

THE FIGHT AGAINST ISIS HAS CHANGED—SO SHOULD ITS FUNDING SOURCE

MAJOR CHRISTOPHER D. ELDER*

Reduction of the physical caliphate is a monumental military accomplishment but the fight against ISIS and violent extremism is far from over.¹

I. Introduction

Election security in Iraq is one of the many key parts to achieving stability and ensuring a lasting defeat of the Islamic State of Iraq and Syria (ISIS)² in the region. The 12 May 2018 Iraqi national elections were no exception.³ Tensions and turmoil were high, and election security was

* Judge Advocate, United States Army. Presently assigned as Associate Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia. LL.M., 2019, Military Law, The Judge Advocate General's Legal Center and School, United States Army; J.D., 2009, University of Louisville, Brandeis School of Law; B.A., 2002, Texas Tech University. Previous assignments include Chief of Contract and Fiscal Law, 1st Armored Division (Forward-Iraq), Fort Bliss, Texas, 2017–2018; Administrative Law Attorney, 1st Armored Division, Fort Bliss, Texas, 2016–2017; Trial Defense Counsel, Trial Defense Service-Eurasia, Kaiserslautern, Germany, 2013–2016; Trial Counsel, 16th Combat Aviation Brigade, 7th Infantry Division, Joint Base Lewis-McChord, Washington, 2012–2013; Trial Counsel, 62d Medical Brigade, I Corps, Joint Base Lewis-McChord, Washington, 2011–2012; Legal Assistance Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2010–2011. Member of the bars of Kentucky and Texas. A prior version of this article was submitted in partial completion of the Master of Laws requirements of the 67th Judge Advocate Officer Graduate Course.

¹ Ryan Browne, *Top US General in Middle East Says Fight Against ISIS 'Far from Over,'* CNN, <https://www.cnn.com/2019/03/07/politics/votel-isis-fight/index.html> (quoting General Joseph Votel, Commander, U.S. Central Command) (Mar. 7, 2019, 1:57 PM). See also Ranj Alaaldin, *COVID-19 Will Prolong Conflict in the Middle East*, BROOKINGS INST. (Apr. 24, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/04/24/covid-19-will-prolong-conflict-in-the-middle-east>.

² The group is also known as the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and the Levant (ISIL), and al-Dawla al-Islamiya fi al-Iraq wa al-Sham (Daesh). *ISIS, HISTORY*, https://www.history.com/topics/21st-century/isis#section_3 (June 7, 2019). This article will use the term “Islamic State of Iraq and Syria (ISIS)” interchangeably, as it is the term Congress most recently adopted in section 1222 of the Fiscal Year 2018 National Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222, 131 Stat. 1283, 1651 (2017).

³ Margaret Coker & Falih Hassan, *ISIS is Weakened, but Iraq Election Could Unravel Hard-Won Stability*, N.Y. TIMES, Jan. 30, 2018, at A10.

essential to winning the confidence of the Iraqi people in the election results and establishing regional stability.⁴ Despite the billions of dollars the United States spent since 2014 on training and equipping the Iraqi Security Forces (ISF) for combat,⁵ U.S. forces could not spend a single U.S. dollar to train or equip local Iraqi police in election security or crowd control.

The fund Congress created to support the fight against ISIS no longer matches the mission. Since its 2014 inception, the Operation Inherent Resolve (OIR) mission, with the Combined Joint Task Force (CJTF) Global Coalition leading the way, is the defeat of ISIS in Iraq and Syria and to “set[] conditions for follow-on operations to increase regional stability.”⁶ The ISF have now retaken most of the territory held by ISIS in Iraq, and major combat operations against the group have declined since early 2018.⁷ With the physical caliphate nearly defeated, the CJTF has shifted its focus from combat operations to preventing the resurgence of ISIS through regional stability⁸ operations.⁹ However, the funds appropriated to help the ISF and other qualifying groups to counter ISIS do not permit the CJTF to pursue vital stabilization and security efforts aimed at a lasting defeat of ISIS.

Congress has not authorized the Counter-ISIS Train and Equip Fund (CTEF)—the only U.S. appropriation available to train and equip foreign

⁴ *Id.*

⁵ Congress appropriated \$1.77 billion in fiscal year (FY) 2018, \$1.35 billion in FY19, and \$1.19 billion in FY20 for the Counter-ISIS Train and Equip Fund (CTEF). Consolidated Appropriations Act 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018); Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

⁶ *Combined Joint Task Force (CJTF) Operation Inherent Resolve (OIR) Fact Sheet*, OPERATION INHERENT RESOLVE, <http://www.inherentresolve.mil/Portals/14/Documents/Mission/20170717-%20Updated%20Mission%20Statement%20Fact%20Sheet.pdf> (last visited Aug. 28, 2020). Until 2018, the CJTF also had a subordinate Combined Joint Forces Land Component Command (CJFLCC) responsible for operations in Iraq.

⁷ U.S. DEP'T OF DEF., *Coalition Announces Shift in Focus as Iraq Campaign Progresses* (Feb. 5, 2018), <https://dod.defense.gov/News/Article/Article/1432692/coalition-announces-shift-in-focus-as-iraq-campaign-progresses> [hereinafter *Coalition Shift*].

⁸ “Stabilization is the process by which military and nonmilitary actors collectively apply various instruments of national power to address drivers of conflict, foster host-nation resiliencies, and create conditions that enable sustainable peace and security.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-07: STABILITY, at ix (3 Aug. 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_07.pdf.

⁹ *Coalition Shift*, *supra* note 7.

forces in Iraq and Syria—for this type of support.¹⁰ Instead, the CJTF may only use CTEF to support groups “participating, or preparing to participate in activities to counter” ISIS.¹¹ This language significantly limits the groups the CJTF can support with CTEF to those directly combating ISIS. Commanders in the CJTF, along with their judge advocates, find funding stability missions problematic because of the limitation.¹² Election security training is just one of the many examples of support the U.S.-led coalition is unable to perform using CTEF. Additional restrictions limit the CJTF’s counter-ISIS construction authority to “facility fortification and humane treatment”¹³ and limits all construction, repair, and renovation projects to \$4 million per project and no more than \$30 million in total per fiscal year, even for otherwise eligible groups.¹⁴ The appropriation also restricts the CJTF from using CTEF to support any groups who are primarily responsible for stability operations, like local police forces, and prevents the CJTF from transferring unused CTEF equipment from Iraq to Syria.¹⁵

With the shift to stability operations, the groups and projects the CJTF can support with CTEF is shrinking dramatically. Most of these issues are due to the statutory construction of the CTEF appropriation. However, the Department of Defense’s (DoD) own Office of the General Counsel (OGC) interpretation of CTEF makes matters worse. This office’s opinion further restricts the use of CTEF beyond its plain language and limits support to operations resulting in a “kinetic” effect.¹⁶ This opinion effectively limits CTEF projects to those involving combat or training for combat.¹⁷

¹⁰ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

¹¹ *Id.*

¹² Telephone Interview with Colonel Charles Poché, Staff Judge Advoc., Combined Joint Task Force-Operation Inherent Resolve (Nov. 2, 2018).

¹³ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

¹⁴ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).

¹⁵ *Id.*; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

¹⁶ Telephone Interview with Major Ryan Howard, U.S. Cent. Command Fiscal & Cont. L. (Jan. 24, 2019); Telephone Interview with Colonel Charles Poché, *supra* note 12; Telephone Interview with Captain David Marold, Chief of Fiscal L., Combined Joint Task Force-Operation Inherent Resolve (Nov. 5, 2018).

¹⁷ Telephone Interview with Major Ryan Howard, *supra* note 16; Telephone Interview with Colonel Charles Poché, *supra* note 12; Telephone Interview with Captain David Marold, *supra* note 16.

Another concern in the near future is that the CJTF is not an enduring institution in Iraq,¹⁸ and stability operations take time.¹⁹ Because of this, the United States requires a long-term presence in Iraq to take responsibility for CTEF and the programs it funds. The Office of Security Cooperation, Iraq (OSC-I), a DoD organization nested within the Department of State (DoS) and the U.S. Embassy in Baghdad, is better suited to conduct long-term stability operations using CTEF. The DoS is also better suited for the diplomacy required to support the third-party organizations stability operations will require. Further, the OSC-I previously owned this mission in the recent past.²⁰

The CTEF appropriation, in its current form, lacks the ability and flexibility to adequately support the current and future OIR mission against ISIS. Therefore, Congress should amend CTEF's purpose language to broaden its construction, repair, and renovation authority, and permit support to groups with stability operation missions. Until then, the OGC should modify its opinion limiting CTEF to "kinetic" operations and, instead, broadly interpret the term "counter ISIS" to include stability operations designed to prevent the resurgence of ISIS. The OGC should then issue formal guidance on the use of CTEF. Finally, once ISF combat operations against ISIS cease and the CJTF dissolves, the ISF train and equip mission for stability operations should transfer from the CJTF to the OSC-I.

This article discusses the background of OIR, the evolution of the train and equip funds used by OIR commanders, and an overview of the issues with CTEF in OIR today. This article then compares and contrasts alternate sources of training and equipping foreign security forces and, ultimately, proposes a solution for matching CTEF with the current OIR mission. The mission in Iraq is the lasting defeat of ISIS. A lasting defeat requires stability operations in order to prevent the group's resurgence. Until CTEF evolves, it will veer further off course from the mark Congress originally

¹⁸ U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS, at para. 4.a.(3) (Sept. 16, 2009) (incorporating Change 1, June 29, 2017) [hereinafter DoDI 3000.05].

¹⁹ See generally LINDA ROBINSON ET AL., RAND CORP., FINDING THE RIGHT BALANCE: DEPARTMENT OF DEFENSE ROLES IN STABILIZATION (2018) (evaluating the U.S. military's stabilization efforts).

²⁰ INSPECTOR GEN., U.S. DEP'T OF DEF., REP NO. DODIG-2012-063, ASSESSMENT OF THE DOD ESTABLISHMENT OF THE OFFICE OF SECURITY COOPERATION-IRAQ, at app. D (Mar. 16, 2012) [hereinafter DoD IG ROI-OSC-I].

intended, and the CJTF will continue to fight with one hand tied behind its back.

II. The Evolution of CTEF and OIR

After eight years of the U.S. military's presence in Iraq, and mounting political pressure both at home and abroad, President Barack Obama withdrew U.S. military forces from the country in December 2011.²¹ The withdrawal left a fragile Iraqi government in Baghdad, already grappling with sectarian and political infighting.²² The Government of Iraq (GoI) was a fledgling government with tenuous control over its territory and its identity in the region. Within days of the U.S. departure, Iraqi Prime Minister Nouri al-Maliki, a Shiite, issued an arrest warrant for his Sunni vice president, Tariq al-Hashimi.²³ This sparked the Sunni political block, Iraqiya, to leave parliament in protest.²⁴ In the months that followed, the three major factions in Iraq—Shia, Sunni, and Kurd—dove deeper into sectarian conflict and political hard line divisions.²⁵

A. The Rise of ISIS

In April 2013, Abu Bakr al-Baghdadi formed ISIS, a fundamentalist Sunni Islamic militant group.²⁶ At the time, al-Baghdadi was part of al Qaeda in Iraq (AQI) and the Islamic State of Iraq (ISI), and his declaration separated ISIS from those original affiliations.²⁷ Two events sparked the formation of ISIS: the United States' withdrawal from Iraq and "the

²¹ See Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 17, 2011, 11:40 PM), <https://www.reuters.com/article/us-iraq-withdrawal/last-u-s-troops-leave-iraq-ending-war-idUSTRE7BH03320111218>; Scott Wilson & Karen DeYoung, *All U.S. Troops to Leave Iraq by the End of 2011*, WASH. POST (Oct. 21, 2011), https://www.washingtonpost.com/world/national-security/all-us-troops-to-leave-iraq/2011/10/21/g1QAUyJi3L_story.html.

²² Logan, *supra* note 21; see also Wilson & DeYoung, *supra* note 21.

²³ Adam Taylor, *How Iraq Unraveled Since the U.S. Withdrawal, in 10 Steps*, WASH. POST (Jun. 13, 2014, 5:20 PM), <https://www.washingtonpost.com/news/worldviews/wp/2014/06/13/how-iraq-unraveled-since-the-u-s-withdrawal-in-10-steps>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ MICHAEL W.S. RYAN, U.S. NAVAL WAR COLL., *ISIS: THE TERRORIST GROUP THAT WOULD BE A STATE* 18–19 (2015).

