in support of a “more perfect union.”³⁶ Leaks and bureaucracy only serve to undermine that goal. While these factors constrain executive power, Goldsmith dilutes his argument by relying on constraints that corrode, rather than strengthen, the federal government as a whole.

V. A Limited Argument

While Goldsmith provides readers with a thorough retrospective on executive power and limitations, he fails to address how these constraints would or should shape executive power in the next crisis.³⁷ Goldsmith’s thesis, looking back on the last decade, is very well supported.³⁸ Looking forward, however, this thesis is of less value to the reader because the executive branch will adapt and navigate around the constraints developed over the last decade.³⁹

³² *See id.* at 73 (a “Compressed Split File” was released to the world through WikiLeaks).

³³ *Id.* at 68.

³⁴ *Id.* at xvi.

³⁵ *Id.* at 89.

³⁶ U.S. CONST. pmb1.

³⁷ While Goldsmith does reference drones and cyber conflicts, GOLDSMITH, *supra* note 1, at 13, 17, he fails to explain how the constraints outlined in his text, relating largely to detention operations, limit executive power moving forward.

³⁸ Goldsmith makes clear that the judicial and legislative branches greatly shaped and limited executive power in the areas of interrogation, indefinite detention, habeas corpus, and military commissions. *See supra* notes 23 and 24.

³⁹ “The making of foreign policy is infinitely harder than it looks from the ivory tower.” *See* GOLDSMITH, *supra* note 1, at 22 (quoting Harold Hongu Koh, Legal Advisor, Dep’t of State, Speech at the American Society of International Law: The Obama Administration and International Law (May 25, 2011) available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

First, Goldsmith's thesis is limited because the executive branch will be able to distinguish the next crisis from the post-9/11 conflicts that gave rise to the current regime of constraints. When the nature of the conflict changes,⁴⁰ existing case law and legislation will offer only a tangential check on executive power. How will Hamdan and the Military Commissions Act of 2009 limit executive power during a cyber war? The unique nature of future conflicts will limit the applicability of post-9/11 constraints moving forward and, accordingly, limit the relevance of Goldsmith's thesis to his readers.

Second, the executive branch may avoid these constraints altogether by altering the strategies and tactics employed to achieve the Commander in Chief's desired end-state. For example, some believe the executive branch has shifted away from strategies that trigger the complex process governing "capture" operations.⁴¹ Instead, the executive has embraced a strategy of leveraging drones to target and kill high value targets.⁴² The relevance of Goldsmith's thesis is limited by the executive's ability to adapt and employ techniques that sidestep existing constraints.

VI. Conclusion

Goldsmith serves up an uncommonly neutral, thorough, and insightful summary of executive power and national security policy following 9/11. Goldsmith concludes that the judicial and legislative branches, assisted by civil society

and the press, effectively constrain the president. His thesis is well supported by the powerful actors internal to the federal government who move to check executive power—the judicial and legislative branches. However, Goldsmith's argument is weakened, but not debunked, by relying too heavily on external actors to constrain the executive branch. Specifically, civil society and the press offer less meaningful checks on presidential power because they have the choice to act and their action is not engineered into the separation of powers. Furthermore, the relevancy of his thesis is limited as the executive branch demonstrates its ability to navigate around existing constraints to meet tomorrow's national security challenges. Nevertheless, given the breadth and depth of Goldsmith's summary and analysis of executive power, this text is essential reading for all judge advocates and national security attorneys. Goldsmith's *Power and Constraint: The Accountable Presidency After 9/11* provides readers with a history of presidential power, a primer of national security law in the decade following 9/11, and an intriguing argument that presidential power is constrained even in a time of persistent conflict.

⁴⁰ Many are debating whether the United States has terminated counterinsurgency operations. See, e.g., Robert Haddick, *This Week at War: End of the COIN Era?*, FOREIGN POL'Y, June 23, 2011, available at http://www.foreignpolicy.com/articles/2011/06/23/this_week_at_war_end_of_the_coin_era.

⁴¹ See, e.g., *Questions and Answers on the 9/11 War Crimes Trial*, ASSOC. PRESS, June 8, 2012.

⁴² See, e.g., Jo Becker & Scott Shane, *'Secret Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qadea.html?pagewanted=all> ("Their policy is to take out high-value targets, versus capturing high-value targets," said Senator Saxby Chambliss of Georgia, the top Republican on the intelligence committee. "They are not going to advertise that, but that's what they are doing.").

