Volume 197 **Fall 2008**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

Department of Army Pamphlet 27-100-197

MILITARY LAW REVIEW

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW—VOLUME 197

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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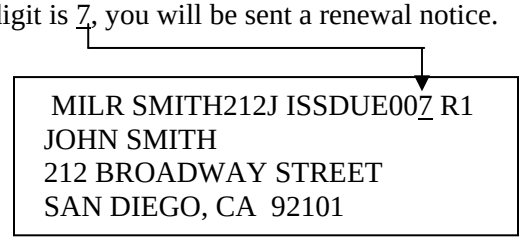

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FOREWORD

Fifty years ago, the world was on the brink of change. The United States scrambled to catch up with the Soviet Union's *Sputnik* launch, thus heralding the "space race" era. The atomic age transitioned to the nuclear age as terms like "brinksmanship" and "mutually assured destruction" crept into our lexicon. During this time, military lawyers were also dealing with change. The Uniform Code of Military Justice had been in effect for less than a decade. Judge Advocates were also adjusting to legal operations in a new type of war—the Cold War.

The challenges faced by the world community have evolved since 1958. Instead of racing to outer space, global powers now vie to dominate cyberspace. A new type of war—the War on Terror—has spurred fresh debate on law of armed conflict issues once thought to be well-settled. One constant, however, has been the demand for educated and innovative practitioners, jurists, and scholars to navigate the legal issues of our times.

Another constant of the past fifty years has been the high quality military legal scholarship published in the *Military Law Review*. What started as a limited-distribution Army pamphlet is now an indispensable repository of legal research and analysis, available to anyone via the World Wide Web, which is itself an extraordinary communications and research platform unimaginable fifty years ago. Indeed, the Library of Congress's Military Legal Resources website registered an incredible 1,121,175 "hits" on the *Military Law Review* during the first ten months of Fiscal Year 2008.[1]

The Fiftieth Anniversary edition of the *Military Law Review* continues to exemplify excellence in legal scholarship. In keeping with tradition, this volume features the best research paper and the best thesis of the 56th Judge Advocate Graduate Course. Also reprinted in these pages are the insightful comments of the Honorable Donna E. Shalala from her recent lecture at The Judge Advocate General's Legal Center

[1] Memorandum from Sandra W. Meditz, Acting Chief, Library of Congress Federal Research Division, to Daniel C. Lavering, Librarian, TJAGLCS, subject: Project Report and Status of Funds—July 2008 (Aug. 7, 2008) (on file at TJAGLCS).

and School. Of course, this commemorative edition would not be complete without a history of the *Military Law Review* compiled by the JAG Corps' Regimental Historian, Colonel (Ret.) Fred Borch.

The *Military Law Review* could not succeed without the thought-provoking and well-reasoned articles contributed by Judge Advocates and legal scholars from around the world. Your contributions keep the *Military Law Review* relevant and vital. I encourage you to take the time to think and write about the exciting and historic issues our military faces every day. Your submissions to the *Military Law Review* will enrich our continuing legal discourse for the next fifty years and beyond.

SCOTT C. BLACK
Major General, USA
The Judge Advocate General

MILITARY LAW REVIEW

Volume 197 **Fall 2008**

THE *MILITARY LAW REVIEW*:

THE FIRST FIFTY YEARS (1958–2008)

FRED L. BORCH*

Introduction

Fifty years ago, in September 1958, The Judge Advocate General's School, U.S. Army (TJAGSA) published the first issue of the *Military Law Review* (*MLR*). Its 136 pages contained three articles by Army lawyers on TJAGSA's faculty and staff. The topics of these articles—"Military Searches and Seizures," "Compatibility of Military and Other Public Employment," and "Legal Aspects of Non-Appropriated Fund Activities"—were relevant and important for military legal practitioners of the day; it would be hard to argue that these articles would be any less timely today.

* Fred L. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. A.B, 1976, Davidson College, Davidson, N.C.; J.D., 1979, Univ. of N.C., Chapel Hill, N.C.; LL.M., magna cum laude (International & Comparative Law), 1980, Univ. of Brussels, Belg.; LL.M. (Military Law), 1988, The Judge Advocate General's Sch., U.S. Army, Charlottesville, Va.; M.A., highest distinction (National Security Studies), 2001, Naval War College, Newport, R.I.; M.A. (History), 2007, Univ. of Virginia, Charlottesville, Va.

From 1980 until 2005, Mr. Borch was a career Army Judge Advocate. After retiring from active duty, he was the Clerk of Court, U.S. District Court, Eastern District of North Carolina. He resigned from that position in March 2006 to take his current position as Regimental Historian and Archivist.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001) and JUDGE ADVOCATES IN VIETNAM (2004), a history of Army lawyers in Southeast Asia from 1959 to 1975. He also is the co-author (with Daniel Martinez) of KIMMEL, SHORT AND PEARL HARBOR: THE FINAL REPORT REVEALED (Naval Inst. Press 2005).

Since this inaugural issue appeared fifty years ago, almost 200 individual volumes have been published; this issue is the 197th. The *MLR*'s fiftieth birthday is an appropriate occasion to examine its history and its impact on the practice of military law. This article first examines the origins of the *MLR*. It then looks at the men and women who have edited, formatted, and produced the *MLR*. This article also examines the content of this periodical, including special issues and those articles that have significantly impacted military jurisprudence or otherwise stood the test of time. Finally, this article offers some thoughts on the *MLR*'s future.

Origin of the *Military Law Review*

In retrospect, it is clear that the impetus for the *MLR* resulted from TJAGSA's efforts to achieve the model of legal education set by the American Bar Association (ABA). As a result of the caliber of its students, its rigorous academic curriculum, and the personal efforts of the first Commandant, Colonel Charles L. "Ted" Decker,[1] in February 1955 TJAGSA became the first and only military law school in American history to receive accreditation from the ABA. While this ABA stamp of approval was important because TJAGSA was co-located with the University of Virginia's law school, ABA accreditation was part of a larger effort to obtain statutory authority for TJAGSA to grant degrees to students.[2]

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[1] In this article, the military rank of authors or editors is that which they held at the time they wrote their articles or served as editors—recognizing that many of these officers continued to serve and advance in rank.

[2] As early as March of 1956, "action was initiated to obtain statutory authority . . . to confer the Master of Laws degree for successful completion of the Advanced Program." NATHANIEL B. RIEGER, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, REPORT OF THE COMMANDANT 15 JUNE 1955–25 FEBRUARY 1957, at 1–2 (1957) (on file with author). Legislation drafted by the Office of The Judge Advocate General (OTJAG) was sent to the Congress later that year but was not enacted. Not until some thirty years had passed would officers be awarded an advanced degree at TJAGSA, when members of the 36th Graduate Course received their LL.M.s in May 1988. This successful effort was spearheaded by Lieutenant Colonel David E. Graham, head of TJAGSA's International Law Division (at the urging of Commandant Colonel Paul J. Rice and Assistant The Judge Advocate General Major General William K. Suter). Lieutenant Colonel Graham made the necessary coordination with the Department of Education and the essential academic accreditation organizations and drafted the legislation ultimately enacted by Congress in early 1988.

With ABA accreditation in hand—and looking for ways not only to preserve this accreditation but to enhance the reputation of military legal education—TJAGSA began publishing material on military law. A key publication in this early period was "A Chronicle of Recent Developments of Immediate Importance to Judge Advocates." The TJAGSA's Research, Planning and Publications Department, which was tasked with researching "military law and military legal education" and publishing its results "in periodicals, permanent publications, and films,"[3] produced the first *Chronicle Letter* in 1951. Distributed to all Judge Advocates, it contained recent developments in military law (digests of all cases from the Court of Military Appeals, selected opinions of the boards of review, decisions from federal and state courts, and opinions of The Judge Advocate General (TJAG), Attorney General and Comptroller General). Interestingly, TJAGSA began selling the *Chronicle Letter* in its book store on 1 January 1957—with "Reserve Officers and other interested parties" being the primary purchasers of subscriptions.[4]

But, while the *Chronicle Letter* certainly pushed information to the field—and was a valuable publication—every law school of consequence had a law review in which scholarly articles and comments were published. As the students in the Advanced Courses (the forerunner of today's Judge Advocate Officer Graduate Course) were required to write a thesis as part of the curriculum, there existed a ready source of intellectually stimulating material for a law review-type publication.

In sum, it seems that at least three factors coalesced to produce the first *MLR*: a desire to enhance and preserve TJAGSA's ABA accreditation; a ready source of theses from Advanced Course students that could be easily transformed into law review articles; and a publications and research department that had the mission of producing written materials that would help military legal professionals to be better practitioners.

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[3] *Id.* at 14.

[4] In December 1955, TJAGSA obtained permission to establish a bookstore "to provide a medium for distribution of the School's publications and to serve the conveniences of students at the School." CHRONICLE LETTER (Dec. 1955) (on file with author). The bookstore opened in January 1956 and sold "typewriters, stationery supplies, military insignia and uniform accessories." *Id.* It also sold the *Chronicle Letter* on a subscription basis.

Early Years of the *Military Law Review*

On 30 April 1958, a memorandum from the Office of the Judge Advocate General (OTJAG) announced that TJAG had "recently secured approval for the publication of a DA Pamphlet No. 27-100 series, entitled *Military Law Review*, to provide a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army."[5] The announcement further solicited "articles, comments and notes treating subjects of import to the military" and requested that they be submitted "in duplicate" to TJAGSA in Charlottesville, Virginia.

The first issue of the *MLR* appeared as DA Pamphlet 27-100-1, dated 15 September 1958.[6] The lead article was by two members of TJAGSA's faculty, Captain Cabell F. Cobbs and First Lieutenant Roberts S. Warren. Entitled "Military Searches and Seizures," it had been adapted from a thesis written while the authors were members of the Fourth Advanced Course from 1955 to 1956. The second article, by Captain Dwan V. Kerig, was called "Compatibility of Military and Other Public Employment." It also had originated as an Advanced Course thesis, and explored the many federal statutes governing military personnel (especially retirees) who sought to continue their service as U.S. civilian employees. The third and last article, "Legal Aspects of Non-Appropriated Fund Activities," also had been a thesis and it author, Lieutenant Colonel Paul J. Kovar, likewise was a member of TJAGSA's faculty.

While this first *MLR* was styled as a DA Pamphlet, it looked like any law school periodical. It was the same size and format, and followed the manner of citation in the Harvard *Blue Book* for civilian legal citations and the TJAGSA *Uniform System of Citation* for military citations. The inaugural September 1958 issue was well-received and a second volume appeared before the year was out. In 1959, the *MLR* established its publication schedule as quarterly (January, March, July, October) and, as would be expected of any civilian law review, was available for sale at $.45 a copy or $1.75 for a year's subscription.

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[5] Memorandum from Colonel John E. O'Brien, Commandant, TJAGSA, to All Officers of the Judge Advocate General's Corps, subject: A Chronicle of Recent Developments in Military Law of Immediate Importance to Army Judge Advocates 15 (30 Apr. 1958) (on file with author).

[6] As the second issue (Dep't of the Army Pamphlet 27-100-2) is dated 17 September 1958, it is possible that the first issue appeared some months earlier.

Editors and Staff

From the outset, the quality of the *MLR* depended on its editors and their staffs. But, while there was an *MLR* editor from the outset, no named editor appeared in the pages of the legal periodical until 1979, when Major Percival D. Park identified himself as the editor in an introductory preface to a symposium on international law.[7] It was not until Volume 95, however, which was published early in 1982, that the *MLR* had a masthead identifying Major Park as editor. This issue of the *MLR* also identified Ms. Eva F. Skinner as editorial assistant, the first time that a non-lawyer staff member had been listed in print.

Major Park had an amazing tenure at the *MLR*. After completing the 25th JA Advanced Course in May 1977, he took over as editor and did not give up this position until he completed Volume 95 (Winter 1982)—a nearly five-year tenure.

The next editor was Captain Connie S. Faulkner, who first appeared as an editor (but in an understudy status to Major Park) in Volume 95. Captain Faulkner is listed as editor in Volume 96 (Spring 1982), along with Captain Steven Kaczynski. He assisted Faulkner while serving primarily as editor for *The Army Lawyer*. Ms. Eva F. Skinner continued as editorial assistant.

Starting with Volume 101 (Summer 1983), Captain Kaczynski was promoted to be the editor of the *MLR*, with Captain Debra Boudreau listed as co-editor. Captain Boudreau, in fact, concentrated chiefly on editing *The Army Lawyer*. Kaczynski's editing finished with Volume 109 (Summer 1985) and, beginning with Volume 110 (Fall 1985), Captain Boudreau was the sole editor. Her last issue was Volume 113 (Summer 1986).

Major Thomas J. Feeney was the next editor (beginning with Volume 114), and he held the position until Captain Alan D. Chute took over as editor with the publication of Volume 120 (Spring 1988). Major Chute completed Volume 129 (Summer 1990) and passed the reins of the *MLR* to Captain Matthew E. Winter. In 1991, Major Winter won "Editor

[7] 82 MIL. L. REV. 1, 2 (Fall 1978). Although Major Park was the first editor listed on the masthead, a photograph on file at TJAGLCS with the author states that "Captain Donald A. Donadio was the Chief, Publications Division and Editor, Military Law Review, in 1969."

of the Year" in an Army-wide competition to find the best editor of an Army publication. Winter's tenure was relatively short; he edited issues 130 (Fall 1990) through 133 (Summer 1991).

In the fall of 1991, beginning with Volume 134, Captain Daniel P. Shaver took over as editor, with Ms. Skinner still identified as his assistant. Captain Shaver had also served as editor of *The Army Lawyer* from 1990 to 1991. Captain Shaver remained the editor until Volume 140 (Spring 1993), when Captain Stuart W. Risch took over as the sole *MLR* editor with the publication of Volume 141 (Summer 1993). Captain John B. Jones, Jr. joined Captain Risch as co-editor with the publication of Volume 146.

Captain Jones finished as sole editor with Volume 150 (Fall 1995) and Captain John B. Wells joined him as co-editor with the publication of Volume 151 (Winter 1996). After Ms. Skinner retired, Mr. Charles J. Strong was hired in December 1995 as editorial assistant. Mr. Strong would later be promoted to technical editor in 1998.

Captains Jones and Wells remained as co-editors through Volume 153 when the editorial staff expanded. Captain Albert R. Veldhuyzen was appointed senior editor with the publication of Volume 154 (October 1997), but Captain Wells and a new Judge Advocate, Captain Scott C. Murray, were also identified as editors.

Captain Murray was the sole editor for one issue, Volume 157 (October 1998). He was followed by then Captain Mary J. Bradley, who took over as senior editor with Volume 158 (December 1998) and continued her work through Volume 165 (September 2000). After editing *The Army Lawyer* for a year, Captain Todd S. Milliard took over as "senior editor" with Volume 166 (December 2000), although now Major Bradley remained on the masthead as editor.

The next editor was Captain Erik L. Christiansen, who assumed his duties with the publication of Volume 173 (September 2002) and continued his work through Volume 176 (June 2003). Starting with Volume 176, however, the *MLR* editorial board underwent a remarkable metamorphosis. There were two "editors-in-chief" (Captain Joshua B. Stanton and Captain Heather J. Fagan) and twelve "adjunct editors." These are described as "professors at the School" and "Reserve officers

selected for their demonstrated academic excellence and legal research and writing skills."[8]

With the publication of Volume 178 (Winter 2003), however, the number of editors decreased. Captain Andras M. Marton was now editor in-chief with Captain Fagan the assistant editor. Starting with Volume 180 (Summer 2004), Captain Anita Fitch was the chief editor, with Captain Fagan continuing as assistant editor. Captain Jennifer L. Crawford assumed the reins as editor with the publication of Volume 182 (Winter 2004), with Captain Anita J. Fitch moving to assistant editor and editor of *The Army Lawyer*.

Captain Colette E. Kitchel assumed the role of editor for Volume 185 (Fall 2005), with Captain Anita J. Fitch as assistant editor. Captain Kitchel continued her work through Volume 188 (Summer 2006), when she left active duty. Major Ann B. Ching is the current editor and, assisted by Mr. Strong and Captain Alison M. Tulud, is producing this Fiftieth Anniversary issue.

Content: Generally

From the beginning, much of the content of the *MLR* came from work done by students in the Advanced and Graduate Courses. A well-written thesis on any topic was a candidate for publication, but so were scholarly papers of shorter length. Today, while student work continues to provide a steady source of *MLR* articles, scholarly pieces produced by civilian law school professors and civilian attorneys are also published. Reviews of books of interest to military law practitioners also have appeared in the pages of the *MLR* for many years.

While the *MLR*'s content over the past fifty years has been similar to what would be seen in a law review at any ABA-accredited law school, some key differences stand out. Until the creation of *The Army Lawyer* in August 1971 and the emergence of electronic publications like the "Quill and Sword" (published quarterly on JAGCNet since June 2005) provided other forums for Judge Advocate scholarship, the *MLR* was the only scholarly periodical produced at TJAGSA. This meant that articles

[8] 177 MIL. L. REV. ii (Fall 2003).

were published that would not appear in the *MLR* today, such as a ten-page piece on Judge Advocate training in a logistical command exercise.[9]

The editors of the *MLR* also published articles that otherwise would not have been available—and arguably would have been lost—in the area of Regimental history. For example, the fourth *MLR*, published in March 1959, contained a general history article on the Corps.[10] Years later, Major Percival D. Park authored "The Army Judge Advocate General's Corps, 1975 to 1982,"[11] which was an update to the Corps' bicentennial history book, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975.*[12] This same *MLR* issue also contained a "finding aid" for *The Army Lawyer* compiled by Major Park. Since the original publication had been produced with only a table of contents and a bibliography (probably because the book was rushed into print for the Bicentennial celebrations of 1976), Major Park's finding aid now provided readers with a detailed table of contents, list of illustrations and a subject-matter index—an invaluable tool for research.[13] Major Tom Feeney and Captain Margaret L. Murphy continued Major Park's initiative when they published "The Judge Advocate General's Corps, 1982–1987" in Volume 122.[14]

Other important legal history articles have been published over the years, including Frederick Bernays Wiener's "The Seamy Side of the World War I Court Martial Controversy," which examined the infamous struggle between TJAG Major General Enoch Crowder and the Acting TJAG Brigadier General Samuel Ansell over the extent of any reform to the Articles of War.[15] Wiener challenged the prevailing view[16] that this was a professional struggle, and insisted instead that Brigadier General Ansell had wronged his boss and was guilty of disloyalty. Another history article of note is Lieutenant Colonel John R. Howell's "TDS:

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[9] John F. Wolf, *Judge Advocate Training in LOGEX*, 3 MIL. L. REV. 57 (1959).
[10] Colonel William F. Fratcher, *History of the Judge Advocate General's Corps*, 4 MIL. L. REV. 89 (1959).
[11] 96 MIL L. REV. 5 (Spring 1982).
[12] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975 (1975).
[13] 96 MIL. L. REV. 75 (1982).
[14] 122 MIL. L. REV. 1 (Fall 1988).
[15] 123 MIL. L. REV. 109 (Winter 1989).
[16] The prevailing historical view is to be found in Major Terry W. Brown, *The Ansell-Crowder Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).

The Establishment of the U.S. Army Trial Defense Service,"[17] which details the evolution of a separate stove-pipe legal organization for Army Judge Advocates serving as trial defense counsel at courts-martial. The establishment of the Trial Defense Service was a watershed event in military criminal law, and Lieutenant Colonel Howell's piece captures it for posterity.

Over the years, hundreds of articles have appeared in the pages of the *MLR*. While most have focused on U.S. military law, the editors recognized from the outset that they should periodically publish articles on non-American military legal systems. In 1963, for example, there were three separate articles on Danish, Dutch and Swedish military law.[18] Three years later, Major Albert P. Blaustein authored an article on the military justice codes of Nigeria, Ghana and the Sudan.[19]

Finally, the *MLR* routinely published edited transcripts of lectures delivered at TJAGSA (now The Judge Advocate General's Legal Center and School (TJAGLCS)) as part of the institution's chaired lecture series. For example, the 25th Annual Kenneth J. Hodson lecture, presented by TJAG Major General Michael J. Nardotti, Jr. appears in Volume 151, as does the 2nd Annual Hugh J. Clausen Leadership Lecture presented by Lieutenant General Henry H. Shelton.[20] The *MLR* also has published transcripts of the first and second George S. Prugh Annual Lecture in Military Legal History.[21]

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[17] 100 MIL. L. REV. 4 (1983).

[18] Jozef Schuurmans, *A Review of Dutch Military Law*, 19 MIL. L. REV. 101 (1963); Soren B. Nyholm, *Danish Military Jurisdiction*, 19 MIL. L. REV. 113 (1963); Bengt Lindeblad, *Swedish Military Jurisdiction*, 19 MIL. L. REV. 123 (1963).

[19] Albert P. Blaustein, *Military Law in Africa: An Introduction to Selected Law Codes*, 32 MIL. L. REV. 43–79 (1966).

[20] Major General Michael J. Nardotti, Jr., *General Ken Hodson: A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202–15 (1996); Lieutenant General Henry H. Shelton, *Attributes of a Leader*, 151 MIL. L. REV. 216–29 (1996). At the time, General Shelton was commander in chief of U.S. Special Operations Command. His next assignment (1997–2001) was Chairman of the Joint Chiefs of Staff.

[21] 190/191 MIL. L. REV. 153 (Winter 2006/Spring 2007); 196 MIL. L. REV. 187 (Summer 2008).

Content: Specials Issues

Just as this volume is a special commemoration of the *MLR*'s fifty years as a legal periodical, other important anniversaries and events have been honored with special issues.

The first, "A Symposium on Military Justice," was published in 1961 on the tenth anniversary of the enactment of the Uniform Code of Military Justice (UCMJ).[22] There were seven feature articles, a survey, or analysis, of the work done by the Court of Military Appeals, and three shorter comments. The emphasis was on the practical aspects of prosecuting and defending courts-martial under the UCMJ. As more than a few Judge Advocates then in the Corps had experience with the Articles of War, the ten years between 1951 and 1961 had been nothing short of revolutionary.

It is clear from the pages of Volume 12 that Judge Advocates were proud of the UCMJ. As TJAG Charles L. Decker said in his foreword, the code "was designed to provide greater uniformity among the several armed forces and to remedy conditions which had been the subject of much adverse criticism."[23] General Decker undoubtedly spoke for the majority when he wrote that he wanted "our system of military justice . . . [to] become the most modern, useful, and enlightened system extant."[24]

Not surprisingly, the articles in this symposium reflected the inchoate nature of this new military justice system. For example, Professor Robinson O. Everett, who would later serve as Chief Judge of the Court of Military Appeals, penned an article called "The Fast Changing Law of Military Evidence."[25] Captain Hugh Clausen, who subsequently served as TJAG from 1981 to 1985, authored a piece called "Rehearings Today in Military Law."[26]

This inaugural special issue in criminal law was followed the next year by a Symposium on Procurement Law.[27] A foreword by Brigadier

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[22] 12 MIL. L. REV. (1961).
[23] Major General Charles L. Decker, *Foreword to a Symposium on Military Justice*, 12 MIL. L. REV. v (1961).
[24] *Id.*
[25] 12 MIL. L. REV. 89 (1961).
[26] *Id.* at 145.
[27] 18 MIL. L. REV. (1962).

General Nathan J. Roberts, the Assistant JAG for Civil Law, explained that articles in this *MLR* had been chosen for their substantive value but also "to illustrate the controversy and the constant change that make the practice of procurement law the fascinating and demanding task that it is."[28] Since one half of the Department of Defense's annual budget was earmarked for procurement, Brigadier General Roberts emphasized that the role of the Army lawyer in ensuring that dollars were lawfully spent was of critical importance. There were articles on the judicial and non-judicial remedies of a government contractor, how to reduce state and local tax costs to compete more effectively for government contracts, and an examination of bid guarantees in federal procurement.

Other special issues followed, with the largest ever—at more than 650 pages—being published when the Corps celebrated its 200th birthday in 1975. This "Bicentennial Issue" reprinted seventeen articles that had "significantly influenced the development and administration of military law."[29] The articles in this special issue fit into two categories. First, there were legal history essays that anticipated the development of military law and that consequently provided a socio-political context. These included General Henry W. Halleck's "Military Tribunals and Their Jurisdiction," which had first appeared in the *American Journal of International Law* in 1911.[30] Brigadier General Samuel T. Ansell's *Cornell Law Quarterly* article on military justice also was included, no doubt because Ansell's claims that military justice as it then existed was "archaic" and "un-American" reverberated for years and ultimately resulted in a uniform code of military criminal law in 1950.[31] But there were more recent historical pieces, such as Navy Judge Advocate Joseph E. Ross' article on the historical background of the Military Justice Act of 1968.[32]

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[28] *Id.* at 1.

[29] MIL. L. REV. BICENT. ISSUE (1975).

[30] 5 AM. J. INT'L L. 958 (1911). Halleck, who served as General in Chief of the Union armies from 1862 to 1864, was a practicing lawyer and the first American whose writings were internationally known; his sponsorship of Francis Lieber's codification of the laws of land warfare—which was published as General Orders No. 100 in 1863—remains an important milestone in the development of the law of armed conflict.

[31] MIL. L. REV. BICENT. ISSUE 53 (1975); Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. (1919). Ansell served as acting Judge Advocate General of the Army from 1917 to 1919, while the JAG, Major General Enoch Crowder, was serving as Provost Marshal General and overseeing the operation of the first peacetime draft since the Civil War.

[32] MIL. L. REV. BICENT. ISSUE 273 (1975); Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125 (1969).

Essays for the practitioner comprised the second category of this special issue. For example, a *Tennessee Law Review* article on the constitutional basis for U.S. ownership of land (which included a lengthy analysis of the distinction made by the courts between the U.S. government's "sovereign" as opposed to "proprietorial" interests) was included.[33] So too was an essay on the legal problems of non-appropriated funds[34]—an area of the law that continues to be of great interest to Judge Advocates.

Over the years, the *MLR* has published other special issues of note. In the spring of 1978, after a special panel discussion on new developments in the law of war was held at TJAGSA, the *MLR* published an edited transcript of this discussion along with a series of scholarly articles in a two-issue set, "International Law Symposium."[35] This was followed a few months later by a "Symposium on Administrative and Civil Law" that included articles on probate and the military and the origins of TJAG's civil authority.[36] The next issue was a "Symposium on Contract Law,"[37] followed by a "Symposium on Criminal Law"[38]

In the late 1980s and 1990s, volumes concentrating on particular areas of practice continued to be published. While the Corps had officially created an Army Legal Assistance Program during World War II, its increasing importance in military legal practice led to a series of issues devoted to this area of practice. The "First Legal Assistance Symposium" appeared in 1983; the "Second Legal Assistance Symposium" was published in 1986; and the "Third Legal Assistance Symposium" appeared in 1991.[39] Recently, the *MLR* published its "Fourth Legal Assistance Symposium."[40] Each addressed some aspect of family law, taxation, property law, or civil rights, with an emphasis on a pro-active approach to providing legal advice and counsel to Soldiers and their families.

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[33] MIL. L. REV. BICENT. ISSUE 513 (1975); Toxey H. Sewell, *The Government as a Proprietor of Land*, 35 TENN. L. REV. 287 (1968).
[34] MIL. L. REV. BICENT. ISSUE 357 (1975). *Legal Problems of Non-appropriated Funds: Hearings on S. 3263 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 90th Cong. 201 (1968) (statement by Michael F. Noone).
[35] 82 MIL. L. REV. (Fall 1978); 83 MIL. L. REV. (Winter 1979).
[36] 85 MIL. L. REV. (Summer 1979).
[37] 86 MIL. L. REV. (Fall 1979)
[38] 88 MIL. L. REV. (Spring 1980).
[39] 102 MIL. L. REV. (Fall 1983); 112 MIL. L. REV. (Spring 1986); 132 MIL. L. REV. (Spring 1991).
[40] 177 MIL. L. REV. (Fall 2003).

Content: Articles of Note

The past fifty years has seen an abundance of scholarly articles published in the *MLR*. Some had a marked impact on the development of military law; several are still cited by today's practitioners.

In the area of military criminal, Major Ron Holdaway's "Voir Dire—A Neglected Tool of Advocacy"[41] remains the single best analysis on the differences between voir dire in civilian and military courts, and the extent to which defense counsel may use voir dire to educate panel members about the case. Major Kevin Carter's *Fraternization* continues to be a key source for those interested in the topic.[42] His article traces the history of fraternization in the Army and provides hundreds of illustrative courts-martial. It remains the best historical treatment of the offense ever written.

In the area of death penalty litigation, Marine Captain Dwight H. Sullivan's *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*[43] remains the key article on this area of military criminal practice. With the recent decision by President George W. Bush to approve the first military death sentence in more than fifty years—and the fact that habeas review of this court-martial is near—Captain Sullivan's article has lost none of its relevance.[44]

Major William T. Barto's article on double jeopardy, lesser included offenses, and the problem of multiplicity remains the seminal article on this area of military criminal law. Practitioners continue to find it

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[41] 40 MIL. L. REV. 1 (1968). After serving on TJAGSA's staff and faculty from 1967 to 1969 (during which time his article on voir dire was published), Holdaway served in a variety of assignments, including: Staff Judge Advocate (SJA), 1st Cavalry Division, Vietnam; SJA, VII Corps, Germany; and Judge Advocate, Office of the Judge Advocate, U.S. Army Europe. He retired as a Brigadier General in 1989.

[42] 113 MIL. L. REV. 1 (1986).

[43] 144 MIL. L. REV. 1 (Spring 1994). Sullivan, who left active duty to take a position with the American Civil Liberties Union of Maryland, remained in the Marine Corps Reserve. He later served as the Chief Defense Counsel for the Office of Military Commissions from August 2005 to August 2007. *See* Captain Dwight H. Sullivan, *Playing the Numbers: Court Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998); *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1 (Fall 2006).

[44] On 28 July 2008, President Bush approved the death sentence in *United States v. Ronald A. Gray*. A former Army cook convicted of multiple rapes and murders, Gray has been on death row at the Disciplinary Barracks, Ft. Leavenworth, Kan., since April 1988.

valuable because of its helpfulness in determining proper charging at courts-martial.[45]

In the area of international and operational law, no article has been more widely read or more often cited than Major Mark S. Martins's "Rules of Engagement for Land Forces: A Matter of Training, not Lawyering."[46] Major Martins's article (also originally a thesis completed while he was a student at TJAGSA) was especially important because, for the first time, he suggested a comprehensive series of training scenarios and other practical tips for imparting rules of engagement to individual Soldiers and Marines. Major Martins's suggestions revolutionized the way in which Judge Advocates—and the commanders they served—thought about ROE and trained Soldiers on the use of force.

In the area of administrative and civil law, then Captain Holly Cook's 1996 article on affirmative action is still considered by many practitioners to be the best ever published on the subject.[47] Captain Cook examined the legality of Army programs granting minority employment preferences in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*[48] and concluded that the Army needed to drastically modify, if not end, its current affirmative action efforts.[49] Although a number of cases have been decided since Captain Cook's article, it remains the starting point for legal research on the applicability of "strict scrutiny" to the Army's affirmative action programs.

Another *MLR* article that has stood the test of time was written by retired Lieutenant Colonels J. Mackey Ives and Michael J. Davidson. Their "Court-Martial Jurisdiction Over Retirees under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?"[50] remains a valuable resource for Litigation Division attorneys wrestling with Regular and Reserve retiree recall issues.

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[45] Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996).
[46] 143 MIL. L. REV. 3 (1994).
[47] Holly O'G. Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113 (1996).
[48] 515 U.S. 200, 229–31 (1995).
[49] Cook, *supra* note 47, at 193.
[50] 175 MIL. L. REV. 1 (2003).

Publishing the *MLR* Today and Tomorrow

At present, TJAGLCS publishes the *MLR* both in paper and electronically as a portable document file (.pdf). About 5000 paper copies of each volume are published through a private printer obtained under contract through U.S. Army Publications and Printing Command, Rosslyn, Virginia. Some are mailed directly to subscribers, while others go to law libraries and other institutions. Starting in mid-July 2001, each new *MLR* volume also was published as a .pdf and posted to http://www.jagcnet.army.mil/mlr. Accessible by the general public, this website has .pdf versions of every volume since 1958.

To ensure that the *MLR* reaches the widest possible audience—and is available to those doing legal research—it is indexed in a variety of publications, including the Index to Legal Periodicals and Legal Resources Index. More importantly, as legal research is now heavily Internet-based, the publication is available in at least five computerized electronic databases: LEXIS, Westlaw, the Public Affairs Information Service, The Social Sciences Citation Index, and JAGCNet.

The *MLR* will continue to be published in paper for the foreseeable future, albeit possibly in smaller numbers. Regardless of advances in electronic publishing, however, these paper issues are unlikely to disappear; printed volumes will always be retrievable and readable, while electronic media formats change so rapidly that what is "published" electronically today may very well be unreadable within twenty-five years.

Conclusion

The beginning of the twenty-first century has witnessed increasingly complex military operations around the globe. The multitude of ensuing legal issues will ensure that the *MLR* will continue to serve as a valuable resource, not just for military attorneys and paralegals, but for scholars, civilian practitioners, and jurists. As the *MLR* begins its next half century of service to the military legal community, General Decker's vision of scholarly excellence in military legal writing will continue to shape its mission.

MILITARY STRATEGISTS ARE FROM MARS, RULE OF LAW THEORISTS ARE FROM VENUS:[1] WHY IMPOSITION OF THE RULE OF LAW REQUIRES A GOLDWATER-NICHOLS MODELED INTERAGENCY REFORM

MAJOR TONYA L. JANKUNIS*

I. Introduction

Military victory in Iraq and Afghanistan proved relatively easy for the United States and its coalition partners.[2] This overwhelming success was due, in large part, to the top-down reorganization of the Department of Defense (DOD) put into practice by the 1986 Goldwater-Nichols Act.[3]

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[1] *See* JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX (1992) (applying the same metaphor to explain differences between men and women); Colonel Rickey L. Rife, Defense Is from Mars, State Is from Venus: Improving Communications and Promoting National Security (June 1, 1998) (unpublished Senior Service College Fellow Research Project, *available at* http://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA351032) (using the same metaphor to contrast the Departments of Defense and State).

* Judge Advocate, U.S. Army. Presently assigned as Associate Professor, Administrative and Civil Law Department, The Judge Advocate General's Legal Ctr. and Sch., (TJAGLCS), U.S. Army, Charlottesville, Va. LL.M., 2008, TJAGLCS, Charlottesville, Va; J.D. 1998, University of Iowa; B.A., 1995, Dartmouth College. Previous assignments include Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C., 2004–2007 (Capital Litigation Trial Counsel, 2006–2007; Trial Counsel, 2005–2006; Administrative Law Attorney, 2004–2005); Office of the Staff Judge Advocate, U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, Mo., 2001–2004 (Deputy Chief, Administrative Law, 2003–2004; Chief, Federal Litigation Division, 2001–2003); Office of the Staff Judge Advocate, 1st Cavalry Division, Fort Hood, Tex., 1999–2001 (Chief, Legal Assistance Division, 2001; Administrative Law Attorney, 2000–2001; Legal Assistance Attorney, 1999–2000). Member of the New York Bar. This thesis was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[2] Joseph J. Collins, *Planning Lessons from Iraq and Afghanistan*, JOINT FORCES Q., 2d Quarter 2006, at 10, 11.

> U.S. conventional military power is unparalleled. No country or nonstate actor in its right mind seeks conventional battle with the United States. Operation *Iraqi Freedom* demonstrated that the Armed Forces, with minimal allied help, can attack a significant opponent at a 1:6 force ratio disadvantage, destroy its forces, and topple a mature, entrenched regime, all in a few weeks.

Id.

[3] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.). General Peter

A work in progress for more than forty years, at times hotly resisted by the stakeholders even in the face of significant military debacles resulting from the disjointedness of the services,[4] the Act has resulted in a meaner, leaner, much more agile and capable DOD.[5] The success of the Goldwater-Nichols Act demonstrates that no matter how good an agency's intentions and subject matter expertise, sometimes it takes an act of Congress to mandate the coordination, cooperation, and leadership necessary to spur success in a changing world.[6]

Pace, while Vice Chairman of the Joint Chiefs of Staff, attributed the military success in Iraq to the realization of the Goldwater-Nichols promise:

> [General Peter Pace] said that during operations Desert Shield and Desert Storm the battlefields were "deconflicted"—meaning the various services carved out exclusive niches and did not have to work together. In Iraq, 'I believe the capabilities and capacities of the U.S. military on that battlefield were finally the realization of the dream that was the Goldwater-Nichols Act,' he said.

Jim Garamone, *Pace Proposes Interagency Goldwater-Nichols Act*, ARMED FORCES PRESS SERV., Sept. 7, 2005 (quoting General Peter Pace); *see also* Peter M. Murphy & William M. Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183, 194–95 (1986); Christopher L. Naler, *Are We Ready for an Interagency Combatant Command?*, JOINT FORCES Q. , 2d Quarter 2006, at 26, 27.

[4] *See generally* JAMES R. LOCHNER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON (2002) (discussing how significant shortcomings of the military organizational structure pre-Goldwater-Nichols led to military debacles as well as the numerous challenges to the Act's passage); Murphy & Koenig, *supra* note 3 (providing overview of background and implementation of the Goldwater-Nichols Act).

[5] Naler, *supra* note 3, at 27.

> The success of the Goldwater-Nichols Department of Defense Reorganization Act of 1986 is evident when an empowered unified combatant command leads a coalition of over 40 countries in multiple regions executing the war on terror. The intent of the act has come to fruition in less than 20 years. In Iraq, for instance, "the capabilities and capacities of the U.S. military on the battlefield were finally the realization of the dream that was the Goldwater-Nichols Act."

Id. (quoting Garamone, *supra* note 3). *But see* Peter W. Chiarelli, *Beyond Goldwater-Nichols*, JOINT FORCES Q., Autumn 1993, at 71 ("Goldwater-Nichols is like the Articles of Confederation—each is better than what went before; however, each failed to endow the new order it created with the authority needed to unify its parts.").

[6] *See, e.g.*, Lorelei Kelly, *Unbalanced Security: The Divide Between State and Defense*, FOREIGN POL'Y FOCUS (Inst. for Policy Studies, Silver City, N.M & Wash. D.C.), Mar. 28, 2007 ("The backstory of today's interagency impasse provides important context. Our policymaking dilemma is not an accident. It is an outcome. And Congress has been frustratingly absent where leadership is concerned.").

In stark contrast to the initial overwhelming military success, post-conflict stabilization and reconstruction challenges in Iraq and Afghanistan have proven that winning the "peace" is a more elusive, ill-defined, costly, difficult, and long-term campaign.[7] History dictates that the United States must win this campaign if we are to avoid repeating the past.[8] If the United States is unsuccessful, failed and fragile states will endure as fertile breeding grounds for terrorist networks.[9] Also,

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[7] *See* Collins, *supra* note 2, at 11 ("[T]he insurgents decided after a few months that they had to defeat reconstruction in order to force the evacuation of coalition forces and discredit the people who had worked with the coalition. In both conflicts, counterinsurgency, stabilization, and reconstruction have become threads in the same cloth."); Jeffrey Record, *Why the Strong Lose*, PARAMETERS, Winter 2005–2006, at 16, 26 ("Operation Iraqi Freedom achieved a quick victory over Iraqi conventional military resistance, such as it was, but did not secure decisive political success. An especially vicious and seemingly ineradicable insurgency arose in part because Coalition forces did not seize full control of the country and impose the security necessary for Iraq's peaceful, economic, and political reconstruction."); Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45, 50 (describing changes for the worse in Afghanistan, to include an increase in insurgent attacks, crime, and opium production, a deficit in basic services such as water and electricity, and the de facto control of portions of the country by warlords); *see also* General William S. Wallace, *Foreword* to U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0] ("Battlefield success is no longer enough; final victory requires concurrent stability operations to lay the foundation for lasting peace."); *cf.* Address to the Nation on Iraq from the U.S.S. *Abraham Lincoln*, 1 PUB. PAPERS 410, 412 (May 1, 2003) (declaring an end to major hostilities in Iraq less than forty-five days after the initiation of major military action). *See generally* U.S. DEP'T OF STATE & BROAD. BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., REPORT OF INSPECTION NO. ISP-IQO-06-01, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD (Oct. 2005) [hereinafter DOS IG INSPECTION] (describing the rule of law efforts in Iraq through September 2005 and various barriers to success).

[8] *See* JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 7 (2006) ("Unless the rule of law can be created in post-intervention societies, military interventions will not fully eradicate the dysfunctional conditions that necessitated intervention in the first place . . . perhaps necessitating another intervention a few years down the road.").

[9] OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA v (2002) ("[W]eak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murders. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels."); FM 3-0, *supra* note 7, para. 1-9 ("The problem of failed or failing states can result in the formation of safe havens in which adversaries can thrive."); STROMSETH ET AL., *supra* note 8, at 3 ("Repression, poverty, and injustice can fuel terrorism, instability, civil war, and organized crime, and these in turn can lead to still more repression, poverty, and injustice. In the future, many military interventions are likely to arise jointly out of humanitarian concerns and security concerns."); Andrew S. Natsios, *The Nine Principles*

regardless of whether a state fails or is led by a repressive regime, "human rights abuses and violence will recur and continue unchecked, posing ongoing threats not only to the residents of post-conflict societies but also to global peace and security."[10] Either way, if we fail at reconstruction now, in the future we may need to re-intervene in a country with an even less receptive population.[11] Finding a formula to get it right now is imperative, for the future likely holds only more of the same.[12] Given this necessity[13] for success in Afghanistan, Iraq, and

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of Reconstruction and Development, PARAMETERS, Autumn 2005, at 4, 18–19 ("This new paradigm means that an increasing number of complex emergencies and fragile states have heightened consequences for US national security interests. It is no longer acceptable or appropriate for us to avoid engaging with failed states. There is a contemporaneous correlation between failed states and terrorist-induced instability.").

[10] STROMSETH ET AL., *supra* note 8, at 7. Stromseth continued: "The logic is straightforward: although the roots of terrorism are complex, misery and repression create fertile ground for terrorist recruiters." *Id.*

[11] *Id.* One need only consider the present situation in Somalia to appreciate how difficult a subsequent intervention in a failed state would be following an initial unsuccessful effort. When a state's attempt to fix a fragile or failed state is unsuccessful, conditions deteriorate, so that any later effort will be that much more difficult. Moreover, any goodwill the United States may have initially enjoyed, for example, in Somalia, may be near nonexistent in the second intervention. Colonel James M. Coyne, Back to the Future: The Role of the Military in Enforcing the Rule of Law 9 (Apr. 10, 2001) (unpublished U.S. Army War College Strategy Research Project, *available at* http://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA390621) (discussing Somalia and noting that "[t]he conflicting UN purposes, the lack of Somali government consent because a government did not exist, the existence of a collapsed state, and the promise of the UN and US to 'rebuild the state' were part of the recipe for disaster"). Coyne further elaborated on how the initial U.S. failure in Haiti ultimately led to its re-intervention: "The departure of the US military in 1934 was hailed as Haiti's second emancipation. Subsequent history, however, showed the failure to stabilize the political system by improving public administration resulted in the US military returning 60 years later." *Id.* at 6.

[12] Secretary of Defense Robert M. Gates, *Beyond Guns and Steel: Reviving the Nonmilitary Instruments of American Power*, MIL. REV., Jan.–Feb. 2008, at 2, 3 ("The end of the Cold War, and the attacks of September 11, marked the dawn of another new era in international relations—an era whose challenges may be unprecedented in complexity and scope."); Lieutenant General Peter W. Chiarelli & Major Stephen M. Smith, *Learning from Our Modern Wars: The Imperatives of Preparing for a Dangerous Future*, MIL. REV., Sept.–Oct. 2007, at 2, 3 ("We must also broaden our scope to include imperatives across our government—imperatives that will help us prepare for a future in which we will almost certainly encounter situations of equal or greater complexity than those we face today."). These thoughts echo the 2006 National Security Strategy:

> The goal of our statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system. This is the best way to provide enduring security for the American people.

beyond,[14] the question becomes: how has the United States fared in its nation-building[15] efforts to date in post-conflict societies?

> Achieving this goal is the work of generations. The United States is in the early years of a long struggle, similar to what our country faced in the early years of the Cold War. The 20th century witnessed the triumph of freedom over the threats of fascism and communism. Yet a new totalitarian ideology now threatens, an ideology grounded not in secular philosophy but in the perversion of a proud religion. Its content may be different from the ideologies of the last century, but its means are similar: intolerance, murder, terror, enslavement, and repression.

OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2006) [hereinafter 2006 NSS]; *see also* FM 3-0, *supra* note 7, at viii ("America is at war and should expect to remain fully engaged for the next several decades in a persistent conflict against an enemy dedicated to U.S. defeat as a nation and eradication as a society."). Field Manual 3-0 continues that the "conflict cannot be won by military forces alone; it requires close cooperation and coordination of diplomatic, informational, military, and economic efforts." *Id*. It lists eight "trends that will affect ground force operations," to include "globalization," "technology," "demographic changes," "urbanization," "resource demand," "climate change and natural disasters," "proliferation of weapons of mass destruction and effects," and "failed or failing states." *Id*.

[13] Not all agree that the United States must succeed or intervene in the large majority of failed or failing states, only those that may potentially harbor terrorists and thereby present a threat to the United States.

> History is awash in failed states, but only a handful have posed a serious problem for American security. A few civil wars have given impetus to jihadism, but it does not follow that the United States should join these conflicts, even in the Middle East. The principal interest the United States has in lawless states is to prevent a government from taking power that will give refuge to terrorists aiming to attack our country.