²⁷ *Id.*

unanticipated full-scale insurrection against Bashar al-Assad in Syria in the context of the Arab Spring.”²⁸

In 2012 and 2013, ISIS began capturing and holding territory throughout Iraq and Syria.²⁹ Then, in June 2014, ISIS gained considerable strength and resources when “about 800 to 1,000 ISIS fighters took [Mosul, a] city of two million people [and] Iraqi forces comprising two divisions of approximately 30,000 soldiers fled after initial skirmishes.”³⁰ Soon after, ISIS expanded and gained control of vast areas throughout northern Iraq. They captured Tikrit in June 2014, the Mosul Dam in August 2014, and Ramadi in May 2015.³¹ This expansion moved further south without resistance, and ISIS became a legitimate threat to Baghdad—the center of the Iraqi government.³² The GoI, facing a threat it could not control, requested the United States return to Iraq and assist in its defense against ISIS.³³ On 22 June 2014, the Ministry of Foreign Affairs of the Republic of Iraq approved an exchange of diplomatic notes between the United States and Iraq, outlining the conditions for a return of U.S. forces into Iraq.³⁴

B. The OIR Mission

In August 2014, the United States returned to Iraq to defeat ISIS and began supporting the ISF through air strikes against ISIS positions and building an international coalition.³⁵ The United States named the mission against ISIS “Operation Inherent Resolve” (OIR).³⁶ On 17 October 2014, the United States established a multi-nation CJTF under the U.S. Central Command (CENTCOM) combatant command to formally head the

²⁸ *Id.* at 18.

²⁹ *Id.* at 20. See also INSPECTOR GEN., U.S. DEP’T OF DEF., REPORT NO. DODIG-2018-147, U.S. AND COALITION EFFORTS TO TRAIN, ADVISE, ASSIST, AND EQUIP THE IRAQI POLICE HOLD FORCE 2 (Sept. 13, 2018) [hereinafter DoD IG ROI-HOLD FORCE].

³⁰ RYAN, *supra* note 26, at 20.

³¹ *Id.* See also DoD IG ROI-HOLD FORCE, *supra* note 29.

³² Michael R. Gordon, *Iraq’s Leader Requests More Aid in Fight Against ISIS*, N.Y. TIMES, (Dec. 3, 2014) <https://www.nytimes.com/2014/12/04/world/middleeast/iraqi-leader-seeks-additional-aid-in-isis-fight.html>.

³³ *Id.*

³⁴ Exchange of Diplomatic Notes Between the Embassy of U.S. and the Ministry of Foreign Affs. of the Republic of Iraq (June 22, 2014) (on file with author).

³⁵ DoD IG ROI-HOLD FORCE, *supra* note 29, at 3.

³⁶ *About Us*, OPERATION INHERENT RESOLVE, <https://www.inherentresolve.mil/About-CJTF-OIR> (last visited Aug. 28, 2020).

operation.³⁷ The CJTF currently contains seventy-four partner nations and five international organizations.³⁸

1. By, With, and Through

The U.S. mission in returning to Iraq was—and continues to be—the defeat of ISIS (D-ISIS)³⁹ “by, with, and through”⁴⁰ the GoI and its security forces. Stated more broadly, the CJTF mission is the defeat of “ISIS in designated areas of Iraq and Syria and [to set] conditions for follow-on operations to increase regional stability.”⁴¹

In practical terms, working “by, with, and through” means neither the United States nor the CJTF are the lead in the fight. In all Iraqi operations, the GoI and the ISF lead the fighting, and the CJTF works to support them.⁴² To accomplish its D-ISIS objective, the CJTF employs various combinations of advise, assist, accompany, and enable (A3E) missions with the ISF.⁴³ One of the primary means of supporting the GoI is through

³⁷ *Id.*

³⁸ Press Release, U.S. Cent. Command, CJTF-OIR Reflects on Significant Military Gains, Fighting ISIS in 2018 (Jan. 9, 2019) (on file with author).

³⁹ Telephone Interview with Colonel Charles Poché, *supra* note 12. On 10 September 2014, the U.S. State Department, along with the North Atlantic Treaty Organization (NATO), announced “[f]ive mutually reinforcing lines of effort to degrade and defeat ISIS These lines of effort include: 1. Providing military support to our partners; 2. Impeding the flow of foreign fighters; 3. Stopping financing and funding; 4. Addressing humanitarian crises in the region; and 5. Exposing the nature [of ISIS].” *About Us – The Global Coalition to Defeat ISIS*, U.S. DEP’T OF STATE, <https://www.state.gov/about-us-the-global-coalition-to-defeat-isis> (last visited Aug. 28, 2020).

⁴⁰ *Operation Inherent Resolve: Targeted Operations to Defeat ISIS*, U.S. DEP’T OF DEF., <https://dod.defense.gov/OIR> (last visited Aug. 28, 2020). “By, with, and through” as an operational approach entails the conduct of military campaigns primarily through the employment of partner maneuver forces with the support of U.S. enablers, through a coordinated legal and diplomatic framework.” Interview by Ctr. for Army Lessons Learned with Lieutenant Gen. Paul E. Funk II, Commanding Gen., III Corps & CJTF-OIR (Jan. 27, 2018).

⁴¹ *About Us*, *supra* note 36.

⁴² Interview with Gen. Paul E. Funk II, *supra* note 40.

⁴³ The CJTF-OIR campaign is separated into four phases: (1) degrade, (2) counterattack, (3) defeat, and (4) support stabilization, with three lines of effort. *Campaign*, OPERATION INHERENT RESOLVE, <http://www.inherentresolve.mil/campaign> (last visited Aug. 29, 2020). The second line of effort “enable[s] sustainable military partner capacity in Iraq and Syria.” *Id.* This is accomplished by training, equipping, advising, and assisting partner forces. *Id.* “Advise—The use of influence and knowledge to teach, coach, and mentor while working by, with, and through a partner. *I am providing you with a recommended and proven (rooted in doctrine and experience) way to do it.* Assist—Directly or indirectly support partners to enhance their ability to deliver desired effects. *I am helping you do something better that*

training and equipping the ISF at various building partner capacity (BPC) sites.⁴⁴

2. *The Fight Against ISIS*

According to the Coalition narrative, the CJTF must accomplish two goals to defeat ISIS.⁴⁵ First, the ISF must defeat the physical ISIS “caliphate.”⁴⁶ This consists of conventional warfare and keeping ISIS from holding territory. Second, the CJTF must “purs[ue] the lasting defeat of the terrorist organization.”⁴⁷ Here, the ISF and the Coalition works to prevent the resurgence of ISIS in the future. Unless and until ISIS is dismantled and incapable of reforming, it is not truly defeated. Iraq also requires regional stability to prevent the resurgence of ISIS. This second prong requires the United States and its partners to meaningfully combat ISIS where it derives its strength—in the vacuum created by regional instability and fear.

Beginning in 2015, with the help of the Coalition, the ISF began effectively fighting and taking territory back from ISIS.⁴⁸ The ISF regained control over Tikrit in March 2015, Ramadi in February 2016, Fallujah in June 2016, Mosul in July 2017, Tal Afar in August 2017, and Hawijah in October 2017.⁴⁹ These successes are largely due to the now-increased fighting ability and capacity of the ISF.⁵⁰ The Iraq Train and Equip Fund (ITEF)⁵¹ and CTEF were instrumental in providing the ISF with these capabilities.

you can already do. Accompany—Move with and be present with the partner. *I will go forward with you.* Enable—Use of coalition capability to enhance the partners’ desired effects where their organic means may be insufficient. *I am helping you do something that you cannot effectively do—I can help you with our assets.* U.S. ARMY TRAINING & DOCTRINE COMMAND, NO. 17-24 U, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE 42 (2017).

⁴⁴ *Campaign*, *supra* note 43. See also Deja Borden, *Coalition Support Growing for Build Partner Capacity Effort in Iraq*, U.S. CENT. COMMAND (Apr. 15, 2015), <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/885071/coalition-support-growing-for-build-partner-capacity-effort-in-iraq>.

⁴⁵ DoD IG ROI-HOLD FORCE, *supra* note 29, at 3 (citing Annex F of the CJTF-OIR Campaign Plan).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

3. *The Current Fight*

The strides made by the ISF came much more quickly than the Coalition planners had predicted. In February 2018, “ISIS ha[d] lost about 98 percent of the territory it once held in Iraq and Syria”⁵² and the CJTF announced a “shift in focus as [the] Iraq Campaign progresses.”⁵³ With the conventional fight now waning, the CJTF is shifting its focus to its second goal—the lasting defeat of ISIS through stability operations.⁵⁴ This phase, also known as “consolidating gains,” is the current focus of the CJTF.⁵⁵ Consolidating gains has three objectives: (1) to attack the remnants of ISIS to prevent its ability to develop an insurgency; (2) to provide security for diplomatic, economic, and informational activity; and (3) to transition from offensive military operations to security functions (policing and border control).⁵⁶

Congress and CENTCOM agree that wide area security and stability operations are vital to “consolidate[ing] gains [made by the Coalition and the ISF], hold[ing] territory, and protect[ing] infrastructure from ISIS and its affiliates in an effort to deal a lasting defeat to ISIS and prevent its reemergence in Iraq.”⁵⁷ The Islamic State of Iraq and Syria “is still capable of offensive action and retains the ability to plan and inspire attacks worldwide.”⁵⁸ Training and equipping are still a vital part to the CJTF strategy,⁵⁹ but the focus requires change, along with the CJTF’s entry into this second phase. Since February 2018, the CJTF has attempted to focus its train and equip efforts “more on policing, border control and military capacity building.”⁶⁰ However, the CJTF is not able to support many of these efforts with CTEF because of its fiscal limitations.

⁵² *Coalition Shift*, *supra* note 7.

⁵³ *Id.*

⁵⁴ Phase IV of the CJTF-OIR Campaign plan. *Campaign*, *supra* note 43.

⁵⁵ DoD IG ROI-HOLD FORCE, *supra* note 29, at 3.

⁵⁶ *Id.* See also *Campaign*, *supra* note 43.

⁵⁷ John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1233(d), 132 Stat. 1636, 2039 (2018); Gen. Joseph L. Votel, Commander, U.S. Cent. Command, Defense Department Briefing (July 19, 2018) (“With the newly elected government of Iraq taking shape, we will continue our efforts to support the Iraqi Security Forces in their transition from major combat operations to the wide area security force that the Iraqi people want and deserve and that will be necessary to consolidate their hard-won gains.”).

⁵⁸ *Coalition Shift*, *supra* note 7.

⁵⁹ *Id.*

⁶⁰ *Id.*

III. Proper Funds

A. Fiscal Law

To keep any one branch of the federal government from gaining too much power, the founders of the United States built into the Constitution specific “checks” on each of the three branches. Sections 8 and 9 of Article I of the U.S. Constitution are examples of the Legislative Branch’s check on the Executive Branch. Article I grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁶¹ Article I also states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁶² Collectively, these are Congress’s “power of the purse.”⁶³ This power prohibits Executive Branch agencies, including the DoD, from spending any money until and unless Congress has passed a lawful appropriation.⁶⁴

Congress generally passes appropriations for the DoD annually.⁶⁵ In addition to appropriations, Congress also passes authorizations.⁶⁶ An authorization is a statute authorizing a particular agency to conduct specified activities using a specified appropriation.⁶⁷ Included in these acts are generally three broad limitations on their use: the reasons the agency may use the appropriation (purpose), when the appropriation is available for obligation (time), and the total the agency may obligate (amount).⁶⁸ The Supreme Court also held that “the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”⁶⁹

For example, U.S. forces may not use any funds to conduct offensive operations outside of the United States, unless Congress authorizes the activity, and only when there are funds from a proper appropriation

⁶¹ U.S. CONST. art I, § 8, cl. 1.

⁶² *Id.* § 9, cl. 7.

⁶³ *See generally* U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 1, § A, at 1-4 (4th ed. 2016) [hereinafter GAO RED BOOK].

⁶⁴ *United States v. MacCollom*, 426 U.S. 317 (1976).

⁶⁵ GAO RED BOOK, *supra* note 63, ch. 2, § B.4.a., at 2-17.