Civilization: The West and the Rest¹

Reviewed by Captain Janet C. Eberle*

*[I]t makes no sense for China to have better rail systems than us, and Singapore having better airports than us. And we just learned that China now has the fastest supercomputer on Earth—that used to be us.*²

I. Introduction

With the United States struggling with over eight percent unemployment and recovering from the worst economic downturn since the Great Depression,³ the factors that led to these circumstances and what needs to be done to return the United States as a dominant power in the world is a popular subject amongst scholars.⁴

In *Civilization: The West and the Rest*, Niall Ferguson provides his perspective on how western civilization adapted over the course of 500 years to become and remain the dominant power in the world. Essentially, Ferguson posits that “if we can come up with a good explanation for the West’s past ascendancy, can we then offer a prognosis for its future?”⁵ Ferguson credits six concepts or behaviors that he terms “the killer apps”—competition, science, property rights, medicine, the consumer society, and the work ethic—as providing the basis of western dominance.⁶ Despite proposing a relevant topic for the military reader, Ferguson fails to properly support his thesis.

II. Background

Niall Ferguson is the Laurence A. Tisch Professor of History at Harvard University and a senior research fellow at the Hoover Institution, Stanford University, as well as at Jesus College, Oxford. He has written numerous books,

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¹ NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* (2011).

² President Barack Obama, President of the United States, Office of the Press Secretary, Press Conference at the White House (Nov. 3, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/11/03/press-conference-president>, and THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* at Dedication Page (2011).

³ *U.S. Economy Adds 96k Jobs; Unemployment Rate Falls to 8.1 Pct. as More People End Job Searches*, WASH. POST (Sep. 2, 2012), http://www.washingtonpost.com/business/us-economy-adds-96k-jobs-unemployment-rate-falls-to-81-pct-as-more-people-end-job-searches/2012/09/07/488b6892-f93b-11e1-a93b-7185e3f88849_story.html.

⁴ See, e.g., FRIEDMAN & MANDELBAUM, *supra* note 2.

⁵ FERGUSON, *supra* note 1, at xv.

⁶ *Id.* at 12.

including *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (2003), *Colossus: The Rise and Fall of the American Empire* (2004), and *The Ascent of Money: A Financial History of the World* (2008).

Ferguson teamed with PBS to turn *The Ascent of Money* into a documentary series. It garnered Ferguson an International Emmy for Best Documentary in 2009.⁷ Following this successful model, Ferguson again teamed with PBS to turn *Civilization* into a documentary series. The two-part documentary series aired in May 2012.⁸

III. The West

Ferguson provides a clear roadmap for readers in the book’s introduction with what he intends to show “distinguished the West from the Rest.”⁹ He also describes each of the six concepts he uses to explain how the West became dominant.¹⁰ Where Ferguson first missteps is in failing to concretely define what or where he means by “the West.” He proposes it be defined as English-speaking countries, plus the French; possibly those, plus Germany, Italy, Portugal, Scandinavia, Spain, and Greece; perhaps, the Balkans and Russia could be added.¹¹ Eventually, Ferguson defines “the West” as “more than just a geographical expression. It is a set of norms, behaviours and institutions with borders that are blurred in the extreme.”¹² By failing to define who are “the West” and who are “the Rest,” Ferguson makes it difficult to assess his theory when a nation can be categorized as either one.

⁷ Niall Ferguson, *Biography*, NIALL FERGUSON, <http://www.niallferguson.com/site/FERG/Templates/General2.aspx?pageid=5&cc=GB> (last visited Aug. 15, 2013). See also *Home, The Ascent Of Money*, PBS, <http://www.pbs.org/wnet/ascentofmoney/> (last visited Aug. 15, 2013).

⁸ *About, Civilization: The West and the Rest*, PBS, <http://www.pbs.org/wnet/civilization-west-and-rest/about/> (last visited Aug. 12, 2013).

⁹ FERGUSON, *supra* note 1, at 12.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 14–15.

¹² *Id.* at 15.

IV. The Killer Apps

In *Civilization*, Ferguson argues “the fortuitous weakness of the West’s rivals”¹³ in conjunction with “six identifiably novel complexes of institutions and associated ideas and behaviors”¹⁴ propelled the West ahead of other civilizations. Ferguson translates his theory into modern lexicon by deeming these six concepts “the killer apps.”¹⁵ He proceeds to argue his thesis by explaining how each of these “apps” contributed to the rise of western civilization. Unfortunately for the reader, Ferguson often fails to support his arguments for each of the “killer apps” or he discusses unrelated information, which runs contrary to Ferguson’s goal of explaining exactly what propelled the West forward. Nevertheless, his discussion of Competition, Science, Property Rights, Medicine, Consumption, and Work does give the reader a solid basis for understanding his theory.