Benjamin H. Friedman et al., *Learning the Right Lessons from Iraq*, POL'Y ANALYSIS NO. 610 (CATO Inst., Wash. D.C.), Feb. 13, 2008, at 13. While Friedman's argument has a certain allure, it neglects the complexities of globalization in which terrorists networks can export their beliefs, or for that matter their entire organization, from a region of the world that has become impermissive to one that has become permissive due to the tolerance of the host-government or alternatively the government's inability to control its own territory. Therefore, while a failed state may seem momentarily innocuous, over time it will likely become a breeding ground for terrorists unless conditions are improved.

[14] JAMES DOBBINS ET AL., THE BEGINNERS GUIDE TO NATION-BUILDING vi (2007) ("Western governments thus increasingly accept that nation-building has become an inescapable responsibility."); *see also* Martin J. Gorman & Alexander Krongard, *A Goldwater-Nichols Act for the U.S. Government: Institutionalizing the Interagency Process*, JOINT FORCES Q., 4th Quarter 2005, at 51, 52.

Unfortunately, the United States' stability and reconstruction track record in Afghanistan and Iraq has proven that the congressional framework established for the executive branch by the National Security Act of 1947,[16] its amendments in 1949,[17] and the Goldwater-Nichols Act of 1986[18] are insufficient to achieve our strategic objectives.[19] Moreover,

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> Globalization, technological advances, and even American international preeminence have caused problems to meld and fuse together—sometimes purposefully, other times by chance. While past problems were complex, today, due to globalization, the communications revolution, and the ease of travel, there is an element of time compression that allows for this complexity and conflation to increase much faster. In addition, beyond the speed at which conflation occurs, the consequences of failing to address these problems both quickly and comprehensively are more severe. In today's international environment, the proliferation of weapons of mass destruction (WMD), the potential for economic disruption, the possibility of massive migration, and the rise of cyber threats raise the stakes . . . .

Id.; Chiarelli & Smith, *supra* note 12, at 3 (quoting General Charles C. Krulak) ("The rapid diffusion of technology, the growth of a multitude of transnational factors, and the consequences of increasing globalization and economic interdependence have coalesced to create national security challenges remarkable for their complexity . . . .").

[15] Coyne describes nation-building as follows:

> Peace building, also known as "nation-building," involves dealing with failed states after resistance is overcome. Occurring in the post conflict stage of a failed state, it seeks to rebuild basic civil infrastructure, governmental institutions, and procedures different from those that existed prior to the conflict/strife. It is during this type of operation that additional duties are generated and thrust upon the military. These include disarming the former combatants, training security personnel, monitoring elections and reforming or strengthening governmental institutions.

Coyne, *supra* note 11, at 2.

[16] Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

[17] National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578.

[18] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.).

[19] *See* Lieutenant Colonel Floyd A. McKinney, Interagency Coordination: Picking-Up Where Goldwater-Nichols Ended 1 (Mar. 15, 2006) (unpublished U.S. Army War College Strategy Research Project, *available at* www.strategicstudiesinstitute.army.mil/pdffiles/Ksil422.pdf ("This suggests that in present form, the U.S. Government, and specifically the [National Security Council], may be ill-equipped to effectively deal with the 21st century challenges confronting the United States."); Gabriel Marcella, *National Security and the Interagency Process: Forward into the 21st Century*, *in* ORGANIZING FOR NATIONAL SECURITY 163, 189 (Douglas T. Stuart ed., 2000) ("It is time to move away from a system

an analysis of nation-building efforts prior to these two conflicts reveals an inconsistent track record where lessons learned are shortly thereafter forgotten within the executive branch until world events once again cause the cycle to repeat itself.[20] Driven primarily by the recent lackluster results of U.S. operations in Iraq and Afghanistan,[21] and in part by variable U.S. stabilization and reconstruction efforts over time,[22] two distinct schools of thought have emerged as to how best to ensure future successes in these complex nation-building enterprises. Notably, neither model is concerned with whether the beneficiary is viewed as the United States or the host nation.

Rule of law theorists or scholars comprise the first of these schools of thought. An examination of the theorists reveals the necessity for a uniform definition and application of the rule of law across the U.S. government if the United States is actually to achieve the rule of law in failed or fragile states. The second school of thought, consisting of

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designed for the problems of 1947 toward one that is appropriate to the challenges of the next century."); William A. Navas, Jr., *The National Security Act of 2002*, *in* ORGANIZING FOR NATIONAL SECURITY 231 (Douglas T. Stuart ed., 2000) (arguing for a major reform of the national security system pre-US intervention in Iraq); *see also* Kelly, *supra* note 6 (arguing for the creation of a "deployable international civil service" to offset the significant operational burden placed on the military); Garamone, *supra* note 3 (discussing General Peter Pace's suggestion for a Goldwater-Nichols-like reform of U.S. agencies).

[20] *See* DOBBINS ET AL., *supra* note 14, at iii–vii (providing an overview of the ebbs and flow in U.S. dedication to and relative performance in nation-building missions from the Cold War through the present). In the context of military downsizing following victory in war, Secretary Gates characterized the situation as follows:

> One of my favorite lines is that experience is the ability to recognize a mistake when you make it again. Four times in the last century the United States has come to the end of a war, concluded that the nature of man and the world had changed for the better, and turned inward, unilaterally disarming and dismantling institutions important to our national security—in the process, giving ourselves a so-called "peace" dividend. Four times we chose to forget history.

Gates, *supra* note 12, at 3.

[21] Conditions in Iraq have significantly improved since I wrote this article, while those in Afghanistan have conversely deteriorated. However, the dilemma of how the U.S. government should organize its instruments of national power to bring about a society marked by the "rule of law" remains elusive and problematic. Iraq has made it clear that security legitimated through the use of host-nation forces is essential to building the rule of law.

[22] *See generally* Coyne, *supra* note 11 (discussing U.S. military role in peacekeeping operations from the Civil War forward).

military strategists, highlights the failures of the national security apparatus in achieving highly integrated, coordinated, and successful interagency effort in today's complex contingency operations leading to the conclusion that the instruments of national power must be overhauled. I propose that the United States' successful implementation of the rule of law in failed or fragile states requires the merger of these two schools of thought. To accomplish this merger, I first draw on the rule of law theorists to propose that the United States universally adopt the United Nations' (U.N.) definition of the rule of law in all its operations. Second, to create an organizational entity capable of adopting and "synergistically"[23] applying this definition in an operational setting, I draw on the military strategists' suggested overhaul of the national security apparatus and propose a revision of that apparatus tailored to accomplish the rule of law objective.

Part II of this article analyzes the various definitions and descriptions of the rule of law, including those espoused by U.S. government agencies, to conclude that the rule of law must be seen as a process. The formal and substantive components of the rule of law must be co-equally pursued from the inception of the intervention onward, with the ultimate goal of a host nation population "buy in" that results in the accomplishment of pre-defined ends.[24] Further, to solve the "problem of knowledge"[25] with the definition and implementation of rule of law, there must be a single, harmonious definition of the means and goals of any U.S. sponsored rule of law program.

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[23] *See infra* notes 125–53 and accompanying text (defining and discussing a "synergistic" approach to the establishment of the rule of law).

[24] *See infra* notes 19–196 and accompanying text.

[25] Thomas Carothers, *The Problem of Knowledge* (2003), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15 (Thomas Carothers ed., 2006). Carothers broadly describes the problem of knowledge as follows:

> The problem of knowledge in rule of law promotion can be considered as a series of deficits at various analytical levels, descending in generality. To start with, there is a surprising amount of uncertainty about the basic rationale for the rule of law promotion. Rule of law practitioners know what the rule of law is supposed to look like but in practice they are uncertain as to what the essence of the rule of law is.

Id. at 16–17; *see infra* notes 76–80 (generally discussing the "problem of knowledge").

As part of this analysis, Part II introduces the first of the two schools of thought—rule of law theorists. I label the first school of thought as theorists because they tend to focus on how to describe or define the rule of law, how those definitions or descriptions can be realized within a society, and the potential impact particular descriptions or definitions have on the sustainability of the rule of law in a given society.[26] Unfortunately, none of the theorists translate their respective definitions and descriptions into concrete courses of action that actually achieve rule of law on the ground.[27] At best, subscribers suggest that greater U.S. and international interagency coordination is needed to achieve a society "culturally committed"[28] to the rule of law.[29]

Part II concludes by attempting to solve the "problem of knowledge" for U.S. government agencies. I propose in this section that the United States adopt the U.N. definition of the rule of law across all government agencies as a baseline that is synergistically tailored and applied to

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[26] *See, e.g.*, DOBBINS ET AL., *supra* note 14, at iii–vii; STROMSETH ET AL., *supra* note 8; Rosa Brooks, *From Autocracy to Democracy: The Effort to Establish Market Democracies in Iraq and Afghanistan: Panel 1: Establishing the Rule of Law*, 33 GA. J. INT'L & COMP. L. 119 (2004); Carothers, *supra* note 25; Rachel Kleinfeld, *Competing Definitions of the Rule of Law* (2005), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006); Richard H. Fallon, Jr., *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and Its Place in Development Theory and Practice*, 10 YALE H.R. & DEV. L.J. 178 (2007); Captain Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92 (2006); Kevin H. Govern, "Rechtstaat" Aspirations Versus Accomplishments: Rethinking Recent Rule of Law Efforts in Iraq (2007) (unpublished presentation at the 2007 Barnes Symposium at the University of South Carolina Law School, Columbia South Carolina) (on file with author).

[27] *See infra* notes 49–84, 136–37 and accompanying text. *But see* Tasikas, *supra* note 7, at 55–58 (examining rule of law implementation in Afghanistan and proposing a rule of law "joint command"). While Tasikas's proposal is a step in the right direction it fails to go far enough, and akin to the other rule of law theorists, he fails to take into account the wide-ranging calls for reformation by the military theorists.

[28] STROMSETH ET AL., *supra* note 8, at 75–76 ("*Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper*."); *see also* DOBBINS ET AL., *supra* note 14, at 88 (echoing Stromseth very closely); *cf.* FM 3-0, *supra* note 7, para. 1-33 ("People base their actions on the perceptions, assumptions, customs, and values. Cultural awareness helps identify points of friction within populations, helps build rapport, and reduces misunderstandings. It can improve a force's ability to accomplish its mission and provide insight into individual and group intentions.").

[29] *See generally* authorities cited *supra* note 24.

various failed and fragile states.[30] Substantively robust, this definition is capable of producing a "cultural commitment"[31] by the host-nation if properly pursued from the planning stages of an intervention onward. As importantly, the substantive elements of this definition are critical to any U.S. definition of the rule of law because without them, there can be rules and institutions that create the illusion of the rule of law, but that nonetheless produce regimes inconsistent with U.S. national policy objectives.[32] Additionally, because this definition has much in common with the various descriptions and definitions offered by a number of U.S. agencies, a shift to its uniform application should not be institutionally overwhelming.[33]

Part III discusses in detail the inadequacies of the current national security framework to achieve a robust and substantive definition of the rule of law that is uniformly defined and synergistically applied across agencies. By comparison to the deficiencies within the U.S. Government and the DOD that necessitated the National Security Act of 1947, its amendments in 1949, and the Goldwater-Nichols National Defense Reorganization Act of 1986, I argue that National Security Presidential Directive (NSPD) 44[34] and the establishment of the Office of the Coordinator for Reconstruction and Stabilization[35] are inadequate to

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[30] *See infra* notes 165–96 and accompanying text (discussing "a synergistically applied U.N. definition"). In this regard, my approach is similar to that advocated by Jane Stromseth, David Wippman, and Rosa Brooks, leading theorists on the rule of law. *See generally* STROMSETH ET AL., *supra* note 8.

[31] STROMSETH ET AL., *supra* note 8, at 75–76.

[32] For example, Vali Nasr describes how elections in Iraq that resulted in a Shia Islam rise to power sparked similar electoral movements by Hezbollah in Palestine as well as Lebanon. VALI NASR, THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE 231–40 (2007). Even in Iraq itself, there exists the possibility that an elected government, if it and the population have not bought into a robust, substantive definition of the rule of law, could migrate toward a much closer relationship with Iran, a country with a history of human rights abuses that has been regionally empowered by the U.S. invasion of Iraq. *See id*. at 211–26 (discussing Iran's post-U.S. invasion rise to power and the country's ability to influence events in Iraq).

[33] *See infra* notes 187–94 and accompanying text.

[34] NATIONAL SECURITY PRESIDENTIAL DECISION DIRECTIVE/NSPD 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION (Dec. 7, 2005) [hereinafter NSPD 44].

[35] *Id.*; *see also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCH., U.S. ARMY, RULE OF LAW HANDBOOK 22–23 (July 2007) [hereinafter ROL HANDBOOK] (providing brief overview of NSPD-44 and the Office of the Coordinator for Reconstruction and Stabilization).

produce lasting changes.[36] The only viable means of achieving the successful implementation of the rule of law in failed or fragile states is a robust coordinated interagency planning and implementation process. It is a full spectrum process that brings the weight of each agency's critical expertise at critical stages of the intervention and the establishment of the rule of law process. Part III concludes that because the existing national security apparatus is incapable of producing this highly coordinated robust effort, the national security apparatus must be fundamentally overhauled if the United States is to successfully meet the challenges of today and tomorrow.

To support my argument, I rely on and indirectly introduce the second of the two schools of thought, which I label military strategists. The military strategists acknowledge the national security objective, the complexities of the situation in Iraq, Afghanistan, and the broader global community, and the inadequacy of organization of the U.S. national security apparatus to address the problems associated with post-conflict stabilization and reconstruction operations due to a lack of unified interagency planning and action.[37] After providing some examples of how a lack of interagency coordination adversely impacts operations on the ground, these strategists tend immediately to delve into a proposed reorganization of the national security apparatus.[38] At best, military strategists dissect the problem while only assuming input from a non-DOD agency would favorably impact a situation. They fail to delve extensively into the breadth, type, or depth of expertise possessed by these other agencies and how a coordinated application and synchronization of efforts might shape future outcomes. For example, within the broader context of stability and reconstruction operations, these strategists do not consider in detail how input from rule of law theorists can and should influence the shape of the new organizations they propose.[39]

Part IV formally introduces the military strategists. Drawing on the discussion of the problems with the existing national security apparatus

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[36] I also conclude that the yet to be fully developed and implemented Department of State Interagency Management System is similarly insufficient to achieve enduring success. *See infra* notes 265–82 and accompanying text.

[37] *See, e.g.*, Collins, *supra* note 2, at 11; Gorman & Krongard, *supra* note 14, at 52 ; Naler, *supra* note 3, at 27; Mitchell J. Thompson, *Breaking the Proconsulate: A New Design for National Power*, PARAMETERS, Winter 2005, at 62; McKinney, *supra* note 19.

[38] *See generally* authorities cited *supra* note 37.

[39] *See infra* notes 292–342 and accompanying text.

as described in Part III, Part IV sets forth the various military strategist proposed revisions to the national security apparatus. Modeled after the National Security Act of 1947[40] and the Goldwater-Nichols Act of 1986,[41] the proposed revisions call for major changes at the strategic and high-operational or combatant command level that are accompanied by significant changes to government personnel policies and education systems.[42]

Finally, Part V joins the military strategists with the rule of law theorists to propose a congressional revision of the national security apparatus. The proposed apparatus is tailored to the level of interagency effort necessary to synergistically apply the robust and substantive U.N. definition of the rule of law to accomplish U.S. national security objectives in failed or fragile states. Both the strategists and the theorists share a common ground—an acknowledgement that the military alone is not the ideal government agency to accomplish post-conflict reconstruction and stabilization operations.[43] The dilemma: military strategists are from Mars, and rule of law theorists are from Venus.[44] The military strategists see the problem and immediately spring into action to find the solution. The rule of law theorists see the problem, talk about the problem, talk about the problem some more, and then ask that everyone work together to fix the problem, but never seem to get around to actually proposing a concrete solution to the problem. Ironically,

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[40] Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.).

[41] Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

[42] *See infra* 292–342 and accompanying text.

[43] *See, e.g.*, DAVID GALULA, COUNTERINSURGENCY AND WARFARE: THEORY AND PRACTICE 88 (Hailer Publishing 2005) (1964); STROMSETH ET AL., *supra* note 8, at 143–45; Brooks, *supra* note 26, at 128; Coyne, *supra* note 11, at 13–15; Friedman et al., *supra* note 13, at 1, 9; Gorman & Krongard, *supra* note 14, at 51; Michael J. Totten, *The Final Mission, Part I* (Jan. 27, 2008), http://www.michael totten.com/archives/2008/01/. *But see* John A. Nagl & Paul L. Yingling, *New Rules for New Enemies*, ARMED FORCES J., Oct. 2006 (arguing that nation-building is a proper task for Soldiers).

[44] I originally based my reference to Mars and Venus on GRAY, *supra* note 1. Gray characterizes men as more solution oriented, woman as more discussion and feeling oriented. By analogy, the strategists are solution oriented, hence from Mars, while the theorists are discussion oriented, hence from Venus. Subsequently, I learned that Colonel Rickey L. Rife applied the same metaphor to describe differences between the Departments of Defense and State. His metaphor is even more apt to my comparison between rule of law theorists and military strategists in that in many ways, rule of law theorists operate in similar fashion to his descriptions of the Department of State. *See* Rife, *supra* note 1.

neither appears to know that the other exists. Not one military strategist directly references or cites a rule of law theorist; in turn, not one rule of law theorist directly cites or references a military strategist. The same barrier-inducing stovepipe structure between the military and civilian agencies in the field has reproduced itself in academia. This article seeks to introduce the two as the opening salvo in a dialogue that ultimately leads to necessary organizational reform, reform which all appear to agree upon, at least in theory.

The synthesis of a substantive description of the rule of law with a Goldwater-Nichols type overhaul of the national security apparatus is the best means of accomplishing the national security objective of building enduring democracies or stable law-abiding countries from failed or fragile states. Without one, the other will fail, as reflected even in the debate between the rule of law theorists and military strategists as to how best to achieve success in Iraq, Afghanistan, and beyond. Without the underpinning of the rule of law theorists, the dramatic changes called for by the strategists may lack sufficient weight to warrant action and, more importantly, risk creating a U.S. institutional framework inadequate to move from a failed or fragile state to a state marked by a "robust," "substantive,"[45] adherence to the rule of law. Without the theorists, any U.S. institutional changes may only be geared to achieve pyrrhic victories, such as the establishment of a "thin," institutionally focused, "formal" rule of law.[46] Like the seed that lands on the rock, these fledgling states will initially appear to be successes only to wither in the months and years to follow.[47] Similarly, without the support of the military strategists, rule of law theorists will remain just that—theorists—failing to explain how even a "synergistic approach"[48] to the rule of law can be practically put into action. Mars must therefore align with Venus. The U.S. instruments of national power must be fundamentally overhauled.

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[45] STROMSETH ET AL., *supra* note 8, at 70–76.
[46] *Id.* at 56–84.
[47] *Luke* 8:1-15 ("Those on the rock are the ones who receive the word with joy when they hear it, but they have no root. They believe for awhile, but in the time of testing they fall away.").
[48] STROMSETH ET AL., *supra* note 8, at 56–84.

II. The Rule of Law: If We Might "Know It When [We] See It,"[49] Shouldn't We All Be Looking at the Same Thing?

Rule of law is here, rule of law is there, rule of law is everywhere. The rule of law has become ubiquitous to the point of becoming slippery.[50] Akin to eyewitness testimony at a trial, while most persons can generally agree on what they witnessed as being the rule of law, their accounts of what it looks like and how it came to be are as varied in number as there are eyewitnesses. Through an examination of the numerous eyewitness accounts of the rule of law,[51] to include those of U.S government agencies,[52] it becomes evident that for rule of law to achieve its promise of stabilized societies, even democracy in the eyes of some, there must be a centralized authority capable of coordinating the extraordinarily diverse agencies and actors involved in accomplishing this mammoth undertaking. For while everyone talks the rule of law, attempts to define the rule of law, argues the rule of law is the answer, and criticizes the rule of law, no one translates all of these concepts and ideas into a concrete, comprehensive, and actionable plan that actually results in the rule of law.[53]

The need for a centralized authority first presents itself upon consideration of the diverse definitions and descriptions of the rule of law among theorists themselves. For example, some theorists advocate a

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[49] *Id.* at 56.

[50] *See infra* notes 66–85 and accompanying text (discussing that despite universal agreement on the benefits of the rule of law, no one can really agree on what it is or how to achieve it).

[51] *See infra* notes 85–153 and accompanying text (discussing the various definitions and descriptions of rule of law theorists).

[52] *See infra* notes 154–64 and accompanying text (discussing the implementation of rule of law among U.S. government agencies, to include their definition, if any, of what the rule of law is and how to achieve it).

[53] As one scholar observed:

> It would not be very difficult to show that the phrase "the Rule of Law"' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Kleinfeld, *supra* note 26, at 31 (quoting Judith N. Shklar, *Political Theory in the Rule of Law*, *in* IDEAL OR IDEOLOGY? 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987)). *See generally, e.g.*, STROMSETH ET AL., *supra* note 8; Carothers, *supra* note 25; Kleinfeld, *supra* note 26.

"formal," "minimalist" or "thin" approach to the rule of law.[54] These theorists emphasize the rule of law's "formal and structural components, rather than the substantive content of the laws."[55] In contrast, substantive rule of law theorists acknowledge the importance of the laws' structure and components, but "insist[] that the true rule of law also requires particular substantive commitments: to human rights, for instance."[56] Some of these theorists, sensing the great divergence of opinion on what the rule of law is and how to measure it, have recently categorized the various descriptions and definitions of the rule of law and attempted to synthesize them into a more comprehensive or synergistic approach that emphasizes means and ends.[57]

Unfortunately, this disparity of how to define or describe the rule of law transcends these scholarly articles and manifests itself within various U.S. agency approaches to the rule of law, for example, the U.S. Agency for International Development's (USAID) approach compared to that of the DOD.[58] As one of these theorists notes, "[a]lthough some practitioners harbor no doubts and promote the rule of law abroad with a great sense of confidence, most persons working in the field openly recognize and lament the fact that very little really has been learned about rule-of-law assistance relative to the extensive amount of on-the-ground activity."[59] A "problem of knowledge"[60] as to what rule of law is—beyond "I know it when I see it"[61] and it is a good thing—and how to practically achieve it hinders the rule of law's successful development in countries where it is lacking or nonexistent.

From a national policy perspective, there must be a centralized authority for the rule of law to be realized in a post-conflict or fragile state. This centralized authority must, in coordination with subordinate

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[54] *See, e.g.*, Ringer, *supra* note 26; *see also infra* notes 96–105 and accompanying text.
[55] STROMSETH ET AL., *supra* note 8, at 76.
[56] *Id.* at 71; *see infra* notes 106–14 and accompanying text (discussing the substantive approach).
[57] *See* STROMSETH ET AL., *supra* note 8, at 80 (advocating a synergistic approach); *see also* Kleinfeld, *supra* note 26, at 31 (advocating that rule of law be defined and its success measured by pre-articulated ends); Ringer, *supra* note 26, at 207 (emphasizing that rule of law should be seen as a "dynamic" "means of development" rather than a "fully fledged end" because the "ends of development shift over time, as developing societies begin to define their own goals for themselves").
[58] *See infra* notes 154–64 and accompanying text.
[59] Carothers, *supra* note 25, at 15.
[60] *Id.*
[61] STROMSETH ET AL., *supra* note 8, at 56.

actors and agencies, arrive at a generally applicable universal definition of the rule of law that incorporates stated goals and the particular means to achieve those goals. This central authority must define the mission or goal of rule of law operations. Moreover, this centralized authority and the supporting organizational infrastructure must also be flexible enough to vary the definition, goals, and methods to accommodate the panoply of cultures and societies in which it will operate.[62] Beyond these logistical concerns, in defining the mission or goal, this centralized authority must adopt a substantively infused definition of the rule of law that results in a host-nation society "culturally committed"[63] to its continued development. Only then may U.S. policy goals, such as a stable society that abides by the rule of law, be achieved. Toward this end, in Part II.E, I argue that the United States should adopt and synergistically[64] apply the U.N. definition of the rule of law as a baseline for all U.S. government agencies when planning for and actually intervening in failed or fragile states.[65]

A. The Obvious—No One Can Really Agree on What It Is

In any scholarly discussion on the rule of law, it is amazing how common it is to hear the following refrain —no one knows what the rule of law really is, except that "we *do* know it when we see it, and we most certainly know it when we *don't* see it."[66] In chameleon fashion, its definition has been considered sufficiently vague and elusive so as to spark comparisons to the "proverbial blind man's elephant."[67] The rule of law may be everything and anything depending on who is defining it and for what purpose—"a trunk to one person, a tail to another."[68] This malleability results in groups as disparate as economic-oriented entities,[69]

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[62] *See infra* notes 154–64 and accompanying text (discussing the necessity for a centralized authority).
[63] STROMSETH ET AL., *supra* note 8, at 310–46 (discussing the creation of "rule of law cultures").
[64] *See infra* notes 125–53 and accompanying text (discussing the synergistic approach).
[65] *See infra* notes 165–96 and accompanying text.
[66] STROMSETH ET AL., *supra* note 8, at 57.
[67] Kleinfeld, *supra* note 26, at 32.
[68] *Id.*
[69] STROMSETH ET AL., *supra* note 8, at 58–59. Stromseth explains the embracement of the rule of law by these economic interests, such as the World Bank and multinational corporations, as follows:

international and national security experts,[70] military personnel,[71] and human rights advocates[72] embracing the rule of law as central in attaining their respective goals, however divergent their interests may otherwise be.[73] All "share the basic assumption that the rule of law is central to [a]

> Most in the economic development and corporate communities assume that the rule of law entails or produces sensible, intelligible regulations, effective dispute resolution mechanisms, and a predictable, fair legal framework in which property interests can be effectively protected. Thus, for those concerned with the creation of a stable, favorable business climate and with new investment and market opportunities, the rule of law is often conceptualized as a necessary prerequisite.

Id.

[70] *Id.* at 60 ("[A]lthough the roots of terrorism are complex, misery and repression create fertile breeding grounds for terrorist recruiters. If the rule of law is necessary to economic growth and to eliminating egregious human rights abuses, then by extension the rule of law plays a key role in eliminating the conditions that give rise to violence and terror."). Stromseth's line of reasoning echoes that in the 2002 and 2006 National Security Strategies. *See, e.g.*, 2006 NSS, *supra* note 12, at 1 ("The goal of our statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system. This is the best way to provide enduring security for the American people.").

[71] *See* Gates, *supra* note 12, at 4 (stating that military success alone in Iraq and Afghanistan is "not sufficient to win"); ROL HANDBOOK, *supra* note 35, at 3–4 (outlining the importance of rule of law efforts to the conduct of stability operations).

[72] STROMSETH ET AL., *supra* note 8, at 59 ("To human rights advocates, where the rule of law is absent, human rights violations flourish . . . . Promoting the rule of law thus seems to most human rights advocates like a critical component of protecting fundamental human rights.").

[73] *Id.* at 58–60. Another rule of law theorist has similarly characterized the susceptibility to perceive the rule of law as an elixir to multiple ailments:

> "One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond the Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political, and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law. Indeed, whether it's Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course."

Ringer, *supra* note 26, at 179 (quoting Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.–Apr. 1998, at 95).

stable and modern democratic society."[74] As a result, "the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement on precisely what it means."[75]

The vagueness associated with the definition and implementation of rule of law projects has best been described as a "problem of knowledge."[76] All agree it is a good thing, no different than "apple pie and ice cream,"[77] yet its elusiveness thwarts efforts to define and implement it. From theorists to military practitioners, all have encountered the same dilemma—a "problem of knowledge."[78] The dilemma lies in that the rule of law appears to be an interdisciplinary mixture that encompasses philosophy, law, behavioral sciences, economics, and politics,[79] which when blended with a fair amount of art and luck in the implementation, produces a law-abiding, stable society

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[74] STROMSETH ET AL., *supra* note 8, at 60.

[75] Stigall, *supra* note 26, at 93 (citing BRIAN Z. TAMANAHA, ON THE RULE OF LAW 5 (2004)); *see also* STROMSETH ET AL., *supra* note 8, at 56–57 ("In the foreign policy world, most policymakers and practitioners take it for granted that the rule of law is something everyone needs in post-conflict and post-intervention societies, something that is clearly worth pursuing . . . even in the absence of a precise and agreed-on definition.").

[76] Carothers, *supra* note 25, at 5. Carothers described the problem as follows:

> When rule-of-law aid practitioners gather among themselves to reflect on their work, they often express contradictory thoughts. On the one hand they talk with enthusiasm and interest about what they do, believing that the field of rule-of-law assistance is extremely important. Many feel it is at the cutting edge of international efforts to promote both development and democracy abroad. On the other hand, when pressed, they admit that the base of knowledge from which they are operating is startlingly thin. As a colleague who has been closely involved in rule-of-law work in Latin America for many years said to me recently, "we know how to do a lot of things, but deep down we don't really know what we are doing."

Id.

[77] STROMSETH ET AL., *supra* note 8, at 58.

[78] Carothers, supra note 25, at 5; *see, e.g.*, ROL HANDBOOK, *supra* note 35, at 4 ("From an operational standpoint, any approach to actually *implementing* the rule of law as part of stability operations must take into account so many variables—cultural, economic, institutional, and operational—that it may seem futile to seek a single definition for the rule of law or how it is to be achieved.").

[79] *See* ROL HANDBOOK, *supra* note 35, at 4 (describing rule of law as based as much in philosophy as law); *see also* STROMSETH ET AL., *supra* note 8, at 75 ("'[*P*]*romoting the rule of law' is an issue of norm creation and cultural change as much as an issue of creating new institutions and legal codes.*").

from a failed or fragile state. At its core, rule of law theorists and practitioners are striving to find the solution to that indefinable gel that somehow binds societies together under a stable government and congeals it into an intelligible formula. Put another way, they are attempting to understand the foundational elements that generate a meeting of the minds in the "social contract" between a government and its people.[80]

Ironically, despite being unable collectively to overcome the "problem of knowledge," rule of law theorists insist that the rule of law is essential to the success of any intervention in a failed or fragile state.[81] Rule of law theorists also agree that the current U.S. and international organizational framework is inadequate to nurture the rule of law in a failed or fragile state. By proposing an ideal rule of law definition from the various competing ones held by the United States and international agencies as well as scholars, the theorists highlight the need for a cohesive approach as the current piecemeal framework is dysfunctional.[82] Whether or not directly stated, for rule of law theorists, the United States must change how it approaches post-conflict reconstruction and stabilization operations to ensure greater interagency coordination from the intervention's inception to its completion. In particular, this approach must emphasize the primacy of civilian agencies during the reconstruction phase once security has been established.[83]

Admittedly, overcoming this "problem of knowledge" to arrive at a working and effective definition of the rule of law has been an incredibly complex and difficult undertaking.[84] Nonetheless, I advocate that it is an undertaking the United States must pursue through the full coordinated

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[80] *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., Penguin Books 1968) (1762).

[81] *See, e.g.*, STROMSETH ET AL., *supra* note 8, at 7 ("[M]ilitary interventions that do not ultimately rebuild the rule of law in post-conflict societies are doomed to undermine their own goals.").

[82] Some authors, such as Stromseth, Brooks, and Wippman, explicitly cite the need for greater interagency coordination and cooperation. *See id.* at 364–67. Other authors tacitly acknowledge this fact by highlighting the need for a more universal definition as opposed to the various competing definitions articulated by government agencies, scholars, international organizations, and states. *See, e.g.*, Stigall, *supra* note 26, at 99–110 (comparing the various U.S. institutional definitions of the rule of law to demonstrate the need for a cohesive approach that adopts a uniform operational formalist definition).

[83] *Compare* STROMSETH ET AL., *supra* note 8, at 351, 364–67, *with* Stigall, *supra* note 26, at 99–110.

[84] *See generally* Carothers, *supra* note 25.

use of all instruments of national power to achieve as much as possible a well-rounded, practical, substantive, and uniform approach to the establishment of rule of law in failed or fragile states.

B. Categorizing Efforts to Define or Describe It

A cursory review of the various scholarly efforts to categorize, describe, or define the rule of law quickly reveals it to be a monumental undertaking, one that could easily fill multiple books, much less a scholarly article. Recognizing this challenge, in this section I introduce the reader to these various efforts to highlight the necessity for the U.S. government to undertake a multiagency study of rule of law theory and thereby arrive at a common, substantive definition of the rule of law that furthers U.S. national policy objectives.

Within the scholarly world, the rule of law can be broken down into three core components: purposes, definitions or descriptions, and approaches and measurement techniques. Purposes speak to the underlying importance or "values" of rule of law to a society.[85] How does the rule of law "serve" or benefit a society?[86] Definitions and descriptions of the rule of law, in turn, flesh out "different ways of conceptualizing"[87] the rule of law to achieve these often unstated purposes or assumed beneficial purposes.[88] For example, definitions seek to identify or characterize core building blocks that a society must possess to achieve the rule of law, to include its purposes. Generally, two competing definitions of the rule of law have evolved: "formal," "minimalist," or "thin," compared with "substantive," "maximalist," or "thick."[89] Lastly, approaches and measurement techniques refer to those means used to accomplish the defined state of a rule of law and assess a given society's establishment of the rule of law. For example, do we establish the rule of law through building courthouses and "legal codes," or do we attempt to bring about an internalization of the rule of law by citizens of the host-nation? Similarly, do we measure the rule of law by

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[85] Fallon, *supra* note 26, at 7.
[86] *Id.*
[87] STROMSETH ET AL., *supra* note 8, at 70 (emphasis removed).
[88] *Id.*
[89] *Id. Compare infra* notes 96–105 and accompanying text (discussing and defining "formal," "minimalist," or "thin" definitions of the rule of law), *with infra* notes 106–14 and accompanying text (discussing and defining "substantive," "maximalist," and "thick" definitions of the rule of law).

counting the number of courthouses and trials, or do we measure it by the society's commitment to the rule of law?[90] These two differing approaches and measurement techniques have come to be referred to as "institutional" or "reformist," and "ends based," respectively.[91]

1. Purposes

The underlying purposes of the rule of law are the least controversial of its three components. Relatively widespread agreement[92] exists that Professor Richard Fallon correctly stated the three bedrock purposes of the rule of law:

> Efforts to specify the meaning of the Rule of Law commonly appeal to values and purposes that the Rule of Law is thought to serve. Three such purposes—against which competing definitions or conceptions can be tested—appear central. First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.[93]

Broken down more "simply," the three core purposes of the rule of law to a society are to provide "security, predictability, and reason."[94] From the perspective of any member of a given society, these three core objectives are difficult to dispute. From the perspective of another society, however, there is a noticeable absence. These purposes are content-neutral and could be achieved in societies many in the West

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[90] STROMSETH ET AL., *supra* note 8, at 75.
[91] Kleinfeld, *supra* note 26, at 32–33, 47; *see also* STROMSETH ET AL., *supra* note 8, at 74–75; *infra* notes 115–24 and accompanying text (discussing the "institutional/reformist" and "ends based" approaches and measurement techniques).
[92] *See, e.g.*, STROMSETH ET AL., *supra* note 8, at 69–70 ("Scholars, philosophers, and lawyers have debated this for centuries, and although there is no one definition everyone agrees upon, it is probably fair to say that most scholarly conceptions of the rule of law at least share a similar sense of the *goals* of the rule of law."); ROL HANDBOOK, *supra* note 35, at 4–5.
[93] Fallon, *supra* note 26, at 7–8.
[94] ROL HANDBOOK, *supra* note 35, at 5.

would consider totalitarian or despotic.[95] Hence, much debate has ensued over how to best define or describe a society that can be said to have achieved these purposes and established the rule of law. At its core, this is a debate about whether something ideal should be added, such as human rights, democracy, or compliance with international law, to include the law of armed conflict. How one resolves this debate will fundamentally influence how he or she defines and describes the rule of law.

2. Definitions and Descriptions

The formalist or "minimalist"[96] conception of rule of law "echoes the Aristotelian precept that there should be 'a government of laws, not men.'"[97] The formalist conception of the rule of law emphasizes the form and sources of laws and the government's compliance with those laws rather than the substantive content of the laws.[98] Professor Fallon adopts a formal conception of the rule of law. For example, he asserted that the following five elements must exist for a state to be characterized as having a rule of law:

> (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
> (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the

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[95] STROMSETH ET AL., *supra* note 8, at 71–72. Stromseth raises these concerns in the context of discussing the "minimalist" approach without directly applying them to the "purposes." *See infra* notes 96–105 and accompanying text (discussing the dangers of content-neutral formalist definitions of the rule of law). However, these concerns appear to apply as equally to "purposes" as they do the "definitions."

[96] STROMSETH ET AL., *supra* note 8, at 71.

[97] *Id.* at 70 (quoting Aristotle).

[98] Stigall, *supra* note 26, at 94. Stigall elaborates on the formalist definition as follows:

> The formalist definition is procedural in nature, viewing the rule of law as a situation in which a government acts in accordance with predetermined rules or laws. The focus of the formalist conception of the rule of law is on the form and source of the laws and the state's conformance therewith. The substance of these laws is of secondary (if any) concern.

Id.

> most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it."
> (3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
> (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
> (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.[99]

Formal conceptions of the rule of law are favored for being clear and objective without the taint of subjective values or morals,[100] to include such seemingly basic values as the fairness and justness of the law's content.[101] Provided there are "specific, observable criteria of the law or legal system" and the government conforms to these criteria, the rule of law may be said to exist under a formalist definition.[102] Due to a formalist conception of the rule of law's content neutrality, it has been viewed as a more easily exported, one size fits all approach.[103] However, for this same reason, the formal conception has often been criticized for being "devoid of moral and ethical content," allowing it to "coexist comfortably with appalling human rights abuses and injustices."[104] "As

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[99] Fallon, *supra* note 26, at 9.

[100] Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html (last visited Aug. 26, 2008).

[101] *Id.* ("Formal definitions thus avoid more subjective judgements [sic], for example, about whether laws are 'fair' or 'just.'").

[102] *Id.*

[103] ROL HANDBOOK, *supra* note 35, at 14 (citing Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709–10 (1991) for the proposition that "formalist goals . . . are less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement on the formal criteria for the rule of law than there is regarding the substantive criteria").

[104] STROMSETH ET AL., *supra* note 8, at 72. Stromseth provided the following scenario to highlight the content neutrality of a formalist definition relative to a substantive definition:

> Imagine, for instance, a state in which a minority group is considered inferior by the majority; duly and democratically passed laws mandate discriminatory treatment for the minority; elected officials obediently enforce the laws. . . . Or, alternatively, consider a state

long as the system is predictable, it is acceptable, even if brutal, for example, 'Yield to merging traffic or you will be tortured.'"[105] Marked by a content neutrality that leads to ease of exportability, the formalist definition of the rule of law remains subject to potential criticism for being morally indifferent.

In contrast to the formal or minimalist conception of the rule of law is the substantive or thick conception of the rule of law. It is labeled thick or substantive because it adds content to a formalist conception of the rule of law, thus leaving behind the potential moral vacuum which characterizes the formalist approach. "A substantive account of the rule of law does not necessarily reject the notion that the rule of law has important structural and formal elements—predictability, universality, nonarbitrariness, and so on—but insists that true rule of law also requires particular substantive commitments: to human rights, for instance."[106] Stromseth, Wippman, and Brooks present an example of a substantive definition of the rule of law:

> The "rule of law" describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial

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> that favors gruesome and harsh punishments for minor crimes: shoplifters are flogged to death; adulterers are publicly stoned.
>
> In either of these hypothetical states (and readers will readily think of real-life examples), the formal elements of most minimalist definitions of the rule of law might well be satisfied. The laws might not be arbitrary; they might be enforced in a consistent fashion; people could plan around them; they might even have been adopted through some fair and democratic voting process. Nevertheless, most of us would consider these states unjust in some fundamental ways, and those who favor more substantive accounts of the rule of law insist that injustice is incompatible with true rule of law.

Id. at 71.

[105] Ringer, *supra* note 26, at 194.

[106] STROMSETH ET AL., *supra* note 8, at 71. Other substantive ideals could include justness, fairness, equality, freedom, and minority rights. *Id*.

> killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.[107]

Self-described as "unabashedly substantive," it is difficult to miss the substantive element of this definition: "human rights norms (such as prohibitions on racial, ethnic, [etc.] . . .)."[108] Therefore, Stromseth's definition of the rule of law is similar to those labeled thick or substantive because they add content to the minimalist or thin definition, usually in the form of stated or unstated moral values.

The relative pros and cons of a substantive conception of the rule of law present a mirror image of the formalist conception pros and cons. Whereas formalist definitions are viewed as "cookie cutter"[109] due to their content neutrality and ease of exportation, the insertion of values into a substantive definition arguably makes it more difficult to "generate support from across the political spectrum."[110] It is therefore considered less exportable. Similarly, while formalist conceptions can be criticized as morally void, substantive conceptions of the rule of law offer the advantage of being generally equated with "something normatively good and desirable."[111] Substantive conceptions have also been criticized in two additional ways. First, they have been criticized as being too viewpoint discriminatory—that is, he or she that holds the power gets to impose the substance.[112] In other words, who decides which ideals or

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[107] *Id.* at 78.
[108] *Id.* at 78–79.
[109] *Id.* at 74.
[110] *Id.* at 72.
[111] *See* Stephenson, *supra* note 100 ("This is appealing, first because the subjective judgement [sic] is made explicit rather than hidden in formal criteria, and, second, because the phrase 'rule of law' has acquired such a strong positive connotation. Many people cannot accept any definition that would allow, even in theory, a repressive or unjust regime to possess the rule of law.'").
[112] STROMSETH ET AL., *supra* note 8, at 71–72. Stromseth characterizes the "vulnerabilities" of a substantive definition of the rule of law as follows:

> Who should decide, for instance, *which* substantive values must be embodied in law for the rule of law to be satisfied? What neutral principle can be invoked to resolve disputes over competing conceptions of justice and rights? Thus, although everyone might agree that Nazi Germany's Jewish laws were horrifically unjust, what about the laws that remain on the books in many countries of the

values should be pursued, and at what point the ideal is achieved?[113] Second, not only does the rule of law "vest the law with responsibility for social justice and distributive equality," but it also "vests lawyers and judges with great power over those same societal objectives."[114] Thus, while a substantive definition solves the potential moral void of the formalist definition by injecting content, it thereby diminishes exportability and potentially creates the appearance of imperialism.

3. Approaches and Measurement Techniques

The final core component or building block of the rule of law concerns how to approach its implementation and measure its achievement. Under the institutional or reformist approach, the rule of law is measured by the number and type of institutions a society possesses,[115] such as courthouses, trials, prisons, and legal codes.[116] As an approach to the rule of law, it seeks to reform the institution without defining a broader end.[117] Typically, reformists or institutionalists focus on the reform or establishment of three primary institutions: laws, judiciary, and "police, bailiffs, and other law enforcement bodies."[118] The danger of the institutional approach to which practitioners are particularly susceptible is that the institutions and reforms to institutions become the end themselves, to the exclusion of any defined goal of the rule of law.[119]

> world that grants women greatly reduced political and social rights? Would it be possible for a state such as Saudi Arabia to continue its policies that discriminate against women but still satisfy the main substantive requirements of the rule of law?

Id.

[113] *Id.*

[114] Ringer, *supra* note 26, at 194.

[115] Kleinfeld, *supra* note 26, at 32–33, 47–54; *see also* STROMSETH ET AL., *supra* note 8, at 74–75.

[116] Kleinfeld, *supra* note 26, at 47–48; *see also* STROMSETH ET AL., *supra* note 8, at 74–75.

[117] Kleinfeld, *supra* note 26, at 32–33, 47–48.

[118] *Id.* at 47–48.

[119] *Id.* at 48–54; *see also* STROMSETH ET AL., *supra* note 8, at 74–75. A Judge Advocate who formerly served in Afghanistan observed a similar phenomenon:

> [B]y focusing only on objective criteria, there is an underlying failure to address whether or not the subjective analysis supports the particular course of action. For example, the objective fact that the

> When the rule of law is implicitly defined by its institutions, rather than its end, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. Practitioners engaged in such institution modeling tend to compare institutions in the country that need to be reformed with their counterparts in developed countries and then provide the resources, skills, and professional socialization to help each local institution approach Western models.[120]

For example, if a substantive end goal is justice, merely building a courthouse does not necessarily result in the ultimate end goal of justice actually being achieved across a society. Institutionalists tend to become so focused on the architectural blueprint for and furnishing of the courthouse that they misconstrue the interim production of the courthouse as being an end in itself, rather than a means to the end of achieving justice.[121]

In contrast to the institutional and reformist approach to the rule of law, which are most often unknowingly embraced by rule of law

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> Iraqi or Afghani Judge has been provided a computer is worthless if the subjective analysis demonstrates that nobody bothered to train him/her on how to use it or that the Courthouse lacks electricity.

E-mail from Major Steven Gariepy, 56th Judge Advocate Officer Advanced Course, The Judge Advocate General's Legal Ctr. and Sch., to Major Tonya Jankunis (Mar. 21, 2008, 12:33 EST) (on file with author).

[120] Kleinfeld, *supra* note 26, at 50–51.

[121] STROMSETH, ET AL., *supra* note 8, at 77. Stromseth provides:

> Many Americans take the value of the rule of law for granted and assume that "if you build it, they will come" applies to courts as much as to baseball fields. But courts and constitutions do not occupy the same place in every culture that they occupy in American (or European) culture, and as a result, efforts to build the rule of law in post-intervention societies can appear irrelevant to the concerns of ordinary people—or, at worst, incoherent, arrogant, and hypocritical.