⁶⁶ *See generally id.* at ch. 2, § C.1, at 2-54.

⁶⁷ *Id.*

⁶⁸ Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–1519.

⁶⁹ *MacCollom*, 426 U.S. at 321 (citing *Reese v. Walker*, 52 U.S. 272, 291 (1851)).

available.⁷⁰ In this instance, Congress traditionally passes an Overseas Contingency Operation, Operation and Maintenance (OCO O&M) appropriation. Unless Congress has provided an exception, the DoD may only use OCO O&M funds to operate and maintain the armed forces when the beneficiary is the U.S. Armed Forces, and only for select missions.⁷¹ This is the primary fund the DoD uses to pay for its operations in the CENTCOM area of operations. However, the fund is not available to pay for any foreign forces.⁷² For the DoD, this means Congress must specifically authorize and appropriate a separate fund to provide any train and equip assistance to a foreign force.

In November 2014, the DoD requested Congress appropriate and authorize funds to achieve its goals in supporting the ISF.⁷³ Specifically, the DoD requested approximately \$1.6 billion for fiscal year (FY) 2015 to provide assistance to “military and other security forces of, or associated with, the Government of Iraq, including Kurdish and tribal security forces, with a national security mission, to counter [ISIS].”⁷⁴ The types of assistance requested included “the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, *construction*, and stipends.”⁷⁵

Congress granted the DoD request beginning in fiscal year 2015 (FY15).⁷⁶ Between FY15 and FY19, Congress changed both the appropriations and their authorizations to counter ISIS in several important ways.

⁷⁰ See Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–1519.

⁷¹ See, e.g., Memorandum from Army Budget Off., Department of the Army Financial Management Guidance for Contingency Operations (June 28, 2012). See also 10 U.S.C. § 101(a)(13).

⁷² Memorandum from Army Budget Off., *supra* note 71.

⁷³ OFF. OF THE SEC’Y OF DEF., U.S. DEP’T OF DEF., JUSTIFICATION FOR FY 2015 OVERSEAS CONTINGENCY OPERATIONS IRAQ TRAIN AND EQUIP FUND (ITEF) (2014).

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* (emphasis added).

⁷⁶ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

B. The ITEF Appropriation: Predecessor to CTEF

In December 2014, Congress granted the initial DoD request by appropriating approximately \$1.6 billion for ITEF and making the fund available for two years (through 30 September 2016).⁷⁷

1. *Support to the GoI*

The purpose language in ITEF focused on benefiting certain groups, like the GoI, and other groups with an Iraqi “national security mission.”⁷⁸ The language in ITEF permitted “the Secretary of Defense . . . to provide assistance . . . to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces, with a national security mission, to counter [ISIS].”⁷⁹ Congress added an additional condition that the Secretary of Defense must also coordinate the assistance with the Secretary of State.⁸⁰

2. *Prohibition on Construction*

The types of assistance approved by Congress in ITEF permitted “training; equipment; logistics support, supplies, and services; stipends; infrastructure repair, renovation, and sustainment.”⁸¹ Notably, the appropriation mirrored the DoD’s request in all types of assistance, except for one. The appropriation passed by Congress contained no reference to construction. In light of the language from the DoD’s request for the ability to perform construction, and the express provision for construction in the corresponding Syria Train and Equip authorization (discussed further below), this omission by Congress was clearly intentional.⁸² As a

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² “[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). See *Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in one provision between “used” and “intended to be used” creates implication that related provision’s reliance on “use” alone refers to actual and not intended use); *Merck v. Reynolds*, 559 U.S. 633, 655–61 (2010) (Scalia, J., concurring) (use of “discovery” alone in one securities fraud statute of limitations provision and the use of “discovery, or after such discovery should have been made” in another securities fraud statute of limitations provision implies that “discovery” in the first provision means only “actual discovery” and does not include “constructive

result, ITEF prohibited the DoD from performing any construction using ITEF for the benefit of the GoI or the ISF.

Construction is work “necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.”⁸³ A “facility” is “[a] building, structure, or other improvement to real property.”⁸⁴ This includes the creation of a new facility, adding a feature to an existing facility, all of the work required to develop the land around a facility, and “related real property requirements.”⁸⁵ In practical terms, this prohibition meant U.S. forces could not use ITEF to build or improve any real property for the ISF. For example, the CJTF could not use ITEF to build any training facilities, life support areas, headquarters, bases, ammunition holding areas (AHA), or improvements to any existing facilities. The DoD could not even use ITEF to lay a gravel road or bulldoze a defensive earthwork berm if the primary beneficiary was the ISF.

Instead, ITEF only permitted the CJTF to repair the GoI’s existing facilities. This limited OIR units to bringing existing real property facilities back to their originally intended use and composition, and only when they were in a “failed or failing” state.⁸⁶

C. Authority to Provide Assistance to Counter ISIS in Iraq: Section 1236

At the same time Congress granted the initial ITEF appropriation in December 2014, it also authorized the Secretary of Defense to use ITEF to provide assistance to counter ISIS in section 1236 of the FY15 National Defense Authorization Act (NDAA).⁸⁷ The authorization permitted the DoD to use ITEF for the same types of assistance and supported groups listed in the ITEF appropriation. However, section 1236 also added several requirements regarding the purpose of the expenditures. The DoD could use ITEF only when the expenditure was used for “(1) [d]efending Iraq, its people, allies, and partner nations from the threat posed by the

discovery”); *Bates v. United States*, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in one provision and exclusion in a parallel provision). *See also Statutory Interpretation: General Principles and Recent Trends*, EVERYCRSREPORT.COM (Sept. 24, 2014), <https://www.everycrsreport.com/reports/97-589.html>.

⁸³ 10 U.S.C. § 2801(b); U.S. DEP’T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT, para. 4-17(a) (12 Feb. 2008) (RAR 24 Aug. 2012).

⁸⁴ AR 420-1, *supra* note 83, glossary at 436(defining facility).

⁸⁵ *Id.* para. 4-17(a)(4).

⁸⁶ *Id.* para. 4-17(c).

⁸⁷ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).

Islamic State of Iraq and the Levant (ISIL) and groups supporting ISIL [or] (2) [s]ecuring the territory of Iraq.”⁸⁸

D. Authority to Provide Assistance to the Vetted Syrian Opposition: Section 1209

Congress also authorized the DoD, in section 1209 of the FY15 NDAA, to provide assistance to the vetted Syrian opposition (VSO) to counter ISIS in Syria.⁸⁹ Instead of appropriating a separate fund, Congress funded this Syria Train and Equip authorization by reprogramming \$500 million of the \$1.3 billion in funds from the Counterterrorism Partnerships Fund⁹⁰ and re-appropriating them in support of the STE program.⁹¹ Section 1209 permitted expenditures with the purpose of “(1) Defending the Syrian people from [ISIS], and securing territory controlled by the Syrian opposition[;] (2) Protecting the [U.S.], its friends and allies, and the Syrian people from the threats posed by terrorists in Syria[;] and (3) Promoting the conditions for a negotiated settlement to end the conflict in Syria.”⁹² Unlike section 1236, section 1209 initially permitted the DoD to provide “training, equipment, supplies, stipends, *construction of training and associated facilities*, and sustainment.”⁹³

Separating ITEF and STE created two distinct authorities and funding sources controlled by the CJTF. This separation prohibited the CJTF from being able to reallocate resources purchased under one authority for use in the other theater.⁹⁴ As discussed below, this separation created issues

⁸⁸ *Id.*

⁸⁹ *Id.* § 1209.

⁹⁰ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

⁹¹ *Id.* § 9016.

⁹² § 1209(a), 128 Stat. at 3541.

⁹³ *Id.* (emphasis added).

⁹⁴ Longstanding precedent dictates that an appropriation for a purpose is available to pay expenses necessarily incident to accomplishing that purpose. “It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures” Major General Anton Stephan, 6 Comp. Gen. 619, 621 (1927). Here, articles purchased under one appropriation’s purpose (e.g., ITEF) may not be then put to use for another purpose where there is a more specific appropriation available to the subsequent effort (e.g., STE). *See also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 3 (4th ed. 2017).

when the CJTF wanted to use equipment purchased for one area of operations in another area.

E. CTEF

The ITEF and STE programs remained functionally unchanged until FY17. As the fight against ISIS developed, the terrorist organization grew outside the borders of Iraq and Syria.⁹⁵ In the DoD's FY 2017 Request for Additional Appropriations, the Secretary of Defense asked Congress to combine the ITEF and STE appropriations into a single "Counter-ISIS Train and Equip Fund."⁹⁶ The DoD made the request to combat ISIS outside of the borders of Iraq and Syria. Congress granted the request in the FY17 DoD Appropriations Act.⁹⁷

The types of assistance provided in the FY17 CTEF appropriation were the same as the original ITEF appropriation. In other respects, however, the language in CTEF changed significantly from the ITEF appropriation. The FY17 CTEF appropriation allowed the DoD to provide assistance outside of Iraq and Syria in countries "designated by the Secretary of Defense, in coordination with the Secretary of State, as having a security mission to counter [ISIS]."⁹⁸ Additionally, Congress removed the ITEF language referring to the GoI, security forces with a "national security mission," and "securing the territory of Iraq."⁹⁹ Instead, the purpose language focuses on the type of group or individual receiving the assistance. In particular, CTEF allows the DoD to provide assistance to "foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant,

⁹⁵ See Matthew Rosenberg et. al., *ISIS Expands Reach Despite Military and Financial Setbacks*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/world/middleeast/isis-iraq-syria.html>.

⁹⁶ See U.S. DEP'T OF DEF., REQUEST FOR ADDITIONAL APPROPRIATIONS, OVERSEAS CONTINGENCY OPERATIONS (OCO) COUNTER-ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) TRAIN AND EQUIP FUND (CTEF) (2017). See also OFF. OF THE UNDER SEC'Y OF DEF. (COMPTROLLER), U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REQUEST FOR ADDITIONAL FY 2017 APPROPRIATIONS 10 (2017).

⁹⁷ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017). The FY17 appropriation was titled "Counter-ISIL Train and Equip Fund." *Id.* Congress again changed the title in the FY18 CTEF appropriation to "Counter-ISIS Train and Equip Fund." Consolidated Appropriations Act 2018, Pub. L. No. 115-141, 132 Stat. 348, 498 (2018) (emphasis added).

⁹⁸ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

⁹⁹ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

and their affiliates or associated groups.”¹⁰⁰ The Counter-ISIS Train and Equip Fund also permits the enhancement of “border security of nations adjacent to conflict areas . . . resulting from [the] actions of [ISIS].”¹⁰¹

Congress also did not introduce any authority for construction into the FY17 CTEF appropriation. A year later, however, Congress seemingly changed course on its intent to prohibit construction. In the FY18 NDAA, Congress deleted from section 1236 the words “facility and infrastructure repair and renovation” and inserted the term “infrastructure repair and renovation, small-scale construction of temporary facilities necessary to meet urgent operational or force protection requirements with a cost less than \$4,000,000.”¹⁰² The FY18 NDAA also limited the aggregate amount of construction, repair, and renovation under CTEF to \$30 million.¹⁰³

Despite this apparent construction authorization, the CJTF was still unable to perform construction in OIR using CTEF until two years later, when Congress included permissive language in the FY20 CTEF appropriation for construction.¹⁰⁴ Here, the CTEF appropriation was more restrictive than the authorization because it did not authorize construction.¹⁰⁵ The result was an authority without a proper appropriation to carry out the authorization.

The current constraints on CTEF funded construction, repair, and renovation are significant. While the FY20 CTEF appropriation does permit construction, it limits construction projects to “facility fortification

¹⁰⁰ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

¹⁰¹ *Id.*

¹⁰² National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c)(1), 131 Stat. 1283, 1652 (2017).

¹⁰³ *Id.* § 1222(c)(2).

¹⁰⁴ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019). The discrepancy is likely a result of a disagreement over construction between the different Congressional subcommittees handling appropriations legislation and authorization legislation. “Like organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter [(e.g., the Armed Forces)], whereas appropriation bills are exclusively within the jurisdiction of the appropriations committees.” GAO RED BOOK, *supra* note 63, at ch. 2, § C.1, at 2-55. Under fiscal law, an authorization act does not provide budget authority. *See generally id.* Budget authority requires an appropriation, and an authorization may not expand the scope of an appropriation’s purpose. *Id.* ch. 2, at 2-1 to -3, 2-54 to -79.