A. Competition

In the 1400s, the East, in particular China, was the dominant superpower of the time. Asian agriculture far out produced European agriculture, resulting in a more populous East and more developed towns.¹⁶ Innovations developed during the 1500s to 1700s, such as the printing press, paper, and blast furnaces for smelting iron ore, are historically credited to European inventors when actually they originated in China hundreds of years prior.¹⁷ Ferguson argues that despite China’s power and position in the world, the competition of the Age of Exploration first propelled the West forward.¹⁸ Unlike Asian explorers who sought to bring back tributes for their leaders, Europeans viewed exploration as “about getting ahead of their rivals, both economically and politically.”¹⁹

While Asia was dominated by the Chinese Empire, Europe was fragmented into many nation-states. Near-constant fighting among the European nations was a byproduct of the geopolitical fragmentation, but it provided three benefits to western civilization²⁰—“it encouraged innovation in military technology;”²¹ states had to improve

methods of revenue collection to pay for their wars, which included government borrowing;²² and, unlike China, who suspended its overseas exploration in 1424, no one state was ever powerful enough to prevent exploration.²³ Ferguson successfully illustrates his point through a discussion of Portuguese explorers seeking an alternate route to the Indian Ocean to break into the spice trade previously controlled by the Turks and the Venetians.²⁴ Once the Portuguese established the new spice shipping route, European competition kicked into high gear and the Dutch and French began sailing and trading in spices as well. Eventually, the Dutch became the most prolific traders in spices over the Portuguese.²⁵

B. Science

In his next chapter, Ferguson explores the role scientific advances played in propelling European nations ahead of the Ottoman Empire. Ferguson credits the movable type printing press, which sparked the Reformation in Europe, as also promoting the Scientific Revolution by spreading ideas allowing scientists to build upon and form new theories.²⁶ In contrast, the Ottoman Empire had seen little scientific development after clerics argued in the eleventh century that science and philosophy were incompatible with the teachings of Islam.²⁷ Additionally, printing “was resisted in the Muslim world.”²⁸ Beginning in the late 1600s, European armies began defeating the Ottomans and driving them out of their territory. This shift in superiority resulted from the “application of science to warfare”²⁹ which provided “deadly accurate firepower.”³⁰

Ferguson’s scientific analysis is by far the best section of *Civilization*. He does an excellent job illustrating how science propelled the West ahead of the Ottoman Empire. He indicates the scientific gap is just now closing between the West and the Rest, giving Iran holding annual science festivals as an example.³¹ The problem with this example is it centers the scientific gap as being between the West and the Islamic world, not the Rest.

¹³ *Id.* at 13.

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 27–28.

¹⁸ *Id.* at 33.

¹⁹ *Id.*

²⁰ *Id.* at 36–37.

²¹ *Id.* at 37.

²² *Id.* at 38.

²³ *Id.* at 32, 38.

²⁴ *Id.* at 33.

²⁵ *Id.* at 36.

²⁶ *Id.* at 60–67.

²⁷ *Id.* at 67.

²⁸ *Id.* at 68.

²⁹ *Id.* at 57.

³⁰ *Id.* at 83.

³¹ *Id.* at 94.

C. Property Rights

While Ferguson introduces the third “killer app,” property rights, in his Introduction as “the rule of law as a means of protecting private owners and peacefully resolving disputes between them, which formed the basis for the most stable form of representative government,”³² his chapter on the subject does not address these property rights in the West versus the Rest. Instead, he compares the colonization of the Americas by two Western cultures, the British and the Spanish, and deems it “one of history’s biggest natural experiments.”³³ He concludes that North America was more successful than South America due to the “British model of widely distributed private property rights and democracy”³⁴ as compared with “the Spanish model of concentrated wealth and authoritarianism.”³⁵ While an interesting historical discussion, none of the analysis in this chapter shows that widely distributed private property rights are unique or more common in the West, or how they might be superior to any system in the rest of the world.