Id.

practitioners,[122] is the ends-based approach. Under the ends-based approach, the intended ends or goals of the rule of law are first defined, and then the means to achieve them is developed.[123] It is an approach to the rule of law that is more than just establishing institutions. It also seeks to create in the host-nation population a "normative commitment to the project of law itself, a commitment to the orderly and nonviolent resolution of disputes and a willingness to be bound by the outcome of legal rules and processes."[124] With this normative commitment paramount among predefined ends, adherents to this approach view the means—to include institutions—as clay to be kneaded, shaped, molded, and if necessary, reshaped, to ultimately achieve the predefined end, which is a normative commitment. Under the ends-based approach, the ends define the means, not the means the end.

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[122] Kleinfeld, *supra* note 26, at 48. Kleinfeld described the process as follows:

> Yet when practitioners turned these ideas into practice, they inevitably had to simplify such nuanced theoretical concepts. Because programs to build the rule of law are most easily oriented around reforming concrete problems within material things, such as laws or organizations, it was all too easy for means to become conflated with ends and eventually made into ends in themselves.

Id.

[123] *Id.* at 34–36. Kleinfeld defines five of these "rule of law ends" or goals: "government bound by law," "equality before the law," "law and order," "predictable, efficient justice," and "lack of state violation of human rights." *Id*. In contrast, at least one theorist advocates an emphasis on means over ends. "[M]y conviction that the rule of law is part of developments means rather than one of its fully-fledged ends. . . . The ends of development shift over time, as developing societies begin to define their own goals for themselves." Ringer, *supra* note 26, at 206–07.

[124] STROMSETH ET AL., *supra* note 8, at 75 (emphasis removed).

C. A New Wave—The Synergistic[125] Approach

Recognizing the extraordinary confusion in the field concerning the definition and successful implementation of the rule of law, Stromseth, Wippman, and Brooks developed the synergistic approach to building the rule of law through a pragmatic, substantive, ends-based definition.[126] Using their "descriptive and pragmatic"[127] definition provided above,[128] the synergistic approach includes three core elements: First, "it is ends-based and strategic,"[129] meaning that the rule of law "starts with a clear articulation of strategic objectives."[130] Second, it is "adaptive and dynamic,"[131] meaning that it "recognizes the need to build on what is

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[125] Stromseth uses the biological and theological definitions of "synergism" to highlight that building the rule of law is a difficult process with the ultimate goal of affecting individuals, not just institutions. "Synergism, in biological terms, refers to '*the action of two or more substances, organs, or organisms to achieve an effect of which each is individually incapable*.' . . . Borrowing a term from biology is a useful way to remind ourselves that building the rule of law is a profoundly human endeavor." *Id.* at 80–81 (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1233 (2d College ed. 1982)). "Theologically, synergism is *a theory that both human effort and divine grace are needed to achieve regeneration. . . .* Regardless of one's theological views, this meaning of synergism helps serve as reminder of the need for *humility* in efforts to build the rule of law." *Id.* at 81.

[126] *Id.* at 77–84.

[127] *Id.* at 78.

[128] *See supra* note 107 and accompanying text. The authors recognize the limitations inherent in any definition of the rule of law, to include their own.

> It is not intended to stand up to rigorous philosophical critiques or subtle arguments about first-order and second-order rule-making or resolve questions relating to the universality of rights. Instead, this working definition seeks simply to identify *what it is that most policymakers are looking for* when they talk about the rule of law in post-intervention societies.

STROMSETH ET AL., *supra* note 8, at 78.

[129] STROMSETH ET AL., *supra* note 8, at 81.

[130] *Id.* Stromseth elaborated on this strategic goal as follows:

> Improved institutions can help to achieve certain aims of the rule of law—such as securing law and order, or protecting human rights—but the institutions are not the ends in themselves. At the very least, this insight means that reformers should focus clearly on the ultimate goals of building the rule of law and resist an overly narrow concentration on institutions alone.

Id.

[131] *Id.* at 82.

there[132] and move it in constructive directions—and we also recognize that the rule of law is never permanently 'achieved.' It must be continuously and creatively sustained."[133] And third, it is "systemic" and "holistic."[134] In discussing the systemic nature of the synergistic approach, these authors provide the following guidance:

> Appreciating how institutions intersect and operate *as a system* is vital to designing effective and balanced programs for reform. Interveners need to appreciate failures and challenges in the legal system as a whole. They need to understand the interrelationships between the various components and how they impact each other. They need to take a holistic approach to reform, working toward a balanced development of the component parts of a functioning legal system. The priorities in any given situation will depend on the areas of greatest need, with the overall aim of balanced and mutually reinforcing improvements.[135]

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[132] Stromseth continued: "The rule of law cannot be imported wholesale; it needs to be built on preexisting cultural commitments." *Id.* Failing to build on "preexisting cultural commitments" may alienate critical host-nation personnel. As one Iraqi judge stated:

> "Are you familiar with the Code of Hammurabi?" We replied that we knew of the Code of Hammurabi, and he said, "Well, most Americans have never even heard of it. Iraq has an ancient legal culture. We don't need you to come here and tell us about what law is. We invented law. This is the cradle of Western civilization. We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you're not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they're completely immune, there's nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?"

Brooks, *supra* note 26, at 130 (quoting an Iraqi Judge).

[133] STROMSETH ET AL., *supra* note 8, at 82. "The emphasis on adaptive intervention encourages a focus on the perceptions and needs of ordinary people, on the consumers of the law." *Id.* "By noting that the synergistic approach is also dynamic, we mean that the rule of law is always a work in progress. New achievements create new challenges, and efforts to build the rule of law must continually evolve as circumstances change." *Id*.

[134] *Id.*

[135] *Id.*

Of all the rule of law definitions and approaches, this approach appears to be the most flexible, practical, and reality—as opposed to theory—oriented. While these theorists do not propose a concrete solution, their solution has the potential to dovetail neatly with an overhauled national security apparatus to produce a synergistic[136] realization of the rule of law.[137]

Central to the synergistic approach is recognition that for the rule of law to be achieved, the means and ends must result in the "cultural commitment" of the host nation to its sustained development.[138] "Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing."[139] Looking beyond the institutions to the people themselves, the tremendous span of "cultural commitment" required appears truly daunting:

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[136] The biological and theological definition of synergism appears an appropriate remedy to the interagency failures of the U.S. Government in its stability and reconstruction efforts. *See supra* note 125 providing biological and theological definitions of the word synergism.

[137] In fairness to Stromseth, Wippman, and Brooks, their goal was not to propose a concrete solution. Rather, their "definition describes the strategic goals of the rule of law but does not tell practitioners how to achieve these goals. A framework for combining these two must be developed—a framework that can help practitioners link ends and means more efficiently." STROMSETH ET AL., *supra* note 8, at 80; *see infra* notes 292–342 and accompanying text (discussing military strategists proposed overhauls of the national security apparatus); *infra* notes 343–88 and accompanying text (discussing my proposal for an overhaul of the national security apparatus).

[138] For some scholars, the rule of law, to include a cultural commitment, is unachievable in Iraq.

> The functioning of a modern state requires the participation of millions of people who show up for work, pay taxes, and so on. People do these things because they believe in a national idea that organizes the state or because they are coerced. In attempting to build foreign nations, the United States is unable to impose a national idea and our liberalism, thankfully, limits our willingness to run foreign states through sheer terror.

Friedman et al., *supra* note 13, at 9; *see also* Totten, *supra* note 43 (providing the following on-the-ground perspective: "But a gloomy Army soldier I met last summer in Baghdad said something so simple, depressing, and obviously correct that I doubt I will ever forget it. 'Iraq will always be Iraq.'"). While establishing the rule of law may be difficult, and the work of decades rather than months or years, it is a mission the United States has committed itself to undertaking. *See* STROMSETH ET AL., *supra* note 8, at 392 ("In the world we inhabit, there is no other choice.").

[139] STROMSETH ET AL., *supra* note 8, at 310.

> The "building blocks" for the rule of law might be said to be courts, police, prisons, legislatures, schools, the press, bar associations and the like. Of course, unlike the bricks and timber that go into physical structures, the institutional building blocks on which the rule of law depends are themselves made up of human beings, with their own hopes, fears, and attitudes, and this makes creating the institutional aspects of the rule of law as complex as any other venture that relies on mobilizing multiple individuals in a common enterprise.[140]

The challenge of "norm creation"[141] within a failed or fragile state applies with equal weight regardless of whether one is pursuing a formalist or substantive definition of the rule of law.[142] Without "norm creation" and a resulting "cultural commitment," any perceived gains will be temporal and fade as quickly as the intervener's departure.[143]

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[140] *Id.* at 57. As an example of one of the human challenges that must be overcome, the President of the Iraqi High Tribunal observed: "The rule of law has to be seen as more powerful than the rule of fear." Patrick O'Donnell, *Iraqi High Tribunal Judges Visit Case Western Reserve University in Cleveland*, PLAIN DEALER, Jan. 30, 2008, http://www.cleveland.com/news/plaindealer/index.ssf?/base/cuyahoga/1201685572303840.xml&coll=2; *see also* Totten, *supra* note 43 ("Iraqis are not lumps of clay or blank slates that can be hand-molded or written on. They are human beings with their own complex history and culture. Most recently they were the most brutally micromanaged subjects and enforcers of the regime of Saddam Hussein.").

[141] STROMSETH ET AL., *supra* note 8; *supra* note 139 and accompanying text (relating a normative commitment of the host nation population to the cultural commitment of the host nation to building the rule of law).

[142] STROMSETH ET AL., *supra* note 8, at 75 ("For even in its formal sense, the rule of law requires a particular set of cultural commitments. Most fundamentally, even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of rule of law itself . . . .").

[143] *Id.* Several other scholars have arrived at a similar conclusion. For example, as one scholar noted:

> The first principal of development and perhaps the most important is ownership. . . . When ownership exists and community invests itself in a project, the citizens will defend, maintain, and expand the project well after the donors have departed. If what is left behind makes no sense to them, does not meet their needs, or does not belong to them, they will abandon it as soon as aid agencies leave.

Natsios, *supra* note 9, at 7; *see also* Brooks, *supra* note 26, at 131 ("[T]he bottom line is that if one wants to achieve that magical thing—the rule of law—one not only has to create fair, appropriate, and reasonable laws and institutions, one also has to create a widely shared societal commitment to using those laws and institutions."); Ringer, *supra*

While it is apparent that an institutional approach focused on courts, cops, and corrections will fail to result in a "cultural commitment,"[144] even an intervener with the goal of establishing a "cultural commitment" will confront three significant barriers to its attainment. First, and as referenced above, is the history of the host-nation people.[145] For example, the Iraqis' past experience with a brutal regime's reign of terror by government institutions likely impacts their willingness to trust any future government.[146] Second, interveners must tread the fine line between being, or creating the appearance of being, imperialists as opposed to humanitarians or helpful neighbors; that is, they must be

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note 26, at 5 ("For law to be effective and actually change behavior, it must be fully understood and embraced not only by law enforcers but also by those using the law, i.e., its customers.").

[144] *See supra* notes 115–21, 138–43 and accompanying text.

[145] *See supra* notes 131–33, 140 and accompanying text.

[146] *See* Brooks, *supra* note 26, at 132 ("[I]f U.S efforts to reform the Iraqi legal system appear arbitrary, many Iraqis may find it hard to tell the difference between Saddam's rule of law and American rule of law."); Michael J. Totten, *A Plan to Kill Everyone* (Jan. 2, 2008) [hereinafter Totten *Plan*], http://www.michaeltotten.com/archives/2008/01/. Totten's description of the numbing of the Iraqi population is remarkable:

> It was only then that I noticed that none of the Iraqis on the street reacted in any noticeable way to what had just happened. They didn't take cover when we did. We were *all* briefly certain that war had returned to Fallujah. But the Iraqi kids still played in the streets. They did not run and hide. Their parents did not yank them inside. Try to imagine that in an American city.
>
> One of the Marines later told me that military dogs, while they're being trained, are put into rooms with loud speakers. The first half hour of Stephen Spielberg's *Saving Private Ryan*—that terrifying scene where hundreds of soldiers are shot and blown to pieces while storming the beach at Normandy—are played over and over again until the dogs no longer fear the sounds of war.
>
> Iraqis who live in Fallujah have heard more shots fired in anger than I ever will. Machine gun fire has been the soundtrack in that city for a long time. War is just a shot away, but even the children of Fallujah will not budge if breaks out again.

Id.; *see also* Michael J. Totten, *The Dungeon of Fallujah* (Feb. 18, 2008) [hereinafter Totten *Dungeon*], http://www.michaeltotten.com/archives/ 2008/02/ (describing in detail the "'Red Building'" in Suleimaniya: "Before it was liberated . . . resistance fighters and their family members were arrested, interrogated, and sadistically tortured inside its walls. A free standing rape-room with large windows was built just outside.").

cautious not to substitute wholesale their values for those of the host-nation.[147]

Lastly, as will always be the case in post-intervention attempts to establish the rule of law, interveners will have to overcome the creation of a coerced rule of law from the "barrel of a gun"[148] versus the real thing. The rule of law and provision of security presents a "chicken-and-the-egg problem."[149] Though one can debate whether the rule of law leads to security or security to the rule of law, the reality is likely that both are mutually supporting, and that without the other, neither can exist.[150] Unfortunately, the necessity for both creates a security dilemma. Security must exist, but in the process of creating a secure environment, an intervener may inadvertently create a coerced, fleeting adherence to the rule of law.[151] While there may not be a universal solution to this

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[147] Kleinfeld, *supra* note 26, at 52 ("Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws . . . ."); Ringer, *supra* note 26, at 185 ("[T]he citizens of nations experiencing foreign-funded rule of law reforms may become resistant and perhaps even hostile to development initiatives if they feel the rule of law is being used to smuggle in foreign moral, political, and cultural values under the guise of neutrality."); *see also* STROMSETH ET AL., *supra* note 8, at 322–23 (describing the lack of familiarity of U.S. personnel in Iraq with the Iraqi legal system and concluding that "[f]rom the perspective of the [Iraqi] judges, this is sheer arbitrariness and disrespectful of Iraqi legal process. From the perspective of coalition officials, many of whom are U.S. officers with the Judge Advocate General's Corps (JAG), this represents an effort to correct substantive defects in the Iraqi judicial process.").

[148] Brooks, *supra* note 26, at 130 ("How can the U.S.-led coalition in Iraq claim to care about the rule of law when it maintains control—tenuous control—only through overwhelming force and when its actions strike many Iraqis as inconsistent and arbitrary? To put it a little differently, how can you pull the rule of law from the barrel of a gun?").

[149] STROMSETH ET AL., *supra* note 8, at 312 (using this metaphor in a different context).

[150] Brooks, *supra* note 26, at 128 ("[O]ne of the biggest challenges is that the institutions of the rule of law have to be rebuilt at the very same time that security has to be reestablished. Reestablishing security in turn involves both protecting people from physical violence and also ensuring human security in the very broadest sense . . . ."); Natsios, *supra* note 9, at 6 ("Development cannot effectively take place without the security that armed forces provide. And security cannot ultimately occur until local populations view the promise of development as an alternative to violence.").

[151] Brooks, *supra* note 26, at 134–35. Brooks states:

> This paradox that I have talked about—how to bring the rule of law from the barrel of a gun—partly stems from the fact that in Iraq, the face of the guy with the gun and the face of the guy urging the rule of law are one and the same. With almost all the troops and civilians on the ground operating under the auspices of the American military, most Iraqis unsurprisingly find it difficult to distinguish between our claims about legitimate authority and rights and our sheer power.

dilemma, "[w]hen fighting ends or least moderates to the point that security becomes a priority, a critical window of opportunity opens."[152] "'This phase of the intervention should not be squandered because military presence in significant numbers and the initial positive impact on public opinion are of limited duration. The longer an external military force remains deployed on the ground, the more it is apt to be perceived as an occupation army.'"[153] Therefore, the actual orchestration of the intervention must be carefully planned in advance rather than created piece by piece as the campaign unfolds.

D. Reality Reflects the Debate

Unfortunately, rule of law efforts within U.S. agencies so far reflect disparate efforts in need of a centralized authority to dictate the pursuit of a uniform, synergistic approach that results in a normative commitment by the host-nation population to the rule of law. As discussed in various scholarly articles, no agreed upon approach to the rule of law exists across or even within U.S. government agencies.[154] Moreover, civilian agencies charged with the lead in rule of law operations,[155] in particular the DOS, lack the essential resources to complete their mission.[156] As a result of these civilian agency resource deficits, the DOD has assumed the de facto lead in rule of law operations.[157] Without centralized

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Id.

[152] STROMSETH ET AL., *supra* note 8, at 145. "Lord [Paddy] Ashdown, who served in Kenya, Kuwait, Borneo and Northern Ireland, has set out his conviction that an invading force has to establish authority over its captured territory in the 'golden hour' immediately after intervention." Nick Meo & Richard Beeston, *Lord Ashdown Called in to Overhaul Reconstruction of Afghanistan*, TIMESONLINE, Jan. 17, 2008, http://www.timesonline.co.uk/tol/news/world/asia/article3200995.ece.

[153] STROMSETH ET AL., *supra* note 8, at 145 (quoting Robert B. Oakley & Michael J. Dziedzic, *Conclusions*, *in* POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY 509, 535 (Robert Oakley et al. eds., 1998)).

[154] *See, e.g.*, Christopher M. Ford, *The Rule of Law for Commanders*, MIL. REV., Jan.-Feb. 2008, at 50, 51–52.

[155] *See* NSPD 44, *supra* note 34; *see infra* notes 265–82 and accompanying text (discussing the DOS's lead coordinating agency role under NSPD 44).

[156] Chiarelli & Smith, *supra* note 12, at 5; Kelly, *supra* note 6.

[157] Chiarelli & Smith, *supra* note 12, at 5–7 (stating that "like it or not, until further notice the U.S. Government has decided that the military largely owns the job of nation-building"); Gates, *supra* note 12, at 6; Kelly, *supra* note 6. Chiarelli and Smith further observed: "Unless and until there is a significant reorganization of U.S. Government interagency capabilities, the military is going to be the Nation's instrument of choice in nation-building." Chiarelli & Smith, *supra* note 12, at 5–7. In recent publications, the DOD has tacitly acknowledged its prominent role in nation-building. *See* U.S. DEP'T OF

authority definitively refereeing and coordinating interagency actions, the result has been at times piecemeal and/or conflicting rule of law efforts.[158] Additionally, in assuming the lead, the DOD has run head-first into the security dilemma.[159] Looking at Iraqi operations as a whole, it becomes apparent that only a centralized authority which includes augmentation of civilian agency resources can create a rule of law definition and program capable of potentially achieving its realization in Iraq.

Considering that the United States has been engaged in two major nation-building enterprises involving numerous U.S. government agencies since 2001 and 2003, it is inconceivable that it still has not established a common interagency operating definition and approach to

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DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS para. 4.1 (28 Nov. 2005) [hereinafter DODD 3000.05] (establishing stability and reconstruction operations as a core military mission); FM 3-0, *supra* note 7 (making similar recognition).

[158] For example, it has been observed:

> In the United States, for example, "dozens" of agencies participate in post-conflict security, reconstruction, and rule of law efforts. Duplication of effort, confusion, competition for resources, gaps in assistance, mixed messages, and lost time commonly follow. Worse, division among the international actors creates opportunities for spoilers to play different international actors against each other, and even derail assistance efforts.

STROMSETH ET AL., *supra* note 8, at 351. For a discussion of the difficulties created by unclear interagency roles, responsibilities, and authority in the relationship between Combined Joint Task Force-Seven and the Coalition Provisional Authority, see Christopher M. Schnaubelt, *After the Fight: Interagency Operations*, PARAMETERS, Winter 2005–2006, at 47.

[159] The narrative of an embedded reporter accompanying Marines in Fallujah highlights the conflicting nature of military efforts to simultaneously establish security and implement the rule of law:

> I had a hard time imagining that the Marines I walked with had a quiet and secretive plan to kill this guy if all of sudden he raised up an AK-47 from behind the bushes. He was not going to do that. I just knew it. It is very nearly impossible to tell what most Iraqis are thinking when you briefly pass them on the street. Theoretically any one of them could be an insurgent. But there are some I felt safe writing off as potential threats. You can just tell with some people. At least I have the luxury of thinking so when it isn't my job to return hostile fire.

Totten *Plan*, *supra* note 146.

the rule of law.[160] Rather, in the absence of an overarching approach, agencies have been left to fend for themselves.[161] For example, the military has not even articulated a definition of the rule of law applicable across the Defense Department despite publishing a directive and joint publication directly stating that stability and reconstruction operations are one of the military's core missions.[162] Successful stability and reconstruction operations necessarily entail rule of law operations. Therefore, the silence of this directive and publication is disturbing as it leaves the complex goals and definitions of the rule of law[163] to be determined on an ad hoc basis by various elements of command within the DOD.[164] And because this dilemma is not limited to the DOD, the same could be said across all government agencies.

E. A Synergistically Applied U.N. Definition

The successful establishment of a society culturally committed to the rule of law in a failed or fragile state requires the United States to adopt a

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[160] Ford, *supra* note 154, at 51–52; Stigall, *supra* note 26, at 3 ("[T]he United States has yet to adopt a definition of the rule of law. However, there are numerous government entities that focus on the work of the rule of law and rule of law reform. Each entity defines the rule of law differently, depending on the entity's focus.").

[161] STROMSETH ET AL., *supra* note 8, at 69 ("This 'I know it when I see it' quality has some virtues, to be sure: it enables consensus, because it leaves everyone free to interpret the rule of law in his or her own way, with little need to confront or resolve areas of disagreement. But it also permits superficiality and obtuseness that has badly limited the efficacy of many rule of law promotion efforts.").

[162] *See* Ford, *supra* note 154, at 51–52; *see also* DODD 3000.05, *supra* note 157, para 4.1; JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS i (17 Mar. 2006) [hereinafter JOINT PUB. 3-08].

[163] The complex and seemingly hopeless endeavor of defining the goals, definitions, and approaches to the rule of law requires a more centralized response as individual practitioners in the field may be overwhelmed by the task and revert to an institutionalist approach. *See supra* notes 96–105 and accompanying text (describing how practitioners tend to rely on institutional approaches to implementing the rule of law); *see also* ROL HANDBOOK, *supra* note 35, at 4 ("From an operational standpoint, any approach to actually *implementing* the rule of law as part of stability operations must take into account so many variables—cultural, economic, institutional—that it may seem futile to seek a single definition for the rule of law or how it is to be achieved.").

[164] The U.S. Army Judge Advocate General's Corps has recognized the absence of a doctrinal definition of the rule of law and the necessity for policymakers to provide that definition by optimistically stating: "The deployed captain or major who is this *Handbook*'s audience will hopefully be part of an operation that already has a definition of the rule of law—one that has been adopted by policymakers." ROL HANDBOOK, *supra* note 35, at 6.

uniform definition and synergistic approach to the rule of law. I propose that the United States adopt the rule of law definition provided by the former U.N. Secretary General:

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[165]

The greatest strength of this definition is that it is sufficiently substantive to satisfy U.S. policy objectives and simultaneously broad enough to be exportable and tailored to fit the needs of different societies and cultures.

The definition is clearly substantive as it characterizes the rule of law as embracing "human rights,"[166] "equality before the law," "participation in decision-making," and "fairness." As noted above, a strictly formalistic approach to the rule of law could exist in the absence of these substantive values and result in regimes most would consider brutal or totalitarian.[167] However, by incorporating these values, the definition is

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[165] *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616, at 4 (2004).

[166] STROMSETH ET AL., *supra* note 8, at 59. In defining human rights within the context of rule of law, Stromseth provided:

> The human rights-oriented conception of the rule of law involves, at a minimum, due process, equality before law, and judicial checks on executive power, for most human rights advocates regard these as essential prerequisites to the protection of substantive human rights. To human rights advocates, where the rule of law is absent, human rights violations flourish: without the rule of law, arrests and detentions are arbitrary, there is no effective mechanism for preventing torture or extrajudicial execution; individuals or groups may be free to take the law into their own hands in abusive and violent ways, and abuses go unpunished in a climate of impunity.

Id.

[167] *See supra* notes 96–105 and accompanying text.

largely in accord with the U.S. policy objective of establishing viable democracies.[168] For example, although the definition does not explicitly contemplate democracies, its requirement for "participation in decision-making" cannot exist in a totalitarian or dictatorial society. Similarly, although the definition does not explicitly reference gender, race, or religious relations, its incorporation of "equality before the law," if given its natural meaning, includes all of these rights. While admittedly this definition is still subject to the criticism that it is viewpoint-discriminatory and may result in the imposition of the values of the intervener, this critique is in many ways contemplated by the U.S. national security policy.[169] It should not, therefore, be a barrier to the adoption of this definition. Rather, from a U.S. policy perspective, the fact that this definition is so substantively robust argues in favor of embracing it.

By adopting a definition proposed by the former U.N. Secretary General, the United States will mitigate imperialist appearances. "Defining the rule of law in terms of widely accepted international norms therefore allows for the emergence of the concept of the rule of law at an international level without the taint of undue Western influence."[170] In mitigating imperialist tendencies, this definition has three benefits. First, as it is not expressly and solely American in origin and character, coalition partners as well as non-governmental organizations, to include foreign organizations, can more readily share in its adoption as a goal. To the extent pursuit of this definition leads in turn to wider international and nongovernmental support, appearances of imperialism as a barrier to the rule of law further diminish. Second, for this same reason, this definition enables host-nation persons, some who may have values and beliefs highly divergent from those of the United States, to also agree to this definition as a goal. Importantly, while substantive, the definition is broad enough to enable the particulars of its application to be tailored to meet the needs of individual societies, building on the roots of their history, culture, and experience.[171] Lastly, by enabling interveners on the

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[168] *See supra* note 12. Note, however, that this does not mean that these newly established governments will necessarily reflect western political positions even if they appear to be democracies. *See supra* note 32.

[169] *See supra* note 12 (discussing the 2006 National Security Strategy).

[170] David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 33 (2006).

[171] *See supra* notes 122–53 and accompanying text (discussing "cultural commitment"); *see also* STROMSETH ET AL., *supra* note 8, at 11 ("[T]he minimally necessary historical and theoretical background consists of a basic understanding of the legal and historical

ground to assert an internationally accepted definition of the rule of law in their daily interactions with host-nation personnel, it reduces the appearance of imperialism at the individual level as well.[172] Reduced appearances of imperialism thus make this definition highly exportable.

A valid criticism of the U.N. definition is that it does not adequately incorporate security.[173] However, as discussed above, security and the rule of law must be seen as two sides of the same coin. Without one, the other will fail.[174] Therefore, it is likely that the definition assumes security has been or will be established. This assumption probably stems from the rule of law ideal that persons responsible for imposing the rule of law should be distinct from the individuals providing security.[175] Regardless, it is clear that security must be established. Additionally, security should not be viewed in a narrow sense. Rather, as with all other aspects of rule of law implementation, it should be synergistically pursued:

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context in which military interventions occur and an awareness that the rule of law is a complex and culturally situated idea . . . ."); FM 3-0, *supra* note 7, paras. 1-25, 1-31–1-33 (recognizing that "societies are not monolithic" and discussing the need to take into account the individual society's political, economic, military, religious, and cultural circumstances). Depending on the society an intervener finds itself in, some important elements of the definition, such as "equality" before the law, could be initially curtailed until introduction of the right will not undermine the broader rule of law project. For example, in an Islamic country, "equality" before the law could not likely immediately translate into gender equality. Or, for example, while near universal agreement exists that fundamental human rights are minimally necessary, other "secondary" human rights could be trimmed or emphasized to address the cultural, historical, and religious heritage in a failed or fragile state.

[172] Michael J. Totten, *The Final Mission, Part III* (Feb. 12, 2008), http://www.michaeltotten.com/ archives/2008/02/. Totten stated:

> The Marines are not imposing American values per se on the Iraqis. They're grounded in international law, and they're deadly serious about it. Lieutenant Montgomery didn't give a lecture on the Declaration of Independence, the Bill of Rights, or anything else that is particular of or exclusive to the United States. Instead, he taught the U.N. Code of Conduct for Law Enforcement Officials.

Id.

[173] *See, e.g.*, ROL HANDBOOK, *supra* note 35, at 5–6 n.15 (stating that the definition "does not emphasize the role of security").

[174] *See supra* notes 148–53 and accompanying text.

[175] *See supra* notes 148, 151 and accompanying text (discussing the security dilemma).

> The legitimacy of an intervention in local eyes will also depend on the goals that interveners pursue and their effectiveness in meeting local needs. Are interveners able to establish basic security quickly and deal credibly and robustly with violent obstructionists? Can interveners address concrete needs for food, water, electricity, health care, and so forth?[176]

Efforts to establish the rule of law without similar progress in these basic areas will result in the frustration of both efforts.[177] As one author stated, "[w]hen a man's life is at stake, it takes more than propaganda to budge him."[178] Absent tangible progress toward or the realization of broadly defined security, any definition of the rule of law, however well articulated, must fail. Therefore, adoption of the UN definition of the rule of law must necessarily anticipate the establishment of security.

A second potentially valid criticism of this definition as well as any other worth pursuing from a national policy perspective is that it is too lofty a goal. For example, one author characterized the U.N. approach to the rule of law as a "highly aspirational 'laundry list.'"[179] However, it is a "laundry list" in sync with U.S. policy objectives and therefore worth setting as an end goal even if it may never ultimately be achieved. "In truth the rule of law is a complex, fragile, and to some extent inherently unrealizable goal. Nonetheless, projects that are self-conscious about the nuances and paradoxes of the rule of law are much more likely to be successful."[180] One need only consider our own experience in the United States to appreciate how long it has taken to realize the promises of our

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[176] STROMSETH ET AL., *supra* note 8, at 59.

[177] As observed by the U.N. Undersecretary for Legal Affairs:

> The rule of law is not sufficient to deal effectively with all the challenges we are facing. There are millions of people in the world today who suffer from hunger, poverty, disease, and other difficulties. Lofty words about the rule of law give little comfort to someone who is struggling to survive the day.

Hans Corell, United Nations Under-Secretary General for Legal Affairs, Lecture at the Vienna International Centre: Prospects for the Rule of Law Among Nations 10 (Feb. 24, 2004), *available at* http://untreaty.un.org/OLA/media/info_from_lc/Vienna_24_2_04 final.doc.

[178] GALULA, *supra* note 43, at 78.

[179] Ringer, *supra* note 26, at 193.

[180] STROMSETH ET AL., *supra* note 8, at 57.

Constitution.[181] In other words, simply because it is aspirational or may take a long time does not mean it is not worth pursuing. It must be understood by all involved that building the rule of law is a "step-by-step" process.[182] There is no rule of law fairy godmother who will wave her magic wand and make rule of law in Iraq look like rule of law in the United States—rule of law and democracy may not happen for decades or more.[183] Building the rule of law begins with the planting of seeds, which when properly nurtured will root and grow into tomorrow's oaks.[184] As each seedling matures, it may not resemble its neighbor, but it will be distinctly recognizable as a stable representative society rooted in the rule of law. Creating the environment necessary to nurture and achieve this end state must begin with aspirational goals and a devoted pursuit of the means necessary to achieve it.

A third and final potential criticism of this or any other rule of law program in a failed or fragile state is that it involves an intangible which the United States cannot impose. "[S]uccess requires the cooperation of the subject population or a goodly portion of it. That is not something that we can create through planning."[185] While this may be true, by

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[181] *Id.* at 76 (noting that the "American rule of law culture . . . evolved over centuries and has been facilitated by a relatively high degree of prosperity").

[182] Interview with Lieutenant Colonel Gregory Gillette, Office of Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, in Wash. D.C. (Feb. 14, 2008); *see also* STROMSETH ET AL., *supra* note 8, at 82 (noting that the rule of law is "always a work in progress"); Coyne, *supra* note 12, at 1 ("'It is a dangerous hubris to believe we can build other nations. But where our own interests are engaged, we can help nations build themselves—and give them time to make a start of it.'") (quoting Anthony Lake, Mar. 6, 1996).

[183] In fact, it may never "look like" the rule of law in the United States if one considers cultural differences, but hopefully "we will still know it when we see it." STROMSETH ET AL., *supra* note 8, at 56; *see also* E-mail from Major John Porter Harlow, Professor, International & Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., to Major Tonya L. Jankunis (Feb. 20, 2008, 14:28 EST) (on file with author) ("[W]e will never make [rule of law] in Fallujah look like [rule of law] in Charlottesville in our lifetimes.").

[184] Even the tiniest sprout demonstrates fertile ground for further cultivation:

> The Iraqi Police call it a jail, but it's nothing like a jail you've ever seen, at least not in a civilized country. It was built to house 120 prisoners. Recently it held 900. . . . It seems somehow inadequate, tone-deaf, and perhaps even wrong to say Fallujah's disgraceful warehouse for humans is progress. But it is.

Totten *Dungeon*, *supra* note 146.

[185] Friedman et al., *supra* note 13, at 9.

synergistically pursuing the U.N. definition with the goal of gradually cultivating a "cultural commitment," the United States maximizes the likelihood of success. Moreover, this critique ignores a more critical fact: often, the United States may not have a choice but to intervene to protect its national security interests.[186] Therefore, unless the United States reverts to a fundamentally more isolationist foreign policy position, interventions and the establishment of the rule of law are here for the foreseeable future.

Amidst this criticism, and in addition to the strengths discussed above, lies perhaps the greatest benefit of adopting the former U.N. Secretary General's definition: it or variations of it are currently in use on the ground in Iraq. Notwithstanding the silence of Department of Defense Directive 3000.05[187] and Joint Publication 3-08[188] on a rule of law definition,[189] Multi-National Force–Iraq[190] and Multi-National Corps–Iraq[191] have adopted the first sentence of the former Secretary General's definition as their own. Similarly, among three definitions of the rule of law espoused by the DOS, one of them mirrors the former Secretary General's.[192] An examination of the rule of law definition in the USAID and other government agencies reveals similar threads of the U.N. definition.[193] Thus, with the United States engaged in two major contingency operations, a key benefit of universally shifting to the U.N. definition is that it should result in very little agency antagonism. It is "not tailored to a single agency's programs or identity."[194] This conclusion raises an obvious question—if most agencies are already

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[186] *See supra* notes 7–15 and accompanying text (discussing how failed and fragile states can jeopardize U.S. national security); STROMSETH ET AL., *supra* note 8, at 392 (recognizing that interventions are dictated by necessity).
[187] DODD 3000.05, *supra* note 157.
[188] JOINT PUB. 3-08, *supra* note 162.
[189] *See supra* notes 150–60 and accompanying text (discussing this directive and publication).
[190] E-mail from Major Olga M. Anderson, Professor, International & Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., to Major Tonya L. Jankunis (Feb. 14, 2008, 10:56 EST) (on file with author) (stating that based on her review of unclassified portions of current operations orders, Multi-National Force–Iraq has adopted the first sentence of the former U.N. Secretary General's definition as its own).
[191] *Id.* (stating the same thing with regard to Multi-National Corps–Iraq).
[192] *See* Ford, *supra* note 154, at 51 (listing the three DOS definitions, to include the U.N. definition).
[193] *Id.* (stating that USAID "has concocted a similar definition").
[194] E-mail from Lieutenant Colonel Gregory Gillette, Office of Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, to Major Tonya L. Jankunis (Feb. 15, 2008, 15:18 EST) (on file with author).

using variants of the same U.N.-based definition, how does the authoritative imposition of this definition foster enhanced rule of law efforts?

The unfortunate answer is that conflicting interagency efforts on the ground coupled with an overly institutional focus on courts, cops, and corrections, in particular by DOD, has frustrated rule of law efforts. As observed by the President of the Iraqi Bar in a letter to President Bush:

> America's Rule of Law effort in Iraq has focused almost entirely on training police, building prisons, and supporting prosecutions. This is understandable. These areas are important to security but they represent a policeman's and prosecutor's definition of what Rule of Law means. This definition is limited to law enforcement. . . . [O]ur legal culture is in need of assistance and America's millions of dollars have done little to assist our institutions. . . . If you think that "implanting" the Rule of Law in Iraq is limited to your current Rule of Law efforts, then you are receiving poor advice.[195]

As a preliminary matter, to overcome this narrow implementation of the rule of law, all federal agencies need not only to have the same definition of the rule of law but also actually know that they have the same definition. Second, all federal agencies must understand the implications of the definition—that is, that while courts, cops, and corrections are an important element of any rule of law program, a more comprehensive approach that results in a host-nation cultural commitment to the rule of law project itself is needed. To achieve this more comprehensive approach, the United States must synergistically apply the U.N. definition of the rule of law. Unless you also win the "hearts and minds"[196] by building a normative commitment to living under the rule of law, the mission may fail. For while all the institution building may give the impression you have the entire elephant, trunk and tail included,

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[195] Memorandum from Manuel Miranda, Office of Legislative Statecraft, to Ambassador Crocker, U.S. Embassy, Baghdad, Iraq, subject: Departure Assessment of Embassy Baghdad (5 Feb. 2008) (quoting letter from Aswad Al-Minshidi, President of the Iraqi Bar, to President George W. Bush (n.d.)).

[196] Brooks, *supra* note 26, at 132–33 ("To use a wildly overused phrase, creating the rule of law is a matter of winning hearts and minds as much as a matter of creating institutions.").

the end result may be much less spectacular—in fact, the intended elephant may just turn out to be a mouse. With this understanding in mind, the remainder of this article is largely dedicated to discussing whether the U.S. national security apparatus is capable of achieving this synergistic approach.

III. The National Security Act of 1947 and Goldwater-Nichols Example: Why We Must Build a Dynamic Bridge from Mars to Venus

Today's Departments of Defense, State, Treasury, and so forth are yesterday's Departments of War and Navy. Today's myriad complex threats to national security are yesterday's developing Cold War. Today's National Security Presidential Directive 44 (NSPD 44),[197] unfortunately, is not yesterday's National Security Act of 1947 or Goldwater-Nichols Department of Defense Reorganization Act of 1986.[198] Notwithstanding NSPD 44's directive to increase interagency coordination and the DOS's creation of the Office of the Coordinator for Reconstruction and Stabilization (S/CRS),[199] today's national security apparatus remains virtually unchanged from that created by the National Security Act of 1947. Akin to 1945, the result has been "a fundamental mismatch between the international threat environment and the national security apparatus."[200] The United States must successfully confront the "myriad challenges around the world in the coming decades,"[201] to

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[197] NSPD 44, *supra* note 34.

[198] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C); Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.).

[199] NSPD 44, *supra* note 34; *see also* ROL HANDBOOK, *supra* note 35, at 22–23 (providing brief overview of NSPD-44 and S/CRS); *see infra* notes 265–82 and accompanying text (providing brief overview of NSPD-44 and S/CRS).

[200] McKinney, *supra* note 19, at 2.

[201] Gates, *supra* note 12, at 4. Secretary Gates elaborated on these "myriad challenges":

> Unfortunately, the dangers and challenges of old have been joined by new forces of instability and conflict, among them—
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> - A new and more malignant form of global terrorism rooted in extremist and violent jihadism;
> - New manifestations of ethnic, tribal, and sectarian conflict all over the world;
> - The proliferation of weapons of mass destruction;
> - Failed and failing states;

include the establishment of stable societies through the cultivation of the rule of law, by restructuring our national security framework to meet the challenges of today and tomorrow—not yesterday.[202]

Many military strategists and practitioners analogize today's national security apparatus's ineffective and inefficient handling of security challenges to the situation in the late 1940s as the end of World War II quickly transitioned into the developing Cold War.[203] One author synopsized these similarities as follows:

> While the problems facing the United States were varied, the most important challenges were shaped by a quickly changing strategic environment;[204] rapid advances in

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> · States enriched with oil profits and discontented with the current international order; and
> · Centrifugal forces in other countries that threaten national unity, stability, and internal peace—but also with implications for regional and global security.

Id. at 3.

[202] Numerous others have suggested a similar necessity. *See, e.g.*, CTR. FOR STRATEGIC & INTERNATIONAL STUDIES, BEYOND GOLDWATER-NICHOLS: U.S. GOVERNMENT AND DEFENSE REFORM FOR A NEW STRATEGIC ERA, PHASE 2 REPORT 4–87 (2005) [hereinafter CSIS] (discussing various potential modifications to the national security structure to meet the post-Cold War threat); Chiarelli & Smith, *supra* note 12, at 5 (advocating a "top down review of the roles and missions of all its elements of national power"); Gates, *supra* note 12, at 4; McKinney, *supra* note 19, at 1.

[203] *See, e.g*, Colonel Mark D. Needham, The Triad of National Security Legislation for the 21st Century 1 (Mar. 18, 2005) (unpublished U.S. Army War College Strategy Research Project, *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil 192.pdf) (noting that the United States faces challenges today similar to the challenges faced at the end of World War II and advocating for the United States to "revise its national security apparatus for the environment of the 21st century.").

[204] As a result of this changing strategic environment, there developed a pronounced need for effective intelligence and counter-intelligence capabilities.

> [M]any people in the United States developed a form of paranoia that saw fifth column enemies everywhere. Even paranoiacs can have real enemies; the Soviet Union started to expand its efforts to subvert the United States at home. Unlike the Red Scare of 1919, however, this fear was seriously grounded. . . . This fed fears of a foreign-inspired internal revolution in the United States.

Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289, 326 (2000).

> technology;[205] growing concern with organizational effectiveness and efficiency; a growing chorus of pundits and Congressional leaders advocating organizational changes to the foreign policy establishment;[206] and efforts to unify the U.S. government and military services in an effort to improve organizational performance.[207] These principal causal factors formed

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[205] *Id.* at 326. Shulman vividly makes apparent how rapidly advancing technology greatly reduced the Atlantic and Pacific Oceans' capability of serving as a protective barrier:

> [T]he emergence of post-war technology meant that for the first time an enemy could strike the continental United States catastrophically. The sea-launched surprise attack on Pearl Harbor had been sufficient to cause the War and Justice departments to imprison thousands of American citizens based merely on their ethnic origins. . . . The fire-storm bombings of Dresden and Tokyo, and even the nuclear explosions at Hiroshima and Nagasaki, barely foreshadowed the destructiveness of intercontinental missiles to come.

Id.

[206] Included in this growing chorus are two former Presidents. Franklin Roosevelt, in discussing the difficulty in getting the Navy to change, likened the Navy to a featherbed: "'You punch it with your right and you punch it with your left until you are finally exhausted . . . and then you find the damn bed just as it was before.'" Gates, *supra* note 12, at 5 (quoting President Franklin Roosevelt). Harry Truman made a similar observation, noting "that if the Army and Navy had fought as hard against the Germans as they had fought against each other, the war would have been over much sooner." *Id.* (paraphrasing President Franklin Roosevelt).

[207] The impetus for these efforts to reform the military has been described as follows:

> [M]ilitary roles and missions were rethought in light of the gargantuous World War II campaigns. The scope and scale of war had expanded dramatically, as had the ability to strike across wide expanses of ocean. The German Blitzkrieg and above all the Japanese attack on Pearl Harbor had shattered many Americans' faith in their nation's invulnerability. The conduct of the war and lessons learned from other armed forces brought home the critical importance of cooperation among land, sea, and air forces. This was as true at the tactical level as at the level of grand strategy. Frequently in the Pacific, tactical success depended on soldiers fighting alongside marines, with air support and naval bombardment. Likewise, grand strategy required that General Douglas MacArthur and Admiral Chester Nimitz not only to divide the Pacific theater of operations but also share forces.

Shulman, *supra* note 204, at 325–26.

> the foremost impetus for the National Security Act. . . .[208]

As a result of these perceived and real deficits, Congress enacted the National Security Act of 1947.[209] The overarching congressional intent was "to provide a comprehensive program for the future security of the United States."[210] To accomplish this objective, it created the National Security Council (NSC);[211] a National Military Establishment[212] to include the Navy,[213] the former War Department which was re-designated the Army,[214] and a newly created Air Force,[215] all in theory headed by the newly created Secretary of Defense;[216] and the Central Intelligence Agency and position of Director of Central Intelligence.[217]

The NSC served as the fulcrum under this new framework for the development of integrated and comprehensive policy. Headed by the President, it was originally comprised of the Secretaries of State and Defense, the three military service secretaries, and the Chairman of the

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[208] McKinney, *supra* note 19, at 2; *see also* Needham, *supra* note 203, at 1–2 (discussing similar factors contributing to the passage of the National Security Act of 1947).
[209] Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C).
[210] *Id.* § 2, 61 Stat. at 496 (codified as amended 50 U.S.C § 401 (2000)). To achieve this objective, the Act sought:

> [T]o provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to national security; to provide three military departments for the operation and administration of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force, with their assigned combat and service components; to provide for their authoritative coordination and unified direction under civilian control but not to merge them; to provide for the effective strategic coordination of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval, and air forces.

Id.
[211] *Id.* § 101(a), 61 Stat. at 496.
[212] *Id.* § 201, 61 Stat. at 499–500.
[213] *Id.* § 206, 61 Stat. at 501.
[214] *Id.* § 205, 61 Stat. at 501.
[215] *Id.* § 207, 61 Stat. at 502.
[216] § 202, 61 Stat. at 500.
[217] *Id.* § 102(a), 61 Stat. at 497; *see also* Needham, *supra* note 203, at 2 (providing an overview of the National Security Act).