¹⁰⁵ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c), 131 Stat. 1283, 1652 (2017).

and humane treatment.”¹⁰⁶ The section 1236 authorization still limits construction, repair, and renovation projects using CTEF to those with a funded cost under \$4 million per project, and no more than \$30 million in any fiscal year.¹⁰⁷ By comparison to the total amount appropriated under CTEF for a fiscal year, this represents merely five percent of the total budget authority in FY20.¹⁰⁸ Also, any project with a funded cost exceeding \$1 million must receive CENTCOM approval and includes a twenty-one-day Congressional notification and wait period.¹⁰⁹ The resultant ability to support foreign security forces who are countering ISIS, like the ISF, using CTEF, is largely limited to services and supplies because of these restrictions on construction, repair, and renovation.

F. The CTEF Requirement Approval Process

The CJTF has primary responsibility for CTEF management.¹¹⁰ Multiple units within the CJTF have various responsibilities regarding the development, procurement, and divestment of CTEF train and equip missions.¹¹¹ Generally, units request CTEF equipment and services through memorandums of request (MORs).¹¹² Units throughout the ISF and the Coalition first identify train and equip needs and shortfalls within the ISF.¹¹³ For example, the CJTF CJ7 Partner Force Development section “synchronizes train and equip efforts in order to generate a coherent force-generation process that meets operational requirements and tracks the status of CTEF equipment deliveries and divestitures.”¹¹⁴ The Ministry Liaison Team within the CJ7 section “liaises between CJTF-OIR and the

¹⁰⁶ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

¹⁰⁷ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, sec. 1222(c), § 1236, 131 Stat. 1283, 1652 (2017).

¹⁰⁸ Thirty million dollars is 5.02% of \$597,500,000 (half of the \$1,195,000,000 two-year FY20 CTEF appropriation). See Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

¹⁰⁹ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, sec. 1222(c), § 1236, 131 Stat. 1283, 1652 (2017).

¹¹⁰ Memorandum from the Sec’y of Def. to the Sec’ys of the Mil. Dep’ts et. al., Management of the Counter-ISIL Train and Equip Fund (June 7, 2017) (on file with author).

¹¹¹ This assertion is based on the author’s recent professional experiences as the Chief, Fiscal Law for the Combined Joint Force Land Component Command (CJFLCC)-Operation Inherent Resolve (OIR) from 17 June 2017 to 26 February 2018 [hereinafter Professional Experiences].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ DoD IG ROI-HOLD FORCE, *supra* note 29, at 5.

Iraqi Ministries of Interior and Defense” regarding ISF plans and CJTF operational requirements.¹¹⁵

Once a requesting unit identifies a need, the unit then develops an MOR packet.¹¹⁶ The MOR includes all the information about what the unit is requesting, the relevant costs, the circumstances surrounding the requirement, and the primary beneficiary of the request.¹¹⁷ Once the packet is complete, the CJ4 section, normally responsible for logistics, finalizes the packet and presents it to the Combined Joint Force Land Component Command (CJFLCC) or CJTF CTEF board.¹¹⁸ This board is comprised of various staff section leaders and chaired by the CJTF Deputy Commanding General for Sustainment.¹¹⁹ A U.S. Army judge advocate also sits on the board as a non-voting member to advise the Chairman and the board members on various fiscal and other legal matters.¹²⁰

Once approved by the board, the U.S. commander for CJTF approves or denies the MOR, after de-conflicting requirements with the GoI and OSC-I.¹²¹ The CJTF then sends approved MORs to CENTCOM for endorsement.¹²² Once all levels fully approve and endorse the requirement, either the Defense Security Cooperation Agency fulfills the need or the contracting office makes the procurement.¹²³

IV. Issues with CTEF in OIR Today

A. CTEF Has Limited Construction, Repair, and Renovation Authority

As discussed above, prior to the FY18 NDAA’s cap on construction, repair, and renovation, CTEF, and ITEF before it, did not permit construction at all. Projects involving real property facilities were limited to “repair” or “maintenance” only.¹²⁴ No other funds available to the CJTF

¹¹⁵ *Id.*

¹¹⁶ Professional Experiences, *supra* note 111.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Telephone Interview with Lieutenant Colonel Anthony C. Adolph, Former Staff Judge Advoc., Off. of Sec. Coop.-Iraq (Jan. 23, 2019) [hereinafter LTC Adolph Interview].

¹²² Professional Experiences, *supra* note 111.

¹²³ *Id.*

¹²⁴ A “repair” is the “restor[ation of] a real property facility, system, or component to such condition that it may effectively be used for its designated functional purpose.” 10 U.S.C. § 2811(e). The FY17 NDAA also added an additional option to the statutory definition of

permit this type of work for the benefit of the ISF. Now, while CTEF permits construction, its availability is significantly limited. However, the CJTF requires multiple facilities and real property structures to conduct its BPC training mission and its A3E missions with the ISF. Many of the facilities in use for these missions require significant construction or repair efforts. For example, the training area at Besmaya is vital to the ISF training mission and in substantial need of construction and repair.

1. Besmaya

In 2014, when the United States and its coalition partners re-entered Iraq, they chose several BPC sites to conduct train and equip missions. These sites were mostly old U.S. training sites, built during Operation Iraqi Freedom prior to 2011.¹²⁵ After the United States left Iraq in 2011, the sites fell into severe disrepair.¹²⁶ The CJTF designated one such site, the Besmaya Range Complex (BRC), located outside of Baghdad, as a BPC site, where the Spanish Army still operates its training programs.¹²⁷ This site is a prime example of how CTEF's pre-FY18 prohibition on construction and post-FY18 restrictions on real property projects impede the CTJF mission.

Besmaya is a very large area, capable of training soldiers on any weapon system in the Iraqi arsenal.¹²⁸ However, the infrastructure was, and continues to be, in severe disrepair.¹²⁹ The Spanish pay for the construction, maintenance, and repair of the Gran Capitan area occupied by their

repair. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 2802, 130 Stat. 2000, 2712 (2016) (current version at 10 U.S.C. § 2811(e)(2)). A repair may now also be the “conver[sion of] a real property facility, system, or component to a new functional purpose without increasing its external dimensions.” 10 U.S.C. § 2811(e)(2). Historically, conversions of facilities have fit squarely within the definition of construction. 10 U.S.C. § 2801(a). With this change, Congress permitted conversion projects to be included within the definition of repair and without the requirement for them to be in a failed or failing condition. A “conversion” is the transformation of a facility from its originally intended purpose to that of another purpose. *Id.*

¹²⁵ Professional Experiences, *supra* note 111.

¹²⁶ This assertion is based on the author's professional experiences during a site visit and tour of the Besmaya Regional Complex (BRC) by the Spanish Army in September 2017 [hereinafter BRC Site Visit]; Task Force Besmaya, Condition of Training Sites, at slide 5 (Sept. 17, 2017) (unpublished PowerPoint presentation) (on file with author) [hereinafter BRC Slide].

¹²⁷ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹²⁸ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹²⁹ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

forces.¹³⁰ However, the Spanish relied on the use of ITEF, and now relies on CTEF, to fund improvements to any training facilities and equipping the ISF.¹³¹

The existing training facilities at the BRC include life support areas (LSA), classrooms, dining facilities, and a basic load ammunition holding area (BLAHA).¹³² However, by 2017, these facilities were in such disrepair the ISF could only use part of the kitchen and dining area in the primary dining facility, and only one of the LSAs.¹³³ The construction restriction not only limited the ability to create new training facilities, it also restricted the CJTF's ability to improve facilities, even to address safety concerns.

For example, the ISF used the BLAHA to hold munitions used in training and for storing ammunition recovered from the battlefield.¹³⁴ However, the blast barriers surrounding the facility were deteriorating, and the ammunition load far exceeded the structure's capability to hold the explosives.¹³⁵ The ISF were also storing the explosives and ammunition above the facility's capacity and only in one area, rather than spreading the items throughout the BLAHA.¹³⁶ The storage structures for holding the munitions were nothing more than exposed metal shipping containers.¹³⁷ During the summer, the area reached temperatures in excess of 100 degrees Fahrenheit, and the temperature inside the containers well exceeded the air temperature outside.¹³⁸ If the temperatures around the munitions got too high, they were at risk of explosion, secondarily detonating the rest of the explosives in the facility.¹³⁹ To make matters worse, the BLAHA was located next to the only usable ISF LSA.¹⁴⁰ All of these factors created a significant safety concern. The BRC BLAHA was in such a deplorable

¹³⁰ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹³¹ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹³² BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹³³ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹³⁴ See Memorandum of Request 510 Packet and Letter of Justification, Request for Repair of the Besmaya Range Complex Base Load Ammunition Holding Area (Jan. 8, 2018) (on file with author).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

condition that the DoD Inspector General issued a notice of concern to the CENTCOM commander in February 2018, citing multiple safety issues.¹⁴¹

The CJTF wanted to move the BLAHA and build a new one at a remote location with an improved structure and better safety features. However, due to the construction prohibition, the CJTF could not use CTEF to build a new BLAHA. At the time, CTEF also prohibited improving the existing facility.¹⁴² The only course of action available was to repair the BLAHA and restore it to its original dimensions and capabilities, in its current location.

Life support areas, which the BRC also requires to house ISF soldiers during training, provide another example of needed construction. In 2018, the one LSA available for ISF use was significantly overcrowded.¹⁴³ The Regional Camp area at the BRC contained an LSA with multiple housing units, bathrooms, classrooms, and the primary dining facility.¹⁴⁴ However, unknown people had looted the containerized housing units, bathrooms, and classrooms in the camp of air conditioners and any other valuable property.¹⁴⁵ Also, the facilities themselves were severely dilapidated due to exposure to the weather and lack of maintenance.¹⁴⁶ Nearly all of the LSA buildings were completely unusable.¹⁴⁷

As a result, early in the OIR campaign, the CJTF attempted to build a temporary LSA (named “F4N”) nearby, using tents and other personal property materials.¹⁴⁸ The CJTF approved and executed the contract. However, when the project was nearly complete, someone vandalized the site and stole essential parts from the generators and electrical system.¹⁴⁹ As a result, the Spanish Army sent an additional request for funds to the appropriate ITEF board to complete the project.¹⁵⁰ When the board looked into the work completed on the project itself, it found the work included

¹⁴¹ DoD IG ROI-HOLD FORCE, *supra* note 29.

¹⁴² Improvements to real property facilities are defined as construction. 10 U.S.C. § 2801(a).

¹⁴³ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁴⁴ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁴⁵ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁴⁶ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁴⁷ BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁴⁸ Purchase Request and Commitment for Life Support Area at F4N in the Besmaya Range Complex (Sept. 25, 2015) (on file with author).

¹⁴⁹ E-mail from Mr. Boris Pallares, U.S. Army Corps of Eng’rs, to Mr. Stanley Dowdy, U.S. Army Corps of Eng’rs (Oct. 12, 2017) (on file with author) (describing the original F4N Life Support Area project).

¹⁵⁰ *Id.*

elements of construction.¹⁵¹ Work on the project had included leveling and grading the site for the tent structures and digging a pit for a water tank.¹⁵² This work falls within the definition of construction. Although the work was a small part of the overall price and work for the project, it triggered concerns about an Antideficiency Act violation regarding the use of ITEF.¹⁵³ Work on the project halted.¹⁵⁴ As of spring 2018, the site remained untouched and unusable for the ISF.¹⁵⁵

The BRC also required classroom space. The CJTF was able to get approval for a conversion project involving badly needed classroom space.¹⁵⁶ The BRC had a set of old barracks buildings (named “M22”) that were unusable because flooding and weather damaged the flooring.¹⁵⁷ The project consisted of converting these buildings into classrooms. Because the project would not expand the footprint or dimensions of the original buildings, the engineers were able to classify the work as a conversion.¹⁵⁸ However, if CTEF had permitted construction, the CJTF could have completed the classrooms and the rest of the required facilities more quickly, better tailored to the need, and more economically.