D. Medicine

Ferguson deems medicine “the West’s most remarkable killer application”³⁶ due to its ability to significantly increase life expectancy. He shows through empirical data that life expectancies in Asia and Africa began a sustained improvement in life expectancy “before the end of European colonial rule.”³⁷ Rather than illustrate how medicine helped the West succeed, Ferguson spends a significant portion of his time examining unrelated subject matter.³⁸ Much of the chapter is devoted to a discussion of the role eugenics played in justifying brutal treatment of the local population during European colonization of Africa.³⁹ Ferguson’s argument would have been far more persuasive if he had focused more on the advances in medicine that helped European colonialists survive illnesses common to Africa.

³² *Id.* at 13.

³³ *Id.* at 97.

³⁴ *Id.* at 138.

³⁵ *Id.*

³⁶ *Id.* at 146.

³⁷ *Id.* at 147.

³⁸ *Id.* at 149–57 (discussing the French Revolution), 157–61 (discussing Carl von Clausewitz’s *On War* and Napoleon Bonaparte’s military campaigns).

³⁹ *Id.* at 175–88.

E. Consumption

In examining the role of consumption in the rise of western society, Ferguson details the link between the Industrial Revolution, manufacturing of textiles, and the role of the worker as the consumer.⁴⁰ He describes the manufacture of clothing and the response to consumer demands of the different post-World War II economic models.⁴¹ Ferguson draws on the story of jeans in the West, and the demand for them behind the Iron Curtain, to support his argument that western society was better able to adapt to consumer demands.⁴²

Ferguson significantly detracts from an otherwise well-reasoned argument by including commentary on the perception of jeans as a sex symbol.⁴³ Additionally, he claims the campus revolts of 1968 were only “[s]uperficially . . . directed against the U.S. war to preserve the independence of South Vietnam.”⁴⁴ He argues their true goal was for “unlimited male access to the female dormitories.”⁴⁵ By including this sophomoric line of thought, it causes the reader to question the rest of Ferguson’s reasoning.

F. Work

The final “killer app” is the work ethic, which Ferguson argues finds its roots in the Protestant work ethic. The Protestant Reformation promoted not only hard work, but also high literacy rates, and saving capital by its members.⁴⁶ These characteristics helped the West succeed historically, but now are waning with Europeans working fewer hours and American saving rates falling.⁴⁷ In marked contrast, Christianity is on the rise in China. Ferguson illustrates the economic benefits with first-hand accounts of modern Chinese Christians; its ability to reduce corruption, promote philanthropy, and supply credit networks.⁴⁸ Ferguson’s logic and argument in this chapter are easily followed and well supported.

⁴⁰ *Id.* at 198.

⁴¹ *Id.* at 236–52.

⁴² *Id.* at 240–52.

⁴³ *Id.* at 241 (detailing Mormon leader, Brigham Young, denouncing button fly trousers as “fornication pants”), 242 (commenting “how very difficult it is to have sex with someone wearing tight-fitting jeans”).

⁴⁴ *Id.* at 245.

⁴⁵ *Id.*

⁴⁶ *Id.* at 259–64.

⁴⁷ *Id.* at 264–76.

⁴⁸ *Id.* at 285–87.

V. Conclusion

In his conclusion, Ferguson begins with the caveat that civilizations “are highly complex systems, made up of a very large number of interacting components that are asymmetrically organized.”⁴⁹ They can appear stable, but go into crisis from “[a] slight perturbation.”⁵⁰ Ferguson then leads into the current state of affairs in the United States, the impact of China acting as a U.S. creditor, and four obstacles to China continuing to ascend as a world power.⁵¹ He also argues that despite the West no longer monopolizing the “killer apps,” they are ahead because they have all the “apps” packaged together.⁵² Unfortunately, by starting with the explanation that civilizations are complex systems, Ferguson caveats his own predictions causing the reader to question the relevancy of the entire book.

If the reader desires an articulate, well-reasoned, thorough discussion of the historical rise of western civilization, the problems facing the West today, and how we might resolve them, look elsewhere. *Civilization: The West and the Rest* simply misses the mark.

⁴⁹ *Id.* at 299.

⁵⁰ *Id.*

⁵¹ *Id.* 308–23. Ferguson argues that due to China’s non-competitive economic and political systems, a stock-market or real estate bubble burst could cause a depression; they might succumb to social unrest; the middle class could want a larger say in politics; finally, a coalition, led by the United States, could be formed to balance China.

⁵² *Id.* at 323.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAА: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail Thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clerereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

a. The Judge Advocate General’s School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

d. Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

a. Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

b. Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering.mil@mail.mil.