National Security Resources Board.[218] The President could designate heads of other executive departments to the Council subject to the advice and consent of the Senate.[219] Its mission was extraordinary in scope and importance: "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security."[220]

Within two years it became apparent that the National Military Establishment was dysfunctional. "[I]t was meant to promote unity among the military services. It didn't. A mere two years later the Congress had to pass another law because the Joint Chiefs of Staff were anything but joint. And there was no chairman to referee the constant disputes."[221] The National Security Act Amendments of 1949[222] were thus geared toward the overhaul of the recently created DOD. Among other matters, the Amendments elevated the DOD to an executive or cabinet level department while simultaneously demoting the services to military departments.[223] The Amendments also created the position of the Chairman of the Joint Chiefs of Staff (CJCS), who along with the service chiefs, was to serve as the "principal military adviser to the President, the NSC, and the Secretary of Defense."[224]

With the exception of changes resulting from the Goldwater-Nichols Department of Defense Reorganization Act of 1986,[225] "the current national security apparatus is [structurally] unchanged since its creation following World War II."[226] The Goldwater-Nichols Act was a

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[218] *Id.* § 101(a), 61 Stat. at 496.
[219] *Id.*
[220] *Id.*
[220] *Id.*
[221] Gates, *supra* note 12, at 5.
[222] Pub. L. No. 81-216, 63 Stat. 578 (1949).
[223] *Id.* § 201, 63 Stat. at 579.
[224] *Id.* § 211, 63 Stat. at 582; *see also* Murphy & Koenig, *supra* note 3, at 186–87.
[225] Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).
[226] McKinney, *supra* note 19, at 1. This statement was made after and remains valid despite the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638. Among other matters, the Act created the position of the Director of National Intelligence. Pub. L. No. 108-458 § 102, 118 Stat. 3638, 3644. It also established the National Counterterrorism Center, National Counter-Proliferation Center, and National Intelligence Centers. *Id*. §§ 1021–1023, 118 Stat. 3638, 3672–77.

congressional response to reorganize the military following a series of less than optimal contingency operations from the Korean and Vietnam conflicts through Desert One[227]—a failed rescue attempt of fifty-three American hostages in Iran[228]—and the failure in basic force protection measures that led to the suicide bomber attack on the Marine Corps barracks in Lebanon.[229] Specifically, in passing the Act, Congress intended:

> To reorganize the Department of Defense and strengthen civilian authority in the Department of Defense, to improve the military advice provided to the President, the National Security Council, and the Secretary of Defense, to place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands and ensure that the authority of those commanders is fully commensurate with that responsibility, to increase attention to the formulation of strategy and to contingency planning, to provide for more efficient use of defense resources, to improve joint officer management policies, otherwise to enhance the effectiveness of military operations and improve the

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[227] Chiarelli, *supra* note 5, at 71.

[228] LOCHNER, *supra* note 4, at 45. Lochner provided a sobering description of the botched rescue attempt:

> On April 25, 1980, a military raid to rescue fifty-three Americans held captive in Iran failed. Code-named Operation Eagle Claw, the mission was aborted when only six of eight helicopters arrived at the rendezvous point in Iran, labeled "Desert One," and one of those was broken. In departing, a helicopter collided with a C-130 transport plane. Five airmen and three marines died in the explosion, which destroyed both aircraft. The other five helicopters were abandoned with valuable secret documents, weapons, and communications gear on board.

Id. Lochner attributed the failed mission to "institutional deficiencies" and "Pentagon unpreparedness . . . so immense that [not] even six months of organizing, planning, and training could . . . overcome" them. *Id*. at 46.

[229] *Id.* at 142–63. "[A] lone terrorist drove a yellow Mercedes-Benz truck laden with explosives into the lobby of the BLT headquarters building where he triggered one of the biggest nonnuclear detonations ever." *Id*. at 150. As a result, 241 service members, predominantly Marines, died. "Another 112 Americans were wounded." *Id.*

> management and administration of the Department of Defense, and for other purposes.[230]

To accomplish these objectives, the Goldwater-Nichols Act first significantly strengthened the role of the CJCS by making him the principal advisor to the President, NSC, and Secretary of Defense and providing him greater authority over the service chiefs.[231] Second, it "mandate[d] that the Joint Staff function as the chairman's staff, responding to the direction and guidance of the CJCS."[232] Third, the Act enhanced joint assignments by codifying "joint duty positions," requiring joint schooling prior to assignment to a joint position, requiring joint service for promotion to flag officer, and mandating the same promotion rates for officers assigned to joint assignments "as those for officers serving on their own service's staff."[233] Finally, the Act "clearly defined the chain of command as running from the President to the Secretary of Defense to the [combatant commanders]."[234] The service chiefs were thus removed from the operational chain of command and relegated to a "train, man, and equip" function. The overall effect of the Act, as previously discussed, has been an extraordinarily more capable DOD.[235]

Based on the structure of the national security apparatus, it is easy to understand why so many commentators have characterized the structure as "stovepiped."[236] Each agency is statutorily required to meet together in only one forum—the NSC. At this high level ideas are finally brought together, shared, and developed into national policy.[237] The vast streams

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[230] Pub. L. No. 99-433, 100 Stat. 992 (1986).
[231] Murphy & Koenig, *supra* note 3, at 189–91.
[232] *Id.* at 191–92.
[233] *Id.*
[234] *Id.* at 192–93.
[235] *See supra* notes 2–6 and accompanying text (discussing the impact of the Goldwater-Nichols Act on operations).
[236] Gorman & Krongard, *supra* note 14, at 53. A stovepipe is defined as "a pipe, as of sheet metal, serving as a stove chimney or to connect a stove with a chimney flue." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1319 (1991). Smoke is generated from the fireplace and thereafter contained within the stovepipe until it exits the house from the chimney. Similarly, ideas and concepts are developed within an agency and contained within that agency until they are finally released at the chimney, which in this case is the National Security Council.
[237] Needham, *supra* note 203, at 3 ("What is most critical about the NSC is the strategic thought process that leads to the coordinated strategy. Strategy created in each of the various departments and brought to the NSC for coordination will not work. It must be a holistic and synergistic product of the different perspectives of the NSC members, their staffs, and the NSC staff.").

of information collected and developed within each of these agencies—each with its own organization, language, doctrine, budget, goals, expertise, and culture[238]—must funnel through their respective leadership before arriving at the NSC. Only at the NSC are all of these streams of information finally pooled together to receive interagency perspectives, information, and synchronization to develop U.S. policy.[239] From the Cold War perspective, this approach made sense. While overly simplistic, we were either at war (a military function) or we were not (a civilian agency function).[240] As a result, relative to today, there was a negligible requirement for interagency coordination and unity of action below the NSC level.

Unfortunately, since the collapse of the former Soviet Union, the nature of the threats and missions has evolved beyond the capacity of our current national security apparatus to anticipate and counter effectively. It is 1947 all over again.[241]

> For well over a decade, the United States has faced a security environment far more complex than that of the Cold War. Today's challenges—such as winning the global war on terror and slowing the proliferation of weapons of mass destruction—require multifaceted security strategies that take advantage of the capabilities from across the full spectrum of national security agencies.
>
> Yet, while today's challenges are vastly different from those of the Cold War, the structures and mechanisms the United States uses to develop and implement national security policy remain largely unchanged. Cabinet agencies continue to be the principal organizational element of the national security policy, and each agency has its own strategies, capabilities, budget, culture, and institutional prerogatives to emphasize and protect.[242]

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[238] *See, e.g.*, CSIS, *supra* note 202, at 26; Kelly, *supra* note 6 (describing differences between Defense and State); Rife, *supra* note 1 (same).
[239] Gorman & Krongard, *supra* note 14, at 53–54.
[240] *See* Kelly, *supra* note 6.
[241] *See supra* notes 7–15, 200–01 and accompanying text (describing the contemporary threat).
[242] CSIS, *supra* note 202, at 26.

The Secretary of State,[243] Secretary of Defense,[244] various general officers,[245] pundits, and think tanks[246] have also widely acknowledged the inadequacy of the current security apparatus to meet this evolving threat. In general, there have been two major critiques of the national security apparatus relative to the current threat: first, a noticeable and consistent failure of interagency coordination,[247] and second, a remarkable interagency imbalance resulting from a resource-dictated overreliance on the mammoth personnel, logistical, and planning capacities of the DOD compared with the minimal capacities of U.S. government civilian agencies.[248]

General Peter Pace stated that "the interagency process now in effect does a good job with presenting the president with options. 'But once the president decides to do something, our government goes back into its stovepipes for execution—Department of State does what they do, [DOD] does what we do, the Department of Treasury, etc.'"[249] Lieutenant General Peter W. Chiarelli is even more critical: "In every overseas intervention the U.S. has undertaken since the end of the cold war, an integrated approach and an understanding of each organization's missions and capabilities have been woefully lacking."[250] Simply put:

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[243] Chiarelli & Smith, *supra* note 12, at 5 ("*I don't think the U.S. government had what it needed for reconstructing a country. We did it ad hoc in the Balkans, and then in Afghanistan, and then in Iraq.*") (quoting Secretary of State Condoleezza Rice).
[244] Gates, *supra* note 12, at 4. Secretary Gates stated:

> One of the most important lessons of the wars in Iraq and Afghanistan is that military success is not sufficient to win: economic development, institution-building and the rule of law, promoting internal reconciliation, good governance, providing basic services to people, training and equipping indigenous military and police forces, strategic communications, and more—these, along with security are essential ingredients for long-term success. Accomplishing all of these tasks will be necessary to meet the diverse challenges I have described.
>
> So, we must urgently devote time, energy, and thought to how we better organize ourselves to meet the international challenges of the present and the future . . . .

Id.
[245] *See, e.g.*, Chiarelli & Smith, *supra* note 12.
[246] *See, e.g.*, CSIS, *supra* note 202.
[247] *See infra* notes 249–52, 259–64 and accompanying text.
[248] *See infra* notes 253–64 and accompanying text.
[249] Garamone, *supra* note 3 (quoting General Pace).
[250] Chiarelli & Smith, *supra* note 12, at 5.

> The principal problem of interagency decision making is lack of decisive authority; there is no one in charge. As long as personalities are involved who work well together and have leadership support in the NSC, interagency efforts will prosper, but such congruence is not predictable. The world situation does not wait for the proper alignment of the planets in Washington. There is too much diffusion of policy control.[251]

And yet today's missions, whether conducting rule of law operations in failed or fragile states or conducting an offensive contingency operation in support of the global war on terrorism, demand interagency direction and coordination at the strategic, operational and tactical levels to increase the likelihood of success.[252]

Beyond this failure of interagency coordination, the national security apparatus suffers from a dramatic institutional imbalance that has resulted in a de facto reliance on the DOD to carry the vast weight in all stability operations,[253] to include nation-building and rule of law operations. "It is a simple fact that today, U.S operational capability rests almost entirely in the Department of Defense. Enhanced coordination, planning, and outreach among non-DOD agencies are of little use until they can be translated into operations—yet that capability exists in very few agencies today, and even then in little quantity."[254] For example, the DOS "has only 11,000 employees in the foreign service, a miniscule number compared to the more than 2,000,000 uniformed personnel in the U.S. military."[255] The USAID is even more miniscule, a mere 3,000 employees, making it "little more than a contracting agency."[256] This institutional imbalance is problematic for

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[251] Marcella, *supra* note 19, at 184.

[252] CSIS, *supra* note 202, at 26 ("The national security agencies can bring a wealth of experience, vision, and tools to bear on security challenges, but more often than not, the mechanisms to integrate the various dimensions of U.S. national security policy and to translate that policy into integrated programs and actions are extremely weak, if they exist at all.").

[253] *Id.* at 56.

[254] *Id.* at 8.

[255] Chiarelli & Smith, *supra* note 12, at 5. It goes almost without saying that many of the two million members of the armed services have not historically been trained to conduct rule of law operations. Even recognizing this, however, the stark contrast in number of personnel alone allocated to the DOS and its sister agencies relative to the DOD to conduct their respective missions is mind-numbing.

[256] *Id.*

two primary reasons. First, in the context of rule of law and nation-building efforts, civilian expertise is needed not only to enhance the operation, but more practically, to positively affect the host-nation's receptiveness by having civilian personnel administer programs vice military personnel.[257] Second, to the extent civilian agencies are tasked with lead responsibility for stabilization and reconstruction operations, but DOD personnel must take the de facto on the ground lead, a "tremendous amount of uncertainty regarding who is in charge"[258] can result.

As might be imagined, systemic problems with the national security apparatus have migrated and manifested themselves on the ground. For example, the Provincial Reconstruction Team (PRT) is often viewed as the vehicle of interagency action at the ground level.[259] The PRT is composed of a mix of military and civilian personnel normally under the leadership of a DOS civilian employee.[260] Unfortunately, the reality has not lived up to the hype. For example, regarding PRT operations in Afghanistan, it has been observed that "[d]espite their potential record of success . . . PRTs always have been a bit of a muddle. Inconsistent mission statements, unclear roles and responsibilities, ad hoc preparation, and, most important, limited resources have confused potential partners

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[257] *See supra* notes 148–53 and accompanying text.

[258] CSIS, *supra* note 202, at 57; *see* Schnaubelt, *supra* note 158, at 50. For example, in discussing the relationship between the Coalition Provisional Authority and Combined Joint Task Force-7, Schnaubelt highlights how this ambiguity as to who is in charge detracted from the mission.

> The official relationship between the CPA Administrator and the CJTF-7 Commander was probably clear to those two individuals, but not completely understood by others inside the former Republican Palace in which CPA and CJTF-7 were collocated. "Who is Bremer's boss?" was a common question. Many military officers appeared to believe that the Commander of CJTF-7 was the senior person in the building, or at least an equal to Ambassador Bremer—responsible for all military-related decisions, while Ambassador Bremer handled only civilian matters. Meanwhile, CPA staff believed the opposite to be true—that the CPA Administrator was the senior official in the country, setting Iraq-wide policy.

Schnaubelt, *supra* note 158, at 50.

[259] *See generally, e.g.*, Michael J. McNerney, *Stabilization and Reconstruction in Afghanistan: Are PRTs a Model or a Muddle?*, PARAMETERS, Winter 2005–2006, at 32.

[260] *Id.* ("First established in 2003, PRTs consisted of 60–100 soldiers plus, eventually, Afghan advisors and representatives from civilian agencies like the US State Department, the US Agency for International Development, and the US Department of Agriculture.").

and prevented PRTs from having a greater effect on Afghanistan's future."[261]

Outside the context of PRTs, the same holds true. An officer who served in Afghanistan noted that "[t]he biggest frustration in dealing with other agencies was a complete lack of synchronization of effort, and at times, different opinions as to how a particular problem should be addressed."[262] Among numerous examples of the interagency discord at the ground level that this officer experienced, two stand out. First, due to a "lack of organic resources, these (non-Department of Defense) agencies would continually place a drain on the limited assets that Combined Joint Task Force 76 had in Afghanistan."[263] And second, in the context of counter-narcotic operations:

> USAID would meet with local leaders . . . and promise them alternative resources if they would willingly reduce the level of opium production within their respective areas. The problem with this plan was that USAID did not have the resources to physically deliver these items (i.e., grain, farm equipment, etc.). USAID would then try and blame us for either not delivering the items and/or not providing a secure enough environment for them to contract out the delivery. The bottom line was that every broken promise, whether intentional or not, was a setback to the efforts that our Commanders were making at the tactical level.[264]

Thus, the interagency situation at the micro level mirrors the situation at the macro level: a lack of a decisive authority and absence of coordinated action and planning combined with a mission impacting resource imbalance.

In late 2004, Congress responded in limited fashion to at least the lack of civilian interagency planning in section 408 of the Consolidated

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[261] *Id*. at 33.
[262] E-mail from Major Steven Gariepy, Student, 56th Judge Advocate Advanced Course, The Judge Advocate General's Legal Center and School, to Major Tonya L. Jankunis (Nov. 30, 2007, 15:15 EST) (on file with author).
[263] *Id.*
[264] *Id.*

Appropriations Act of 2005.[265] Section 408 established the Department of State's Office of the Coordinator for Reconstruction and Stabilization.[266] This office "has the authority to *catalog* and *monitor non-military* resources and capabilities and to *coordinate* the development of contingency plans and training of civilian personnel for effective reconstruction and stabilization . . . activities."[267] National

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[265] Pub. L. No. 108-447, 118 Stat. 2809 (2004); *see* PRESIDENTIAL REPORT TO CONGRESS, 109TH CONG., REPORT ON IMPROVING INTERAGENCY SUPPORT FOR THE UNITED STATES 21ST CENTURY NATIONAL SECURITY MISSIONS AND INTERAGENCY OPERATIONS IN SUPPORT OF STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS 8 (June 2007) [hereinafter INTERAGENCY REPORT] (noting that the DOS established the Office for the Coordination of Reconstruction and Stabilization prior to the passage of section 408).

[266] Pub. L. No. 108-447, § 408, 118 Stat. 2809, 2904. Section 408 provides in relevant part:

> That the functions of the Office of the Coordinator for Reconstruction and Stabilization shall include--
>
> (1) *cataloguing and monitoring* the non-military resources and capabilities of Executive agencies (as that term is defined in section 105 of title 5, United States Code), State and local governments, and entities in the private and non-profit sectors that are available to address crises in countries or regions that are in, or are in transition from, conflict or civil strife;
>
> (2) *monitoring* political and economic instability worldwide to anticipate the need for mobilizing United States and international assistance for countries or regions described in paragraph (1);
>
> (3) *assessing* crises in countries or regions described in paragraph (1) and determining the appropriate non-military United States, including but not limited to demobilization, policing, human rights monitoring, and public information efforts;
>
> (4) *planning* for response efforts under paragraph (3);
>
> (5) *coordinating* with relevant Executive agencies the development of interagency contingency plans for such response efforts; and
>
> (6) *coordinating* the training of civilian personnel to perform stabilization and reconstruction activities in response to crises in such countries or regions described in paragraph (1).

Id. (emphasis added).

[267] INTERAGENCY REPORT, *supra* note 265, at 8 (emphasis added).

Security Presidential Directive 44 (NSPD 44)[268] broadens the scope of DOS "coordination" responsibilities by authorizing the "Secretary of State to *coordinate* whole-of-government [reconstruction and stabilization] planning and operations and to choose to appoint a Coordinator to manage those efforts."[269] In the words of NSPD 44, the DOS has the responsibility to "*harmonize* [reconstruction and stabilization] efforts with U.S. military plans and operations."[270] Finally, pursuant to NSPD 44, an Interagency Management System (IMS) is being developed to "provide a framework for interagency *cooperation* in a [reconstruction and stabilization] crisis."[271] When a crisis "triggers" the IMS, the Office of the Coordination for Reconstruction and Stabilization's "planning and operations staff have the responsibility to provide core teams, as required, in Washington, at the military operational command level, and in the affected country."[272] In other words, the IMS is a special "coordinating" team that arises only upon the occurrence of a crisis.

Undoubtedly, these are extremely important first steps in recognizing the necessity for a coordinated government effort to respond to reconstruction and stabilization operations.[273] But these initial steps are problematic for several reasons. First, none of these authorities do more than require "coordination," "harmonization," "monitoring," and "cataloguing."[274] The word "direct" is therefore painfully absent. Absent "direct" or a similarly authoritative verb, much of the promise of these coordinating organizations will remain aspirational, personality dependent, and ultimately unfulfilled without a decisive referee below the strategic level to decide disputes.[275] Second, these measures do not

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[268] NSPD 44, *supra* note 34.

[269] INTERAGENCY REPORT, *supra* note 265, at 8 (emphasis added). NSPD 44 provides that the Secretary of State shall "coordinate and strengthen efforts . . . to prepare, plan for, and conduct reconstruction and stabilization assistance and related activities that require the response capabilities of multiple United States Government agencies." NSPD 44, *supra* note 34.

[270] NSPD 44, *supra* note 34 (emphasis added).

[271] INTERAGENCY REPORT, *supra* note 265, at 9 (emphasis added).

[272] *Id.*

[273] CSIS, *supra* note 202, at 8.

[274] *See supra* notes 266–71 and accompanying text (placing emphasis on the use of these and similar words).

[275] Marcella, *supra* note 19, at 184 (noting that a lack of "decisive authority" leads to personality-based relationships in the interagency). For example, FM 3-0 provides:

> Most civilian organizations are not under military control. Nor does the U.S. ambassador or United Nations Commissioner control them.

address the resources problem.[276] Third, with regard to the DOD, this "harmonizing" is not even statutory. As such, it is a first step that has repeatedly been taken before.[277] For example, one need only compare the promise of NSPD 44 with that of Presidential Decision Directive 56 (PDD 56),[278] enacted during the Clinton administration to manage

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> Civilian organizations have different organizational cultures and norms. Some may be willing to work with Army forces; others may not. Thus, personal contact and trust building are essential. Command emphasis on immediate and continuous coordination encourages effective cooperation. Commanders should establish liaison with civilian organizations to integrate their efforts as much as possible with Army and joint operations. Civil affairs units typically establish this liaison.

FM 3-0, *supra* note 7, para. 1-54.

[276] *See, e.g.*, Marcella, *supra* note 19, at 184. According to Marcella:

> The Department of State, which has the responsibility to conduct foreign affairs, is a veritable pauper. Indeed, the military has more money to conduct diplomacy. The State Department's diplomats may have the best words in town, in terms of speaking and writing skills, and superb knowledge of foreign countries and foreign affairs, but it is a very small organization that has been getting smaller budget allocations from Congress in recent years.

Id.

[277] The Center for Strategic and International Studies described the frustratingly repetitive cycle as follows:

> U.S. responses to complex emergencies to date have been largely *ad hoc* and plagued by poor planning, slow response time, insufficient resources, and little unity of effort among agencies. This continuous cycle—in which the U.S. government cobbles together plans, people, and resources for stabilization and reconstruction efforts before, during or after major combat operations—puts unnecessary strains on the U.S. military, undermines success, and must be broken.

CSIS, *supra* note 202, at 55. Recognizing similar deficiencies in the national security apparatus, Secretary Gates suggested that among other measures, funding for DOS must be increased. *See* Gates, *supra* note 12, at 8.

[278] *See* White Paper: The Clinton Administration's Policy on Managing Complex Contingency Operations: Presidential Decision Directive 56: Managing Complex Contingency Operations (May 1997) [hereinafter PDD 56 White Paper]. Presidential Decision Directive 56 is a classified document. However, the PDD 56 White Paper is a redacted and unclassified version of PDD 56. The PDD 56 White Paper explains, "the key elements of the Clinton Administration's policy on managing complex contingency operations." *Id.* at 1. It was "promulgated for use by government officials as a handy reference for interagency planning of future complex contingency operations." *Id.* While the White Paper "explains the PDD, it does not override the official PDD." *Id.*

"complex contingency operations."[279] As one contemporary observer noted, PDD 56 "mandates reform in the joint/interagency coordination process. It recognizes that the United States will continue to conduct complex contingency operations (CCOs). Greater coordination is required to appropriately bring all instruments of national power to bear on all such operations."[280] Unfortunately, with the change in administration, the lessons of PDD 56 were forgotten until the United States was forced to relearn them the hard way—on the ground in Iraq and Afghanistan.[281] As a result, while NSPD 44 is a positive first step, it is a step that may quickly be forgotten unless embraced in a broader statute amending the national security apparatus.[282]

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[279] *Id.* The similarities between NSPD 44 and PDD 56 in characterizing the threat and need for a coordinated response are remarkable. The PDD 56 White Paper provides:

> In the wake of the Cold War, attention has focused on a rising number of territorial disputes, armed ethnic conflicts, and civil wars that pose threats to regional and international peace and may be accompanied by natural or manmade disasters which precipitate massive human suffering. We have learned that effective responses to these situations may require multiple dimensional operations composed of such components as political/diplomatic, humanitarian, intelligence, economic development, and security; hence the term complex contingency operations.

Id.

[280] William P. Hamblet & Jerry G. Kline, *Interagency Cooperation: PDD 56 and Complex Contingency Operations*, JOINT FORCES Q., Spring 2000, at 92.

[281] McKinney, *supra* note 19, at 10 (stating, in the context of the forgotten lessons of PDD 56, "the changeover in intellectual thought and experience that occurs with changes in administrations, results in missed opportunities and a relearning of lessons across the organizations").

[282] In describing the inherently fickle nature of presidential decision directives (PDDs), Marcella's discussion highlights the likely future for NSPD 44 upon completion of operations in Iraq and Afghanistan absent further congressional involvement:

> The reality is however, that a PDD is not a permanent guide to the actions of agencies. Rarely is it fully implemented. It can be overtaken by new priorities, new administrations, and by the departure of senior officials who have the stakes, the personal relationships, the know-how, and the institutional memory to make it work. A senior NSC staffer, Navy Captain Joseph Bouchard, Director of Defense Policy and Arms Control, remarked in 1999 that one cannot be sure about whether a PDD from a previous administration is still in force because for security reasons no consolidated list of these documents is maintained. Moreover, PDDs and other presidential documents are removed to presidential libraries and archives when a new president takes over. A senior Defense

In a similar vein, the publication of Department of Defense Directive 3000.05,[283] *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*, may be seen as recognizing that significant interagency challenges, from poor coordination to inadequate resources, have made the military the de facto lead in reconstruction and stabilization operations.[284] The Directive provides:

> Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all [DOD] activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.[285]

Published in 2006, Joint Publication 3-08, *Interagency, Intergovernmental Organization, and Nongovernmental Organization During Joint Operations* provides the "doctrinal basis for interagency coordination and for U.S. military involvement in multinational operations."[286] Clearly, as related by the senior military assistant to the Secretary of Defense, the military has accepted this de facto responsibility which has been evolving since the end of the Cold War:[287]

> Department official states that PDDs are rarely referred to after they are final, are usually overtaken by events soon after publication, and are rarely updated. In this respect the interagency evaluation of PDD 56's effectiveness, published in May 1997, is instructive: "PDD 56 no longer has senior level ownership. The Assistant Secretaries, Deputy Assistant Secretaries, and the NSC officials who initiated the document have moved on to new positions."

Marcella, *supra* note 19, at 179. While NSPD 44 is currently enjoying greater longevity than PDD 56, PDD 56's history may unfortunately be predictive of NSPD 44's future.

[283] DODD 3000.05, *supra* note 157.

[284] Kelly, *supra* note 6 ("It is difficult to overstate the significance of this document, which makes civil society support as important as combat operations. It's probably safe to say that the military has rarely, if ever, advocated so strenuously on behalf of the State Department and other agencies within one of its own planning documents.").

[285] DODD 3000.05, *supra* note 157, para 4.1.

[286] JOINT PUB. 3-08, *supra* note 162, at i.

[287] One author vividly described the military's assumption of this de facto status since the end of the Cold War as follows:

"[L]ike it or not, until further notice the U.S. Government has decided that the military largely owns the job of nation-building."[288] Unfortunately, as tremendously advantageous as this directive and joint publication will be to planning, training for, and conducting nation-building operations, they are not without their shortcomings. First, these publications are as susceptible to change as NSPD 44.[289] Second, by affirmatively taking on a nation-building responsibility, they exacerbate the interagency imbalance. Why bother bolstering State's resources when you can fall back on Defense?[290] Third, although these publications can direct the DOD to coordinate with other government agencies, they are only aspirational as applied to members of other government agencies. Again, there is no practical mechanism or higher authority to require integration below NSC level. More fundamentally, absent the provision of additional personnel and resources to these other government agencies, there will be a limited number of persons with whom to coordinate. Finally, it is difficult to achieve the rule of law from what appears to be the barrel of a gun to the host-nation.[291] Regardless of how well the military conducts itself during nation-

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> With little guidance from the elective officials who control the purse strings, the military adapted to the ad-hoc nature of its post-Cold War missions largely on its own. For the past 15 years, the DoD has lived in a policy space somewhere between war and peace. The military even evolved its own lingo to describe the complicated, ground-level and very human terrain where it worked. Post-Cold War activities had many titles besides MOOTW: complex contingency, irregular war, conflict termination, low-intensity conflict, counter-insurgency. Like Spanglish, international partnerships added to the mix. Peacekeeping, Peace building, and Peace Enforcement come from the United Nations Charter. Stability and support each has its own subdivision of labor. Stability may still require use of force while Support addresses humanitarian needs. Meanwhile, more and more responsibility for civilian tasks accrued to the Defense Department.

Kelly, *supra* note 6.

[288] Chiarelli & Smith, *supra* note 12, at 6.

[289] *See supra* notes 265–82 and accompanying text (discussing how presidential decision directives are generally susceptible to change). In the context of a military publication, if the authority on which it is premised changes, it too must change. Similarly, if there is a change in the civilian leadership of the DOD, it is possible the publication will also change. For example, even if NSPD 44 remained static, it does not follow that stability and reconstruction operations must remain a "core" military mission.

[290] Kelly, *supra* note 6.

[291] *See supra* notes 148–53 and accompanying text.

building missions, this perception will adversely affect at least how some of the population responds.

Review of the lessons of Goldwater-Nichols and the National Security Act of 1947 relative to the current operational challenges and the capacity of the national security apparatus to meet those challenges highlights the necessity for a congressional level reform. Recent efforts at greater interagency coordination are steps in the right direction; however, they risk being fleeting in nature. More fundamentally, these efforts have failed to go beyond "coordination" to "direction," a key component in successfully conducting complex rule of law operations in failed or fragile states. To provide a more permanent structure that has the capacity to truly "direct" rule of law operations, Mars must align with Venus.

IV. Choosing the Perfect Bridge: Military Strategist-Suggested Juxtapositions of Mars and Venus

The current stove-piped and inadequately resourced U.S. national security apparatus is fundamentally mismatched to counter today's complex, multifaceted threats, to include the conduct of stability and reconstruction operations, and its subpart, rule of law operations.[292] "What is required is the transformation and integration of the entire national security interagency apparatus. Any tangible success in a war against the common noun of 'terrorism' absolutely requires that we tear down our inherently stove-piped Cold War institutions and recreate them for the 21st century."[293] In other words, only a major overhaul of this apparatus combined with resource augmentation of civilian agencies will produce a sufficiently dynamic framework to establish the rule of law and thereby create stable societies.

In contrast to the theorists who live on Venus, the strategists who call Mars home acknowledge the problem but do not talk about it all that much. Instead they immediately spring into action with proposed reorganizations and supplementations of the national security apparatus to facilitate, coordinate, and direct interagency action as well as correct

[292] *See supra* notes 7–15, 197–291 and accompanying text.
[293] Thompson, *supra* note 37, at 74.

the imbalance of interagency resources.[294] Almost uniformly, each strategist invokes the name of the National Security Act of 1947[295] and the Goldwater-Nichols Department of Defense Reorganization Act of 1986[296] to justify the necessity for change as well as serve as a model of change.[297]

Generally, these strategists can be divided into arguing for one of three major levels of reform: strategic or NSC-level reform,[298] high operational or combatant commander level of reform,[299] or significant tweaking of the current national security apparatus to enhance interagency capabilities without dramatic reorganization.[300] Many strategists additionally maintain, in keeping with the Goldwater-Nichols model, that personnel systems must be modified to require interagency experience and that training must similarly reflect the new interagency reality.[301] Given that intimate interagency coordination is a sine qua non

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[294] *See, e.g.*, Collins, *supra* note 2; Garamone, *supra* note 3 (discussing General Peter Pace's suggestion for a Goldwater-Nichols-like reform of U.S. agencies); Gorman & Krongard, *supra* note 14, at 52; Kelly, *supra* note 6 (arguing for the creation of a "deployable international civil service" to offset the significant operational burden placed on the military); Marcella, *supra* note 19, at 189 ("It is time to move away from a system designed for the problems of 1947 toward one that is appropriate to the challenges of the next century."); McKinney, *supra* note 19, at 5; Naler, *supra* note 3, at 27; Navas, *supra* note 19, at 231 (arguing for a major reform of the national security system pre-US intervention in Iraq); Needham, *supra* note 203, at 1 (noting that the United States faces challenges today similar to the challenges faced at the end of World War II and advocating for the United States to "revise its national security apparatus for the environment of the 21st century"); Thompson, *supra* note 37, at 62. *But see* CSIS, *supra* note 202, at 4–87, 17 (rejecting the argument that "'we need a Goldwater-Nichols for the interagency'" reform because there is "no integrated USG chain of command" and the President lacks "'authority, direction, and control'" over non-Defense agencies, and instead proposing significant tweaks of the current national security apparatus).

[295] Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C).

[296] Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.).

[297] *See, e.g.*, Gorman & Krongard, *supra* note 14, at 52; McKinney, *supra* note 19, at 5; Naler, *supra* note 3, at 27; Navas, *supra* note 19, at 231; Needham, *supra* note 203, at 1; Thompson, *supra* note 37, at 62.

[298] *See* Gorman & Krongard, *supra* note 14, at 54–56; McKinney, *supra* note 19, at 12–14; Needham, *supra* note 203, at 6–8.

[299] *See* Naler, *supra* note 3, at 27–31; Thompson, *supra* note 37, at 71–74.

[300] *See* CSIS, *supra* note 202, at 4–87; Collins, *supra* note 2, at 12–14; Kelly, *supra* note 6 (arguing for the creation of a "deployable international civil service" to offset the significant operational burden placed on the military).

[301] *See* Collins, *supra* note 2, at 12 (highlighting the need for interagency experience); Gorman & Krongard, *supra* note 14, at 57 (recognizing the valuable contributions of

of successful rule of law operations, the following is a summary of several military strategists' proposed overhauls at the strategic/NSC level and high operational/combatant commander level.

Strategists focusing on an overhaul of the national security apparatus at the strategic level generally view the current national security apparatus as incapable of effectively anticipating, "plan[ning] and execut[ing] long-term strategic policy."[302] In part, this incapacity is the result of information overload at the NSC level naturally resulting from the stove-piped decision-making process established under the National Security Act of 1947[303] and the National Security Act Amendments of 1949.[304]

> After surviving the intradepartmental process, these separate solutions enter the interagency process and eventually make their way to the highest levels of government. Called "policy hill" by Robert Cutler, President Dwight D. Eisenhower's National Security Adviser, this process means that only at the highest levels do actual integration, coordination, and synchronization occur. In testimony before the 9/11 Commission, Secretary Powell, Secretary of Defense Donald Rumsfeld, and Condoleezza Rice testified that it took over 7 months to formulate a coherent, regionally based counterterrorism strategy that was originally scheduled to be briefed to the Principals Committee the week of September 11. This delay occurred despite the realization of the urgency for a coordinated, multifaceted strategy to confront the imminent threat posed by Al Qaeda.[305]

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interagency professionals); McKinney, *supra* note 19, at 13–14 (highlighting the need for interagency training and experience); Needham, *supra* note 203, at 12–15 (highlighting the need for interagency training and experience).

[302] McKinney, *supra* note 19, at 10.

[303] Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C).

[304] Pub. L. No. 81-216, 63 Stat. 578 (1949).

[305] Gorman & Krongard, *supra* note 14, at 53–54; *see also* McKinney, *supra* note 19, at 10.

> Given the challenges facing the nation in the 21st century, the small structure of the NSC staff limits its ability to plan and execute long-term strategic policy. Likely because of this inability, the Brookings

Beyond this core problem, strategists proposing strategic level reform point to several other deficits in the current national security apparatus. For example, that the structure "rewards parochialism through promotion and opportunity, stovepipes divergent expertise, and wastes resources by producing unnecessary redundancies."[306] Further, that the current organization is ineffective due to the ever "Changing Role of the NSC Based on Chief Executive's Inclinations,"[307] "Ineffective Organizational Learning and Missed Opportunities,"[308] "Ineffective Control of Interagency Rivalries,"[309] and an "Inability to Influence Appropriations and Spending Priorities."[310]

To remedy these deficiencies, the strategists propose a dramatic overhaul of the national security apparatus at the strategic level to achieve a coordinated and "synergistic"[311] interagency effort. The goal of their effort is to efficiently transmit integrated policy options and recommendations to the President. To achieve this result, the strategists mix together the combined lessons of the National Security Act of 1947,[312] National Security Act Amendments of 1949,[313] and the

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> institution found that the NSC is immersed in policy detail and focuses predominantly on the short-term.

Id.; Needham, *supra* note 203, at 3.

> What is most critical about the NSC is the strategic thought process that leads to a coordinated strategy. Strategy created in each of the various departments and brought to the NSC for coordination will not work. It must be holistic and synergistic product of the different perspectives of the NSC members, their staffs, and the NSC staffs.

Id.

[306] Gorman & Krongard, *supra* note 14, at 54.

[307] McKinney, *supra* note 19, at 9.

[308] *Id.* at 10.

[309] *Id.*

[310] *Id.* at 11.

[311] Needham, *supra* note 203, at 3.

[312] Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in various sections of 10 U.S.C.) (creating the National Security Council, Central Intelligence Agency, Department of Defense, and Air Force); *see supra* notes 199–216 and accompanying text.

[313] Pub. L. No. 81-216, 63 Stat. 578 (1949) (creating the position of the Chairman of the Joint Chiefs of Staff, elevating Department of Defense to cabinet level position, and demoting the services to military departments); *see supra* notes 221–24 and accompanying text.

Goldwater-Nichols Department of Defense Reorganization Act of 1986.[314]

As a preliminary step, the strategists would create a new executive agency or department with control over the combined activities of its subordinate elements. For example, one would create a "permanent executive or governing board comprised of the senior leadership . . . from the departments and agencies . . . that would be similar to how the service chiefs sit on JCS while retaining their service roles."[315] Another would create a "Secretary of National Security," who with regard to the underlying agencies would serve in a capacity similar to that of "the military service chiefs to the CJCS."[316] And yet another strategist would create a "Department of National Security and Strategy" encompassing a multitude of agencies while at the same time correcting the President's current lack of "statutory responsibility to direct the activities of the different interagency actors" beyond the DOD.[317]

Second, the strategists would demote wholesale or partial elements of existing executive agencies, such as Defense, State, Intelligence, Commerce, and Immigration and Customs Enforcement from their current cabinet level status and bring them under the fold of this new executive authority.[318] In other words, it would be very similar to the elevation of the DOD to a cabinet level status and the demotion of the services to military departments by the National Security Act

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[314] Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in various sections of 10 U.S.C.) (empowering the combatant commanders, relegating the services to a train, man, and equip function, mandating "jointness" through military personnel and professional education systems, and empowering the Chairman of the Joint Chiefs of Staff); *see supra* notes 225–35 and accompanying text.

[315] Gorman & Krongard, *supra* note 14, at 55.

[316] Needham, *supra* note 203, at 6.

[317] McKinney, *supra* note 19, at 12–13 ("This would resolve the current inability of the NSC to control and direct activities across the interagency community to ensure unity of effort across the competing departments."); *see* CSIS, *supra* note 202, at 17 ("While Title 10 of the U.S. Code gives the Secretary of Defense 'authority, direction and control' over the Department subject to the direction of the President, Congress has not given the President the same authority over the USG agencies, except when he invokes his temporary emergency powers.").

[318] Gorman & Krongard, *supra* note 14, at 54; *see also* McKinney, *supra* note 19, at 12–13; Needham, *supra* note 203, at 6 (creating a structure that encompasses "Defense, Foreign Policy and Regional Affairs, Finance, and Homeland Security" and at least has a close working relationship with if not direct control over the intelligence community).

Amendments of 1949,[319] or alternatively, the elevation of the Chairman's role relative to that of the service chiefs by the Goldwater-Nichols Act.[320]

Third, through suggested changes in funding, personnel policies, interagency education and training, and the creation of "interagency service officers,"[321] the strategists seek to foster an interagency attitude that ultimately results in an effective, dynamic, interagency approach to the identification and resolution of threats to the national security of the United States. In other words, these strategists echo the Goldwater-Nichols reform of the military personnel and education systems.[322]

Strategists focused on the high operational level of reform in turn concentrate on an overhaul of the combatant command structure to take account of the extraordinary interagency nature of current military operations.[323] To support their claims for an overhaul of the combatant command structure, one strategist relied on the observations of two former combatant commanders as to "where problems exist and potential remedies might be found."[324] The other strategist adopted a more studied

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[319] *See supra* notes 221–24 and accompanying text.
[320] *See supra* notes 225–35 and accompanying text.
[321] McKinney, *supra* note 19, at 13–14; *see also* Gorman & Krongard, *supra* note 14, at 54–55.

> These organizations would assume a role similar to the military services and become responsible for training and equipping the personnel seconded to the interagency bodies. Their personnel would rotate between their home organizations and the new organizations just as military officers serve within their own services and also in joint organizations.

Id.
[322] *See supra* notes 225–35 and accompanying text.
[323] *See* Naler, *supra* note 3; Thompson, *supra* note 37.
[324] Naler, *supra* note 3, at 27. Naler's focus on a combatant command level reform makes sense because he relies on General Peter Pace's observations on the deficiencies of the current interagency construct. While not quoted specifically in Naler's work, in a media interview General Pace stated that the "interagency process now in effect does a good job with presenting the president with options. 'But once the president decides to do something, our government goes back into its stovepipes for execution—Department of State does what they do, DoD does what we do, the Department of Treasury, etc.'" Garamone, *supra* note 3 (quoting General Pace). Naler does cite General Pace for asking whether we "'need a Goldwater-Nichols-like event for the interagency?'" Naler, *supra* note 3, at 27 (quoting Garamone, *supra* note 3 (quoting General Pace)). Naler also relied on the observations of the former commander of U.S. Central Command, General Anthony Zinni, who stated: "'In Washington there is no one place, agency, or force that directs interagency cooperation. The only such cooperation is on an ad hoc, person-to-person or group-to-group basis. So if you have a problem like putting Iraq back together

approach. He initially highlighted the current "absurdities" resulting from a lack of an interagency unified effort.[325] Second, he acknowledged that the "Combatant Commands are by far the most structured tools with which the United States can wield all the elements of its national power."[326] Third, he recognized the shortcomings of the combatant commands to achieve a coordinated interagency approach. Despite the development of the Joint Interagency Coordination Groups[327] and Civil

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after Saddam . . . there's nowhere to start.'" *Id.* (quoting General Anthony Zinni in Chris Stronhm, *Former Military Commander Calls for New Military-Civilian Planning Organization* (Dec. 7, 2004), www.govexec.com/dailyfed/1204/120704cl.htm).

[325] Thompson, *supra* note 37, at 62. Thompson described the "absurdities" as follows:

> Examples of obvious absurdities abound—the fact that DOD's division of the world's nations in its Unified Command Plan bears no relation whatsoever to the State Department's regional bureaus, which, in turn, are different from the Central Intelligence Agency's regional groupings. DOD dutifully prepares its "National Military Strategy" (and now a "National Defense Strategy") but there is no corresponding National Economic Strategy or National Information Strategy for two other key elements of power. "Unified Action" is a fine idea with a prominent place in DOD doctrinal publications; unfortunately, no one else in the government pays much attention to DOD's doctrine.

Id.

[326] *Id.*

[327] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 290 (12 Apr. 2001, *as amended through* 17 Oct. 2007) [hereinafter JOINT PUB. 1-02], defines a Joint Interagency Coordination Group, or JIACG, as follows:

> An interagency staff group that establishes regular, timely, and collaborative working relationships between civilian and military operational planners. Composed of US Government civilian and military experts accredited to the combatant commander and tailored to meet the requirements of a supported joint force commander, the joint interagency coordination group provides the joint force commander with the capability to coordinate with other US Government civilian agencies and departments. Also called JIACG.

Id. A problem with the JIACG is that "[a]lthough they are intended to '[p]rovide regular, timely, and collaborative day-to-day working relationships between civilian and military operational planners,' the representatives in the JIACG typically do not possess tasking authority with their parent agency. Planning and operations by non-DOD agencies still remain largely disconnected from military planning and operations." Schnaubelt, *supra* note 154, at 57. JIACGs have at least three additional "crippling deficiencies." Thompson, *supra* note 37, at 67. First, "it is not possible, absent legislation, to mandate non-DOD participation." *Id.* "Second, there are strict limitations on the roles and

Military Operations Centers,[328] evidence from operations in Iraq and Afghanistan "demonstrates that the true unified action among the interagency construct remains a distant, elusive goal."[329] To cement his argument, he concluded that "the reality is that there is no single entity responsible for managing interagency coordination at the all-important nexus between the strategic and operational levels. In a striking passage for a doctrinal publication, Joint Publication 0-2 laments the utter absence of any government-wide doctrine or controlling authority."[330] From this analysis of the problem, these strategists proposed an overhaul of the combatant commands to achieve an integrated interagency approach to threats and missions.

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responsibilities of the JIACGs. They cannot task civilian agency elements or personnel, reorganize civilian agency elements, prioritize the efforts of civilian elements, or unilaterally commit agency resources." *Id.* "Third, and most fundamentally, the vastly differing organizational cultures of the civilian and military agencies that constitute the JIACG really hinder its smooth functioning." *Id.*

[328] JOINT PUB. 1-02 defines a Civil Military Operations Center, or CMOC, as follows:

> An ad hoc organization, normally established by the geographic combatant commander or subordinate joint force commander, to assist in the coordination of activities of engaged military forces, and other United States Government agencies, nongovernmental organizations, and regional and intergovernmental organizations. There is no established structure, and its size and composition are situation dependent.

JOINT PUB. 1-02, *supra* note 327, at 89.

[329] Thompson, *supra* note 37, at 72 ("The overall poor performance of the interagency coordinating process in Afghanistan and Iraq demonstrates that the Combatant Commands are, by their single element of power nature and orientation, not up to the task of planning and conducting effects-based operations.") Thompson cites the Joint Forces Command definition of effects-based operations: "'operations that are planned, executed, assessed, and adapted based on a holistic understanding of the operational environment in order to influence or change system behavior or capabilities using the integrated application of selected instruments of power to achieve directed policy aims.'" *Id.*

[330] *Id.* at 64. Thompson quotes Joint Publication 0-2 as follows: "'There is no overarching interagency doctrine that delineates or dictates the relationships and procedures governing all agencies, departments, and organizations in interagency operations. . . . [T]here is no oversight organization to ensure that the myriad of agencies, departments, and organizations have the capabilities to work together.'" *Id.* (quoting JOINT PUB. 0-2, *infra* note 392, at I-11).