2. Q-West

The Qayyarah Airfield West (Q-West) sits approximately forty miles south of Mosul in a key northern Iraq location.¹⁵⁹ After the ISF took Q-West back from ISIS, the Coalition began conducting A3E missions from the base with their partner Iraqi Air Force units.¹⁶⁰ Combat destroyed most of the infrastructure of Q-West in 2016 during the fight to take back the base from ISIS.¹⁶¹ During the Mosul offensive, the Coalition also used the

¹⁵¹ *Id.* The definition of construction also includes any “[r]elated site preparation, excavation, filling, landscaping, or other land improvements.” AR 420-1, *supra* note 83, glossary, at 431.

¹⁵² BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

¹⁵³ E-mail from Mr. Boris Pallares, U.S. Army Corps of Eng’rs, to Mr. Stanley Dowdy, U.S. Army Corps of Eng’rs (Oct. 12, 2017) (on file with author).

¹⁵⁴ *Id.*

¹⁵⁵ Professional Experiences, *supra* note 111.

¹⁵⁶ Memorandum of Request 506 Packet, Request for Repair and Furnishing of M22 Classrooms at Besmaya Range Complex (Feb. 4, 2018) (on file with author).

¹⁵⁷ *Id.*

¹⁵⁸ *See supra* note 124 and accompanying text.

¹⁵⁹ Memorandum of Request 801 Packet and Letter of Justification Regarding Procurement of Force Provider Kits at Q-West (July 13, 2018) (on file with author) [hereinafter MOR 801].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

base to conduct air and fire support operations in support of ISF units retaking the city.¹⁶² After the ISF liberated Mosul in July 2017, fire support operations out of Q-West declined. Because of its northern location, the CJTF wanted to turn Q-West into another BPC site and increase wide area security forces training for four ISF emergency response battalions (ERB) located in northern Iraq.¹⁶³ Wide area security forces training includes “fieldcraft, small arms training, section and platoon maneuver, checkpoint operations, cordon and search, communications, combat first aid, explosive threat awareness, CBRN defen[s]e, [and] ethics and law of armed conflict.”¹⁶⁴ At the time, Q-West was experiencing a large increase of ISF units reassigned to the area due to a relocation of an ISF division headquarters and “large numbers of troops . . . from the Mosul area.”¹⁶⁵ The CJTF intended to train an ISF battalion-size element, containing approximately 300 soldiers, during each training rotation.¹⁶⁶

However, the site lacked a sufficient number of LSAs to support the desired training.¹⁶⁷ Q-West also lacked any existing infrastructure the CJTF could convert into LSAs.¹⁶⁸ Because of the CTEF limitations on construction, the CJTF had to consider alternative options. Instead of building the LSAs, they were forced to purchase Force Provider kits for the ISF during their training rotations.¹⁶⁹ A Force Provider kit is a series of large tents for billeting that also includes “ancillary equipment to enable sanitation . . . kitchen installations, refrigeration, laundry units, expeditionary showers, as well as latrines.”¹⁷⁰ They are quick to assemble and are highly configurable. Each kit allows for the housing of 150 personnel, and the CJTF purchased two sets for Q-West in the summer of 2018.¹⁷¹ Army regulations deem tents to be personal property items and not construction

¹⁶² See Chad Garland, *As Mosul Campaign Continues, Q West to ‘Get Bigger, But It Won’t Get Nicer’*, STARS & STRIPES (Mar. 24, 2017), <https://www.stripes.com/news/as-mosul-campaign-continues-q-west-to-get-bigger-but-it-won-t-get-nicer-1.460388>.

¹⁶³ MOR 801, *supra* note 159.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* See also *Force Provider Expeditionary (FPE)*, USAASC, <https://asc.army.mil/web/portfolio-item/cs-css-force-provider-fp> (last visited Aug. 31, 2020).

¹⁷¹ *Id.*; MOR 801, *supra* note 159.

when used in this configuration, so the purchase was permissible using CTEF and was not subject to the \$30 million annual cap.¹⁷²

However, the design of Force Provider kits makes them ideal only for temporary environments,¹⁷³ and they are quite expensive. These kits cannot function as enduring LSAs, and the duration of their use is limited. Each kit costs approximately \$2.5 million, and the CJTF estimated the shipping and ancillary costs to be approximately \$750,000.¹⁷⁴ The total cost for this requirement was approximately \$5.7 million.¹⁷⁵

When compared to expeditionary construction projects, the costs of these temporary LSAs for a limited training audience is excessive. For example, the CJTF built an LSA on Camp Union III in Baghdad that was capable of housing approximately 100 personnel for an indefinite period at the total cost of \$716,144.07.¹⁷⁶ If CTEF permitted greater flexibility regarding real property projects, the CJTF could have built multiple LSAs at a significantly reduced cost, and they could have used the remaining funds for other projects.

3. *Baghdad Operations Center—Media Training Center*

The fight against ISIS exists on multiple fronts. For example, one of the primary methods ISIS uses to recruit and spread its messaging is through social media.¹⁷⁷ The ISF's Baghdad Operations Center (BOC) tries to counter ISIS's social media presence through its own social media messaging and by directly attacking ISIS's access and capabilities on the internet.¹⁷⁸

¹⁷² AR 420-1, *supra* note 83, glossary at 453. *See also* U.S. DEP'T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION, para. 1-6(h) (18 Mar. 2010).

¹⁷³ MOR 801, *supra* note 159.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ CJFLCC-OIR Joint Requirement Review Board (JRRB) Request for Construction of Union III Taylorsville Life Support Area (Jan. 17, 2018) (on file with author).

¹⁷⁷ *ISIS Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. 6–8 (2016) (statement of Michael Steinbach, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation).

¹⁷⁸ Meeting Minutes from CJFLCC-OIR Joint Facilities Working Group (JFWG) Regarding MOR-123A, Request for Construction of Ministry of Defense Media Training Center (July 1, 2017) (on file with author).

However, the ISF's capabilities to conduct such a mission are undeveloped.¹⁷⁹ The ISF has information operations (IO) units in many of its different entities. However, the GoI does not have a central narrative, and their IO efforts as of June 2017 were not doing well.¹⁸⁰ As a result, the BOC requested the CJTF construct a Media Training Center (MTC), to train ISF units with the technical expertise to conduct these missions.¹⁸¹ The center required specialized and technical equipment to meet the need.¹⁸² This also required a specialized facility.¹⁸³ The facility the BOC was using in the summer of 2017 was inadequate because it borrowed the space from another ISF unit and was at continual risk of repossession.¹⁸⁴

The CJTF wanted to grant the request and intended to use an existing contract with British contractors to teach Iraqi officers the required IO skill set, as well as teach them how to train new officers themselves.¹⁸⁵ However, as discussed above, CTEF was not available to the CJTF to simply build an MTC. In order for the CJTF to build the ISF an MTC using CTEF, they were limited to repairing an existing facility. In this case, it was difficult to locate an adequate facility because the BOC did not have many assets.¹⁸⁶ The BOC also required a facility central to their operations in Baghdad.¹⁸⁷

In addition, in order to properly train and conduct their IO mission across the ISF, they needed to train various officers from different organizations within the GoI.¹⁸⁸ This would provide the centralized messaging and a uniform skill set within each of the ISF's War Media Cells.¹⁸⁹ The political nature of the various groups required the BOC to be the owner of the facility.¹⁹⁰ Otherwise, once built, there was a danger of the true owner reclaiming the facility and commandeering the resources.¹⁹¹

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Professional Experiences, *supra* note 111.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

As a result of the inability to find such a specialized facility, the ISF, BOC, and CJTF considered multiple locations without success.¹⁹² The CJFLCC-OIR Joint Facilities Working Group (JFWG) evaluated the initial request on 1 July 2017.¹⁹³ As of February 2018, the project had still not gone beyond the engineering evaluation phase.¹⁹⁴

B. CJTF-OIR Cannot Support Groups Conducting Stability Operations

1. Consolidating Gains—Stability Operations

Stability operations are key to the current CJTF mission. The ISF have largely defeated the physical ISIS “caliphate” in Iraq.¹⁹⁵ Because of this, the ISF and the CJTF must focus more on pursuing the lasting defeat of ISIS. To prevent the resurgence of ISIS, the CJTF needs to be able to support groups with missions to secure the territory of Iraq and promote stability throughout the country. Both the language of CTEF and the DoD OGC interpretation of CTEF limit the CJTF regarding stability operations.

One example of these limitations is with requests to train and equip regional and local police forces.¹⁹⁶ Two general categories of local police training audiences exist in Iraq: “blue” police and “green” police.¹⁹⁷ “Blue” police are those local police forces with a traditional law and order mission for their assigned area.¹⁹⁸ “Green” police, on the other hand, are forces responsible for holding territory in Iraq against the resurgence of ISIS.¹⁹⁹ As the ISF push ISIS out of territory, these forces “secure liberated areas

¹⁹² *Id.*

¹⁹³ Meeting Minutes from CJFLCC-OIR Joint Facilities Working Group (JFWG) Regarding MOR-123A, Request for Construction of Ministry of Defense Media Training Center (July 1, 2017) (on file with author).

¹⁹⁴ Professional Experiences, *supra* note 111.

¹⁹⁵ *Coalition Shift*, *supra* note 7.

¹⁹⁶ These groups are distinguished from “hold forces,” which are more directly responsible for holding newly won territory against the reintroduction of ISIS forces. Hold forces have a stronger nexus to the CTEF purpose and are eligible for support. An example of these forces are Emergency Response Battalions. MOR 440, Task Force Carabinieri Request for Procurement of Police and Riot Gear for the Training Audiences at Camp Dublin (Aug. 5, 2017) (on file with author) [hereinafter MOR 440].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* See also DoD IG ROI-HOLD FORCE, *supra* note 29, at 4. “Green” police are also synonymous with “hold forces” or “wide area security forces.”

and prevent ISIS from reestablishing an effective presence.”²⁰⁰ This also frees the ISF to continue fighting ISIS.

“Blue” police are important to regional stability. They are the local face of the GoI, and they give confidence to the local population in the GoI’s ability to establish law and order.²⁰¹ “Blue” police are responsible for election security and crime enforcement.²⁰² However, these forces are currently ineligible for support because they are not directly “countering” ISIS and they do not have a direct “kinetic” effect.²⁰³ The closest groups the CJTF has been able to support with CTEF are the green police hold forces. However, under the current paradigm, even these groups tenuously qualify for support.²⁰⁴

While the CJTF may not use CTEF to support the training or equipping of blue police, the fight against ISIS through stability operations would benefit from blue police training. For example, courses in crowd security and riot control would assist the GoI in providing regional stability and election security. The Camp Dublin BPC site is a prime example where the CJTF can leverage already existing trainers and infrastructure to train blue police.

2. *Camp Dublin*

For most of the OIR operation, Task Force Carabinieri has trained both “blue” and “green” police forces at the Camp Dublin BPC site.²⁰⁵ The CJTF named the task force after Italy’s national military police force, the Carabinieri Corps, because they were the primary coalition partner performing the training.²⁰⁶ In November 2017, Task Force Carabinieri was renamed Police Task Force-Iraq “to reflect its growing multinational presence.”²⁰⁷ Included in the training audience are Iraq’s Federal Police (FEDPOL), Energy Police, Highway Police, Federal Building Security, and local police forces.²⁰⁸ The courses of instruction include Police

²⁰⁰ DoD IG ROI-HOLD FORCE, *supra* note 29, at 4.

²⁰¹ MOR 440, *supra* note 196.

²⁰² *Id.*

²⁰³ See sources cited *supra* note 16.

²⁰⁴ Consider the previously discussed DoD OGC limitation on CTEF support for requirements only intended to produce a “kinetic effect.”

²⁰⁵ DoD IG ROI-HOLD FORCE, *supra* note 29, at 7 (describing that CTEF was not available for the “blue” police training audience).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 5.

²⁰⁸ MOR 440, *supra* note 196.

Advanced Training, Law and Order, and Counter-Improvised Explosive Device training.²⁰⁹ The trainees at Camp Dublin fall primarily under Iraq's Ministry of the Interior (MoI).²¹⁰ These training audiences also vary in their primary functions in the fight against ISIS.