One of these strategists turns the Civil Operations and Revolutionary Development Support (CORDS) model from Vietnam "on its head."[331] He describes this new framework as follows:

> Turning the CORDS model on its head, the commanders of geographic combatant commands could be senior civilians with the experience of long and distinguished careers, representing key governmental agencies in the National Security Council. The President would nominate them to their new role with full ambassadorial rank, and they would report to the National Security Advisor. Interagency synergy would be achieved through deputy director positions based on the elements of power—[Diplomatic, Information, Military, Economic (DIME)]. Reversing the command relationships in CORDS, the military director would be the current four-star Combatant Commander. This officer would retain command authority over military

[331] *Id.* at 72. Under the CORDS model, a civilian, Robert Komer, was appointed the "civilian operational deputy" to the commander of the Military Assistance Command, Vietnam (MACV). *Id.* at 70. Vested with full ambassadorial rank, this civilian ranked third in line of command at MACV, "after Westmoreland's deputy, General Creighton Abrams." *Id.*

> Komer did not have command authority over military forces, but he was now the sole authority over the entire U.S. pacification effort, "for the first time bringing together its civilian and military aspects under unified management and a single chain of command." Komer appointed new deputy commanders for pacification in each of the four corps regions, giving them the same command relationship to their respective corps commanders that he had to Westmoreland. These four individuals . . . "were, in effect, his corps commanders." Serving under these "Corps Dep CORDS" were Province Senior Advisors (PSAs) in each of South Vietnam's 44 provinces. The PSAs were roughly half-military and half-civilian, though those in less secure provinces were usually military. They were in charge of fully integrated military and civilian agency province teams; under them were small, usually four-person, district teams in each of the 250 districts. The district teams were, again, a mixture of military and civilian agency personnel.

Id. at 70–71 (quoting GUENTER LEWY, AMERICA IN VIETNAM 124 (1978); NEIL SHEEHAN, A BRIGHT SHINING LIE—JOHN PAUL VANN AND AMERICA IN VIETNAM 657 (1988)). The CORDS model went so far as to permit military and civilians to conduct one another's "performance reports." *Id.* For a discussion on the contributing factors to the failure of the CORDS model, see *id.*

> forces, and responsibility for planning efforts, albeit with augmentation from the diplomatic, informational, and economic directorates. Military billets might be staffed by officers from an "Interagency Officer" career field, proposed by Colonel Harry Tomlin, with the same underlying philosophy as the Army's Foreign Area Officer field. Diplomatic, informational, and economic directors, each with ministerial rank, would come from appropriate Cabinet departments and be responsible for integrating planning with the military within their spheres of expertise, and for coordination and interface with embassy country teams. Interagency intelligence centers, staffed by regional and topical specialists from the Defense Intelligence Agency, the CIA, and the State Department's Bureau of Intelligence and Research (INR), would replace the current Joint Intelligence centers at the commands.[332]

In contrast, the other strategist proposing an overhaul of the combatant commands leaves the ultimate commander a general officer but creates two deputy commanders, one civilian and the other military.[333] Below these levels, the combatant commands would incorporate at the headquarters and staff level a more "inclusive list of instruments of national power [to] include diplomatic, informational, military, economic, law enforcement, financial, and health and environmental."[334] Through this "transformational integration" of the elements of national power at the "juncture of the strategic and operational levels," the U.S. will have created "truly interagency organizations capable of harnessing and projecting America's 'soft' power."[335]

Clearly other changes must be contemplated to fully realize the potential of the U.S. instruments of national power. Perhaps the most obvious among these deficiencies is the glaring institutional imbalance between our military and civilian agencies. As discussed earlier, the resources available to the DOD dwarf those of other government agencies.[336] As a result, the military has come to be relied upon as our

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[332] *Id.* at 72–73.
[333] Naler, *supra* note 3, at 28.
[334] *Id.* at 27.
[335] Thompson, *supra* note 37, at 74.
[336] *See supra* notes 248, 253–58 and accompanying text.

preeminent instrument of national power, even in such areas as stability and reconstruction operations and rule of law implementation, where civilian agencies should be in the lead.[337] As one commentator remarked upon the publication of Department of Defense Directive 3000.05,[338] "[i]t's probably safe to say that the military has rarely, if ever, advocated so strenuously on behalf of the State Department and other agencies within one of its own planning documents."[339] To remedy this defect, she argued for the creation of a "deployable international civil service."[340] Secretary of Defense Robert M. Gates echoed this sentiment, stating we need "to build a civilian response corps" that incorporates "a permanent, sizeable cadre of immediately deployable experts with disparate skills."[341] As a result, even if we build it, unless Congress creates additional resources and billets in these civilian agencies, they will not come.[342] Our structure at the critical tactical and operational levels will remain as hollow as it is today with the notable exception of the DOD.

Deciding how to reform the national security apparatus is no easy task. It will require numerous congressionally directed studies, and as history has shown, it will also require perfect timing to coalesce the political will of all the necessary powerbrokers across government agencies and within the halls of the Congress and the White House. However, having seen some of the possibilities, are any of them suited to achieve the rule of law and the broader stability and reconstruction mission in a post-intervention or failed state?

V. The Alignment of Mars and Venus to Achieve the Rule of Law in Failed and Fragile States

Having completed a tour of Venus and Mars, illumination from the rays of the sun has made one thing abundantly clear: Mars and Venus must collide and in the process become one. The current national security apparatus cannot adequately respond to the complex

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[337] *See supra* notes 248–5 and accompanying text.
[338] DODD 3000.05, *supra* note 157.
[339] Kelly, *supra* note 6.
[340] *Id.*
[341] Gates, *supra* note 12, at 7.
[342] *See* STROMSETH ET AL., *supra* note 8, at 77 ("Many Americans take the value of the rule of law for granted and assume that 'if you built it, they will come,' applies to courts and constitutions as much as to baseball fields.").

multidisciplinary challenges presented in building the rule of law in a failed or fragile state.[343] A review of Mars's proposals taking into account Venus's dynamic requirements for the establishment of the rule of law shows that the best course of action is a combination of the three approaches outlined in Part IV: reform the strategic level, reform the high operational level, thereby integrating the tactical level, and augment our civilian agencies. That is the real lesson of the National Security Act of 1947, its amendments in 1949, and the Goldwater-Nichols Act of 1986, when viewed through the lens of reforms to the DOD.

The National Security Act of 1947 created a DOD but left the Secretary's position relatively powerless, as the service chiefs still retained their cabinet level authority.[344] The 1949 amendments corrected this problem by demoting the service secretaries to military departments and elevating the DOD to a cabinet level position.[345] In turn, the Goldwater-Nichols Act empowered combatant commanders by relegating the services to a train, man, and equip function, thereby giving combatant commanders the authority to make operational decisions subject to the direction of the DOD, NSC, and the President. It also empowered the CJCS. To effectuate this apparatus, the Act mandated "jointness" through training, doctrine, and importantly, personnel.[346]

Recognizing the relatively widespread agreement that our national security apparatus is not poised to meet the dynamic challenges of the twenty-first century,[347] a holistic and synergistic reform rather than a piecemeal one is in order. Otherwise, we may simply repeat once again the nearly fifty years it took the DOD to become fully integrated, only this time in the context of the national security apparatus. Adopting only one aspect of the proposal, or a variant thereof, equates to taking baby steps. In fact, it takes "one giant leap." One giant leap will effectively bridge the gap between the goal of creating stable societies and the reality of actually achieving them.

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[343] Gates, *supra* note 12, at 6 ("But these new threats require our government to operate as a whole differently—to act with unity, agility, and creativity. And they will require considerably more resources devoted to America's nonmilitary instruments of power.").
[344] *See supra* notes 203–20 and accompanying text.
[345] *See supra* notes 221–24 and accompanying text.
[346] *See supra* notes 225–35 and accompanying text.
[347] *See supra* notes 197–291 and accompanying text.

To remedy this gap, I propose a "giant leap"[348] at the Appendix. The Appendix sets forth a proposed reform of the national security apparatus at the strategic and high operational or combatant commander level capable of producing a single, directed, unified, and "synergistic" approach to implementing a substantively robust U.N. definition of the rule of law.

At the strategic level, an interagency perspective is necessary to make the fundamental decision of how to define and measure or administer the rule of law for the entire U.S. government. Should it be substantive or formal, and if substantive, what added values should we include?[349] Beyond how to define the rule of law, the strategic level must decide how we measure or administer the rule of law. In other words, how do we go about establishing our definition of the rule of law? Is it the building of institutions or the intangible ends that we seek to achieve, such as a host-nation "cultural commitment" that results in a stable society capable of enduring when the United States departs?[350]

To produce an organization capable of answering these questions across the interagency spectrum, I propose the creation of a National Security Department headed by a Director of National Security. The Director of National Security[351] would be a cabinet or executive level department and a full time member of the NSC, replacing the Secretaries of Defense and State in this regard. The NSC would remain otherwise intact as would the position of National Security Advisor as an advisory position to the President.[352] The Department of National Security would have lead responsibility for all matters affecting the national security of the United States from external or foreign threats. To realize this responsibility, and ensure unity of effort between the two government agencies primarily responsible for U.S. national security today, both the DOD and DOS would be demoted from their cabinet level position and fall under the Department of National Security and report to the Director

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[348] *See* Schnaubelt, *supra* note 158, at 59 (calling for a "quantum leap to interagency operations").
[349] *See supra* notes 96–114 and accompanying text.
[350] *See supra* notes 115–53 and accompanying text.
[351] *See generally* McKinney, *supra* note 19 (proposing the creation of a "Department of National Security and Strategy" and accompanying structure).
[352] *See generally* Goreman & Krongard, *supra* note 14 (making a similar recommendation with regard to the National Security Council and Advisor).

of National Security.[353] A Unified Staff would be created. All staff functions, from budget through operations, plans, personnel, and training ultimately would fall under the authority of this newly established Department as opposed to either State or Defense. To synchronize this staff, the position of Chairman of the Unified Staff would be created.

The Director of National Security would report directly to the President.[354] The chain of command would flow from the President through the Director of National Security to the newly created Geographic Control Center Commanders, which will be discussed below. Neither the Secretaries of State nor Defense would exercise operational command or control over their respective departments, which would retain their existing names. Rather, akin to the combined changes of the National Security Act of 1949 and Goldwater-Nichols Act of 1986,[355] both of these departments would be demoted from cabinet level positions and relegated to a train, man, and equip function in support of the Geographic Control Center Commanders.

Other currently existing cabinet level positions would remain intact. However, these other agencies would be required to provide support to the Director of National Security beyond simple "coordination" and "cooperation." Effective planning and functioning in today's complex operating environment requires the Department of National Security to have actual authority over other agency assets during operations. Therefore, upon a presidential declaration that a contingency operation exists,[356] the Director of National Security would receive tasking authority over these other government agencies to provide required personnel, training, equipment, and support to the Geographic Control Center Commanders.[357] Adopting this approach ensures the President,

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[353] *See generally id.* at 54–55 (advocating "the primacy of the current departments and agencies involved in national security should be lowered. These organizations would assume a role similar to the military services and become responsible for training and equipping the personnel seconded to the interagency bodies.").

[354] *See id.* at 55.

[355] *See supra* notes 203–35 and accompanying text (discussing these two acts).

[356] Contingency operation would be broadly defined, to include anything from peacekeeping through humanitarian missions to actual military intervention.

[357] *See* Needham, *supra* note 203, at 5. With regard to his vision of a "Deputy Director of the National Security Directorate" (DDNSD), Needham stated:

> Although the President is still in a lead role, the DDNSD emerges as a significant player—much empowered. The DDNSD can coordinate the previous State Department diplomatic actions, some treasury

Director of National Security, and most importantly, the Geographic Control Center Commanders have the resources and operational command and control necessary to plan effectively for and conduct synergistic rule of law operations. Additionally, during times other than a presidentially declared contingency operation, these other agencies will be required to have a permanent staff presence within the Department of National Security, to include a presence at each Geographic Control Center Command. They will also be required to participate in and provide personnel and subject matter expertise to unified training and planning.

Successful implementation of the rule of law also requires a similar reorganization at the high operational level which will have a trickle-down effect to the tactical level. Reorganization at the high operational level would build regional expertise and enable long-term planning for contingency operations and hot spots across the region well in advance of a crisis, possibly even circumventing the crisis itself through preventative measures short of a full scale contingency operation. By centralizing area expertise across the spectrum of U.S. agencies, these plans could encompass cultural, linguistic, economic, health, environmental, religious, and regional nuances, even within a country, and use this information to arrive at a workable, synergistic plan.

As the rule of law theorists recognize, there is no "one size fits all" to implementing the rule of law.[358] At the high operational level, we would find our tailors—that mix of interagency personnel who could tailor the broad rule of law directives from the strategic level into country and region specific wardrobes or courses of action. By possessing all the requisite personnel in-house, an interagency combatant command,[359] or as I label them, Geographic Control Center Commands, would then have the operational authority similar to that of current combatant commanders to deploy appropriate resources and personnel as necessary to maximize the mission and ultimately achieve success at the tactical

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> powers, elements of what is currently the purview of the Department of Homeland Security, and the significant actions of the secretary of Defense for crisis management and in his Homeland Defense role. That is if the President grants him or her that authority.

Id. *See generally* Goreman & Krongard, *supra* note 14.

[358] STROMSETH ET AL., *supra* note 8, at 9.

[359] *See* Naler, *supra* note 3 (proposing an "interagency combatant command" that is similar to yet distinct from the Geographic Control Center I propose).

level. And, importantly, should a disagreement arise between the various interagency actors, these Geographic Control Center Commanders would be the centralized authority that serves as a referee and makes the call.

Filling the interagency void at the high operational level,[360] these Geographic Control Center Commands will look largely similar to the current combatant commands but with a dramatic interagency twist.[361] There will be six Geographic Control Centers that mirror the geographic orientation of the current combatant commanders and the anticipated addition of Africa Command. However, borrowing from a strategist, the "commander" of the Geographic Control Center will be a civilian nominated by the President, approved by Congress, and vested with full ambassadorial rank.[362] The commander has direct responsibility over all military and DOS personnel and operations within the region, to include the chiefs of mission at embassies. He has similar control over all military affairs. However, this commander must be a civilian[363] to preserve civilian control over the military, and perhaps more importantly, prevent military control over the traditional DOS mission. Also, under this framework, having a military member in charge of an entire region's foreign policy might significantly tarnish diplomatic relations with foreign countries based on appearance alone.

Falling under the commander are two deputy commanders—the current military combatant commander and a DOS senior executive service (SES) civilian.[364] Each deputy commander would serve as the principal advisor to the commander on their respective areas of expertise. The commander would also have a personal staff. Included on this personal staff would be a legal advisor. The principal legal advisor would be a military flag officer (O7) or DOS SES, while the deputy would be the principal's interagency counterpart. Overall, the composition of this personal staff, like that of the primary staff, would reflect an interagency mix of personnel. Personnel from this legal staff,

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[360] On this concept of the Geographic Combatant Control Center, I borrow heavily from Thompson, *supra* note 37. Thompson stated: "Only civilian leadership, with significant interagency experience, can recreate these commands into truly interagency organizations capable of harnessing and projecting America's 'soft' power, arguably the most potent weapon in its arsenal, along with its military force."). *Id.* at 74.
[361] *See infra* app.
[362] *See generally* Thompson, *supra* note 37.
[363] *See id.* (proposing a civilian commander).
[364] *See generally id.*

in addition to forming a core legal office, would be seeded in each primary staff section.

The primary or Unified Staff would be composed of personnel representative of all the elements of national power—diplomatic, intelligence, military, and economic[365]—but concentrated on the diplomatic and military. Each staff section would be headed by a DOS SES or alternatively military flag officer based on their traditional areas of expertise. As was the case with the personal staff, the deputy would be the interagency counterpart of the staff principal. The staff sections depicted in the Appendix are, for the most part, self-explanatory with the exception of the environment, health, and legal staff section.[366] The legal portion of this staff section is distinct from that of the legal advisor to the commander. The latter is charged with providing legal advice to the commander and his staff on all matters. The former is exclusively dedicated to studying the legal systems of countries within the Geographic Command Center to thereby enhance rule of law or any other contingency operations that may arise in the region. The same may be said of several other staff sections, such as "cultural affairs" and "financial and economic development" (as distinct from "requirements and acquisitions").

Beyond these core elements, another central feature would be a standing Unified Headquarters Element.[367] This element would contain core personnel necessary to stand-up a unified task force in the event of a contingency. The ultimate commander and composition of this task force could vary depending on whether the mission is predominantly military or civilian in nature. Either way, this element would contain the structure necessary to direct the personnel or equipment received from the DOS, DOD, and other government agencies during a contingency operation.

For this overhaul of the national security apparatus to be effective, the civilian agencies will need to be augmented in terms of personnel and equipment.[368] While budgetary concerns may be eased by having appropriated funds flow to and through the Department of National

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[365] *See id.* (proposing deputy commanders based on DIME).
[366] *See* Naler, *supra* note 3. I adopt Naler's proposed staff for his "unified combatant command headquarters." *Id.*
[367] *See id.*
[368] *See generally, e.g.*, Gates, *supra* note 12; Kelly, *supra* note 6.

Security, without authorizations for more civilian personnel, the organizations will remain DOD heavy and DOS and civilian agency light. Additionally, as learned from Goldwater-Nichols, there will need to be similar changes to personnel policies, such as the creation of interagency specialty tracks,[369] the reward of interagency experience,[370] and increased interagency education and training.[371]

If the national security apparatus is overhauled as outlined above, one of the immediate results will be a "synergized," uniform approach to all operations as a result of mandated integration and cooperation orchestrated by authoritative heads at the strategic and high operational level. However, another equally beneficial consequence will be the cross-pollination of interagency cultures. The premise of this article has been that Mars and Venus, or military strategists and rule of law

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[369] *See* McKinney, *supra* note 19, at 13 (calling for the growth of "interagency service officers"). McKinney described these officers as follows:

> The Secretary of DNSS should also establish an interagency duty career specialty to provide an opportunity to develop a cadre of civilian and military professionals who are trained to work the interagency process. These new Interagency Service Officers (ISO) would be required to return to their parent organizations periodically to ensure they do not become isolated, and thereby maintain a certain degree of organizational specific proficiency.

Id.

[370] *See id.* at 14 (stating that "the Secretary of DNSS should revise the current civilian and military personnel systems to reward interagency experience"). Thompson further noted that "the quality of advice produced by the interagency process is directly related to the quality of the civilian and military professionals working in the different agencies. It is critical that the United States has trained civilians and military professionals experienced with the interagency process." *Id.* at 13. Others have echoed these same thoughts. *See, e.g.*, Chiarelli & Smith, *supra* note 12, at 13 ("[W]e should consider expanding opportunities for interagency team members to work routinely with military organizations. These members would increase their understanding of what the military can and cannot contribute to our national security solutions."); Needham, *supra* note 203, at 13–14 ("Imagine the synergy created when the upper-level staff in Defense has served in Homeland Security with the State Department. Barriers to interagency cooperation and coordination would crumble.").

[371] *See, e.g.*, McKinney, *supra* note 19, at 13 (suggesting that leadership "establish a professional interagency education system similar to the professional military education system in the Department of Defense. . . . Moreover, the Secretary of DNSS should ensure that interagency college graduates actually serve in interagency duty assignments."); Needham, *supra* note 203, at 14 ("Schooling is a very significant aspect of the entire national security personnel system. To that end there have even been recommendations to transform the National Defense University into a more of a National Security University for educating not only military officers, but national security civilians as well.").

theorists, must collide. As a result of this collision, the original Mars and Venus, that is, the State Department and Department of Defense cultures,[372] will also collide.[373] A criticism of civilian agency efforts to date has been that they suffer from a lack of planning and coordination.[374] On the other hand, a criticism of the DOD is that it is overly focused on the institutional aspects of the rule of law—courts, cops, and corrections.[375] The reorganization I propose will necessarily result at least in part in some of the DOD's weighty planning and organizational skills[376] rubbing off on civilian agency personnel. Similarly, some of the DOS's more interpersonal and holistic approach[377] to operations will rub off on the DOD, such that courts, cops, and corrections will be seen more clearly as a component part of the broader rule of law mission. In this sense, there will be a second, more long-term and ongoing alignment of Mars with Venus.

In proposing an overhaul of the national security apparatus of this magnitude there are likely to be a wealth of objections ranging from comments that it is outright impossible to comments that it contradicts the intentions of the Founding Fathers.[378] While it is not possible to anticipate all the objections, in this section I respond to some that have been made or are anticipated.

An immediate reaction to the proposed overhaul is that it is politically and practically impossible. First, it will be argued that it is politically impossible. An insufficient amount of political goodwill when matched against significant potential hostility within the presidency, Congress, and the agencies themselves may preclude its realization forever. To borrow from Machiavelli,

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[372] *See generally* Rife, *supra* note 1 (discussing the unique and very different cultures of the Departments of Defense and State).

[373] Major Steven Gariepy suggested the idea of this second "collision" to me. Interview with Major Steven Gariepy, 56th Judge Advocate Officer Graduate Course, TJAGLCS, in Charlottesville, Va. (Dec. 17, 2007).

[374] *See* Needham, *supra* note 203, at 3 ("The State Department lacks military proficiency, the Defense Department lacks diplomatic skills, and therefore, neither can create an integrated strategy on their own, not to mention the strategic input from the economic and informational elements of our national policy-making institutions.").

[375] *See supra* note 195 and accompanying text.

[376] *See generally* Rife, *supra* note 1.

[377] *Id.*

[378] Friedman et al., *supra* note 13, at 6 (arguing that a major reorganization and integration of the national security apparatus would contravene the intentions of the Founding Fathers' preference for checks and balances).

> "It must be realized that there is nothing more difficult to plan, more uncertain of success, or more dangerous to manage than the establishment of a new order of government; for he who introduces it makes enemies of all those who derived advantage from the old order and finds but lukewarm defenders among those who stand to gain from the new one."[379]

The history of the Goldwater-Nichols Act and National Security Act of 1947 reveals this to be a valid criticism.[380] However, this same history also shows that even though it may be hard, it can still be accomplished.[381] Just because it will be hard does not mean it not worth the effort.

Beyond being politically impossible, others will argue that it is practically impossible. For example, it has been observed that

> [i]n 1986, no one questioned whether the U.S. military had the ability to conduct superior military operations, and Goldwater-Nichols' enhancement of joint operations made it function even better. By contrast, many, if not most, of today's non-Defense agencies lack the operational culture and capacities to conduct effective interagency operations. Bringing "jointness" to the interagency is therefore an even more daunting task that will also take decades.[382]

Clearly, integrating the cultures of Mars and Venus will take a significant period of time. But if one does nothing and maintains the status quo, then this same criticism will remain valid twenty-five years from now when there remains a need for integrated interagency action. Rather than taking baby steps toward this integration, a giant leap will achieve the end result sooner. Though this leap may stir up a lot of dust and cause short-term confusion, when the dust settles in ten or twenty years, the United States will have practically achieved an integrated interagency approach to operations.

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[379] Navas, *supra* note 19, at 231 (quoting NICCOLO MACHIAVELLI, THE PRINCE (1532)).
[380] *See generally* LOCHNER, *supra* note 4.
[381] *Id.*
[382] CSIS, *supra* note 202, at 17.

Others have argued that the creation of an increasingly integrated national security apparatus, such as that proposed by the military strategists, runs counter to the system of checks and balances envisioned by the Founding Fathers. For example, Friedman, Sapolsky, and Preble have asserted:

> A wish that agencies always march to the same strategy ignores the fact the agencies should and do have different goals, interests, and perspectives. . . . Unity, we should not forget, was anathema to the authors of the Constitution, who mistrusted concentrations of power—even in foreign affairs—and organized a government to bicker and muddle through.[383]

To make this argument, the authors first determine that the military strategist proposed overhauls of the national security apparatus "rely not only on faulty premises about Iraq, but also on undue faith in planning and coordination."[384] In their view, the national security apparatus does not need "better planning, [just] better leaders. That problem is solved by elections, not bureaucratic tinkering."[385]

The argument of these authors advocating for less government integration is overly simplistic and flippant, ignoring the complex intricacies of coordinated interagency action across multiple theaters of operation. Future presidents, regardless of their innate abilities, will be confronted with the complexities of translating into action a stove-piped interagency decision-making process that only comes together on their doorstep at the NSC, for a coordinated decision.[386] To enable better decision-making, an integrated approach is required. Objections based largely on the perceived size of the newly created agency should not hinder its adoption.

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[383] Friedman et al., *supra* note 13, at 9.

[384] *Id.* at 6.

[385] *Id.* The authors continued: "The President's failure to referee his subordinates, however, is not a structural deficiency in the U.S. Government but a managerial deficiency in the Bush Administration. No amount of bureaucratic rejiggering can make the President listen to the right people." *Id.* at 8.

[386] Before NSPD 44, President Clinton recognized the complexities of interagency action and issued PDD 56. Unfortunately, the Bush administration initially neglected the lessons of the Clinton Administration allowing PDD 56 to lapse until world events caused the interagency learning cycle to repeat itself. *See supra* notes 277–82 and accompanying text (discussing the history of PDD 56).

> Critics will challenge the idea of this "Super Department" for just that reason—it is a "Super Department." But in a post-9/11 world the elements of national power that are essential to national security should not be coordinated and focused by chance. Bringing them together under one organization, at a minimum, will lead to quality discussions and interaction among all interagency actors and that in turn will provide well-thought out policy recommendations to the President in a timely manner.[387]

Additionally, the Founding Fathers contemplated an energetic executive branch. "In *Federalist Paper 70*, Alexander Hamilton wrote, 'Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.'"[388] For the executive to be energetic, as opposed to wallowing in the flood of information from the stovepipes of a multitude of government agencies, the national security apparatus must be overhauled.

VI. Conclusion

The lessons of Part II and Part III of this article are that Mars must align with Venus if the United States is to successfully counter the complex challenges to establishing the rule of law in failed or fragile states. As discussed in Part II, there is widespread agreement that the rule of law is a good thing.[389] The trick, however, within both the

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[387] Needham, *supra* note 203, at 18 n.19.

[388] Gorman & Krongard, *supra* note 14, at 57 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

> President John Adams stated, "The essence of a free government consists of an effectual control of rivalries." If President Adams' observation is correct, then the organization tasked with leading the interagency process must be an arbiter of disputes, coordinator of action, and a central body responsible for harmonizing the national elements of power.

McKinney, *supra* note 19, at 10–11 (quoting Marcella, *supra* note 19, at 9).

[389] *See supra* notes 66–84 and accompanying text.

scholarly world and U.S. government agencies, has been a "problem of knowledge,"[390] resources,[391] and "unity of effort."[392]

At the most basic level, if the United States is to solve this "problem of knowledge," it must achieve a common interagency working definition of what the rule of law is and the means that it will use to establish it and measure the results.[393] To oversimplify and borrow a military phrase, all U.S. government agencies must agree on uniform tasks, conditions, and standards. Toward this end, I have argued that the United States should uniformly adopt across all government agencies the U.N. definition of the rule of law. It is substantively robust and incorporates national security objectives of the United States.[394] Further, borrowing from Stromseth, I have argued that the United States must synergistically implement this rule of law definition to achieve a cultural commitment by the host nation through the combined resources of all its instruments of national power, to include resource and personnel enhanced civilian agencies.[395] In a nutshell, an effective rule of law program requires a fully integrated interagency government effort under the operational control of a single centralized authority capable of making decisions binding on all the interagency actors in a theater of operations.[396]

Unfortunately, as outlined in Parts III and IV, the current national security apparatus cannot adequately respond to today's complex challenges, such as the establishment of the rule of law, which requires extraordinary interagency coordination and unity of effort.[397] As a result,

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[390] Carothers, *supra* note 25, at 5.
[391] *See supra* notes 248, 253–58 and accompanying text.
[392] *See supra* notes 247–52, 259–64 and accompanying text. Within the Department of Defense, "unity of effort" is defined as:

> *Unity of effort* requires coordination among government departments and agencies within the executive branch, between the executive and legislative branches, with nongovernmental organizations (NGOs), international organizations (IOs), and among nations in any alliance or coalition.

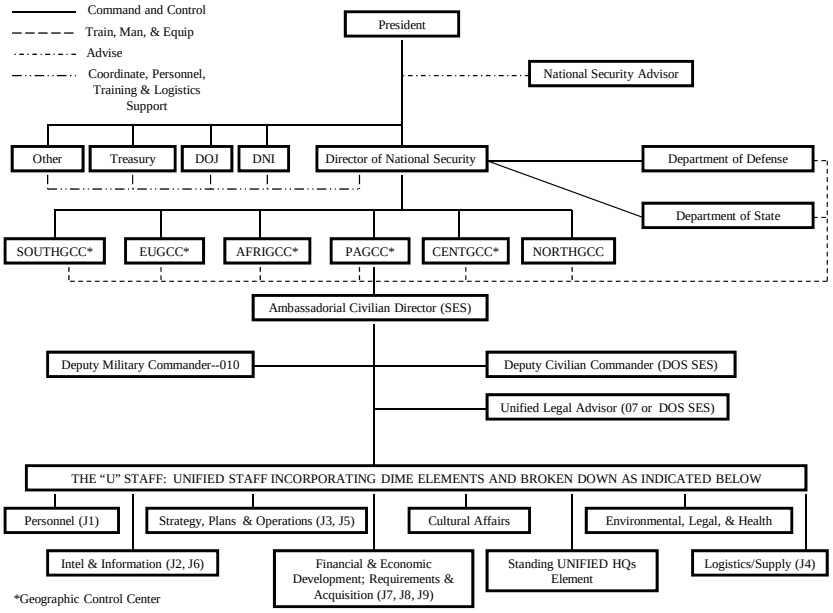
JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) vii (10 July 2001) [hereinafter JOINT PUB. 0-2].
[393] *See supra* notes 66–84 and accompanying text.
[394] *See supra* notes 30–33, 165–96 and accompanying text.
[395] *See supra* notes 53,125, 165–96 and accompanying text.
[396] *See supra* notes 49–196 and accompanying text.
[397] *See supra* notes 197–342 and accompanying text.

various military strategists have proposed overhauls of the national security apparatus, although with relatively little discussion.[398]

Taken together, these differing viewpoints of the theorists and strategists highlight the necessity for and means of change. However, an examination of their writings reveals that the two have apparently never been formally introduced. This brings me to the humble objective of this article: "Mars meet Venus, Venus meet Mars." My intent in writing on both of these two relatively disparate topics was to simply serve as a matchmaker of sorts, from which respective scholars in both areas could discern how the weight of their different fields complement one another and can lead to the formulation of a truly effective national security objective and accompanying apparatus. Having introduced the two, in Part V of this article I proposed a revision to the national security apparatus tailored to a synergistic implementation of the rule of law. Having set the table, I now leave it in the capable of hands of Mars and Venus to advance the argument. Who knows, maybe they will give birth to the National Security Act of the future.

[398] *See supra* notes 292–342 and accompanying text.

Appendix


Command and Control
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President
National Security Advisor
Other
Treasury
DOJ
DNI
Director of National Security
Department of Defense
Department of State
SOUTHGCC*
EUGCC*
AFRIGCC*
PAGCC*
CENTGCC*
NORTHGCC
Ambassadorial Civilian Director (SES)
Deputy Military Commander--010
Deputy Civilian Commander (DOS SES)
Unified Legal Advisor (07 or DOS SES)
THE "U" STAFF: UNIFIED STAFF INCORPORATING DIME ELEMENTS AND BROKEN DOWN AS INDICATED BELOW
Personnel (J1)
Strategy, Plans & Operations (J3, J5)
Cultural Affairs
Environmental, Legal, & Health
Intel & Information (J2, J6)
Financial & Economic Development; Requirements & Acquisition (J7, J8, J9)
Standing UNIFIED HQs Element
Logistics/Supply (J4)
*Geographic Control Center

THE LAST SHALL BE FIRST: THE USE OF LOCALIZED SOCIO-ECONOMIC POLICIES IN CONTINGENCY CONTRACTING OPERATIONS

MAJOR BRADLEY A. CLEVELAND*

Goodwill is the only asset that competition cannot undersell or destroy.
— Marshall Field[1]

Competition has been shown to be useful up to a certain point and no further, but cooperation, which is the thing we must strive for today, begins where competition leaves off.
— Franklin D. Roosevelt[2]

We have conducted a thorough assessment of our military and reconstruction needs in Iraq, and also in Afghanistan . . . [To] support our commitment to helping the Iraqi and Afghan people rebuild their own nations, after decades of oppression and mismanagement. We will provide funds to help them improve security. And we will help them to restore basic services, such as electricity and water, and to build new schools, roads, and medical clinics. This effort is essential to the

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* Judge Advocate, U.S. Air Force. Presently assigned as an Instructor, The Judge Advocate General's School, Air Force Legal Operations Agency, Maxwell Air Force Base, Ala. LL.M., 2008, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va.; J.D., 2000, University of Tennessee at Knoxville; B.A., 1997, University of Tennessee at Knoxville; 1997, B.S., Park University, Parkville, Mo. Previous assignments include Trial Attorney, Air Force Material Command Law Office, Directorate of Contract Dispute Resolution, Wright-Patterson AFB, Ohio, 2005–2007; Area Defense Counsel, Air Force Legal Services Agency, Andersen AFB, Guam, 2004–2005; Chief, Military Justice, 36th Air Base Wing, Andersen AFB, Guam, 2003–2004; Ogden Air Logistics Center, Hill AFB, Utah (Chief of Separations, 2002–2003; Chief of Legal Assistance, 2001–2002). Member of the bar of the Supreme Court of Tennessee, the Air Force Court of Criminal Appeals, and the Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course, TJGLCS, Charlottesville, Va.

[1] Marshall Field, Marshall Field Quotes, http://www.brainyquote.com/quotes/quotes/m/marshallfi109041.html (last visited on Mar. 10, 2008).

[2] Franklin D. Roosevelt, Franklin D. Roosevelt Quotes, http://www.brainyquote.com/quotes/quotes/f/franklind404172.html (last visited Mar. 10, 2008).

stability of those nations, and therefore, to our own security.
— President George W. Bush[3]

I. Introduction

The current rebuilding effort in Afghanistan and Iraq is similar in many ways to the massive rebuilding effort conducted in post World War II Europe under the Marshall Plan.[4] Like the Marshall Plan, an important aspect of the rebuilding effort in Afghanistan and Iraq is the goal to stabilize and stimulate their economies, as well as to build their capacity for future sustainability, by utilizing local goods, services, labor, and companies.[5] In addition, like in Europe at the end of the World War II, the United States is striving to build goodwill in the geographically and resource important countries of Afghanistan and Iraq for the benefit and long-term security of the United States.[6] The United States' desire to foster goodwill and rebuild Afghanistan's economy led to a dynamic and innovative new contracting program called "Afghan First."[7] Under the

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[3] Everything2, President George W. Bush's Address to the Nation: Sept. 7, 2003, Sept. 8, 2003 [hereinafter Bush Address], http://www.everything2.com/index.pl?node_id=1490413.

[4] *See* K.L. Vankan, *President Sign $87.5 Billion Package for Iraq, Afghanistan*, AM. FORCES PRESS SERV., Nov. 6, 2003, http://www.defenselink.mil/news/newsarticle.aspx?id=27830 (reporting that President Bush "called America's Investment in Iraq and Afghanistan the 'greatest commitment' since the Marshall Plan . . . [and] said the United States is 'engaged in a massive and difficult undertaking' and likened the situation to that of post World War II.").

[5] *See* Press Release, Combined Forces Command–Afghanistan, Coalition Boosting Opportunities with 'Afghan First' (Apr. 11, 2006) [hereinafter Press Release, CFC–A], http://www.cfc-a.centcom.mil ("['Afghan First'] provide[s] opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan."); ASSISTANT SEC'Y OF THE ARMY FOR ACQUISITION, LOGISTICS, AND TECH., A REPORT ON IRAQ RECONSTRUCTION, JAN. 2004–SEPT. 2006 (2006) [hereinafter IRAQ RECONSTRUCTION REPORT] ("PCO/GRD [Project Contracting Office/Gulf Region Division] has sought to maximize the use of Iraqi firms whenever possible to help restore Iraq's political and economic stability.").

[6] Vankan, *supra* note 4 (reporting that President Bush "called America's Investment in Iraq and Afghanistan the 'greatest commitment' since the Marshall Plan. 'By this action we show the generous spirit of our country, and we serve the interest of our country, because our security is as (sic) stake.'").

[7] *See* CFC–A, *supra* note 5 ("There's a new game in town for an ongoing Combined Forces Command–Afghanistan program designed to increase opportunities for Afghan economic development and expansion. The program is called 'Afghan First' . . . [and it is designed] to provide opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan.").

Afghan First program, local nationals and companies generally receive favorable consideration in contract solicitation evaluations (evaluative preferences) when the United States procures goods and services in Afghanistan.[8] The Afghan First program enjoyed immediate success and soon led to a similar program in Iraq called the "Iraqi First" program.[9]

The Iraqi First program is identical in purpose, scope, and practice to the Afghan First program.[10] Each evaluates how well an offeror proposes to use local national labor and businesses.[11] Both programs achieved the same immediate success.[12] The programs provide a valuable and productive method of achieving local contracting needs while simultaneously helping the United States to achieve its short and long term strategic goals in Afghanistan and Iraq.[13]

Apart from the benefits of the programs, the intersection of policy and law that arises because of the Afghan First and Iraqi First programs

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[8] Joint Contracting Command–Iraq/Afghanistan, Acquisition Instruction (AI), pt. 26 (Oct. 26, 2007) [hereinafter JCC-I/A, 2007 AI].

[9] Fact Sheet, Joint Contracting Command, Iraq/Afghanistan (JCC-I/A), Iraqi First Program (n.d.) (on file with author).

[10] JCC-I/A, 2007 AI, *supra* note 8, pt. 26.3.

[11] *Id.*

[12] *See generally* John D. Bausiewicz, *NATO Takes Lead for Operations Throughout Afghanistan*, A.F PRINT NEWS, Oct. 5, 2006 [hereinafter *NATO*], http://www.af.mil/news/story.asp?id=123028498 (beginning fiscal year 2007, the "Afghan First" Program provided "hundreds of millions of dollars . . . to Afghan contractors and subcontractors" and work to approximately 20,000 Afghanis.); Colonel Michael T. Luft, USAF, Contracting in Afghanistan, (n.d.) [hereinafter Luft Presentation] (PowerPoint Presentation, available at http://bishkek.usembassy.gov/uploads/images/2Q r5cr35YZRaYX1ihVE4B2/Contracting_inAfghanistan_DoD.pdf) (last visited Mar. 10, 2008 (during just a portion of fiscal year 2007, Afghan First procurements totaled 81% of all contract actions and 76% of $577M of total contracting dollars.); Press Release, Multi-National Force–Iraq, MNF-I Iraqi First Program Surpasses $1 Billion for Year (July 17, 2007), *available at* http://www.mnf-iraq.com/index.php? option=com_ content&task=view&id=12881&Itemid=128 (stating that since the implementation of the "Iraqi First" program, Iraqi businesses have captured $2.9 billion in contract awards. Moreover, as of 17 July 2007, Iraqi First has assured that "42% of all contract dollars" which equates to over $1 billion, were provided to Iraqi businesses.).

[13] *See* CFC–A, *supra* note 5 ("It is the command's intent to leverage . . . contracting activities and resources . . . [in order to] maximize our positive, long-term impact on local economies and the Afghan work force."); Press Release, Combined Press Information Center, Signs of Progress Seen in Iraqi Security, Economy (May 3, 2007), http://www.mnf–iraq.com/index.php?option=com_content&task=view&id=11741&Item id=1 (explaining that Iraqi First seeks to "strengthen the Iraqi economy, enhance[] the security environment, give[] local workers a vested stake in the quality of finished products in their communities and increase[] local resources for future use").

is worthy of critical examination. The United States must balance the policy to use programs like Afghan First and Iraqi First to rebuild Afghanistan and Iraq with government procurement law that mandates the use of full and open competition for government contracts.[14] Procurement policy and government procurement law are at loggerheads with each other because it is unlawful to provide evaluative preferences to local workers and businesses in Department of Defense (DOD) contracts without a lawful exception.[15] Consequently, the use of localized socio-economic programs, like Afghan First and Iraqi First, in contingency contracting environments, without a lawful exception, infringe upon the law that all government agencies, including DOD, shall use full and open competition when it contracts for goods and services.[16] Nevertheless, the Afghan First and Iraqi First programs use of local businesses and workers is an important and necessary strategic tool in the current rebuilding efforts in Afghanistan and Iraq.[17] The use of the programs also contributes to the overall stability of Afghanistan and Iraq and the short and long-term strategic needs of the United States.[18] Congress recognized and acknowledged the benefits of the programs and legitimized them in the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008);[19] however, this was approximately two years after the programs first use. The NDAA 2008 creates the lawful exception required for the continued use of the Afghan First and Iraqi First programs.[20] The NDAA 2008 is a good short-term measure, but

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[14] *See* Competition in Contracting Act of 1984, 10 U.S.C. §§ 2301–2306 (2000).
[15] *See id.*
[16] *See id.*
[17] Bush Address, *supra* note 3.

> We have conducted a thorough assessment of our military and reconstruction needs in Iraq, and also in Afghanistan . . . [to] support our commitment to helping the Iraqi and Afghan people rebuild their own nations, after decades of oppression and mismanagement. We will provide funds to help them improve security. And we will help them to restore basic services, such as electricity and water, and to build new schools, roads, and medical clinics. This effort is essential to the stability of those nations, and therefore, to our own security.

Id.
[18] *Id.*
[19] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3 [hereinafter NDAA 2008] (providing "Enhanced Authority to Acquire Products and Services Produced in Iraq and Afghanistan," which allows the Secretary of Defense to conduct procurements in Afghanistan and Iraq using other than full and open competition procedures under certain circumstances).
[20] *Id.*

Congress can do more. Congress should go further and create permanent legislation to allow Combatant commanders and procurement officials to utilize localized socio-economic programs in future wars, conflicts, and international emergencies. This article critically examines the Federal Acquisition Regulation's competition rules and the Competition in Contracting Act (CICA), including the act's legislative history.[21] Next, the article will discuss the current rebuilding efforts in Afghanistan and Iraq and compare them to the United States' rebuilding efforts in post World War II Europe. The article will then explore the history, goals, application, and impacts of the Afghan First and Iraqi First programs and explain why the programs violated the full and open competition requirement. The article will then discuss why, despite their shortcomings, the programs are vitally important to the United States' efforts in the regions of Afghanistan and Iraq. Finally, the article will explain why congressionally authorized "enhanced contingency contracting authority"[22] is vitally important for both today's contingency efforts and those that may arise in the future.

II. Competition in Federal Procurements

A. Contracting Commandments: The Federal Acquisition Regulation

1. The Golden Rule in Government Contracting: Thou Shalt Conduct Full and Open Competitions

The Federal Acquisition Regulation (FAR) both encourages and allows maximum flexibility in the procurement of goods and services.[23] In the FAR Part 1.102-4(e), procurement officials are given wide latitude for innovation for procuring goods and services.[24] However, within the

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[21] H.R. REP. NO. 98-369, at 1421 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 2109.

[22] NDAA 2008, *supra* note 19, § 886.

[23] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.102-4 (July 2008) [hereinafter FAR].

[24] *Id.* pt. 1.102-4(e). "[If] a policy or procedure, or a particular strategy or practice, is in the best interest of the government and is not specifically addressed in the FAR, nor prohibited by law . . . [then procurement officials] should not assume it is prohibited." *Id.* "Rather, absence of direction should be interpreted as permitting . . . [procurement officials] to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority." *Id.*; *accord id.* pt.1.102-4(a) ("[T]he contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies . . . .").

realm of contract competition, the FAR makes clear that competition is a priority.[25] In fact, all of FAR Part 6 is dedicated to the full and open competition and the exclusions and exceptions to the full and open competition requirements.[26] The import of FAR Part 6 is clear: DOD awards contracts based on full and open competition[27] and any competition that is not full and open is unlawful unless Congress explicitly allows a specific exception.[28]

The FAR provides limited exceptions to the full and open competition requirement, but admonishes that "[c]ontracting without providing for full and open competition or full and open competition after exclusion of sources is a violation of statute, unless permitted by one of the [enumerated] exceptions."[29] The exceptions to full and open competition include full and open competition after exclusion of sources,[30] and, in limited cases, other than full and open competition.[31] The use of an exception requires the contracting officer to cite to the specific exception and prepare a written document to justify the exception.[32] "Full and open competition after exclusion of sources" is the first legal exception to full and open competition the FAR addresses.[33] Full and open competition after exclusion of sources generally consists of exceptions designed to carry out Congress's domestic socio-economic policies.[34]

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[25] *See generally id.* pt. 6.000 (prescribing "policies and procedures to promote full and open competition in the acquisition process and to provide for full and open competition").
[26] *Id.*
[27] *Id.* pt. 6.101(a) ("10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions[,] . . . that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.").
[28] *See id.* pt. 6.001 (stating that the competition requirements apply to all government acquisitions unless a specific exemption or exception exists.)
[29] *Id.* pt. 6.301.
[30] *Id.* pt. 6.2.
[31] *Id.* pt. 6.3.
[32] *Id.* pt. 6.301(b). *See generally id.* pt. 6.303-1 (stating that the contracting officer must "reference to a specific authority" for the exception used. Additionally, he must "[j]usitif[y] . . . the use of . . . [the] action in writing; certif[y] the accuracy and completeness of the justification; and obtain[] [appropriate] approval . . . .").
[33] *Id.* pt. 6.2.
[34] *See id.* (showing that five of the exceptions listed in FAR pt. 6.2 relate directly to small businesses and disabled veterans, and one exception benefits local businesses in areas affected by an emergency).

2. An Exception to Golden Rule: Domestic Socio-Economic Policies that Allow Full and Open Competition after Exclusion of Sources

Socio-economic programs are not novel in government contracting. Congress recognized that certain businesses and groups deserve different treatment in contract competitions and created specific exceptions to full and open competition requirements for them.[35] Specifically, Congress recognized the need to favor small business concerns,[36] Section 8(a) businesses[37] and historically underutilized business zone (HUBZone)[38] small business concerns.[39] The FAR also allows an exception to accommodate the socio-economic concerns of certain members of society.[40] Apart from individual businesses and certain members of society, Congress also created an exception to full and open competition based solely on the location of businesses in relation to major disasters or emergencies under the Stafford Act.[41] These examples emphasize that Congress decides who qualifies for a preference in government

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[35] *See id.* (allowing procurement officials to exclude sources from contract competitions to accommodate specific statutorily created socio-economic policies of Congress.).

[36] *Id.* pt. 6.203 ("To fulfill . . . statutory requirements relating to small business[es], . . . Contract officers may set aside solicitations to allow only such business[es] . . . to compete.").

[37] *Id.* pt. 6.204 ("To fulfill statutory requirements relation to section 8(a) of the Small Business Act, . . . contracting officers may limit competition to eligible 8(a) contractors . . . .").

[38] *Id.* pt. 6.205 ("HUBZone means a historically underutilized business zone that is in an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.").

[39] *Id.* ("To fulfill the statutory requirements relating to the HUBZone Act of 1997 . . . contracting officers . . . may set aside solicitations to allow only qualified HUBZone small business[es] . . . to compete.").

[40] *See id.* pt. 6.206 ("[C]ontracting officers may set-aside solicitations to allow only service-disabled veteran-owned small business concerns to compete.").

[41] *See id.* pt. 6.207 ("[C]ontracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete."); *see id.* pt. 26.202.

> When awarding emergency response contracts during the term of a major disaster or emergency declaration by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act . . . preference shall be given, to the extent feasible and practicable, to local firms. Preference may be given through a local area set-aside or an evaluation preference. [Moreover,] [t]he contracting officer may set aside solicitations to allow only local firms within a specific geographic area to compete . . . .
>
> *Id.*

contracting, not procurement officials. The bottom line for government contracting is simple: use full and open competition unless Congress says otherwise. Put another way, any contracting practice that limits competition to local contractors requires Congress to authorize a statutory exception to the full and open competition.[42] The strict competition rules of today are a direct result of DOD's wasteful past practice of using non-competitive procurement methods to procure goods.[43]

B. It Is Good to Compete: The CICA

1. Know Thy Past to Know Thy Future: History of the CICA

The FAR's competition requirements promulgate federal law found in the CICA.[44] Congress designed the CICA to address the widespread, expensive practices of government procurement officials, especially DOD procurement officials, of limiting competition or awarding government contracts with no competition at all.[45] The CICA's legislative history records Congress's concerns over limited or no competition in government contracting.[46] Specifically, Senator Quayle commented on two newspaper articles (one appearing in the *Washington Post* and the other in the *New York Times*) that discussed the use of sole-source contracts in the military's procurement of spare engine parts for aircraft.[47] In the *Washington Post* article, the author discussed a DOD inspector general report that found "in 1982 the Air Force paid $17.59

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[42] *See* HAP Constr. Inc., Comp. Gen. B-280044.2, Sept. 21, 1998, 98 CPD ¶ 76 (discussing a procurement carried out under the Stafford Act).

> [T]he agency . . . provide[d] for an evaluation preference to be given to local firms [,] . . . [in which] offerors were to be given evaluation credit under two evaluation factors, for proposing to subcontract with local firms and for being local themselves. Since it does not appear that utilization of local contractors is otherwise related to any need of the agency, these preferences reflect, in effect, a form of limitation on full and open competition . . . .

Id.

[43] *See* 98 CONG. REC. 18,606–07 (1983).

[44] Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000).

[45] *See*, 98 CONG. REC. 18,606–07 (1983).

[46] *Id.*

[47] *Id.* 18,606.

for a bolt that costs $0.67 in 1980."[48] The article noted that the "Pentagon virtually guarantees high prices by purchasing most spare parts with 'sole source,' non-competitive contracts."[49] Showing his disdain for the lack of competition in the DOD's procurement of spare parts, Senator Quayle exclaimed:

> I can assure my colleagues in the Senate as well as the leaders in the Pentagon that there had better be a very drastic turnaround in the way spare parts are bought. Competition is so obviously needed in this area that if a drastic change is not seen by the time of next year's authorization bill, I intend to propose some drastic changes in the law which will force the Pentagon to move away from sole source contracting.[50]

The use of limited competition in contracting by DOD, and other federal agencies, and the resultant inefficiencies and waste produced, ultimately spurred Congress into action and led to the passage of the CICA.[51]

The CICA "embodies a strong commitment [by Congress] to achieving the benefits of competition in government procurement."[52] The CICA's history helps illuminate Congress's meaning and intent behind the definition of competition and it definitively lays out the level of competition Congress expects in government contracting.[53] The CICA's legislative history also shows Congress's intent to limit noncompetitively awarded contracts to a minimum.[54] Congress took special care to define "'competitive procedures' to mean procedures under which an executive agency enters into a contract pursuant to full and open competition, thereby permitting all responsible sources to *compete*."[55] To ensure all interested and responsible[56] sources would

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[48] *Id.* (quoting Fred Hiatt, *Auditors Report Pentagon Spending Too Much on Parts*, WASH. POST, July 12, 1983).
[49] *Id.*
[50] 98 CONG. REC. 18,606 (statement of Sen. Quayle).
[51] Competition in Contracting Act of 1984, 10 U.S.C. §§ 2301–2306 (2000).
[52] ATA Def. Indus. Inc. v. United States, 38 Fed. Cl. 489, 499 (1997).
[53] *See* H.R. REP. NO. 98-369, at 1421, 1431 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 2109, 2119.
[54] *See id.* at 1425 ("The Senate Amendment shifts the emphasis from having to justify the use of negotiation, . . . to concentrate on those contract[s] which are negotiated noncompetitively, thereby restricting sole-source to when it is truly necessary.").
[55] *Id.* at 1422 (emphasis added).

have the opportunity to compete for federal procurement dollars, the committee rejected a proposed Senate amendment to "establish 'effective' competition as the standard for awarding federal contracts for property or services."[57] The Senate amendment wanted to define "effective competition . . . [as] a market-place condition which results when two or more contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the Government's business."[58] Instead, the conference committee opted for a more stringent competition standard and elected to use "'full and open' competition as the required standard in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement."[59] "The conferees strongly believed that the procurement process should be open to all capable contractors who want to do business with the government."[60] As indicated in the *Congressional Record*, full and open competition is the rule in government contracting.[61] To maintain that standard, Congress intentionally limited exceptions to the rule.[62]

The legislative history of CICA clearly depicts Congress's negative opinion of any exceptions to CICA's high competition standard. As the Court of Claims noted, "Congress' strong commitment to competition is apparent from the narrow breadth of the exceptions to the general mandate to secure full and open competition."[63] Specifically, the "Senate amendment [only provided for] . . . six exceptions to competitive procedures which parallel the conditions which the Comptroller General has historically recognized as legitimate conditions for awarding contracts on a sole-source basis, . . . thereby restricting sole-source contracting to when it is truly necessary."[64] Unsatisfied with the Senate's amendment, the conferees insisted on the possibility of

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[56] *See* FAR, *supra* note 23, pt. 9.104-1 (explaining that responsible means "a prospective contractor" has the financial resources and the ability to complete the contract. Responsible also means the contractor has performed satisfactorily in the past and is ethical, and is "otherwise qualified and eligible . . . under applicable laws and regulations").
[57] H.R. REP. NO. 98–369, at 1422.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *See id.* at 1425 (discussing that only six "exceptions to competitive procedures" were proposed "thereby restricting sole-source contracting to when it is truly necessary").
[63] ATA Def. Indus. Inc. v. United States, 38 Fed. Cl. 489, 500 (1997).
[64] H.R. REP. NO. 98–369, at 1425.

competition, even within the recognized exceptions, and "require[d] agencies to obtain competition under the second and sixth exception to the maximum extent practicable."[65] Based on the legislative history of CICA, it is clear that the intent of the act was to "set forth [a] broad defense procurement policy which, first and foremost, directs the Department of Defense, [and] the military services . . . to use full and open competitive procedures in acquiring property and services."[66] President Ronald Reagan made Congress's efforts to strengthen competition standards in government contracting law by signing the CICA on 18 July 1984.[67]

2. Off the Straight and Narrow Path of Full and Open Competition: The Permanent Exceptions to Full and Open Competition Under CICA

As Congress intended, CICA mandates, except in limited circumstances, that agencies use "full and open competition through the use of competitive procedures"[68] when they procure goods and services. As noted, Congress recognized that narrow and limited exceptions to full and open competition were necessary.[69] These limited exceptions addressed unusual or emergency situations: only one contractor could meet the government's needs, unusual circumstances existed, a national emergency occurred, certain expertise is required, an international agreement prohibited competition, national security required it, or the public interest was at stake.[70] Congress also allowed for full and open competition after the exclusion of certain sources to carry out its domestic socio-economic policies.[71]

The statutory exceptions to full and open competition drive home the point that Congress must explicitly provide authority to exclude sources from competition and use anything less than full and open competition.[72]

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[65] *Id.* (discussing the second and sixth exceptions, which are unusual and compelling circumstances found in FAR pt. 6.302-1 and national security found in FAR pt. 6.302-6.).
[66] *Id.* at 1431.
[67] President's Statement on Signing the Deficit Reduction Act of 1984, 20 WKLY. COMP. PRES. DOC. 29 (July 18, 1984).
[68] Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (2000).
[69] *See id.* § 2304(b), (c).
[70] *Id.* § 2304(c).
[71] *Id.* § 2304(b).
[72] *Id.* § 2304; *see also id.* § 2304(e) (emphasizing that full and open competition is the default rule and to limit the use of "other than full and open," the law requires procurement officials to "request offers from as many potential sources as is practicable

Thus, the full and open competition rule, (like every other procurement law, regulation, or rule), applies anywhere and everywhere DOD procures goods or service, regardless of the circumstances or contingency the procurement(s) is made under unless Congress permits otherwise. Prior to the passage of the NDAA 2008, Congress provided only two contingency exceptions.

3. Sanctioned Transgressions: Contingency (Temporary) Exceptions to Full and Open Competition

a. Commander's Emergency Response Program

To address the challenges of battlefield and contingency contracting, Congress provided only two exceptions to the full and open competition mandate: the Commander's Emergency Response Program (CERP)[73] and the contingency exception to the Commercial Item Test Program.[74] These exceptions are significant because Congress passed legislation that explicitly allowed procurement personnel to procure items without adhering to the stringent full and open competition requirement.

The CERP allows procurement officials to use operation and maintenance funds, "notwithstanding any other provision of law . . . for the purpose of enabling military commanders . . . to respond to urgent humanitarian relief and reconstruction requirements . . . by carrying out programs that will immediately assist the Iraqi people, and . . . the people of Afghanistan."[75] To use the exception, Congress required the Secretary of Defense to "provide quarterly reports . . . to the congressional defense committees regarding the source of funds and the allocation and use of funds."[76] Subsequently, Congress amended the CERP authorization. The new amendment only required the Secretary of Defense to provide a waiver "of any provision of law . . . that would (but for the waiver)

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under the circumstances" and except for specific reasons listed in the statute, the "contracting officer for the contract [must] justif[y] the use of such procedures in writing and certif[y] the accuracy and completeness of the justification").

[73] NDAA 2008, *supra* note 19, § 1205.

[74] FAR, *supra* note 23, pt. 13.5.

[75] Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1215 (2003). The "notwithstanding any other provision of law" language is important because it represents Congress's explicit and unambiguous exception that is required to conduct less than full and open competition.

[76] *Id.*

prohibit, restrict, or otherwise constrain the exercise of that authority."[77] Congress renewed the CERP authorization through 2009 in the NDAA 2008.[78]

b. Commercial Items Test Program for Contingency Operations

The second contingency contracting exception to the full and open competition mandate allowed by Congress is the "Test Program for Certain Commercial Items" (Test Program) found in the FAR, subpart 13.5.[79] Under the Test Program exception, procurement personnel may use simplified acquisition procedures[80] for acquisitions that do not exceed "$11 million . . . [when t]he acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation."[81]

The CERP and the Test Program are the only contingency exceptions Congress allowed to CICA's full and open competition requirement; that

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[77] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2078 (2004). Memorandum from Gordon England, Deputy, Office of the Sec'y of Defense, to Secretaries of the Military Dep'ts et al., subject: Waiver of Limiting Legislation for Commanders' Emergency Response Program (CERP) for Fiscal Years 2006 and 2007 (Mar. 27, 2006) (on file with author) (stating that the Secretary of Defense provided the waiver for the 2006 and 2007 fiscal years on 6 January 2006).

[78] NDAA 2008, *supra* note 19, § 1205.

[79] FAR, *supra* note 23, pt. 13.5; *cf.* Supplemental Appropriation Act for Fiscal Year 2008, Pub. L. No. 110-252 § 9104 (providing $1.2 billion in CERP funds, available until 30 September 2008, "for the purpose of enabling military commanders in Iraq, Afghanistan, and the Philippines to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi, Afghan, and Filipino people").

[80] *Id.* pt. 13.104 (explaining that simplified acquisition procedures only require the contracting officer to "promote competition to the maximum extent practicable . . . [and to] consider solicitation of at least three sources to promote competition to the maximum extent practicable.").

[81] *Id.* pt. 13.5. A contingency operation is

> a military operation that (1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (2) Results in the call or order to, or retention on, active duty of members of the uniformed services . . . during a war or during a national emergency declared by the President or Congress.

Id. pt. at 2.1.

is until the NDAA 2008. These specific exceptions highlight the important, overlooked point that Congress is aware of the challenges of contingency contracting and the potential benefits, strategic or otherwise, that contingency contracting exceptions to full and open competition can have on the military's mission in contingency operations. Congress chose to address the challenges and pursue the potential benefits through these limited exceptions. Congress's circumspect action makes clear that any other limitations on competition are unacceptable and are a clear infringement on the unwavering competition requirements of the CICA.

C. Old Habits Die Hard: Lack of Competition in Government Contracting is Still a Concern of Congress

A lack of competition in government contracting is not, unfortunately, a problem relegated to the 1980's when limited competition and sole source contracts were the norm.[82] Despite the clear, unambiguous language of the CICA and the competition requirements of the FAR, a lack of competition in government contracts continues to raise the ire of Congress.[83] Last year produced much commentary and disgust from two congressmen and the Office of Federal Procurement Policy.[84] In May 2007, Representative Henry Waxman, from the 30th District of California, delivered a speech on federal contracting and noted that "[s]pending on no-bid and other forms of noncompetitive contracts has more than doubled over the last six years. Competition protects the taxpayers by driving prices down and quality up."[85] Likewise, in November 2007, Senator Joseph Lieberman, in a press release concerning "Legislation to Combat Waste, Fraud, and Abuse in Federal Contracting," observed that "[t]he dollar amount of federal

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[82] *See* Press Release, Senator Joseph Lieberman, Lieberman, Collins Probe Federal Contracting Weaknesses: Lack of Accountability Leads to "Infuriating" Levels of Waste, July 17, 2007 [hereinafter Lieberman, Lack of Accountability], http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=C&PressRelease_id=1502&Month=7&Year=2007 (providing a general discussion of Congress's present day concerns about a lack of accountability and competition in government contracting).

[83] *See* Representative Henry Waxman, Committee on Oversight and Government Reform, *Chairman Waxman Delivers a Speech on Federal Contracting*, May 14, 2007, http://oversight.house.gov/story.asp?ID=1318; Press Release, Senator Joseph Lieberman, U.S. Senate Approves Sens. Collins', Lieberman's Legislation to Combat Waste, Fraud, and Abuse in Federal Contracting, Nov. 8, 2007 [hereinafter Lieberman, Waste, Fraud, and Abuse], http://lieberman.senate.gov/newsroom/release.cfm?id=287079.

[84] Waxman, *supra* note 83; Lieberman, Waste, Fraud, and Abuse, *supra* note 83.

[85] Waxman, *supra* note 83.

contracts has nearly doubled since the year 2000, but the number of contracts that were awarded following a full and open competition has fallen below 50 percent."[86] Senator Lieberman's press release also discussed the "Accountability in Government Contracting Act of 2007," designed in part to "strengthen competition in federal contracting."[87] In addition to Congress, an Office of Federal Procurement Policy memorandum reiterated, "[c]ompetition is the cornerstone of our [federal government] acquisition system. The benefits of competition are well established. Competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results."[88] The strict competition requirements espoused by the CICA and the FAR, as well as the clear concerns of Congress, apply to the Afghan First and Iraqi First programs. Thus, in light of present Congressional concerns about a lack of competition in violation of the CICA, contingency socio-economic programs such as Afghan First and Iraqi First deserve heightened scrutiny.

III. Socio-Economic Programs in Contingency Contracting

A. Help Yourself by Helping Others: The United States Interests in Rebuilding Afghanistan and Iraq

1. Post-War Reconstruction Needs

Afghanistan and Iraq are vitally important to the United States for its present and future security and its strategic requirements in the Middle East.[89] Thus, it seems clear that the United States must create western

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[86] Lieberman, Waste, Fraud, and Abuse, *supra* note 83.
[87] *Id.*
[88] Memorandum from Adm'r of the Office of Fed. Procurement Policy, to Chief Acquisition Officers and Senior Procurement Executives, subject: Enhancing Competition in Federal Acquisition (May 31, 2007), *available at* http://www.whitehouse.gov/omb/procurement/memo/competition_memo_053107.pdf.
[89] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, AFGHANISTAN RECONSTRUCTION: DESPITE SOME PROGRESS, DETERIORATING SECURITY AND OTHER OBSTACLES CONTINUE TO THREATEN ACHIEVEMENT OF U.S. GOALS, GAO-05-742 (2005) [hereinafter GAO REPORT 2005], *available at* http://www.gao.gov/new.items/d05742.pdf ("The U.S. goal is to firmly establish Afghanistan as a democratic nation inhospitable to international terrorism and drug trafficking and cultivation . . . and able to provide its own internal and external security."); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 3 ("The foundation of democracy in Iraq is dependent on a functioning infrastructure that provides essential services to the people of Iraq."); Bush Address, *supra* note 3.

friendly, democratic governments in both Afghanistan and Iraq. To do so, it is also clear that the United States must rebuild Afghanistan and Iraq to a level that allows them to achieve long-term stability and economic independence.[90]

a. Rebuilding Afghanistan

"The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorist."[91] Stabilization can only come from a successful rebuilding effort, which in turn will provide a normalization process in which democracy can flourish. The job of rebuilding Afghanistan, however, is "easier said than done." The post-war reconstruction of Afghanistan began "[i]n 2001, when U.S. and coalition forces removed the Taliban regime from power in Afghanistan."[92] After the liberation of Afghanistan, the United States found that the approximate "quarter century of war and years of drought had destroyed Afghanistan's government, judicial, economic, and social institutions and its transportation, health, and other infrastructure."[93] Afghanistan was literally "a place where the basic structure of a nation-state had been obliterated."[94] To meet the enormous rebuilding

> In Iraq, we are helping the long suffering people of that country to build a decent and democratic society at the center of the Middle East. Together we are transforming a place of torture chambers and mass graves into a nation of laws and free institutions. This undertaking is difficult and costly—yet worthy of our country, and critical to our security.

Id.

[90] *See* GAO REPORT 2005, *supra* note 89 ("The U.S. goal is to firmly establish Afghanistan as a democratic nation inhospitable to international terrorism and drug trafficking and cultivation . . . and able to provide its own internal and external security."); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 3 ("The foundation of democracy in Iraq is dependent on a functioning infrastructure that provides essential services to the people of Iraq.").

[91] Bureau of Int'l Info. Programs, U.S. Dep't of State, Stable Afghanistan Vital to Central Asia, Europe, United States: Long-Term, Comprehensive Approach Needed (2007), *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=September&x=20070926145609cpataruk0.3264429.

[92] GAO REPORT 2005, *supra* note 89.

[93] *Id.*

[94] Press Release, The White House, Rebuilding Afghanistan (n.d.) [hereinafter Rebuilding Afghanistan], http://www.whitehouse.gov/infocus/nationalsecurity/rebuildingafghanistan.html (last visited Mar. 10, 2008).

challenges the "United States and its European allies have contributed $26.8 billion to Afghanistan since 2001, enabling the country to make large strides in providing better lives for its people."[95]

b. Rebuilding Iraq

The reconstruction challenge in Iraq was similarly daunting. Like Afghanistan, the country of Iraq had experienced years of neglect, war, and waste that created Herculean reconstruction challenges for the United States and its allies.[96] Based on the total state of disrepair within Iraq, the Iraqi Reconstruction effort proved to be "the largest and most complex reconstruction program undertaken in a single country."[97] In addition, like Afghanistan, a stable and thriving Iraq is important to the security of the United States and its allies. The enormous expense and

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[95] Phillip Kurata, *Stable Afghanistan Vital to Central Asia, Europe, United States: Long-Term, Comprehensive Approach Needed*, AMERICA.GOV (Sept. 27, 2007), http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=September&x=20070926145609cpataruk0.3264429; *see also* Rebuilding Afghanistan, *supra* note 94 (reporting that the United States alone has "erected 74 bridges and tunnels, . . . has repaired or constructed 205 schools, . . . [has] rehabilitated 141 health clinics, . . . [and] has established more than 175 projects that support Afghan women.").

[96] *See* IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 7.

> After the fall of Baghdad in April 2003, U.S. engineers . . . close[ly] inspect[ed] Iraq's infrastructure and found the capacity for electrical power generation, oil production, water purification and sewage handling greatly diminished. Power plants were antiquated and poorly maintained, while looters had stripped substations of copper cables and other valuable assets. Oil production was inefficient at best and sewage backed up into many streets. Iraqi banks were almost non-existent, government and police protection had disappeared, commerce was moribund-and people were growing desperate for food and clean water. Iraq was 'a completely failed state'. . . .

Id.

[97] *Id.* at 3; *see also* U.S. ARMY CORPS OF ENG'RS, 1 GWOT RECONSTRUCTION REPORT 7, at 3 (2007), *available at* http://www.grd.usace.army.mil/news/releases/GWOT.pdf (describing the enormity of Iraq's reconstruction needs, consider that since reconstruction began in Iraq, the United States has erected "26 400kv and 132kv Substations, 68 33/11kv Substations" that provide up to fourteen hours of electricity a day, "85 . . . Primary Healthcare Centers," "16 . . . hospital rehabilitation projects," "810 . . . schools providing classrooms for 324,000 students," "4 Training Academy Projects, 96 Fire Station Projects, 265 Border Forts," "38 . . . Village Road Projects," "97 Railway Station Renovations, 14 . . . Aviation Projects").

time invested in rebuilding Afghanistan and Iraq in the hopes of gaining long-term strategic benefits is warranted based on the results of the United States' previous reconstruction efforts in Europe after World War II.

2. Present Day Marshall Plan

The United States' reconstruction efforts in Afghanistan and Iraq look very similar to the United States' monumental reconstruction efforts in post-World War II under the Marshall Plan.[98] Post-World War II Europe suffered massive damage to its infrastructure, its economies, and its political systems.[99] To rebuild Europe, and Germany in particular, the United States embarked upon a massive reconstruction effort as envisioned by U.S. Secretary of State, George C. Marshall.[100] There are several similarities between the Marshall Plan and the current rebuilding efforts in Afghanistan and Iraq and *three* major differences. The differences are that in the present reconstruction efforts the United States is still in a state of war,[101] the United States is trying to employ military

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[98] *See* U.S. DEP'T OF STATE, THE MARSHALL PLAN, REBUILDING EUROPE 1 (2007) [hereinafter REBUILDING EUROPE], *available at* http://usinfo.state.gov/products/pubs/marshallplan/; *see also* IRAQ RECONSTRUCTION REPORT, *supra* note 5 (comparing the Marshall Plan within the larger context of the Iraqi reconstruction effort); Robert Nichols, *Iraq Reconstruction: Government Contracts Year In Review*, *in* YEAR I REVIEW CONFERENCE BRIEFS (2004), *available at* http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLE_831.pdf.

> The reconstruction of Iraq is the most ambitious program of nation-building since the Marshall Plan in 1947. The CPA, IIG, and U.S. Government agencies have awarded over 4000 reconstruction prime contracts in 2003-04. While the large-dollar contracts have been awarded primarily to established, proven U.S. contractors, Iraqi companies have won the majority of prime contracts. Additionally, the large U.S. prime contracts are expected to result in approximately 15,000 subcontracts, involving a wide range of contractors in the reconstruction process.

Id.

[99] *See* REBUILDING EUROPE, *supra* note 98, at 7 (describing that the war badly damaged the economic and political systems throughout Europe and brought about widespread food and basic resources shortages, inflation, poverty, and worker demoralization).

[100] *Id.* at 10.

[101] *See id.* at 7 ("Although V-E Day brought the struggle against Nazi Germany to an end, the peace still had to be won, and this required, above all, the reconstruction of economic and political systems badly damaged by World War II."). Unlike in Europe at the end of

aged people so they do not take part in insurgent activities,[102] and the current procurement laws did not exist.[103]

The first similarity between the Marshall Plan and the reconstruction efforts in Afghanistan and Iraq is the amount of money spent on the rebuilding efforts.[104] Under the Marshall Plan, the United States' total "assistance to Germany [alone] is almost $1.4 billion in current year dollars."[105] As in post-World War II Europe, the funding efforts in Afghanistan are similarly massive in size and scope. "The U.S. government . . . provided more than $3.7 billion since September 2001 to programs and activities throughout Afghanistan."[106] The thrust of the rebuilding efforts are "revitaliz[ing] agriculture, provid[ing] security, expand[ing] educational opportunities, improv[ing] basic health, build[ing] effective government, and encourag[ing] citizen participation in the democratic process."[107] The level of assistance to Iraq is, likewise, substantial[108] with "[n]early 40% of total funding, roughly $11.5 billion, . . . aimed at restoring economically critical infrastructure,

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World War II, the U.S. is still engaged in hostilities in Afghanistan and Iraq while the reconstruction process is taking place.

[102] *See Joint Contracting Command—Iraq/Afghanistan: Providing Responsive, Full-Spectrum Contracting Support to U.S. Military Forces*, 6 COMMUNICATOR: NEWS FOR DCMA PROFESSIONALS 3, at 24, 26 (Summer 2006) [hereinafter DCMA], a*vailable at* http://www.dcma.mil/communicator/summer06/contents.htm#.

[103] *See* Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000) (depicting that CICA's (signed into law in 1984) requirements for full and open competition was not a concern for procurement officials carrying out the Marshall Plan); FAR, *supra* note 23, *foreword* ("The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984 . . . .").

[104] NINA SERAFINO ET AL., CONG. RESEARCH SERV. REPORT, U.S. OCCUPATION ASSISTANCE: IRAQ, GERMANY AND JAPAN COMPARED, RL33331, at CRS-4 (2006), *available at* http://www.fas.org/sgp/crs/natsec/RL33331.pdf ("The entire amount of Marshall Plan aid is usually considered economic reconstruction funding . . . .").

[105] *Id.*

[106] *See* Rebuilding Afghanistan, *supra* note 94.

[107] *Id.*

[108] *See* SERAFINO ET AL., *supra* note 104, at CRS-6.

> U.S. assistance to Iraq appropriated from FY2003 to FY2006 totaled some $28.9 billion. All of it is grant assistance. While most funds were appropriated to a special Iraq Relief and Reconstruction Fund (IRRF, $21 billion) and an Iraq Security Forces Fund ($5.7 billion), additional sums from the budgets of DOD and other agencies have been used for reconstruction purposes.

Id.

including airports, roads, bridges, railroads, seaports, electric power, water and sanitation, telecommunications, and essential buildings. Another $6.2 billion . . . has been allocated to assist democratization . . . ."[109] Beyond vast amounts of U.S. money, another critical ingredient in the reconstruction process is active participation by local citizens.

Another similarity between the current reconstruction efforts in Afghanistan and Iraq and the reconstruction efforts in post-World War II Europe is the level of participation provided by the countries undergoing reconstruction. The Marshall Plan focused on "a joint European-American venture, one in which American resources were complemented with local resources [and] one in which the participants worked cooperatively toward common goals of freedom and prosperity."[110] Particularly, the venture provided the local populations with opportunities to participate fully in the reconstruction of their respective country.[111] Likewise, the reconstruction efforts in Afghanistan and Iraq, vis-à-vis the Afghan First and Iraqi First programs, emphasize a cooperative approach that utilizes local resources, businesses, and public works like programs to the maximum extent possible.[112]

The use of localized labor, businesses, and resources is just as imperative today as it was during post World War II for three basic and obvious reasons. The Afghan First and Iraqi First programs inject local pride and ownership in the reconstruction process. [113] Moreover, idle

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[109] *Id.*

[110] REBUILDING EUROPE, *supra* note 98, *introduction*.

[111] *See id.* at 16 ("In Italy, they [counterpart funds] were earmarked . . . for a public-works program to absorb part of the large pool of unemployed labor.").

[112] *See* Press Release, Combined Forces Command–Afghanistan, Coalition boosting opportunities with 'Afghan First' (Apr. 11, 2006), *available at* http://www.cfc-a.centcom.mil (explaining that through the Afghan First program, "more than 11,000 Afghan laborers, interpreters, and construction workers" and "contracting office and procurement specialist . . . [are] looking for new ways to purchase required supplies and services from local vendors and help develop local workers as often as possible" to help rebuild their country.); IRAQ RECONSTRUCTION REPORT, *supra* note 5, at 11 (stating that under the Iraqi First program, the Public Contracting Office/Gulf Region Division (PCO/GRD) "has sought to maximize the use of Iraqi firms whenever possible to restore Iraq's political and economic stability").

[113] The author's recent professional experiences at JCC-I/A, from May 2006 to Sept. 2006 is the basis for this assertion (recalling that local national participation and assistance in reconstruction efforts generally increased job site security and led to increased productivity on contracts and, conversely, decreased acts of violence, sabotage, and theft. Moreover, local participation contributes to the proud Middle Eastern culture that prizes self-sufficiency.).

hands are the devil's workshop; if the local populace is fully engaged in reconstruction efforts they will be less likely to engage in nefarious activities aimed at sabotaging the reconstruction efforts and democratization goals of the United States.[114] Finally, by utilizing the local population, the United States has the ability to infuse desperately needed liquidity into the economies of Afghanistan[115] and Iraq.[116]

An important collateral goal to the United States' commitment to rebuilding Europe in post-World War II was to ensure long-term peace and stability throughout Europe and the world and, to a smaller extent, to counter "popular discontent upon which the Communists were capitalizing."[117] Secretary Marshall clearly understood what the long-term benefits and risks were if the United States failed to act: democracy, world economic health, political stability, and peace.[118]

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[114] *See* DCMA, *supra* note 102, at 26 (explaining that one of the recognized benefits of "[e]ffects based contracting" measures like Afghan First and Iraqi First is the ability to "'put military-aged males to work so they won't join the insurgents'").

[115] *See generally* Afghanistan Coalition Press, *Afghan Bottling Plant Wins Contract to Supply Water to Coalition Troops*, E-ARIANA, Oct. 10, 2006, *available at* http://www.e-ariana.com/ariana/eariana.nsf/be77f8366cbd693387256b790077e1df/913de13582f24bfd87257203003dcd7f?OpenDocument ("[Afghan First] aims to stimulate the local economy [of Afghanistan] and develop skill sets for local workers that can be used in the private market place); *NATO*, *supra* note 12 (discussing that because of Afghan First, "[e]ach year . . . contractors pay more than $45.5 million in salaries for Afghan laborers.").

[116] *See* Memorandum from Commander JCC-I/A, to JCC-I/A PARC'S, subject: JCC-I Implementation of the Iraqi First Program (1 June 2006) [hereinafter JCC-I/A June 2006 Memo] (on file with author) ("Every dollar contracted to an Iraqi firm assists . . . [Iraq] in its economic recovery. A dollar infused into the Iraqi economy circulates up to seven times.").

[117] REBUILDING EUROPE, *supra* note 98, at 7.

[118] *See id.* at 3–4.

> Aside from the demoralizing effect on the world at large and the possibilities of disturbances arising as a result of the desperation of the people concerned, the consequences to the economy of the United States should be apparent to all. It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full cooperation, I

Similarly, the United States is seeking long-term peace and stability in the Middle East and is striving to defeat terrorists who have a long record of capitalizing on public discontent and misery for their own political and religious agendas.[119] Based on the lessons of history in post-World War II Europe, I propose that the success of the United States' endeavors in Afghanistan and Iraq depend not on the amount of money and resources that it injects into these countries. Instead, the level of goodwill and cooperative assistance the United States fuses together with its money and resources is what will ultimately forge unbreakable bonds of trust and friendship. The United States attains it national goals and ideals through programs like Afghan First and Iraqi First. It seems evident that through the use of these localized socio-economic programs, the United States is imparting its ideals, customs, and philosophies, as well as building long-term business and national relationships from the ground up. Like the benefits and security the United States reaped because of its reconstruction efforts in Europe after World War II, the long-term success of the reconstruction of Afghanistan and Iraq (and the goodwill and mutual respect gained through programs such as "Afghan First" and "Iraqi First") is incalculable to the long term security and benefit of the United States.

> am sure, on the part of the United States government. Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek to perpetuate human misery in order to profit there from politically or otherwise will encounter the opposition of the United States.

Id.

[119] *See* Kurata, *supra* note 95 ("The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorists U.S. and European officials say."); Bush Address, *supra* note 3.

> In Iraq, we are helping the long suffering people of that country to build a decent and democratic society at the center of the Middle East. Together we are transforming a place of torture chambers and mass graves into a nation of laws and free institutions. This undertaking is difficult and costly—yet worthy of our country, and critical to our security.

Id.

B. The Last Shall be First: The Afghan First and Iraqi First Programs

1. Genesis of Afghan First and Iraqi First

To understand and fully appreciate the emphasis and importance placed upon the Afghan First and Iraqi First programs it is important to understand the history behind the programs. The Afghan First program, established on 25 March 2006,[120] "applies to civilian and military organizations across the command [Combined Forces Command-Afghanistan]."[121] The Afghan First program represents "the command's intent to leverage . . . [its] contracting activities and resources to provide opportunities for economic expansion, increased entrepreneurship and skills training for the people of Afghanistan . . . [in order to] maximize our [the Command's] positive, long-term impact on local economies and the Afghan workforce."[122] Based on the immediate success and positive mission impact of the Afghan First program, the Iraqi First program quickly materialized.

In mid-April 2006, shortly after the Combined Forces Command–Afghanistan implemented Afghan First, the Commander, Multi-National Force—Iraq, (MNF-I) requested the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A)[123] to "provide set-asides on USG [United States Government] contracts for Iraqi owned firms."[124] Acting upon MNF-I's request, JCC-I/A "kicked-off the 'Iraqi First

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[120] Luft Presentation, *supra* note 12.
[121] Press Release, CFC–A, *supra* note 5.
[122] *Id.*
[123] *See generally On Iraq Reconstruction and Contracting Before the S. Comm. on Armed Forces*, 109th Cong. 3 (Feb. 7, 2006) (statement of The Honorable Claude M. Bolton, Jr.).

> In October 2004, the U.S. Central Command designated the Army as the lead component for contracting for Operation Enduring Freedom in the Combined Joint Operations Area, Iraq and Afghanistan, and the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) was established. JCC-I/A provides contracting support . . . to both the Iraq reconstruction effort and to . . . combatant commanders in Iraq and Afghanistan. The JCC-I/A is headed by a two-star General Officer who has been designated . . . as HCA for Iraq and Afghanistan. This joint command has over 160 people in two theatres of war who are working in dangerous and difficult conditions.

Id.
[124] Iraqi First Program, *supra* note 9.

Program,' modeled after 'Afghanistan First' . . .'"[125] through an implementation memorandum on 1 June 2006.[126] Iraqi First had the same goals as the Afghan First program: provide U.S. contracts to local businesses and employ local workers.[127]

The JCC-I/A's implementation memorandum gave special emphasis to Iraqi First and "challenge[d] . . . [all members of the Command] to make every reasonable attempt to use Iraqi Businesses to the maximum extent possible in support of the Iraqi First Program."[128] The memorandum went on to state that "[a]ll contracting efforts will be directed to support the Iraqi First Program as our major contribution to the Campaign Plan. This will have long term payoffs in developing Iraq's economic capacity on their journey to prosperity."[129] Finally, the memorandum reiterated that the desired "end-state . . . [was] to award at least 75% of our contracting dollars to Iraqi Host Nation business."[130] On 12 July 2006, approximately a month after JCC-I/A actually put Iraqi First into practice, MNF-I provided official support for the Iraqi First program and voiced its "intent to leverage all of . . . [the] command's activities and resources, including contracting, to provide increased opportunities for economic expansion, entrepreneurship, and skills training for the people of Iraq."[131] The JCC-I/A published a subsequent Iraqi First implementation memorandum in September 2006[132] ostensibly to retract the 75% end state goal.[133] Multi-National Force–Iraq renewed its official support of the Iraqi First policy in March 2007 upon a change of command.[134] As even the most inexperienced procurement professional can see, the rationale for creating the Afghan First and Iraqi

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[125] *Id.*
[126] JCC-I/A June 2006 Memo, *supra* note 116.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Memorandum from Commander, Multi-National Force—Iraq, to MNF-I, subject: Iraqi First Program (12 July 2006) (on file with author).
[132] Memorandum from Commander, JCC-I/A, to JCC-I/A PARC'S, subject: JCC-I Implementation of the Iraqi First Program (24 Sept. 2006) [hereinafter JCC-I/A Sept. 2006 Memo] (on file with author).
[133] *See* Iraqi First Program, *supra* note 9 ("In September 2006, the Department of the Army decided that JCC-I/A needed to revamp the Iraqi First Program to further separate it from what could be viewed as a set-aside program. JCC-I/A removed the 75% goal from the program . . . .").
[134] Memorandum from Commander, Multi-National Force—Iraq, to MNF-I, subject: "Iraqi First" Program (28 Mar. 2007) (on file with author).

First programs is directly tied to helping the United States achieve its broad strategic goals, as well as directly helping Afghanistan and Iraq.

2. Goals of the Afghan First and Iraqi First Programs

The Afghan First and Iraq First programs (Programs) are an excellent example of using government procurements in a new, nontraditional way; they play a direct role in the United State's overall mission accomplishment in Afghanistan and Iraq.[135] These Programs help achieve the United State's overall goals by accomplishing the "Economic" element of the "DIME" paradigm.[136] They effectively accomplish the Economic element[137] because they are able to inject large amounts of capital into the local economies, (villages and towns), of

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[135] *See* Phillip Kao, *Into Africa,* ARMED FORCES J., (Jan. 2008), *available at* http://www.armedforcesjournal.com/2008/01/2902120 ("The post-9/11 ethos and largesse of defense budgets has allowed the U.S. military to task itself substantially with more nontraditional defense missions."); Luft Presentation, *supra* note 12 (noting that the Afghan First program is designed to carry out JCC-I/A's vision for contracting in Afghanistan which is to "maximize economic effects and support campaign plans to defeat terrorism within Afghanistan"); JCC-I/A Sept. 2006 Memo, *supra* note 132, at enclosure 1: Interim Command Guidance on Implementation of the Iraqi First Program (discussing that the goal of the Iraqi First program is to "significantly contribute to the Campaign Plan" of the Coalition Forces.).

[136] *See* U.S. Joint Forces Command, Joint Forces Command Glossary, http://www.jfcom.mil/about/glossary.htm#D (last visited Mar. 10, 2008) (explaining that DIME represents "[a]reas of national power that are leveraged in 'effects-based' operations against an adversary's vulnerabilities identified by Operational Net Assessment, and targeted against his will and capability to conduct war"); Austin Bay, *The Dime Ballet*, STRATEGY PAGE, May 24, 2005, http://www.strategypage.com/on_point /2005524.aspx ("The acronym . . . 'DIME' . . . [is] a quick verbal coin for the four elements of national power: 'Diplomatic,' 'Information,' 'Military' and 'Economic' . . . .").

[137] Discussion with Lieutenant Colonel Ralph Tremaglio, Professor, Contract and Fiscal Law Dep't, TJAGLCS, in Charlottesville, Va. (Feb. 26, 2008) (teaching that although the "Economic" element is solely discussed, arguably the Programs indirectly apply to the other DIME elements as well. For example, under the "Diplomatic" and "Information" elements, the Programs provide the U.S. with significant credibility and stature in the world community and create a powerful incentive to other nation's to support our efforts in the war on terrorism in Afghanistan and Iraq. In addition, under the "Military" element, the Programs contribute by engaging military-aged men and women in honest work, thereby taking them out of the fight. Concomitantly, the Programs generate tremendous good will in the town and villages. As a result, the threat level against our forces diminishes and lowers the need to engage in kinetic warfare.).

Afghanistan and Iraq.[138] The Programs create jobs for vast numbers of local workers, put wages in their pockets, and provide constructive alternatives to terrorist activities, which provide greater security to the regions.[139] Through the injection of capital and providing work to locals, the Programs directly contribute to the overall stabilization and economic development of Afghanistan and Iraq.[140] In furtherance of achieving the "Economic" element of the DIME, the execution of the Programs are designed to ensure that every DOD contract awarded in Iraq and Afghanistan has at least some nexus to local Afghani or Iraqi businesses respectively.[141]

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[138] *See* Press Release, CFC–A, *supra* note 5 (explaining that the Afghan First program "directs CFC-A [Combined Forces Command-Afghanistan] units to hire Afghan workers and purchase Afghan products and services whenever it is possible to do so."); *NATO*, *supra* note 12 (stating that the Afghan First program "provide[s] work on a daily basis for some 20,000 Afghan citizens, with hundreds of millions of dollars flowing to Afghan contractors and subcontractors . . . ."); JCC-I/A Sept. 2006 Memo, *supra* note 132 (noting that Iraqi First "leverage[s] contracting operations to stimulate and mature the local Iraqi economy . . ." which arguably achieves the DIME's "Economic" element).

[139] *See* Memorandum from Commander, JCC-I/A, to JCC-I/A, subject: Host Nation Business Plan Guidance (26 Apr. 2007) (explaining that the Programs are designed to "establish and cultivate economic development in the local economies of Iraq and Afghanistan in an effort to increase employment of the host nation populations thereby affecting a decrease of opportunistic cooperation with insurgents") (on file with author); *NATO*, *supra* note 12 ("[Afghan First] contractors . . . increasingly employ skilled Afghan labor forces, who will put their abilities to work in furtherance of national economic development."); Specialist Carl N. Hudson, Combined Press Info. Ctr., *Signs of Progress Seen in Iraqi Security, Economy*, OPERATION IRAQI FREEDOM, May 3, 2007, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=11741&
Itemid=1 (noting that the Iraqi First program effectively "put[s] Iraqis to work by procuring construction supplies, services and other commodities from local Iraqi contractors, . . . [which] . . . helps strengthen the Iraqi economy, enhances the security environment, gives local workers a vested stake in the quality of finish products in their communities").

[140] *See* Luft Presentation, *supra* note 12 (noting that Afghanistan has a "40% unemployment rate" and its dependence on Opium accounts for "33% of [Afghanistan's] GDP [gross domestic product]"); Kurata, *supra* note 95 ("The security and well-being of the trans-Atlantic community depend on successfully stabilizing Afghanistan so that it will not be a source of narcotics or a haven for terrorist."); *NATO*, *supra* note 12 (linking security with development and points out that "[i]n Afghanistan there can be no development without security . . . and there will be no long-term security without development . . ."); Memorandum from Commander, Multi-National Force—Iraq, to MNF-I, subject: "Iraqi First" Program (28 Mar. 2007) (on file with author) ("Increasing opportunities for Iraqi businesses and individuals yields great benefits to the Coalition mission to stabilize and support Iraq.").

[141] JCC-I/A, 2007 AI, *supra* note 8, pt. 26.1 (directing "contracting officers . . . to make every effort to seek out capable Iraqi/Afghan businesses . . . [and to] use the most practical tools and methods to support the Iraqi/Afghan First Program in contracts").

3. Execution of the Afghan First and Iraqi First Programs

The method chosen by JCC-I/A to ensure that procurement personnel carry out the Programs is to recommend that every solicitation for goods and services issued within theater consider, to some extent, either Afghan First or Iraqi First evaluation criteria.[142] The level of support contracting officer's are required to afford Afghan First or Iraqi First primarily depends on whether the proposed contract is above the simplified acquisition threshold of $1 million[143] or not and whether the solicitation is for a contract in Afghanistan or Iraq. The following section will address and examine each variation and review actual solicitations issued in the Afghanistan and Iraqi theaters of operation.

For procurements over the simplified acquisition threshold, procurement officials "will consider potential benefits of using a socio-economic factor," (either Afghan First or Iraqi First).[144] For these acquisitions, the JCC-I/A acquisition instruction (Instruction) provides "recommended" language for the solicitation's Sections L and M[145] that accomplish the intent of the Programs.[146] The Section L language requires the offerors to explain whether they are a local business or how they will affect the local workforce. [147] The Section M language then notifies offerors how source selection officials will evaluate the

[142] *Id.* (providing discretion to not use a socio-economic evaluation factor at all as long as the decision is documented in the contract file and the Division Chief approves of the decision).

[143] *Id.* (explaining that for procurements under the 1 million dollar simplified acquisition threshold, normal simplified acquisition procedures generally apply. The Instruction only suggests that "[w]here opportunities present themselves and it makes sense under the circumstances, the contracting officer should create a best value approach to evaluate and use the offerors' socio-economic programs as a factor in awarding the contract.").

[144] *Id.*

[145] FAR, *supra* note 23, 15.204-5 (explaining that Section L includes "[i]nstructions, conditions, and notices to offerors or respondents" that "guide offerors or respondents in preparing proposals or responses to requests for information . . . ." Section M includes the "[e]valuation factors for award" which "[i]dentify all significant factors and any significant subfactors that will be considered in awarding the contract and their relative importance . . . .")