The FEDPOL, for example, is similar to a traditional military force and directly takes part in combat operations against ISIS.²¹¹ Groups like the Energy Police and Federal Building Security focus primarily on protecting Iraq's infrastructure.²¹² The ISF also organizes units like these into ERBs.²¹³ The GoI uses these ERBs as the "hold forces" to take the place of Iraqi Army units in liberated areas in order to secure territory taken from ISIS and allow the Army units to continue fighting. The ERBs primary focus is to hold this territory and prevent the resurgence of any enemy forces. They conduct urban operations within the security framework of the Iraqi Army and conduct joint operations.²¹⁴

This varied combination of police training audiences creates funding issues when furnishing them with equipment purchased using CTEF. While Italy initially provided some equipment, the Task Force required additional resources to fully train and equip all of their intended courses of instruction.²¹⁵ However, only the "green" police qualify for CTEF assistance. This requires the CJTF to parse out which forces receiving the equipment are actually countering or preparing to counter ISIS.

In April 2017, the Carabinieri requested approximately \$1.8 million in equipment for their training period beginning in June 2017.²¹⁶ This request passed the CJTF CTEF board, but CENTCOM denied the requirement in July 2017.²¹⁷ The reason for the denial primarily rested on the inclusion of various items not traditionally associated with warfighting.²¹⁸ For example, the request included crowd control shields, crowd control bags, riot gear, and batons.²¹⁹ This forced the Carabinieri to re-evaluate and re-submit their request, taking out any equipment associated with riot control training, and

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

they submitted another request in August 2017. As of February 2018, the CJTF had not provided any equipment purchased using CTEF under this MOR to Camp Dublin.²²⁰

3. *The DoD OGC Interprets CTEF Too Narrowly*

The Office of the Secretary of Defense's (OSD) guidance on the use of CTEF is narrower than the plain language of the CTEF appropriation. The OSD's OGC interprets CTEF in such a way that the assistance must tie into a "kinetic" effect in relation to the defeat of ISIS.²²¹ While the OGC has not formalized this interpretation into a policy memorandum, it still has a substantial effect on CTEF requirements and CENTCOM's endorsement of those requirements. However, neither the CTEF appropriation, nor the section 1236 authorization to provide assistance to counter ISIS, contain any language regarding "kinetic" operations against ISIS.²²² Instead, the current version of the CTEF appropriation only limits support to "foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to *counter* [ISIS], and their affiliates or associated groups."²²³ Joint Doctrine does not define the term "counter."²²⁴ The closest analogy in Joint Doctrine regarding countering ISIS is the term "counterterrorism." The *DOD Dictionary of Military and Associated Terms* defines "counterterrorism" as "[a]ctivities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals."²²⁵ The dictionary defines the term "counter" in lay terminology as "to act in opposition to," "to oppose," "offset," or "nullify."²²⁶ Using either of these definitions, the term "counter" can and should be broadly applied when used in the CTEF context. Many different means and methods exist to counter ISIS that do not result in an immediate "kinetic" effect.

²²⁰ Professional Experiences, *supra* note 111.

²²¹ See sources cited *supra* note 16.

²²² Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).

²²³ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019) (emphasis added).

²²⁴ JOINT CHIEFS OF STAFF, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2020); see 10 U.S.C. § 310(7).

²²⁵ JOINT CHIEFS OF STAFF, *supra* note 224, at 53.

²²⁶ *Counter*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/counter> (last visited Aug. 31, 2020).

The OGC interpretation more strictly construes CTEF than Congressional intent regarding the fight against ISIS. In section 1233(d) of the FY19 NDAA, Congress states its intent explicitly.²²⁷

It is the sense of the Congress that . . . a lasting defeat of ISIS is critical to maintaining a stable and tolerant Iraq in which all faiths, sects, and ethnicities are afforded equal protection and full integration into the Government and society of Iraq; and [] in support of counter-ISIS operations and in conjunction with the [GoI], the United States should continue to provide operational sustainment, as appropriate, to the [Peshmerga, so that they] can more effectively partner with the [ISF], the United States, and other international Coalition members *to consolidate gains, hold territory, and protect infrastructure from ISIS* and its affiliates in an effort to deal a lasting defeat to ISIS and prevent its reemergence in Iraq.²²⁸

Consolidating gains, holding territory, and protecting infrastructure from ISIS are all activities that do not traditionally result in a “kinetic” effect.

C. Reallocating Equipment

The separation of ITEF and STE into two separate funding sources and authorizations resulted in the funding compartmentalization of both efforts. The CJTF is responsible for both missions. However, when the CJTF purchases equipment with ITEF for use in Iraq, and the equipment later becomes excess or undesirable for that purpose, the CJTF may not redirect that equipment for use in Syria, where they could use it for training and equipping the VSO.²²⁹

The ITEF and CTEF appropriations do permit unneeded or returned equipment, purchased under those authorities, to be taken back into DoD stocks, but they do not permit its transfer to another purpose. The STE did

²²⁷ John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1233(d), 132 Stat. 1636, 2039 (2018).

²²⁸ *Id.* (emphasis added).

²²⁹ See sources cited *supra* note 94. This issue will likely become moot with the withdrawal of most U.S. forces from Syria. Annie Karni & Thomas Gibbons-Neff, *200 U.S. Troops to Stay in Syria, White House Says*, N.Y. TIMES, Feb. 22, 2019, at A9.

not even allow excess equipment to be taken back into DoD stocks.²³⁰ Until the FY19 DoDAA, neither program permitted the transfer of equipment between theaters.²³¹ However, the CJTF still may not transfer excess equipment, previously purchased under ITEF or CTEF for use in Iraq, to purposes in Syria. This became an obvious and counter-intuitive problem. The United States and ISF had stockpiles of unused and unneeded weapons and equipment purchased with ITEF and CTEF in Iraq and Kuwait.²³² Yet, the CJTF may not transfer this equipment to forces in Syria, where the CJTF needs it for the VSO, because of the restriction. Instead, the CJTF is left to procure new Syria requirements through the Defense Security Cooperation Agency (DSCA), or the contracting office. The ability to transfer excess weapons and equipment from Iraq to Syria would result in a quicker response to procuring MORs in Syria, a significant cost savings, and a reduction in the amount of resources used by the CJTF.

D. The Acquisition and Cross Servicing Agreement with Iraq

The DoD executed an Acquisition and Cross Servicing Agreement (ACSA) with the Iraqi Ministry of Defense in August 2014.²³³ An ACSA is an agreement between the military forces of two nations for the purchase, or equal value exchange, of logistical support, supplies, and services (LSSS).²³⁴ Using this authority, it is possible for the United States to provide multiple LSSS requirements to the Iraqi Ministry of Defense (MoD), to include “construction incident to base operations.”²³⁵ At first glance, the use of this ACSA could fill in where CTEF falls short. However, neither military force has used this agreement with each other

²³⁰ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 9016, 128 Stat. 2130, 2301 (2014).

²³¹ Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, § 9016, 132 Stat. 2981, 3045 (2018) (allowing the transfer of unused equipment purchased under the STE to be transferred for any CTEF purpose).

²³² Michele Gorman, *U.S. Army Lost Track of \$1 Billion Worth of Weapons and Equipment: Report*, NEWSWEEK (May 24, 2017, 12:10 AM), <https://www.newsweek.com/us-military-lost-track-1-billion-worth-weapons-and-equipment-report-614391>.

²³³ Memorandum of Acquisition and Cross Servicing Agreement Between the United States Department of Defense and the Iraqi Ministry of Defense (Aug. 2014) (on file with author).

²³⁴ See generally 10 U.S.C. §§ 2341–2350.

²³⁵ 10 U.S.C. § 2350(1).

in the fight against ISIS since approximately 2015.²³⁶ Instead, both sides appear to rely on the CTEF programs to support the ISF.

To use an ACSA transaction, the requesting party must reimburse the servicing party in one of several ways for the actual value of the items or services.²³⁷ In short, unlike CTEF assistance, the GoI would have to pay for the cost of the requirement. In recent years, the GoI has experienced significant budget shortfalls. Oil exports account for almost 90% of Iraq's public-sector revenue.²³⁸ Low oil prices, output limitations imposed by the Organization of the Petroleum Exporting Countries, and funding the ISF have significantly limited GoI resources.²³⁹ This limitation on resources provides little incentive or ability for the GoI to pay for equipment and services they believe the United States could provide them without reimbursement under CTEF. In an effort to fulfill several MORs not otherwise eligible for CTEF, the CJFLCC leadership approached their ISF counterparts in early 2018 about using the ACSA.²⁴⁰ However, the GoI and MoD have been reluctant to even identify who the currently authorized ACSA transaction authority is within the MoD.²⁴¹ As a result, the ACSA authority is not likely to fill requirement gaps in the near future without additional agreement between the DoD and the MoD.

V. Alternate Sources of Train and Equip and Comparative Appropriations

In order to analyze the CTEF appropriation's efficacy, it is necessary to explore alternate sources of support and to compare similar appropriations in other theaters.²⁴² This section looks at several of these relevant sources: The Office of Security Cooperation, Iraq (OSC-I), the Afghanistan Security

²³⁶ Professional Experiences, *supra* note 111.

²³⁷ 10 U.S.C. § 2344.

²³⁸ CHRISTOPHER M. BLANCHARD, CONG. RSCH. SERV., R45096, IRAQ: ISSUES IN THE 115TH CONGRESS 15 (2018).

²³⁹ *Id.*

²⁴⁰ Professional Experiences, *supra* note 111; Telephone Interview with Captain Carlos Pedraza, Fiscal L. Judge Advoc., Combined Joint Task Force-Operation Inherent Resolve (Jan. 15, 2019).

²⁴¹ *Id.*

²⁴² This article does not address the use of 10 U.S.C. § 333 (governing authority to build capacity of foreign security forces) as a potential gap filler for real property requirements because it is not available for that purpose. Because CTEF and its section 1236 authorization provide for *some* construction, repair, and renovation authority, CTEF is the more specific appropriation and any other appropriation is unavailable for that purpose. *See supra* note 240 and accompanying text.

Forces Fund (ASFF), and the North Atlantic Treaty Organization (NATO) Mission in Iraq.

A. The OSC-I

The DoS has the primary responsibility to establish policy and conduct foreign assistance on behalf of the U.S. Government.²⁴³ This responsibility even exists during U.S. military operations.²⁴⁴ Foreign assistance includes providing security assistance to a foreign nation.²⁴⁵ Generally, security assistance falls under Title 22 funding authorities, enabling the DoS to train, equip, and assist foreign militaries through security assistance mechanisms like Foreign Military Sales (FMS),²⁴⁶ Foreign Military Financing (FMF),²⁴⁷ and International Military Education Training (IMET).²⁴⁸

The terms “security cooperation” and “security assistance” each have independent significance in the context of providing assistance to foreign countries. Security cooperation includes “[a]ll [DoD] interactions with foreign security establishments to build security relationships that promote specific [U.S.] security interests, develop allied and partner nation military and security capabilities for self-defense and multinational operations, and provide [U.S.] forces with peacetime and contingency access to allied and partner nations.”²⁴⁹ Security assistance is a subset of security cooperation referring to a “[g]roup of programs . . . by which the [U.S.] provides defense articles, military training, and other defense-related services by grant, lease, loan, credit, or cash sales in furtherance of national policies and objectives.”²⁵⁰

Many of the Title 22 “security assistance” programs stem from DoS appropriations, and the DoS Office of Security Assistance manages them

²⁴³ The Foreign Assistance Act of 1961 created the authority for the Executive Branch to conduct foreign assistance on behalf of the United States. Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151) (2012)); *see also* Exec. Order No. 10973, 26 C.F.R. § 639 (1961) (delegating the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State).

²⁴⁴ *See* The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

²⁴⁵ JOINT CHIEFS OF STAFF, *supra* note 224.

²⁴⁶ *See* 22 U.S.C. § 2761 (sales from stocks: allows for the FMS of items from current military stocks); *see also id.* § 2762 (procurement for cash sales: allows for the FMS of items through U.S. contracting mechanisms).

²⁴⁷ 22 U.S.C. § 2763 (credit sales: allows for FMF utilizing U.S. funds with terms for repayment).

²⁴⁸ *Id.* § 2347 (International Military Education and Training).

²⁴⁹ JOINT CHIEFS OF STAFF, *supra* note 224; *see* 10 U.S.C. § 301(7).

²⁵⁰ JOINT CHIEFS OF STAFF, *supra* note 224.

under an individual Chief of Mission at the various U.S. embassies.²⁵¹ However, the DoD largely administers these programs through DSCA, and the definition includes DSCA as part of security cooperation.²⁵² The DSCA mission “is to advance U.S. national security and foreign policy interests by building the capacity of foreign security forces to respond to shared challenges.”²⁵³ The DSCA accomplishes this mission through various Security Cooperation Organizations²⁵⁴ (SCOs) throughout the world.