[146] *See id.* pts. 26.2–26.3; *see also id.* pt. 26.1 (stating that the socio-economic evaluation factor "should be weighted equally with the highest factor whether non-cost or cost alike in a descending order of importance").

[147] *Id.* pt. 26.2 (providing the following recommended language: "Offeror shall describe its plan to maximize the employment of, training of, and transfer and knowledge to the Iraqi/Afghan workforce.").

evaluation factor.[148] The Instruction also recommends specific language for the solicitations' statements of work.[149] Afghanistan solicitations, however, require more than these general requirements.

For solicitations in Afghanistan, the Instruction also includes additional language for the solicitation's statement of work and requires specific representations and certifications.[150] For example, the statement of work must indicate how the offeror will provide training to Afghanis as it relates to the work required by the contract.[151] The Instruction also requires offerors to certify the number of Afghan workers and third country nationals that they will employ.[152] Finally, an Afghan owned business must present a certification from the Afghanistan government that it is an actual Afghan owned business with its proposal.[153] Beyond the guidance and requirements of the Instruction, the application of the Programs is where the real threat of something other than full and open competition lies.

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[148] *See id.* pt. 26.3 ("Proposals will be evaluated on the planned utilization and training of, and transfer of knowledge, skills and abilities to the Iraqi/Afghan workforce; and proposed utilization of both Iraqi/Afghan companies and personnel in the performance of statement of work requirements.").

[149] *See id.* pt. 26.5 ("The Contractor shall maximize the employment of, training of, and transfer of knowledge, skills and abilities to the Iraqi/Afghan workforce. The Contractor shall maximize utilization of Iraqi/Afghan subcontractors and businesses. The offeror shall maximize utilization of material of Iraqi manufacture.").

[150] *Id.* pt. 26.6.

[151] *See id.*

> An important mission factor is the hiring and training of the Afghan workforce. Offeror will identify in the solicitation Section K their company's Afghan employment numbers. Offeror will submit their training plan with details of how they will provide training to their Afghan workers as it relates to the main effort described in this SOW. This plan could be on-the-job, classroom, or a mixture of techniques. The plan should discuss training frequency, measures of success, location, supplies, and instructor qualifications. This information is required with proposal submittal, and throughout the life of the contract.

Id.

[152] *Id.*

[153] *Id.*

4. Application of the Afghan First and Iraqi First Programs

Actual requests for proposals, source selection plans, and contract award decisions depict how the Programs are actually applied. As often happens, a concept seems good in theory, but often falls short in its execution. The Programs as administered by JCC-I/A and the Combatant commanders allow contracting officers to go beyond the concept of assisting local businesses and workers and into an area of impermissible sole source contracting while utilizing the specific Sections L and M recommended in the Instruction. As a result, some contracting officers have gone too far.

In Afghanistan, employment of Afghanis appeared to be mandatory in a solicitation for a fixed-price construction contract. In the solicitation, the Afghan socioeconomic plan evaluation factor required contractors to "provide the information requested in [the solicitation's] Addendum."[154] Subsequently, the Addendum required contractors to "submit evidence of Afghan employee training through a contracting data requirements list (CDRL)," as well as the "total projected number of Afghans and Foreign citizens that will be directly employed in the performance of this contract."[155] Arguably, the Afghan First program, as applied in this example, is either all or nothing without any gradation possibilities between proposals. This becomes important when determining eligibility for award. Misapplication of the Programs was not limited to Afghanistan, it also occurred in Iraq.

In an Iraq solicitation, the contracting officer approached the Iraqi First socio-economic evaluation by using a percentage of Iraqis employed system.[156] In this particular solicitation, an excellent rating

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[154] Solicitation for Commercial Items, Bagram Regional Contracting Center, Afghanistan, to offerors, subject: Renovate Building 455, Bagram Airfield, Afghanistan, Solicitation No. W91B4N-08-R-0009 (13 Jan. 2008), *available at* http://www.military contracting.com/AfghanSolDetail.asp?id=1544.

[155] *Id.*

[156] Source Selection Plan, Joint Contracting Command-Iraq/Afghanistan, to Contracting Officials, subject: Perform Service for Combustor Inspection (CI) General Electric Frame 5 Combustion Turbine Unit One at Shaubia Power Plant and PTCH Power Plant, Solicitation No. W91GXY-06-R-0101 (9 Aug. 2006) [hereinafter Shaubia Source Selection Plan] (on file with author); Solicitation for Commercial Items, Joint Contracting Command-Iraq/Afghanistan, Iraq, to Offerors, subject: Perform Service for Combustor Inspection (CI) General Electric Frame 5 Combustion Turbine Unit One at Shaubia Power Plant and PTCH Power Plant, Solicitation No. W91GXY-06-R-0101 (17 Aug. 2006) [hereinafter Shaubia Solicitation] (on file with author) (showing that the Iraqi

required the offeror to show that it would "employ a minimum of 85% of their employees as Iraqi personnel (direct or subcontractors) OR [sic] [show that it] is an Iraqi-owned business/joint venture with an Iraqi-owned business."[157] Under this example, the contracting officer went beyond what the Instruction recommends or requires. By doing so, he effectively restricted competition to Iraqi centric businesses. These examples depict what happens when a great concept goes awry in its execution: full and open competition is threatened and only local businesses have a realistic opportunity to compete. Beyond a misapplication by procurement officials, the Programs inherently and systemically fail to achieve full and open competition.

IV. Competition Lost: Afghan First and Iraqi First Inhibit Full and Open Competition Required by the CICA

A. The Last Shall Not Be First: Afghan First and Iraqi First Are Akin to Set-Asides

Although the overall goals and policy aims of Afghan First and Iraqi First are commendable, logical, and "the right thing to do,"[158] unfortunately they simply do not meet the level of full and open competition that is required by the CICA.[159] The Programs have created Afghan and Iraqi set-aside programs that closely resemble the small business, Section 8a, women, or minority owned business set asides found in the FAR.[160] The important distinction between the Programs and the set-asides found in the FAR is that Congress allows the latter whereas JCC-I/A emplaced, used, and touted the former to the world without any Congressional authority; that is until the NDAA 2008.

The proposition that the Programs are being applied as socio-economic set aside programs stem from the initial goals and command

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First socio-economic factor evaluated the ownership of the offeror's company, the amount of "Iraqi contract performance," the "[a]pproximate number and/or percentage of Iraqi and non-Iraqi personnel who are direct-hire employees of the offeror who will work under the resultant contract," and the "[a]pproximate number and/or percentage of Iraqi and non-Iraqi personnel who will hired (sic) as sub-contractors/subcontractor employees who will work under the resultant contract").

[157] Shaubia Source Selection Plan, *supra* note 156; Shaubia Solicitation, *supra* note 156.

[158] JCC-I/A Sept. 2006 Memo, *supra* note 132.

[159] *See* Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000).

[160] *See* FAR, *supra* note 23, pt. 9.000.

policy JCC-I/A designed the Programs to meet.[161] On their face, the Programs sound very much like the FAR's small business set-aside programs because their intent is to award contracts to local Afghani and Iraqi businesses.[162] Even if the intent of the Programs are to simply assist local businesses and not an endorsement of or a creation of a localized socio-economic set-aside program, the perceived purpose of the Programs by procurement officials in the field belie that intent.

If there is any doubt that the Programs are not set-asides, a person only has to read some of the publications that discuss the Programs. For example, an article from the Bagram Regional Contracting Center stated that its "primary missions[] . . . [is to] enhance strategic partnerships with Afghan communities through integration of the Afghan First Program, which *provides contracting preferences to locals*."[163] A similar misinterpretation occurred regarding the correct use of the Iraqi First program. A unit's mission briefing noted that the Iraqi First program's goal is to have "75% of funds awarded to Iraqi firms."[164] The unit created the presentation approximately six months after JCC-I/A's 24 September 2006 memorandum, yet it still referenced the 75% "end-state" goal.[165] Based on these examples, it is evident that procurement officials view the Programs as local socio-economic set-aside programs for Afghani and Iraqi businesses. In addition to perceiving the Programs as set-aside programs, some procurement officials apply them as such.

On 8 May 2007, approximately eight months after JCC-I/A's 24 September 2006 memorandum eliminated the "end-state [goal] . . . to award at least 75% of our contracting dollars to Iraqi Host-Nation business,"[166] the perception that the Programs are set-asides became a

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[161] *See* Iraqi First Program, *supra* note 9 (stating that the Commander, MNF-I, requested the JCC-I/A to "provide set-asides on USG [United States Government] contracts for Iraqi owned firms."); JCC-I/A June 2006 Memo, *supra* note 116 ("[The desired] end-state . . . [was] to award at least 75% of our contracting dollars to Iraqi Host Nation business.").

[162] FAR, *supra* note 23, pt. 19.2.

[163] Master Sergeant Smith, *Coalition Construction Management Section News*, 1 BAYONET FORWARD 13, at 6 (2007) (emphasis added).

[164] Terry Edwards, Air Force Ctr. for Envtl. Excellence: Engineering & Construction Programs (30 Mar. 2007) (PowerPoint Presentation), *available at* http://www.same.org/files/members/DOD2007edwardsAFCEE.pdf.

[165] JCC-I/A June 2006 Memo, *supra* note 116.

[166] JCC-I/A Sept. 2006 Memo, *supra* note 132.

reality.[167] On that day, a New Jersey business,[168] Glendale Industries, was unable to compete for and sell ceremonial gloves to a military honor guard unit because of the perception that the Iraqi First program required a local Iraqi business set-aside.[169] The business owner received a letter from the honor guard unit in Iraq that stated, "Due to the new ordering process we must order from Iraqi vendors first instead of your company like we would rather do. Thanks for your understanding and support of our operations here in Iraq."[170] *The Record*, a North Jersey Media Group newspaper, discussed the business owner's inability to compete for the contract in an article entitled "'Iraqi first' policy hurts N.J. firm."[171] The article reported that "a new policy that forces the U.S. military in Iraq to support that country's economy by purchasing . . . from Iraqi companies is hurting a supplier 6,000 miles away . . . ."[172] The business owner "learned that under the Iraqi First program, she would have to go through some new 'middlemen'—Iraqi vendors—if she wanted to continue doing business in the war-torn country."[173] In the article, the company's operations manager stated that the Iraqi First program was "making it a little more labor intensive for us [the company] and, possibly, more expensive for the military."[174] Regardless of whether the Iraqi First program has or will impact Glendale Industries' overall business, the contracting officer's application of the Iraqi First program denied it the opportunity to engage in full and open competition for a government contract. Aside from creating impermissible set-asides for local businesses, the Programs' evaluation criteria also precludes obtaining full and open competition.

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[167] *See* Justo Bautista, *'Iraqi first' Policy Hurts N.J. firm*, RECORD, Aug. 11, 2007, *available at* http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3danFIZUVFeXk1NSZmZ2JlbDdmN3ZxZWVFRXl5NzE4MDI5MCZ5cmlyeTdmNzE3Zjd2cWVlRUV5eTM=.

[168] Telephone Interview with Wendy Lazar, Owner, Glendale Industries, in Bergen County, N.J. (Dec. 10, 2007) (explaining that Glendale Industries is a small women-owned business that specializes in ceremonial equipment used by military units, police departments, and fire departments).

[169] *See* Letter from 447th Honor Guard Sather AB, Iraq, to Glendale Indus., Bergen County, N.J. (May 8, 2007) (on file with author).

[170] *Id.*

[171] Bautista, *supra* note 167.

[172] *Id.*

[173] *Id.*

[174] *Id.*

B. The Afghan First and Iraqi First Evaluation Schemes Stifle Full and Open Competition

Typically, the "contracting agency has broad discretion in choosing evaluation factors and their relative importance."[175] Courts or boards will not usually "object to the absence or presence of particular factors or an evaluation scheme so long as the factors used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests."[176] Unfortunately, under the Programs, the localized socio-economic evaluation criteria apply to some degree even if there is no Afghani or Iraqi business that can perform the contract.[177] The evaluation schemes convey that the agency can never satisfy its needs in Afghanistan and Iraq unless local Afghani/Iraqi businesses and/or workers are involved in every contract awarded (or at least considered).[178] How is it possible that every individual contract awarded in Afghanistan and Iraq requires the relative importance of a local business or local worker nexus? It is a long stretch and logically implausible.[179]

On the other hand, there is little doubt that the use of Afghan First and Iraqi First socio-economic evaluation factors satisfies the overall strategic, host-nation building, or effects-based contracting needs of the

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[175] Consol. Bell, Inc., B-228566, 1987 U.S. Comp. Gen. LEXIS 18, at *5 (Dec. 29, 1987).
[176] King Constr. Co., Inc., B-298276, 2006 U.S. Comp. Gen. Lexis 114, at *6 (July 17, 2006).
[177] JCC-I/A, 2007 AI, *supra* note 8, pt. 26 (advising that for procurements under the simplified acquisition threshold, contracting officers should "create a best value approach to evaluate and use the offerors' socio-economic programs as a factor in awarding the contract." For procurements over the simplified acquisition threshold, the Instruction recommends that contracting officers include the Afghan First and Iraqi First socio-economic evaluation factors in the solicitation.).
[178] *See id.* pt. 26.1 (stating that for acquisitions over the simplified acquisition threshold contracting officers are required to consider the Programs as a socio-economic evaluation factor).
[179] *See King Construction Co., Inc.*, 2006 U.S. Comp. Gen. Lexis 114, at *6.

> When a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility to establish that the specification is reasonably necessary to meet its needs. . . . The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny.

Id.

U.S. military in Afghanistan and Iraq. [180] However, the ends cannot justify the means. Procurement officials must tailor each individual contract's evaluation criteria to meet the agency's needs on that particular contract. [181] Contrarily, it is unacceptable to have whole groups of unrelated contracts contain an evaluation factor simply to meet the agency's generalized needs.[182]

The use of the Programs' evaluation schemes in every contract is overbroad. The socio-economic benefits of the Programs cannot logically relate to every individual contract awarded in Afghanistan and Iraq. Moreover, since the evaluative schemes are overbroad and do not meet the specific needs of the agency in every individual contract, their inclusion unnecessarily inhibits competition. Thus, even though "competition" occurs for contracts awarded in Afghanistan and Iraq, full and open competition is lost. It is lost because the evaluation schemes make it practically impossible for an equally capable, non-local business to fairly compete on a level playing field for any contract in Afghanistan or Iraq unless they utilize local workers. Instead, the Programs only provide *adequate* competition. For example, assume on any given contract that a non-local offeror with no local workers was fully capable of performing the work at a competitive cost to the government; it would not receive the same full and equal consideration that a local company or a business that proposes the use of local workers would receive. This is "adequate competition" as opposed to full and open competition and it fails to comply with Congress' definition of "competitive procedures."[183] A Congressional conference committee rejected a proposal to "establish 'effective' competition as the standard for awarding federal contracts for

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[180] *See* DCMA, *supra* note 102, at 24.

[181] *See* Sea-Land Serv. Inc., B-278404.2, 1998 U.S. Comp. Gen. LEXIS 41, at *12 (Feb. 4, 1998) (citing FAR, *supra* note 23, pt. 15.605(a) (June 1997)) ("A solicitation's evaluation factors and subfactors must be tailored to the acquisition in question."); a*ccord id.* pt. 15.304 ("The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition." Moreover, the evaluation criteria chosen must "[r]epresent key areas of importance and emphasis to be considered in the source selection decision.").

[182] *Id.*

[183] *See* Prisoner Transp. Serv. L.L.C, B-292179, 2003 Comp. Gen. LEXIS 95, at *7 (June 27, 2003) ("Contrary to the agency's assertion, the CICA mandate for full and open competition is not satisfied by the agency's view that 'adequate' competition has been obtained.").

property or services" as opposed to full and open competition.[184] In short, denying a business the opportunity to compete at all and conducting the evaluation in a manner that overwhelmingly favors local businesses/workers simply presents a "distinction without a difference";[185] neither promotes *full and open* competition.

C. Voices We Have Heard on High: Congress's Response to the Afghan First and Iraqi First Programs

1. Senator Jack Reed: Congressional Action Is Needed to Support the Afghan First Program

While Congress, commanders, and contracting officials recognize the benefits of the Programs, at least one Senator recognized that the Programs' failed to pass muster under the CICA.[186] Senator Jack Reed recognized that "*Afghan First* which encourages the United States government and private international companies to give contracts and jobs to Afghanis, thus improving their skills, increasing entrepreneurship and provide opportunities for Afghan economic expansion"[187] is one of "several projects which have the potential to achieve great success in winning the hearts and minds of the Afghan people."[188] However, he also recognized that "[a]ccommodation of U.S. contracting regulations in DoD and civilian agencies should be made to promote *Afghan First* in order to accelerate the acceptance and investment of the Afghan people in a central government rather than the Taliban."[189] Congress took this to heart by creating the long needed exception to the full and open competition requirement for the Programs and legalized them by providing explicit authority for the Programs in the NDAA 2008.[190] Finally, after almost two years of use, Congress provided enhanced contracting authority to use the Afghan First and Iraqi First evaluative schemes in awarding contracts despite the Programs transgressions on

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[184] H.R. REP. NO. 98–369, at 1422 (discussing that the congressional conference committee rejected a proposed Senate amendment to "establish 'effective' competition as the standard for awarding federal contracts for property or services").
[185] L-3 Commc'ns Corp., ASBCA No. 54920, 2006-2 B.C.A. ¶ 33,374.
[186] SENATOR JACK REED, TRIP REPORT: PAKISTAN, AFGHANISTAN, AND IRAQ (Oct. 3–9, 2006), at 7, *available at* http://www.reed.senate.gov/documents/Trip%20Reports/trip report%20oct06%20final.pdf.
[187] *Id.* at 4 (emphasis in the original).
[188] *Id.*
[189] *Id.* at 7 (emphasis in the original).
[190] NDAA 2008, *supra* note 19, § 886.

full and open competition.[191] The congressional exception is section 886 of the NDAA 2008 and it allows DOD procurement officials to use "other than competitive procedures" and to provide "a preference . . . for products or services that are from Iraq or Afghanistan."[192]

2. The NDAA 2008 Section 886 Enhanced Contracting Authority

It is rare that Congress embraces and approves a DOD contracting practice that infringes on full and open competition. Normally, Congress is in the habit of criticizing and legislating to ensure more competition in government contracting.[193] Ironically, however, section 886 goes well beyond simply embracing the Afghan First and Iraqi First socio-economic evaluation schemes. Instead, it provides JCC-I/A even more authority to limit full and open competition in favor of local businesses, workers, and products.[194] Seemingly, subsection (a)(3) of Section 886, which allows "a preference . . . for products or services that are from Iraq or Afghanistan,"[195] is sufficient authority for JCC-I/A's continued use of the current Programs. However, Congress allowed even more authority to limit competition by allowing DOD, and JCC-IA, to restrict competition geographically to either Iraq of Afghanistan by limiting "competition . . . to products or services that are from Iraq or Afghanistan."[196] Congress also, arguably, allowed DOD to avoid using competitive procedures whatsoever and use "procedures other than

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[191] *See id.*
[192] *Id.*
[193] *See generally* Representative Henry A. Waxman, *Democratic Truth Squad Introduces "Clean Contracting Act"* (Sept. 13, 2006), http://oversight.house.gov/story.asp?ID=1103 ("In response to these widespread abuses in federal contracting, the Democrats' Waste, Fraud, and Abuse Truth Squad is introducing the 'Clean Contracting Act of 2006[,]'" which intends to promote, among other things, more competition in the award of contracts.); Lieberman, Lack of Accountability, *supra* note 82 ("Homeland Security and Governmental Affairs Committee Chairman Joe Lieberman, ID-Conn., and Ranking Member Susan Collins, R-Me., Tuesday searched for ways to strengthen accountability and competition in the federal government's $415 billion-a-year acquisition process . . . ."); Lieberman, Waste, Fraud, and Abuse, *supra* note 83 ("The U.S. Senate has unanimously approved the bipartisan 'Accountability in Government Contracting Act of 2007,[] (SIC) authored by Senator Susan Collins (R-ME) and Joe Lieberman (ID-CT). The bill will strengthen competition in federal contracting, add transparency to the process, and help curtail waste, fraud, and abuse of taxpayers' money.").
[194] NDAA 2008, *supra* note 19, § 886.
[195] *Id.*
[196] *Id.*

competitive procedures . . . to award a contract to a particular source or sources from Iraq or Afghanistan."[197]

While Section 886 of the NDAA 2008 is "commendable, logical, and the right thing to do,"[198] it does not go far enough. Yes, it embraces JCC-I/A's innovative localized socio-economic policies and provides additional contracting authority to maximize the benefits and impact of the Programs.[199] However, despite Congress's best efforts to legitimize and support the Programs, the proposed enhanced authority falls short of what is truly required for contingency contracting operations: permanent enhanced contingency contracting authority for any declared contingency.

Providing permanent enhanced contingency contracting authority to support the "Economic" element of the "DIME" is not a new or novel idea. Congress previously created authority for contracting during "major disaster[s] or emergency assistance activities" under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.[200] Congress could and should create a similar permanent exception for contracting in contingency operations. The on-going rebuilding efforts in Afghanistan and Iraq are not unique in either place or time. Future wars will take place that will require, in the least, future rebuilding efforts; and perhaps, even a need to win the local populaces' hearts and minds as in Iraq and Afghanistan. Either way, the job of the military is no longer just "killing

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[197] *Id.*
[198] JCC-I/A Sept. 2006 Memo, *supra* note 132.
[199] NDAA 2008, *supra* note 19, § 886.
[200] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.S. § 5121, 5150 (2005). Providing that

> In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.
>
> This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter.

Id.

people and breaking things."[201] In today's conflicts, as well as in future conflicts, "killing people and breaking things has given way to feeding people and fixing things."[202] New permanent legislation would only require minimal effort to create. Like in the Stafford Act, Congress could require the President, or the Secretary of Defense, to declare a contingency operation in order to trigger an enhanced contracting authority exception to the full and open competition requirement. The language of the permanent statute could easily come from Section 886.

A solution could be found in a new permanent authority[203] that would require the President, or preferably the Secretary of Defense, to declare that a contingency operation is presently taking place and to identify the country, countries, or region(s) in which the operation is occurring. This would require defining a contingency operation as war, military operations, or stability operations (including security, transition, reconstruction, and humanitarian relief activities) to capture most of the duties the military is currently performing. The new permanent authority would accommodate any contingency operation. A product, service, or source would qualify under the permanent authorization if it emanates from the area(s) declared by the President, or Secretary of Defense. To prevent abuses and to provide oversight, Congress could require DOD wait for a determinate amount of time (perhaps thirty days) before it utilizes the enhanced contingency authority and require quarterly reports and/or renewed declarations by either the President or Secretary of Defense. Through these measures, Congress can voice its disapproval and maintain fiscal control either before DOD uses the enhanced contingency authority or at any time during the declared contingency.

Permanent legislation would allow commanders and contracting officials the freedom and authority to immediately control the battle space and win the hearts and minds of the local population as soon as a war, conflict, or foreign emergency arises. Without permanent enhanced contingency contracting authority, two alternatives exist for future conflicts. Procurement officials may take it upon themselves to utilize localized socio-economic policies that infringe upon full and open competition despite a lack of Congressional authority. Alternatively,

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[201] Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 11 (2001).
[202] *Id*.
[203] *See* Appendix for the complete text of the proposed permanent enhanced contracting authority.

battlefield commanders may not receive the proven benefit of effects based contracting actions that quickly and effectively utilize localized socio-economic programs to affect their battle space.

V. Conclusion

A critical examination of the competition requirements in federal procurements and the execution, application, and impacts of the Afghan First and Iraqi First programs leaves no doubt that, but for the NDAA 2008, the Programs violate the law of full and open competition. Several key facts support and prove this conclusion. First, the Programs application only realistically allows local business, or businesses that hire local workers, to compete for DOD contracts in Afghanistan and Iraq. Second, procurement officials in the field perceive and use the Programs as localized set-aside programs; procurement officials refer to the Afghan First program as a local business preference program and continue to apply the 75% end goal. Moreover, a procurement official in Iraq would not even allow an American company to compete for a contract because of a maligned application of the Iraqi First program. Third, the Programs are overbroad because the Programs' requirement for local businesses cannot logically relate to every contract awarded in Afghanistan or Iraq. Finally, Congress's specific acknowledgement and acquiescence of the Programs in the NDAA 2008 is incontrovertible evidence that the Programs violate the CICA. Why would Congress even bother if the Programs were legal? In spite of the fact that Afghan First and Iraqi First violate the CICA and the FAR, the Programs are vitally important to the United States' efforts in Afghanistan and Iraq.

Like in post World War II Europe, these Programs are helping to forge long-term strategic alliances in economically, politically, and militarily decisive areas of the world by utilizing local businesses and labor in the rebuilding efforts. The Programs are successful for two simple reasons: using local businesses and labor puts dollars directly into the economies of Afghanistan and Iraq, and employing military aged men and women reduces the chance that they will join in the insurgency. Because of the obvious benefits provided by the Programs, Congress should look beyond the current contingencies in Afghanistan and Iraq. They should provide permanent enhanced contingency contracting authority for future contingency operations. Permanent enhanced contingency authority will allow Combatant commanders to factor this type of effects-based contracting into the early stages of their mission planning.

Appendix

Section 886 of the 2008 National Defense Authorization Act appears below in subsection (a). Subsection (b) of Appendix A contains the proposed permanent enhanced contingency contracting authority.

Sec. 886. ENHANCED AUTHORITY TO ACQUIRE PRODUCTS AND SERVICES PRODUCED IN IRAQ AND AFGHANISTAN.

(a) In General.--In the case of a product or service to be acquired in support of military operations or stability operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities) for which the Secretary of Defense makes a determination described in subsection (b), the Secretary may conduct a procurement in which--

(1) Competition is limited to products or services that are from Iraq or Afghanistan;

(2) Procedures other than competitive procedures are used to award a contract to a particular source or sources from Iraq or Afghanistan; or

(3) A preference is provided for products or services that are from Iraq or Afghanistan.

(b) Determination.--A determination described in this subsection is a determination by the Secretary that--

(1) The product or service concerned is to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan; or

(2) it is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference as described in subsection (a) because--

(A) Such limitation, procedure, or preference is necessary to provide a stable source of jobs in Iraq or Afghanistan; and

(B) Such limitation, procedure, or preference will not adversely affect--

(i) Military operations or stability operations in Iraq or Afghanistan; or

(ii) The United States industrial base.

(c) Products, Services, and Sources from Iraq or Afghanistan.--For the purposes of this section:

(1) A product is from Iraq or Afghanistan if it is mined, produced, or manufactured in Iraq or Afghanistan.

(2) A service is from Iraq or Afghanistan if it is performed in Iraq or Afghanistan by citizens or permanent resident aliens of Iraq or Afghanistan.

(3) A source is from Iraq or Afghanistan if it--

(A) is located in Iraq or Afghanistan; and

(B) offers products or services that are from Iraq or Afghanistan.

PROPOSED PERMANENT ENHANCED CONTINGENCY CONTRACTING AUTHORITY

(a) In General.--In the case of a product or service to be acquired in support of a Contingency Operation as declared under subsection (b) and for which the Secretary of Defense makes a determination described in subsection (c), the Secretary of Defense may conduct a procurement in which—

(1) Competition is limited to products or services that are from the area in which the Contingency Operation is conducted;

(2) Procedures other than competitive procedures are used to award a contract to a particular source or sources within the area where the Contingency Operation is conducted; or

(3) A preference is provided for products or services that are from the area where the Contingency Operation is conducted.

(b) The President of the United States, delegable to the Secretary of Defense, shall declare an action a Contingency Operation and specifically indentify the geographic area(s) in which the Contingency Operation is taking place. An action may qualify as a contingency operation if it constitutes a declared war, a military operation, and/or a stability operation (including but not limited to, security, transition, reconstruction, and humanitarian relief activities.)

(c) (1) The product or service concerned is to be used only by the military forces, police, or other security personnel of countries in which contingency operation is conducted; or

(2) It is in the national security interest of the United States to limit competition, use procedures other than competitive procedures, or provide a preference as described in subsection (a) because

(A) Such limitation, procedure, or preference is necessary to provide a stable source of jobs in the areas in which the contingency operation is conducted; and

(B) Such limitation, procedure, or preference will not adversely affect—

(i) Military operations or stability operations in the area(s) in which the contingency operation is conducted; or
(ii) The United States industrial base.

THE TWENTY-SEVENTH CHARLES L. DECKER LECTURE ON ADMINISTRATIVE AND CIVIL LAW*

THE HONORABLE DONNA E. SHALALA[1]

* This lecture is an edited transcript of a lecture delivered on 28 April 2008 by The Honorable Donna E. Shalala to members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Ctr. & Sch., Charlottesville, Va. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School and the 25th Judge Advocate General of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture on Administrative and Civil Law.

[1] Donna E. Shalala became Professor of Political Science and President of the University of Miami on 1 June 2001. President Shalala has more than twenty-five years of experience as an accomplished scholar, teacher, and administrator.

Born in Cleveland, Ohio, President Shalala received her A.B. degree in history from Western College for Women and her Ph.D. from The Maxwell School of Citizenship and Public Affairs at Syracuse University. A leading scholar on the political economy of state and local governments, she has also held tenured professorships at Columbia University, the City University of New York (CUNY), and the University of Wisconsin–Madison. She served as President of Hunter College of CUNY from 1980 to 1987 and as Chancellor of the University of Wisconsin–Madison from 1987 to 1993. One of the country's first Peace Corp volunteers, she served in Iran from 1962 to 1964.

In 1993, President Clinton appointed her U.S. Secretary of Health and Human Services (HHS) where she served for eight years, becoming the longest serving HHS Secretary in U.S. history. At the beginning of her tenure, HHS had a budget of nearly $600 billion, which included a wide variety of programs including Social Security, Medicare, Medicaid, Child Care and Head Start, Welfare, the Public Health Service, the National Institute of Health (NIH), the Center for Disease Control and Prevention (CDC), and the Food and Drug Administration (FDA).

As HHS Secretary, she directed the welfare reform process, made health insurance available to an estimated 3.3 million children through the approval of all State Children's Health Insurance Programs (SCHIP), raised child immunization rates to the highest levels in history, led major reforms of the FDA's drug approval process and food safety system, revitalized the National Institute of Health, and directed a major management and policy reform of Medicare. At the end of her tenure as HHS Secretary, *The Washington Post* described her as "one of the most successful government managers of modern times." In 2007, President George W. Bush handpicked Shalala to co-chair with Senator Bob Dole the Commission on Care for Returning Wounded Warriors, to evaluate how wounded service members transition from active duty to civilian society.

As Chancellor of the University of Wisconsin–Madison, she led what was then the nation's largest public research university. She successfully strengthened undergraduate education and the university's research facilities, and spearheaded the largest fundraising drive in Wisconsin's history. In 1992, *Business Week* named her one of the top five managers in higher education.

She served in the Carter administration as Assistant Secretary for Public Development and Research at the U.S. Department of Housing and Urban Development. In 1980, she assumed the presidency of Hunter College of the City University of New

Thank you. I'm delighted to be here and to be joining all of you, particularly my old friend, Secretary Eagleburger,[2] who is one of the great public servants—a fellow Wisconsinite, who is totally supportive of my own long career. But we're lucky to have him here with us. He knows a lot more about the subject than I do.

You thought I've been invited really to talk about the President's commission on Wounded Warriors, which I co-chaired with Senator Bob Dole, whose long distinguished history with the military is well known,[3] but I want to put it into context because I'm a political scientist, not a lawyer. And all of you, while you can study the law, you have to wonder every once in a while, how did we get this crazy law or this crazy regulation that you're trying to implement at one time or another? And usually the explanation is not as rational as sometimes the literature would suggest, nor is the process of getting there. And it's very important that you understand that because if you don't understand the context in which we make laws in this country, even though you know the role of government, the role of the Supreme Court, what the Congress does, it's hard to either administer those laws or, in fact, understand what's underlying the law or the regulation that you're trying to implement when you're trying to help an individual client or, in fact, help an agency to get where they need to get.

Let me start—and I'm going to tell you a number of stories because the way in which I teach I actually tell stories—my first government

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York. She is a Director of Gannett Co., Inc., and the Lennar Corporation. She also serves as a Trustee of the Henry J. Kaiser Family Foundation.

President Shalala has more than three dozen honorary degrees and a host of other honors, including the 1992 National Public Service Award and the 1994 *Glamour* magazine Woman of the Year Award. In 2005, *U.S. News & World Report* and the Center for Public Leadership at Harvard University's Kennedy School of Government named Shalala one of "America's Best Leaders." She has been elected to the Council on Foreign Relations, National Academy of Education, the National Academy of Public Administration, the American Academy of Arts and Sciences, the National Academy of Social Insurance, the American Academy of Political and Social Science, and the Institute of Medicine of the National Academy of Sciences.

[2] Lawrence S. Eagleburger served as U.S. Secretary of State from 8 December 1992 to 19 January 1993. *See* Secretary of State Lawrence Sidney Eagleburger, http://www.state.gov/secretary/former/40402.htm (July 15, 2003).

[3] Former U.S. Senator Bob Dole served as an officer in the 10th Mountain Division during World War II. He was gravely wounded in the right arm while attempting to assist a fellow Soldier during combat in Italy. As a result, Senator Dole was awarded two Purple Hearts and a Bronze Star. *See* Senator Bob Dole's Official Website, http://www.bobdole.org/bio/wwII.php (last visited Aug. 12, 2008).

assignment I was living in a mud village in southern Iran. There was very little government regulation when I was a Peace Corps volunteer; they sort of threw us in the mud villages and said, "Do something." And two years later they came and picked us up. This was probably the most defining experience in my career because I was literally living in a mud village in southern Iran for two years trying to get some things done. And we got a lot done. But we got it done because we were very respectful of the local religion and the local culture. Many of the things that our military is doing now in Iraq and Afghanistan were lessons that the Peace Corps and our own development agency learned years ago in terms of understanding how you get things done in other cultures and in complex situations. My first experience of that actually was in that mud village. My family did not want me to go into the Peace Corps. They thought it was the craziest—every generation of my family has served in the military. Actually, my father would have been more comfortable if I had joined the military at that time. But I had wanted to go to the Peace Corps. And my grandmother—my family is Lebanese—said to my father, "You know, she's going to the Old Country, it's okay." I'm not sure my grandmother knew exactly where I was going in the old country, but she thought I was going to the old country.

So as I was leaving Cleveland, my grandmother gave me this letter, and she said give it to the head man of the village. My grandmother was highly educated and wrote classical Arabic. And when I arrived at my little village, I took my little note out and handed it to the head man. And it actually was written in classical Arabic. And it said, "This is to introduce Donna Shalala, the daughter of a great sheik in Cleveland, Ohio. Please put her under your protection."

And actually that worked out very well because I developed a relationship with the mullah of the village. One of our assignments was, in fact, to build a school; we were a bunch of liberal arts kids—there were five. Three of them were Aggies, and they were straightening out southern Iran at the time. We lived right next to the Marsh Arabs—very close to them. So I went to the head of the village and said, "You know, we're here to build a school." And he said, "We don't need a school." He said, "We need a mosque." And for six months we went back and forth with the head of the village. And we got into a very philosophical debate among ourselves: Did the Constitution allow government authorities to build mosques? And, you know, we sent letters and never got a response. Sent letters up to Tehran to the people that were running

us—at the time it was USAID.[4] And we sent letters to them. And they usually said, "Well, we don't want to give you the answer to that question, but it's not a good idea for government employees to build mosques," even though they were only paying us $100 a month. I mean it wasn't like we were highly paid government employees. And finally I said, "You know, we're not going to get anything done. We're not going to sit around,"—we were doing some teaching—"so we'd better build this mosque." So we all got together and we helped the villagers build a mosque. In fact, the Aggie guys had actually invented a new brick in which they mixed some straw with a brick, and would make it much stronger. We built the mosque. And we were at the dedication of the mosque, and the mullah turned to me and said, "It's time we had a school." A very important lesson, and I got that lesson at twenty-one. A very important lesson.

It's an important lesson in management. It's also an important lesson in terms of listening to the population that you're working with, and understanding the context that you're in.

The second story I want to tell you is about being with HUD in the 1970s. In the Carter Administration, I was appointed Assistant Secretary of HUD.[5] The first secretary was Pat Harris. And Pat Harris actually was a very distinguished African-American secretary—the first African-American woman ever to be secretary—to be a member of the President's cabinet. [Pat Harris was] a Washington lawyer and saw the world through Washington. And because she had been part of the civil rights movement, she believed in a strong Washington presence; she didn't trust the states, she didn't trust the city. She wanted—she believed in—government regulations. And everything she wanted was to see whether we got more control over the world out there so that we could get accountability in the programs we were managing. She was sent over to what became HHS.[6] [She] asked me whether I wanted to go along and I actually remember saying to her, "No, I'm at the end of my tour here and I really don't want to learn about healthcare."

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[4] USAID stands for United States Agency for International Development. *See* U.S. Agency for International Development, http://www.usaid.gov (last visited 12 Aug. 2008).

[5] The U.S. Department of Housing and Urban Development is commonly referred to as HUD. *See* Homes and Communities—U.S. Department of Housing and Urban Development (HUD), http://www.hud.gov/ (last visited Aug. 13, 2008).

[6] The U.S. Department of Health and Human Services is commonly referred to as HHS. *See* United States Department of Health and Human Services, http://www.hhs.gov (last visited Aug. 13, 2008).

So she went off to HHS and I stayed with the next secretary, Moon Landrieu, another liberal democrat, who came from the city of New Orleans; [he] was the first man actually ever to bring black [employees] into government. He had been a great state legislator. His daughter, Mary Landrieu, is a senator now from Louisiana. And Moon Landrieu saw the world completely differently. He asked the question, is this something the federal government should be doing? So you had two liberal democrats who saw the world in a different way. And for those who think federalism is kind of locked-in depending on the ideology of the party, those were two completely different liberal democrats—, who saw the world differently because of their background and because of where they sat.

And so Moon was constantly saying, should the federal government be doing this? Where Pat Harris said the exact opposite to it; the federal government should be doing it and we're not going to get equality or justice unless there's a strong federal government. Those lessons of those two were very important, but Moon taught me another lesson. He called me up one day and said, "I just got the new set of regulations on public housing." He said, "I've got to tell you something about these regs—I was in charge of regs and policy in the department—I was like thirty-one or something." And so he said to me, "Donna, the problem with you is you hire people that are too brilliant." And I said, "I beg your pardon?" He said, "You have to get rid of some of those Harvard people." He said, "You've got to write regulations for the people that are administering them in the field. And you've got to understand who your clients are and who you're writing these regulations for." He said, "They may be very clear to your Harvard educated people, including the people in the General Counsel's office, but we're writing for people of average or higher intelligence, that are of good heart, that have to administer these regulations. And before you write a subject regulation under my watch, you're going to understand your client, but, more importantly, you're going to understand who has to interpret and administer these regulations."

That was an important experience. It meant that we were going to think about and bring in those people who were going to administer the regulations, and those people that were going to have to interpret them for the clients we were serving.

Now why do I tell you those two stories? They come out of my government experience, but they actually deepened my understanding of

how government actually worked. And, in fact, the reason our laws and our regulations are so complex is because we rarely think about the client and who's going to get the services. But more importantly, we rarely think about those who have to interpret them or administer them. And if you're going to make changes in government, particularly if you want to make more than incremental changes—and even incremental changes, which I consider major steps when you're dealing with large complex bureaucracies—you had better understand the system in which you're going to have to interpret and administer the regulations or the laws in which you're going to write them. And more importantly, you'd better understand the Congress and who's going to interact with those people.

So I start out with that because before talking about the healthcare system or trying to understand what happened to our Wounded Warriors or the Walter Reed experience, I think it's important that we understand how regulations are made and often how these decisions are made.

In general, the reason the government is so complex and our regulations are so complex, and sometimes our laws overlap on top of each other, is because we never get rid of anything. We always layer on top. And it's because we often are reacting to a scandal or an emergency or a crisis of some kind, and, therefore, we always patch it up. We always find a way not to intervene in the system and to rethink what we're doing, but we always go for patches. And we go for patches because we're trying to clamp down on the scandal or on something that's revealed. And that's the common way in which government gets layers. So I suppose it won't help you when you're trying to figure out what idiot wrote this, that I have to try to explain to some poor officer or some poor enlisted person, but I just want to give you a sense of the mess here that either the literature or the books suggest in terms of how things are initiated and how they're fixed and how the decisions are made.

The most common way in which we handle a crisis at the national level, particularly if it's a big crisis, is we often punt on them. And Secretary Eagleburger will tell you that. In March of 2007, I was literally talking to my football coach and the phone rang. And the person on the other line said, "The President's Chief of Staff, Josh Bolton, would like to speak to you." And I said to my football coach, "It's the President's Chief of Staff." And he said, "What president?" He thought I was talking about the president of some other school, not the President of the United States. So I stepped out. And on the phone was Josh Bolton. He said, "The President would like to speak to you." So the

President says, "Donna, your country needs you." This is typical President Bush. And I said, "Yes, sir." I said, "I've heard that before. What is it that you have in mind?" And he was laughing. He had to tell everybody what I had just said to him. So he—while he was telling everybody what I had just said to him, then he got back on the phone and he explained that he would like to appoint me and Senator Dole. He said, "Your friend, Secretary Gates, and Senator Dole very much want you to do this. And I do, too. And I hope that you'll do it."[7] And I, of course, said "Yes." You don't—when you're asked for service, no matter what you're doing, you do it. And he explained—I had read the Walter Reed stories out of *The Washington Post*.[8] So I didn't ask him a lot of detail. I figured that Senator Dole and I would get together and try to figure out what we were doing.

The common way of dealing the crisis when it's considered at the national level of a major crisis is either you punt it to a committee or a commission, or you will appoint a couple of serious people and they take a couple of years or so and try to sort out the issues. But that's the way; the use of a Blue Ribbon Commission has had a long and honored tradition in this country. And there have been many of them. The 9/11 Commission. You know about the Watergate Commission. But that's the way in which major public figures, particularly Presidents, have taken issue and handed off to try to tap down a controversy. It's not that they're not good hearted and don't want someone to sort it out, but they're going to try to tap it down.

Now, Senator Dole and I, long experienced in government, went to see the President. And it's sort of nice to work with someone like Senator Dole because he's not afraid of anything. And certainly he's not intimidated by a President of the United States. So he looks the President straight in the eye and says, "Mr. President, very respectfully, Secretary Shalala and I are very capable people. And if you're not going to implement our recommendations—we don't know what they are yet—but if you're not going to implement them, we're not going to do them. So you have to give us a promise that you're going to take our recommendations seriously." And the Secretary of Veterans Affairs and

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[7] Robert M. Gates currently serves as the U.S. Secretary of Defense. *See* http://www.whitehouse.gov/government/gates-bio.html (last visited Aug. 13, 2008).

[8] In 2007, *The Washington Post* ran a series of articles that were highly critical of Walter Reed Army Medical Center's facilities and care provided to injured Soldiers and their families. *See generally* Walter Reed and Beyond, http://www.washingtonpost.com/wp-srv/nation/walter-reed/ (last visited Aug. 13, 2008).

the Secretary of Defense were sitting in the room, and the President said, "Nope." And he said, "You bring me the recommendations and I'll implement them." And Secretary Gates made the same commitment. The Secretary of Veterans Affairs was close to the end of his tour, but he made the same commitment. So Senator Dole said, "Okay, we will do it." But we made a very strategic decision. Because we were so knowledgeable about government, we decided we weren't going to take a couple of years. We were actually going to take a shorter period of time. That's the first decision we made. We said, "We're going to do this in six months. You're going to have to detail people to us because this issue can stay alive only for a short period of time. We're happy to go look at what is needed, and that is the seamlessness of the system—from the time someone is injured until they either go back into the service or they go on to VA and we'll take a look at the disability system."

So we said, "Six months. You're going to have to detail people from all the services to us to put this together; we'll hire our own executive director"

The second decision we made, which turned out to be a much more important, is that we were going to produce a report of things that can be done by the Executive Branch. That is, we didn't want to be that dependent on Congress. And, so, we were going to limit the number of things the Congress needs to do, so that if the President does what we recommend, and if he starts now making some investments, which he already was doing on Walter Reed, that we have a chance of putting this together and actually getting some changes in the system and making it more seamless.

The third thing we said to them was, don't give us the usual suspects. We do not need constituency representatives and large interest groups on this group. We wanted the majority of people to be disabled themselves.

And, we wanted a couple of people that are experts in military health (I was hardly an expert in military health) we want to make sure that real Soldiers and Sailors and Marines are represented, who have actually gone through the system. We appointed people that were under thirty. We had a couple of people, one of whom had served in Afghanistan and Iraq, who were severely disabled, who were members of the commission, plus the wife of another Soldier who was on the commission, who understood the benefits and what was happening to families, and the

head of the National Rehab' Hospital, and an expert on information technology. I think only three of us were what you would consider the usual suspects—and it was a small group. It was only eight people. But it didn't have the major powerhouse constituency. It didn't have the American Legion, it didn't have the usual groups on the commission because we were to get in and out of our recommendation quickly.

We did was we went out and did the usual tours and hearings. We actually sat for hours and listened to people who had been injured and we looked into their families because what we wanted was a feel for what they perceived as the issue.

Now the Walter Reed issue aside, that was very much a housing issue. You'll remember the scandal was about Building 18. What happened at Walter Reed is we had a group of single, mostly young men that were in a building that was deteriorating. The authority over that building was not the commandant of Walter Reed. It was another branch of the service. And, as one of my people at [University of] Miami said, it looks like our dormitories after you put a bunch of eighteen year-olds in with not much supervision. But it was a building that was clearly in bad shape.