One of these SCOs, based at the U.S. Embassy in Baghdad, is OSC-I. The plan for OSC-I began in February 2009 when President Barack Obama announced his intent to withdraw all U.S. troops from Iraq by 31 December 2011, and his commitment to “pursuing sustained diplomacy to build a lasting strategic relationship between the two countries.”²⁵⁵ The intent in establishing the OSC-I was to facilitate the transfer of all security assistance responsibilities from the DoD to the DoS.²⁵⁶ The resulting OSC-I responsibilities were immense, compared to other SCOs at the time, and Baghdad became one of the largest SCOs in the world.²⁵⁷ Between 2011 and 2014, the OSC-I had primary responsibility for training and equipping the ISF.²⁵⁸ The OSC-I administered FMS, Foreign Military Construction Services, Foreign Military Sales Credit, Leases, Military Assistance Program, IMET, and Drawdown.²⁵⁹ During the administration of these programs, personnel at OSC-I were able to develop significant relationships with their Iraqi MoD and MoI counterparts.²⁶⁰ The OSC-I personnel generally serve a minimum of twelve months in their office and have an opportunity to work closely with the MoD and MoI.²⁶¹

After the U.S. military re-entered Iraq, the CJTF asserted control over the Iraq train and equip missions using ITEF (and later CTEF).²⁶² The

²⁵¹ 22 U.S.C. §§ 2304(d)(2), 3927.

²⁵² *Id.* §§ 2304(d)(2), 3927.

²⁵³ *Mission, Vision, and Values*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/about-us/mission-vision-values> (last visited Aug 31, 2020).

²⁵⁴ U.S. DEP’T OF DEF., INSTR. 5132.13, STAFFING OF SECURITY COOPERATION ORGANIZATIONS (SCOS) AND THE SELECTION AND TRAINING OF SECURITY COOPERATION PERSONNEL 15 (6 June 2017).

²⁵⁵ DoD IG ROI-OSC-I, *supra* note 20, at 2.

²⁵⁶ *Id.*

²⁵⁷ *Id.* app. D.

²⁵⁸ Interview with Anthony C. Adolph, *supra* note 121.

²⁵⁹ DoD IG ROI-OSC-I, *supra* note 20.

²⁶⁰ Interview with Anthony C. Adolph, *supra* note 121.

²⁶¹ *Id.*

²⁶² *Id.*

OSC-I retained responsibility for FMS cases and long term planning with the GoI.²⁶³ However, their budget authority diminished significantly year after year.²⁶⁴ The OSC-I also acted as the liaison between the GoI, MoD, DoS, and DoD. Congress intentionally split these functions between the CJTF and OSC-I.²⁶⁵ There was no intention for U.S. troops to remain in Iraq for an extended period, and OIR is an international coalition mission.²⁶⁶ The United States preference was for other nations to perform many of these functions.²⁶⁷

B. Afghanistan Security Forces Fund

Compared to CTEF, the Afghanistan Security Forces Fund (ASFF)²⁶⁸ has broader authority for commanders to provide security assistance. Congress recently renewed ASFF through 30 September 2021.²⁶⁹ The ASFF allows the commander of the Combined Security Transition Command, Afghanistan (CSTC-A) to provide assistance to the “security forces of the Ministry of Defense and the Ministry of the Interior of the Government of the Islamic Republic of Afghanistan.”²⁷⁰ This includes the Afghan National Army, the Afghan National Police, and even the Afghan Local Police.²⁷¹ The CSTC-A may use ASFF to provide “equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding.”²⁷²

The purpose language in CTEF and ASFF differs significantly. The ASFF permits construction without further restriction where CTEF does not.²⁷³ Like CTEF, ASFF limits its support to membership in certain

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

²⁶⁹ *Id.*

²⁷⁰ John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, sec. 1223(b), § 1513(b)(1), 132 Stat. 1636, 2028 (2018).

²⁷¹ U.S. DEP’T OF DEF., ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 76 (2019). See Combined Security Transition Command-Afghanistan (CSTC-A), Standard Operating Procedure for the CSTC-A Planning, Programming, Budgeting, and Execution for the Afghanistan Security Forces Fund, para. 5(b) (Mar. 22, 2020) (on file with author).

²⁷² National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1513(b)(2), 122 Stat. 3, 428 (2008).

²⁷³ *Id.*

security forces.²⁷⁴ However, CTEF further limits its support to those groups who are also actively countering ISIS or training to counter ISIS.²⁷⁵ The ASFF does not have similar restrictive language regarding the Taliban, or any other forces the Afghan security forces are fighting. This discrepancy is likely due to a difference in overall mission. While the mission of the CJTF is the defeat of ISIS, the mission of the CSTC-A is to build the infrastructure of Afghanistan and transfer all security responsibilities to the Afghan security forces.²⁷⁶ Also, the United States leads the Coalition's mission in Iraq, while NATO leads the Afghanistan mission.²⁷⁷

Another key difference in the scope of ASFF is Congress's inclusion of "funding" as an approved source of support in the appropriation.²⁷⁸ Using this language, the CSTC-A can use ASFF to give money directly to security forces of the Government of the Islamic Republic of Afghanistan for a broad range of purposes. However, the biggest difference between CTEF and ASFF is the size of the appropriations. Congress appropriated just over \$4.9 billion for ASFF in the FY19 DoD Appropriations Act.²⁷⁹ By comparison, Congress appropriated \$1.35 billion for CTEF at the same time.²⁸⁰ In short, Congress provides more money, wider authorities, and broader discretion to the security force train and equip mission fighting terrorism in Afghanistan, than that of Iraq and Syria.

C. The NATO Mission Iraq

In July 2018, NATO launched a training and capacity-building mission aimed at Iraq's security forces and defense institutions.²⁸¹ The NATO mission is a non-combat role developed in coordination with the CJTF and the GoI.²⁸² The North Atlantic Treaty Organization sends "several hundred NATO-trainers" with a goal of helping the ISF "secure their country and

²⁷⁴ *Id.* ("Assistance provided under this section may include the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funds.")

²⁷⁵ Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

²⁷⁶ *Mission*, NATO RESOLUTE SUPPORT, <https://rs.nato.int/rsm/about-us/mission> (last visited Aug. 31, 2020).

²⁷⁷ *Id.*

²⁷⁸ National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1513, 122 Stat. 3, 428 (2008).

²⁷⁹ Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018).

²⁸⁰ *Id.*

²⁸¹ *Operations and Missions: Past and Present*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_52060.htm (last updated June 4, 2020, 3:47 PM).

²⁸² *Id.*

the wider region against terrorism and prevent the re-emergence of ISIS.”²⁸³ Their focus is on “train[ing] the trainer” in counter-IED, civil-military planning, armored vehicle maintenance, military medicine, and setting up military schools.²⁸⁴ This NATO mission was up and running in October 2018.²⁸⁵

The NATO Mission Iraq will be valuable to long-term stability operations in Iraq. However, the scope of the mission and resources appears to be small in comparison to the total resources and effort needed to achieve a lasting defeat of ISIS. The mission will likely supplement the Coalition’s efforts, rather than replace them.

VI. The Solution

The ISF and Coalition fight against ISIS is at a fragile crossroads. The ISF still needs CJTF support to fully defeat ISIS, and stability operations are key to that goal. However, the United States has a history of “forgetting that stabilization is a vital function that must be performed across the range of military operations.”²⁸⁶ Doctrinally, stability operations are a “core U.S. military mission,” on par with combat operations.²⁸⁷ As traditional combat operations against ISIS wind down, the DoD expects ISIS to transition to asymmetric tactics designed to “prevent GoI consolidation of authority in the liberated areas.”²⁸⁸ Currently, the GoI still requires combat operations by the ISF, including the Peshmerga, to set conditions for the next phase of stability operations.²⁸⁹ The ISF are fighting well, but they still “rely upon significant coalition enablers to achieve tactical overmatch against ISIS” and continued efforts to train and equip the ISF are required for the GoI to “secure its people and territory from ISIS and

²⁸³ *Id.*

²⁸⁴ Press Release, U.S. Cent. Command, *supra* note 38.

²⁸⁵ *NATO Mission Iraq*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_166936.htm (last updated Aug. 20, 2020, 5:10 PM).

²⁸⁶ ROBINSON ET AL., *supra* note 19, at x (emphasis removed).

²⁸⁷ DoDI 3000.05, *supra* note 18, para. 4.a.

²⁸⁸ OFF. OF THE SEC’Y OF DEF., U.S. DEP’T OF DEF., JUSTIFICATION FOR FY 2019 OVERSEAS CONTINGENCY OPERATIONS (OCO): COUNTER-ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) TRAIN AND EQUIP FUND (CTEF) 4 (2018).

²⁸⁹ *Id.*

deny ISIS the opportunity to regenerate.”²⁹⁰ To successfully achieve this end, Congress and the DoD must make several changes.²⁹¹

A. Broaden CTEF’s Purpose Language

The combat mission against ISIS in Iraq is temporary and not intended to last longer than required to obtain a lasting defeat of ISIS. However, a stable and secure territory in Iraq is vital to prevent the resurgence of ISIS. Congress should amend the language of the CTEF appropriation and the section 1236 authorization to match the current fight against ISIS.

1. Broaden Construction, Repair, and Renovation Authority

Congress should amend the CTEF appropriation to allow the CJTF broad authority to conduct minor military construction for qualifying groups, like the ISF. Currently, the FY20 CTEF appropriation states, “[t]hat such funds shall be available to the Secretary of Defense in coordination with the Secretary of State, to provide assistance, including training; equipment; logistics support, supplies, and services; stipends; infrastructure repair and renovation; construction for facility fortification and humane treatment; and sustainment”²⁹² Congress should strike the words “**construction for facility fortification and humane treatment**” and insert the words “**small-scale construction.**”²⁹³ The CTEF already includes purpose language limiting its use for groups countering or preparing to counter ISIS. The current language unnecessarily adds limitations to construction projects by requiring them to be for “facility fortification” or “humane treatment.” The CTEF appropriation’s original purpose language is sufficient. Making this proposed change would broaden the CJTF’s ability to respond to counter-ISIS requirements, as originally intended by the appropriation, and still minimize the potential for financial waste by limiting projects to small-scale construction. Practitioners could then reference section 1236 to determine what constitutes “small-scale construction.”

²⁹⁰ *Id.*

²⁹¹ Various vetting requirements for supported groups and individuals are already part of the MOR process (CTEF (terrorist associations and the Government of Iran) and Leahy (human rights violations)). This article does not advocate for the removal or amendment of any currently required vetting processes.

²⁹² Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

²⁹³ All recommended legislative changes are noted in bold typeface.

Section 1236 currently permits “infrastructure repair and renovation, small-scale construction of temporary facilities necessary to meet urgent operational or force protection requirements with a cost less than \$4,000,000.”²⁹⁴ Section 1236(m) states, “[t]he aggregate amount of construction, repair, and renovation projects carried out under this [authority] in any fiscal year may not exceed \$30,000,000.”²⁹⁵ Congress should strike section 1236(m) and eliminate the aggregate annual cap. An annual cap unnecessarily forces the command to make value determinations on projects and rank them against each other. It also forces the command to be too cautious in validating projects. If a highly needed unforeseen requirement arises in the latter part of the year, it might be sacrificed at the expense of a lower priority requirement earlier in the year that exceeded the cap.

Making these changes in language would help the CJTF meet the current need on the ground by adding flexibility. It would also allow the CJTF the ability to react to needs in a timely manner, without having to rely on the lengthy budget request and notification process. For example, all of the projects referenced above at the BRC would qualify for funding²⁹⁶ under the recommended language without going against an artificial annual cap, and all without exceeding the \$1 million threshold for notification to Congress.²⁹⁷ Making these small amendments will align CTEF with the current mission and empower CJTF commanders by giving them the flexibility to match the ever-changing OIR mission.

2. Broaden CTEF Eligibility

In order to achieve its goal, the CJTF needs the ability to train and equip groups that are not actively engaged in “kinetic” or “counter” ISIS operations. For example, local police forces are vital to combating terrorism at a local level and securing the territory of Iraq. With the understanding that CTEF is available in several different countries, Congress should amend the CTEF appropriation to include the following definition of the term “Counter-ISIS”:

A foreign security force, irregular force, group, or individual is participating, or preparing to participate

²⁹⁴ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c)(1), 131 Stat. 1283, 1652 (2017).

²⁹⁵ *Id.* § 1236(m).

²⁹⁶ All are under \$4 million.

²⁹⁷ § 1222(c)(2), 131 Stat. at 1652.

in activities to counter the Islamic State of Iraq and Syria (ISIS), and their affiliated or associated groups when:

(1) Their mission is to defeat ISIS through combat operations,

(2) Their mission is to prevent the resurgence of ISIS in an area affected by ISIS, or

(3) Their mission is to promote stability in an area affected by ISIS through the implementation of legitimate and traditional governmental functions.

“Legitimate functions” are those functions legally chosen by the governed population, including police activities. “Traditional functions” are those recognized by the international community as being a well-established and required function of a democratically elected government (e.g., law and order, elections, utilities, education).

The section 1236 authorization should retain most of its original language regarding groups eligible for support, with several minor changes:

. . . to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces, with a national security mission, through **December 31, 202X**, for the following purposes:

(1) Defending Iraq, its people, allies, and partner nations from the threat posed by the Islamic State of Iraq and Syria (ISIS) and their affiliated or associated groups, or

(2) Securing the territory of Iraq in areas affected by ISIS.

Making these amendments will allow the CJTF to fully support the ISF and the GoI as their fight against ISIS continues and stability operations become more imperative. This would permit CTEF funding for many of the stability and social media missions Iraq currently requires.

B. The DoD OGC Should Broaden Its Current Interpretation of CTEF

The current OGC interpretation of CTEF and section 1236 is unnecessarily strict. The OGC and OSD should issue formal guidance to fiscal law practitioners in the field regarding its interpretation of these authorities. Judge advocates, logisticians, comptrollers, and commanders are accustomed to limitations from higher commands. However, higher commands generally formalize these limitations in a written order, delegation, or guidance. In this case, verbal guidance has been issued by OGC to CENTCOM, and then from CENTCOM to the CJTF Office of the Staff Judge Advocate.²⁹⁸ While not prohibited, verbal direction that seems to contradict the plain language of the written Congressional appropriation and authorization creates multiple issues in practice. Commanders rely on the advice and guidance of their staff sections. When the judge advocate cannot produce a written instruction regarding a significant limiting factor from higher command, the commander loses confidence in his or her advisor. At a minimum, this frustration causes unnecessary staffing, consternation, and a lack of ability to interpret the instruction. Written directions cause less confusion and are more likely to provide clear guidance regarding the proposed course of action.

Here, OGC's interpretation of "counter-ISIS" activities requires an MOR to result in some "kinetic" effect. As discussed previously, the OSD and OGC should interpret CTEF and section 1236 to match the plain language of the legislation and intent of Congress. Stability operations designed to prevent the resurgence of ISIS can and should reasonably be included in the definition of counter-ISIS activities. The OGC should then issue this opinion in written guidance so units and fiscal law practitioners can better empower their commanders.

C. Incorporate Previously Purchased ITEF and STE Equipment into CTEF

Congress should amend CTEF to allow the "re-purposing" of undistributed equipment purchased under ITEF to be reallocated under current CTEF programs. This would permit the transfer of equipment purchased under ITEF from Iraq to Syria and legitimize the distribution of previously stockpiled equipment.

²⁹⁸ See sources cited *supra* note 16.

Currently, CTEF allows the DoD to take unused or returned ITEF and CTEF purchased equipment into DoD stocks.²⁹⁹ Congress also recently allowed the transfer of unused equipment from Syria to Iraq.³⁰⁰ However, CTEF still does not permit the transfer of unused equipment from Iraq to Syria.³⁰¹ Congress should amend CTEF by adding the following language:

That equipment procured using funds provided under this heading, or under the headings, “Iraq Train and Equip Fund,” or “Counterterrorism Partnership Fund” in prior Acts, under the authority of either section 1209 or 1236 of the Fiscal Year 2015 National Defense Authorization Act, and not yet transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and Syria, may be redirected for use in any other authorized purpose under section 1209 or 1236 of the Fiscal Year 2015 National Defense Authorization Act, when determined by the Secretary to no longer be required for transfer to such forces or groups and upon written notification to the congressional defense committees.

Adding this language to CTEF would permit the CJTF to transfer unused equipment purchased under ITEF for use in Syria. It would also allow the CJTF to transfer unused equipment purchased under STE for use in Iraq.

D. Improve the Process

1. Transfer Iraq CTEF Responsibility to OSC-I

The CJTF currently has authority over the train and equip mission for the ISF. Once CENTCOM determines the CJTF and ISF have completed the first phase of the Coalition mission and defeated the physical ISIS caliphate, the authority to use CTEF should move from the CJTF to OSC-I.³⁰² The OSC-I should also remain as the enduring DoD security

²⁹⁹ Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018).

³⁰⁰ *Id.* § 9016.

³⁰¹ *Id.*

³⁰² The 2018 U.S. National Defense Strategy states the physical ISIS caliphate has been defeated and the U.S. is in a period of consolidating its gains in Iraq. U.S. DEP'T OF DEF.,

cooperation presence in Iraq until the GoI achieves regional stability. The OSC-I is better suited to handle long-term stability operations and security assistance in Iraq for two reasons.

First, security assistance is a DoS responsibility. The CTEF appropriation and section 1236 are a security assistance program.³⁰³ According to Joint Doctrine, the DoS is responsible for security assistance programs and the DSCA manages the programs.³⁰⁴ Under DSCA, the OSC-I already plans for long-term security cooperation with the GoI. Taking on short-term assistance planning using CTEF is already in line with its current functions. Based on the FY19 NDAA regarding the OSC-I, Congress also intends the DoS to regain its traditional role of security assistance in Iraq, as early as 2020.³⁰⁵ It appears from this language, OSC-I's focus is on eventually shifting the security assistance mission back to the DoS, where it is appropriate. The OSC-I is also already nested within the DoS and the Chief of Mission at the U.S. Embassy in Iraq.

Second, the OSC-I is better suited to determine what effect particular types of security assistance will have during a period of stability operations and ensure they are in line with U.S. national interests. Moreover, they

SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>. However, from an operational perspective this is not the case yet. The CJTF is still engaged in daily operations supporting the ISF in combat operations against ISIS pockets in Iraq using A3E, joint fires, intelligence, aerial surveillance, training and equipping. David Vergun, *Task Force Commander: ISIS Forces Degraded from Caliphate to Caves*, U.S. DEP'T OF DEF. (Dec. 11, 2018), <https://dod.defense.gov/News/Article/Article/1710543/task-force-commander-isis-forces-degraded-from-caliphate-to-caves>. For example, in October 2018, ISF forces began Operation Last Warning to clear pockets of ISIS forces from the desert around the Anbar province. C. Todd Lopez, *5 Things to Know About Operations in Iraq*, U.S. DEP'T OF DEF. (Dec. 11, 2018), <https://www.defense.gov/explore/story/Article/1710650/5-things-to-know-about-operations-in-iraq>. Also, the FEDPOL are still "conducting large-scale clearance operations in Hawijah." *Id.*

³⁰³ JOINT CHIEFS OF STAFF, *supra* note 224.

³⁰⁴ 22 U.S.C. §§ 2304(d)(2), 3927.

³⁰⁵ Section 1235(d)(1) of the FY19 NDAA requires the Secretary of Defense to submit a report to Congress regarding the OSC-I. John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1235(d)(1), 132 Stat. 1636, 2041 (2018). The NDAA requires the report to include "the enduring planned size and missions of the [OSC-I] after the cessation of major combat operations against [ISIS, a] description of the relationship between [OSC-I] and any planned enduring presence of other United States forces in Iraq[, and a] plan and timeline for the normalization of [OSC-I] to conform to other offices of security cooperation, including the transition of funding from the [DoD] to the [DoS] by the beginning of fiscal year 2020." *Id.* § 1235(d)(2)(A)–(D).

have had responsibility for this function in the recent past. Their planning horizon looks beyond three years, and longer-term stability in Iraq is the ultimate goal. Also, OSC-I and the DoS are better able to partner with Iraqi MoI because the DoD is generally limited to security cooperation engagements with the MoD.³⁰⁶ Long term stability train and equip missions will need to focus more and more on local police training and law and order courses. Transferring CTEF authority and administration responsibility would require additional manpower resources within OSC-I. Both Congress and the DoD should allocate appropriate resources to the OSC-I with this in mind.

2. *Enable the ACSA*

The ACSA process is potentially a very useful tool to fulfill ISF capability gaps when the CJTF cannot use CTEF. United States Central Command should reengage the GoI and MoD leadership to standardize the use of the ACSA under certain conditions. While the Iraqis may not have excess funds to pay for ACSA transactions, they do have other resources they can use to pay for ACSA support. The supported party in an Iraq ACSA transaction can pay for the requirement in three ways. The supported entity can pay in cash, do an equal value exchange, or replace in kind.³⁰⁷ In this case, the equal-value-exchange option is underused. Here, the MoD can use the resources they do have—manpower—in exchange for the support. For example, the MoD could agree to provide a certain amount of perimeter security for a set period. The value of this service should be easily quantifiable by any contracting office.

VII. Conclusion

The continued “threat of ISIS attacks remains, and the Iraqi Security Forces continue to aggressively pursue these remnants where they are hiding.”³⁰⁸ Much work is left to be done, lest we repeat the mistakes of our past by leaving before the fight is fully won. To ensure the lasting defeat of ISIS, CTEF requires change. Congress must amend CTEF to

³⁰⁶ Interview with Anthony C. Adolph, *supra* note 121.

³⁰⁷ Memorandum of Acquisition and Cross Servicing Agreement Between the United States Department of Defense and the Iraqi Ministry of Defense (Aug. 2014) (on file with author).

³⁰⁸ Colonel Jonathan Byrom, *Joint Operations Command-Iraq Briefing*, U.S. DEP’T OF DEF., (Dec. 11, 2018), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1710791/joint-operations-command-iraq-briefing>.

support the current fight, one that includes stability operations designed to combat the resurgence of ISIS. Until and unless that happens, the DoD OGC should loosen its restrictive interpretation on “counter-ISIS” activities. It should remove its requirement for “kinetic” effects and include activities designed to prevent the return of ISIS. Forsaking all other recommendations, this singular act has the potential to make the greatest, most meaningful, and immediate impact on the fight in OIR.

These recommended actions will give OIR commanders the flexibility and resources to support the GoI in the current fight against ISIS, as well as the fragile time of transition found in stability operations. The continued use of CTEF after implementing the proposed changes is the most effective, efficient, and responsible way to finally defeat ISIS and permanently prevent it from returning. United States interests are also critical in this region. If the United States does not support the efforts for regional stability in Iraq, multiple other bad actors are in the area, ready to destabilize the region and set conditions for ISIS, or the next iteration of ISIS, to return.³⁰⁹

³⁰⁹ Seth J. Frantzman, *Iranian-Backed Militias Playing Key Role In Anbar Against ISIS*, JERUSALEM POST (Apr. 26, 2020, 4:31 PM), <https://www.jpost.com/middle-east/iranian-backed-militias-playing-key-role-in-anbar-against-isis-625925>; Jennifer Griffin & Vandana Rambaran, *Rocket Fire Hits Base in Iraq Housing US Troops, Killing 2 Americans, 1 Briton*, *Military Says*, FOX NEWS, <https://www.foxnews.com/world/rocket-fire-hits-base-in-iraq-housing-us-troops-killing-2-americans-1-briton-military-says> (last updated Mar. 12, 2020); Devan Cole, *Two US Service Members Killed in Iraq*, CNN, <https://www.cnn.com/2020/03/09/politics/us-service-member-killed-iraq-isis/index.html> (last updated Mar. 9, 2020, 6:58 PM); Russlan Mamedov, AL-MONITOR, *In Moscow, Iraqi Foreign Minister Talks ‘Strategic Cooperation’ with Russia* (Feb. 4, 2019), <https://www.al-monitor.com/pulse/originals/2019/02/in-moscow-iraqi-foreign-minister-is-talking-strategic-cooperatio.html>.