Senator Dole had been out there for years. He went out every week, but he had never seen that building. But the whole scandal came out of a deteriorating building, which is another lesson: Pay attention to the details. Because it's always going to be something in your command that's so small that it can be blown up. It's not going to usually be your system, it's going to be something that can be blown up and then used as a proxy for everything else.

A very important lesson in management is trying to anticipate what can blow up in your face. And it's often something like a Building 18, not the fundamental system. But we were charged with looking at the fundamental system and actually taking a look from beginning to end of what happened to our wounded warriors that were serving in Iraq and Afghanistan.

I have actually had a lot of contact with the Veterans Administration [VA]—a little bit with the military health part because I had helped the Defense Department while I was Secretary with the issue of Agent Orange. We had gotten the National Institute of Health and the National Academy of Sciences to take a look at the complexity of that issue. I

knew a lot about the VA and about their reforms in the VA and the IT systems that they had put together, and I had never looked at the system from beginning to end from the point at which someone was injured in the field. And that's what we went back to do; we actually talked to people that had had that experience. And here was my quick conclusion: The military and the VA health system were as fragmented and as disorganized as the rest of the health system in the United States.

For those people in this country who believe in the single payer system, that is a government is just writing the check for everything, we'd have a much better system, it looks exactly the same. Even if it's command and control, it's a highly disorganized, decentralized system that's not patient-centered.

And so looking at a system, particularly regarding those who were severely injured, was very important. And what were the complaints? The complaints were very few in the field; almost none in the field. In fact, all of the services worked together in a seamless way from the time that someone is injured until they're either fixed in the field—and most of them would go back to their previous post—or if they're severely injured, they're flown either directly to the United States or more likely to Germany. And, so, that trip is carefully orchestrated. There is world-class medicine going on at this moment in Iraq, in Afghanistan, in the major military facilities in Germany, and here in the United States. If you need an operation or if you're severely injured, that trauma is dealt with brilliantly by careful coordination between the services. You might be treated by a Navy corpsman, operated on by an Army surgeon, transported by an Air Force member, and, more likely than not, you were probably picked up initially by the Marines.

So there is no question that we know how to do that. The high-tech medical part of healthcare in the military is just brilliant. And the surgeons and nurses are world-class. They know what they're doing. We've made those kinds of investments. And while there are mistakes that are made, the number of mistakes are much lower than what you would see in the private sector.

The problem was what happened afterwards. It was a nightmare. It was a nightmare for families, whether they were spouses or grandparents or parents. It was a nightmare for the military itself. In World War II, the lives that were saved were much fewer if you got a real trauma in the field, than now. More importantly, medicine had changed dramatically.

When Robert Dole was severely injured, he was flown first to Miami and then to Kansas, where he stayed in the hospital for a year. Most of his generation who had severe trauma died. What happened is we improved medicine so dramatically that we were saving lives that we never could save in World War II or in Vietnam or in Korea. In fact, people had much more severe injuries than they did in those wars. They would have died in previous wars. So the three thousand plus Soldiers that were severely injured, most of them would have died in previous wars, but our healthcare had improved so much, we had actually saved their lives and stabilized them. And the challenge was, once you had done that, what else do you need to put together? So it was medicine itself that had fundamentally changed, which, in fact, was the underlying challenge to both the military as well as to the armed services, as well as to the VA. And, you know, major studies of this had been going on for years, but there's no question of the quality of medicine. Even the quality of medicine without the housing issues at Walter Reed was clearly world-class. And no one disputes that issue. The problem that occurred was once the operation was done and the patient became an outpatient. You weren't talking about outpatients in World War II. You were somewhat in the Vietnam War, but we know what we did—we created a lot of homeless people and a lot of complex issues. And we never really got our arms around it other than throwing money at the VA and improving some of their services substantially over a period of time.

So it was a different war and a different medicine that we were faced with. And the challenge was once members of the services got out of the hospital, what would happen to them, and whether there was coordination of the services. And that's where the system collapsed. But I keep reminding people where it collapses in the civilian system: it's the coordination of care, the number of outpatient visits, the appointments, and what happens to your family. Mothers and fathers and grandparents and spouses were clearly dropping their jobs and rushing out to wherever their loved ones were stationed to basically coordinate their care. It wasn't just a support system, they were going out to make certain. And we had something else to this war—we had brain traumas, we had TBI,[9] and stress related problems that were happening to people. So it was as much psychiatric as it was physical in many cases. But you had the specter of parents and loved ones dropping what they were doing, not being able to make their mortgage payments, and rushing off to bases all over this country to try to coordinate essentially outpatient services. And

[9] Traumatic brain injury.

that's what we found. That's basically what we found. We didn't find people that were ill-willed. We didn't even find a system that was overwhelmed. We found a system that was actually not ready to handle a very complex set of cases because it's one thing to lose an arm or a leg and have to go into rehab, it's another thing to have that combined with TBI or the post-traumatic stress disorder and have a set of complex injury related illnesses. The burn victims were horrible. And in San Antonio they're doing miracles out there. But it also was a pretty young generation that was being injured, and they were professional Soldiers, Sailors, and Marines—what I would describe as world-class athletes—who suddenly saw their lives changing before them. And so we had a lot of challenges we had to deal with.

And to deal with those challenges, we could have just told the military to spend more money and to get their act together in terms of coordinating. But what we did instead is we rethought the system. We actually sat down after talking with everybody and rethought the system. And you've actually never seen this before in government, we did a report that had a title: "Serve, Support, and Simplify." And, you know, you'll see the words serve and support in many instances, but you'll never see the word simplify when anyone's talking about government. But the reason simplify became important—of course, I'm a nut on this—is that when you take on an issue you've got to figure out a way to make it a little more straightforward. We had to come up with some ideas that would handle those issues. You're talking about a relatively small number—for the military at least—of people who were severely injured. And we thought about it, and I actually came up with an idea by reading in the newspaper in Miami that when a police officer in this country goes down, the police department assigns one person to him, an officer, that stays with him until he finishes his rehab. Then either he goes back into the police department or goes on disability. And even after he goes on disability, he has a single contact in the department that coordinates all those pieces. So we came up with the idea of a recovery coordinator and a recovery plan for each of these [wounded warriors] to substitute for his family running around. The Defense Department's in the process of training people with the VA to be a single recovery coordinator.

Now did the Defense Department already have case coordinators? You bet. In fact, the last group I met with was hysterical. They were a bunch of master sergeants back from Iraq. This was the easiest job they have ever had in their lives, trying to coordinate the care. They were

totally overqualified. But they also didn't know very much about the injuries. They didn't know very much about the science. And so their ability to do sensitive kind of coordination to change directions, to interact with some of the doctors and some of the therapists, wasn't as good. We suggested—in fact, I was giving a lecture like this at North Carolina State when someone stood up and said that her life had been changed and her husband had been severely wounded and had TBI, and she had a recovery coordinator who was an old Navy nurse, who had retired, who just wasn't afraid of anyone, and was totally coordinating all the services for her. And she says, "It's out of my hands now. She talks to me or she talks to him, but she has every piece coordinated now." So what we suggested was a pretty simple straightforward solution to get rid of all those individual case managers.

One of the members of our panel, a young man who's now at school at George Mason, who lost a leg and an arm and had all sorts of complicated issues, said he had so many case managers that he couldn't remember them all, and they kept getting deployed. He said they were all great people, but they were just responsible for one part of his body. So by recommending a single person, we recommended a kind of torpedo; a way of cutting through the bureaucracy and we recommended a plan at the same time. And we recommended a series of investments. This generation of young people does not want to just collect their checks and go home. They actually would like to work or go back to school. And we need to make deeper investments to make that possible. We recommended that people get to stay on Tricare for their families, which turned out to be important, as opposed to just [the servicemember]. That became important because it's possible to take a part-time job in this country if you don't have to work for benefits for your family. And our interviews with people indicated they would like to work—would like to do something. We recommended deeper educational benefits including a bonus if you stayed in school longer. The dropout rate in the VA's education programs looked like inner-city high school; no one stays in very long. And as I reminded everybody, some people do go in the military because they didn't like high school—they didn't want to go onto college. So you've got to have a different attitude about this and find out what people's interests are and make deeper investments.

We recommended family benefits in a different structure. All of these things are in the process of being implemented. And we recommended that we figure out a way to transfer records from the

Defense Department to the VA in a more seamless way so they weren't constantly lost. But we recommended against the Defense Department spending a billion dollars to build an IT system for that transfer because we argued that by the time that we got it, it would be out of date. And that what they needed to do was to build a couple of programs that allowed them to transfer the records.

We recommended that the disability system fundamentally be changed. That was the only recommendation that requires congressional action, which they haven't done yet, and I hope they'll do it. We suggested that the Defense Department get out of disability ratings, and that they, in fact, simply make a decision of whether someone's up or out, and give them an annuity based on their number of years of service and their rank. [The servicemembers then] leave there with their annuity, go over to the VA, and get their disability rating over there. But the Defense Department ought to be doing the physical exams based on an agreement between the VA and the DOD. But at least stop duplicating decisions and go back to a much simpler, more understandable system. Making the system understandable not simply for family members, but for the wounded warriors themselves became very important.

All of these things are in the process of being implemented, particularly the recommendation on recovery coordinators, which will become very important.

So the point is the context was a crisis, the crisis we looked at was very different than what was described in *The Washington Post*. But *The Washington Post* was basically focusing on the housing and some outpatients' concerns. We looked deeper at it. We put people on our panel that had actually experienced the system. We went out and looked at the people. We saw the system changing as we were going along, and made recommendations that were strategic that actually could be done in our lifetime. And then we got commitments from people responsible for making those kinds of changes.

Now that is one way to do public policy, and that is to take a look at the problem and jump into the problem, and then figure out some straightforward way of dealing with it in a way that doesn't wreck the current system except in the places where you're trying to simplify.

Another example [of doing public policy], when you have time, is the HIPAA regulation. I want to point out to you, even though

everybody gets upset about them, no one has ever been sued under the HIPAA regulation.[10] Some people have tried to collect some money saying that their privacy had been violated—in that case the Congress is supposed to do it. And these are the major recommendations for healthcare really of our time. Congress couldn't agree on the specifics, and they wrote a little sentence into the law that said if they couldn't get it done in three years the Secretary of HHS ought to do it.

And so we waited a couple of years and finally my legislative person came in and said, "I don't think Congress is going to do it. I think you're going to have to write the privacy reg." I said, "Oh, my Lord. Write the privacy reg for the whole country." The truth is there were more federal protections on the privacy of your Blockbuster card than there were on your healthcare card in this country. Does anyone remember why we have protection from the Blockbuster card? This is the one group that must know the answer. Ah, who was that? Yes, tell me.

AUDIENCE: I don't know all the details, ma'am, but Judge Bork was going before Congress—

SHALALA: To be confirmed on the Supreme Court, correct?

AUDIENCE: Yes, ma'am. And they looked at some racy—not the videos themselves, but records of racy videos that he had rented.

SHALALA: That is exactly correct. The Republicans were so angry with that confirmation hearing that they did one of the few things they could do; they put federal protections on your Blockbuster card. Now the military may have different rules. They may be able to go back and look at your records, but they can't look at mine.

So there were more federal protections on the Blockbuster card than on your healthcare card. And we had a year—but what did we do to write the regulations? First of all, we followed the congressional hearings. It's very important to know where the consensus is when you're trying to write regulations about something so fundamental in health as privacy.

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[10] *See* Health Insurance Portability & Accountability Act, Pub. L. No. 104-91 (1996); Standards for Privacy of Individually Identifiable Health Information; Final Rule, 45 C.F.R. pts. 160 & 164 (2000).

Second, we sat for weeks and discussed what principles should underlie the regulation and arrived on one: healthcare records should only be used for healthcare purposes. And the regulations were entirely based on that principle because we had the time to think through what we wanted to do. Now the lawyers, the private lawyers in particular, had a field day on those regulations to scare people to death, but in the end all the private sector did was pay a lot of money for lawyers to tell them that there was simply an underlying principle and there was nothing more complex than that. That you could not use health records for anything other than healthcare purposes. That included research. Couldn't, in the private sector at least, use it to keep someone out of a job.

So there were pretty fundamental rules, or a fundamental principle, that underlie those. And that's another example of how major policy is made. And, in fact, we were so good at finding the consensus that a high official said to me, "You know, I took the regs to the President because some of the interest groups wanted us to change some of the regs after you had done them. And the President looked at me straight in the eye and said, 'Hey, you have to understand, I'm for privacy in the healthcare.' He said, 'I don't want to change these regulations.' And Congress, which had a chance to change the regulations, never changed a one. So we found the consensus of those regulations. We put them out for comment. Everybody commented on them, including the military. Lawyers commented on them. And then we put them out in final—actually in the Bush administration they went out in final. But there was a chance for us to fundamentally look at the rules."

And that's another example of how rules are made in healthcare.

The third example, which I'll end with and then I'll take some of your questions, is what happens when a President takes office? I've told you what happens when the President is long in an office and some crisis hits and they appoint a Blue Ribbon Commission, and then you try to get your arms around the issue. My other example is what happens in the beginning of an administration—and this is a good time to talk about it because we're about to have a beginning of another administration—and, of course, healthcare may or may not be on the President's agenda after Iraq and the economy, depending on who's President. As these candidates are running around the country, they're making all sorts of promises. And there actually is some little college dropout walking around writing them all down. And the day the President takes office and appoints his cabinet, someone pulls all those things together in a

book that's called "Promises, Promises." And then some other little college dropout rips the book apart and hands each cabinet officer their part of the book "Promises, Promises." And a cabinet officer takes a look at the book and says, "Why would they say that?" Right, Larry? How could they say that? It's easy. They're trying to get elected; they're trying to get the constituency.

So I took my copy of "Promises, Promises," and I went to talk to the President. And the only thing the President promised was to get every kid in the country immunized before they were three years old. Sounds easy? He thought it was easy. I mean, he was promising it all over the country. Only 40% of the kids in the country were getting their shots before they were three. And you're supposed to get them before you're three. Most of them were getting it by the time they went to school because that was the requirement of the schools. But to reduce the kids that got all these diseases, mumps, the measles, you really had to get your shots before you were three. So President Clinton called me in and we're talking. And he said, "You've got to get me something I can run on second term" We're talking about the first day in office, and he's talking about second term. And I said, "Yes, sir." He said, "You know, I've been looking through 'Promises, Promises.'" He said, "What do you think about immunization?" I said, "Mr. President"—in my first day in office, I'm not going to turn him down unless he asks me to do something illegal—I said, "Okay."

So I went back and assembled a group like this—the leading public health experts in the country—and they proceeded to spend an hour telling me why they couldn't do it. We didn't have universal healthcare. And we were all sure that Mrs. Clinton was going to get universal healthcare through, so they said why don't you wait a year until we have universal health care. Parents don't know the names of the diseases. It's too expensive for parents. They would have to go to public health clinics—that they couldn't afford it. It would cost about $700. They don't know where the public health clinics are. It would be a disaster, Donna. You've got to go back to the President and take something else off the list. I said, "I don't think so. I don't think I can go back to the President." And they—every single public health expert in the United States told me you cannot do it. Absolutely cannot do it. And so there I was stuck. The President was down the street. He had told me to do it my first day in office, and the public health experts were telling me—so I reached down into my purse and I pulled out a postcard. And the postcard was addressed to my golden retriever. And it said, "Dear

Bucky, please tell your master to bring you in for the following shot." And I held up the postcard and I said, "Look, if all the dogs and cats and sheep and cows in this country can get immunized on time and we have a notification system for all of them, we can figure out a way to get the kids in this country—and there's no universal healthcare for animals in this country, so we've got to figure out a way to do it." And today over 90% of the kids get their shots before they're three years old.

Policy is made in a wide variety of ways and we just figured out a system to do it without a universal care system, we built a tracking system not unlike—how many of you have animals that get notifications? You get notifications from the vets, right? The dogs do or the cats do. Mine kind of likes the personal notes that she gets from the vet. But we built a tracking system not unlike that one so that we can remind parents and we made the shots almost free, and we gave them the pediatrician and we worked with the HMO. So we built a system in response.

My fundamental point here is that there are a wide variety of ways in which policy is made—in which regulations are written. Sometimes we get the time to do it in a more rational way, to consult with everyone so that we're not challenged in the end. And sometimes it's a crisis that you all have to respond to. Either way, it takes people who have their feet on the ground who understand their clients and are looking at it from the point of view of the people who are to be served. And every system in government has some kind of command and control. I used to say to people, "Running a university is far more complex than running a government agency because in a government agency I actually could say something and someone would sort of do it, unlike a university." I mean I would rather take the United State Senate to a faculty senate any day; they're much easier to understand.

But the point is that policy and regulations are written for different purposes and different ways. But what we all have to do as policy makers or as the people who deliver it, is constantly think about who we're trying to serve. And it's as difficult and as challenging for the Department of Defense and the Department of Veterans Affairs as it is for those of us that have served in the other agencies. So no matter where you go or whatever you do, you have to keep that in mind, that it's the client that's important. But you also have to make sure that you define the client because there's often confusion . . . . It's the people who are going to get the services. And that's what I've built my career

about and around, my ability to be very careful about who we were trying to serve, whether we were writing regulations or writing laws or trying to get people to change their minds about something. You have to be very clear about who in the end you were trying to serve.

Thank you very much.

NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY[1]

REVIEWED BY MAJOR MATTHEW R. HOVER[2]

This is a book about the constitutional rights that impinge on the measures for the protection of national security that the U.S. government has taken in response to the terrorist attacks of September 11, 2001.[3]

Introduction

With this ironically drafted first sentence of *Not a Suicide Pact*, author Richard A. Posner immediately impresses upon the reader his perspective that constitutional civil liberties are impeding national security measures, not vice versa.[4] Judge Posner then quickly communicates his thesis that practical-minded judges should modify individual constitutional rights, if necessary, after pragmatically balancing a security measure's negative effect on personal liberty against its positive effect on public safety.[5]

Judge Posner uses this approach to analyze several national security measures that will continue to be relevant as the United States and its allies fight the Global War on Terror. Some of the measures, such as detention of suspected terrorists,[6] military tribunals,[7] and interrogations[8] could directly or indirectly affect military lawyers. Deployed military lawyers will also face a dilemma very similar to one that Judge Posner explains in *Not a Suicide Pact*. He states that constitutional provisions "do not make a good match with the distinctive characteristics of modern terrorism, which defies conventional constitutional categories such as

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[1] RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[2] U.S. Army. Written while assigned as a student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. and School, Charlottesville, Va.

[3] POSNER, *supra* note 1, at 1.

[4] Judge for the U.S. Court of Appeals for the Seventh Circuit and Senior Lecturer in Law at the University of Chicago Law School. *See* The University of Chicago Law School, Faculty—Richard Posner, http://www.law.uchicago.edu/faculty/posner-r [hereinafter University of Chicago Law School, Faculty—Richard Posner] (last visited May 13, 2008).

[5] POSNER, *supra* note 1, at 1.

[6] *Id.* at 53–75.

[7] *Id.* at 57, 75.

[8] *Id.* at 77–103.

war and crime."[9] Similarly, military lawyers often face novel questions during counterinsurgency (COIN) operations in Iraq or Afghanistan, the answers to which do not fit neatly within the law of armed conflict.[10] To determine whether military lawyers should use the balancing method to analyze a novel tactic, technique, or procedure (TTP)'s compliance with the law of armed conflict, this book review will examine Judge Posner's method, how he conceived it, and whether the method is appropriate for legal analysis.

This review will conclude that while Judge Posner's balancing method and his legal analyses of national security measures provide an interesting and provocative perspective, recent activity by the Supreme Court makes it highly unlikely that courts will adopt them to conduct their constitutional analysis. Similarly, military lawyers must apply available or analogous law, precedent, and policy to unique COIN issues instead of Posner's approach, or they will risk finding themselves on the wrong side of an investigation. Consequently, *Not a Suicide Pact* is a thought-provoking read, but neither civilian nor military practitioners will ultimately find much pragmatic value in it. Ironically, pragmatism is the value that Judge Posner claims to cherish the most.[11]

Judge Posner's Pragmatic Method

Judge Posner advocates "restrik[ing] the balance between the interest in liberty . . . and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation's security."[12] He recommends that judges modify constitutional rights accordingly when analyzing national security measures.[13] To do this, one must try to "locate the point at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty and a slight contraction would subtract more from personal liberty than it would add to public safety."[14]

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[9] *Id.* at 18.
[10] This view of the issues faced by military lawyers during counterinsurgency operations is based on the reviewer's personal experiences during Operation Iraqi Freedom in 2005 to 2006 while assigned as both a Brigade Combat Team Operational Law attorney and as the Chief of Operational Law for the Multi National Division–Baghdad.
[11] POSNER, *supra* note 1, at 1.
[12] *Id.* at 31.
[13] *Id.* at 147.
[14] *Id.* at 32.

A look at his background reveals that "Posner is best known as one of the founding fathers of the law and economics movement, so it is hardly surprising that his judgments are powerfully informed by an economist's fetish for cost-benefit analysis."[15] Indeed, Judge Posner has written several books and articles on economic analysis of the law and related topics.[16] He was also the founding editor of the *American Law and Economics Review* and the President of the American Law and Economics Association from 1995 to 1996.[17]

Judge Posner also doesn't hide his belief in judicial activism and the "*dynamic* character of constitutional law."[18] He explains that constitutional rights are "more the handiwork of Supreme Court justices than of the Constitution's framers,"[19] and the Justices "find themselves making decisions in much the same way that other Americans do—by balancing the anticipated consequences of alternative outcomes and picking the one that creates the greatest preponderance of good over bad effects."[20] These beliefs were likely cultivated during his clerkship for Supreme Court Justice William J. Brennan Jr., widely known as a leading judicial activist.[21]

Posner uses his balancing approach to reach the following conclusions regarding seven national security measures. First, a terrorist suspect could be detained incommunicado for a reasonable time before a federal court would be required to review his detention.[22] Second, the Constitution permits increasing amounts of coercive interrogation as the value of the information sought from a terrorist suspect increases.[23] Third, the government could conduct practically warrantless interception of all electronic communications inside or outside the United States without violating the Fourth Amendment, as long as computers screened the initial data instead of humans.[24] Fourth, the government should be allowed to criminalize or enjoin the media's dissemination of known

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[15] David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1737 (2007).
[16] University of Chicago Law School, Faculty—Richard Posner, *supra* note 4.
[17] *Id.*
[18] POSNER, *supra* note 1, at 40.
[19] *Id.* at 21.
[20] *Id.* at 24.
[21] DAVID E. MARION, THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN JR.: THE LAW AND POLITICS OF "LIBERTARIAN DIGNITY" 26 (1997).
[22] POSNER, *supra* note 1, at 63–75.
[23] *Id.* at 80.
[24] *Id.* at 99–100.

classified material as long as the material was properly classified by the agency.[25] Fifth, the Federal Bureau of Investigation (FBI) could conduct surveillance of extremist imams in U.S. mosques despite the potential curtailment of free speech.[26] Sixth, the government can conduct security measures based on racial profiling of persons of Middle Eastern descent.[27] Finally, Congress could pass a law criminalizing the advocacy of terrorism.[28]

Heavy on Pragmatism, Light on Law?

Judge Posner's practical, weights-and-balances reasoning and his conservative conclusions will resonate with national security hawks and infuriate civil libertarians. Many non-lawyers will likely be persuaded. Lawyers on the other hand, constitutional law experts or otherwise, will likely raise an eyebrow or two as they read the book. Professor David Cole states in his rather scathing review of *Not a Suicide Pact*, "The further one reads in the book, the further the Constitution fades into the background, supplanted by Posner's ad hoc and often unsupported speculation about the putative costs and benefits of various security initiatives."[29] Professor Cole deftly counters some of Judge Posner's conclusions with precedent rather than policy, and sharply criticizes Posner's constitutional analyses and conclusions.[30] Most lawyers will likely have the same reaction.

But Cole may be missing the point of *Not a Suicide Pact*. Judge Posner tells the reader from the beginning that the "main task of this book" is "to suggest the direction that the law *should* take, by assessing the relevant consequences and hoping that the Supreme Court will be convinced by the assessment and shape the law accordingly."[31] Therefore, one would think that this is a book about one judge's policy beliefs regarding national security law. But Judge Posner clouds things for the reader at different points by stating some of his conclusions as the constitutionally correct outcome (based on text, history, and precedent)

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[25] *Id.* at 110.
[26] *Id.* at 112.
[27] *Id.* at 119.
[28] *Id.* at 121–22.
[29] Cole, *supra* note 15, at 1737.
[30] *Id.* at 1737–45.
[31] POSNER, *supra* note 1, at 29 (emphasis added).

instead of his own policy belief.[32] Other times, it is clear that Posner's conclusion is based primarily on the outcome of his policy-based balancing test and nothing else.[33] Moreover, at other times it is unclear whether Posner is making a legal or policy conclusion.[34] This uncertainty is the main frustration of *Not a Suicide Pact*.

Judge Posner does use constitutional text, precedent, and other legal sources to begin all of his analyses. Indeed, he offers six pages of "Further Readings" in the back of the book, which include cases, statutes, articles, and books that he either relies upon or mentions in *Not a Suicide Pact*.[35] However, Posner is then often required to stretch text and precedent, or disagree with it and ignore it, to reach his desired conclusion.[36] As he says, "[l]anguage and drafters' intent are not the only, or even, in my judgment, the best guides to constitutional rule making; they are merely the most orthodox ones."[37] An example is his position that despite the Supreme Court's holding in *Brandenburg*, which distinguishes advocacy of violence (protected speech) from incitement of violence (unprotected speech), it should be constitutional for Congress to pass a law that criminalizes advocating terrorism against the United States.[38] This conclusion is pragmatic from a national security standpoint, but it is in contravention of clear precedent regarding First Amendment freedom of speech. Judge Posner also makes analogies to support his conclusions and highlight the absurdity in certain areas of the law. An example, again from criminalizing the advocacy of terrorism: "A rule that in the name of freedom of speech forbids punishing preachers of holy war against the West while allowing the punishing of false advertising of a weight-loss pill is excessively lacking in nuance."[39] Unfortunately, the analogy is a policy argument and not a legal argument.

The major problem with Judge Posner's balancing approach is its subjectivity, which makes it impossible to apply uniformly. Each person applying the test will assign different weights to the importance of liberty and security, and come to differing results. For example, Posner believes

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[32] *See supra* text accompanying note 22.
[33] *See supra* text accompanying note 28.
[34] *See supra* text accompanying note 23.
[35] POSNER, *supra* note 1, at 159–64.
[36] *Id.* at 121–22.
[37] *Id.* at 129.
[38] *Id.* at 120–25 (discussing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).
[39] *Id.* at 123.

that civil libertarians exaggerate the negative effects on personal liberties,[40] while Posner's opponents believe he undervalues civil liberties.[41] But beyond its subjectivity, the test is really not an appropriate legal test at all. Professor Cole states:

> If constitutionalism is to have any bite, it must be distinct from mere policy preferences. In fact, our Constitution gives judges the authority to declare acts of democratically elected officials unconstitutional on the understanding that they will not simply engage in the same cost-benefit analyses that politicians and economists undertake. . . . The Framers of the Constitution did not simply say "the government may engage in any practice whose benefits outweigh its costs," as Judge Posner would have it. Instead, they struggled to articulate a limited number of fundamental principles and enshrine them above the everyday pragmatic judgments of politicians.[42]

This is the primary flaw with the balancing approach and with *Not a Suicide Pact*. It is disconcerting that a federal judge may subscribe to such a "non-legal" way of deciding the constitutionality of executive and congressional acts. It would be interesting to see if Judge Posner would actually attempt to decide these issues in this manner if they came before his court.

Checks and Balances

Judge Posner advances two other related themes throughout the book that are puzzling coming from a federal judge. The first is his call for the judiciary to defer to the political branches in times of national crisis.[43] He reasons that Congress has much more knowledge about national security than the judiciary does, so Congress can perform better as the check against executive power.[44] If the executive and legislative branches agree on a particular measure, there is even less need for

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[40] *Id.* at 51.
[41] Cole, *supra* note 15, at 1738.
[42] *Id.* at 1747.
[43] POSNER, *supra* note 1, at 149–50.
[44] *Id.* at 150.

judicial intervention.[45] The courts should "decid[e] cases narrowly, preferably on statutory grounds, hesitating to trundle out the heavy artillery of constitutional invalidation."[46] This recommendation is overly deferential to the political branches of government, especially in light of the potential for overreaction in times of emergency. Posner himself admits that professionals responsible for national security are unlikely to value civil liberties unless the judiciary forces them.[47] The bottom line is that if a congressional statute or an executive act is unconstitutional, the judiciary must have the backbone to strike it down. That is what the judiciary is for, current events notwithstanding.[48]

Judge Posner's discussion of the "law of necessity" is also of concern.[49] He postulates that the President, in desperate and extreme circumstances, could authorize torture or other violations of constitutionally held civil liberties to avoid a catastrophic attack.[50] The action would be based on a *moral* and *political* justification, quite possibly an obligation, instead of a legal justification.[51] Posner acknowledges that there is no constitutional basis to allow the President to unilaterally assume dictatorial authority, but he still endorses the concept.[52] Categorizing the President's right to violate the Constitution as a power instead of a legal right is really a distinction without a difference.[53] A violation is a violation, and either way it is unconstitutional. Judicial acknowledgment of any such authority, which would arm the Executive with the knowledge that he or she can sometimes act in contravention of the Constitution, is extremely dangerous and overly deferential due to the potential for abuse. It could also potentially strain the citizens' respect for the rule of law and for the democratic system of checks and balances, both of which are essential to maintaining order.

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[45] *Id.* at 10.
[46] *Id.* at 34.
[47] *Id.* at 61.
[48] *See supra* text accompanying note 42.
[49] POSNER, *supra* note 1, at 158.
[50] *Id.* at 38.
[51] *Id.* at 12, 38.
[52] *Id.* at 39.
[53] *Id.* at 38.

Conclusion

Not a Suicide Pact is a thought-provoking book, but it will likely miss its intended goal of influencing the Supreme Court's constitutional analysis of national security measures.[54] Judge Posner may instead want to shift his focus to Congress, a branch of the government that would likely be more apt to follow his politician-like balancing approach. Congress's reaction to the Supreme Court's holding in *Hamdan v. Rumsfeld* may also be an indication that Posner should focus his efforts on Congress.[55]

The Supreme Court in *Hamdan* declined the opportunity to defer to the Executive on a matter of national security, counter to what Judge Posner recommends in *Not a Suicide Pact*.[56] The Court held that President Bush did not have the authority to convene military commissions for detainees held at Guantanamo Bay.[57] The commissions were further flawed because they did not provide the rights and protections required pursuant to the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[58] So, not only did the Court refuse to defer to the executive, it also provided a foreign terrorist suspect with more rights and protections for his trial. This certainly appears to contravene Judge Posner's recommended course of action for the Court.

However, Congress reacted with the Military Commissions Act (MCA) of 2006, which provides for detainee prosecutions at military commissions almost identical to the President's original commissions.[59] The MCA also weakens the criminal prohibitions for coercive interrogations of detainees, which falls in line with Judge Posner's

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[54] *See supra* text accompanying note 31.
[55] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[56] *Id.* at 587–90.
[57] *Id.* at 593–95.
[58] *Id.* at 566–67.
[59] Cole, *supra* note 15, at 1750; *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006). In 2008, pursuant to the Military Commissions Act, Hamdan was tried by a military commission at Guantanamo Bay. On 7 August 2008, he was sentenced to five and a half years confinement after being found guilty of "providing material support to Al Qaeda by continuing to serve as a driver and body guard to Bin Laden—even after he learned [Al Qaeda] was involved in terrorism." Warren Richey, *Hamdan Sentenced in First Terror Tribunal*, THE CHRISTIAN SCIENCE MONITOR, Aug. 8, 2008, *available at* http://www.csmonitor.com/2008/0808/p25s29-usju.html.

opinions regarding the use of coercive tactics when the situation warrants.[60]

Finally, in addition to missing its intended goal, *Not a Suicide Pact* lacks utility for the military practitioner. As mentioned, military lawyers could find themselves on the wrong side of the law if they use Judge Posner's method to tackle novel COIN issues that do not fit squarely into the law of armed conflict (of which there are plenty).[61] Force protection and mission accomplishment, like national security from *Not a Suicide Pact*, are not bottom lines that provide "a license to do anything our leaders think might improve our safety."[62] Just as judges must adhere to the Constitution's "articulate[d] . . . fundamental principles . . . enshrine[d] . . . above the everyday pragmatic judgments of politicians," military lawyers must adhere to the law of armed conflict's fundamental principles when analyzing the legality of an innovative and ostensibly pragmatic TTP.[63] Military lawyers must enforce the fundamental principles in their advice to commanders and staff, even if the advice is unpopular. They cannot ignore a TTP that bypasses established law simply because it may lead to a desirable effect. Unfortunately, Judge Posner seems to advocate precisely that in *Not a Suicide Pact*.

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[60] Cole, *supra* note 15, at 1750.
[61] *See supra* note 10.
[62] Cole, *supra* note 15, at 1748.
[63] *Id.* at 1747.

COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH[1]

REVIEWED BY MAJOR SCOTT E. DUNN[2]

Upon thy belly shalt thou go, and dust shalt thou eat all the day of thy life.[3]

During the Civil War, President Lincoln's political foes may have threatened the Union almost as much as the military forces of the Confederacy. Democratic opponents of his war policies, so-called Peace Democrats, did not necessarily wish to see the Union divided by secession, but they opposed the effort to maintain the Union by force. Their opposition gave hope to Confederates, discouraged enlistment in the North, and incited active defiance of the federal government, thereby hindering the war effort. Or so argues Jennifer Weber in *Copperheads: The Rise and Fall of Lincoln's Opponents in the North*, her fine and comprehensive analysis of the subject. Despite some minor shortcomings, I recommend *Copperheads* to anyone seeking an overview of domestic political opposition in the North during the Civil War.

Weber makes four primary points in this book. First, antiwar sentiment was not a "peripheral issue" during the war, contrary to the beliefs of many historians. Instead, antiwar sentiment was substantial and almost allowed Peace Democrats, commonly known as Copperheads, to take over the Democratic Party.[4] Second, pervasive disagreement over the war divided towns and counties throughout the Union, at times erupting into violence.[5] Third, antiwar activity "damaged the army's ability to conduct the conflict efficiently."[6] Last, Weber argues that Union Soldiers were progressively politicized during the war and that their support of President Lincoln was critical to the ultimate victory of the Union.[7]

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[1] JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH (2006).

[2] U.S. Army. Written while assigned as a student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. and School, U.S. Army, Charlottesville, Va.

[3] WEBER, *supra* note 1, at 3 (quoting *Genesis* 3:14).

[4] *Id.* at 1–2.

[5] *Id.* at 2.

[6] *Id.*

[7] *Id.*

Weber clearly and succinctly describes the conduct and influence of the Peace Democrats over the course of the war, always mindful of the military developments that formed their backdrop. She demonstrates how a group that had great influence at times ultimately fell into disgrace and was viewed by many as traitorous. Though most Copperheads probably did not support secession, the inverse relationship between the political fortunes of the Copperheads and the success of Union armies led somewhat inevitably to suspicion of their motives. The term Copperheads, in fact, was first applied to them by a critic likening them to the serpent in the Garden of Eden.[8] Copperheads co-opted the term, however, based on its alternate slang usage referring to coins bearing the likeness of Lady Liberty.[9]

One of the strengths of *Copperheads* lies in Weber's description of the disparate groups that coalesced into Peace Democrats and the development of antiwar sentiment. She divides the growth of the Copperhead movement into three phases corresponding with the following events or time periods: secession, the Emancipation Proclamation and the adoption of conscription, and the onset of simple war weariness in the North.[10] Some opposed the war from the beginning because they believed that the Southern states had a right to secede. The Constitution, after all, did not forbid it.[11] Others joined the ranks of the Peace Democrats after the issuance of the Emancipation Proclamation in the fall of 1862 and the initiation of conscription the following spring. According to Weber, "[d]eeply racist Democrats who had supported the war when its only purpose was maintaining the Union jumped to the opposition when the confrontation became an effort to free the slaves. . . . Others, already worried by growing government power, drew the line at the draft, which was the most coercive measure Lincoln had adopted to that point."[12] The third and last wave of antiwar sentiment corresponded to pessimism wrought by the war's enormous human and materiel cost. This pessimism peaked in the summer of 1864, prior to a string of military successes that dramatically reversed public sentiment.[13]

Most of the Copperheads who belonged to the first two phases described by Weber were motivated by a combination of legal and

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[8] *Id.*
[9] *Id.*
[10] *Id.* at 7–8.
[11] *Id.* at 7.
[12] *Id.* at 8.
[13] *Id.*

political principles, racism, and self-interest. From the beginning, many Democrats were upset at President Lincoln's assumption of broad powers to suppress the rebellion.[14] Following the commencement of hostilities at Fort Sumter, President Lincoln proclaimed a state of war, called up troops to fight the war, started spending money to fight the war, and suspended habeas corpus in some parts of the country.[15] Later, critics were outraged when a Union general ordered the arrest and trial by military commission of former Congressman Clement Laird Vallandigham, a highly prominent Copperhead, for treason. This provoked a storm of criticism against the administration for "suppressing free speech and freedom of the press, suspending habeas corpus, barring trial by a civilian jury, and denying the supremacy of civil law over military justice."[16] Lincoln replied that "certain actions that would not otherwise be constitutional became legitimate under the extraordinary circumstances of rebellion . . . ."[17]

In addition to such apparently honest grounds for disagreement with President Lincoln's policies, many Copperheads had baser motives. Racists did not want to expend blood and treasure for the benefit of Black people, and many actually felt deceived by the President when emancipation became an express goal of the war. An Ohio Congressman informed the House of Representatives that Northwesterners were under the impression that "they have been deliberately deceived into this war . . . under the pretense that war was to be for the Union and the Constititution, when, in fact, it was to be an armed crusade for the abolition of slavery."[18] Some harbored a visceral fear of miscegenation, or mixing of the races, that they believed would result from emancipation.[19] Many men of military age who opposed conscription were presumably motivated solely by their desire to avoid service in the Army.[20]

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[14] *Id.* at 32–33.
[15] *Id*. at 30–31.
[16] *Id*. at 97; *see also id.* at 149 (describing a trial by military commission of Harrison H. Dodd, who was convicted of planning to liberate Confederate prisoners in Indianapolis and start an insurrection).
[17] *Id*.
[18] *Id*. at 80.
[19] *Id*. at 161.
[20] *Id*. at 107–11. Draft riots broke out in New York City in July 1863, largely instigated by the city's lower and working classes who feared both conscription and the emancipation of Black people, which they perceived as a threat to their employment and economic status. For an example of the political risks attendant to conscription in

Antiwar sentiment was at its height in the summer preceding the presidential election of November 1864. The groups described above combined with those weary of the appalling and seemingly endless casualties that showed no sign of abatement.[21] Peace Democrats succeeded in drafting the platform of the Democratic Party and placing one of their own on the Democratic ticket as the vice-presidential candidate.[22] The presidential candidate was George B. McClellan, a War Democrat who supported the war on the basis of maintaining the Union. Though the Copperheads did not constitute a majority of the Democratic Party, "Democratic leaders could not afford to ignore them or offend the peace wing [of the Party] . . . ."[23]

However, Union battlefield successes extinguished Democratic chances in the presidential election of 1864. In particular, General Sherman's capture of Atlanta increased the public's confidence in President Lincoln's policies. Union Soldiers, moreover, formed a significant block of support for the President. In addition to their significant number of votes, Soldiers had a substantial, if hard to measure, influence on the civilian community.[24] Union Soldiers, even those who may have been Democrats when the war started, gradually shifted their allegiance to President Lincoln and the Republicans as the war continued. For the most part, they perceived antiwar criticism at home as a betrayal of the sacrifices they had made to preserve the Union. Many Soldiers who were initially unsympathetic to Black people and hostile to abolitionism warmed to emancipation, either because they recognized its utility to the war effort or because their perspective on slavery changed when they traveled into the South.[25] This politicization of Soldiers provided President Lincoln a formidable base of support for his war policies when the election came.

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another conflict, see NORMAN PODHORETZ, WHY WE WERE IN VIETNAM 79 (Touchstone 1983) (1982), noting President Johnson's reluctance to expand the draft in 1965.

[21] WEBER, *supra* note 1, at 141 (describing people who changed their position on the war based on "headlines" as "fickle.").

[22] *Id*. at 169.

[23] *Id*. at 168; *see* SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE: RED RIVER TO APPOMATTOX 551 (1974). President Lincoln recognized that the Peace Democrats and War Democrats were bound to arrive at a compromise regarding the platform and candidate, with the predictable result that the "platform and man were likely to be mismatched," either yielding a peace platform and pro-war candidate, or vice versa. FOOTE, *supra*, at 551.

[24] *See* WEBER, *supra* note 1, at 196.

[25] *Id*. at 101.

Ultimately, Weber concludes that the Copperheads failed for three reasons. First, they were disorganized.[26] Second, their policies were essentially obstructionist. While they opposed Lincoln's policies at every turn, they offered little in the way of a realistic program of their own.[27] They said they wanted peace, but most were not prepared to concede independence to the South and they seemed oblivious to Confederate insistence on that point.[28] Copperheads often summarized their position as "the Union as it was, the Constitution as it is," which amounted to little more than a vague prescription for returning to the status quo before the war without resolving the issues that caused it.[29] Third, the increasing hostility of Soldiers to the Copperhead cause gave President Lincoln great support and influenced civilian voters to follow suit.[30] In light of these weaknesses, the Copperhead political movement could not maintain broad support in the wake of Union military successes.

From a legal perspective, *Copperheads* suffers from superficial analysis of the constitutional issues raised by the Peace Democrats. This criticism may be unfair, to a degree, given that Weber is neither an attorney nor a constitutional scholar. However, legal scholars should be advised to look elsewhere for rigorous treatment of the legal issues attendant to President Lincoln's use of executive power during the war, such as the suspension of habeas corpus and trial of civilians by military commissions. Instead of examining the merits of Copperhead legal arguments concerning executive power, for example, Weber dismisses them as being "[b]linkered by ideology," so much so that "their interpretation [of the Constitution] would have barred Lincoln from employing most of the flexible and creative initiatives that helped the Union to win the war."[31] According to Weber, the Copperheads never recognized or acknowledged "the seriousness of the threat to destroy the United States"; she states that "[t]heir rigid ideology led them to focus on important constitutional issues but not to put those issues in the context of greater danger."[32] Given the paucity of legal analysis, Weber implies that measures necessary to the war effort were constitutional per se, which is an oversimplification to say the least.

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[26] *Id.* at 216.
[27] *Id.*
[28] *Id.* at 216–17.
[29] *Id*. at 216.
[30] *Id*. at 216–17.
[31] *Id*. at 6.
[32] *Id*. at 217.

Copperheads contains no discussion of possible parallels between political opposition to the Civil War and political opposition to other conflicts, such as the current Global War on Terror (GWOT). That is a strength. There is no shortage of tendentious analysis comparing the GWOT to previous wars, and I was gratified that Weber confined her commentary to the period in question. I suspect that the clarity and focus of the book would have suffered had she not done so.

Still, at least one critic found it "curious" that Weber did not touch on the experience of prior opposition parties during the War of 1812 or the Mexican War.[33] Conservative commentators reviewing the book have been quick to make comparisons between the Copperheads and contemporary Democrats who are opposed to the war in Iraq or other elements of the GWOT, arguing that opponents of the current war effort are similarly compromising its successful prosecution.[34] Although historical analogies can never be exact and are always debatable, these comparisons demonstrate the timelessness of the issues explored in *Copperheads*.[35]

Overall, the author presents a compelling case for her points concerning the influence of the Copperheads, their motivation and composition, the role of Union soldiers in their political defeat, and the relationship between Copperhead popularity and the success, or lack thereof, of Northern arms. *Copperheads* is well-written and worthy of attention for its analysis of political opposition to the Lincoln

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[33] Ethan S. Rafuse, Book Review, CIVIL WAR NEWS, http://www.civilwarnews.com/reviews/2007br/Jan/webercopperheads.htm (last visited May 13, 2008) (reviewing JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH (2006)).

[34] Fred Barnes, *Lincoln's Fifth Column: Northern Democrats versus the Great Emancipator*, WKLY. STANDARD, Dec. 11, 2006, http://weeklystandard.com/Content/Public/Articles/000/000/013/028ydfmp.asp (reviewing JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH (2006)); Mackubin Thomas Owens, *Copperheads, Then and Now: The Democratic Legacy of Undermining War Efforts*, NAT'L REV. ONLINE, Mar. 19, 2007, http://article.nationalreview.com/?q=YjAxOWZhOWQ1YWMwNDEwMDIyYmQ0MjQwZjgyOGFkZTU=(reviewing JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH (2006)).

[35] For a comparison of the Civil War and Vietnam era drafts, see MYRA MACPHERSON, LONG TIME PASSING: VIETNAM & THE HAUNTED GENERATION 106–08 (Signet 1985) (1984). MacPherson finds similarity in the violent opposition to these drafts (i.e., draft riots), but contrasts the motivation of the draft protesters. In particular, she does not recognize any parallel between Vietnam era protesters and those Civil War era protesters who were motivated by racism.

administration during the Civil War. The line between treason and proper dissent in time of war has never been, and will likely never be, a clear one. *Copperheads* does not define that line, but it provides much of value to inform the debate.

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.
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Chief of Staff

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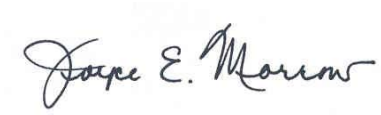

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
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